

# **Private Remedies for Corruption**



**Private Remedies for Corruption**  
*towards an international framework*

**Privaatrechtelijke handhaving en corruptie**  
*de ontwikkeling van een internationaal  
raamwerk*

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## List of Selected Acronyms and Abbreviations

AC	Appeal Cases
ALI	American Law Institute
All ER	All England Reports
Art. /Arts.	Article/Articles
ATCA	Alien Tort Claims Act
AUC	African Union Convention against Corruption
BIBOB	Bevordering Integere Besluitvorming Overheidsbeslissingen (Law for the promotion of integrity assessments by the Public Administration)
CLC	Civil Law Convention on Corruption
COA	Corrupt Organizations Act
Ct. Cl.	Court of Federal Claims
DCC	Dutch Civil Code
DCFR	Draft Common Frame of Reference
DOJ	US Department of Justice
DPC	Dutch Penal Code
EC	European Community
ECOWAS	Economic Community of West African States
EDNY	Eastern District of New York
EFCC	Economic and Financial Crimes Commission
F., F.2d, F.3d	Federal Reporter (first, second and third series) United States Courts of Appeals
F. Supp., F. Supp. 2d	Federal Supplement (first and second series) United States District Courts
CETS	Council of Europe Treaty Series
EU	European Union
EWHC	High Court of England and Wales
FCA	False Claims Act
FCPA	Foreign Corrupt Practices Act
FSA	Financial Services Authority
HR	Hoge Raad
Id.	<i>Ibidem</i> (Latin) meaning: ‘the same place’; used when citation used in the previous footnote is used again.
LJN	Landelijk Jurisprudentie Nummer
NJ	Nederlandse Jurisprudentie
NJB	Nederlands Juristenblad

## LIST OF ACRONYMS AND ABBREVIATIONS

IACC	International Anti-Corruption Conference
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
IACAC	Inter-American Convention against Corruption of the Organization of American States
ICPC	Independent Corrupt Practices Commission
ICSID	International Centre for Settlement of Investment Disputes
ILM	International Legal Materials
OECD	Organization for Economic Co-operation and Development
OJ	Official Journal of the European Union
Para.	Paragraph
PSLRA	Private Securities Litigation Reform Act
Pub. L. or P.L.	Public Law
Rb.	Rechtbank (Dutch District Court)
RICO	Racketeer Influenced and Corrupt Organizations Act
SDNY	Southern District of New York
Sec.	Section
SEC	United States Securities and Exchange Commission
SEA	Securities Exchange Act
SEC	Securities and Exchange Commission
SFO	Serious Fraud Office, UK
Stat.	Statutes at Large
TI	Transparency International
UCL	California's Unfair Competition Law
UK	The United Kingdom
UKHL	United Kingdom's House of Lords
UN	United Nations
UNCC	United Nations Convention against Corruption
UNCTC	United Nations Convention against Transnational Organized Crime
UNCITRAL	United Nations Commission on International Trade Law
US	The United States
U.S.	United States Reports United States Supreme Court
U.S.C.	United States Code
Vol.	Volume

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# **PART 1**

## **THE FOUNDATION FOR PRIVATE REMEDIES**



# CHAPTER 1

## INTRODUCTION

*‘Bribery blights lives. Its immediate victims include firms that lose out unfairly. The wider victims are government and society, undermined by a weakened rule of law and damaged social and economic development. At stake is the principle of free and fair competition, which stands diminished by each bribe offered or accepted.’*

*Kenneth Clarke, UK Secretary of State for Justice, March 2011<sup>1</sup>*

There is a shift taking place in the fight against corruption. Increasingly attention is turning to the role of the private actor.<sup>2</sup> This can be characterized as a shift from a *public approach* that sees the state and government as the primary driving force in the fight against corruption to an approach that sees private processes and actors playing an equally important role. This begs the question: what is a *private approach*? What is its motivation, content, or method? How does a private approach interrelate with the public approach? This book on private remedies for corruption is a response to these questions from the perspective of private law.<sup>3</sup> This chapter introduces the research question, the research method and the relevance of this research.

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- 1 See Foreword of the UK Ministry of Justice Guidance on the UK Bribery Act 2010.
  - 2 See recent paper by S. Rose-Ackerman, ‘Anti-corruption policy: can international actors play a constructive role?’, Yale Law & Economics Research Paper No. 440, September 2011. Electronic copy available at SSRN: <http://ssrn.com/abstract=1926852>. In the last two years, the role of the private actor has been an important theme at international fora attended by this author. In November 2010, this author was a participant at a ‘Workshop on Legal Redress for Victims of Corruption: Enhancing the Role of Civil Society in Corruption’ in Bangkok, Thailand at the 14th International Anti-Corruption Conference (IACC). She also participated in a ‘Peoples Empowerment Special Session’ billed as a response by the IACC to the ‘paradigm shift’ toward a ‘people centered approach.’ See 14 IACC Documents at [http://iacconference.org/documents/ws43MaudPerdrielVaissiere\\_SR.pdf](http://iacconference.org/documents/ws43MaudPerdrielVaissiere_SR.pdf). In June 2011 this author presented the ideas summarized in Chapter 10 of this book at a conference in Bellagio, Italy, on ‘Anti-Corruption Policy: Can International Actors Play a Constructive Role’, organized by the Yale Law School/Rockefeller Foundation, 13-17 June 2011. See Yale Law School News at <http://www.law.yale.edu/news/13528.htm>. In December 2011 in The Hague, the Netherlands, this author took part in an International Fraud and Corruption Expert Meeting on ‘Dispute Resolution on International Fraud and Corruption’ of the World Legal Forum, to discuss The Hague Utilities for Global Organizations (HUGO) program, which focused on a ‘private approach’ to the prevention of international fraud and corruption.
  - 3 Private law is the law that applies to persons in their relations with each other. See T. Foster, *Dutch Legal Terminology in English*, Kluwer, Deventer, 2009. The expression private law in common law countries is regarded as the law pertaining to civil or private rights and duties

### 1.1 The Corruption Conundrum

Corruption is a complex and multifaceted phenomenon that challenges the best of efforts to confront, much less eradicate it. The World Bank recognizes corruption as ‘the greatest obstacle to economic and social development’ whose harmful effects are ‘especially severe on the poor.’<sup>4</sup> Despite being recognized as a problem in most cultures,<sup>5</sup> it remains a pernicious and enigmatic obstacle.<sup>6</sup> While some may argue that ‘the corruption obsession [...] crowds out the debate on other crucial problems,’<sup>7</sup> there is broad agreement about the detrimental effect that corruption has on the economic,<sup>8</sup> social and political development of countries.<sup>9</sup> The 140 members of the United Nations Convention against Corruption acknowledge the ‘seriousness of the problems

rather than to matters arising under administrative, criminal or military law: See *Webster's New World Dictionary*, Wiley, New York, 2006; Hesselink remarks that:

‘Private law is usually defined as the law which governs relationships between citizens as opposed to public law, which is the law which deals with the relationships between citizens and the state, or among state institutions. However, this clear-cut distinction does give rise to some doubt. Not only as a result of the development of administrative law and, especially, of functional fields of the law which do not seem to fit in very well with this distinction.’

See A. Hesselink, ‘The Structure of the New European Private Law’, Vol. 6.4, *Electronic Journal of Comparative Law*, December 2002, [www.ejcl.org/64/art64-2.html](http://www.ejcl.org/64/art64-2.html).

- 4 See World Bank Website on Corruption <http://www1.worldbank.org/publicsector/anticorrupt/index.cfm>.
- 5 Nichols shows that corruption is condemned in every major legal tradition from Buddhism, Christianity, Confucianism, Hinduism, Islam, Judaism and Sikhism as well as in most countries. See P. Nichols, ‘Outlawing transnational bribery through the World Trade Organization’, *Law and Policy in International Business*, Vol. 28, No. 2, 1997, p. 305.
- 6 Chapter 2 of this book examines the problem of definition as one of the challenges faced in tackling corruption. Chapters 3 charts how the process of worldwide criminalization of corruption in international transactions has resulted in the category of ‘international corruption’, which is distinguished from other forms of corruption such as, for example, petty corruption or political corruption, and also distinguished from corruption in a broad sense as a verb to describe the interactions between actors in a corrupt exchange. International corruption is typically of the sort referred to as grand corruption. It occurs at the highest levels of governance and ‘distorts the central functions of government.’ See Preamble UN Convention against Corruption, New York, 31 October 2003, in force 14 December 2005, 2349 UNTS, p. 41; 43 *ILM*, 2004, p. 37 (Hereinafter, the UNCC).
- 7 M. Naim, ‘Tunnel Vision on Corruption’, *The Washington Post*, 20 February 2005, <http://www.moisesnaim.com/es/node/277>.
5. See for example M. Paolo, ‘Corruption and growth,’ Vol. 110, No. 3, *The Quarterly Journal of Economics*, 1995, pp. 681-712; J.E. Campos, D. Lien, S. Pradhan, ‘The impact of corruption on investment: predictability matters’, Vol. 27, No. 6, *World Development*, 1997, pp. 1059-1067; P.H. Mo, ‘Corruption and economic growth’, Vol. 29, No. 1, *Journal of Comparative Economics*, 2001, pp. 66-79. For a comprehensive review of the current economics literature on the effects of corruption see A. Dreher, T. Herzfeld, *The Economic Costs of Corruption: A Survey and New Evidence*, 2005. (Monograph on file at Wageningen University and Research Center Publications (Netherlands) <http://129.3.20.41/eps/pe/papers/0506/0506001.pdf>).
- 9 See generally G.T. Abed, S. Gupta (Eds.), *Governance, Corruption & Economic Performance*, Washington: International Monetary Fund, 2002; S. Rose-Ackerman, *Corruption and Government: Causes, Consequences and Reform*, CUP, Cambridge, 1999.

## PRIVATE REMEDIES FOR CORRUPTION

and threats posed by corruption to the stability and security of societies.<sup>10</sup> They link corruption to organized and economic crimes stating that it involves ‘vast quantities of assets, which may constitute a substantial proportion of the resources of states.’<sup>11</sup> At the regional level, the Inter-American Convention against Corruption disavows the corruption that strikes ‘at society, moral order and justice, as well as at the comprehensive development of peoples.’<sup>12</sup>

The African Union for its part decries corruption’s ‘devastating effects on the economic and social development of the African peoples’ as well as the ‘negative effects of corruption and impunity on the political, economic, social and cultural stability of African States.’<sup>13</sup> The members of the Council of Europe state that their strong interest in the international fight against corruption stems from ‘the obvious threat corruption poses to the basic principles the Organization stands for.’ These principles it enumerates as the rule of law, the stability of democratic institutions, human rights as well as social and economic progress.<sup>14</sup> Petter Langseth of the World Bank sums up the essential nature of the fight against corruption when he states:

‘The rationale for combating and containing corruption is not because corruption is “immoral,” “wrong,” or even illegal. Rather, it is because of the negative impact of corruption on economic development and on the emergence of an enabling environment for the private sector, and its role in deepening poverty in the developing world.’<sup>15</sup>

However, despite increased awareness, international, regional and domestic initiatives, as well as self-regulatory mechanisms, corruption remains a pressing problem.<sup>16</sup> Instances like the intervention of the UK government in

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10 Para. 2 Preamble UNCC id., Note 6 above.

11 Id.

12 Para. 1 Preamble Inter-American Convention against Corruption, 29 March 1996, 35 *ILM*, 1996, p. 724. Adopted at Caracas, Venezuela. Entered into force on 6 March 1997. (Hereinafter the IACAC).

13 Para. 6 Preamble African Union Convention on Combating and Preventing Corruption, 43(1) *ILM*, July 2003, p. 5. (Hereinafter the AUC).

14 Para. 1 Explanatory Report, Civil Law Convention 174 CETS.

15 P. Langseth, Building Integrity to Fight Corruption: A Partnership between Uganda, TI and EDI to Improve Service Delivery to the Public, in A. Ruzindana, P. Langseth, A. Gakwandi (Eds.), *Fighting Corruption in Uganda: The Process of Building a National Integrity System*, Fountain Publishers, Kampala, Uganda, 1998, p. 159.

16 In 2009, Transparency International reported that ‘governments are considered to be ineffective in the fight against corruption – a view that has remained worryingly consistent in most countries over time.’ See 2009 *Global Corruption Barometer Report*, p. 3, available at [http://www.transparency.org/policy\\_research/surveys\\_indices/gcb/2009](http://www.transparency.org/policy_research/surveys_indices/gcb/2009). As of 2011 the situation has not much improved. The 2011 Corruption Perceptions Index shows that public frustration is well founded. No region or country in the world is immune to the damages of public-sector corruption; the vast majority of the 183 countries and territories assessed scored below five on a scale of 0 (highly corrupt) to 10 (very clean). See *Our Countries Our Future*,

## CHAPTER 1 - INTRODUCTION

the investigation of the BAE bribery scandal<sup>17</sup> and the regular appearances of large corporations in bribery scandals raise disquieting questions about the real substance of the fight against corruption.<sup>18</sup> Some are of the opinion that the chorus of anti-corruption voices renders a one-sided and rather politicized account of a much more complex and nuanced issue.<sup>19</sup> However, the dichotomy between the reality of the market place and a wealth of regulation suggests an urgent need to continue in the quest for effective schemes of ‘restraint.’<sup>20</sup> In strategizing a way forward, the question must be asked: should there be a different approach in the fight against corruption? Should it continue primarily to follow the criminal law approach of deterrence through punishment or is a different strategy required?<sup>21</sup>

The fact that corruption is such a pervasive problem should not act as a dampener to such questions but rather motivate the search for more effective ways of protecting society from its serious consequences. This is particularly true because of social, economic and political changes in the last three decades

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*Transparency International Corruption Perceptions Index 2011*,  
[http://cpi.transparency.org/cpi2011/in\\_detail/](http://cpi.transparency.org/cpi2011/in_detail/).

- 17 In 2006, the Serious Fraud office of the United Kingdom announced that it was ending its investigation into the BAE bribery allegations on the grounds that continuing the investigation might lead to Saudi Arabia withdrawing diplomatic co-operation with the UK on security and intelligence. See ‘Lords Says SFO Saudi Move Lawful’, BBC News, available at <http://news.bbc.co.uk/2/hi/business/7532714.stm>.
- 18 Companies such as Baker Hughes International, Chevron Corporation, Vetco Gray International, El Paso Corporation, Ingersoll Rand co., Siemens, Halliburton, to name a few, have in the last few years paid fines in the millions of dollars for offences relating to the bribery of foreign officials.
- 19 Williams and Beare note that ‘...despite the appearance of an array of separate voices all reaching the same conclusion(s), closer inspection of the corruption “debate” reveals a clear overlapping of positions and interests. With most of the research on the topic being sponsored and conducted by members of the major economic development agencies – the IMF, the World Bank, and the OECD – there has been a strong convergence between academic, public policy and corporate perspectives. This convergence has contributed to a singular and highly politicized account of corruption, its underlying causes, and the necessary policy responses.’ See J. Williams, M. Beare, *The Business of Bribery: Globalization, Economic Liberalization, and the ‘Problem’ of Corruption* in M. Beare (Ed.), *Critical Reflections on Transnational Organized Crime, Money Laundering and Corruption*, UTS Press, Toronto, 2003, pp. 89-90. Ha-Joon Chang, using contrasting patterns of countries like Zaire and Indonesia, shows that high levels of corruption can have surprisingly different economic impacts. This suggests that it is not so much the *fact* of corruption but *how* it is managed that is a predictor of its impact on economic growth. See H. Chang, ‘Zaire vs. Indonesia’ in his book *Bad Samaritans: The Guilty Secrets of Rich Nations and the Threat to Global Prosperity*, RH Business Books, London, 2007, pp. 160-181.
- 20 C. Beccaria, *On Crimes and Punishment*, 1764, Translation by D. Young, Hackett Publishing Company, Indiana, 1986, Chapter 2, The Right to Punish.
- 21 Jan Smits notes: ‘If the law is to retain its role of regulating society (be it no longer a national, but a global one), we have to find new ways of making law and enforcing law.’ See J. Smits, ‘Law Making in the European Union: On Globalization and Contract law in Divergent Legal Cultures’, Vol. 67, No. 4, *Louisiana Law Review*, 2007, p. 1181.

## PRIVATE REMEDIES FOR CORRUPTION

that have changed the environment in which grand corruption, the focus of this book, occurs.<sup>22</sup> Grand corruption is described as:

‘corruption that pervades the highest levels of government, engendering major abuses of power. A broad erosion of the rule of law, economic stability and confidence in good governance quickly follow. Sometimes it is referred to as “state capture,” which is where external interests illegally distort the highest levels of a political system to private ends.’<sup>23</sup>

In today’s integrated world, interactions that used to be the preserve of the state are now significantly influenced by non-state actors and the increasingly powerful multinational corporations.<sup>24</sup> Regulating corruption is complicated by the absence of an identifiable nexus of governance in international society as well as the blurring boundaries between the public and private sectors.<sup>25</sup> State-centered criminal law approaches do not easily translate to the sanctioning of transactions that occur outside territorial boundaries. Pieth has remarked that ‘given the dynamism of globalization, it would be logical for the private sector to take a more pro-active approach in influencing regulations and defining their own rules, particularly at the international level.’<sup>26</sup>

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22 Corruption is a word that has a complexity of meanings. Johnson and Sharma provide a representative list of examples and patterns of corruption as including, Bribery and Graft (extortion and kickbacks); Kleptocracy (stealing and privatizing public funds); Misappropriation (forgery, embezzlement, misuse of public funds); Nonperformance of duties (cronyism); Influence peddling (favor, brokering and conflict of interest); Acceptance of improper gifts (speed money); Protecting maladministration (cover-ups and perjury); Abuse of power (intimidation and torture); Manipulation of regulations (bias and favoritism); Electoral malpractice (vote buying and election rigging); Rent seeking (public officials illegally charging for services after creating artificial shortage); Clientelism and patronage (politicians giving material favors in exchange for citizen support); Illegal campaign contributions (giving unregulated gifts to influence policies and regulations). See R. Johnson, S. Sharma, *About Corruption*, in R. Johnson (Ed.) *The Struggle against Corruption: A Comparative Study*, Palgrave, New York, 2004, p.1 at p. 2

23 See The UN Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators, Vienna, September 2004, pp. 23-24. A distinction is drawn between grand and petty corruption. Petty corruption ‘involves the exchange of very small amounts of money, and the granting of small favors.’ See UN Handbook id at p. 23. All further references in this book, unless otherwise indicated, are with respect to grand scale corruption.

24 P. Muchlinski, *Multinational Enterprises and the Law*, OUP, Oxford, 2007, pp. 81-83.

25 P. Muchlinski, *Global Bukowina Examined: Viewing the Multinational Enterprise as a Transnational Law Making Community*, in G. Teubner (Ed.) *Global Law without a State*, Dartmouth Publishing, Aldershot, 1997, p. 79.

26 This remark was made in reference to money laundering, not corruption, but the argument is equally valid for all transnational crimes including corruption. See M. Pieth, G. Aiolfi, ‘The private sector becomes active: the Wolfsberg process’, *Journal of Financial Crime*, Vol. 10, No. 4, 2003, pp. 359-365. In a similar vein from the opposite point of view, Slaughter and Burke-White remark that in order to address problems of an international dimension, international law must be able to influence the domestic policies of states and harness national institutions in pursuit of global objectives. They note that the ‘primary purpose of international law then shifts from providing independent regulation above the national state to interacting

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As the demarcating lines between private and public law,<sup>27</sup> are being challenged by the nature of transacting in a global world traditional categorizations are coming under increasing pressure. Private claimants and private actors are becoming increasingly active in societies which are no longer strictly territorial but stretch as far as the market reaches on a truly global scale.<sup>28</sup> Brownsword remarks on how this changing terrain influences the interaction between public and private law when he states:

‘the relationship between contract and public law, despite having many important facets, has not always been a matter in which private lawyers have taken a particularly keen interest. However, with the emergence ... of a modern contracting state, in which there is extensive public procurement from the private sector, privatised supply of public utilities and a strong contract culture within the public sector itself, it is clear that contract lawyers can no longer afford to ignore *the interface between contract and public law*.’<sup>29</sup>

This book makes the case that broadening the conceptual framework in the fight against corruption to focus more deliberately on private law transactions that accompany corrupt exchanges is the inevitable next step in the fight against grand corruption.<sup>30</sup> Since corruption occurs in interactions, the future of the fight against corruption may lie in moving its boundaries beyond the traditional criminal law dialogue of offender and punishment. Such a shift will bring into focus the contracts, assets, and liability for harm resulting from corruption. It will also emphasize the private actor as an important element in the sanctioning processes of corruption.<sup>31</sup>

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with, strengthening and supporting domestic institutions.’ See A. Slaughter., W. Burke-White, *The Future of International Law is Domestic: (or, The European Way of Law)*, in J. Nijman and A. Nollkaemper (Eds.), *New Perspectives of the Divide between National and International Law*, OUP, Oxford, 2007, p. 110 at p. 111.

27 Traditionally a distinction has been drawn between public and private corruption. Public corruption involves the ‘breaking by public persons for the sake of private financial or political gain, of the rules of conduct in public affairs, prevailing in a society in the period under consideration,’ while private bribery has been defined as ‘dishonesty between private persons in economic transactions represented by the giving and taking of bribes and the granting and taking of favors. See generally R. Nield, *Public Corruption: The Dark Side of Social Evolution*, Anthem Press, London, 2002, at Appendix A.

28 Virilio remarks of globalization, ‘We are not seeing an end of history, but an end of geography.’ P. Virilio, *The Information Bomb*, London, Verso Books, 2000, p. 9.

29 Emphasis added. R. Brownsword, *Contract Law: Themes for the Twenty-First Century*, 2nd Edn, OUP, Oxford, 2009, p. 230.

30 See Chapter 10 for the outlines of such a conceptual shift to a *Transaction Approach* to fighting corruption based on the insights acquired from the research done in this book.

31 Rose-Ackerman includes the private actor in her checklist of international actors that may play a role in the fight against corruption. See S. Rose-Ackerman, ‘Anti-Corruption Policy: Can International Actors Play a Constructive Role?’, *id.*, Note 2 above.

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Private law can play a double role. Corrupt exchanges, often camouflaged as private contracts, are often supported by private law processes that protect the autonomy of parties and create protective bubbles designed to break the chain of ownership to dispersed owners. This can be exploited by parties seeking to cover the trail of corrupt transactions. However, the flip side of the private law is its ability to follow and sanction these same transactions in a manner that can be of serious consequence to the parties. Private actors can upset the dynamics of the corrupt exchange by challenging the contracts that result from it, by pursuing the benefits of corrupt exchanges and by seeking to undo legal arrangements that seek to preserve illicitly acquired assets within the reach of the perpetrator but outside the reach of the law.<sup>32</sup> Private legal proceedings can bypass a compromised state by initiating actions wherever a jurisdictional link in assets or in person presents itself. Civil judgments and awards are enforceable against the defendant in any jurisdiction where he or she holds assets. Furthermore, by enabling the victim of corruption to seek recourse independently of the state, private remedies introduce a neglected but motivated actor into the fight against corruption

In general, private remedies can target not only the wrongdoer but also related persons or organizations. Simpson concurs and states that ‘some theoretical and anecdotal empirical evidence suggests that civil justice processes may offer more efficient corporate deterrence than the imposition of criminal legal sanctions.’<sup>33</sup> Furthermore, the language and processes of private law are intuitively better understood by private actors who traditionally stand apart from public law criminal processes. The private law can be described as a sleeping tiger that is in many ways better equipped to ensure that the participants in grand corruption do not profit from their crimes.

Although there has been considerable research into the criminal law aspects of corruption, the role and potential of private law in the fight against corruption is in need of more inquiry.<sup>34</sup> The link between private law and crime

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32 Kevin Chamberlain, for example, discusses the difficulties faced by the Nigerian government in recovering moneys stolen from Nigerian citizens and deposited outside the jurisdiction of Nigerian courts by the former head of state, General Sanni Abacha (now deceased), using foreign banks and various laundering schemes. See K. Chamberlain, ‘Recovering the proceeds of corruption’, Vol. 6, No. 2, *Journal of Money Laundering Control*, 2002, pp. 157-165.

33 S. Simpson, *Corporate Crime, Law, and Social Control*, CUP, Cambridge, 2002, p. 78.

34 Olaf Meyer points out that a review of the practices in several countries in Europe and the United States shows that ‘there is still no discernible systematic approach to the phenomenon of corruption ... in the shape of a well-planned civil law strategy.’ See O. Meyer, The Civil Law Consequences of Corruption: An Introduction, in O. Meyer (Ed.), *Civil Law Consequences of Corruption*, Nomos, Baden Baden, 2009, p.18. In their study of thirteen OECD countries, Heine, Huber and Rose point out that the reasons for the reluctance to pursue private redress include: (1) rules that substantially limit the plaintiff’s possible claim; (2) the fact that damage claims must be brought in separate proceedings from criminal prosecutions;

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prevention is not new. Atiyah, a doyen of contract law, has pointed out that private law may be ‘surprisingly effective’ in tackling crime.<sup>35</sup> Alan Berg highlights the question of the private law consequences of corruption and laments that ‘on the part of regulators there has been no recognition that improving and clarifying the civil law remedies ... would do much to combat corruption.’<sup>36</sup> Burger and Holland give several examples of cases where private actors have pursued claims for injury suffered as a result of international bribes even without ‘direct statutory support’<sup>37</sup> and conclude that ‘the right of civil action provides a useful complement to criminal proceedings as a deterrent.’<sup>38</sup> They argue that private actors, rather than governmental ones, are in a position to lead the next stage of the global fight against corruption.<sup>39</sup>

In a similar vein Paul Carrington remarks on the weakness of enforcing anti-corruption laws by means of the very public servants that are part of the problem and states ‘it is the integrity of governments that is the global problem in greatest need of a plausible threat of civil liability.’<sup>40</sup> The potential created by the intervention of private parties is also emphasized by Pines, who argues that the possibility of a limited private right of action for the US Foreign Corrupt Practices Act<sup>41</sup> would aid in ‘achieving the economic and moral goals of the FCPA.’<sup>42</sup> In his view the most effective means of solving what he describes as the problems of vagueness and weak enforcement of the FCPA are best met by allowing competing US businesses that have suffered as a result of

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(3) damages do not adequately compensate for the costs of protracted litigation; (4) difficulty in investigating and compelling production of evidence and witnesses in international cases; (5) showing damages with certainty and proving causal links; and (6) obtaining jurisdiction. See G. Heine, B. Huber, T. Rose (Eds.), *Private Commercial Bribery: A Comparison of National and Supranational Legal Structures*, ICC, Paris, 2003, pp. 654-655.

35 Atiyah remarks that while it is normally the function of criminal law to provide a deterrent against criminal conduct, contract law as an additional deterrent over and above that provided by criminal law can be surprisingly effective. P. Atiyah, *An Introduction to the Law of Contract*, 3rd edn, OUP, Oxford, 1981, p. 255.

36 A. Berg, ‘Bribery: transaction validity and other civil law implications’, *Lloyd’s Maritime and Commercial Law Quarterly*, Iss. 1, 2001, p. 27 at p. 29.

37 Burger and Holland cite cases such as *Environmental Tectonics v. W.S. Kirkpatrick, Inc.* 847 F.2d 1052, 1054-56 (3d Cir. 1988); *Dooley v. United Technologies Corp.* 786 F.Supp. 65, 69 (D.D.C. 1992); *Rotec Indus., Inc. v. Mitsubishi Corp.* 348 F.3d 1116, 1118 (9th Cir. 2003); *Korea Supply Co. v. Lockheed Martin Corp.* 63 P.3d 937, 94142 (Cal. 2003). See E. Burger, M. Holland, ‘Why the private sector is likely to lead the next stage in the global fight against corruption’, *Fordham International Law Journal*, Vol. 30, 2006-2007, pp. 63-69.

38 Id., at p. 63.

39 Id., at p. 75.

40 P. Carrington, *American Law and Transnational Corruption: Is There a Need for Lincoln’s Law Abroad?*, in O. Meyer (Ed.), *Civil Law Consequences of Corruption*, Nomos, Baden Baden, 2009, p. 49.

41 See Chapter 3 below.

42 D. Pines, ‘Amending the Foreign Corrupt Practices Act’, *California Law Review*, Vol. 82, 1994, p. 185 at p. 220.

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bribery to have a right of enforcement.<sup>43</sup> In motivating private actions for corruption Simon Young, argues that:

‘The crime of corruption is unique in many ways. The gains and losses can be massive. The state or government is often the victim. The proceeds of corruption, if traceable, are often in another jurisdiction, thereby complicating recovery ... [...] civil actions against corruption are indicative not necessarily of a failing of the criminal justice system but of the absence of a better alternative to recovery ....’<sup>44</sup>

In summary, the character of the principal actors in grand corruption (the government on the one hand and the multinational corporation on the other), and the environment in which this corruption occurs, presents a conundrum yet unresolved by the criminal law approach to fighting corruption. The fight against corruption must adapt itself to the international environment in which grand scale corruption occurs.<sup>45</sup>

Here lies the potential of a private law approach.<sup>46</sup> Private actions before courts of law or, as is more likely in international commercial disputes, before international arbitration tribunals, have a capacity for decentralization and dislocation from territory that can play a vital role in ensuring that the ramifications of the international criminalization of corruption are consistently applied in a global world. In addition private actors also assume a more prominent role because of the potential and resources that they can bring to the fight against corruption. This creates a new paradigm for providing security with private actors acting in partnership with the state.

### 1.2 The Research Question

Corruption is not an abstraction but takes shape in the form of agreements, payments, kickbacks and other transactions. At the heart of the corrupt

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43 Id.

44 S. Young, ‘Why Civil Actions against Corruption’, *Journal of Financial Crime*, Vol.16, No.2, 2009, p. 144 at pp. 144-145.

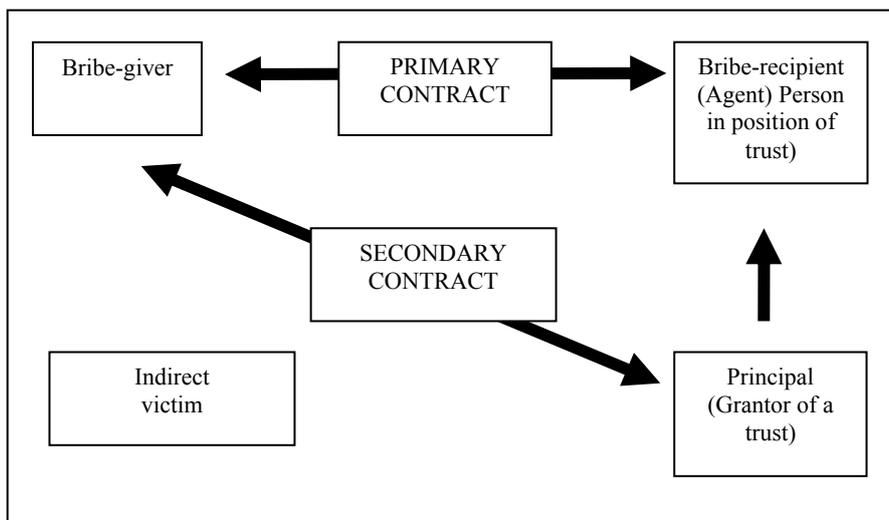
45 Essential to this is development of methods to overcome the conflict of interest created by the monopoly held by the state in initiating the sanctioning process under the criminal law. See A. Makinwa, International Corruption and the Privatisation of Security: Resorting to Private Remedies, in M. Hildebrandt, A. Makinwa, A. Oehmichen (Eds.), *Controlling Security in a Culture of Fear*, Boom Legal Publishers, The Hague, 2009, p. 99 at pp. 105-107.

46 A. Portnoy and J. Murino speak of an imminent front that is being opened by ‘private parties now joining the fight against corruption.’ In ‘Private actions under the U.S. Foreign Corrupt Practices Act: An imminent front?’, *IBA’s International Litigation News*, April 2009, pp. 31-33.

exchange are agreements that trigger the private law into action. This raises questions about the response of private law to such transactions.<sup>47</sup>

From the perspective of private law, four primary relationships are affected by the corrupt exchange. The first is the relationship between the person who pays a bribe (hereinafter referred to as the *bribe-giver*) and the person who receives a bribe while acting in a position of trust to negotiate in the best interest of a third party (hereinafter referred to as the *agent* or *bribe-recipient*). Contracts for special fees, kickbacks, consultancies and commissions are examples of agreements to give a bribe. This agreement is referred to in this book for convenience as the *primary contract* because it evidences the payment of a bribe and kicks-off the sequence of actions and contracts that are tainted by this original act of bribery.

**Figure 1: The Corrupt Exchange**



The second relationship is the relationship between the bribe-giver and the party in whose interest the bribe-recipient negotiated with the bribe-giver (hereinafter referred to as the *principal* or *employer*). The contract that results from the successful bribery exchange between the bribe-giver and the principal or employer of the bribe-recipient is referred to for convenience in this book as

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47 See A. Berg, id Note 36 above.

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the *secondary contract* because it results from the successful execution of the primary agreement to give a bribe.

The third relationship is that between the principal and the disloyal agent. The term principal is used in the broadest sense as representing any party who grants trust to another to act in the best interest of the principal. The relationship between the bribe-giver and the agent is the catalyst for the corrupt exchange. Without such a grant of trust there would be no basis for the bribe-giver to negotiate with the agent, nor would a secondary contract that binds the principal to the bribe-giver come into existence.

A fourth situation, which is a more indirect relationship, is that of the person who suffers harm as a result of the corrupt exchange but who is not in a contractual relationship with any of the parties (hereinafter referred to as the *indirect victim*).<sup>48</sup> The indirect victims of corrupt acts are often the suffering majority. Citizens lose the benefit of contracts with a public dimension where corruption results in unrealized or sub-standard projects as well as a lack of social and economic development.

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48 This book does not deal with the related issue of the passage of property rights under the primary and secondary contracts. Art. 34 UNCC requires that due regard should be had to the rights of third parties acquired in good faith with respect to measures taken by states to address the consequences of corruption. This has implications with respect to innocent third parties who seek to sue on the contract because property may have passed under the contract to such parties. It is important to note that although a contract tainted by bribery is considered unenforceable, it does not mean that property may not pass to an innocent third party under the transaction. An illustrative case in this regard is the US case of *Bankers Trust Company v. Litton Systems, Inc.*, where the court applied the *holder in due course* doctrine to a transaction tainted by bribery. The defendant had entered into an agreement to lease photocopying machines from Regent Leasing Corporation on the recommendation of the defendant's agent. Litton later found out that its agent had entered into an agreement with Regent Leasing under which he was to receive 'service fees.' To finance the photocopiers which it intended to lease to Litton, Regent took a loan from Bankers Trust and assigned Litton's leases as security. Litton defaulted in meeting its obligation to the bank under its leases and in the subsequent court actions argued that the bribery of the agent advising Litton rendered the Leasing contract, which had been assigned to the bank by Regent Leasing, void and unenforceable and that as such the bank had no basis for a claim. The court held that the question that arose from these facts was 'whether a holder in due course may enforce lease contracts not enforceable by the holder's assignor because the contracts were induced by commercial bribery committed by the assignor.' The court held that where an innocent party, such as a holder, in due course sues on an illegal contract, the innocent party has done no wrong for which it should be penalized. The court further held that '[b]ribery which induces the making of a contract is much like a fraud which has the same result. The bribery of a contracting party's agent or employee is, in effect, a fraud on that party.... Inasmuch as the New York Uniform Commercial Code allows a holder in due course to enforce a contract induced by fraud, Sec 3-305(2), the same treatment should be given to a contract induced by bribery. The result ought not to be changed by the additional fact that commercial bribery is a criminal offense in New York. Finally the court stated that it would be poor policy for courts to transform banks and other finance companies into policing agents charged with the responsibility of searching out commercial bribery committed by their assignors. See *Bankers Trust Company v. Litton Systems, Inc.* 599 F.2d 488 (1979).

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How does a private law response to these relationships further the fight against corruption? How are courts and international arbitration tribunals influenced by the public policy objectives of world-wide anti-corruption laws?<sup>49</sup> To what extent will they provide relief to parties that have suffered damage related to corrupt exchanges? A framework within which these questions can be answered is provided in the 2003 UN Convention against Corruption (UNCC).<sup>50</sup> The UNCC presents a model for private law intervention in the fight against corruption along two fronts: firstly, in claims relating to the validity or enforceability of contracts resulting from the corrupt exchange, and, secondly, in encouraging personal actions by persons who have suffered injury as a result of corruption. These interventions can be summed up as transaction validity on the one hand, and the right to institute legal proceedings on the other.<sup>51</sup>

These two points of intervention form the basis of analysis in this book. In the absence of an international system of private law, questions about transaction validity and instituting legal proceedings can only conceivably be answered from within the context of national law systems. This implies not just a consideration of the international instruments that impact on private remedies for corruption but also national law.

A secondary aspect of this research project was how to combine the divergent strands of civil, criminal, private, and public approaches to corruption into a coherent framework. The public/private divide that characterizes current research on anti-corruption creates a disconnected set, of events which are in reality a single narrative. The insights drawn from this book are used to formulate a conceptual framework for fighting corruption that places the transaction, not the offender, as the logical central point of intervention in a manner that brings the public and private law aspects together.<sup>52</sup>

In summary, the research question can be outlined in four parts: (1) What is the motivation and foundation for an international framework on private remedies for corruption? (2) What is the position of national laws regarding the issue of private remedies for corruption? (3) How do these national laws complement the framework for private remedies provided by the United Nations Convention? (4) Can a conceptual framework that incorporates the various

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49 See Chapters 4, 5, 6, and 7 for a comparative viewpoint on private remedies in the US, England, the Netherlands and those under International Arbitration.

50 See Chapters 8 and 9 below.

51 See Chapter 8 for an analysis of Art. 34 UNCC as a factor in assessing the validity of transactions and contracts tainted by corruption and Chapter 9 for an analysis of Art. 35 UNCC on the right to institute legal proceedings for damage suffered as a result of acts of corruption.

52 See Chapter 10 below.

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strands of public/private, criminal/civil law strategy in the fight against corruption be formulated?

### 1.3 Choice of Research Method

Researching private remedies for corruption implies a move *from* the normative demand in the UNCC that member states *ought* to address the validity of transactions tainted by corruption and to provide victims of corruption the means to seek redress for damage suffered *to* the substance of *how* such remedies are provided in interpretation and implementation. Furthermore, the UNCC rules present concepts such as ‘victim,’ ‘damage,’ ‘compensation’ and ‘validity of contracts,’ which are in themselves complex in nature. As such, exploratory research of an analytical character is necessary in order to translate and give content to these concepts. This nature of the research questions suggests that a comparative methodology is the appropriate choice.<sup>53</sup>

Comparative law can serve many purposes, depending on the purpose for which it is being used. It starts from a given problem or issue, and it is this ‘main purpose for which ... comparative study or research is undertaken [that] will to a large extent dictate the choice of legal systems or topics to compare and the method of comparison.’<sup>54</sup> Comparison may occur at the macro level, involving the comparison of entire legal systems, or at the micro level, involving the comparison of particular elements or issues of selected legal systems.<sup>55</sup> Comparison may be viewed as an end in itself in the search for common principles or as a means to achieve insight into the reaction of legal systems to common problems. For several reasons a comparative approach is adopted to address the research question.

Firstly, grand scale corruption is a problem of international dimension. This means that an effort to tackle it requires the creation of an environment in which a common legal regime that is binding for all players displaces the fractured responses of diverse national rules with varying requirements.

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53 This section on the choice of the comparative method updates methodology previously published as A. Makinwa, ‘Researching Civil Remedies for International Corruption: The Choice of the Functional Comparative Method’, *Erasmus Law Review*, Vol. 2, No. 3, November 2009, p. 335. I thank Prof N. Dorn for his critique as commentator when I presented the paper, ‘Researching Civil Remedies for International Corruption: The Choice of the Functional Comparative Method’, at the Erasmus Law Review Seminar on ‘The possibilities of comparative law methods for research on the rule of law in a global context’, 23 January 2009.

54 W. Kamba, ‘Comparative law: a theoretical framework’, *International and Comparative Law Quarterly*, Vol. 23, Iss. 3, 1974, p. 489.

55 P. De Cruz, *Comparative Law in a Changing World*, 2nd Edn, Cavendish Publishing, London, 2007, pp. 233-236.

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Proposals for shaping an environment that encourages compliance with anti-corruption rules require a methodology that can work across differing national positions to arrive at an approximation of a *level playing field*.<sup>56</sup> The comparative method enables the identification of such a baseline of legality from a plurality of jurisdictions.

Secondly, this research on private remedies for corruption in international transactions requires an outward-looking methodology that can accommodate and anticipate a plurality of meanings and interpretations and accepts that in today's global environment several legal systems must interact in communities to create shared values.<sup>57</sup> An inward-looking approach, which focuses on the position in a given legal system, may be suitable for national problems. However to assess the potential and scope of private remedies for corruption across jurisdictions, an inward-looking approach is handicapped by the limitations of national values and interpretations. This suggests the adoption of an approach that involves the comparison of more than one national system.

Thirdly, the gap between the law and the remedial needs of society requires the law to possess a certain flexibility or indeterminacy to achieve justice in the particular case. This means that there is an inevitable *penumbra of uncertainty*<sup>58</sup> that exists in legal systems. Indeterminacy implies that legal theories may lack comprehensiveness, may contain gaps and may be contradictory.<sup>59</sup> In the fluid dynamics of interactions of international society, this penumbra of uncertainty is even more pronounced. However, as Singer points out, indeterminacy is balanced out by the consolidating effect of culture. He states that within a '*particular culture*'<sup>60</sup> commonality of thought may lead to a '*shared understanding*'<sup>61</sup> that makes the outcome of the judicial processes

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56 Emphasis added.

57 A major objection against this notion of 'shared values' is that it is based on 'misleading generalizations.' Franz von Benda-Beckmann cautions against a 'neglect of legal pluralism' and points out that in 'legal and philosophical assertions, human rights, like any positive law, 'exist' in the temporal and spatial dimension normatively specified, in legal texts, and in their implementation. But from a legal anthropological point of view, there are more 'existences'. '... [H]uman rights also "exist" in the knowledge of people, in the programs, strategies and struggles of social movements and individuals, in political philosophies of the powerful and the oppressed.' F. von Benda-Beckmann, Human Rights, Cultural Relativism, Legal Pluralism; Towards a Two-Dimensional Debate, in F. von Benda-Beckmann, K. von Benda-Beckmann, A. Griffiths (Eds.), *The Power of Law in a Transnational World*, Berghahn, New York, 2009, p. 114 at pp. 120-121.

58 H. Hart, 'Positivism and the separation of morals', *Harvard Law Review*, Vol. 71, No. 593, 1958, pp. 606-607.

59 J. Singer, 'The player and the cards: nihilism and legal theory', *Yale Law Journal*, Vol. 94, No. 1, 1984, p. 1 at pp. 14-16.

60 Emphasis added.

61 Emphasis added.

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predictable.<sup>62</sup> This idea of *shared understandings* can also be applied to the particular culture that develops in the international business environment. This ‘shared understanding’ embraces a plurality of legal traditions and suggests that, as regards research on a problem of international dimension such as grand scale corruption, a research methodology that addresses this pluralism should be adopted.

Fourthly, an approach that accommodates a plurality of diverse national systems, is supported by the fact that the international anti-corruption framework places compliance at the level of domestic legal systems. This implies a plurality of enforcement methods in diverse systems. To arrive at an understanding of the potential and scope of private remedies for international corruption, a movement must be made from the international framework presented by the UNCC and other international, intergovernmental and regional instruments to the workings of domestic systems in which this framework will find expression and be implemented. As such, the content of the international framework can only be evaluated by an assessment of national legal principles across representative jurisdictions. The comparative method enables such a content-filling exercise.

In summary, in this book a comparison is undertaken with the objective of assessing the role of private law in the fight against corruption. The aim is to obtain insight into areas of consensus and/or divergence with regard to private remedies that may indicate shape and future of private law and private actors in the fight against corruption.

### 1.4 Functional Comparison

A fundamental question, however, in assessing an international framework for private remedies for grand corruption is how such an articulation can take place across legal traditions and cultures. As an answer to this, this book adopts the method of *functional comparison*. This is a methodology that focuses on the *solutions*<sup>63</sup> presented by chosen legal systems. Zweigert and Kötz in their seminal text argue that the basic methodological principle of comparative law is ‘functionality,’ which they argue rests on the fact that ‘the legal system of every society faces essentially the same problems and solves these problems by quite different means though very often with similar results.’<sup>64</sup> Rheinstein, describing the functional approach, states that it shows

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62 Id.

63 Emphasis added.

64 K. Zweigert, H. Kötz, *Introduction to Comparative Law*, translated from the German by Tony Weir, 3rd Edn, Clarendon, Oxford, 1998, p. 34.

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how ‘the problems set by life ... the actual conflicts of social interests [are] solved by the legal order....’<sup>65</sup> Rheinstein touches on the essence of functionalism when he states that it ‘will show us the variety of means which may be and have been used for the same purposes, thus enlarging our ‘stock of solutions.’<sup>66</sup> Functional comparison facilitates the cross-cultural analysis of ‘solutions’ provided by different systems.<sup>67</sup> It focuses not so much on legal rules and concepts, as on the response a legal system gives to a particular problem. By focusing on function rather than content, it can provide a picture of the position regarding private law responses to corruption in various jurisdictions.

The logic of the international trading order requires certainty of the rule of law. This is the driving force for the constant formulation of common rules to regulate the expanding sphere of commercial activity beyond state borders. The process of rule formulation proceeds from ‘problem to problem’, as states coordinate their responses in the framework of their mutually dependent relationships. The methodology adopted in this research on private remedies for corruption focuses on the identification, comparison and analysis of these responses. Starting from the *problem* enables a certain detachment from particular concepts, substantive laws or procedures in cases where they arrive at ‘more or less the same result.’<sup>68</sup> This method of comparison is functional and pragmatic. In this way, the functional comparative method enables the identification of various solutions to the question of private remedies for international corruption, i.e. its building blocks.

How valid are comparisons of laws dealing with corruption that reflect countries at different stages in social, political and economic development? How does one bridge the differences in language and concepts?<sup>69</sup> Private remedies, proceeding as they do from the individual, are closely linked to local customs, attitudes and practices. The diversity of such practices means that a

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65 M. Rheinstein, ‘Comparative law and conflict of laws in Germany’, *University of Chicago Law Review*, Vol. 2, No. 232, 1934-1935, p. 248.

66 Id.

67 Rosenblum remarks that ‘[c]omparative law holds significant potential to understand how nations internalize international norms.’ See D. Rosenblum, ‘Internalizing gender: why international law theory should adopt comparative methods’, *Columbia Journal of Transnational Law*, Vol. 45, No. 759, 2006-2007, p. 770.

68 Reitz points out that ‘[b]y asking how one legal system may achieve more or less the same result as another legal system without using the same terminology or even the same rule or procedure, the comparatist is pushed to appreciate the interrelationships between various areas of law, including especially the relationships between substantive law and procedure.’ See J. Reitz, ‘How to do comparative law’, *American Journal of Comparative Law*, Vol. 46, 1998, p. 622.

69 Legrand discusses this problem of translation at length. See P. Legrand, ‘How to compare now’, *Legal Studies*, Vol. 16, Iss. 2, 1996, pp. 232-234.

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‘view from nowhere’<sup>70</sup> may fall short of reality. Notions of private remedies are necessarily limited by the constraints of national legal systems. The functional comparative approach allows for the identification of the basic elements at play; how they operate within the selected national systems; the extent of their compatibility or incompatibility; and how, if at all, they are likely to influence a ‘common platform.’

The functional comparative method does not resolve the ‘enigma of translation’<sup>71</sup> but, by focusing on function rather than content, it can provide a picture of private remedies for corruption across jurisdictions in a manner that reflects the blended international environment. In this view, the functional comparative method can provide an element of predictability. Freeman points out that the law is normative but it is also factual, as is the degree of compliance with the law.<sup>72</sup> It should be freely admitted that the pragmatism of the *solution* is colored by the realities of power and politics. The functional comparative method can only provide a window into how the law is likely to develop. Beyond this point lies the unpredictability of politics, power and governance.

Functional comparison involves an examination of the responses of national systems that are representative in the fashioning of international anti-corruption rules. In the first instance the comparison is ‘cross-national,’ comparing the private law positions of selected jurisdictions, and in the second instance, it is ‘vertical’ in its comparison of national and international rules. This book presents in Part 2 models of private remedies under chosen national jurisdictions as well as international arbitration, and subsequently, in Part 3, a comparison of the solutions presented under these chosen systems within the framework established by the UNCC. This process raises two important questions. Firstly, what legal systems should form the basis of the comparison? Secondly, what should the parameters of the comparison be?

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70 Donaldson and Dunfee point out that the ‘pivotal traditions of ethical theory, when applied in diluted form to real world problems, have offered a ‘view from nowhere.’ They have been incapable of locating the complex, particular problems of corporations, industries, economic systems, marketing strategies, etc., in a way that would provide an institutional ‘somewhere.’ See T. Donaldson, T. Dunfee, *Ties That Bind: A Social Contracts Approach to Business Ethics*, Harvard Business Press, Cambridge, MA, 1999, p. 13. This phrase is the title of the illuminating book by T. Nagel. *The View from Nowhere*, OUP, New York, 1986.

71 Reitz refers to this as the ‘enigma of translation.’ He points out that ‘[i]n one sense every term can be translated because there are things in each legal system that are roughly the functional equivalent of things in the other legal system. In another sense nothing can be translated because the equivalents are different in ways that matter at least for some purposes. At a minimum, generally equivalent terms in each language often have different fields of associated meaning....’ J. Reitz, ‘How to Do Comparative Law’, id at Note 68 above at pp. 620-621.

72 M. Freeman, *Human Rights: An Interdisciplinary Approach*, Polity Press, Cambridge, UK/Malden, 2002, p. 77.

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### 1.4.1 Choice of Countries for Comparison

It can be argued that the question of private remedies for grand corruption cannot be answered without having detailed information about the response to this issue from all participants in the international economy. Since most countries in the world are involved in international commerce, this would be a weighty task. However, this may not be a valid argument, as not all players in a system necessarily play a similar role in the emergence of the rules that shape it. There is a definite politics of rule-making, in which traditional configurations of power play an important role. The process of the emergence of international rules regulating grand corruption, and the central role played by the United States, underscores the influence of political interest.<sup>73</sup>

The selection of countries for comparison in this book was guided by the history of the development of the anti-corruption regulatory framework. Here, the US has played a pre-eminent role. Its position in the world economy, coupled with its historical role in the regulation of corruption occurring in foreign countries make it an important indicator on the question of private remedies for corruption. The United States was the first country to adopt in 1977 far-reaching anti-corruption legislation (the 'Foreign Corrupt Practices Act'), which laid the foundation for the international framework against corruption.

Also important are countries whose legal systems have greatly influenced and continue to influence the international trading system. Grand corruption is an issue of international commercial law and is greatly influenced by the Western tradition. As Watson points out '... virtually every country in the world has borrowed most of its commercial law from a few legal systems, particularly French and German civil law and English common law.'<sup>74</sup> These legal systems remain the foundation of commercial laws all over the world and from a pragmatic point of view are the logical focus of a comparative study to assess the scope and potential of private remedies for international corruption. This fact narrows the discourse by excluding religious traditions such as Islamic and Hindu law, traditions of the Far East such as the Chinese and Japanese systems and other legal traditions such as African, Russian or unclassifiable systems.<sup>75</sup>

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73 See Chapter 3 for a description of how the domestic US Foreign Corrupt Practices Act served as a catalyst for the worldwide criminalization of international corruption.

74 A. Watson, *Legal Transplants: An Approach to Comparative Law*, University of Georgia Press, Athens, GA, 1974.

75 For an impressive overview of the major legal families see Patrick Glenn, *Legal Traditions of the World*, OUP, Oxford, 2000.

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In this book the example chosen for a civil law jurisdiction is the Netherlands while England<sup>76</sup> is chosen as a common law jurisdiction. The choice of the England and the Netherlands stems from the fact that they are representative of the two families of law (civil and common law), whose distinct socio-legal histories reflect the scope and content of the commercial laws of major legal systems. These fairly representative systems give insight into how civil and common law positions on these issues are formulated. In addition to these national rules, reference is made to the Restatements of the U.S. common law published by the American Law Institute.<sup>77</sup> Occasional reference is also made to the Principles of European Contract Law by the Commission on European Contract Law (the ‘Lando Commission’)<sup>78</sup> and to the Draft Common Frame of Reference on European Private Law.<sup>79</sup>

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76 The focus of this book is the law of England as opposed to Scotland, Wales and Northern Ireland. It should however be noted that all the anti-corruption legislation discussed in this book applies to the whole of the United Kingdom (UK). Furthermore, London is often described as the financial capital of the world. The coming into force of the far-reaching new UK Bribery Act of 2010 also underscores the importance of this jurisdiction as a comparative law source.

77 As a federation of states, contract, tort, agency and unjust enrichment laws in the US are found in state case law and statutes. However, the American Law Institute in producing the Restatements of US Law has codified the common law in these areas. Although they are not binding rules they are regarded as persuasive authority by the legal establishment and courts. See *Restatement of the Law (2nd) Torts*, as adopted and promulgated by the American Law Institute at Washington, DC, 19 May 1976, American Law Publishers, St. Paul, MN, 1977; *Restatement of the Law (2nd) Contracts*, as adopted and promulgated by the American Law Institute at Washington, D.C., 17 May 1979, American Law Publishers, St. Paul, MN, 1981; *Restatement of the Law (3rd) Unfair Competition*, as adopted and promulgated by the American Law Institute at Washington, DC, 11 May 1993, American Law Publishers, St. Paul, MN, 1995; *Restatement of the Law (3rd) Agency* as adopted and promulgated by the American Law Institute at Washington, DC, 17 May 17 2005, American Law Publishers, St. Paul, MN, 2007; *Restatement of the Law (3rd) Restitution and Unjust Enrichment*, as adopted and promulgated by the American Law Institute at Washington, DC, 19 May 2010, American Law Publishers, St. Paul, MN, 2011.

78 O. Lando, H. Beale, *Principles of European Contract Law, Parts I and II Combined and Revised*, Kluwer Law International, The Hague, 2000; O. Lando, A. Prüm, E. Clive, R. Zimmermann, *Principles of European Contract Law Part III*, Kluwer Law International, The Hague, 2003. The Principles of European Contract Law (PECL) have been described as a form of a ‘restatement’ based on comparative research of European contract law. However, Zimmermann urges caution regarding it in the same light as the American Law Institute Restatements of US Law stating that the drafters of the PECL were more ‘creative’ in their task compared to what the authors of the American Restatement were faced with. See R. Zimmermann, ‘The Present State of European Private Law’, *Mededeligen*, Part 73, No. 1, Royal Academy of Sciences (KNAW), 2010, p. 8. He notes that ‘divergences between national legal systems had to be resolved, decisions implying value judgments and policy choices had to be taken, and sometimes unconventional solutions were adopted which draftsmen of the PECL themselves describe as a progressive development from [the] common core.’ See R. Zimmermann, *id.* at p. 9. For this and several other reasons, he concludes that ‘the PECL, as they stand, present an incomplete and partly inadequate picture of European contract law. Zimmermann, *id.* at p.10.

79 C. von Bar, E. Clive, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, OUP/Sellier, Oxford, 2010.

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Another important legal process regarding corruption and the transactions that result from the corrupt exchange is international arbitration. The fact that most international contracts contain an arbitration agreement means that the bulk of disputes that are tainted by corruption in international transactions are more likely to end up before an international arbitration tribunal than a court of law. This fact alone indicates that there is a role for international arbitration in the discussion about fighting international corruption.<sup>80</sup> Consequently, in addition to the national legal systems selected for comparison, this book examines the responses to issues of transaction validity provided by international arbitration as well as its role with regard to the issue of private remedies for grand corruption.

In summary, in this book data is collected from the normative international legal framework for private remedies established by the UNCC, the legal systems of the United States, England, the Netherlands as well as by international arbitration. By focusing on the pragmatism of the solutions presented to the question of private remedies for grand corruption using these reference points, the functional comparative method can provide a window into the ‘building blocks’ or concepts that may influence the shape of a ‘common platform’ for actions by private actors in the fight against corruption. To a certain extent, the functional comparative method addresses the methodological problems associated with research into private remedies for corruption across several jurisdictions.<sup>81</sup> To put it simply, this book uses the comparative method to explore private remedies for corruption in an attempt to map the path toward an international framework.

### 1.4.2 The Parameters for Comparison

In his work, Kamba proposes a three-stage process of comparison that comprises a descriptive phase, an identification phase, and an explanatory phase.<sup>82</sup> This process is derived, in his words, from the fact that comparison ‘entails not merely the ascertainment of divergences and resemblances between the legal systems or parts of the legal systems compared, but also the explanation of such divergences and resemblances.’<sup>83</sup> This systematic approach allows for the identification of the basic elements at play; how they operate within the selected national systems; the extent of their compatibility

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80 See Chapter 7 on the Role of Arbitration for further discussion of this point.

81 To this end, the functional comparative method is most useful where it paints a vivid picture of the interaction between the cultures, legal traditions, economies and indeed political practices of the legal systems chosen for comparison as they respond to the shared problem that forms the basis of the research question.

82 W. Kamba, ‘Comparative law: a theoretical framework’, *id.*, Note 54 above at pp. 511-512.

83 *Id.*, at p. 511.

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or incompatibility; and how, if at all, they are likely to influence the ‘common platform.’

The first step of the descriptive phase of functional analysis is to ascertain the existing state of affairs under the legal systems chosen for comparison. This can be done by examining the solutions presented by the chosen legal systems as dictated by the two principal requirements regarding private remedies for corruption contained in the UNCC i.e., transaction validity and the right to institute legal proceedings. Art. 34 UNCC requires its parties to consider corruption as a ‘relevant factor’ in legal proceedings relating to the validity of contracts, the grant or withdrawal of a concession or similar instrument, or other remedial action.<sup>84</sup> Art. 35 UNCC requires that parties should take measures to ensure that entities or persons who have suffered damage as a result of an act of corruption shall have the right to initiate legal proceedings against those responsible.<sup>85</sup>

The first aspect of private remedies presented by the UNCC flows from the fact that most jurisdictions now have measures in place criminalizing international corruption. To allow persons to benefit from contracts resulting from such criminal transactions contradicts the logic of the international rules. What is the effect of corruption on contracts arising from or tainted by international corruption? The second aspect is focused on persons who have suffered damage because of corrupt activity. These persons are to be given the right to sue for compensation. This right to privately sue for harm suffered can change the dynamic of the fight against corruption by bringing in the victims of corruption as active participants in the sanctioning process.

How does comparison take place? Simply placing the national laws next to the international stipulations may not convey how these rules influence or fit within the decision and rule-making process.<sup>86</sup> The process of comparison itself should be much more than a dry analysis of ‘juxtaposed’ rules. Rather, it should reflect the systems, processes and solutions of the legal systems chosen for analysis. The parameters for comparison chosen for this research project are drawn from the interface between the rules and the societies in which they operate. This research project has chosen as parameters the extent to which the chosen legal systems (1) *provide recourse* to private remedies and (2) *interpret* provisions in a manner conducive to the pursuit of such remedies. This approach helps to identify a framework of solutions that provides an element

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84 Art. 34 UNCC. See further analysis in Chapter 8 of this book.

85 Art. 35 UNCC. See further analysis in Chapter 9 of this book.

86 Legrand castigates what he refers to as the ‘narrow view of the comparative enterprise’, which is reduced to a ‘dry juxtaposition of the rules of one legal culture ... with those of another.’ Legrand, ‘How to compare now’, *id.*, Note 69 above at p. 234.

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of predictability and may highlight areas of ‘shared understanding,’ which can influence the development of an international approach toward the question of private remedies for corruption. To this end, the research question has been contextualized by viewing the question of private remedies in the context of the legal regulatory framework regarding corruption in the chosen jurisdictions.

### 1.5 Empirical Case Study

To enable this researcher to gain a better understanding of the issues that a private law response to corruption should anticipate, a preliminary illustrative, qualitative case study was carried out to put the question of private remedies for corruption into context.<sup>87</sup> Qualitative research has been described as activity that locates the observer in the world. This means that ‘qualitative researchers study things in their natural settings, attempting to make sense of or to interpret phenomena in terms of the meanings people bring to them.’<sup>88</sup> The flexibility of the qualitative method<sup>89</sup> suggested that it could be used in this research on private remedies for corruption to give insight as to how ‘social experience is created and given meaning.’<sup>90</sup> This study provided the researcher with insight into the interrelated conditions that influence the incidence of grand scale corruption and what the potential of private remedies is in such circumstances.<sup>91</sup>

While merely illustrative, it is helpful to underscore the effect undertaking the case study has had on clarifying the direction and content of this book. Firstly it provided *real experiences* that gave the researcher more insight into the complexity of the issues that arise in fighting corruption and the limits of the

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87 Van Oer points out that ‘contextualizing actually is a process of adding new meaning to a given situation in order to characterize this situation in terms of what could (or should) be done, and by the same token to exclude (for the time being) alternative interpretations of the required mode of acting.’ See B. Van Oer, ‘From context to contextualizing’, *Learning and Instruction*, Vol. 8, Iss. 6, 1998, pp. 473 at p. 482.

88 N. Denzin, Y. Lincoln, Introduction: The Discipline and Practice of Qualitative Research, in N. Denzin, Y. Lincoln (Eds.), *The Landscape of Qualitative Research: Theories and Issues*, Sage Publications California, 2003, pp. 4-5.

89 It has been observed that ‘...qualitative research, as a set of interpretative activities, privileges no single methodological practice over another. As a site of discussion or discourse, qualitative research is difficult to define clearly. It has no theory or parading that is distinctly its own.’ N. Denzin, Y. Lincoln, Introduction: The Discipline and Practice of Qualitative Research, id., at p. 9.

90 N. Denzin, Y. Lincoln id., at p. 13.

91 ‘The idea that all kinds of learning processes in any situation can be accounted for by one limited general set of laws or mechanisms, has been replaced by a view on learning that acknowledges the importance of the content of learning, as well as the nature of the learning situation.’ B. Van Oer, ‘From context to contextualizing’, id., at p. 473.

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law.<sup>92</sup> This provided realistic impressions that gave a face and voice to the effects and consequences of corruption. This exposed the researcher to factors that may not have been encountered in a purely dogmatic analysis.<sup>93</sup>

Secondly, the case study emphasized for this researcher the necessity of '*looking beyond black letter law*' in proposing solutions to the problem of corruption. This encouraged the writer to explore the possibilities that exist as a result of the '*environment*' where corrupt transactions actually take place. This provided further motivation to tackle the research question from the perspective of how this environment is affected by encouraging private actors to participate in the fight against corruption; by the provisions of the law; by the role of the courts and arbitration panels; by strategies to encourage private prosecutors and private claims; as well through public/private partnerships in processes of negotiated settlements. These factors shape the environment in which corruption occurs in a manner that influences the choice for compliance or non-compliance with anti-corruption rules.

Thirdly, the case study underscored the need for innovative thinking where traditional approaches in the fight against corruption collide with the reality of a changed global world. An approach that utilizes the contracts, transactions and relationships that characterize corrupt exchanges as important points of intervention can help to overcome the '*fault-lines*' of criminalization. This is particularly true of the environment '*beyond the state*' in which grand scale corruption occurs. This provided the impetus for the conceptual shift towards a *Transaction Approach* suggested in this book.

Fourthly, the case study gave a perspective of the sheer scale of the problem of corruption; from the reality of corruption as an '*entry point*' into a market to the viciousness of the '*cycle of poverty*' that perpetuates the conditions that

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92 This admittedly unusual step for a researcher in private law was prompted because this research project was situated in the former Research School of Safety and Justice a co-operation between the Erasmus University Rotterdam (EUR), Leiden University, University of Twente, Vrije Universiteit Amsterdam, the Netherlands Institute for the Study of Crime and Law Enforcement, the Addiction research Institute and the Research and Documentation Center. I greatly appreciate the greater depth and insight about the importance of societal aspects of research I gained. I am grateful for the advice and guidance given to me by Dr. Damián Zaitch formerly of the Criminology Department of the EUR and Ms. Karin van Wingerde also of the EUR in respect of this illustrative case study. I also thank Prof. R. Swaeningen and Prof. H Bunt for their critique as commentators when I presented the paper 'Contextualising a Private law Response to International Corruption: Nigeria as an Illustrative Case Study' at the Research Programme Monitoring, Safety & Security, Lunch Seminar on the 7th of January 2010.

93 I. Curry-Sumner, M. van der Schaaf, *Research Skills: Introduction for Lawyers*, Nijmegen Ars Aequi Libri 2010 at p. 23. These writers mention the usefulness of empirical research in legal research.

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foster deep institutionalized corruption. This helped to underscore the urgency of the problem and the need to spare no effort in finding ‘real solutions’ to the societal, economic and political logjam that results from corruption. The following sections describe the method adopted in conducting this limited illustrative case study.

### 1.5.1 Choice of Country for Analysis

The research question was put into a social context by examining the views of experts drawn from Nigeria, a developing country that is suffering the detrimental effects of corruption.<sup>94</sup> These experts give their perspectives on grand corruption, its nature, causes, impact, the role of private remedies and court intervention, as well as the way forward. Previous works on corruption in Nigeria have provided helpful insights but are mostly approached from a general perspective of corruption as a whole and not corruption in international commercial transactions in particular.<sup>95</sup>

Nigeria is Africa’s second largest economy and its most populous country.<sup>96</sup> At the time this study was undertaken, Nigeria ranked 147th out of 179 countries in Transparency International’s ‘Corruption Perceptions Index’ for 2007.<sup>97</sup> Despite being rich in natural resources, 50-90 million Nigerians live in ‘absolute poverty’ with an income of less than one dollar a day.<sup>98</sup> Nigeria used to rank as one of the foremost developing nations, with a sound agricultural industry, hospitals and universities that were among the best on the continent. Over the space of 40 odd years the situation has completely reversed and corruption is held up as the primary culprit.

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94 The author also comes from Nigeria and attended some years of secondary school as well as undergraduate and postgraduate university education in Nigeria.

95 See for example, I. Lame, F. Odekunle (Eds.), *Fighting Corruption and Organized Crime in Nigeria: Challenges for the New Millennium*, Spectrum Books, Ibadan, 2000, p. 31-52; C. Akani, *Corruption in Nigeria, The Niger Delta Experience*, Fourth Dimension, Nigeria, 2002; T. Iredia, ‘Civil Society and Corruption: the Nigerian Experience’, 2005 Annual Alumni Lecture of the Asaba Chapter of the University of Ibadan Alumni Association, Nelrose Hotel Asaba, 11 May 2005; D. Smith, *A Culture of Corruption: Everyday Deception and Popular Discontent in Nigeria*, Princeton University Press, New Jersey, 2007. Also relevant from the broader African perspective are the country case studies in K. Hope, B. Chikulo (Eds.), *Corruption and Development in Africa: Lessons from Case-Studies*, Palgrave, New York, 2000.

96 World Population Prospects: The 2008 Revision Department of Economic and Social Affairs Population Division, <http://www.un.org/esa/population/>.

97 Available at [http://www.transparency.org/news\\_room/in\\_focus/2007/cpi2007](http://www.transparency.org/news_room/in_focus/2007/cpi2007). In 2011 Nigeria ranked 143 out of 183 countries on the TI Index. See <http://cpi.transparency.org/cpi2011/results/>.

98 The United Kingdom’s Department for International Development (DFID) estimates that 90 million Nigerians live in absolute poverty. DFID, ‘Nigeria Country Assistance Plan, 2004-2008’, <http://www.dfid.gov.uk/pubs/files/nigeria-cap.asp>.

## PRIVATE REMEDIES FOR CORRUPTION

### 1.5.2 Methodology of the Case Study

Field research was carried out in Nigeria and the Netherlands from July-August 2008 based on semi-structured face-to-face interviews with seven participants drawn from the business sector, the legal profession as well as law academics. Participants were selected based on their level of experience with the Nigerian domestic and international trading sectors and knowledge of the Nigerian legal system. However, as Nigerians living and experiencing the reality of life in Nigeria, they were also able to give a personal account of corruption. Letters of introduction requesting an appointment were sent out that stated this researcher was interested in obtaining a perspective on the role, desirability and viability of actions by private actors in the fight against grand corruption from a demand side country. Six of these interviews were conducted in Nigeria and one in the Netherlands. The interviews were recorded and varied in length from about 70 minutes to about 120 minutes. The participants were assured that their privacy will be protected, that the interviews would be anonymously reported and that excerpts of these interviews would be reproduced in this book.

The participants will be referred to anonymously as Participants 1-7. Participant 1 is one the most recognized leaders in Nigerian business circles, who has served as the chairman of a multinational corporation, been actively engaged in business research and education and has chaired several government commissions as well as served as the Nigerian Ambassador to one of Europe's largest economies. Participant 2 is a senior member of an international petroleum company operating in Nigeria. This participant is also from the Delta region of Nigeria which is particularly affected by the direct effects of oil exploitation despite being the source of the bulk of Nigeria's income. Participant 3 is a Senior Advocate of Nigeria with first-hand knowledge of the workings and capacities of the Nigerian legal system. Furthermore as prominent member of Nigerian society he is able to give insight into the political and legal processes as they relate to the fight against corruption in Nigeria. Participant 4 is a senior member of the Nigerian Bar and in a leading position of the Section on Business Law of the Nigerian Bar Association. He runs an international commercial legal practice as well as participating actively in social and development activities in Nigeria. Participant 5 is a Senior Member of the legal profession and a leading practitioner in the area of commercial law and intellectual property. Participant 6 is a Professor of International Law at one of Nigeria's federal universities. Participant 7 is an Associate Professor of Environmental Law at one of Nigeria's state universities.

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### 1.5.3 Analysis of Data

A thematic strategy of data analysis based on systematically listening to the recordings of the interviews with the 7 participants was adopted. The data was analyzed by first listening to the complete interviews to identify particular points made. These points were grouped together into themes which were given the headings that have been reproduced in this report. A summary is made under each theme of the general thrust of the interviews and a selection of quotes is included to illustrate the particular theme. As much as possible these quotes are left intact so that the reader is able to reference the highlighted points of the thematic analysis directly from the quotations from the experts.

The objective of these interviews was to obtain expert Nigerian opinion on the problem of grand corruption and the effectiveness of the criminal/civil law approaches to fighting corruption. These interviews present a vivid picture of the elements to be considered in addressing the question of private remedies for grand corruption. The principal themes that emerged from the interviews with the participants cover the following areas: (1) The definition of international corruption; (2) the sufficiency of the Nigerian anti-corruption rules; (3) the key actors and (4) victims of grand scale corruption in Nigeria; (5) the causes and impact of corruption on the economic and social fabric of Nigerian society; (6) the question whether corruption is a cultural issue; (7) the effect of the international regulatory framework against corruption on Nigerian business practices; (8) the role of the courts and (9) the role of private sector in the fight against corruption. Finally (10) the participants gave their opinions on how to chart a way forward in the fight against corruption. The findings and conclusion of this empirical study confirmed for this researcher the complexity of the problem of corruption and provided insight into some areas and issues that have been considered in articulating and assessing the research question. Excerpts are used to supplement the discussion in Chapter 2, which outlines the challenges faced in tackling grand corruption.<sup>99</sup>

### 1.6 Relevance of Research

By evaluating the potential and scope of private remedies for corruption this book hopes to provide a platform upon which discussion about a private approach to fighting corruption can take place. The laws criminalizing grand corruption leave open the question of the private law consequences of agreements and contracts arising from or tainted by such corruption. Fora for

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<sup>99</sup> The full report is available at A. Makinwa, 'Motivating private remedies for international corruption: Nigeria as a case study', *CALS Review of Nigerian Law & Practice*, Vol. 2, 2008, pp. 97-129.

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the settlement of international commercial disputes are then faced with the task of ‘finding their way’ to an answer that accords with the spirit of the criminal laws. This book highlights various approaches that are possible and argues that the mandatory nature of the laws criminalizing corruption implies that private law jurisprudence should develop in a manner that supports the goals of criminalization. Only where there is coherency between the criminalization of grand corruption and the private law consequences of the crime can the anti-corruption rules act as an effective deterrence.

The stability of the international consensus repudiating corruption is challenged by the persistence of the consequential transactions that result from successful violations of anti-corruption rules. This encourages risk taking and undermines the effectiveness of international rules. Furthermore, in a global market, the complexity of transactions, the character of the actors and fluidity of money moving across borders present serious challenges for the criminal process. Articulating private remedies as a strategy helps to move the global fight against corruption a step further by addressing not only the crime but also framing the transactions affected by corrupt acts as a central point of intervention. In urging a shift from the offender to the transaction, this research departs from approaches in previous works that deal with the question of civil law consequences of corruption primarily by describing and assessing national legal provisions.<sup>100</sup>

Private remedies exploit the rational behavior of corporations. Companies will favor a course of action that best boosts company earnings and satisfies shareholders. Where the satisfaction of shareholders can be quantified in terms other than company profits, the choices of corporations will reflect this

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100 See discussion about the Civil Law Consequences of Corruption in Denmark, Sweden, Germany, Estonia, Poland, Bulgaria, England, France and Spain in O. Meyer (Ed.), *Civil Law Consequences of Corruption*, (Schriftenreihe des Zentrums für Europäische Rechtspolitik an der Universität Bremen) (ZERP), Vol. 53, Nomos, Baden Baden, 2009; See also G. Heine, B. Huber, T. Rose, *Private Commercial Bribery: A Comparison of National and Supranational Legal Structures*, ICC, Paris, 2003, pp. 654-655; C. Nicholls, T. Daniel, M. Polaine, J. Hatchard, ‘Civil Remedies’, in *Corruption and Misuse of Public Office*, OUP, New York, 2006, pp. 225-265; A. Berg, ‘Bribery: transaction validity and other civil law implications’, *Lloyd’s Maritime and Commercial Law Quarterly*, Iss. 1, 2001, p. 27 at p. 29; E. Burger, M. Holland, ‘Why the private sector is likely to lead the next stage in the global fight against corruption’, *Fordham International Law Journal*, Vol. 30, 2006-2007, pp. 63-69; T. Daniel, J. Matin, Civil Proceedings to Recover Corruptly Acquired Assets of Public Officials, in Mark Pieth (Ed.), *Recovering Stolen Assets*, Peter Lang, New York, 2008, p. 245 at pp. 250-252; A. Portnoy, J. Murino, ‘Private Actions under the U.S. Foreign Corrupt Practices Act: An Imminent Front?’, IBA’s *International Litigation News*, April 2009; P. Carrington, American Law and Transnational Corruption: Is There a Need for Lincoln’s Law Abroad?, in O. Meyer (Ed.), *Civil Law Consequences of Corruption*, Nomos, Baden Baden, 2009, p. 37; S. Young, ‘Why civil actions against corruption?’, *Journal of Financial Crime*, Vol. 16, No. 2, 2009, pp. 144-159.

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changed environment. Factors such as increased awareness by consumers of a corporation's corrupt activity, the aversion of the public to damage caused by corrupt activity, the reputational implications of private actions by victims, can increase the risks of corrupt activity for the corporation in a manner that can positively influence compliance.<sup>101</sup>

Developing a systematic approach implies a broader approach to the question of private remedies. This book attempts to tie together the various threads of the public/private discourse regarding the fight against corruption in a systematic way to provide a cohesive picture of the landscape of the fight against corruption from the point of view of intervention by the private actor. To this end, Chapter 10 of this book advocates a *Transaction Approach* in the fight against corruption that is centered on the notion of restoring interactions damaged by the corrupt exchange. By identifying and addressing 'broken' interactions, the environment in which corruption occurs can be influenced in a way that encourages compliance with anti-corruption rules.<sup>102</sup>

Corruption remains an urgent issue and this book joins the growing discussion about the role of the private actor, which is catalyzed by the changing regulatory environment and the opportunities offered by an integrated world. As the state grapples with the governance gaps created by globalization, the center of gravity is broadening with respect to the private actor. This is a natural adjustment that may be expected in a 'global world without global government.'<sup>103</sup> Territorial boundaries have become shadows of their former selves and in many respects the foundations of the old world are incompatible with the new. Old insights may remain true but operate differently as traditional demarcations between public and private rights, public and private law are redefined.<sup>104</sup> Private dispute settlement processes, supported by states but engineered by private actors, operate beyond the nation state. Self-regulatory and hybrid reward schemes redefine the method and nature of the

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101 Such activities make the corrupt actions of corporations more tangible and 'seen' by ordinary citizens. This presents real victims in a manner that triggers mirror responses in the general public. The abstraction of public corruption becomes more concrete and evokes a desire for more direct repercussions for the offenders in the eyes of the general public. See E. Salcedo-Albarán, I. De León-Beltrán, M. Rubio, 'Feelings, brain and prevention of corruption', *International Journal of Psychology*, Vol. 3, Iss. 3, 2008, p. 2 at p. 11 and ff.

102 John Braithwaite in his seminal work *Restorative Justice and Responsive Regulation*, OUP, New York, 2002, argues that restorative practices may serve as more effective deterrent systems than traditional criminal punitive sanctions.

103 J. Stiglitz, *Globalization and its Discontents*, WW Norton, New York, 2002, p. 248.

104 This was also my experience in writing this thesis. My methodology in this thesis, the categorization of the primary and secondary contracts, public and private interests, and conceptualization of a *transaction approach* to fighting corruption were a reaction to my need for order in my thinking processes as well as my dissatisfaction with the artificial separations I encountered in the private and public law narratives on corruption.

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process of sanction. A central argument of this book is that public-private partnerships shall be a principal feature of the emergent terrain in the fight against grand corruption.

Ruggie has remarked that ‘[t]here is no single silver bullet solution to the institutional misalignments in the business and human rights domain. Instead all social actors – states, businesses, and civil society – must learn to do many things differently.’<sup>105</sup> This research on private remedies is a response to the need to develop models of intervention that are more consistent with the realities of the international environment, in which grand corruption occurs. The hope is that this research will add to the growing recognition of the role of the private actor in the fight against corruption and contribute to a viewpoint that emphasizes the need for a seamless platform of international consensus that spans the breadth of the public/private law divide – from the originating acts to the consequences of corruption.

### 1.7 Outline of this Book

Part 1 of this book, *The Foundation for Private Remedies*, answers the first aspect of the research question, namely, what is the motivation and foundation for an international framework on private remedies for corruption? To this end, Chapter 2 builds on the arguments presented in this introductory chapter and using excerpts from the Nigerian case study, discusses the challenges that must be taken into consideration in any attempt to provide strategies for reform in regulating corruption. These challenges are broadly grouped into the problem of definition, the challenge of compromised processes of governance, the challenge faced by business operators, the challenge faced by the judicial process as well as the challenge posed by the new ordering of international society. Chapter 2 ends with insights from participants on the path ahead in the fight against corruption. These challenges and insights provide an illustrative backdrop for the international normative framework repudiating grand corruption discussed in Chapter 3. Chapter 3 describes the process of the emergence of a world-wide consensus repudiating international corruption starting from a domestic US Act, the Foreign Corrupt Practices Act, to a variety of regional, intergovernmental and international instruments. This global consensus provides the baseline of legality upon which a discussion

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105 J. Ruggie, ‘Protect, Respect and Remedy: A Framework for Business and Human Rights’, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5, 7 April 2008. Available at <http://www.reports-andmaterials.org/Ruggie-report-7-Apr-2008.pdf> at Para 7. Endorsed by the UN as the Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, UN Human Rights Council, 17th Session A/HRC/17/31.

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about private remedies for corruption can take place by (a) establishing international corruption as an international legal wrong and (b) providing new insights on processes of implementation that engage the private actor.

Part 2 of the book, *Models of Private Remedies*, answers the second aspect of the research question, namely, what is the position of national law and arbitration regarding the issue of private remedies for corruption? The position of private remedies for corruption is examined under the three jurisdictions chosen for study in this book as well as from the context of international arbitration. Chapter 4 examines the right to private remedies in the United States, Chapter 5, the right to private remedies in England, Chapter 6, the right to private remedies in the Netherlands, and Chapter 7, the role of international arbitration with regard to contracts that are tainted by corruption.

Part 3 of the book, *Towards an International Framework*, answers the third and fourth part of the research question, namely, (1) what is the common ground or areas of divergence on private remedies for corruption and (2) how can a framework for private remedies be conceptualized? The methods of private redress provided by the UN Convention against Corruption (UNCC) are used as the reference point. To this end, Chapter 8 assesses the contrasting approaches to the validity of the transaction tainted by international corruption against the framework of Art. 34 UNCC, while Chapter 9 assesses the contrasting approaches to the right to institute legal proceedings for corruption under the chosen legal systems against the framework of the model provided by Art. 35 UNCC. Chapter 10 brings the different threads together and presents a conceptual framework for the future of the fight against corruption that takes as a starting point the environment in which international corruption occurs and the interactions that characterize the corrupt exchange. This approach is centered on the transactions that result from the corrupt exchange and urges an increased instrumental role for private law. Chapter 11 ends the book with conclusions and recommendations about the future of private remedies for corruption that can be identified from the findings in this book as well as areas for future research.

## CHAPTER 2

# THE CHALLENGES OF FIGHTING CORRUPTION

*'Corruption is by no means a new phenomenon. It is as old as human nature itself.'*<sup>1</sup>

*Mark Pieth*

### 2.1 Introduction

The question of private remedies for corruption is part of the larger question of how to develop effective strategies to fight corruption in international commercial affairs.<sup>2</sup> Although it has been argued that the tools and methodology<sup>3</sup> of ascertaining the true extent of the problem of corruption are far from perfect,<sup>4</sup> there seems to be sufficient evidence that corruption has

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- 1 Mark Pieth, in his introduction to the history and development of the OECD, opens with these very apt words. They sum up the breadth and scale of the problem of corruption and put the efforts in this book and indeed all other works regarding the fight against corruption into perspective. Corruption is an ancient and complex problem. This alone should caution that there are no simple answers to be found in this area of inquiry. M. Pieth, Introduction, in M. Pieth, L. Low, P. Cullen (Eds.), *The OECD Convention on Bribery*, CUP, Cambridge, 2007, p. 5.
  - 2 One of the most significant areas of legal development in the next 20-30 years will be developing the tools and methods to tackle crimes of international dimensions such as corruption, piracy, terrorism, environmental pollution, cybercrime, money laundering, human trafficking and international fraud. These activities undermine governance, jeopardize development and compound poverty. They pose an urgent threat to international peace, security and well-being in a world that is increasingly integrated. This is the motivation for the urgent and sustained efforts to develop rules and strategies to fight this problem as well as a motivation for this book.
  - 3 Williams argues that it is 'almost inevitable that the "evidence" used by students of corruption is bound to be fragmentary, biased, anecdotal, potentially misleading, impressionistic and inadequate,' and thus incapable of sustaining general (comparative) theory. See R. Williams, *Political Corruption in Africa*, Aldershot, Hampshire, England, Avebury, Gower Publishing 1987, p. 27-28. Quoted in W. Sandholtz, W. Koetzle, 'Accounting for corruption: economic structure, democracy and trade', *International Studies Quarterly*, Vol. 44, Iss. 1, March 2000, p. 31.
  - 4 Sandholtz and Koetzle argue that the reasons for the lack of numerical data on corrupt practices are not hard to imagine: corrupt actions take place in secret and are generally meant to remain secret; even the victims' of corruption frequently are unaware that they have been victimized; those reporting or alleging instances of corruption can be political opponents of the accused with motives to discredit them; critics of corrupt practices often have a separate agenda to extol or denigrate specific groups; and governments may not want researchers probing such sensitive areas. See W. Sandholtz, W. Koetzle, id.

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deleterious effects, which justifies international and domestic efforts to confront it.<sup>5</sup> As I have noted elsewhere,

‘The articulation of the rule of law has become imperative as the globalization and integration of world markets makes national borders opaque ... Regardless of market advances, the gains of globalization can be undone. A vacuum created by an incoherency in the rule system may lend itself to alternative ideologies, grabs for power, the rise of nationalism, the promotion of self-interest and a race to wealth by the strong and rich at the expense of the weak and poor. It is against this background of an urgent need for common rules in a global society that the issue of civil remedies for international corruption has arisen.’<sup>6</sup>

Identifying the challenges faced in fighting corruption is an important indicator of the problems and the prospects of private remedies. A helpful step in this regard is to contextualize the problem and develop an understanding of the legal landscape against which the issue of remedies for victims of corruption is played out.<sup>7</sup> It is appropriate to highlight some of these challenges as an introduction to the research question tackled in this book.<sup>8</sup>

Fighting corruption in today’s integrated world is no easy task in view of the multiplicity of legal traditions, varying levels of social development and the diverse political, cultural and economic conditions that characterize the international community. Complicating this diversity is the absence of a clear nexus of governance with the result that traditional state based solutions to crime may not transplant adequately in the ‘global city.’<sup>9</sup> This poses challenges that can be grouped into two main categories. The first set of challenges has to do with the notion of corruption and the rule of law. The challenges in this

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5 Economists such as Susan Rose-Ackerman have provided economic data that point to the fact that corruption impedes economic, political and social growth as well as general security. An impressive compilation of this data is found in the recent S. Rose-Ackerman (Ed.), *International Handbook on the Economics of Corruption*, Edward Elgar, Cheltenham, England, 2006. These studies also show a link between levels of corruption and liberal open democracies.

6 A. Makinwa, ‘Researching civil remedies for international corruption: the choice of the functional comparative method’, *Erasmus Law Review*, Vol. 2, No. 3, November 2009, p. 331 at p. 335.

7 This chapter is based in part on an award-winning essay contemplating the future of the fight against corruption. See A. Makinwa, ‘Future Thinking through the Prism of International Corruption’, Award winning essay at the Hiil Law of the Future Conference 23-24 June 2011.

8 A few excerpts of interviews from the brief case study undertaken in the introductory stages of this research provide personal accounts and contextualize the problem of corruption in Nigeria, a society grappling with its negative effects. The full report is available at A. Makinwa, ‘Motivating private remedies for international corruption: Nigeria as a case study’, *CALS Review of Nigerian Law & Practice*, Vol. 2, 2008, pp. 97-129.

9 Sassen describes how privatization, deregulation and digitalization have resulted in the weakening of the nation state. See S. Sassen, *The Global City: New York, London, Tokyo*, 2nd edn, Princeton University Press, Princeton, NJ, 2001, at p. xviii.

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regard center on the definition of corruption and the deleterious consequences of the failure or absence of an effective rule regime. These challenges are described below as the *Problem of Definition*, *Compromised Processes of Governance*, the *Challenge faced by Business Operators* and the *Challenge faced by the Judicial Process*.

A second set of challenges has to do with the efficacy of the rules developed to fight corruption. The challenges center firstly, on the narrow focus of the criminal law, which excludes the victim of corruption in penalization and enforcement processes; secondly, on the narrow conceptual framework, which leaves transactions that result from corruption inadequately addressed; and, thirdly, on the limitations to effective regulation of corruption via the criminal process in a world where the position of the sovereign state has receded. These challenges are described under the headings, the *New Ordering of International Society* and *the Path Ahead*.

These afore-mentioned challenges shape the legal terrain of any efforts to review or reform the laws regulating corruption. Certainly, these challenges have political, social and economic dimensions that lie beyond the purview of law reform. Nonetheless they serve as a helpful reminder of the complexity of corruption to provide a dose of realism as a starting point to this inquiry into the potential and scope of private remedies for corruption.

### **2.2 The Problem of Definition**

What is corruption? Does it lie in the eye the beholder or does it have a minimum content? There are several fundamental challenges to tackling corruption from an international perspective. The first challenge is determining the point at which it occurs. Corruption, an ancient problem, has been beset with the problem of a lack of content. One man's corruption is another man's gift.<sup>10</sup> The term 'corruption' throws up images of diverse traditions, cultures, peoples, values and norms, all flooded with a kaleidoscope of meanings. The social, political and economic dimensions of corruption, as well as cultural values and accepted practices, lend themselves to a state of cultural relativism that could severely limit the possibilities of a collective response to the issue of private remedies for corruption. How does one arrive at a common understanding of this word?

This is important because in the absence of a common understanding, there is little basis for common intervention. Domestic interpretations of what is in

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10 S. Rose-Ackerman, *Corruption and Government: Causes, Consequences and Reform*, CUP, Cambridge, 1999, at p. 5.

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essence an international problem will not bridge the ‘impunity gap’, where countries act according to their own understanding and values. The interconnectedness of our societies and markets today dictates the need to develop common rules for efficiency and growth. A common solution is the only way to ensure that the playing field of international commerce is indeed level. At the same time, any definition must be set against the background of real experiences. This suggests that any over-arching definition of corruption is to a certain degree artificial.

While it is well accepted that corruption is a problem that has a ‘multitude of faces,’<sup>11</sup> defining the nature and content of corruption is a necessary preliminary step to legal analysis and a common frame for action. The absence of a common definition is a limiting factor to any concerted international effort to fight corruption or indeed any discussion about private remedies for corruption from an international perspective. Two primary problems confront the attempt to give specific content to corruption. The first is the use of the word corruption to cover a varied cross section of activities. The second is the problem of pluralism and cultural diversity.

### 2.2.1 Corruption as an ‘Umbrella Term’

Corruption is an ‘umbrella’ term. Vastly different activities are lumped together in the expression corruption. The lack of precision as to what corruption means reflects the elasticity of the word.<sup>12</sup> As Kimberly points out, the extent to which people abuse their position for personal gains is limitless.<sup>13</sup> Friedrich remarks that ‘in English and other languages the word corruption has

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- 11 E. Campos, S. Pradham (Eds.), *The Many Faces of Corruption: Tracking Vulnerabilities at the Sector Level*, International Bank for Reconstruction and Development/World Bank, 2007, p. 9. The authors point out that the scale of corruption can be grand or petty and classify corruption into three broad types: state capture, patronage and nepotism, and administrative corruption.
  - 12 Bribery scholar Daniel Lowenstein has described corruption as a series of concentric circles with the most severe form of corruption – bribery – at the ‘black core’ surrounded by grey circles ‘growing progressively lighter as they become more distant from the center, until they blend into the surrounding white area that represents perfectly proper and innocent conduct.’ D. Lowenstein, ‘Political bribery and the intermediate theory of politics’, *UCLA Law Review*, Vol. 32, April 1985, pp. 784-786.
  - 13 K. Elliott, Corruption as an International Policy Problem: Overview and Recommendations, in K. Elliott (Ed.), *Corruption and the Global Economy*, Institute for International Economics, Washington, DC, 1996, p. 177. Elliott points out that ‘corruption involves many types of crimes. The extent to which people abuse their position for personal gains is limitless. At one end of the spectrum are local low-level officials taking small sums of money to expedite routine approvals or transactions *i.e.* petty corruption to defense contractors paying billions of dollars to lawmakers for awarding major defense or transportation projects.’

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a history of vastly different meaning and connotations.<sup>14</sup> This creates a stumbling block to analytical inquiry as separate categories of ‘corruption’ are considered together within a general analysis of corruption. Petty corruption and grand corruption are as different as tea and coffee and this fact must separate any analytical consideration of the two phenomena.

A proper analysis of corruption must therefore start with some clarity about what activity and in what context the word is being applied. More importantly, in drawing conclusions and making recommendations, emphasis must be placed on the precise form of corruption that such conclusions have a bearing on. To speak generally of a fight against ‘corruption’ may make for a good headline but is in fact confusing in content. The United Nations Office on Drugs and Crime for example, distinguishes several types of ‘corruption’ including grand corruption, petty corruption, bribery, embezzlement, theft and fraud, extortion, abuse of a discretion, conduct creating or exploiting conflicting interests, and improper political contributions.<sup>15</sup> The root causes and manifestations of each type of ‘corruption’ listed are not necessarily the same. Petty corruption may be more symptomatic of poverty, inequality and lack of development while political corruption is more related to power, personal gain and a monopoly on the political process. To discuss both types under the general term corruption results in a confused process of analysis. Clearly medicine must be prescribed to suit the disease and a clear diagnosis is key to any hope of cure. Incoherency and conflicting conclusions result from the indeterminate use of the term ‘corruption.’

### 2.2.2 Corruption as a Culturally Complex Phenomenon

Corruption is a long standing problem that is identified in most cultures.<sup>16</sup> Cultural relativism may result in differing standards and values. A corrupt act in one society may be a culturally accepted practice in another.<sup>17</sup> For example,

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14 C. Friedrich, Corruption Concepts in Historical Perspective, in A. Heidenheimer, M. Johnston (Eds.), *Political Corruption, Concepts and Contexts*, 3rd edn, Transaction Publishers, New Brunswick, 2002, p. 15.

15 See the UN Handbook on *Practical Anti-Corruption Measures for Prosecutors and Investigators*, Vienna, September 2004, pp. 23-24.

16 Nichols shows that corruption is condemned in every major legal tradition from Buddhism, Christianity, Confucianism, Hinduism, Islam, Judaism and Sikhism as well as in most countries. See P. Nichols, ‘Outlawing transnational bribery through the World Trade Organization’, *Law and Policy in International Business*, Vol. 28, 1997, p. 305.

17 Klitgaard, for example, states ‘when historian J.S. Furnivall examined why according to British standards, colonial Burma was so corrupt, he concluded that in many cases the Burmese were simply following their customary norms of correct conduct.’ Other examples are the practices of *compradazgo* system, described as a ritual network of relatives and adopted relatives that commands the loyalty of Filipinos more than any formal institution. See R. Klitgaard, *Controlling Corruption*, University of California Press, Berkeley, 1988, pp. 3-4.

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in feudal Thailand the historic *Sakdina* system allowed for cultural practices ‘where giving or demanding a bribe or giving something in return for favors has long been a practiced norm.’<sup>18</sup> Another example is the *harambee* system in Kenya popularized in the 1960s, which originally started out as a practice of communal self-help but has with the passage of time become a means of influencing public servants. The argument of counsel representing the giver of a US\$2 million bribe to the then Prime Minister Mzee Jomo Kenyatta of Kenya in the *World Duty Free v. Kenya* case is illustrative of this point. Counsel argued that this payment was understood by the parties involved to be a ‘standard business practice’ that was part of the local Kenyan custom of *harambee*, which rendered the payment ‘not only acceptable, but fashionable.’<sup>19</sup>

The Chinese *guanxi* custom sees business culture in terms of relationships based on honor and respect in contrast to the western transactional approach. *Guanxi* places great emphasis on long-term relationships, and as Burton and Stewart in their commentary on business practices in China write:

‘the idea that taking a job with a company [...] cancels obligations toward people with whom someone has had a long term relationship and to whom one owes much *guanxi* is seen not only as alien but also has the essence of immorality.’<sup>20</sup>

The problem of cultural relativism would seem to militate against the emergence of a common, cross-cultural definition of corruption. However, cultural diversity has collided with the reality of an increasingly integrated world market. To tackle a problem of international dimension there has to be a ‘common point of departure’<sup>21</sup> otherwise there would be little basis upon which to achieve a common solution.

### 2.2.3 Definition as a Starting Point to Private Remedies

What, then, is corruption? This fundamental question defines the parameters of research into a concerted private law response. Cultural relativism implies that a definition of corruption from within one tradition will not necessarily hold

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18 Transparency International Thailand Country Report 2005 at [http://www.transparency-thailand.org/english/index.php?option=com\\_content&task=view&id=37&Itemid=40](http://www.transparency-thailand.org/english/index.php?option=com_content&task=view&id=37&Itemid=40).

19 *World Duty Free Company Ltd v. The Republic of Kenya*, 46 *ILM.*, 2007, p. 339, ICSID Case No. ARB/00/7, Award, 4 October 2006, Para. 120.

20 See F. Burton, S. Stewart, ‘Crossing the cultural divide’, *Business Spectator*, 19 January 2008, available at <http://www.businessspectator.com.au/bs.nsf/Article/Crossing-the-cultural-divide-AWUGN?OpenDocument>.

21 F. van Eemeren, R. Grootendorst, *Argumentation, Communication, and Fallacies: A Pragmatic-Dialectical Perspective*, Lawrence Erlbaum, Hillsdale, NJ, 1992, p. 149.

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true for all. A definition that is valid across cultures has to be reached by a process of consensus and would have to assume a higher ranking than, or even displace, domestic understandings. In the absence of such a supranational consensus, there is a ‘chaos of meaning’<sup>22</sup>, and there would be no basis upon which to pose the question addressed in this research project. Simply put, there has to be a starting point, a normative rule that lends coherence, content and definition to the question of utilizing private law to fight corruption. Without such a starting point, the question of private remedies is not ‘ripe’ enough to be asked. At the same time it must be accepted that there is no simple formulation that can capture the complexities of corruption and adopting any particular definition is done from a pragmatic viewpoint in the understanding that we are yet to find an ‘acceptable alternative.’<sup>23</sup>

Corruption is generally seen as an abuse of power. This power is mostly associated with the state or public officials and the abuse of the citizen’s trust. Corruption appears as blight on the social contract. Rose-Ackerman defines corruption as ‘an illegal payment to a public agent to obtain a benefit that may or may not be deserved in the absence of payoffs.’<sup>24</sup> Friedrich speaks of damage to the group, to the society that results from corruption, and states:

‘[...] the pattern of corruption may [...] be said to exist whenever a power holder who is charged with doing certain things, that is, a responsible functionary or office holder, is by monetary or other rewards, such as the expectation of a job in the future, induced to take actions which favor whoever provides the reward and thereby damage the group or organization to which the functionary belongs, more specifically the government.’<sup>25</sup>

However, the Asian Development Bank makes the point that many conventional definitions of corruption focus on the abuse of public power. This in their view does not ‘give adequate attention to the problem of corruption in the private sector or to the role of the private sector in fostering corruption in

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22 Resorting to Wittgenstein, Hildebrandt writes about the relationship of mutuality between rules and action, stating that one does not precede the other. The decision that an act counts as a crime is dictated as much by the rule that governs our understanding of the crime as by the type of action that we understand as the crime. Hildebrandt emphasizes that norms are implicit standards that rule our actions without which we would live in ‘a chaos of meaning.’ M. Hildebrandt, *Trial and Fair Trial: From Peer to Subject to Citizen*, in A. Duff, L. Farmer, S. Marshall and V. Tadros (Eds.), *The Trial on Trial Judgment and Calling to Account*, Hart, London, 2006, p. 15.

23 See R. Harris, *Political Corruption in and beyond the Nation State*, London Routledge, London, 2003, p. 5.

24 S. Rose-Ackerman, *When is Corruption Harmful?*, in A. Hedenheimer, M. Johnston (Eds.), *Political Corruption, Concepts and Context*, 3rd edn, Transaction Publishers, New Brunswick, NJ, 2009, p. 353.

25 C. Friedrich, *Corruption Concepts in Historical Perspective*, id., Note 14 above.

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the public sector.<sup>26</sup> As such, the working definition adopted by the Bank sees corruption as ‘[t]he abuse of public or private office for personal gain.’<sup>27</sup> In an age where the role of the private sector has spilled out into traditionally public undertakings and the public sector has become increasingly privatized, *private* power can also abuse the social compact.

Corruption has also been defined in terms of abusing the promise to serve the interests of a group or ideal. Klitgaard comments that ‘[c]orruption exists when an individual illicitly puts personal interests above those of the people or ideals he or she is pledged to serve.’<sup>28</sup> Transparency International defines corruption the ‘abuse of entrusted power for private gain.’<sup>29</sup> A definition that focuses on the fact of corruption as a betrayal of trust is that by Eicher, who defines corruption as ‘[a]ny act where a trust between the principal, the one whose interests are supposed to be protected, is violated by the agent, the one who is supposed to be protecting the principal’s interests.’<sup>30</sup>

Friedrich points out that there is a core meaning to corruption which emerges from an analysis of the different meanings and connotations given to the term. He remarks that ‘corruption is the kind of behavior which deviates from the norm actually prevalent or believed to prevail in a given context, ... it is deviant behavior associated with a particular motivation, namely that of private gain at public expense.’<sup>31</sup>

Framing the definition of corruption in ‘public’ or ‘private’ terms creates an artificial boundary. The increasing involvement of government in private enterprises and of private enterprises in matters of public dimension means that the line that could once easily be drawn between public and private corruption is not so clear anymore. The traditional divide between public and private bribery has been described as having ‘no meaningful distinction’ and deserving of similar treatment.<sup>32</sup>

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26 Asian Development Bank Website at <http://www.adb.org/documents/policies/anticorruption/anticorrupt300.asp>.

27 Id.

28 R. Klitgaard, *Controlling Corruption*, id., Note 17 above, at p. xiii.

29 [http://www.transparency.org/whoweare/organisation/faqs\\_on\\_corruption/2/](http://www.transparency.org/whoweare/organisation/faqs_on_corruption/2/)

30 S. Eicher, *Corruption in International Business: The Challenge of Cultural and Legal Diversity*, Gower, Surrey, England, 2008, p. 4.

31 C. Friedrich, *Corruption Concepts in Historical Perspective*, id., Note 14 above, at p. 15.

32 Dorresteyn argues that there is no reason to make a separation between the private and public sector when dealing with corruption because the problem is essentially the same, and the division of responsibilities between the government and private organizations is no longer quite so clear cut especially with the increasing privatization of government services. Quoting Wertheim, he states, ‘the 19th century strict division between government and private sectors does not seem to be the case in these times.’ Despite this convergence he observes that there is

## PRIVATE REMEDIES FOR CORRUPTION

Apart from the inconsistency of the public/private bribery categorization, the context of a liberalized and integrated world economy lends credence to the argument that corruption ‘can no longer be plausibly analyzed only within a national state framework.’<sup>33</sup> Harris argues that fractures in the international system ‘give political corruption many forms to take and many cracks in which to hide.’<sup>34</sup> He concludes from this that the way forward in the fight against corruption is transnational regulation. It is from a transnational understanding across the public/private bribery divide that a global definition of corruption can emerge. The challenge facing the international community in fighting corruption is to give common content to its essential core.

### 2.2.4 Illustrations from Case Study: *Cultural Perspectives*

The participants in the case study rejected the notion that corruption is an inherent aspect of Nigeria culture. Interestingly enough, there was a general reference to ‘corruption’ as the root of social malaise by all the participants. However, they were also of the view that this ‘corruption’ was strongly rejected by indigenous society. They agreed that while there may be elements in local traditions of ‘showing appreciation’ that may bear some semblance to the act of giving a bribe, equating this semblance is misplaced. In the view of most participants, the tradition of ‘showing appreciation’ is far removed in concept and substance from acts of bribery.

Even within the cultural/ethical context, there were varying nuances. There was a noticeable dichotomy between the ‘morality of the society’ and the ‘morality of this thing they call government’, where the government is seen as alien and disconnected from the common man. This distance from government and the lack of evidence of paternal care by the state created a free-for-all situation where public office or a connection to public power was seen as a duty to garner a share for the people ‘back home’ by whatever means.

From the comments of the participants it was clear that the community sees the concrete ‘known’ persons in corridors of power as the primary provider of security rather than the abstract State. The result is that governance becomes a parody, and election to public office becomes a means of getting a share of the

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still a criminal law emphasis in fighting public and private corruption. In his opinion, this can be traced to the need to protect the interest of the state, the integrity of public authority and the integrity of the master-servant relationship. He asks whether these reasons still justify the primarily criminal law approach to corruption. The modern public servant is, in his view, more independent and should not be treated any differently from his equivalent in the private sector. A. Dorresteyn, *Corruptie en Privaatrecht, (Corruption and Private Law)*, Quint, Gouda, 1994, pp. 20-22.

33 R. Harris, *Political Corruption in and beyond the Nation State*, id., Note 23 above, at p. 1.

34 R. Harris id., at p.10.

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‘national cake.’ This implies a driving force for corruption that is based in economic and not cultural imperatives.

*Participant 3: (Tape 1: 00:11:11)...: In Yoruba land it is not so ... if people know that you have stolen money they will not come to your house; that is not our culture .... The Yoruba custom is that your wealth must be with honor.*

*Participant 6: (00:28:33) if somebody steals from the commonwealth at the local level, he or she will be ostracized from the community ... (29:38) that person will see the instant wrath of the community (29:48) if you steal from the Federal government provided you bring a part of it home they will see it as God has used you as an instrument of getting their own share.*

*Participant 4: (00:06:44) ... African system is replete with value, yes we are taught to say thank you. We are taught to appreciate older people ... but all that is taken in the right measure. We are not talking about the same things at all and cultural values are still good ... I would not want to train my children in western culture....’*

*Participant 1: (Tape 3 00:13:31) If ... for instance someone is known to be corrupt or a thief, even if all he stole is someone’s goat or chicken, he and his entire family carry that stigma for a long time. Now if the same man, the same person now wins an election in the Local Government Council ... and goes to the Assembly as representing his people, those same people will say to him don’t come back empty handed. So you can see that there is in the minds of, and we are talking culture now, in the minds of our ordinary local people, there is a clear distinction between morality in the society and morality concerning this thing that they call government which is really quite remote from them as far as they are concerned.*

*Participant 2: (Tape 1, 00:11:37) People show appreciation a lot ... [This] has also been transported to the white collar jobs as well ... he does not bring an apple ... he says ... just out of appreciation take five naira .... I draw a line between that and outright bribery where ... company ABC is not supposed to get a particular contract but because of my relationship with them ... I try to do something to make them get it ... (Tape 1, 00:13:01) the culture sees the bribe I have just described as evil but the culture does not see the thank you as evil ... the culture expects that ... if someone has been nice to you, you go back you say thank you.*

*Participant 3: (Tape 1, 00:04:14) ... whoever propounded that idea is correct because it is a cultural issue. ... If I make a profit of one million naira what is wrong in giving a hundred thousand out to say thank you or two hundred thousand .... That is in another sense.*

*Participant 6: (00:53:17) ... the fight against corruption has to be holistic ... (00:55:30) the fight against corruption cannot draw a rigid dichotomy between the public sector and the private sector. The private sector... they often happen to be the giver, the public sector, the receiver but quite often if you look at our earlier legislation,... the emphasis and the focus of the ... anti-corruption war or campaign is almost entirely targeted at the public sector where you have those who receive. Whereas you cannot tackle the problem effectively by focusing only on the receiver and neglecting the giver and I think that is what the international war on corruption is seeking to capture.*

### 2.3 Compromised Processes of Governance

A second challenge presented by corruption is the incapacity it breeds in units of governance. Once it takes foot, it is a cancer that undermines the institutions of governance and dynamics of the market place. There is broad agreement about the detrimental effect corruption has on the economic, social and political development of countries.<sup>35</sup> This is reflected in the strong perception by States that corruption has a debilitating effect on the functioning of democratic societies and global security. The 40 signatories of the United Nations Convention against Corruption link corruption to instability and insecurity of societies.<sup>36</sup>

#### 2.3.1 The Inefficacy of the ‘Compromised’ State

Corruption in its many facets is an abuse of the social contract that underlies the notion of governance. It runs the whole spectrum from tax deductible bribes<sup>37</sup> to the complete emasculation of the institutions of governance.<sup>38</sup> Corruption strikes from within, spilled out by the very persons supposed to be

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35 See M. Paolo, ‘Corruption and growth’, *The Quarterly Journal of Economics*, MIT Press, Vol. 110, No. 3, 1995, pp. 681-712; S. Johnson, D. Kaufmann, P. Zoido-Lobaton, ‘Corruption, public finances, and the unofficial economy’, *Policy Research Working Paper Series 2169*, Washington, DC: World Bank, World Bank Institute, Governance, Regulation, and Finance, 1999; J. Hellman, G. Jones, D. Kaufmann, ‘Seize the state, seize the day: state capture, corruption and influence in transition’, *Policy Research Working Paper Series 2444*, Washington, DC: World Bank, World Bank Institute, Governance, Regulation, and Finance, 2000; B. Chong-En, W. Shang-Jin, ‘Quality of bureaucracy and open-economy macro policies’, *NBER Working Papers 7766*, National Bureau of Economic Research, Inc., 2000; D. Reisman, ‘What have we learned about the causes of corruption from ten years of cross-national empirical research’, *Annual Review of Political Science*, Vol. 10, June 2007, p. 211; J. Graf Lambsdorff, ‘Consequences and Causes of Corruption: What do We Know from a Cross-Section of Countries?’, in S. Rose-Ackerman (Ed.), *International Handbook on the Economics of Corruption*, id., Note 5 above, at p. 3; G. T. Abed, S. Gupta (Eds.), *Governance, Corruption & Economic Performance*, Washington, DC, IMF, 2002.

36 Para. 2 Preamble, UN Convention against Corruption New York, 31 October 2003, in force 14 December 2005, 2349 UNTS, p. 41; 43 *ILM*, 2004, p. 37, (hereinafter, the UNCC).

37 The bribery of foreign officials in several countries used to be a tax-deductible expense. In response to this practice the OECD passed the Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials (1996), urging Member countries that allowed the tax deductibility of bribes to foreign public officials to deny the tax deductibility of such bribes. OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, (adopted by the Council on 11 April 1996 at its 873rd session [C/M (96)8/PROV]) C (96)27/FINAL.

38 Mueller describes corruption as an example of ‘a conservative force that maintains or increases asymmetries, which in developing countries in particular has seriously hampered social, economic and political progress.’ This, he says, results in a weakening of productive capacity, the reduction of administrative efficiency, and undermines the legitimacy of the political order. G. Mueller, *Transnational Crime: Definitions and Concepts*, in P. Williams, D. Vlassis (Eds.), *Combating Transnational Crime: Concepts, Activities and Responses*, Frank Cass Publishers, London, 2001, p. 26.

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providers of security or competitive players in a market. The susceptibility of a market to corruption triggers a chain reaction of bribe giving by competitors in a bid to stay competitive. A system beset by corruption has a reduced capacity to fix itself because the ‘fixers’ have abdicated governance for private gain. This insecurity impacts directly on the ability of governments to govern.<sup>39</sup> This can lead to a spiral of corruption that creates a deadlock in the societies where democratic processes are no longer able to deliver the promises of elected representatives. Transnational crimes such as corruption dilute the progress of liberalization making strong states weaker and weak states ungovernable.<sup>40</sup> This poses a risk to the rule of law to the eventual detriment of public security and governance.

The scale of the damage inflicted by grand scale corruption is hard to fully quantify as this cost manifests itself not just in economic terms but also in the distortion of the values and ethics of society. The corrosive effect of grand corruption on the fabric of society is a great threat to the stability of liberalized world markets. Societies afflicted by grand corruption recede in their ability to govern, and such societies become more vulnerable to the breakdown of the rule of law with the result that groups may opt out and seek their own solutions.<sup>41</sup> Unstable societies discourage investment and the gap widens. The rule-based system that is essential to international commerce and growth is jeopardized. Furthermore, the domestic impact of international corruption does not stay confined neatly within local borders but flows out in the form of war and economic refugees, international crime, terrorism, environmental pollution and other threats to the stability of the international community.

Speaking with respect to Africa, Hope identifies the compromised state as a ‘stranglehold’ and the leading factor of corruption. He states:

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39 Integration has social, cultural, economic and security implications. As Klempner points out ‘[u]ltimately we are all in the same boat.’ G. Klempner, ‘Philosophy of corporate social responsibility’, *Philosophy for Business*, Iss. 27, 17 March 2006, Electronic Journal available at <http://www.isfp.co.uk/businesspathways/issue27.html>.

40 Rotberg emphasizes this interrelatedness using the example of failed states when he points out that ‘today’s failed states, such as Afghanistan, Sierra Leone, and Somalia, are incapable of projecting power and asserting authority within their own borders, leaving their territories governmentally empty. This outcome is troubling to world order, especially to an international system that demands – indeed, counts on – a state’s capacity to govern its space. Failed states have come to be feared as “breeding grounds of instability, mass migration, and murder” (in the words of political scientist Stephen Walt), as well as reservoirs and exporters of terror. The existence of these kinds of countries, and the instability that they harbor, not only threatens the lives and livelihoods of their own peoples but endangers world peace.’ See R. Rotberg, ‘Failed states in a world of terror’, *Foreign Affairs*, Vol. 81, No. 4, 2002, p. 128.

41 Garten points out that there are already signs that economic distress is increasing nationalist fervor and political instability in hot spots including Pakistan, Turkey, Ukraine and the nations of Central Asia, Thailand and Iran. See J. Garten, ‘Stop the Free-Fall’, *Newsweek International*, 22 December 2008, p. 22.

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‘The first factor contributing to corruption in Africa is that of the total exercise by the ruling elite of all power attached to national sovereignty. This exercise of state power has led to the supremacy of the state over civil society and, in turn, to the ascendancy of the patrimonial state with its characteristic stranglehold on the economic and political levers of power, through which corruption thrives for it is through this stranglehold that all decision making occurs and patronage is dispersed.’<sup>42</sup>

### 2.3.2 Corruption as a Self-Fulfilling Prophecy

Corruption is a self-fulfilling prophecy. Corruption, unchecked will cripple any potential for reform. As Nuhu Ribadu once said ‘...if you fight corruption it fights back.’<sup>43</sup> Corruption decimates the rule of law with the result that the normal processes of governance are abdicated with severe consequences for the citizens held hostage by these very same processes of corruption. The sheer scale of corruption can reduce citizens into a sort of corruption inertia. Smith, in his illuminating anthropological study on corruption in Nigeria, speaks of ‘a culture of corruption’ and concludes that, ‘[t]o Nigerians, corruption is such a common phenomenon that it defines the nation.’<sup>44</sup>

Uslaner speaks of the vicious hold of corruption in terms of an ‘inequality trap.’ The failure of governance leads to a breakdown of the rule of law with resulting inequality as the ‘well-off “redistribute” society’s resources to themselves and entrench themselves in power by controlling all of society’s institutions.’<sup>45</sup> He also states that this inequality breeds corruption by (1) leading ordinary citizens to see the system as stacked against them; (2) creating a sense of dependency of ordinary citizens and a sense of pessimism for the future which in turn undermines the moral dictates of treating your neighbor honestly; and (3) distorting the key institutions of fairness in society such as the courts, which ordinarily citizens see as their protectors against evil doers,

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42 K. Hope, Corruption and Development in Africa, in K. Hope, B. Chikulo (Eds.), *Corruption and Development in Africa: Lessons from Case-Studies*, Palgrave, London, 2000, p. 17 at p. 19.

43 Nuhu Ribadu was the former Director of the Economic and Financial Crimes Commission (Nigeria). The interview was given in a PBS Frontline Report on The Halliburton Case and Corruption in Nigeria, (Minute 9.30), available at <http://www.youtube.com/watch?v=IhcmwcPf4PY&feature=related>. This case is a prime example of the incredible scale of bribery in commercial transactions. In September 2003, Albert Jack Stanley, the former chairman of KBR Inc., pleaded guilty to conspiring to violate the American Foreign Corrupt Practices Act by arranging payments to Nigerian public officials of more than \$180 million in order to secure contracts related to the design and building of liquefied natural gas facilities on Bonny Island in Nigeria using consultancy agreements.

44 See D. Smith, *A Culture of Corruption, Everyday Deception and Popular Discontent in Nigeria*, Princeton University Press, Princeton, NJ, 2007, p. 230.

45 See E. Uslaner, *Corruption, Inequality, and the Rule of Law*, CUP, New York, 2008, pp. 44-45.

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especially those with more influence than they have. This leads Uslander to conclude that there is little evidence that countries can escape the *corruption trap*.<sup>46</sup>

### 2.3.3 Illustrations from Case Study: *The Cycle of Poverty*

An important insight from the study is the effect of poverty on corruption. The cycle of poverty and corruption is so profoundly connected that attempts to solve the problem of corruption normatively without tackling the fundamental issue of poverty has a very limited chance of success. This is clear in the dichotomy between the elaborate system of anti-corruption rules that Nigeria has and the high prevalence of corruption in the society.

Poverty exerts considerable pressure that flows from the poor to those who are perceived to be better off and who are related by family, tribe or association. The social and cultural expectation that help be proffered is well described by the participants in the case study. The pressure to finance social demands in amounts that go well beyond a monthly government salary catalyzes the urge to corrupt activity. Accolades that follow the doling out of largesse incentivize corrupt behavior on a larger and larger scale. The strength of this social expectation is profound and the moral pressure to fulfill societal obligations turns the value system on its head. What is wrong (engaging in acts of corruption to satisfy societal pressures) becomes an act to be praised, and what is good (resisting corruption and not being in a position to satisfy societal pressures) becomes an act worthy of contempt. This impunity and the absence of law-abiding role models further undermine faith in the rule of law and the notion of justice.

The failure of leadership and government policies that favor the ordinary citizen create a vicious cycle of poverty and corruption. This failure of leadership was attributed by some participants, in part to the colonial systems inherited by the Nigeria and the ‘truncation’ of the fledgling democracy several times by military rule. Interestingly one participant also traced the failure of leadership to the fact that there is no sense of commitment to the concept of ‘Nigeria.’ A lack of national identity and its influence on political development in his opinion, fuels corruption. From this perspective, government is seen as an opportunity of a group to take its share from the government treasury.

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46 He, however, does note the countries he refers to as the ‘Great Exceptions’ – Singapore and Hong Kong – which were able to move out of corruption with strong leadership and political will. E. Uslander, *Corruption, Inequality, and the Rule of Law*, id.

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The lack of national identity is replaced, it would seem, by an identification with the person that 'God has used' to help the group to get their share of the *national cake*. In such a context the act of corruption morphs into a laudable effort of a member of a community to 'help' his people. In this sense, the elite group caters to the hangers-on in an exchange based on emotional ties that may be more compelling than abstract rules and notions of a distant government. In the absence of effective systems of social security the intensity of the pressure on persons to engage in acts of corruption to meet the needs foisted on them by social expectations results in poor leadership which in turn leads to lack of provision of the social security and infrastructure needed to alleviate the effects of poverty.

This leads to a vicious cycle where poverty leads to pressures of social expectation, which leads to poor leadership, which leads to lack of social security, which leads to poverty and so it goes on. This pressure creates a groundswell of corruption that is strengthened by a lack of national identity. It flows up to all levels of leadership with the result that effective leadership is compromised by rampant large scale corruption. The effects of poor leadership lead to a lack of provision of basic infrastructure such as water, power, health, education and transportation. This also impacts on job and retirement security. The formidable cost of attempting to provide for this security and infrastructure privately ensures that a large proportion of society remains mired in poverty to exert even more social pressure on their connections in government. Thus the cycle continues.

*Participant 3: (Tape 2, 00:10:16) When you do not have the control of ... enforcement there is nothing you can do and those who are supposed to enforce, they are already compromised .... People are compromised, those who are to enforce the law, they are already compromised.*

*Participant 1: (Tape 3:00:23:33) Nigeria as Nigeria only really existed in colonial times and that because it was legislated into being. Not because anybody thought ... you know ... that we belonged together.*

*Participant 3: (Tape 1, 00:7:24) ... If the government policy does not favor the masses that is the result (corruption) you normally get.*

*Participant 1: (Tape 3, 00:26:46) People now perceive public office as access to the opportunity to get something that you really shouldn't have. It's an opportunity to the treasury and you can go in there and share it out without consideration for the larger picture ... (Tape 3, 00:28:14) so this development has been one of the most negative influences ... and of course it is a great fuel for corruption.*

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*Participant 5: (Tape 1,00:09:29) There is no social security system that ensures that after working for 25 years, 30 years that you have a roof over your head that you can send your kids to school, that you can take care of your health. As such, it is very difficult to not to get involved in corruption being corrupt ... it is very difficult.*

*Participant 5: (Tape 1,00:22:13) So, that is one of the worst parts of the thing, the society expects so much from you and in order to live up to that expectation, you have to be ingenious in quote about making money and the easiest way to be ingenious about making money is being corrupt.*

*Participant 6: (00:05:04) ... Our failure in all these areas can be traced to a failure of leadership .... (00:05:48) Hopes and expectations have been raised by people ... the country has been deceived by a comical and deceitful, and hollow commitment to the fight against corruption .... (00:25:33) Basic to all this is the nature of elite rule which with only few exceptions has been characterized by riotous opportunism ... grabbing individualism.*

*Participant 5: (Tape 1, 00:28:57) They need people who will come and contribute money, and he is not contributing money because he does not have stolen money because he is not corrupt. And the body language will be there and... some of them will even abuse him, the drummers will come and abuse him with their drums and you know with the talking drum, you know that they are abusing him with the talking drum. So it means he will probably have to avoid those functions and for ... some people it is difficult to handle that because you want to be accepted in your hometown, among your social people among your friends and so on.*

*Participant 4: (00:02:35) Hope is beginning to wane in this society. For me that is the biggest threat we face and you need to talk to the younger generation to know that they are not as hopeful as you ordinarily have expected...*

*Participant 1: (Tape 1, 00:44:21) Who are the victims of international corruption? Well it's actually the ... ordinary person in the market place because eventually what happens is that there is either a distortion or a real constraining of the opportunities for that individual to express his or her role, productivity, potential because corruption has actually the frozen him or her out of that opportunity. So eventually, that's the real victim.*

### **2.4 Challenge Faced by Business Operators**

A third challenge is the conflict faced by corporations that are emerging as a major player in rule making and order in international society. The world has witnessed an explosion in transnational trade with the liberalization of markets. Increased foreign direct investment has resulted in increased foreign ownership, and a shift of centers of production. A huge amount of trade is occurring outside national boundaries, which translates to increasing influence on economic, social, cultural and political processes by multinational corporations. The transnational nature of trade makes common rules and stable trading conditions urgent. Corruption in international transactions has moral,

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political and social dimensions that affect the relationship between the corporations and the societies in which they operate. It also distorts free and fair competition to the detriment of corporations and eventually the consumer. This puts the corporation in a conflict between the short-term gain of the immediate contract and the long-term gain of a more competitive and stable business environment.

### 2.4.1 The Lure of Functional Corruption

Eicher speaks of functional corruption.<sup>47</sup> This is a real challenge faced by corporations. Functional corruption can be seen as part of management strategy that increases the profitability of the company. This means that refusing to engage in functional corruption results in ‘real losses’ that reduce the profitability of a corporation. Charles Prince, the former CEO of the Citigroup, has noted in very pragmatic terms:

‘there is no reward for long-term growth ... Nobody cares at all about long-term sustainable growth outside of the institution itself. It’s one of the harshest lessons to learn about business. And why is that? Not because people are bad. Investors get rewarded on how much profit they made, how much their portfolio grew. Not whether or not they’re investing in something that lasts for 200 years.’<sup>48</sup>

However, the rise of the multinational corruption and its increased visibility to the consumer along with increased concerns and awareness about the role multinational corporation plays with respect to problems of international dimension is leading to a changing social expectations.<sup>49</sup> Gradually, the notion that the responsibility of corporations is solely to create profits<sup>50</sup> is being replaced with the notion that a corporation owes some responsibilities to the societies in which it operates. The laissez-faire free trade agenda once seen as essential to global peace and security, and the focus on dismantling of

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47 S. Eicher, *Corruption in International Business: The Challenge of Cultural and Legal Diversity*, id., Note 30 above, at p. 5.

48 Quoted in M. Blowfield, A. Murray, *Corporate Responsibility, : A Critical Introduction*, OUP, Oxford, 2008, p. 385.

49 See *The Social Responsibility of Transnational Corporations*, United Nations, Report by the United Nations Conference on Trade and Development, New York, 1999. [www.unctad.org/en/docs/poiteiitm21.en.pdf](http://www.unctad.org/en/docs/poiteiitm21.en.pdf), pp. 1-8.

50 See, for example, the famous interview by J. Milton Friedman, ‘The Social Responsibility of Business is to Increase its Profits’, *Time Magazine*, New York, 11 September 1970, available at <http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html>.

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regulatory constraints in the understanding that markets are the best determinant of utility, is coming against increased criticism.<sup>51</sup>

While the nature or extent of the social responsibility of corporations is the subject of much academic discourse,<sup>52</sup> there is clearly an increased accommodation of the interests of stakeholders such as the suppliers, customers, employees, and local communities as opposed to a singular focus on satisfying the shareholder.<sup>53</sup> The general consensus is that corporations should operate within a framework of sustainability that secures the viability of future generations.<sup>54</sup> Functional corruption for the sake of profit is at odds with this changing landscape.

### 2.4.2 Illustrations from Case Study: *Corruption as an Entry Process*

Some of the participants described corruption as an entry requirement into the Nigerian market in a manner that presents a picture not only of the abuse of public trust but also of extortion of an otherwise unwilling participant. This perception of corruption sees the offender simultaneously as a perpetrator and victim. Participants speak of corruption as affecting economic growth, work and business ethics. The lack of effective sanctions for persons who have committed flagrant acts of corruption incentivizes the practice of corruption. The cost of uprightness is perceived as ‘too steep’ in the face of real demands. Money is ‘stolen’ with foreign participation from the system in the form of

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51 See generally J. Ruggie, ‘Protect, Respect and Remedy: A Framework for Business and Human Rights’, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5, 20087, April 2008, available at <http://www.reports-andmaterials.org/Ruggie-report-7-Apr-2008.pdf>, at Para. 7. Endorsed by the UN as the ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, UN Human Rights Council, 17th Session A/HRC/17/31.

52 Eijsbouts remarks that corporate social responsibility is ‘still in search of its paradigm’. See J. Eijsbouts, ‘Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate’, Inaugural Lecture, Maastricht University, 20 October 2011, at p. 12. See also J. Zerk, *Multinationals and Corporate Social Responsibility*, CUP, Cambridge, 2006, pp. 243-298; *The Social Responsibility of Transnational Corporations*, id., Note 49 above, at pp. 18-45; P. Muchlinski, ‘Human rights and multinationals: is there a problem?’, *International Affairs*, Vol. 77, No. 1, 2001, p. 31; M. Blowfield, A. Murray, *Corporate Responsibility: A Critical Introduction*, OUP, Oxford, 2008, pp. 10-90; UN Millennium Declaration September 2000, <http://www.un.org/millennium/declaration/ares552e.htm>; UN Global Compact Principles, <http://www.unglobalcompact.org/aboutthegc/thetenprinciples/index.html>; OECD Guidelines for Multinational Enterprises, [http://www.oecd.org/document/28/0,3343,en\\_2649\\_34889\\_2397532\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/28/0,3343,en_2649_34889_2397532_1_1_1_1,00.html).

53 M.-D.P. Lee, ‘A review of the theories of corporate social responsibility: its evolutionary path and the road ahead’, *International Journal of Management Reviews*, Vol. 10, Iss. 1, 2008, pp. 53-73.

54 J. Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, id., Note 51 above, at Para. 51-81.

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white elephant projects where billions of dollars have been awarded and there is 'nothing to show for it'. The result is a society with decaying infrastructure, a poor work ethic and stymied economic growth. This reality impedes the normative effectiveness of laws that prohibit corruption. The laws become incidental in a process that is greatly influenced by the need to survive, to make ends meet and where there is insufficient deterrence in cases where corruption has in fact been exposed.

Corruption as an entry process into the Nigerian market is further exacerbated by the character of the key actors and players in grand scale corruption. . The key actors were described as the elite of the society, a 'minority with an enormous capacity to influence the norms and values' of the general society. Under the criminal process it is this same group of government officials and the elite who are charged with the implementation and enforcement of the criminal laws regarding corruption. This dynamic between the key actors in the corrupt exchange creates an almost impermeable wall. In this scenario there is a pressure to either play along or get side-lined.

The view of corruption as an entry process permeates all levels. The victim of corruption is the party that needs to 'perform' in order to make progress whether commercial, economic or social. Here, the participants identified several groups of persons as the 'victims of corruption.' Not surprisingly, the ordinary man on the street is seen as the primary recipient of the negative effects of corruption. The losing competitor is also referenced as a victim. Interestingly, government officials are also seen as victims as a result of social expectations. Furthermore, the multinational corporation is also characterized as a victim who has no choice but to 'play ball.' As such, the term victim has many nuances.

*Participant 3: (Tape 1, 00:03:28) International businesses cannot do business in Nigeria without giving money out. .... (Tape 1, 5:14) ... If you want to survive as a business man in Nigeria, you must be ready to do a deal ... No exception.*

*Participant 3: (Tape 1, 00:00:56) In Nigeria it is part and parcel of our system ... if you are coming and you want to do business ... want a contract, it's like a way of life in Nigeria and if you do not play that ball the way they do it ... the way it is ... you will be deprived from benefiting from any contract ... in a real sense you cannot get any contract in Nigeria unless you agree to a percentage*

*Participant 1: (Tape 2, 00:11:50) ... I mean if you speak with the types of executives that come to the School, (Lagos Business School) for instance, for executive seminars, what you tend to find is that they say and they believe that the situation is so heavily loaded against uprightness that the cost of maintaining uprightness is too steep. And so they tend to think that, look it's better to be in business and succeed in business now and maybe if you live long enough there will be a day when you can fight corruption.*

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*Participant 1: (Tape 2,00:09:55) It's very difficult, very difficult because ... government still has the upper hand on many things such as for instance the granting of licenses, ... things that have to do with whether you can do business easily or not and because of this ... business in the private sector tend to do the things that they know will get the results they want to achieve and ... it means turning the blind eye or even going specifically to do something that you know to be irregular or improper, if it gets the results ... that's what tends to happen.*

*Participant 1: (Tape 2, 00:17:04) The bottom line is very important to the shareholder here. Bottom line of the dividend, capital appreciation, Those are the things shareholders look for, and therefore the concern with the environment, the concern with the corporate social responsibility issues is not a very strong one .... Yes, ... even though activism among shareholders is now rising, it tends to be to be rising only in respect of whether you are succeeding in doing the business in a profitable manner, whether you are a good employer, whether you are well regarded in the society.*

### 2.5 Challenge Faced by Judicial Processes

The co-existence of a comprehensive regulatory framework and significant corruption illustrates the limits of a criminal law approach to fighting corruption. Corruption is the greatest impediment to the very rules that seek to tackle it. The nature of the actors to the corrupt exchange makes them the primary beneficiaries of the corrupt exchange and also the primary enforcers of the anti-corruption rules. Increased regulation does not resolve this conundrum. The problem is not the absence of the rule, but the absence of the capacity to enforce it. The strong connection between criminal law, morality and the deprivation of liberty creates a strong territorial and local aspect to the criminal process. A weak or compromised sovereign can hold the sanctioning process to ransom.

Ashraf Ali al-Baroudy, a president of the High Court of Appeals in Egypt, captures the essence of this dilemma. Despite the impressive number of oversight and monitoring entities in Egypt, such as the Central Auditing Organization (CAO), Administrative Control Agency, Administrative Prosecution, Illicit Gains Authority, General Prosecution, Consumer Protection Agency and the General Administration for Investigation of Public Funds, a part of the Ministry of Interior corruption thrives. 'How can we have so many oversight bodies in Egypt but in spite of that we have so much corruption?

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That is because these entities are answerable to the Egyptian government, instead of monitoring [it]', says al-Baroudy.<sup>55</sup>

While the criminalization of international corruption is an important and necessary first step, it presents fundamental conflict of interest problems especially in those societies where corruption has taken root. Criminalization gives a monopoly to the state on the right to initiate sanction. This, however, means that implementation using the criminal process is dependent on government officials. The dependence on the apparatus of the state in initiating, investigating and sanctioning corruption in criminal prosecutions is a grave impediment to fighting corruption. Furthermore, in a global market, the complexity of the transactions, the character of the actors and fluidity of movement of money across borders present serious challenges for the criminal process. This fractures the sanctioning environment in a manner that encourages risk taking and undermines the effectiveness of international rules. Furthermore, criminalization takes the victim, who is motivationally an important catalyst for redress, out of the loop of offense and sanction. Indeed, a victim seeking remedies must surmount the monopoly on initiating sanction held by the state.

The conflict of interest, which is inherent in the criminal process of sanctioning corruption, particularly in those states that are the most badly affected by corruption, implies that effective strategies to tackle international corruption must not only define and give content to the offense of corruption by criminalizing corrupt acts, but must also address the monopoly on initiating sanction given to the state under the criminal process where the capacity of that very same state to effect redress is undermined by corruption. There is an urgent need to develop strategies in the fight against corruption that can circumvent the *compromised state*.

A central thesis of this book is that, while criminalization represents an important and significant first step, the criminal law approach has three fundamental 'fault lines', which impede its effectiveness as a sanctioning process: (a) the monopoly of the State on initiating sanction; (b) the incentivized risk inherent in contract left standing; and (c) the narrowness of the criminal law approach as compared to the breadth of actors and transactions that feature in the typical exchange involving international corruption.

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55 Comments of al-Baroudy during the release of the 'Transparency International Report on Legislation in Egypt: An Analysis of Compliance with the UN Convention against Corruption'. Quoted by Abdel Rahmen Hussein in 'Impotent Oversight Agencies Stymie Fight against Corruption', *Al-Masry Al-Youm Newspaper*, 7 July 2011, available at <http://www.almasryalyoum.com/en/node/475135>.

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A further challenge to initiating sanction is the lack of information. The nature of corruption means that it is a significantly difficult activity to prove. The traditional burden in a criminal trial of proof beyond reasonable doubt is somewhat lessened in a civil trial that is based on the preponderance of evidence. However, accessibility of this evidence across jurisdictions may be problematic. Freedom of information, particularly in countries where corruption is endemic, is often illusory. This presents the party seeking remedies with a formidable challenge in meeting the burden of proof. This is a stumbling block to an efficient fight against corruption. The need for effective access to information about corruption is a challenge that the sanctioning process must overcome.

This conflict of interest points to the need for alternate paths of initiating sanctions for corrupt acts. Shearing recognizes the blurring of roles between the public and private sectors in his discourses on governing security. He strongly criticizes the continued focus on the state as the primary provider of security in the face of the de facto reality of private government that has resulted from an explosion of ‘mass private property.’<sup>56</sup> This is particularly true in respect of corruption in a global world where the diminishing power of the state and increasing influence of the multinational corporation motivate a need to map out new ‘nodes of governance.’<sup>57</sup> The path to progress in the fight against corruption may therefore lie in devising strategies that are pro-active rather than merely reactive. Applying this to corruption, the question to be asked is maybe not so much how to eliminate corruption by punishing offenders but rather how to make its commission the least attractive option. As van Boom remarks, efficacious remedies would be those that have the capacity to encourage good behavior.<sup>58</sup>

A related problem is the fact that contracts involving multinational corporations may in fact lie beyond the reach of national courts. The combination of the commercial and international elements means that resulting contracts will in most cases contain an international arbitration clause that effectively removes the contracts in question from the jurisdiction of national courts. This implies that international arbitration tribunals have a role to play in the fight against corruption.

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56 C. Shearing, Reflection on the Refusal to Acknowledge Private Governments, in J. Wood, B. DuPont (Eds.), *Democracy, Society and the Governance of Security*, CUP, Cambridge, 2006, pp.11-32, at p. 26.

57 C. Johnston, C. Shearing, *Governing Security Explorations in Policing and Justice*, Routledge, London, 2003, pp.145-148.

58 See W. van Boom, ‘Efficacious Enforcement in Contract and Tort’, Inaugural lecture 21 April 2006, Erasmus University Rotterdam, at p. 4.

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### 2.5.1 Illustrations from Case Study: *Access to Justice and Information*

*Participant 3: (Tape 2, 00:10:53) The truth of the matter is that, that is for the western world, not in Nigeria. A victim of corruption ... you may not be able to get justice. If it is outside the country, maybe. That is why in most cases if you prepare an international agreement, even the international partners will never agree that the law of Nigeria should govern their business. They prefer either the law of the UK or America or any other country rather than to agree to the law of Nigeria because they believe that you have to pay for justice in Nigeria. You have to buy it.*

*Participant 3: (Tape 1, 00:09:10) The laws are there, they are good laws there is no doubt about it .... In Nigeria, because of corruption you cannot get the proper enforcement.*

*Participant 2: (Tape 1, 00 09:48) In the western world, the laws work ... the laws can be circumvented more easily in developing lands ... in Nigeria they know if I get caught I can still wrangle my way through if I have the right connections ... and the right quantity of money to dole out to those who are supposed to be prosecuting me.*

*Participant 7: (Tape 1, 00:42:37) We need to find a way of making sure matters do not stay in courts for too long. ... by the time the mill of justice is moving very fast people will think twice because right now when people want to do something ... they sit down and tell themselves ... 'don't worry – by the time we finish at the high court we will have spent some six years at the court of appeal by and large ... another four years at the supreme court another seven years so in totality I can buy some 15 years successfully ... go ahead and do it.' With that confidence they go ahead and perpetrate evil.*

*Participants 1 (Tape 2, 00:06:23) local legislation, regulatory bodies here have not yet developed the kind of machinery that enables them to police the regulations that they are trying to enforce. So, it's very difficult for you to be able to establish that something has happened that should have not have happened, but let's remember that in the last couple of years there have been specific cases here, Siemens for instance, Halliburton, so those things are beginning to happen here as well.*

*Participant 7: (Tape 1, 00:17:40) You can only intervene in something when you know it is happening. .... Corrupt practices are done under the cloak of silence, under the cloak of confidentiality. It is only where there is a breakdown of relationship between those who are doing it that you get to know of it ... so most times it goes undetected.*

*Participant 7: (Tape 1, 00:18:30) Information flow is one of the hardest things to come by – everything is covered by the cloak of state security, national security; ... (Tape 1,00:19:05) look at it. In the last couple of years now the information Bill has been at the national Assembly, they have been playing games with it ... bill that will empower citizens with information that will assist NGOs to be able to track these criminal activities they have refused to pass it.*

*Participant 7: (Tape 1, 00:30:33) NGOs are working effectively ... there are quite a number of high quality NGOs that are doing a good job .... The name of the game is collaboration networking between NGOs. That way the local NGO, who is conversant with the terrain, and the foreign NGO, who is able to bring technical expertise, because they*

*have faced such situation and are able to replicate it here ... to bring pressure on the system.*

## 2.6 New Ordering of International Society

These aforementioned challenges are exacerbated by assumptions of legitimacy derived from notions of a sovereign state with a monopoly on violence.<sup>59</sup> The environment of international corruption knows no such sovereign, is premised on the power of agreements rather than a monopoly on violence, and is peopled by a shifting collection of artificial persons, state officials, and persons who suffer the social and economic consequences of corruption. In this environment, the idea of the state as a provider of security<sup>60</sup> is blurred, and the notion of the private sector must be redefined in the face of the public effects of its activities. The existing public/private divide cannot be said to reflect the ordering of rights in international society. A conceptual basis for fighting corruption that moves beyond traditional taxonomies and classical theories of moral culpability is necessary to articulate the purpose and motivations for remedies in a global environment. At this level, traditional divisions between the public and private sectors, public and private law are more nuanced.<sup>61</sup>

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59 M. Weber, (1919), *Politik als Beruf*, in M. Weber, Gesamtausgabe, Vol. 17, J.C.B. Mohr/Paul Siebeck, Tübingen, 1992, pp. 157-252. Translation available at Sociosite <http://www.sociosite.net/topics/weber.php>.

60 Backer speaks of the increasing tendency of states to substitute actions in the private law realm with regulatory (or sovereign) activity. Backer argues that 'Modern globalization has effectively introduced a global advance toward free movement of capital. States have sought to act more energetically as private as well as public actors. In a global legal order in which the value of state sovereignty has diminished as the cross-border element of transactions has increased, states can extend their authority as private actors to an extent difficult when they seek to regulate as sovereigns.' See L. Backer, 'The private law of public law: public authorities as shareholders, golden shares, sovereign wealth funds, and the public law element in private choice of law', *Tulane Law Review*, Vol. 82, No. 1, 2008, p. 62.

61 Johnston and Shearing's remark that '[I]t is now virtually impossible to identify any function within the governance of security in democratic societies that is not, somewhere and in some circumstances, performed by non-state authorities as well as by state ones,' is even more true of international society. L. Johnston, C. Shearing, *Governing Security*, Routledge, London, 2002, p. 32. Dorn speaks of 'glocality', where local and global issues are intertwined, and argues that the vertical segmentation of 'multi-level' governance structures are being challenged by the more horizontal notion of 'multi-source' governance, where states inhabit a broad policy arena alongside multilateral forums, powerful market interests, and cosmopolitan actors. See N. Dorn, *Conceptualizing Security: Cosmopolitan, State, Multilateral and Market Dynamics*, Boom, The Hague, 2008, p. 8.

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### 2.6.1 Corruption in an Increasingly Integrated World

Cheap transportation, the internet and direct access of individuals to each other has radically changed the structure of societies. The state is faced, on an increasing scale, with the cross-border activities of private actors. Jobs are outsourced, corporations have divisions scattered over diverse continents and individuals have gone global. Corruption in an integrated world knows no borders.

The flattened world<sup>62</sup> is witnessing a corresponding seepage of threats to security such as environmental pollution, cyber-crime, terrorism, pandemic risks, human trafficking, global financial distress and corruption across the level field. Instances of corruption occurring in such an integrated environment assume an international dimension, as the consequences of corruption can no longer be safely contained within particular national boundaries. As a result, the path to solving the problem of corruption in today's integrated world must adapt to this changing environment.

### 2.6.2 The Shifting Public/Private Divide

Fighting corruption in an international environment is a more complex proposition because there is no clear nexus of governance, and sovereignty is dispersed. In the international environment the homogeneity of norms and singularity of government that is present in national systems is absent. The state as the primary provider of security is limited in the terrain beyond the state. This is the terrain in which the fight against corruption occurs today. These complexities notwithstanding, the deleterious effects of corruption is and remains the catalyst for the emergence of an international consensus repudiating corruption. This provides a framework to govern interactions in public and private relationships of transnational society. The implication of this state of affairs is clear. On the one hand, methods of fighting corruption that are state-centered may need to be reconstructed. On the other hand, the regulation of corruption in deterritorialized space is an urgent matter. Private law, based as it is on relationships between persons, may provide regulatory opportunities better suited to this environment.

### 2.6.3 Illustrations from Case Study: *The 'Trickle Down' Effect*

The participants suggested that there is a domestic impact of the international anti-corruption rules. The perception is that compliance checks and strategies

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62 Expression from T. Friedman, *The World is Flat*, Farrar, Straus and Giroux, New York, 2005.

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being implemented by multinational corporations are influencing Nigerian companies who want to present themselves as viable business partners. Some participants saw a trickle-down effect into domestic laws as well as a ‘no choice factor’ as more international aid is tied to transparency and accountability. The effect of international rules and increased awareness were also seen in attempts to hold the Nigerian government accountable to the obligations it has assumed under international conventions. Increasing globalization and the integration of world markets means that domestic leadership is increasingly sensitive to outside influence. The need for investors to have security for their investments also encourages a harmonization of standards and greater insistence on the rule of law.

*Participant 6: (00:54:15) The fight against corruption has gone beyond ... the realm of a national project. In that both within IMF, World Bank they have made it an article of faith ... issues like that which before appeared to be no-go areas so that sensitivities and sensibilities are not unduly ruffled are no longer shielded from scrutiny. In fact there are guidelines regarding World Bank loans which aim to ensure transparency and accountability.*

*Participant 5: (Tape 2, 00:01:51) They would want to do business with the Americans. They want to be rated as international companies are being rated. ... because they want to be classified in a way that suggests that they are ready for more international business that they can be treated at the same level and they have the same kind of ethic as the foreign companies; I think that will happen.*

*Participant 4 (00:02:35)...one is increasingly becoming globalised. There cannot be a system peculiar to Nigeria .... We are all beginning to look at a global standard in certain kinds of transactions.*

*Participant 6: (00:53:24) Happily it trickles down even to national legislation ... if you look at our own ICPC Anti-Corruption Act it seems to have captured that trend inasmuch as it is not talking about you receiving alone but also the person who gave so both the giver and the taker ... that trust is already being assimilated into national legislation.*

*Participant 6: (00:57:16) The international fight against corruption is unstoppable .... (57:43) We cannot afford to be indifferent to it. We now have conventions – UN Convention, the OECD Convention – and we are part of the international community and it cannot be business-as-usual within the country. At any rate, the distinction between what is national and what is international is now a fine one. Borders are crumbling, sovereignty is having a reduced significance ... There are even people within Nigeria, the NGOs being led by Femi Falana, who wrote to the prosecutor of the ICC seeking his view whether corruption is not a crime against humanity ... so that somebody can be brought before the ICC ....– At least an effort to use an international machinery to confront corruption.*

*Participant 6: (00:59:30) Government actions are being measured with reference to the UN Convention on Corruption. I have been seeing statements in the media ‘this is incompatible with our obligations under the UN Convention.’*

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*Participant 6: (00:60:12) We may not even have much choice again in this matter ... the accountability principles are being built into some World Bank loans. Now [the] IMF has also been issuing guidelines to its country officials .... Really if you take a loan from the WB their own accountability principles will be brought in monitoring the way you use it ... after all, in the past some of the accusations have been that some of those loans have gone into private pockets. If a body like the Worlds Bank ... OECD ... if they are now building accountability principles and norms into their loan policy, so long as you want to take advantage of those then you have to comply. So you can really see that it is impacting.*

*Participant 4: (00:13:20) One immediate benefit would be these foreign banks ... being ready havens for stolen funds ... these days you can be tracked, you can be traced .... At least let's take it step-by-step, you can be caught. The Abacha thing reminds us that even as tough as the Swiss were, they cracked under international pressure ... the UK as well. .... If you step this up it actually gives impetus to the genuine fight against corruption on the demand side. ... Now that they see some kind of partnership developing with the supply side beginning to tighten its belt ... yes, I think that it hands out hope ... early days yet, but I think it hands out hope.*

### 2.7 The Path Ahead

The case study on Nigeria provided helpful perspectives as to the path ahead in the fight against corruption. It would seem that the emergence of an international rules tackling supply-side corruption does have downstream effects. These rules introduce an element of hope, however slight, that there is a partner in the fight against corruption that can assist and empower a domestic movement to curb corruption. It is interesting that this window of hope is the result of pressure from the outside. The building of transparency and accountability into foreign aid and development support; the freezing and repatriation of assets; the arrests and repatriation of persons by foreign governments and institutions are helping to create a climate that at least tempers the hemorrhage of stolen funds to the west. Where these funds, even if acquired as a result of corruption, are forced to remain within an economy, the jobs and economic growth that result go some way to addressing the issue of poverty.

Corruption is seen by some as a necessary entry requirement into a market. The slow pace of the judicial process, the lack of security, the paucity of information and the lack of effective prosecution are seen as factors that make a choice not to be corrupt a rather expensive and probably a bad business and social choice. While a traditional culture may be 'replete in value', this culture is not immune to the overriding need for 'survival.'

The issues highlighted by participants in the case study suggest that strategies to fight corruption must address the problem of poverty and provide for

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infrastructural development. To this end, strategies that enable and empower leadership further from the center and closer to the community (by using private actors such as NGOs, for example) may have a greater chance of promoting reaching leaders that are committed to developing their communities and providing basic social infrastructure.

This case study on Nigeria shows anecdotally, that developments in the fight against corruption at the international level have had a positive influence on the domestic fight against corruption in Nigeria. The complexities of the issues discussed by the participants accentuate the difficulty of finding purely domestic solutions. Foreign pressure can play a positive and complementary role. This emphasizes the need for the international community to continue to refine and develop strategies that create an environment which encourages compliance with the international rules. Such an environment must address the conflict of interest problem inherent in the criminal law approach as well as the issue of transactions resulting from or tainted by international corruption. These are areas where the private law provides a window of opportunity. Creating an environment where both the private and public law present a coherent response to the offenders and the transactions involved in the corruption exchange will push the frontiers of the fight against international corruption.

### 2.7.1 Illustrations from Case Study: *Moving Forward*

*Participant 5: (Tape 2, 00:33; 26) One way forward is to have a society that can assure the average worker of a future. The average Nigerian I believe is not corrupt or greedy naturally. If there is assurance that after 20 years when he retires, he will have a places to retire to, health, his children will have a good decent school, I think most people will not be corrupt and they would not care if others are corrupt and others are living big. Because that was the society we had before where you could not come into a social group and say that you have made money. People would say whose child is this, where is he from, what is his pedigree? Where did he get his money from? Today we do not ask those questions You've made It! God let me make it too! Before it was important that you were honest and that was what mattered most. I think that if we sort out the financial issue in terms of security, I think we will probably move back to that and I hope we will.*

*Participant 1: (Tape 3, 00:34:29) Well the tendency is to give up and say we can't solve it and yet my personal belief is that what it takes is a few years of the right quality of leadership in sensitive strategic positions, just a few years... (Tape 3, 00:36:30) The democratic process is capable of doing it now right now if you are to take a look at how the States are operating as opposed to the Federal Govt.... You can see for instance that there is new spirit of fresh discipline in Lagos. Lagos is beginning to talk about things they never spoke of before. If you go to Niger state, the governor is beginning to do things that make people think... oh it is still possible to do certain things.*

*Participant 1: (Tape 3, 00:37:22) Now what I am saying is perhaps it is too much to expect that Nigeria-wide we are going to be able to come up with that kind of leadership because the compromises we have to make are too many... Mainly because we've broken*

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*ourselves up into so many little units and the tension between the interest of all these units is really something we do not have the machinery to deal with. But in those individual units it is possible for leadership to begin to correct some of these things and probably over a generation or two if there can be sustenance of whatever initiatives start in those units we can begin to see differences.*

*Participant 1: (Tape 2, 00:03:08) ...but wherever the overseas companies has returned to majority shareholding and particularly sent in perhaps a chief executive and a finance director who are both from the home country and the tendency is for them to do only those things that they can explain to their own shareholders at home.*

*Participant 3: (Tape 2, 00:14:20) when ...Ribadu was the chairman of EFCC...because Ribadu was in link with international community ... people ...were .....afraid to take money abroad because they knew that Ribadu and his group would chase you .... as at that time everybody started keeping their money within Nigeria, the stock market was booming, real estate was booming, because they could not take the money out.... The economy was improving. ... (Tape 2,00:15:53) ...,You cannot keep the money in your bedroom; you still have to invest it ... (Tape 2,00:16:28) If the enforcement is really very effective particularly internationally, even if they have stolen the money they will invest the stolen money in Nigeria and it will still benefit the citizenry that is sure.*

*Participant 7: (Tape 1, 00:41:20) Holistically review the criminal justice system and create a place for civil society to be energized within that system. ...*

*Participant 6: (00:38:08) We are underrating the capacity of a minority to build certain values in society... don't let us underrate the influence of all this radio ,TV and all this other media of mass communication in terms of the impact they can have on people's values, people's orientation and so on.*

*Participant 7: (Tape 1, 00:20: 10) If you want to go to court as an NGO to say that we want this to be investigated or you even want to lodge a petition with the police ... if we have that opportunity for you to be able to go into an office and say "you have concluded this bid exercise". We want to know what all the parties submitted ...if in Angola they... paid 1.5 for that same project ...even in Ghana it was 1.6.... and you come to Nigeria and find it 5.6 eyes will be opened that something is wrong. ...but why are you able to assess that? Because you have seen that information....we have debilitating structures in our judiciary, why complicate it again with no information?*

*Participant 6: (00:61:54) There is a basis for sustained optimism that sooner or later the national efforts and the international efforts will coalesce, ... Even Switzerland that was reputed to be a safe haven and other Western countries ...(66:16)...if you go by what you see now, Britain, Switzerland in respect of the Abacha funds...how these are being returned... how some public officials have been arrested and charged with money laundering there is a basis for a shift in our perception ...*

*Participant 6: (00:68:15) Whether or not we feel that the anti-corruption fight is sincere..... For the first time we are seeing former top government functionaries being charged to court... handcuffed.... ... Governors so far about eight or so...charged.... If our existing machinery can be used ... it means that the public law approach or machinery is not as weak as we have thought.*

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*Participant 6: (00:16:13) The democratic space has been opened, there is no doubt about that... (16:34) to the extent that under civil rule and with the constitution we operate there is more openness, transparency and demand for accountability ... than we had under the military.*

*Participant 4: (00:29:58)... ... the gap will be filled by injury lawyers and I think that that time is fast approaching... (00:30:24) the criminal justice system is notoriously slow... (00:30:48) those who are directly affected never really heal and it is for the benefit of those ones that civil actions must be taken because they get compensated. You cannot truly replace their losses but you can at least assuage their feelings.*

*Participant 6: (00:70:30) ... Is it the only weapon that we have (public law approach) in the fight against corruption? I will say no it is not ... but it is a viable weapon ... it can be complemented... people are also talking about restitution... somebody's property finds its way into your hands whereupon you are under the obligation to return so that that will bring in the question of civil remedy... which it doesn't appear we have been using... it is not just a case of charging people to court ...civil remedies might even encourage people more.*

*Participant 4: (00:41:20) Advocating for less and less government. Because when you have less government power begins to shift to the private sector and if it is going to be via mainly large publicly quoted companies then you are going to have a strong market .... In which case you can narrow down on people who are corrupt in government, isolate them ....*

*Participant 2: (Tape 1, 00:23:56) The person to tackle it is me...when I say me I am talking of the common man unfortunately I am not empowered. ...when I say I, I am also talking about the common man, (Tape 1, 25:57) if there is anyone who is going to stop it I think the common man would do a lot more than the law enforcement agencies ...that is why I say that the person who can stop it is not empowered to stop it.. which then means that he needs some empowerment and he needs some source of support.*

### 2.8 Conclusion

Corruption is normatively complex, far reaching in its consequences and truly permeates all areas of society and governance. This is the motivation, but also the challenge, in tackling corruption. As a multi-faceted problem a plurality of strategies are needed to address its various aspects. Research into corruption must necessarily be a convergence of ideas reflecting different aspects of study, from law, to political science, to criminology, to economics to name a few. Contextualizing the problem of corruption helped to provide this researcher with a better understanding of the interrelatedness of corruption research issues and the limitations of a single viewpoint.

The findings of this illustrative case study also helped this author to motivate the research question tackled in this book by illustrating that where the process

## PRIVATE REMEDIES FOR CORRUPTION

of criminal sanctions for corruption is compromised by historical, political, economic or social factors, an approach centered on alternative methods of tackling corruption must be explored. There is no supranational body that can enforce anti-corruption laws. In the absence of global governance, methods of bypassing the compromised state become the logical way forward in the fight against corruption. Private remedies, private actors and public/private partnerships create the opening that enables the consequences of corruption to be challenged independently of government.

An important insight provided by this illustrative study is the effect of the environment on compliance. Businesses do not exist in a vacuum but are responsive to their environment. Challenging the status quo, by opening up new points of intervention, following the money, empowering the private litigant, challenging resulting contracts and encouraging negotiated settlements may help to foster an environment where the intelligent choice for long term profitability by corporations is compliance with anti-corruption rules. If corruption is an entry mechanism into a market, the choice for corruption can only be outweighed by reactions from that same environment that make such a choice a risky one. This is an argument that runs through this book i.e. changing business practices by creating incentives to do so can tilt the balance in the fight against corruption in favour of compliance.

Finally, corruption is not ‘another people’s’ problem. In a world that is ultimately a closed system, no country is an island that is immune to its devastating consequences. However, for such a formidable foe it is naive to think that there can be a simple all-embracing solution. Corruption is existential and progress is probably best measured not in claims of eradication but rather in the continued determined effort to stem its growth and the spread of its deleterious consequences. This book acknowledges the intractable nature of corruption and examines the potential of the private law to act as *one* agent for change. It is hoped that this line of inquiry will add ‘new meaning’ to the anti-corruption discourse.<sup>63</sup>

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63 Van Oer points out that ‘contextualizing actually is a process of adding new meaning to a given situation in order to characterize this situation in terms of what could (or should) be done, and by the same token to exclude (for the time being) alternative interpretations of the required mode of acting.’ See B. Van Oer, ‘From context to contextualizing’, *Learning and Instruction*, Vol. 8, No. 6, 1998, pp. 473, at p. 482.



## CHAPTER 3

# FROM THE FCPA TO AN INTERNATIONAL STANDARD

*‘For the first time, a country made it criminal to corrupt the officials of another country.’*

*Justice Noonan<sup>1</sup>*

### 3.1 Introduction

Historically, the first obstacle to an international response to corruption has been the absence of a common understanding of what corruption is. In the absence of a normative baseline, there is no basis for common intervention. The challenge in a world of diverse values is to find a common standard of legality that can create a level playing field across jurisdictions. To engage in an international fight against corruption, domestic standards of legality, reflecting national norms and values have to, in some shape or form, give way to a common standard. This chapter charts the evolution of a domestic US norm from an expression of outrage of the American people to an international mandatory standard repudiating corruption in business transactions.<sup>2</sup>

Even though most countries have laws prohibiting corruption and bribery, it is only in recent times that the *de jure* prohibition of corruption has translated

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1 J. Noonan Jr., *Bribes: The Intellectual History of a Moral Idea*, University of California Press, Berkeley, CA, 1987, p. 680.

2 Eijsbouts describes this process as the ‘crystallization of social norms’ of which the anti-bribery norm is an excellent example. He states:

‘since 1976, when it left the area of non-regulation and was first codified in the OECD Guidelines on Multinationals, the substantive social norm to not bribe foreign officials thus found its way in various types of regulation: (individual or collective) self-regulation, soft law, civil law, administrative law and, finally, criminal law. It travelled many international and national routes ending in many instances in the strongest form of regulation, criminal law, which by its nature is national state law, although the extraterritorial effect enlarges its reach beyond state boundaries.’

See J. Eijsbouts, ‘Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate’, Inaugural Lecture, Maastricht University, 20 October 2011, at p. 22.

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into the *de facto* processes of business operations. Bribery used to be shrugged off as an inevitable aspect of doing business. There was no baseline of legality demarcating corruption from accepted business practices. Double standards, uncertainty, and incoherence of law and policy created an environment where there was little basis on which to assert that corruption in international transactions or beyond local borders was a criminal act.<sup>3</sup> Bribery was something that took place ‘somewhere else’ and its negative effects remained safely behind someone else’s borders.

The inevitable seepage of corruption through the matrix of connected societies has changed the global attitude to corruption. Moral condemnation has given place to a real concern that unbridled corruption is everyone’s problem and that for economic, social and political reasons it must be curtailed. From an emphasis on domestic, territory-based, demand-side corruption, the anti-corruption agenda is now driven by a focus on foreign, transnational, and supply-side corruption. Corruption in international business, once tolerated, is now vigorously attacked, and finding a solution is a major driver of policy and strategy, both in government and business affairs.<sup>4</sup>

By engaging in acts of corruption, processes are set into motion that undermines the stability of the business environment and indeed the very structure of the state. In a pre-global world, the incongruence between rules repudiating corruption and business practices that encouraged corruption could be managed more easily. This incongruence is very aptly demonstrated by the tax deductibility of bribes in leading economies that used to be commonplace.<sup>5</sup>

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3 The comments of the House Committee in respect of the FCPA puts this incongruence very clearly when stating, ‘although a vast number of questionable corporate payments have been disclosed, subsequent management changes have been attendant only to disclosures of domestic bribery. The reason is obvious: domestic bribes are clearly illegal whereas foreign bribes are not.’ *Foreign Corrupt Practices Act: House Report*, 95-640, 95th Congress, 1977, p. 6. (Hereinafter *House Report*).

4 The United States, the world’s most powerful economy, in its response to the peer review questionnaire of the OECD states with regard to the link between international business and global corruption that ‘the bribery of foreign government officials in international business transactions is a serious threat to the development and preservation of democratic institutions.’ See *(OECD) U.S. Response to Phase 1 Questionnaire DAF/IME/BR (98)8/ADD1/FINAL* Sec. 0.1.

5 Despite the almost universal existence of national laws prohibiting domestic corruption, the general attitude to commercial corruption occurring outside national borders seems to have been that anything goes. Bribes were treated as tax deductible expenses in many countries. In response to this practice, the OECD passed the Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, which calls on:

‘member countries that allowed the tax deductibility of bribes to foreign public officials to re-examine this treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign public officials as illegal with a view to denying the tax deductibility of such bribes.’

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The globalization of the corruption discourse has changed the landscape of the fight against corruption.<sup>6</sup> The fact that in a globalized world, the effects of the consequences of corruption, such as poverty and crime, do not stay safely within one jurisdiction but migrate with the flow of goods and markets across the globe, has increased the sensitivity toward this issue.

For corruption in international business, a normative baseline has been established. A domestic US law, the Foreign Corrupt Practices Act (FCPA) is singularly responsible for the internationalization of the anti-corruption discourse.<sup>7</sup> By creating a modality where a domestic standard condemning corruption would have worldwide application, and by lobbying aggressively to ensure that this standard will also apply to non-US companies, a normative space has been created by the FCPA in which the development of international and national strategies to fight corruption can take place.<sup>8</sup>

The characterization of foreign bribery under the FCPA as an uncompetitive practice has changed the thrust of the argument against corruption from one of moral condemnation to an issue of economic consideration.<sup>9</sup> The

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See OECD 'Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials', (adopted by the Council on 11 April 1996 at its 873rd session [C/M (96)8/PROV]) C (96)27/FINAL.  
[http://www.oecd.org/document/46/0,2340,en\\_2649\\_34551\\_2048174\\_119672\\_1\\_1\\_37447,00.html](http://www.oecd.org/document/46/0,2340,en_2649_34551_2048174_119672_1_1_37447,00.html).

6 Several factors have been identified as having led to this change of attitude. These include the end of the cold war; the increasing integration of Europe; the increase in international mergers; the recognition of the economic costs of corruption; and the emergence of a borderless global market. Also key are the links that have been made between international corruption and the lack of sustainable development, poverty and organized crime. B. George, K. Lacey, J. Birmele, 'On the threshold of the adoption of global anti-bribery legislation: a critical analysis of current domestic and international efforts toward the reduction of business corruption', *Vanderbilt Journal of Transnational Law*, Vol. 32, 1999, p.17; See also G. Abed. S. Gupta (Eds.), *Governance, Corruption, and Economic Performance*, Washington, D.C., International Monetary Fund 2002; S. Rose-Ackerman, *Corruption and Government: Causes, Consequences and Reform*, CUP, Cambridge, 1999.

7 The Foreign Corrupt Practices Act, 15 USC Sec. 78dd-1, et seq., 1977. (Hereinafter, the 'FCPA').

8 The US in its self-evaluation report on the implementation of the OECD Convention refers to its push to internationalize the FCPA standard and notes that '[S]ince 1977, the United States has outlawed bribery of foreign officials in commercial transactions by its nationals and companies organized under its laws. In addition, the United States has worked with other countries and in various international fora, including the OECD, the United Nations, the Council of Europe, and the Organization of American States, to encourage the enactment of similar prohibitions by other major trading countries. See the 1998 *U.S. Response to Phase I Questionnaire* DAF/IME/BR (98)8/ADD1/FINAL, Sec. 0.1.

9 Mauro, in a review of empirical studies, states that they show that corruption discourages investment, limits economic growth, and alters the composition of government spending, often to the detriment of future economic growth. See P. Mauro, 'Why worry about corruption?', *Economic Issues*, No. 6, International Monetary Fund, 1977, available at <http://www.imf.org/external/pubs/ft/issues6/index.htm>.

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accommodation that corruption once enjoyed in international trade has all but disappeared.<sup>10</sup> The link to international business and fair trade has galvanized state as well as non-state private actors, international organizations, multinational corporations, and non-governmental organizations to establish rules and standards regarding international corruption.<sup>11</sup>

This chapter looks at the emergence, content and method of the FCPA which catalyzed and remains the driving force of the international regulation of corruption.<sup>12</sup> Equally important, and also examined, is the method of enforcing the FCPA. The sanctioning process of the FCPA has evolved into a carrot and stick mechanism that encourages compliance by allowing evidence of compliance to play a role in the final determination of punishment. This model of fighting corruption uses corporate culture as an integral tool of the sanctioning process.<sup>13</sup> It involves the corporation in the process of prevention, detection and sanctioning of corruption in a private-public partnership. The focus of sanction is not just the particular offender but the environment that produces the offender. The last part of this chapter looks at the internationalization of the FCPA standard and the emergence of an international definition of *international corruption* in the principal international instruments that have emerged in the wake of the FCPA. It also identifies the *essential elements* of international corruption that they establish.

### 3.2 The Foreign Corrupt Practices Act – The Genesis

The FCPA can be described as the hub of anti-corruption regulation. International rules, corporate codes and various national initiatives reflect

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10 P. van Duyne, Corruption: Acts and Attitudes, in B. Huber (Ed.), *Combating Corruption in the European Union*, Academy of European Law, Trier, 2002, p. 1, at p. 13.

11 Pieth, gives an insightful description of the genesis and development of the legal framework to combat corruption and notes that the local political agenda in the United States marked the first step in legislative action against transnational bribery. See M. Pieth, L. Low, P. Cullen (Eds.), *The OECD Convention on Bribery: A Commentary*, CUP, Cambridge, 2007, pp. 6-9.

12 This chapter is based on the article: A. Makinwa, 'The rules regulating transnational bribery: achieving a common standard?', *International Business Law Journal*, Iss. 1, 2007, p. 17.

13 Ruggie speaks of states beginning to use 'corporate culture' in deciding corporate criminal accountability and explains that the state uses:

'[a] company's policies, rules and practices to determine criminal liability and punishment, rather than basing accountability on the individual acts of employees or officers. These principles may be invoked at the liability stage, or during sentencing and in exercising prosecutorial discretion. Both incentivize companies to have appropriate compliance systems.'

J. Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5, 20087 April 2008, Available at <http://www.reports-andmaterials.org/Ruggie-report-7-Apr-2008.pdf>, at Para. 31.

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FCPA provisions and its method to varying degrees.<sup>14</sup> The FCPA was a unique occurrence in the history of the fight against corruption.<sup>15</sup> In the words of Justice T. Noonan:

‘For the first time in the history of the world a measure for bribery was introduced into law that was universal as far as those subjected to the law were concerned. For the first time, a country made it criminal to corrupt the officials of another country.’<sup>16</sup>

Understanding the FCPA is the key to understanding the new legal and normative order that exists today regarding corruption. The process of implementing the FCPA continues to cast a long shadow over the direction of anti-corruption strategy.<sup>17</sup> This book on private remedies for corruption is arguably only possible because of the foundation set by the FCPA and the subsequent internationalization of the FCPA standard. As such, a discussion on private remedies for corruption is well served by starting with a clear understanding of the method and provisions of the FCPA.

The events that led to the worldwide repudiation of corruption occurred in the early seventies in the aftermath of the *Watergate Scandal*.<sup>18</sup> A congressional investigation was instituted into political espionage carried out on the orders of the then President Nixon of the Republican Party. This inquiry into a break-in at the offices of the Democratic Party at the Watergate building complex on 17

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14 Bill Shaw asserts that the principles articulated by the FCPA as adopted and elaborated upon in subsequent international agreements represent a sort of ‘Habermasian general will’ and have become ‘morally unassailable.’ See B. Shaw, ‘The Foreign Corrupt Practices Act and progeny: morally unassailable’, *Cornell International Law Journal*, Vol. 33, 2000, p. 689, at pp. 706-709.

15 M. Biegelman, D. Biegelman, *Foreign Corrupt Practices Act Compliance Handbook*, Wiley and Sons, Hoboken, NJ, 2010, p. 332.

16 J. Noonan Jr., *Bribes*, id., Note 1 above, at p. 680.

17 Cohen and Marriot write that ‘[I]t is impossible to understand global anti-corruption efforts today without appreciating the FCPA’s role in getting those efforts started. It is impossible to discuss the development of international anti-corruption instruments ... without understanding that the FCPA provided a spur to their enactment. And it is impossible – or at least highly impractical – to consider anti-corruption compliance and best practices without drawing on the extensive examples offered by companies dealing with the FCPA.’ P. Cohen, A. Marriot (Eds.), *International Corruption*, Sweet and Maxwell, London, 2010, p. 73.

18 Farnsworth has an extensive collection of Watergate Material in his web-based databank on the Watergate Scandal. He describes ‘Watergate’ as a general term used to describe a complex web of political scandals between 1972 and 1974. The word refers to the Watergate Hotel in Washington DC. In addition to the hotel, the Watergate complex houses many business offices. It was here that the office of the Democratic National Committee was burgled on 17 June 1972. The burglary and subsequent cover-up eventually led to moves to impeach President Richard Nixon. Nixon resigned the presidency on 8 August 1974. For detailed information of the Watergate scandal see M. Farnsworth, Collection of materials at the Watergate Info Database, <http://watergate.info/background/>.

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June 1972, revealed a web of political and corporate commercial corruption.<sup>19</sup> The discovery that more than 400 US companies had admitted to making overseas payments in excess of US\$300 million in a bid to secure contracts and other favors, led to the ‘moral outrage’ of the American people.<sup>20</sup> The Watergate scandal was the launching pad for the eventual passage of the FCPA that would establish common rules for parties engaging in soliciting for business in foreign countries.<sup>21</sup>

The FCPA represents the ‘values’ of the American people regarding corruption in the conduct of corporate affairs. With specific regard to the interaction between corporations and foreign officials, the FCPA introduces an ethical imperative, namely that bribery is an unacceptable method of acquiring business. This establishes a boundary not just for the American corporation but for parties dealing with that corporation. This means that interactions between the American corporations and officials of foreign countries are no longer governed simply by the domestic laws of the country in which the transaction is taking place, but are subject to the FCPA provisions. The FCPA, by design, could reach and sanction corruption occurring in other countries.

### 3.2.1 Protecting the Public Interest

The FCPA tackles the issue of corruption by criminalizing a particular form of activity. This is the bribery of foreign officials for the purpose of obtaining a

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19 Lowell Brown, commenting on the Senate and Securities Exchange Commission (SEC) investigations, remarks that the SEC investigation resulted in enforcement actions against United Brands, Gulf Oil Corporation, Ashland Oil Company, Boeing Company and Lockheed Corporation, among others, and that in all more than 400 companies admitted making overseas payments in excess of US\$300 million and that 117 of these companies were in the Fortune 500. H. Lowell Brown, *Bribery in International Commerce*, Thompson/West, Eagan, MN, 2003, p. 2.

20 The House Committee on Interstate and Foreign Commerce reported that:  
‘[M]ore than 400 corporations have admitted making questionable or illegal payments. The companies, most of them voluntarily, have reported paying out well in excess of \$300 million in corporate funds to foreign government officials, politicians, and political parties. These corporations have included some of the largest and most widely held public companies in the United States; over 117 of them rank in the top Fortune 500 industries. The abuses disclosed run the gamut from bribery of high foreign officials in order to secure some type of favorable action by a foreign government to so-called facilitating payments that allegedly were made to ensure that government functionaries discharge certain ministerial [sic] or clerical duties. Sectors of industry typically involved are: drugs and health care; oil and gas production and services; food products; aerospace, airlines and air services; and chemicals.’

See *House Report*, id., Note 3 above, at p. 4. See also the United States Senate, Securities and Exchange Commission, ‘Report on Questionable and Illegal Corporate Payments and Practices’, (12 May 1976). (Hereinafter *SEC Report*).

21 A. Makinwa, ‘The rules regulating transnational bribery: achieving a common standard?’, id., Note 12 above, at pp.17-19.

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concession, business or other advantage. There is a clear *commercial context*<sup>22</sup> to its framing of the fight against corruption. It addresses offers and inducements that are meant to distort free competitive processes on a grand scale and not the petty routine small payment. Not surprisingly, it is directed primarily at the principal actors in such grand scale corruption, namely, multinational corporations and government officials.

The US Congress was faced with a choice when deciding on the strategy to adapt with regard to foreign bribery. On the one hand was a strategy that focused on the disclosure of improper payments and the imposition of criminal penalties for failure to disclose. On the other hand was a strategy that directly criminalized such payments.<sup>23</sup> The House of Representatives chose the latter strategy and decided to criminalize bribery in foreign transactions because it determined that:

‘... disclosure can never be an effective deterrent because the anticipated benefit of making a bribe, such as winning a multimillion dollar contract, generally exceeds the adverse effect, if any, of disclosing one year later a lump sum figure without names, amounts or even countries. Criminalization, on the other hand, has proven an effective deterrent.’<sup>24</sup>

The House Committee was of the view that criminalization would be no more difficult to enforce than disclosure as both approaches would involve ‘proving beyond a reasonable doubt the same factual and legal elements.’<sup>25</sup> The Committee, however, reasoned that ‘criminalization would be far less burdensome on business. A disclosure scheme, unlike outright prohibition, would require US corporations to contend not only with additional bureaucratic overlay but also with massive paperwork requirements.’<sup>26</sup> Thus, the more fundamental step of stigmatizing foreign bribery payments as being criminal was taken.

There are two broad planks to the anti-corruption strategy of the FCPA. The first is normative anti-bribery provision that criminalizes the bribery of foreign

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22 Emphasis added.

23 See *House Report*, id., Note 3 above, at p.6. See also comments of the Minority at p. 19 where it is stated that:

‘The criminalization approach is contrasted with the approach recommended by Former Secretary of Commerce Elliot Richardson which would have required disclosure of improper payments. We believe that adoption of the disclosure approach would, in no way, imply that payoffs will be condoned as long as they are disclosed. Rather, we believe that this approach would prove ultimately to be a much more effective deterrent than would the provisions of H.R. 3815.’

24 *House Report*, id., Note 3 above, at p. 6.

25 Id.

26 Id.

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officials.<sup>27</sup> The second, is the creation of a means to detect and control the giving of bribes by establishing requirements for books *and records*, as well as internal and accounting controls that provide reasonable assurance that financial reports are accurate.<sup>28</sup> As such, the FCPA criminalizes two types of conduct: firstly, acts of bribery that distorts honest competition, and secondly, false accounting practices that can be utilized to cover up the corrupt activities of corporations.<sup>29</sup>

The commercial context of the FCPA should not be dissociated from the very clear public interest that it caters to. The FCPA is codified in Title 15, Chapter 2B of the United States Code, which deals with Commerce and Trade. It is in fact an amendment of the 1934 Securities Exchange Act.<sup>30</sup> The 1934 Act was enacted to regulate the secondary trading of securities, often through brokers. Such transactions, usually conducted through securities exchanges and over-the-counter markets, were considered by the US Congress to be affected with a national public interest, which made it ‘necessary to provide for regulation.’<sup>31</sup>

The motivation for the 1934 Securities Exchanges Act identifies the public interest that the FCPA is supposed to protect. Sec. 78b explains that the necessity to protect the public interest arises from the fact that securities transactions involve the general public on a large scale.<sup>32</sup> Securities may originate from outside the state where the exchange or over-the-counter market is located, involve the use of credit and be carried out by mail or other instrumentalities of interstate commerce. As such they are considered an important aspect of interstate commerce that can directly impact (a) the financing of trade and industry; (b) transportation in interstate commerce; (c) the volume of interstate commerce; and (d) the national credit.<sup>33</sup> The manipulation of or speculation in such securities can trigger national emergencies which produce ‘widespread unemployment and the dislocation of

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27 15 USC Sec. 78dd-1, 15 USC Sec. 78dd-2, 15 USC Sec. 78dd-3.

28 15 USC Sec. 78m.

29 The Senate Committee on Banking, Housing and Urban Affairs remarked that:  
‘In the past, corporate bribery has been concealed by the falsification of corporate books and records. Title I removes this avenue of cover-up, reinforcing the criminal sanctions which are intended to serve as the significant deterrent to corporate bribery. Taken together, the accounting requirements and criminal prohibitions of Title I should effectively deter corporate bribery of foreign government officials.’

See US. Senate, Committee on Banking, Housing and Urban Affairs: Foreign Corrupt Practices and Domestic Foreign Investment Improved Disclosure Act of 1977, Foreign Corrupt Practices Act, *Senate Report*, No. 95-114, 1977, (Hereinafter *Senate Report*), at p. 3.

30 The Unlawful Corporate Payments Act of 1977 enacted a new Sec. 30A of the Securities Exchange Act of 1934 codified as 15 USC Sec. 78a - 78mm of the USC.

31 15 USC Sec. 78b.

32 15 USC Sec. 78b(1).

33 *Id.*

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trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare.<sup>34</sup>

This public interest motivates the need for regulations that protect against ‘impediments’ and ‘perfect the mechanisms’ of the national securities market so as to safeguard such securities and funds.<sup>35</sup> The public interest points to the fact that the corruption tackled by the FCPA has a cost not just to the parties to these transactions but more importantly to the ‘*indirect victims*’ who suffer the long-term consequences of such transactions.

It is interesting to note the acceptance implicit in these provisions that in the *laissez-faire* world of corporate activity, public interest provides a clear boundary to acceptable corporate behavior. The FCPA is an example of a regulation whose objective is the protection of the public interest by criminalizing and ruling out bribery as a means of acquiring business. While the above provisions deal more specifically with the trading of stocks and shares and not foreign bribery, the underlying message is of the need for intervention by the state to protect citizens who may suffer the catastrophic consequences of private corporate acts. Such reasoning underlies the intervention by the US government regarding corruption in international business.<sup>36</sup> The House Committee noted that the:

‘[B]ribery of foreign officials by some American companies casts a shadow on all U.S. companies. The exposure of such activity can damage a company’s image, lead to costly lawsuits, cause the cancellation of contracts, and result in the appropriation of valuable assets overseas.’<sup>37</sup>

Further motivation for the FCPA given by the committee was that:

‘it was not necessary to pay bribes to have a successful export program; the fact that the resulting adverse competitive affects were entirely domestic as payments were often made not to out-compete foreign competitors but rather

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34 See Title 15 Chapter 2B Sec. 78b: Necessity for Regulation Paras 1-4.

35 Id.

36 The *House Report* states:

‘[T]he payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical. It is counter to the moral expectations and values of the American public. But not only is it unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. It short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products. In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business.’

*House Report*, id., Note 3 above, at pp. 4-5.

37 See *House Report*, id., at p. 5.

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to gain an edge over other US manufacturers; bribery creates severe foreign policy problems for the United States when they came to light.<sup>38</sup>

The Committee also felt that a strong anti-corruption law would help US corporations to resist corrupt demands by enabling them to cite a US law which stated that they are not allowed to give a bribe.<sup>39</sup>

By tackling corruption in other countries, the US Congress sought to protect its own local business culture and environment. The FCPA is a recognition of the fact that the domestic business environment is not shielded from the negative effects of foreign corruption. This linking of the negative consequences of corruption occurring in other countries with domestic public and corporate interests was a watershed in the annals of the anti-corruption movement.

### 3.3 The FCPA: The Prohibitions

The purpose of the FCPA is summarized by the Committee on Interstate and Foreign Commerce as:

‘designed to prohibit the corrupt use of the mails or other means and instrumentalities of interstate commerce by U.S. corporations, directly or indirectly, to bribe foreign officials, foreign political parties, or candidates for foreign political office.’<sup>40</sup>

The original Act was passed in 1977. This was subsequently amended by the Omnibus Trade Competitiveness Act of 1988, which created an exemption for facilitation payments, as well as affirmative defenses for payments that were lawful under the written laws of a foreign country and payments that were reasonable *bona fide* expenses.<sup>41</sup> In 1998 the FCPA was further amended to implement the provisions of the OECD Convention on Combating Bribery of Foreign Public Officials. The 1998 amendments extended coverage of the

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38 The *House Report* gives several examples as follows:

‘... in 1976, the Lockheed scandal shook the Government of Japan to its political foundation and gave opponents of close ties between the United States and Japan an effective weapon with which to drive a wedge between the two nations. In another instance, Prince Bernhardt of the Netherlands was forced to resign from his official position as a result of an inquiry into allegations that he received \$1 million in pay-offs from Lockheed. In Italy, alleged payments by Lockheed, Exxon, Mobil Oil, and other corporations to officials of the Italian Government eroded public support for that Government and jeopardized U.S. foreign policy, not only with respect to Italy and the Mediterranean area, but with respect to the entire NATO alliance as well.’

See *House Report*, id., Note 3, at p. 5.

39 *House Report* id., at p. 5.

40 *House Report* id., at p. 4.

41 Foreign Corrupt Practices Act Amendment of 1988, (Pub. L. No. 100-418), Sec. 5003, 102 Stat. 1107, 1416-17, codified as 15 USC Sec. 78dd (1)-(3), 78ff.

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FCPA to all foreign persons or companies (all other persons apart from US companies or persons) that have engaged in any act in furtherance of an FCPA violation while in the territory of the United States.<sup>42</sup> The 1988 amendments also included an alternative jurisdiction for US nationals or companies organized under US Laws, extended the meaning of foreign official to include public international organizations, and expanded the scope of the act to include payments made to obtain an improper advantage.<sup>43</sup>

The implementation of the FCPA is carried out by the US Department of Justice (DOJ) and, with respect to companies that are quoted on US Stock Exchanges, the Securities and Exchange Commission (SEC).<sup>44</sup> The DOJ is responsible for the criminal enforcement of the Anti-Bribery Provisions while the SEC along with the DOJ share responsibility for civil enforcement of the anti-bribery provisions. The SEC administers the internal control provisions of the Books and Records with respect to issuers.

### 3.3.1 The Anti-Bribery Provisions

The Anti-bribery provisions of the FCPA are found in sections 78dd-1; 78dd-2 and 78dd-3 of Title 15 Chapter 2 of the US Code. The FCPA provides that persons to whom the act applies are prohibited from:

- ‘Using of the mails or other means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay or authorization of the payment of any money, to any foreign public official, any foreign political party, official of a political party or candidate for political office to any other person while knowing that all or a portion of such money or thing of value given to that person would be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of
- (i) influencing any act or decision of such foreign official in his official capacity;
  - (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official; or
  - (iii) securing any improper advantage; or
  - (iv) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality

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42 See 15 USC Sec. 78dd-3.

43 See International Anti-Bribery & Fair Competition Act of 1998, (Pub. L. No. 105-366), Sec. 2(b), 112 Stat. 3302, 3302-03.

44 See the Department of Justice FCPA website at <http://www.justice.gov/criminal/fraud/fcpa/>; the Securities and Exchange Commission Litigation page, which provides information about SEC FCPA enforcement in respect of issuers at <http://www.sec.gov/litigation.shtml>.

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in order to assist any person to whom the act applies in obtaining or retaining business for or with, or directing business to, any person.<sup>45</sup>

The FCPA prohibition is directed at a very specific set of occurrences. First of all, it applies to bribes or other inducements that occur in an international business context. The purpose for which the bribe or other inducement is given, must be for the obtaining or retaining of business. This commercial context, as well as the category of actors to which the act refers circumscribes a very specific type of grand scale bribery between international businesses, foreign government officials or officials of international organizations.

The basis of liability rests in the giving of a bribe or other inducement whether directly or indirectly, knowing that it will influence a public official in a manner that will result in the acquisition of business for the person offering the inducement. The following sections examine the various aspects of the FCPA as follows: (a) the purpose of the bribe or other inducement; (b) the persons to whom the act applies; (c) territorial and alternative jurisdiction; (d) payment to a foreign official; and (e) and the basis of FCPA liability.

### 3.3.1.1 Purpose of the Bribe or Other Inducement

The FCPA stipulates that the offer of payment or other inducement must be intended to affect the conduct of a foreign official or instrumentality in a manner that illegally benefits the party offering the inducement. The purpose must either be to (a) influence the decision making process of a foreign official, (b) induce the foreign official to do or omit doing a lawful duty, or (c) secure an improper advantage. The gift or inducement may also be for the purpose of inducing the foreign official to use his or her influence with a foreign government or instrumentality to influence any act or decision by such a government or instrumentality in favor of the party offering the payment or other inducement.<sup>46</sup> In all these instances the purpose of influencing the foreign official is in order to obtain or retain business.

This raises the question whether corrupt payments that did not have the purpose of obtaining or retaining business fall within the purview of the FCPA? This question came up in the case of the *United States v. David Kay and Douglas Murphy*.<sup>47</sup> The question before the court was whether the FCPA was restricted to payments that were directly related to the acquisition of business or whether the act would also apply to *any* illicit payments made by

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45 See 15 USC Sec. 78dd-1(a); 78dd-2(a); 78dd-3(a).

46 See 18 USC Sec. 78dd-1(a); 78dd-2(a); 78dd-3(a).

47 *United States v. David Kay and Douglas Murphy* 359 F.3d 738 (5th Cir., 4 February 2004).

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the category of persons to whom the act applied. In this case a former chief executive officer of American Rice Inc. was charged with violating the FCPA by paying bribes to Haitian customs officials to accept false bills of lading and other importation documents so as to obtain lower custom duties. The question was whether these payments to foreign officials to reduce the custom duties and sales taxes a company owed the Haitian government, were payments to ‘assist’ the company in ‘obtaining or retaining business’ within the meaning of the FCPA.

The United States Fifth Circuit Court of Appeals reversing the decision of the lower court held that:

‘...congress meant to prohibit a range of payments wider than only those that directly influence the acquisition or retention of government contracts or similar commercial or industrial arrangements.’<sup>48</sup>

The court was also of the opinion that ‘Congress intended that the FCPA prohibit *all* illicit payments that are intended to influence non-trivial official foreign action in an effort to aid in obtaining or retaining business.’<sup>49</sup> Accordingly, any act that assists *directly or indirectly* in the obtaining or retaining of business will come within the purview the FCPA. This broad standard arguably effectively covers *any* inducement that affects the decision making process regarding a business opportunity in favor of the person offering the inducement. The Supreme Court denied the defendants appeal for review and as such the Kay case remains authoritative on the scope of the FCPA.<sup>50</sup>

In general, while the FCPA has a very broad ambit, the traditional practices of lobbying are therefore excluded from the scope of ‘illicit’ payments that the FCPA applies to.

The House Conference noted that:

‘... the reference to corrupt payments for ‘retaining business’ in present law is not limited to the renewal of contracts or other business, but also includes a prohibition against corrupt payments related to the execution or performance of contracts or the carrying out of existing business, such as a payment to a foreign official for the purpose of obtaining more favorable tax treatment. The

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48     Id.

49     Id.

50     *David Kay v. United States*, 2008 U.S. LEXIS 6775 (US, 6 October, 2008).

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term should not, however, be construed so broadly as to include lobbying or other normal representations to government officials.<sup>51</sup>

The House Conference, in its considerations regarding the 1988 amendments to the FCPA, clearly intended an expansive interpretation but drew the line at the boundary of the practice of lobbying which is, still to this day considered a normal and acceptable business practice.

### 3.3.1.2 Persons to Whom the Act Applies

The FCPA has extensive jurisdictional reach. The FCPA applies to any company quoted on a US Stock Exchange, to any private US company, citizen, national, or resident as well as to any foreign companies or natural persons who carry out an act in furtherance of an FCPA violation while operating within the US. These are described as issuers, domestic concerns and persons other than issuers or domestic concerns while in the territory of the United States as follows:

*Issuers:* These are public companies that offer, register and sell securities for the purpose of financing their operations on US Stock Exchanges. As such, the term issuer applies to every company that has a class of securities that must be registered and which is required to file annual reports and other documentation under the Securities Exchange Act. The term issuer includes any ‘officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer.’<sup>52</sup> This would also include any subsidiaries or business units of the issuer.

Since many corporations operate through subsidiaries abroad, the question arises whether the bribery of foreign officials by such subsidiaries comes within the purview of the FCPA. A foreign subsidiary of an ‘issuer’ that is organized under the laws of another country will come within the purview of the FCPA when the act in furtherance of a bribe takes place within US territory. Furthermore, it must be noted, that the parent company will also be liable for the acts of a foreign subsidiary when it can be established that the parent company or its employees authorized, directed or controlled the activity in question.

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51 Omnibus Trade and Competitiveness Act of 1988: No. 100-576, 100th Congress, pp. 918-919. (Hereinafter the *House Conference Report*).

52 15 USC Sec. 78dd-1(a).

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A recent case that illustrates this is the case of *United States v. ABB Inc.*<sup>53</sup> ABB Ltd was a corporation headquartered and incorporated in Switzerland with sponsored shares publicly traded on the New York Stock Exchange (NYSE). ABB Ltd admitted that one of its companies based in Sugar Land, Texas, ABB Network Management (ABB NM), paid bribes from 1997 to 2004 that totalled approximately \$1.9 million to officials at Commission Federal de Electricidad (CFE), a Mexican state-owned utility company. ABB NM's primary business was to provide products and services to electrical utilities, many of them foreign state-owned utilities, for network management in power generation, transmission and distribution. In exchange for the bribe payments, ABB NM allegedly received contracts worth more than \$81 million in revenue. ABB Inc. admitted that the bribe payments were made through various intermediaries, including a Mexican company that served as ABB NM's sales representative in Mexico on its contracts with CFE.<sup>54</sup>

Since the parent company ABB Ltd issued and maintained a class of publicly traded securities registered pursuant to Sec. 12(g) of the Securities Exchange Act of 1934 (15 U.S.C. Sec. 781) and was required to file periodic reports with the United States Securities and Exchange Commission under Sec. 13 of the Securities Exchange Act (15 U.S.C. Sec. 78m), ABB Ltd was accountable to the US government for these activities by its subsidiary as an 'issuer' within the meaning of Sec. 78dd-1 (a) of the FCPA.<sup>55</sup>

Foreign multinationals fall within the scope of the FCPA because of a jurisdictional link as issuer on a US Stock Exchange.<sup>56</sup> A US listing is sufficient to establish jurisdiction over acts involving the listed company that take place entirely outside the US. An example is the *Statoil* case. In 2006, the US brought a criminal action against the foreign Norwegian energy company Statoil, which is listed on the NYSE. Statoil and certain high-level executives were charged with attempting to bribe Iranian officials through an offshore consulting company owned by a UK person. Corrupt payments to the Iranian officials made by this UK concern were characterized as 'consulting fees' in

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53 *United States v. ABB Inc.* Court Docket Number: 10-CR-664, Filed in S.D. Tex., 29 September 2010.

54 'ABB Ltd and Two Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Will Pay \$19 Million in Criminal Penalties Company to Pay More Than \$58 Million in Criminal and Civil Penalties, Disgorgement and Interest', *DOJ Press Release*, 29 September 2010, available at <http://www.justice.gov/opa/pr/2010/September/10-crm-1096.html>.

55 Plea Agreement, *United States v. ABB Inc.*, Court Docket Number:10-CR-664, (S.D. Tex. 2010), attachment A-1 (ABB Inc.), Statement of Facts, at Para. 2.

56 Eleven of the twenty corporate matters brought in 2010 involved non-U.S. companies. These were Alcatel-Lucent, BAE, Daimler, Innospec, Noble, Panalpina World Transport, Royal Dutch Shell, Snamprogetti/ENI, Technip, and Transocean. See *Recent Trends and Patterns in FCPA Enforcement* | Shearman & Sterling LLP, 2011, at p. 5.

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Statoil's books and records. Statoil agreed to fines exceeding \$10m, and three senior executives resigned.<sup>57</sup>

Individuals working for listed companies will also fall under the jurisdiction of the FCPA. In the 2007 *US v. Sapsizian* case<sup>58</sup> an executive of one of Alcatel's subsidiaries was charged in connection with the alleged bribery of Costa Rican officials. Jurisdiction over Mr. Sapsizian was based on the fact that the shares of Alcatel S.A. established under the laws of France and headquartered in Paris are registered and traded in the US.

*Domestic concerns:* The FCPA defines a domestic concern as (a) any individual who is a citizen, national, or resident of the United States; and (b) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a state territory, possession, or commonwealth of the United States.<sup>59</sup>

A recent example of a bribery transaction involving a domestic concern is that of *United States v. The Mercator Corporation*.<sup>60</sup> Mercator is a merchant bank headquartered and incorporated in New York. Mercator was to be paid 'success fees' with respect to contracts it had successfully closed in its role as advisor and counsellor to the government of Kazakhstan concerning oil and gas transactions. Between 1995 and 2000, Kazakhstan paid Mercator approximately \$67 million in success fees for its work. From these fees, the chairman of the company James Giffen paid bribes to three senior officials of the Kazakh government who could influence whether or not Mercator obtained and retained lucrative business and also the authority to ensure that the merchant bank was paid.<sup>61</sup> In August 2010, the defendant merchant bank

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57 *United States v. Statoil*, Court Docket Number: 06-CR-960, (S.D.N.Y., 13 October 2006).

58 *United States v. Sapsizian and Valverde Acosta*, Court Docket Number: 06-CR-20797-PAS (S.D. FLA., 19 December 2006). See also *DOJ Press Release* (19 December 2006). Sapsizian was sentenced to 30 months in prison, three years of supervised release, and forfeiture of \$261,500 for bribing employees of the state-owned telecommunications authority in Costa Rica.

59 15 USC Sec. 78dd-2(h).

60 *United States v. Mercator Corp*, S3 03 Cr. 404 WHP (S.D.N.Y., 6 August 2010).

61 See *United States v. The Mercator Corporation*, S3 03 Cr. 404 (WHP) (S.D.N.Y. 2010), available at <http://www.scribd.com/doc/35488290/Mercator-Corporation-S3-Information>.

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pleaded guilty to making corrupt payments in violation of the FCPA.<sup>62</sup> James Giffen also pleaded guilty on a related tax violation charge.<sup>63</sup>

The definition of a domestic concern is broad enough to cover foreign subsidiaries of non-listed US companies. The House Committee remarked that this construction of the term ‘domestic concern’ was designed ‘to reach not only all US companies other than those subject to SEC jurisdiction, but also foreign subsidiaries of any U.S. corporation.’<sup>64</sup> The committee noted that:

‘it was appropriate to extend the coverage of the bill to non-U.S. based subsidiaries because of the extensive use of such entities as a conduit for questionable or improper foreign payments authorized by their domestic parent.’<sup>65</sup>

The House Committee remarked that such an extension to foreign subsidiaries was necessary to ‘avoid a massive loophole’ through which ‘millions of bribery dollars would continue to flow.’<sup>66</sup> As such, the FCPA will also apply to foreign subsidiaries of non-listed US companies that engage in actions violating the FCPA.

*Persons other than issuers or domestic concerns while in the territory of the United States:* When the FCPA was first passed it applied only to US issuers, domestic concerns, citizens, nationals or residents. In the 1998 amendments to the FCPA, the scope of its provisions was extended to *any person*<sup>67</sup> that committed an act in violation of the statute *while on US territory*.<sup>68</sup> The FCPA prohibits persons who are not issuers or domestic concerns ‘while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other *act in furtherance of* an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value’ to commit an FCPA offense. This includes any natural person other than a national of the United States or any corporation,

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62 ‘New York Merchant Bank Pleads Guilty to FCPA Violation: Bank Chairman Pleads Guilty to Failing to Disclose Control of Foreign Bank Account’, *DOJ Press Release*, 6 August 2010, available at <http://www.justice.gov/opa/pr/2010/August/10-crm-909.html>.

63 *United States v. James H. Giffen*, Court Docket Number S4 03 Cr. 404 (WHP) (S.D.N.Y. 2 April 2003).

64 *House Report*, *id.*, Note 3 above, at p. 11.

65 *Id.*

66 *Id.*

67 Emphasis added.

68 Emphasis added. Foreign Corrupt Practices Act of 1977, 15 USC, as amended by the International Anti-Bribery and Fair Competition Act of 1998, (Pub. L No. 105-366, signed on 10 November 1998). This act added a new Sec. 78dd-3 to Title I of the Foreign Corrupt Practices Act of 1977.

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partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof.<sup>69</sup>

There has to be a territorial link for persons other than issuers or domestic concerns to fall within the direct scope of the FCPA. A foreign company or person will not be subject to the FCPA if there is no act *in furtherance* of an FCPA violation that took place while such a person was within the territory of the US.<sup>70</sup> However, the use of a US or the mails or instrumentality need only be incidental to bring a foreign person or company under FCPA jurisdiction. The legislative history of the FCPA shows that the words ‘in furtherance’ used in this provision were deliberately used to broaden the scope of the statute. As originally worded, the FCPA would have required that ‘the mails or instrumentality of interstate commerce be directly used to offer or make the prohibited payment.’<sup>71</sup> The provision was modified to provide that the mails or interstate facility need only be used *in furtherance* of the illicit payment.<sup>72</sup> In a recent case four former ABB employees were accused of offering, approving, and paying bribes to Nigerian officials. They were suspected of using wire transfers in the United States to help secure a \$180 million contract to provide equipment for an oil drilling project in Nigeria’s offshore Bonga Oil Field. The former employees agreed to settle the charges without admitting or denying the allegation.<sup>73</sup> The wire transfers *in furtherance* of illicit payments were sufficient to found FCPA liability.

The 2002 case of *United States v. Syncor Taiwan* also shows how the ‘*in furtherance*’ provision can be used to extend FCPA rules to foreign subsidiaries. The SEC alleged that Syncor International’s foreign subsidiaries in Taiwan, Mexico, Belgium, Luxembourg, and France gave about \$600,000 in bribes to doctors employed by hospitals controlled by foreign authorities so as to use these illicit payments to influence the doctors’ decisions in favor of

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69 15 USC Sec. 78dd-3(f)(1).

70 It must be reiterated that even where there is no territorial nexus a parent company can be held responsible for acts of a foreign subsidiary that occurred with its ‘knowledge’ or authorization.

71 *House Report* id., Note 3 above, at p. 18.

72 *Id.*

73 *SEC v. J. Samson, J. Munro, I. Campbell, and J. Whelan*, Civil Action No. 06 CV 01217(D.D.C.), available at <http://sec.gov/litigation/complaints/2006/comp19754.pdf>; see also *SEC Litigation Release*, No. 19754, 5 July 2006, available at <http://sec.gov/litigation/litreleases/2006/lr19754.htm>; see also the 2005 case of *SEC v. Yaw Osei Amoako*, Civil Action No. 05-4284 (GEB) (D.N.J.), the Regional Director for Africa at ITXC Corp violated the FCPA by arranging for ITXC to make wire transfers from the United States totaling \$166,541.31 to a senior official at the government-owned telephone company Nigerian Telecommunications Limited (‘Nitel’), *SEC Litigation Release* No. 19356, 1 September 2005, available at <http://www.sec.gov/litigation/complaints/comp19356.pdf>.

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business opportunities for Syncor.<sup>74</sup> The SEC alleged that cash payments were found to have been authorized by the Chairman of the Board of Syncor Taiwan while he was traveling in the United States. Using the 1998 amendments, the SEC founded jurisdiction on the new Sec. 78dd-3 of the FCPA. Syncor Taiwan pled guilty to the charge and agreed to pay a \$2 million criminal fine.<sup>75</sup>

The *Alcatel Lucent* case also provides a good example of the effect of committing acts in violation of the FCPA by ‘any person while in the territory of the US.’ Alcatel-Lucent France, S.A., formerly known as Alcatel, S.A., is a French corporation headquartered in Paris, France. Alcatel’s American Depository Receipts (‘ADRs’) were registered with the Commission pursuant to Exchange Act Section 12(b) and traded on the New York Stock Exchange. As such, Alcatel was required to file reports with the Commission under Section 13 of the Exchange Act<sup>76</sup> and was an ‘issuer’ within the meaning of the FCPA.<sup>77</sup>

Alcatel conducted its commercial transactions through its subsidiaries. Alcatel CIT, S.A. was a wholly owned subsidiary of Alcatel, and was incorporated in France.<sup>78</sup> From the 1990s to late 2006 Alcatel pursued its business activities around the world using subsidiaries like Alcatel CIT SA. This subsidiary was responsible for contracting with telecommunications providers, including many telecommunications providers owned by foreign governments. Alcatel CIT and its employees had regular meetings with Alcatel personnel in the US office in Florida. These meetings involved, among other things, discussions about payments to third-party consultants, and who passed on some or all of such payments to foreign officials in exchange for obtaining or retaining business. Alcatel CIT also maintained at least one bank account in the United States through which it paid money to third-party consultants that it knew were going to pass on some or all of that money to foreign officials in exchange for obtaining or retaining business. As such, Alcatel CIT fell directly within the scope of the FCPA as a person *other than an issuer or domestic concern that*

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74 *SEC v. Syncor International Corporation*, Case No. 1:02CV02421 (U.S.D.C., D.D.C.) *SEC Litigation Release* No. 17887, 10 December 2002, available at <http://www.sec.gov/litigation/complaints/comp17887.htm>.

75 *United States v. Syncor Taiwan, Inc.*, No. 02-CR-1244-ALL (C.D. Cal. 5 December, 2002).

76 15 USC Sec. 78m.

77 15 USC Sec. 78dd-l.

78 In 2006 this subsidiary merged with Lucent Technologies in the US and changed its name to Alcatel-Lucent France S.A. After the merger, Alcatel-Lucent shares were traded on the Paris Euronext exchange and as ADRs on the NYSE.

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*engaged in acts in furtherance of an FCPA violation while in the territory of the United States.*<sup>79</sup>

In the recent Siemens case, Siemens AG was held accountable for the acts of Siemens Argentina, Siemens Venezuela and Siemens Bangladesh, all of which were foreign subsidiaries headquartered in other countries. These companies, although organized under the laws of foreign countries, were caught in the FCPA web as a result of meetings in the US, where discussions were held about improper payments, as well as moneys paid via US bank accounts.<sup>80</sup>

Since the FCPA prohibits domestic concerns from engaging *in any acts in furtherance of a bribe*, a US company may be liable for FCPA violations by foreign incorporated subsidiaries where a chain of authorization can be established. Even if the foreign subsidiary itself does not fall within the scope of the FCPA as a result of the absence of a territorial link, the parent company may still be held accountable for improper payments by such a subsidiary where it can be established that the parent company or its employees authorized, directed or controlled the activity in question.<sup>81</sup> The FCPA imposes liability on U.S. companies and their employees for prohibited payments to or through third parties (agents, consultants, sales representatives, or other intermediaries) while ‘knowing’ the payment would be for the purposes of assisting the firm in obtaining or retaining business.<sup>82</sup> This would include a prohibited payment made by a foreign incorporated subsidiary where the necessary ‘knowledge’ can be established.

Knowledge about corrupt payments may be implied in cases where the US company is the decision making center for the foreign company and can be deemed to be the foreign company’s alter ego. In such instances the US Company may be held directly liable for the acts of the subsidiary or foreign company. A case in point is *SEC v. Monsanto Company*.<sup>83</sup> Here, the SEC alleged that from 1997 to 2002, Monsanto inaccurately recorded approximately \$700,000 which were used by two Indonesian entities, owned or controlled by Monsanto, to influence about 140 current and former Indonesian government officials and their family members. These bribes were channeled through a

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79 *United States v. Alcatel-Lucent France, S.A., et al.* Court Docket Number: 10-CR-20906 S.D. FLA., 27 December 2010.

80 See *Securities and Exchange Commission v. Siemens Aktiengesellschaft*, Civil Action No. 08 CV 02167 (D.D.C.).

81 H. Lowell Brown, Parent-Subsidiary Liability under the Foreign Corrupt Practices Act, 1998, 50 Baylor L. Rev. p. 1, at pp. 7-9.

82 15 USC Sec. 78dd-1(a)(3) et seq.

83 *SEC v. Monsanto*, No. 1:05CV00014 (U.S.D.C., D.D.C), available at <http://www.sec.gov/litigation/complaints/comp19023.pdf>. See also SEC Litigation Release No. 19023/ 6 January 2005, available at <http://www.sec.gov/litigation/litreleases/lr19023.htm>.

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Jakarta-based investment consulting firm and were paid to affect the repeal of an environmental impact assessment decree that was adverse to Monsanto's interests. Additional bribery payments were made via a network of Monsanto's Indonesian affiliates. According to the SEC, a senior Monsanto manager told the Indonesian firm employee to 'incentivize' the senior environment official with a \$50,000 cash payment. The fact that a senior US Monsanto manager based in the United States had authorized and directed an Indonesian consulting firm to make an illegal payment to a senior Indonesian ministry official was sufficient to establish FCPA liability. Without admitting or denying the Commission's charges, Monsanto, the parent company, consented to pay a \$500,000 penalty.

Again, companies in a group may fall within the reach of the FCPA where one member of the group falls under the definition of domestic concern. For example, a US domestic concern of a group of companies may open the door to FCPA liability for all members of the group. The *Vetco* case<sup>84</sup> illustrates this point. In 2007 the US brought an action against a UK company and four subsidiaries, only one of which was a US company, for bribing Nigerian customs officials. The US company opened the door to the other subsidiaries within the group. This is instructive as it shows that even the *slightest of contacts* will suffice to drag a group of related subsidiaries within the reach of the FCPA. If the decision making structure of a group of companies lies in a US company, such a company runs the risk of being held liable on the basis of the 'knowing' requirement for the improper acts of any such linked companies.

### 3.3.1.3 Alternative Jurisdiction

Issuers, domestic concerns and any other person while on US territory are prohibited from offering a bribe or other inducement using any instrumentality of state commerce. Interstate activity creates the nexus that triggers the applicability of the FCPA as federal law. The FCPA provides that the term 'interstate commerce' means trade, commerce, transportation, or communication among the several states, or between any foreign country and any state, or between any state and any place or ship outside thereof; this term includes the intrastate use of (a) a telephone or other interstate means of communication, or (b) any other interstate instrumentality.<sup>85</sup> Any contact with the American market by a foreign corporation will suffice as an instrumentality of state commerce that renders the FCPA applicable. Prior to 1998 there was a territorial requirement for FCPA jurisdiction. The issuer, domestic concern, or other person had to have made use of the mails or

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84 *United States v. Vetco Gray Controls et al.*, Case No. 07-cr-004 (S.D. Tex. 5 January 2007).

85 15 USC Sec. 78dd-2(h)(5); Sec. 78dd-3(f)(2)(5).

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instrumentality of interstate commerce for the FCPA to be triggered into application.

However, in 1998, amendments to the FCPA provided an alternative basis for jurisdiction for issuers, and US persons.<sup>86</sup> Issuers and US persons that are operating completely outside the United States and who make no use of any instrumentality of state commerce also fall within the scope of the FCPA. The FCPA states that it is:

‘...unlawful for any [Issuer or United States Person] to corruptly do any act *outside the United States* in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a) of this section for the purposes set forth therein, *irrespective of whether* such [Issuer or United States Person] makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.’<sup>87</sup>

A US person for the purpose of this section is defined as a national of the United States or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any state, territory, possession, or commonwealth of the United States, or any political subdivision thereof.<sup>88</sup>

Thus even where there has been no use of an instrumentality, the FCPA can still apply by virtue of the alternative jurisdiction clause.<sup>89</sup> The FCPA applies to any improper payments made by companies, or US employees companies that are made completely outside the US with no nexus to the United States via the mails or other instrumentality of interstate commerce. There is no requirement for a territorial link.<sup>90</sup> Any US issuer or national involved in international corruption anywhere would be subject to the penalties of the FCPA regardless of the country in which the act took place.<sup>91</sup> The case of

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86 Foreign Corrupt Practices Act of 1977, 15 USC, as amended by the International Anti-Bribery and Fair Competition Act of 1998, (Pub. L 105-366, signed on 10 November 1998). This added a section giving alternative jurisdiction based on nationality to the Title 15 of the USC in Sec. 78dd-1(g) and 78dd-2(i).

87 Emphasis added. 15 USC Sec. 78dd-1(g)(1); Sec. 78dd-2(1)(2).

88 15 USA Sec. 78dd-1(g)(2).

89 15 USA Sec. 78dd-1(g)(1) Sec.78dd-2(1)(1).

90 15 USC Sec. 78dd-1(g); 78dd-2(i).

91 Id.

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*United States v. Giffen*, for example, involved conduct that took place entirely outside the United States.<sup>92</sup>

### 3.3.1.4 Payment to a Foreign Official

The term ‘foreign official’ covers four categories of persons. It applies to: (1) officers and employees of foreign governments or instrumentalities; (2) officers and employees of public international organizations; (3) any person acting in an official capacity either for a foreign government or instrumentality; or (4) for public international organizations.<sup>93</sup> A ‘foreign government’ is a fairly straightforward concept,<sup>94</sup> as is a ‘public international organization.’<sup>95</sup> However, the expression ‘instrumentality’ is less clear. This term is not defined in the FCPA and the position of the US government as reflected in its OECD Self-Evaluation report provides that:

‘the United States has consistently applied to the FCPA to cover bribery of officials of public enterprises. State-owned business enterprises may, in appropriate circumstances, be considered instrumentalities of a foreign government and their officers and employees to be foreign officials.’<sup>96</sup>

The report further adds that there is no ‘red line’ test that has been adopted by the US Government in coming to this result. However, the factors that are taken into consideration are:

‘the foreign state’s own characterization of the enterprise and its employees, *i.e.*, whether it prohibits and prosecutes bribery of the enterprise’s employees

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92 See p. 78 above. *United States v. James H. Giffen*, Court Docket Number S4 03 Cr. 404 (WHP) (S.D.N.Y. 2 April 2003).

93 15 USC Sec. 78dd-1(f)(1)(a); Sec. 78dd-2(h)2(a); Sec. 78dd-3(f)2(a) provide that the term ‘foreign official’ means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

94 Title 18 Chapter 2 Sec. 11 of the USC provides that the term ‘foreign government’ includes any government, faction, or body of insurgents within a country with which the United States is at peace, irrespective of recognition by the United States.

95 15 USC Sec. 78dd-1(f)(1)(b); Sec. 78dd-2(h)2(b); Sec. 78dd-3(f)2(b) provide that for purposes of subpara (A), the term ‘public international organization’ means (i) an organization that has been designated by Executive Order pursuant to Sec. 1 of the International Organizations Immunities Act (22 USC Sec. 288); or (ii) any other international organization that is designated by the President by executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

96 US Response to OECD Questions Concerning Phase I, at Sec. A.1.1.

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as public corruption, the purpose of the enterprise, and the degree of control exercised over the enterprise by the foreign government.<sup>97</sup>

In the recent case of *United States v. Carson*<sup>98</sup>, judicial guidance was given regarding the meaning of the term instrumentality. Stuart Carson was CEO of a US domestic concern that designed and manufactured control valves for use in the nuclear, oil and gas and power generation industries worldwide. The company sold its products to both state-owned and private companies in thirty countries around the world. Stuart Carson designed a company policy (friend-in-camp) as a sales model where employees and agents cultivated special relationships with employees and agents of state and private customers. Corrupt payments were alleged to have been made under this sales model to the sum of approximately \$4.3 million to officers and employees of state-owned companies and \$1.8 million to officers and employees of private companies. Carson, charged with FCPA violations, sought a dismissal of the charges arguing that employees who allegedly received the bribes worked for a state-owned company and therefore did not fall within the scope of the FCPA's definition of a foreign official.

The court dismissed the motion and held that 'the question of whether state-owned companies qualify as instrumentalities under the FCPA is a question of fact.'<sup>99</sup> The court set out several factors that should be taken into consideration in determining whether a business entity constitutes a government instrumentality. These include the foreign state's characterization of the entity and its employees; the foreign state's degree of control over the entity; the purpose of the entity's activities; the entity's obligations and privileges under the foreign state's law, including whether the entity exercises exclusive or controlling power to administer its designated functions; the circumstances

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97 Id.

98 *United States v. Carson et al.*, No. 09-77 (C.D. Cal. 8 April 2009); See also similar challenges in *U.S. v. Noriega et al.*, No. 10-1031 (C.D. Cal. 20 April 2010), where the court found that a state-owned enterprise the Mexican Comisión Federal de Electricidad (CFE) was an instrumentality under the FCPA. More recently in August 2011 Carlos Rodriguez, the executive vice president of a US-based Telecommunications Corporation, was convicted for bribing officials of the state-owned Haiti Telecommunications Corp (Telco). See *United States v. Joel Esquenazi et al.*, court docket number: 09-CR-21010-JEM, which was filed on 4 December 2009 in the S.D. FLA. Subsequently Rodriguez sought a release pending appeal of his 15-year sentence claiming that employees of a state company should not properly be regarded as foreign officials and that the lower court in its instruction to the jury had improperly broadened the reach of the statute. See Brief of the Appellant in *United States v. Joel Esquenazi et al.*, Case: 11-15331 which was filed on 5<sup>th</sup> September 2012 in the S.D. FLA. See also C. Matthews, 'The Big test for the FCPA's Foreign Official Definition?', *Corruption Currents, The Wall Street Journal Blogs*, 3 January 2012, available at <http://blogs.wsj.com/corruption-currents/2012/01/03/the-big-test-for-the-fcpas-foreign-official-definition/>.

99 Order Denying Motion to Dismiss, *United States v. Carson et al.*, No. 09-77, (C.D. Cal. 2009)

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surrounding the entity's creation; and the foreign state's extent of ownership of the entity, including the level of financial support by the state (*e.g.*, subsidies, special tax treatment, and loans).<sup>100</sup> The court further held that entities such as banks and railroads have long been used to carry out governmental objectives, as this added weight to the fact that such entities could be considered government instrumentalities.<sup>101</sup>

### 3.3.1.5 Basis of FCPA Liability

The FCPA makes it unlawful for a person to whom it applied: 'to make use of the mails or any means or instrumentality of interstate commerce *corruptly*,<sup>102</sup> in furtherance of an (1) offer, gift or other inducement directly to a foreign public official, (2) the authorization of such a gift or other inducement or (3) the payment to any person *while knowing*<sup>103</sup> that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official to influence such a public officer for the purpose of acquiring business.<sup>104</sup> As such, the FCPA imposes liability on persons to whom it applies for making or authorizing prohibited payments to or through third parties (agents, consultants, sales representatives, or other intermediaries) while knowing the payment would be for the purposes of assisting the firm in obtaining or retaining business.

The FCPA rules do not define what is meant by the term 'corruptly' but does provide a definition for the standard of liability required under the 'knowing' standard.<sup>105</sup> It is however clear that there is a requirement for intentionality and that the FCPA only applies where the persons to whom it applies intended the consequences of the actions in furtherance of a bribe. The Senate Committee on Banking, Housing and Urban Affairs in their consideration of the FCPA Bill stated that:

[t]he word 'corruptly' is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payer or his client, or to obtain preferential legislation or a favorable regulation. The word 'corruptly' connotes an evil motive or purpose, intent to wrongfully influence the

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100 Id at p. 5.

101 Id pp. 8-10.

102 Emphasis added.

103 Emphasis added.

104 15 USC Sec. 78dd-1(a)(3); 78dd-2(a)(3); 78dd-3(a)(3).

105 See D. Burns, E. Sullivan, 'Navigating the FCPA's Complex Scierter Requirements', *Bloomberg Finance, L.P.* (April 2009), available at <http://www.gibsondunn.com/publications/Documents/Burns-Sullivan-NavigatingTheFCPAComplexScierterReq.pdf>.

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recipient. It does not require that the act be fully consummated, or succeed in producing the desired outcome.’<sup>106</sup>

In *United States v. Liebo*, the United States Eighth Circuit Court of Appeals upheld the instruction of the lower court that ‘corruptly’ meant that:

‘the offer, promise to pay, payment or authorization of payment, must be intended to induce the recipient to misuse his official position or to influence someone else to do so,’ and that ‘an act is “corruptly” done if done voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.’<sup>107</sup>

On the other hand, the FCPA does define the meaning of the term ‘knowing’ and states that:

‘...a person’s state of mind is knowing, with respect to conduct, a circumstance or a result if (i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur. When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.’<sup>108</sup>

It is important to note that the FCPA does not require ‘actual knowledge.’ The standard is much looser than that. Knowledge is established if a person is aware of a ‘high probability’ of the existence of such circumstance. This is a much lower standard of liability and requires a more proactive stance on the part of the corporation. If a corporation is doing business in an area of endemic corruption, such as Nigeria or Kazakhstan, where there is a very high probability of FCPA violations, or in a high risk industries such as arms or mining for example, ‘knowledge’ sufficient to render the parent company liable to the acts of its subsidiaries or agents may be established by the existence of circumstances that indicate the *high probability* of the act of bribery occurring.

The House Conference Report describes the ‘knowing’ standard as covering:

‘...both prohibited actions that are taken with ‘actual knowledge’ of intended results as well as other actions that, while falling short of what the law terms

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106 See *Senate Report*, id., Note 29 above, at p.10.

107 *United States v. Liebo*, 923 F. 2d 1308 (8th Cir. 1991) at 1312.

108 15 USC Sec. 78dd-1(f) (2). Sec. 78dd-2(h) (3). Sec. 78dd-3(f) (3).

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‘positive knowledge,’ nevertheless evidence a conscious disregard or deliberate ignorance of known circumstances that should reasonably alert one to the high probability of violations of the Act.’<sup>109</sup>

The US legislators sought to use this standard to circumvent claims of ignorance by parent or related companies. The report states:

‘...the so called “head-in-the-sand” problem – variously described in the pertinent authorities as “conscious disregard,” “willful blindness” or “deliberate ignorance” – should be covered so that management officials could not take refuge from the act’s prohibition by their unwarranted obliviousness to any action (or inaction), language or other “signaling device” that should reasonably alert them of the “high probability” of an FCPA violation.’<sup>110</sup>

A company can be held liable under the FCPA if it can be established that the corporation should have known about the violations of foreign subsidiaries, agents or joint venture partners or where internal controls are found to have been inadequate to detect material illegality. The *Akzo Nobel* case<sup>111</sup> illustrates how this threshold of imputed knowledge can be met. The SEC alleged that from 2000 to 2003, two of Akzo Nobel’s subsidiaries authorized and made \$279,491 in kickback payments in connection with their sales of humanitarian goods to Iraq under the U.N. Oil for Food Program. These kickbacks were labelled as ‘after-sales service fees.’ The SEC maintained that Akzo ‘knew’ or was ‘reckless in not knowing’ that improper payments were offered or paid, and secondly that Akzo failed to maintain a system of internal controls sufficient to prevent or detect FCPA violations as the company’s accounting for the Oil for Food Program transactions failed to properly record the nature of the company’s kickback payments. As a result Akzo agreed to pay a civil penalty of \$750,000 plus \$2.2 million in disgorgement of profits, including pre-judgment interest.

A company may be deemed to have ‘known’ of the alleged violations on the part of a subsidiary, joint venture or agent, where a director sits on the board or serves as an officer of such a subsidiary joint venture or agency; where the center of decision making rests with a person to whom the FCPA applies; where the decision making process involves a person to whom the FCPA applies. It is important to note that trends in FCPA enforcement suggest that traditional concepts of corporate liability and the firewalls that can be built by corporate structures and level investment holdings are not an impediment to

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109 *House Conference Report*, id., Note 51 above, at p. 920.

110 *Id.*

111 *SEC v. Akzo Nobel*, N.V., Civil Action No. 07-02293 (D.D.C. 20 December 2007).

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DOJ/SEC prosecution. What is key is the ‘authorization of’ or ‘knowing of’ the acts in question.

In summary, a ‘knowing’ standard can be used to link the acts of persons to whom the FCPA applies to foreign companies even where no aspect of the FCPA violation occurred in the United States. This knowing standard can be met where there is an element of supervision by the US company over such a foreign company. The FCPA will also hold a person to whom it applies accountable for any FCPA violations which it can be said to have *authorized* or directed. Such authorization can be implied where the decision making aspects of the transaction in question took place within the structures of parties to whom the FCPA applies.<sup>112</sup>

### 3.3.2 Exceptions to the Application of the FCPA

There are some exceptions to the prohibitions made under the FCPA. These exceptions are very limited in number.

#### 3.3.2.1 Facilitating Payments for Routine Governmental Actions

The FCPA provides an exception for routine governmental action. It provides that the provisions of the FCPA:

‘... shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official, to a foreign official, political party or party official the purpose of which is to expedite or secure the performance of a routine governmental action.’<sup>113</sup>

Such ‘grease’ or ‘facilitating’ payments to expedite or secure non-discretionary routine governmental action by a foreign official do not fall within the category of unlawful payments.

The US legislators were very deliberate in seeking to ensure that payment to which the FCPA provisions applied should be clearly distinguished from

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112 This is a further incentive for the corporation to be able to demonstrate that it has taken all possible measures to prevent the violation from occurring. This is referred to in the Ruggie Report as avoiding complicity. He states that ‘the relationship between complicity and due diligence is clear and compelling: companies can avoid complicity by employing due diligence processes ... not only to their own activities but also to the relationships connected to them.’ J. Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, id., Note 13 above, at p. 21 Para. 81.

113 15 USC Sec. 78dd-1(b); 78dd-2(b); 78dd-3(b).

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facilitating payments. The legislative history notes that by providing for the requirement of intentionality the FCPA applies to payments that are made ‘corruptly’ to distinguish:

‘... payments which cause an official to exercise other than his free will in acting or deciding or influencing an act or decision and those payments which merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action.’<sup>114</sup>

Accordingly, the FCPA provides that the term ‘routine governmental action’ does not include any decision by a foreign official whether, or on what terms to award new business to, or to continue business with, a particular party, or any action taken by a foreign official involved in the decision-making process.

The key factor in determining whether or not a payment is a facilitating payment within the meaning of the FCPA is the absence of the exercise of discretion with regard to obtaining or retaining business. US legislators intended that any ‘gratuity’ paid to a customs official to ‘speed up the processing of customs documents,’ payments to ‘secure permit or licenses,’ or duties that are essentially ministerial or clerical in nature and which must be ‘performed in any event,’ are not payments to which the FCPA applies.<sup>115</sup> The FCPA details payments that will fall within the exception as follows:

‘The term routine governmental action means only an action which is ordinarily and commonly performed by a foreign official in (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (ii) processing governmental papers, such as visas and work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature.’<sup>116</sup>

The FCPA focuses on bribes that are intended to influence the outcome of a business transaction. What matters is not the size of the bribe but whether the bribe is given to influence the decision making process with respect to a business opportunity. This interpretation is consistent to a certain degree with the distinction between petty and grand corruption.<sup>117</sup> In general terms it can

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114 *House Report*, id., Note 3 above, at p. 8.

115 *Id.*

116 15 USC Sec. 78dd-(f)(3)(A); 78dd-2(h)(4)(A); 78dd-3(f)(4)(A).

117 Petty corruption is of an administrative or bureaucratic nature, while grand corruption affects higher levels of decision making and is also referred to as political corruption. See V. Tanzi, *Corruption Around the World: Causes, Consequences, Scope, and Cures*, in G. Abed, S. Gupta

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therefore be said that the FCPA rules apply to grand as opposed to petty corruption.

Recent opinion procedures released by the US Department of Justice provide helpful pointers as to what activity will fall within the purview of routine governmental activity. In FCPA Opinion Release 07-02, for example, the Department issued an opinion in response to a query from a private insurance company in the United States regarding domestic expenses for a trip by six officials from an Asian government for an educational program at the company's U.S. headquarters. The company represented that the purpose of the visit would be to familiarize the officials with the operation of a U.S. insurance company; that it would not select the officials who would participate; that it would pay costs directly to the providers; and that it had no non-routine business pending before the agency that employs the officials.

The DOJ in its Opinion stated that, based on all the facts and circumstances, as represented by the Requestor, and consistent with prior opinions, the expenses contemplated were reasonable under the circumstances and directly related to 'the promotion, demonstration, or explanation of [the Requestor's] products or services.' Therefore, the Department did not intend to take any enforcement action with respect to the planned program and the proposed payments described.<sup>118</sup> It is important to note that in instances where the Department indicated that it 'did not intend to take any enforcement,' there was no non-routine business pending before the relevant government agency, or the US company did not conduct operations in the foreign official's country.<sup>119</sup>

### 3.3.2.2 Affirmative Defenses

The FCPA provides two more exceptions to the operation of the FCPA in the form of so-called affirmative defenses. The first is the defense that the payment was lawful under the laws of the country where it was made. FCPA provides that:

'[I]t shall be an affirmative defense to actions under subsection (a) or (g) of this section that (1) the payment, gift, offer, or promise of anything of value

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(Eds.), *Governance, Corruption & Economic Performance*, id., Note 6 above at pp. 24-26. However, see Salbu who cautions that 'grand' and 'petty' are not respectively synonymous with payments prohibited by the FCPA because small payments could also be made for non-routine dispensations. S. Salbu, 'A delicate balance: legislation, institutional change, and transnational bribery', *Cornell International Law Journal*, Vol. 33, 2000, pp. 657-665.

118 DOJ Opinion Procedure Release, 30 June 2011.

119 See US Department of Justice Opinion Releases Fraud Section (FCPA0) 2011 Opinion procedure Release 11-01, 07-01 and 07-02, available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/>.

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that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country.<sup>120</sup>

For the payment to be considered as lawful there must be a positive law that establishes this. The legislative history makes it clear that '...the absence of written laws in a foreign official's country would not by itself be sufficient to satisfy this defense.'<sup>121</sup>

The FCPA also allows for reasonable 'promotional' expenses made in the process of conducting international business.<sup>122</sup> It states that it is:

'an affirmative defense to actions under subsection (a) or (g) of this section that or (2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to (A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof.'<sup>123</sup>

To make use of this defense, expenses must truly be 'reasonable.' Excessive travel and lodging expenses, for example, may trigger an FCPA violation. In *United States v. Metcalf & Eddy Inc.*, a US domestic concern was found to have paid costs, travel, lodging and other expenses as well as paid an inflated per diem allowance covering an Egyptian government official to influence the Government of Egypt to support contracts and contract extensions to the benefit of M&E. A consent agreement was entered with M&E agreeing to pay a fine of \$400,000 plus an additional \$50,000 as costs for the investigation.<sup>124</sup>

Similarly in the *Schnitzler Steel* case<sup>125</sup>, the company spent approximately \$138,000 on gifts and entertainment for managers of customers over a period of five years. Pens, perfume, and jewellery were provided as adornments to some of the payments to managers, and while the value of those gifts was

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120 15 USC Sections 78dd-1(c)(1); 78dd-2(c)(1); 78 dd-3(c)(1).

121 *House Conference Report*, id., Note 51 above, at p. 922.

122 The *House Conference Report* states in respect of reasonable expenditure that payment of reasonable and bona fide expenses associated with promotional activities would also be a defense to prosecution, and explicitly includes 'execution' of a contract as well as 'performance.' If a payment or gift is corruptly made, in return for an official act or omission, then it cannot be a bona fide, good-faith payment, and this defense would not be available. See *House Conference Report*, p. 922.

123 15 USC Sec. 78dd-1(c)(2); 78dd-2(c)(2); 78 dd-3(c)(2).

124 See *United States v. Metcalf & Eddy, Inc.* (D. Mass. 14 December 1999), available at [http://www.usdoj.gov/criminal/fraud/fcpa/Appendices/Appendix%20E\(i\).pdf](http://www.usdoj.gov/criminal/fraud/fcpa/Appendices/Appendix%20E(i).pdf).

125 *United States v. SSI-Korea*, Court Docket Number: 06-CR-398 (D. Or. October 2006); see also DOJ 'Deferred Prosecution Agreement with Schnitzer Steel Industries, Inc.' (September 25, 2006).

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generally less than \$350, ‘... more substantial gifts, ranging in value from \$400 to \$8,000, were also given.’ For example, the company allegedly gave officials access to the company’s golf club and corporate condominium, \$10,000 in gift certificates, and a \$2,400 luxury watch. This was all held to be in violation of the FCPA.

### 3.3.3 Books and Records Provisions

The books and records provisions are found in Sec. 78m of Title 15 Chapter 2 of the US Code.<sup>126</sup> These provisions provide that every issuer which has a class of securities registered on a US stock exchange is required to file reports pursuant to such registration. Issuers must accurately and fairly reflect how company assets are being utilized so as to enhance the confidence of the general public and in particular investors.<sup>127</sup> As such, every issuer is required to file information, documents and annual reports as the SEC Commission prescribes to provide proper protection for investors and to ensure fair dealings in their registered securities.<sup>128</sup> The US Congress believed that the imposition in the FCPA of requirements on issuers (1) to maintain books and records which accurately and fairly reflected the transactions of the corporation as well as (2) to design an adequate system of internal controls to assure that assets were used for proper corporate purposes, would significantly influence the prevention of the use of corporate assets for corrupt purposes.<sup>129</sup>

#### 3.3.3.1 Adequate System of Internal Controls

The necessity for effective internal controls in the fight against corruption is emphasized in the Senate Report. The Senate noted that:

‘[A] fundamental aspect of management’s stewardship responsibility is to provide shareholders with reasonable assurances that the business is adequately controlled. Additionally, management has a responsibility to furnish shareholders and potential investors with reliable financial information on a timely basis. An adequate system of internal accounting controls is necessary to management’s discharge of these obligations.’<sup>130</sup>

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126 The FCPA provisions amend Sec. 13 (Periodical and Other Reports) of the Securities Exchange Act of 1934 by adding to Para. 13 (b) on the Form of report, books, records and internal accounting; directives, Paras. 13(b)(2)-(5).

127 *Senate Report*, id., Note 29 above, at p. 7.

128 15 USC Sec. 78m(a).

129 *Senate Report*, id., Note 29 above, at p. 7.

130 Id.

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To meet the obligation for effective internal controls, issuers are mandated to:

- (a) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer;
- (b) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that
  - (i) transactions are executed in accordance with management's general or specific authorization;
  - (ii) transactions are recorded as necessary;
    - (1) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements; and
    - (II) to maintain accountability for assets;
  - (iii) access to assets is permitted only in accordance with management's general or specific authorization; and
  - (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.<sup>131</sup>

The terms 'reasonable assurances' and 'reasonable detail' are defined as meaning 'such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.'<sup>132</sup>

### 3.3.3.2 Prohibition against False Accounting

In addition to a requirement for effective internal control, the FCPA contains a direct prohibition against the making of false and misleading statement designed to cover up corrupt activity. The FCPA provides that '[N]o person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account.'<sup>133</sup> The legislative history shows that:

'the term "knowingly" connotes a "conscious undertaking." Thus these paragraphs proscribe and make unlawful conduct which is rooted in a conscious undertaking to falsify records or mislead auditors through a statement or conscious omission of material facts and not behavior that is merely negligent.'<sup>134</sup>

The Senate committee explained that the inclusion of the 'knowingly' standard is appropriate because of the danger inherent in matters relating to financial recordkeeping that inadvertent misstatements or minor discrepancies arising

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131 15 USC Sec. 78m(b)(2).

132 15 USC Sec. 78m(b)(7).

133 15 USC Sec. 78m(b)(5).

134 *Senate Report*, id., Note 29 above, at p. 7.

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from an unwitting error in judgment might be deemed actionable. However, the committee was very clear that:

‘the use of the term knowing is not intended to provide a defense for those who shield themselves from the facts. The knowledge required is that the defendant be aware that he is committing the act which is false not that he knows that his conduct is illegal.’<sup>135</sup>

As such, where the SEC can prove that there has been a failure to maintain effective internal controls or that any other of the obligations imposed by the accounting books and record provisions have not been met by a corporation, this will suffice to establish FCPA liability.<sup>136</sup>

This imputes a standard of ‘knowing’ on parent companies for the actions of their subsidiaries. As the report points out, the FCPA does not on the face of it reach those corrupt overseas payments where, for example, payments are made by foreign nationals acting solely on behalf of foreign subsidiaries and there is no nexus with US interstate commerce and where the issuer, reporting company or domestic concern has no knowledge of the payment.<sup>137</sup> However, looking the other way will not serve as a defense for a US company with regard to bribes made by a foreign subsidiary because of the requirement that companies must devise and maintain adequate accounting controls. ‘Under the accounting section, no off-the-books accounting fund could be lawfully maintained, either by a U.S. parent or by a foreign subsidiary, and no improper payment could be lawfully disguised.’<sup>138</sup>

To implement the requirements of the FCPA, the SEC has adopted two regulations under the Code of Federal Regulations (CFR).<sup>139</sup> Rule 13b2-1 deals with the ‘Falsification of Accounting Records’ and provides that ‘No person shall directly or indirectly, falsify or cause to be falsified, any book, record or account subject to Sec. 13(b) (2) (A) of the Securities Exchange Act.’<sup>140</sup> The responsibility is placed on the issuer to ensure that the system of internal and accounting controls is sufficiently robust to provide the assurance that

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135 Id.

136 The *Senate Report* states ‘... in this limited instance, in order to prove that falsification of corporate accounting records or deception of auditors is ‘knowingly’ committed, the Commission will be required to establish this element in actions arising under new Paras. 13(b) (3) and 13(b)(4).’ See *Senate Report*, id., Note 29 above, at p. 9.

137 Id., at p. 11.

138 Id.

139 Code of Federal Regulations (General Rules and Regulations promulgated under the Securities Act of 1933). (Hereinafter CFR).

140 17 CFR 240.13b2-1 is codified as 15 USC Sec. 78m(b)(2)(i).

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transactions that are undertaken by the issuer are executed in accordance with the general or specific authorization of management.<sup>141</sup>

The second rule 13b2-2(a) deals with ‘Representations and Conduct in Connection with the Preparation of Required Reports and Documents.’ It prohibits the making of misleading or false statements to the company’s internal auditors or accountants and provides:

‘No director or officer of an issuer shall, directly or indirectly: (1) Make or cause to be made a materially false or misleading statement to an accountant in connection with; or (2) Omit to state, or cause another person to omit to state, any material fact necessary in order to make statements made, in light of the circumstances under which such statements were made, not misleading, to an accountant in connection with: (i) Any audit, review or examination of the financial statements of the issuer required to be made pursuant to this subpart; or (ii) The preparation or filing of any document or report required to be filed with the Commission pursuant to this subpart or otherwise.’<sup>142</sup>

Rule 13b2-2(b) prohibits officers, directors or any person acting under their direction from directly or indirectly taking any action ‘to coerce, manipulate, mislead, or fraudulently influence any *independent public or certified public accountant* engaged in the performance of an audit or review of the financial statements of that issuer that are required to be filed with the Commission pursuant to this subpart or otherwise if that person knew or should have known that such action, if successful, could result in rendering the issuer’s financial statements materially misleading.’<sup>143</sup>

The FCPA holds parent public companies responsible for ensuring that the accounting books and records of foreign subsidiaries comply with FCPA requirements.<sup>144</sup> An example is the 2003 case of *SEC v. Schering-Plough Corporation*,<sup>145</sup> where the corporation was found liable for violations of the FCPA books and records and internal controls provisions resulting from the actions of its Polish subsidiary. The SEC alleged that the internal controls of the parent company had been inadequate to prevent or detect the payment of donations to a charity headed by a government official. Those donations were allegedly made to induce the government official to purchase Schering-Plough pharmaceutical products for his constituency’s health fund. Schering-Plough

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141 Id.

142 17 CFR 240.13b2-2(a).

143 17 CFR 240.13b2-2(b).

144 15 USC Sec. 78m(b)(2).

145 See *SEC v. Schering-Plough Corporation*, Case No. 1:04CV00945 (D.D.C. 9 June 2004), available at <http://www.sec.gov/litigation/complaints/comp18330.htm>.

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did not admit or deny its liability but agreed to pay a \$500,000 civil penalty in settling the claim.<sup>146</sup>

The legislative history does show that Congress was sensitive to the limitations of a minority owner to a complete monitoring of the books of a subsidiary. As such it provides that ‘where an issuer ... holds 50 per cent or less of the voting power with respect to a domestic or foreign firm,’ the requirement is that ‘the issuer proceed in *good faith* to use its influence, to the *extent reasonable* under the issuer’s circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph.’<sup>147</sup>

### 3.4 FCPA Penalties

#### 3.4.1 Criminal Penalties for Anti-Bribery Provisions

The FCPA provides that any issuer or domestic concern that is not a natural person or foreign entity that violates a provision of the FCPA shall be fined not more than \$2,000,000.<sup>148</sup> In addition to this, the general sentencing provisions applicable under criminal procedure may apply to increase the levels of punishment prescribed under the FCPA. The USC Alternative Fine Provisions provide that in general ‘an individual who has been found guilty of an offense may be fined not more than the greatest of (1) the amount specified in the law setting forth the offense; or (2) the applicable amount under subsection (d) of this section....’<sup>149</sup> Subsection (d) provides for an alternative fine based on gain or loss. It provides:

‘[I]f any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.’<sup>150</sup>

The FCPA does not exempt its provisions from the Alternative Fine provisions<sup>151</sup> and as such the FCPA penalty for an organization or (if greater)

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146 See U.S. *SEC Litigation Release* No. 18740 (9 June 2004).

147 15 USC Sec. 78m(b)(6).

148 15 USC Sections 78dd-2(g)(1); Sec. 78dd-3(e); Sec. 78ff(c)(1).

149 18 USC Sec. 3571(b).

150 18 USC Sec. 3571(d).

151 18 USC Sec. 3571(e) provides a ‘Special Rule for Lower Fine Specified in Substantive Provision,’ and states that:

‘If a law setting forth an offense specifies no fine or a fine that is lower than the fine otherwise applicable under this section and such law, by specific reference, exempts

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twice the gross pecuniary gain to the defendant or the gross loss suffered by a person other than the defendant (*i.e.* the victim of the crime) may apply in the sentencing of FCPA violations.

Any individual officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of entities that are subject to the FCPA provisions who commit an FCPA violation can be fined up to \$100,000 or face imprisonment for five years or both.<sup>152</sup> Under the Alternative Fine Provisions, this sum may be increased to the higher penalty of \$250,000 for an individual or (if greater) twice the gross pecuniary gain to the defendant or the gross loss suffered by a person other than the defendant (*i.e.* the victim of the crime).<sup>153</sup>

### 3.4.2 Civil Penalties for Anti-Bribery Provisions

Issuers, domestic concerns that are not natural persons and foreign entities subject to the FCPA are also subject to a civil penalty of \$10,000 dollars in an action brought by the Attorney General in the case of non-issuers and by the SEC in the case of issuers.<sup>154</sup> However, other civil sanctions are applicable to persons that violate FCPA provisions. These include prohibitions from working, serving on the board or as a consultant, or being involved in any way with a defense contract;<sup>155</sup> debarment from government contracting;<sup>156</sup> ineligibility for government programs such as the Commodity Credit Corporation Facility Guarantee Program<sup>157</sup> and the assistance provided under the Overseas Private Investment Corporation.<sup>158</sup> Any individual officer,

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the offense from the applicability of the fine otherwise applicable under this section, the defendant may not be fined more than the amount specified in the law setting forth the offense.’

152 15 USC Sections 78dd-2(g)(2); Sec. 78dd-3(e)(2); Sec. 78ff(c).

153 18 USC Sec. 3571.

154 15 USC Sections 78u(c); 78dd-2(g); 78dd-3(e); 78ff(c).

155 10 USC Sec. 2408 regarding defense procurement contracts.

156 48 CFR Subpart 9.4 deals with the Debarment, Suspension and Ineligibility of contractors regarding government contracts. Rule 9.405 provides that:

‘Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head determines that there is a compelling reason for such action ... Contractors debarred, suspended, or proposed for debarment are also excluded from conducting business with the Government as agents or representatives of other contractors.’

157 7 CFR Subpart C, the Commodity Credit Corporation Facility Guarantee Program, provides government guarantees for opportunities or projects that improve the handling, marketing, processing, storage, or distribution of imported agricultural commodities or products. Sec. 1493.270 dealing with Certifications provides that to qualify it must be shown that ‘...[T]here have not been and are no arrangements for any payments in violation of the Foreign Corrupt Practices Act of 1977, as amended, or other U.S. Laws ...’

158 Sec. 237(l) of the Foreign Assistance Act of 1961, General Provisions Relating to Insurance Guaranty, and Financing Program provides in Sec. 237(l) that:

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director, employee, or agent of a domestic concern, or stockholder acting on behalf of entities that are subject to the FCPA provisions who commit an FCPA violation can be fined and in addition be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Attorney General in the case of non-issuers and by the SEC in the case of issuers. Whenever a fine is imposed on any officer, director, employee, agent, or stockholder of a domestic concern, this fine may not be paid, directly or indirectly, by such domestic concern.<sup>159</sup>

### 3.4.3 Criminal Penalties for Books and Records Provisions

Any person who willfully violates the books and records provisions or who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed, or any statements that are false or misleading with respect to any material fact, shall upon conviction be fined of up to \$5,000,000, or imprisoned not more than 20 years, or both.<sup>160</sup> If the person willfully making false and misleading statements is not a natural person, a fine not exceeding \$25,000,000 may be imposed.<sup>161</sup> Again under the Alternative Fine provisions the defendant may also be fined not more than the greater of twice the gross pecuniary gain or twice the gross pecuniary loss resulting from the offense.<sup>162</sup>

### 3.4.4 Civil Penalties for Books and Records Provisions

The SEC may also seek monetary penalties for violations of the books and records provisions. The Commission may bring an action in a United States district court to seek a civil penalty, which the court shall have jurisdiction to impose, to be paid by the person who committed the violation. For each violation, the amount of the penalty shall not exceed the greater of (I) \$5,000 for a natural person or \$50,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation.<sup>163</sup> If the violation involves fraud, deceit, manipulation, or deliberate or reckless disregard of a

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‘...No payment may be made under any insurance or which is issued under this title on or after the date of enactment of this subsection for any loss occurring with respect to a project, if the preponderant cause of such loss was an act by the investor seeking payment under this title, by a person possessing majority ownership and control of the investor at the time of the act, or by any agent of such investor or controlling person, and a court of the United States has entered a final judgment that such act constituted a violation under the Foreign Corrupt Practices Act of 1977.’

159 15 USC Sections 78dd-2(g)(3); Sec. 78dd-3(e)(3).

160 Sec. 78ff(a).

161 Id.

162 15 USC Sec. 3571.

163 15 USC Sec. 78u(d)(3)(B)(i).

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regulatory requirement, the amount of the penalty for each such violation shall not exceed the greater of (I) \$50,000 for a natural person or \$250,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation.<sup>164</sup> If the violation described involves fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, and directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons, the penalty for each such violation shall not exceed the greater of (I) \$100,000 for a natural person or \$500,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation.<sup>165</sup>

### 3.4.5 SEC Powers of Subpoena and Injunction

The SEC has civil subpoena authority with respect to any books and records investigations. The Commission or any officer designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any state at any designated place of hearing.<sup>166</sup>

The SEC also has civil injunction powers. Whenever it appears to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any books or records provisions it may in its discretion bring an action in a US District Court for a permanent or temporary injunction or restraining order.<sup>167</sup>

### 3.5 FCPA Guidance and Opinions by the Attorney General

The FCPA required that within six months of 23 August 23 1988, the Attorney General was first to consult with major stakeholders such as the Securities and Exchange Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, the Secretary of the Treasury, and all interested persons through public notice and comment procedures, and afterwards to determine to what extent compliance with the FCPA would be enhanced and the business community would be assisted by further clarification of guidelines about how to comply with the FCPA. These

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164 15 USC Sec. 78u(d)(3)(B)(ii).

165 15 USC Sec. 78u(d)(3)(B)(iii).

166 15 USC Sec. 78u(b).

167 15 USC Sec. 78u(d).

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guidelines were to describe what specific types of conduct associated with common types of export sales arrangements and business contracts, would be in compliance with the FCPA and, very importantly, what precautionary procedures domestic concerns may use on a voluntary basis to make their activities FCPA compliant.<sup>168</sup> The DOJ ultimately did not issue any guidelines as required under the FCPA.<sup>169</sup>

The FCPA also required that the Attorney General establish a procedure to provide issuers and domestic concerns responses to specific inquiries concerning whether or not specific activities complied with the requirements of the FCPA. An Opinion Procedure was established by the Department of Justice to ‘... enable issuers and domestic concerns to obtain an opinion of the Attorney General as to whether certain specified, prospective – not hypothetical – conduct conforms to the Department’s present enforcement policy regarding the anti-bribery provisions of the Foreign Corrupt Practices Act of 1977.’<sup>170</sup> Within 30 days of receiving a request, the Attorney General provides an opinion that states whether or not the prospective conduct would for the purposes of the DOJ’s enforcement policy violate the FCPA.<sup>171</sup> A rebuttable presumption that conduct for which the Attorney General has issued an opinion is in conformity with the FCPA is created by such an opinion.<sup>172</sup>

### 3.6 Enforcement of the FCPA

The challenge facing the US government in seeking to fight foreign bribery was not underestimated. As a member of Congress puts it:

‘... the legislation will be extremely difficult, if not impossible, to enforce. Payments falling within the scope of the legislation would include payments made on foreign soil to foreign officials and most of such payments certainly require the active cooperation of foreign individuals and governments. Without such cooperation, the difficulties of obtaining witnesses and evidence

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168 15 USCA Sections 78dd-1(d), 78dd-2(e).

169 The department of Justice issued a statement to the effect that:  
‘After consideration of the comments received, and after consultation with the appropriate agencies, the Attorney General has determined that no guidelines are necessary ... [C]ompliance with the [anti-bribery provisions] would not be enhanced nor would the business community be assisted by further clarification of these provisions through the issuance of guidelines.’

170 See Department of Justice, Anti-Bribery Provisions, 55 Fed. Reg. 28694 (12 July 1990).  
57 Fed. Reg. 39600 (Order No. 1620-92, 57 FR 39600, 1 September 1992) Foreign Corrupt Practices Act Opinion Procedure.

171 Id., 80.8.

172 Id., 80.10.

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to successfully investigate and prosecute the case would be insurmountable.<sup>173</sup>

A two-pronged approach was adopted by the US Congress for the enforcement of the FCPA. On the one hand the Department of Justice operates as the traditional prosecutor of crimes against the public interest and, on the other hand, the Securities and Exchange Commission is responsible for maintaining standards of transparency and information on the part of listed corporations.<sup>174</sup> By integrating the strengths of the two institutions, the FCPA has been able to provide a ‘unified approach’ that allows the requirements for ‘accurate accounting by corporations to be part of a statutory policy that enables an effective approach toward corporate bribery.’<sup>175</sup> The Senate Report emphasizes the importance of SEC involvement in enforcement, stating that:

‘The SEC has been the principal agency of the Government taking the lead in the investigation of foreign bribery. This is as it should be for the bribery of foreign officials often violates our securities laws to the extent the payment is not disclosed to investors. The SEC has thus developed considerable expertise in investigation [sic] corrupt overseas payments. This same expertise can be put to work in investigating potential violations of the anti-bribery provisions of this legislation.’<sup>176</sup>

Apart from the expertise the SEC has developed, the Senate Committee noted that a unified approach also reduces the investigative costs involved in fighting

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173 The *House Report* quotes the reservation of the Secretary of the Treasury Blumenthal who stated:

‘I have always felt a criminal statute such as this one will not be easy to enforce, particularly because it does involve acts that take place in other countries, the whole question of extra territoriality and gets you into questions of availability of witnesses, gets you into the question of acts taken in other jurisdictions in which the laws are different ... we must not underestimate the difficulties of enforcement that in any case will result from this kind of legislation.’

See Minority Views to H.R. 3815, Unlawful Corporate Payments Act, *House Report*, id., Note 3 above, at p. 19.

174 A Letter from the Department of Justice dated 20 April 1997 to the Hon. Harley O. Staggers, Chairman, Interstate and Foreign Commerce Committee, House of Representatives, Washington D.C., *House Report*, id., Note 3 above, at pp. 17-18, states:

‘The Department fully recognizes the expertise developed by the Securities and Exchange Commission over the past several years in the area of illicit foreign payments and believes they must play a vital role in any future attempt to deter and eradicate once and for all bribery of foreign officials by American issuers. Through their voluntary disclosure program they have performed a vital public service in exposing the pervasive and apparently longstanding practice of some businesses to engage in such illicit practices. Their proposed Rules governing corporate record keeping, if promulgated, should further thwart attempts by issuers to conceal such payments and will presumably result in many fertile investigative leads.’

175 *Senate Report*, id., Note 29 above. at p. 7.

176 *Id.*, at p. 11.

corruption by using investigative capacity already developed by the SEC and not duplicating it in the Justice Department.<sup>177</sup>

### **3.7 Effect of Other US Laws and Provisions**

There are other US Laws and provisions that impact the enforcement of the FCPA. These have contributed to the increase in anti-bribery prosecution of both US and non-US companies by making it easier to find evidence of corruption, and, secondly, by creating a big incentive for companies to self-disclose. The combined effect of these laws provides a carrot that encourages companies to co-operate with the DOJ and SEC, in the understanding that this co-operation may be rewarded with an exercise of prosecutorial discretion that may favor a company. This inspires companies to self-police and self-report incidences of corruption. It also acts as a big incentive for companies to set up effective compliance and ethics programs, robust internal controls, good training programs, anti-corruption policy and company codes, and involves all levels of company management and in particular the highest levels.

The criteria that lead to an exercise of discretion in the company's favour with regard to cases of corruption that violate the FCPA include the following: Did the company share the results of its review, as well as all relevant documentation?; Did the company disclose information that was not requested and otherwise might not have been discovered?; Did the company produce the details of its internal investigation, including notes and transcripts of interviews?; Did the company decline to invoke the attorney-client privilege, work product protection or other privileges or protections with respect to any facts uncovered in the investigation? Did the company have in place an adequate compliance program? Did the company take effective remedial actions? The extent of disclosure is quite extensive and probably comparable to what state investigators would have uncovered with much more difficulty.

The carrot that makes this option attractive to companies is the opportunity to avoid a criminal prosecution and the possibility of debarment from government contracting, the management of its public image by the positive message such actions send to the public of a responsible company that is seeking to repair damage done by errant employees, as well as the possibility of a negotiated settlement with the authorities. The primary US laws that encourage such public-private partnering in the implementation of the FCPA are the Sarbanes-Oxley Act, Memos of US attorney Generals and the Federal Sentencing Guidelines discussed below.

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177 Id.

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The *Sarbanes-Oxley Act of 2002*<sup>178</sup> requires companies to establish effective internal controls and ensure that their accounts and financial statements accurately reflect the current financial status of the company. The onus is placed directly on chief executive (CEO) and chief financial officers (CFO) as well as company auditors to certify the accuracy of financial reports, including an annual statement regarding the status of internal company controls. The financial statement must identify any ‘material weaknesses’ that affects the internal controls (including findings of suspicious and illegal transactions) and must do so promptly. Severe criminal penalties are imposed on CEO’s and CFO’s of companies that render false statements in the form of fines of up to \$5 million and up to twenty years in prison. Furthermore, the personal liability of the CEO and CFO makes it important that any suspicious transactions are quickly investigated and disclosed.<sup>179</sup>

The Department of Justice (DOJ) *Thompson Memo on Principles of Federal Prosecution of Business Organizations, 20 January 2003*. In this memo the DOJ advises prosecutors to take the following factors into consideration when deciding on whether and how to prosecute companies for FCPA violations. These factors include: the corporation’s timely and voluntary disclosure of wrongdoing; its willingness to co-operate in the investigation of its agents; the waiver, where necessary, of corporate attorney-client and work-product protection; the existence and adequacy of the corporation’s compliance program; the corporation’s remedial actions, including any efforts (i) to implement an effective corporate compliance program or to improve an existing one, (ii) to replace responsible management, (iii) to discipline or terminate wrongdoers, (iv) to pay restitution, and (v) to co-operate with the relevant government agencies. The Thompson Memo makes it clear that under certain circumstances, companies may be able to avoid prosecution altogether.<sup>180</sup>

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178 The Public Company Accounting Reform and Investor Protection Act, Pub.L. 107-204, 116 Stat. 745, enacted July 29, 2002.

179 15 USC Sec. 7241 (civil provision) 18 USC Sec. 1350 (criminal provision).

180 See [http://www.justice.gov/dag/cftf/corporate\\_guidelines.htm](http://www.justice.gov/dag/cftf/corporate_guidelines.htm). There have been several Guidance Memos issued by Attorney Generals regarding the exercise of prosecutorial discretion in determining when and how to prosecute FCPA violations. These include the Holder Memo (1999) – Federal Prosecution of Corporations by Deputy Attorney General Eric Holder JR, [http://federalevidence.com/pdf/Corp\\_Prosec/Holder\\_Memo\\_6\\_16\\_99.pdf](http://federalevvidence.com/pdf/Corp_Prosec/Holder_Memo_6_16_99.pdf); The Thompson Memo (2003) – Principles of Federal Prosecution of Business Organizations – by Deputy Attorney General Larry D. Thompson; The McNulty Memo (2006) – Principles of Federal Prosecution of Business Organizations – by Deputy Attorney General Paul J. McNulty, [www.justice.gov/dag/speeches/2006/mcnulty\\_memo.pdf](http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf); and the Filip Memo (2008) – Principles of Federal Prosecution of Business Organizations – by Deputy Attorney General Mark Filip, [www.justice.gov/opa/documents/corp-charging-guidelines.pdf](http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf).

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The Securities and Exchange Commission's (SEC) *Report of Investigation Pursuant to Sec. 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, 23 October 2001. Under Sec .21 of the Securities Exchange Act of 1934 the SEC has a discretion whether or not to investigate whether a person has violated the provisions of the Act. The factors that the SEC will take into consideration in making this determination are listed in the afore-mentioned Report where the SEC decided not to take enforcement action against a parent company, the Seaboard Corporation, for accounting violations by one of its divisions. The report lists the many factors the SEC

‘will consider in determining whether, and how much, to credit self-policing, self-reporting, remediation and cooperation - from the extraordinary step of taking no enforcement action to bringing reduced charges, seeking lighter sanctions, or including mitigating language in documents we use to announce and resolve enforcement actions.’

A company that co-operates fully with the investigation could in fact have no enforcement charges brought against it.

The *Federal Sentencing Guidelines for Organizations*, issued by the U.S. Sentencing Commission and applicable to criminal violations of all federal statutes such as the FCPA, require federal courts handing down criminal sanctions to take into account the existence or absence of effective corporate compliance programs. The presence of an effective compliance program can significantly reduce a corporation's sentence, in some cases by as much as 95%, while the absence of such a program can increase the sentence. These guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program.

The Sentencing Guidelines set out minimum criteria for a compliance program to be deemed effective: (1) Compliance standards and procedures must be established to deter crime; (2) High-level personnel must be involved in oversight; (3) Substantial discretionary authority must be carefully delegated; (4) Compliance standards and procedures must be communicated to employees; (5) Steps must be taken to achieve compliance in establishment of monitoring and auditing systems and of reporting systems with protective safeguards; (6) Standards must be consistently enforced; (7) Any violations

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require appropriate responses, which may include modification of compliance standards and procedures and other preventive measures.<sup>181</sup>

### 3.8 Loopholes in the FCPA

The prohibition under the FCPA extends only to corrupt payments to a foreign official, a foreign political party or party official, or any candidate for foreign political office. A 'foreign official' means any officer or employee of a foreign government or any department or agency, or any person acting in an official capacity. Wells and Ahmed show in recent research that US, European and Japanese companies have devised sophisticated insider partnerships with relations and friends of developing country leaders with current-payoff-and-deferred-gift structures that give in return for no capital investment by such persons an equity position that results in a dividend flow.<sup>182</sup> Such arrangements technically do not infringe FCPA provisions, which apply only to gifts to foreign officials and do not mention friends, business associates, or relatives of such persons.

### 3.9 Encouraging a Public-Private Partnership

The effect of the FCPA provisions along with the aforementioned laws and initiative that work alongside it is the creation of a unified system of enforcement for the FCPA, which encourages a private-public partnership between the government agencies responsible for implementing the FCPA and the business corporations which it monitors. This is a logical strategy because the government does not have effective access to the internal records of complex multi-national corporations, while corporations are motivated to voluntarily co-operate with the authorities by the promise of reduced sanction. It is a marriage of convenience for all concerned and is proving to be a pragmatic and realistic strategy. Bribery occurs in the shadows and is difficult to expose and prosecute.<sup>183</sup>

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181 See [www.ussc.gov/guidelines/2010\\_guidelines/Manual.../Chapter\\_8.htm](http://www.ussc.gov/guidelines/2010_guidelines/Manual.../Chapter_8.htm).

182 See L. Wells, R. Ahmed, *Making Foreign Investment Safe: Property Rights and National Sovereignty*, OUP, New York, 2007, quoted in T. Moran, 'Combating Corrupt Payments in Foreign Investment Concessions: Closing the Loopholes, Extending the Tools', Center for Global Development, January 2008. [http://www.cgdev.org/files/15197\\_file\\_CombatingCorruption.pdf](http://www.cgdev.org/files/15197_file_CombatingCorruption.pdf).

183 The comments of the Department of Justice are instructive of the US experience in this regard. In a letter from the Department it is stated that the:  
'...experience in combating domestic political corruption, coupled with our own recent efforts to develop prosecution [sic] involving the bribery of foreign officials amply demonstrates the difficulties of gathering sufficient credible and admissible evidence to support prosecution. By its very nature the bribery of public officials is covert and

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This enforcement model makes it possible for companies, rather than risk the negative effects of a public prosecution and significant sanctions being played in public view, to co-operate in seeking a deferred prosecution agreement worked out in private. This produces a carrot-and-stick scenario. The stick of the FCPA and related US laws and initiatives mean that it is even more difficult now to ignore the far-reaching effects of the FCPA and the need to integrate effective compliance mechanisms into company operations. The carrot is the possibility to mitigate the potential damage that may result from anti-bribery violations by the corporation by active participation in the detection and sanctioning processes.<sup>184</sup> By adopting a carrot-and-stick approach to implementation, the US authorities have been able to engage the private sector to actively participate in the process of uncovering and tackling corruption in international business.

Given the increasing tempo of anti-bribery prosecutions the world over, the increased co-operation between governments as well as the political will to prosecute foreign companies shown by the DOJ and the SEC, companies can expect a higher likelihood of prosecution to follow from any FCPA violations. The financial penalties for FCPA anti-bribery violations are quite onerous. In addition, companies may risk being barred from government support in the form of facilities and participation in government programs. This is quite apart from the financial fall-out of attendant bad publicity. What is of significance is the increased prosecution of individuals for anti-FCPA violations. The personal exposure including the risk of a jail term of individual directors and employees is much higher in today's regulatory climate.

Apart from the direct effect of penalties and fines, there are several indirect consequences that are equally undesirable for the corporation. The general public is now more sensitive to 'corrupt' multinationals. There is an increasing demand for responsible corporate practice. Shareholders and the public at large are sensitive to companies that have acquired a 'bad reputation' or have acted 'irresponsibly.' Negative publicity may expose the company to further consequences in form of shareholders actions. A recent example is the case of

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generally involves consensual parties who go to great lengths to conceal the transaction. When the official involved is a representative of a foreign government and most of the critical acts take place outside of the country, the problems of detection, investigation and prosecution are necessarily compounded.'

See Letter from the Department of Justice dated 20 April 1997 to the Hon. Harley O. Staggers, Chairman, Interstate and Foreign Commerce Committee, House of Representatives, Washington DC, *House Report*, id., Note 3 above, at p. 17.

184 Cassin writes that the idea is to 'punish, don't kill.' The FCPA framework offers companies that want to co-operate alternatives in the form of negotiated settlements. The idea he states is that 'no company is beyond redemption.' See R. Cassin, *Bribery Everywhere, Chronicles From the Foreign Corrupt Practices Act*, 2009 (based on posts from the FCPA Blog) <http://www.fcablog.com/>.

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the shareholders of British Aerospace, who brought a civil action against the directors of the company for damages resulting from their failure to detect and prevent corrupt behavior on the part of the company.<sup>185</sup> Furthermore, civil boycotts or other unforeseen actions from an increasingly militant public translate into financial losses for the company. The toleration bribery and corruption once enjoyed is now completely a thing of the past.

The effects of the FCPA are in no way restricted to the United States. From inception it was designed to tackle corruption occurring outside the United States. Under the new international regulatory framework regarding corruption, countries are required to co-operate with one another and offer mutual legal assistance in the collection of evidence of anti-corruption violations. The US DOJ and the SEC seem to be using these avenues of cooperation to bring more prosecutions against non-US companies. In addition, other OECD countries such as Germany, France, Italy, Norway and the Netherlands have increased the tempo of their anti-bribery enforcement. Apart from US prosecution, therefore, there is a chain-reaction of anti-bribery prosecution that is moving across to Europe and other parts of the world. The European Commission is also encouraging more active prosecution of corrupt practices.<sup>186</sup>

### 3.10 Internationalization of the FCPA Standard

The FCPA was the manifestation of the negative sentiments of the American public toward acts of bribery on the part of their public corporations. However, the international context of the FCPA meant that the standard it set would have to exist within the dynamics of multi-jurisdictional, multicultural transactions. The imposition of the FCPA standard on American companies gave them a handicap compared to competing companies to whom no such standard applied. The fact that only the United States had rules prohibiting transnational bribery placed it at a competitive disadvantage in the global market place.<sup>187</sup> The question was ultimately whether this American standard would become a universal standard or whether, in the face of business realities, the Americans would reconsider their domestic standard.

In the 30-odd years since the passage of the FCPA, the moral outrage of the American people has been recast as a fair competition argument. American

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185 *City of Harper Woods Employees' Ret. Sys. v. Oliver*, 577 F. Supp. 2d 124 (D.D.C. 2008).

186 See Seventh Activity Report for the period 1 January to 31 December 2006 of the European Anti-Fraud Office at p. 64.

187 Undersecretary of State Stuart Eizenstat is reported to have stated that U.S. businesses lost contracts worth \$30 billion from mid-1997 to mid-1998 because of corruption, S. Nathan, 'Tie Loans to Corruption: Weigh Bribery in Aid Decisions', *U.S.A. Today* (17 February 17 1999).

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companies, saddled with domestic restrictions against foreign bribery, argued forcefully that the standard imposed by the FCPA would be their Waterloo if it did not apply to all companies trading in the international market.<sup>188</sup> The fact that the American standard has prevailed<sup>189</sup> and become a global norm is testament to the realities of the integration of world markets, to the need for common standards to ensure fair competition, and ultimately to the economic power of the United States.<sup>190</sup> The repudiation and moral outrage felt by the American people against foreign corruption was transformed into an economic, social and political issue of international dimension.<sup>191</sup>

### 3.10.1 World-Wide Criminalization: The Consensus against Corruption

For over two decades the FCPA remained an American oddity. The standards it proclaimed applied only to American companies. Other countries had no rules against the bribery of foreign officials and in several countries it was in fact a tax-deductible expense.<sup>192</sup> The US started a vigorous international campaign to redress the situation. Two decades later there is now a significant array of international rules to combat transnational bribery. The regulation of international bribery has become a central issue in the quest for free and fair international trading conditions. The international legal framework regulating transnational bribery is a dynamic patchwork of instruments operating at international, regional and intergovernmental levels. However, rather than

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188 See S. Sporkin, 'The worldwide banning of schmiergeld: a look at the Foreign Corrupt Practices Act on its twentieth birthday', *Northwestern Journal of International Law and Business*, Vol. 18, 1997-1998, p. 269, at p. 271; S. Lochner, 'The criminalization of American extraterritorial bribery: the effect of the Foreign Corrupt Practices Act of 1977', *New York University Journal of International Law and Politics*, Vol. 13, 1980-1981, p. 645, at pp. 645-653; J. Duncan, 'Modifying the Foreign Corrupt Practices Act: the search for a practical standard', *Northwestern University Journal of International Law and Business*, Vol. 4, 1982, p. 203.

189 D. Gantz, 'Globalizing sanctions against foreign bribery: the emergence of a new international legal consensus', *Northwestern Journal of International Law and Business*, Vol. 18, 1998, p. 457, at pp. 466-468.

190 See B. Earle, 'The United States Foreign Corrupt Practices Act and the OECD anti-bribery recommendation: when moral suasion won't work, try the money argument', *Dickson Journal of International Law*, Vol. 14, 1996, p. 207; L. Low, 'New antibribery rules create new compliance responsibilities', *International Business Lawyer*, Vol. 26, 1998, p. 272.

191 C. Corr, J. Lawler, 'Damned if you do, damned if you don't': the OECD convention and the globalisation of anti-bribery measures', *Vanderbilt Journal of Transnational Law*, Vol. 32, 1999, p. 1249, at p. 1253; T. Snider, W. Kidane, 'Combating corruption through international law in Africa: a comparative analysis', *Cornell International Law Journal*, Vol. 40, 2007, p. 691, at p. 697.

192 In response to this practice the OECD passed the Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials (1996), urging Member countries that allowed the tax deductibility of bribes to foreign public officials to deny the tax deductibility of such bribes. See 'OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials', (adopted by the Council on 11 April 1996 at its 873rd session [C/M (96)8/PROV]) C (96)27/FINAL.

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opening the door to a variation in standards, this chapter shows that the international rules have mostly been faithful to the spirit of the FCPA.<sup>193</sup>

The first of these was the Inter-American Convention against Corruption (IACAC) of the Organization of American States.<sup>194</sup> It was adopted by the Organization of American States in 1996. The momentum then moved to the industrialized West. In 1997 the Organization of Economic Co-operation and Development<sup>195</sup> adopted a Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).<sup>196</sup> As its name implies, this convention principally addresses the issue of transnational bribery.

Still in 1997, on 26 May, the Council of the European Union took measures to tackle corruption amongst European Community Officials. Even though it does not make express reference to transnational bribery, the Convention of the Fight against Corruption involving Officials of the European Communities or Member States of the European Union 'EU Convention',<sup>197</sup> defines the act of giving or receiving bribes across member states and other corrupt activity by European Union officials as a punishable offense. In 2003, this prohibition was extended to private sector bribery with the Council Framework Decision on combating bribery in the private sector.<sup>198</sup> The preamble to the Decision notes that the member states of the EU 'attach particular importance to combating

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193 Bukovansky describes the emergence of the international anti-corruption regime with a focus on its normative dimensions and warns that this regime 'attempts to unreflectively internationalize moral codes without inviting broader, inclusive public discourse on the nature and applicability of this normative baggage to diverse societies.' M. Bukovansky, *Corruption is Bad: Normative Dimensions of the Anti-Corruption Movement*, Working Paper, No.2002/5 Department of International Relations, Australian National University, 1962, pp. 5-21.

194 Inter-American Convention against Corruption, 29 March 29 1996, 35 *ILM*, p. 724, adopted at Caracas, Venezuela, entered into force on 6 March 1997. The United States signed the Convention on 29 March 1996 and ratified it on the 27 July 2000. For details of ratification and implementation status see <http://www.oas.org/juridico/english/Sigs/b-58.html> (Hereinafter referred to as the IACAC Convention).

195 The OECD is an international organization of states based in Paris. Its goals are the pursuit of global economic growth and stability. The 30 members of the OECD account for 2/3 of world trade in goods and services.

196 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Paris, 27 November 1997, in force 15 February 1999, 1998, 37 *ILM*, p. 1. The United States, the United Kingdom and the Netherlands have ratified the Convention and enacted implementing legislation. For details of implementation status see [http://www.oecd.org/document/21/0,3746,en\\_2649\\_34859\\_2017813\\_1\\_1\\_1\\_1,00.htm](http://www.oecd.org/document/21/0,3746,en_2649_34859_2017813_1_1_1_1,00.htm). (Hereinafter referred to as the OECD Convention).

197 Convention drawn up on the basis of Art. K.3(2)(c) Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, Official Journal C 195, 25 June 1997, p. 0002-0011, not yet in force. (Hereinafter referred to as the EU Convention).

198 Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, not yet in force, Official Journal L 192, 31/07/2003 p. 0054-0056.

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corruption in both the public and the private sector, in the belief that in both those sectors it poses a threat to a law-abiding society as well as distorting competition in relation to the purchase of goods or commercial services and impeding sound economic development.’ As such, Art. 2 requires that member states take the necessary measures to ensure that ‘intentional’ active or passive bribery in the private sector shall constitute a criminal offense.

January 1999 saw the adoption of the Council of Europe’s Criminal Law Convention on Corruption.<sup>199</sup> Like the EU Convention, this convention criminalizes active and passive corruption. However, the Criminal Law Convention is of wider application. It applies not only to EU officials but also to officials of ‘any other State.’<sup>200</sup> In 1999 the Council of Europe also adopted the Civil Law Convention on Corruption.<sup>201</sup> This Convention contains a very broad definition of corruption that applies to every type of corrupt activity including transnational bribery.

The international regulation of transnational bribery continued with the adoption on 15 November 2000 of the United Nations Convention Against Transnational Organized Crime (UNCTC),<sup>202</sup> the African Union Convention on Preventing and Combating Corruption (AUC) adopted on 11 July 2003,<sup>203</sup> and finally the 2003 United Nations Convention Against Corruption

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199 Criminal Law Convention on Corruption, Strasbourg, 27 January 1999, in force 1 July 2002, 173 CETS. The Convention has been ratified by 43 states including the Netherlands and the United Kingdom. It has been also signed by the United States as a non-member state of the Council of Europe. For details of ratification and implementation status see <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=173&CM=1&DF=&CL=ENG> (Hereinafter referred to as the Criminal Law Convention).

200 Art. 5 Criminal Law Convention.

201 Civil Law Convention on Corruption, Strasbourg, 4 November 1999, in force 1 November 2003, 174 CETS. The Treaty has been ratified by 34 States including the Netherlands. It has been signed but not ratified by the United Kingdom. It has not been signed by the United States. For details of ratification and implementation see <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=174&CM=8&DF=7/13/2006&CL=ENG> (Hereinafter referred to as the CLC).

202 United Nations Convention against Transnational Organized Crime, New York, 15 November, 2000, in force 29 September 2003, 2225 UNTS; (2000), 40 *ILM*, p. 353. The Convention has 165 parties and has been signed by 147 including the Netherlands, the United Kingdom and the United States. For details of ratification and implementation status see [http://www.unodc.org/unodc/crime\\_cicp\\_signatures\\_convention.html](http://www.unodc.org/unodc/crime_cicp_signatures_convention.html) (hereinafter referred to as the UNCTC).

203 African Union Convention on Preventing and Combating Corruption, 43 (1) *ILM*, p.1. As of April 2006, 10 of the 53 member states of the African Union – Burundi, Comoros, Libya, Lesotho, Madagascar, Mali, Namibia, South Africa, Tanzania and Uganda – have ratified the convention. Notable exceptions are Egypt, and Nigeria. For details of ratification and implementation status see [http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/offTreaties\\_Conventions\\_&\\_Protocols.htm](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/offTreaties_Conventions_&_Protocols.htm) (Hereinafter referred to as the AUC).

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(UNCC).<sup>204</sup> The net effect of all these agreements is that there is now a new ‘hyper norm’ repudiating corruption that ‘transcends national boundaries’ and global consensus on the criminalization of transnational bribery.<sup>205</sup>

Arriving at a general consensus condemning corruption in international business was an important milestone in the development of transnational strategy toward corruption. The transnational nature of the consensus puts in place a common ‘moral’ standard that serves as a platform for international anti-corruption policy and rule-making.<sup>206</sup> This platform also serves to characterize corruption in international business as a legal wrong. This has immediate implications for national rules governing the rights of persons to seek remedies for harm suffered as a result of corruption in international business. It also has far-reaching implications for the status of transactions that result from the illegal infractions of anti-corruption rules. Furthermore, it fundamentally changes the environment in which grand corruption now takes place. As Wrage points out:

‘Prior to the adoption of these conventions and the national laws they produced, a government official and whoever sought to bribe him could have had a reasonably open and moderately civilized conversation about the payment the official expected. ... While bribe negotiations certainly continue today, they tend to be more furtive, they have been forced into the darkened corners of restaurants. They are rarely routine. This is reflected in the elaborate measures taken to obscure the paper trail....’<sup>207</sup>

### 3.10.2 Categories of Instruments

The international instruments fall essentially into three categories. First are instruments devoted solely to the issue of corruption in international business in a similar vein to the FCPA. The second category is those instruments that deal with corruption in general but contain provisions covering the issue of corruption in international business. These instruments adopt the ideas of the FCPA to varying degrees but move beyond the specific issue of corruption in

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204 United Nations Convention against Corruption, New York, 31 October 2003, in force 14 December 2005, 2349 UNTS, p. 41; (2005), 43 *ILM*, p. 37. The Convention has 158 parties and 140 signatories. The United States, the United Kingdom and the Netherlands have signed and ratified the Convention. For details of ratification and implementation status see [http://www.unodc.org/unodc/crime\\_signatures\\_corruption.html](http://www.unodc.org/unodc/crime_signatures_corruption.html).

205 P. Nichols, ‘Regulating transnational bribery in times of globalization and fragmentation’, 1999, *Yale Journal of International Law*, Vol. 24, p. 257, at pp. 302-303.

206 Bukovansky points out that the essential point on which the anti-corruption regime diverges from existing trade and monetary regimes is its ‘evocation of the moral requirements of a market economy.’ M. Bukovansky, *Corruption is Bad: Normative Dimensions of the Anti-Corruption Movement*, id., Note 193 above, at p. 3.

207 A. Wrage, *Bribery and Extortion: Undermining Business, Governments and Security*, Praeger security International, 2007, at p. 115.

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international business to a host of other acts of corruption. The last category of instruments deal with corruption and mention corruption in international business but do not define it as an offense.

The OECD Convention follows the footsteps of the FCPA quite closely and is exclusively devoted to corruption in international business. The IACAC Convention, EU Convention, Council of Europe Criminal and Civil Law Conventions against Corruption, the UNTAC and UNCC can be described as general conventions. They deal with corruption in its broad sense but also contain specific provisions that deal with corruption in international business. The AU Convention does not define corruption in international business as an offense. It however calls on state parties in the ‘spirit of international cooperation’ to ‘collaborate with countries of origin of multi-nationals to criminalize and punish the practice of secret commissions and other forms of corrupt practices during international trade transactions.’<sup>208</sup>

The international instruments repudiating corruption have been implemented as required by member states under their domestic laws. The OECD convention, for example, provides in respect of corruption in international business that ‘... each Party shall take such measures as may be necessary to establish that it is a criminal offense under its law ....’<sup>209</sup> The 36 state parties to the OECD Convention have enacted implementing legislation criminalizing corruption in international business.<sup>210</sup> The EU Convention is also mandatory in its approach. It states that each member state ‘shall’ take the necessary measures to criminalize the active bribery of EU officials.<sup>211</sup> It permits no exceptions in this respect.<sup>212</sup> The UN Convention against Corruption, which has been signed by 140 countries, calls on parties to take measures establishing the act of corruption in international business as a criminal offense, subject to the principle of sovereign equality and non-intervention in the domestic affairs of other states.<sup>213</sup>

The provisions dealing with corruption in international business deal with a very specific aspect of corruption and circumscribe this area with a certain degree of accuracy. They establish the substantive content of the crime of corruption where it has an international dimension. For this reason it can be

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208 Art. 19(1) AUC.

209 Art. 1 OECD Convention.

210 See the OECD’s website for details on the implementation of OECD Convention at: [http://www.oecd.org/document/30/0,2340,en\\_2649\\_34859\\_2027102\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/30/0,2340,en_2649_34859_2027102_1_1_1_1,00.html).

211 Art. 3(2) EU Convention.

212 Art. 15(2) EU Convention.

213 Art. 4 UNCC.

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referred to as *international corruption*.<sup>214</sup> For an international system of commerce confronted with varying legal traditions and standards, criminalization is arguably a necessary first step. It establishes the normative definition of *international corruption* that makes possible the identification and enforcement of infringed rights. In the absence of this first step, the very notion of civil remedies would flounder in a sea of relativism.

### 3.11 Key Elements of International Corruption

The identification and circumscribing of the key elements of international corruption has resulted in a comprehensive international normative framework.<sup>215</sup> The global reach of these rules implies a consensus of values in respect of international corruption. Within this normative framework the moral outrage of the American people has morphed into the common good of mankind. The domestic response to the violation of American norms has given way to a singular norm of global scale. The mandatory nature of the rules and the international dimension of international corruption converge in issues of public policy and public interest. This is the normative framework that makes possible the discussion on private remedies for corruption. The key elements of the rules regarding international corruption closely reflect the framework established by the FCPA. These common elements constitute the core definition of international corruption. A factor that is central to all the provisions is the existence of a foreign element. Some of the conventions also link the commercial context in which the international corruption occurs. Beyond this minimum core there is some variation regarding passive and active bribery, the exclusion of facilitation payments and permitted bribery.

#### 3.11.1. Active Bribery Directed at a Foreign Official

International corruption involves a foreign element. Bribery itself is a reciprocal act with two or more actors. When such actors are habitually resident or domiciled in different countries, this amounts to international corruption. This foreign element is clearly stated in some of the international rules. For example, provisions speak in terms of an inducement to ‘officials of

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214 Emphasis added. All further references in this book to *international corruption* are with respect to corruption in international business affairs.

215 This normative aspect is well illustrated by the severe criticism that was leveled at the US FCPA, which has been described as ‘misguided American moralism.’ See J. Brademas and F. Heimann, ‘Tackling international corruption: no longer taboo’, *Foreign Affairs*, Vol. 77, Iss. 5, 1988, p. 17. Salbu has remarked that ‘... because the nuances of varying practices around the world must be understood in their cultural context, the FCPA’s bluntness subjects Congress’ efforts to justifiable charges of ethnocentrism and moral imperialism.’ See S. Salbu, ‘Bribery in the global market: a critical analysis of the Foreign Corrupt Practices Act’, *Washington and Lee Law Review*, Vol. 54, 1997, p. 229, at p.287.

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another state,<sup>216</sup> a ‘foreign public official,’<sup>217</sup> a ‘public official of any other state,’<sup>218</sup> a ‘foreign public official or international civil servant,’<sup>219</sup> or ‘any foreign public official or official of a public international organization.’<sup>220</sup> Other provisions call for collaboration with ‘countries of origin of multinationals.’<sup>221</sup> In the case of the EU Convention, the foreign element is implicit. Art. 1 makes reference to ‘proceedings involving a member state’s official initiated by another member state.’<sup>222</sup> In a similar way, the foreign element can be deduced in respect of the Civil Law convention. The Explanatory Report explains that the purpose of its very broad definition of corruption is to ensure ‘that no matter would be excluded from its scope’<sup>223</sup> and that this represents part of the broad strategy of the Council of Europe’s comprehensive approach to the fight against corruption which it sees among other things as ‘a threat to international business ....’<sup>224</sup> In this perspective, international corruption can be said to occur when natural or legal persons in more than one country enter into the transaction associated with the bribe.

Bribery may be active, *i.e.*, the act of giving a bribe, or it may be passive, *i.e.*, the solicitation or acceptance of a bribe. Of the various instruments, the OECD Convention follows most closely the approach of the FCPA and does not deal with passive bribery of foreign officials. The Inter-American Convention deals with this issue indirectly by calling for the criminalization of ‘the solicitation or acceptance’ of a bribe by a public official.<sup>225</sup> However, this provision is separate from its provisions on international corruption. The other instruments are even more encompassing. They deal with corruption in general, including passive bribery.

In a very general sense, passive bribery can be described as international corruption where the transaction in question involves a foreign element. However, the problem the FCPA sets out to cure is not passive bribery occurring within the jurisdictional reach of domestic laws, but rather active bribery directed at recipients in a foreign country. The need for the extraterritorial application of US law was the central motivation for the

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216 Art. VIII IACAC.

217 Art. 1 OECD Convention, Art. 16 UNCC.

218 Art. 5 Criminal Law Convention.

219 Art. 8(2) UNCC.

220 Art. 16 UNCC.

221 Art. 19 AUC.

222 Art. 1(c) of the European Convention. However, cases involving international corruption are clearly limited to cases involving other member states. Art. 1(a) restricts the definition of ‘official’ to any community or national officer of a Member States.

223 Explanatory Report on the Council of Europe Civil Law Convention No. 174 CETS (1999) Art. 2 Sec. 29.

224 *Id.*, Art. 2 Sec. 29.

225 Art. VI (1)(a) Inter-American Convention.

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mechanism of the FCPA to sanction the active bribery of giving bribes to foreign public officials. In the absence the jurisdictional link created by the FCPA, it is difficult to see how the courts of the ‘supply side’ country of the party offering the bribe will have jurisdiction over the recipient foreign official of another country. As such, international corruption is essentially concerned with the act of active rather than passive bribery.<sup>226</sup>

From this perspective, the passive bribery of foreign officials effectively amounts to a form of domestic bribery and as such, strictly speaking, will not fall within the ambit of a strict definition of international bribery that envisages the extraterritorial application of laws to prosecute bribes offered outside national territories. The fact that passive bribery is generally covered by the rules dealing with domestic bribery is implied from comments of the Explanatory report on the Criminal Law Convention. This Convention calls for the criminalization of active and passive corruption of foreign officials.<sup>227</sup> However, the Report notes referring to this requirement for criminalization of passive bribery say that ‘... contracting parties ... will already be covered by Art. 3 [dealing with domestic bribery].’ It explains that ‘the inclusion of passive corruption of foreign officials in Art. 5 seeks to demonstrate the solidarity of the community of states against corruption wherever it occurs.’ This inclusion is motivated by the fact that ‘corruption is a serious criminal offense that could be prosecuted by all Contracting Parties and not only by the corrupt officials own state.’<sup>228</sup>

The linking of passive bribery to domestic bribery is also reflected in the UNCC which calls on state parties to ‘consider’ the criminalization of passive bribery.<sup>229</sup> The Interpretative Notes to the Convention show that this was not due to any condonation or tolerance of the solicitation or acceptance of bribes by foreign officials, but rather because passive bribery is already addressed under provisions dealing with domestic bribery which require that state parties criminalize the solicitation and acceptance of bribes by their own officials.<sup>230</sup>

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226 The explanatory report of the Criminal Law Convention speaks of the possibility of a universal jurisdiction that would allow states to establish jurisdiction over serious offenses regardless of where or by whom they are committed when they are seen as threatening universal values and the interest of mankind. It, however, also adds such universal jurisdiction would enable countries to prosecute foreigners for being the recipient of a transnational bribe and therefore is not yet commonly accepted. Explanatory Report on the Council of Europe Criminal Law Convention, ETS No. 173 (1999) Art.17, Sec. 83.

227 Art. 2 and 3 Criminal Law Convention.

228 Explanatory Report, *id.*, Note 226 above, Art. 5, Sec. 49.

229 Art. 16(2) UNCC.

230 Art. 15 UNCC. See also Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the UNCC. U.N. Doc. A/58/422/Add.1 (2003) Art. 16 (2) Sec. 28.

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The inclusion of passive bribery in the discourse surrounding international corruption would broaden the moral reach of international corruption to all corruption in business transactions whether domestic or international. However, it is important to note that the core definition of international corruption centers on a mechanism that renders acts of corruption committed in a country punishable by national courts in a *country other than the country where the act of corruption took place*.

### 3.11.2 A Commercial Context

The context in which the transnational bribery takes place is also specified in some of the rules. This is in keeping with the spirit of the FCPA, which prohibits the offer of a bribe that will influence the ‘obtaining or retaining of business.’<sup>231</sup> The IACAC Convention stipulates that the act of bribery has to be in connection with an ‘economic or commercial transaction.’<sup>232</sup> This formulation is very broad. Keeping more with the clearer limits set by the FCPA, the OECD Convention and the UNCC state that the purpose of the bribe should be to ‘obtain or retain business or any other undue advantage in relation to the conduct of international business.’<sup>233</sup> The EU Convention, UNCTC and Criminal Law Convention do not specify any such economic or business context for the act of international corruption. Under these systems, the scope of application is therefore much broader than that anticipated under the FCPA.

### 3.11.3 Exclusion of Facilitation Payments and Permitted Bribery

The OECD Convention excludes from the ambit of its application, small ‘facilitation’ payments made in some countries to induce public officials to perform their functions.<sup>234</sup> This exclusion is mentioned in the Commentary to the Convention rather than in the Convention itself. The Commentary states that while facilitation payments are a corrosive phenomenon, they are one that should be regulated under domestic law rather than by international regulation.<sup>235</sup> This is a reflection of the provision of the FCPA which excludes facilitation payments from the ambit of the Act. There is, however, no similar

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231 Id.

232 Art. VIII Para. 1 IACAC.

233 Art. 1 OECD Convention; Art. 16(1) UNCC.

234 Facilitation payments, known also as facilitating, speed or grease payments, are payments which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits. See Art.1 Sec. 9 Commentaries on the OECD Convention, [http://www.oecd.org/document/20/0,3343,en\\_2649\\_34859\\_2017813\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/20/0,3343,en_2649_34859_2017813_1_1_1_1,00.html).

235 Id.

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express exclusion of facilitation payments under the other international agreements.

It is interesting to see that some OECD countries in their domestication of the OECD Convention have nonetheless penalized facilitation payments. The British government, for example, in its anti-bribery legislation, implementing the OECD Convention, made facilitation payments illegal.<sup>236</sup> In response to criticism from British Industry, the British Government stated that there was no basis for excluding such payments and commented that ‘a culture of facilitation payments hinders those overseas governments who are trying to fight both grand and small-scale corruption in their countries.’<sup>237</sup>

Permitted bribery also falls outside the scope of the international rules. Clearly where the use of a bribe to procure an undue advantage is permitted by the laws of the country in question, the question of culpability is moot. The OECD Convention allows an affirmative defense when an act of international corruption ‘was permitted or required by the written law or foreign regulation of the public official’s country including case law.’<sup>238</sup> This affirmative defense is more theoretical than real given the fact that most countries do prohibit bribery. This is, however, in keeping with the model provided by the FCPA. There is no such affirmative defense allowed under the other international agreements.

### 3.11.4 Effect, Nature and Intent of the Bribe

Under the FCPA, the decision about what constitutes an international bribe depend on its effect on the decision making process relating to a business opportunity. The FCPA speaks in terms of a bribe that causes the official in question ‘to do or omit to do’ an act, in violation of his or her lawful duty.<sup>239</sup> This language is echoed to varying degrees throughout the international instruments. These speak of offers of international bribes to public officials ‘in exchange for an act or omission in the performance,’<sup>240</sup> ‘to act or refrain from

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236 Anti-Terrorism, Crime and Security Act, Chapter 24, 2001. (Now superseded by the 2010 Bribery Act).

237 *Financial Times* (Britain), 29 January 2002. The non-exclusion of facilitation payments is also a feature of the new UK 2010 Bribery Act. See Chapter 5 below for more details.

238 Art. 1 Sec. 8 of the Commentaries on the OECD Convention, id., Note 234 above.

239 15 USC Sections 78dd-1(a)(1)(A); Sec. 78 dd-2(a)(1)(A); Sec. 78dd-3(a)(1)(A).

240 Art. VIII Inter-American Convention.

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acting,<sup>241</sup> or in a fashion that ‘distorts the proper performance,’<sup>242</sup> of the decision making process relating to the business opportunity in question.

An international bribe may take the form of an offer, a promise or a grant and must, in the language of the OECD Convention, the UNCTC and the UNCC, be an ‘*undue pecuniary or other advantage*.’<sup>243</sup> This raises the question of what constitutes an ‘undue advantage,’ which opens the door to the differences that may exist in business cultures. It is also a subjective valuation. In the absence of any supra-national court charged with international corruption-related dispute resolution, such cases have to be resolved in domestic courts. What may be considered ‘undue’ in one jurisdiction may well be accepted as necessary and very much ‘due’ in another. It certainly raises the burden of proving that, in the context of each particular transaction, a particular offer, promise or grant is ‘undue.’ The IACAC does not use such open-ended language and speaks simply of the ‘exchange’ of any ‘... article of monetary value or other benefit such as a gift, favor, promise or advantage.’<sup>244</sup> Similarly, the EU Convention uses the expression: ‘gives ... an advantage of any kind.’<sup>245</sup> Here the onus of proof is clearly on the offeree, who has to show that the exchange was bona fide.

Another element that distinguishes a bribe is the requirement in the OECD Convention, the UNCTC and the UNCC that the act of international corruption should have been committed ‘*intentionally*’<sup>246</sup> to procure an advantage. This is in keeping with the provisions of the FCPA, which require an intention to corrupt in order for the Act to apply.<sup>247</sup> This forces prosecutors to establish that there was active knowledge of the corrupt purposes behind the bribe. The IACAC and EU Convention do not indicate whether intention is a necessary element of the offense of international corruption. This leaves open the question whether there is a requirement to prove criminal intent under these rules.

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241 Art. 3 EU Convention; Art. 8(1)(a) United Nations Convention against Transnational Crime; Art.1 OECD Convention; Art. 2 Criminal Law Convention.

242 Art. 1 CLC.

243 Art. 1 OECD Convention; Art. 2 Criminal Law Convention; Art. 8(1)(a) UN Convention against Transnational Crime; Art. 16(1) UNCC.

244 Art. VIII Para.1 IACAC.

245 Art. 3 EU Convention.

246 Art. 1 OECD Convention; Art. 2 Criminal Law Convention; Art. 8(1)(a) UN Convention against Transnational Crime; Art. 16(1) UNCC.

247 The FCPA prohibits the use of instrumentalities of interstate commerce ‘corruptly.’ See 15 USC Sec. 78 dd-1(a)(1)(A); Sec. 78 dd-2(a)(1)(A); Sec. 78dd-3(a)(1)(A).

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### 3.11.5 Territorial and Nationality-Based Jurisdiction

The matter of jurisdiction is a key issue in the regulation of international corruption. The subject matter of the transaction affected by international bribery, the parties involved, and the location where the event took place will usually fall under different jurisdictions. Under the principle of territoriality, the anti-corruption instruments generally call for states to assume jurisdiction when an offense is committed within its territory. The IACAC Convention, for example, provides that parties should take measures to establish jurisdiction when an offense is committed within its territory.<sup>248</sup> The OECD Convention and the Criminal Law Convention in a similar vein provide that a state shall take measures as may be necessary in order to establish its jurisdiction over the bribery of a foreign public official when ‘committed in whole or in part in its territory.’<sup>249</sup> The OECD Convention also states that this territorial basis for jurisdiction is to be interpreted broadly so that an extensive physical connection to the act of bribery is not required.<sup>250</sup> The UNCTC and UNCC provide that territorial jurisdiction should be established when the offense is committed in a member state territory or when committed aboard a vessel or aircraft flying the flag of, or which is registered under the laws of a member state.<sup>251</sup>

Jurisdiction based on territoriality limits the ability to regulate international corruption. The main motivation of the FCPA, and the instruments in its wake, is to bring acts of transnational bribery (which by definition occur outside the limits of territorial jurisdiction) within the jurisdictional reach of the state from which the bribe was supplied. This enhances the prosecution of offenses involving international bribery and avoids the uncertainties of domestic legal systems and politics. The international agreements acknowledge this and call upon members to adopt provisions to make possible extraterritorial jurisdiction for offenses outside their own territory. Thus, apart from territorial jurisdiction, the international rules require member states to extend jurisdiction to bribery offenses committed by their nationals abroad. Such extraterritorial jurisdiction makes it possible to establish jurisdiction in all cases involving whatever the ability, resources or laws of the state where the bribe is accepted by public officials.

Extraterritorial jurisdiction is not as commonly accepted as territorial jurisdiction. The provisions relating to nationality-based extraterritorial jurisdiction are phrased in more flexible terms as compared to the provisions relating to territorial jurisdiction, which are generally phrased using mandatory

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248 Art. V(1) IACAC.

249 Art. 4(1) OECD Convention; Art. 17(1)(a) Criminal Law Convention.

250 Art. 4 Sec. 25 of the Commentary on the OECD Convention, *id.*, Note 234 above.

251 Art. 42(1) UNCC; Art. 15(1) UNCTC.

language *i.e.* the parties ‘*shall*’ adopt such measures as to ensure territorial jurisdiction. The IACAC Convention for example states that state parties ‘*may*’ adopt measures establishing jurisdiction in transnational bribery cases ‘where the offense is committed by one of its nationals or by a person who habitually resides in its territory.’<sup>252</sup>

The OECD Convention, on its part, calls on parties that already embrace principles of jurisdiction based on nationality to extend their jurisdiction to offenses involving international corruption. It states that a party that has jurisdiction to prosecute nationals for offenses committed abroad shall take ‘such measures, as may be necessary, to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.’<sup>253</sup> Although the OECD Convention recognizes that not all countries apply principles of nationality-based jurisdiction, parties to the Convention are expected to review their jurisdictional rules to assess whether they are effective (in the fight) against the bribery of foreign public officials.<sup>254</sup> If not, they are to take remedial steps.

The UNCTC and UNCC also use permissive rather than mandatory language regarding nationality-based jurisdiction and provide that state parties ‘may also establish’ nationality-based jurisdiction.<sup>255</sup> The UNCC has the broadest formulation of jurisdiction based on the principle of nationality. It states that member states can take measures to establish jurisdiction where a national of that state or a stateless person who resides in its territory commits the offense.<sup>256</sup> The EU Convention and Criminal Law Convention, on their part, use mandatory language regarding the assumption of nationality-based jurisdiction. They, however, also make provision for the fact that not all states may have such nationality-based jurisdiction by allowing those states to reserve the right not to apply its rules.<sup>257</sup>

### 3.11.6 Mandatory and Permissive Aspects of Normative Order

A comparison of the key elements of the various rules dealing with transnational corruption and of their methodology of adoption suggests two models of international regulation. A strict mandatory model and a permissive liberal model. The strict model of regulation is epitomized by the OECD Convention. The OECD Convention provides that ‘... each Party shall take

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252 Art. V(2) IACAC.

253 Art. 4(2) OECD Convention.

254 Art. 4(4) OECD Convention.

255 Art. 15(2) UNCTC; Art. 42(2) UNCC.

256 Art. 42(2)(b) UNCC.

257 Art. 7(2) EU Convention; Art. 17(2) Criminal Law Convention.

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such measures as may be necessary to establish that it is a criminal offense under its law...'<sup>258</sup> The word 'shall' is mandatory in character. It is interesting to note that the 36 state parties to the OECD Convention have enacted implementing legislation criminalizing international corruption.<sup>259</sup> The EU Convention is also mandatory in its approach. It states that each Member state 'shall' take the necessary measures to criminalize the active bribery of EU officials.<sup>260</sup> It permits no exceptions in this respect.<sup>261</sup>

This contrasts with the position of the other international conventions under which there is some degree of flexibility. The IACAC Convention, for example, makes the adoption of its provisions by a state party 'subject to its constitution and fundamental principles of its legal system.'<sup>262</sup> Only when a state has established international corruption as an offense, does such bribery constitute an act of corruption for the purposes of the Convention.<sup>263</sup> In other words the IACAC Convention regulates international corruption only if it is regulated under the domestic laws of its member states.<sup>264</sup> Similarly, the UNCC makes the adoption of measures establishing the act of international corruption as a criminal offense, subject to the principle of sovereign equality and non-intervention in the domestic affairs of other states.<sup>265</sup> The Criminal Law convention, on its part, gives signatory states the power to grant themselves the right not to establish a particular corrupt conduct as a criminal offense under domestic law.<sup>266</sup> In a similar fashion, UNCTC states that state parties 'should consider' adopting provisions criminalizing transnational corruption.<sup>267</sup>

The above provisions show that the international conventions are for the most part permissive rather than mandatory in nature. With the exception of the OECD and EU Convention, the adoption of the international rules is left to the discretion of the member states. Yet, the relative harmonization in the local

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258 Art. 1 OECD Convention.

259 See OECD Website for details of the Implementation of OECD Convention. Available at [http://www.oecd.org/document/30/0,2340,en\\_2649\\_34859\\_2027102\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/30/0,2340,en_2649_34859_2027102_1_1_1_1,00.html).

260 Art. 3(2) EU Convention.

261 Art. 15(2) EU Convention.

262 Art. VIII Para. 1 IACAC.

263 Art. VIII Para. 2.

264 See E. Lagos, 'The Future of the Inter-American Convention against Corruption', Inter-American Development Bank Conference: Transparency and Development in Latin America and the Caribbean, 4 May 2000. He comments that 'In regard to international corruption and illicit enrichment, this has not been generally incorporated into domestic law. Nevertheless, there is growing awareness that nontransparent financial transactions, excessive regulations, and untrained and underpaid public officials promote and constitute an incentive to bribery and fraud.' <http://www.iadb.org/leg/Documents/Lagos%20Eng.pdf> at p. 4.

265 Art. 4 UNCC. See further on this point Chapters 8 and 9 of this book.

266 Art. 26 Criminal Law Convention.

267 Art. 8(2) UNCTC.

domestication of international rules regarding international corruption is important to achieve the objective of fair competition in international trade. This fact is acknowledged in the commentaries to the OECD Convention. Here it is stated that while uniformity or changes in fundamental principles of a Party's legal system are not required,<sup>268</sup> the convention establishes a standard to be met by members, by providing a definition of what should be criminalized.<sup>269</sup>

Under the OECD Convention the achievement of a certain equality of application is important. The Convention states that 'achieving equivalence among measures to be taken by the parties is an essential object of the convention, which requires that the Convention be ratified without derogations affecting this equivalence.'<sup>270</sup> While this idea of a minimum standard or equivalence may be true of the OECD Convention, it is not the case with the other agreements. The inclusion of provisions subjecting domestication to constitutional requirements, to the principle of sovereignty or to a system of reservations, contradicts the idea of a minimum standard.

However, such divergence may be more cosmetic than real. The ratification of the UN Convention by 140 countries and the criminalization of public bribery in domestic laws worldwide place it in the same class as mandatory rules prohibiting anti-competitive practices, environmental spoliation, money laundering and terrorism, *i.e.* laws which must be applied regardless of the agreement between the parties. Such laws curtail and in fact remove the freedom to contract at will, ensuring a movement toward convergence.

### 3.12 Self-Regulation and Best Practices

While international corruption is often thought of in terms of the 'envelope under the table' or 'suitcase full of cash' offered to a foreign official, the fact is that activities that are more nuanced may also fall foul of anti-corruption provisions. Consulting fees, commissions, finder's fees, referral fees paid to third parties such as consultants, agents, lobbyists or distributors, gifts, training

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268 Such flexibility is identified as a positive indicator of acceptability and ultimately of the success of a Convention. See G. Aiofi, M. Pieth, How to Make a Convention Work: The Organisation for Economic Co-operation and Development Recommendation and Convention on Bribery as an Example of a New Horizon in International Law, in C. Fijnaut, L. Huberts (Eds.), *Corruption, Integrity and Law Enforcement*, Kluwer Law International, The Hague, pp. 349-360.

269 Art. 1 Sections 2 and 3 Commentaries OECD Convention, id., Note 234 above.

270 Preamble to the OECD Convention. See also discussion on the principle of Functional Equivalence by M. Pieth, Introduction, in M. Pieth, L. Low, P. Cullen (Eds.), *The OECD Convention on Bribery*, CUP, Cambridge, 2007, p. 27.

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costs, entertainment, educational sponsorship, goodwill payments, discounts, performance bonuses, bad debts, and marketing funds are all strategies that may be used as vehicles to ‘facilitate’ the acquisition of business. For multinationals the chance that such strategies will be discovered and penalized are more likely in today’s regulatory climate than it was ten years ago.

In this new regulatory environment, the emphasis is as much on avoidance of corrupt practices as it is on instituting and implementing internal compliance systems. The existence and consistency of application of compliance systems can have a dramatic effect on the negotiating ability of a company where an infringement of anti-corruption laws does occur. The presence or absence of an effective compliance system may also significantly increase or reduce the severity of punishment. It is therefore not only desirable but a matter of responsible management to establish monitoring and compliance systems within a corporation. Indeed the corollary is true – a multinational corporation in today’s business climate that does not have a robust monitoring and compliance structure in place could well be liable for a breach of duty to its shareholders. It is not surprising therefore that the last two decades have seen multinational corporations setting up compliance departments at a rapid pace and taking steps to incorporate anti-corruption strategy into their daily operations. There is a plethora of self-regulation, voluntary codes and sector initiatives encouraging voluntary adoption of anti-corruption policies by corporations. A few principal initiatives are mentioned in closing this chapter.

### 3.12.1 The OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises provides voluntary principles and standards from the state members of the OECD to multinational corporations. Principle 7 deals specifically with corruption. Enterprises are encouraged not to engage in active or passive bribery, or use third parties such as agents to channel bribes or other undue advantages to public officials, or to employees of their business partners or to their relatives or business associates. Companies are advised to develop adequate internal controls, ethics and compliance programs or measures to prevent and detect bribery and to ensure fair and accurate books and financial records.

Furthermore, companies are encouraged to enhance the transparency of their activities in the fight against bribery by making public commitments against bribery and disclosing the management systems and the internal controls, ethics and compliance programs or measures adopted by enterprises in order to honor these commitments. Enterprises should also foster openness and dialogue with the public so as to promote its awareness of and cooperation with the fight against bribery, bribe solicitation and extortion. Enterprises are also encouraged to enhance the transparency of their activities in the fight against bribery through training programs and disciplinary procedures. In

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addition, enterprises are encouraged not to make illegal contributions to candidates for public office or to political parties or to other political organizations. Political contributions should fully comply with public disclosure requirements and should be reported to senior management.<sup>271</sup>

### 3.12.2 The OECD Good Practice Guidance

In 2009 the OECD Council made a Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions.<sup>272</sup> This Recommendation includes as an annex the Good Practice Guidance on Internal Controls, Ethics and Compliance. The Guidance is a voluntary non-binding guidance to assist companies with developing effective internal controls, ethics and compliance programs or measures for preventing and detecting foreign bribery. It covers the role of senior management, the need for a clearly articulated corporate policy, self-evaluation of compliance and ethics programs, and clear rules that apply to all company staff as well as entities over which a company has effective control including subsidiaries with regard to gifts, hospitality, customer travel, political contributions, charitable donations, facilitation payments, solicitation and extortion.

The Good Practice Guidance also requires companies to take steps to ensure that ethics and compliance programs or measures designed to prevent and detect foreign bribery are applicable where possible to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners. In particular such compliance measure should be taken with regard to risk-based due diligence pertaining to the hiring of business partners, informing business partners of prohibitions against bribery and seeking reciprocal commitments.

Companies are encouraged to develop effective systems of financial and accounting procedures, and internal controls to ensure the maintenance of fair and accurate books and records to ensure that they cannot be used for the purpose of hiding foreign bribery payments. The Guidance also covers issues of training, communication of anti-corruption policy, appropriate disciplinary measures, internal guidance and confidential reporting.<sup>273</sup>

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271 See generally the OECD Guidelines for Multinational Enterprises [http://www.oecd.org/document/28/0,3746,en\\_2649\\_34889\\_2397532\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/28/0,3746,en_2649_34889_2397532_1_1_1_1,00.html).

272 See [http://www.oecd.org/document/13/0,3746,en\\_2649\\_34859\\_39884109\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/13/0,3746,en_2649_34859_39884109_1_1_1_1,00.html) for further details.

273 See generally, 'Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions', 26 November 2009 (With

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### 3.12.3 The United Nations Global Compact

The United Nations Global Compact is ‘a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labor, environment and anti-corruption.’ The Compact calls on companies to voluntarily align their activities around a core of 10 principles that cover areas of international dimension such as Human Rights, Labor, the Environment and Anti-Corruption. Principle 10, dealing with corruption, states that ‘[b]usinesses should work against corruption in all its forms, including extortion and bribery.’<sup>274</sup>

### 3.12.4 The International Chamber of Commerce Rules

The International Chamber of Commerce (ICC) Rules of Conduct on Extortion and Bribery in International Business Transaction provides guidelines to companies formulating an anti-bribery code of conduct and corporate compliance programs. Developed in 1977 by the Shawcross Committee, it was revised in 1996 and again in 2005.<sup>275</sup> The Rules of Conduct are ‘intended as a method of self-regulation’ for businesses against the background of applicable domestic laws.<sup>276</sup> The Rules call on enterprises to prohibit bribery (offering a bribe) and extortion (demanding a bribe) at all time and in any form whether directly or indirectly through agents and other intermediaries.<sup>277</sup> It makes special provisions regarding vehicles through which such bribery and extortion may occur, *i.e.* agents and other intermediaries, joint ventures, political and charitable contributions and sponsorships, gifts, hospitality, expenses and facilitation payments.<sup>278</sup>

The Rules call on companies to implement comprehensive policies or codes reflecting the ICC Rules of Conduct and include four key elements to be incorporated into such company codes or policies. Guidance and training, provision of confidential channels for whistle blowers, inclusion of disciplinary procedures to sanction misconduct, and an indication that they will apply to all controlled subsidiaries whether foreign or domestic.<sup>279</sup> Guidelines

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amendments adopted by Council 18 February 2010 to reflect the inclusion of Annex II, Good Practice Guidance on Internal Controls, Ethics and Compliance).

274 See Website of the Global Compact at <http://www.unglobalcompact.org/>.

275 F. Heimann, F. Vincke (Eds.), *Fighting Corruption: International Corporate Integrity Handbook*, ICC, 2003, pp. 11-15.

276 See Introduction Part 1: ICC Rules of Conduct to Combat Extortion and Bribery. (Hereinafter ICC Rules).

277 Art. 1 ICC Rules.

278 Art. 2-6 ICC Rules.

279 Art. 7 ICC Rules.

relating to financial records and auditing procedures are included with requirements for proper and fairly recorded books of accounts available for inspection by boards of directors and auditors if available; prohibition of off-the-books or secret accounts; the need for independent systems of auditing; and compliance with national tax laws.<sup>280</sup> The Rules also detail the responsibilities of the Board of Directors and in particular the audit committee of reasonable steps that can be taken to ensure compliance with the rules, including making sure that resources are available, supporting management, establishing proper systems of control, sanctioning violations and making appropriate public disclosure.

### 3.12.5 The Partnering against Corruption Initiative

The Partnering against Corruption Initiative (PACI) is an initiative of the World Economic Forum along with Transparency International and the Basel Institute of Governance. It is a self-regulatory effort by corporations to take a stand against corruption in a peer-reviewed, mutual evaluation process. The PACI Principles first issued in 2004 for the engineering and construction sector were broadened to be adopted by all companies who commit to a zero-tolerance approach to bribery and corruption and to put in place an effective program to counter bribery.<sup>281</sup>

The PACI initiative uses the basis of the World Economic Forum to bring companies together to fight corruption. It is a private sector initiative that tries to respond to the legal, social and economic needs of society. It provides companies with practical guidance and encourages the companies that sign up to ensure that all companies or suppliers that interact with these signatories also buy into the anti-corruption strategy. The notion of PACI is to create a platform where the private sector takes the initiative in drawing up a plan of action against corruption independently of states. The key to the PACI is that sufficient companies sign up for the initiative to create a culture change in global contracting; by so doing this will help to create a level playing field for all companies.

The PACI Principles prohibit bribery in any form and covers areas such as political contributions, facilitation payments, gifts, hospitality and expenses. It sets out the minimum requirements that a company should meet when implementing the program. This covers the role of the Board of Directors, business relationships with subsidiaries, joint venture partners, agents,

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280 Art. 8 ICC Rules.

281 See <http://www.weforum.org/issues/partnering-against-corruption-initiative> for more information.

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contractors and third parties. It also covers issues of human resources and training as well as whistle blowing mechanisms and communication of anti-bribery programs. The principles cover the need for effective internal controls and audit as well as self-assessment and review.

### **3.13 Observations**

The FCPA has set the baseline in the fight against corruption. It remains the primary motivator, catalyst and driving force of the international anti-corruption movement. The most important lessons that have resulted from the implementation of the Act are (1) the establishment of a world-wide standard repudiating corruption occurring in foreign countries, (2) the development of the notion of international corruption and its precise definition, (3) a carrot-and-stick approach to sanction, (4) the notion of the fight against corruption as a private/public partnership, and (5) the acceptance of the need for external intervention in bribery occurring in other countries.

The stark and difficult to control reality of the consequences of corruption has meant that moving toward a more consistent standard repudiating corruption in business transactions was probably an inevitable outcome of globalization. Regardless of its genesis or its motivations, the FCPA is the catalyst that produced such a baseline of legality. The FCPA provides a credible method of tackling grand scale corruption and inspired a standard that prevails over national norms and interpretations. This standard applies across the public and private sectors and creates an integrated unified approach that draws public and private processes into the fight against corruption. Whatever its shortcomings, it represents a watershed in the fight against corruption and has on balance had a positive effect.

In the almost 35 years since the passage of the FCPA, the regulatory environment of international business has continued to change. The process of integrating world markets is erasing economic borders and the growth of the multinational corporation has greatly impacted the international and domestic law and policy. The clear cut roles of the private and public sectors have become blurred as a result of the changing role of the sovereign state and the formidable economic clout of the transnational enterprise. While the FCPA refers solely to the bribery of foreign public officials, in the 35 years since its passage, for the type of international grand scale corruption to which the FCPA applies, the boundaries between public and private corruption have all but collapsed.

Grand scale corruption knows no sectors and international business knows no boundaries. Grand scale corruption is by definition a marriage between the private sector givers of the bribe and public or private sector receivers of the

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bribe. The regulation of bribery in the private sector at the national level is therefore also inextricably linked to the foreign business which that company transacts. Companies with worldwide operations and contacts with the American market are exposed to the risk of far-reaching anti-bribery sanctions triggered by the FCPA. These corporations are the messengers of the FCPA message of ethical business and the repudiation of corruption across the globe.<sup>282</sup>

The implementation of the FCPA across the public and private sectors is the engine that drives the progress of the anti-corruption movement today. The FCPA model of implementation is characterized by public and private co-operation that is underpinned by soft and hard law elements. The international framework of rules that has emerged as a result the FCPA has converged to establish grand corruption as a legal wrong. This legal fact has both public and private law consequences. Indeed, the issue of private remedies is only made possible by the baseline of legality established by this framework.

While the focus of the FCPA is the criminalization of foreign bribery, the effect of criminalization is not limited to the punishment of the offender but also has effects on associated transactions. As a result the FCPA and the international framework of rules that have emerged criminalizing grand corruption on a global scale have created by the same token the foundation to challenge the transactions that result from illegal corrupt transactions across the public-private divide. The international consensus on the illegality of corruption in business affairs empowers parties who have suffered damage as a result of corruption to seek remedies wherever there is a jurisdictional link in the shape of assets or persons. The international consensus positively influences the substance of anti-corruption laws as well as the public policy against corruption that influences dispute settlement processes.

This is the great strength of the FCPA model. By adopting a unified approach of enforcement using the DOJ and SEC, it acknowledges the limits of the criminal law in the fight against as complex an issue as grand scale corruption. Nonetheless by adopting the path of criminalization it can use the associated stigma and sanction as the launching pad for private sector co-operation. It uses this baseline of legality though the mechanism of the FCPA itself, through complementary laws and initiatives, as well as the international consensus

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282 The process of sanction that is emerging in the implementation of the FCPA is very dynamic. It cuts across a range of sources of regulation. This affirms the observation that:

‘a substantive social norm can leave the territory of non-codified social norms and migrate back and forth among different forms of regulation and even return to the territory of noncodified social norms.’

See J. Eijsbouts, *id* Note 2 above at p.22.

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against grand corruption, as an incentive to draw multinational corporations into schemes of voluntary disclosure and compliance. The effect of the FCPA does not stop with US companies because by creating a 'real sanction' for violations and being aggressive in its implementation, it has set the stage for compliance wherever international business takes place that involves US issuers, domestic concerns or non-US entities that have engaged in acts in furtherance of bribery while in the United States. This model of implementation is pragmatic in that it adapts to the reality of the transacting environment rather than vice versa.<sup>283</sup> Given the economic clout of the US, this is a truly global mechanism and gives the FCPA world-wide application.<sup>284</sup>

### 3.14 Conclusion

The regulation of international corruption has become a central issue in the quest for fair international trading conditions and economic growth. In addition to the work of governments, international institutions such as the World Bank are adopting vigorous anti-corruption policies.<sup>285</sup> Transparency International is in the forefront of NGOs committed to ensuring more transparency in business practices by publicizing information about companies engaged in corrupt practices. Despite the plethora of instruments discussed in this chapter, it is clear that there is a minimum standard contained in the international rules. The differences that exist such as the burden of proof, the context in which international bribery occurs, passive bribery, the exclusion of facilitation payments and permitted bribery, are more formal than substantial.

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283 Aiofi and Pieth make a similar analysis with regard to the OECD Convention. See G. Aiofi, M. Pieth, 'How to Make a Convention Work: The Organisation for Economic Co-operation and Development Recommendation and Convention on Bribery as an Example of a New Horizon in International Law'. *id.*, at Note 267 above.

284 For this reason the position of the Department of Justice is to be encouraged. Assistant Attorney Lanny Breuer, the head of the Criminal Division, recently stated:

'I am aware that there have been a number of efforts made this year to amend the FCPA, by the Chamber of Commerce and others. We in the Justice Department are always open – and I personally am – to working with Congress on ways to improve our criminal laws. That said, I want to be clear about one thing with respect to these proposals: we have no intention whatsoever of supporting reforms whose aim is to weaken the FCPA and make it a less effective tool for fighting foreign bribery.'

L. Breuer, 26th National Conference on the Foreign Corrupt Practices Act 2011 FCPA Conference, available at <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html>.

285 In 2008 the World Bank has said that it will implement the recommendations of the Volcker Report and create an independent advisory board composed of international anticorruption experts and a consulting unit to help bank staff guard against fraud and corruption hitting their projects. See World Bank News Site, 23 January 2008, available at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21622074~pagePK:64257043~piPK:437376~theSitePK:4607,00.html>.

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There is a divergence between strict and permissive models of regulation. The mandatory strict model applied by the OECD Convention is probably the most effective approach. In contrast, more liberal models of regulation are found in other instruments that grant more discretion in implementation. In this sense, the rules regulating international corruption fail to achieve a common standard in application.

However, from a pragmatic point of view, it may well be that although a common standard in content and application is the best method of ensuring the uniformity essential to fair competition, the existence of more liberal models is the glue that holds the regulatory system together. Such flexibility allows countries to participate at the level of their particular legal, social and political conditions. The absence of a common standard may in fact result in greater participation with varied but incremental steps toward a common standard. By accommodating jurisdictional and cultural differences, a liberal model plays an important role in pushing the international market toward free and fair competition.

The necessity for a level playing field in international business has triumphed over cultural differences and domestic conditions in the fight against corruption in commercial transactions. The global consensus on the criminality of corruption in international business has implications for transactions that are centered on such illegal activity. This means that the discussion about private remedies for damage suffered as a result of corruption now occurs within an international framework where the illegality of grand scale corruption has become established as a rule of law.

**PART 2**

**MODELS OF PRIVATE  
REMEDIES**



# **CHAPTER 4**

## **PRIVATE REMEDIES IN THE UNITED STATES**

### **4.1 Introduction**

This chapter examines private remedies for corruption under US Law. Federal and state laws criminalize bribery in commercial transactions and by so doing establish public policy against corruption that shapes judicial decision making in private claims. The first part of the chapter looks at the laws that provide the foundation for the private remedy for corrupt acts. The principal federal laws that serve as a backdrop to private claims by individuals are the FCPA as well as US antitrust and securities legislation. Other potential avenues for private claims are the Racketeering Influenced and Corrupt Organizations Act, and the False Claims Act. Also within this framework is federal law prohibiting the bribery of domestic public officials as well as state commercial bribery statutes. These rules are the launching pad for the private claim for corruption.

The second part of this chapter examines the questions of transaction validity and the right to institute legal proceedings. Particular focus is placed on the extent to which the Art. 35 UNCC stipulation for a right to institute legal proceedings can be equated with a private right of action under US law. The position of the US Senate with regard to Art. 35 UNCC, as well as the response of US courts to attempts to exercise a private right of action in respect of anti-corruption rules, are examined. With regards to transaction validity, the effect of public policy against corruption and in particular the response of the US courts to the primary and secondary contracts tainted by corruption is analyzed. In addition, instances where parties have sought to institute legal proceedings for damage suffered as a result of corruption are discussed. This provides a taxonomy of the types of private remedies for corruption that are possible under the US system.

In view of the federal structure of US government, where necessary, the laws of the State of New York are used as illustrative of state law because it is the

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state with the longest history of anti-bribery laws.<sup>1</sup> Furthermore, the American Law Institute's Restatements of the Law of Contract, Torts, Agency, Unfair Competition, Restitution and Unjust Enrichment are referred to as they represent a codification of US common law principles regarding the contracts tainted by corruption and in particular questions of enforceability and restitution.<sup>2</sup>

### 4.2 The Normative Framework

#### 4.2.1 International Instruments

The US is a party to the major international anti-corruption instruments.<sup>3</sup> In a broad sense, these international conventions can be described as the 'offspring' of the US Foreign Corrupt Practices Act.<sup>4</sup> The US Senate has consented to the Inter-American Convention against Corruption. As a non-member state of the Council of Europe, the US has signed but not ratified the Council of Europe Criminal Law Convention on Corruption. It has however not signed or ratified the Council of Europe Civil Law Convention on Corruption.<sup>5</sup> The OECD Convention and UNCC have been signed and incorporated into US law. These two instruments are the most far reaching of the international instruments against corruption that the US is a party to and are the focus of the rest of this chapter.

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1. Noonan remarks that New York was the pioneer in the criminalization of bribery of private persons making it a misdemeanor in 1881 to give a 'gift' to an agent, employee or servant.' See J. Noonan, *Bribes*, MacMillan, New York, 1984, p. 578. See also a historical viewpoint on the development of the bribery offense in J. Lindgreen, 'The elusive distinction between bribery and extortion: from the common law to the Hobbs Act', *UCLA L. Rev.*, Vol. 35, No. 815, 1988, p. 889. Lindgreen notes that '[s]ince this statute [New York] is broadest in scope, has been more widely enforced than any other, and has served as a prototype for the legislation of several other states.'
  2. As a federation of states, contract, tort, agency and unjust enrichment laws in the US are found in state case law and statutes. However, the American Law Institute in producing the Restatements of US Law has codified the common law in these areas. See Chapter 1 Note 77 for full references of the various Restatements used in this chapter.
  3. For an overview of US involvement in international agreements relating to the Bribery of Foreign Officials, See the Department of Justice at <http://www.justice.gov/criminal/fraud/fcpa/intlagree/>
  4. As noted by Senator Feingold, 'But with the signing of the OECD Convention ... the rest of the industrialized world, along with several key lesser developed countries, is finally beginning to follow America's lead. What this convention does is initiate significant steps to raise the standards of our major trading partners to the level established by the FCPA.' *Congressional Record – Proceedings and Debates of the 105th Congress Second Session* Vol. 144, Part 13, Senate, 31 July 1998 to 8 September 1998, United States Government Printing Office, Washington, 1998, pp. 18327-19630, at p. 18510.
  5. See Chapter 7 below. For chart of signatures and ratifications see <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=174&CM=8&DF=22/11/2010&CL=ENG>.

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The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was incorporated into US law by the International Anti-Bribery and Fair Competition Act of 1998.<sup>6</sup> This Act amended the FCPA to make it OECD-compliant by (1) removing the need for a territorial nexus,<sup>7</sup> introducing the possibility of criminal liability for foreign national agents or employees of US corporations<sup>8</sup> and (2) broadening the definition of ‘foreign official’ to include employees of international organizations.<sup>9</sup>

The UN Convention against Corruption (UNCC) criminalizes international corruption.<sup>10</sup> In addition to this prohibition, it broadens the scope of the legal response to corruption by requiring the establishment of civil liability for the offenses of corruption established under the Convention.<sup>11</sup> Very importantly, the Convention requires in Art. 35 that members of the convention ensure that

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6. Pub. L 105-366, signed on 10 November 1998. This act added a new Sec. 78dd-3 to Title I of the Foreign Corrupt Practices Act of 1977.
  7. The Amendments of 1998 remove the requirement that a means of interstate commerce must be used in the commission of the act of bribery. This means that there is no need for a territorial nexus where US individuals and corporations engage in prohibited conduct. Acts by such persons occurring outside the United States would fall under the ambit of the FCPA. See 15 USC Sec. 78dd-2(i)(1), which provides that:  
‘It shall be unlawful for any United States person to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to [a foreign official] ... irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.’
  8. 15 USC Sec. 78ff (c)(2) provides that:  
‘(A) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of Sec. 78dd-1 of this title shall be fined not more than \$100,000, or imprisoned not more than 5 years, or both. (B) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates subsection (a) or (g) of Sec. 78dd-1 of this title shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Commission. (3) Whenever a fine is imposed under Para. (2) Upon any officer, director, employee, agent, or stockholder of an issuer, such fine may not be paid, directly or indirectly, by such issuer.’
  9. 15 USC Sec. 78dd-(f)(1)(A) provides that:  
‘The term ‘foreign official’ means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.’
  10. Art. 15-25 UNCC.
  11. Art. 26(1) UNCC provides that ‘Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offenses established in accordance with this Convention. Art. 26(2) UNCC stipulates that subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.’

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their domestic laws provide for the right of private remedies for persons harmed by acts of corruption by stipulating that states ensure that parties have the right to institute legal proceedings.<sup>12</sup> The UNCC also requires that states consider the validity of transactions that result from corrupt acts.<sup>13</sup> The United States signed the UNCC on 9 December 2003 and ratified it on 30 October 2006.

### 4.2.2 Federal Law

There are no laws that are specifically directed at providing private remedies for victims of corruption. However, claimants have resorted to using provisions in rules that seek to ensure fair trading mechanisms, disclose full information for investors, provide accountability in government projects and fight organized crime as launching pads for private action to be taken for damage suffered as a result of corrupt activity. Enterprising claimants have used the private rights of action granted under these instruments to found corruption-related claims. Apart from this, wherever a corrupt activity is criminalized, this has implications with regard to the transactions that result from the legal wrong. As such, laws that establish bribery as a legal wrong as well as those that provide for private rights of actions, serve as a foundation for bribery-related claims.

The primary federal prohibitions of international and public bribery are found in the FCPA<sup>14</sup> and the Bribery, Grafts and Conflicts of Interest Statute.<sup>15</sup> These instruments establish international and national public corruption as legal wrongs. Apart from these principal instruments there are other federal and state laws that impact on corrupt activity.<sup>16</sup> Examples of such statutes are the

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12. Art. 35 UNCC.

13. Art. 34 UNCC.

14. See Chapter 3 above.

15. Title 18 USC, Chapter 11, Bribery Graft and Conflicts of Interest.

16. Henderson and Guida in their overview of Private Commercial Bribery in the United States list the relevant statutes as including the following: The Travel Act (1961), Title 18 USC Sec. 1952, Pub. L. 87-228 Sec. 1(a), 13 September 1961, 75 Stat. 498, which makes it an offense to commit bribery in violation of the laws of the state in which it was committed; The Anti-Kickback Act (1946 as amended), Title 41 USC Sec. 53, which prohibits kickbacks involving contractors under federal contracts; The Federal Securities Act (1934) and State 'Blue Sky' Laws, which prohibit fraud in connection with the sale of securities and enable the purchaser to make a reasoned decision based on reliable and adequate information; the Mail and Wire Fraud statutes (1948), Title 18 USC Sec. 1341, and Title 18 USC Sec. 1343. These laws prohibit the use of mail and wire facilities for fraudulent purposes; The Racketeering Influenced and Corrupt Organization Act, RICO Act (1970), as amended Title 18 USC Sec. 1962, which enables persons financially injured by a pattern of criminal activity to bring a RICO claim in a federal or state court and to obtain damages three times the amount of their actual harm, plus attorney's fees and costs; The Clayton Anti-Trust (1914) and Robinson-Patman Acts (1936), Title 15 USC Sections 13(c), which seeks to prevent sellers and brokers from yielding to the

## PRIVATE REMEDIES FOR CORRUPTION

various antitrust instruments and anti-racketeering rules.<sup>17</sup> These statutes allow for a private right of action and introduce notions of compensation and the payment of aggravated damages. An Act which deserves mention for the opportunities it offers to incentivize the potential plaintiff is the False Claims Act<sup>18</sup>, which rewards a plaintiff with a share of the damages recovered by government prosecutors. Carrington argues that the False Claims Act can in fact serve as a model of private intervention in circumstances where corruption renders government institutions ineffective in the fight against corruption. He states:

‘The relevance of the American practice of privatized law enforcement to the corruption problem results from the historical fact that it is a product of a nineteenth-century culture sharing very limited trust in government and its officers. Its cultural situation thus bears some resemblance to the situations both in impoverished lands and in the community of nations hoping for enforcement of international law prohibiting corrupt practices. It is a system of law enforcement that reduces the law’s dependence on the integrity of judges, prosecutors, and other public servants. Wherever public integrity is in great doubt, the American experience may offer useful instruction.’<sup>19</sup>

### 4.2.2.1 18 USC Chapter 11 Bribery Graft and Conflicts of Interest

Abusing public trust for private gain is a criminal offense under US law. The Bribery, Graft and Conflicts of Interest statute is a federal law that criminalizes active and passive bribery of US public officials acting for or on behalf of the US government.<sup>20</sup> It provides that whoever directly or indirectly corruptly gives, offers or promises anything of value to any public official with the intent of influencing the public official in his public duties shall be fined not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be

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economic pressures of large buying organizations by granting unfair preferences in connection with the sale of goods; The Economic Espionage Act (1996), Title 18 USC Sec. 1832, which criminalizes the theft, unauthorized appropriation, or acquisition, by fraud or copy, of protected interests; The Tax Fraud and Internal Revenue Code (1954 as amended), Sec. 7201 of the Internal Revenue Code; Bribery in Procurement of Bank Loans (1984 as amended), Title 18 USC Sec. 1344; Sports Bribery (1964 as amended), Title 18 USC Sec. 224; Bribery of Witnesses and Perjury (1962 as amended), Title 18 USC Sec. 201; Bribery within Employee Benefit or Pension Plans, Title 18 USC Sec. 1954. See K. Henderson, K Guida, The United States, in G. Heine, B. Huber, T. Rose (Eds.), *Private Commercial Bribery: A Comparison of National and Supranational Legal Structures*, Paris, ICC, 2003, pp. 479-557.

17. The principal regulations in this regards are the antitrust instruments in the Sherman Act (1890), Clayton Act (1814), Robinson-Patman Act (1936), and the RICO Act (1982).
18. Codified at 31 USC Sec. 3729-3733.
19. P. Carrington, ‘Law and transnational corruption: the need for Lincoln’s law abroad’, *Law and Contemporary Problems*, Vol. 70, 2007, p. 109, at p. 112.
20. 18 USC Sec. 201(a).

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disqualified from holding any office of honor, trust, or profit under the United States.<sup>21</sup>

The statute also criminalizes the soliciting of a bribe by a public official, and it stipulates that any public official who corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for being influenced in the performance of a public duty, shall be fined not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.<sup>22</sup> Not only must US public officials not solicit or receive bribes, they must not participate in any bribery-related scheme. Sec. 208 of the same statute prohibits any public officer or employee of a US authority from participating in the decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which such an officer has a financial interest.

### 4.2.2.2 Antitrust Law

US antitrust laws have been used with respect to bribery-related claims.<sup>23</sup> The US Supreme Court has commented that antitrust laws are:

‘designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.’<sup>24</sup>

The payment of a bribe may distort healthy competition in the market place. The *Sherman Antitrust Act* of 1890 addresses the issue of anti-competitive

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21. 18 USC Sec. 201(b)(1).

22. *Id.*, 201(b)(2).

23. Gevurtz points out that commercial bribery claims that are predicated on the Sherman Act are coming before the courts with increasing frequency. See F. Gevurtz, ‘Commercial bribery and The Sherman Act: the case for per se illegality’, *U. Miami L. Rev.*, Vol. 42, p. 365; see also F. Gevurtz, ‘Using the antitrust laws to combat overseas bribery by foreign companies: a step to even the odds in international trade’, *Vanderbilt Journal of International Law*, Vol. 27, 1987, p. 211.

24. See *Northern Pacific R. Co. v. United States*, 356 U.S. 1 (1958), at p. 4. See also J. Zamansky, ‘Preferential treatment, payoffs and the antitrust laws: distortion of the competitive process through commercial bribery’, *Commercial Law Journal*, Vol. 83, 1978, p. 558, at p. 563.

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practices that may occur in the setting up of cartels or monopolies. Sec. 1 of the Act provides that '[E]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.'<sup>25</sup> Sec. 2 of the Act stipulates that:

'Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony ....'<sup>26</sup>

The *Sherman Act* directs itself 'not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.'<sup>27</sup> The door to the private claimant in antitrust claims was opened by the *Clayton Act* enacted in 1914 to supplement the *Sherman Antitrust Act*.<sup>28</sup> This Act allows for a private right of action for persons who have suffered antitrust injury and provides in Sec. 4 that:

'any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover *threefold the damages* by him sustained, and the cost of suit, including a reasonable attorney's fee.'<sup>29</sup>

As such, under US antitrust laws, private persons may sue for treble damages where they have suffered an injury as a result of an antitrust violation.<sup>30</sup> The

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25. 15 USC Sec. 1.

26. 15 USC Sec. 2.

27. See US Supreme Court in *Spectrum Sports Inc. et al. v. McQuillan et vir, DBA Sorboturf Enterprises*, 506 U.S. 447 (1993), at p. 458.

28. 15 USC Sec. 15 (1983 & Supp. 1990).

29. Clayton Act, Ch. 323, Sec. 4, 38 Stat. 731 (1914) as amended Pub. L. 96-349, Sec 4(a)(1), 94 Stat. 1156 (1980); Pub. L. 97-393, 96 Stat. 1964 (1982) (current version at 15 USC Sec. 15 (1983 & Supp. 1990).

30. See *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U.S. 477, (1977), at pp. 484-489. The court held that for plaintiffs in an antitrust action to recover treble damages on account of Sec. 7:

'[Clayton Act] violations, they must prove more than that they suffered injury which was causally linked to an illegal presence in the market; they must prove injury of the type that the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury must reflect the anticompetitive effect of either the violation or of anticompetitive acts made possible by the violation.'

Similarly in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981) at p. 568, the court held that:

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US Supreme Court has noted that this is meant to encourage the private claimant to support the government in tackling antitrust violations. The court stated:

‘[C]ongress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation. By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as ‘private attorneys general.’<sup>31</sup>

Private claims based more specifically on allegations of commercial bribery have also been brought on the basis of the *Robinson-Patman Act*.<sup>32</sup> This Act, a 1936 amendment to Sec. 2 of the *Clayton Antitrust Act*, was designed to curb price discrimination caused by the practices of chain store buyers who used ‘dummy’ brokerage (commission) fees as a means of securing price rebates to buy products at lower prices.<sup>33</sup> The stores required sellers to pay a ‘brokerage’ to persons employed by the stores. These persons had rendered no service, and would simply pay over the commissions to their employers.<sup>34</sup> Payment of commissions by a seller to an employee of the buyer for which no service was rendered was little more than a thinly cloaked bribery scheme. This led to an uncompetitive situation. As a consequence the *Robinson-Patman Act* was enacted.

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‘By its terms Sec. 2(a) [of the Clayton Act] is a prophylactic statute which is violated merely upon a showing that “the effect of such discrimination may be substantially to lessen competition.” ... “As our cases have recognized, the statute does not require that the discriminations must in fact have harmed competition....” Section 4 of the Clayton Act, in contrast, is essentially a remedial statute. It provides treble damages to “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. . . .” To recover treble damages, then, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent.’

31. *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251 (1972), at p. 262. The US Supreme Court notes that ‘the purpose of giving private parties treble damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws.’
32. In *Federal Trade Commission v. Henry Broch & Co*, 363 U.S. 166 (1960), at note 6, to the judgment the US Supreme Court referring to the 80 Cong. Rec. 7759-7760, 8111-8112, stated in obiter that ‘although not mentioned in the Committee Reports, the debates on the bill show clearly that Sec. 2(c) was intended to proscribe other practices such as the ‘bribing’ of a seller’s broker by the buyer.’
33. For historical overview see K. Allen, M. Williams, ‘Commercial bribery, antitrust injury and Sec. 2(c) of the Robinson-Patman Anti-Discrimination Act’, *Gonzaga L. Review*, Vol. 26, 1990/91, p. 167, at pp. 170-173.
34. Per Weis J. in *Seaboard Supply Co. v. Congoleum Corp.*, 770 F.2d 367, 371 (3rd Cir. 1985), at p. 371.

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Sec. 2(c) of the *Robinson-Patman Act*<sup>35</sup> prohibits the payment of such commissions where there has been no service rendered in respect of a sale of goods. It provides that it is unlawful for:

‘any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.’

Treble damages can be recovered where the plaintiff suffers an injury that the antitrust laws were established to prevent. Such a brokerage payment may constitute an antitrust injury that can found a private action under Sec. 4 of the *Clayton Act*.<sup>36</sup> The courts have in fact applied the *Robinson-Patman Act* to cases of bribery in sales transactions.<sup>37</sup> There are however several limitations to the potential plaintiff regarding the use of the *Robinson-Patman Act* as a means of seeking remedy. Firstly, it only applies to transactions involving the sale of goods, and secondly, it only applies where the defendant has been ‘engaged in commerce.’ Thus in the case of bribes paid to influence the acquisition of business by bribing public officials, as is the case with international corruption, there may be little scope for the application of the *Robinson-Patman Act*.

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35. 15 USC Sec. 13(c).

36. Clayton Act, id., Note 29 above.

37. See for example *Grace v. E J Kozin Company*, 538 F.2d 170 (7th Cir. 1976), where events constituting commercial bribery were held to come within the terms of 2(c); and *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965), cert. denied 383 U.S. 936, where it was held that Sec. 2(c) of the Robinson-Patman amendment to the Clayton Act encompasses cases of commercial bribery tending to undermine the fiduciary relationship between a buyer and its agent, representative, or other intermediary in a transaction; in *Environmental Tectonics Corp. v. W.S. Kirkpatrick & Co.*, 659 F.Supp. 1381 (D.N.J. 1987), affirmed on other grounds, 847 F.2d 1052 (3rd Cir. 1988), 493 U.S. 400 (1990), the Court held that it is generally agreed that a direct competitor of a company that obtains a contract through commercial bribery has standing to press a 2(c) claim against the briber; in *Seaboard Supply Co. v. Congoleum Corp.*, 770 F.2d 367, 371 (3rd Cir. 1985) the Supreme Court affirmed that as a general matter, commercial bribery is actionable under 2(c), but that a plaintiff must show that the illegal payments in question crossed the line from buyer to seller or vice versa for the *Robinson-Patman Act* to apply.

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### 4.2.2.3 Securities Acts 1933 and 1934

Corporate wrongdoing often results in harm to the corporation, which adversely impacts the interests of shareholders. There is also increased public activism and shareholder awareness about the links between corporate governance and issues such as human rights, corruption, environmental pollution, conditions in the workplace, animal welfare and sustainable development. Corporate scandals such as Enron, Siemens, BAE, and Halliburton have focused attention on mechanisms to manage corporate wrongdoing and increase accountability in corporate decision making. This is a driver for efforts to influence the decision making processes of corporations in a manner that protects the interest of shareholders in particular, as well as a broader range of stakeholders in general. An important vehicle for shareholders to redress harm occasioned to the corporation or to their interests is to institute legal proceedings against or on behalf of a corporation by way of derivative or class-direct actions.

Such actions may be based on allegations of inaccurate or misleading information to shareholders. Engaging in secret acts of corruption that are not disclosed to shareholders may constitute information that may have influenced the investment decisions of a shareholder. The *Securities Exchange Act of 1933*<sup>38</sup> requires that shareholders receive complete and accurate information before they invest. Sec. 10(b) of the *Securities Act 1933* requires that a prospectus for the protection of investors must not include any untrue statement of a material fact or omit to state any material fact.<sup>39</sup> Sec. 11-12 provides for civil liability on account of false registration statements and enables any shareholder to sue company executives for damages.<sup>40</sup> Violation of

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38. Codified at 15 USC Sec. 77a et seq.

39. Codified at 15 USC Chapter 2A Sec. 77j, which deals with information required in a prospectus and provides in Sec. 77j (b) that:

‘[t]he Commission may at any time issue an order preventing or suspending the use of a prospectus permitted under this subsection, if it has reason to believe that such prospectus has not been filed (if required to be filed as part of the registration statement) or includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein, in the light of the circumstances under which such prospectus is or is to be used, not misleading.’

40. Securities Act 1933, Sec. 11(a) Codified at 15 USC Chapter 2A Sec. 77k provides that: ‘in case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—(1) every person who signed the registration statement; (2) every person who was a director of (or person performing similar functions) or partner in, the issuer at the time of the filing of the part of the

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the registration requirements can lead to civil liability for the issuer and underwriters.<sup>41</sup> Sec. 20 provides that the court may impose civil penalties on persons who have committed violations of the Securities Act of between \$5,000-\$100,000 for a natural person and \$50,000-\$500,000 for any other person or the *gross pecuniary gain* made by the defendant, whichever is the greater.<sup>42</sup>

*The Securities Exchange Act of 1934* also allows for the possibility of private actions by investors.<sup>43</sup> The 1934 Act is the umbrella Act for the FCPA and was enacted to regulate the secondary trading of securities, often through brokers. Such transactions, usually conducted through securities exchanges and over-the-counter markets, were considered by the US Congress to be affected with a national public interest which made it ‘necessary to provide for regulation.’<sup>44</sup> The intervention of the state was considered necessary to protect citizens who may suffer the ‘catastrophic consequences’ of private corporate acts. Sec. 10(b) of the *Securities Exchange Act of 1934* provides:

‘it shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange ... [T]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement ..., any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in *the public interest or for the protection of investors.*’<sup>45</sup>

The securities laws are provided for the protection of the private investor and the rules give such private investors a private right of action. Sec. 20(a) of the *Securities Exchange Act of 1934 Act* provides for private right of action for securities violation and states:

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registration statement with respect to which his liability is asserted; (3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions or partner; (4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him; (5) every underwriter with respect to such security.’

41. See Sec. 11-12(a)(1) and 12(a)(2) Securities Act of 1933.

42. See Sec. 20(d) Securities Exchange Act 1933 Codified at 15 USC Sec. 77t(d)(2).

43. Codified at 15 USC Sec. 78a et seq.

44. Title 15 Chapter 2B Sec. 78b: Necessity for Regulation.

45. Codified at 15 USC Sec. 78j(b).

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‘any person who violates any provision of this title or the rules or regulations there under by purchasing or selling a security while in possession of material, non-public information *shall be liable in an action in any court of competent jurisdiction to any person* who, contemporaneously with the purchase or sale of securities that is the subject of such violation, has purchased (where such violation is based on a sale of securities) or sold (where such violation is based on a purchase of securities) securities of the same class.’

Penalties may range from between \$5,000-\$100,000 for a natural person and \$50,000-\$500,000 for any other person or the *gross pecuniary gain* made by the defendant, whichever is the greater.<sup>46</sup>

### 4.2.2.4 The RICO Act 1970

Violations of the FCPA are a predicate act under the 1970 *Racketeer Influenced and Corrupt Organizations (RICO) Act*<sup>47</sup> and may give rise to a private cause of action. Victims harmed by the acquisition or investing activities of a racketeering enterprise which has engaged in a ‘pattern or racketeering activity’ may sue for treble damages.<sup>48</sup> Racketeering activity is defined to include any threat or act involving among other things bribery.<sup>49</sup> The US courts have affirmed that the right of the plaintiff to private redress under *RICO* includes persons who have suffered damage as a result of commercial bribery.<sup>50</sup>

The *RICO Act* provides that it shall be:

‘unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt ... to use or invest, directly or indirectly, any part of such

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46. Emphasis added. Sec. 20 Securities Exchange Act 1934 Codified at 15 USC Sec. 78t(a).
47. Codified at 18 USC Sec. 1961-1968. ‘Racketeering activity’ is defined in 18 USC Sec. 1961(1) by listing predicate offenses that are considered racketeering activity. The list includes acts made punishable by state law, such as ‘murder, kidnapping, gambling, arson, robbery, bribery, extortion,’ and certain drug offenses; as well as specific federal offenses including mail fraud and interstate travel or transportation in aid of racketeering. See *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272 (7th Cir. 1983) at Para. 74.
48. 18 USC Sec. 1964(c).
49. 18 USC Sec. 1961(1).
50. In *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272 (7th Cir. 1983) at Para. 88, the Court stated:  
‘the broad remedial purposes of RICO clearly permits private lawsuits by a firm forced to pay bribes or kickbacks of any kind. [Plaintiff] was directly injured if, as alleged, it paid for services it never received, the proceeds of which were used to pay off [its] employees and to bribe union officials. RICO was addressed to the precise form of racketeering activity which allegedly took place here.’

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income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.<sup>51</sup>

A pattern of racketeering activity is defined as ‘at least two acts of racketeering activity’ which occurred within ten years of one another, with one of the acts occurring after the effective date of the *RICO Act*.<sup>52</sup> Also prohibited is the acquisition of any interest in or control of any enterprise<sup>53</sup> or for an employee or person associated to conduct or participate<sup>54</sup> in the activities of which affect interstate or foreign commerce through a pattern of racketeering activity or through collection of an unlawful debt.

### 4.2.2.5 The False Claims Act

Private parties are enabled to file actions against government contractors or other recipients of government money in the name of the US government under the *qui tam* provisions of the *False Claims Act* of 1986.<sup>55</sup> Any person who knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000 plus three times the amount of damages which the Government sustains because of the act of that person.<sup>56</sup>

A person (referred to as a relator) may bring a civil action for a violation of the *False Claims Act* provisions for the person and for the United States Government. The action is brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.<sup>57</sup> If the Government proceeds with the action, the relator initiating the claim shall receive at least 15 per cent but not more than 25 per cent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action.<sup>58</sup>

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51. 18 USC Sec. 1962(a).
  52. 18 USC Sec. 1961(5).
  53. 18 USC Sec. 1962(b).
  54. 18 USC Sec. 1962(c).
  55. Codified at 31USC Sec. 3729-3733.
  56. 31USC Sec. 3729(a).
  57. 31USC Sec. 3730(b).
  58. 31USC Sec. 3730(d). For more on the potential of the *qui tam* action see P. Carrington, American Law and Transnational Corruption: Is There a Need for Lincoln’s Law Abroad?, in O. Meyer (Ed.), *Civil Law Consequences of Corruption*, Nomos Verlag, Baden Baden, 2009, p. 37.

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Carrington notes that about \$15 billion were recovered by the United States in the 9,000 false-claims cases pursued from 1987 to 2005, and that of this amount about two-thirds were recovered in qui tam cases initiated by citizen-relators. He notes that the median recovery in such private qui tam cases was \$784,597, and the median relator's share was \$123,885.<sup>59</sup>

### 4.2.3 State Commercial Bribery Laws

The aforementioned federal laws only relate to public bribery as there is no federal law relating to private commercial bribery.<sup>60</sup> This is left to the states.<sup>61</sup> The state laws derive from common law prohibitions on misconduct by

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59. P. Carrington, *Law and Transnational Corruption: The Need for Lincoln's Law Abroad*, id., Note 19 above, p. 109, at p. 127.

60. The FCPA does not provide for the criminalization of commercial bribery.

61. For a listing of state laws that outlaw commercial bribery see *Perrin v. United States*, 444 U.S. 37 (1979), Notes 9 & 10. Fourteen States have statutes which outlaw commercial bribery generally. The statutes are currently codified at Conn.Gen.Stat. §§ 53a-160, 53a-161 (West 1972) (enacted 1905); La.Rev.Stat. Ann. § 14.73 (West 1974) (enacted 1920); Mass.Gen.Laws Ann., ch. 271, § 39 (West 1970) (enacted 1904); Mich.Comp.Laws § 750.125 (1968) (enacted 1905); Miss. Code Ann. §§ 97-11-11, 97-11-13 (1973) (enacted 1857); Neb. Rev. Stat. § 28-710 (1975) (enacted 1907); N.Y. Penal Law §§ 180.00-180.03 (McKinney Supp. 1978-1979) (enacted 1905); N. C. Gen. Stat. § 14-353 (1969) (enacted 1913); Pa. Stat. Ann., Tit. 18, § 4108 (Purdon 1973) (enacted 1939); R.I. Gen. Laws §§ 11-7-3, 11-7-4 (1970) (enacted 1881); S. C. Code § 16-17-540 (1977) (enacted 1905); Vt. Stat. Ann., Tit. 13, § 1106 (1974) (enacted 1904); Va. Code § 18.244 (1975) (enacted 1950); Wis. Stat. § 134.05 (1978) (enacted 1905).... the Court added that '[a]n additional 28 had adopted more narrow statutes outlawing corrupt payments to influence private duties in particular fields, including bribery of agents, common carrier and telegraph company employees, labor officials, bank employees, and participants in sporting events. The current codifications of the statutes are found at Ala. Code § 134-9 (1977) (sports); Alaska Stat. Ann. § 42.20.110 (1976) (telegraph agent); Ariz. Rev. Stat. Ann. § 4-243 (1974), § 13-2309 (1978) (alcoholic beverages, sports); Ark. Stat. Ann. § 41-3288 (1977), § 67-707 (1966) (sports, banking); Cal. Penal Code Ann. §§ 337b-337e, 641 (West 1970) and Cal. Fin. Code Ann. § 3350 (West 1968) (sports, telegraph agent, banking); Colo. Rev. Stat. § 18-5-403 (1978) (sports); Del. Code Ann., Tit. 28, §§ 701-704 (1975) (sports); Fla. Stat. § 838.12 (1976) (sports); Haw. Rev. Stat. § 708-880 (1976) (sports); Ill.Rev.Stat., ch. 38, §§ 29-1 to 29-3 (1977) (sports); Ind.Code §§ 35-18-10-1, 35-18-10-2, 35-18-12-1, 35-18-12-2 (1976) (common carrier, sports); Iowa Code § 722.3 (1979) (sports); Ky.Rev.Stat. § 244.600 (1972), § 518.040-050 (1975) (alcoholic beverages, sports); Me.Rev.Stat. Ann., Tit. 17, § 3601 (1965) (labor); Md.Ann.Code, Art. 27, §§ 24, 25 (1976) (sports); Minn.Stat. § 609.825 (1964) (sports); Mo.Rev.Stat. § 570.155 (1978) (sports); Mont.Code Ann. § 94-35-221 (1978) (telegraph agent); Nev.Rev.Stat. §§ 614.140, 707.120 (1973) (labor, telegraph agent); N.J.Stat. Ann. §§ 2A:91-1, 2A:93-7, 2A:93-10 (West 1969) (banking, labor, sports); Ohio Rev.Code Ann. § 2915.06 (1975) (sports); Okla.Stat., Tit. 21, §§ 399, 400 (1971) (sports); Ore.Rev.Stat. § 165.515 (1977) (telegraph agent); S.D.Comp.Laws Ann. § 36-18-28 (1967) (architects); Tenn.Code Ann. §§ 39-821, 39-824 to 39-826 (1975) (common carriers, sports); Tex. Penal Code Ann. §§ 32.43, 32.44 (1974) (attorneys, sports); Wash.Rev.Code §§ 49.44.020, 67.04.010 to 67.04.080 (1976) (sports, labor); W.Va.Code § 61-10-22 (1977) (sports). Since 1961, of the eight States which had not adopted nonpublic official bribery statutes, Georgia, Kansas, New Hampshire, New Mexico, North Dakota, and Wyoming now have such statutes. Moreover, a number of the States which did not have a commercial bribery statute in 1961 do so today.'

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agents.<sup>62</sup> For example, as far back as 1881, the State of New York criminalized private bribery in Sec. 439 (now Sec. 180) of its Penal Law. Sec. 180 of the New York Penal Law prohibits active and passive private commercial bribery.<sup>63</sup>

Sec. 180.00 of the New York Penal Law penalizes active bribery in commercial transactions and provides that:

‘a person is guilty of commercial bribing in the second degree when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter’s employer or principal, with intent to influence his conduct in relation to his employer’s or principal’s affairs. Commercial bribery in the second degree is a class (A) misdemeanor. Where the value of the benefit conferred or offered or agreed to be conferred exceeds one thousand dollars and causes economic harm to the employer or principal in an amount exceeding two hundred fifty dollars this is commercial bribery in the first degree which is a class E felony.’

The New York Law also prohibits passive commercial bribery and states that:

‘an employee, agent or fiduciary is guilty of commercial bribe receiving in the second degree when, without the consent of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that such benefit will influence his conduct in relation to his employer’s or principal’s affairs.’<sup>64</sup>

Certain key elements are found in the definition of commercial bribery. It relates to bribery in the course of business transactions, involving a party who secretly receives a payment or other inducement to act against the interest of a principal or employer. This has economic and social implications. Russell C.J. in *People v. Davis* has remarked that the:

‘Significance of Sec. 439 of the Penal Law, taken as a whole, is this, namely, that secret commissions are to be contended because they prompt a servant to betray his master, and thus prejudice the master’s interests in consideration of pay received from others. Obviously the gravamen of this charge lies in the secrecy of such transactions. The master believes, and has reason to believe, that he is being served without stint or qualification by his employee, who is devoting the full measure of his time and attention, without diminution to his

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62. The substantive law relating to civil and criminal actions which allege commercial bribery finds its origins in the common law. The common law recognized that the misconduct of an agent by concealment or neglect of duty entitled the principal to the equitable remedy of rescission.

63. Sec. 180.10-180.30 (bribery involving labor officials), Sec. 180.35-180.51 (sports bribery), Sec. 180.52-180.53 (pair mutual betting), and Sec. 180.54-180. 57 (rent gouging).

64. Sec. 180.05 N.Y. Penal Law.

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employer's interests exclusively. The evil aimed at is in the service of two masters, whose interests are necessarily and forever antagonistic.<sup>65</sup>

The role of the state in combating such practices is pre-eminent. Russell C.J. further states:

'Business experience demonstrates the necessity for such a statutory bulwark of fidelity. Without such a statute, under the fierce competition of modern life, purchasing agents and agents to employ labor can be lured all too readily into the service of hopelessly conflicting interests.'<sup>66</sup>

He concludes that provisions such as Sec. 439 of the old New York Penal law are 'zealous to banish the very appearance of evil, and requires of such an agent complete and unswerving devotion to his one master.'<sup>67</sup> Commercial bribery statutes cover both private as well as public bribery. The court in *State v. Prybil*<sup>68</sup> remarked that commercial bribery statutes reach:

'private as well as public employees. In its relationship to private employees it is a commercial bribery statute. As to public employees it fits in the scheme of statutes prohibiting commercial bribery.'

The basis of liability under these statutes is the breach of the duty of loyalty or fiduciary duty owed by the agent or employee to the principal or employer.

### 4.3 The Private Right of Action

#### 4.3.1 Position under Treaty Law

While the federal laws discussed above may be used to found a private claim, there is no express private right of action for damage suffered as a result of corrupt acts under these laws. Is there an express private right of action that results from the ratification by the US of the UNCC, which provides that states should facilitate the right of private parties to institute actions for damage suffered as a result of corruption?

Art. 35 UNCC provides that state parties 'shall take such measures as may be necessary, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.' At first

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65. *People v. Davis*, 33 N.Y. Crim. 460, 160 N.Y.S. 769, (1915), at p. 776.

66. *Id.*, at p. 778.

67. *Id.*

68. *State v. Prybil*, 211 N.W.2d 308, (Iowa 1973, 17 October 1973).

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glance, the mandatory nature of Art. 35 UNCC for participating states is established with the use of the word ‘shall’ with respect to the requirement that state parties provide persons with a right to initiate legal proceedings against those responsible for damage suffered as a result of an act of corruption. This provision has not been accepted into US Law.

This apparent mandatory nature of Art. 35 UNCC and its seemingly broad scope was a matter of concern for the US Congress, which stated during Senate hearings on the Convention that Art. 35:

‘could be read to require or encourage a State to open its courts to civil suits unrelated or only tangentially related to that State, and for acts only marginally related to acts of corruption...’<sup>69</sup>

The final wording of Art. 35 does not contain any caveat limiting the category of persons against whom an action relating to corruption can be brought. It gives the right to any entity or person who has suffered damage to seek redress against ‘those responsible for the damage.’ In the opinion of the US representatives in its present form, Art. 35 would seem to suggest that ‘every person’ who ‘suffers’ damage has a ‘right’ to redress. As framed, recourse may be the direct offender who perpetrates the act of corruption but could also include persons ‘associated’ with the direct perpetrator.<sup>70</sup>

Art. 35 UNCC was, in the view of the US Congress, too broad and it was a departure from the historical record of the Convention. In their opinion, the Travaux Préparatoires showed much more flexibility to Art. 35. In the opinion of the committee, the Travaux Préparatoires clarified that Art. 35 is only intended to be applied to legal proceedings against those who commit acts of corruption, rather than those who may be associated with others who may commit acts of corruption. In other words, private legal proceedings could be brought ‘only’ against those who directly commit the act of corruption itself.<sup>71</sup>

This potential broad application of Art. 35 was disquieting to the Senate Committee, which was of the opinion that the Travaux Préparatoires showed that the intention was to:

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69. Senate Treaty Documents Nos. 1-8, 109th Congress-1st Session 4 January - 22 December 2005, *US Congressional Serial Set Serial Number 14941*, US Government Printing Office Washington, 2006, at p. 10.

70. US Congress noted that Art. 35 could be interpreted to include ‘those who may be associated with others who commit acts of corruption,’ *id.*

71. *Id.*

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‘provide the State Parties significant flexibility in its implementation. It does not restrict the right of a State Party to decide the precise circumstances under which it will make its courts available, nor does it require or endorse a particular choice made under this article.’<sup>72</sup>

A broad interpretation of Art. 35 was firmly rejected by the Senate Committee on two principal grounds. Firstly, because the US Congress felt that US laws provided sufficient redress to the private claimant, and secondly, that corruption should not be seen as a ‘stand-alone violation’ of international law that could found a claim under the *Alien Tort Claims Act*.

On the issue of sufficiency, the Congress stated that US law was sufficient to meet the objectives of Art. 35 stating that:

‘The current laws and practices of the United States are in compliance with Art. 35 and the United States does not construe Art. 35 to require any broadening or enhancing current US law and practice in any way. US jurisprudence permits persons who have suffered from criminal acts such as bribery to seek damages from the offenders under various theories. These remedies are sufficient to comply with this Article.’<sup>73</sup>

Also rejected by the US Congress was the possibility of using the Art. 35 UNCC as a basis to bring an anti-corruption claim under the *Alien Tort Statute*.<sup>74</sup> This statute gives U.S. District Courts original jurisdiction in any civil action by an alien for a tort committed in violation of the law of nations or a treaty of the United States. A lawsuit based on a violation of the UNCC could constitute such a violation. However, this would only occur if corruption is considered a ‘law of nations’ violation in keeping with the U.S. Supreme decision in *Sosa v. Alvarez-Machain*.<sup>75</sup> In that case, the court held that the Alien Tort Statute only permits actions based on a limited set of claims of international law violations and essentially limited actionable claims under the Act to serious ‘law of nations’ violations such as genocide, war crimes, and crimes against humanity, slavery-like practices, torture, disappearance, summary execution, and prolonged arbitrary detention.<sup>76</sup>

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72. Id.

73. Id.

74. 28 USC Sec. 1350.

75. Senate Treaty Documents Nos. 1-8, 109th Congress-1st Session 4 January - 22 December 2005, id., Note 69 above, at p. 10.

76. In *Sosa v. Alvarez-Machain*, 542 US 692 (2004), Alvarez alleged that the fact that the US Drug Enforcement Administration had instigated his abduction from Mexico for criminal trial in the United States as the basis of a claim against the Government under the Federal Tort Claims Act. He sought to recover damages under the Alien Tort Statute. The Supreme Court rejected this argument and held that:

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The US Congress was of the view that corruption does not fall within the category of international crimes, stating that the UNCC:

‘does not itself suggest that corruption is a stand-alone violation of international law (but rather is something that States parties should prohibit under their domestic law). Accordingly, this Convention does not signify that corruption is a norm that is specific, universal and obligatory for the purposes of the Alien Tort Statute.’<sup>77</sup>

In view of its objection to the scope of Art. 35, the US Congress advised that an express declaration should be made in the resolution of declaration and consent to the UNCC to the effect that the provisions of the Convention were not self-executing and did not convey a private right of action. This reservation to the operation of Art. 35 was duly made, and the US has declared:

‘that the provisions of the Convention ... are non-self-executing. None of the provisions of the Convention creates a private right of action.’<sup>78</sup>

### 4.3.2 Position under the FCPA

The question has arisen whether private claimants have a right of action under the watershed FCPA. The FCPA is silent about the right of private individuals to bring an action based on its provisions. This silence and the attempts by parties to file suits based on the FCPA have brought the issue of the availability of such a private right of action before the courts. The US courts have in general affirmed the denial of a private right to seek a remedy under the FCPA.<sup>79</sup>

The key case in this regard is *Lamb v. Philip Morris, Inc.*<sup>80</sup> Philip Morris and British American Tobacco purchased tobacco for their products from American as well as foreign markets. The plaintiffs, Lamb and Willis, local producers of tobacco in Kentucky, were therefore, as suppliers to the

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‘at the time of enactment [of the ATS] the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized as common law. We do not believe, however, that the limited, implicit sanction to entertain the handful of international law cum common law claims understood in 1789 should be taken as authority to recognize the right of action asserted by Alvarez here.’

77. Senate Treaty Documents Nos. 1-8, 109th Congress-1st Session 4 January - 22 December 2005, id., Note 69 above, at p. 10.

78. Id.

79. A correlation can be drawn between the responses of the US Senate to the provisions of Art. 35 UN Convention and the position of the US Supreme Court with regard to the notion of a private right of action under the Alien Tort Statute codified under 28 USC Sec. 1350.

80. *Lamb v. Philip Morris Inc*, 915 F.2d 1024, (6th Cir. 24 August 1990).

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defendants, in direct competition with other producers in foreign markets. The trading conditions under which the foreign tobacco was sold to the defendants had a direct effect on the opportunities for sale of the plaintiff's tobacco to the defendants.

Philip Morris and British American Tobacco entered into arrangements in Venezuela, Argentina, Brazil, Costa Rica, Mexico, and Nicaragua that resulted in price controls on tobacco, elimination of controls on retail cigarette prices, as well as assurances that existing tax rates applicable to tobacco companies would not be increased. The modality for acquiring this agreement in Venezuela was through the use of a Phillip Morris subsidiary known as C.A. Tabacalera National and a B.A.T. subsidiary known as C.A. Cigarrera Bigott, SUCS. In 1982 these subsidiaries entered into a contract with La Fundación Del Niño (the Children's Foundation) of Caracas, Venezuela. This agreement was signed by the organization's president, who was the wife of the then President of Venezuela. The two subsidiaries agreed to make periodic donations to the Children's Foundation totalling approximately \$12.5 million dollars in exchange for the price controls arrangement.

The plaintiffs, not surprisingly, saw this arrangement between Philip Morris, BAT and the wife of the Venezuelan president as an unlawful inducement designed and intended to restrain trade. The damage to the plaintiffs was the artificial depression of tobacco prices in Venezuela to the detriment of US tobacco growers, while ensuring lucrative retail prices for tobacco products sold abroad. The plaintiffs brought an action seeking treble damages and injunctive relief under the antitrust laws for the reduction in the domestic price of tobacco. They also later amended their action to include a claim under the FCPA.

The court stated that the issue before them was to determine whether or not there was *an intention* on the part of the legislature to confer a private right of action under the FCPA.<sup>81</sup> In coming to a determination on this point, the court stated that the intent of the Congress was the ultimate deciding factor. The court held that 'unless this Congressional intent could be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply [would] not exist.'<sup>82</sup>

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81. Emphasis added.

82. *Lamb v. Philip Morris* 915 F.2d 1024, (6th Cir. 24 August 1990), at p. 1028.

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The four factors the court took into consideration in determining the intent of Congress were:

1. Whether the plaintiff was among ‘the class for whose especial benefit’ the statute was enacted;
2. Whether the legislative history suggested congressional intent to prescribe or proscribe a private cause of action;
3. Whether implying such a remedy for the plaintiff would be ‘consistent with the underlying purposes of the legislative scheme’; and
4. Whether the cause of action was ‘one traditionally relegated to state law, in an area basically the concern of States, so that it would be inappropriate to infer a cause of action.’

On the issue of whether the plaintiffs fell within the class of ‘especial beneficiaries’ of the FCPA, the court found that the FCPA was an effort by Congress to ‘aid federal law enforcement agencies in curbing bribes of foreign officials.’ They noted that in the history of the FCPA it was clear that the US Congress was concerned about ensuring a strong enforcement effort in implementing the new rules criminalizing foreign bribery. In short, the court was in agreement with arguments by the defendants that the FCPA was designed with the assistance of the Securities and Exchange Commission (SEC) to aid federal law enforcement agencies in curbing bribes of foreign officials. These parties the SEC and Justice Department are in this sense the ‘especial beneficiaries’ contemplated by the legislators in passing the FCPA.

On the issue of congressional intent derivable from the legislative history of the FCPA, the court summarized the motivations expressed in the Senate Record. These motivations were (1) to restore confidence in the financial integrity of American corporations, (2) to restore the efficient functioning of American capital markets, (3) to improve the stability of overseas business and (4) to improve the domestic competitive climate.<sup>83</sup> As such, the court found that the purpose of the FCPA was not to prevent the use of foreign resources to reduce production costs as argued by the plaintiffs in the case, but rather to ‘protect the integrity of American foreign policy and domestic markets.’<sup>84</sup>

Furthermore, the court found that the issue of a private right of action was barely mentioned in the legislative history before the House of Representatives. They did acknowledge the supportive reference the plaintiffs identified in the record,<sup>85</sup> but noted it as significant that the Senate committee

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83. *Id.*, at p. 1029.

84. *Id.*

85. ‘The committee intends that courts shall recognize a private cause of action based on this legislation, as they have in cases involving other provisions of the Securities Exchange Act, on

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had deleted this provision.<sup>86</sup> They further found that the availability of a private right of action apparently was never resolved (or perhaps even raised) at the conference that ultimately produced the final bill that was passed by both houses and signed into law. Neither the FCPA as enacted, nor, as the conference report mentions, as such a cause of action. As such, the court concluded that the fact that the final legislative compromise contained no mention of a private right of action inferred that Congress intended no such result.<sup>87</sup>

In addition, the court was of the opinion that the underlying legislative scheme of the FCPA was to encourage compliance in preference to prosecution. In their view the fact that the Attorney General was required to ‘establish a procedure to provide responses to specific inquiries’ by issuers of securities and other domestic concerns regarding ‘conformance of their conduct with the Department of Justice’s [FCPA] enforcement policy ...’,<sup>88</sup> as well as the fact that the Attorney General was to furnish ‘timely guidance’ concerning the Department of Justice’s FCPA enforcement policy to potential exporters and small businesses, showed a preference for compliance in lieu of prosecution. As such, the introduction of private plaintiffs interested solely in post-violation enforcement, rather than pre-violation compliance, would be inconsistent with congressional efforts to protect companies and their employees concerned about FCPA liability.<sup>89</sup> The court found that the introduction of a private right of action would directly contravene the carefully tailored FCPA scheme presently in place.

Finally, the court looked at what other alternative avenues of redress existed in its bid to determine whether there was congressional intent for the creation of a private right of action under the FCPA. The plaintiff’s argument that a private cause of action under the FCPA constituted the only *viable mechanism* for redressing anticompetitive behavior on a global scale, was countered by the potential for private recovery under federal antitrust laws. The court held that

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behalf of persons who suffer injury as a result of prohibited corporate bribery.’ See *House Report* No. 95-640, 95th Cong., 1st Sess. 4, (1977).

86. See Senate. Rep. No. 1031, 94th Cong., 2nd Sess. 13 (1976).

87. *Lamb v. Morris* 915 F.2d 1024, (6th Cir. 24 August 1990) at p. 1029.

88. *Id.*

89. Portnoy argues that this reasoning:

‘resonates in prosecutorial patterns today. US prosecutors routinely and publicly highlight the leniency afforded to companies who voluntarily report findings of suspicious activities and take remedial measures within their organizations. Also consistent with this theme is the overwhelming predominance of non-prosecution agreements in the United States in lieu of formal prosecution.’

See A. Portnoy, J. Murino, ‘Private Actions under the US Foreign Corrupt Practices Act: An Imminent Front?’, *International Litigation News Newsletter*, International Bar Association Legal Practice Division, April 2009, at p. 31.

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this potential for recovery under federal antitrust laws belied the plaintiffs' contention that an implied private right of action under the FCPA was imperative. Based on these factors the court concluded that there was no basis for a private right of action under the FCPA. The FCPA was an instrument geared, in the opinion of the courts, to aid state initiated processes of criminal prosecution.<sup>90</sup>

In recent times there has been an attempt to include a limited private right of action under the FCPA. *The Foreign Business Bribery Prohibition Act of 2008*<sup>91</sup> sponsored by US Representative Ed Perlmutter sought to introduce a limited private right of action under the FCPA for violations by foreign concerns that damaged US domestic business. This bill was to be limited to foreign concerns that were not subject to the Sec. 30 of the Securities Exchange, *i.e.* they were not affiliated with the US securities market, nor domestic concerns, nor were they US legal persons.<sup>92</sup> The proposed Foreign Business Bribery Prohibition Act of 2008 provided that:

‘any foreign concerns which violated the anti-bribery and records falsification provisions in Sec. 30A of the Securities Exchange Act would be liable in an action brought ... in any court of competent jurisdiction ... for damages caused to such issuer, domestic concern, or other person by the violation.’<sup>93</sup>

A plaintiff under the Foreign Business Bribery Prohibition Act would be required to prove that the defendant foreign concern violated the anti-bribery and records falsification provisions of the Securities Exchange Rules and that

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90. In another case an attempt by a plaintiff implicated in a bribery conspiracy to establish a private right of action under the FCPA in a bid to clear his name was rejected. See *McLean v. International Harvester Co.* 817 F.2d 1214, (5th Cir. 2 June 1987), at p. 1219, where Grazia J. remarked that ‘[...] we find it inappropriate to imply a private cause of action from the statute. The statute on its face shows no congressional intent to create a private action. Moreover, no legislative history exists referring to such an intent.’ The court in *Citicorp International Trading Co. Inc. v. Western Oil & Refining Company Inc.*, 771 F. Supp. 600 (S.D.N.Y. 22 July 1991) at 607 held that the attempt to use the FCPA to support a private tort action would not be allowed as the ‘law is not necessarily intended to protect individual businesses from the backlash of having an attempted bribe to a foreign official rejected.’

91. H.R. 6188: Foreign Business Bribery Prohibition Act of 2008, 110th Congress 2007-2008. On 4 June 2008, H.R. 6188, the Foreign Business Bribery Prohibition Act of 2008 was introduced to the House by Rep. Ed Perlmutter; the bill was referred to the House Committee on Energy and Commerce and the House Committee on the Judiciary; however, the committees never reported on the bill, the bill was never voted on, the session expired, and the bill was removed from the books. On 28 April 2009, Rep. Ed Perlmutter again introduced an identical bill numbered H.R. 2152, the Foreign Business Bribery Prohibition Act of 2009. The bill was referred to the House Committee on Energy and Commerce and the House Committee on the Judiciary, which further referred the bill to the Subcommittee on Crime, Terrorism, and Homeland Security.

92. Foreign Business Bribery Prohibition Act of 2008, Sec. 2(f) (8).

93. *Id.*, Sec. 2(1).

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this violation (i) prevented the plaintiff from obtaining or retaining business for or with any person; and (ii) assisted the foreign concern in obtaining or retaining such business.<sup>94</sup>

The measure of damages which a plaintiff could obtain under the proposed Foreign Bribery Prohibition Act was stipulated as follows: general damage equal to the higher of the two following amounts that are established by the plaintiff's allegations and proof: (i) the total amount of the contract or agreement that the defendant gained in obtaining or retaining business by means of the violation of the rules of (ii) the total amount of the contract or agreement that the plaintiff failed to gain because of the defendant's obtaining or retaining of business by means of the violation of the anti-bribery rules. Furthermore, the plaintiff would be entitled to treble damages as follows: In assessing damages the court shall enter judgment for three times the amount determined under clause (i) or (ii) of such subparagraph (whichever is greater), together with a reasonable attorney's fee and costs, for any violation of the anti-bribery rules.<sup>95</sup> This bill never became law.

It can be concluded that there is no private right of action under the FCPA. This demonstrates a consistency with the rejection of the notion of a private right of action in the reservation made by the US to Art.35 UNCC. The message from Congress and the courts is that the fight against foreign corruption is one that concerns federal authorities, and that the rules of the international and domestic instruments against corruption are not in any way intended to introduce the concept of a private right of action.

### 4.3.3 Position under State Law

The position regarding the private right of action under state law is somewhat similar. The Supreme Court of New York in *Sardanis v. Sumitomo Corp*<sup>96</sup> held that there is no private right of action under the commercial bribery statutes. In this case, the plaintiff, a former chairman of the board of directors of RST Resources, a corporate trader in commodities, claimed that employees had formed a competing company that had conspired with Sumitomo to drive the plaintiff's company out of business and control the trade of copper in the world futures market. The plaintiff sought damages for commercial bribery and fraud from the former employees for breach of fiduciary duty, and from the corporate defendants for inducement to breach fiduciary duty.

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94. Id., Sec. 2(2).

95. Sec. 2(f)(3)(A) Foreign Business Bribery Prohibition Act of 2008.

96. *Sardanis v. Sumitomo Corp* 279 A.D.2d 225 (App. Div. 1st Dep't 9 January 2001).

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The Court held that commercial bribery of the nature alleged by the plaintiff was a felony under New York law but that the statute made no mention whether a private right of action was thereby created. In the opinion of the court:

‘The test, in general, for determining whether such a right of action implicitly derives from a criminal statute depends upon satisfaction of all of the following factors: whether plaintiff is of a class for whose benefit the statute was enacted, whether recognition of such a right of action would promote the legislative purpose, and whether creation of such a right would be consistent with the legislative scheme.’<sup>97</sup>

The Court went on to state that:

‘The purpose of this statute was to protect consumers from the higher prices and lower quality that would almost inevitably result from pervasive bribery in any segment of commerce. RST is not among that class intended to be protected. It is possible that permitting such a right of action, thus enabling employers to pursue corrupt employees, might enhance the statute’s purpose of weeding out such corruption; but such a remedy already exists under tort law. More important, the creation of such a right of action under the statute would be inconsistent with the existing legislative and remedial scheme, which gives the power of enforcement to the District Attorney.’<sup>98</sup>

As such, the general rule is that the enforcement of the rules criminalizing commercial bribery, whether foreign or domestic, remains the preserve of government authorities. No private right of redress is created under the FCPA or under the state commercial bribery statutes. However, the normative framework does show that despite the absence of an express private right of action under the anti-bribery laws, there are other avenues that can found a claim for injury suffered as a result of corruption. Bribery has been used by enterprising claimants under US antitrust and securities laws. Furthermore, there are also opportunities for redress under the *RICO* and *False Claims Act*.<sup>99</sup>

### 4.4 Transaction Validity

The international public policy against corruption in business transactions, the criminalization of international commercial bribery and the US federal and state laws criminalizing international and domestic commercial bribery create a line of convergence between the conduct and the results of the corrupt exchange. Where a party who has suffered the damages as a result of

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97. Id., at p. 229.

98. Id.

99. See Section 4.5 below.

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corruption seeks redress in a court of law, public policy is likely to tilt in favor of such a plaintiff.<sup>100</sup> The following sections examine the position of such a plaintiff from the perspective of the contracts that result from the corrupt exchange. Challenging the validity of transactions resulting from corrupt exchanges is an important avenue of private remedy for the plaintiff who has suffered injury as a result of corruption.

### 4.4.1 The Fiduciary Duty

The act of bribery is an abuse of a relationship where one of the parties replaces a duty to act in the best interests of the other party with the pursuit of private gain. The opportunity to make a private profit only exists because of the nature of the relationship between these parties. Where there is a fiduciary duty to act in the best interest of another, this indicates an agency relationship. The Restatement (3rd) on Agency notes that ‘within the scope of a relationship of agency, the agent owes fiduciary duties to the principal.’<sup>101</sup> Agency is defined as:

‘the fiduciary relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principals control, and the agent manifests assent or otherwise consents so to act.’<sup>102</sup>

This definition makes it clear that under US common law an agency relationship ‘creates the agents fiduciary obligation as a matter of law.’<sup>103</sup> Furthermore, it is the law, and not the parties, that determines whether or not a relationship is one of agency.<sup>104</sup> This is referred to as the general fiduciary principle whereby ‘an agent has a fiduciary duty to act loyally for the principal’s benefit in all matters connected with the agency relationship.’<sup>105</sup> The US courts generally make a strong connection between contracts that result in the breach of this duty of loyalty, otherwise referred to as the fiduciary duty, and objectionable conduct that needs to be deterred.

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100. With regard to the transactions tainted by corruption, the court must consider the relationship between the transactions and the prohibitory rules. In *Flegenheimer v. Brogan*, 284 N.Y. (1940) 268, at 272, the court considered the fact that:

‘[t]he transactions of plaintiff’s ... were clearly destructive of the purpose of a statute which was enacted “for the protection, health, welfare and safety of the people of the state.” ... We think those transactions were so far against the public good as to disable the plaintiff from invoking the aid of the court ....’

101. Restatements (3rd) Agency, p. 4.

102. Sec. 1.01 Restatement (3rd) Agency.

103. Sec. 1.01 Comment e. Restatement (3rd) Agency.

104. Comment b. Sec. 8.06 Restatement (3rd) Agency. at p. 324.

105. Sec. 8.01 Restatement (3rd) Agency.

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This fiduciary relationship is *uberrima fides* (utmost good faith), because the agent is under a duty to act for or to give advice for the benefit of the principal on matters within the scope of the relationship.<sup>106</sup> Examples of such relationships are, for example, the relationship between a government and an official negotiating on its behalf,<sup>107</sup> or between a company and its employees or representatives.<sup>108</sup> Any interference with the duty of loyalty that exists in these relationships results in a contract that is tainted by the breach of the fiduciary relationship and affects the validity of contracts that are associated with its violation. Sec. 193 of the Restatement (2nd) Contracts provides:

‘a promise by such a fiduciary to violate his fiduciary duty or a promise that tends to induce such a violation is unenforceable on grounds of public policy.’

Where a fiduciary duty is violated by the taking of a bribe by an agent, such an agent is liable to the principal for any harm that results from the breach.<sup>109</sup> There is consistent public policy against the enforceability of any promise that induces a party to act in breach of a fiduciary duty.<sup>110</sup> Public policy resists the juxtaposition of conflicting duties in one person by seeking to deter its occurrence. As has been eloquently summarized: ‘[m]ay one serve two

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106. Sec. 2 Restatement (2nd) Trusts.

107. Some illustrative examples are discussed in this chapter including *Oscanyan v. Arms Co.*, 103 U.S. 261 (1880), where a Consul General of the Ottoman Government took bribes for influencing the award of government contracts; *Adler v. Republic of Nigeria*, Nos. 98-55456, 98-55460, 9th Cir. 19 May 2000, where a US Citizen engaged in a bribery scheme with purported Nigerian government officials; *Tool Company v. Norris*, 69 U.S. 2 Wall. 45 (1864), where a certain Mr. Norris using his connections procured a government arms contract from representatives of the government for a private company in exchange for a commission; *Marshall v. Baltimore & Ohio Railroad Co.*, 57 U.S. 314 (1853), where a private individual was contracted to influence the legislators from Virginia to obtain a law to grant a railway company a right of way through the state.

108. Some illustrative examples are discussed in this chapter including *Nathan v. Tenna Corporation* 560 F.2d 761 (7th Cir. 10 August 1977), where a Mr. Nathan contracted to represent Lake Eire Industries to procure contracts from International Harvester gave secret commissions to the buyer of International Harvester; *Sirkin v. Fourteenth Street Store*, 124 App. Div. 384. 108 N.Y.S. 830, where Sirkin bribed an employee of the Fourteenth Street Store to purchase his merchandise; *McConnell v. Commonwealth Pictures Corp*, 199 N.Y.S.2d (March, 31,1960) 468, where McConnell had contracted to negotiate a contract for distribution rights with a motion picture producer and bribed a representative of that producer in order to obtain the contract; *Colyvas v. Red Hand Compositions Co.*, 318 F. Supp. 1376 (S.D.N.Y.1970), where the plaintiff sought a commission for procuring contracts to furnish paint supplies and services to Olympic Maritime S.A. and certain other companies of Aristotle Onassis obtained as a result paying a bribe to an employee of the Onassis companies.

109. Sec. 874 Restatement (2nd) Torts.

110. This has been described broadly as referring to ‘any person who occupies a position of peculiar confidence toward another. It refers to integrity and fidelity.’ See *Kinzbach Tool Co. v. Corbett-Wallace Corp*, 138 Tex 565, 160 S.W.2d 509 (1942), cited in H. Reuschlein, W. Gregory, *The Law of Agency and Partnership*, 2nd edn, West Publishers, St. Paul, MN, 1990, p. 125.

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masters? It is the duty of an agent to act solely and completely for the benefit of the principal.’<sup>111</sup>

Sec. 8.03 of the Restatement (3rd) Agency provides that:

‘An agent has a duty not to deal with the principal as or on behalf of an adverse party in a transaction connected with the agency relationship’

The onus is on the agent to disclose any adverse interest. Only where the agent ‘discloses all material facts that the agent knows, has reason to know, or should know would reasonably affect the principal’s judgement’ is conduct, such as taking a bribe which would otherwise constitute a breach of fiduciary duty, exonerated.<sup>112</sup> The agent must disclose any adverse interest to the principal to enable the principal to have full information about the activities of the agent. It is the secrecy of the agent’s actions that constitutes the breach of fiduciary duty. Where a principal is fully informed and consents to the action of the agent, there can be no breach of fiduciary duty. This implies that consent must be based on full information. There has to be ‘full and fair’ disclosure to the principal that is more than a ‘by the way’ notice of the actions of the agent to the principal.<sup>113</sup> The duty of an agent to be undivided loyal is independent of whether or not harm is occasioned by the breach of the duty. Whenever an agent takes a bribe, the principal’s interest is compromised.

### 4.4.2 The Primary Contract

The breach of fiduciary duty that results from acts of bribery in commercial transactions has an impact upon the validity of the primary agreement (to give a bribe) and the secondary contract (which results from the successful bribery transaction). The rules criminalizing international corruption and the various provisions in the federal and state laws relating to commercial bribery mean that offering or receiving bribes or other inducements to acquire business is clearly a legal wrong. There is, however, no express declaration in these rules about the status of the contract that evidences the corrupt exchange. Pronouncements about the status of such contracts are therefore left to the judicial process.

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111. H. Reuschlein, W. Gregory, id., at p. 127.

112. Sec 8.06 Restatement (3rd) Agency.

113. ‘Where a fiduciary acts in his own interest in dereliction of his beneficiaries’ interest, more than some “by the way” notice is required.’ *Ehlen v. Lewis*, 984, F.Supp.5. 9 (D.D.C. 1997), cited in Comment c. to Sec. 8.06, at p. 331.

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The duty of the courts to preserve the common good of society acts as a counterbalance to the fundamental principles of freedom of contract.<sup>114</sup> The US Restatement of the Law of Contracts (2nd) groups together contracts that are unenforceable on grounds of public policy.<sup>115</sup> The use of the term ‘unenforceable’ as opposed to ‘void’ or ‘illegal’ helps to emphasize that there need not be inherent illegality in the contract tainted by corruption for it to be unenforceable. A perfectly valid contract may, within the context of public policy against corruption, be declared unenforceable because of the implication of such contracts on the effectiveness of the fight against corruption as well as the long-term interest of society. Distinguishing such contracts allows them to be considered from the perspective of the link that exists between these contracts and the corrupt exchange.

A contract may in general be considered unenforceable on grounds of public policy in two instances:<sup>116</sup> firstly, if legislation provides that it is unenforceable, or secondly, where interest in the enforcement of the contract is outweighed by a public policy against its enforcement. The first situation, where legislation expressly provides for unenforceability, is less problematic. Enforceability is decided by statute and the question before the court is the fairly straightforward one of determining whether or not the contract in question falls within the four walls of the statute. The second instance lacks such clarity. It is for the courts themselves to determine the enforceability of the contract in question by weighing the principle of freedom of contract against the public interest of society. Both of these categories are relevant to the question about the validity of contracts tainted by corruption.

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114. Sec. 1 of the Restatement (2nd) Contracts defines a contract as a promise or set of promises for the breach of which the law gives a remedy. For this reason in Sec. 7 Comment A, it states, ‘A promise for breach of which the law neither gives a remedy nor otherwise recognizes a duty of performance is often called a void contract. Under Sec. 1 however, such a promise is not a contract at all; it is the “promise” or “agreement” that is void is of no legal effect. Inasmuch as is possible given the frequent use of the terms void and voidable contract in case law, this book describes “void” contracts as agreements that the courts will not enforce.’
115. Sec. 178-315 Restatement (2nd) Contracts. These include contracts in restraint of trade, contracts that impair family relations, and contracts that interfere with other protected interests. Of most relevance to the issue of contracts tainted by corruption are the general provisions in Sec. 178-185 and contracts that induce an interference with other protected interests in Sec. 192-196.
116. Sec. 178 Restatement (2nd) Contracts states that:  
‘A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or if the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.’

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### 4.4.2.1 Unenforceability on Grounds of Statutory Illegality

Federal and state law makes active and passive bribery criminal offenses. These provisions clearly prohibit, at various levels, the *conduct* of giving and receiving bribes. They do not, however, actually prohibit the *agreement* to give and receive a bribe or declare that contracts to give or receive such bribes are unenforceable. Can these anti-bribery rules be said to provide for the unenforceability of an agreement to give or receive a bribe? If they did, then the courts would be bound to give effect to the 'legislative mandate.'<sup>117</sup> However, in the absence of a clear express prohibition of the contract to give a bribe, there is, technically, no statutory prohibition, on the basis of which the contract evidencing the corrupt exchange will be deemed invalid. In the absence of specific express provisions in the anti-bribery rules declaring such contracts unenforceable, the question of enforceability is a decision left to the courts of law on grounds of public policy.

### 4.4.2.2 Unenforceability on Grounds of Public Policy

In assessing whether or not a contract is unenforceable on grounds of public policy, the courts will generally consider whether the interest in the enforcement of the contract is outweighed by a public policy against its enforcement.<sup>118</sup> The context of this decision is not a private-to-private paradigm as in a typical contract between individuals, but rather a public-private paradigm where the interest of the general public is pitted against the individual interests of the contracting parties. The principle of freedom of contract accepts that within the private-private paradigm, parties are the masters of their contracts and the role of the state is to protect and not interfere in that freedom. However, the corollary of this is that the state has the duty to protect the security of society and that instances may arise where public policy will outweigh the notion of enforceability of free promises.

Sec. 279 of the Restatement (2nd) Contracts identifies the bases of public policy against the enforcement of contracts as being derived from (a) legislation relevant to such policy and (b) the need to protect some aspect of the public welfare. In other words, factors that the court will consider in determining whether or not a contract tainted by bribery is an agreement that the courts will enforce are the existence of legislation prohibiting such bribery, the extent to which non-enforcement will further legislative policy, and the

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117. See Restatement (2nd) Contracts, Comment (a) to Sec. 178.

118. Sec S.178 Restatement (2nd) Contracts, which lays out these parameters stating, '[...] on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.'

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effect of the agreement to give or receive a bribe on the interests of third parties.

As such, in arriving at a decision about the enforceability of the primary contract, the court engages in a balancing of interests. This balancing of interests is influenced by the (a) strength of public policy against the enforcement of the primary contract to give a bribe as manifested by legislation or judicial decision: (b) the likelihood that a refusal to enforce the primary contract will further legislative policy: (c) the seriousness of any misconduct involved and the extent to which it was deliberate: and (d) the directness of the connection between the misconduct and the promise.<sup>119</sup> The balancing of interests is also influenced by the traditional rules that prohibit the courts from allowing recovery with respect to illegal acts as well as the body of rules that have developed with regard to commercial and international corruption. The stronger the connection between objectionable conduct and a contract, the greater the chance that such a contract will not be enforceable on grounds of public policy.

The primary contract to give a bribe is evidence of a breach of a statutory prohibition as well as evidence of the breach of a fiduciary duty. This means that the primary contract is a promise to commit a tort or to induce the commission of a tort. Such a contract is unenforceable on grounds of public policy.<sup>120</sup> This falls within the purview of Sec. 192 of the Restatement (2nd) Contracts, which provides that a promise involving the commission of a tort or to induce the commission of a tort is unenforceable on grounds of public policy. Furthermore, a promise that induces the violation of the fiduciary duty owed by an agent to a principal is also unenforceable on grounds of public policy.<sup>121</sup> Farnsworth points out that in most instances where the legislation expressly prohibits the making of an agreement, the courts will assume that such agreements are unenforceable.<sup>122</sup> The primary contract is clearly an agreement that courts will decline to enforce within this framework of rules.

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119. Sec. 178 Restatement (2nd) Contracts.

120. Sec. 192 Restatement (2nd) Contracts.

121. Sec. 193 Restatement (2nd) Contracts.

122. He gives as an example the judicial response to invalidate agreements made on a Sunday in violation of statutes prohibiting transaction of business on Sundays. He notes that this response is not inevitable and that a court may also conclude that the sanction explicitly provided by the legislature is adequate to further the statutes underlying policy without the additional sanction of unenforceability. The provisions of Art. 2-1-8 of the US Uniform Commercial Code for example provides that a failure to comply with a law with respect to the list of transactions listed in the article '... has only the effect specified in that law.' See E. Farnsworth, *Contracts*, 4th edn, Aspen, New York, p. 335.

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The US courts have maintained a policy that supports the unenforceability of the primary contract to give a bribe. This policy cuts across foreign, public and private bribery. For example, the courts in *Oscanyan v. Arms Co.*<sup>123</sup> held that a contract to bribe or influence officials of foreign governments will not be enforced for public policy reasons. In this case, the plaintiff, the Consul General of the Ottoman Government (Turkey), brought an action to recover the sum of \$136,000 allegedly due as a result of a contract with the defendant, a US arms manufacturing company, as commission on the sales of firearms to the Turkish government effected through the influence of the plaintiff. Winchester, the president of the Winchester Repeating Arms Company of Connecticut, the defendant, sought an introduction to the plaintiff:

‘Said Mr. Winchester to Oscanyan, “Will you be kind enough to call the attention of Rustem Bey to my repeating rifle?” “Well,” said Oscanyan, “Mr. Winchester, I am receiving commissions from all parties for that favour, and I expect commissions for my services, and that is one of the ways by which I make my livelihood; if you can compensate me, if you can remunerate me by giving me commissions, I will use my influence for you and do all I can for you.” “Very well,” said Mr. Winchester, “that is all right. You shall have whatever commissions we deem proper and we will talk the matter over and agree upon that.”’<sup>124</sup>

Mr. Justice Field, in determining whether or not this agreement for a commission was enforceable by the plaintiff, held that the contract was unenforceable because of the nature of its origin and because of the results such a contract would encourage. He stated:

‘[t]he contract was a corrupt one ... corrupt in its origin and corrupting in its tendencies. The services stipulated and rendered were prohibited by considerations of morality and policy which should prevail at all times and in all countries, and without which fidelity to public trusts would be a matter of bargain and sale, and not of duty.’<sup>125</sup>

The notion of fidelity to the public trust outweighed any notions of freedom of contract because of what the court viewed as the necessary negative consequences of allowing such contracts. The court noted that official positions are ‘trusts to be exercised from considerations of duty and for the public good. Whenever other considerations are allowed to intervene and control their exercise, the trust is perverted and the community suffers.’<sup>126</sup> The

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123. *Oscanyan v. Arms Co.*, 103 U.S. 261 (1880), at p. 277.

124. *Id.*, at p. 270.

125. *Id.*, at p. 272.

126. *Id.*, at p. 273.

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court emphasized the need to protect the public welfare by not allowing such contracts to be enforced stating that:

‘a contract to bribe or corruptly influence officers of a foreign government will not be enforced in the courts of this country ... not from any consideration of the interests of that government or any regard for its policy, but from the inherent viciousness of the transaction, its repugnance to our morality, and the pernicious effect which its enforcement by our courts would have upon our people.’<sup>127</sup>

Similarly, in *Adler v. Federal Republic of Nigeria*, an illegal contract entered into by the plaintiff to bribe Nigerian officials was held by the courts to bar the plaintiff’s right to recover on a breach of contract claim. The Court held that the actions of Adler rendered the contract one that was not enforceable by the court and that the court would not provide a remedy for such corrupt activity. Justice Pregerson of the Court of Appeals stated:

‘Making a judicial remedy available when the bribe fails to accomplish the intended result would reduce the risk inherent in paying bribes, and encourage individuals such as Adler. In short, public policy favours discouraging frauds such as the one perpetrated on Adler, but it also favours discouraging individuals such as Adler from voluntarily participating in such schemes and paying bribes to bring them to fruition.’<sup>128</sup>

Justice Noonan, in the same case, reiterated the fact that the origin of the contract rendered it unenforceable stating:

‘the crux is a contract made with a fictitious person, Chief Abba Ganna, never shown to have been an official of the Nigerian government and indeed never shown to have existed. The contract was criminal in nature and criminal in purpose. It was void under California law.’<sup>129</sup>

The fact of a corrupt exchange affects the rights of all parties involved in a contract tainted by corruption. The *Adler* case illustrates how the facts of bribery can jeopardize recovery on the part of a claimant whose hands are ‘unclean.’ In keeping with the maxim, ‘he who comes to equity must come with clean hands,’ the contract resulting or tainted by corruption becomes unenforceable by a party that has been an instrument in the chain of corruption. In the words of the court,

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127. *Id.*, at p. 277.

128. *Adler v. Republic of Nigeria*, Nos. 98-55456, 98-55460 (9th Cir. 17 May 2000).

129. *Adler v. Republic of Nigeria*, *id.*, at p. 5231, Justice Noonan added, ‘[t]his disgraceful effort to make us parties to a criminal conspiracy should never have darkened our doors. It is time to expunge it wholly.’

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‘[t]his maxim ... is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.’<sup>130</sup>

The plaintiff that is involved in a corrupt process is debarred from reaping the fruits of this behavior under the ‘unclean hands doctrine.’

In *Tool Company v. Norris*<sup>131</sup> the court emphasized that the public policy against enforcing a contract to give a bribe is tied to the fact that it is ‘the most efficient and economical mode of meeting the public wants ...’<sup>132</sup> Agreements to give a bribe, in the opinion of the court, tended to ‘introduce personal solicitation and personal influence as elements in the procurement of contracts,’ and thus directly lead to ‘inefficiency in the public service and to unnecessary expenditures of the public funds.’<sup>133</sup> In this case, the court concluded that:

‘all agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy ..., [t]he law looks to the general tendency of such agreements, and it closes the door to temptation, by refusing them recognition in any of the courts of the country.’<sup>134</sup>

In *Marshall v. Baltimore & Ohio Railroad Co.*, compensation was claimed for services rendered in procuring the passage of a law. Justice Grier urged the rejection of such contracts in the most urgent terms stating:

‘bribes, in the shape of high contingent compensation, must necessarily lead to the use of improper means and the exercise of undue influence ... The use of such means and such agents will have the effect to subject the state governments to the combined capital of wealthy corporations, and produce universal corruption, commencing with the representative and ending with the elector. Speculators in legislation, public and private, a compact corps of venal solicitors, vending their secret influences, will infest the capital of the Union and of every state, till corruption shall become the normal condition of the body politic, and it will be said of us as of Rome – “*omne Romae venale*.”’<sup>135</sup>

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130. *Id.*, at p. 5223.

131. *Tool Company v. Norris*, 69 U.S. 2 Wall. 45 (1864).

132. *Id.*, at p. 54.

133. *Id.*

134. *Id.*, at p. 56.

135. Per Lord Grier in *Marshall v. Baltimore & Ohio Railroad Co.*, 57 U.S. 314 (1853), at p. 335.

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In general for public policy reasons, the US courts will seek to avoid the enforcement of a contract evidencing a corrupt exchange even where there is no express provision declaring such a contract invalid. The logic adopted by the court is that this is consistent with the need to provide the very protection that the rules prohibiting corruption seek to provide. Apart from the need to protect the public by acting consistently with criminal prohibitions, the courts have also rejected contracts that run afoul of such prohibition by invoking the dignity of the court. The courts have noted that:

‘It is an undoubted principle of the common law that it will not lend its aid to enforce a contract to do an act that is illegal or which is inconsistent with sound morals or public policy or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions.’<sup>136</sup>

The court has similarly noted that ‘[t]he principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation.’<sup>137</sup> Thus even where there is no express statutory provision, in which case a contract is based on conduct that is illegal under a statute, the courts on grounds of public policy will hold such a contract to be unenforceable.

This means that the court, in considering the primary contract to give or receive a bribe, is guided by factors other than the justice between the parties. The public trust, the integrity of government and social institutions, as well as economic efficiency are determining factors that render the primary contract an agreement that will not be countenanced by the courts. In other words, a contract made in violation of a penal statute, although not expressly prohibited or declared to be void, is prohibited, void, and unenforceable, whether executory or executed.<sup>138</sup> It has been stated that ‘no court should be required to serve as paymaster of the wages of crime, or referee between thieves.’<sup>139</sup> Mr. Justice Hughes remarks:

‘Freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the

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136. Per Lord Grier in *Marshall v. Baltimore & Ohio Railroad* 57 U.S. 314 (1853), at p. 314.

137. *Coppell v. Hall*, 74 U.S. 542 (1863), at pp. 558-559.

138. See *Riggs v. Palmer*, 115 N.Y. 506, (8 October 1889), at p. 511; ‘No one shall be permitted to profit from his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire any property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statute.’

139. See *Stone v. Freeman*, 298 N.Y. 268, 82 N.E. 2d 571 (1948), at p. 572.

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absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.’<sup>140</sup>

When a court is faced with a contract to give and/or receive a bribe, it is faced with a contract that is unenforceable on grounds of public policy because the anti-corruption rules regarding private and public bribery clearly provide for the unenforceability of such conduct. By engaging in a contract to give or receive a bribe, the parties are committing the very conduct prohibited by the law.

### 4.4.2.3 Effect of Unenforceability of Primary Contract

There is no recourse for a party who seeks performance of a promise that is contrary to public policy. Nor will the court order restitution, specific performance or another remedy. The court will ‘leave both parties as it finds them even though this may result in one of them retaining a benefit that he has received as a result of the transaction.’<sup>141</sup> Sec. 197 of the Restatement (2nd) Contract states that ‘a party has no claim in restitution for performance that he has rendered under or in return for a promise that is unenforceable on grounds of public policy unless denial of restitution would cause disproportionate forfeiture.’<sup>142</sup> This allows the defendant, who may be the party at fault, to walk away from the transaction without paying any penalty. Indeed it may leave the defendant enriched at the cost of the plaintiff.<sup>143</sup> A few cases illustrate this point.

In *Nathan v. Tenna Corporation*, the plaintiffs sought to recover commissions purportedly due under the terms of a contract with the defendant that amounted to an illegal kickback scheme. The court held that the illegal acts undertaken by the plaintiff in performing the contract rendered the contract unenforceable and further stated:

‘Nathan’s conduct constituted the crime of commercial bribery under Illinois law. Criminal conduct of this degree cannot be ignored by a court asked to

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140. See *Chicago, B. & Q. R. R. v. McGuire*, 219 U.S. 549 (1911), at p. 567.

141. Comment on Sec. 197 Restatement (2nd) Contracts) at p. 71.

142. *Sirkin v. Fourteenth Street Store*, 124 App. Div. 384. 108 N.Y.S. 830, at pp. 833-834. The court held that where a promise to pay the price is unenforceable on grounds of public policy; because of bribery, restitution is not available as a remedy.

143. The court of Appeal has stated that ‘the court refuses to enforce such a contract, and it permits defendant to set up its illegality not out of any regard for the defendant who sets it up, but only on account of the public interest. It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions.’

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enforce a contract, even if the promise sought to be enforced is severable from that performed illegally. Nathan, the party who engaged in illegal conduct, is the plaintiff seeking enforcement of the contract. We share the district court's expressed disdain for the plaintiff's audacity in suing on a contract which he, at least partially, performed by engaging in criminal acts. We agree with the court's conclusion that public policy dictates that the plaintiff's suit be dismissed.<sup>144</sup>

In *McMullen v. Hoffman*, the parties had committed a fraud in combining their interests and concealing this fact in the process of submitting bids, which they presented as separate bids on the understanding that they will share the income equally if either of them won the bid. The court of appeal stated that:

'The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract. In cases of this kind, the maxim is "*Potior est conditio defendentis*."<sup>145</sup>

In *Coppell v. Hall*, a rebellion and civil war in the City of New Orleans led to military occupation by the United States forces. Parties from different sides entered into a contract in violation of a treasury regulation prohibiting commercial intercourse with localities beyond the lines of military occupation by the United States forces. The contract was declared 'contrary to public policy, to the law of nations, to the act of Congress, to the proclamation of the President, and to the regulations of the Treasury Department.'<sup>146</sup> Mr. Justice Swayne, delivering the opinion of the Court, stated:

'The defense [of illegality] is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced [and that] [w]henver the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation.'<sup>147</sup>

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144. *Nathan v. Tenna Corporation*, 560 F.2d 761 (7th Cir. 10 August 1977) Para. 21-22.

145. *McMullen v. Hoffman* 174 U.S. 639 (1899), at p. 654.

146. *Coppell v. Hall*, 74 U.S. 542 (1868), at p. 56.

147. *Id.*, at pp. 558-559.

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The policy that underlies the refusal to enforce contracts that are in violation of statutory prohibition is emphasized by the court in *McMullen v. Hoffman* as follows:

‘The more plainly parties understand that when they enter into contracts of this nature, they place themselves outside the protection of the law so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way, the public secures the benefit of a rigid adherence to the law.’<sup>148</sup>

For the same reasons, parties to a contract to give a bribe are outside the protection of the law and will receive no assistance pursuant to a contract that offends the dignity of the court and contaminates the ‘pure fountains of Justice.’<sup>149</sup>

There are some exceptions to the strict rules against restitution for illegal contracts. A party may be granted restitution where such a party has a claim for performance rendered in return for a promise that is unenforceable on grounds of public policy, and the party was excusably ignorant of the facts or of legislation or was not equally in the wrong.<sup>150</sup> In the case of the primary contract between the party who pays the bribe and the party who receives the bribe, both parties act in full knowledge that their actions are contrary to what is in the best interest of the principal. It is hardly likely that the exception will be of any application in such a case.

However, it would seem that the primary contract to give or receive a bribe is not void *ab initio*. The federal law on the bribery of public officials,<sup>151</sup> for example, criminalizes the giving of bribes, but makes it clear that the contracts that result are not automatically void. It provides that in ‘addition to other remedies provided by law’ a government authority *may* declare void and rescind any contract or instrument ‘in respect of which there has been a criminal conviction for bribery, graft or conflict of interest.’<sup>152</sup> This is an

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148. *Id.*, at p. 670.

149. Wade cites the colorful words of Lord Chief Justice Wilmot regarding a contract tainted by illegality as follows: ‘Ye shall not stipulate for iniquity. All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again; you shall not have a right of action when you come into a Court of Justice in this unclean manner to recover it back. Procul O! procul este profam.’ *Collins v. Blantern*, 95 Eng rep 847 (k.B.1767) at 852, cited in J. Wade, ‘Benefits obtained under illegal transactions-reasons for and against allowing restitution’, 25 *Texas Law Review* 31, 1946-1947, at p. 38.

150. Sec. 198 Restatement (2nd) Contracts.

151. 18 USC Chapter 11 Bribery Grafts and Conflict of Interest.

152. 18 USC Chapter 11 Sec. 218.

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administrative action that makes it clear that the contract can survive a conviction for bribery. While this is with respect to the bribery of public officials, the same reasoning can apply in the absence of specific provisions to contracts that are tainted by corruption. Indeed the case law cited above shows that the courts do not consider such contracts void *ab initio*. In leaving the parties where they found them, the agreement between the parties is not automatically voided by the court and can subsist.

### 4.4.3 The Secondary Contract

A distinction should be made between the contract to give a bribe and the contract that results from the successful bribery transaction. The contract that results between the party paying the bribe and the principal of the party, who received the bribe, is a contract which is, on its face, a valid contract. The anti-bribery rules criminalize the conduct of giving and receiving a bribe. The rules do not extend to the bribe resulting from the successful violation of the anti-bribery prohibitions. There is no salutatory prohibition with regard to this secondary contract. Yet, these contracts are tainted by the originating act of bribery and the question that arises is whether these contracts are enforceable by a court of law.<sup>153</sup> The courts faced with a contract that has resulted from a corrupt exchange must weigh the implications of the rules criminalizing bribery against the freedom of the parties to the contract sought to be enforced.<sup>154</sup>

The contract that results from a bribe follows the commission of a tort but is not in itself an agreement that encapsulates a legal wrong, such as the primary contract, to give or receive a bribe. It is not a promise to commit a tort. The court must take into consideration the justified expectations of the parties to the contract, *i.e.*, the bribe-giver and the principal of the agent who took a bribe, as well as any forfeiture or unjust enrichment that may result where the contract is not enforced.<sup>155</sup> At the same time the courts must consider the public policy against bribery and whether the refusal to enforce the contract that results from the successful act of bribery will further the policy against bribery in the acquisition of business.<sup>156</sup> Other factors that will be considered

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153. In *Oscanyon v. Arms Co.*, 103 U.S. 261 (1880), at pp. 271-272, the US Supreme Court posed the question in these terms:

‘The plaintiff claims that these contracts were procured through the recommendations which by his influence were made by Rustem Bey. ... It is for the use of this influence that the contract in suit was made and compensation is now demanded. The question then arises is this contract one which the court will enforce?’

154. Sec. 178(2) Restatement (2nd) Contracts.

155. *Id.*

156. Sec. 178 (a)-(b) Restatement (2nd) Contracts.

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are the seriousness of the misconduct and whether or not the terms of the contract are directly connected to the payment of the bribe.<sup>157</sup>

The contract that results from the successful act of bribery is directly linked to the legal wrong that preceded it. It is indeed the inducement for the commission of the act of bribery. As such, it cannot be considered in isolation of this originating fact. Farnsworth points out that the policy developed by the courts to deny the enforcement of agreements that serve as an inducement for a tort or breach of fiduciary duty has a long history.<sup>158</sup> Judicial policy extends the policy underlying the criminalization of corruption to contracts that result from it.

A few examples illustrate this point. In *Sirkin v. Fourteenth Street Store*,<sup>159</sup> Sirkin paid a bribe to an employee of the Fourteenth Street store in a bid to get a contract to supply the store with goods. This contract was successfully executed but when the store learned about the bribery transaction that had preceded the making of the contract, it refused to pay for the goods. An action for the price of goods sold and delivered was met with a defense by the defendant for dismissal of the claim on the grounds that the contract for sale was a result of a bribery exchange between the plaintiff and the purchasing agent of the defendant in violation of the then Sec. 384 (current Sec. 439) New York Penal Code. The defendant store did not tender back the goods or offer to return the proceeds of the goods that it had sold, nor did the defendant assert that it had suffered any loss or damage by way of the purchase.

The court held that the action of the plaintiff in bribing the purchasing agent of the defendant was a violation of the penal code, which prohibited the corrupt practice of secretly offering bribes to the agents and employees of a servant to induce a contract with the master or principal.<sup>160</sup> In the opinion of the court, the plaintiff had committed a crime in order to obtain the contract upon which the action before the court was based.<sup>161</sup> The court agreed that the 'legislature has not expressly declared either that the contract to pay the bribe or the contract induced by the bribe is void and unenforceable.'<sup>162</sup> However, the court held that in both instances such a contract is prohibited, void and unenforceable whether executory or executed.<sup>163</sup>

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157. Sec. 173 (c)-(d) Restatement (2nd) Contracts.

158. Farnsworth, *Contracts*, id., Note 122 above, at pp. 318, 338.

159. *Sirkin v. Fourteenth Street Store*, 124 App. Div. 384. 108 N.Y.S. 830.

160. Sec. 348r N.Y.S. Penal Code.

161. *Sirkin v. Fourteenth Street Store* 124 App. Div. 384. 108 N.Y.S. 830, at p. 833.

162. Id., at p. 833.

163. Id.

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The court emphasized that the legislature in criminalizing the act of bribing an agent intended ‘to emphasize and extend the public policy of the common law, which rendered such contracts by agents for their own benefit void.’<sup>164</sup> This being the case, the court held that it was the duty of the courts to be ‘guided’ by the laws penalizing the bribery of agents in its administration of the law.<sup>165</sup> The focus of the court was on the fact that the plaintiff who brought the action had committed a crime and was seeking the assistance of the court in enforcing the contract, which he had ‘procured by violating the penal law.’<sup>166</sup>

The *Sirkin* case illustrates the obstacles to the enforcement of a secondary contract. If the contract is held to be valid and enforceable, the court is in effect rewarding the criminal activity of the plaintiff and acting contrary to the clear intention of the legislature in passing laws that criminalize the act of bribery. The court in the *Sirkin* case noted that:

‘if the court should lend its aid to the enforcement of this contract ... it would thereby be indirectly compelling a master or employer to reimburse a party for moneys expended in bribing his servant, agent or employee in violation of the law.’<sup>167</sup>

The court felt that simply compelling the payment of the difference of the price between what the principal would have paid and the increase in the quantity of the bribe paid would not be sufficient.<sup>168</sup> The court held that:

‘[p]ublic policy requires that an agent servant or employee shall perform the duties of his employment involving discretion and trust, with a single purpose of serving his master or employer; and the master or employer ... has a right to expect faithful, loyal service rendered with sole regard to his interest.’<sup>169</sup>

The ‘vice’ in the opinion of the court was not the difference in price. The main motivation for the court’s response was not to restore a breach of contract. Rather the court was focused on preventing a situation that rewarded the ‘making of the agreement without the knowledge of the master.’<sup>170</sup>

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164. *Id.*, at p. 834.

165. *Id.*

166. *Id.*

167. *Id.*

168. Laughlin J. remarked that ‘of course a contract by which the price is increased to enable the vendor to pay the agent could not be enforced as to such an increase, but a decision stopping there would be of little aid in remedying the evil,’ *id.*, at p. 834.

169. *Id.*

170. *Id.*

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In the *Sirkin* case, the court stated with respect to the secondary contract, that ‘public policy ... forbids the ratification as well as the making of such a contract.’<sup>171</sup> This is because of the public dimension of such a contract and its impact on the general public. The court noted that ‘[u]sually private contracts concern only the parties thereto, and it is optional with a person who has discovered that he has been defrauded whether to ratify the contract or rescind it.’<sup>172</sup> In this respect, the court cited Chief Justice Marshall of the US Supreme court in *Armstrong v. Toler*, who stated:

‘Where a contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it. And if the contract be, in fact, one connected with the illegal transaction, and growing immediately out of it, though it is, in fact a new contract, it is equally tainted by it.’<sup>173</sup>

Although the defendant in *Sirkin* admitted that they had suffered no damage, the court held that the plaintiff would have been shown ‘to have committed a crime in obtaining the very contracts which he asks the aid of the court to enforce and should be denied assistance.’<sup>174</sup> The court sought more than justice between the parties. There was a deterrent purpose to its public policy position. The court noted that:

‘... nothing will be more effective in stopping the growth and spread of this corrupting, and now criminal custom, than a decision that the courts will refuse their aid to a guilty vendor or vendee, or to anyone who has obtained a contract by secretly bribing the servant, agent or employee of another to purchase or sell property, or to place a contract with him.’<sup>175</sup>

This position has less to do with restoring the rights of parties to a contract than it has to do with punishing unacceptable conduct. In *Coppell v. Hall*, the court emphasized that a holding that a secondary contract is not enforceable on account of bribery is motivated not by the interests of the parties but for the sake of the law, stating:

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171. *Id.*, at p. 835.

172. *Id.*, at p. 835.

173. *Armstrong v. Toler*, 24 U.S. 258 (1826), at p. 278.

174. *Sirkin v. Fourteenth Street Store* 124 App. Div. 384. 108 N.Y.S.830, at p. 837. Justice Scott dissenting stated that ‘The unlawful agreement ... was not part of the contract between the plaintiff and the defendant, and in order to prove the latter, it was not necessary to prove the existence of the former. ... The statute which has made that a crime, which therefore was merely immoral, has affixed to that crime the appropriate penalty. It is not a part of our duty to assume legislative power and prescribe an additional punishment ...’ at pp. 837-838.

175. *Id.*, at p. 834.

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‘[it] is not allowed for the sake of the party seeking to escape his contract, but for the sake of the law. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced .... Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect .... Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation.’<sup>176</sup>

Similarly, in *McConnell v. Commonwealth Pictures Corp*, a principal whose agent had been bribed pleaded this illegality as a defense for non-performance under the contract between the principal and the bribe-giver.<sup>177</sup> The defendant entered into an agreement to pay McConnell the plaintiff \$10,000 plus a percentage of the profits if McConnell successfully obtained distribution rights to motion pictures for the plaintiff. McConnell succeeded in acquiring the distribution rights after paying bribes without the knowledge of the defendant. The defendant subsequently defaulted on the contract and refused to pay the promised commission or to give him an accounting of the profits.

The plaintiff argued that:

‘since the agreement sued upon between the plaintiff and the defendant was not in itself illegal, the plaintiffs right to be paid for performing it could not be defeated by a showing that he had misconducted himself in carrying it out.’<sup>178</sup>

The court rejected this argument stating that ‘[p]roper and consistent application of a prime and long-settled public policy closes the doors of our courts to those who sue to collect the rewards of corruption.’<sup>179</sup>

Justice Desmond remarked that even though in essence the contract was not illegal, the court would deny awards for corrupt performance of contracts.<sup>180</sup> Regarding the question of the unjust enrichment or windfall that such a ruling would give to the defendant, the court stated that ‘[i]t is not every minor wrongdoing in the course of a contract performance that will insulate the other party from liability for work done or goods furnished. There must be at least a direct connection between the illegal transaction and the obligation sued upon.’<sup>181</sup> The court did not intend that its ruling apply to ‘all kinds of

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176. *Coppell v. Hall*, U.S. 542 (1868) at p. 556.

177. *McConnell v. Commonwealth Pictures Corp*, 199 N.Y.S. 2d (March, 31, 1960) 468.

178. *Id.*

179. *Id.*

180. *Id.*, at p. 471.

181. *Id.*

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corruption, minor and major, essential and peripheral.’<sup>182</sup> Rather the court distinguished the bribery of the agent of a principal under circumstances such as in the McConnell case as:

‘gross corruption’ which “... consistent with public morality and settled public policy” would deny a plaintiff recovery even on a contract valid on its face, if it appears that the plaintiff has resorted to “gravely immoral and illegal conduct in accomplishing its performance.”<sup>183</sup>

The following cases emphasize the fact that the secondary contract resulting from a corrupt exchange will meet the same fate of unenforceability as the primary contract. In *Colyvas v. Red Hand Compositions Co.*,<sup>184</sup> the plaintiff sought an accounting of income and recovery of commissions for services he claimed to have rendered in procuring contracts for the defendant to furnish paint supplies and services to Olympic Maritime S.A. and certain other companies of Aristotle Onassis. The plaintiff admitted to a bribery agreement with an employee of the Onassis companies to ensure that the defendant got the contract. The defendant argued that the contract, valid though it may be on its face, was wholly unenforceable under the governing law of New York because the plaintiff’s admitted course of conduct during the course of his alleged performance of said contract was illegal.<sup>185</sup> The court upheld the defendant’s claim that the plaintiff’s contract was unenforceable.

Similarly, in *Bankers Trust Co. v. Litton Sys.*,<sup>186</sup> the courts found that a lease contracts for photocopiers was unenforceable because they had arisen through an illegal bribe. In *Pharm. Sales and Consulting Corp. v. J.W.S. Delavau Co.*,<sup>187</sup> the courts found that the proof of commercial bribery could be asserted to avoid enforcement of a contract. In *United States v. Mississippi Valley Generating Co.*,<sup>188</sup> a claim was made against the United States to recover costs and damages incurred under a government-terminated contract to construct and operate a power plant to provide electric power for the Atomic Energy Commission. The Government argued that the contract was unenforceable because it resulted from a proposal resulting from negotiations in which the Government had been represented by an unpaid, part-time consultant to the Budget Bureau, who was at the same time was an active officer of an

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182. Id.

183. Id.

184. *Colyvas v. Red Hand Compositions Co.*, 318 F. Supp. 1376 (S.D.N.Y. 1970 Id., at p. 1377

185. Id.

186. *Bankers Trust Co. v. Litton Sys.*, 599 F. Supp. 2d 488, 492 (2nd Cir. 1979)

187. *Pharm. Sales and Consulting Corp. v. J.W.S. Delavau Co.*, 59 F. Supp. 2d 398, 405-08 (D.N.J. 1999)

188. *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 548-51, 563.

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investment banking company which was expected to profit from the transaction by becoming the financial agent for the project.

The court agreed with the government stating that the consultant violated 18 USC Sec. 434, and that public policy forbids enforcement of the contract. The court added that although the statute did not specifically provide that the contract would be invalid, the protection under the statute could only be:

‘fully accorded only if contracts which are tainted by a conflict of interest on the part of a government agent may be disaffirmed by the Government. If the Government’s sole remedy in a case such as that now before us is merely a criminal prosecution against its agent, as the respondent suggests, then the public will be forced to bear the burden of complying with the very sort of contract which the statute sought to prevent.’<sup>189</sup>

These cases support the view that even in the absence of express legislation providing for unenforceability, contracts obtained as a result of bribery, although valid on the face of the contract, will not be enforced by the US courts for reasons of public policy. This has nothing to do with the position of the parties and is not directed at ensuring justice between the parties. Rather the focus is on protecting society from the effects of contracts that are a result of criminal activity. It is also to protect the institution of the fiduciary by refusing to allow the enforcement of contracts that arise as a result of the breach of the fiduciary duty. The actions of a plaintiff in seeking to enforce such a secondary contract cannot be divorced from the manner in which the contract was obtained. As such, both the primary contract to give a bribe and the secondary contract that results from the successful bribery exchange will be considered promises that are unenforceable under US law.

### 4.5 The Private Claim for Corruption

Private civil actions used to be the most commonly used method of fighting corruption in the United States. However, the outcry against the pervasive practice of bribery and the perceived limitations of civil actions led many states to enact statues outlawing bribery thus moving redress for corruption from the private to the public sphere. The fact that bribery is criminalized does not rule out the possibility of a civil action based on common law principles.<sup>190</sup>

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189. 189 Id at p. 564; see also *Michigan Steel Box Co. v. United States*, 49 Ct.Cl. 421 (1940), at p. 440, (tainted contracts are disaffirmed because of ‘the breach of the agent’s ... duty towards those he has undertaken to represent ... and not (because of) the quantum of damage to the one or the amount of benefit to the other.’)

190. See *Continental Management, Inc. v. United States*, 527 F.2d 613 at 617 (1975), at p. 620. See also *United States v. Acme Process Equip. Co.*, 385 U.S. 138 (1966). The court held ‘that, had Congress wanted “to provide the additional remedy of contract annulment, it could have done

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Judge Davis in the *Continental* case remarked that the statutory remedy under the criminal law ‘is not exclusive and common law rights and remedies survive, unless Congress intended the legislative provision to be exclusive.’<sup>191</sup> He noted that the existence of statutes establishing bribery penalties did not in any way detract from the right to a civil remedy but rather the criminalization of bribery strengthens the case for the civil remedy because ‘it establishes a statutory standard of conduct and evidences a strong policy against [bribery].’<sup>192</sup>

Furthermore, although the US courts have held that that the UNCC, the FCPA and the state commercial bribery statutes do not create an express private right of action; the creativity of the motivated plaintiff has created a somewhat different scenario.<sup>193</sup> Redress is being sought by plaintiffs as a consequential claim to a FCPA violation.<sup>194</sup> Private actions are being instituted by claimants using breaches of the FCPA provisions as a trigger to file civil actions. These include actions by shareholders under the securities laws, or for breach of fiduciary duties by company executives, private claims by foreign government, losing competitors, former employees or consumers.

This section provides a sampling of cases that are illustrative of the attempts made to use the private civil process as distinct from public criminal proceedings to seek remedies for corruption in business transactions.

### 4.5.1 Actions by Principal of Disloyal Agent

The principal-agent relationship is the primary relationship that is the subject of private claims for corruption. It is generally accepted that the corruption of

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so” by express language, and of course it could have. But the fact that it did not see fit to provide for such a remedy by express language does not end the matter. The Anti-Kickback Act not only “prohibited” such payments, but clearly expressed a policy decidedly hostile to them. They were recognized as devices hurtful to the Government’s procurement practices .... There is absolutely no indication in the legislative history of the Anti-Kickback Act that Congress, in providing a civil remedy for a more tangible evil, intended to preclude other civil sanctions necessary to effectuate the purpose of the Act .... This public policy requires that the United States be able to rid itself of a prime contract tainted by kickbacks.’ At pp. 142-146; see also *United States v. Mississippi Valley Generating Co.*, *id.*, Note 188 above, at p. 563.

191. Per Judge Davis in *Continental Management, Inc. v. United States Continental*, 527 F.2d 613 (1975), at p. 620.

192. *Id.*

193. Vega points out that the majority of court decisions involving the FCPA have been brought by private litigants. M. Vega, ‘The Sarbanes-Oxley Act and the culture of bribery: expanding the scope of private whistle-blower suits to overseas employees’, *Harvard Journal on Legislation*, Vol. 46, 2009, p. 425.

194. A. Portnoy, J. Murino, ‘Private Actions under the US Foreign Corrupt Practices Act: An Imminent Front?’, *id.*, Note 89 above, at p. 31.

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an agent can be the basis for a civil action. A fundamental motivation for the courts in cases involving the bribery of an agent is that such actions in breach of the fiduciary duty are inimical to the general public interest. In *June Fabrics v. Teri Sue Fashions*, the court held that acts by a third party allegedly corrupting an employee or agent of another amount to a wilful tort. The court held that in such circumstances the injured party has the right to redress and ‘has it within his ability to hold one or several or all such wrongdoers accountable.’<sup>195</sup> An action may be brought by the principal against the agent, the bribe-giver or both parties.

### 4.5.1.1 Recovery against the Disloyal Agent.

Commercial bribery is viewed as a deliberate tort. The principal can sue for damages in tort and the agent is liable to the principal for losses arising from the breach of fiduciary duty as well as the possible loss of employment. Sec. 910 of the Restatement (2nd) Torts provides that ‘[a] person injured by the tort of another is entitled to recover damages from him for all harm, past, present and prospective, legally caused by the tort.’

The principal may in the alternative seek a constructive trust on the profits that the agent has made from the act of bribery. As the courts held in *Williams Electronics Games Inc. v. Garrity*,<sup>196</sup> where the manufacturer of the video game *Mortal Combat* alleged that two of its suppliers had bribed their purchasing agent to purchase goods from them:

‘The victim of commercial bribery, who usually ... is the principal of an agent who was bribed, can obtain by way of remedy either the damages that he has sustained (the damages remedy) or the profits that the bribe yielded (the restitution or unjust enrichment remedy).’<sup>197</sup>

The court added that the total profits would consist of the bribe itself, plus the revenue that the bribe generated for the person paying the bribe, minus the cost of goods sold and any other variable costs incurred in making the sales that generated that revenue.<sup>198</sup> The Restatement (3rd) Agency, Sec. 407(1), provides that ‘If an agent has received a benefit as a result of violating his duty of loyalty, the principal is entitled to recover from him what he has so received, its value, or its proceeds, and also the amount of damage thereby caused.’

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195. *June Fabrics v. Teri Sue Fashions*, 194 Misc. 267, 81 N.Y.S.2d 877 N.Y. Sup., 2 June 1948.

196. *Williams Electronics Games Inc. v. Garrity*, 366 F.3d 569 (7th Cir, 29 April 2004) at Para. 16.

197. *Id.*, at Para. 16.

198. *Id.*

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The principal, as the person to whom the fiduciary duty is owed, is entitled to any benefit acquired by the agent or the bribe-giver as a result of the corrupt exchange. The measurement is not the loss of the principal but the gain of the agent or bribe-giver. The courts have stated that this is the underlying motivation for the courts response. The focus is not so much on repairing the loss of the victim as it is on deterring commercial bribery. In the *Williams Electronic Games* case, the court stated that the rationale for sanction of disgorgement:

‘is to make it worthless to the tortfeasor by stripping away all his gain, since if his gain exceeded the victim’s loss a damages remedy would leave the tortfeasor with a profit from his act.’<sup>199</sup>

As such, the plaintiff may seek the proceeds of the bribe from the agent. In *United States v. Carter*, a case dealing with the corruption of a public official, Justice Lurton held that:

‘[t]he larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent. If he takes any gift, gratuity or benefit in violation of his duty, or acquires any interest adverse to his principal without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received.’<sup>200</sup>

The US Supreme Court has emphasized that the *disgorgement of all corrupt gains* is the appropriate response to the breach of fiduciary duty. The Court held, for example, where a government official made profits from contracts under his control that:

‘government is not limited, in a suit to recover the same and in which it has impounded securities, to the traced securities; the officer must account for all his gains and, ... the government is entitled to a judgment for money had and received to its use, and may enforce it against any property of the defendant including property in the hands of third parties with notice of how it was obtained.’<sup>201</sup>

Even where the plaintiff principal has made a recovery against the bribe-giver, the principal can also proceed against the agent involved in the bribery transaction. A case from the State of Minnesota is illustrative of this point. In

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199. *Williams Electronics Games Inc. v. Garrity*, 366 F.3d 569 id., at Para. 17.

200. *United States v. Carter*, 217 U.S. 286 (1910), at p. 306.

201. *United States v. Carter*, id.

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*Tarnowski v. Resop*,<sup>202</sup> the plaintiff hired the defendant to advise on the purchase of a string of coin-operated music machines. The defendant, Resop, was paid a secret commission by the party selling the route to report back to the plaintiff that there were over 75 locations, each with machines less than six months old, and that the overall gross income was over \$3,000 per month. Relying upon the advice of the defendant and the investigation he had made, the plaintiff purchased such a business from Phillip Loechler and Lyle Mayer of Rochester, Minnesota. The plaintiff paid an \$11,000 down payment. Six weeks after the purchase, the plaintiff discovered that the representations made to him by defendant were false, in that the agent had only investigated five locations and some machines were up to seven years old, with the gross income much less than the projected \$3,000.

Upon discovering the falsity of defendant's representations and those of the seller's, the plaintiff rescinded the sale. He offered to return what he had received, and demanded the return of his money. When the sellers refused to comply, the plaintiff successfully brought an action against the sellers resulting in a verdict of \$10,000 for the plaintiff.

The plaintiff also proceeded to sue the defendant (his agent) for collecting a secret commission from the sellers in breach of fiduciary duty owed to him and sought for (a) the sum of the secret commission and (b) damages for (1) losses suffered in operating the route prior to rescission; (2) loss of time devoted to operation; (3) expenses in connection with rescission of the sale and his investigation in connection therewith; (4) nontaxable expenses in connection with prosecution of the suit against the sellers; and (5) attorneys' fees in connection with the suit.<sup>203</sup>

The defendant argued that since the plaintiff had recovered against the sellers, he was barred from a further action against Resop as agent because (1) that plaintiff had elected one of the alternative remedies and cannot thereafter pursue another; (2) that successful pursuit of one remedy constitutes a bar to another remedy for the same wrong, even though the outcome of the first action did not make plaintiff whole in point of actual loss; (3) that the satisfied verdict in the rescission case is a bar; and (4) that defendant and the sellers were joint tortfeasors, and the discharge of one discharged them all.<sup>204</sup>

The court held that with regard to the recovery of the secret commission it was well settled that:

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202. *Tarnowski v. Resop*, 51 N.W. 2d 801 (Minn. 1952).

203. *Id.*, at p. 35.

204. *Id.*, at p. 36.

## CHAPTER 4 - PRIVATE REMEDIES IN THE UNITED STATES

‘the principle that all profits made by an agent in the course of an agency belong to the principal, whether they are the fruits of performance or the violation of an agent’s duty, is firmly established and universally recognized.’<sup>205</sup>

The court further held that:

‘[a]ctual injury’ is not the principle the law proceeds on, in holding such transactions void. Fidelity in the agent is what is aimed at, and, as a means of securing it, the law will not permit him to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal.’<sup>206</sup>

The court noted that the right of the principal to recover profits made by the agent in the course of the agency was not affected by the fact that the principal, upon discovering a fraud, had rescinded the contract and recovered the moneys which he had spent.<sup>207</sup> As such, the court held that the principal had an ‘absolute right’ to the secret commission irrespective of any recovery resulting from the action against the sellers for rescission.<sup>208</sup> The court also held that the plaintiff could recover any profits made by the agent irrespective of his recovery against the sellers as well as any losses flowing directly from the agent’s tortious conduct.<sup>209</sup>

### 4.5.1.2 Recovery against the Bribe-Giver

There are two main planks upon which the court seeks to affect a civil remedy on the parties to a corrupt exchange. The first has to do with the breach of the fiduciary duty and the second is to give effect to the public policy of the statutes criminalizing bribery as criminal behavior. The party who pays a bribe is in violation of the rules criminalizing public and private corruption. The US courts encourage the right to a remedy for the principal who has suffered

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205. Id.

206. Id., at p. 36 quoting *Lum v. McEwen (Lum v. Clark)*, 57 N.W. 662, 662-63 (Minn. 1894).

207. Id., at p. 37. The Court referred to Sec. 407(2) of the Restatement (3rd) Agency, St. Paul MN, American Law Institute 2007, which provides in Comment e on Subsection (2) that ‘If an agent has violated a duty of loyalty to the principal so that the principal is entitled to profits which the agent has thereby made, the fact that the principal has brought an action against a third person and has been made whole by such action does not prevent the principal from recovering from the agent the profits which the agent has made. Thus, if the other contracting party has given a bribe to the agent to make a contract with him on behalf of the principal, the principal can rescind the transaction, recovering from the other party anything received by him, or he can maintain an action for damages against him; in either event the principal may recover from the agent the amount of the bribe.’

208. Id.

209. Id., at p. 41.

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from the corrupt exchange between the bribe-giver and the agent of the principal. The US Supreme Court in *Continental Management, Inc. v. United States* remarked that ‘the violation of a statutory standard of conduct should normally meet with civil sanctions designed to effectuate the purpose of the statute infringed.’<sup>210</sup> The court added that the:

‘purpose of the bribery statute—the protection of the public from the corruption of public servants and the evil consequences of that corruption—will obviously be furthered by the recognition of a civil remedy.’<sup>211</sup>

Apart from the need to protect the general public, the personal interest of the principal is a key element of liability on the part of the bribe-giver. The party who pays the bribe is liable to the principal for interfering with the principal-agent relationship.<sup>212</sup> The Supreme Court in the *Continental Management* case held that it is a well-established principle that:

‘a third party’s inducement of or knowing participation in a breach of duty by an agent is a wrong against the principal which may subject the third party to liability.’<sup>213</sup>

The court added that the broad principle is that an agent’s receipt of secret profits injures the principal because it necessarily creates a conflict of interest and tends to subvert the agent’s loyalty.<sup>214</sup> Any such person who knowingly participates in a scheme by which an agent obtains secret profits should be held liable to the principal.<sup>215</sup> This case is worth examining in some detail, because

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210. *Continental Management, Inc. v. United States*, 527 F.2d (1975) 613, at p. 617.

211. *Id.*

212. The BBC news in January 2011 reported the Greek government announcement that it would take legal action against Siemens for allegedly bribing officials. This follows an 11-month parliamentary investigation that estimated the cost to Greek taxpayers of the alleged bribery at €2bn (\$2.7bn, £1.7bn). The bribery allegedly took place during 1997-2002 and affected telecoms contracts as well as security prior to the 2004 Athens Olympics. According to the BBC, the former Transport Minister, Tassos Mantelis, told the investigating committee he had accepted the equivalent of €100,000 (\$136,700, £85,400) in 1998. See BBC News, 26 January 2011, available at <http://www.bbc.co.uk/news/business-12272153>.

213. *Continental Management, Inc. v. United States*, *id.*, at p. 616. The court cited a long line of cases that show ‘in nearly unbroken succession’ that courts have held that ‘victimized principals may obtain non-statutory remedies against outsiders who have knowingly participated in or induced an agent’s breach of duty.’ See *United States v. Acme Process Equip. Co.*, 385 U.S. 138, 145; *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 548-51, 563; *Brown v. United States*, Ct. Cl., 524 F.2d 693, 699, 700 (1975); *Donemar, Inc. v. Molloy*, 252 N.Y. 360, 169 N.E. 610, 611 (1930); 34 *Hillside Realty Corp. v. Norton*, 198 Misc. 302, 101 N.Y.S.2d 437, 440 (1950). See also *Kemler v. United States*, 133 F.2d 235, 238 (1st Cir. 1942).

214. *Id.*, at p. 617.

215. *Id.*

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it basis for liability of the bribe-giver and the measure of damages in such cases.

In the *Continental Management* case the plaintiff sued the United States for sums due to them under contracts of mortgage insurance issued by the Federal Housing Administration (FHA). The government authority counterclaimed seeking to collect from the plaintiffs an amount equal to the sum of bribes paid by a former president of the plaintiffs' predecessor corporation to its employees after an FBI investigation uncovered evidence that this company had violated federal statutes prohibiting bribery, conspiracy, and the making of false statements to the Department of Housing and Urban Development. The former president of the plaintiff's predecessor company and four government FHA employees pleaded guilty to bribery.

The question before the court was what sort of proof of damages the Government needed to make when bringing a case against the bribe-giver. The defendant argued that it was sufficient to show the evidence of bribery and the amount of the bribes and that nothing further needed to be alleged or proven by way of specific or direct injury.<sup>216</sup> The court accepted this argument holding:

‘[i]n normal course the briber deprives the Government of the loyalty of its employees, upon which the Government and the public must rely for the impartial and rigorous enforcement of government programs. Bribery of officials can also cause a diminution in the public's confidence in the Government, upon which the Government must also rely. The Government likewise incurs the administrative costs of firing and replacing the venal employees and the costs of investigation, all of which are compensable in fraud cases.’<sup>217</sup>

In determining the measure of damages, the court alluded to the old maxim of the law that ‘where the fact of injury is adequately shown, the court should not cavil at the absence of specific or detailed proof of the damages’ and stated that while the plaintiffs had engaged in wrongful conduct that clearly hurt the Government, significant elements of that harm, such as the injury to the impartial administration of governmental programs, are *not susceptible to an accurate monetary gauge*.<sup>218</sup> The court found that it would not deny the principal government relief because the plaintiff managed to cause injury that was not readily traceable or measurable and that the government's inability to attach an exact and provable dollar figure to the harm it sustained would also

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216. *Id.*, at p. 618.

217. *Id.*

218. *Id.*, at p. 619. Emphasis added.

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not result in the exculpation of the plaintiffs.<sup>219</sup> On this basis the court held that in the absence of ‘a more precise yardstick,’ the amount of the bribe provides a reasonable measure of damage on the condition that the principal cannot recover the same bribes twice – once from the briber and again from the corrupted employee.<sup>220</sup>

### 4.5.2 Shareholder Actions under the Federal Securities Laws

Although the courts have held that the FCPA does not grant a private right of action, victims of corruption have used FCPA indictments as the basis for lawsuits under US securities laws.<sup>221</sup> Paying a bribe in violation of the FCPA can be considered material information that may influence the decision of a person to invest in company stock. Reports about a company’s involvement in corrupt activity can have an impact of the share price that may impact negatively on an investor’s holding. In a derivative action, shareholders can file a claim against company executives on behalf of the company. Any damages recovered from such an action are paid to the company. This is to be contrasted with a direct action where shareholders file a claim against company executives for loss suffered as a result of a violation of the securities laws. In this instance damage awarded is paid to the plaintiff and not to the company.

An example of a direct class action is the 2006 case of *Re Immucor*,<sup>222</sup> where following the announcement of a formal SEC investigation into allegations of an improper payment under the FCPA by the company, shareholders filed a class action lawsuit under Sections 10(b)<sup>223</sup> and 20(a)<sup>224</sup> of the Securities

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219. *Id.*, at p. 619. The court cited *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, at 563, where the Supreme Court held that:

‘Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.’

220. *Id.*

221. Shareholders have brought shareholder derivative suits alleging violations of Sec. 10(b), Sec. 11, and Sec. 20 of the Securities Act of 1933, common law fraud, negligent representation based on artificially inflated stock price, breach of fiduciary duties, waste of corporate assets, abuse of control, gross mismanagement, and unjust enrichment. See for example, *Glazer Capital Mgmt. LP v. Magistri*, 549 F.3d 736 (9th Cir. 2008) (alleging misrepresentation); *In re Immucor Inc. Securities Litigation* 2006 U.S. Dist. LEXIS 72335 (N.D. Ga. 4 October 2006) (alleging false statements); *In re Nature’s Sunshine Products Securities Litigation*, 486 F. Supp. 2d 1301 (D. Utah 2007) (alleging securities fraud and other violations of the securities act); Complaint, *Hawaii Structural Ironworkers’ Pension Trust Fund v. Belda*, No. 08-cv-00614 (W.D. Pa. 6 May 2008).

222. *In re Immucor Inc. Securities Litigation*, 2006 U.S. Dist. LEXIS 72335 (N.D. Ga. 4 October 2006).

223. Sec. 10b provides that:

‘it shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any

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Exchange Act of 1934 alleging losses for material misstatements. The shareholders claimed that press releases and statements made by the defendant were materially misleading because they presented an unreasonably optimistic outlook over the scope and gravity of the FCPA investigation, referring to it as an 'isolated event,' when representatives of Immucor had in fact committed multiple acts of corruption including allegedly paying bribes to obtain favorable consideration of contracts in Italy over a period of years beginning in 1998. This, the plaintiffs alleged, caused an artificial inflation of Immucor's stock price.

This stock dropped in price<sup>225</sup> after the truth regarding Immucor's Italian business became known to the market. This resulted in real economic loss to Immucor investors. They alleged that as a result of the corporation's wrongful conduct, they suffered damages as a result of the fraudulent scheme undertaken by the defendants and further economic loss when the true facts were revealed to the public.<sup>226</sup> The plaintiffs sought compensation for all damages sustained

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national securities exchange ... [T]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement ..., any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.'

224. Sec. 20(a) provides for a private right of action based on contemporaneous trading and states that:
- '[...] Any person who violates any provision of this title or the rules or regulations there under by purchasing or selling a security while in possession of material, non-public information shall be liable in an action in any court of competent jurisdiction to any person who, contemporaneously with the purchase or sale of securities that is the subject of such violation, has purchased (where such violation is based on a sale of securities) or sold (where such violation is based on a purchase of securities) securities of the same class.'
225. As a result of these back-to-back adverse disclosures impacting the senior management's credibility and honesty, the marketplace punished the Company's stock. From a close of \$28.61 per share on 25 August 2005, the Company's stock closed at \$23.58 per share on 1 September 2005, a drop of \$5.03 or over 17%, on heavy volume. See *In re Immucor Inc.* id Note 233 above at Para. 8.
226. See *In re Immucor Inc.*, id., at Para. 93-94. However, as this excerpt of the Immucor From 10-Q filed with the SEC for the quarterly period ended 31 August 2007 shows, this lawsuit was settled and had little impact on the company itself. 'On May 18, 2007, the Court granted preliminary approval of a proposed settlement of these lawsuits and directed that notice of the settlement be provided to all class members. On September 20, 2007, the Court conducted a hearing to inquire into the fairness, reasonableness and adequacy of the proposed settlement. On September 26, 2007, the Court entered an order granting final approval for the terms of the proposed settlement. Under the settlement, the Company's insurance carrier agreed to pay \$2.5 million to the plaintiff class in consideration of an unconditional release of all claims against the Company and the individual defendants. The Company's only costs are certain legal defense expenses incurred by the Company, which have been expensed as incurred. The sole remaining open issue – the amount of attorneys' fees and expenses of litigation the Court will permit plaintiffs' counsel to recover from the agreed settlement proceeds – has no impact on the Company or its insurer. The Court's order concludes the Company's involvement in this

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as a result of the defendants' wrongdoing, for their reasonable costs and expenses incurred in their action, including counsel fees and expert fees, as well as interest on the amount awarded.

The District Court for the Northern District of Georgia denied Immucor's motion to dismiss the shareholder claim. The court found that the plaintiffs had adequately alleged false or misleading statements that the facts alleged regarding the various statements did support the heightened pleading requirements under the Private Securities Litigation Reform Act (PSLRA).<sup>227</sup> In the view of the court, this omitted information would have been viewed by a reasonable investor as affecting the total mix of information available, and a reasonable investor's investment decision would have been swayed had the alleged omitted information been included in the press release. The court allowed the claim.<sup>228</sup>

A similar case dealing with material misrepresentations which was eventually settled out of court, but which is nonetheless instructive to show how FCPA investigations can lead to actions under the federal securities laws, is the case of Titan Corporation.<sup>229</sup> The indictment of Titan Corporation, a San Diego-based military intelligence and communications company, for the bribery of an agent to secure an agreement with the government of Benin to build and operate a wireless telephone network as well as a substantial management fee for maintaining the system, led to several shareholder actions.

Titan Corporation made improper payments totalling \$3.5 million to the agent for the purpose of influencing the upcoming elections in Benin and ensuring the support of the incumbent president for Titan's contract. The agent submitted at Titan's request over \$2 million of false invoices to Titan. Titan

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litigation and terminates the claims asserted in this litigation as to all class members. Management believes this resolution of the litigation has no material adverse effect on the Company's financial condition or results of operations.'

227. The Private Securities Litigation Reform Act ('PSLRA') 15 USC Sec 78u-4, imposes additional pleading requirements for plaintiffs in securities fraud cases. First, the PSLRA requires a plaintiff to specify each statement or omission alleged to be misleading, the reason why the statement or omission is misleading, and the facts surrounding the alleged misrepresentation. 15 USC Sec. 78u-4(b)(1). Second, the PSLRA requires a plaintiff 'with respect to each act or omission ... [to] state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.' 15 USC Sec 78u-4(b)(2). If the plaintiff does not satisfy the PSLRA's pleading requirements, the Court must grant a motion to dismiss. See 15 USC Sec. 78u-4(b)(3)(A).
228. This case is reported to be the first time in a federal court that plaintiffs have been held to have met the heightened pleading requirement for fraud under the PSLRA in an FCPA case. In May 2007 Immucor settled the class action lawsuit for \$2.5 million.
229. *In re Titan Securities Litigation*, No. 04-CV-0701-K (NLS) U.S. District Court for the Southern District of California, Titan agreed to pay the largest FCPA penalty to date of \$28.5 million. <http://securities.stanford.edu/1030/TTN04-01/>.

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falsified its books to conceal these illegal payments. In March 2005 Titan Corporation pleaded guilty to one count of FCPA bribery, one count of falsifying its books and records, and one count of aiding or assisting in the filing of a false tax return, in violation of 26 USC Sec. 7206(2). Titan was sentenced to pay a criminal fine of \$13 million on the FCPA bribery count and was ordered to serve three years of supervised probation. As a condition of its probation, Titan was ordered to institute a strict compliance program and to implement a system of internal controls designed to prevent future FCPA violations. Titan also entered into a consent decree with the SEC agreeing to cease-and-desist from future FCPA violations and also entered into a financial settlement comprising of disgorgement and prejudgment interest of \$15,479,000. The aggregate penalty paid by Titan was over \$28 million.<sup>230</sup>

Several shareholder class actions resulted from these investigations. In April 2004, two stockholder class action lawsuits were filed against Titan and some of its officers, asserting claims under the federal securities laws. In September 2004, these class action lawsuits were consolidated as *In re Titan, Inc.* securities litigation. The federal securities action was brought on behalf of all purchasers of Titan common stock during the period from 24 July 2003 through and including 22 March 2004. The complaint sought damages for artificially inflated prices paid for Titan Stock by the shareholders in reliance on the market which had been inflated by Titan's misleading statements. The defendants alleged, among other things, that the defendants violated Sec. 10(b) of the Securities Exchange Act of 1934, as amended (the Exchange Act), and SEC Rule 10(b)(5) promulgated thereunder, as well as Sec. 20(a) of the Exchange Act, by issuing a series of press releases, public statements and filings disclosing significant historical and future revenue growth, but omitting to mention certain allegedly improper payments involving international consultants in connection with Titan's international operations, thereby artificially inflating the trading price of Titan's common stock.

The Immucor and Titan lawsuits are examples of instances where the damage caused by the breach of criminal laws had translated into private losses for shareholders. The recourse to the courts and the availability of remedies in these cases show that a private right of action for damages caused by corrupt acts while not expressly provided for by the FCPA statute can nonetheless arise by operation of law.

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230. *Paul Berger v. Gene W. Ray et al.*, No. GIC 828346, and *Robert Garfield v. Mark W. Sopp et al.*, No. GIC 828345. Superior Court for the State of California in and for San Diego County.

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### 4.5.3 Shareholder Actions for Breach of Fiduciary Duty

Another category of FCPA-inspired civil litigation is the actions by shareholders who allege that by failing to prevent the bribery of foreign public officials, company executives were in breach of their fiduciary duty. For example, in April 2004, two stockholder class action complaints were filed against certain Titan officers, asserting that these officers breached their fiduciary duties to Titan's stockholders.<sup>231</sup> The actions were brought on behalf of all holders of Titan common stock as of 7 April 2004 and alleged that the defendants breached their fiduciary duties by acquiescing in or condoning Titan's alleged violations of the FCPA by failing to establish adequate procedures to prevent the alleged FCPA violations, and by failing, in bad faith, to voluntarily report the alleged FCPA violations to government officials. The complainants sought compensatory damages in respect of the loss of value sustained by Titan stockholders.

In addition to these shareholder class actions, in June 2004, three shareholder derivative lawsuits were filed against Titan directors and certain Titan officers.<sup>232</sup> The derivative actions were brought for the benefit of Titan, and alleged that the defendants breached their fiduciary duties to the company by failing to monitor and supervise management in a way that would have either prevented alleged FCPA violations or would have detected the FCPA violations. Titan eventually paid \$67.4 million to settle the securities law class actions and derivative suits pending against Titan in both Federal and State courts in California and the Delaware Court of Chancery.<sup>233</sup>

### 4.5.4 Private Actions by Nationals

Actions for remedies have also been brought by private citizens. In *Adler v. The Federal Republic of Nigeria*,<sup>234</sup> James Adler, a U.S. citizen and majority shareholder of the Mexican corporation El Surtidor del Hogar, brought an unsuccessful claim against the Federal Republic of Nigeria. Adler in 1992 fell

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231. *Theodore Weisgerber v. Gene Ray, et al.*, No. 832018, which was filed in the Superior Court for the State of California, San Diego; *Robert Ridgeway v. Gene Ray et al.*, No. 542-N, which was filed in Delaware Court of Chancery, New Castle County; and *Bernd Bildstein v. Gene Ray et al.*, No. 833701, which was filed in the Superior Court for the State of California, San Diego County. *Paul Berger v. Gene W. Ray et al.*, No. GIC 828346, and *Robert Garfield v. Mark W. Sopp et al.*, No. GIC 828345. Superior Court for the State of California in and for San Diego County.

232. See generally Titan Corp.- TTN Annual Report (10-K) Item 3. Legal Proceedings. Available at <http://securities.stanford.edu/1030/TTN04-01/232>.

233. *Id.*

234. *Adler v. The Federal Republic of Nigeria*, Nos. 98-55456, 98-55460. (9th Cir. 17 May 2000).

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victim to a '419'<sup>235</sup> scheme under which he transferred a total of \$2.1 million in bribes to Nigerian officials in return for an '*investment*' opportunity. He received a letter from a Chief Abba Ganna Hen George about an investment opportunity for which Adler could receive a substantial commission. The letter explained that former members of the Nigerian ruling party had used their positions to create companies and award themselves for invoiced contracts, and that the new Nigerian government had 'given its blessing for the payment of these contracts.' Adler could receive a commission, the letter explained, by arranging for the payment of one of these contracts by providing blank copies of El Surtidor's letterhead and invoice statements, as well as a non-Nigerian bank account into which \$130 million would be transferred.

After the transfer, 40 percent of the total would go to Adler; 50 percent would go to Nigerian government officials; and 10 percent would go toward expenses. Adler sent the letterhead, invoices, and the number of a bank account in the Grand Cayman Islands. The deal fell through and Adler sought to recover the over five million dollars he had paid to further the illegal contract and to bribe the Nigerian government officials.

The district court held that the transaction involved criminal activity on its face and that Adler knowingly and intentionally participated in that activity. Adler had paid bribes to Nigerian officials in violation of California bribery law and the Foreign Corrupt Practices Act. Adler had travelled in interstate commerce and used instrumentalities of interstate commerce to make gifts and payments to foreign officials or persons he believed were foreign officials for the purpose of influencing their decisions to assist him in obtaining business. As such the court decided that the unclean hands doctrine barred Adler from recovering the money he had paid to the Nigerian government officials. This decision was upheld on appeal. Although this claim was unsuccessful, it demonstrates the possibility of private parties to file claims to seek a remedy for losses suffered as a result of corrupt activity.

### 4.5.5 Private Actions by Foreign Governments

Another set of claimants seeking private remedies for corruption are foreign governments. In 2008, for example, in a case brought before the US District Court of the Southern District of New York, the Republic of Iraq on behalf of

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235. The basic fraud, notorious in Nigeria for its practice by skilled confidence men, is known to the Nigerian police as a '419,' because it is a violation of the Criminal Code Act of Nigeria, Chapter 77, S 419 (1990), which provides that 'Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a felony, and is liable to imprisonment for three years.'

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the Citizens of the Republic of Iraq brought a claim against *ABB et al.*<sup>236</sup> The case centered upon the United Oil-for-Food Program established in 1996 to provide relief to the people of the Republic of Iraq from sanctions the U.N. had imposed on Iraq after its invasion of Kuwait in 1990.

The Republic of Iraq claimed that the previous government of Saddam Hussein had corrupted the program by imposing surcharges on sales of Iraqi oil and demanding kickbacks on purchases of humanitarian goods to obtain hard currency for the Iraqi Treasury in violation of the terms of the program and the underlying sanctions. Iraq claimed to have been injured by such payments and sought to recover as damages three times the amount of surcharges and kickbacks paid with regard to commercial transactions under the Oil-for-Food Program asserting claims for violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), conspiracy to commit fraud, breach of fiduciary duty, breach of contract, unjust enrichment, violation of the commercial bribery prohibitions of the Robinson-Patman Act (RPA), and violation of the Foreign Corrupt Practices Act (FCPA). The action is still before the courts.

Another significant foreign government private claim was brought by the Kingdom of Bahrain state-owned aluminum smelter, Aluminum Bahrain against Alcoa Inc. (a company involved in the supply of alumina to the state owned company) in the US District Court of the Western District of Pennsylvania. Aluminum Bahrain alleged that Alcoa bribed one or more of its former senior officials as well as officials of the Government of Bahrain to induce the plaintiff to cede a controlling interest in that company to Alcoa and to overpay for alumina. The bribes were sent through a series of shell companies that Alcoa ultimately controlled. Aluminum Bahrain is seeking damages in excess of \$1 billion. Aluminum Bahrain alleges among other claims breaches of the RICO Act and is relying on the alleged illegal payments to foreign officials in violation of the FCPA as a predicate act for the RICO claim.<sup>237</sup>

### 4.5.6 Private Actions by Losing Competitors

Apart from the claim arising from the contract tainted by corruption, an important type of claim focuses on the effect that the corrupt exchange has on other parties involved in the bidding process. These parties suffer damage that results from the distortion that the act of bribery has on free and fair

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236. *Iraq v. ABB AG*, No. 08 CV 5951 (S.D.N.Y. 27 June 2008).

237. *Aluminium Bahrain v. Alcoa Inc.*, Complaint (Case 2:05-mc-02025 Document 279 Filed 02/27/2008). This action has been stayed by the court in order to allow the Department of Justice conduct its own criminal investigations.

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competition. The bribe-giver who wins a contract as a result of a corrupt exchange has interfered with the ability of the party who has given no bribe to win that same contract. This is a tort of unfair interference in the prospective business relations of another who is in competition with the bribe-giver.

An illustrative case is the *Rangen* case, where an action was brought by a competitor who claimed that Rangen, the defendant, had paid bribes to an official of the Idaho State Fish Hatchery as a result of which the Idaho Hatchery bought only Rangen fish food. The losing competitor claimed damages on the grounds that but for these bribes he would have had a portion of the business given to Rangen in the four-year period of the contract. The Court granted him treble damages under Art. 2(c) of the Robinson-Patman Act, which was affirmed on appeal. The Court held that the elimination of 'commercial bribery' was one of the purposes of the Act stating:

'In our case the bribery not only undermined a fiduciary relationship which Congress sought to protect, but gave one seller a grossly unfair advantage over a competing seller. Where commercial bribery is associated with evils which a particular provision of the antitrust laws was designed to prevent, the fact that it was bribery rather than a more defensible arrangement ought not to preclude application of the statute.'<sup>238</sup>

Another illustrative example is the *Environmental Tectonics Corporation International* (ETC) case. ETC, a Pennsylvania corporation, brought an action to recover damages against several defendants who according to ETC had obtained a defense construction contract from the Nigerian Government by bribing Nigerian officials. ETC claimed to have been injured by the apparently successful scheme. The district court declined jurisdiction in the case holding that adjudication of ETC's claims would lead inevitably to an examination of the Nigerian government's motives in awarding the Nigerian contract to Kirkpatrick, one of the defendants. The district court was convinced that such a finding would be interpreted as criticism of the Nigerian Government and concluded that the case presented the type of situation which precludes judicial inquiry. In the opinion of the court, the act of state doctrine barred adjudication of ETC's claims and dismissed the action in its entirety.

On appeal, the court reversed this decision and stated:

'The nature of the acts alleged and the number of victims are also important considerations in this analysis ... ETC claims to have suffered direct economic injury from the appellees scheme. By illegally influencing the

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238. *Rangen Inc. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir.1965), cert. denied 383 U.S. 936.

## PRIVATE REMEDIES FOR CORRUPTION

decisions of appellees public officials, however, appellees have also created an even larger class of victims, the citizens of Nigeria. Moreover, because bribery of foreign officials by American businessmen diminishes this nation's stature and influence abroad, conduct of the kind here alleged victimizes the citizens of this nation as well.<sup>239</sup>

The Supreme Court affirmed the ruling of the Court of appeal and held:

'(1) act of state doctrine was not applicable to bar United States court from entertaining action alleging that company obtained military procurement contract from Nigerian government through bribery of Nigerian officials, and (2) act of state doctrine does not establish exception to obligation of United States courts to decide cases and controversies for cases and controversies that may embarrass foreign governments, but merely requires that, in process of deciding, acts of foreign sovereigns taken within their own jurisdictions be deemed valid.'<sup>240</sup>

Another case involving a losing competitor is *Rotec Industries, Inc. v. Mitsubishi Corp.*<sup>241</sup> Although the case did not succeed because of the inability of the plaintiff to establish a causal link, it is a useful pointer to the type of claim that is possible by a losing competitor. In this case, Rotec brought an action against Mitsubishi and other competitors. The plaintiff alleged violations of the Robinson-Patman Act and Oregon state law, which prohibits intentional interference with economic relations. Rotec claimed that the defendants had bribed certain members of the bid evaluation committee as a result of which Rotec lost the construction competition.

The Court of Appeal, agreeing with the lower court, dismissed Rotec's claims. The court noted that in Oregon, the tort of intentional interference with economic relations requires Rotec to prove: (1) the existence of a professional or business relationship (which could include, *e.g.*, a contract or a prospective economic advantage), (2) intentional interference with that relationship, (3) by a third party, (4) accomplished through improper means or for an improper purpose, (5) a causal effect between the interference and damage to the economic relationship, and (6) damages.<sup>242</sup> The lower court assumed for purposes of its decision that all elements other than the causation element were

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239. *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 659 F. Supp. 1381 (D.N.J. 1987), affirmed on other grounds, 847 F.2d 1052 (3d Cir. 1988) 2 May 1988, at pp. 1063-1064. Some writers argue that there should be a bribery exception to the Act of State Doctrine. See J. Simon, 'Clayco Petroleum Corp. v. Occidental Petroleum Corp.: should there be a bribery exception to the Act of State Doctrine?', *Cornell International Law Journal*, Vol. 17, 1984, p. 407.

240. *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp.*, Intern. 493 U.S. 400, 110 Supp. Ct. 701 U.S.N.J., 1990, 17 January 1990.

241. *Rotec Industries, Inc. v. Mitsubishi Corp.*, 348 F.3d 1116 C.A.9 (Or.), 2003.

242. *Id.*, at p. 1121.

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met. It dismissed the action because in its opinion Rotec had failed to demonstrate causation between the allegedly improper interference and the damage to the economic relationship.

The court of appeal agreed and held that ‘too many inferences need to be drawn to establish a connection between that improper conduct and Rotec’s ultimate failure to secure the two contracts won by the defendants.’<sup>243</sup> The court held that even if it accepted Rotec’s assertions that Mitsubishi essentially bought the votes of two members of the Evaluation Committee and that these two members caused the sixty-member Evaluation Committee to act as it did, the court could still not identify a linkage between the Committee’s actions and CRNC’s decision to execute a contract with the defendants.<sup>244</sup>

An example of a claim for the intentional tort of bribery based on unfair competition law is the case of *Korea Supply Company v. Lockheed Martin Corp.*<sup>245</sup> Korea Supply was in a competitive bid with Lockheed Martin to supply military equipment to the Republic of Korea. Although Korea Supply put in a lower bid, Lockheed Martin won the contract with anticipated profits of approximately \$10,000,000.<sup>246</sup> Korea Supply sued Lockheed Martin under California’s Unfair Competition Law (UCL),<sup>247</sup> alleging that Lockheed Martin was awarded the contract by unlawfully bribing South Korean officials, in violation of the FCPA and also in tort for unlawful interference with prospective economic advantage. The Californian Supreme Court accepted that the plaintiff had an action in tort but limited the scope of the remedy available under the UCL disallowing the remedy of non restitutionary disgorgement that had been allowed by the court of appeal.

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243. *Id.*, at p. 1122.

244. *Id.*, at p. 1123.

245. See *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 94142 (Cal. 2003). *Korea Supply Co. v. Lockheed Martin Corp. et al.*, 29 Cal. 4th 1134 (2003).

246. *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 94142 (Cal. 2003) *id.*, at 941.

247. The Californian Unfair Competition Law (Business and Professions Code) Sec. 17200 provides:

‘[A]s used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertizing and any act prohibited by unlawful, unfair and fraudulent business acts.’ This provision allows plaintiffs to use violations of prohibited acts under other rules as a cause of action in court under the Californian rules; Sec. 17203 permits a court: ‘to make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition . . .’ and empowers a court: ‘to make such orders or judgments . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.’

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The court of appeal focused on what it described as the deterrent purpose of the UCL and held that Sec. 17203 should be construed to provide for the non-restitutionary disgorgement of any ill-gotten gains to any plaintiff who could demonstrate that those gains had been obtained in violation of the UCL. The court ruled that such non-restitutionary disgorgement could be granted whether or not the case had been brought as a class action and whether or not any money or property had actually been unlawfully acquired from the plaintiff or anyone the plaintiff purported to represent.<sup>248</sup>

On further appeal to the California Supreme Court, this sweeping interpretation was rejected. The Supreme Court Justices found that ‘while restitution was an available remedy under the UCL, disgorgement of money obtained through an unfair business practice is an available remedy in a representative action only to the extent that it constitutes restitution.’<sup>249</sup> As such the Supreme Court concluded that non-restitutionary disgorgement of profits in an action brought by an individual was not an expressly authorized remedy under the UCL. The court looked into the history of the legislation to ascertain whether authorization for such a remedy could be implied.

The court noted that from the language of UCL it was ‘... clear that the equitable powers of a court were to be used to “prevent” practices that constitute unfair competition and to “restore to any person in interest” any money or property acquired through unfair practices.’ However, the court noted that while the ‘prevent’ prong of Sec. 17203 of the UCL suggested that the Legislature considered deterrence of unfair practices to be an important goal, the fact that attorney fees and damages, including punitive damages, are not available under the UCL was clear evidence that deterrence by means of monetary penalties is not the act’s sole objective. Indeed in the opinion of the court, the ‘fact that the “restore” prong of Sec. 17203 [was] the only reference to monetary penalties in this section indicates that the Legislature intended to limit the available monetary remedies under the act.’ As such, the court concluded that there was nothing to indicate that the legislature intended to authorize such a remedy in the case of an action brought by an individual that would result in an order that to a ‘defendant to disgorge all profits to a plaintiff who does not have an ownership interest in those profits.’

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248. California Court of Appeal Second Appellate District, Division Four, No. B136410.

249. *Korea Supply Co. v. Lockheed Martin Corp. et al.*, 29 Cal. 4th 1134 (2003).

250. *John Boyd et al AWB Limited, et al.* 544 F.Supp.2d 236 (2008).

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Private actions also provide avenues for losing competitors to draw upon foundations laid by criminal investigations. An example of such a ‘piggy back’ action was the landmark class action by US wheat farmers who were seeking hundreds of millions of dollars in compensation from the AWB Limited relying on a UN Investigation that revealed that the AWB paid \$290 million in transnational bribes to Saddam Hussein regime officials to secure wheat contracts in Iraq. The litigants claim that the AWB were ‘unfair advantage conspirators,’ whose conduct excluded US wheat growers from the Iraqi wheat markets.<sup>250</sup> The court dismissed the claim stating that the plaintiffs could not show that AWB’s conduct in Iraq was a ‘proximate cause’ of their injury, which is a required element of antitrust standing.<sup>251</sup>

### 4.5.7 Private Actions by Consumers

An interesting class of claimant is the class action by consumers. In the *Ferona Wint* case,<sup>252</sup> Wint had employed a mortgage broker to obtain a mortgage loan in connection with the purchase of her new home. The mortgage loan was made by ABN Amro, who influenced the mortgage broker Cliffco by paying a yield spread premium or deferred premium (‘YSP’). A YSP is a payment made by a lender to the borrower’s broker in exchange for the broker deceptively exacting approval from the borrower of a mortgage loan with an interest rate that is above the ‘par’, or market rate offered by the lender. As a result, Wint had to pay thousands of dollars in extra interest.

The court held that the act of ABN Amro constituted commercial bribery in violation of the provisions of New York Penal Law Sec. 189.03. The Court further held that commercial bribery constitutes a separate and distinct civil cause of action, and reversed the decisions of the lower courts, dismissing the appellants case and ordered that the case be certified as a class action

The court in the case found that a class action for damages and injunctive relief for claims of this type is superior to other available methods for a fair and efficient determination because the case involved relatively moderate losses to

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251. *Id.*, at p. 249. It is interesting to note that this lawsuit was inspired by the article by F. Gevurtz, ‘Using the antitrust laws to combat overseas bribery by foreign competitors,’ *Virginia Journal of International Law*, Vol. 27, 1987, p. 211.

252. *Ferona Wint, individually and on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, v. Abn Amro Mortgage Group, NC., Defendant-Respondent*. Nos. 2004-03218, 2004-07314. 12 October 2004. Supreme Court, Appellate Division, Second Department, New York Suffolk County Clerk’s Index No. 22116/03, at p. 56.

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thousands of people, thus making a class action for damages not only the superior method, but the only feasible method for resolving this controversy.

### 4.6 Observations

The normative framework for private remedies for corruption in the US is composed of international, federal and state rules. The reservation to Art. 35 UNCC made by the US Congress and the denial of a private right of action under the FCPA and state commercial bribery laws means that anti-corruption rules do not serve as a direct basis for private actions for redress. The trend, as affirmed by the response of the US Congress and courts, would seem to be to deny the extension of private rights of redress to individuals for violations of anti-corruption laws.

However, acts of bribery in commercial affairs may act as a trigger for the application of other rules particularly under antitrust and securities laws designed to encourage free and fair competition as well as to protect investors. Also relevant are rules that encourage the private claimant to act as a private prosecutor where a fraud has been committed against the government in the RICO type claim as well as *qui tam* actions under the False Claims Act. Nonetheless, the fact remains that, the private claimant does not have any express right of action under the anti-corruption laws but is restricted to incidental opportunities presented under other statutes and common law principles.

Transactions tainted by corruption (whether national or international) benefit from the public policy against corruption that emerges from the criminalization of public bribery under US federal law as well as private commercial bribery under state laws. Judicial policy has developed in response to these statutory prohibitions, which affect the validity of the primary contract to give a bribe and the secondary contract that results from a successful bribery exchange.

The primary contract evidences conduct that is prohibited under federal and state laws regarding public and private bribery. However, there is no express statutory prohibition of the primary agreement. The question of the validity of the primary agreement is therefore one that must be decided by a court of law. In the absence of an express statutory prohibition, the courts have developed judicial policy regarding the enforceability of the agreement to give a bribe. This policy is determined by a balancing of public and private interest affected by the enforcement of such agreements.

Public interest weighs against allowing recovery or access to courts for actions based on illegal conduct. In this regard, the illegal conduct of an agreement to give a bribe is not only a conduct in violation of criminal law; it is also conduct

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that induces the breach of a fiduciary duty. These elements have resulted in policy that supports the unenforceability of the primary contract that evidences the agreement to give a bribe. Cases that support this public policy have varied from domestic disputes involving private parties (e.g. *Tool Company v. Norris*), to disputes involving public contracts (e.g. *US v. Mississippi Valley* case) as well as disputes involving a foreign national (for example the *Oscanyan* and *Adler* cases).

The public policy against the unenforceability of the primary contract acts in the interest of the defendant, as the court will leave the parties as it has found them and not lend its assistance in any way to enforcing the rights under the contract. The courts act in these instances as custodians of the law and of the indirect victims of corrupt acts i.e. the general public. As such, they do not offer the protection of the law to parties of the primary contract. There is no claim, no restitution, and no enforcement available to the party who intentionally enters into a contract to give a bribe. The objective of the courts is to deter the commission of such transactions and thereby encourage compliance with the anti-corruption rules.

Judicial policy against enforcement extends to the secondary contract, which results from the successful payment of a bribe or other inducement. The courts agree that the secondary contract is on its face a valid contract. It is, however, inextricably linked to the commission of a tort. The fact that a plaintiff bribe-giver seeking enforcement of a secondary agreement has committed a crime in order to 'obtain the contract upon which the action before the court is based' led to the important ruling in the *Sirkin* case that the secondary contract is unenforceable. The focus of the courts is not so much on achieving justice between the parties as it is on deterring the commission of acts of bribery. In this view the courts have discountenanced arguments that such a position will lead to the unjust enrichment of the defendant at the expense of the plaintiff. This public policy plays in favor of the defendant, who can repudiate the secondary contract without any cost.

Furthermore, the bribe-giver and the party receiving the bribe are liable in restitution to the party to whom is owed the fiduciary duty that is breached by the act of bribery. The principal may seek damages against a bribe-taking agent that will minimally consist of the bribe itself. The proceeds resulting from the bribe are also payable to the principal, as the objective of the court is to strip the wrongdoer of all gain made from the corrupt exchange. The disgorgement of all benefit is judged by the courts as the appropriate response to a breach of the fiduciary duty by the agent.

The right of the principal to proceed against the agent is not affected by the fact that the principal may have already repudiated the secondary contract. As noted by the courts in the *Tarnowski* case, the principle that the courts proceed

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on is not based on *actual injury*. The absolute right to the secret commission and benefits accruing to the agent are directed at securing the fidelity of the agent and to discourage the temptation of an agent to use the fiduciary relationship to further personal private interests.

The bribe-giver is liable to the principal for interfering with the principal/agent relationship. As the courts showed in the *Continental Management* case, the measure of damages is a reasonable measure where the amount of actual injury cannot be quantified. Thus in addition to repudiating the contract entered into with the bribe-giver with no obligation to provide restitution, the principal may also seek damages in at least the sum of the bribe paid against the bribe-giver.

The taxonomy of private claims for corruption shows that although there is no private right of action under the FCPA, this statute has served as a trigger for private claims under other laws. FCPA violations have led to derivative and direct actions by shareholders under securities laws. FCPA violations have also triggered antitrust, unfair competition claims by losing competitors. The breach of fiduciary duty that characterizes the act of bribery serves as a foundation for claims by the aggrieved principal which includes, for example, shareholders against their company executives for failing to prevent the bribery of foreign public officials, as well as class actions by consumers against a disloyal broker. Another category of claimant is the private individual who seeks remedies for damages suffered as a result of corrupt activity, as well as foreign governments seeking damages against corporations for engaging in corrupt acts against the interests of their people.

### 4.7 Conclusion

In the implementation of the UNCC, a deliberate effort has been made by the US legislature to restrict the ambit of Art. 35 based on the assertion that existing US rules and practice will meet the objectives of the UNCC. The implementation of the international rules under the US law does not significantly broaden the scope of remedies for damage resulting from acts of corruption in the US. Private remedies for corruption remain circumscribed by domestic US law.

This overview shows that despite the public nature of the offense of commercial bribery and offenses under the FCPA, the right of victims to exercise a private right of action using the FCPA violations as a launching pad for such claims, has been supported by the courts. The implication here is that the categorization of 'commercial bribery' as a criminal offense does not shut the door to the private claim. A right to private remedies for damage suffered as a result of corruption has been founded using antitrust, securities, unfair competition law as well as traditional public policy principles regarding

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illegality in transactions and the breach of fiduciary duty. The lack of express stipulations in the law notwithstanding, a group of creative plaintiffs is emerging using the anti-bribery statutes to trigger civil actions from the ranks of employers, shareholders, consumers and losing competitors.

The role of the courts in influencing the fight against corruption is important, as the statutory rules criminalizing acts of corruption are centered on the punishment of the offender and are more or less silent on the status of transactions that result from the corrupt activity. As such, the issue of enforceability or otherwise of resulting transactions is left to the exercise of the courts discretion. The resulting effect is that the courts must enter into a balancing of interests. This balancing must be viewed in light of the international consensus against corruption and the anti-corruption rules under US laws. The protection of the society from the negative effects of corruption is the singular focus of the courts. The US courts will clearly favor the defendant seeking to repudiate the contract tainted by corruption to ensure that all benefits that accrue to the wrongdoing agent or bribe-giver or other inducement are disgorged in a restitutionary process.

This overview of the US law shows that the boundaries between private and public law are not fixed and definite as regards the pursuit of remedies for corruption. The global market has become fundamentally different from what it was 30 years ago when the FCPA was enacted. The receding sovereign state and the blurring of the lines between the public and private sectors may mean that presumptions made about the nature of redress may need to be revisited to broaden the notion of remedies to a form that matches a changed global environment.<sup>253</sup> It may be argued that the victim of corruption is gradually moving to the center stage and that the focus in the fight against corruption is not just to punish the offender but also, increasingly, to enable the victim. This is a desirable course of action because it uses the motivated victims as one more point of intervention in the fight against corruption and

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253. This is aptly illustrated by the obstacles faced by Jack J. Grynberg, a Colorado-based independent oilman, who after exhausting all remedies in North America under the Racketeer influenced and Corrupt Organization Act (18 USC Sec. 1961 et seq.) for FCPA, Travel Act and other violations concerning the Kashagan Oil Field and Karachaganak Field offshore development against British petroleum, Statoil and British Gas, filed a complaint with the European Commission seeking redress for bribery and corruption by the companies which led to his companies loss of rights in the aforementioned oil fields. The Complaint was based on Art. 81 and 82 EU Treaty (Antitrust and Abusive behaviour). See generally *Grynberg v. British Gas Plc.*, 817 F. Supp. 1338 (ED Tex. 1993) *Grynberg v. BP P.L.C.*, 596 F. Supp. 2d 74 (D.D.C. 2009); *Grynberg v. BP P.L.C.*, 585 F. Supp.; The FCPA Blog Jack Grynberg Battles On. Tuesday, February 2, 2010 available at <http://www.fcpablog.com/blog/2010/2/3/jack-grynberg-battles-on.html>.

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mitigates its damaging consequences on world markets, on social development and on the well-being of citizens.



## CHAPTER 5

### PRIVATE REMEDIES IN ENGLAND

*‘... in England, historically, the common law has traditionally abhorred the corruption by bribery of officers of state, ranking its offence next to high treason. Such corruption is more odious than theft; but it does not depend upon any financial loss and it requires no immediate victim. Corruption of a state officer by bribery is synonymous with the most heinous crimes because it can cause huge economic damage; and its long-term victims can be legion.’*

*G. Guillaume, A. Rogers, V. Veeder  
Tribunal World Duty Free v. Republic of Kenya<sup>1</sup>*

#### 5.1 Introduction

London is considered, by some, the international business capital of the world. It is also a leading center for the settlement of international commercial disputes. This chapter looks at private remedies for corruption from the perspective of English Law. The persuasive influence of English law in the British Commonwealth makes solutions emerging from the English legal system of great relevance.

English law regarding corruption is spread across the common law and in several statutes. The Public Bodies Corrupt Practices Act of 1889, the Prevention of Corruption Acts of 1906 and 1916, the Anti-Terrorism, Crime and Security Act of 2001 and finally the new UK Bribery Act of 2010 set the backdrop for the private claim for corruption.<sup>2</sup> The new Bribery Act represents

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1 *World Duty Free Company Ltd v. The Republic of Kenya*, 46 ILM 339, ICSID Case No. ARB/00/7, Award, 4 October 2006, at Para. 173.

2 These are not the only anti-corruption statutes in the United Kingdom; however for the purposes of this book they are the most relevant. Nicholls lists additional sources of anti-corruption law in England as the Sale of Offices Act 1551, Sale of Offices Act 1809, Prevention of Corruption Act 1926, Honours (Prevention of Abuses) Act 1925, Licensing Act 1964 s. 178, Criminal Law Act 1967, s. 5; Local Government Act 1972, s. 117(2), Customs and Excise Management Act 1979, s. 15, and Representation of the People Act 1983, ss. 107, 109 and 111- 115. See C. Nicholls, T. Daniel, A. Bacarese, J. Hatchard, *Corruption and Misuse of Public Office*, Oxford University Press, New York, 2006, p. 16.

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a consolidated scheme of bribery offenses that brings cohesion to UK law on corruption and replaces common law and existing statutes.<sup>3</sup>

In the last few years there have been some significant developments in the prosecution of corruption cases involving British Companies. The Serious Fraud Office (SFO) reported the first conviction of a UK company, Mabel and Johnson, for corruption committed in a foreign country.<sup>4</sup> In a statement released by the SFO they reported that the prosecution for corruption resulted from the ‘company’s voluntary disclosure to the SFO of evidence to indicate that the company had sought to influence decision-makers in public contracts in Jamaica and Ghana between 1993 and 2001.’<sup>5</sup> The company also admitted paying kickbacks to Saddam Hussein’s regime in Iraq in connection with the United Nations’ Oil-For-Food Program in violation of UN sanctions in 2001 and 2002. On 10 July 2009, the company pleaded guilty to these charges and agreed to pay a settlement of 6.6 million pounds. On this the SFO Director Richard Alderman said:

‘This is a landmark outcome. The first conviction in this country of a company for overseas corruption and for breaking the UN Iraq sanctions and, satisfyingly, achieved quickly. The offences are serious ones but the company has played its part positively by recognising the unacceptability of those past business practices and by coming forward to report them and engage constructively with the SFO.’<sup>6</sup>

In 2008, Neils Tobiasen, the Danish head of CBRN Team Ltd, a British security company, was given a five-month suspended jail sentence in the Southwark Crown Court in London, after he admitted giving £83,000 to Tumukunde and Rusoke, two senior Ugandan officials, to win about £210,000 worth of business in respect of a contract to provide security training to local troops responsible for guarding visiting dignitaries who included the British

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3 Sec. 3 of the explanatory notes to the UK Bribery Act 2010 states that the purpose of the Act is to reform the criminal law of bribery to provide for a ‘new consolidated scheme of bribery offences’ to cover bribery both in the United Kingdom (UK) and abroad. The Act replaces the offenses at common law and under the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916 (known collectively as the Prevention of Corruption Acts 1889 to 1916 which it repeals). The extensive history of the Bribery Act is recounted in the 1995 Nolan Committee *Report on Standards in Public Life*; the Law Commission Proposal for Reform in the 1998 Report *Legislating the Criminal Code: Corruption*; the June 2000 Government White Paper CM 4759 on *Raising Standards and Upholding Integrity: The Prevention of Corruption*; and the November 2008 Law Commission Report No. 313 on *Reforming Bribery*.

4 Serious Fraud Office, Press Release dated 29 September 2009, available at <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/mabey--johnson-ltd-sentencing-.aspx>; Prosecution Opening Statements available at <http://www.sfo.gov.uk/media/41953/sfo-annex2-statement-01-250909.pdf>.

5 Id.

6 Id.

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prime minister and the Queen of England.<sup>7</sup> This is reportedly the first conviction of an individual for a bribe given by a UK company.

In October 2008 the SFO accepted a £2.25 million settlement from a construction company, Balfour Beatty, following an investigation into payment irregularities that occurred within a subsidiary of the company in a joint venture with an Egyptian company.<sup>8</sup> Balfour Beatty accepted that unlawful conduct, in the form of inaccurate accounting records arising from certain payment irregularities, had occurred within the subsidiary during the construction of the Bibliotheca Project in Alexandrina, Egypt. In another recent case in 2010, the former vice-president of De Puy, the UK subsidiary of US company Johnson and Johnson, was jailed for 12 months for helping arrange £4.5 million worth of bribes in Greece.<sup>9</sup>

The first section of this chapter examines the foundations for private remedies and outlines the anti-corruption laws in England. The second section examines the civil law definition of corruption focusing on the essential elements of secrecy, and existence of a conflict of interest, which are the distinguishing features of bribery from the perspective of English civil law. Section 3 examines the question of the validity of the transactions that are associated with a corrupt exchange, namely the primary contract to give a bribe made between the bribe-giver and the bribe-recipient and the secondary contract that results from a successful bribery exchange between the bribe-giver and the principal of a disloyal agent. The final section examines the types of private claims for corruption that are featured under English law. The chapter ends with observations and a conclusion about the provision of private remedies, the use of such remedies, and the position of the courts with regard to private claims for corruption under English law.

### 5.2 The Normative Framework

English law shows the development of rules regulating bribery progressing from the public sector to the private sector, and from domestic to foreign bribery. As such, it provides an interesting view of the dynamics that occur in the regulation of private sector versus public sector bribery and the extent to which private law (referred to hereinafter as civil law in keeping with English

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7 See news report in The Guardian, Tuesday 23 September 2008, <http://www.guardian.co.uk/uk/2008/sep/23/ukcrime.law>.

8 Serious Fraud Office, Press Release 6 October 2008 <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2008/balfour-beatty-plc.aspx>.

9 Serious Fraud Office, Press Release 14 April 2010 <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/british-executive-jailed-for-part-in-greek-healthcare-corruption.aspx>.

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law terminology) and criminal law enhance and complement each other in the fight against corruption.

The development of the anti-bribery laws in England reflect a ‘needs of the moment’ pragmatism. Laws evolved into a ‘piecemeal’ manner as a matter of expediency in the particular instance.<sup>10</sup> The English rules emerged in four stages. The first stage tackled corruption regarding judicial and ministerial officers;<sup>11</sup> the second stage, political corruption; the third stage, corruption in commercial relationships<sup>12</sup> and the fourth, more recent stage, foreign bribery.

Fennel and Thomas record that the Public Body Corrupt Practices Act of 1889 Act was introduced to curb corruption by ‘local public bodies’ in the ‘wake of revelations of corrupt practice made before a Royal Commission appointed to inquire into the affairs of the Metropolitan Board of Works.’<sup>13</sup> They note that the 1906 Prevention of Corruption Act was a response to ‘10 years of agitation for legislation by the Secret Commission of the London Chamber of Commerce’ against the practice of taking secret commissions by agents, and that the 1916 Prevention of Corruption Act was ‘passed in the wake of scandals regarding the Clothing Department of the War Office’ and created a presumption of corrupt intent in cases of bribes regarding public bodies.<sup>14</sup> The Anti-Terrorism, Crime and Security Act of 2001 was on its part, the result of a wave of public opinion against foreign corruption that was unleashed in the United States by the Watergate Scandal in the 1970s. This wave resulted in the US Foreign Corrupt Practice Act (FCPA), which in turn laid the foundation for

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10 David Lanham remarks that ‘the law of bribery and corruption in England is the product of a hesitant common law and piecemeal and overlapping statutory development.’ D. Lanham, *Bribery and Corruption*, in P. Smith (Ed.), *Criminal Law: Essays in Honor of J C Smith*, Butterworths, London, 1987, p. 92. Abdul Gofur remarks that ‘many of the statutory provisions were hasty responses to contemporary scandals.’ See A. Gofur, ‘A panoptic study of corruption’, *Opticon*, Iss. No. 1, p. 1826, available at <http://www.ucl.ac.uk/opticon1826/archive/issue1/corruption.pdf>.

11 Scheb notes that ‘the concept of bribery dates back to biblical times when it was regarded as sinful to attempt to influence the judge with a gift because judge represented the divine. Thus when the common law developed the crime of bribery, it sought to penalize only persons whose actions were designed to improperly influence those identified with the administration of justice. J. Scheb, J. Scheb II, *Criminal Law and Procedure*, 5th edn, Wadsworth, Belmont, CA, 2008, at p. 332.

12 Leslie James describes the first three stages as judicial, political and commercial corruption. See L. James, ‘Bribery and corruption in commerce: the need for harmonization of criminal law in European countries’, *International and Comparative Law Quarterly*, Vol. 11, 1962, p. 880.

13 P. Fennel and P. Thomas state that statistics suggest ‘an historical lack of enthusiasm in prosecuting offences of corruption.’ See P. Fennel, P. Thomas, ‘Corruption: an historical analysis’, *International Journal of the Sociology of Law*, Vol. 11, 1983, pp. 167-189, cited in C. Nicholls, T. Daniel, A. Bacarese, J. Hatchard, *Corruption and Misuse of Public Office*, id., Note 2 above, at p. 24.

14 Id.

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the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Chapter 12 of the Anti-bribery Act was the United Kingdom's domestication of the rules enunciated in the OECD Convention.

International dissatisfaction with the checkered state of corruption laws in the UK and a dismal history of prosecutions<sup>15</sup> finally resulted in the 2010 Bribery Act, which consolidates all the existing common and statutory law. To a certain extent this has been driven by the push for standardization at the international level.<sup>16</sup> The following sections review the legal framework regulating corruption under the English Law. This is the foundation on which private rights can be exercised. Although the new Bribery Act has replaced the common law offenses and repealed the Prevention of Corruption Acts, a brief overview is given of these important building blocks of the normative framework of anti-corruption law in England.

### 5.2.1 The Common Law Offense of Bribery

There is no single definition of what is meant by bribery under the common law. As Lanham points out, the offense underwent development over centuries and is often described in terms of a number of offenses rather than a single offense.<sup>17</sup> A review of the anti-corruption rules in England shows that for the most part the term corruption is synonymous with bribery. The articulation of the offense under common law and statute refer consistently to bribery. The common law offense of bribery focuses on acts of public officials in their

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15 In defending the need for new law because of the 'obscurity' of the current law, the Joint Committee on The Draft Corruption Bill reported that based on the statistics it had received from the audit commission very few cases of corruption were reported. According to these statistics, on average 21 people were prosecuted in each year between 1993 and 2003 under the Prevention of Corruption Acts. By comparison on average, some 23,000 defendants were prosecuted each year for fraud between 1997 and 2001. See *Report and Evidence of the Joint Committee on the Draft Corruption Bill*, 17 July 2003, HL paper 157, HC 705, published 31 July 2003 by the authority of the House of Lords and the House of Commons, London: The Stationery Office Ltd. 1 at Para. 11.

16 Ruth Winstone reports that the Law Commission has described the state of anti-corruption rules in the United Kingdom as 'obscure, complex, inconsistent and insufficiently comprehensive.' See R. Winstone, Draft Legislation Standard Note: SN/PC/2059 on the report of the Joint Committee on the Draft Bill Draft Bill to reform the laws on corruption, 17 July 2003 (HL Paper 157; HC 705), at p. 2, available at <http://www.parliament.uk/commons/lib/research/notes/snpc-02059.pdf>.

17 See D. Lanham, *Bribery and Corruption*, id., Note 10 above, at p. 92. In the United Kingdom, the *Review of Implementation of the OECD Convention and 1997 Recommendation*, Phase 1 Bis Report states that according to UK authorities, 'there are different legal opinions as to whether there is one common law offence of bribery that applies to a range of different offences or functions or a number of common law offences that apply in relation to different offence of functions.... It is however certain that there is a common law offence of bribing a public official.' Available at [www.oecd.org/dataoecd/12/50/2498215.pdf](http://www.oecd.org/dataoecd/12/50/2498215.pdf), at p. 2.

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official capacity. Stephen's Codes<sup>18</sup>, for example, describe bribery and corruption under the headings of 'judicial corruption,'<sup>19</sup> corruption of other public officers,<sup>20</sup> corruption of public bodies,<sup>21</sup> and embracery.<sup>22</sup> The English Law Commission in its review of the corruption laws remarked that because the common law on bribery has evolved over time, opinions differ as to whether:

'it is to be regarded as a general offence (*i.e.* applying to a range of different offices or functions) or whether the common law is comprised of a number of specific or different offences of bribery.'<sup>23</sup>

An often quoted definition of bribery is that found in Russell on Crime:

'Bribery is the receiving or offering of any undue reward by or to any person whatsoever, in public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity.'<sup>24</sup>

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18 H. Stephen, H. Lushington, *A Digest of the Criminal Law (Crimes and Punishments)*, 5th edn, Macmillan, New York, 1894. (Hereinafter Stephens's Codes).

19 Art. 136 Stephens's Codes provides about judicial corruption that:  
'Everyone who gives or offers to any person holding any judicial office, and every person holding any judicial office who accepts any bribe is guilty of a misdemeanour.'

20 Art. 137 Stephens's Codes provides about corruption of other public officers that:  
'Everyone commits a misdemeanour who by any means endeavours to force, persuade or induce any public officer not being a judicial officer to do or omit to do any act which the offender knows to be a violation of such officials duty.'

21 Art. 138 Stephens's Codes provides about corruption of public bodies that:  
'Everyone is guilty of a misdemeanour ... who (a) corruptly solicits or receives, or agrees to receive, for himself or for any other person, any reward as an inducement to, or reward for, or otherwise on account of, any member, officer, servant of a public body, doing or forbearing to do anything in respect of any matter or transaction actual or proposed in which the public body is concerned; or (b) corruptly gives, promises or offers any reward to any person, whether for the benefit of that person or another person, as an inducement to, or reward for, or otherwise on account of, any member, officer, or servant of any public body, doing or forbearing to do anything in respect of any matter or transaction actual or proposed in which the public body is concerned.'

22 Art. 139 Stephens's Codes provides about embracery that:  
'Everyone commits the misdemeanour called embracery who by any means whatever except the production of evidence and argument in open court attempts to influence or instruct any jurymen, or to incline him to be more favourable to the one side than to the other in any judicial proceeding whether any verdict is given or not, and whether such verdict if given, is true or false.'

23 *Legislating the Criminal Code: Corruption. A Consultation Paper*, Law Commission Consultation Paper No. 145, 1997. Para. 2.2.

24 W. Russell, *A Treatise on Crimes and Misdemeanors*, 12th edn, Stevens, London, 1865, p. 223 (1964, p. 381). See also H. Stephen, H. Lushington, *A Digest of the Criminal Law (Crimes and Punishments)*, 5th edn, Macmillan, New York, 1894, p. 137. 'Everyone commits a misdemeanour who by any means endeavours to force, persuade, or induce any public officer not being a judicial officer to do or omit to do any act which the offender knows to be a

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The phrase ‘undue reward’ leaves undefined what will suffice as ‘undue.’ However, early cases show that it is linked to an abuse of trust that results in damage to society at large but also to individuals. In *R v. Bembridge*, Lord Mansfield stated:

‘a man accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the King for misbehaviour in his office; this is true, by whomsoever and in whatsoever way the officer is appointed ....’<sup>25</sup>

The *locus classicus* *R v. Whitaker* makes it clear that the notion of a public officer is broadly interpreted. Lawrence J. defines a public officer as ‘one who discharges any duty in which the public is interested, and more particularly if he receives payments from public money.’<sup>26</sup> A public official stands in a position of trust. In the words of Best C.J.:

‘... if a man takes a reward—whatever be the nature of that reward, whether it be in money from the Crown, whether it be in land from the Crown, whether it be in lands or money from any individual—for the discharge of a public duty, that instant he becomes a public officer ...’<sup>27</sup>

In summary, the common law offense of bribery was directed at public officials who corruptly took a reward in the performance of a public duty. The essential element was the nature of the responsibility assumed by the carrying out of public acts. The responsibility to use public funds in the public interest identified the holder of such a responsibility as a public officer. The common law offenses of bribery are now replaced by the offenses created under the Bribery Act of 2010.

### 5.2.2 Statutory Law

Statutory law overlaps with the common law to a significant extent. As a result, the common law offense of bribery was not often used as the basis of public prosecution. Offenses were generally charged under the statutory law.

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violation of such officer’s official duty.’ Halsbury’s Laws of England by Lord Halsbury vol. ix., p. 484, Sec. 965, ‘every person is guilty of a misdemeanour at common law who bribes a ministerial officer, or being a ministerial officer, accepts a bribe, where the object of the bribe is to induce such officer to do, or to omit to do, any act which to his knowledge is in violation of his official duty,’ *id.*, p. 97.

<sup>25</sup> (1783) 3 Doug K B 327, at p. 332.

<sup>26</sup> *R v. Whitaker*, 1914, 10 Cr. App. R. 245, at p. 252.

<sup>27</sup> *Henley v. Mayor of Lyme Regis*, 1828, 5 Bing. 91, at p. 106, reported in J. Bayly Moore, J. Payne, *Reports of Cases Argued and Determined in the Courts of Common Pleas and Exchequer Chamber: With Tables of the Names of the Cases and Principal Matters*, Vol. 2, Sweet and Maxwell, London, 1828, at p. 302.

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The statutory law on corruption of public officers was found principally in four instruments. These were the 1889 Public Bodies Corrupt Practices Act, the 1906 and 1916 Prevention of Corruption Acts,<sup>28</sup> as well as the 2002 Anti-Terrorism, Crime and Security Act. It was in statutory law that the expansion of the duty not to take bribes extended beyond the scope of public officers. Nevertheless, the extension of the statutory prohibition to corruption in commercial matters is a more recent development. Lesley James points out that ‘while official and political corruptions were both punishable at common law, commercial corruption is the subject of relatively modern statute law only.’<sup>29</sup>

### 5.2.2.1 The Public Bodies Corrupt Practices Act 1889

The Public Bodies Corrupt Practices Act was passed on 30 August 1889 with the intention of ensuring ‘the more effectual prevention and punishment of bribery and corruption of and by members, officers, or servants of corporations, councils, boards, commissions, or other public bodies.’<sup>30</sup> It made acts of passive or active bribery by holders of public office a misdemeanor under English law.<sup>31</sup> Sec. 1 of the 1889 Act criminalized the act of receiving a bribe (passive bribery) and made it an offense providing that:

‘Every person who shall by himself or by or in conjunction with any other person, corruptly solicit or receive, or agree to receive, for himself, or for any other person, any gift, loan, fee, reward, or advantage<sup>32</sup> whatever as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body as in this Act defined,<sup>33</sup> doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned, shall be guilty of a misdemeanour’.

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28 These Acts may be cited together as the Prevention of Corruption Acts 1889 to 1916. See Sec. 4 Prevention of Corruption Act 1916. These three Acts are now repealed in their entirety by the Bribery Act of 2010. See Schedule 2 Repeals and Revocations Bribery Act 2010.

29 L. James, ‘Bribery and corruption in commerce’, id., Note 12 above, at p. 881.

30 Preamble Public Bodies Corrupt Practices Act 1889.

31 A misdemeanour is a lesser crime usually punishable by fines under English common Law. ‘A felony was the name of all crimes which, whether at common law or by statute, were punished with death and forfeiture of property, or were denominated as felonies whatever might be the punishment. Treason is a felony, and more. All other crimes are misdemeanors.’ J. Stephan, *A General View of the Criminal Law of England*, 2nd edn, Macmillan, London, 1890, p. 58.

32 Sec. 7 Para. 5 of The Public Bodies Corrupt Practices Act 1889 defines ‘advantage’ as including any office or dignity, and any forbearance to demand any money or money’s worth or valuable thing, and includes any aid, vote, consent, or influence, or pretended aid, vote, consent, or influence, and also includes any promise or procurement of or agreement or endeavor to procure, or the holding out of any expectation of any gift, loan, fee, reward, or advantage, as before defined.’

33 Sec. 7 Para. 2 of the Public Bodies Corrupt Practices Act 1889 act provides that ‘The expression ‘public office’ means any office or employment of a person as a member, officer, or servant of such public body.’

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In similar terms Sec. 1(2) of the 1889 Act criminalized the act of active bribery, *i.e.* in respect of the party who gives the bribe. The term ‘corruptly’ is not defined under English law but is generally taken to mean purposely doing an act which the law forbids. Lord Willes has stated ‘the word “corruptly” in this statute means not “dishonestly,” but in purposely doing “an act which the law forbids as tending to corrupt.”<sup>34</sup>

The 1889 Act referred to the acts of passive and active bribery in respect of ‘public bodies’ situated within the United Kingdom. It was therefore an act of purely domestic jurisdiction. It did not apply in any way to corruption occurring in foreign countries. At this stage of the development of anti-corruption rules, the notion of punishing international corruption did not exist. Sec. 7 of the Act made it clear that the Act applied only to public officers within the United Kingdom.<sup>35</sup>

### 5.2.2.2 The Prevention of Corruption Act 1906

Where the 1889 Act addressed bribery in the public sector, the 1906 Prevention of Corruption Act shifted the boundaries of the offense of bribery to include not just public sector bribery but also bribery between private persons engaged in a business context. The preamble to the Act stated that its aim was to ‘better prevent corruption by punishing corrupt transactions with agents.’ The 1906 Act defined an agent as including ‘any person employed by or acting for another.’<sup>36</sup> Such a person will include ‘a person serving under the crown or under any corporation or any ... borough, county or district council, or any board of guardians.’<sup>37</sup> The Act criminalized the passive<sup>38</sup> and active<sup>39</sup> bribery of agents and provides as misdemeanors.

Furthermore, the 1906 Act was international in scope inasmuch as it applied not only to acts of corruption affecting local public bodies, but also to instances where ‘the principal’s affairs or business had no connection with the United Kingdom and were ‘conducted in a country or territory outside the United Kingdom.’<sup>40</sup> Similarly it was also of application where the agents

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34 *Cooper v. Slade* (1858) VI House of Lords Cases (Clark’s) 746, at p. 773.

35 This definition was expanded twice. Firstly by Sec. 4(2) of the Prevention of Corruption Act 1906 to apply to local and public authorities of all descriptions. Secondly by the Sec. 108(3) of the Anti-Terrorism Crime and Security Act 2001 to include anybody which exists in a country or territory outside the United Kingdom and is equivalent to anybody described in the 1889 Act.

36 Sec. 1(2) Prevention of Corruption Act 1906.

37 Sec. 1(3) Prevention of Corruption Act 1906.

38 Sec. 1(1), Para. 1, Prevention of Corruption Act 1906.

39 Sec. 1(1), Para. 1, Prevention of Corruption Act 1906.

40 Sec. 1(4)(a), Prevention of Corruption Act 1906.

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function had ‘no connection with the United Kingdom and [was] carried out in a country or territory outside the United Kingdom.’<sup>41</sup>

### 5.2.2.3 The Prevention of Corruption Act 1916<sup>42</sup>

The 1916 Prevention of Corruption Act followed the 1906 Act. This Act extended the scope of the 1889 Act from local public bodies to all public authorities. It provided in Sec. 4(2) that ‘the expression “public body” included, in addition to the bodies mentioned in the 1889 Act, “local and public authorities of all description.”’<sup>43</sup> In keeping with the 1906 Act, it also provided that it applied to ‘authorities existing in a country or territory outside the United Kingdom.’<sup>44</sup>

Under the 1916 Act a presumption of corruption was introduced. The Act provided that:

‘where in any proceedings against a person for an offence under the Prevention of Corruption Act 1906, or the Public Bodies Corrupt Practices Act 1889, it is proved that any money, gift, or other consideration has been paid or given to or received by a person in the employment of His Majesty or any Government Department or a public body by or from a person, or agent of a person, holding or seeking to obtain a contract from His Majesty or any Government Department or public body, the money, gift, or consideration shall be deemed to have been paid or given and received corruptly as such inducement or reward as is mentioned in such Act unless the contrary is proved’<sup>45</sup>

This reversed the burden of proof. Any gift or other advantage given by a person who acquired or sought to acquire a contract from a public body was presumed to be a bribe. This presumption of corruption did not apply to overseas corruption.<sup>46</sup>

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41 Sec. 1(4)(b), Prevention of Corruption Act 1906.

42 This Act may be cited as the Prevention of Corruption Act 1916, the Public Bodies Corrupt Practices Act 1889, or the Prevention of Corruption Act 1906; this Act may be cited together as the Prevention of Corruption Acts 1889 to 1916.

43 Sec. 4(2) of the Prevention of Corruption Act 1916 provides that ‘In this Act and in the Public Bodies Corrupt Practices Act 1889, the expression “public body” includes, in addition to the bodies mentioned in the last-mentioned Act, local and public authorities of all descriptions.’

44 Sec. 4(2) of the Prevention of Corruption Act 1916 uses the phrase ‘including authorities existing in a country or territory outside the United Kingdom.’

45 Sec. 2 Prevention of Corruption Act 1916

46 Sec. 110 of the Anti-Terrorism, Crime and Security Act 2001 provides that Sec. 2 of the Prevention of Corruption Act 1916 (c. 64) is not to apply in relation to anything which would not be an offence apart from Sec. 108 or Sec. 109.

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### 5.2.2.4 The Anti-Terrorism, Crime and Security Act 2001

The Anti-Terrorism, Crime and Security Act was the response of the English Parliament to the internationalization of the fight against corruption and it domesticated the provisions of the OECD Convention for the UK. Part 12 of the Anti-Terrorism, Crime and Security Act of 2001 erased the boundary between local and foreign acts of bribery. Ordinarily, the 1889, 1906, and 1916 laws did not apply to acts carried out by UK companies or citizens that occurred wholly in foreign jurisdictions. However, Sec. 108(3) of the Anti-Terrorism, Crime and Security Act amended these laws and gave courts in the UK extra-territorial jurisdiction. As long as a transaction involved a national of the UK, a corporation incorporated in the United Kingdom or a limited partnership,<sup>47</sup> such an act – if carried out in the UK – would constitute an offense of corruption.<sup>48</sup> This meant that criminal liability under UK law could arise in respect of corruption that occurred abroad. This Act came into force on 14 February 2002.

### 5.2.3 The New Bribery Act 2010

The patchwork nature of English anti-corruption laws led to calls for reform.<sup>49</sup> A Draft Corruption Bill by the Law Commission was presented to the parliament in 2003 but met with no success.<sup>50</sup> A revised bill was introduced into parliament in March 2009.<sup>51</sup> This resulted in the Draft Bribery Bill, which according to the Ministry of Justice was to ‘replace the fragmented and complex offences at common law and in the Prevention of Corruption Acts 1889-1916’ and ‘provide a more effective legal framework to combat bribery in the public or private sector.’<sup>52</sup> In introducing the draft Bill, Jack Straw remarked that:

‘the current statutory criminal law of bribery is functional: cases are prosecuted successfully. However, it is old and anachronistic – dating back to around the turn of the twentieth century – and it has never been consolidated.

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47 Sec. 109 (1)(a) Anti-Terrorism Crime and Security Act.

48 Sec. 109 (1)(b) Anti-Terrorism Crime and Security Act.

49 Nichols et al. in Chapter 5 of their book trace the reform process through the Radcliffe-Maud Committee, the Salmon Committee, the Committee on Standards in Public Life, The Home office initiatives, the Law Commission, and the Government Responses to what eventually took shape as the Draft Bribery Bill of 2003. See C. Nicholls, T. Daniel, A. Bacarese, J. Hatchard, *Corruption and Misuse of Public Office*, id., Note 2 above, at pp. 172-223.

50 Draft Corruption Bill Report, together with formal minutes, oral and written evidence House of Lords papers 2002-03 157 House of Commons papers 2002-03 705 2002-03 Session.

51 Draft Bribery Bill available at <http://www.publications.parliament.uk/pa/ld200910/ldbills/003/10003.1-7.html#j403ca>.

52 Website of the Ministry of Justice, Bribery Bill, at <http://www.justice.gov.uk/publications/bribery-bill.htm>.

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Consequently there are inconsistencies of language and concepts between the various provisions and a small number of potentially significant gaps in the law. Furthermore, the exact scope of the common law offence is unclear. The result is a bribery law which is difficult to understand for the public and difficult to apply for the prosecutors and the courts.<sup>53</sup>

There was no definition of the term ‘corruptly’ that was central to the offenses created under the 1889 and 1906 Acts. The absence of definition was on the one hand criticized as leaving the law in a state of confusion and disarray, as the courts were left to interpret and give content to the term.<sup>54</sup> On the other hand, some argued that there was merit in not adopting a definition, as it could be counterproductive if definition become ‘too complex.’ It was also pointed out that most jurisdictions do not have a definition for the term ‘corruptly’ and this has not posed significant problems.<sup>55</sup> While this may be the case, it would seem that, particularly with regard to foreign bribery, the term corruptly needed to be defined accurately to provide a base line of what would be considered corruption under UK law with regard to foreign transactions.

The patchwork nature of UK anti-corruption laws has now been streamlined. The 2010 Bribery Act was a response to the general dissatisfaction regarding the state of English anti-corruption law.<sup>56</sup> The Bribery Bill received Royal Assent on 8 April 2010 and eventually entered into force in June 2011. The new Act brings the UK into the mainstream of anti-corruption rules by providing what some say are the most draconian anti-corruption rules for corporations. It covers not just public sector but also private sector bribery. The new Bribery Act does not use the term ‘corruptly,’ which is found in the existing legislation. Nor does it give a definition of the term bribery. Rather it provides scenarios in which the offenses of bribery can be said to occur.

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53 Rt. Hon. J. Straw MP, Foreword to the Draft Bribery Bill, Cm 7570 25, March 2009.

54 D. Lanham, *Bribery and Corruption*, id., Note 10 above, at p. 104, states that ‘[t]he most difficult question under the 1889 and 1906 Acts is the meaning of ‘corruption.’ The main questions are whether the word adds anything to the remainder of the formulation of the offence, and if so, what it is that it adds. The cases on these questions are in impressive disarray.’

55 See *Bribery Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials. A Consultation Paper*, available at [http://www.nio.gov.uk/bribery\\_consultation\\_paper.pdf](http://www.nio.gov.uk/bribery_consultation_paper.pdf).

56 It has been pointed out that the ‘UK government has been under pressure to reform its bribery laws for a considerable time. Pressure has come from international organisations such as the OECD and non-governmental organisations. This is not because the UK is seen as an especially corrupt country but because of its poor record in prosecuting offences. Until 2009 there had not been a single case of a British company being convicted of bribery offences.’ See T. Edmonds, O. Gay, *Bribery Bill [HL] Bill No 69 Research Paper 10/19 of 1 March 2010*, House of Commons Library, available at [www.parliament.uk/briefing-papers/RP10-19.pdf](http://www.parliament.uk/briefing-papers/RP10-19.pdf); see also ‘*OECD’s Group Demands Rapid UK Action to Enact Adequate Anti-Bribery Laws*’, 16 October 2008, OECD, available at [http://www.oecd.org/document/8/0,3343,en\\_2649\\_34855\\_41515464\\_1\\_1\\_1\\_37447,00.html](http://www.oecd.org/document/8/0,3343,en_2649_34855_41515464_1_1_1_37447,00.html).

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It also expands the offenses of bribery to new ground by specifically addressing the failure of companies to take steps to prevent bribery as well as a stand-alone offense of foreign bribery. In addition to this, the Act provides for the offense of active and passive bribery and does not recognize facilitation payments. An individual committing an offense can be liable to imprisonment for up to 10 years.<sup>57</sup> Both individuals and other persons can be liable to an unlimited fine.<sup>58</sup> The following sections outline the main provisions of the new Act.

### 5.2.3.1 General Bribery Offenses

The Bribery Act provides six scenarios in which conduct constituting a bribery offense is described. Case 1 and 2 scenarios deal with the active act of giving a bribe, while Cases 3-6 deal with the passive act of receiving a bribe. Case 1 scenarios occur where a person offers, promises or gives a financial or other advantage to another person, either to induce a person to perform improperly a relevant function or activity, or to reward a person for the improper performance of such a function or activity.<sup>59</sup> A Case 2 scenario occurs where a person offers, promises or gives a financial or other advantage to another person, and knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.<sup>60</sup> In both Case 1 and Case 2 scenarios, it does not matter whether the advantage is offered, promised or given by a person directly or through a third party.<sup>61</sup>

Cases 3-6 are scenarios that will result in the offense of requesting or receiving a bribe. Case 3 occurs where a person (R) requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person).<sup>62</sup> Case 4 occurs where R requests, agrees to receive or accepts a financial or other advantage, and the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.<sup>63</sup> Case 5 occurs where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity.<sup>64</sup> Case 6 is where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is

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57 Sec. 11 Bribery Act 2010.  
58 Sec. 11(2) Bribery Act 2010.  
59 Sec. 1(2) Bribery Act 2010.  
60 Sec. 1(3) Bribery Act 2010.  
61 Sec. 1(5) Bribery Act 2010.  
62 Sec. 2(2) Bribery Act 2010.  
63 Sec. 2(3) Bribery Act 2010.  
64 Sec. 2(4) Bribery Act 2010.

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performed improperly by R, or by another person at R's request, or with R's assent or acquiescence.<sup>65</sup>

The Bribery Act specifies the scope of its application by delimiting what constitutes a *relevant function or activity*<sup>66</sup> for the purposes of the Act in a two-step process.<sup>67</sup> Firstly, it lists activities that fall within the purview of the Act, and secondly, it stipulates conditions that should be met for such an activity as listed to constitute a 'function or activity' within the meaning of the Act. The following functions and activities fall within the Act: (1) any function of a public nature; (2) any activity connected with a business; (3) any activity performed in the course of a person's employment; and (4) any activity performed by or on behalf of a body of persons (whether corporate or unincorporated).<sup>68</sup> This shows that the Act applies equally to activities of both a public and private nature.

However, such an activity must meet one or more of the following conditions to constitute a relevant activity within the meaning of the act: (A) that a person performing the function or activity is expected to perform it in good faith; (B) that a person performing the function or activity is expected to perform it impartially; or (C) that a person performing the function or activity is in a position of trust by virtue of performing it.<sup>69</sup> Even where such an activity has no connection with the United Kingdom and is performed in a country or territory outside the United Kingdom, it remains a relevant function or activity within the meaning of the Act when these conditions are met.<sup>70</sup> There is no distinction between local and foreign bribery. When the relevant activity occurs in a foreign country and is expressly permitted under that country's domestic law,<sup>71</sup> such a foreign law is taken into account. However, mere local

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65 Sec. 2(5) Bribery Act 2010.

66 Emphasis added.

67 Sec. 3(1) Bribery Act 2010.

68 Sec. 3(2) Bribery Act 2010.

69 Sec. 3(3)-3(5) Bribery Act 2010.

70 Sec. 3(6) Bribery Act 2010.

71 Written law means a written constitution, legislation or judicial decision of the foreign country, Sec. 3(3). A defense put forward by the alleged disloyal agent in the Daraydan case was that the relationship with his principal Sheikh Mohammed was governed by Qatari law, which allows an employee or agent to receive a commission from a third party contracting with his employer or principal, unless expressly forbidden by the terms of his contract of employment. He was therefore not prevented by any fiduciary duties owed to Sheikh Mohammed from receiving the commissions. This defense was rejected by the court because for the most part Mr. Khalid's duties were governed by English law: the oral and written contracts entered into with Sheikh Mohammed were when he was an English resident for a contract of employment or of agency in England and were consequently governed by English law, and his relationship with Daraydan as a project manager was on a contract expressly governed by English law. The court however implied that even if Qatari law were found to apply, then English public policy would come into play to disapply any foreign custom which validated what would in English

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customs or practices will not suffice to remove such an activity from the scope of application of the Bribery Act.<sup>72</sup>

The Act also defines what is meant by *improper performance*.<sup>73</sup> A relevant function or activity is performed improperly if it is performed in breach of a ‘relevant expectation.’<sup>74</sup> A ‘relevant expectation’ means the expectation that the activity will be performed in *good faith* (for activities to which condition A applies) or (in the case of activities to which condition B applies) *with impartiality*. In relation to a function or activity to which condition C applies (persons in a position of trust), it means any expectation as to the manner in which, or the reasons for which, the function or activity will be performed that arises from the position of trust mentioned in that condition.<sup>75</sup> The test of ‘expectation’ is what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned.<sup>76</sup> These defined ‘relevant expectations’ restrict the application of the Bribery Act to instances where there is a duty or good faith, or duty to act impartially or in the best interests of a person in a position of trust.

### 5.2.3.2 Bribery of Foreign Officials

The Act creates the specific offense of bribing public officials. A person who bribes a foreign public official is guilty of an offense<sup>77</sup> where the person by so doing intended to obtain or retain business or an advantage in the conduct of business.<sup>78</sup> The offense of bribery of a foreign public official only covers the active offering, promising or giving of bribes, and not the passive acceptance of them.<sup>79</sup> The offense of foreign bribery will only occur where the foreign public official is permitted by the written law applicable to the foreign official to be influenced by the offer, promise or gift.<sup>80</sup> A foreign public official means an official or agent of a public international organization,<sup>81</sup> or a person who holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom, or who exercises a public function for or on behalf of a country or territory

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law be regarded as corrupt practices. *Daraydan Holdings Ltd. v. Solland International Ltd.*, 2005, Ch. 119 Para. 72.

72 Sec. 5(10) Bribery Act 2010.

73 Emphasis added.

74 Sec. 4(1) Bribery Act 2010.

75 Sec. 4(2) Bribery Act 2010.

76 Sec. 5(1) Bribery Act 2010.

77 Sec. 6(1) Bribery Act 2010.

78 Sec. 6(2) Bribery Act 2010.

79 See Explanatory Notes Para. 35.

80 Sec. 6(3) Bribery Act 2010.

81 Sec. 6(5)(c) Bribery Act 2010,

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outside the United Kingdom or for any public agency or public enterprise of that country.<sup>82</sup>

### 5.2.3.3 Failure of Commercial Organization to Prevent Bribery

A relevant commercial organization is guilty of an offense if a person associated with the company bribes another person with the intention of obtaining or retaining business or to obtain or retain an advantage in the conduct of business for the company. A relevant commercial organization is (a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere); (b) any other corporate body (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom; (c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or (d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom.<sup>83</sup>

A person who performs services for or on behalf of a company is an associated person. The capacity in which A performs services for or on behalf of C does not matter.<sup>84</sup> Accordingly, an associated person may be an employee, agent or subsidiary.<sup>85</sup> The status of an associated person is determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between the alleged associated person and the company.<sup>86</sup>

It is a defense to the new offense of failing to prevent persons associated with a company from committing bribery under Sec. 7(1) of the Bribery Act 2010 if a company can show that it had in place *adequate procedures* designed to prevent associated persons from bribing another person on behalf of the company.<sup>87</sup> The Bribery Act does not define what such adequate procedures might be. However Sec. 9 of the Act put the onus on the Secretary of State to publish guidance about procedures which commercial organizations could put in place to prevent persons associated with them from committing bribery.<sup>88</sup> In

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82 Sec. 6(5) Bribery Act 2010.

83 Sec. 7(5) Bribery Act 2010.

84 Sec. 8(1)-(2) Bribery Act 2010.

85 Sec. 8(3) Bribery Act 2010.

86 Sec. 8(4) Bribery Act 2010.

87 Sec. 7(2) Bribery Act 2010 provides: 'But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.'

88 Sec. 9(1) Bribery Act 2010 provides: 'The Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as mentioned in section 7(1).'

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2010 the Ministry of Justice published the Bribery Act 2010 Guidance on the procedures that the relevant commercial organization can put in place to prevent persons associated with them from bribing. This Guidance is formulated around six guiding principles as follows: Proportionate procedures to prevent bribery risks; Top-level commitment of management; periodic risk assessment; proportionate and risk-based due diligence; communication and training of bribery prevention policies and monitoring and review of measures to prevent bribery.

### 5.2.3.4 Facilitation Payments

The Bribery Act goes further than the FCPA with regard to so-called facilitating payments. The FCPA has an exception for routine facilitation, or ‘grease’ payments.<sup>89</sup> The Bribery Act does not exempt facilitation payments.<sup>90</sup> In response to the proposed Amendment 5 creating an exception for facilitation payments in the hearings leading up to the new Bribery Act, Lord Tunncliffe responded:

‘[w]e recognise that many UK companies still struggle with petty corruption in emerging markets and other countries, facing regular demands for “facilitation payments” in circumstances that amount to extortion or something very near. The answer is to face the challenge head-on, not to create exemptions and defences like those of the United States’ Foreign Corrupt Practices Act, which created artificial distinctions that are difficult to enforce and which have the potential to be abused.’<sup>91</sup>

He further added:

‘... a payment, no matter how small, made to a foreign public official in order to facilitate the performance of that public official’s function, and in order to secure an advantage in the conduct of business, will be a criminal offence unless the local written law permits the official to be influenced by the payment. The message needs to be clear and unambiguous: bribery, in whatever form and whatever the size of the payment, is a crime.’<sup>92</sup>

UK law, however, leaves the decision regarding the question of whether or not a payment is such that would warrant prosecution to the government prosecutor. The prosecutor will determine whether (1) there is a sufficiency of

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89 See Chapter 3 above.

90 Sec. 44-45 Guidance of the Bribery Act 2010.

91 Amendment 5 Bribery Bill Moved by Lord Henley Parliamentary Debates (Hansard) House of Lord Official Report Vol. No. 717 Part No. 36, Tuesday 2 February 2010, available at <http://www.publications.parliament.uk/pa/ld200910/ldhansrd/text/100202-0004.htm#10020253000424>.

92 Id., 2 February 2010: Column 135.

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evidence, and, if so, (2) whether a prosecution is in the public interest.<sup>93</sup> The Bribery Act 2010 Guidance explains that in cases where hospitality, promotional expenditure or facilitation payments do, on their face, trigger the provisions of the Act, prosecutors will consider very carefully what is in the public interest before deciding whether to prosecute.<sup>94</sup> As such, the Bribery Act 2010 covers payments in both the public and private arenas, with no exemption for facilitation payments, relying instead on prosecutorial discretion to enforce only the more serious transgressions.

### 5.2.3.5 Scope of Application

The Bribery Act 2010 will apply if an offense under the Act (Sections 1, 2 or 6) is committed within the UK or if any omission which forms part of the offense takes place in the UK.<sup>95</sup> The Act will also apply if the relevant activity took place outside the UK and the party committing the acts has a close connection with the UK.<sup>96</sup> A party has a close connection with the UK if, at the time the acts or omissions occurred, such a person was a (a) a British citizen, (b) a British overseas territories citizen, (c) a British National (Overseas), (d) a British Overseas citizen, (e) a person who under the British Nationality Act 1981 was a British subject, (f) a British protected person within the meaning of that Act, (g) an individual ordinarily resident in the UK, (h) a body incorporated under the law of any part of the UK, (i) a Scottish partnership.<sup>97</sup>

The Sec. 7 offense of failure by a commercial organization to prevent bribery is committed where (1) the organization is incorporated in the UK, (2) some of its activities are carried out in the UK, (3) or the relevant activity is committed by an associated person regardless of whether or not the activity took place in or outside the UK.<sup>98</sup> There is also no need the associated person committing the bribery to have a close connection to the UK.<sup>99</sup> As long as the commercial

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93 Sec. 49 Guidance.

94 Sec. 50 Guidance.

95 Sec. 12(1) Bribery Act 2010.

96 Sec. 12(2) Bribery Act 2010.

97 Sec. 12(4) Bribery Act 2010.

98 Sec. 12(5) Bribery Act 2010.

99 Sec. 12(4) Bribery Act 2010 defines a close connection as occurring where at the time the acts or omissions concerned were done or made by one of the following persons: a British citizen; a British overseas territories citizen; a British national (overseas); a British overseas citizen; a person who under the British Nationality Act 1981 was a British subject; a British protected person within the meaning of that Act; an individual ordinarily resident in the United Kingdom; a body incorporated under the law of any part of the United Kingdom; a Scottish partnership.

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organization falls within the definition of ‘relevant commercial organisation,’ that should be enough to provide courts in the UK with jurisdiction.<sup>100</sup>

This means that any foreign company that carries out a part of its business in the UK falls within the scope of the Act for any of the bribery offenses established under the Bribery Act. If a corporation with a subsidiary in the UK is engaged via an associated person in the commission of an act in a third country (for example paying bribes to Nigerian government officials) and this activity took place wholly outside the UK, the fact that the foreign parent company has a close connection to the UK via its UK subsidiary would bring it within the reach of the Bribery Act.

The Bribery Act 2010 is now the principal backdrop for the private claim for redress under English Law. It establishes public and private bribery as legal wrongs that have not just public law but private law consequences.

### 5.2.3.6 Self-Reporting/Plea Bargain Agreements

The Serious Fraud Office (SFO), which is charged with implementing the Bribery Act, has adopted provisions that are designed to encourage the self-reporting mechanism that characterizes FCPA enforcement. In its Guidance on Self Reporting<sup>101</sup> it emphasizes the benefit to companies that self-report stating:

‘... the benefit to the corporation will be the prospect (in appropriate cases) of a civil rather than a criminal outcome as well as the opportunity to manage, with us, the issues and any publicity proactively. The corporation will be seen to have acted responsibly by the wider community in taking action to remedy what has happened in the past and to have moved on to a new and better corporate culture. Furthermore, a negotiated settlement rather than a criminal prosecution means that the mandatory debarment provisions under Article 45 of the EU Public Sector Procurement Directive in 2004 will not apply.’<sup>102</sup>

In the same Guidance the SFO points out the risks to the company where it does not self-report:

‘Self referral together with action by the corporation to remedy the problem of corruption will reduce the likelihood that we may discover the corruption ourselves through other means. If this happens we would regard the failure to self report as a negative factor. The prospects of a criminal investigation

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100 Sec. 7(3) Draft Bill. See Explanatory Notes Para. 51.

101 ‘The Serious Fraud Office’s approach to dealing with overseas corruption’, available at <http://www.sfo.gov.uk/bribery--corruption/the-sfo's-response/self-reporting-corruption.aspx>.

102 Id., Introduction.

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followed by prosecution and a confiscation order are much greater, particularly if the corporate was aware of the problem and had decided not to self report.<sup>103</sup>

The SFO also points out the benefit of a private/public partnership for the company. Self-reporting is a preventative measure that can avoid an escalation in sanction. This is particularly important since the SFO may well come across the information that is not disclosed by a company independently of the company to its detriment. The SFO warns that:

‘Corporations will need to be aware of the length and expense of an investigation by the SFO. There will inevitably be considerable publicity and disruption to the business of the corporation. ... There is also a serious prospect that we will learn about the corruption issue from another agency in the UK or elsewhere, a whistleblower or a statutory report such as a Suspicious Activity Report. We will assume in those circumstances that the corporate has chosen not to self report. The chances of a criminal investigation leading to prosecution are therefore high.’<sup>104</sup>

In July 2009 the SFO released *Guidelines for Prosecutors on the Bribery Act 2010*.<sup>105</sup> The Guidelines encourage companies to voluntarily disclose instances of corruption. In the decision whether or not to charge a company for offenses under the Bribery Act, the SFO will take the following public interest factors into account:

- a. A history of similar conduct (including prior criminal, civil and regulatory enforcement actions against it); failing to prosecute in circumstances where there have been repeated and flagrant breaches of the law may not be a proportionate response and may not provide adequate deterrent effects;
- b. The conduct alleged is part of the established business practices of the company;
- c. The offence was committed at a time when the company had an ineffective corporate compliance programme;
- d. The company had been previously subject to warning, sanctions or criminal charges and had nonetheless failed to take adequate action to prevent future unlawful conduct, or had continued to engage in the conduct;
- e. Failure to report wrongdoing within reasonable time of the offending coming to light (the prosecutor will also need to consider whether it is

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103 Id., Para. 24.

104 Id., Para. 25.

105 Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecution.  
<http://www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.pdf>

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- appropriate to charge the company officers responsible for the failures/ breaches);
- f. Failure to report properly and fully the true extent of the wrongdoing.

Additional public interest factors against prosecution are:

- a. A genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice, involving self-reporting and remedial actions, including the compensation of victims: In applying this factor the prosecutor needs to establish whether sufficient information about the operation of the company in its entirety has been supplied in order to assess whether the company has been proactively compliant. This will include making witnesses available and disclosure of the details of any internal investigation;
- b. A lack of a history of similar conduct involving prior criminal, civil and regulatory enforcement actions against the company.; contact should be made with the relevant regulatory departments to ascertain whether investigations are being conducted in relation to the due diligence of the company;
- c. The existence of a genuinely proactive and effective corporate compliance programme;
- d. The availability of civil or regulatory remedies that are likely to be effective and more proportionate: Appropriate alternatives to prosecution may include civil recovery orders combined with a range of agreed regulatory measures. However, the totality of the offending needs to have been identified. A fine after conviction may not be the most effective and just outcome if the company cannot pay. The prosecutor should refer to the Attorney's Guidance on Civil Recovery (see 'Proceeds of Crime Act 2002: Section 2A [Contribution to the reduction of crime] Joint Guidance given by the Secretary of State and Her Majesty's Attorney General') and on the appropriate use of Serious Crime Prevention Orders;
- e. The offending represents isolated actions by individuals, for example by a rogue director;
- f. The offending is not recent in nature, and the company in its current form is effectively a different body to that which committed the offences – for example it has been taken over by another company, it no longer operates in the relevant industry or market, all of the culpable individuals have left or been dismissed, or corporate structures or processes have been changed in such a way as to make a repetition of the offending impossible;
- g. A conviction is likely to have adverse consequences for the company under European Law, always bearing in mind the seriousness of the offence and any other relevant public interest factors. Any candidate or tenderer (including company directors and any person having powers of representation, decision or control) who has been convicted of fraud relating to the protection of the financial interests of the European Communities, corruption, or a money laundering offence is excluded from participation in public contracts within the EU. (Article 45 of Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts). The Directive is intended to be draconian in its effect, and companies can be assumed to have been aware of the potential consequences at the time when they embarked on the offending. Prosecutors should bear in mind that a decision not to

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- prosecute because the Directive is engaged will tend to undermine its deterrent effect;
- h. The company is in the process of being wound up.

This framework provides corporations with an incentive to co-operate with the SFO in the detection and sanction of corruption. Co-operation may positively influence a decision against prosecution and reduce the level of sanction through plea bargaining based on the aforementioned public-interest factors. However, the recent ruling in *R v. Innospec Limited*<sup>106</sup> raises questions about the direction of plea bargaining in the UK. In March 2010, Innospec Ltd, a UK Company and wholly owned subsidiary of Innospec Inc., a US-listed company, pleaded guilty to a charge of conspiracy to corrupt under UK law. Innospec Ltd had conspired with its directors and various other agents to pay bribes totalling approximately \$8 million, to secure contracts for the supply of a fuel additive, Tetraethyl Lead (TEL), to public officials of the Government of Indonesia. In 2005 the US authorities began an investigation into Innospec Inc. The independent directors of Innospec entered into discussions with the US authorities to seek a ‘global’ settlement with regard to the on-going investigations. The SFO along with the DOJ agreed that in light of Innospec’s full admission and full co-operation, they would not seek to impose a penalty which would drive the company out of business.

A final settlement of about \$40 million dollars (which was a fraction of the penalties that properly could have been imposed) was reached subject to the approval of the courts in the US and the UK. The court in the US approved the settlement, however, the UK court held that the SFO could not enter into an agreement under English law with an offender as to the penalty in respect of an offense. The court stressed that as a matter of constitutional principle, except in cases of minor offenses such as motoring offenses, the imposition of a sentence is a matter for the judiciary.<sup>107</sup> The court held that for crimes of corruption, it is in the public interest for the court to rigorously scrutinize the basis of the plea bargain agreement in open courts, in the interest of transparency and good governance.<sup>108</sup>

The court was of the opinion that the UK portion of the fine was wholly inadequate. With considerable reluctance the court, however, allowed the agreement to stand for the following reasons: (1) the US courts had already agreed to the Settlement; (2) Innospec had admitted guilt, made a full confession and provided evidence that would be of significant assistance to the

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106 [2010] Lloyd's Rep. F.C. 462 Crim. L.R. 665 Official Transcript, 2010 WL 3580845.

107 Id., Para. 30-32.

108 Id., Para. 27.

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prosecution of other related transactions; (3) the fact that Innospec would not have been able to pay the fine payable under the law without entering into immediate insolvency which would have affected the innocent employees of the company, caused considerable difficulties for the unfunded pension liabilities of the company and be detrimental to the agreed 'clean up' program the company has in place in the UK with respect to the environmental pollution it has caused there; furthermore, the court took into consideration the fact that (4) the 'global settlement' had already been announced to the markets; and finally that (5) the US courts had agreed to the plea agreement made in the US.<sup>109</sup>

The *Innospec ruling* shows that there is still a way to go before the FCPA model influences plea bargaining in England. The FCPA was a watershed in the fight against corruption, which serves as a model in its content and its implementation. However, it remains very much an American affair, as the rest of the world feels its influence but watches guardedly as the US puts into place incentives for a global compliance system. The question is whether this model shall catch on and change corporate culture and become the new norm. The UK Bribery Act suggests that this may become a possibility. However, just as the FCPA spent about 25 years in splendid isolation, there may be no instant turning of the corner. The coming years will demonstrate whether the Bribery Act has the teeth and capacity to introduce in Europe the public-private partnership of the US model and live up to the stricter control of corruption that it portends.

### 5.3 The Civil Law Definition of Corruption

English civil law relating to corruption is couched primarily in the language of the principal-agent relationship.<sup>110</sup> A prominent definition of bribery is given by Slade J., in *Industries and General Mortgage Co. Ltd. v. Lewis*.<sup>111</sup> He remarks that 'for the purposes of the civil law, a bribe means a payment of a secret commission.'<sup>112</sup> Slade's definition highlights the essential fact that the civil law on corruption is centered on transactions that involve the payment of a commission.<sup>113</sup> It is the manner and the purpose for which a commission is proffered that distinguishes the illegal bribe from the legitimate commercial

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109 Id., Para. 42.

110 This has been described as the 'core relationship required by the modern offence of bribery.' Consultation Paper legislating the Criminal Code: Corruption, A Consultation Paper, Law Com No. 145, Para. 7.4.

111 *Industries and General Mortgage Co. Ltd. v. Lewis*, [1949] 2 All E.R. 573, at p. 575.

112 Id.

113 A commission is usually regarded as remuneration for services rendered. This commission is paid to an intermediary who plays a central role between two parties in a contractual arrangement.

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commission. The two essential elements that distinguish a commission as a bribe are, firstly, the secrecy of the act, and secondly, the conflict of interest the transaction engenders. These two elements create a situation that jeopardizes the good order of business transactions, and it is this mischief that criminal and civil law seek to cure.

### 5.3.1 First Essential Element: Secrecy

A principal's knowledge that a commission has been paid to his agent is a key element in distinguishing a bribe from a valid commission.<sup>114</sup> Bowen L.J. acknowledges the necessity for the courts to 'draw with precision and firmness the line of demarcation which prevails between commissions ... honestly received and ... [those] taken behind the master's back.'<sup>115</sup>

A commission only becomes a bribe when it is given in secret.<sup>116</sup> However, bare knowledge that a commission has been paid may not be sufficient.<sup>117</sup> The knowledge that is required to dispel the secrecy that distinguishes a bribe from a valid commission must entail *full disclosure*. The case of *Hurstanger Ltd v. Wilson*<sup>118</sup> confirms that the meaning of the expression 'secret' is broader than the literal meaning of *something not revealed*. A simple revelation of the payment of a commission may not, in the principal-agent relationship, be sufficient to remove the element of secrecy required to distinguish such a commission from a bribe.

The ruling of the court in the *Hurstanger* case shows that there is a level of knowledge which may be sufficient to remove the element of secrecy from a commission but which is nonetheless insufficient to satisfy the requirement of knowledge by the principal.<sup>119</sup> In the *Hurstanger* case, a disclosure about the possible payment of a commission was contained in one of the loan documents signed by the defendants. The relevant document stated: 'In certain circumstances this company does pay commission to brokers/agents.' Clearly, the defendants, in signing this document, had been put on notice that their agent may be paid a commission by the party offering them a loan via the same agent. In the opinion of the court this revelation was sufficient to negate the idea that the commission had been secret. In the words of Tuckey L.J., 'If you

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114 Per Slade J., in *Industries and General Mortgage Co Ltd. v. Lewis* [1949] 2 All E.R. 573, at p. 575.

115 *Boston Deep Sea Fishing v. Ansell* (1888) L.R. 39 Ch. D. 339, at p. 2.

116 Chitty J. in *Shipway v. Broadwood* [1899] 1 Q.B. 369, at p. 3, remarked, 'the real evil is not the payment of money but the secrecy attending to it.'

117 See generally A. Makinwa, 'Wilson v. Hurstanger Ltd.: Secret Commissions – Extent of Duty to Disclose', *Int. Comp and Com L. R.*, 2007, p. 365.

118 *Hurstanger Ltd. v. Wilson* [2007] 1 W.L.R. 2351.

119 *Id.*

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tell someone something may happen, and it does, I do not think the person you told can claim that what happened was a secret. The secret was out when he was told it might happen.<sup>120</sup>

The court faced a dilemma. Their Lordships held:

‘... where there has been sufficient disclosure to negate secrecy ... it would be unfair to visit the agent and any third party involved with a finding of fraud ... or conversely, to acquit them altogether for their involvement of what would still be a breach of fiduciary duty unless informed consent had been obtained.’<sup>121</sup>

This dilemma might have been avoided by adopting a contextual as opposed to literal approach to the interpretation of secrecy. ‘Secrecy’ should be interpreted in the context of the rules that govern secret commissions. Discussing the nature of a bribe, Lord Romer has remarked:

‘If a gift be made to a confidential agent with the view of inducing the agent to act in favour of the donor in relation to transactions between the donor and the agent’s principal and that gift is secret as between the donor and the agent –that is to say, without the knowledge and consent of the principal – then the gift is a bribe in the view of the law.’<sup>122</sup>

The expression ‘that is to say’ refers back to the word ‘secret’ and can be said to define this term when used in the context of gifts or commissions to agents. It identifies two constituents: (1) ‘without knowledge’ and (2) ‘without consent.’ This suggests a standard for the negation of secrecy that is not met by a mere passive awareness on the part of the principal but which requires a positive act of consent.

This conclusion is supported by dicta to the effect that a broker or agent must be able to prove informed consent.<sup>123</sup> In the words of Jessel M.R. in the *Dunne* case:

‘[A] statement which in other cases would be sufficient to put the party on inquiry will not be sufficient in the case of principal and agent ... for reasons

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120 Id., at p. 2364.

121 Id., at p. 2363.

122 *Hovenden and Sons v. Millhoff* (1900) 83 L.T. 41, at p. 43.

123 *Fullwood v. Hurley* [1928] 1 K.B. 498, at 502; *North and South Trust Co v. Berkeley* [1971] 1 W.L.R. 470, at 484; both cases referred to in *Anangel Atlas v. Ishikawajima-Harima* [1990] 1 Lloyd’s Rep. 526.

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of policy he must not only put the principal on inquiry, but must give him full information and make full disclosure.<sup>124</sup>

The court ruled in the *Hurstanger* case that the broker's interest in obtaining a further commission for himself from the claimant gave him an incentive 'to look for the lender who would give him the biggest commission.'<sup>125</sup> This created a conflict of interest on the part of the agent and violated the obligation of loyalty owed by the agent to the borrowers. Such a breach of the duty of loyalty would justify the granting of equitable remedies such as rescission and compensation unless it could be shown that the defendants had consented to the transaction.<sup>126</sup> The court found that the principal ought to have 'the fullest information given to them and ought not to be driven to inquiry.'<sup>127</sup> The agent must prove good faith and full information and make it perfectly clear that he furnished his employer with the 'full disclosure of all that he knows.'<sup>128</sup>

In a similar vein, the Court of Appeal in the *Imperial* case emphasized that a declaration of interest by a person in a fiduciary position is not satisfied by a mere declaration that the agent has an interest but rather by declaring the nature of the interest to enable the principal to be 'fully informed of the real state of things.'<sup>129</sup> A general disclaimer that the principal had 'studied and understood the contents' of the loan documentation does not displace the burden of proof from the claimants to establish informed consent. In the *Alexander* case, the court held that the maxim 'caveat emptor' has no application in fiduciary relationships.<sup>130</sup>

Consent can only be considered as granted where the defendant principal has 'full knowledge'<sup>131</sup> of all the material circumstances and of the nature and the extent of [the brokers'] interest.<sup>132</sup> Not only must the principal know about the commission; he must consent to its payment. Bare knowledge of the payment of commission was in the opinion of the court not sufficient.

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124 *Dunne v. English* (1874) L.R. 18 Eq. 524, at p. 5.

125 *Hurstanger Ltd. v. Wilson* [2007] 1 W.L.R. 2351, at p. 2362.

126 *Id.*, at p. 2365.

127 *Id.*

128 *Id.*, at p. 536.

129 *Imperial Mercantile Credit Association (In Liquidation) v. Coleman* (1873), L.R. 6 H.L. 189.

130 *Alexander v. Automatic Telephone Co* [1900] 2 Ch. 56, at p. 67.

131 Emphasis added.

132 The court held that a finding of whether or not there was sufficient disclosure would depend on the facts of each case. A relevant factor, in the court's opinion, was whether the principal/agent relationship took place in the context of established usages and customs. If this was the case, a more general disclosure may be sufficient. However, in the *Wilson* case, the court was of the opinion that borrowers such as the defendants, coming to the non-status lending market, were likely to be vulnerable and unsophisticated. As such, a higher level of disclosure was required. *Hurstanger Ltd. v. Wilson* [2007] 1 W.L.R. 2351, at p. 2362.

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The consent of the principal removes the element of secrecy. However, there are circumstances where such consent is more problematic. As the Law Commission has pointed out:

‘a private principal can consent to something which would otherwise be corrupt but where the functions are of a public nature the principal’s consent cannot exonerate. This could give rise to problems where the public/private functions are blurred.’<sup>133</sup>

This is particularly true of matters involving corruption in business transactions whether national or international. Here the public/private divide is blurred by the criminal nature of the activity. In the recent case of *Imageview Management*, Mummery L.J., stated:

‘... in our age it is more important than it ever was for the courts to hold the precise and firm line drawn between payments openly, and therefore honestly, received by agents, and undeclared payments received by agents secretly, and therefore justly liable to all the legal consequences flowing from breaches of an agent’s fiduciary obligations.’<sup>134</sup>

Secrecy is the red flag that is at the core of the misconduct of bribery. This is where the ‘precise and firm line’ can be drawn. The full informed consent of the principal is necessary. Indeed even if the principal does not suffer a loss, the fact that there was a lack of consent is sufficient to found the wrong of bribery. As Banks L.J. in *Rhodes v. Macalister* remarked that:

‘there seems to be an idea prevalent that a person ... acting as agent ... of another is committing no wrong to his employer in taking a commission ... from the other side, provided that in his opinion his employer ... does not have to pay more than if the bribe were not given. There cannot be a greater misconception of what the law is ... and I do not think the rule can too often be repeated or its application more frequently insisted upon.’<sup>135</sup>

The element of secrecy may also debunk the claim that the secret commission is acceptable in a particular line of business. In the *Fyffes Group* case, the defense was made that an ‘address commission’ was acceptable in the particular line of business. The courts agreed and stated that there was nothing unusual about a ship-owner and ship charterer agreeing that the charterer should receive what is misleadingly termed “address commission,” but is in reality a discount or rebate on the hire. It was also not uncommon for such

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133 Joint Committee on The Draft Corruption Bill Report, available at <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtcorr/157/15705.htm#n38>.

134 *Imageview Management Ltd. v. Jack* [2009] EWCA Civ. 63 2009 WL 289360 at Para. 65.

135 Per Banks L.J. in *Rhodes v. Macalister* (1923), 29 Com. Cas. 19, at pp. 20-21.

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“commission” to be paid to a nominee of the charterer. However, the court found that in this case there had not been full information. The court held that an:

‘agreement to pay address commission would ordinarily be documented in some way between the parties. In this instance, an arrangement, intended not to be documented or subsequently mentioned, by which commission was to be paid to an off shore company lacking apparent connection to the charterer, was not an ordinary arrangement.’<sup>136</sup>

As such, the defense that this was a usual payment in the course of business failed because it was found, despite the attempt to present it otherwise, to be a bribery arrangement.<sup>137</sup>

The element of secrecy also serves to uncloak bribery transactions that are cloaked as ‘introduction fees.’ The defense that a payment was a ‘normal’ commission in the course of business was rejected by the courts in the case of the *Arab Monetary Fund v. Hashim*. Here the court took their former president to court seeking to recover US\$1,848,132 paid to him by Bernard Sunley & Sons Ltd on 29 January 1980. The plaintiffs claimed that the payment was a bribe paid to him when he was acting as their agent in connection with the building of their headquarters offices in Abu Dhabi. The building contract was signed on 23 January 1980, a few days before the payment was made. Dr. Hashim’s evidence was that the payment was a fee for effecting introductions and was not dependent in any way upon the introductions resulting in contracts nor related to any contract which Bernard Sunley might obtain.

This defense was rejected by the Court. Evans J. found the coincidence between the date of payment and the amount of payment overwhelming and that the plaintiffs had discharged their burden of proof. He stated:

‘... [T]he coincidence factor is powerful, indeed overwhelming; the coincidence of date (payment immediately after the contract was signed) and the coincidence of amount. ... The total Dr.7m. itself is close to 10 per cent of the contract amount ... There is ample evidence that this was within the range of ‘normal’ commission arrangements when that term was used to mean ‘bribes.’ This bribe was to facilitate a secret arrangement for a ‘bogus tender’

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136 *Fyffes Group Ltd. v. Templeman & Ors* [2000] 2 Lloyd’s Rep 643, [2000] EWHC 224 (Comm). [2000] 2 Lloyd’s Rep. 643 (2000), 97(25) L.S.G. 40 Times, June 14, 2000. Official Transcript 2000 WL 699393, at p. 14.

137 *Id.*, at p. 15.

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that was concealed from the board of the bank.<sup>138</sup>

### 5.3.2 Second Essential Element: Conflict of Interest

A secret nature of a bribe creates a conflict of interest by compromising the duty of loyalty owed by the agent to the principal. In the words of Justice Slade, the:

‘... person making the payment makes it to the agent of the other person with whom he is dealing; (ii) ... makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and (iii) ... fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person’s agent.’<sup>139</sup>

In the *Petrotrade* case, this is described as the ‘key distinguishing feature’ of a bribe. This factor is namely that it ‘gives rise to a conflict of interest on the part of the agent.’<sup>140</sup> This conflict of interest results in a breach of the fiduciary duty owed by the agent to the principal.

The Courts in Donegal citing *Shipway v. Broadwood*<sup>141</sup> emphasized that the mischief to which the law is directed is conduct that is designed to create a conflict between an agent’s duty to a principal and his own private interest.<sup>142</sup> The obligation to act in the best interests of the principal is the basis of the fiduciary relationship that exists between a principal and his agent. In *Bristol and West Building Society v. Mothew*, Millett L.J. defined a fiduciary as:

‘... someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary.’<sup>143</sup>

According to Millet, this obligation of loyalty has four primary aspects. These are: (1) a duty to act in good faith; (2) a duty not to make a profit; (3) a duty not to assume a position where the duty and personal interest of the agent

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138 The plaintiffs succeeded in establishing liability against the defendants but they were defeated by limitation defenses under the law of Abu Dhabi by virtue of the Foreign Limitation Periods Act, 1984.

139 Per Slade J. in *Industries and General Mortgage Co. Ltd. v. Lewis* [1949] 2 All E.R. 573.

140 Per Steel J. in *Petrotrade Inc. v. Smith* [2000] C.L.C. 916, at 920. [2000] 1 Lloyd’s Rep., at p. 486.

141 *Shipway v. Broadwood* [1899] 1QB 369.

142 *Donegal International Ltd. v. Zambia & Anor* (2007), WL 504688 Para. 275.

143 *Bristol and West Building Society v. Mothew* (1998), 75 P. & C.R. 241, at p. 254.

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conflict; and (4) a duty not to act for personal benefit or the benefit of a third person without the informed consent of the principal.<sup>144</sup>

An early case that centered on the effect of bribery on the duty to act in the best interest of the principal is the 1874 *Panama* case.<sup>145</sup> A telegraph works company agreed with a telegraph cable company to lay a cable. This cable was to be paid for in 12 instalments upon certification by the cable company's engineer. The cable company's engineer subsequently approached the telegraph works company and offered to lay the same cable for a sum of money. In the course of an attempted re-arrangement of the two companies, the contract between the agent and the Works Company came to light.

The court found that the principal of the engineer agent 'required honest and disinterested advice' and had relied on the 'skill and disinterested advice of their engineer.'<sup>146</sup> Where this same engineer having arranged a sub-contract with that construction company behind their backs for part of what they had contracted to do for the purposes of the telegraph company,<sup>147</sup> the principal plaintiff was, in the opinion of the court, deprived of his services' and lost full benefit of the contract. This breach of the duty to act in the best interests of the principal was sufficient ground for the rescission of the contract.<sup>148</sup>

Lady Justice Arden of the Court of Appeal has remarked on the importance of ensuring that the fiduciary acts in the best interest of the principal. She stated in respect of the 'agency' problem in company law that:

'[t]here is a separation of beneficial ownership and control and the shareholders (who may be numerous and only have small numbers of shares) or beneficial owners cannot easily monitor the actions of those who manage their business or property on a day to day basis. Therefore, in the interests of efficiency and to provide an incentive to fiduciaries to resist the temptation to misconduct themselves, the law imposes exacting standards on fiduciaries and an extensive liability to account.'<sup>149</sup>

An important question is whether only parties in a formal principal-agent relationship fall within the rules regarding fiduciaries. There are traditionally four categories of persons recognized as fiduciaries under English law. These

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144 Id.

145 *Panama and South Pacific Telegraph Co v. India Rubber, Gutta Percha and Telegraph Works Co* (1874-75), L.R. 10 Ch. App. 515.

146 Id., at p. 528.

147 Id.

148 Id., at p. 532.

149 *Murad & Anor. v. Al-Saraj & Anor.* (2005), WL 1767588 Para. 74.

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are the relationship between a solicitor and client;<sup>150</sup> a company director and his/her company;<sup>151</sup> a trustee and a beneficiary;<sup>152</sup> as well as that between an agent and a principal.<sup>153</sup> There is, however, no all-encompassing definition of a fiduciary under English law, and there is a measure of judicial discretion in the determination of a fiduciary relationship.<sup>154</sup>

It is interesting to note that as far as bribes are concerned, the English courts have been willing to classify as fiduciaries persons outside the traditional categories. In the *Reading* case,<sup>155</sup> a claim was made against a sergeant in the Royal Army Medical Corps stationed in Cairo during the Second World War. The sergeant accompanied a truck which was distributing black market alcohol wearing his uniform to avoid inspections by the police. For this he received about £20,000. Upon arrest, some £2,000 found in his possession was confiscated. He later sought the return of this money after being released from prison. The question was whether the Crown had a claim on this money.

Lord Denning of the lower court agreed that ‘this man Reading was not acting in the course of his employment; and there was no fiduciary relationship in respect of those long journeys nor, indeed, in respect of his uniform.’ Lord Denning however still imposed a fiduciary type duty on Reading stating:

‘[i]f this means, as I think it does, that the appellant was neither a trustee nor in possession of some profit-earning chattel, and that it was contrary to his duty to escort unwarranted traffic or possibly any traffic through the streets of Cairo, it is true, but, in my view, irrelevant. He nevertheless was using his position as a sergeant in His Majesty’s Army and the uniform to which his rank entitled him to obtain the money which he received.’

The Court of Appeal agreed that the sergeant was using his position as sergeant and the uniform to which his rank entitled him to obtain the money which he received. This in the view of the court gave the master a ‘right to receive the

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150 *Bristol & West Building Society v. Mothew* [1998] Ch.1.

151 *Guinness v. Saunders* [1990] 2 A.C. 663.

152 *Keech v. Sandford* (1726), Sel Cas Ch. 61.

153 *Kelly v. Cooper* [1993] A.C. 205.

154 Writers such as S. Sealy, ‘Fiduciary relationships’, *Camb. L.J.*, Vol. 20, Iss. 1, 1962, p. 69; J. Shepherd, ‘Towards a unified concept of fiduciary relationships’, 97 *Law. Q.R.*, 1981, p. 51; E.J. Weinrib, ‘The fiduciary obligation’, 25 *University of Toronto Law Journal*, 1975, pp. 1-22 at p. 1; and R. Goff, G. Jones, *The Law of Restitution*, Sweet and Maxwell, London, 1986, Chapter 34, have sought to arrive at some characteristic features that define the fiduciary relationship.

155 *Reading v. Attorney General* [1951] AC 507.

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money.<sup>156</sup> The court held that the term fiduciary relationship in these settings is used in a:

‘wide and loose sense and include, *inter alia*, a case where the servant gains from his employment a position of authority which enables him to obtain the sum which he receives.’<sup>157</sup>

This ‘duty to act in the best interest’ can imply a fiduciary relationship even where there is no contractual relationship between the party who brings the action and the party who took the bribe. In other words, a fiduciary relationship can be imputed by the court. A sub-agent, for example, who has a contractual relationship with the main agent but no relationship with the principal may have a duty of loyalty imputed by the court between the sub-agent and principal. An early case in point is the *Powell* case, where an agent subcontracted by the agent to the principal took a bribe without the knowledge of these parties. The courts held that even if no privity of contract existed between them, the sub-agent stood in a fiduciary relation to the principals, and was therefore accountable to them for the commission which he had received from the company.<sup>158</sup>

This reasoning has been followed in cases where a party, regardless of whether or not there was a contractual relationship, is supposed to act in the best interests of another.<sup>159</sup> The court will look at the ‘factual matrix’ as opposed to the documented relationship between the parties in coming to a conclusion as to where a fiduciary duty lies. The *Daraydan* case illustrates this point.<sup>160</sup> A Mr. Khalid and Sheikh Sultan, owner of Qatar Industrial Services Ltd and a senior adviser to Sheikh Mohammed (the deputy Prime Minister of the State of Qatar), entered into a contract of employment under which Mr. Khalid was appointed as a Properties and Administration Manager in Sheikh Mohammed’s Private Office. Under this contract, Mr. Khalid accepted the obligation that ‘Confidentiality, trust and honesty are the basis of the job ... Attention to details and maximum cost efficiency in all involvements.’

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156 *Id.*, at p. 514.

157 *Id.*, at p. 516.

158 *Powell & Thomas v. Evans Jones & Co.* [1905] 1 K.B. 11, at p. 11.

159 See for example *Crown Resources AG v. Vinogradsky & Ors* (2001), WL 1751075 QBD; *Prentis Donegan & Partners Ltd v. Leeds & Leeds Co Inc.* [1998] C.L.C. 1132 QBD (Comm); *Attorney-General for Hong Kong Appellants v. Charles Warwick Reid and Others Respondents* [1994] 1 A.C. 324 [1993] 3 W.L.R. 1143 PC; *Anangel Atlas Compania Naviera S.A. and Others v. Ishikawajima-Harima Heavy Industries Co. Ltd.* [1990] 1 Lloyd’s Rep. 526; *Joseph Hayim and Another Appellants v. Citibank N.A. and Another Respondents* [1987] A.C. 730 [1987] 3 W.L.R. 83 PC; *Reading v. The King* [1949] 2 K.B. 232 CA.

160 *Daraydan Holdings Ltd. v. Solland International Ltd* [2005] Ch. 119.

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In the course of his employment with Sheikh Sultan, Mr. Khalid extracted from the co-defendants, Mr. and Mrs. Solland and their companies, about £1.8 million between 1997 and 2001 representing 10% commission on receipts from contracts they undertook for the luxurious refurbishment of properties belonging to Sheikh Mohammed in London and Qatar. Daraydan, Sheikh Mohammed's company, sought an order that Mr. Khalid was accountable to them for this secret commission.

Mr. Khalid argued that he was not an agent or representative of Daraydan or any of the claimants and that he had not played a role in the negotiation of the contracts. The Courts found that although Sheikh Sultan was indeed Mr. Khalid's employer, with regard to the 'factual matrix,' Sheikh Mohammed could be regarded for all intents and purposes as Mr. Khalid's employer. As a result of this factual matrix, Mr. Khalid could be regarded as a fiduciary of Daraydan and Sheikh Mohammed, and had used this position to extract 'very substantial payments from the Sollands and their companies in return for his influence in obtaining and carrying out the contracts.'<sup>161</sup>

Another example of an imputation of a duty of loyalty is the case of *Murad v. Al-Saraj*.<sup>162</sup> The Murad sisters entered into an agreement with Al-Saraj that they should jointly buy a hotel in London for £4.1 million. Al-Saraj was to contribute £500,000 in cash, which he failed to do claiming that it was offset by unenforceable obligations of the same amount from the vendor of the hotel to Al-Saraj. These obligations included a sum of £369,000, which represented Al-Saraj's commission for introducing the vendors to the Murad sisters. The court found that the relationship between the parties was 'a classic one in which [the Murads] reposed trust and confidence in Mr. Al-Saraj by virtue of their relative and respective positions' and that Mr. Al-Saraj was in breach of a fiduciary duty in not disclosing to the Murads that he was making his contribution by way of set-off.<sup>163</sup>

As such, regardless of whether or not there is a formal agency contract between the parties, the court may in light of the factual situation between the parties impute a fiduciary relationship upon which a claim for damages may be founded. In the *Petrotrade* case, the court held that the proposition that remedies of claims in both restitution and in fraud are only available in circumstances where a contract between the bribe-giver and the principal is untenable. In the view of the court, 'damage is the gist of the cause of action in

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161 Id., at pp. 135-136.

162 *Murad & Anor. v. al Saraj & Anor.* (2005), *WL* 1767588.

163 Id., Para. 332.

fraud and such can clearly be independent of whether it was sustained as a result of ... a contract.’<sup>164</sup>

These cases show that where a bribery transaction is concerned, the categories of a fiduciary are flexible. The essential characteristic of a bribe is the fact that it is accompanied by the breach of the fiduciary obligation. Thus it can be argued that behind every breach of a duty of loyalty lies a ‘fiduciary agent.’ As Finn points out, ‘the agent is ... not subject to the fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.’<sup>165</sup>

The two essential elements of secrecy and conflict of interest distinguish a legal commission from an illegal bribe. The following section explores the issue of the validity of the transactions associated with the breach of the fiduciary duty that a bribe occasions.

#### 5.4 Transaction Validity

The loss caused by bribery has been described in terms that move beyond issues of restitution, compensation for personal loss or damage that are typical of private law claims in the English courts. The civil action for bribery is linked to broader social, economic and cultural factors. It is not simply a matter of adjudicating private rights. It also has a regulatory function, and therefore the civil action for bribery, in this sense, serves as an opportunity to punish and deter. In *AG v. Reid*, Templeman J. describes bribery as:

‘an evil practice which threatens the foundations of any civilised society. In particular, bribery of policemen and prosecutors brings the administration of justice into disrepute. Where bribes are accepted by a trustee, servant, agent or other fiduciary, loss and damage are caused to the beneficiaries, master or principal whose interests have been betrayed. The amount of loss or damage resulting from the acceptance of a bribe may not be quantifiable.’<sup>166</sup>

The giving of a bribe to influence the acquisition of a contract or other advantage is seen by the English courts as an act that corrodes deep into the welfare of the society, affects the taxpayer and which is, regardless of the particular interests of the parties before the court, a matter of general public importance. Brooke L.J. in the *Corner House Research* case states:

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164 *Petrotrade Inc. & Others v. Clive Stafford Smith & Others* [2000] C.L.C. 916, at p. 920.

165 P. Finn, *Fiduciary Obligations*, Law Book Co., Sydney, 1977, p. 2, quoted in *Bristol and West Building Society v. Mothew* [1998] Ch. 1, at p. 254.

166 Per Templeman J., *AG for Hong Kong v. Reid* [1994] 1 AC 324, at p. 330.

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‘[O]btaining contracts by bribery is an evil which offends against the public policy of this country. When the interests of the taxpayer are involved, the question whether or not companies are obliged to provide details of money paid to middlemen ... is a matter of general public importance.’<sup>167</sup>

Even where a case involves private rights, the danger to the general public posed by bribery influences the courts response to the exercise of these rights. This is well demonstrated in the response of a judge to a plea for mitigation in a case where an agent received large sums of money behind the back of his employers. The argument was made that a prison sentence should not be imposed for this type of case because that ‘the rewards in the terms of the money received by the appellant are small in comparison with the gain that the company achieved through these contracts.’<sup>168</sup> The court rejected this line of argument stating that:

‘it would significantly destroy the coherence and propriety of commercial life in this country if we were to take a view that a prison sentence should not occur in a case of this kind. .... To receive money behind the back of your employers who trust you in these amounts must offend not only the law of this country but also the concepts the public rightly have of corruption so as to justify a custodial sentence.’<sup>169</sup>

The English court treats bribery as a grave matter not only because of the private rights affected by the act of bribery but more so because of its effect on the conduct of governance and trade. In the words of Hirst J., in *Marlwood Commercial Inc. v. Kozeny*:

‘... bribery is a pernicious practice and a very serious crime of which this Court must take a grave view. It can properly be said to be a cancer in business and political life, because it is impossible for honest businessmen to compete with bribers, and because officials entrusted with making decisions on behalf of their principals do so in their own self-interest rather than objectively in the best interests of their principal.’<sup>170</sup>

This is the framework within which the courts will consider the contract tainted by bribery. The public good and the negative consequences of corruption on society play an important role on the position the courts take with respect to the validity of such contracts.

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167 *Corner House Research, R (on the application of) v. Secretary of State for Trade & Industry*, Neutral Citation Number: [2005] EWCA Civ. 192; (2005) WL 460696 Para. 137.

168 *R. v. Wilcox (Robert Albert)* [1995] 16 Cr. App. R.(S.) 197, at 198-199.

169 *Id.*, at p. 199.

170 *Marlwood Commercial Inc v. Kozeny & Ors* [2006] EWHC 872 (Comm) 2006 WL 1457378 at Para. 176.

5.4.1 The Primary Contract

The framework of anti-corruption rules outlined in the previous sections shows that bribery whether of a public or a private nature is a criminal offense under UK law. The abuse of trust that occurs in both types of transactions is the common thread that evokes the response of the legislator and the court. Both bribery involving public officials and bribery involving private persons share a common basis in the legal wrong that results from the criminalization of private and public bribery.<sup>171</sup>

A statute may prohibit conduct but also specify the civil law consequences for the breach. For example, Sec. 1 of the Life Assurance Act stipulates that ‘no insurance shall be made by any person ... on the life ... of any person’ in whom the insured had no insurable interest.<sup>172</sup> The statute, however, also stipulates that ‘every assurance made contrary to the true intent and meaning hereof shall be null and void.’<sup>173</sup> The UK Bribery Act prohibits the making of agreements to give or receive a bribe without specifying the civil consequences of a violation. The Bribery Act, however, does not expressly state that the contract to give or receive a bribe is void.

The issue that arises therefore is whether there is a prohibition of the primary agreement that evidences a bribery transaction. An argument can be made that there is. The bribery offenses that are described in the Bribery Act are described in language that will cover any *agreement*<sup>174</sup> to give a bribe. The scenarios that are presented in Sections 1 and 2 of the Act support this viewpoint. The Case 1 scenario, for example, states that the offense of bribery occurs where a party ‘*offers or promises*’ a financial or other advantage to induce a person to perform improperly a relevant function or activity.<sup>175</sup> This is counterbalanced by the Case 3 scenario, which refers to the offense of bribery as occurring where a party ‘*agrees to receive*’ a financial or other advantage to

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171 Sedley J. has said that ‘public law is not about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power.’ In *R. v. Somerset County Council and ARC Southern Limited ex p Dixon* (1998), 75 P. & C.R. 175, at p. 183.

172 Sec. 1 Life Assurance Act 1774 provides that ‘From and after the passing of this Act no insurance shall be made by any person or persons, bodies politick or corporate, on the life or lives of any person, or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever.’

173 Id.

174 Emphasis added.

175 Sec. 1(2) Bribery Act 2010.

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bring about an improper performance by another person of a relevant function or activity.<sup>176</sup>

The same language prohibiting the offer and agreement to receive, is used with respect to Case 2 and 4 scenarios, where the offer and acceptance of the bribe in itself constitutes the improper performance;<sup>177</sup> the Case 5 scenario speaks of the situation where a party ‘*agrees to receive*’ a financial or other inducement as a reward for improper performance of a relevant function,<sup>178</sup> while the Case 6 scenario refers to the offense of bribery occurring where a party ‘*agrees*’ to accept a financial or other advantage in anticipation of improper performance.<sup>179</sup>

The offer and acceptance of a bribe, which show the mutual assent between the parties to offer or receive a bribe, is expressly prohibited by the wording of the Bribery Act. As such, a contract that is an agreement to give or receive a bribe would arguably fall within the meaning of Sections 1 and 2 of the Bribery Act. In this sense, the Bribery Act applies not just to the act of bribery but also to the agreement entered into between the parties to give or receive a bribe. In *Stone & Rolls v. Moore Stephens*, Lord Philips commented that:

‘[t]he court will not enforce a contract which is expressly or impliedly forbidden by statute or that is entered into with the intention of committing an illegal act ... [t]he court will not assist a claimant to recover a benefit from his own wrongdoing.’<sup>180</sup>

The English courts will not enforce the performance of an illegal contract either in law or at equity.<sup>181</sup> The effect of the prohibitions that expressly prohibit the bribery of public officers, agents and foreign officials is to render any transaction that breaches this prohibition illegal.<sup>182</sup>

Even if this argument is rejected on the grounds that the Bribery Act does not expressly refer to a contract resulting from a violation of the statute, there is a clearly implied prohibition of the primary agreement. The effect

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176 Sec. 2(3) Bribery Act 2010.

177 Sec. 1(3) and Sec. 2(3) Bribery Act 2010, respectively.

178 Sec. 2(4) Bribery Act 2010.

179 Sec. 2(5) Bribery Act 2010.

180 *Stone & Rolls v. Moore Stephens* [2009] 3 WLR 455 at Para. 21.

181 ‘It is clear that the law is that no person can obtain, or enforce any right resulting to him from his own crime; neither can his representative, claiming under him, obtain or enforce any such right.’ Per Sir Samuel Evans, *In the Estate of Cunigunda Crippen Deceased* [1911] P 108, at p. 112. See also *Cleaver v. Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147,151; *Munt v. Stokes* 917920 4 T.R. 561, at p. 564.

182 *Ali Mohamed v. Alaga & Co* [2000] 1 WLR 1815.

whether express or implied is the same. In *St. John Shipping Corporation v. Joseph Rank Ltd*,<sup>183</sup> the court distinguished between contracts expressly and impliedly prohibited by statute. The distinction, the court noted, is not as to enforceability because in both cases the courts will not enforce such a contract.<sup>184</sup> The distinction between express and implied prohibition in the words of the Justice is that:

‘[i]n the former class you have only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is deliberately made to do a prohibited act, that contract will be unenforceable. In the latter class, you have to consider not what acts the statute prohibits, but what contracts it prohibits; but you are not concerned at all with the intent of the parties; if the parties enter into a prohibited contract, that contract is unenforceable.’<sup>185</sup>

In *Ali Mohamed v. Alaga & Co.*, the court referred to the unenforceability of a contract where the relevant legislation (in this case the Solicitors’ Practice Rules) prohibited the actions embodied in the contract stating that:

‘there are substantial reasons why, in the public interest, such agreements should be outlawed [and that] if the court were to allow its process to be used to enforce agreements of this kind, the risk would inevitably arise that such agreements would abound ... to the detriment of the public.’<sup>186</sup>

Another case in point is *Re Mahmoud & Ispahani*.<sup>187</sup> Here the plaintiff sought damages for the defendant’s non-acceptance of linseed oil, which due to the absence of a mandatory licence, the defendant was actually not licensed to buy. The plaintiff was not aware of this illegality. In this case, the court found that there was an express prohibition of the contract in question stating:

‘here it appears ... that the particular contract was expressly prohibited by the terms of the order which imposes the necessity of a compliance with the licence.... When one looks at the licence one finds an express prohibition against the plaintiff selling to the defendant as the latter had not a licence.’<sup>188</sup>

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183 *St. John Shipping Corporation v. Joseph Rank Ltd*. [1957] 1 QB 267, at p. 283.  
 184 Per Devlin J., ‘... the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not...’  
 185 *Id.*  
 186 *Ali Mohamed v. Alaga & Co* [2000] 1 WLR 1815.  
 187 *Mahmoud & Ispahani* [1921] 2 KB 716.  
 188 *Mahmoud & Ispahani* [1921] 2 KB 716, at p. 731.

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Apart from unenforceability due to violation of statutory prohibition, the contract to give a bribe is also unenforceable on grounds of public policy and for breach of fiduciary duty. In *Lemenda Trading Co. Ltd v. African Middle East Petroleum Co. Ltd* the court refused to enforce a contract under which an intermediary was obliged to use personal influence so as to obtain a contract in Qatar as contrary to public policy and general principles of morality.<sup>189</sup> The contract to give a bribe is unenforceable in a court of law and this means that with regard to claims by a plaintiff, the principle of *ex turpi causa non oritur actio* will apply.

It is a defense to a claim by the plaintiff that the contract is illegal. This defense is not to achieve justice between the parties but rather to protect the public interest. This will clearly work out in favor of the defendant where a plaintiff seeks to enforce a contract to give a bribe. In *Nayyar & Ors. v. Sapte & Anor.*,<sup>190</sup> the claimants – a joint venture in the travel agency business – sought damages against the defendants for negligence and/or breach of contract and/or breach of fiduciary duty in relation to the sum of £383,259 paid by the claimants to the senior solicitor of the defendants, a Ms. Advani, in anticipation of the appointment of their joint venture, Maharaja Travel Limited, by Air India as its exclusive Global Sales Agent (GSA) for the UK and Ireland. The appointment was to be for a minimum of 4½ years.

Ms. Advani encouraged the claimants to pursue the GSA and they were informed that to obtain the GSA would cost £2 million: an upfront payment or deposit of £400,000 and a balance of £1.6 million payable in two instalments, including £250,000 in legal fees. This proposal was introduced to Ms. Advani by a Mr. Ashkok Yadav, a former Tourism Minister for the State of Uttar Pradesh who had connections in the aviation industry in India and with the then Aviation Minister, Mr. Hussain. Acting on the advice of Ms. Advani, the claimants paid sums totalling £383,259 to acquire the GSA. The claimants were not awarded the GSA and, despite repeated demands, the deposit was not recovered. The claimants brought a court action to seek the loss of the deposit and wasted costs as damages against Ms. Advani and the defendant company.

The court found that the claimants ‘knew, that the payment was made in order to get the GSA, and to get the GSA regardless of the merits of the claimants “application” either in itself or by comparison to that of other actual or potential applicants. As they knew, there was no proper application....’<sup>191</sup> Furthermore, the court held that ‘it is obvious and was appreciated by them

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189 *Lemenda Trading Co. Ltd. v. African Middle East Petroleum Co. Ltd.* [1988] 1 Q.B. 448.

190 *Nayyar & Ors v. Sapte & Anor* [2009] EWHC 3218 (QB) (16 December 2009).

191 *Id.*, at Para. 104.

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that a contract of this nature and significance should only be awarded on the basis of the merits of the application made. In this case, as they knew, it was going to be awarded on the basis of a third party payment.<sup>192</sup> The judge held that:

‘[I]n the light of the above findings I am satisfied that the payment of £400,000 was intended to be a bribe in civil law terms. It was made with the intention of procuring that whoever was mandated to grant the letter of appointment, and thereby in effect the GSA, would grant it to the claimants, and do so on the basis of a payment rather than of the merits of the application. That would involve a breach of fiduciary duty by that mandated person and it was a payment made in order to induce a breach of such duty.’<sup>193</sup>

The court further held that ‘proof of a payment which is intended to be a civil law bribe is sufficient to engage the *ex turpi causa* principle. It is not necessary to establish that the intended illegal purpose has been effectively carried out.’<sup>194</sup> The court dismissed the plaintiff’s claim holding that the defendants had successfully made out their defense of *ex turpi causa* and the claimants’ claim accordingly had failed.<sup>195</sup>

The court in *Tinsley v. Milligan* emphasized that the *ex turpi causa* principle is:

‘not a principle of justice; it is a principle of policy, whose application is indiscriminate and so can lead to unfair consequences as between the parties to litigation. Moreover the principle allows no room for the exercise of any discretion by the court in favour of one party or the other.’<sup>196</sup>

In *Holman v. Johnson*, Lord Mansfield remarked:

‘The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this; *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.’<sup>197</sup>

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192 Id., at Para. 105.

193 Id., at Para. 114.

194 Id., at Para. 118.

195 Id., at Para. 121.

196 *Tinsley v. Milligan* [1993] 3 All ER 65.

197 Id., at 1 Cowp. 343.

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Thus where the influence of a party has been used to obtain a government loan, the promise of commission made to such a party in respect of getting such a loan cannot be enforced.<sup>198</sup> In *Marlwood Commercial Inc. v. Kozeny*, the court held that ‘window dressing’ will not change the essential nature of a contract to give a bribe. Hirst J., stated:

‘the bribery would, in my judgment taint all the contracts. The contractual undertaking recorded in them that there would be no acts of corruption ... would turn out simply to be window-dressing for the outside world. The real but unstated agreement was that the parties knew and expected that bribery was taking place. The contracts should be treated as providing that bribery was not only permitted but intended. No contract containing any such provision could conceivably be enforced.’<sup>199</sup>

### 5.4.2 The Secondary Contract

The central question regarding the contract that comes into being between the bribe-giver and the principal of the agent who received the bribe (referred to in this book as the secondary contract) is whether the contract is the result of the legitimate exercise of authority by the agent who negotiated the contract. Only where a secondary contract results from a legitimate exercise of authority by an agent will such a contract be binding on the principal.

Bowstead & Reynolds point out the authority of an agent is actual (express or implied) where it ‘results from a manifestation of consent that he should represent or act for the principal expressly or impliedly made by the principal to the agent himself’<sup>200</sup> This authority extends to doing ‘whatever is necessary for, or ordinarily incidental to, the effective execution of his actual authority.’<sup>201</sup>

It stands to reason that the grant of authority to an agent by a principal will not extend to authority to act in the agent’s interest rather than in the principal’s interest. Lightman J. has stated that:

‘The grant of actual authority to an agent would not normally include authority to act for the agent’s benefit rather than that of his principal so that, without agreement, the scope of actual authority will not include this. The

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198 *Montefiore v. Menday Moror Components Co, Ltd.* [1918] 2 K.B. 241.

199 *Marlwood Commercial Inc v. Kozeny* [2006] EWHC 872 (Comm) (28 April 2006) Para. 174.

200 P. Watts, F. Reynolds, *Bowstead & Reynolds on Agency*, 19th edn, Sweet & Maxwell, London, 2010, Art. 22 (1) 3-001, p. 111.

201 *Id.*, Art.27 3-018, p. 127.

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grant of actual authority should be implied as being subject to a condition that it is to be exercised honestly and on behalf of the principal.<sup>202</sup>

He further states, ‘if an act is carried out by an agent which is not in the interests of his principal ..., then the act will not be within the scope of the express or implied grant of actual authority’. There cannot be actual authority and ‘[t]he transaction is therefore void unless the third party can rely on the doctrine of apparent authority.’<sup>203</sup>

Ordinarily, even in the absence of express authority, a principal can be bound where the agent is perceived by a third party to hold such authority. However, the transaction resulting from the act of bribery by the agent is clearly an act of an agent acting outside the authority granted by a principal with the knowledge and complicity of the third party who extend the bribe to the agent. Bowstead and Reynolds argue that such a transaction is void at common law unless the third party can rely on the doctrine of apparent authority stating:

‘Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority.’<sup>204</sup>

However, in the situations where the third party is actually involved in the agent’s breach of duty, there can usually *ex hypothesi* be no apparent authority. As Lord Scott points out in *Criterion Properties plc. v. Stratford UK Properties LLC*, a third party cannot claim to have relied upon the apparent authority of an agent if he knew that the agent had no actual authority:

‘...If a person dealing with an agent knows that the agent does not have actual authority to conclude the contract or transaction in question, the person cannot rely on apparent authority. Apparent authority can only be relied on by someone who does not know that the agent has no actual authority. And if a person dealing with an agent knows or has reason to believe that the contract or transaction is contrary to the commercial interests of the agent’s principal, it is likely to be very difficult for the person to assert with any credibility that he believed the agent did have actual authority. Lack of such a belief would be fatal to a claim that the agent had apparent authority.’<sup>205</sup>

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202 *Hopkins v. TL Dallas Group* [2005] 1 BCLC 543 at Para. 88.

203 *Hopkins v. TL Dallas Group Ltd.* [2005] 1 BCLC 543 at Para. 88.

204 P. Watts, F. Reynolds, *Bowstead & Reynolds on Agency*, 19th edn, Sweet & Maxwell, London, 2010, Art. 72 Para. 8-013., p. 364.

205 *Criterion Properties Plc. v. Stratford UK Properties LLC* [2004] 1 WLR 1846, at p. 1856.

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Similarly in *Lysaght Bros and Co Ltd v. Falk*, Griffith CJ stated:

‘...If the agent has acted in his own interest, he does not bind his employer. But there is an exception to this rule in the case of a person dealing bona fide with the agent without knowledge of the limitation of his authority. That is based on the principle of estoppel; but there can be no estoppel if the person dealing with the agent knows the actual facts, and knows that the agent is acting in his own interests and not in the interests of his employer...’<sup>206</sup>

This viewpoint is supported by Slade L.J. in *Rolled Steel Products (Holdings) Ltd v. British Steel Corporation*, who states:

‘If ... a person dealing with a company is on notice that the directors are exercising the relevant power for purposes other than the purposes of the company, he cannot rely on the ostensible authority of the directors and, on ordinary principles of agency, cannot hold the company to the transaction.’<sup>207</sup>

The lack of authority of the agent renders the secondary contract unenforceable. The question has arisen whether this contract is void *ab initio* or merely voidable at the instance of the principal. The proposition that the contract between the briber and the principal is void *ab initio* is summed up by Nourse J., who states:

‘where an agent is known by the other party to a purported contract to have no authority to bind his principal, no contract comes into existence. The agent does not purport to contract on his own behalf and the knowledge of the other party unclothes him of ostensible authority to contract on behalf of the principal. Whether or not such a transaction is accurately described as a void contract, it is plainly not voidable. If no contract comes into existence, there is nothing to avoid or rescind, nor can any property pass under it.’<sup>208</sup>

In a similar vein, Cockburn C.J., in *Smith & Sorby* has held:

‘of a party with whom an agent is negotiating on the part of another agreed to give and does give the agent a secret gratuity and that gratuity does influence the mind of the agent directly or indirectly, in assenting to anything prejudicial to his employer in making the contract, the contract is vitiated.’<sup>209</sup>

However, this can produce a harsh result. For reasons of fairness the courts have indicated that the secondary contract resulting for the breach of the duty

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206 *Lysaght Bros and Co Ltd v. Falk* (1905), 2 CLR 421, at pp. 431-432.

207 *Rolled Steel Products (Holdings) Ltd v. British Steel Corporation* [1986] Ch. 246, at 284C-D, 295G-296A p. 295H.

208 *Heinl v. Jyske Bank (Gibraltar) Ltd.* [1999] Lloyd’s Rep Bank 511, at p. 521.

209 *Smith & Sorby* (1875), L.R. 3 Q.B.D. 552.

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of loyalty by the agent is not void but voidable at the instance of the aggrieved principal. In the words of Lord Hatherly, a contract that is induced by bribery ‘is one that can be impeached and which would be set aside in a court of equity.’<sup>210</sup>

One of the earliest cases dealing with this right of rescission is the 1874 *Panama* case.<sup>211</sup> Following the discovery of a bribe taken by their agent, the principal sought to have the entire agreement rescinded, the recovery of all moneys paid under the contracts as well as the repayment of the commission paid to the agent. The Court in granting this relief stated that:

‘the right of the plaintiff to the relief which they have asked and which has been given to them is a matter of course, according to the view of the law which I have learnt as student, practitioner, and Judge for nearly half a century.’<sup>212</sup>

The court found it as a matter of ‘...common sense, common honesty and common equity ... that the plaintiff was entitled to have the contract rescinded.’<sup>213</sup>

In a now famous dictum, James L.J. gives authority to the position that ‘any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal.’ He goes on to state that such a defrauded principal:

‘if he comes in time, is entitled, at his option, to have the contract rescinded, or, if he elects not to have it rescinded, to have such other adequate relief as the Court may think right to give him.’<sup>214</sup>

In *Logicrose v. Southend United Football Club*, Millet J. makes it clear that the contract between the bribe-giver and the principal of the disloyal agent is not void *ab initio*. He states that the principal who discovers that his agent in a transaction has obtained or arranged to obtain a bribe or secret commission from the other party to whom the transaction is entitled, in addition to other remedies which may be open to him, may elect to rescind the transaction *ab initio* or, if it is too late to rescind, to bring it to an end in the future.<sup>215</sup> The

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210 Per Lord Hatherly in *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 A.C., at p. 1244.

211 *Panama and South Pacific Telegraph Co. v. India Rubber & Telegraph Works Co.* (1875), L.R. 10.

212 *Id.*, at p. 516.

213 *Id.*

214 *Id.*, at 526.

215 *Logicrose v. Southend United Football Club* [1988] 1 W.L.R. 1256 per Millet J., at pp. 1263-1264.

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choice is clearly that of the principal, who may be left in a very unfair position should the contract be considered void *ab initio*. This would mean that the bribe-giver could be placed in the position where after having deceived the principal, the bribe-giver would still hold the upper hand in being able to walk away from a contract that in the eyes of the law does not exist. Lord Millet in *Logicrose* clearly identifies this when he states:

‘the principal, having been deprived by the other party to the transaction of the disinterested advice of his agent is entitled to a further opportunity to consider whether it is in his interests to affirm it.’<sup>216</sup>

The tribunal in the *World Duty Free Company Limited v. The Republic of Kenya* cited with approval the words of Millet J. in *Logicrose* and added that:

‘The contract is not void *ab initio*, and remains valid unless and until steps are taken to set it aside. There is nothing wrong with it as a contract, the position being simply that the circumstances in which it was made require that the injured party should be given the opportunity to relieve himself from its burdens.’<sup>217</sup>

However, the Tribunal noted that the right of the injured party to rescind the contract will depend on the extent to which such a party had ‘knowledge of the relevant circumstances.’<sup>218</sup> It is clear that the secondary contract would remain valid at the instance of the principal, who retains the prerogative to set the tainted transaction aside.<sup>219</sup> As such, it can be concluded that the secondary contract that comes into being between the bribe-giver and the principal of the disloyal agent is unenforceable as a result of an unauthorized act at the instance of the principal.

### 5.5 The Private Claim for Corruption

The following sections outline the main types of private claims for bribery that have been brought under English Law. As may be expected, the major claims and remedies are those directed by the principal at the disloyal agent and the bribe-giver. Within the framework of English civil law, the victim of corruption is found primarily within the principal-agent relationship. The direct victim of the acts of corruption is the principal whose trust has been breached. The defining feature of the principal-agent relationship is the existence of a

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216 Id., at p. 1261.

217 *World Duty Free v. Kenya* 46 ILM 339 (2007), ICSID Case No. ARB/00/7, Award, 4 October 2006, at Para. 164.

218 Id.

219 See also E. Peel, *Treitel on the Law of Contract*, 12th edn, Sweet and Maxwell, London, 2010, at p. 799.

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fiduciary relationship. In a general sense, when this fiduciary relationship is breached, there is a right to redress in contract and in tort.

A private claim can also be brought in respect of bribery under other heads of tort. Prominent examples are (1) the tort of misfeasance in public office where the abuse of office by a public officer is an actionable tort, (2) the unlawful interference with contract where the unlawful offer of a bribe to an agent will result in a breach of the agent's contract, and (3) the tort of unlawful interference with trade where the acts of the bribe-giver may result in loss to the plaintiff who has as a result entered into less favorable conditions of trade. Also discussed in this chapter are claims by public interest litigators and shareholder litigation. These last two categories are still in a very nascent stage of development.

Private remedies for harm suffered as a result of bribery should be distinguished from the civil law mechanisms that are increasingly being used to recover the profits of crime. Nicholls notes several examples, including the Proceeds of Crime Act 2002, which allows for forfeited cash to be paid to its rightful owner; the Asset Recovery Agency, which has the power to institute civil proceedings *in rem* to recover moneys or other assets as the proceeds of crime; as well as the power of the criminal court to order a person convicted of an offense to compensate a victim for loss suffered. These strategies seek to strip offenders of the proceeds of their crimes. Nicholls points out that these mechanisms are 'primarily designed to deprive the offenders of the proceeds of their crimes, not to compensate persons who have lost their property as a result of crime.'<sup>220</sup> However, these mechanisms nonetheless emphasize the intertwined nature of public and private law in cases involving bribery. From this perspective, the purpose of private remedies and civil sanctions is not merely to restore the damage done to parties but also to protect society from the negative consequences of corruption.

### 5.5.1 Claim by Principal for the Bribe and Resulting Profits

What remedies can a wronged principal claim? There are two aspects to the injury suffered by a principal. The first is the injury resulting from the breach of the duty of loyalty owed to him by his agent and the second the injury suffered as a result of the acts of the person offering the bribe. The principal can bring a claim against the agent as well as against the party who paid the bribe.

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220 C. Nicholls, T. Daniel, A. Bacarese, J. Hatchard, *Corruption and Misuse of Public Office*, id., Note 2 above, at pp. 225-226.

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### 5.5.1.1 Claim against the Agent

At common law a bribe is recoverable *as money had and received* by the agent to the use of the principal.<sup>221</sup> By receiving a bribe the agent causes the principal to enter into a contract that is disadvantageous to him or her, at least to the extent of the bribe.<sup>222</sup> In the words of Smith L.J.:

‘If a vendor bribes a purchaser’s agent, of course the purchase money is backed by the amount of the bribe ... In this case the purchase money was £28,000 in which was included the £700 given to the purchaser’s agents. Of course the vendor would have sold the goods for £28,000 less £700. Therefore he has in his pocket £700 money of the purchaser. That £700 he must disgorge.’<sup>223</sup>

In the case of *Arab Monetary Fund v. Hashim*, Evans J. summarizes the basis of this common law liability. Drawing on dicta from the *Hovenden*, *Mahesan* and *Anangel* cases, he states:

‘in a case ... where the employer has paid the contractor the full amount due under a contract which was induced by a bribe paid to the employer’s agent, the employer is entitled to recover the amount of the bribe from the contractor (on a restitutionary basis as distinct from a damages claim) and that the reason for the contractor’s liability is that he has received a greater sum than what was the true price between them and must restore the balance.’<sup>224</sup>

In equity, the principal also has a claim against the disloyal agent for the bribe received.<sup>225</sup> The legal owner of the inducement that is given as a bribe is the

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221 Per Bowen L.J. in *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888), 39 Ch.D. 339, at p. 337:

‘the law implies a use, that is to say, there is an applied contract, if you put it as a legal proposition – there is an equitable right, if you treat it as a matter of equity – as between the principal and agent that the agent should pay it over, which renders the agent liable to be sued for money had and received, and there is an equitable right in the master to receive it, and to take it out of the hands of the agent, which gives the principal a right to relief in equity.’

222 In *Salford Corp v. Lever* (No.2) (1890), WL 9774 [1891] 1 Q.B. 168, the court held that:

‘where an agent, who has been bribed so to do, induces his principal to enter into a contract with the person who has paid the bribe, and the contract is disadvantageous to the principal, the principal has two distinct and cumulative remedies: he may recover from the agent the amount of the bribe which he has received, and he may also recover from the agent and the person who has paid the bribe, jointly or severally, damages for any loss which he has sustained by reason of his having entered into the contract.’

223 *Hovenden and Sons v. Milhoff* (1900), 83 L.T. 41, at p. 42.

224 *Arab Monetary Fund v. Hashim* (No.9) [1993] 1 Lloyd’s Rep. 543, at p. 565.

225 *Attorney-General v. Goddard* (1926), 98 L.J.K.B. 743, at p. 746 per Rowlatt J., *Reading v. The King* [1948] 2 K.B. 268; *Attorney-General for Hong Kong v. Reid* [1993] 3 W.L.R. 1143; *Mahesan v. Malaysia Government Officers* [1978] 2 W.L.R. 444. at p. 448.

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person who receives the bribe. However, since this bribe occasions the breach of a duty of loyalty held to a principal, the receipt of the bribe creates a debt to the principal in equity to the amount of the bribe.<sup>226</sup> In *Boston Deep Sea Fishing & Ice Co. v. Ansell Bowen*, L.J. explains that:

‘it is because it is contrary to equity that the agent or the servant should retain money so received without the knowledge of his master. Then the law implies a use, that is to say, there is an implied contract, if you put it as a legal proposition – there is an equitable right, if you treat it as a matter of equity – as between the principal and agent that the agent should pay it over, which renders the agent liable to be sued for money had and received, and there is an equitable right in the master to receive it, and to take it out of the hands of the agent, which gives the principal a right to relief in equity.’<sup>227</sup>

While the principal may have a right at common law and at equity to the bribe, the question whether the plaintiff also has a *proprietary claim to benefits arising from the bribe*. Millet asks the fundamental question ‘should a proprietary remedy be available at all to a plaintiff who is not merely seeking to recover his own property?’ His answer to this question is in the affirmative and is in his words based on principles of equity and policy. This policy, he states, has been settled for over two hundred years. Millet points out that the object of the law is not compensatory. The principal is not given a remedy in order to compensate him for loss; he is entitled to recover whether or not he has suffered loss. Rather, the principal is given this remedy:

‘because it is considered necessary to enforce the high standards which equity demands of a fiduciary. A fiduciary that fails to observe then must be stripped of every advantage which he has obtained thereby; better that the principal should receive a windfall than that the fiduciary (or his creditors) should benefit.’<sup>228</sup>

The ‘stripping away of every advantage’ obtained by the disloyal agent in breach of a fiduciary duty creates in the words of Millet ‘proprietary rights out of personal obligations.’<sup>229</sup> Early case law, however, rejected such a proprietary claim and maintained that the relationship between a principal and a disloyal agent was merely that of a debtor to a creditor and that the principal had only a personal claim against the agent.

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226 M. Cope, Ownership, Obligation, Bribes and the Constructive Trust, in M. Cope (Ed.), *Equity: Issues and Trends*, Federation Press, Sydney, 1995, p. 91.  
227 *Boston Deep Sea Fishing & Ice Co v. Ansell* (1888), L.R. 39 Ch. D. 339, at pp. 367-369.  
228 Sir Peter Millet, Remedies: The Error in *Lister v. Stubbs*, in P. Birks (Ed.), *The Frontiers of Liability*, Vol. 1, OUP, New York, 1994 (Reprint 2002), p. 51, at p. 56.  
229 *Id.*, at p. 57.

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In the leading case of *Lister v. Stubbs*<sup>230</sup> it was alleged by the plaintiffs that their foreman had received secret commissions which he had invested in land and other investments.<sup>231</sup> The plaintiffs brought an action against the defendant to recover the secret payments and also claimed to be entitled to follow such moneys into the investments that the disloyal agent had made. They sought interlocutory relief to prevent him dealing with the land he had invested the secret commissions in and also required him to bring the other investments made into court.

The court held that the injunction sought by the plaintiffs should be refused because the money in question did not belong to the plaintiffs so as to make the defendant a trustee. Rather, in the view of the court, this was money which the plaintiffs were entitled to claim as ‘a debt due from the defendant to the plaintiffs in consequence of the corrupt bargain which he entered into.’ The courts found that the money which he had received under the corrupt bargain could not be treated as belonging to plaintiffs ‘before any judgment or decree in the action [had] been made.’<sup>232</sup> As such, in the view of Lindley L.J., the relation between the parties was that of debtor and creditor, and not that of trustee and *cestui que trust*.<sup>233</sup>

The court was influenced by two considerations: (a) firstly, the fact that if the claimants were entitled to a proprietary remedy, the property acquired by the defendant with the bribe money would be withdrawn from the mass of the defendant’s creditors on the defendant’s bankruptcy; and (b) secondly, the fact that the claimants would be entitled not only to an account of the money plus interest, but also to all profits made by the defendant using the money, for example if he had set himself up in business.<sup>234</sup> The effect of the *Lister* decision was that the principal’s relief was restricted to an account for the value of the bribe. Profits arising from the bribe remained the property of the agent. The principal had no priority status as a secured creditor in the event of the agent being declared bankrupt.

A century after *Lister*, in the landmark case of *AG for Hong Kong v. Reid*<sup>235</sup> the relationship between the principal and agent was viewed in a fundamentally

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230 *Lister v. Stubbs*, 45 Ch. D 1.

231 The Plaintiffs, a manufacturing company, employed the Defendant, who was their foreman, to buy certain materials which they used in their business. The Defendant, under a corrupt bargain, took from one of sellers large sums by way of commission, a portion of which he invested. The Plaintiffs brought an action against the Defendant to recover the moneys so paid to him, claiming to be entitled to follow such moneys into the investments thereof.

232 *Id.*, per Cotton L.J., pp. 12-13.

233 *Id.*, Lindley L.J., at p. 15.

234 *Id.*, at p. 14.

235 *AG for Hong Kong v. Reid* [1994] 1 AC 324.

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different manner by the courts. In this case, Mr. Reid, a New Zealander who eventually rose to become the Attorney General Public Prosecutions for the Government of Hong Kong, had received bribes from certain criminals to obstruct justice in their favor. Mr. Reid was found guilty and eventually sentenced to eight years imprisonment and fined HK\$12.4 million. It was established that property held by Mr. Reid in New Zealand was acquired by the proceeds of the bribe. These assets included three freehold properties – two in the name of Mr. and Mrs. Reid and the third in the name of Mr. Malloy, Mr. Reid's solicitor.

The question before the courts was whether the claimant had any right to these proceeds of the bribe. The Privy Council held that while under the law, such moneys or properties belonged to the agent under equity, which acts *in personam*, it was unconscionable for the agent to obtain or retain the benefit of the bribe. As such, in the view of the court, when Mr. Reid received the bribe, he was in breach of his duty to the Government of Hong Kong. Upon the breach of this duty, he became a debtor in equity for the amount of the bribe to the Hong Kong government. Equity requires *as done* that which ought to have been done. As such, the increased value of the property representing the bribe was also owed to the Hong Kong government by Mr. Reid, who stood as a constructive trustee in respect of such property. In the words of Lord Templeman:

‘The decision in *Lister & Co v Stubbs* is not consistent with the principles that a fiduciary must not be allowed to benefit from his own breach of duty, that the fiduciary should account for the bribe as soon as he receives it and that equity regards as done that which ought to be done. From these principles it would appear to follow that the bribe and the property from time to time representing the bribe are held on a *constructive trust* for the person injured.’<sup>236</sup>

This constructive trust or account of profits is now regarded as a conventional equitable remedy. In *Murad v. Al-Saraj*,<sup>237</sup> the court remarked that:

‘Equity recognises that there are legal wrongs for which damages are not the appropriate remedy. In some situations, as in this case, a court of equity instead awards an account of profits. As with an award of interest, the purpose of the account is to strip a defaulting fiduciary of his profit.’<sup>238</sup>

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236 *Id.*, at p. 336.

237 *Murad & Anor. v. al Saraj & Anor* (2005), ECWA CIV 959, 2005 WL 1767588.

238 *Id.*, at p. 9 Para. 56.

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Lord Russel of Killowen in the early *Regal* case<sup>239</sup> remarked about the constructive trust:

‘The rule of equity which insists on those, who by use of fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as to whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made.’

The position of the law on constructive trusts with respect to illegal commissions has, however, been radically affected by the recent 2011 ruling in *Sinclair Investments v. Versailles*.<sup>240</sup> This case involved the attempt to recover the proceeds of a fraudulent conspiracy. Sinclair Investments was induced to advance money to an offshore company controlled by a Mr. Cushnie called Trading Partners Limited (‘TPL’) by false representations that the money would be used by TPL for trading transactions of a particular type. Sinclair Investments advanced £2.35m to TPL. The moneys advanced were not used by TPL for the agreed purpose but instead used in a ‘cross-firing’ operation involving transfers between bank accounts and a series of fraudulent transactions which eventually led to a collapse of the conspiracy and the appointment of receivers with respect to the companies involved.

Sinclair sought a declaration that the receivers had held a part of the proceeds upon a constructive trust for Sinclair. Sinclair claimed that a Kensington property was (or is to be regarded as having been) purchased with profits improperly made by Mr. Cushnie in breach of the fiduciary duty he personally owed to Sinclair Investments with regard to the advances that it had made to TPL. Sinclair also argued that in the alternative, the property was (or is to be regarded as having been) purchased with profits the making of which had been achieved by Mr. Cushnie’s unconscionable and dishonest conduct in inducing Sinclair to pay its advances to TPL and then dishonestly assisting in TPL’s breach of trust towards Sinclair by procuring the use of the money for an unauthorized purpose. *Sinclair’s* case was dismissed by the High Court.<sup>241</sup>

The Court of Appeal noted that the arguments made by the claimants focused on cases where:

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239 *Regal (Hastings) Ltd. v. Gulliver* [1942] UKHL 1.

240 *Sinclair Investments v. Versailles* [2011] EWCA Civ. 347 (29 March 2011).

241 *Sinclair Investments v. Versailles* [2007] EWHC 915 (Ch.) (30 April 2007).

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‘the courts have had to consider whether, where an agent or employee accepts a bribe or secret commission or the like, his principal or employer beneficially owns the bribe. As in the present case, the money in such cases was received by a fiduciary, and, although its receipt derived from his fiduciary position and was a plain breach of his fiduciary duties, it was not money which was part of the assets subject to his duties, or derived from such assets.’<sup>242</sup>

After reviewing the cases on this point, the court referred to the decision in *Lister & Co v. Stubbs*,<sup>243</sup> where the Court unanimously held that the bribe could not be considered to be the property of the employers. The court in *Sinclair* held that the ruling of Lindlay L.J. in *Lister v. Stubbs* indicated that the remedy of equitable compensation would not extend to enable a fiduciary to be held accountable for any profit he had made on an asset which he had acquired with a bribe.<sup>244</sup>

The court noted that the *Lister* case was disapproved by the Privy Council in the *AG v. Reid* case, where Templeman J. held that the agent was accountable to the principal ‘not only for the original amount or value of the bribe but also for the increased value of the property representing the bribe.’<sup>245</sup> The Court of Appeal in *Sinclair Investments* rejected this contention and stated that they would not follow the Privy Council decision in the *Reid* case in preference to its own decision unless there were domestic authorities that showed that its decision was *per incuriam* or of doubtful reliability.<sup>246</sup>

The Court of Appeal held that the lower court was right in rejecting the claimant’s proprietary claim to the proceeds of sale of the shares in question. The court found that there was a consistent line of reasoned decisions which:

‘appear to establish that a beneficiary of a fiduciary’s duties cannot claim a proprietary interest, but is entitled to an equitable account, in respect of any money or asset acquired by a fiduciary in breach of his duties to the beneficiary, unless the asset or money is or has been beneficially the property of the beneficiary or the trustee acquired the asset or money by taking advantage of an opportunity or right which was properly that of the beneficiary.’<sup>247</sup>

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242 *Sinclair Investments v. Versailles* [2011] EWCA Civ. 347 (29 March 2011), Para. 55.

243 *Lister & Co v. Stubbs* (1890), LR 45 Ch. D.

244 *Sinclair Investments v. Versailles* [2011] EWCA Civ. 347 (29 March 2011), at Para. 66).

245 *Id.*, at Para. 71.

246 *Id.*, at Para. 73.

247 *Id.*, at Para. 88.

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The Court of Appeal in the *Sinclair Investments* case concluded that the claimant had only a personal not proprietary claim in such cases.<sup>248</sup> Thus the pendulum seems to have swung from the denial of a proprietary claim to the proceeds of a bribe in *Lister v. Stubbs*, to the ruling that favored such a proprietary right in *AG v. Reid* and back again to a position that denies such a proprietary right with respect to *Sinclair Investment v. Versailles*.

### 5.5.1.2 Claim against the Bribe-Giver

The principal can also bring claims against the bribe-giver. A claim can be made against the bribe-giver for the amount of the bribe as well as an account for profits.<sup>249</sup> In the *Petrotrade* case, Steel J. remarks that as:

‘... regards the claim for money had and received, the gist of the cause of action is the benefit which has accrued to the briber, again whether or not attributable to a contract between the briber and the claimant.’<sup>250</sup>

The principal can claim against the bribe-giver for an *account for profits* that resulted from the bribery of a principal’s agent. In *Consul Development Pty Ltd v. DPC Estates Pty Ltd*,<sup>251</sup> Gibbs J. points out that the strict rule of equity that forbids a person in a fiduciary position to profit from his position appears to be designed to deter persons holding such a position from being swayed by interest rather than by duty. This, in his opinion, lays the premise to extend such a no-profit rule to persons who assist in the violation of fiduciary duties. He states that:

‘if the maintenance of a very high standard of conduct on the part of fiduciaries is the purpose of the rule it would seem equally necessary to deter other persons from knowingly assisting those in a fiduciary position to violate their duties.’<sup>252</sup>

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248 Id.

249 Mitchell points out that the difficulty encountered in this construction is the fact that in most cases the bribe received by the fiduciary is money paid by the bribe-giver, rather than money received by him, with the result that his liability to ‘repay’ the amount of the bribe can only be explained by fictionally deeming him to have received a benefit of the same value at the principal’s expense. He points out that it is unclear whether the bribe-giver’s restitutionary liability derives from the law of unjust enrichments (on the basis that he has derived the benefit by subtractive unjust enrichment from the principal by a misrepresentation on some sets of facts although not all) or from the law of wrongs (on the basis that he has enriched himself by committing the tort of fraud). C. Mitchell, ‘Civil liability for bribery’, 117 *Law Quarterly Review*, p. 207, 2001, at p. 212.

250 *Petrotrade Inc v. Smith* [2000] C.L.C. 916 [2001] 1 Lloyd’s Rep. 486, at Para. 18.

251 *Consul Development Pty Ltd. v. DPC Estates Pty Ltd* [1975] 132 CLR 373, at p. 397.

252 Id.

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The rationale of the account for profits is to strip the agent and briber of all they have gained. It is not compensatory or restitutionary. An account for profits is not calculated on the basis of what the principal has lost but rather on what the defaulting parties have gained. Even if there is no loss suffered by the plaintiff, the right to an account of the profits subsists.<sup>253</sup>

Another rationale for such a no-profit rule is the equitable principle that a man should not be allowed to benefit from his own wrong. As Gibbs J. points out:

‘the rule is to be explained simply because it would be contrary to equitable principles to allow a person to retain a benefit that he had gained from a breach of his fiduciary duty, it would appear equally inequitable that one who knowingly took part in the breach should retain a benefit that resulted therefrom. I therefore conclude, on principle that a person who knowingly participates in a breach of fiduciary duty is liable to account to the person to whom the duty was owed for any benefit he has received as a result of such participation.’<sup>254</sup>

In *Fyffes v. Templeman*, Toulson J. cited with approval the reasoning in the *Consul Development Property* case and stated:

‘although the dishonest intruder owes no personal obligation of loyalty to the injured party, it is unconscionable for him dishonestly to suborn the loyalty of the agent and equally unconscionable for him to keep benefits which he has obtained by dishonestly abusing to his own advantage the position of the agent whose duty was to his principal.’<sup>255</sup>

Toulson J. further stated:

‘I would conclude that there are cogent grounds, in principle and in practical justice, for following the approach of Gibbs J and holding that the briber of an agent may be required to account to the principal for benefits obtained from the corruption of the agent.’

In *Attorney General for Hong Kong v. Reid*, Lord Templeman described bribery as ‘an evil practice which threatens the foundations of any civilised society’ and that the law should not assist a party to retain the profits of such a vice.<sup>256</sup>

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253 *Keech v. Sandford* (1726), Sel Cas Ch. 61; *Boardman v. Phipps* 16 1967] 2 AC 46.

254 Id.

255 [2000] 2 Lloyd’s Rep. 643.

256 Per Templeman J., *AG for Hong Kong v. Reid* [1994] 1 AC 324, at p. 330.

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These rulings must now be reconsidered in light of the *Sinclair Investment v. Versailles* case, which reverts to the position established by the *Lister v. Stubbs* position to the effect that there is no proprietary right to the proceeds of the bribe but only a personal right against the fiduciary.

The principal can also make a claim against the bribe-giver for equitable compensation based on *knowing assistance*. The briber does not stand in a fiduciary relationship to the principal. The briber is a ‘stranger’ to the relationship of trust that exists between the principal and the agent. Yet the briber is an instrumental element in the breach of the fiduciary duty owed by the agent by assisting such an agent to fraudulently and dishonestly breach the fiduciary duty owed. Lord Selborne has stated that:

‘... strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.’<sup>257</sup>

In the case of the bribe-giver there is a clear intention to assist in ‘a dishonest and fraudulent design.’ Dishonesty is ‘the touchstone’ of this equitable liability.<sup>258</sup> The Court in the *Royal Brunei* case concluded that:

‘liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation. It is not necessary that, in addition the trustee or fiduciary was acting dishonestly, although this will usually be so where the third party who is assisting him is acting dishonestly.’<sup>259</sup>

Following on from this ruling, the court in *Kuwait Oil Tanker Co v. Al Bader* held that:

‘If one who knowingly assists in a breach of trust may be held liable as a constructive trustee even though he does not receive the trust property ... it must follow that one who dishonestly participates in a theft, albeit as an accessory rather than a principal, must be liable along with the actual thief as a constructive trustee.’<sup>260</sup>

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257 Per Lord Selborne L.C., in *Barnes v. Addy* (1874), L.R. 9 Ch. App. 244, pp. 251-252.

258 Per Lord Nicholls in *Royal Brunei Airlines v. Tan* [1995] 2 AC 378, at p. 389.

259 *Id.*, at p. 392.

260 *Kuwait Oil Tanker Co. SAK and 1 Other v. Abdul Fattah Suleiman Khalid Al Bader & Others* [2008] EWHC 2432.

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On the nature of such accessory liability, Lord Millet in the *Twinsectra* case stated that the:

‘accessory’s liability for having assisted in a breach of trust is quite different. It is fault-based, not receipt-based. The defendant is not charged with having received trust moneys for his own benefit, but with having acted as an accessory to a breach of trust. The action is not restitutionary; the claimant seeks compensation for wrongdoing.’<sup>261</sup>

### 5.5.2 Claim in Tort for Damages

The principal can sue the agent and bribe-giver for fraud. The courts in the *Salford* case stated that where bribery is concerned, the cause of action against the bribe-giver is for fraud. According to the judges, ‘since the agent is necessarily a party to the bribery, it follows that the tort is a joint tort of briber and agent.’<sup>262</sup> The liability arising against the bribed agent and bribe-giver is reiterated in the *Mahesan* case. Here the courts described the right of the plaintiff to remedies against the briber in the alternative. Either from the bribe-giver in the amount of the bribe as money had and received or to recover, as damages for tort, the actual loss which the principal sustained as a result of entering into the transaction in respect of which the bribe was given.<sup>263</sup>

This position is summarized in Bowstead and Reynolds Art. 49, which provides:

‘When an agent receives or arranges to receive any money or property by way of bribe or secret commission in the course of his agency from a person who deals or seeks to deal with his principal, the agent is liable to his principal jointly and severally with that person –

- (1) in restitution for the amount of the bribe or secret commission; or
- (2) in tort or contract, for any loss suffered by the principal from entering into the transaction in respect of which the bribe or secret commission was given or promised;

and the bribe, if it was paid, is held on trust for the principal.’<sup>264</sup>

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261 *Twinsectra v. Yardley* [1999] Lloyd’s Rep. 438 Para. 107.

262 *Salford Corporation v. Lever* (No. 2) (1891), 1 QB 168.

263 The court relying on the decision in *United Australia Ltd. v. Barclays Bank Ltd* [1941] A.C. 1 also held that the principal does not need to choose between these alternatives before the time has come for judgment to be entered in favor of the principal in one or other of them. *Id.*, at p. 383. This would enable the principal to choose the higher amount.

264 P. Watts, F. Reynolds, *Bowstead & Reynolds on Agency*, 19th edn, Sweet & Maxwell, London, 2010, Art. 49, Para. 6-084, p. 256.

## PRIVATE REMEDIES FOR CORRUPTION

A claim can be made against the disloyal agent in damages for fraud in respect of the actual loss which has been sustained by the claimant as a result of acts in connection with which the payments were made. The court will presume the amount of the bribe. If the purchaser alleges loss or damage beyond this, he must prove it.<sup>265</sup> In *Daraydan Holdings Ltd v. Solland International Ltd*, Mr. Justice Lawrence Collins said that it would be assumed that the true price of any goods bought by the principal was increased by at least the amount of the bribe, but any loss beyond the amount of the bribe itself must be proven.<sup>266</sup>

Bribery causes loss or damage as a result of the breach of the fiduciary duty. The courts have ruled on loss and damage even where there has been no representation made to the principal or any reliance placed on a non-existent representation as is typical of the classic tort. In *Hovenden and Sons v. Millhoff*, Romer L.J. laid down three rules that characterize bribery as a wrong which is 'is *sui generis*.' Firstly, the motive of the briber in giving the bribe is not relevant and evidence as to such motive will not be allowed; secondly, there is an irrebuttable presumption in favor of the principal that the agent was influenced by the bribe; and thirdly, there is an irrebuttable presumption in favor of the claimant that the true price of the goods as between him and the purchaser company must be taken to have been less than the price paid by at least the amount or value of the bribe. If the principal seeks to claim for any loss beyond this presumption it must be proven.<sup>267</sup>

There is some debate whether this opens up a gap in the remedial scheme and creates in the case of bribery a *sui generis* tort that has its own particular characteristics. In the *Mahesan* case, Diplock J. expresses the view that the rules in the *Hovenden* case open a new chapter in the law of civil remedies for bribery. He states:

'[T]hese rules refer to three of the elements in the tort of fraud, the motive, the inducement, and the loss occasioned to the plaintiff, but go on to say that the existence of the first two elements and of the third up to the amount of the bribe are to be irrebuttably presumed. This is merely another way of saying that they form no part of the definition of bribery as a legal wrong. To the extent that it is said that there is an irrebuttable presumption of loss or damage to the amount of the value of the bribe this is another way of saying that, unlike in the tort of fraud, actual loss or damage is not the gist of the action. But then to go on to say that actual loss in excess of the amount of the bribe can be recovered only if it is proved is to produce a hybrid form of legal

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265 *Hovenden and Sons v. Millhoff*(1900), 83 L.T. 41.

266 *Daraydan Holdings Ltd. v. Solland International Ltd.*, [2004] EWHC 622 (Ch.), [2005] Ch. 119.

267 *Hovenden and Sons v. Millhoff*(1900), 83 L.T. 41, at p. 43.

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wrong of which actual damage is the gist of part only of a single cause of action.<sup>268</sup>

Mitchell suggests that a reading of the *Mahesan*,<sup>269</sup> *Petrotrade*<sup>270</sup> and *Fyffes*<sup>271</sup> cases leads to the proposition that bribery is a special *sui generis* tort of fraud.<sup>272</sup> The Privy Council in the *Mahesan* case established that a principal whose agent has been bribed can recover the amount of the bribe from the briber in an action for money had and received, and alternatively, recover damages from the briber in an action for the tort of fraud. Steel J. in *Petrotrade* states that the bribery claim is ‘... not a species of deceit but a special form of fraud where there is no representation made to the principal of the agent let alone reliance.’<sup>273</sup> In a similar vein, regarding loss resulting from the agent, the courts in *Reading v. AG* have held that the right of the principal to recover the amount of the bribe from the agent does not depend upon his having incurred any loss as a result of his agent’s conduct.<sup>274</sup> Mitchell argues that these rulings point to bribery as a form of tort, but that the normal elements of the tort of fraud are inoperative. There is no need to prove motive, inducement and a proportion of the loss sustained. There is an irrebuttable presumption in favor of the claimant.<sup>275</sup>

In line with the *Hovenden* position, Mr. Justice Slade in *Industries & General Mortgage Co. Ltd v. Lewis* has held that proof of corruptness or corrupt motive is unnecessary in a civil action founded on bribery.<sup>276</sup> The plaintiff must, however, prove any loss beyond the amount of the bribe. For this aspect of the loss, actual damage must be established to sustain the claim. Nonetheless, to the extent that there is an irrebuttable presumption in respect of the bribe itself, it is unlike any tort. On the other hand, to the extent that proof is required of actual damage of loss beyond the amount of the bribe, the claim is like any tort. As such, it may be argued that the bribery claim in tort occupies a special *sui generis* position. This position is arguably traceable to the desire of the

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268 Per Lord Diplock in *Mahesan v. Malaysia Government Officers’ Co-operative Housing Society Ltd.* [1979] A.C. 374, at pp. 382-383.

269 *Id.*

270 *Petrotrade Inc. v. Smith* [2000] 1 Lloyd’s Rep., at p. 486.

271 *Fyffes Group Ltd. v. Templeman* [2000] 2 Lloyd’s Rep. 643.

272 C. Mitchell, ‘Civil Liability for Bribery’, *id.*, Note 249 above, p. 207. See also however K Handley, ‘Civil liability for bribery (No. 2)’, *Law Quarterly Review*, 2001, p. 536, at p. 538, who argues that contrary to the position argued by Mitchell, bribery is not a separate tort but may be a means of committing torts such as deceit, conspiracy, or inducement of breach of contract. He argues that ‘there is no gap in the remedies available to a principal whose servant or agent has been corrupted which would be filled by the recognition of a tort of bribery because the ground is already covered by established torts.’

273 *Petrotrade Inc. v. Smith* [2000] 1 Lloyd’s Rep. 486 at p. 490.

274 *Reading v. Attorney-General* [1949] 2 K.B. 232; (1951), A.C. 507.

275 See C. Mitchell, ‘Civil liability for bribery’, *id.*, Note 243 above.

276 *Industries & General Mortgage Co. Ltd. v. Lewis* [1949] 2 All ER 573, at p. 575.

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courts to punish and deter acts of bribery. Here the scale of justice tilts towards deterrence rather than mere compensation.

### 5.5.3 Claim for Breach of Employment Contract

The principal can also sue for breach of the employment contract. Increasingly the breach of anti-bribery rule is considered a material breach of contracts involving agents such as consultancy, procurement and construction contracts. The common law right to terminate a contract of agency for disloyalty by the agent is maintained by the Commercial Agents (Council Directive) Regulations 1993, which provides in Regulation 16 that:

‘[T]hese Regulations shall not affect the application of any enactment or rule of law which provides for the immediate termination of the agency contract—  
(a) because of the failure of one party to carry out all or part of his obligations under that contract; or (b) where exceptional circumstances arise.’<sup>277</sup>

### 5.5.4 Rule against Double Recovery

The various claims highlighted above show that the aggrieved plaintiff may pursue claims for the recovery of the bribe or claims for losses resulting from the damages resulting from the corrupt exchange. This could imply that the claimant could make a double recovery in restitution and in fraud. Indeed, this was the finding in *Salford Corporation v. Lever*, where the court held that an aggrieved principal had two distinct and cumulative remedies: from the agent for the amount of the bribe, and from the agent and the briber, jointly or severally, damages for any loss which he has sustained by reason of his having entered into the contract.<sup>278</sup>

This idea of double recovery was, however, put to rest in the *Mahesan case*.<sup>279</sup> The courts after examining the *Salford and Hovenden* cases found that the principles they laid down simply described the right of the plaintiff to alternative remedies against both the agent and the bribe-giver either to recover the amount of the bribe as money had and received (in restitution) or to recover, as damages for tort, the actual loss which the principal sustained as a

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277 The Commercial Agents (Council Directive) Regulations 1993 Statutory Instrument 1993/3053, Regulation 16.

278 *Salford Corporation v. Lever* (No. 2) (1891), 1 QB 168, at p. 181.

279 *Mahesan v. Malaysia Government Officers' Co-operative Housing Society Ltd.* [1979] AC 374.

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result of entering into the transaction in respect of which the bribe was given.<sup>280</sup>

### 5.5.5 Misfeasance in Public Office

The act of bribery by a public official is a deliberate act of abuse of office. It is an act which the public official knows is illegal, is committed by the public official by virtue of his position, and is for the personal gain of such a public official. As a basic principle, where an individual suffers loss or damage as a result of acts of corruption by a public official, a claim for redress can be made by such an individual. This principle is demonstrated and explained in the early civil case of *Henley v. Mayor of Lyme Regis*.<sup>281</sup> This case involved the damage to property caused by a failure of the Mayor and Burgess of Lyme Regis, in breach of their public duty, to repair sea banks imposed by charter or letters patent of King Charles the first.

Best J. held that ‘if a public officer abuses his office, either by an act of omission or commission, and the consequences of that, is an injury to an individual, an action may be maintained against such public officer.’<sup>282</sup> He further added:

‘If a man take a reward – whether it be in money from the Crown ... for the discharge of a public duty from that moment he is quasi a public officer; and, if through any act of negligence or abuse in his office, an individual sustain an injury, he is entitled to remedies in a civil action.’<sup>283</sup>

The House of Lords in the recent case of *Three Rivers District Council v. Governor and Company of the Bank of England* gave an up-to-date summary of the right of a member of the public to sue a public official whose abuse of office has resulted in injury to the claimant.<sup>284</sup> Lord Hobhouse of Woodborough put the tort of misfeasance in public office in legal context and stated it has the following elements:

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280 The court relying on the decision in *United Australia Ltd. v. Barclays Bank Ltd* [1941] A.C. 1 also held that the principal does not need to choose between these alternatives before the time has come for judgment to be entered in favor of the principal in one or other of them, *id.*, at p. 383. This would enable the principal to choose the higher amount.

281 *Henley v. The Mayor of Lyme Regis*, 5 Bing. 91, at p. 106, reported in J. Bayly Moore, J. Payne, *Reports of Cases Argued and Determined in the Courts of Common Pleas and Exchequer Chamber: With Tables of the Names of the Cases and Principal Matters*, Vol. 2, Sweet and Maxwell, London, 1828, *id.*, Note 27 above, at p. 302.

282 *Id.*, at p. 302.

283 *Id.*, at p. 303.

284 *Three Rivers District Council v. Governor and Company of The Bank of England* (No. 3) [2001] UKHL 16 2001 WL 239757.

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‘[F]irst, there must be an unlawful act or omission done or made in the exercise of power by the public officer. Second, as the essence of the tort is an abuse of power, the act or omission must have been done or made with the required mental element. Third, for the same reason, the act or omission must have been done or made in bad faith. Fourth, as to standing, the claimants must demonstrate that they have a sufficient interest to sue the defendant. Fifth, as causation is an essential element of the cause of action, the act or omission must have caused the claimants’ loss.’<sup>285</sup>

These requirements place several obstacles in the path of a bribery claim against a public officer on the grounds of misfeasance in public office. The claimant must be able to prove that the public officer knew that he was acting unlawfully in taking a bribe. The plaintiff must also be able to establish a causal connection between the injury suffered and the actions of the public official. Furthermore, the plaintiff must show: (1) that the public official intentionally sought to cause a loss to the plaintiff by taking the bribe, (2) that he could have foreseen the loss to the plaintiff, and (3) that the public official willfully disregarded that risk.

These are significant hurdles that make the path of a claim for bribery on the grounds of misfeasance in public office an unlikely one for victims of public bribery.

### 5.5.6 Tortious Interference

Where a party intentionally uses unlawful means to cause economic loss to another, such a party is liable for causing this loss.<sup>286</sup> There must be an intention to cause harm as well as the use of an unlawful means. Where a party, using lawful or unlawful means, intentionally induces another person to breach a contract that he knew existed between such a person and another party, he is liable for the loss occasioned by such conduct. Such improper interference with another’s business or contracts is a tort whose precise scope is still in the process of being defined by the courts of law.<sup>287</sup>

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285 *Id.*, at Para. 42.

286 Lord Bridge recognizes the tort of unlawful interference with business stating, ‘[T]here evolved from the 19th century cases the clear and salutary principle that a person who does an intentional unlawful act in the furtherance of his own business interest, or who aims to injure another and as a result causes damage to that other in the form of economic loss, or alternatively, economic loss relating to his business, has committed an actionable tort.’ See *Lonrho Plc v. Fayed and Others* [1992] 1 A.C. 448, at p. 455.

287 J. Bentil, ‘Improper interference with another’s business or trade interest as a tort’, *Journal of Business Law*, November 1993, pp. 519-543, remarks ‘However, whilst essential aspects of the law relating to the tort of conspiracy to injure another’s business or commercial interest may now have come to be clarified and settled; those in respect of the law relating to the tort of

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A bribe can be considered unlawful interference with a contract to the extent that the bribe-giver is committing a legal wrong, and knows that a legal wrong is being committed in the proffering of a bribe. The bribe-giver also knows that the giving of the bribe will cause the agent to stand in breach of the contract with the principal. Such an act of bribery can fall under the claim of wrongful interference with the trade of the principal to the extent that it may cause economic loss to the principal. As a result of the bribe given to the agent, the principal does not get the best possible conditions of trade. However, these are new and developing torts whose precise scope under English law is uncertain.<sup>288</sup> Certainly as compared with the existing position of the law on bribery, there is not much merit in pursuing this course of action. Bribery as a *sui generis* tort does not require proof of reliance or intention; these are irrebuttably presumed against the person offering the bribe. It does, however, require proof of loss (beyond the actual sum of the bribe), as do most torts. Therefore, taking the route of the bribery claim as a *sui generis* tort is a simpler, less burdensome route.

### 5.5.7 The Public Interest Litigant

In recent years a new class of claimant in bribery-related claims has come to the fore. The Corner House, a non-governmental organization that supports democratic and community movements for environmental and social justice, has brought several high-profile claims regarding the fight against corruption in England.

In December 2004, The Corner House instituted legal proceedings against the UK's Secretary of State for Trade and Industry, Ms. Patricia Hewitt, claiming that the UK Export Credits Guarantee Department (ECGD) had weakened its rules aimed at reducing corruption without consulting The Corner House or other interested NGOs. The Corner House claimed that the ECGD had, however, 'carried out extensive and detailed consultation with its corporate customers and their representatives,' who had lobbied the ECGD intensively on these rules. This, they argued, was 'a serious breach of basic public law

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unlawful interference with another's business or commercial interest may be said to be at an embryonic stage waiting to be fully developed and settled.', at p. 542.

288 Carty notes that 'the common law having no general tort of unfair competition, the economic torts represent its chosen method to attack excessive (rather than simply aggressive) competition or economic endeavour, whether through diversion of custom or attacks on commercial links.' She argues that there is a need to provide a base line for the torts generally grouped together as economic torts and adds that it 'is imperative that the courts resolve as soon as possible this messy mix of individual torts and imprecise ingredients.' H. Carty, *An Analysis of the Economic Torts*, 2nd edn, OUP, Oxford, 2010, at pp. 2 and 301, respectively.

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standards of fairness and the ECGD's own published consultation policy.<sup>289</sup> The Corner House was awarded a full 'protective costs order' for a judicial review. This meant that it would not have to pay the government's legal costs if it lost because it was bringing the case in the public interest. The government settled out of court and agreed to instigate a full public consultation on its changes to its anti-corruption rules, and to pay The Corner House's legal costs.<sup>290</sup>

In April 2007, The Corner House and the Campaign against Arms Trade (CAAT) instituted an action for the judicial review of the UK's Serious Fraud Office's decision in December 2006 to end its investigation into alleged corruption by BAE Systems in Saudi Arabia. The High Court found for Corner House stating that:

'the court has a responsibility to secure the rule of law. The Director of the Serious Fraud Office (SFO) was required to satisfy the court that all that could reasonably be done had been done to resist the threat. He has failed to do so. He submitted too readily because he, like the executive, concentrated on the effects which were feared should the threat be carried out and not on how the threat might be resisted. No-one, whether within this country or outside is entitled to interfere with the course of our justice. It is the failure of Government and the defendant to bear that essential principle in mind that justifies the intervention of this court.'<sup>291</sup>

The High Court formally quashed the SFO's decision to drop its corruption investigation into arms deals between BAE Systems and Saudi Arabia. It gave the SFO permission to appeal to the House of Lords against its ruling that the SFO's termination of the investigation was unlawful. In July 2008 the House of Lords overturned the High Court's ruling of April 2008. They held that the Director's discretion to drop criminal proceedings legally extended to taking account of the threat uttered by Saudi Arabia that it would withdraw diplomatic and intelligence co-operation with the UK if the investigation continued, even though the threat was 'ugly and obviously unwelcome.'<sup>292</sup>

These cases show an increased willingness by private sector participants to intervene in cases involving international corruption. The response of the

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289 *Corner House Research, R (on the application of) v. Secretary of State for Trade & Industry* [2005] EWCA Civ. 192.

290 See Corner House Double Victory on UK Government Department's Anti-Bribery Rules and Public Interest Litigation, available at <http://www.thecornerhouse.org.uk/item.shtml?x=107362>.

291 *Corner House Research & Campaign against Arms Trade, R (on the application of) v. Director of the Serious Fraud Office & Anor* [2008] EWHC 714 at Para. 171.

292 *Corner House Research & Ors, R (On the Application of) v. The Serious Fraud Office* [2008] UKHL 60 Para. 41.

courts in permitting the applications and providing an unprecedented full protective costs order to enable such public interest litigation, represents a broadening of the spectrum of the parties that can use the civil courts to challenge the occurrence of corruption and bribery under English law.

#### 5.5.8 Shareholder Litigation

Shareholders of a company may bring an action against directors who pay bribes to secure a contract. However, as the *City of Harper Woods Employees' Ret. Sys. v. Oliver* case shows, the application of English law may make this difficult.<sup>293</sup> In this case a US federal appeals court affirmed the dismissal of a shareholder derivative suit against some current and former directors and executives of BAE Systems PLC. BAE is a publicly owned corporation incorporated in England and Wales. It operates in the United States through its subsidiary BAE Systems, Inc. The suit was filed in 2007 by the City of Harper Woods (Michigan) Employees' Retirement System. The complaint alleged payment of more than \$2 billion in bribes and kickbacks to Prince Bandar bin Sultan of Saudi Arabia. The alleged purpose was to secure for BAE the \$80 billion Al-Yamamah contract from the Saudi Arabian Ministry of Defense for the sale of jet fighters and trainers. The suit claimed the defendants had breached their fiduciary duties and wasted corporate assets.

Harper Woods alleged that the BAE defendants engaged in:

‘intentional, reckless, and/or negligent breaches of their fiduciary duties of care, control and candour, involving illegal, improper, and/or ultra vires conduct, including causing BAE to violate the laws of the United States and international business codes and conventions ... by making, or permitting to be made, improper and/or illegal bribes, kickbacks and other payments.’

According to Harper Woods, the BAE defendants ‘caused BAE to engage in a pattern and practice of making illegal and improper payments to secure contracts and false and misleading statements to conceal and cover them up,’ in violation of U.S. and United Kingdom law. Specifically, Harper Woods alleged that the BAE defendants ‘undertook illegal and improper conduct ... in breach of their fiduciary duties to BAE,’ including paying more than \$2 billion in bribes and kickbacks to Prince Bandar bin Sultan of Saudi Arabia in order to obtain a large contract (known as the Al-Yamamah contract) from the Saudi Arabian Ministry of Defence. Harper Woods further alleged that the ‘illegal or improper payments were secretly bargained for at the outset of the Al-Yamamah contract,’ and that Bandar received most of this money in

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293 *City of Harper Woods Employees' Ret. Sys. v. Oliver*, 577 F. Supp. 2d 124 (D.D.C. 2008).

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Washington, DC, via an account at Riggs Bank. Harper Woods sought damages (including punitive damages), an accounting by the defendants, and an order directing BAE to undertake certain corporate governance reforms.

The trial court had applied English law to the case. It found that the Harper Woods pension fund had no standing to act as plaintiff. The United States Court of Appeals for the District of Columbia agreed. It said that under the 1843 English case of *Foss v. Harbottle*,<sup>294</sup> ‘the company, not a shareholder, is the proper plaintiff in a suit seeking remedies for wrongs allegedly committed against the company.’ Furthermore, the court found that Harper Woods had failed to demonstrate that an exception to the rule of *Foss v. Harbottle* applies in this case. It also found that even if the defendants had paid bribes that broke the law, they had not acted beyond the scope of their legal authority. In English law, an *ultra vires* act is an act ‘beyond the corporate capacity of a company.’ The court pointed to the case of *Arab Monetary Fund v. Hashim*<sup>295</sup> as authority for the fact that the payment of a bribe does not constitute an act that is *ultra vires* the capacity of the company.

### 5.6 Observations

The English rules against corruption have moved from the public to the private sphere in a progression from judicial and ministerial corruption, to political corruption, to corruption in commercial relationships, to corruption occurring in foreign countries. The 2010 Bribery Act merges all these stages in a comprehensive instrument that covers public, private, national and international bribery. The Bribery Act replaces and repeals the English common law offenses of bribery as well as existing statutory laws. Nonetheless the common law and statutory instruments provide useful insight into the development, scope and nature of corruption as a legal wrong in the United Kingdom. As such, they remain important elements in an understanding of English anti-corruption law.

Corruption is expressed in terms of bribery over criminal and civil law jurisprudence. The distinguishing feature of the commission that constitutes a bribe is that it is given in secret and its transfer involves a conflict of interest. English law clearly sees bribery as a grievous problem and this is reflected in successive acts of criminalization. From 1889 until the 2010 Bribery Bill there has been a concerted effort to address the damage that corruption causes within the society. The moral basis for the criminal law injunction is also evident in

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294 (1843) 67 E.R. 189,

295 *Arab Monetary Fund v. Hashim* [1993] 1 Lloyd’s Rep. at p. 569.

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the civil law regime. Here the focus is also on the perpetrators and how to remedy the breach of a duty that has occurred in order to act in the best interests of another person. In this sense, the bribery claim can be said to have a regulatory function

The primary victim of corruption under English civil law is the principal in an agency relationship. There are indeed other opportunities to file private claims using rules developed relating to the abuse of public office, the economic torts of unlawful interference with contractual and trade relations, shareholder litigation, and public interest litigation. However, these present significant burdens of proof of causality or lack of standing for the potential claimant.

An important question is the extent to which the historical principal/agency formulation can be stretched to accommodate a broader spectrum of victims of corruption. The challenge is how to accommodate within the principal/agent formulation parties who are not principals in a contractual sense without losing the certainty and clarity that enables persons to know what the precise scope of their obligations are under the law. At the same time, too narrow an interpretation may leave persons who have suffered loss as a result of corruption without redress.

Cases like the *Khalid* case show that it is the existence of a fiduciary relationship that triggers private remedies for bribery. While there is clearly a fiduciary relationship in every principal-agent relationship, the fiduciary obligation may also arise in the absence of any contractual relationship. In determining the agency relationship in claims tainted by corruption, there is some element of judicial discretion with regard to the expression fiduciary. The courts have departed from traditional categorizations and imputed a fiduciary duty, where a position of authority is misused, even if there is no strict principal-agent relationship. Indeed the courts have stated that the expression fiduciary is used in a ‘*wide and loose sense*’ in settings such as the *Reading* case, which involved the receipt of bribes by virtue of position.

The courts have imputed a fiduciary relationship where there was no contractual relationship between the party to whom a duty was owed and the party who took the bribe, but where the *factual matrix* pointed to a fiduciary relationship as in the *Daraydan* case. The breach of the duty to act in the best interest of another lies at the heart of the claim for bribery. Wherever this duty exists, it can be argued that there is a party whose right to a duty of loyalty has been breached. Simply put, the fiduciary nature of the duty is what identifies the parties rather than any formal classification.

If this is the case, the concept of the principal-agent is very fluid and can arguably be stretched to cover cases that do not typically fall within the

## PRIVATE REMEDIES FOR CORRUPTION

commercial principal-agent relationship. It can give a right of suit to any party who holds a position in a 'fiduciary' relationship. Such a party would then have the right to proceed against the disloyal party (for example, public officials) as well as the bribe-giver (for example, the corporation that proffers the bribe to influence the acquisition of business). Adopting a loose definition of the concept of fiduciary may give persons to whom a duty of loyalty is owed by their elected representative the standing to proceed against bribe paying corporations as well as public officials, since damage or injury is not the basis for the claim but rather the breach of fiduciary duty.

In the 2010 Bribery Act, the principal-agent terminology is done away with altogether. Rather, the Act speaks of persons who have a duty to perform a function in good faith or with impartiality, or who are in a position of trust. It remains to be seen what effect this abandonment of the agent/principal terminology may have on the private claim for redress. Is the legal test of good faith or proper performance as espoused in the Act sufficient to justify intervention of the court into private transactions in a bid to deter bribery? Or is a fiduciary relationship necessary for the intervention of the court? Does removing the principal/agent formulation make it easier for parties that fall outside this formulation to bring a bribery claim or can the concept of agent and principal be stretched to include such indirect claimants? A related question is what triggers the intervention of the court in the bribery claim? Is the primary focus solely the rights of the parties before the court or are there larger purposes that can be deduced from the court's jurisprudence regarding the private action for bribery?

The replacement of the principal-agent relationship with the concepts of good faith, impartiality and the position of trust under the Bribery Act, arguably widens the doors of the court's discretion to entertain claims from a broader spectrum of claimants. Such an approach could broaden the conceptual basis of the bribery claim. It moves beyond being an avenue for the enforcement of private rights in private transactions to a method of ensuring that transactions that militate against social, economic and cultural development are deterred.

The payment of a *secret* commission that gives rise to a conflict of interest is the distinguishing feature of a bribe under English civil law. Secrecy is more than 'bare knowledge' but requires that the principal be fully informed of all circumstances relating to the payment of a commission to an agent and not have to make further inquiry. The element of secrecy helps to expose payments that are dressed up as *legal* commissions as bribes. Secrecy has been described as the line of demarcation that must be firmly drawn by the courts. Secrecy in the payment of the commission triggers the breach of the fiduciary duty that exists between the agent and principal. The principal has a right to the single-minded loyalty of the agent, and where this is breached the law exerts an

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extensive liability to account on the disloyal agent and the party causing the agent to breach the duty to act in the best interest of the principal.

Defenses that can be made against the bribery claim are that there was no secret gift or inducement offered. This will be the case where the principal was aware of the transaction. Another possible line of defense is that such payments are acceptable in course of business or customary under an applicable law. A further line of defense is that there was no fiduciary relationship and therefore no duty of loyalty to breach. This list is not exhaustive but the response of the courts show that the essential nature of the transaction is the decisive factor. ‘Smokescreens’ and attempts to camouflage the nature of the transaction will usually not succeed.

The Bribery Act does not expressly provide that the primary agreement to give a bribe is void. However, by using language prohibiting the ‘offer or promise’ or ‘agreement’ to receive a bribe, this will clearly cover a contract that evidences the agreement to give or receive a bribe. The primary contract to give a bribe is one that will not be enforced by the English courts and the plaintiff will be faced with the application of the *ex turpi causa* principle. The courts will leave the parties as they found them and not assist the plaintiff in benefiting from wrongdoing. This clearly benefits the defendant at the expense of the plaintiff, but as the courts have pointed out this is not a question of justice between the parties but rather an issue of public policy.

The secondary contract between the bribe-giver and the party to whom a duty of loyalty is owed is a contract that results from unauthorized acts of an agent. Such an agreement is voidable unless the third party can rely on the doctrine of apparent authority. However, in the situations where the third party is actually involved in the agent’s breach of duty, as is typically the case in a bribery exchange, there can be no application of the doctrine of apparent authority. It would seem from the rulings in the *Logicrose* case and the *World Duty Free* case that the contract is not *void ab initio*. This would result in harm to the principal, who has already suffered the disloyalty of the agent. These rulings hold that the secondary contract is voidable at the instance of the principal. The secondary contract therefore remains valid at the prerogative of the principal.

The principal offenders from the viewpoint of civil law are the disloyal agent and the bribe-giver. On the part of the disloyal agent, stripping the agent of any profit gives the principal the right to recover the bribe, to recover the profits resulting from the bribe, to recover any loss suffered as a result of the actions of the agent, and may also justify the termination of the contract. On the part of the bribe-giver, the principal is given the right to recover the bribe, to recover any loss suffered as a result of the actions of the principal’s agent, to rescind the contract resulting from the bribe, and to account to the principal for the benefits arising from the bribe paid to the principal’s agent. The well-accepted

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proprietary right of the principal to any benefits arising from the bribe is now under question with the recent *Sinclair Investment v. Versailles* ruling. The Court of Appeal has now denied the principal a proprietary right to the proceeds of a breach of fiduciary duty. The Court expressly rejected the *AG v. Reid* ruling and upheld the *Lister v. Stubbs* position. This is clearly a setback for the line of reasoning that sees the complete disgorgement of any and all profits arising from a bribery transaction as an important public policy statement, and the manifestation of a deterrent function that is in keeping with the criminal prohibitions that underlie the civil law on bribery.

### 5.7 Conclusion

This chapter has shown that the pursuit of claims by persons who have suffered damage as a result of corruption has engendered the response of courts not just to undo the damage caused by the acts of bribery but also to serve a larger function of deterrence that echoes criminal law. The principle that persons should not profit from their wrongful actions has pushed the boundaries of civil law response beyond mere restitution and compensation. This is reflected in remedies that seek to strip away the profits obtained by virtue of the crime and denying the underlying primary and secondary contracts of validity.

The bribery claim in English civil law can be described as a quasi-public claim. The cases and approach of the courts show that the effect of bribery on the social, economic and cultural development of English society plays a prominent role in their decision making. Even though the parties are asserting private rights, the public law implications of their actions override the traditional viewpoint of the function of private law as serving an essentially compensatory function. The intrusion of public policy is reflected in the tendency of the courts to adopt rulings that seek to deter and punish in a manner that reflects classical criminal law theory.

Beyond the traditional principal-agent claims, where the private claimant enjoys the benefit of the court's strict approach to the breach of the fiduciary duties, the path for the private claimant is not so clear. Nonetheless elements such as: (1) the broadening of the base of plaintiffs who can institute a bribery claim by imputing the fiduciary relationship where the facts indicate such as a relationship; (2) the emphasis on deterring the practice of bribery; (3) the unenforceability of the primary agreement to give a bribe by the plaintiff; (4) the unenforceability of the secondary agreement at the prerogative of the aggrieved principal of contracts resulting from bribery; (5) the development of public interest litigation; (6) nascent shareholder litigation; as well as (7) the possibility of claims for tortious interference, provide a framework by which civil law can augment the foundations laid by the criminalization of bribery and corruption in the bid to rid society of what the English judges has described as the 'evil' that is bribery.



# CHAPTER 6

## PRIVATE REMEDIES IN THE NETHERLANDS

### 6.1 Introduction

The Netherlands is one of the ten least corrupt countries in the world. However, along with the rest of Europe it is caught up in an intense effort to review and strengthen its anti-corruption strategies.<sup>1</sup> The Dutch authorities have been evaluated as being aware of the ‘potential dangers of corruption’ and are occupied with ‘continuous pro-active actions’ with regard to integrity. This active anti-corruption strategy, even in a country where corruption is arguably not the most pressing of problems, can be viewed as a testament to the interconnectedness of a globalized world. The negative effects and impact of corruption call for a coordinated response by all players in the world market, regardless of their position on the Transparency International Index.<sup>2</sup>

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- 1 See *Evaluation Report on the Netherlands, Reporting in the Second Evaluation Round*, Greco Evaluation II Rep (2205) 2E, Council of Europe, GRECO-Group of States against Corruption, p. 14, Para. 46, and at p. 21 Para. 73. [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval2\(2005\)2\\_Netherlands\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval2(2005)2_Netherlands_EN.pdf). In a recent study for the Ministry of Justice Research and Documentation on Public Corruption in the Netherlands, the authors concluded that ‘research on criminal cases and convictions based on the corruption articles in the Penal Code support the image that the corruption problem in the Netherlands is rather limited’. See L. Huberts, J. Nelen, *Corruption in Dutch Public Administration, Scope, Character and Findings (Corruptie in het Nederlandse openbaar bestuur omvang, aard en afdoening)*, Boom Lemma, Utrecht, 2005, at p. 153. <http://www.wodc.nl/onderzoeksdatabase/aard-en-omvang-corruptie-in-nederland.aspx#project-informatie>. However, this may be a question of perception and what is actually being evaluated. In the introductory chapter of his book, van Hulten makes a strong argument that corruption is as much a problem in the Netherlands as it is elsewhere. See M. van Hulten, *Corruption, Unknown, Not Reduced and Present Everywhere (Corruptie onbekend, onbemind, alomtegenwoordig)*, Boom, Amsterdam, 2002. The persistent allehation of fraud in the building sector may be an indication of this. See the *Parliamentary Inquiry in Fraud in the Building Sector (Eindrapport Parlementaire Enquetecommissie Bouwnijverheid, Vergaderjaar 2002-2003, Kamerstuk 28244 nr. 6)* which confirmed the problem of large scale fraud in this sector.
  - 2 On 1 December 2011, the Netherlands, with a score of 8.9, was listed as No. 7 (and No. 5 in the EU and Western Europe) after New Zealand, Denmark, Finland, Sweden and Norway in the *Corruption Perceptions Index* 2011 published by Transparency International. <http://cpi.transparency.org/cpi2011/results/>

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There has been considerable development in anti-corruption initiatives in Europe. As Corstens points out, the issue of corruption has been a topical issue in Europe for a significant time.<sup>3</sup> In the Netherlands, significant changes have been made to Dutch law as a result of the ratification of several international anti-corruption instruments.<sup>4</sup> It is safe to say that effective implementation of anti-corruption rules have entered the mainstream of policy concerning Dutch business transactions. However, most studies and research done on the reform of corruption law have focused mainly on criminal aspects as well as the resulting criminal consequences of breaches of the criminal law.<sup>5</sup>

The prosecution of cases involving foreign bribery in the Netherlands is quite limited. In the Netherlands Phase 2 Follow up Report on the Implementation of the OECD Convention, for example, the Netherlands admitted that as of ‘October 2008, no foreign bribery cases had been brought before the Dutch

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- 3 G. Corstens, ‘European Initiatives against Corruption’ (Europese initiatieven tegen corruptie), in A. Hartmann, E. Pols, (Eds.), *Corruption from Taboo to Social Change, (Corruptie: van taboe naar sociale verandering)*, Vol. 27 SI-EUR, Gouda Quint, Deventer, 2001, pp. 21-30.
  - 4 See ‘The Law on the Reform of Certain Public Servant Offenses’ in the Dutch Penal Code to adjust certain provisions in the Penal Code, Art. 51 Extradition Law, and Art. 67-67(a) Criminal Procedure Rules, in view of the ratification of certain Treaties relating to the fight against Fraud and Corruption (Corruption Law Reform), *Staatsblad van het Koninkrijk der Nederlanden*, Vol. 2000, 616 (Official Gazette, 28 December 2002, No. 616), which entered into effect 1 February 2001 (Wet van 13 december 2000 tot herziening van een aantal strafbepalingen betreffende ambtsmisdriven in het Wetboek van Strafrecht alsmede aanpassing van enkele bepalingen van het Wetboek van Strafrecht, van artikel 51a van de Uitleveringswet en van de artikelen 67 en 67a van het Wetboek van Strafvordering in verband met de goedkeuring en uitvoering van enkele verdragen inzake de bestrijding van fraude en corruptie (herziening corruptie-wetgeving)). This effected changes in the Dutch criminal laws as a result of the ratification of the international anti-corruption instruments such as the Convention on the Protection of the European Communities financial Interests, 26 July 1995, and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997.
  - 5 Examples of recent research include H. Addink, J. ten Berge, ‘The study on innovation of legal means for eliminating corruption in the public service’, *Electronic Journal of Comparative Law*, Vol. 11.1, May 2007, <http://www.ejcl.org>; L. Huberts, (Ed.) *Public Corruption and Fraud in the Netherlands (Bestuurlijke corruptie en fraude in Nederland)*, Gouda Quint, Arnhem, 1992; L. Huberts, H. Hulsebosch, K. Lasthuizen, C. Peeters, *The Netherlands a Fraud and Corruption Country? The Scope, Background Findings of research on corruption and fraud in Dutch City Councils in 1992 and 2003 (Nederland fraude en corruptie land? De omvang, achtergronden en afwikkeling van corruptie- en fraude onderzoeken in Nederlandse gemeenten in 1991 en 2003)*, Working paper, Vrije Universiteit, Amsterdam, 2004; H. Nelen, A. Nieuwendijk, *Not ABC: An Analysis of National Police Internal Investigations Department Research into Public Servant and Government Corruption (Geen ABC: Analyse van rijksrechercheonderzoeken naar ambtelijke en bestuurlijke corruptie)*, Boom Juridische Uitgevers, The Hague, 2003; H. de Doelder, G. Smid, ‘The United Nations Convention against Corruption: Useful for the Netherlands?’, (‘Het Verdrag van de Verenigde Naties tegen corruptie: waardevol voor Nederland?’), *Delikt en Delinkwent* Vol. 36, No. 8, 2006, pp. 833-854; L. Hubert, J. Nelen, *Corruption in Dutch Public Administration, Scope, Character and Findings (Corruptie in het Nederlandse openbaar bestuur omvang, aard en afdoening)* Boom Lemma, Utrecht, 2005.

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courts.<sup>6</sup> However, out-of-court settlements with respect to seven companies accused of paying kickbacks in the context of the Oil-for-Food Program in Iraq were achieved (although the offense charged was the violation of legislation relating sanctions on Iraq and not the foreign bribery offense).<sup>7</sup> More recently, in October 2010 Royal Dutch Shell is reported to have paid out \$10m (£6.3m) in fines to the Nigerian government, following allegations of bribes paid on its behalf by freight forwarding company Panalpina to Nigerian government officials. The fines were part of the settlement of Foreign Corrupt Practices Act (FCPA) charges following an investigation launched in early 2007 that involved up to a dozen energy companies that were customers of Panalpina.<sup>8</sup>

Apart from these developments in criminal processes the ambit of anti-corruption strategy has been further broadened by the entry into force, in the Netherlands, of the United Nations Convention against Corruption (UNCAC)<sup>9</sup>

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6 The Netherlands. Review of Implementation of the Convention and 1997 Recommendation, p. 1, available at <http://www.oecd.org/dataoecd/39/43/2020264.pdf>; see also The Netherlands: Follow-up Report on the Implementation of the Phase 2 Recommendations, p. 3 Para. 2. [http://www.oecd.org/topicdocumentlist/0,3448,en\\_33873108\\_33873626\\_1\\_1\\_1\\_1\\_37447,00.html](http://www.oecd.org/topicdocumentlist/0,3448,en_33873108_33873626_1_1_1_1_37447,00.html)

7 The Dutch Prosecution Department reports 'that it has concluded financial transactions (out of court settlements) with 7 companies for violating sanction legislation by paying kickbacks when implementing the Oil for Food Programme.' Criminal gains have also been confiscated. In July 2008 a press release was issued about these settlements. Together with names of the companies (Alfasan International B.V., N.V. Organon, Flowsolve B.V., OPW Fluid Transfer Group Europe B.V., Prodetra B.V., Solvochem Holland B.V., Stet Holland B.V.), the settlements have been made public. For the following Oil-for-Food transactions out-of-court settlements have been reached: 1. Alfasan International B.V., Woerden, fine: € 31,800 and confiscation: € 10,183.55; 2. N.V. Organon, Oss, fine: € 381,602; 3. Flowsolve B.V., Etten-Leur, fine: € 76,274 and confiscation: € 180,260; 4. OPW Fluid Transfer Group Europe B.V., Nieuw Vennep, fine: € 57,204 and confiscation: € 24,600; 5. Prodetra B.V., Wadinxveen, fine: 64,751 and confiscation: € 34,485.95; 6. Solvochem Holland B.V., Rotterdam, fine: € 136,000 and confiscation: € 144,592; 7. Stet Holland B.V., Emmeloord, fine: € 119,712 and confiscation: € 54,458. See The Netherlands Follow-up Report, id., Note 6 above, at p. 14.

8 The Securities and Exchange Commission reported that from September 2002 through November 2005, Shell International Exploration and Production Inc., on behalf of Shell, authorized the reimbursement or continued use of services provided by a company acting as a customs broker that involved suspicious payments of approximately \$3.5 million to officials of the Nigerian Customs Service in order to obtain preferential treatment during the customs process for the purpose of assisting Shell in obtaining or retaining business in Nigeria on Shell's Bonga Project. As a result of these payments, Shell profited in the amount of approximately \$14 million. None of the improper payments were accurately reflected in Shell's books and records, nor was Shell's system of internal accounting controls adequate at the time to detect and prevent these suspicious payments. See 4 November 2010 Royal Dutch Shell Plc. and Shell International Exploration and Production Inc. Other Release Number(s): AAER-3204 <http://www.sec.gov/litigation/admin/2010/34-63243.pdf>.

9 United Nations Convention against Corruption (Verdrag van de Verenigde Naties tegen Corruptie) 31 October 2003, *Tractatenblad van het Koninkrijk der Nederlanden*, Vol. 44, 2003, No. 3, Vol. 2006, No. 266, entered into force 30 November 2006. See for general overview H. de Doelder, G. Smid, 'The United Nations Convention against Corruption: Useful for the Netherlands?' ('Het Verdrag van de Verenigde Naties tegen corruptie: waardevol voor Nederland?'), id., at Note 5 above.

and the Civil Law Convention on Corruption (CLC).<sup>10</sup> These conventions, which call for effective remedies for persons who have suffered damage as a consequence of corruption, motivate the development of strategies centered on private remedies in the implementation of Dutch anti-corruption laws. In this respect, Tak points out that there has not been much published about the private law effects of bribery in Dutch literature.<sup>11</sup> He identifies the dissertation on *Steekpenningen* (Bribery) written in 1925 by Salomonson,<sup>12</sup> the article on *Enige civielrechtelijke gevolgen van omkoping* (Certain Civil Law Consequences of Corruption)<sup>13</sup> written in 1982 by de Savornin Lohman; as well as the 1994 publication by Dorresteyn, *Corruptie en Privaatrecht* (Corruption and Private Law)<sup>14</sup> as the primary academic literature in this regard. More recently, Eltjo Schrage made private remedies for corruption the subject of his valedictory lecture at the University of Amsterdam.<sup>15</sup> These writings lay the foundation for a central question that is now made more urgent by the obligations of the Netherlands under its domestication of the UNCAC and CLC, *i.e.*: what potential exists under Dutch private law for private remedies for persons who have suffered damage as a result of corruption?

The notion of non-criminal redress for corruption is one that is receiving increased interest. In 2001 Hartmann identified three primary avenues for non-criminal law redress under the Dutch system.<sup>16</sup> The first involves using administrative penalties such as fines or the withdrawal of permits and subsidies where acts of corruption have been committed by persons. A second aspect is the rules relating to the laws relating to professional misconduct. A

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10 Civil Law Convention on Corruption (Burgerrechtelijk verdrag inzake Corruptie), *Tractatenblad van het Koninkrijk der Nederlanden*, Vol. 2008, No. 27, entered into force 1 April 2008.

11 See P. Tak, Private Commercial Bribery: A Comparison of National and Supranational Legal Structures, in G. Heine, B. Huber, T. Rose (Eds.), *Private Commercial Bribery: A Comparison of National and Supranational Legal Structures*, Paris, ICC, 2003, pp. 275-317, p. 303.

12 L. Salomonson, Bribery (*Steekpenningen*), Dissertation, Vilders, Leiden 1925, p. 24.

13 O. de Savornin Lohman, Certain Civil Law Consequences of Corruption (Enige civielrechtelijke gevolgen van omkoping), in *Lugdunum Batavorum Juri Sacrum: 1882-30 januari-1982: rechtsgeleerde opstellen vervaardigd door leden van het Leids Juridisch Dispuut 'Juri Sacrum' ter gelegenheid van het honderdjarig bestaan van het Dispuut*, Kluwer, Deventer, 1982, pp. 127-158.

14 A. Dorresteyn, *Corruption and Private Law (Corruptie en privaatrecht)*, Gouda Quint, Arnhem, 1994.

15 E. Schrage, Private Law Redress for Bribery (Privaatrechtelijke aanpak steekpenningen) (, Valedictory Lecture, University of Amsterdam, 21 October 2010.

16 A. Hartmann, The New Anti-Corruption Rules in the Dutch Penal Code (De nieuwe anti-corruptiebepalingen in het Nederlandse wetboek van strafrecht), in A. Hartmann, E. Pols (Eds.), *Corruption: from Taboo to Social Change (Corruptie: van taboe naar sociale verandering)*, Vol. 27, SI-EUR, Gouda Quint, Deventer, 2001, pp. 31-49.

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third avenue is the private civil actions<sup>17</sup> resulting from a breach of the obligations between persons as a result of an act of corruption.

On the issue of administrative recourse, Hartmann points out that although corruption is generally not considered suitable for administrative sanctions (because it falls into a category of actions that are normally punished by the criminal process and therefore excluded from administrative sanctions). Administrative sanction is nonetheless possible, in his opinion, where conditions and requirements are clearly set out. He points, for example, to the *Wet bevordering integriteitsbeoordelingen door het openbaar bestuur* (Wet Bibob) (Promotion of Integrity Reviews by the Public Administration Act). This law enables administrative bodies such as city councils and ministries to check the integrity of corporations or applicants for permits or subsidies. Such a permit or subsidy can be denied where an applicant fails to meet the necessary conditions.<sup>18</sup> Involvement in acts of corruption would clearly fall within such a lack of integrity. He also points to the possibility of suspending permits or subsidies as activities within the powers of administrative bodies that can be used in the fight against corruption by making such permits or subsidies subject to the fulfillment of required conditions.<sup>19</sup>

Hartmann, however, raises an important question that relates closely to the question of private remedies by victims of corruption. He notes that while the unlawful nature of corrupt transactions can lead to private legal consequences in the form of damages or the payment of fines, the question remains whether such administrative procedures and civil sanctions are a *suitable* approach to adopt in the fight against corruption. The ultimate result of a private action, similar to an administrative action, is monetary compensation. Hartmann points out that the symbolic value of punishment via the criminal process brings with it a certain moral weight that is appropriate in the punishment of corruption, and that the criminal process helps to underscore the societal rejection of corruption. This, in his opinion, is an important function of using the criminal process to fight corruption.<sup>20</sup>

Hartmann's comments about the various non-criminal modes of redress present a broader picture of the possibilities of non-criminal redress for corruption that exist under Dutch law. However, this chapter is concerned primarily with private remedies for corruption that center upon the private obligations and agreements that are affected by corrupt exchange as well as the right to

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17 Id., at pp. 45-47.

18 Id., at p. 46.

19 Id., at p. 47.

20 Id., at pp. 47-48.

institute legal proceedings by persons who have suffered injury as a result of corruption.

## 6.2 The Normative Framework

The normative framework that governs private remedies for corruption from the perspective of Dutch Law is derived from three principal sources: firstly, international instruments that have been incorporated into Dutch Law; secondly, the Dutch Penal Code (DPC), which criminalizes public and private corruption thereby laying the foundations for private remedies for such ‘wrongful’ acts; and thirdly, the Dutch Civil Code (DCC), whose rules determine the specific avenues of redress available where corruption occurs in private relationships.

### 6.2.1 International Instruments

The Netherlands is a party to major regional and international conventions regulating international corruption. These include the Convention on the Protection of the European Communities Financial Interests of 26 July 1995 drawn up on the basis of Art. K.3 Treaty on European Union;<sup>21</sup> the EU Convention on the Fight against Corruption involving officials of the European Communities or officials of the EU Member States;<sup>22</sup> The OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions;<sup>23</sup> the EU Council Framework Decision against Corruption in the Private Sector;<sup>24</sup> the Criminal Law Convention on Corruption of the Council of Europe;<sup>25</sup> the Civil Law Convention on Corruption of the Council of Europe;<sup>26</sup>

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- 21 Convention on the Protection of the Financial Interests of the European Communities, OJ C 316, 27 November 1995.
- 22 Council Act of 26 May 1997; drawing up the Convention made on the basis of Art. K.3(2)(c) Treaty on European Union, on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, OJ C 195, 25 June 1997, [http://europa.eu/legislation\\_summaries/fight\\_against\\_fraud/fight\\_against\\_corruption/l33027\\_en.htm](http://europa.eu/legislation_summaries/fight_against_fraud/fight_against_corruption/l33027_en.htm).
- 23 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Paris, 27 November 1997, in force 15 February 1999, 1998, 37 ILM, p. 1. The Netherlands has ratified the Convention and enacted implementing legislation. For details of implementation status see [http://www.oecd.org/document/21/0,3746,en\\_2649\\_34859\\_2017813\\_1\\_1\\_1\\_1,00.htm](http://www.oecd.org/document/21/0,3746,en_2649_34859_2017813_1_1_1_1,00.htm). (Hereinafter referred to as the OECD Convention).
- 24 Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, [http://europa.eu/legislation\\_summaries/fight\\_against\\_fraud/fight\\_against\\_corruption/l33308\\_en.htm](http://europa.eu/legislation_summaries/fight_against_fraud/fight_against_corruption/l33308_en.htm).
- 25 Criminal Law Convention on Corruption (Verdrag inzake de strafrechtelijke bestrijding van corruptie); Strasbourg, 27 January 1999, Trb. 78, 1999, No. 3, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm>, entered into force in the Netherlands on 1 August 2002.

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the United Nations Convention against Transnational Organized Crime,<sup>27</sup> and the United Nations Convention against Corruption.<sup>28</sup>

Under the Dutch Constitution, international conventions have primacy over domestic law to the extent that they are obligatory, self-executing and duly published. Primacy implies that they prevail over any national law that contradicts the international rules.<sup>29</sup> Of these aforementioned international instruments, two deserve further consideration because they have not only entered into force in the Netherlands but have specific provisions regarding the provision of private remedies for corruption. These are the Civil Law Convention on Corruption and the United Nations Convention against Corruption.

### 6.2.1.1 Explanatory Reports on the CLC and UNCC

The Council of Europe Civil Law Convention on Corruption (CLC) entered into force in the Netherlands in April 2008. The United Nations Convention against Corruption (UNCC) entered into force in the Netherlands in November 2006.

The implications of the CLC for Dutch law were commented upon by the Minister for Foreign Affairs in his *Toelichtende Nota* (Explanatory Report) to Parliament while the bill was being considered.<sup>30</sup> The government noted that

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26 Civil Law Convention on Corruption (Burgerrechtelijk verdrag inzake corruptie) *Tractatenblad van het Koninkrijk der Nederlanden*, Vol. 2008, No. 27, entered into force in the Netherlands on 1 April 2008.

27 United Nations Convention against Transnational Crime (Verdrag van de Verenigde Naties tegen grensoverschrijdende georganiseerde misdaad), New York, 15 November 2000, Trb. 46, 2000, No. 4 entered into force 25 June 2004. <http://conventions.coe.int/Treaty/EN/Treaties/PDF/Dutch/174-Dutch.pdf>.

28 United Nations Convention against Corruption (Verdrag van de Verenigde Naties tegen corruptie), *Tractatenblad van het Koninkrijk der Nederlanden*, Vol. 44, 2003, No. 3, Vol. 2006, No. 266, entered into force 30 November 2006.

29 See Art. 93 Dutch Constitution (Grondwet voor het Koninkrijk der Nederlanden, Versie 2008), which provides that 'provision of treaties and resolutions by international institutions, which may be binding on all persons by virtue of their content, shall become binding after they have been published.' Art. 94 Dutch Constitution provides that 'Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.'

30 Briefing of the Minister of Justice, J.M.H. Hirsch Ballin, and the Minister of Foreign Affairs, M.J.M. Verhagen, on the Civil Law Convention on Corruption, to the Speakers of the Upper and Lower Chambers of the States-General Dutch Parliament (Brief van de Minister van Buitenlandse Zaken aan de Voorzitters van de Eerste en van de Tweede Kamer der Staten-Generaal: Burgerrechtelijk Verdrag inzake Corruptie, Strasbourg, 4 November 1999, No. 1), The Hague, 21 September 2007, 31 230 (R 1833), 2007-2008 Session, Explanatory Report (Toelichtende Nota) (Hereinafter referred to as the Explanatory Report to the Dutch Parliament

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the convention did not require that there have to be legal remedies within the domestic law that are specifically directed at corruption.<sup>31</sup> Rather, the motivation of the Convention, in the understanding of the Dutch government, was to ensure that contracting parties implemented its principles and rules to make it possible for legal and natural persons who have suffered harm as a result of corruption to have access to effective remedies including damages.<sup>32</sup> In this view, the private claim for damages by the person who has suffered harm as a result of corruption was not to be viewed as a new right awarded to such victims but rather as a remedy that flows from the operation of the Dutch Civil Code.

Requirements of the CLC that affect the private right to private remedies, such as the definition of corruption,<sup>33</sup> the right to compensation for damage<sup>34</sup> and conditions for liability,<sup>35</sup> were in the opinion of the Dutch government fully satisfied by provisions of Dutch law. For example, the elements of the definition of corruption under Art. 2, the CLC comes within the definition under the Dutch Penal Code (DPC).<sup>36</sup> The government noted that the requirement under Art. 3, of the CLC for material damage, loss of profits and non-pecuniary loss are also satisfied by provisions under Dutch law.<sup>37</sup> However, the requirement for ‘full compensation’ for damage was interpreted by the Minister as allowing the judge in each instance to determine in each individual case whether the criteria for damages have been fulfilled and the

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- on the Civil Law Convention),  
www.eerstekamer.nl/brief/20070921/burgerrechtelijk\_verdrag\_inzake.
- 31 Explanatory Report to the Dutch Parliament on the Civil Law Convention, id., at p. 4.
- 32 Id.
- 33 Art. 2 Civil law Convention provides that:  
‘... corruption means requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof.’
- 34 Art. 3 CLC provides that:  
‘1. Each Party shall provide in its internal law for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage. 2. Such compensation may cover material damage, loss of profits and non-pecuniary loss.’
- 35 Art. 4 of the CLC provides that  
‘1. Each Party shall provide in its internal law for the following conditions to be fulfilled in order for the damage to be compensated: (i) the defendant has committed or authorised the act of corruption, or failed to take reasonable steps to prevent the act of corruption; (ii) the plaintiff has suffered damage; and (iii) there is a causal link between the act of corruption and the damage. 2. Each Party shall provide in its internal law that, if several defendants are liable for damage for the same corrupt activity, they shall be jointly and severally liable.’
- 36 Explanatory Report CLC referring to Arts. 177-178a, 328ter, 362-364a Dutch Penal Code, id., Note 30 above.
- 37 Id., referring to Art. 6:95-110 and Art. 6:162 DCC.

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extent of the compensation that should be paid to the plaintiff.<sup>38</sup> The requirement for a causal link between the act of corruption and the damage suffered by the plaintiff as well as joint and several liability under Art. 4 CLC was also considered to be satisfied by the provisions of Dutch law.<sup>39</sup>

Similarly, in the Explanatory Report by the Minister of Foreign Affairs to parliament in respect of the United Nations Convention against Corruption,<sup>40</sup> the government noted, in a similar vein, that the ratification of the Convention would not require any amendments to Dutch law.<sup>41</sup> The UNCAC requires that participant states establish the liability of legal persons for the offenses of corruption established under the Convention including civil liability.<sup>42</sup> In the Explanatory Report on the UNCC, the Minister identified two categories of remedial actions that can be taken under Dutch law pursuant to Arts. 34 and 35 of the United Nations Convention. The first category goes to the validity of contracts. Parties whose free consent to a transaction is influenced by error or fraud attributable to an act of corruption and who would not have entered into the contract but for the act of corruption, are given the right to sue for remedies by seeking the nullity of the contract. The validity of such contracts could also be questioned for being contrary to good morals and public policy.

The second category identified in the report concerns the actions to recompense the person who has suffered damage. The UNCAC requires that members of the convention must ensure that their domestic laws provide for the right to compensation for damages resulting from acts of corruption. The Explanatory Report points out that under Art 6:162 of the Dutch Civil Code an action may lie in tort for the ‘violation of a right, an act or omission violating a statutory duty or a rule of unwritten law pertaining to proper social conduct.’<sup>43</sup> Such a tortious act renders the perpetrator liable to a claim for damages for pecuniary loss and loss of profit,<sup>44</sup> or disgorgement of profits (*winstafdracht*)<sup>45</sup> in favor of the person who has suffered damage. Furthermore, damages can be claimed where the agreement is rescinded (*ongedaanmaking*). Where the bribery occurs through an employee of the briber, the behavior of the employee

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38 Id., referring to Art. 6:109 DCC.

39 Id., referring to Arts. 6:98, 6:162 and 6:102 DCC.

40 Briefing of the Minister of Foreign Affairs, B.R. Bot, and the Minister of Justice, J.P.H. Donner, to the Dutch Parliament (Brief van de Minister van Buitenlandse Zaken aan de Voorzitters van de Eerste en van de Tweede Kamer der Staten-Generaal), 2005-2006 Session, No. 30 808 (R1815), Explanatory Report (Toelichtende Nota), 30 808. (Hereinafter referred to as the Explanatory Report to the Dutch Parliament on the UN Convention).

41 Id., at p. 3.

42 See Art. 26 UNCC.

43 Explanatory Report to Dutch Parliament on the UN Convention, id., Note 40 above, at p. 21.

44 Id., referring to Art. 6:96 DCC.

45 Id., referring to Art. 6:104 DCC.

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may be attributed to the employer. This responsibility of the employer is based on the fact that an employer is vicariously responsible for the acts of his employees.<sup>46</sup>

For these reasons, the Dutch government considers that Dutch law is fully compliant with the provisions of the CLC and the UNCAC. The following sections examine these provisions in more detail to determine the extent to which the right to private remedies is indeed met under Dutch law.

### 6.2.2 National Law

Dutch domestic law provides the legal foundation for claims by persons who have suffered damage as a result of corruption. Firstly, the Dutch Penal Code (DPC)<sup>47</sup> criminalizes acts of corruption, and secondly, the Dutch Civil Code (DCC) sets the framework for the types of claims that can be brought by victims of corrupt acts. The following sections examine the provisions relating to corruption under the DPC and DCC respectively.

#### 6.2.2.1 The Dutch Penal Code

Sikkema points out that the word ‘corruption’ does not have a legal meaning and is not found in the Dutch Penal Code (DPC). Rather the expression used in the Code is the ‘bribery’ of public officials.<sup>48</sup> An important foundation for civil actions for bribery stems from the fact that bribery is considered an illegal act and is criminalized under the DPC. In his 1925 dissertation, Salomonson remarked that without the criminalization of bribery in all countries there can be no effective fight against the problem of corruption.<sup>49</sup> There would be no basis for recourse by the victim. Provisions of the DPC that criminalize bribery are found in: Book 2 Title 8, *Misdrijven tegen het openbaar gezag* (Offenses against Public Order), Arts. 177, 177(a), 178 and 178(a) dealing with the active bribery of public servants and judges; Book 2 Title 28 *Ambtismisdrijven* (Offenses of Public Servants), Arts. 362-364 dealing with passive bribery; and in Book 2 Title 25 *Bedrog* (Deceit), Arts. 328ter dealing with private bribery.

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46 Id., at p. 22, referring to Art. 6:170 Para. 1 DCC as well as Art. 6:172 DCC for the liability of a party for the acts of a person acting as his representative (vertegenwoordiger).

47 *The Dutch Penal Code (Wetboek van Strafrecht)*, Adopted 3 March 1881, updated by amendments up to 1994 (Hereinafter referred to as the DPC).

48 E. Sikkema, ‘Public corruption in the Criminal Law’ (Ambtelijke corruptie in de strafwetgeving), *Justitiële Verkenningen*, Vol. 31, No. 7, 2005, at p. 26. See also E. Sikkema *Ambtelijke corruptie in het strafrecht: een studie over omkoping en andere ambtsdelichten*, Boom, The Hague, 2005.

49 L. Salomonson, *Bribery (Steekpenningen)*, id., Note 12 above, at p. 14.

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### 6.2.2.2 Active Bribery as an Offense by Public Officials

The DPC categorizes the active bribery of public servants as an indictable serious offense in Arts. 177 to 178a of the DPC. It is placed in the second book of the Penal Code, which deals with serious offenses such as those against the safety of the state, offenses against the dignity of the Queen, offenses against heads of friendly states or other internationally protected persons, offenses against the carrying out of state duties and responsibilities, against public order, the general safety of goods and persons, offenses against the state and offenses against immorality. A cursory reading of these serious offenses shows that they all go to the foundation of the existence and well-being of the authority of the State and the rule of law.

Giving a bribe to public servants is an offense that undermines the operation of public authorities and institutions. According to Art. 177(1) of the DPC, a public servant who does something contrary to his or her duty is guilty of performing an ‘unlawful act or omission.’<sup>50</sup> It states that whoever:

“gives” a gift, makes a promise or offers a service to a public official with the intention of influencing such a public official to do or omit from doing something contrary to his or her public duty will be liable to incur a prison sentence of no more than four years or a fine.<sup>51</sup>

This prohibition and sanction also applies to influencing former public officials<sup>52</sup> or persons to be appointed as public officials.

Art. 177(a) applies in situations where a civil servant is influenced in a way that is not contrary to his or her duty. This article was added as a result of the Corruption Law reform of 2001 to establish that the bribery of a public servant in order to obtain an act or omission of such a public servant which is not in breach of official duty is nonetheless an offense. For this offense the offeror of the gift or other inducement is subject to a lesser prison sentence of no more than two years or a fine in the fourth category.<sup>53</sup> Special provision is made for judges in Art. 178(1). Where a person is guilty of active bribery to influence the judgment of a judge, such a person is subject to a higher prison sentence of six years or a fine in the fourth category.<sup>54</sup> Where such a gift or promise is

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50 See title Heading Art. 177 Dutch Penal Code. See generally C. Cleiren, J. Nijboer (Eds.) *Text and Commentary on the Dutch Penal Code (Strafrecht Tekst & Commentaar: de tekst van het Wetboek van Strafrecht en enkele aanverwante wetten voorzien van commentaar)*, 5th edn, Kluwer, Deventer, 2004.

51 See Art. 177(1) Para. 1 DPC.

52 See Art. 177(1) Para. 2 DPC.

53 See Art. 177a DPC.

54 See Art. 178(1) DPC.

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made with the intention of obtaining a conviction in a criminal case, the offeror can be punished with a prison sentence of not more than nine years or a fine in the fifth category.<sup>55</sup>

Any exchange that is of value to the recipient constitutes a gift within the meaning of Art. 177.<sup>56</sup> The Dutch Supreme Court has held that this would include not just a promise of money,<sup>57</sup> but also non-monetary promises such as a sexual favor.<sup>58</sup> Where an act contrary to the public duty of an official coincides with a period of receipt of gifts, there does not have to be a one-on-one link between a specific gift and a specific act contrary to the public duty of an official for Art. 177 to be applicable.<sup>59</sup>

The scope of application of these provisions was extended after the Netherlands ratified the OECD Bribery Convention on 12 January 2001. Art. 178(a) extends the jurisdiction of the Dutch courts to corruption that has occurred in other countries. This allows the Dutch courts to have jurisdiction over (1) any Dutch public servant engaged in foreign bribery outside the Netherlands,<sup>60</sup> (2) the employee of any Dutch domiciled international organization,<sup>61</sup> (3) foreign bribery involving a Dutch public servant,<sup>62</sup> as well as (4) any act of bribery of a Dutch or foreign public official committed by a Dutch national abroad.<sup>63</sup> As a result of the OECD induced reforms, the DPC also applies to present, former, and ‘to be appointed’ public servants of foreign states or international institutions.<sup>64</sup>

### 6.2.2.3 Passive Bribery as an Offense by Public Servants

Arts. 362-363 of Book 2 Title XXV the DPC provides that prison sentences or fines will be imposed on an official who accepts<sup>65</sup> or asks for<sup>66</sup> gifts, promises or services, knowing or reasonably suspecting that it is given to influence his or her behavior. Where this is done in respect of acts done or omitted to be done that are *not contrary to the duty* of a present, future or ‘to be appointed’ public official, a prison sentence of not more than two years or a fine in the

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55 See Art. 178(2) DPC.

56 HR 25 April 1916, *NJ* 1916, p. 551.

57 HR 29 November 1915, *NJ* 1916, p. 300.

58 HR 31 May 1994, *NJ* 1994, p. 673.

59 HR 20 June 2006, *NJ* 2006, p. 380.

60 See Art. 6(1) DPC.

61 See Art. 6(2) DPC.

62 See Art. 4(10) DPC.

63 See Art. 5(1) DPC. See generally The Netherlands: Follow-up Report on the Implementation of the Phase 2 Recommendations, at p. 26.

64 See Art. 178a DPC.

65 See Art. 362(1) Para. 1-2 DPC.

66 See Art. 362(1) Para. 3-4 DPC.

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fifth degree will be imposed.<sup>67</sup> A higher prison sentence or fine is imposed in instances where the acceptance or the asking for the gift, promise or service is with regard to an act that is *contrary* to the duty of the public official. This is punishable with a prison sentence of no more than four years or a fine in the fifth category.<sup>68</sup> As Peçi and Sikkema point out in their comparative study on passive bribery under Dutch law, a ‘distinction is made between bribery inducing an unlawful act or an omission in return on the one hand, and bribery inducing a legitimate act or an omission in return on the other. This distinction is relevant for the severity of the maximum punishment that can be imposed.’<sup>69</sup>

Again special provision is made in the case of the asking for, or acceptance of a gift, promise or service by a judge where the highest penalty of up to nine years or a fine of the fifth category may be imposed.<sup>70</sup>

### 6.2.2.4 Private Bribery as an Offense

From the outset, public bribery has been a criminal offense. However, private bribery only became a criminal offense in 1967 after the addition of Art. 328ter to the Penal Code.

Art. 328ter (1) criminalizes the passive bribery of persons other than public officials (private sector agents or employees) as follows:

‘A person who, in a capacity other than that of a public official, either in the service of his/her employer or acting as an agent, requests or accepts a gift or service, or promise thereof in relation to something s/he has done or has refrained from doing or will do or will refrain from doing in the service of his/her employer or in the exercise of his/her mandate, and who, in violation of the requirements of good faith, conceals the acceptance or request in question from his/her employer or principal, will be sentenced to a term of imprisonment of not more than two years or a fine of the fifth category.’

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67 See Art. 362(1) and (2) DPC.

68 Id., Art. 363. See also J. Roording, ‘Corruption in Dutch Criminal Law’ (‘Corruptie in het Nederlandse strafrecht’), *Delikt en Delinkwent*, 2002, p. 120.

69 These authors, however, argue that the distinction between legitimate acts (Art. 362 DCC) and unlawful acts (Art. 363 DCC) should be abolished. They argue that:

‘case law concerning the term “contrary to his duty” seems to be unclear. As a result of the very broad view that the courts take with respect to the scope of the provision of Art. 363 DCC, the provision of Art. 362 DCC seems to have become more or less superfluous. Finally, an important advantage of joining the two articles referred to is that the legislation concerning bribery could be greatly simplified.’

See I. Peçi, E. Sikkema, ‘Corruption and legal certainty; the case of Albania and the Netherlands implementation of the Criminal Law Convention on Corruption in a transitional and consolidated democracy’, *Utrecht Law Review*, Vol. 6, Iss. 1, January 2010, p. 101, at p. 113, available at <http://www.utrechtlawreview.org/>.

70 See Art. 364 DPC.

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Art. 328ter (2) criminalizes the active bribery of persons other than public officials (private sector agents or employees) as follows:

‘The same sentence will be imposed on a person who gives a gift, makes a promise thereof, or offers, or provides a service to another person who, in a capacity other than that of a public official, is employed or acts as an agent, in relation to something that person has done or has refrained from doing or will do or will refrain from doing in his/her employment or in the exercise of his/her mandate, the gift or promise being of such nature or made under such circumstances that s/he might reasonably assume that the latter, in violation of the requirements of good faith, will conceal the acceptance of the gift or promise from his/her employer or principal.’

The motivations for the introduction of this article can be deduced from the Report of the Committee on Private Bribery.<sup>71</sup> Central to the Committee’s recommendations were its findings that:

- (a) public morals and public order were at stake;
- (b) that the increase in the number of positions of trust because of increased specialization and delegation in the business world brought with it an increase in the number of instances in which corruption can flourish;
- (c) as more private enterprises are occupied with matters of public interest private corruption can extend to these areas; and
- (d) that the existing rules in the opinion of the committee did not provide sufficient protection to maintain the integrity of the employment relationship.<sup>72</sup>

The Committee was of the opinion that the criminalization of private corruption would clarify the legal position and provide an impulse for the improvement of business regulations against corruption. Furthermore, the Committee felt that in view of the ongoing integration of Europe, it would be good for the Netherlands not remain behind in this international movement toward the criminalization of private bribery.<sup>73</sup>

There was resistance to the idea of criminalizing private bribery; some argue that Art. 328ter has remained a dead letter.<sup>74</sup> Nonetheless, Art. 328ter performs

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71 Report of the Committee on ‘Private Bribery’ (Rapport van de Commissie ‘Niet-Ambtelijk Corruptie’), Explanatory Memorandum, Parliamentary Papers, Session 1965-1966, No. 8473, pp. 5-16, also referred to as the Commissie-Mulder. Bijlage bij de Memoire van Toelichting, Zitting 1965-1966, No. 8437, Subnote. 4, pp. 5-16. (Hereinafter referred to as the Report of the Committee on Private Bribery).

72 Report of the Committee on Private Bribery, id., at pp. 11-12.

73 Id., at p. 12.

74 See G. Corstens, ‘Why some categories of criminal laws remain a dead letter’ (‘Waarom blijven sommige categorieën van strafbepalingen een dode letter’), *NJB*, 24 October 1981, Vol. 37, Kluwer, Deventer, pp. 973-978; H.G. Bunt, ‘Measures against corruption in the private

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an important characterizing function by stilling the debate as to whether or not commercial bribery is a permissible act. Simply put, it establishes that bribery whether carried out by in public or in private is a criminal activity that is punishable by law. Furthermore, whether such activity is carried out domestically or abroad by Dutch nationals, it is a punishable criminal activity. There is no exemption made in the language of facilitating payments under these Dutch provisions.

In summary, the DPC criminalizes the practices of active<sup>75</sup> and passive bribery<sup>76</sup> of public officials as well as judicial officers in the public sector.<sup>77</sup> In the private sector, the DPC criminalizes active<sup>78</sup> as well as passive<sup>79</sup> bribery of non-public officials such as agents acting in violation of the duty of good faith owed to a principal. These provisions lay a foundation that stigmatizes bribery in public and private transactions making it an illegal act. This creates the platform upon which the notion that parties ought not to be allowed to profit from the illegal activity of bribery or rely on contracts resulting from such illegal acts, can be founded. In addition, it also creates the basis for private remedies for damage has been suffered by a victim as a result of an act of corruption.

### 6.2.3 Dutch Civil Law

Salomonson writing in 1925 concluded that Dutch civil law does not give enough redress in the fight against bribery.<sup>80</sup> Dorresteijn, discussing the interaction between corruption and the private law, stated ‘that the picture has arisen that the bribe-giver always wins.’<sup>81</sup> Has this state of affairs changed today? This question is all the more relevant in view of the provisions of the Civil Law Convention (CLC), which requires that Dutch law shall provide ‘for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage.’<sup>82</sup>

This right of compensation extends not just to actions against private parties<sup>83</sup> but also to actions against public officials.<sup>84</sup> This compensation should ensure

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sector’ (*Maatregelen tegen Corruptie in het Bedrijfsleven*), *Justitiële Verkenningen*, Vol. 19, No. 1, 1993, pp. 35-50.

75 Arts. 177 and 177a DPC.

76 Arts. 362, 363, 364 DPC.

77 Art. 178 DPC.

78 Art. 328(2)ter DPC.

79 Art. 328(1)ter DPC.

80 L. Salomonson, *Bribery*, id., Note 12 above at p. 65.

81 A. Dorresteijn, *Corruption and Private Law*, id., Note 14 above, at p. 16.

82 See Art. 3 CLC.

83 Art. 3 CLC.

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that any ‘material damage’<sup>85</sup> suffered by the person who has been betrayed by an act of bribe-taking by a person in a position of trust, or who has suffered ‘lost profits’ or other ‘non-pecuniary’<sup>86</sup> loss, is compensated by the courts. The courts also have a duty to the larger society. The freedom of parties to conduct contracts and enter in to contracts is limited by any association to circumstances that pose a danger to society in most legal systems.<sup>87</sup>

The preamble of the CLC emphasizes the ‘importance for civil law to contribute to the fight against corruption, in particular by enabling persons who have suffered damage to receive fair compensation.’<sup>88</sup> With the coming into force of the CLC in the Netherlands, the rights of persons who have suffered as a result of corruption could receive a new impetus. These rights are established by the DCC.<sup>89</sup>

### 6.2.3.1 Distinguishing Element of Bribery

The criminalization of corruption by the DPC establishes a baseline of illegality from which not only criminal but also private law consequences flow. While the *Committee on Private Bribery*, which criminalized private bribery in the Netherlands, did not delve into the civil law consequences of bribery, it pointed out that the criminalization of private bribery labeled it as a tort and that this fact increases the possibilities and range of civil law responses and private actions by parties that have suffered damage.<sup>90</sup> The focus of civil law is on defining the link between the illegal act of corruption and its consequences.

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- 84 Art. 5 CLC states that:  
‘Each Party shall provide in its internal law for appropriate procedures for persons who have suffered damage as a result of an act of corruption by its public officials in the exercise of their functions to claim for compensation from the State or, in the case of a non-state Party, from that Party’s appropriate authorities.’
- 85 See Art. 4 Civil Law Convention.
- 86 Id.
- 87 See generally on the issue of the validity of contracts, J. Hijma, *Void and Voidable Legal Transactions (Nietigheid and vernietbaarheid van rechthandelingen)*, Kluwer, Leiden, 1988.
- 88 Preamble Civil Law Convention on Corruption.
- 89 A completely reformed Civil Code entered into force in 1992 replacing the Civil Code dating from 1838. The former Dutch Civil Code (Burgerlijk Wetboek) became effective in the year 1838. It was essentially a translation of the French Civil Code with some adaptations. The Dutch Civil Code (Burgerlijk Wetboek) comprises nine Books. Of these nine, Books 3, 6 and 7 are of particular relevance to the issue of contracts tainted by bribery. Books 3 deals with the general principles and the law of patrimony, Book 6 deals with the law of obligations and general related principles, while Books 7 and 7A deal with special contracts that are subject to particular statutory rules, such as agency contracts. The English Translation used in this book is that by H. Warendorf, R. Thomas, I. Curry-Sumner, *The Civil Code of the Netherlands*, Kluwer, Deventer, 2009.
- 90 See Report Committee on Private Bribery, id., Note 72 above, at p. 11, see Note 2.

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The Explanatory Report to the Civil Law Convention explains that the definition of corruption contained in Art. 2 of the CLC is aimed at clarifying the meaning of corruption and to provide the legal framework within which the obligations, arising from the Convention, operate.<sup>91</sup> The distinguishing element of bribery is found in the obligations between parties. The Dutch Minister in his Explanatory Report to the Convention points out that corruption can only be said to have occurred where the corrupt behavior *has had an effect* on the manner in which the transaction at hand has been carried out.<sup>92</sup> Parties examining the private law consequences of corruption are essentially looking at the effect of bribery on obligations assumed between the parties to the legal transaction affected by corruption.

Corruption is defined in Art. 2 of the CLC as the:

‘requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behavior required of the recipient of the bribe.’<sup>93</sup>

Since not all gifts or other actions are automatically bribes, what factor distinguishes a bribe from innocuous activity? This is a difficult line to draw and may well depend on a particular society’s ‘norms and values.’<sup>94</sup> Nonetheless, as Salomonson points out, the giving of money – unless of a completely insignificant amount – is seen as associated so closely with the concept of buying that it assumes some counter-performance or consideration.<sup>95</sup> The bribe may, of course, also consist of a gift other than money such as goods or services<sup>96</sup> and this is reflected in the terms of *undue advantage or influence* in the above definition. However, the key point here is the fact that the giving and receiving occurs within a relationship. The manner in which this relationship is defined sets the scope of the application of the rules governing the civil law consequences of corruption.

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91 Explanatory Report to the Dutch Parliament on the Civil Law Convention, id., Note 30 above, at p. 4.

92 Id., at p. 4.

93 Art. 2 CLC.

94 O. de Savornin Lohman, Certain Civil Law Consequences of Corruption, id., Note 13 above, at p. 129.

95 Salomonson remarks that a tip, for example, will always be such a small amount while with a bribe very high amounts are usually involved. See L. Salomonson, *Bribery*, id., Note 12 above, at p. 6. He refers to the work of R. von Jhering, *Die Jurisprudenz des täglichen Lebens: eine Sammlung an Vorfälle des gewöhnlichen Lebens anknüpfender Rechtsfragen*, 12th edn, Gustav Fischer, Jena, 1903, and more particularly to his work *Das Trinkgeld*. See also article by C. Kenny, ‘Jhering on Trinkgeld and Tips’, *Law Quarterly Review*, Vol. 32, 1916, at pp. 306-321.

96 O. de Savornin Lohman, Certain Civil Law Consequences of Corruption, id., Note 13 above, at p. 128.

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There is a common element in the definitions under the Penal Code and under the CLC. This is the fact that bribery occurs in a triangular relationship and cannot arguably exist outside of these relationships. The Civil Law Convention speaks of corruption as an act that *distorts proper performance*.<sup>97</sup> It is within these relationships that ‘distortion’<sup>98</sup> or the ‘influencing’<sup>99</sup> that affects the performance of a ‘duty’<sup>100</sup> occurs. This duty is owed by the bribe-recipient to a party who stands outside the transaction between the bribe-giver and the person bribed.

Dorresteyn sees corruption as an element in a relationship of trust and delegation of power within a triangular relationship of the offeror of a bribe, the bribe-recipient, and the principal of the bribe-recipient. Indeed, according to Dorresteyn, there can be no corruption without bribery. Someone who profits at the cost of an organization but without the involvement of a third party is not, in his view, corrupt. Such conduct can rather be described as fraudulent. From this perspective Dorresteyn argues that corruption is a form of white collar crime and can only occur in a relationship that provides the opportunity *to misuse power*. Where there can be no misuse of power, there can be no corruption.<sup>101</sup> An abuse of power can occur in terms of the power of representation given by an employer to an employee or agent, or from a public authority to a public servant.<sup>102</sup>

In a similar vein, de Savornin Lohman restricts his examination of civil law consequences of bribery to instances where a person in seeking a particular legal result with a third person, gives a gift to a another person with whom this *third person stands in a contractual relationship* that gives the recipient of the gift the power to influence the coming into effect of the desired legal result.<sup>103</sup>

From this analysis, the essential distinguishing element of bribery from fraud, tips, gifts and other business practices is that the person bribed misuses his relationship with a third person, to whom he owes a contractual duty of loyalty.

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97 Art. 2 CLC.

98 Art. 2 CLC.

99 Art. 177 DPC.

100 Art. 2 CLC; Art. 177 DPC.

101 A. Dorresteyn, *Corruption and Private Law*, id., Note 14 above, at p. 19.

102 Id., p. 19

103 O. de Savornin Lohman, *Certain Civil Law Consequences of Corruption*, id., Note 13 above, at p. 128.

### 6.3 Consequences of Bribery on Contracts

Public and private bribery are criminalized under the Dutch Penal Code. This has implications both in contract and in tort. A contract tainted by bribery raises questions about the boundaries of contractual freedom. Since the law does not act in vain in cases where an action is characterized as criminal, this characterization sets a boundary to the extent that parties may freely contract. It also sets a framework for remedies where damage is suffered as a result of such illegal activity. The following sections examine, firstly, the remedies that arise from the breach of the contractual principal/agent relationship, and secondly, those remedies that accrue where the breach of obligations is non-contractual.

#### 6.3.1 Contractual Validity of Primary and Secondary Contracts

The rules prohibiting public and private bribery are silent as to the status of transactions entered into or resulting from a violation of the prohibition. Under Dutch law, this regulatory silence is filled by provisions that deal with the validity of transactions that fall outside the boundaries of contractual freedom. A contract that leads to socially unacceptable consequences may be declared a nullity *ipso facto* or a nullity at the instance of one of the parties to the contract. Such an annulment has retroactive effect to the time the contract came into existence.<sup>104</sup> The principal provisions that have an impact on the effect of bribery on the validity of resulting contracts are found in the second title of Book 3,<sup>105</sup> in Book 6<sup>106</sup> and in Book 7<sup>107</sup> of the Dutch Civil Code (DCC). There are three primary grounds for a contract to be declared a nullity. These are:

- (1) that the contract is contrary to good morals or public policy;<sup>108</sup>
- (2) that the contract has been entered into as a result of duress, fraud or undue influence,<sup>109</sup> and
- (3) that the contract has been entered into under the influence of an error.<sup>110</sup>

The question whether a contract affected by bribery can be declared a nullity rests in a distinction drawn under Dutch law between ‘unilateral’ and ‘multilateral’ juristic acts. A unilateral act can be declared a nullity *ipso facto* whereas a multilateral act that involves more than two parties is open to the

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104 See Art. 3:53(1) DCC.

105 Book 3 deals with the Law of Property, Proprietary Rights and Interests.

106 Book 6 deals with the General Part of the Law of Obligations.

107 Book 7 deals with Specific Contract including Agency Contracts.

108 Art. 3:40 DCC.

109 Art. 3:44 DCC.

110 Art. 6:228 DCC.

possibility of an annulment.<sup>111</sup> The contract between the bribe-giver and the party receiving the bribe as well as the contract between the bribe-giver and the party to whom the receiver of the bribe owes a duty of trust, both constitute multilateral agreements that are subject to the penalty of being annulled as opposed to being nullity *ipso jure*. As such, the contract resulting from a transaction tainted by bribery is not automatically a nullity. These contracts are, however, subject to the threat of being annulled by parties who have suffered damage due to the corruption that *led to* the contract.

A ground for annulment serves as a defense against a claim or other legal measure based upon the contract tainted by corruption.<sup>112</sup> Such an annulment has retroactive effect to the time the performance of the contract.<sup>113</sup> However, the court may refuse to give effect to an annulment in whole or in part, if the juridical act (contract tainted by corruption) has already produced consequences which can only be reversed with difficulty. It may order a party who is prejudiced by its decision to be compensated in money by a party who unjustly benefits from it.<sup>114</sup> Therefore, where a contract tainted by a bribe has come into existence and there has been some element of performance, it may become difficult to declare that the contract ceases to exist and is annulled. In these circumstances, the issue will become one of monetary compensation for the damage caused as a result of the act of bribery.

### 6.3.2 The Primary Contract

The first agreement in a transaction affected by bribery is the agreement between the bribe-giver and the bribe-recipient. This is referred to in this book as the *primary contract*. Art. 328ter DPC criminalizes passive and active private bribery while Arts. 177, 178 and 362 DPC criminalize the active and passive bribery of public officials. The criminalization of bribery under the provisions of the DPC renders the primary contract subject to the challenge of invalidity. Furthermore, Art. 8 CLC provides that Dutch law should ensure that

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111 Art. 6:213 DCC defines a contract as a multilateral juridical act whereby one or more parties assume an obligation towards one or more other parties. Hartkamp explains that a fundamental distinction is made between (*ipso jure*) nullity on the one hand and the possibility of annulment. *Ipso jure* nullity operates automatically and the function of the court in a dispute over the validity of such a contract is purely declaratory. A contract that is subject to annulment is valid until it is annulled by a subsequent act of a court or declaration by the interested party where there is no transfer of immovable property. See generally A. Hartkamp, Chapter 8 Law of Obligations, in J. Chorus, P. Gerver, E. Hondius (Eds.), *Introduction to Dutch Law*, 4th edn, Kluwer, Deventer, 2006, at p. 152, at p. 154.

112 Art. 3:51(2) DCC provides that ‘a ground for annulment may always be invoked at law as a defence against a claim or other legal measure based upon the juridical act.’

113 *Id.*, Art. 3:53(1).

114 *Id.*, Art. 3:53(2).

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‘any contract or clause of a contract providing for corruption to be null and void.’

Generally, under Dutch law, the grounds for a declaration that a primary contract is unenforceable are found in Art. 3:40 DCC, which provides that:

1. A juridical act which by its content or necessary implication is contrary to good morals or public policy is a nullity.
2. A juridical act that violates a mandatory statutory provision becomes a nullity; if however, the provision is intended solely for protection of one of the parties to a multilateral juridical act, the act may only be annulled; in both cases this applies to the extent that the provision (violated statutory provision) does not otherwise provide.
3. Statutory provisions which do not purport to invalidate juridical acts in conflict therewith are not affected by the preceding paragraph.

The provisions of Art. 3:40 (1) and 3:40 (2) DCC establish two grounds on which a party’s freedom to enter into a contract is curtailed: (1) where the agreement will be in conflict with public morality and public order and (2) where it is in conflict with mandatory law. Art. 3:40(1) deals with the broader notion of illegality as contrary to public morality and good morals, while Art. 3:40(2) is more specific to the illegality that results from the violation of a mandatory statutory provision. Art. 3:40(3) of the Code provides that Art. 3:40(2) has no application to mandatory rules, which do not in their scope of application affect the validity of the juridical act in question. The laws criminalizing bribery and in particular Art. 328ter DPC are mandatory in character and clearly can affect the validity of the transaction in question. The exception to Art. 3:40(2) provided in Art. 3:40(3) therefore would not seem to apply with regard to the anti-bribery rules.

### 6.3.2.1 Invalid as Contrary to Public Order and Public Morality

Where an agreement is based on an alleged unlawful cause, such an agreement has to be evaluated according to the public order and morality grounds of Art. 3:40(1) DCC.<sup>115</sup> There is no definition of ‘good morals’ or ‘public policy’ in the DCC, and an evaluation of what satisfies either of these grounds depends on the public standards of morality as discerned by the courts of law.<sup>116</sup> Private bribery has not always been regarded as contrary to public morality or order. Private bribery was once seen as a tax-deductible expense. Companies could, for tax purposes, declare bribes that had been given to close international deals.

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115 HR 24 September 1999, *NJ* 1999, 737.

116 See O. de Savornin Lohman, *Certain Civil Law Consequences of Corruption*, id., Note 13 above.

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Clearly in this scenario it was not contrary to public morality or public order to give a bribe.

Thus, in 1925 when Salomonson wrote his dissertation on bribery, the question whether an agreement to give a bribe was contrary to good morals or public policy was still posed in a context where private bribery was not illegal in the Netherlands. There was no law forbidding private bribery and Salomonson could rightly conclude that ‘in our law, the giving of a bribe to persons other than public officials is not declared to be a crime or explicitly forbidden.’<sup>117</sup> This resulted in a dichotomy where the criminality of a transaction involving corruption depended on whom the parties to the transaction were. If the bribery transaction involved private parties it was not illegal; only where bribery transactions involved a public official did it become illegal under the Penal Code.

Since at that time private bribery was not a crime, Art. 3:40(2) dealing with illegality that results from the violation of a mandatory statutory provision did not apply. Nonetheless even in the absence of a direct statutory prohibition of private bribery, Salomonson still made the argument that the primary contract to give a bribe was against public morality because the ‘logical and intended consequence of the bribe is immoral.’<sup>118</sup> As Salomonson pointed out, the agreement to give a bribe put the receiver of the bribe in a position where an agreement could only be concluded by betraying the interest of the principal as ‘*niemand immers kan twee heren tegelijk dienen*’ (nobody can simultaneously serve two masters).<sup>119</sup> He further argued that where such behavior leads to direct and demonstrable injury to the principal, it can be concluded that the receiver of the bribes has not fulfilled his duty to the principal and, as such, the bribery agreement is contrary to public morality.<sup>120</sup> However, public policy is an unruly horse.<sup>121</sup> In the absence of a statutory provision stigmatizing bribery

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117 L. Salomonson, *Bribery*, id., Note 12 above, at p. 70.

118 He states that the ‘logische en bedoelde gevolg der steekpenningen immoreel is, d.w.z. wanneer de steekpenningen dengeen voor wie ze bestemd zijn, in de verleiding moeten brengen een met zijn plichten onverenigbare handeling te verrichten.’ (The logical and intended result of a bribe is immoral, i.e. bribes influence the person for whom they are intended, to perform acts that are incompatible with his duty). See L. Salomonson, *Bribery*, id., Note 12 above, at p. 71.

119 Id., Salomonson at p. 72.

120 Id., Salomonson at p. 72.

121 The view that public perception shapes public morality seems to be the accepted standpoint Salomonson points out, citing a decision by the Hoge Raad H.R. 22 February 1924, *NJ* 192, where the Supreme Court decided that transportation insurance agreements on birth control products to prevent conception were not in conflict with public morals because in present day Holland it was not seen by the people in general as unacceptable. See Salomonson, *Bribery*, id., Note 12 above, at p. 68.

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in private transactions, a finding that such bribery was contrary to good order and policy was not indicated by public perceptions of morality.

With the enactment of Art. 328ter DPC any uncertainty about the status of private bribery and its legal consequences is removed. The public policy position today is clarified by the existence of national and international rules, to which the Netherlands is a party, that criminalize both private and public bribery. These establish bribery is an act that is contrary to public morality in the Netherlands.

If there is a dispute about the validity of the primary contract, Art. 3:49 DCC provides that it can be annulled by judicial decision, which in this instance will be merely declaratory as the act was never valid and is therefore null, void and without legal consequence.<sup>122</sup> By reason of bribery being contrary to public policy under Art. 3:40(1) the courts will annul any contract to give or receive a bribe.<sup>123</sup> Furthermore, a party affected by the primary contract to give a bribe can invoke Art. 3:40(1) as a ground for annulment of the contract. Art. 3:51 provides that ‘a ground for annulment may always be invoked as a defense against a claim or legal measure based upon the juridical act.’

### 6.3.2.2 Invalid as Contrary to Mandatory Law

Art. 3:40(2) DCC renders any act that violates a mandatory statutory provision a nullity. Since 1965 private bribery has been criminalized in the Netherlands. However, these provisions are directed at the conduct of the parties engaging in private bribery and do not expressly prohibit the primary contract to give or receive a bribe. Is the primary contract between the bribe-giver and the bribe-recipient a nullity as a result of the operation of Art. 3:40(2) DCC? De Savornin Lohman, writing after the criminalization of private bribery, took the view that the primary agreement was a nullity but not on the basis of being in conflict with a mandatory law under Art. 3:40(2) DCC. Rather he was of the view that the primary contract was a nullity under the ‘more complicated’ route of being in conflict with good morals and public policy.<sup>124</sup>

This is because, according to him, the legislative history points out that Art. 3:40(2) DCC is only applicable where the juridical act – the agreement itself –

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122 Art. 3:49 DCC provides that ‘Where a juridical act is subject to annulment, it can be annulled either by extra-judicial declaration or by a judicial decision.’ See also A. Hartkamp, Chapter 8 Law of Obligations, in J. Chorus, P. Gerver, E. Hondius (Eds.), *Introduction to Dutch Law*, id., Note 111 above, at p. 154.

123 Art. 3:51 DCC.

124 O. de Savornin Lohman, *Certain Civil Law Consequences of Corruption*, id., Note 13 above, at p. 131-132.

is forbidden by the law.<sup>125</sup> He rightly points out that in the case of the agreement to give a bribe, this is not the case. The agreement itself is not forbidden but only the content or application of the agreement is in conflict with Art. 328ter DPC, which prohibits the active or passive bribery of non-public officials. Art. 328ter DPC is silent on the validity or otherwise of the actual agreement between the bribe-giver and the bribe-recipient.

This viewpoint is supported by authors such as Hijma, who in his commentary on Art. 3:40 points out that ‘even though this is not made clear in the article itself, the meaning to be drawn from the parliamentary records is that Art. 3:40(2) is only applicable where the transaction or contract itself is in violation of the law.’ If the entry into the contract is not in itself per se forbidden but rather only *the effect* of such a contract is contrary to the mandatory rules, then the relevant applicable article is Art. 3:40(1) DCC.<sup>126</sup>

The parliamentary records do seem to indicate that where the performance of an agreement according to its content or application obliges one of the parties to commit an act forbidden by law, then the agreement is a nullity on the basis of Art. 3:40(1).<sup>127</sup> The rationale for this is that it is contrary to public policy to require persons to comply with performances that the law forbids. Where an agreement commits a party to performing an act forbidden by law, it is contrary to public policy under Art. 3:40(1) DCC and therefore a nullity.

However, it is possible to make an argument for nullity of the primary contract as contrary to mandatory law under Art 3:40(2). While Art. 328ter DPC does not stipulate the sanction that awaits a primary contract to give a bribe, it does clearly indicate that such an act of giving or receiving a bribe, or other undue influence, is a criminal offense. Hartkamp has remarked that where the law provides that a particular type of conduct results in a criminal act, it is beyond doubt that an agreement that results in the act is forbidden by the law.<sup>128</sup> With the passage of Art. 328ter of the DPC, private bribery is clearly prohibited by the law. An agreement between two private parties to give and receive a bribe is an act that is criminally punishable. This implies that in as far as the primary

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125 He refers to the Report of the Committee on ‘Private Bribery’ (Rapport van de Commissie ‘Niet-Ambtelijk Corruptie’), id., Note 72 above, at p. 11, Note 2.

126 J. Hijma, in J. Nieuwenhuis (Ed.), *Law of Property, Proprietary rights and Interests, text and Commentary on Books 3, 5, 6 (Vermogensrecht: tekst & commentaar : de tekst van de Boeken 3, 5, 6)*, Kluwer, Deventer, 2007, at p. 59; see also HR 11 May 1951 (Flora-Van der Kamp) (*NJ* 1952/127); HR 11 May 1951 (Burgman-Aviolanda) (*NJ* 1952/128); HR 16 November 1984 (Maduro-Maduro) (*NJ* 1985/624); HR 11 May 2001 (OZF/AZL-AZL/Moerman) (*NJ* 2002/364).

127 Parl. Gesch. Boek 3, pp. 190-91.

128 A. Hartkamp, C. Sieburgh, *Verbintenissenrecht, : Algemeen overeenkomstenrecht (Contract Law: General Contracts)*, Asser Series, 13th edn, Kluwer, Deventer, 2010, at pp. 271-273.

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contract to give a bribe is concerned, the statutory prohibition of Art. 328ter DCC renders it prohibited by mandatory law. The contract between the bribe-giver and the bribe-recipient arguably falls within the scope of Art. 3:40(2) DCC.

Bribery is seen as a threat to the integrity of public order, the employment relationship, and the integrity of business and fair competition.<sup>129</sup> This condemnation of bribery has culminated in the criminalization of private bribery with the passage of Art. 328ter DPC. This changes the argument against the validity of the primary contract between the bribe-giver and the bribe-recipient. Instead of the primary contract being void on the more flexible ground of public policy, such an agreement can be considered a nullity on the unambiguous ground of being invalid as being contrary to mandatory law.

In summary, the primary agreement between the bribe-giver and the bribe-recipient is a nullity on the basis of being contrary to good order and public policy under Art 3:40(1) DCC and arguably also as being contrary to mandatory provisions of the law under Art 3:40(2) DCC. However, as a multilateral act, it is only subject to annulment where a party to the transaction seeks such an annulment. As such, it may be declared a nullity at the instance of one of the parties to the transaction.<sup>130</sup>

### 6.3.3 The Secondary Contract

As noted above, Art. 328ter DPC criminalizes private bribery. It applies to the conduct of *giving and receiving a bribe* and does not address the secondary contract that comes into being between the bribe-giver and the party to whom the bribe-recipient owes a duty of loyalty. Since there is no statutory prohibition of this secondary agreement, the provisions of Art. 3:40(2) DCC dealing with agreements that are in violation of a statutory prohibition will not apply to the secondary contract. Yet, this contract between the bribe-giver and the principal of the bribed agent is clearly tainted by bribery. The freedom of consent of the principal is compromised by the concerted acts of the agent and the bribe-giver. The question is whether the principal bound by a contract negotiated by an agent or employee who has been disloyal to the interests of the principal, or whether the principal claim that the contract is a nullity on the grounds of Art. 3:40(1) DCC?

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129 Report of the Committee on Private Bribery, *id.*, Note 72 above, at p. 6.

130 See generally for a discussion on transactions in conflict with good morals V. van den Brink, *Legal Transactions in conflict with Public Morality (De rechtshandeling in strijd met de goede zeden)*, Boom, Amsterdam, 2002.

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Upholding a party to a contract that was not entered into with complete freedom of contract contradicts the notion of consent required for legal acts that produce juridical effects.<sup>131</sup> Any agreement that suffers from a defect in consent may therefore be annulled.<sup>132</sup> Has the consent of the principal to a secondary contract been compromised in such a way as to justify a claim that there is a defect in the consent?

A principal is usually bound by any action of an agent where such acts are within the agent's authority.<sup>133</sup> Where a contract is tainted by allegations of bribery, this is arguably an action that has taken place outside the scope of the agent's authority. Unless it can be shown that the principal has expressly directed that a bribe be solicited, or unless the principal ratifies the resulting contract, the principal may seek to avoid the contract by establishing grounds that show a defect of consent.

Typical grounds would include the claim that he is not bound by the consequences of the agent's acts because:

- (a) the contract was entered into as a result of duress, fraud or undue influence Art 3:44(1) DCC;
- (b) the fact that the principal has been 'tricked' into a contract under circumstances that compromise freedom of choice, may constitute a civil wrong, which opens the door to an action in damages if any losses have been incurred by the principal Art 3:44(3);
- (c) (b) the contract was entered into as a result of an error Art 6:228 DCC);
- (d) the principal may also seek to end the contract of employment with the agent based on the 'loss of confidence' resulting from the abuse of the trust relationship;

These possible grounds are examined in the following sections.

### 6.3.3.1 Invalidity for Duress, Fraud, Undue Influence

The DCC does not refer specifically to bribery as a ground for a defect of consent. However, it does provide some general rules on circumstances that would constitute an impediment of freedom of choice. Art. 3:44(1) DCC provides for nullity of contract where the agreement is the result of duress,

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131 See Art. 3:33 DCC.

132 See generally A. Hartkamp, Chapter 8 Law of Obligations, in J. Chorus, P. Gerver, E. Hondius (Eds.), *Introduction to Dutch Law*, id., Note 111 above, at p. 155.

133 See generally on the liability of the unauthorized agent from the perspective of Dutch law, D. Busch, *Unauthorised Agency in Dutch law*, in D. Busch, L. Macgregor (Eds.), *The Unauthorised Agent, Perspectives from European and Comparative Law*, CUP, Cambridge, 2009, pp. 141-148.

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fraud or undue influence.<sup>134</sup> Does bribery fall into any of these categories? Duress is described under Art 3:44(2) DCC as occurring where a person induces another to perform a specific juridical act by unlawfully threatening him or a third party with harm to his person or property. The duress must be such that the person would be influenced by it. Furthermore the duress must be such that a reasonable person would be influenced by it.<sup>135</sup> Bribery clearly does not fall within this category of duress. There is no threat that influences the principal to enter into the agreement.

Another category which is not of immediate application is undue influence. It occurs where a person knows or ought to understand that another is being induced to perform a juridical act as a result of special circumstances – such as a state of necessity, dependency, wantonness, abnormal mental condition or experience – and promotes the realization of that juridical act, although what he knows or ought to understand should cause him to refrain from doing so.<sup>136</sup> There is no special relationship of dependency between the principal and the giver of the bribe that would found allegations of undue influence under Art. 3:44(4) DCC.

The category which has the closest connection to bribery is that of fraud under Art 3:44(3) DCC. Fraud is said to occur where a person induces another to perform a specific juridical act by intentionally providing him with inaccurate information, or by intentionally concealing any fact he was obliged to communicate, or by any other artifice.<sup>137</sup> Art. 3:44(3) DCC makes it clear that where a person is deliberately misled into entering a legal transaction, this may constitute a fraud that can annul the validity of the ensuing transaction. However, the three circumstances under which this can occur are stated to be where:

- (a) inaccurate information has been provided;
- (b) a fact that a party was obliged to communicate was concealed; or
- (c) a trick or artifice (*kunstgreep*) has occurred.

This raises the question whether in the contractual negotiations between the bribe-giver and the principal of the bribe-recipient, the bribe-giver as a contracting party has a duty to communicate the fact of such bribery to the other contracting party (i.e. the principal) and whether a failure to do this constitutes a fraud or ‘trick’ that grounds the nullification of the secondary contract that results from their negotiations.

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134 See Art. 3:44(1) DCC.

135 See Art. 3:44(2) DCC.

136 See Art. 3:44(4) DCC.

137 Art. 3:44(3) DCC.

Asser's *Introduction* states that not every 'untruth' should be regarded as fraud, but only those instances where the untruth is of such importance and was intended to be relied upon by another.<sup>138</sup> Art. 3:44(3) stipulates that representations in general terms, *even if they are untrue* do not constitute fraud. As such, not every untrue representation by the bribe-giver to the principal can be regarded as fraud. Only a representation that is made *with intent to deceive* is a fraud.

The parties to the secondary contract are, on the one hand, the bribe-giver and, on the other, the principal of the bribe-recipient. This contract is entered into based upon the representations that the principal has agreed to. Unknown to the principal, these terms of the contract may have (but for the disloyalty) of the agent been more in his favor than they were under the current terms of the contract. However, the fact remains that the principal consented to the terms of the contract as signed. Similarly, the bribe-giver is well aware that the terms of the contract were influenced by his secret dealing with the agent of the principal. However, for this untruth to constitute a fraud it must have been the deliberate intention of the bribe-giver to deceive the principal with respect to the terms of the contract and, more importantly, this deliberate untrue representation must have *caused* the principal<sup>139</sup> to enter into the contract.<sup>140</sup> In other words, the false information must have influenced the principal to an extent that in this was the factor that caused the principal to enter into the contract.

It can be argued that since the principal consented the terms of the contract there was no false information regarding the contract between the principal and the bribe-giver. This contract, tainted as it is by corruption, is nonetheless a validly concluded contract. However, as regards the question of untrue representation, it could be argued that the failure to disclose the act of bribery, constituted a false representation, which if the principal was fully informed about, would have caused him not to enter into the contract. De Savornin Lohman argues that between the principal and the bribe-giver there is little doubt the bribe can be described as a 'trick' (*'kunstgreep'*), by which the employer of the bribe-recipient is moved to enter into the transaction in a fraudulent way within the meaning of Art. 3:44(3) DCC. De Savornin Lohman argues that the application of this as a ground to nullify the contract is in keeping with reality because it is precisely the discovery of this fraud that leads

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138 C. Asser, *Introduction to Dutch Civil Law: General Contract Law (Handleiding tot de beoefening van het Nederlands burgerlijk recht: algemeen overeenkomstenrecht)*, Asser Series 6, Vol. 3, Kluwer, Deventer, 2005, p. 207.

139 Emphasis added.

140 See Art. 3:44(3), sentence 3.

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to the breakdown of trust that in many instances will be the reason for the principal to want to withdraw from the contract.

However, the standard to establish fraud is high. It must be shown that the false representation *caused* the principal to enter into the contract. If the principal would still have entered into the contract albeit on different terms, then this does not constitute fraud.<sup>141</sup> Where the principal intended to enter into the contract, and the fact of bribery compromised his negotiating position as to the terms of the contract, the fact of bribery cannot be said to be a central element that induced the contract. For these reasons, bribery cannot be said to constitute fraud within the meaning of Art. 3:44(3) DCC that is sufficient to annul the contract entered into between the principal and the bribe-giver.

### 6.3.3.2 Invalidity for Reasons of Error

Art. 6:228 DCC deals with error as a vitiating factor and can apply to the secondary contract between the bribe-giver and the principal of the bribed agent. It provides:

A contract which has been entered into under the influence of an error and which would not have been concluded had there been a correct assessment of the facts, may be nullified:

- (a) if the error is due to information given to the other party, unless the other party could assume that the contract should have been entered into irrespective of such information;
- (b) if the other party, in view of what he knew or ought to know regarding the error, should have informed the party in error;
- (c) if the other party entering into the contract made the same incorrect assumption as the party in error, unless the other party, even if there had been a correct assessment of the facts, need not have understood that the party in error would therefore be prevented from entering into the contract.

Art. 6:228 DCC is said to address ‘facts or circumstances that are essential to the mistaken party (in the sense that he would not have entered into the contract on the same terms at all had he known the truth) even if the facts and circumstances are extrinsic to the contract.’<sup>142</sup> Art. 6:228(a) DCC emphasizes that where a misrepresentation has been made, this may lead to nullification of the contract. Art.6:228(b) DCC focuses on the failure to disclose information, while Art. 6:228(c) DCC deals with the consequences of a common mistake.

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141 Parl. Gesch. Boek 3, p. 210; Asser p. 208.

142 See H. Beale, A. Hartkamp, H. Kötz, D. Tallon, *Cases, Materials and Text on Contract Law: Casebook on the Common Law of Europe*, Hart Publishing, Oxford, 2002, at p. 394. See also A. Hartkamp, M. Tillema, *Contract Law in the Netherlands*, Kluwer, The Hague/Boston, 1995, Para. 80, p. 78.

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The contract that results from the successful bribery of an agent is not likely to fall under Art. 6:228(c) DCC because the terms and conditions of the contract are not the bone of contention. There is no error as to the contents of the contract. Rather, the primary focus of a claim for invalidity rests on whether the act of bribery of the agent and the failure of the bribe-giver to disclose this fact to the principal falls within the purview of Art. 6:228(a) and (b) DCC.

The principal seeking to avoid a secondary contract that is tainted by allegations of bribery could argue that it was entered into without full information or wrong information about the state of affairs relating to the contract under Art. 6:228(a) DCC. If so, the principal is in effect claiming that the contract was entered into as a result of erroneous information about the manner into which the contract came into being. If a principal is the only party that is unaware of the fact of bribery, then the principal could claim that the contract was entered into under an error about the ‘attributes’ of the other party.<sup>143</sup> This can be described as an error made as to the person with whom he was contracting. Rather than the contract being made with someone who is trustworthy, the contract was actually being made with someone who is undermining and sabotaging the interests of the mistaken party. This raises the question whether there was an intention to be legally bound in that particular instance. This failure could create a ground for declaring the contract invalid as not meeting the fundamental principle of *consensus ad idem*, which creates a binding contract,

For a claim that a contract is defective for bribery under Art. 6:228(b), there has to be proof of deliberate withholding of information by the bribe-giver. An objective test is provided in Art. 6:228(b) DCC, which offers relief on the ground of error where the party who paid the bribe knew or ought to have known that this constituted, for the principal, information that may lead to the contract not being concluded had there been a correct assessment of the facts. The second part of Art. 6:228(b) implies that such a withholding of information only constitutes an error where the party paying the bribe *had a duty to inform the party* in error of what he knew. This raises the question of when the duty to inform (*mededelingsplicht*) arises. Is the bribe-giver under a duty to inform the principal of the fact of bribery on the part of his agent? Does this failure to inform the principal come within the meaning of ‘error?’

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143 H. Beale, A. Hartkamp, H. Kötz, D. Tallon, *Cases Materials and Text on Contract Law: Casebook on the Common Law of Europe*, id., pp. 365-366, where it is pointed out that Dutch law treats mistaken identity or attributes as a kind of error falling under Art. 6:228 DCC.

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The Dutch Supreme Court has made it clear that under certain circumstances there is a duty of disclosure on the part of the other party to the transaction.<sup>144</sup> Hijma points out that it is generally agreed that there are three criteria that determine when such a duty to inform exists. These are:

- (a) where a party is aware of the real state of affairs or can be assumed to be aware of the real state of affairs;
- (b) where such a party knew or should have known that such information was important to the other party to the transaction; and
- (c) where the party must have known that the other party was mistaken.<sup>145</sup>

To these conditions Hijma adds that such a party is in such a position where the *prevailing opinion* (*verkeersopvatting*)<sup>146</sup> affirms that there is a duty to tell the other party the true state of affairs.<sup>147</sup>

Is there a *prevailing opinion* that a party who gives a bribe to an agent is under a duty to inform the principal of the agent of the fact of the bribery? De Savornin Lohman argues that the crux of the answer to this question depends on whether the principal of the bribe-recipient can be said not to have been aware of the bribery.<sup>148</sup> Art. 6:228(b) DCC applies to a situation where one party knew of the *lack of information* of the party in error. As such, a lot will depend on whether the knowledge of the agent can be imputed to the principal. If it can, then the employer is deemed to have been aware of all the circumstances relating to how the transaction came into being. De Savornin Lohman points out that this will depend on the circumstances of the case.<sup>149</sup>

Dutch law recognizes two classes of agent: the ‘direct’ agency, where a contract concluded by such an agent is imputed to the principal, and the ‘indirect’ agency, where the agent acts in his own name but for the account and

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144 HR 30 November, 1973, *NJ* 1974, 97 (Van der Beek-Van Dartel); HR, 21 December, 1990, *NJ* 1991, 251 (Van Geest-Nederlof).

145 J Hijma in his comments on Van Geest-Nederlof, HR, 21 December 1990, in S. Lindenbergh, A. Koburg (Eds.), *Cases on Contract Law (Ars Aequi Jurisprudentie Verbintenissenrecht)*, 1st edn, Ars Aequi Libri, Nijmegen, 2009, pp. 18-19.

146 There is no clear English translation for this Dutch judicial phrase. Pauline Memelink gives the closest approximation as ‘common opinion, public opinion, generally accepted principles, generally accepted views, views accepted in society, generally prevailing opinion, general business understanding, or general understanding of the business community.’ See P. Memelink, *De Verkeersopvatting*, Dissertation, Boom, Leiden, 2009, (English Summary).

147 J. Hijma in S. Lindenbergh, A. Koburg (Eds.), *Cases on Contract Law (Ars Aequi Jurisprudentie Verbintenissenrecht)*, id., Note 145 above, at p. 19.

148 O. de Savornin Lohman, *Certain Civil Law Consequences of Corruption*, id., Note 13 above, at pp. 142-143.

149 Id.

at the risk of the principal.<sup>150</sup> Cases involving bribery usually involve the direct agent who is the intermediary between the principal and the bribe-giver. There would in general be no restriction to the power of representation granted. It is indeed that very power of representation, the direct nature of the agency, which gives the agent the necessary leverage to be considered as the party with whom the bribe-giver negotiates. The principal is bound by actions that are within the agent's authority. The question arises whether the taking of a bribe to facilitate a contract renders the resulting contract outside the scope of the agent's authority.

De Savornin Lohman argues that the Supreme Court in 1979 held that where the person who represents a foundation enters into a transaction in the name of the foundation between the foundation and another party, this transaction is valid as a legal transaction of the foundation even where the statutory representatives have acted contrary to an internal rule of the foundation (that such a transaction could only come into place following a decision of the directors).<sup>151</sup>

However, another viewpoint could be based on the notion of apparent authority or lack of it. In view of the fact that bribery is criminalized under the DPC, bribery by an agent may lead to criminal liability on the part of the company that knew of such activities, if the company can be deemed to have 'implicitly authorized' such conduct. To avoid such liability, the onus will be on the company to show that it had done everything possible to ensure that bribes were not accepted by its agents, via its due diligence, company policies, company codes, warnings to prospective clients, and so on. If this meets the standard set out in Art. 3:61(2) DCC, then there can be no claim that the principal was 'informed' within the meaning of Art. 6:228 DCC. Art. 3:61(2) sets the threshold for the apparent authority of an agent. It provides:

'Where a juridical act is performed in the name of one party and, on the basis of a declaration of conduct of that party, another party has assumed and, in the circumstances could reasonably assume that a sufficient procuration (authority) had been granted, the inaccuracy of this assumption may not be invoked (against the party making the assumption).'

When the circumstances are such that a reasonable person can assume sufficient authorization given by the principal to the agent, the threshold for

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150 D. Busch, Unauthorised Agency in Dutch Law, in D. Busch, L. Macgregor (Eds.), *The Unauthorised Agent, Perspectives from European and Comparative Law*, CUP, Cambridge, id., Note 133 above, pp. 139-140.

151 O. de Savornin Lohman, Certain Civil Law Consequences of Corruption, id, Note 13 above, at pp. 146-47.

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apparent authority is met and the principal cannot claim not to have knowledge of the acts of the agent, and there will be no basis for a claim of error on the grounds of a lack of awareness of the real state of affairs. In such an instance, there would be no basis from which to declare the contract annulled. On the other hand, where the threshold of apparent authority is not met, and the company can show that the actions of the agent or intermediary were expressly forbidden by the corporation and that this was done in such a way as to make it reasonable for parties contracting with the company to assume that the agent was acting contrary to the wishes of the principal, then there can be no apparent authority within the meaning of Art. 3:61(2) and a foundation is laid for nullification on the ground of error under Art. 3:228(b).

Furthermore, the Supreme Court has held that there is a duty within reasonable boundaries to investigate before entering into a transaction so as to ensure that consent is not given as a result of an error.<sup>152</sup> In the anti-corruption climate of today's business world, this implies that a principal cannot bury his head in the sand but must play an active role in ensuring that the contract entered into is the sort of contract that the principal indeed intended to enter into and not a contract procured as a result of a bribe. This duty to investigate can also help the principal to set the boundaries of what is and what is not the apparent authority of the agent. If a principal has taken reasonable steps to investigate the other party to the transaction and any possibilities of bribery by its agent, then the exercise of this duty to investigate makes clear the fact of a lack of consent to a corrupt exchange and may allow the principal to seek to nullify a contract that is tainted by corruption despite the principal's best efforts to make sure that this did not occur. This line of reasoning could bring the lack of disclosure of the fact of bribery by the bribe-giver as a ground of error sufficient to vitiate the contract under Art 6:228 (a) and (b) DCC.

In summary, the secondary contract resulting from the successful act of commission of bribery on the part of the agent of the principal is not within the contemplation of the prohibition under Art. 328ter DPC. The question whether it is a valid contract hinges whether the consent the principal was impaired. An argument for impairment can be made on the grounds of error. If the principal had been aware of all the circumstances surrounding the contract, would he have entered into the contract? Since the party giving the bribe was aware that the consent of the principal was being undermined by the bribe transaction with the principal's agent, Art. 6:288(b) could apply to the advantage of the principal by not allowing the bribe-giver who 'purchased' the contract, to exploit the lack of information to the principal and provide such a principal with the grounds to claim a lack of consent sufficient to annul the contract.

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152 HR 15 November, 1957, *NJ* 1958, 67 (Baris-Riezenkamp).

## 6.4 Right to Return of the Bribe or Other Performance

### 6.4.1 Position of the Bribe-Giver

The giving of a bribe in a private transaction is an illegal act and forbidden by Art. 328terDPC. As a result, the contract between the bribe-giver and the bribe-recipient is a nullity and any payments made in this respect are in respect of a null transaction. A payment made on the basis of a null transaction is an undue payment within the meaning of Art. 6:203 DCC because there is no valid contract that justifies the payment of the bribe-giver to the bribe-taker. Art. 6:203 DCC provides that:

A person who has given an item of property to another without legal basis is entitled to reclaim it from the recipient as performance not due. (2) If the performance not due was the payment of a sum of money, the claim is for restitution for the same amount. (3) A person who without any legal obligation, has performed an act of a non pecuniary nature, may claim from the recipient that this performance be reversed.

Art. 6:203 DCC anticipates three sorts of performances in the making of an undue payment, *i.e.*, the giving of a ‘good’,<sup>153</sup> the giving of money,<sup>154</sup> and a performance of another kind.<sup>155</sup> From the perspective of the money paid or other advantage given by the bribe-giver, Art. 6:203 DCC provides that such a payment must be restored to the bribe-giver because the payment was made without a legal ground or a legal fact to justify the making of the payment.<sup>156</sup>

This is supported by the position of the Dutch Supreme Court in the *Lotisico* case, where parties entered into an agreement forbidden under the Lottery Law of 1905.<sup>157</sup> The court ruled that where an agreement is entered into contrary to the law, it is clear that both parties in the transaction have acted contrary to the law and the return of what is unjustifiably given can be demanded. Following this reasoning, the person who has paid the bribe has the grounds upon which to ask for the return of the bribe.<sup>158</sup>

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153 Art 6:203 Para. 1.

154 Id. Para. 2.

155 Id. Para. 3.

156 See generally, H. van Kooten *Restitutory Consequences of Invalid Agreements (Restitutierechtelijke gevolgen van ongeoorloofde overeenkomsten)*, Kluwer, Deventer, 2002.

157 HR 4 May 1923, *NJ* 1923, 920 (*Lotisico*).

158 For example, in October 1884, the District court in Assen required that an employee who had received a bribe pay the bribe back to the person who had given the bribe so as to restore the parties to the transaction position that had existed before the wrongful act of bribery was performed. Rb Assen 23 October, 1984, *NJ* 1985, 829. See on this decision A. Dorresteyn, *Corruption and Private Law*, *id.*, Note 14 above, at p. 10.

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As more focus is being turned to corrupt practices, one can conceive of instances where the bribe-giver may seek the bribe back.<sup>159</sup> Salomonson describes a situation where in a case of insolvency the trustees in bankruptcy may seek the return of bribe moneys given out by the insolvent party.<sup>160</sup> The right of the bribe-giver to the return of the bribe, on the ground of undue payment, however raises some problematic issues. De Savornin Lohman points out that in a case where the bribe-recipient has accepted the bribe but has taken no action to further the interests of the bribe-giver, it is clearly reasonable for the bribe to be returned. However, where the bribe-recipient has in fact achieved the purpose for which the bribe was given and a contract in favor of the bribe-giver has resulted, this raises questions about the reasonableness and fairness of the expectation under Art 6:203 DCC that the bribe be returned to the bribe giver. It is unfair to hold that the bribe-giver is, under these circumstances, entitled to the return of the bribe.<sup>161</sup>

### 6.4.2 Position of the Bribe-Recipient

De Savornin Lohman raises the interesting question: if a bribe-giver is entitled to a return of the bribe as an undue payment, is the bribe-recipient also entitled to some form of return for his performance under the contract? In a reciprocal agreement, Art. 6:203 DCC applies to both parties. Each party to a contract that has no legal ground has the right to have the agreement ‘undone.’ From the point of view of the bribe-recipient, the performance carried out in respect of the primary contract to give and accept a bribe is not the giving of a ‘good’ or of ‘money.’ Nonetheless, there has been a performance of some ‘other kind’ in respect of the null contract. Can this performance be repaid to the bribe-recipient?

Clearly, the actual activity that the bribe-recipient has performed cannot be returned ‘*in natura*.’<sup>162</sup> The question arises whether it can be quantified in terms of money. The two principal arguments against such a quantification center on the illegality of the activity of the briber taker and the difficulty in placing a value on the actions of the bribe-recipient. De Savornin Lohman disagrees with these arguments and states that the arguments that the actions of

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159 Of interest is the attempt by the son of former President Suharto to sue two men he says he paid \$2 million to in a failed bid to secure a pardon after his sentencing on corruption charges. See report in *The New York Times*, 4 January 2002, available at <http://query.nytimes.com/gst/fullpage.html?res=9C06E0DF1E30F937A35752C0A9649C8B63&sec=&spon=&pagewanted=print>.

160 See L. Salomonson, *Bribery*, id., Note 12 above, at pp. 74-75; See also O. de Savornin Lohman, *Certain Civil Law Consequences of Corruption*, id., Note 13 above, at p. 134.

161 See generally O. de Savornin Lohman, *Certain Civil Law Consequences of Corruption*, id., Note 13 above, at pp. 134-136.

162 Id. at p. 135.

the bribe-recipient are immoral and therefore are not quantifiable in money are met by the fact that the actions of the bribe-giver are equally morally irreprehensible, yet the bribe-recipient does have a right, under a strict reading of the law, to a return of his performance.<sup>163</sup> Secondly, he argues that the argument that it is difficult to place a value on the actions of the bribe-recipient can be met with the fact that the value of the bribe itself is known or that the value of the performance of the bribe-recipient can be assessed in terms of the value that the transaction represented for the bribe-giver.<sup>164</sup>

Quantification of the value of the transaction may be easier where the actions of the bribe-recipient have been successful and a contract has come into place as a result of these activities. However, where the purpose of giving the bribe has not been realized, the quantification of the value of the performance of the bribe-taker is more difficult to assess. It is open to question how to quantify performance made without juridical foundation. However, in general the arguments made have focused on the fact that this must be made in according to the market value.<sup>165</sup> Hamaker adopts a different point of view and states that an objective calculation can lead to unfair results and that the value should be taken from that price which the parties to the contract have placed on their null agreement.<sup>166</sup> Hijma arrives at this same conclusion in his dissertation *Nietigheid en vernietigbaarheid van rechtshandelingen*.<sup>167</sup> De Savornin Lohman, speaking specifically about bribes, states that the performance of the bribe-recipient should be viewed as ‘one that cannot be quantified in money.’ Art. 6:211 DCC provides that:

‘Where a performance made on the basis of a contract which is null and cannot by its nature be reversed, and where this performance ought not to be valued in money, a claim to reverse a counter-performance or reimbursement of its value is also barred to the extent that such claim would, for that reason offend reasonableness and fairness.’

On these premises, de Savornin Lohman argues that where rescission is not possible because the bribe has achieved its desired purpose and the resulting agreement between the bribe-giver and the employer of the bribe-recipient was

163 Id. at p. 136.

164 Id. (*in natura* can be translated as ‘in kind’).

165 See M. Scheltema, *Undue Payment (Onverschuldigde betaling)*, Kluwer, Deventer, 1997, pp. 203-207; H. van Kooten, *Restitutory Consequences of Invalid Agreements (Restitutierechtelijke gevolgen van ongeoorloofde overeenkomsten)*, id., Note 156 above, at pp. 107-112.

166 G. Hamaker, *The Claim of Undue Payment under Dutch Law (De Vordering uit Onverschuldigde Betaling naar Nederlands Recht)*, Kluwer, Deventer, 1970, at pp. 149-150.

167 See J. Hijma, *Void and Voidable Legal Transactions (Nietigheid en vernietigbaarheid van rechtshandelingen)*, id., Note 87 above, at p. 94. See also M. Scheltema, *Undue Payment (Onverschuldigde betaling)*, id., Note 165 above, pp. 236-238.

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not rescinded after the discovery of the bribe, it is in conflict with reasonableness and fairness for the bribe-giver to have a claim against the bribe-recipient and that the bribe-recipient will have no reciprocal claim against the bribe-giver. Following this reasoning, any performances made in respect of this void contract for reasons of reasonableness and fairness, should lie where they have fallen. The bribe-giver ought not to be entitled to the return of his bribe to the extent that the bribe-recipient cannot retrieve the actions he has taken in performance of the bribery contract.<sup>168</sup>

In summary, therefore, in the interests of reasonableness and fairness, the argument that supports the return of the bribe to the giver of the bribe, must also support the quantification of the corresponding performance of the bribe-recipient and the payment of such restitution. Reasonableness and fairness dictate that there should be no one-sided imposition of the right to the return of the bribe in favor of the bribe-giver. The agreement to give a bribe is a nullity and any payment made in respect of such an agreement has no legal basis. The performances of the bribe-giver and the bribe-recipient should be considered performances which under Art. 6:211 DCC by their nature cannot be reversed and ought not to be valued in money. To conclude otherwise, would benefit the bribe-giver to the detriment of the bribe-recipient where both parties have behaved in an equally morally reprehensible manner.

### 6.4.3 Position of the Principal of the Disloyal Agent

Can the amount of the bribe be claimed by the principal? An agency contract is defined as a contract for services under the DCC.<sup>169</sup> The agent must exercise the care of a good provider of services.<sup>170</sup> An important aspect of the duty of a good provider of services is the duty to account to the client for the manner in which the agent has executed the services.

In the *Goudse Bouwmeester* case,<sup>171</sup> the principal of an agent was allowed to keep the bribe money. The Chief Engineer of the City Council of Gouda received a bribe of 35,000 guilders from a contractor. The City Council discovered this and threatened him with summary dismissal stating that their final decision may be positively influenced if he returned the money. The chief engineer transferred the amount of the bribe into the Council's account. Nonetheless the City Council went ahead and fired him. He then demanded the bribe to be paid back to him stating that the payment was unjustified and

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168 See O. de Savornin Lohman, *Certain Civil Law Consequences of Corruption*, id., Note 13 above, at p. 136.

169 See Art. 7:425 DCC.

170 See Art. 7:401 DCC.

171 HR 12 March 1926, *NJ* 1926, 777, (*Goudse Bouwmeester*).

without legal basis. The Supreme Court held otherwise and stated that the City Council was entitled to keep the money.<sup>172</sup>

Where the agent has received moneys for the principal, the agent must account for such moneys.<sup>173</sup> In Salomonson's opinion, the wording of Art. 7:403 DCC and the history under Roman and German law leads to the conclusion that the principal is in his rights to expect from his agent a declaration of all that he has received as a result of his authorization and that this would also include what he has received from third persons in relation to the power of authority that he has received.<sup>174</sup> He is therefore responsible to declare the receipt of any bribe to his principal. Such a duty can only be given up by the express permission of the principal to the fact that his agent is receiving the bribe.<sup>175</sup>

### 6.5 Tort Claims

Dutch Tort law is codified in Book 6 of the Dutch Civil Code. One of the most celebrated expansions of the old Art. 1401 DCC<sup>176</sup> involved a bribery case – the *Lindenbaum-Cohen* case.<sup>177</sup> The judgment in this case has been codified in Art. 6:162 DCC, which provides:

- (1) A person who commits a tort against another which is attributable to him must repair the damage suffered by the other in consequence thereof.
- (2) Except where there are grounds for justification, the following are deemed tortious: the violation of a right and an act or omission

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172 The court reasoned that by paying back the money, motivated by feelings of proprietary, regret or other such feelings, the chief engineer had wanted to establish a 'natural' (moral) obligation. Art. 6:3 states that (1) a natural obligation is one which cannot be enforced at law. (2) A natural obligation exists (a) where the law or a juridical act deprives an obligation of its enforceability; (b) where a person has, as regards another person, a compelling moral duty of such a nature that its performance, although unenforceable at law, must, in common opinion, be considered as the performance of an obligation owed to that other person. The court found that in this instance there was a natural contract. As such, in the opinion of the court, there was a basis upon which the chief engineer had paid the money into the city council's account and as such a legal ground for the payment. The payment could therefore not be viewed as unjustified, but rather justified and as such could not be paid back.

173 See Art. 7:403 DCC.

174 See L. Salomonson, *Bribery*, id., Note 12 above, at pp. 76-81.

175 Id.

176 Art. 1401 Old DCC provided that 'Every unlawful act which causes damage to another obliges him by whose fault the damage occurred to repair it.'

177 HR 31 January 1919, (*Lindenbaum-Cohen*); *NJ* 1919, p.161: W 10365(1919). J. van Dunne, *Verbintenissenrecht: onrechtmatige daad en overige verbintenissen*, 5th edn, Kluwer, Deventer, 2004, pp. 140-144. See also the discussion about development from Art. 1401 Old DCC to Art. 6:162 DCC in G. Betlem, *Civil Liability for Transfrontier Pollution: Dutch Environmental Tort Law in International Cases in the Light of Community Law*, Kluwer, London, 1993.

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- breaching a duty imposed by law or a rule of unwritten law pertaining to proper social conduct.
- (3) An unlawful act can be imputed to its author if it results from his fault or from a cause for which he is answerable according to law or common opinion.

The claims by a victim of corruption in tort under Dutch law are considered below in the light of the provisions of Art. 6:162 DCC.

### 6.5.1 The Claim against the Agent

Art. 3 of the Civil Law Convention that is in force in the Netherlands provides that parties to the Convention shall ensure that their national laws provide *persons who have suffered damage* as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage. Such compensation may cover material damage, loss of profits and non-pecuniary loss. The persons who have suffered damage within the meaning of Art 3 CLC can be identified from provisions of Art. 2 CLC, which defines corruption as the giving or accepting of a bribe which distorts the proper *performance of any duty or behavior required of the bribe-recipient*.<sup>178</sup> The victim of corruption is that party to whom such duty is *owed*. This right of performance will most usually arise as a result of a contractual undertaking of proper performance in an agency relationship. As far as bribery in commercial transactions is concerned an action could lie in tort for damages against the agent for breach of the duty of proper performance.

The right of proper performance owed to the principal is also derived from the fact that the DCC describes the contract between the principal and his agent as a contract of mandate, by which one party the mandatee (*lasthebber*) assumes the obligation to perform juridical acts for the account of the other party, the mandatory (*lastgever*). The acts of the mandatee have legal effect for the mandatory as if they had been performed by the mandatory himself.<sup>179</sup> The mandatee may only act within the limits of the powers vested in him by the mandatory and any act performed outside of these limits will have no binding effect.<sup>180</sup> Where a mandatee acts outside of the authorization granted, the mandatory or other party to the juridical act may claim damages for any loss sustained as a result of the null act unless he knew or should have known that

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178 Emphasis added by the author.

179 Art. 3:66(1) DCC.

180 Id.

the mandatee was acting outside the remit of his power or that the mandatee had given the third party full information about the extent of his powers.<sup>181</sup>

### 6.5.2 The Claim against the Bribe-Giver

An action in tort could also lie against the party with whom the principal of the bribe-recipient was negotiating *i.e.* the bribe-giver. There is a general obligation to negotiate in ‘good faith’ that is violated where one of the parties to the negotiation seeks to undermine the position of the other party, without his knowledge, by giving a bribe to his agent. The position of the principal is undermined as is the position of other persons competing for business with the principal. There is no direct provision in Dutch law for economic torts caused by the unlawful interference with another’s business. However, bribery can be said to cause injury to all those who have sought to compete freely and fairly for a contract. Art. 6:162 DCC provides that ‘... the following are deemed tortious: the violation of a right and an act or omission breaching a duty imposed by law or a rule of unwritten law pertaining to proper social conduct.’

Acting in breach of the legal prohibitions against bribery in commercial activity under Art. 328ter DPC is clearly an unlawful act. However, the question may be raised whether the prohibition in Art. 328ter DPC is intended to protect the principal or the losing competitor claiming to have suffered unjustly as a result of the act of bribery by the bribe-giver. Art. 6:163 DCC provides that there is no obligation to repair the damage if the standard breached does not serve to protect against damage such as that suffered by the person suffering the loss. The argument can be made that Art. 328terDPC does not contemplate the injury suffered by persons whose economic interests are injured by acts of bribery. However, the counter-argument can be made that in the case of bribery, the bribe-giver violates the standard set by the statutory prohibition against bribery as well as the general duty of good faith owed to the principal as the other party in a contract negotiation and as such is an act that can be deemed tortious within the meaning of Art. 6:162 DCC.

Apart from this, there seems to be a strong case to suggest that the term ‘unlawful’ in Art. 6:162 DCC will create liability on the part of the bribe-giver with regard to *anyone* who has suffered injury as a result of an act of bribery. The duty that is breached is against the duty of care which is due in society. The Dutch Supreme Court in the famous *Lindenbaum-Cohen* case ruled on the meaning of an unlawful act arising out of non-contractual liability. This case involved a printer who had given bribes to employees of his competitors to share information about their principals. The Supreme Court stated that an

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181 Art. 3:70 DCC.

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action could lie against Cohen, the printer, even though there was no contractual undertaking between him and the employer of the persons bribed. The court held that under the term *unlawful act* is to be understood ‘an act of omission which violates another person’s right or conflicts with the defendant’s statutory duty, or is contrary either to good morals or to the care which is due in society with regard to another’s person or property.’<sup>182</sup> The concept of tort according to this case is to be understood to apply to cases of performance or non-performance by a person that is against good morals or the duty to take care, which is owed in the eyes of society to another person or property and which results in an obligation to redress such damage as may be caused as a result of such action.<sup>183</sup>

As such, the principal of the disloyal agent or any other party that has suffered injury as a result of the unlawful acts of the bribe-giver will have a right under Dutch law to sue for damages in tort for the breach of the statutory duty not to act in violation of mandatory law.

### 6.6 Compensation for Damages

The bribe-giver in making a payment to an agent seeks to distort the relationship between the agent and principal to his own advantage and to the disadvantage of the principal. This fact alone constitutes harm to the principal. Whether or not the actions of the agent taking the bribe result in a contract between the principal and the bribe-giver, there has been a failure of the duty of proper performance by the disloyal act of the agent. Where such a failure of performance results in any material damage, loss of profits or non-pecuniary loss to the person to whom the duty of proper performance is owed, there is a right to initiate an action in order to obtain full compensation for such damage.<sup>184</sup>

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182 HR 31 January 1919, *NJ* 1919 161 (Lindenbaum-Cohen). This ruling is codified in Art. 6:162(2) DCC, which states that except where there is a ground for justification, the following acts are deemed tortious: the violation of a right, or act or omission violating a statutory duty or rule of unwritten law pertaining to proper social conduct. Art. 6:162(3) DCC states that a tortfeasor is responsible for the commission of a tort if it is due to his fault or to a cause for which he is accountable by law or pursuant to generally accepted principles.

183 A. Hartkamp, Chapter 8 Law of Obligations, in J. Chorus, P. Gerver, E. Hondius (Eds.), *Introduction to Dutch Law*, Id., Note 111 above, at p. 146. See also J. van Dunne, *Verbintenissenrecht: onrechtmatige daad en overige verbintenissen*, id., Note 177 above, at pp. 141-43.

184 See Art. 3 CLC. In addition it is useful to refer to the provisions of the *Draft Common Frame of Reference*, Outline Edition, Sellier, 2009, on this point. It provides in Book 6 Art. 2:208 that:

‘Loss caused to a person as a result of an unlawful impairment of that person’s exercise of a profession or conduct of a trade is legally relevant damage. (2) Loss

6.6.1 Damages for Non-Performance of an Obligation

The principal whose agent has taken a bribe may be entitled to damages under certain circumstances. Art. 6:74 DCC provides that ‘[e]very failure of an obligation shall require the obligor to repair the damage to which the obligee suffers therefrom, unless the failure is not attributable to the obligor.’ Where the non-performance is not attributable to the agent, there can be no claim in damages.<sup>185</sup> The principal who can show that a loss has been suffered that was *caused* by the act of receipt of a bribe by an agent is entitled to damages. The plaintiff may claim damage for loss to property, rights and interests and any other prejudice suffered to the plaintiff’s property.<sup>186</sup> The courts have some discretion in determining the extent of damage to be claimed. Art. 6:97 allows the court to assess the damage in a manner most appropriate to its nature. Where the extent of the damage cannot be determined precisely, it shall be estimated by the court.<sup>187</sup> To establish a right to damages is, however, no easy task because of (1) the lack of information available to the principal; (2) the need to show that the principal has suffered quantifiable damage; and (3) the need to establish a causal link between the act of bribery and the damage suffered. There has to be a link between the non-performance and the damage caused. Art. 6:98 DCC provides that:

‘reparation of damage can only be claimed for damage which is related to the event giving rise to the liability of obligor, which, also having regards to the nature of the liability and of the damage, can be attributed to him as a result of such event.’

Art. 4 of the CLC elaborates further on this requirement for a causal link between the act of bribery and the damage caused. Art. 4(1) of the CLC provides that:

Each Party shall provide in its internal law for the following conditions to be fulfilled in order for the damage to be compensated:

- (1) the defendant has committed or authorized the act of corruption, or failed to take reasonable steps to prevent the act of corruption;
- (2) the plaintiff has suffered damage; and
- (3) there is a causal link between the act of corruption and the damage;

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caused to a consumer as a result of unfair competition is also legally relevant damage if Community or national law so provides.’

185 See Art. 6:75 DCC provides that ‘a failure in performance cannot be attributed to the obligor if it is neither due to his fault nor his account pursuant to the law, a juridical act or generally accepted principles.’

186 See Art. 6:95 DCC.

187 See Art. 6:97 DCC.

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As regards damage caused by unlawful (tortious) acts, Art. 6:162 DCC states in broad terms that ‘a person who commits an unlawful (tortious) act towards another which can be imputed to him, must repair the damage which the other person suffers as a consequence thereof.’ The tortious act must be imputable to the party to be sued.

In short, the following conditions must be met for an action with respect to compensation for damages resulting from corruption to lie. Firstly, it must be shown that the party to be sued committed or authorized the act of corruption, or failed to take reasonable steps to prevent the act of corruption. Since bribery occurs in secrecy, this is a high threshold to meet unless there is evidence forthcoming from the parties to the bribery transaction. This could occur where there is an attempt from either of these parties to hold the other to the terms of the bribery agreement where there has been a falling out. However, in the absence of such a conflict, and in the majority of cases where the transaction proceeds smoothly, there will be little incentive from the parties to the transaction to provide the evidence needed to overcome this first hurdle. Independent evidence could be uncovered by forensic accounting and auditing. This is a difficult process as most bribery transactions will occur ‘off the books.’

In recognition of the difficulty this hurdle represents, Art. 10 CLC requires that:

- (1) Each Party shall, in its internal law, take any necessary measures for the annual accounts of companies to be drawn up clearly and give a true and fair view of the company’s financial position.
- (2) With a view to preventing acts of corruption, each Party shall provide in its internal law for auditors to confirm that the annual accounts present a true and fair view of the company’s financial position.

Art. 11 CLC requires that ‘[e]ach party shall provide in its internal law for effective procedures for the acquisition of evidence in civil proceedings arising from an act of corruption.’ Effective internal control mechanisms may help detect that a bribe has been paid and help in the establishment of the fact that the bribe-giver indeed paid a bribe.<sup>188</sup>

Secondly, the party bringing the tort claim must show that damage has been suffered. This is a difficult requirement to establish within the context of an

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188 This will also help to provide a company with the information that a violation of the anti-corruption rules may have occurred and indicate to such a company whether measures such as voluntary reporting should be undertaken, depending on the extent of exposure such a company has to legislative regimes such as the Foreign Corrupt Practices Act or the UK Bribery Act of 2010.

agency relationship. Where the bribery transaction has been successful and the party offering the bribe has entered into a contract with the principal of the bribed agent, the contract itself can only represent damage to the principal where the terms were grossly unfair or misleading. As Salomonson points out, in most cases it will be difficult for the principal to establish (1) that he has suffered damage and (2) the quantum of such damage.<sup>189</sup> In most cases proof of damage will only be possible where the agent has negotiated clearly unacceptable conditions, such as the purchase of products above the market price.<sup>190</sup> In most instances, however, the act of bribery will lead to a contract that is beneficial to the principal, who has agreed to enter into the contract on the terms specified. This is a major difficulty in proving damage sufficient to found a claim in cases of bribery where a subsequent contract has been concluded between the principal and the bribe-giver.

A third hurdle that must be passed is the requirement for a causal link between the act of corruption and the damage suffered. If it is in the first place difficult to establish that damage has occurred to the principal then the issue of causality becomes moot. Apart from this, the causal link limits the sphere of victims that can claim for compensation. The fact that a corporation gave a bribe to construct a bridge that consequently fell down and injured a person may give rise to a suit for negligence but it will be hard to establish a direct causal link between the bribe and the bridge collapsing. The direct cause would be the negligent construction rather than the remote possibility of the influence of a bribe in the negotiation of the contract. It is not sufficient that an act of bribery took place; it must also be demonstrable that the plaintiff has suffered damage that can be attributable to the act of bribery. This proof of damage will in the majority of cases be difficult to achieve.

#### 6.6.2 Joint and Several Liability

Both the bribe-giver and the bribe-recipient are jointly and severally liable for damages to the principal. It is not clear whether the bribe-giver and the bribe-recipient can have recourse to each other in dividing up the claim. Art. 4(2) CLC provides that ‘Each Party shall provide in its internal law that, if several defendants are liable for damage for the same corrupt activity, they shall be jointly and severally liable.’ Similarly, Art. 6:101 DCC provides that both parties are liable for the portion of the damage that each in their mutual relationship has occasioned and that they are obliged to come to an agreement regarding damages and costs. Art. 6:101 DCC further provides that damages will be in proportion with the extent to which the damage can be attributed to

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189 See L. Salomonson, *Bribery*, id., Note 12 above, at pp. 74-75.

190 Id.

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each party, which depends on the circumstances of the case. This gives the judge room to look at the circumstances in coming to a decision. De Savornin Lohman is of the opinion that this will in most instances lead to the greater portion of the damage being borne by the bribe-giver.<sup>191</sup> This is also in keeping with Art. 6:2 DCC, which requires that obligations meet with the requirement of reasonableness and fairness.

### 6.7 Dismissal of the Agent

The agent of a principal who takes a bribe is usually a *direct agent* who has sufficient authority to bind the principal and who was acting in the name of the principal at the time that the contract is concluded.<sup>192</sup> Such an agency contract is a general contract of employment where the agent undertakes to perform work in the service of the principal for remuneration for a given period.<sup>193</sup> In this respect there is a duty to act *bona fides*. The principal and the agent are under an obligation to act as a good employer and a good employee.<sup>194</sup> Where an agent has taken a bribe against the interests of the principal, this can lead to the summary dismissal of the agent for ‘urgent reason.’ Art. 7:677 DCC provides that each of the parties to a contract of employment may give notice of termination of employment for ‘an urgent reason.’ The principal may also apply to a court with a request that a contract of employment be set aside for ‘serious reasons’ under Art. 7:685(1) DCC. Such a ‘serious reason’ will include those circumstances which would constitute an ‘urgent reason’ under Art. 7:677 DCC.<sup>195</sup>

Examples of circumstances that will constitute an ‘urgent reason’ to end an employment include circumstances where the agent lacks to a ‘serious degree the competence or suitability to carry out the work he has contracted to perform,’<sup>196</sup> the agent is guilty of theft, embezzlement, fraud or other offenses, and thereby ‘ceases to be worthy of the trust of the employer’<sup>197</sup> where the agent ‘gravely neglects the work to which he is subject under the contract of employment,’<sup>198</sup> or where the agent becomes or remains unable to perform the contracted work due to intent or recklessness.<sup>199</sup>

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191 See O. de Savornin Lohman, *Certain Civil Law Consequences of Corruption*, id., Note 13 above, at pp. 156-157.

192 See Art. 3:610(1) DCC.

193 See Art. 7:610(1) DCC.

194 See Art. 7:611 DCC.

195 See Art. 7:685(2) DCC.

196 See Art. 7:678(2)b DCC.

197 See Art. 7:678(2)(c) DCC.

198 See Art. 7:678(2)(k) DCC.

199 See Art. 7:678(2)(l) DCC.

In any of these circumstances which may easily result where the agent has acted contrary to the interest of the principal by taking a bribe to influence a transaction in favor a third party, an aggrieved principal may not ‘reasonably be required to allow the contract of employment to continue by a court of law.’<sup>200</sup> As such, the act of bribery may give the principal the right to terminate the contract of employment with the agent with immediate effect and such an agent will be liable to the principal in damages.<sup>201</sup>

### 6.8 The Collective Claim

With regard to empowering litigants to file private actions for corruption, there are mechanisms under Dutch law that encourage small claimants to pool their claims and resources together to bring a collective action. Art. 305a DCC allows for foundations of associations to bring a representative action on behalf of a group of persons with similar interests to the extent that the articles of the foundation promote this interest.<sup>202</sup> This has led to the growth of specialized claim associations.<sup>203</sup> The right to bring an action is subject to a major restriction. Such a foundation has no *locus standi* to bring the claim unless it can show that it has first made an attempt to consult with the defendant to resolve the issue.<sup>204</sup>

Art. 305a DCC serves primarily to encourage the voluntary settlement of disputes regarding harm suffered. Only where there has been an attempt at voluntary settlement can an action be filed in court. Again, there is a restriction regarding the remedy. The foundation may seek a declaratory order from the court against the defendant; however, such an action will not be allowed for the purpose of seeking monetary compensation.<sup>205</sup> As such, the Art. 305a DCC foundation has a rather restricted scope. As has been pointed out these restrictions have taken the ‘sting’ out of its provisions. ‘It can be used for eliciting declaratory judgments on wrongfulness and for obtaining injunctive

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200 See Art. 7:678(1) DCC.

201 See Art. 7:677(3) DCC.

202 Art. 3:305a(1) DCC.

203 Art. 3:305(a) DCC, group actions are by and large self-regulated. In recent times there has been an initiative led by the Dutch lawyer Jurjem Lemstra with other stakeholders to produce a on a claim code for ‘Article 3:305a DCC foundations’ (*Claimstichtingen*). The Claim code was entered into effect in July 2011.  
[http://www.google.nl/url?sa=t&source=web&cd=2&ved=0CC4QFjAB&url=http%3A%2F%2Fwww.consumentenbond.nl%2Fmorello-bestanden%2F716993%2Fcompljuniclaimcodecomm2011.pdf&rct=j&q=Claimcode&ei=HWVwTqv6G8SbOrzK5ZEJ&usg=AFQjCNGitqDPrFks3mBzcTrg19sF2-L6w&sig2=bwUHok4GERjS7\\_z\\_V5wkeQ&cad=rja](http://www.google.nl/url?sa=t&source=web&cd=2&ved=0CC4QFjAB&url=http%3A%2F%2Fwww.consumentenbond.nl%2Fmorello-bestanden%2F716993%2Fcompljuniclaimcodecomm2011.pdf&rct=j&q=Claimcode&ei=HWVwTqv6G8SbOrzK5ZEJ&usg=AFQjCNGitqDPrFks3mBzcTrg19sF2-L6w&sig2=bwUHok4GERjS7_z_V5wkeQ&cad=rja).

204 Art. 3:302a(2) DCC.

205 Art. 3:305a(3) DCC.

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relief, but strictly speaking it cannot be used to legally compel the tortfeasor to compensate.<sup>206</sup>

Apart from the assignment of individual claims to a foundation under Art. 305a since 2005 under the Wet Collectieve Afwikkelingen Massaschade WCAM (Collective Settlement of Mass Damage Act) there is the possibility of a collective action for mass damage.<sup>207</sup> The collective action under WCAM is a process of reaching a settlement between all parties that are affected by a damage<sup>208</sup> causing event that is declared binding by a court of law.<sup>209</sup> The Court has a supervisory jurisdiction over the agreement and may reject the agreement on several grounds.<sup>210</sup> However, the main thrust of the WCAM is the voluntary and amicable settlement of disputes.<sup>211</sup>

It must be pointed out that the Dutch collective action is *sui generis* and very distinguishable from the more commonly encountered class action that is typical of the US legal system.<sup>212</sup> Indeed the collective action has different goals than the typical class action for damages. As such, despite the

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206 T. Arons, W. van Boom, 'Beyond tulips and cheese: exporting mass securities claim', *European Business Law Review*, Vol. 21, No. 6, 2010, at pp. 862-864, for a short history of the case law that is codified in Art. 305(a) DCC.

207 Wet Collectieve Afwikkelingen Massaschade WCAM 2005.

208 Art. 907(2) DCC.

209 Art. 7:907(1) DCC provides that a collective agreement is '[a]n agreement concerning the payment of compensation for damage caused by an event or similar events concluded between a foundation or association with full legal competence and one or more other parties which have committed themselves by this agreement to pay compensation for this damage may, at the joint request of the parties that concluded the agreement, be declared binding by the court on persons to whom the damage was caused so long as the foundation or association represents the interests of these persons pursuant to its articles of association.'

210 Art. 907(3) DCC provides that 'The court shall reject the request if: (a) the agreement does not comply with the provisions of paragraph 2; (b) the amount of the compensation awarded is not reasonable having regard, inter alia, to the extent of the damage, the ease and speed with which the compensation can be obtained and the possible causes of the damage; (c) insufficient security is provided for the payment of the claims of persons on whose behalf the agreement was concluded; (d) the agreement does not provide for the independent determination of the compensation to be paid pursuant to the agreement; (e) the interests of the persons on whose behalf the agreement was concluded are otherwise not adequately safeguarded; (f) the foundation or association referred to in paragraph 1 is not sufficiently representative of the interests of persons on whose behalf the agreement was concluded; (g) the group of persons on whose behalf the agreement was concluded is not large enough to justify a declaration that the agreement is binding.'

211 For procedure under the WCAM see T. Arons, W. van Boom, 'Beyond tulips and cheese: exporting mass securities claim', id., Note 206 above, at pp. 865-876.

212 See generally, T. Arons, W. van Boom, id., at pp. 857-883. See also H. van Lith, *The Dutch Collective Settlement Act and Private International Law*, Maklu, Apeldoorn, 2011, at pp. 13-18; Guidance on the Dutch Collective Settlement Act 2005 by the Ministry of Justice, available at <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/richtlijnen/2008/06/24/de-nederlandse-wet-collectieve-afwikkeling-massaschade/litwcamfrenkn.pdf>.

introduction of the WCAM in the Netherlands, it has been rightly remarked that the class action is not a feature of European litigation.<sup>213</sup> For the small claimant seeking to file a private action for bribery, the focus of collective actions on voluntary settlements in the Netherlands offers a different approach to the developed class actions mechanism of a country like the US.

### 6.9 Observations

The normative framework for private remedies for corruption in the Netherlands is found in the provisions of the UNCC, the CLC and in the provisions of the DPC and DCC. The DPC underwent reform to reflect the changes that have taken place in the international framework regarding corruption, with the result that domestic and foreign acts of corruption are criminalized in the Netherlands. These instruments form the platform upon which the issue of private remedies for corruption takes shape. The definition of corruption under Dutch private law is restricted to bribery. Despite the lack of corruption cases prosecuted in the Netherlands, there has been significant legislative activity that has resulted in an anti-corruption strategy that condemns corruption and is, in principle, committed to providing not just state prosecutors but victims of corruption with a means of fighting the negative consequences of corruption.

This broad policy position is, however, limited by the ambit of the rules in the civil code. In general terms, the position of the penal and private law is that bribery can only be said to occur in a relationship between the principal of an agent who has acted in breach of the duty of trust, the agent, and the bribe-giver who engineers the breach of the duty. Two of these three parties are in a contractual relationship. It is the existence of the contractual relationship between the principal and the bribe-recipient that creates a situation where the bribe recipient has the power to influence the coming into existence of a contract between the principal and the bribe-giver. This grant of power in an agency relationship, such as that between the principal and the bribe-recipient, is subject to the limitation that it be exercised in the best interests of the principal. Where this power is exercised contrary to the interests of the principal and in favor of the bribe-giver, this results in a misuse of power and the commission of a legal wrong, and constitutes a breach of mandate with legal consequences.

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213 W. van Boom, M. Loos, 'Effective Enforcement of Consumer Law in Europe: Synchronizing Private, Public, and Collective Mechanisms', January 2008, at p. 7, Electronic Copy available at SSRN: <http://ssrn.com/abstract=1082913>.

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The Dutch Civil Code lists four primary areas where a victim may claim rights with regard to a relationship tainted by corruption: firstly, with regard to the validity of the agreement; secondly, the right to the return of the bribe or other inducement; thirdly, in the right to bring an action for compensation for damages; and lastly, in the position of the employer affected by corruption on the part of his employee. All of these issues flow out of the relationship between the bribe-giver, the bribe-recipient and the principal of the bribe-recipient. Beyond this narrow category of persons directly involved in the bribery transactions, there is little scope within Dutch law for actions by the indirect victims that may suffer the consequences of corrupt actions. For such indirect victims, their protection against corruption remains in public criminal law and administrative processes such as the BIBOB law. As far as Dutch private law is concerned, however, the primary victim of the act of corruption is the principal of the disloyal agent.

*The Primary Agreement:* The Dutch rules prohibiting private bribery are silent as to the status of transactions entered into in violation of the prohibition. Yet, there is a minimum standard established by Art. 8 CLC Corruption, which stipulates for the invalidation of any contract or clause of a contract providing for corruption, as well as nullity where a party's consent to a contract has been undermined by an act of corruption. These provisions provide a minimum content to the approach the courts must take.

A primary ground for invalidity or nullity is found in the provisions of Art. 3:44 DCC. The provisions of the Dutch Civil code and the jurisprudence on this matter support the conclusion that a primary contract providing for bribery would be a nullity for being contrary to good morals and public order as well as for being in violation of an imperative statutory provision. An agreement to pay a bribe is contrary to good and public order because it commits the actors to carrying out an action that violates an imperative statutory provision.

*The Secondary Agreement:* The question of transaction validity also extends to the subsequent contract that comes into being between the person to whom the bribe-recipient owed a duty of proper performance and the bribe-giver. This contract is not in conflict with the imperative statutory conditions laid down by Art. 328ter DPC, which only applies to the contract that is entered into between the giver and the bribe-recipient. Here the issue of validity centers on the sufficiency of consent. Factors that may undermine the consent to a contract include the abuse of circumstances, error, fraud and improper performance of representational authority. Fraud is a possible ground on which the principal can seek the nullity of a contract. A bribe is certainly evidence of withholding information or inaccurate information to the principal within the meaning of the Art. 3:44(2) Civil Code. This provides the principal with the grounds to avoid the contract for which he claims that had he been fully

informed he would not have entered into the contract. However, proof of fraud is a very high threshold that is not likely to be met in the typical bribery case.

Error is a promising ground for the application of nullity of the secondary contract. Art. 6:228 DCC provides that a contract can be annulled which has been entered into under the influence of error and which would not have been entered into had there been a correct assessment of the facts. Some writers argue that Art. 6:228 DCC is not written for circumstances such as bribery but rather situations where the party suffering under the error has entered into an agreement different from what he thought he was receiving. This is clearly not the case with the contract between the bribe-giver and the employee/principal where both parties are quite clear as to the subject matter of the contract in question. However, the crucial question remains whether the principal would have entered into the contract had he been aware of all the circumstances surrounding the contract.

To the extent that the party giving the bribe was aware that the consent of the principal was being undermined by the bribery transaction with the principal's agent, Art. 6:288(b) DCC could apply to the advantage of the principal where the principal can show that the actions of the agent or intermediary were expressly forbidden by the corporation and that this was done in such a way as to make it reasonable to assume that the agent was acting contrary to the wishes of the principal. Under such circumstances, there would be no imputation of the knowledge of the agent to the principal within the meaning of Art. 3:61(2) DCC. Furthermore, where it is reasonable from public facts to assume that the agent was acting without authority, the bribe-giver would arguably have a duty to inform the principal under Art. 6:288(b) DCC. This lays the foundation for nullification on the ground of error.

With the increasing availability of codes of conduct and self-regulatory frameworks which expressly state that acts of bribery are a violation of company policies, it can be argued that this puts the potential bribe-giver on notice and provides sufficient notice for a reasonable assumption that an agent was acting outside the scope of authority. On such a basis, the act of bribery could fall into the category of information that should be disclosed by the bribe-giver to the principal of the bribe-recipient in order to enable the principal to make a correct assessment about whether or not to proceed with the contract. The non-disclosure by the bribe-giver is arguable ground to nullify the subsequent contract, should the principal desire to do so.

*Right of Return of the Bribe:* If a contract is null in the eyes of the law, it is deemed never to have existed. What occurs then in respect of the performance that has already occurred under the null contract? Art. 7:403 DCC and the jurisprudence on this matter leads to the conclusion that the principal is in his rights to expect from his agent a declaration of all that he has received,

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including the bribe money. In the *Goudse Bouwmeester* case, for example, the principal of the agent was allowed to keep the bribe money. More controversial is the question whether the bribe-giver has a right to the return of the bribe money? The Dutch Supreme Court in *Lotisico* ruled that an agreement that is entered into contrary to the law is a nullity and as such has no legal consequences, and that the return of what is unjustifiably given can be demanded. However, if the bribe-giver is entitled to a return of the bribe as an undue payment, the bribe-recipient is also by the same logic entitled to some form of return for his performance under the contract. This is hardly possible, and Art. 6:211 DCC stipulates that where a performance in kind is made on the ground of a null agreement and does not deserve to be recompensed in money, then the rescission or ‘unmaking’ of the reciprocal action or the repayment of the value thereof is ruled out. Following this reasoning, the company that has given a bribe and the agent who receives a bribe are parties to a contract which, if it comes to light, is a nullity. Any performances made in respect of this null contract for reasons of reasonableness and fairness, will lie where they have fallen.

*Compensation:* The second aspect of the question for civil remedies is the right to institute an action for compensation for damage suffered. The Dutch Supreme Court in the case of *Lindenbaum-Cohen* has given a broad interpretation to the notion of an ‘unlawful act.’ It applies to a performance or non-performance by a person that is against good morals or the duty to take care of that which in the eyes of society is owed to another person or property. A violation of this results in an obligation to redress such damage as may be caused by such an action. Clearly the act of bribery constitutes an unlawful act as a violation of the right of the principal to the proper performance of his agent. It is also a violation of an imperative statutory duty not to give a bribe or other inducement. However, in order for an action for compensation to take place there must be *proof of damage*. In bribery cases this is typically a very high burden to discharge.

The right to sue is restricted by the conditions that need to be met by the person seeking to be compensated. These conditions circumscribe the scope of persons who can be considered ‘victims’ under the normative framework for private remedies under Dutch law. Art. 4 CLC makes it clear that it is not sufficient that an act of bribery took place; it must also be demonstrable that the plaintiff has suffered damage that can be attributable to the act of bribery. The major problem facing the potential plaintiff in actions for compensation is the proof of damage and the quantification of such damage. For this reason it is likely that the right to private remedies for damage arising from corruption may be manifested primarily in its use as a shield to avoid liability under a contract by seeking a declaration of nullity, rather than as a sword to claim compensation for damage under the existing provisions of Dutch law.

### 6.10 Conclusion

The victim of corruption under Dutch law is restricted to the narrow category of the principal of the disloyal agent. This principal represents the direct victim that has suffered damages as a result of corrupt actions. It is the betrayal of the position of trust by the agent that founds the private claim. However, the CLC arguably moves beyond this narrow conceptual basis and speaks of ‘any person’ who has suffered damage. The challenge therefore remains to enable the indirect victim, who may not strictly fall within the principal/agent relationship, to bring claims for redress for breach of non-contractual obligations that occurred as a result of acts of corruption. Dutch law does not recognize a broader category of victims. The types of remedies and categories of persons that may bring an action are restricted by the fact that claims can only be brought by the party to whom the agent owed a duty of performance.

The primary agreement to give a bribe is shrouded in secrecy and will only see the light of day where there is a falling out between the parties to the transactions. This means that rigorous mandatory forensic accounting, which exposes illegal transactions, will remain the primary method of fighting corruption related to the primary agreement. The secondary agreement between the offeror of the bribe and the principal of the disloyal agent *may* be declared invalid following an action by a dissatisfied principal who can show that consent was impaired. However, questions of compensation for damages are made almost unrealistic given the high hurdles of causality that must be scaled.

Does this satisfy the call for private remedies for victims of corruption? The very narrow possibilities that exist for the victim under Dutch Law call for a critical look at how the civil law can be a more effective tool in the fight against corruption. Nothing significant has been added or changed in Dutch private law by the UNCC and CLC regarding redress for the person who has suffered harm as a result of corruption. The right to compensation for damage for the victim of corruption is certainly better acknowledged, but there has been no broadening of a private remedy beyond the scope that already existed under the DCC.

# CHAPTER 7

## THE ROLE OF INTERNATIONAL ARBITRATION

### 7.1 Introduction

Chapters 4-6 have looked at models for private remedies for corruption in the United States, England and the Netherlands. This chapter focuses on international arbitration, a legal process that plays a key role in the regulatory environment of international business.<sup>1</sup> For centuries transacting parties from different jurisdictions have resorted to arbitration as the method of choice to resolve disputes of an international commercial character.<sup>2</sup> Arbitration is a process of dispute settlement that is set up and controlled by the parties to the dispute. It is founded on the principle of party autonomy and underscored by the principle of freedom of contract. This private system of commercial dispute settlement is 'held in place by a complex system of national laws and international treaties.'<sup>3</sup> Although set up by private persons, it has binding force because decisions of the arbitration panel are enforced by the state where parties do not voluntarily comply. International commercial arbitration is a

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1 This chapter is based on a paper presented at a at the Conference on the Civil Law Consequences of Corruption ZERP, Center for European Law and Politics, Bremen, University of Bremen, Germany on 15 March 2008 and subsequently published as A. Makinwa, Civil Remedies for International Corruption: The Role of International Arbitration in the Fight against Corruption, in O. Meyer (Ed.), *Civil Law Consequences of Corruption* (Schriftenreihe des Zentrums für Europäische Rechtspolitik an der Universität Bremen), ZERP, Vol. 3, Nomos Verlag, Baden Baden, 2009, pp. 257-280.

2 For a brief historical review of international arbitration see A. Redfern, M. Hunter, *Law and Practice of International Commercial Arbitration*, Sweet and Maxwell, London, 2004, pp. 2-5. They describe the transformation of arbitration from a primitive form of settling disputes to the preeminent form of settling international commercial disputes. They state, '... at its core, international commercial arbitration remains much as it always was. It is a private method of dispute resolution, chosen by parties themselves as an effective way of putting an end to disputes between them, without recourse to the courts of law. It is conducted in different countries and against different legal and cultural backgrounds with a striking lack of formality ... it does not look like a legal proceeding at all.' *Id.*, at p. 1.

3 *Id.*

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process that is neither fully private nor fully public. It is ‘a hybrid’ form of access to justice that straddles the junction between private and public law.<sup>4</sup>

The issue of private remedies for victims of corruption has received special impetus by the provisions of Art 35 UNCC that requires States to provide persons that have suffered damage as the result of corrupt acts, the means to institute *legal proceedings* to claim compensation.<sup>5</sup> A legal proceeding is generally defined as ‘the orderly sequence of events that constitutes the progression of a lawsuit or judicial procedure from the time of commencement, through all acts and occurrences, until and including the execution of the final judgment.’<sup>6</sup> The legal proceeding characterizes a system of public justice where the state intervenes in disagreements to provide solutions in the interest of the disputing parties and ultimately to society. While Art 35 UNCC refers to legal proceedings and not to international arbitration, its provisions do call on states to ensure redress for *all* victims. To the extent that international arbitration may influence this private right of redress, the role it plays in disputes involving contracts tainted by corruption, should be assessed.

Furthermore, the presence of an arbitration clause in the international contracts that characterise grand corruption means that the primary forum for the settlement of disputes involving contracts tainted by international corruption would not be legal proceedings in a national court, but rather by international arbitration. It is therefore necessary to define and examine the role of the international arbitration in an examination of the rights of private individuals to seek remedies for harm suffered as a result of corruption.

The chapter examines the response of the arbitrator to matters tainted by corruption.<sup>7</sup> It looks at the effect of the world-wide convergence of mandatory

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4 Redfern and Hunter describe international commercial arbitration as a hybrid. ‘It begins as a private agreement between the parties. It continues by way of private proceedings, in which the wishes of the parties are of great importance. Yet it ends with an award that has binding legal force and effect and which, on appropriate conditions, the courts of most countries in the world will recognise and enforce. The private process has a public effect....’ *Id.*, at p. 11.

5 Emphasis added.

6 *Webster’s Law Dictionary*, Wiley, Hoboken, NJ, 2006.

7 This is a broader question than the technical issue of the arbitrability of a contract tainted by corruption. As the following sections show, there is broad agreement that a tribunal has the authority to entertain matters that are tainted by corruption. This chapter, however, looks beyond the basic jurisdictional issue of arbitrability to the compatibility of private arbitration or self-regulation with the resolution of disputes that have a public dimension. The case being made here is that the principles of arbitrability, separability of the arbitration clause and competence-competence, which preserve the right of the arbitration panel to entertain matters tainted by corruption, are premised on the foundation that the rights at issue are essentially private rights. The worldwide criminalization of corruption emphasizes the public dimension of matters involving contracts tainted by corruption. The extent to which a private right centered mechanism can legitimately resolve matters involving public rights raises questions

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rules regarding international corruption as well as the emergence of international anti-corruption public policy on the function of the arbitrator. The two models of response identified in this chapter strengthen the position of victim of corruption by bringing an element of transparency into the arbitration process regarding contracts sanctioned by corruption. However, these responses to matters tainted by corruption also raise significant questions about the expanding scope of the arbitral panel into areas of public law and public rights and the legitimacy of the arbitration process when it takes on such a role. The appropriateness of international arbitration as a forum for settlement of disputes tainted by corruption which have a criminal public dimension is questioned to the extent that private arbitration may not adequately cater for the harm suffered by *all* parties who have suffered harm as a result of corruption or be capable as acting as a custodian for the public good.

### 7.2 The Arbitration Panel and the Victim of Corruption

Art 35 UNCC speaks in terms of victims of corruption. From the perspective of the arbitral panel, victims of corrupt actions fall into two groups: those directly involved in the transaction as a party to the contract in dispute and those indirect victims that are affected by the consequences of the contract.<sup>8</sup> Direct victims who are parties to the contract in question and have suffered damage as a result of corrupt acts may raise corruption as a defense to obligations arising under the contract in dispute. While arbitration typically affects the private rights of parties that agree to subject their private disputes to international arbitration, many contracts acquired via government procurement or bidding process have a public dimension. Where such contracts go to arbitration the question arises as to the proper role of the arbitration panel when faced by such quasi-public matters. The position of the indirect victims that lie beyond the commercial transaction tainted by corruption raises questions about the legitimacy of the international arbitration forum to resolve disputes where the public dimension impinges on these 'ultimate' victims.<sup>9</sup>

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about the role of the arbitration panel in the fight against corruption. This chapter is centered on the fact that the contract tainted by corruption is a contract that is in violation of the law applicable to the contract in most major arbitration centers today.

8 Art. 35 UNCC speaks of a victim as an 'entity' or 'person' who has 'suffered damage' as a result of an act of corruption. UN Convention against Corruption New York, 31 October 2003, in force 14 December 2005, 2349 UNTS, p. 41; (2004) 43 *ILM* 37 (hereinafter, the UNCC).

9 The following quotation sums up the heart of the legitimacy question: 'Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged. And it is all in the name of protecting the rights of foreign investors under the North American Free Trade Agreement.' IISD Publications Centre, *Private Rights Public Problems, A Guide to NAFTA's Controversial*

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Some examples from investment arbitration highlight the plight of such indirect victims in transactions affected by allegations of corruption before a tribunal. Examples are damage suffered by persons living next to a toxic landfill,<sup>10</sup> the drinkers of water contaminated by chemicals, and states trying to undo consequences of massive fraud in a procurement bidding process.<sup>11</sup> In these cases the victims affected by the contract tainted by corruption are made visible. This underscores the fact that corruption is not a ‘victimless’ crime. The basic rights and security of citizens are often compromised by acts of international bribery that distort free market conditions, compromise the provision of goods and services, and deter social development.

### 7.3 Implications of Criminalization

International arbitration in cases involving commercial corruption now takes place within a new normative framework. The existence of this new normative order is demonstrated by the global reach of the recent UNCC signed by 140 countries.<sup>12</sup> The international repudiation of corruption and the criminalization of public and private bribery in international business transactions set contracts tainted by corruption apart as originating from the commission of a legal wrong. This framework has an impact on the role and possible obligations of the arbitrator and also raises questions about the appropriateness of the private agreement to arbitrate disputes that have a public dimension. While the focus of the anti-corruption rules is on formal legal proceedings, it certainly does influence the normative framework within which the arbitration panel must act. The arbitration panel is an integral part of the justice system and its actions should be consistent with the international regulatory framework against corruption.

With the wide reaching criminalization of international corruption, the relative, culture specific perspective regarding corruption has given way, in certain aspects and to a certain extent, to a common standard.<sup>13</sup> For international arbitration, such a ‘universal’ state of affairs implies that the effect of anti-corruption rules on arbitration would be relatively consistent regardless of the

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*Chapter on Investor Rights*, New York Times, International Institute for Sustainable Development and the World Wildlife Fund, 11 March 2001 available at [www.iisd.org/pdf/trade\\_citizensguide.pdf](http://www.iisd.org/pdf/trade_citizensguide.pdf), accessed on 11 November 2011.

10 See W. Dodge, ‘Metalclad Corporation v. Mexico, ICSID Case No. ARB(AF)/97/1, 40 *ILM* 36 (2001), and Mexico v. Metalclad Corporation, 2001 B.C.S.C. 664, *American Journal of International Law*, Vol. 95, No. 4 (October 2001), pp. 910-919.

11 *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26.

12 For a normative analysis of anti-corruption regulations see M. Bukovansky, *Corruption is Bad: Normative Dimensions of the Anti-Corruption Movement*, Working Paper, No. 2002/5, Department of International Relations, Australian National University, 1962.

13 A. Makinwa, ‘The rules regulating transnational bribery: achieving a common standard?’, *International Business Law Journal*, Iss. 1, 2007, p. 17.

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law applicable to the contract. This situation lends itself to the notion of a consistent standard to be adopted by the arbitration panel when faced with matters tainted by international corruption.<sup>14</sup> This is all the more so because of the influence of national law on the implementation of the arbitration process. The application of a consistent standard by the arbitration tribunal overcomes the problem of divergent national approaches. This is a very welcome development because it raises the possibility of treating the primary and secondary contract tainted by corruption in a similar fashion regardless of whether the contracting parties are from a civil or common law jurisdiction.

The private sphere of arbitration must interact with the public sphere of government power when it comes to the recognition and enforcement of awards. In this sense, the fate of a private award ultimately rests with the public authorities.<sup>15</sup> This is particularly true of international arbitration where an agreement reached by private agreement at the international level can only be enforced by a domestic national court in the absence of voluntary settlement. The generality of arbitration instruments make recognition and enforcement by the national courts subject to the compliance with the public policy of the country where the award is sought to be enforced. Making international arbitration awards subject to the public policy of a State preserves the norms of the society and the legitimate expectations of its citizens.

Examples of this requirement for compliance with public policy are found in the New York Convention on the Recognition and Enforcement of Arbitral Awards<sup>16</sup> and the UNCITRAL Model International Arbitration law.<sup>17</sup> Both instruments stipulate that enforcement of awards will not be allowed where

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14 In the absence of an international standard there is no moral basis binding the arbitrator. In this viewpoint it may be argued that:

‘[a]rbitrators operate in a morally relative environment, in the sense that the moral basis in the evaluation of corruption is specific to each arbitral process. This suggests in turn that there could be as many moral systems as there are arbitral processes evaluating corruption.’

See A. Sayed, *Corruption in International Trade and Commercial Arbitration*, 1st edn, Kluwer Law International, The Hague, 2004, p. 23.

15 Hunter and Redfern emphasize that ‘An understanding of the necessary interchange between the arbitral process and national systems of law is fundamental to a proper appreciation of international commercial arbitration.’ They point out that the interchange with local courts may occur at the beginning of the arbitration process with judicial enforcement of the arbitration agreement, to intervene in the process itself in the appointment of a tribunal (if this cannot be done under the arbitration agreement) and after an award is made to intervene to enforce the award. See A. Redfern, M. Hunter, *Law and Practice of International Commercial Arbitration*, id., Note 2 above, at p. 65.

16 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (the ‘New York’ Convention), New York, 10 June 1958, in force 7 June 1959, 1958, 330 UNTS p. 3. See also UNCITRAL Model Law on International Commercial Arbitration 1985 Art. 34 and Art. 36.

17 UNCITRAL Model Law on International Commercial Arbitration 1985 Art. 34 and Art. 36.

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they infringe against the public policy of the state where the award is to be enforced.<sup>18</sup> The New York Convention provides:

‘recognition and enforcement of an arbitral award may ... be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not *capable of settlement by arbitration* under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.’<sup>19</sup>

Also, awards may be reviewed at the place of the seat of arbitration on limited grounds including public policy.<sup>20</sup>

The supervisory role of the courts of the seat of arbitration or the place of enforcement is crucial in a system of dispute resolution that operates parallel to the national courts system because not all matters are *capable of settlement* by arbitration.<sup>21</sup> Redfern and Hunter note that:

‘...it is precisely because arbitration is a private proceeding with public consequences that some types of dispute are reserved for national courts, whose proceedings are generally in the public domain. It is in this sense that they are not capable of settlement by arbitration.’<sup>22</sup>

Matters tainted by corruption are matters that are impacted by mandatory rules. This raises the fundamental question whether matters of such public dimension can properly be the subject matter of private arbitration. This question has for the most part been affirmatively answered by most jurisdictions.<sup>23</sup> This changes the focus of the inquiry in this chapter from whether a matter tainted

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18 R. Cole, ‘The public policy exception to the New York Convention on the recognition and enforcement of arbitral awards’, *Journal on Dispute Resolution*, Vol. 1, 1985-1986, p. 365, at p. 368.

19 Art. 5(2) 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

20 Art. 6 UNCITRAL Model Law.

21 See 1958 ‘New York’ Convention, (1958), Art. II(1), Art. V(2); Model Law Art. 34(2)(b)(i), Art. 36(1)(b)(i).

22 A. Redfern, M. Hunter, *Law and Practice of International Commercial Arbitration*, id., Note 2 above, at p. 138.

23 This question has been answered affirmatively by most western jurisdictions. As Redfern and Hunter point out,

‘the modern approach ... that has now received widespread acceptance both nationally and internationally, is that an allegation of illegality does not in itself deprive the arbitral tribunal of jurisdiction. On the contrary, it is generally held that the arbitral tribunal is entitled to hear the arguments and receive the evidence and to determine for itself the question of illegality.’

See A. Redfern, M. Hunter, *Law and Practice of International Commercial Arbitration*, Sweet and Maxwell, London, 2004, p. 143.

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by arbitration is arbitrable to whether an arbitration tribunal can be the legitimate forum for the settlement of such public policy centered disputes.

### 7.4 The Public/Private Divide

The system of international commercial arbitration is premised on the fact that within the private sphere parties are given the freedom to regulate their private transactions.<sup>24</sup> The state ensures that the legitimate expectations created by such private agreements are met by giving to properly constituted agreements the force of law. This places the principle of party autonomy at the center of a system that caters primarily to private rights. The scope of party autonomy is reflective of contract law where parties enter into private agreements that are enforced by the public legal process. However, this freedom of contract is limited by factors that impinge on the freedom of the parties to the contract or by issues that impinge upon the security of society. The criminalization of corruption renders the contract tainted by corruption subject to limitations on party autonomy. A private agreement by parties cannot circumvent the rules instituted for the protection of the public.

At the same time, international arbitration is a very necessary response to the need to have an effective method of resolving international business disputes in a manner that respects the different jurisdictions of participants, ensures a quick, efficient and capable resolution of the matters in dispute, is binding on the parties and most importantly constitutes a final determination.<sup>25</sup> The tension between the need for finality and the method and transparency of the arbitration process is manageable where the rights involved are purely private rights. However, where the arbitration panel is charged with the resolution of disputes that have not just a private but also a public character, this tension is harder to resolve.

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24 McConnaughay writes that few principles are as widely recognized as the autonomy of parties to international contracts to designate the law that will apply to their transactions and the forum in which they will resolve their disputes but that traditionally the scope of this autonomy is confined to matters that otherwise would be governed by private law. He states, '... Within this context, parties to international contracts are free to designate the law or principles that will govern their transaction to the exclusion of all otherwise applicable law. They also are free to privately arbitrate any disputes that might arise between them to the exclusion of otherwise compulsory public court litigation.' P. McConnaughay, 'The scope of autonomy in international contracts and its relation to economic regulation and development', *Columbia Journal of Transnational Law*, Vol. 39, December 2000, pp. 595-656.

25 Redfern and Hunter in answering the question 'why arbitrate?' point out the principal reasons why parties to international commercial contracts chose to submit a dispute to arbitration as (a) the choice of a 'neutral' forum and a 'neutral' tribunal; (b) the enforceability of the arbitration award; (c) the flexibility of arbitration awards and the confidentiality of the process. See A. Redfern, M. Hunter, *Law and Practice of International Commercial Arbitration*, id., Note 2 above, at pp. 22-23.

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The system of international arbitration floats upon an amorphous categorization of rights as public or private. This categorization is becoming increasingly unclear as the boundary between the private and public spheres becomes less distinct. Privatization and government involvement in private contracting has blurred the lines between private and public entities in international business.

Matters coming before an international arbitral tribunal may often not be strictly private in nature but of a quasi-public character. Not surprisingly, it has been argued that ‘to realize the efficiencies of this international system of private arbitration, it is necessary to cede to arbitrators the authority to reach binding determinations of claims that implicate public rights, and not merely private rights.’<sup>26</sup> It would seem that the idea of international arbitration as essentially a system based on private rights is giving way to a broader concept where it is simply regarded as a method of dispute settlement in international commercial transactions regardless of whether the disputed rights are public or private.<sup>27</sup>

However, the intrusion of a system premised on party autonomy and private rights into the area of public rights raises a basic issue of legitimacy of the arbitration forum. To what extent can a system of private dispute resolution operate in the public sphere? More specifically, what is the implication of the criminalization of international corruption and the consequent mandatory nature of the substantive domestic rules criminalizing international and public bribery on the conduct of international arbitration? Furthermore, corruption in international business is concerned to a great extent with contracts where party autonomy is limited by public interest. Given the objective of public law to protect society from the harm occasioned by acts in breach of public norms, what is the responsibility of arbitration panels towards the victims that the public law seeks to protect?

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26 D. Donovan, K. Greenawalt, Mitsubishi after Twenty Years: Mandatory Rules before Courts and International Arbitrators, in L. Mistelis, J. Lew (Eds.), *Pervasive Problems in International Arbitration*, Kluwer Law International, The Hague, 2006, p. 10, at p. 13.

27 See holding of US Supreme Court in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), which emphasizes a broad scope for the arbitration panel. The court found that:

‘The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts .... We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.’

### 7.5 Effect of Mandatory Nature of Anti-Corruption Rules

The widespread adoption of the UNCC<sup>28</sup> as well as international and regional instruments regulating bribery in international business means that international corruption is a crime in most countries. Anti-corruption rules are mandatory in nature and the condemnation of corruption is of almost global scope. This means that the arbitration panel, when faced with disputes involving such corruption is faced with a convergence of mandatory rules. This convergence places international commercial corruption in a situation where the ‘application of mandatory rules is (or should be) so well accepted that it can be categorized as uncontroversial’<sup>29</sup>

A party to an arbitration agreement could simply insist that international arbitration is not the proper forum for disputes involving public mandatory anti-corruption rules in a bid to avoid the arbitration process. This is the conundrum that international arbitration is faced with. On the one hand, the policy underlying the arbitration process encourages finality and non-interference by the courts in the arbitral process. On the other hand, the mandatory nature of anti-corruption rules implies that arbitrators must defer to these rules regardless of the agreement of the parties.

The interplay between mandatory rules and the place of arbitration as well as the place of enforcement of awards is also important. In general terms, an award must not contravene anti-corruption rules and public policy to be enforceable.<sup>30</sup> Furthermore, there is an obligation on the arbitrator to ensure that the parties do not arbitrate in vain. Art. 35 ICC Rules, for example, stipulate that: ‘In all matters not expressly provided for in these Rules, the Court and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the Award is enforceable at law.’<sup>31</sup>

This may lead to the arbitrator being caught in what Kreindler describes as ‘between a rock and a hard place. He states:

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28 The UN Convention has as of November 2011, 140 signatories and 154 State parties. See also Status of ratification available at <http://www.unodc.org/documents/treaties/UNCAC/COSP/session2/V0850398e.pdf>, accessed on 13 November 2011.

29 A. Barraclough, J. Waincymer, ‘Mandatory rules in international commercial arbitration’, *Melbourne Journal of International Law*, Vol. 6, Iss. 2, 2005, p. 218.

30 1958 ‘New York’ Convention, (1958), Art. II(1), Art. V(2); Model Law Art. 34(2)(b)(i), Art. 36(1)(b)(i).

31 See generally J. Horvath, ‘The duty of the tribunal to render an enforceable award’, *Journal of International Arbitration*, Vol. 18, 2001, pp. 135ff.

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‘Failure to engage in such self-inquiry may cause the arbitrator to be an accomplice to a contract against public morals or issue an award which violates public policy. Initiating his own investigation on the other hand, and in particular drawing his own conclusions as to such illegality in its award might constitute an impermissible foray into a dispute.’<sup>32</sup>

This conundrum is premised on the different roles and objectives of public and private rights. Courts in the US have shown an increasing willingness to move away from a strict private/public law demarcation by allowing the extension of private arbitration to matters that are of a public nature.<sup>33</sup> The danger however of an extension of international arbitration to public law matters is that this expanding role may undermine the rules that protect against public harm and also simultaneously erode at the legitimacy of the arbitration process as a private method of settlement of commercial disputes.<sup>34</sup>

The words of Justice Stevens in his dissenting judgment in the antitrust *Mitsubishi* case are of relevance here.<sup>35</sup> When faced with the question about

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32 R. Kreindler, ‘Aspects of illegality in the formation and performance of contracts’, *International Arbitration Law Review*, Vol. 1, 2003, at p. 14.

33 See for example in the US the case of *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 723 F.2d, at pp. 164-66. The question before the court was whether a federal antitrust claim arising from an international transaction was arbitrable. The Supreme Court held ‘concerns of international comity, respect for the capacities of foreign tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in a domestic context. Again, in respect to *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), which dealt with an international securities transaction, the court upheld the arbitration clause providing for arbitration of an international securities claim.

34 McConnaughay argues that the extension of autonomy in international contracts to public law is detrimental in cases involving developed countries because it:

‘permits transnational commercial actors to opt out of protective regulatory law – thus increasing the risk of precisely the public harm the regulatory law intended to prevent. Further, the arbitrability of public law either reduces the probability of correct applications of public law and thereby contributes to under-regulation, or increases the risk of arbitral procedural reforms that threaten the continued utility of international arbitration.’

He also argues that because the exercise of autonomy with respect to public law matters invites greater judicial supervision than exercises of autonomy with respect to matters governed by private law, the extension decreases rather than increases predictability in international commerce. See P. McConnaughay, ‘The scope of autonomy in international contracts and its relation to economic regulation and development’, *id.*, Note 24 above, at pp. 49-50.

35 In this case the issue involved a claim by an American car dealer in Plymouth that two major automobile companies were parties to an international cartel that had restrained competition in the American market in violation of the Sherman Act, 15 USC Sec. 1. The question before the court was whether the antitrust claim was arbitrable where a company had agreed to arbitration under an arbitration clause. The Court of Appeal, following the decision of the Second Circuit in *American Safety Equipment Corp. v. J. P. Maguire & Co.*, 391 F.2d 821 (1968), held that the claim was indeed non-arbitrable. On appeal the Supreme Court, affirming its ruling in *Scherk v. Alberto-Culver Co.*, 417 U. S. 506 (1974), concluded that ‘concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes

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the arbitrability of a matter involving anti-competitive behavior, he quoted Justice Feinberg and stated:

‘... A claim under the antitrust laws is not merely a private matter. Antitrust violations can affect hundreds of thousands -- perhaps millions -- of people, and inflict staggering economic damage. . . . We do not believe that Congress intended such claims to be resolved elsewhere than in the courts.’<sup>36</sup>

In his opinion an arbitration agreement to the effect that all claims ‘relating to’ a contract should be settled by arbitration could surely not be understood to mean encompass a claim that relies, not on a failure to perform the contract, but on an independent violation of antitrust federal law.<sup>37</sup> Justice Steven’s words can be paraphrased with regards to the primary and secondary contracts resulting from corrupt activity. Contracts tainted by corruption are not ‘merely a private matter’ but can affect hundreds of thousands of people, and ‘inflict staggering economic damage.’

It has been said that ‘public rights belong not to the litigants, but to society at large.’<sup>38</sup> The principles of freedom of contract and consent that underscore the arbitration process are based on ‘private rights’, and on the assumption that the arbitration of these rights are consented to by all parties. This assumption is stretched where the rights at play include not just private but public rights. Criminalization of corruption is a clear indication of the fact that the rights protected are not just private but public rights. Therefore criminalization places international corruption in the same class as mandatory rules prohibiting anti-competitive practices, environment spoliation, money laundering and terrorism, *i.e.* laws which must be applied regardless of the agreement between the parties.<sup>39</sup> Such laws curtail the freedom to contract at will.

Examples of such restrictions are found in principles and restatements of contract law. The EU Regulation on the law applicable to contractual obligations touches on the question of freedom of contract and mandatory rules when it stipulates that:

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require that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in a domestic context.’ *Mitsubishi v. Soler Chrysler-Plymouth, Inc.*, 473 US 614 (1985), 473 US 629.

36 *Mitsubishi Motors Corp. v. Solar-Chrysler-Plymouth, Inc.*, *id.*, at pp. 655-665.

37 *Id.*, at p. 645.

38 W. Park, ‘Private adjudicators and the public interest: the expanding scope of international arbitration’, *Brooklyn Journal of International Law*, Vol. 12, 1986, p. 629, at p. 638.

39 On categories of mandatory rules affecting arbitration see P. Mayer, ‘Mandatory rules of law in international arbitration’, *Arbitration International*, Vol. 2, 1986, at pp. 274-275. See also M. Blessing, ‘Mandatory rules of law versus party autonomy in international arbitration’, *Journal of International Arbitration*, Vol. 14, No. 4, 1997, p. 23ff.

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‘[o]verriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.’<sup>40</sup>

In a similar vein the Principles of European Contract Law stipulate that ‘[A] contract is of no effect to the extent that it is contrary to principles recognized as fundamental in the laws of the Member States of the European Union.’<sup>41</sup> It further provides:

‘Effect should nevertheless be given to those mandatory rules of national, supranational and international law which, according to the relevant rules of private international law, are applicable irrespective of the law governing the contract.’<sup>42</sup>

The US Restatement (2<sup>nd</sup>) Contracts on its part states that ‘[a] promise ... is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.’<sup>43</sup> A public policy against the enforcement of promises or other terms may be derived by the court from (a) legislation relevant to such a policy, or (b) the need to protect some aspect of the public welfare.<sup>44</sup>

A principal argument in this regard is that the role of a public judge or authority should not be thrust or ‘improperly delegated’ to private entities. Writers like Donovan and Greenawalt argue that matters of public dimension do fall properly fall within the scope of the arbitration panel.<sup>45</sup> Referring to the *Mitsubishi* anti-trust case, they take issue with the ‘improper delegation’ argument as unfounded to the extent that it is premised on a delegation that ‘has in large part already taken place.’ In their view, the

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40 Art. 9 EC Regulation of the European Parliament and of the Council of 17 June 2008 No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177 of 4 July 2008.

41 Art. 15:101 Principles of European Contract Law, Prepared by the Commission on European Contract Law, 1999, available at [http://frontpage.cbs.dk/law/commission\\_on\\_european\\_contract\\_law/pecl\\_full\\_text.htm#pecl1](http://frontpage.cbs.dk/law/commission_on_european_contract_law/pecl_full_text.htm#pecl1).

42 Art. 1:103 Principles of European Contract Law.

43 Sec. 178 Restatement (2nd) Contracts, American Law Institute, 1981.

44 Id.

45 D. Donovan, K. Greenawalt, *Mitsubishi after Twenty Years: Mandatory Rules before Courts and International Arbitrators*, in L. Mistelis, J. Lew (Eds.), *Pervasive Problems in International Arbitration*, id. Note 26 above, at p. 31.

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‘entire debate on mandatory rules in arbitration deals with a set of public rights that, by definition, the state has already entrusted to private litigants by providing private rights of action.’<sup>46</sup>

In this view, a delegation may indeed have taken place where criminal statutes expressly provide private litigants with the right to act as private prosecutors. In such instances, the public nature of the laws is not inconsistent with the private nature of the actors charged with prosecution. Examples of public criminal statutes from the United States where the private litigant is given a right of action include US Antitrust legislation such as the Sherman Act<sup>47</sup> and statutes such as the Racketeer Influenced and Corrupt Organizations Act.<sup>48</sup> These expressly allow for private rights of suit along with the possibility of treble damages. Has a private right of action similarly been delegated in the case of international corruption? If yes, following the logic of Donovan and Greenawalt, one could argue that the international arbitration panel is indeed a proper forum for the consideration of such delegated rights.

The United Nations Convention against Corruption introduces on the global stage the notion of private actions for damage caused by corruption. Art. 35 UNCC provides that ‘each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation’. While a distinction must be drawn between the private enforcement of criminal laws and civil liability for damages suffered as a result of another’s act, it could be argued, that the UNCC can be seen as the basis of a delegation of a public right to private enforcement in matters relating to international corruption.

However this argument does not survive a close examination. It is instructive to see that the United States has made a reservation in its ratification of the UNCC stating that the provisions of the Convention are non-self-executing and that none of the provisions of the Convention creates a private right of action.<sup>49</sup> From the perspective of the United States the United Nations does not create a private right of action with respect of international corruption that can form the

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46 Id.

47 Act of 2 July 1890 (Sherman Anti-Trust Act).

48 The Racketeer Influenced and Corrupt Organizations Act. It is important to note that the exercise of the right as a private prosecutor is nonetheless exercised before a national court of law. So the analogy is not quite on all fours with the notion of a private litigant before an arbitration tribunal.

49 The United States signed the Convention on 9 December 2003 and ratified it on 30 October 2006. Available at <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> , accessed on 15th May 2008.

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basis of a delegation of rights proposition.<sup>50</sup> Apart from this, the provisions of the UNCC are made subject to provisions of national law.<sup>51</sup> A private right of action for the anti-corruption rules has not been granted in any of the jurisdictions studied in this book. International corruption cannot be said to fall within the range of matters where a delegation of public criminal rights to private persons has taken place.

As the role of the international arbitration expands the underlying premise of arbitrability of matters tainted by corruption is challenged by the fact that contracts tainted by corruption are evidence or the result of criminal activity. This public law dimension of international corruption may render the arbitrator dealing with the primary or secondary contract tainted by corruption not solely the servants of the parties to these contracts but also of the public at large. In this view, the answer to the question ‘is the arbitrator the servant of the parties or of the truth,’<sup>52</sup> must in the instance of contracts tainted by corruption be answered in favor of ‘the truth’.

### 7.6 Convergence of International Public Policy on Corruption

The international repudiation of corruption and the success of the UNCC which has now been ratified by 140 countries means that apart from a convergence of mandatory laws regarding corruption in international business, there is also a convergence of public policy. Public policy is often looked upon as a ‘wild card’ in law. In legal systems that look to certainty and the rule of law as of highest value, public policy that grows and ebbs with the dynamics of changing societal values can indeed be viewed as ‘a very unruly horse’ which once mounted can lead to destinations unknown.<sup>53</sup> This is particularly true in the context of international commercial disputes where the argument has been made that there may be a clash of public policies emanating from different jurisdictions.<sup>54</sup>

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50 For reasons such as the subjection of Art. 35 to the principle of non-interference in Art. 4 UNCC and to national law, it is clear that Art. 35 does not create a new private right of action in respect of the acts of corruption defined under the UN Convention except to the extent that such a right already exists under national law. See Chapter 9 for a full discussion of this point.

51 See Chapter 9 for a full analysis of the Private Right of Action under Art. 35 UNCC.

52 J. Rosell, H. Prager, ‘Illicit commissions and international arbitration: the question of proof’, *Arbitration International*, Vol. 15, 1999, pp. 329ff.

53 Lord Denning M.R. in *Richardson v. Melish* (1824), Bing. 228; [1834] All ER 258.

54 L. Mistelis, ‘Keeping the unruly horse in control or public policy as a bar to the enforcement of (foreign) arbitral awards’, *International Law Forum du Droit International*, Vol. 2, No. 4, 2000, p. 248.

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Three levels of public policy are generally distinguished.<sup>55</sup> Transnational public policy is understood to comprise of ‘an international consensus as to international standards or accepted norms of conduct that must always apply and which provides limitations to public as well as private international relationships and transactions.’<sup>56</sup> Transnational public policy has been described as policy a breach of which ‘concerns all or most states.’<sup>57</sup> Transnational public policy is a result of an international consensus that reflects the national laws and international response to corruption.<sup>58</sup> Such transnational public policy arguably has a direct effect on the conduct of the arbitral tribunal and sidesteps the question of the varying standards that may occur in the applicable law or laws.

Barraclough and Waincymer assert that ‘it is uniformly accepted that arbitrators must apply any mandatory rule that reflects transnational public policy in order to maintain a minimum standard of conduct and behavior in international commercial relations.’<sup>59</sup> The combination of the domestic anti-corruption laws of most states and their obligations under the international regulations in respect of international commercial corruption supports the view that international corruption is an act that goes against the norms, mandatory rules and international obligations of most societies.<sup>60</sup>

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- 55 The ICSID Tribunal in the *World Duty Free* case referring to practices in national courts, international arbitration and international instruments, outlined three levels of public policy regarding corruption *i.e.* domestic public policy, international public policy, and transnational public policy. *World Duty Free v. Kenya*, 46 *ILM* 339, 2007, ICSID Case No. ARB/00/7, Award, 4 October 2006, at Paras. 138-157. See also P. Mayer, A. Sheppard, N. Nasser, *Interim Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, International Law Association, London Conference, 2000.
- 56 M. Buchanan, ‘Public policy and international commercial arbitration’, 26 *American Business Law Journal*, 511, 513, 1988, pp. 514ff.
- 57 The tribunal in the *World Duty Free* case remarked that in their opinion, bribery constituted a breach of international public policy, as well as of English and Kenyan public policy. The concept of ‘international’ public policy meant, effectively, that of transnational public policy, meaning a breach of the policy concerns of all or most states. *World Duty Free v. Kenya*, *id.*, Note 55 above, at Paras. 141-142.
- 58 Sayed points out that ‘in international arbitration the establishment/existence of such transnational public policy [is] facilitated by the fact that contracts of international trade and arbitration are not only nationally regulated but also internationally debated. Such debates frequently produce inter-national conventions, and often generate “transnational” instruments ... Such practices are regarded as sufficiently established by repetition that they are able to surpass their initial contingent conditions to acquire normative relevance.’ A. Sayed, *Corruption in International Trade and Commercial Arbitration*, 1st edn, Kluwer Law International, The Hague, 2004, p. 4.
- 59 A. Barraclough, J. Waincymer, ‘Mandatory rules in international commercial arbitration’, *id.*, Note 29 above, at p. 218.
- 60 The consensus of opinion is that corruption is not condoned in most systems and cultures. See P. Nichols, ‘Outlawing transnational bribery through the world trade organization’, *Law and Policy in International Business*, Vol. 28, No. 2, 1997, p. 305.

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This was clearly the view of the tribunal in the *World Duty Free* case. The tribunal noted that:

‘In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to international public policy of most, if not all, States, or, to use another formula, to *transnational public policy*. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.’<sup>61</sup>

Transnational public policy against international commercial corruption sets up a limitation to the power of the arbitrator because this public policy transcends and is reflected in all applicable laws. Chukwumerije in fact goes further to assert that in the unlikely event of a conflict between national law and such transnational policy, arbitrators must in fact refuse to apply such national law.<sup>62</sup>

Due to the far reaching wave of criminalization and obligations entered into by countries under the anti-corruption instruments, the chances that the choice of applicable law by the parties will conflict with this global consensus is not very high. In the unlikely case of a conflict between the national law and this international consensus, the arbitration panel should in the interest of the integrity of the arbitration process, recognize the transnational public policy repudiating corruption. Furthermore, the criminalization of international corruption gives it ‘the force of law’ and raises it from the ranks of what some

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61 *World Duty Free v. Kenya* 46 ILM 339 (2007), ICSID Case No. ARB/00/7, Award, 4 October 2006, at Para. 157.

62 O. Chukwumerije, *Choice of Law in International Commercial Arbitration*, Quorum Books, Westport, CT, 1994, p. 193. The convergence of transnational public policy on corruption is probably best articulated by the provisions of the TransLex-Principles of transnational law. This is a digest of transnational law principles compiled by the Center for Transnational Law (CENTRAL) at the University of Cologne, Germany. The TransLex-Principles contain more than 120 principles and rules of transnational law, the New Lex Mercatoria. Available at <http://www.trans-lex.org/principles> accessed on 12 November 2011. Principle No. 4(7)(1) states that ‘A contract that violates *bonos mores* is void.’ Principle No. 4(7)(2)(a) stipulates that ‘Contracts based on or involving the payment or transfer of bribes (‘corruption money’, ‘secret commissions’, ‘pots-de-vin’, ‘kickbacks’) are void.’ Bribery within the meaning of this article is:

‘Any intentional offer, promise or transfer of any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official or private party, for the benefit of that official or private party or for a third party, in order that the official or private party acts or refrains from acting in relation to the performance of official or other duties, in order to obtain or retain business or other improper advantages in the conduct of international business.’

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may refer to as ‘so-called’<sup>63</sup> or ‘fleeting’<sup>64</sup> public policy. In any event, the criminalization of international commercial corruption is a strong guideline to arbitrators to act consistently with the duty to render decisions that are capable of enforcement.

### 7.7 A Medley of Roles

As a private and confidential system of dispute resolution, much of what transpires between the parties and their chosen arbitrators never sees the light of day. Nonetheless, available cases show that the issue of corruption affecting contracts is one that international arbitration panels have wrestled with for a long time. The influence of international arbitration in the fight against international corruption will depend on the role played by the arbitration panel. The panel may, for example, decline to get involved in the detection and sanctioning of corruption by withdrawing from disputes where corruption is alleged. This can be described as a negative passive response. Negative because it denies the party who has suffered harm a forum for redress; passive, because the tribunal makes no determination on the effect of corruption. On the other hand, the tribunal may play a more active role and sanction the occurrence of corruption by making a ruling on the merits of the case. This can be described as a positive active response. Positive because the tribunal provides the party who has suffered harm a forum for redress for such harm and active because the tribunal makes a determination of the effect of corruption on the transaction in dispute. There is also of course the possible role where the arbitrator sees himself solely as a servant of the parties and ignores evidence of corruption or the implications of allegations of corrupt dealing if the parties so direct.

Both the negative passive and positive active roles ultimately support the victim of corruption because the parties to the contract tainted by corruption are faced with the reality that the arbitral tribunal cannot be used as an avenue to sanction corrupt and illegal deals. A look at a few past awards is illustrative in showing how the positive and negative roles have come into play. It also shows that the arbitration panel reserves for itself the discretion to do what it deems best. This is indeed only to be expected in the absence of any system of hierarchy, or precedent as well as the absence of any overriding binding rule that removes the discretion of how to respond from the arbitrator.

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63 W. Reisman, Law, International Public Policy (so-called) and Arbitral Choice in International Commercial Arbitration, in A. van den Berg (Ed.), *International Arbitration 2006: Back to Basics?*, Kluwer Publishing, 2008, pp. 849ff.

64 Expression used by the Swiss Federal Tribunal in *Tensaccia S.P.A. v. Freyssinet Terra Armata R.L.*, 8 March 2006, referred to in Reisman, *id.*, at p. 854.

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### 7.7.1 The Negative Passive Role

The *negative passive* role is exemplified by the ruling of Justice Lagergren the sole arbitrator in ICC Case No.1110 (1963).<sup>65</sup> The claimant, an Argentine engineer, was a businessman in Buenos Aires while the respondent was a British company, trading in Argentina. In 1950 the parties entered into an agreement to supply electrical supplies to the Argentinean authorities. Officials from the respondent British company asked the claimant who had considerable influence with the Argentine government to promote the placing of an order for electrical equipment on the respondent's behalf. The parties entered into an agreement under whose terms the respondent British Company was to pay the claimant a percentage of the price of the electrical equipment contract to be concluded between the respondent British company and the Argentine authorities. Only one contract out of three contracts awarded went to the respondent. The respondent subsequently refused to pay the agreed commission. The parties went to arbitration in Paris. The parties agreed that Argentine law was the proper law of the arbitration agreement.

The arbitrator found that while the documents seemed on their face to be legal and looked like ordinary commercial documents, it was clear to him that 'the agreement between the parties contemplated the bribing of Argentine officials for the purpose of obtaining the hoped-for business.'<sup>66</sup> The arbitrator noted that Art. 768:5 Argentine Code of Civil Procedure stipulated that all questions which affect good morals are excluded from arbitration.<sup>67</sup> Furthermore that Art. 502 Argentine Civil Code provided that an obligation contrary to law or public policy could have no effect. Art. 1891 of the same Code provided that a mandate concerning an illegal, impossible or immoral act did not give the principal any cause of action against the mandatory nor the latter any cause of action against the principal.<sup>68</sup> The arbitrator stated that:

'... it cannot be contested that there exists a general principle of law recognized by civilized nations that contracts which seriously violate *bonos mores* or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators.'<sup>69</sup>

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65 G. Wetter, 'Issues of corruption before international arbitral tribunals: the authentic text and true meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case No. 1110', *Arbitration International*, Vol. 10, No. 3, 1994, p. 277, at p. 281.

66 Case No. 1110. 1963 Yb. Comm Arb. XXI, 1996, 47 Para. 17 of award.

67 Case No. 1110. Id., Para. 14 of award.

68 Case No. 1110. Id., Para. 15 of award.

69 Case No. 1110. Id.

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The arbitrator declined jurisdiction holding:

‘a case like this, involving such gross violations of good morals and international public policy, can have no countenance in any court either in the Argentine or in France or, for that matter, in any other civilized country, nor in any arbitral tribunal.’<sup>70</sup>

The Lagergren case supports a *negative passive* role of the arbitrator by suggesting that disputes involving allegations of corruption do not fall within the ambit of matters properly to be considered as arbitrable. The role of the arbitrator in such instances is to withdraw and avoid giving a ruling. The limitation of this approach is that it does not prevent determined parties from simply moving on till they find a panel that is ready and willing to take on the dispute. From the perspective of the victim of corruption this role is of limited value because it does not effectively ‘sanction’ the act of corruption but rather avoids the issue by retreating. Furthermore, from the point of view of the arbitrator, in a system where the ‘judges’ are paid and selected by the disputants, the positive passive response may not translate to good business sense on the part of the arbitrator.

### 7.7.2 The Positive Active Role

A selection of cases shows many instances where the arbitration tribunal has played a *positive active* role by ruling on the merits in respect of matters tainted by corruption. In the *ICC Iranian party v. Greek Party* case<sup>71</sup> the tribunal found that the commission at the heart of a consulting agreement was clearly ‘intended to remunerate the counterparties’ by way of ‘*pots-de-vin*’ or bribes. The Tribunal found that it was common knowledge that during the years in which the Greek company worked in Iran that corruption and the sale of influence was a constant practice. It was extremely difficult, if not impossible to obtain contracts for public works without use of these methods. The tribunal noted that the Iranian Government had unsuccessfully, attempted to remedy this state of affairs by regulations including the 1936 law prohibiting the sale of influence and the 1958 Anti-Corruption Act, the law punishing conspiracies regarding the public transactions of 1959 as well as the amendment to Art. 139 Penal Code. The tribunal concluded that the parties had knowingly entered into an illicit contract. The consulting agreement was therefore in their view null and void and the parties could not require performance of the contract or seek restitution under it.<sup>72</sup>

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70 Case No. 1110 Para. 16 of award.

71 ICC Case No. 3916 of 1983. Collection of ICC Arbitral Awards 1974-1985, pp. 507ff.

72 ICC Case No. 3916. Id., at p. 510.

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In the Establishment of *Middle East State v. South Asian Construction Company ICC* case,<sup>73</sup> the tribunal also played a positive active role. The respondent company after trying unsuccessfully to enter the construction market in country X employed the claimant as a consultant to act as its representative for the promotion and contracting of the Project. After negotiations lasting some eight months, the respondent was awarded the Project for approximately US\$374 million. In a letter from the respondent's bank to the claimant's bank in Geneva, the respondent undertook the irrevocable and unconditional commitment to pay immediately upon receipt of its down payment from the Ministry 'for services which were received in full in connection with the above mentioned Agreement' the sum of US\$50 million. That sum was subsequently remitted by respondent to the claimant's bank.<sup>74</sup>

The original project was subsequently extended by the Middle East State. When negotiating the extension the claimant and respondent signed an amendment to the Agreement relating to the extension. Having received the amount of US\$50 million in 1979, the claimant claimed it was entitled to US\$7 million more. As the respondent refused to pay anything more, the claimant submitted the case to the ICC for arbitration.<sup>75</sup> The defendant insisted that the Agreement was an agreement for bribery or was abused by the claimant for bribery. The claimant denied such allegation, stating that the Agreement was a consultancy agreement.<sup>76</sup> The parties chose Swiss law as the law governing the agreement and the tribunal held that '... It is obvious that if the said Agreement were an agreement for bribery, it would be null and void...' as bribery was considered as immoral (*contra bonos mores*) in Swiss law. The tribunal found that the defendant's accusation was not supported by direct evidence or even circumstantial evidence to be convincing.<sup>77</sup> The tribunal determined that the US \$50 million payment to the claimant was not a bribe.

In the Westacre Investments case, the Beogradska Banka DD and the State-Owned Company Yugoimport-SDPR (the appellants), the Federal Directorate of Supply and Procurement of the Socialist Federal Republic of Yugoslavia (the Directorate) and Westacre entered into a contract under whose terms the Directorate appointed Westacre its consultant with respect to the sale of

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73 *Establishment of Middle East Country X v. South Asian Construction Company* Award in ICC Case No. 4145, 12 Yb. Comm. Arb., 1987, pp. 97ff.

74 *Id.*, at p. 98.

75 *Id.*

76 *Id.*, at p. 101.

77 *Id.*, at p. 102.

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military equipment in Kuwait.<sup>78</sup> For these services Westacre was to receive a substantial percentage of the value of the contracts entered into by the Directorate with, principally, the Kuwaiti Ministry of Defense. The Bank guaranteed the payment of all fees due to Westacre under the Agreement under Clause 6 of the Agreement. The Agreement was governed by Swiss law and contained an arbitration agreement. In July 1989 the Directorate, secured a contract with the Kuwaiti Ministry of Defense for \$500,546,000 and £11,440,329.29. The Directorate then repudiated the agreement with Westacre who then commenced arbitration.

The Directorate and the Bank argued that the Agreement with Westacre was void on the grounds that it violated ‘ordre *public* international’ or ‘*bonos mores*.’ The arbitration panel found that while bribery renders an agreement invalid, in arbitration proceedings, bribery is a fact which has to be alleged and for which evidence has to be submitted, and at the same time constitutes a defense, nullifying the claims arising from a contract. The consequences of this are decisive. For this reason it is up to the defendant to present the fact of bribery and the pertaining evidence within the time limits allowed to him for presenting facts. The statement of facts and the burden of proof are therefore upon the defendant. The Tribunal found that the Directorate had not established that there was any bribery and had not established that the activities of Westacre were illicit or that there was anything which rendered the Agreement as unenforceable as violating ‘*bonos mores*.’

The award was appealed by the Directorate to the Swiss Federal tribunal who upheld the award.<sup>79</sup> On further appeal at the place of enforcement the question whether the allegations of bribery were sufficient for the facts of the case to be re-opened. The English court of appeal dismissed the appeal stating that ‘From the award itself it is clear that bribery was a central issue. The allegation was made, entertained and rejected. Had it not been rejected the claim would have

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78 *Westacre Investments Inc v. Jugoimport-SDRP Holding Company Ltd & Ors* [[2000] 1 QB 288 affirming [1999] QB 740. 1999], EWCA Civ 1401 (12 May 1999). [1999] 3 All ER 864, 2008 WL 1771450.

79 This award was appealed by the Directorate to the Swiss Federal tribunal, who declined to nullify the award on the grounds that ‘the appellants claim that the agreement, owing to its illegal or immoral purpose, is void does not at all events accord with the factual finding made by the arbitral tribunal ... the truth is that this argument consumes itself in a feckless criticism of the arbitral tribunal’s findings of fact and of the procedure applied, considering that no violation of mandatory rules of procedure occurred. In the last analysis, the arbitral tribunal did not at all contravene public policy in upholding the validity of the April 12, 1988, agreement, the substance of which was determined in the course of the proceedings. Thus the appeal is without grounds.’ Referred to in *Westacre Investments Inc v. Jugoimport-SDRP Holding Company Ltd & Ors* id., [2000] QB 288, per Lord Waller.

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failed, *Swiss and English public policy being indistinguishable in this respect.*<sup>80</sup>

A further example is the *Hilmarton ICC* case where the arbitrator found that Hilmarton Ltd. was engaged in the activity of influencing the Algerian government officials but concluded that bribery was not proven ‘beyond doubt.’<sup>81</sup> The respondent concluded a protocol of agreement to give fiscal and legal advice to the claimant and obtain a contract with the Algerian authorities. The claimant was to be compensated with the payment of a percentage of the price of the construction contract. This respondent subsequently refused to pay in full. The complainant went to arbitration for compensation. The Panel noted that ‘it happens that nowadays, especially in certain fields (armaments, sale of know-how, aviation, etc.), the products or services offered do not differ significantly in quality, or are equivalent. Hence, the manager of an enterprise or the board of a company is tempted to use various means, and particularly bribes, that is, ‘any offer (or request) concerning the granting of a hidden and not-owed material advantage to the employee of a third party with the aim of influencing this third party in favour of the donor.’<sup>82</sup> The Panel noted that ‘[m]any enterprises, in fact, establish reserves for bribes, either by creating a ‘bribery fund’ or by including this practice in the budget. For instance, bribes may be deducted from taxes in the Federal Republic of Germany.’<sup>83</sup> The panel agreed that if the conclusion of the contract between defendant and the Algerian authorities depended on bribes paid by claimant, the contract would be null and void.<sup>84</sup> However the panel found that bribery has not been proved beyond doubt.<sup>85</sup>

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80 Emphasis added per Lord Mantell, *Westacre Investments Inc v. Jugoinport-SDRP Holding Company Ltd & Ors* [2000] QB 288, at 316. S. Gee concludes that under English law, in proceedings to enforce a New York Convention award under Sec. 101(2) of the Arbitration Act 1996:(a), where the award has itself addressed the fraud issue and rejected it, and has been confirmed by the court exercising supervisory jurisdiction; usually the English court would refuse to inquire further into the fraud issue at least unless there is fresh evidence making out a strong *prima facie* case of fraud, and which could not with reasonable diligence be obtained earlier. See S. Gee, ‘The autonomy of arbitrators, and fraud unravels all,’ *Arbitration International*, Vol. 22, No. 3 (2), 2006, p. 337, at p. 371.

81 *Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd*, Award in ICC Case No. 5622, 19 *Yb. Comm. Arb* 19, 1994, p. 105.

82 *Id.*, at p. 111.

83 *Id.*

84 *Id.*

85 *Id.*, at p. 112. Similarly in the *Westinghouse* case, the tribunal ruled that allegations of bribes paid to the former President Marcos of the Philippines by Westinghouse Ltd were found not to have been proven. See *Westinghouse v. The Republic of the Philippines*, Award in ICC Case No. 6401, 7(1) *Mealey’s International Arbitration Report*, 1992.

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A notable case where the arbitration tribunal has played a positive active role is the 2006 World Duty Free Company case,<sup>86</sup> where the arbitral tribunal found that a contract procured by means of a bribe of \$2 million to the former president of Kenya was in violation of international policy, Kenyan and English law and was therefore voidable. The claimant Mr. Nasir Ibrahim Ali owner of the World Duty Free Ltd had entered into an agreement for the construction, maintenance and operation of duty-free complexes at Nairobi and Mombasa International Airports. A lease renewable after a period of 10 years was entered into for the sum of US\$1,000,000 per annum.<sup>87</sup> The claimant asserted in order to be able to get this contract and do business with the Kenyan government he was required to make a 'personal donation' of US\$2 million to Mr. Daniel Arap Moi who was then President of the Republic of Kenya.<sup>88</sup>

The claimant alleged that as a result of his lack of co-operation in a massive fraud scheme set up to provide 'illicit funds' for President's Moi's re-election campaign and his co-operation with Interpol and the Kenyan Police when the scheme was uncovered, the Government of Kenya took over the control, share and assets of the claimant's company.<sup>89</sup> World Duty Free was placed in receivership and according to the claimant was mismanaged and destroyed by the appointed receivers.<sup>90</sup> The claimant alleges that he was threatened, unlawfully arrested and eventually deported to prevent him from challenging the take-over of World Duty Free and giving evidence in the Goldenberg fraud. The claimant further alleged that following an ex parte hearing by the Kenyan High court the illegal expropriation of World Duty Free was legitimized in favour of a Mr Pattni an agent of the Kenyan Government.<sup>91</sup>

The claimant went to ICSID arbitration to seek full compensation and the return of the duty free complexes, lost profits, aggravated and exemplary damages, as well as legal costs. The Government of Kenya, among other actions, brought an application requesting the dismissal stating that the contract upon which the claimants action was based was procured by paying a bribe of US\$2 million to the then President of Kenya, Daniel Arap Moi and as a violation of Kenyan, English and International *ordre public*, the resulting Contract did not have the force of law.<sup>92</sup> The claimant sought to persuade the panel that a party should not be 'enabled to reap the fruits of his own dishonest

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86 *World Duty Free v. Kenya*, 46 *ILM* 339 (2007), ICSID Case No. ARB/00/7, Award, 4 October 2006.

87 *Id.*, Paras. 64-65.

88 *Id.*, Para. 66.

89 *Id.*, p. 21, Paras. 68-71.

90 *Id.*, p. 22, Paras. 70-71.

91 *Id.*, pp. 22-23, Paras. 72-74.

92 *Id.*, p. 30, Para. 105.

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conduct by enriching himself at the expense of the other’ and that the Tribunal ‘must pay sufficient regard to the domestic public policy’ of Kenya under which the donation made was ‘not only acceptable, but fashionable.’<sup>93</sup>

The tribunal found that the payments made by the claimant must be regarded as a bribe made in order to obtain the lease contract.<sup>94</sup> The tribunal noted that bribery or influence peddling, as well as both active and passive corruption, are sanctioned by criminal law in most, if not all, countries. This was the case in Kenya under the Kenyan Prevention of Corruption Act of 1956, and under the Anti-Corruption and Economic Crimes Act of 2003. As such, the tribunal held that:

‘In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.’<sup>95</sup>

The exercise of a positive active role by the arbitral tribunal involves a ruling on the merits in respect of the dispute affected by corruption. Thus is a laudable step as it ensures that the international arbitration panel plays an active role in the sanctioning of corrupt acts and provides the winning party with an award that can be enforced. From the point of view of the victim of corruption, it ensures that whether a matter tainted by corruption comes up before a national court or an international arbitration tribunal, the occurrence of international commercial corruption will be sanctioned. This positive active role therefore works in the interests of the direct and ultimately indirect victims of corruption because it prevents parties from using the arbitration process as a means of legitimizing and enforcing obligations resulting from corrupt activity. It is clear that the principle underlying the arbitration process is that a contract that is the result of bribery will be declared null and void. To this extent the arbitration process is synchronized with the normative framework that repudiates corruption and the framework of mandatory rules and public policy that support it.

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93 Id., p. 34, Para. 121. In this regard the Tribunal remarked at Para. 133 that:  
‘Kenya considers that it is a bribe given in order to obtain the Agreement on which the claims are based. World Duty Free considers it a gift of protocol or a personal donation made to the President to be used for public purposes within the framework of the Kenyan system of Harambee; the Claimant recalls that this system is largely anchored in cultural practices when people are able to pull whatever resources they have, “in particular” to finance community projects.’

94 Id., p. 41, Para. 136.

95 Id., p. 48, Para. 157.

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However, as the several cases show, in many instances this central argument does not come into play for lack of proof. Where the arbitral panel is faced with insufficient proof of bribery, the arbitral panel makes a ruling on this fact and proceeds to give an award. In this manner the arbitration panel acts and reaches a determination on a matter that falls within the scope of mandatory law and international public policy. This fact raises significant questions about the legitimacy and effectiveness of the process of arbitration as a forum for arriving at such determinations. The arbitrator, it may be argued, is a part of a (contractual) system of private settlement. As such, the arbitrator is an agent of the parties whose primary task is to enforce obligations entered into *inter partes* rather than an agent of an adjudication system that seeks to ensure that justice is upheld in the interests of the society as a whole.<sup>96</sup> Mills identifies two aspects of this problem. The first is that the populace that is most affected by grand corruption, such as that found in international commercial corruption, has no advocate in the arbitral reference. Secondly, she states, ‘... one might even question whether public policy should not reserve to the courts of the land disputes affecting the livelihood of its populace, seeing that the populace never agreed to have foreign arbitrators determine their interests...’<sup>97</sup>

From the point of view of private remedies, the indirect victim of corruption is stripped of the protections of mandatory law. In addition, the direct victim to the contract tainted by corruption by agreeing to an arbitration agreement is faced with a burden of proof of corruption that even the state with its powers of investigation and inquiry may find daunting. Corruption occurs in the shadow and seldom leaves a calling card. For the indirect victim, there is a complete gap. By making determinations on matters of public law, the private arbitration panel does not take into consideration the individual rights that are protected by the state machinery. They have no voice; no representation and no input in an arbitration process which by its very definition was never intended to cater to them. By ruling on the merits of disputes involving the primary or secondary contracts, the machinery of the state is bypassed by private agreement and the arbitration process closes the door to the full scope of recourse that would be available to both the direct and indirect victims of corruption.

In this view, it may be argued that international private arbitration cannot be the legitimate forum in respect of sanctioning matters that infringe on public

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96 See generally A. Rau, ‘On integrity in private judging’, *Arbitration International*, Vol. 14, 1998, p. 155.

97 K. Mills, Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto, in ICCA Congress Series (No. 11), *International Commercial Arbitration: Important Contemporary Questions*, Kluwer, The Hague, 2003, p. 288, at p. 289.

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rights. To be more specific, where a matter involves allegations of corruption, parties by agreement should not be able to exclude the rights of participation of other stakeholders, affected by the occurrence of corruption. Private parties should not be able to take the regulation and control of corruption out of the public sphere into a private and confidential dispute settlement process.

Apart from questions about the legitimacy of international arbitration as the forum for the settlement of disputes tainted by international corruption, the efficacy of the international arbitration process in sanctioning international commercial corruption is also open to question. In international arbitration where the arbitrator is ‘hired’ by the very parties to the transaction in dispute, ensuring compliance with anti-corruption rules is arguably a dimension that is simply not within the contemplation of the framework of a submission to arbitration. Another problem is the cost of prosecution as well as the high criminal burden of proof. Added to this is the difficulty in investigating, gathering and compelling the production of evidence in complex international cases. Apart from these procedural difficulties, the stigmatization of the guilty criminal verdict and sanction as well as its possible deterrent effects is not easily replicated in a private confidential arbitration process.

It is also important to note that arbitrators are ‘paid contractors’ who may have no specialized training, and who operate without the ‘stringent safeguards’ for human liberty that are built into criminal proceedings.<sup>98</sup> They are only human.<sup>99</sup> Furthermore, there is in general no appeal against the decision of the tribunal and there are limited chances of judicial review. These factors are arguably significant obstacles in the path of international arbitration as a legitimate and effective forum for the resolution of transactions involving international commercial corruption.

### 7.8 Questioning the Role of the Arbitration Tribunal

Since there is broad agreement that matters tainted by corruption are arbitrable and that the arbitration panel has jurisdiction in such cases, what is the nature and extent of the responsibility of an arbitration tribunal where a matter before it is tainted by corruption? This section takes a purpose-led approach in examining the role of international arbitration panel from the broader

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98 G. Lynch, ‘The role of the criminal law in policing corporate misconduct’, *Law & Contemporary Problems*, Vol. 60, No. 3-2, Summer 1997, p. 23, at p. 27.

99 B. Hanotiau, Misdeeds, Wrongful Conduct and Illegality in Arbitral Proceedings, in A. van den Berg (Ed.), *New Horizons for International Commercial Arbitration and Beyond*, Kluwer, London, 2005, p. 261, at pp. 262-264. The author gives interesting examples of misconduct by arbitrators including corruption, undisclosed business, love, and other relationships with parties to the arbitration.

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perspective of victims of international corruption. The question in this regard is whether it is the private sector (international arbitration), or the public sector that should 'take the lead.'

The role of the arbitration tribunal is also a matter of debate within arbitration circles. Calls have been made, for example, for the need to improve the transparency of the arbitration process;<sup>100</sup> for an international regulatory body that compels and oversees the publication of awards;<sup>101</sup> and for some sort of review in the form of 'an UNCITRAL-based award review board to ensure that misconduct such as corruption, breach of natural justice and wilful disregard for governing law shall not pass unrectified.'<sup>102</sup> Such proposals to improve the transparency of the arbitration process are certainly in the interest of the victims of corruption as they could serve as a 'window' into the type of matters that come up before arbitration panels. This would facilitate the detection of the occurrence of international corruption and at least open up the possibility of follow-on actions or responses from other stakeholders.

Such an approach would however fundamentally change the very essence of the international arbitration process and undermine its characteristic features. Attempts to publicize the arbitration process in a manner similar to adjudication would destroy the important private and confidential nature of international arbitration.<sup>103</sup> This may lead some 'parties to turn away from arbitration completely.'<sup>104</sup> A better approach may be one that preserves the important role international arbitration plays in the regulation of international trade but which prevents the process from being hijacked by the use of the very factors that characterize it for illegal ends.

A victim-oriented purpose is best supported by a role that brings to the public arena the incidences of occurrences of international corruption that come

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100 J. Lew, The Case for the Publication of Arbitration Awards, in J. Schultz, J. van den Berg (Eds.), *The Art of Arbitration: Essays on International Arbitration: Liber Amicorum Pieter Sanders 12 September 1912-1982*, Kluwer, The Hague, 1982, pp. 22ff.

101 D. Gruner, 'Accounting for the public interest in international arbitration: the need for procedural and structural reform', *Columbia Journal of Transnational Law*, Vol. 41, 2003, p. 923

102 K. Mills, Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto, id., Note 97 above, at p. 298.

103 It is appropriate here to recall the 'wise words' of the President of India, Shri Fakhruddin Ali Ahmed quoted by Pieter Sanders in His Welcoming Address to the ICCA New Delhi Arbitration Conference 2000, at pp.5-6.

'Arbitration is different from court proceedings and has to be maintained so, if it is to continue as a successful instrument for resolving disputes. The more arbitration proceedings are aligned to court proceedings, the less it will progress.'

104 V. Veeder, The Transparency of International Arbitration: Process and Substance, in L. Mistelis J. Lew (Eds.), *Pervasive Problems in International Arbitration*, id., Note 26 above, pp. 101ff.

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before such international arbitration tribunals. Corruption in international business has a natural catchment area. International contracts will almost always channel disputes regarding such contracts to international arbitration. Social, political and economic considerations led to the first step of criminalization and stigmatization of international corruption. Where victim-led claims are considered a desirable and logical step in the fight against corruption, strategies that enable the victim to have access, to initiate and to prosecute acts of corruption are crucial. Also required to empower the victim of corruption is access to information about the incidence and occurrence of corruption as well as strategies that limit the ability to conceal its occurrence.

Another factor that can be considered in shaping out the desired role of the international arbitration tribunal is centered on the fact that in today's globalized, integrated world traditional actors and roles are changing. This is particularly so in matters touching on global security and governance of which international corruption is a good example. There is increased participation of the private sector in the provision of security.<sup>105</sup> The 'blurring or collapse' of the distinction between international policy and national domestic issues has been described as a 'recurring motif in recent literature.'<sup>106</sup> International arbitration already plays an important role in the regulation of disputes in transnational interaction. Given the trends towards privatization in the provision of international security, international arbitration stands at a vantage point.

### 7.9 The Socially Responsible Arbitration Tribunal

The idea of victim-led private remedies in the fight against corruption is a tacit acceptance of the positive influence that may be brought to bear when direct or indirect victims of the consequences of international corruption are given a more active voice in the sanctioning process. The objective of increasing the effectiveness of the fight against corruption should be the determining factor in formulating a sanctioning process regardless of what side of the public/private fence it falls. Indeed rigid categorizations may be too great a simplification of the complex interactions that occur in corruption in international transactions.

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105 S. Burris, P. Drahos, C. Shearing, 'Nodal governance', *Australian Journal of Legal Philosophy*, Vol. 30, 2005, p. 30. At pp. 46-47, the authors refer to the TRIPS (Agreement on Trade Related Aspects of Intellectual Property Rights) as a spectacular example of nodal governance that blurs the line between the public and private spheres and which ultimately has global consequences. They state 'far from remaining in the realm of contract, under state regulation, the firms at the center of the TRIPS story are in essence wielding the power of state and international trade law through nodal means. Here the private sector steers and the state rows.'

106 N. Dorn, *Conceptualising Security: Cosmopolitan, State, Multilateral and Market Dynamics*, Boom, The Hague, 2008, p.1.

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The structural weaknesses of the criminal law system in fighting international corruption, coupled with the limitations of the purely private system of international arbitration suggests the need to move beyond these traditional categorizations to an approach that capitalizes on the potential of both systems. This ‘third way’ may be possible in a move to what can be referred to as socially responsible international arbitration.

From the viewpoint of the effectiveness of the processes needed to fight corruption and ultimately of the victim of corruption, what is needed is a process that ensures that international corruption is detected and sanctioned. A link between criminal systems that have inbuilt investigating and sanctioning capacity as well as procedural safeguards, with that of international arbitration which is the primary forum of international commercial disputes and where disputes tainted by international corruption are likely to be brought is, in this respect, of the essence.<sup>107</sup> A link between the criminal process and international arbitration could open up a different role for the arbitrator. This role would be one that assists in the detection of corruption, but which, at the same time, avoids the questions of due process and legitimacy that arise where arbitrators take on a judge-like role in matters that have a public nature. In other words this role would seek to maintain the legitimacy of international arbitration involving international corruption that occurs at the junction of private and public law.

This could be achieved by the development of a mechanism for the transfer of information and jurisdiction from the international arbitration process to a national court and or process<sup>108</sup> in matters with a public dimension, such as international corruption. The trigger for such a transfer can be motivated by the

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107 The idea for such linkage is implied by Justice Waller in *Westacre Investments Inc. v. Jugoimport-SDRP Holding Company Ltd & Ors* id., Note 79 above. He remarks:

‘If the court were concerned with a domestic arbitration and citizens of this country, I would have thought that if a party were to come before the English court and seek to prove that an agreement was unenforceable because it was in fact an agreement to pay a bribe, in addition to the contract not being enforced by the English court, the papers would be sent to the Director of Public Prosecutions. There is no such sanction available in relation to an agreement between foreign citizens. However, I would suggest that it would be appropriate to draw the attention of the Ministry of Defence to the allegations being made so that they could consider what remedies might be available to them.’

108 The motivation for arbitration should not be lost in this transfer. The transfer should be to a nationally supervised process of a confidential nature. This could take the form of a national panel or office that brings the opportunity for the parties to resolve the dispute and engage in a process of negotiated settlement with the authorities. This would bring together the mechanisms for voluntary disclosure and self-policing encouraged by regimes such as the FCPA and the UK Bribery Act and the catchment opportunity offered by international arbitration. This is one of the areas for further research suggested in the concluding chapter of this book.

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argument that the scope of the delegation by the State to the arbitration process is generally only to the extent that the matters it is concerned with are private rights. A matter of significant public dimension and public policy, such as international corruption, would arguably fall outside the scope of such delegated power in the absence of the grant of a private right of enforcement.

In such instances, the discretion the arbitration panel enjoys in deciding how to proceed, should be exercised only to the point of determining that corruption has in fact taken place. At this point, beyond the threshold of a mere allegation, the link with the national court or process may be made. This could be achieved in the form of a duty imposed by the State on arbitrators to report incidences of international corruption.<sup>109</sup> This duty to report, would serve to link the private system of international arbitration with that of the public authorities in a manner that preserves the integrity of the arbitration process while avoiding the dangers that its privacy and confidentiality may create. In the opinion of Catherine Rodgers, a disclosure obligation imposed by national regulation is a better target for reform efforts of the international arbitration system than system-wide transparency reforms.<sup>110</sup>

In this way, it may be argued, the arbitrator remains the agent of the parties insofar as the matter remains within the scope of the power delegated by the state. However, the panel would come under an obligation to the larger society where matters that affect interests beyond those of the contracting parties are at stake. This socially responsible international arbitration panel would bridge the divide between private and public justice for the simple reason that justice in today's world may often require elements of both.

Furthermore, the creation of such a 'walk-away' would serve as a clear guideline for the arbitrator, where matters tainted by international corruption come up before a panel. It will remove the element of discretion and obligate the arbitrator to a particular course of action. This would not only serve as an advantageous link between the public and private elements at play in the regulation of international corruption it would also prevent parties from simply shopping around for a more 'amenable' arbitrator. In such a system of socially responsible international arbitration, neither the private nor public sector takes the lead in the provision of security; rather they work side by side, accepting that traditional categorizations have weakened under new global and market configurations.

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109 It is true that courts in civil cases do not have such a reporting responsibility; however, a crucial difference is the fact that the civil case in a national court is taking place within public open process whereas arbitration is by definition taking place within a private closed process.

110 C. Rodgers, 'Transparency in international commercial arbitration', *Kansas Law Review*, Vol. 54 No. 5, 2006, p. 1301.

### **7.10 Conclusion**

The wide reaching criminalization of international corruption has resulted in the emergence of a new normative framework in which the international arbitration of matters tainted by corruption takes place. In this normative framework there is a growing convergence of public policy and mandatory law, that lends weight to the assertion that there now exists a transnational public policy, condemning international corruption. This wide reaching condemnation has implications for the conduct of the international arbitration panel when faced with cases involving international corruption.

The fact that most international contracts contain an arbitration agreement mean that the bulk of disputes that are tainted by international corruption are more likely to end up before an international arbitration tribunal rather than a court of law. This fact alone indicates that there is a role for international arbitration in the discussion about fighting international corruption.

The limitations of the effectiveness of the criminal approach in the fight against international corruption as well as the coming into force of the UN Convention against Corruption which contains provisions that seek to empower the private litigant to seek remedies for harm caused by corruption motivates further inquiry as to how private remedies can augment and build upon the foundations already laid by criminalization. The objective of private remedies that compensate for damage suffered as a result of international corruption may be positively influenced by the role ascribed to international arbitration. Furthermore, from the perspective of the increasing privatization of global security and governance, international arbitration is at a vantage point to partner with the State in providing security to the victim of corruption.

More specifically, the public policy implications of the new normative framework that has resulted from the criminalization of international corruption may impact on the discretion of the international arbitration panel. The opening up of the possibility of victim-led strategies, changes the dynamics of the fight against corruption. It is no longer simply a private economic affair involving governments and international businesses, but involves other stakeholders who are in the process of being given a voice. Circumscribing the discretion of the arbitration panel where boundaries between private and public matters are increasingly blurred may mean a re-examination of the basic assumptions that underlie the private arbitration process. As the dynamics of international interactions change, the public sector intrudes more into the private sector and multinationals exert considerable influence on social and political development, international arbitration must respond and adapt to these changing currents in a manner that preserves the efficiency of the arbitration process while retaining its legitimacy. In this respect the role adopted by international arbitrators in the face of contracts

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tainted by international corruption may assist or hinder the pursuit of private remedies by the direct and, ultimately, the indirect victims of international corruption.

An examination of past awards shows that in matters tainted by international corruption, international arbitration tribunals have adopted a negative passive role where the tribunal withdraws from the matter as being contrary to public policy, or a positive active role where the tribunal rules on the merits of the dispute in which international corruption is alleged. The positive active role is consistent with the acceptance of the arbitrability of matters tainted by corruption and by the same token confirms the fact that the private international arbitration panel has an important role to play in the public fight against corruption. Both the negative passive and positive active roles strengthen the position of the victim of corruption to some degree but are subject to significant efficiency and legitimacy limitations.

These factors lead to the suggestion for an approach that links the strengths of private international arbitration with those of public criminal law. This may be possible by developing a form of socially responsible international arbitration, where, beyond a certain threshold, the primary obligation of the international arbitrator, as agent to the parties, is replaced by an obligation to the larger society. Beyond this threshold, a duty to report the incidence and occurrence of international corruption is imposed on the arbitrator by the State. The rationale for this could center on the proposition that in the absence of the grant of a right of private enforcement, matters involving public rights are beyond the scope of the delegated power to settle private disputes granted by the State to international arbitrators. A socially responsible arbitration tribunal can bridge the legitimacy divide by being mandated to act not solely as the servant of the parties to the arbitration agreement but also, in certain instances, as a servant of the general public. This may be a necessary step to help ensure that international arbitration continues to meet the needs of an integrated global market while at the same time catering to the provision of security for all victims of corruption and not only persons with access to the international arbitration process.

A socially responsible international arbitration process could preserve the integrity of the international arbitration process and safeguard the vital role it plays in the regulation of international trade. At the same time it could assist in the detection and sanctioning of international corruption by acting as a window as to its incidence and occurrence in international trade disputes. Co-operation between public authorities and private arbitration could further the fight against international corruption and prevent international arbitration from being exploited as a tool to legitimize acts of international corruption to the detriment of its direct and ultimately indirect victims. In conclusion, socially responsible international arbitration could strengthen the ability of victims to

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obtain remedies for damage caused by corruption as well as serve as a vehicle to secure the legitimacy and future of international commercial arbitration in world, increasingly concerned with global security and governance.



**PART 3**

**TOWARDS AN  
INTERNATIONAL  
FRAMEWORK**



# CHAPTER 8

## TRANSACTION VALIDITY

*‘Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it.’*

*Jeremy Bentham*<sup>1</sup>

### 8.1 Introduction

The criminalization of supply-side corruption in international business seeks figuratively to dam the stream of corruption at its source through punishment and deterrence. This does not however address the downstream consequences that occur when the bribe achieves the purpose for which it was given. The contract resulting from corruption plays a pivotal role in the choices actors make in the corrupt exchange. This chapter charts the common ground regarding the private law response to the contracts tainted by corruption. Perspectives from the UNCC, the US, England and the Netherlands provide helping pointers as to the building blocks that may shape a common consensus regarding contracts tainted by corruption and underline the need to consider such contracts as a category of contracts that merits special consideration by the courts in view of their significant public dimension.

Ultimately the corrupt exchange is an agreement between individuals; it also results in an agreement or contract between parties. The global consensus against corruption impacts upon these agreements. Art. 34 UNCC is the first *global* instrument to make the link between the fight against corruption and the contracts that result as consequence of the corrupt exchange.<sup>2</sup> It raises the possibility of declaring such transactions invalid, rescinding contracts tainted

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1 J. Bentham, *Introduction to the Principles of Morals and Legislation*, Chapter 1, The Principle of Utility, 1781.

2 Emphasis added. The Civil Law Convention on Corruption predates the UN Convention but is an intergovernmental instrument of Council of Europe member states. See the Council of Europe Civil Law Convention on Corruption, April 1999, EUROP. T.S. 127 (entered into force November 2003).

## CHAPTER 8 – TRANSACTION VALIDITY

by corruption, and withdrawing contracts or other concession entered into by government authorities as important steps that can be taken to ensure that the consequences of corruption are treated in a manner that is in keeping with the original purpose of criminalization. This book argues that the regulation of contracts tainted by corruption can play a positive role in influencing the choices corporations make with respect to complying with anti-corruption rules.<sup>3</sup>

In general terms, the choice to intervene in private contracts by the courts may occur where the substance of the contract is considered unfair or unreasonable, or is the result of an abuse of the bargaining process, or is simply unconscionable. Court intervention may also be the response to the impact of contracts on the general public.<sup>4</sup> Art. 34 UNCC emphasizes the fact that the role of the courts with regard to contracts tainted by corruption is more than that of an impartial arbiter of a private agreement.

Farnsworth speaks about the *policing* function of the courts, which places limits on the enforceability of contracts for policy reasons.<sup>5</sup> The intervention by courts in contracts tainted by corruption provides a direct method of regulating corruption.<sup>6</sup> This intervention displaces the freedom of the parties to contract with wider considerations of policy and public interest.<sup>7</sup> Court intervention in the contract tainted by corruption challenges the principle of party autonomy and the stability of private agreements.

The transaction tainted by corruption is best characterized as a sequence of illegal acts that are closely connected. In other words, rather than speaking of

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3 Collins argues that '[P]rivate law certainly has similar effects in steering market behaviour to other types of social and economic regulation of business activity. Participants in markets may alter their behaviour in order to comply with private law rules.' H. Collins, *Regulating Contracts*, OUP, Oxford, 1999, p. 56.

4 Strong argues that 'the effect to be given to an illegal element of a contract ... should depend upon how the court can best serve the interest of the public and, when not inimical to the public interest, do justice to the parties.' G. Strong, 'The enforceability of illegal contracts', *Hastings Law Journal*, Vol. 12, 1960-1961, p. 347, at p. 350.

5 E. Farnsworth, *Contracts*, 4th edn, Aspen Publishers, New York, 2004, p. 217.

6 Collins writes that '... we should not presuppose that specialised regulatory agencies and codes are the sole type of legal mechanism. The private law of contract enforced by the ordinary courts is equally a form of legal regulation.' H. Collins, *Regulating Contracts*, id., Note 3 above, at p. 7.

7 Collins speaks of justice as a key consideration in the formulation of legal doctrine regarding obligations created by contracts, he states:

'[t]he state seeks to refrain from promoting injustice, and in legal doctrine this objective becomes interpreted as justification for restraints upon freedom of contract. Private law places limits on the enforceability of agreements, in order to constrain power relations created by contracts and to upset exploitative bargains.'

H. Collins, *Regulating Contracts*, id., Note 3 above, at p. 34.

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an *illegal contract*, the corrupt exchange is a *series of illegal contracts* tainted by corruption in varying ways. While criminalization tends to break up the process of corruption into isolated events, corruption is more *systemic*.<sup>8</sup> The process of corruption is characterized by a sequence of agreements that are closely connected in arriving at the final negative consequences of corruption. This process has been described as an infestation that progresses until corruption ‘become[s] the normal condition of the body politic.’<sup>9</sup>

The first section of this chapter examines the framework provided for the consequences of corruption under the UNCC. The obligations imposed by Art. 34 on states raises the question whether the UNCC heralds the beginning of a legal regime concerning transactions tainted by corruption. The second and third sections examine the response to primary and secondary contracts as elaborated in the US, England, the Netherlands and by international arbitration. The fundamental question is whether or not an enforceable contract can be said to come into existence and, if a contract does come into existence, how this affects the position of the party treated ‘unfairly’ or whose ‘consent has been undermined in the process of reaching the agreement.’

This chapter ends with a brief look at the notion of the contract tainted by corruption as a regulatory tool and whether articulating a common position on the *policing* role of the courts with regard to such contracts may be a necessary step to bring coherency between the international repudiation of corruption and the contracts that result from violations of anti-corruption laws.

### 8.2 Consequences of Corruption under the UN Convention

The tangible consequences of the corrupt exchange are the primary and secondary contracts. Does Art. 34 UNCC introduce a new legal regime regarding the consequences of corruption? Are there new arguments to be made regarding the validity of contracts tainted by corruption as a result of Art. 34 UNCC? By bringing the consequences of corruption into the scope of anti-corruption sanctioning processes, Art. 34 attempts to address the contradiction that may occur where parties who have committed acts of corruption may be prosecuted, fined and imprisoned, while persons who personally benefit from the acts of corruption and the transactions are not treated similarly.

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8     Emphasis added.

9     Per Justice Grier in *Marshall v. Baltimore & Ohio Railroad Company*, 57 U.S. (16 How.) 314, at p. 335.

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The members of the UNCC recognize the need to ‘foster a culture of rejection of corruption.’<sup>10</sup> Requiring that member states shall take measures to deal with the consequences of corruption is necessary to ensure that a culture of corruption does not become the prevailing culture. Art. 34 UNCC provides:

‘[W]ith due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.’

Art. 34 UNCC speaks of the *consequences of corruption*. The specific corruption to which Art. 34 refers is outlined in Arts. 15-25 UNCC.<sup>11</sup> Of particular note are Arts. 15 and 16 UNCC, which respectively criminalize national and international corruption, as well as Art. 21, which criminalizes private corruption. The parties to contracts tainted by corruption can vary from a public/private configuration with the state on the one hand and the commercial entity on the other, to a private/private configuration between two commercial entities. These transactions embody the relationships between the person giving the bribe, the person accepting the bribe and the person from whom the bribe was kept secret. These are all relationships that flow out of or are tainted by the original act of bribery. This raises questions about the status of such transactions.

Art. 34 recognizes the need to embrace the direct link between the act of corruption and its consequences. Art. 34 refers to *contracts, concessions or similar instruments* as consequences of corruption.<sup>12</sup> By so doing, Art. 34 reaches across the public/private divide to bring private agreements into the sphere of consequences of corruption, which states should seek to address. In this sense the purpose of Art. 34 is more than merely the provision of compensation to a wronged party but also, to some extent, to deter the commission of the corrupt exchanges that result in such contracts.

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10 Preamble, Para. 5 UNCC.

11 Arts. 15-25 of the UN Convention provide a taxonomy of acts of corruption as follows: the bribery of national public officials (Art. 15), the bribery of foreign public officials and officials of public international organizations (Art. 16), embezzlement (Art. 17), influence (Art. 18), abuse of function (Art. 19), illicit enrichment (Art. 20), embezzlement of property in the private sector (Art. 22), laundering of proceeds of crime (Art. 23), concealment (Art. 24), and the obstruction of justice (Art. 25).

12 Art. 34 UNCC.

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### 8.2.1 No New Legal Regime

Art. 34 stipulates that states *shall take* measure to address the consequences of corruption. This is to encourage states to integrate the consequences of corruption into their anti-corruption strategy and planning. The first part of Art. 34 is couched in mandatory terms:

‘[W]ith due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption.’

However, the second part of Art. 34 modifies the first part by making it clear that the extent to which states are required to do this will depend on the fundamental laws and principles of the state in question. The fact that such measures are to be taken in *accordance with the fundamental principles of its domestic law* means that there is no new international standard regarding measures to be taken regarding the consequences of corruption established by Art. 34 except to the extent of concurrence with national principles. This is the light in which the last section of Art. 34 must be viewed. It provides that:

‘In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.’

The ‘*context*’ that is referred to is the fact that Art. 34 is subject to the fundamental laws and principles of participating states. Thus, when Art. 34 stipulates that states *may consider* the fact of corruption as a relevant factor with regard to the enforceability or either status of contracts, concessions or other instruments that result from corruption, the linking of corruption to the issue of transaction validity is left to the discretion of the state.

As such, as far as the consequences of corruption are concerned, Art. 34 can hardly be said to be *promoting* any new measures. At best it can be seen as aiming to strengthen existing positions under domestic law with regard to the consequences of corruption to the extent that these promote the objectives of the UNCC.<sup>13</sup> Despite the novelty of Art. 34, the UNCC does not introduce a new legal regime with regard to the validity of contracts tainted by corruption.

In this sense, the UNCC does not add to existing provisions of the national law regarding the enforceability or validity of contracts, concessions or similar

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<sup>13</sup> Art. 1 UNCC states that one of the purposes of the UN Convention is to ‘promote and strengthen measures to prevent and combat corruption.’ Emphasis added.

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instruments tainted by corruption. However, Art. 34 UNCC does articulate on the global stage the important nexus between the public wrong of corruption and the rights and obligations of parties that result from the commission of this wrong. This is an important acknowledgment of the need to remove the artificial boundary that exists between the public and private approaches to the fight against corruption. The UNCC encourages a consistency of approaching by calling for a comprehensive multidisciplinary approach.<sup>14</sup>

### 8.2.2 Measures under Art. 34 UNCC

Art. 34 UNCC also calls on states to ‘*take measures*’ with regard to the contracts, concessions or other instruments that result from the corrupt exchange. This is an open-ended call. Transaction validity is just one suggested measure. The purpose of such measures is to ensure that the purpose of criminalizing bribery also extends to the consequences that it produces. As such, the measures to be taken in this regard are measures that delegitimize, invalidate or otherwise punish the occurrence of these consequences. Addressing the consequences of corruption clarifies the cost of non-compliance with anti-corruption rules. The instability of the resulting contract, for example, or the exclusion from the contracting process can encourage the choice for compliance.<sup>15</sup>

This is supported by the recent self-assessment report with respect to Art. 34 filed by the US and the UK.<sup>16</sup> These show that measures taken with regard to Art. 34 are primarily to exclude parties who have engaged in corrupt activity from the public procurement process. The UK in its Self-Assessment for the United Nations Convention against Corruption – Chapters III and IV<sup>17</sup> – states that it has adopted and implemented the measures described in Art. 34 by providing processes for mandatory exclusions from public contract

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14 See Preamble, Para. 4 UNCC.

15 See EU Public Procurement Directive 2004/18/EC, Art. 45(1), which requires that an entity which has been convicted of corruption shall not be permitted to participate in public contracts. Council Directive 2004/18/EC of 31 March 2004, on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts.

16 The Netherlands is not due for reviewing until the third year of the *United Nations Convention against Corruption Review Mechanism* and has yet to submit a Self-Assessment report. As such no details are yet available as to its implementation of Art. 34. See United Nations Convention against Corruption: Review Mechanism, available at <http://www.unodc.org/unodc/en/treaties/CAC/country-pairings-year-1-of-the-review-cycle.html>, accessed on 27 November 2011. However, Art. 45(1) EU Public Sector Procurement Directive 2004/18/EC, which requires that an entity which has been convicted of corruption shall not be permitted to participate in public contracts, will clearly apply as a measure in the Netherlands and the United Kingdom.

17 UK Self-Assessment for United Nations Convention against Corruption - Chapters III and IV, [www.dfid.gov.uk/.../draft-UK-self-assess-un-convention-corr.pdf](http://www.dfid.gov.uk/.../draft-UK-self-assess-un-convention-corr.pdf), accessed on 27 November 2011.

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procurements where an economic operator has been convicted of corruption or bribery offenses.<sup>18</sup> Even where there has been no conviction but mere allegations of bribery, contracting authorities have the discretion to exclude an economic operator from public bidding processes.<sup>19</sup> The Proceeds of Crime Act 2002 allows for the confiscation of the *benefit* that a convicted defendant has obtained as a result of its criminal conduct.<sup>20</sup> The Act also empowers the enforcement authorities (the Serious Fraud Office) to apply to the High Court for a civil recovery order to recover property which is, or represents, property obtained through unlawful conduct.<sup>21</sup>

The US in its Self-Assessment for United Nations Convention<sup>22</sup> refers to the fact that the adoption of measures with respect to Art. 34 includes administrative, civil and criminal sanctions. According to the report the ‘visibility of punishment plays a significant role in prevention because of its deterrent effect’.<sup>23</sup> It lists the measures that the US has taken with respect to Art. 34 as falling into the following categories: various degrees of criminal sentences for officials convicted for bribery; rescission and annulment of contracts procured by bribery; damages and restitution of moneys paid by government with regard to contracts tainted by corruption; and private actions for damages by private individuals who are victims of corruption.<sup>24</sup> Also included is the withdrawal of contracts where the contracting authorities determine that there has been corrupt activity.<sup>25</sup>

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18 UK Public Contracts Regulations 2006 (SI 2006/5) Art. 23(1) provides that ‘a contracting authority shall treat as ineligible and shall not select an economic operator in accordance with these Regulations if the contracting authority has actual knowledge that the economic operator ... has been convicted of any ... (b) corruption within the meaning of Sec. 1 of the Public Bodies Corrupt Practices Act 1889(3) or Sec. 1 of the Prevention of Corruption Act 1906(4); (c) the offence of bribery;...’ Similar provisions are contained in the Defence and Security Public Contracts Regulations 2011 (SI 2011/1848).

19 Art. 23(4)(e) UK Public Contracts Regulations 2006 (SI 2006/5) provides that: ‘A contracting authority may treat an economic operator as ineligible or decide not to select an economic operator in accordance with these Regulations on one or more of the following grounds, namely that the economic operator ... has committed an act of grave misconduct in the course of his business or profession.’

20 See Part 2, Proceeds of Crime Act 2002.

21 *Id.*, see Part 5.

22 US Self-Assessment for United Nations Convention against Corruption - Chapters III and IV, 14 January 2011, <http://www.unodc.org/unodc/en/treaties/CAC/country-pairings-year-1-of-the-review-cycle.html>, accessed on 27 November 2011.

23 *Id.*, at p.169.

24 *Id.*

25 See for example the US Federal Acquisition Regulations, which provide in Subpart 3.703(b)(2) on Voiding and Rescinding Contracts that a Federal agency, upon receiving information that ‘a contractor or a person has engaged in conduct constituting a violation of subsection 27(a) or (b) of the OFPP Act, should consider the rescission of a contract with respect to which ... (2) The head of the agency, or designee, has determined, based upon a preponderance of the

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### 8.2.3 Corruption as a Vitiating Factor

Art. 34 UNCC stipulates that corruption is to be considered a factor in annulling or rescinding a contract, concession or similar instrument. Art. 34 presents corruption as an independent cause of defective consent. This means that Art. 34 emphasizes corruption as a vitiating factor of an otherwise enforceable contract. A parallel can be drawn to the express inclusion of corruption as a vitiating factor in the Vienna Convention on the Law of Treaties, which provides for corruption as a separate vitiating factor distinguishable from error and fraud. It states that ‘[i]f the expression of a State’s consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.’<sup>26</sup>

### 8.3 The Primary Contract

The first contract in the corrupt exchange is the contract between the bribe-giver and the recipient of the bribe. This contract is described as *primary* because it sets the stage for the *secondary* contract that results between the bribe-giver and the principal of the bribe-recipient. This section draws on Chapters 4, 5, 6, and 7 to examine the extent to which corruption affects the validity of such a primary agreement under US, English, and Dutch law and International Arbitration. This gives a general picture of the status of the primary contract from an international perspective.

#### 8.3.1 US Law

The Foreign Corrupt Practices Act, the UNCC, the OECD Convention and the various state commercial bribery statutes in the US prohibit the offering or acceptance of a bribe or other inducement to acquire business.<sup>27</sup> These laws are directed at the conduct of parties involved in the giving and receipt of a bribe.

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evidence that the contractor or someone acting for the contractor has engaged in conduct constituting such an offense.’

26 See 1969 Vienna Convention on the Law of Treaties (1969), Art. 50. Elias noted the reluctance of some states to include corruption of a state’s representative as a ground for invalidating a treaty. However, he notes that the drafters of the treaty concluded that:

‘the corruption of a representative by another negotiating state undermines the consent which the representative purports to express on behalf of his state in quite a special manner which differentiates the case from one of fraud.’

See Yearbook of the International Law Commission, 1966, p. 74, Para. 2, cited in T. Elias, *New Horizons in International Law*, Oceana Publications, Dobbs Ferry, NY, , 1974, at p. 165.

27 See Chapter 4 for a full description of the criminalization of international and domestic commercial bribery under US laws.

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However, the rules do not specifically address the status of contracts that result from this conduct. This means that decisions about the status of such contracts are left to the determination of the courts. The courts have been consistent about applying the policy behind the criminalization of bribery to questions about the status of resulting contracts. In the *Oscanyon* case, where a kickback was to be paid to a diplomat who promised to influence the award of a contract for the sale of arms, the court stated that '[t]he question then arises is this contract one which the court will enforce?'<sup>28</sup> This is a question that the court has answered in the negative on grounds of public policy and on grounds that it is inconsistent with the statutory prohibitions of bribery.

The Courts will generally hold that where a statute has expressly prohibited a particular type of conduct, an agreement that embodies such conduct is unenforceable.<sup>29</sup> Farnsworth notes that where the promise sought to be enforced is conditioned on the parties engaging in the commission of a tort, the tendency to induce misconduct is what makes the promise unenforceable whether or not the conduct takes place.<sup>30</sup> The courts will not entertain claims that are 'founded upon services rendered in violation of common decency, public morality, or the law.'<sup>31</sup> Similarly, the Court in *Coppell v. Hall* explained that the law will not 'lend its support to a claim founded upon its violation.'<sup>32</sup>

From the public policy perspective, the US courts look at the effect of contracts to give a bribe on the larger society and do not restrict themselves to a consideration of the rights of the parties to the contract. The contract to give a bribe is held to be unenforceable because it undermines the integrity of social and political institutions. In *Marshall v. Baltimore & Ohio Railroad Co.*, compensation was claimed for services rendered in procuring the passage of a law. Justice Grier in rejecting the claim stated that the consequences of bribery are draconian, as such acts of purchasing influence can 'infest the capital of the Union and of every state, till corruption shall become the normal condition of the body politic, and it will be said of us as of Rome – *omne Romae venale*.'<sup>33</sup> In similar dramatic terms, the court in *Coppell v. Hall* describes bribery as 'a contamination that destroys wherever it reaches.'<sup>34</sup> In the afore-mentioned *Oscanyon* case, the courts referred to the far-reaching moral implications of bribery that arise because of the 'inherent viciousness of the transaction, its repugnance to our morality, and the pernicious effect which its enforcement by

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28 *Oscanyon v. Arms Co.*, 103 U.S. 261 (1880), at pp. 271-272.

29 E. Farnsworth, *Contracts*, 4th edn, Aspen Publications, New York, 2004, p. 335.

30 *Id.*, at p. 316.

31 *Oscanyon v. Arms Co.*, *id.*, Note 28 above, at p. 267.

32 *Coppell v. Hall*, 7 Wall. (74 U.S.) 542, 558-59, 19 L.Ed. 244 (1868), cited in *Oscanyon v. Arms Co.*, *id.*, at Note 28 above, at p. 268.

33 Per Lord Grier in *Marshall v. Baltimore & Ohio Railroad Co.*, 57 U. S. 314 (1853), at p. 335.

34 *Coppell v. Hall*, 7 Wall. (74 U.S.), p. 542, at pp. 558-59.

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our courts would have upon our people.<sup>35</sup> For this reason the US courts hold it as a principle that the primary contract to give a bribe is unenforceable.<sup>36</sup>

When a court in the US is faced with a contract to give and/or receive a bribe, it is faced with a contract that is unenforceable on grounds of public policy, because the anti-corruption rules regarding private and public bribery clearly prohibit such agreements.<sup>37</sup> By engaging in a contract to give or receive a bribe, the parties are committing the very conduct prohibited by the law. It is also in violation of public policy as a contract to commit a tort or to induce the commitment of a tort.<sup>38</sup>

A fundamental question with respect to the primary contract is what the role of the court should be as regards the position of the plaintiff and the defendant. If the primary contract is held to be unenforceable this allows the defendant, who may be the party at fault, to walk away from the transaction without paying any penalty. Indeed it may leave the defendant enriched at the cost of the plaintiff.<sup>39</sup> The general rule is that the US courts will not allow a claim on a promise that is unenforceable on grounds of public policy. The court will simply leave the parties as it finds them regardless of the fact that this may lead to one party being unjustly enriched at the cost of the other.

In *Nathan v. Tenna Corporation*, where the defendant sought to recover commissions on what was essentially a bribery kick-back scheme, the court held that public policy dictated that the plaintiff's suit be dismissed.<sup>40</sup> In *McMullen v. Hoffman*, where the defendants sought a claim based on a fraudulent exchange, the court held that the maxim '*Potior est conditio defendentis*' would apply to render the contract unenforceable.<sup>41</sup> In *Coppell v. Hall*, the court emphasized that a contract in violation of a statutory prohibition was unenforceable not on account of the defendant, but on account 'of the law itself' and the 'purity of its administration.'<sup>42</sup> The objective of the court with

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35 *Oscanyan v. Arms Company*, 103 U.S. 261, at p. 277.

36 Per Lord Grier in *Marshall v. Baltimore & Ohio Railroad Co.*, *id.*, Note 33 above, at p. 334.

37 Sec. 192 Restatement (2nd) Contracts.

38 Sec. 193 Restatement (2nd) Contracts.

39 The Court of Appeals in *McMullen v. Hoffman* 174 U.S. 639 (1899), at p. 669, has stated that: 'the court refuses to enforce such a contract, and it permits defendant to set up its illegality not out of any regard for the defendant who sets it up, but only on account of the public interest. It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations, and in order the better to secure the public against dishonest transactions. To refuse to grant either party to an illegal.'

40 *Marvin B. Nathan and Natalie J. Nathan v. Tenna Corporation*, United States Court of Appeals, Seventh Circuit. 560 F.2d 761 (1977).

41 174 U.S. 639 (1899), at p. 654

42 *Id.*, at pp. 558-559.

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regard to its refusal to assist the plaintiff is also to encourage deterrence. The 'rigid adherence' to the rule of non-enforceability helps to ensure that the public understands that such contracts will not be protected by the law.<sup>43</sup> The exceptions to the strict rule against enforceability or recovery that applies to persons who were excusably ignorant of the wrongful aspects of the transaction<sup>44</sup> would not apply to the contract to give a bribe where the actions of both parties were intentional with the purpose of acting against the knowledge of the person to whom the bribe-recipient owed a duty of trust.

Wade, in his examination of US law on the subject of restitution for benefits obtained by illegal transactions, gives the reasons why courts may *refuse to grant* restitution as follows: (1) to grant restitution will aid in enforcing the illegal contract;<sup>45</sup> (2) on the basis of the principle of *volenti non fit injuria*, a party engaged in an illegal contract must be taken to have known that the law will not enforce it or allow him restitution in connection with it. He must therefore have assumed any risk of loss;<sup>46</sup> (3) the plaintiff should be punished by a denial of relief;<sup>47</sup> (4) the plaintiff as a participant in an illegal contract is disqualified from seeking the court's aid;<sup>48</sup> (5) the nature of the suit offends the dignity of the court, as the suit is founded on an unlawful grounds that the courts cannot afford the time and expense for such suits founded in illegality;<sup>49</sup> and (6) to refuse relief will discourage illegal transactions.<sup>50</sup> Wade also summarizes the primary reasons why a court may want to grant recovery.<sup>51</sup> However, with regard to the primary contract to give a bribe, the case law shows that the courts will lean toward the refusal of a right of recovery. The courts will leave the parties as they find them.

In conclusion, the US Courts will not enforce an agreement to give a bribe on grounds of public policy and because it is prohibited by legislation. Sec. 178 of the Restatement provides that:

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43 Id., at p. 670.

44 Sec. 198 Restatement (2nd) Contracts.

45 J. Wade, 'Benefits obtained under illegal transactions – reasons for and against allowing restitution', 25 *Texas Law Review* 31, 1946-1947, at p. 32.

46 Id., at p. 35.

47 Id.

48 Id., at p. 37.

49 Id., at pp. 42-48.

50 Id., at p. 48.

51 Wade also suggests reasons why the courts may decide to grant recovery as follows: (1) the fact that such recovery will prevent the unjust enrichment of the defendant; (2) to encourage the plaintiff to disaffirm the illegal contract; (3) allowing recovery will discourage illegal transactions; and (4) refusing recovery will encourage fraud. See J. Wade, 'Benefits obtained under illegal transactions – reasons for and against allowing restitution', *id.*, at pp. 52-57.

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‘A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.’<sup>52</sup>

In addition, a promise to commit an act of bribery or to induce such an act amounts to a promise to commit a tort and is unenforceable on grounds of public policy.<sup>53</sup> Furthermore, an agreement to give a bribe or other inducement encourages an agent to act in breach of the fiduciary duty owed to a principal or will tend to induce such a violation of duty and is also unenforceable on grounds of public policy.<sup>54</sup> For the above reasons it can be concluded that the primary contract is a contract that the courts will not enforce under US Law.

### 8.3.2 English Law

It is a well-established principle that the English court will not enforce a contract that is illegal.<sup>55</sup> Lord Mansfield in *Holman v. Johnson* stated that ‘No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.’<sup>56</sup> This is a principle that is grounded in general principles of public policy rather than in the interest of the parties. Even where a defendant is seeking to avoid responsibility under a contract by alleging the contract is illegal, public policy allows this by requiring that the contract in contravention of statute is unenforceable.<sup>57</sup> This principle allows no room for the exercise of any discretion by the court in favor of one party or the other.<sup>58</sup>

The UK Bribery Act makes it a criminal offense to (1) *offer* a bribe intending that the bribe will induce the person to perform a relevant function or activity improperly;<sup>59</sup> (2) reward the person for such an improper performance; or (3) know that the acceptance of the bribe will in itself constitute the improper

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52 Sec. 178 Restatement (2nd) Contracts.

53 See Sec. 192 Restatement (2nd) Contracts, which provides that ‘A promise to commit a tort or to induce the commission of a tort is unenforceable on grounds of public policy.’

54 See Sec. 193 Restatement (2nd) Contracts, which provides that ‘A promise by a fiduciary to violate his fiduciary duty or promise that tends to induce such a violation is unenforceable on grounds of public policy.’

55 Justice Gibson, after reviewing *in extenso* the English principles on illegality stated ‘[t]here can be no doubt but that under English law a claim, whether in contract or in tort, may be defeated on the ground of illegality or, in the Latin phrase, *ex turpi causa non oritur actio*.’ *Hall v. Woolston Hall Leisure Ltd* 4 All ER 787.

56 *Holman v. Johnson* (1775) 1 Cowp. 341, at p. 343.

57 Lord Mansfield in *Holman v. Johnson* stated ‘It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff ...’ *id.*

58 *Tinsley v. Milligan* [1993] 3 All ER 65.

59 Sec. 1(2) UK Bribery Act 2010.

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performance of a relevant function or activity.<sup>60</sup> There is an express prohibition on the offering of a bribe and an agreement that evidences the offer of a bribe would clearly contravene the statute. Similarly, the UK Bribery Act criminalizes the request, *agreement to receive*, or the acceptance or anticipation of<sup>61</sup> a financial or other advantage with the intention that, in consequence, a relevant function or activity should be performed improperly.<sup>62</sup> Also criminalized is the request, *agreement* or acceptance of a financial or other advantage of a bribe that in itself constitutes the improper performance<sup>63</sup> or constitutes a reward<sup>64</sup> for improper performance. All functions of a public nature, connected with a business, performed in the course of a person's employment or performed by or on behalf of a body of persons, whether corporate or incorporate, fall within the scope of activities in respect of which giving or receiving a bribe are criminalized.<sup>65</sup> These provisions clearly prohibit the receipt of a bribe, and an agreement that evidences the receipt of a bribe would clearly fall within conduct that is expressly prohibited by statute and would be void following the rules on illegality.<sup>66</sup>

The criminalization of public and private bribery renders the agreement to give or receive a bribe illegal.<sup>67</sup> The defense of illegality will therefore prevent the court from acting inconsistently with the criminal prohibition of bribery. The effect of upholding a contract to give a bribe would be to sanction the commission of the criminal conduct. The rules criminalize both active and passive bribery and as such apply to all the parties to the primary agreement *i.e.* to the party paying the bribe as well as to the party receiving it. The effect of this is to render the primary contract illegal and void.<sup>68</sup>

Where a contract is made to deliberately commit a prohibited act, the contract is unenforceable under English law.<sup>69</sup> In the words of Lord Holt, 'Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, tho' the statute itself doth not

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60 Id., Sec. 1(3).

61 Id., Sec. 2(6).

62 Id., Sec. 2(2).

63 Id., Sec. 2(3).

64 Id., Sec. 2(5).

65 Id., Sec. 3-4.

66 See Chapter 5 above for a full description of the criminalization of international and national commercial bribery under UK law.

67 *St. John Shipping Corp. v. Joseph Rank Ltd* [1957] 1 Q.B. 267, at p. 283, per Devlin J.

68 In *Phoenix Insurance v. Halvanon Insurance* [1988] QB 216, the provisions of the Insurance Companies Act 1974 rendered it illegal, without the authority of the Secretary of State to carry on the business of effecting and carrying out contracts of insurance. A contract of insurance entered into by an unauthorized insurance company was held to be void.

69 *St. John Shipping Corporation v. Joseph Rank Ltd* [1957] 1 QB 267, 283; *Ali Mohammed v. Alaga & Co* [2000] 1 WLR 1815.

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mention that it be so ....<sup>70</sup> The effect of the prohibitions against the bribery of public officers, agents and foreign officials is to render any transaction that breaches this prohibition illegal. As such a contract to give a bribe would involve the commission of a statutory criminal offense and would be unenforceable by a court of law.<sup>71</sup>

The courts in *Re Mahmoud & Ispahani* emphasized that statute may provide an express prohibition or that this may have to be inferred by the court from the fact that the statute imposes a penalty on the person entering into that class of contract.<sup>72</sup> However, in *St. John Shipping Corporation v. Joseph Rank Ltd* the court noted that the distinction between contracts expressly and impliedly prohibited by statute, is not as to enforceability because in both cases the courts will not enforce such a contract.<sup>73</sup> Any attempt by parties to make a claim on the primary contract will not be upheld by the courts.<sup>74</sup> In *Ali Mohammed v. Alaga & Co.*, the court referred to the unenforceability of a contract where the relevant legislation prohibits the actions embodied in the contract stating that ‘there are substantial reasons why, in the public interest, such agreements should be outlawed’ and that ‘if the court were to allow its process to be used to enforce agreements of this kind, the risk would inevitably arise that such agreements would abound ... to the detriment of the public.’<sup>75</sup>

The court will not entertain an action based on an illegality and deny the parties to such a contract the dignity of the law by way of remedies that may inadvertently affirm the illegality. This means that the claim of illegality plays into the hands of the defendant who is opposing the plaintiff’s claim.<sup>76</sup> The consequence of a finding that the contract in question is an agreement to pay or receive a bribe is the application of the principle of *ex turpi causa non oritur*.<sup>77</sup>

This means that with regard to claims by parties concerning the primary contract it is a defense to a claim by the plaintiff that the contract is illegal. This defense is not to achieve justice between the parties but rather to protect

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70 Per Holt C.J. in *Bartlett v. Vinor*, 90 Eng Rep. 750.

71 *Re Mahmoud v. Ispahani* [1921] 2 KB 716.

72 [1921] 2 KB 716.

73 [1957] 1 QB 267, 283.

74 *Parkinson v. College of Ambulance Ltd* (1925) [1925] 2 KB 1.

75 *Ali Mohammed v. Alaga & Co* [2000] 1 WLR 1815.

76 ‘No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality.’ See *Scott v. Brown Doering McNab* [1892] 2 QB 724 per Lindley L.J., at p. 728.

77 In *Holman v. Johnson*, Lord Mansfield remarked that ‘no court will lend its aid to a man who founds his cause of action on an immoral or illegal act.’ See *Holman v. Johnson* (1775) 1 Cowp. 341, 98 ER 1120 (1775) 1 Cowp 341, at p. 343.

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the interest of the society.<sup>78</sup> In *Nayyar & Ors. v. Sapte & Anor.*, an attempt by the plaintiff to sue to recover the bribe paid was defeated by the application of the *ex turpi causa* principle. The court stated that ‘the principle of *ex turpi causa* can extend to immoral as well as illegal acts and may apply to improper conduct evincing serious moral turpitude. Bribery involves serious moral turpitude.’<sup>79</sup> Under English law the primary agreement is unenforceable on grounds of public policy as well as statutory illegality.

If a service can be separated from the illegal contract, then a claim can be allowed. Lord Browne-Wilkinson in *Tinsley v. Milligan* held that ‘A party to an illegality can recover by virtue of a legal or equitable property interest if, but only if, he can establish his title without relying on his own illegality.’<sup>80</sup> In the *Ali Mohammed v. Alaga* case the plaintiff was allowed to a claim for *quantum meruit* for translation service that could be considered separate from the contract to receive a commission for the solicitation of clients contrary to the rules governing solicitors.<sup>81</sup> The court found it relevant that ‘the parties are not in a situation in which their blameworthiness is equal, and that the plaintiff was ignorant that there was any reason why the defendant should not make the agreement which he says was made.’<sup>82</sup>

The Law Commission in its Consultative Report emphasized the public interest sought to be protected by the illegality defense and states that

‘the illegality defence should be allowed where its application can be firmly justified by the policies that underlie its existence. These include: (a) furthering the purpose of the rule which the illegal conduct has infringed; (b) that the claimant should not profit from

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78 Per Lord Mansfield *Holman v. Johnson*, id.

79 *Nayyar & Ors v. Sapte & Anor* [2009] EWHC 3218 (QB) (16 December 2009), where an attempt had been made to win a Global Sales Agent Contract in respect of Air India by paying a bribe to a person with connections in the Indian aviation industry. The court held that proof of a payment which is intended to be a civil law bribe is sufficient to engage the *ex turpi causa* principle. It is not necessary to establish that the intended illegal purpose has been effectively carried out. See Para. 118.

80 [1994] 1 A.C. 340, at p. 385.

81 The court accepted the argument by the plaintiff’s lawyers that ‘even if the alleged agreement is discarded as illegal and unenforceable, and without making any reference to that agreement at all, the plaintiff is entitled to be paid a reasonable sum for professional services rendered by him to the defendant on behalf of the defendant’s clients, the surrounding circumstances being such as to show that such services were not rendered gratuitously.’

82 Id.

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his or her wrongdoing; (c) deterrence and (d) maintaining the integrity of the legal system.’<sup>83</sup>

For the above reasons it can be concluded that the primary contract is a contract that the courts will not enforce under UK Law.

### 8.3.3 Dutch Law

Public and private bribery are criminalized under the Dutch Penal Code (DPC).<sup>84</sup> The primary contract is evidence of an act that is forbidden under Art. 328ter DPC. The Dutch Civil Code (DCC) limits the freedom of parties to contract where there is inconsistency with public law.<sup>85</sup> By virtue of Art.3:40 DCC, the primary contract would be a nullity on the grounds that it is contrary to public order and public policy under Art.3:40(1) DCC or contrary to mandatory law under Art. 3:40(2) DCC.

The validity of an agreement to give a bribe can also be questioned on the grounds that it is in conflict with public policy. A contract to give a bribe in terms of its content and its objective is in conflict with the good morals and public order (*openbare orde*)<sup>86</sup> and it is therefore on the grounds of Art. 3:40(1) DCC a nullity. Art. 3:40(1) DCC states that a juridical act which by its content or necessary implication is contrary to good morals or public policy is a nullity. Criminalization of public and private bribery under Dutch law is a

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83 See Consultative Report, *The Illegality Defence*, LCCP No. 189, January 2009, Part 2, Para. 2. Leading up to this Report, in 1999 the Law Commission published a Consultation Paper (*Illegal Transactions: The Effect of Illegality on Contracts and Trusts*, Consultation Paper No. 154, 21 January 1999) to consider the introduction of a structured discretion for the court as regards the enforcement of an illegal contract (except for cases where the contract is illegal as being contrary to public policy) and the extent to which involvement of one or both of the parties to a contract in illegal activities should have an impact on their usual rights and remedies. The Commission finally decided that any improvement of the law could best be achieved through case law.

84 See Chapter 6 for full details of criminalization of international and national commercial bribery under Dutch law.

85 Some writers describe normative texts as absolutely mandatory ‘when such laws appear in legislation which also prohibits agreement which infringe morals or public policy.’ See Association Henri Capitant & Société de Législation Comparée (Ed.), *European Contract Law Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*, 2008, Sellier, Munich, at p. 142.

86 The European Court of Justice has defined a public order law as follows: ‘concerning the classification of the provisions at issue as public-order legislation ... law, that term must be understood as applying to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State.’ See Judgment of 23 November 1999 in Case 376/ 96 *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL* (C-369/96), at Para. 30.

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good indicator that it constitutes conduct that is contrary to Dutch public morals and policy. A contract to give a bribe would therefore arguably be a nullity under Art. 3:40(1) DCC. The participation of the Netherlands in international instruments prohibiting corruption in international and national business is further evidence of the fact that a contract to give a bribe is against the public order or public policy in the Netherlands.

Apart from nullity on grounds of being in violation of public policy, Art. 3:40(2) DCC states that a juridical act that is in conflict with a mandatory statutory provision (*dwingende wetsbepaling*) is a nullity. While the provisions of the Dutch Penal Code do not specifically refer to the status of the contract to give a bribe, Hartkamp has remarked that where a law provides that a particular type of agreement results in a criminal act, such an agreement that results in the act is forbidden by the law.<sup>87</sup>

The provisions of the DPC with regard to the prohibition of bribery apply to all parties engaging in the agreement to give a bribe and are not intended for the protection of one particular party. As such, the caveat to Art. 3:40 DCC to the effect that where a provision is intended solely for the protection of one of the parties to a multilateral juridical act, the act may only be annulled would not apply. An agreement to give a bribe would therefore fall within the four corners of Art. 3:40(2) DCC as a contract in conflict with the mandatory prohibitions against public or private bribery and constitute a nullity.

Furthermore, the status of the contract to give a bribe is further clarified by the provisions of the Civil Law Convention on Corruption (CLC), which is in force in the Netherlands. Art. 8 CLC provides ‘any contract or clause of a contract providing for corruption to be null and void’. This applies to the primary agreement between the bribe-giver and the bribe-recipient. This agreement is a nullity in the eyes of the law and therefore cannot found an action to enforce any rights before a court.

The effect of such a nullity has consequences where there has been a transfer of property, of money or some other performance. Art.6:203 DCC mandates that any such transfer must be reversed as there is no legal basis to support the change in the position of the parties. Art. 6:203 DCC provides that ‘Any transfer of property must be undone, if for a sum of money, the money must be repaid and if a performance, the performance must be reversed.’

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87 A. Hartkamp, C. Sieburgh, *Verbindenissenrecht, Deel III, Algemeen overeenkomstenrecht*, Asser Series, 13th edn, Kluwer, Deventer, 2010, at pp. 271-273.

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The primary contract to give a bribe will usually involve the exchange of a monetary bribe or other inducement in exchange for the performance of an act by the recipient of the bribe. While it is easy to conceive of the return of the bribe or other inducement to the bribe-giver, it is not easy to envisage simultaneously the undoing or return of the performance of the recipient of the bribe. In a corrupt exchange not all the transfers of property or performances can be undone. Where the bribe-recipient has fulfilled his part of the bribery agreement, and a contract has resulted in favor of the offeror of the bribe, this performance may not be reversible or easily quantifiable. This results in an unfair situation where the recipient of the bribe is required to return the bribe or other inducement while the equally blameworthy bribe-giver is in a position to undo or 'return' the performance of the bribe-recipient. In this circumstance, the bribe-giver would be unfairly enriched by the operation of the rule in Art. 6:201 DCC.

To attain a fair result in instances such as these, Art. 6:211 DCC provides that where a performance made on the basis of a contract which is a nullity and which by its nature cannot be reversed; this performance *ought not to be valued in money*. Furthermore, that a claim to reverse a counter-performance or reimbursement of its value is also barred to the extent that such a claim would, for that reason, offend reasonableness and fairness.<sup>88</sup> Thus where a party colludes in a bribery transaction and engages in conduct prohibited by law, the immorality of the transaction denies the right to restitution to all concerned.<sup>89</sup> For the above reasons it can be concluded that the primary contract is a contract that the courts will not enforce under Dutch Law and the courts will leave the parties as they find them.

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88 Art. 6:210(2) provides that, 'if the performance by its nature precludes a reversal then, so far as is reasonable, restitution shall be by reimbursement of the value of the performance at the time of its receipt, provided that the recipient has been enriched by the performance or was responsible for the performance being effected or had agreed to make some performance in exchange.'

89 Kooten remarks that 'Dutch law recognises a category of cases in which restitution is denied. ... This category is made up of cases in which a party has rendered a performance which "ought not to be valued in money" by a court ... such as a murder. It would be shocking if a court would estimate the value of the murder in monetary terms. The justification for this denial of restitution is a general policy of upholding morality .... It is morally unacceptable for contracting parties to value a murder and this is all the more true for a court.' H. van Kooten, *Restitutierechtelijke gevolgen van ongeoorloofde overeenkomsten*, Kluwer, Deventer, 2002, at p. 331.

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### 8.3.4 International Arbitration

The New York Convention on Recognition and Enforcement Convention of Arbitral Awards<sup>90</sup> and the UNCITRAL Model International Arbitration law<sup>91</sup> emphasize the link between the public policy against corruption that is evidenced by the world-wide criminalization of bribery and international arbitration. This is because the enforcement of arbitral awards is subject to the laws or public policy of the state where the award is to be enforced.<sup>92</sup> The New York Convention for example states that recognition and enforcement of an arbitral award may be refused by the competent authority in the country where recognition and enforcement is sought if the subject matter of the dispute is not *capable of settlement by arbitration* under the law of that country or where recognition or enforcement of the award would be contrary to the public policy of that country.<sup>93</sup>

In general terms, an award must not contravene anti-corruption rules and public policy to be enforceable.<sup>94</sup> Parties cannot contract out of mandatory provisions of the law in place such as the anti-corruption rules with respect to international and domestic commercial corruption. In the words of Justice Waller, in a case reviewing an arbitration award, the courts are ‘concerned to preserve the integrity of its process, and to see that it is not abused. The parties cannot override that concern by private agreement ... [p]ublic policy will not allow it.’<sup>95</sup>

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90 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the ‘New York’ Convention, (1958), Art. V(2). See also UNCITRAL Model Law on International Commercial Arbitration 1985, Art. 34 and Art. 36.

91 UNCITRAL Model Law on International Commercial Arbitration 1985 Art. 34 and Art. 36.

92 A. Cole, ‘The public policy exception to the New York Convention on the recognition and enforcement of arbitral awards’, *Ohio St. J. on Disp. Resol.*, Vol. 1, 1985-1986, p. 365, at p. 368.

93 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the ‘New York’ Convention, 1958, Art. 5(2).

94 The ‘New York’ Convention, 1958, Art. II(1), Art. V(2); Model Law Art. 34(2)(b)(i), Art. 36(1)(b)(i).

95 *Soleimany v. Soleimany* [1998] EWCA Civ 285 (19 February 1998) [1998] 3 WLR 811, [1999] QB 785, [1999] 3 All ER 847. Pronouncements of international arbitration tribunals and the International Center for the Settlement of Investment Disputes show that the transnational public policy on corruption as articulated by the provisions of the TransLex-Principles of transnational law is reflected in the Tribunals holdings. Principle No. 4(7)(2)(a) provides that contracts based on or involving the payment or transfer of bribes (‘corruption money’, ‘secret commissions’, ‘pots-de-vin’, ‘kickbacks’) are void. The TransLex-Principles of the Center for Transnational Law (CENTRAL) at the University of Cologne, Germany available at <http://www.trans-lex.org/principles>.

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In Case No. 1110 (1963),<sup>96</sup> where parties entered into an agreement to pay the claimant a percentage of the price of the electrical equipment contract he obtained for the defendant using his influence, Justice Lagergren, the sole arbitrator, found the claim to be untenable as based on the acceptance of a bribe and emphasized that contracts based on such an agreement to give a bribe and that ‘seriously violate *bonos mores* or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators.’<sup>97</sup>

In the ICC *Iranian Party v. Greek Party* case,<sup>98</sup> the commission at the heart of a consulting agreement in dispute before the tribunal was in the opinion of the arbitral tribunal clearly ‘intended to remunerate the counterparties’ by way of ‘pots-de-vin’ or ‘bribes.’<sup>99</sup> As a result the tribunal held that the consulting agreement was null and void and the parties could not require performance of the contract or seek restitution under it.<sup>100</sup> The characterization of an agreement to give a bribe as null and void is found in the case of the Establishment of the *Middle East State v. South Asian Construction Company* ICC case, where the tribunal held that ‘... It is obvious that if the said Agreement were an agreement for bribery, it would be null and void ....’<sup>101</sup> For the above reasons it can be concluded that the primary contract is a contract that the international arbitration tribunal will not enforce.

### 8.4 The Secondary Contract

The secondary contract results from the successful bribery exchange. The principal of the bribe-recipient enters into a contract with the bribe-giver. This agreement is referred to as secondary because it would not have come into existence without the conclusion of the primary contract. However, the secondary agreement is not an illegal contract. It is a valid contract between the principal and the bribe-giver. The question is whether such a contract may be declared unenforceable because of the direct link between the secondary and primary contract. Extending the invalidity of the primary contract to the secondary contract would be a logical extension of the public policy that underlies the criminalization of corruption and the refusal to help or assist

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96 G. Wetter, ‘Issues of corruption before international arbitral tribunals: the authentic text and true meaning of Judge Gunnar Lagergren’s 1963 Award in ICC Case No. 1110’, *Arbitration International*, Vol. 10, No. 3, 1994, pp. 277-281; Case No. 1110 1963, Yearbook Comm Arbitration XXI, 1996, pp. 47ff.

97 Case No. 1110 1963 *Yb. Comm Arb.* XXI, 1996, 47 Para. 115 of award.

98 ICC Case No. 3916 of 1983. Collection of ICC Arbitral Awards 1974-85, pp. 507ff.

99 ICC Case No. 3916 of 1983. Collection of ICC Arbitral Awards 1974-85, p. 510.

100 *Id.*

101 *Establishment of Middle East Country X v. South Asian Construction Company*, Award in ICC Case No. 4145, 12 *Yb. Comm. Arb.*, 1987, 97ff.

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parties who engage in the corrupt exchange. This section draws on Chapters 4, 5, 6, and 7 to examine the extent to which corruption affects the validity of the secondary contract under US, English, and Dutch law and International Arbitration.

### 8.4.1 US Law

The rules criminalizing bribery are silent about the status of the secondary contract between the bribe-giver and the principal of the bribe-recipient. The secondary agreement, although valid on its face, may nonetheless be declared unenforceable for considerations of public interest. The courts have developed policies on which they deny the enforcement of secondary agreements.<sup>102</sup> One of these is the policy against the commission of inducement a tort or breach of fiduciary duty.<sup>103</sup> The secondary agreement is evidence of the successful commission of the wrongful act of bribery and the breach of the duty of loyalty that the agent owes to a principal. Thus, although the secondary contract is not direct evidence of the commission of a legal wrong or tort, as is the case with the primary contract, it is the direct result of the commission of a legal wrong or tort.

The secondary contract may be declared unenforceable where the court decides that public policy against its enforcement outweighs the interest of the court in upholding the freedom of contract of the parties to the transaction.<sup>104</sup> In this weighing process, the courts will look to the ‘general tendency’ of such agreements.<sup>105</sup> In *Sirkin v. Fourteenth Street Store*,<sup>106</sup> the court found that the secondary contract resulting from a bribery transaction was unenforceable on grounds of public policy. The courts refused to assist the plaintiff in recovering either the price or the goods sold. Essentially the court left the parties as they found them extending the principle of *non turpi causa* to the secondary contract. In the opinion of the court, the seller could not recover because it was the result of a bribe paid to the agent of the principal. The *Sirkin* case shows that even though the commercial bribery statute in question<sup>107</sup> did not expressly declare that the contract was unenforceable, the courts found that it

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102 E. Farnsworth, *Contracts*, 4th edn, Aspen Publishers, New York, 2004, at p. 318.

103 *Id.*, at p. 338.

104 Sec. 178(1) Restatement (2nd) Contracts provides that ‘A promise or other term is unenforceable on grounds of public policy if ... the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.’

105 Justice Field in *Tool Company v. Norris*, 69 U.S. 45 at 53 noted that ‘... in the decisions have not turned upon the question whether improper influences were contemplated or used, but upon the corrupting tendency of the agreements.’

106 *Sirkin v. Fourteenth Street Store*, 124 A.D. 384, 108 N.Y.S. 830, at pp. 833-834.

107 New York Penal Law Sec. 439 makes it a misdemeanor to give, offer, or promise to an agent of another any gift or gratuity whatever without the knowledge and consent of the principal, with intent to influence such agent’s action in relation to his principal’s business.

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was their duty to be guided by the public policy evidenced by the criminal law in administering the law.<sup>108</sup>

Similarly, in *McConnell v. Commonwealth Pictures Corp.*,<sup>109</sup> the court dismissed the arguments that the secondary contract was not in itself illegal, and that the bribe payer had the right to be paid for his performance of his obligations under the contract. The court stated that public policy ‘fail[s] of its purpose’ unless it also covered the secondary agreement between the briber payer and the principal of the bribed agent, as the money being sued for was ‘the fruit of a crime.’<sup>110</sup> The court held that it would ‘deny awards for the corrupt performance of contracts even though in essence the contracts are not illegal.’<sup>111</sup> In *Colywas v. Red Hand Compositions Co.*,<sup>112</sup> a secondary contract acknowledged by the court to be valid on its face was held to be wholly unenforceable because of the admitted acts of bribery that preceded its coming into existence. The position is the same with public contracts. In *United States v. Mississippi Valley Generating Co.*,<sup>113</sup> with respect to a consultant who took a secret commission in violation of the Federal Law against Bribery, Graft and Conflict of Interest 18 U.S.C. Sec. 434,<sup>114</sup> public policy forbade the enforcement of the contract. Even though the statute did not specifically provide that the contract would be invalid, the court was of the opinion that the protection under the statute could only be ‘fully accorded if contracts which are tainted by a conflict of interest on the part of a government agent’ could be disaffirmed by the Government. For these reasons it can be concluded that the US courts will generally extend the public policy underlying the prohibition of the primary contract to the secondary contract as a contract that the courts will not enforce.

### 8.4.2 English Law

The agency relationship between the recipient of the bribe and the principal is the foundation for the act of bribery and the vehicle for the secondary contract that results between the bribe-giver and the principal.<sup>115</sup> The authority to

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108 Although this case was founded on the secondary contract *i.e.* the agreement resulting from the party who paid the bribe and the principal of the agent who received the bribe, the courts comments about the basis for judicial policy are relevant in respect of the primary agreement. See *Sirkin v. Fourteenth Street Store*, 124 A.D. 384, 108 N.Y.S. 830, at pp.833-834.

109 *McConnell v. Commonwealth Pictures Corp.*, 7 N.Y.2d 468.

110 *Id.*, at p. 470.

111 *Id.*

112 *Colywas v. Red Hand Compositions Co.* 318 F.Supp. 1376 (1970).

113 *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520.

114 USC Title 18 Crimes and Criminal Procedure, Chapter 11 – Bribery Graft and Other Conflicts of Interest. Sec. 208. Acts affecting a personal financial interest (formerly Sec. 434).

115 The English Agency laws are found in principles of common law, and statutory instruments such as the Commercial Agents (Council Directive) Regulations 1993, and Statutory

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negotiate and to conclude the secondary contract on behalf of a principal is what makes the act of private or public bribery possible.<sup>116</sup> In the absence of such an agency relationship there is no avenue for bribery. Simply put, the agency relationship is an essential ingredient of public or private bribery. The duties of the agent in the agency relationship play a key role in determining the validity of the secondary contract entered into between the bribe-giver and the principal of the agent. An agent owes the duty to the principal to make *proper efforts* to negotiate and conclude transactions, communicate to the principal all the necessary information available to him and to comply with the principal's reasonable instructions.<sup>117</sup> The position of the agent is that of a fiduciary who has undertaken to act in the best interest of the principal.<sup>118</sup>

The act of accepting a bribe by an agent negates all of these duties. The duty to make 'proper efforts' is breached where the agent requests, agrees to receive or accepts a financial or other advantage intending that, as a consequence, a function of a public nature or one connected with a business or performed in the course of a person's employment, or performed by or on behalf of a body of persons (whether corporate or unincorporated),<sup>119</sup> should be performed improperly<sup>120</sup> in breach of the expectation by the principal that contracts entered into by such an agent on the principal's behalf are negotiated in the best interest of the principal.<sup>121</sup> Instead, bribery is 'conduct designed to create a conflict between an agent's duty and his own private interest.'<sup>122</sup> And the agent is in breach of his fiduciary duty when he places himself in a position where his duty and interest conflict.<sup>123</sup>

For these reasons, the secondary contract is also considered to be unenforceable by the English courts but at the prerogative of the betrayed principal to avoid the unfairness that will result where the principal who has already suffered the betrayal of an agent is also faced with a contract that is void *ab initio*. The court in *Logicrose v. Southend United Football* makes it clear that the secondary contract is not void *ab initio*.<sup>124</sup> The choice is left to

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Instrument No 1993/3053 as amended by the Commercial Agents (Council Directive) (Amendment) Regulations 1993, Statutory Instrument 1993/3173.

116 Sec. 2 Agency Directive.

117 Sec. 3 Agency Directive.

118 Millet L.J. has stated that 'The distinguishing obligation of a fiduciary is the obligation of loyalty.' In *Bristol and West Building Society v. Mothew* (1998) 75 P. & C.R., p. 241, at p. 254.

119 Sec. 3 UK Bribery Act 2010.

120 Sec. 2 UK Bribery Act 2010.

121 Sec. 4 UK Bribery Act 2010.

122 *Donegal International Ltd v. Zambia & Anor* [2007] EWHC 197 (Comm.) 2007 WL 504688 Para. 275.

123 *Daraydan Holdings Ltd v. Solland International Ltd*, [2004] EWHC 622 (Ch), [2005] Ch 119.

124 *Logicrose v. Southend United Football Club* [1988] 1 W.L.R. 1256, per Millet J. at pp. 1263-1264. The ruling in *Logicrose* was cited with approval in *World Duty Free Company Limited*

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the principal whom the courts state should have the prerogative after being deprived of the disinterested advice of the agent to determine whether or not it is in his interest to affirm the contract.<sup>125</sup>

### 8.4.3 Dutch Law

The rules criminalizing bribery in the Netherlands do not apply to the secondary agreement that comes into being between the principal of the disloyal agent and the bribe-giver. The question from the point of view of the DCC is whether such a contract is unenforceable on grounds of public policy. The secondary agreement may be a nullity where it contravenes the notion of freedom of contract and results in one of the parties lacking the intention that is necessary to produce *juridical effects*.<sup>126</sup> If the secondary agreement suffers from a defect of consent, this will render the agreement a nullity. Such defects of consent include duress, fraud and undue influence,<sup>127</sup> as well as error.<sup>128</sup>

The defects of duress and undue influence can be ruled out with respect to the secondary contract. Bribery does not constitute duress as there is no threat that induces the principal to enter into the contract,<sup>129</sup> nor does it constitute undue influence<sup>130</sup> as there is no special relationship of dependency between the bribe-giver and the principal of the disloyal agent. The defect occasioned by fraud deserves further mention.

A possible argument of defect of consent may be made on the grounds of fraud. The circumstances of the bribery exchange leave the principal in the dark. Information about the contract he eventually signed is known by the agent and by the bribe payer. This information can be likened to an inaccurate misrepresentation. However, this is not sufficient to move it into the category of a fraud. Under Art. 3:44(3) DCC, only where there has been inaccurate information that has been deliberately withheld despite an obligation to communicate it, is there grounds for fraud. The actions of the bribe payer could also be described an artifice or ‘trick’ (*kunstgreep*) by which the principal of

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v. *The Republic of Kenya* stating, ‘There is nothing wrong with it as a contract, the position being simply that the circumstances in which it was made require that the injured party should be given the opportunity to relieve himself from its burdens.’ See *World Duty Free Company Ltd v. Kenya*, 46 *ILM* 339 (2007), ICSID Case No. ARB/00/7, Award, 4 October 2006, at Para. 164.

125 *Logicrose v. Southend United Football Club* [1988] 1 W.L.R. 1256, at p. 1261.

126 Art. 3:33 DCC.

127 Art. 3:44 DCC.

128 Art. 6:228 DCC.

129 Art. 3:44(1) DCC.

130 Art. 3:44(1) DCC.

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the agent is moved to enter into the transaction, within the meaning of Art. 3:44(3) DCC.

The argument for fraud fails in that the terms of the contract between the bribe payer and the principal are known to the principal and accepted by him. For there to be fraud within the meaning of Art. 3:44(3) DCC the inaccurate information must have induced the secondary contract. If the principal would still have entered into the contract but on different terms, then the secondary contract cannot be said to have been induced by the fact of bribery. The threshold of causality in the case of fraud is very high and it may be difficult for the principal to seek to avoid the secondary contract where it can be established that terms of the contract were negotiated and agreed to by the principal. If the principal would still have entered into the contract albeit on different terms, then this does not constitute fraud.<sup>131</sup>

A more likely ground for defect of consent is the ground of error. Art. 6:228 DCC allows for the defect of error where the secondary agreement would not have been concluded if the principal had been fully aware of all the facts relating to the negotiation of the contract. Art. 6:228(b) DCC focuses on a failure to disclose information as a ground of error that may invalidate a contract. The principal seeking to avoid the secondary contract may argue that it was entered into without full information or wrong information, about the state of affairs relating to the contract. The principal can claim that the contract was entered into on the basis of an error as to the person he was dealing with. Rather than the contract being entered into with someone the principal considered to be trustworthy, the other party to the contract is a payer of bribes calculated to undermine the interests of the principal. The principal can claim that the contract was entered into based on an error about the 'attributes' of the other party.<sup>132</sup> Such an error compromises the freedom of choice and may constitute a ground for invalidity due to a defect of consent where the other requirements of Art. 6:228 DCC are met.

Art. 6:228(b) DCC states that a contract may be nullified where the other party (*i.e.* the bribe-giver), in view of what he knew or ought to have known regarding the error, should have informed the party in error (*i.e.* the principal of the disloyal agent.) Art. 6:228(b) DCC can only apply where the principal can indeed not be considered to have been informed about the fact of bribery. This will depend on whether the knowledge of the agent can be imputed to the principal. Where it can, there is no basis for invalidity due to the defect of

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131 *Parl. Gesch. Boek 3*, p. 210.

132 H. Beale, A. Hartkamp, H. Kötz, D. Tallon, *Cases Materials and Text on Contract Law: Casebook on the Common Law of Europe*, Hart Publishing, Oxford, 2002, at pp. 365-366.

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mistake. As a direct agent, the acts of the agent will ordinarily be imputed to the principal unless it can be shown that the actions of the agent or intermediary were expressly forbidden by the corporation and that this was done in such a way as to make it reasonable to assume that the agent was acting contrary to the wishes of the principal.<sup>133</sup>

It is noteworthy that the onus is placed on the principal to establish that there has been a defect of consent. In comparison with the position in the US and in England, the plaintiff seeking to avoid the secondary contract has a much steeper task.

### 8.4.4 International Arbitration

In the *Westacre Investments* case, where the Westacre Company was to receive a substantial percentage of the value of the contracts entered into by the Directorate with, principally, the Kuwaiti Ministry of Defence, the tribunal reiterated that bribery renders an agreement invalid.<sup>134</sup> Bribery is a matter of proof, and in the *Hilmarton* case the arbitrator found that Hilmarton Ltd was engaged in the activity of influencing Algerian government officials but concluded that bribery was not proven ‘beyond doubt.’<sup>135</sup> The panel, however, stated that if the conclusion of the contract between the defendant and the Algerian authorities had depended on bribes paid by the claimant, the contract would be null and void.<sup>136</sup> In a more recent case, the arbitral tribunal found that a contract procured by means of a bribe of \$2 million to the former president of Kenya was in violation of international policy, Kenyan and English law, and therefore did ‘not have the force of law.’<sup>137</sup>

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133 Art. 3:61(2) DCC provides that if ‘a juridical act is performed in the name of one party and, on the basis of a declaration of conduct of that party, another party has assumed and, in the circumstances could reasonably assume that a sufficient procurator (authority) had been granted, the inaccuracy of this assumption may not be invoked (against the party making the assumption).’ This places the onus on the principal to show that the acts of the agent are outside the apparent authority of the agent.

134 The arbitration panel found that while bribery renders an agreement invalid, in arbitration proceedings, bribery is a fact which has to be alleged and for which evidence has to be submitted, and at the same time constitutes a defense, nullifying the claims arising from a contract. In this instance the tribunal held that the bribery alleged had not been established in proof. *Westacre Investments Inc. v. Jugoimport-SDRP Holding Company Ltd & Ors* [[2000] 1 QB 288 affirming [1999] QB 740. [1999] EWCA Civ. 1401 (12 May 1999).

135 *Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd.*, Award in ICC Case No. 5622, 19 *Yb. Comm. Arb.* 19, 1994, p. 105.

136 *Id.*

137 *World Duty Free v. Kenya*, 46 *ILM* 339 (2007), ICSID Case No. ARB/00/7, Award, 4 October 2006, at Para. 105.

### 8.5 The Contract as an International Regulatory Tool

Criminalization provides a necessary starting point in the fight against corruption because in the absence of a normative framework there cannot be common objectives, methods or solutions. However, the factual reality of international society, its actors and its transactions center on promises and obligations entered into by artificial persons that direct and control economic activity. By focusing on the consequences of corruption and the status of transactions tainted by corruption the UNCC presents the contract tainted by corruption as a regulatory tool in the fight against corruption. Contracts that are tainted by international corruption constitute a category of contracts whose regulation should be consistent with the overall objectives of the mandatory system criminalizing international corruption.

In this view, the contract tainted by corruption should be seen not only as a private act between parties but also as a potential instrument of social control. In the environment where corruption in international business takes place, a more logical basis for punishment and regulation may be one that is based on obligations *inter-partes*. This may occur by policing contracts to ensure that public policy protecting the public interest is enforced by the courts. It may also occur by interventions between the contracting parties themselves using the defense of illegality as a method of sanctioning bribery.

This moves the debate away from a classical non-interventionist, closed-system approach to contractual obligations, to an approach that accommodates the relational aspects of the parties and other stakeholders to the contract.<sup>138</sup> The international system may require that principles of freedom of contract be subsumed to the economic and social imperatives needed to ensure the stability of the international market. The vested self-interest of participants in the system justifies this interference with classical freedom of contract and party autonomy.

To paraphrase Strong,<sup>139</sup> the contract tainted by corruption may be illegal because the object or purpose of the contract is illegal. This is the case with the

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138 This is in line with the relational theories of contract. Contracts cannot be divorced from the complex, interconnected relationships they evidence. There is no 'universal' law of contract. See I.R. Macneil, 'Whither contracts?', *Journal of Legal Education*, Vol. 21, 1969, p. 403; I.R. Macneil, 'Contracting worlds and essential contract theory', 9 *Social & Legal Studies*, 2000, p. 431. See also R.W. Gordon, 'Macaulay, Macneil, and the discovery of solidarity and power in contract law', *Wisconsin Law Review*, 1985, p. 565; P. Zumbansen, 'The law of society: governance through contract', 14 *Indiana Journal of Global Legal Studies*, 2007, p. 191.

139 Strong states that 'A contract may be illegal because the object or purpose of the contract is illegal. It may be illegal because it contains an illegal promise, although the performance of the promise is not itself illegal. Or it may be illegal because a lawful promise has been or will be

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primary agreement that sets off the corrupt exchange: the agreement to give a bribe. A contract tainted by corruption may also be illegal because it results from the commission of a legal wrong, although the performance of the promise is itself not illegal. This would typically be the case for the secondary contract that results from the act of bribery by a disloyal agent between the principal and party that offered the bribe. Thirdly, it may be illegal because a lawful promise has been or will be performed in an illegal manner. This would be the case where, for example, an ostensibly legal contract, such as a consultancy or agency services, are used as a vehicle for the commission of illegal acts of bribery. These intertwined contracts tainted by corruption are different expressions of a common originating factor, *i.e.* bribery. Questioning the enforceability of such contracts tainted by bribery presents the court ‘with a double problem – the protection of the public welfare and, if consistent with public policy, granting relief to the parties.’<sup>140</sup>

Existing principles of private law on contracts are generalized to preserve certainty, order and stability. However, such a generalization tends to view all contracts alike and does not address the particularities of special cases, for example, the contract that emerges as a result of the violation of anti-corruption rules. As Collins points out, the abstraction and generality of the private law system means that ‘it lacks the mechanisms for differentiating in its regulation between different kinds of contracts.’<sup>141</sup> He remarks that ‘the lesson to be learned from this story is that the price of the advantages obtained from the generality of private law systems is the incapacity to develop an adequately differentiated system of regulation of contracts.’<sup>142</sup>

Contracts that result from the process of international corruption are by definition contracts that have a public element because of the twin facts of the involvement of the state and consequences that have an impact on the public at large. They are clearly in a different category from contracts between private parties whose consequences are primarily restricted to the parties themselves. A distinction between public and private contracts is one that is found in some civil law systems. Friedman explains that in French and German law, a distinction is made between contracts involving the state that are primarily of a financial or commercial character, which are categorized as private ordinary contracts, and those of a more public character, which arise in connection with defense, the police or public service as administrative contracts. The main distinction he points out is ‘the element of discretion in public policy,

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performed in an illegal manner.’ G. Strong, ‘The enforceability of illegal contracts’, 12 *Hastings Law Journal*, 1960-1961, p. 347.

140 G. Strong, ‘The enforceability of illegal contracts’, *id.*, at p. 348.

141 H. Collins, *Regulating Contracts*, OUP, *id.*, Note 3 above at p. 47.

142 H. Collins, *id.*, at p. 48.

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including, for example, the right to terminate a contract in certain circumstances, gives to the public authority greater latitude than in a private law transaction.<sup>143</sup> The question in contracts tainted by corruption is the role this type of public policy-based latitude should play regarding such contracts. Viewing these contracts in the context of the corrupt interaction brings the public interest that is sought to be protected to the fore. This places the primary and secondary contracts resulting from acts of bribery in a category where public interest should be the overriding consideration, regarding the enforceability of these contracts.

This implies a different view of contracts of this nature. Friedman once pointed out that, ‘from being the instrument by which millions of individual parties bargain with each other, it has to a large extent become the way by which social and economic policies are expressed in legal form. This is another way of saying that public law vitally affects and modifies the law of contract.’<sup>144</sup> This is particularly true of contracts resulting from or tainted by international corruption. Such a distinction and viewpoint helps to provide the foundation for a treatment of such contracts in a manner that recognizes the social underpinnings and public character of the consequences of such transactions.

The traditional idea of individuals negotiating on a level playing field, in classical contract theory is contradicted by the reality of mega-artificial persons with great bargaining power. The classical view of a contract in an age of big corporations with substantial bargaining power can no longer be said to represent the reality of contracting in today’s market place. The freedom to contract has, in certain instances, been recognized as illusory as evidenced by government and court intervention.<sup>145</sup> Here, the rigidity of the private law system of contracts has been mitigated by legislative intervention in the particular case.<sup>146</sup> The public interest that is at the center of the anti-corruption discourse also emphasizes and justifies the right of the state to intervene in the terms contracts tainted by international corruption.

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143 W. Friedmann ‘Changing functions of contract in common law,’ *University of Toronto Law Journal*, Vol. 9, No. 15, 1951-1952, at p. 40.

144 W. Friedman id.

145 For example, in special conditions for consumer contracts that underscore the social welfare responsibilities of the modern states and the increasing power of group organization, collective bargaining.

146 Collins concludes that ‘the search for reintegration of welfare regulation within private law reasoning compels private law to loosen its closure rules in order to ascertain the facts or events which permit an assessment of whether the effects of private law regulation achieve harmony with the objectives of social and economic regulation. See Collins, id., Note 3 above, at p. 54.

## 8.6 Observations

This chapter has focused on the consequences of corruption in the form of the primary and secondary contract. Contracts tainted by corruption are the center of the corruption exchange. In seeking to treat the disease and not just the symptoms, the cause and effect between the originating corruption and ensuing transactions must be addressed. Not only must international corruption be criminalized, but transactions resulting from the successful execution of bribery should also be held to the same logic so as to ensure that parties do not benefit from their crimes. It may be argued that the most important deterrent to corruption is the stability of the consequence. The more unstable the consequential contract is, the less the incentive there is to engage in the acts of corruption that create it. The more stable the contract, the more the incentive there is to engage in acts of corruption to acquire it. Real deterrence will therefore be found in a framework that tackles the contract that results from the violation of anti-corruption rules. This requires an approach to tackling corruption that combines the criminal and civil processes of sanctioning corruption into a single narrative.<sup>147</sup> Examining the provisions of Art. 34 UNCC alongside the position on transaction validity in the US, England, the Netherlands and under international arbitration, leads to the following findings.

### 8.6.1 Effect of the UNCC

#### 8.6.1.1 Art. 34 Reaches across the Public/Private Divide

For the first time as a worldwide instrument directed at fighting corruption, Art. 34 UNCC brings together public law provisions criminalizing corruption as well as the private law consequences in the form of contracts that result from acts of corruption. In so doing, it brings these activities within the same normative framework and encourages consistency in approach and treatment of originating acts of bribery and its consequences. In all of the three jurisdictions studied, the public/private divide characterizes the treatment of bribery transactions. Art. 34 UNCC enables public and private government authorities, courts and arbitration tribunals handling disputes tainted by corruption to be more closely aligned in terms of seeking deterrence. The objective in the consideration of such contracts is not simply to achieve justice between the parties to the contract, but also, in view of the UNCC, to protect the interest of the general public.

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<sup>147</sup> Such a *transaction approach* is outlined in the Chapter 11 of this book. It envisages an approach to fighting corruption that is centered on the *interactions* that characterize it.

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### 8.6.1.2 No New Legal Regime

Art. 34 is drafted in non-mandatory terms and subjects the call on states to act on the consequences of corruption to the discretion of the state. It also subjects the measures to be taken regarding transaction validity to the fundamental principles of national law. As such, Art. 34 does not introduce a new legal regime regarding contract validity. While the UNCC does not introduce a new regime, it is a powerful endorsement of the need to ensure that there is a real nexus between the public wrong of corruption, and the status of the contracts and concessions that result from it. This can raise global awareness of the need to take measures against such consequences and possibly the commitment of states to taking such measures. However, as Art. 34 UNCC is currently drafted, recourse must still be made to national laws to assess the position regarding the validity of contracts tainted by corruption and the rights of the parties.

### 8.6.1.3 Reporting on Measures under Art. 34 UNCC

While there is no new legal regime regarding transaction validity under Art. 34, it acts as a focal point for the *reporting of measures* that have been taken to implement it. This brings to the forefront measures that go after the consequences of corruption. The US and UK reports on the implementation of Art. 34 show that measures to strip away the benefits acquired by bribery using civil, criminal and administrative process are operational.<sup>148</sup> These include mandatory exclusion from public contract procurement, confiscation of benefits resulting from criminal conduct, annulment of contracts, and restitution of moneys paid by the government. An important measure listed in the US Report is private actions by individuals who are victims of corruption. Reporting on measures undertaken under Art. 34 is an important method of keeping the focus on the whole spectrum of transactions that are tainted by corruption and not only on the offender who commits the act of corruption.

### 8.6.1.4 Corruption as an Independent Vitiating Factor

Art. 34 UNCC introduces corruption as an independent vitiating element in a similar manner to the Vienna Convention on the Interpretation of Treaties. This is an important step that may help to encourage the development of corruption-specific principles and interpretation across jurisdictions. Art. 34 sets the stage for differentiating contracts tainted by corruption from the general notion of contracts and corruption in stipulating corruption an independent vitiating factor. This is of particular importance for civil law

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148 The Netherlands has yet to submit a report on its implementation of Art. 34.

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jurisdictions such as the Netherlands where the plaintiff principal has the hurdle of establishing a defect of consent for the secondary contract to be considered a nullity. In England and the US, there is already very strong judicial policy against bribery in commercial transactions that applies to both the primary and secondary contract. This is only further strengthened by the provisions of Art. 34.

### 8.6.2 The Primary Contract

The primary agreement is the starting point of the corrupt exchange. The abuse of the position of trust that is central to the character of bribery is evidenced by an agreement that takes place between the party offering the bribe and the party receiving it. The status of the primary contract is not the direct object of the rules criminalizing bribery, but this contract is the very shadow of the prohibited conduct. An examination of the position in the three jurisdictions studied in this book as well as international arbitration shows that the primary contract to give and receive a bribe is a promise that the law will not enforce.

The primary agreement to give a bribe is one that is characterized by the courts in all three jurisdictions studied in this book as unenforceable for public policy reasons. The approach of the courts primarily centers on the question of whether or not the court should intervene to provide recourse for the plaintiff seeking performance on a contract to give a bribe. The courts in the US and England apply principles of statutory illegality and public policy founded in *ex turpi causa* to deny restitution and to leave the parties as they found them even if this leads to the defendant being unfairly enriched at the cost of the plaintiff. There is no recourse under US or English law for the parties to the primary agreement. There is no claim in restitution, specific performance or other remedy. The unenforceability of the primary agreement and the availability of the illegality defense by the defendant create an environment where the contract to give a bribe becomes unstable.

Considerations of public policy underscore the legal position that renders the primary contract unenforceable. In the US and England the courts have emphasized the fact that the ‘corrupting tendencies’ of bribery undermine the integrity of social and political institutions and this founds the principle that the court will not enforce a contract to give a bribe. The act of bribery is seen as a corruption of the law itself, and it is not for the courts to ‘lend support’ to an action to enforce what is in essence a violation of the law. An agreement to give a bribe that deliberately seeks to put in place what the law has prohibited is illegal. The principle of public policy applied by the courts is that no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act, *ex dolo malo non oritur actio*.

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This provides incentive for a defendant to renege on the bribery promise at no cost. The unjust enrichment of the defendant that may result would be, in the scheme of a policy to discourage the occurrence of corruption, a desired outcome. Corruption occurs in the shadows and it is the participants in the corrupt exchange that have access to these hidden processes. If a party may repudiate obligations under a contract to give a bribe at no risk and such repudiation is protected by the refusal of the courts to grant justice to the plaintiff for public policy and statutory illegality reasons, this may influence the contracting environment positively toward compliance with anti-corruption rules. The walk-away offered to the party in breach of the primary agreement may be an important incentive and form of reward that encourages the reporting of corruption. This would in turn encourage compliance with anti-corruption rules, as the incentive to give a bribe is reduced such repudiation of the contract is consistently supported by the courts.

In the Netherlands, the provisions of the Dutch Civil Code make it clear that a contract that is in conflict with mandatory rules prohibiting corruption is a nullity. Such a contract is also in conflict with good morals and public policy. Furthermore, the Civil Law Convention that is in force in the Netherlands requires the Dutch courts to deem any contract providing for corruption as null and void. Art. 34 UNCC, which is in force in the Netherlands, as well as the provisions of the Dutch Penal Code, particularly Art. 328ter DPC, support the viewpoint that the primary contract falls squarely within Art. 3:40(1) DCC and 3:40(2) DCC and is a nullity.

The transnational policy that is evident from a series of international arbitration and international investment awards is that parties to arbitration may not contract out of mandatory rules prohibiting bribery and that the enforcement of an award may be refused where such enforcement would be contrary to the public policy of that country. Given the world-wide criminalization of bribery and the transnational principles that contracts providing for bribery are null and void, it is not surprising that arbitration panels have consistently held that the primary agreement that evidences the payment of a bribe is invalid, null and void and cannot be sanctioned by arbitrators.

As far as the primary agreement is concerned, the provisions of Art. 34 UNCC, the positions in the US, England, the Netherlands and under International Arbitration show that there is common ground. The fundamental principles of law in this regard coincide.

### 8.6.3 The Secondary Contract

The criminal prohibitions against bribery do not apply to the secondary contract that results between the bribe-giver and the principal of the disloyal

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agent. This contract is accepted in the all jurisdictions studied to be a valid contract. The courts in the US and England have had no problem extending the logic of the judicial policy against enforcement of the primary contract to the secondary contract. The secondary contract that results from the successful bribery exchange will not be enforced in the US and England at the instance of the betrayed principal. A distinction is made between the *conduct* of acts of bribery evidenced in the primary contract and the *result* of acts of bribery, such as the secondary contract. However, in both instances the courts regard the behavior underlying these contracts from the perspective of the criminal act of bribery and the inducement to commit a tort that it represents. The motivation of the courts to deter such conduct weighs more than the desire to achieve justice between the parties. As such, the courts have refused to come to the assistance of the bribe payer who seeks to enforce the secondary contract that comes into existence with the principal.

The US and English courts do not consider the secondary contract as void *ab initio* as this could put the principal in a position of double injury: first by the disloyal agent and secondly by the consequences of complete nullity. As such, the prerogative of unenforceability rests with the principal. If the principal decides to affirm the contract, there is judicial precedent that indicates that this is possible. Where the principal refuses to be bound by the obligations under the secondary contract the courts will also support this position.

The position in the Netherlands is more complicated. The secondary contract is a valid contract unless it can be shown to be against public policy as resulting from a defect in consent. A tentative argument can be made on grounds of fraud. However, the threshold for fraud is significantly high. It is not likely that the principal will be able to show that a secondary contract to whose terms he agreed is fraudulent. A more convincing argument can be made on the ground of error. The principal can claim a defect in consent based on an error as to the person with whom the contract was being entered into. Because of the direct nature of the agency contract between the principal and the bribe-recipient to be able to rely on error, the principal will have to show that the knowledge of the agent could not reasonably be imputed to him. To the extent that the claim for nullity in the Netherlands with regards to the secondary contract is dependent on the principal being able to establish a defect of consent this is a more challenging proposition for the principal plaintiff. As such, the principal in the US and in England has an easier path to avoiding the secondary contract.

### 8.7 Conclusion

An increasing level of transacting occurs outside national borders in private arrangements of international dimension. However, as the regulations regarding international corruption show, there are limits to contractual freedom

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and party autonomy. The link between the contract that results from a corrupt exchange and the corrupt exchange itself is a factor that places the courts and international tribunals in a position where the worldwide repudiation of the corruption must necessarily influence their application of private law principles regarding the validity and enforceability of such contracts.<sup>149</sup> This implies that dispute settlement mechanisms need to address the private law consequences of criminal acts of corruption. It also implies that the government monopoly on initiating criminal sanction can be weakened by providing protection for the public interest through supporting private remedies.

These findings show that while there is no new contractual private law regime introduced by Art. 34 UNCC, the primary contract to give a bribe is a nullity on the ground of public policy and statutory illegality in all three jurisdictions considered. This information can be used in an instrumental manner because it serves as a form of reward where a party to a bribery contract is motivated to walk away from the transaction without having to pay any restitution. This could make such contracts more risky and less attractive and could also serve as a method of getting information about the secret practices of bribery if an aggrieved party seeks to enforce the contract. The question is whether and how such a principle of nullity can be fully exploited in the fight against corruption by private parties, civil society and indeed governments.

The secondary contract, though not illegal, will not be enforced by the courts in the US and in England at the instance of the plaintiff principal. This means that the principal can walk away from the secondary contract where it is tainted by bribery. In the Netherlands, the fact that the secondary contract is not illegal means that the principal has to show a defect of consent such as mistake or possible fraud to avoid the contract. This is a more difficult burden than under common law, where the public policy against bribery extends to making the secondary contract unenforceable.

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149 The contract law regime applicable to international contracts, the UN Convention on Contracts for the International Sale of Goods steers clear of questions of validity and illegality of international contracts. De Ly notes that the CISG is an intermediate model in the field of uniform law in which 'a compromise solution was found stretching the uniform substantive model as far as possible while retaining a modest place for domestic law and conflict rules.' This leaves national law as the primary avenue for the translation of the prohibitions of corruption in international transactions into domestic systems. However, such a translation is constrained by the international public policy and the framework of rules repudiating corruption. See F. de Ly, *Sources Of International Sales Law: An Eclectic Model, in Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods, 2006*, (Collation of Papers at UNCITRAL -- SIAC Conference 22-23 September 2005, Singapore), Singapore International Arbitration Center, pp. 28-38, at p. 28.

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It can be concluded that a contract tainted by international corruption raises questions about the role of contracts in the ordering of an international society that is defined not so much in terms of a sovereign with a monopoly on violence, but by agreements based on pragmatism and mutual interest. It can be argued that, from the perspective of the fight against international corruption, principles of contract law must be viewed in the particular context of the international commercial society in which they operate.<sup>150</sup> In this society, the private rights embraced in the law of contract are challenged by a global framework of anti-corruption laws. The mandatory nature of these rules carried to their logical conclusions impact the operation and validity of private agreements. Regulating these agreements could result in more uniformity in the judicial response to primary and secondary contracts tainted by corruption in both common and civil law jurisdictions. This is an essential pre-requisite for an international framework of rules for parties seeking remedies for contractual obligations affected by corruption.

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150 Jan Smits speaks of soft methods of convergence where unification is not left to the State or European institutions but to the actors that are directly touched by legal unification. He states ‘...they will decide to what extent they are in need of uniform law. Bottom-up methods of unification make this possible.’ See J. Smits, ‘Law Making in the European Union: On Globalization and Contract law in Divergent Legal Cultures’, *Louisiana Law Review*, Vol. 67, 2007, p. 1181, at p. 1196.

# CHAPTER 9

## INSTITUTING PRIVATE LEGAL PROCEEDINGS

### 9.1 Introduction

The right of individuals to institute private actions for damage suffered as a result of corruption is a critical element in translating the gains of global criminalization of corruption into reality. It does this by changing the dynamics of the environment in which corruption occurs. The open-ended nature of private claims introduces an element of uncertainty by exposing the corporation to a riskier environment in the shape of variables in terms of number, duration and cost of potential private suits that may be filed by a variety of claimants. The criminal process, on the other hand, is much more predictable, as fines and punishment are pre-determined and can be more easily factored into the decision whether or not to give a bribe.

The state as a principal actor and enforcer in grand scale corruption faces a fundamental conflict of interest that can impede the effectiveness of the fight against corruption.<sup>1</sup> The artificial corporation is the other important actor. Traditional notions of criminal liability are uneasily juxtaposed on such artificial persons especially in an international environment without a clearly defined nexus of governance.<sup>2</sup>

Private actors who institute claims independently of the state provide a potential manner of by-passing a compromised state in confronting the conflict of interest problem. With private legal proceedings, a walk around the state monopoly on initiating the sanctioning process for corruption becomes possible. Again, private claims with respect to private rights are probably more representative of an international trading environment that is based more on the power of agreement than a state's monopoly on violence. Allowing private

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1 See Chapter 2 above.

2 A quotation attributed to a Lord Chancellor of Great Britain in the 18th century very aptly sums up the problem of criminal punishment as a method of encouraging norm-compliant behavior by corporations. Edward Thurlow remarked that 'Corporations have neither bodies to be punished, nor souls to be condemned, they therefore do as they like.' Edward Thurlow, 1st Baron Thurlow PC, KC (9 December 1731 – 12 September 1806).

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persons a larger role in the fight against corruption recognizes that rigid dichotomies along the public/private divide may not adequately provide for social and economic security in an integrated international market.

This chapter examines the international framework for private legal actions for damage suffered as a result of corruption. It draws on the overview undertaken in Part 2 of this book on the positions in the US, England and the Netherlands alongside the UNCC framework for civil liability for corruption.<sup>3</sup> To this end, it examines the framework for civil liability for corruption under the UNCC, and the extent to which it provides or augments the private right of action to institute claims for corruption. In addition, important initiatives from other jurisdictions involving the institution of private legal proceedings for corruption are included so as to present a broad composite of the emerging scope of remedies for corruption using the private law.

This chapter also examines the notion of corruption as a legal wrong as well as the various interests protected from the occurrence of this wrong. These interests are categorized into two broad groups. On the one hand are claims for damage that affect primarily *private interests*, such as, for example, the principal of a disloyal agent, shareholders affected by the corrupt actions of their company executives, or losing competitors alleging claims of unfair competition. On the other hand are claims that affect primarily the *public interest* exemplified by the indirect victims of corruption. This categorization helps to clarify the position of the law regarding these two categories of claimants. Since all claimants seek redress for damage suffered, understanding the foundation of differences in the legal response to these two categories helps to clarify analysis and proposals for reform.

Two main challenges face the potential private litigant and in particular with respect to claims to the public interest. The first is the legal standing to bring the claim, and the second is the financial cost of instituting a private claim or reporting corruption. Encouraging the private litigant to commence actions for corrupt acts by providing mechanisms to resolve these challenges is an important step to exploiting the potential of the private actor in the fight against corruption. To this end, this chapter examines strategies that *encourage the private litigant* from the practices in the US, England and the Netherlands. The chapter concludes with an assessment of the position of the private litigant and whether or not there is a basis to conclude that the right of the citizen to institute legal proceedings for corrupt acts has been strengthened in the last

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3 An obligation is a legally enforceable right. Civil liability relates to private rights and duties rather than those rights and duties that arise under criminal, administrative or military law.

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two decades of intensive growth of anti-corruption rules and in particular under the provisions of the UNCC.

### 9.2 Civil Liability as Enforcement Mechanism

There are three primary provisions dealing with civil liability in the UNCC. The first is found in Art. 26 UNCC dealing with the civil liability of legal persons. The second is found in Art. 34 UNCC dealing with the consequences of acts of corruption.<sup>4</sup> The third provision is found in Art. 35 UNCC dealing with compensation for damage suffered as a result of corruption. These sections set the broad framework for the UNCC civil liability regime for corruption. Art. 26 UNCC frames civil liability in the context of the enforcement of anti-corruption rules by the state while Art. 35 UNCC frames civil liability as a private right of redress for the victim who has suffered damage.

Civil liability can be used as a tool of enforcement in the absence of corporate criminal liability to avoid a sanctioning vacuum.<sup>5</sup> It can also be used to address the conflict of interest that arises where the ability of the state to singlehandedly carry out enforcement is compromised for a variety of reasons ranging from a lack of capacity, to a lack of information, to a lack of political will. Here, civil liability fills a governance void by ensuring that the negative consequences of corruption do not go unchallenged. Civil liability constitutes an important method to harness the strengths of both public and private law processes in the fight against corruption.

A distinction should be drawn between civil liability as sanction under Art 26 UNCC and civil liability as a form of private remedies under Art 35 UNCC. Civil liability as sanction is an extension of the criminal law process and serves as one more method of punishing an offender. Civil liability as a right of redress for the individual operates on completely different principles and is centered upon the harm done to the individual as a platform for initiating a restitutionary process. The UNCC demonstrates these distinctions in its provisions on civil liability for corruption.

The notion of civil liability under Art. 26 UNCC is focused on the relationship between the state and legal persons for whom criminal responsibility does not exist under national laws and in respect of whom civil liability may be the only

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4 For a full description of the civil liability regime under Art. 34 UNCC, see Chapter 8.

5 In Germany, for example, the criminal liability of corporations is described as 'non-existent.' See H. Hirsch, *La Criminalisation du Comportement Collectif-Allemagne* in H. De Doelder, K. Tiedemann (Eds), *Criminal Liability of Corporations: La Criminalisation Du Comportement Collectif*, Kluwer, 1996, pp. 31 – 69.

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channel of governmental action. Art. 26 UNCC provides that states shall adopt such measures as may be necessary, consistent with their legal principles, to establish the liability of legal persons for participation in the offenses established in accordance with this Convention. This liability, subject to the legal principles of the concerned states, may be ‘*criminal, civil or administrative*.’<sup>6</sup> Art. 26(4) UNCC calls on states to utilize ‘*effective, proportionate and dissuasive criminal or non-criminal sanctions*,’<sup>7</sup> including *monetary sanction*.’ This emphasizes the punitive function of the civil liability anticipated under Art. 26 as well as the fact that the execution of this punitive function lies with the state.<sup>8</sup>

Art. 26 UNCC is situated in Chapter 3 of the UNCC, which deals with the criminalization, enforcement and prosecution of acts of corruption. The preceding Arts. 15-25 UNCC provide a taxonomy of acts of corruption as follows: the bribery of national public officials,<sup>9</sup> the bribery of foreign public officials and officials of public international organizations,<sup>10</sup> embezzlement,<sup>11</sup> in influence,<sup>12</sup> abuse of function,<sup>13</sup> illicit enrichment,<sup>14</sup> embezzlement of property in the private sector,<sup>15</sup> laundering of proceeds of crime,<sup>16</sup> concealment,<sup>17</sup> and obstruction of justice.<sup>18</sup> The language of the chapter makes it clear that these offenses are to be investigated and prosecuted by states using the criminal process. Indeed, Art. 30 dealing with enforcement speaks solely in terms of deterrence,<sup>19</sup> criminal proceedings,<sup>20</sup> conviction and parole.<sup>21</sup>

A look at the Legislative Guide to the UN Convention shows that the reference to *criminal, civil or administrative liability* in Art. 26(4) is an acknowledgement of the differences in approaches regarding the criminal liability of corporations worldwide rather than recourse to the notion of civil liability as redress for damage suffered by an individual for acts of corruption. The Legislative Guide notes that:

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6      Emphasis added.  
7      Emphasis added.  
8      Art. 26 UNCC.  
9      Art. 15 UNCC.  
10     Art. 16 UNCC.  
11     Art. 17 UNCC.  
12     Art. 18 UNCC.  
13     Art. 19 UNCC.  
14     Art. 20 UNCC.  
15     Art. 22 UNCC.  
16     Art. 23 UNCC.  
17     Art. 24 UNCC.  
18     Art. 25 UNCC.  
19     Art. 30(3) UNCC.  
20     Art. 30(4) UNCC.  
21     Art. 30(5) UNCC.

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‘[N]ational legal regimes remain quite diverse with respect to liability of legal persons, with some States resorting to criminal penalties against the organization itself, such as fines, forfeiture of property or deprivation of legal rights, whereas others employ non-criminal or quasi-criminal measures.’<sup>22</sup>

The Legislative Guide, points out that the language of Art. 26 UNCC reflects similar language in other international instruments, such as the Convention on the Protection of the Environment through Criminal Law 1988,<sup>23</sup> the Financial Action Task Force on Money Laundering (FAFTF) Forty Recommendations,<sup>24</sup> and the OECD Bribery Convention, to give a few examples.<sup>25</sup>

The motivation of Art. 26 is to ensure that liability for the offenses that are created under the UNCC is achieved by whatever means and even in jurisdictions where there is traditionally no notion of corporate criminal liability. Regardless of the fundamental legal principles of the particular system, liability for the offenses under the convention can be established. While this opens the door to the possibility of civil liability for the criminal offenses of corruption created by the convention, this provision cannot be regarded as providing the foundation for the notion of private remedies. Civil liability under Art. 26 presents civil liability as a sanctioning tool to be used by the State. This shifts the focus of the rest of this chapter to Art. 35 UNCC which is entitled ‘compensation for damage.’

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22 Para. 321 of the *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, ISBN-10: 92-1-133755-0, ISBN-13: 978-92-1-133755-6. UN Publication, Vienna, 2006, [www.unodc.org/pdf/corruption/CoC\\_LegislativeGuide.pdf](http://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf) (hereinafter Legislative Guide).

23 Art. 9 Convention on the Protection of Environment through Criminal Law CETS No: 172 stipulates that Parties shall adopt such appropriate measures as may be necessary to enable them to impose criminal or administrative sanctions or measures on legal persons.

24 Recommendation 2, Subpara. (b) of the FATF Forty Recommendations, as revised in 2003, states that:

‘Criminal liability, and, where that is not possible, civil or administrative liability, should apply to legal persons. This should not preclude parallel criminal, civil or administrative proceedings with respect to legal persons in countries in which such forms of liability are available. Legal persons should be subject to effective, proportionate and dissuasive sanctions. Such measures should be without prejudice to the criminal liability of citizens.’

25 Art. 2 OECD Convention obliges parties to ‘take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official’. Even if a State parties legal system does not apply criminal sanctions to legal persons, Art. 3 (2) requires that states ensure that they are ‘subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.’

### 9.3 Art. 35: The Cornerstone of a Victim-Centered Approach?

The foundation for a private right of action is found in Art. 35 UNCC. The drafters of the Convention readily acknowledge in the Preamble, that while the prevention and eradication of corruption is a responsibility of all States, if their efforts are to be effective they must *cooperate* not just with other states but also with the support and involvement of *citizens* and *groups outside the public sector*, such as civil society, non-governmental organizations and community-based organizations.<sup>26</sup> This paragraph is striking in advocating co-operation between the public and private actors as essential ‘if the fight against corruption is to be effective.’ This is a tacit recognition that the conflict of interest at the core of grand corruption limits the *effectiveness* of a public-centered anticorruption enforcement framework as a single strategy. As the preamble states, the fight against corruption requires the co-operation of a plurality of actors and in particular *of groups outside the public sector*.

Art. 35 focuses on one such private actor – the private litigant – and opens the door to a victim-centered strategy in the fight against corruption. Given the international scope of the UNCC, Art. 35 is an important index of the nature, scope and pre-conditions of the minimum content of a private right of action for corruption on a global scale.

Art. 35 UNCC provides that:

‘Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.’

Art. 35 demarcates corrupt acts established under the convention as wrongs for which there is a concurrent private right of redress. The UNCC effectively establishes the legal wrong of corruption and creates the framework within which private remedies for occurrences of this legal wrong can occur.

The importance of Art. 35 in the development of anticorruption strategy is worth emphasis. Art. 35 represents the first instance in any international instrument where citizens are expressly empowered to initiate legal

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26 Preamble, UNCC. See also Art. 13, which expatiates more fully on the participation of civil society calling on states to take measures ‘to promote the active participation of citizens and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption.’

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proceedings under anti-corruption laws. In addition, the preamble to the UNCC suggests that the purpose for which the private right of redress is provided under the UNCC has a larger public function.<sup>27</sup> In other words the private action of redress has not only the private function of rectifying the harm done to a particular plaintiff but also the public function of deterring persons from engaging in acts of corruption against the public interest.<sup>28</sup>

Art. 35 UNCC can be described as the cornerstone upon which the right of the citizen to seek private remedies for corruption is founded. It reflects the well-held principle that a person who suffers damage from a legal wrong has a right to reparations from the person responsible. It also establishes on a global scale the notion of *private remedies for corruption*. Art. 35 introduces the party left out of criminal law-based descriptions of sanctioning corruption and sees the restoration of the rights that are violated during a corrupt exchange as an intrinsic part of the process of repairing the social and economic hardship caused by corruption. The inclusion of a right to initiate legal proceedings by the private actor in the UNCC creates an international obligation for states. If anti-corruption rules are silent on the question of whether or not there is a private remedy for the breach of the rules, the UNCC would have an overreaching character in filling the regulatory gap. The express provision of a right to initiate legal proceedings by the party who has suffered damage could open a new chapter in the fight against corruption depending on how 'real' the scope of this right is.

### 9.4 Private Right of Action under Art. 35 UNCC

Given the almost-global reach of the UN Convention with 140 parties, the implications of a right of action granted to private parties to institute civil actions for corruption has profound implications. What is the precise scope of the private right of action under Art. 35 UNCC?

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27 Common law jurisdictions have long held the principle of damages that are given to show an example. *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763), Lord Chief Justice Charles Pratt upheld the award in full the basis that the case involved not simply 'the mere personal injury' of the plaintiff, but also the liberty of 'all the King's subjects' against the exercise of 'arbitrary power,' 95 Eng. Rep. at pp. 768-69. In 1836, in the [1836] case of *McBride v. McLaughlin*, 15 4 Watts p. 375, pp. 376-77 (Pa. 1836), the Pennsylvania Supreme Court stated: 'Whatever be the speculative notions of fanciful writers, the authorities teach that damages may be given, in peculiar cases, not only to compensate, but to punish .... That corrective damages may be given for the sake of example, is as old as the law itself.'

28 This is more in line with theorists who see the law of torts or non-contractual obligations in terms of a wrong that should be redressed as opposed to theories that see this branch of the law as dealing primarily with the allocation of costs and adjustment of losses. For an overview of these two positions see J. Goldberg, B. Zipursky, 'Torts as wrongs', *Texas Law Review*, Vol. 88, 2010. Fordham Law Legal Studies Research Paper No. 1576644. Electronic copy available at SSRN: <http://ssrn.com/abstract=1576644>.

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### 9.4.1 Narrow Scope of Art. 35 UNCC

The victim of corruption is typically either a direct party to the primary or secondary contracts that are tainted by corruption or an indirect victim who is not a party to the contracts that underlie the corrupt exchange. A significant challenge especially for the indirect victim of corruption is how to found an action to claim a remedy for harm suffered as a result of corruption. The indirect victim unlike the direct parties to the primary and secondary contracts requires standing to sue on these underlying contracts. In addition, both direct and indirect victims of corruption are directly affected by the effects of the violation of the anti-corruption rules or to enforce the anti-corruption rules in general. This raises the question whether (a) Art. 35 UNCC provides a special right of action for victims of corruption to enforce anti-corruption rules and (b) whether Art 35 UNCC makes it easier for the indirect victim to establish local *standi* to sue of damage suffered as a result of the primary and secondary contracts resulting from corrupt exchanges.

For three reasons, the answer is negative. The UNCC does not appear to give a special private right of action to enforce the anti-corruption laws or special standing to claim damages for injury suffered as a result of corruption to all victims of corruption. This is firstly because of its adherence to the principle of sovereignty of states, secondly because it makes Art. 35 subject to the principles of national law, and thirdly because of the pre-conditions that it imposes for the potential litigant. In addition, an examination of Art. 35 as well as the position in the US, England and the Netherlands shows that access to a private right of action for corruption is constrained either by expressly disallowing such a right (as the US has done) and/or by the pre-conditions to the applicability of Art. 35 which raises the bar to the right to initiate legal action to a level at which only a very limited and narrowly defined group of direct victims can qualify.

#### 9.4.1.1 Subjection to Principle of Sovereignty

The right to institute legal proceedings for corruption under Art. 35 UNCC is subject to the principle in Art. 4 UNCC of sovereignty and non-interference with domestic affairs of member states. Art. 4 UNCC provides that:

‘States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of *sovereign equality* and territorial integrity of States and that of *non-intervention* in the domestic affairs of other States.’

Art. 4 points to a balance sought to be achieved within the UNCC. On the one hand, to provide an effective strategy against corruption there has to be a binding supranational rule that mandates states to adopt a common frame of

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reference and minimum standards. At the same time the principle of comity that underlines the interaction of states relies on mutual respect and observance of each country's sovereign position. The effect of the principle of sovereignty means that provisions regarding civil liability or a private right of action for acts of corruption under the UNCC must be in conformity with the fundamental legal principles of the member state in question.<sup>29</sup>

### 9.4.1.2 Subjection to National Law and Principles

The UNCC, in seeking to realize a common response to the problem of corruption, requires that each state *shall* implement the provisions of the Convention. Art. 65(1) provides that:

‘[E]ach State Party *shall* take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.’

However, the Legislative Guide to the UNCC points out that there are three categories of provisions in the UNCC, which are ranked as (1) mandatory, (2) to be strongly considered and (3) optional.<sup>30</sup> The Legislative Guide explains the significance of this ranking and provides that:

‘[W]henever the phrase “each State Party shall adopt” is used, the reference is to a mandatory provision. Otherwise, the language used in the guide is “shall consider adopting” or “shall endeavor to”, which means that States are urged to consider adopting a certain measure and to make a genuine effort to see whether it would be compatible with their legal system. For entirely optional provisions, the guide employs the term “may adopt.”’<sup>31</sup>

The Guide goes on to point out that there are safeguard clauses that operate as a filter regarding the obligations of states in cases of conflicting constitutional

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29 The Legislative Guide points out the purpose of Art. 65, Para. 1, is to ensure that national legislators act to implement the provisions of the Convention in conformity with the fundamental principles of their legal system. See Para. 18 Legislative Guide UNCC.

30 In establishing their priorities, national legislative drafters and other policymakers should bear in mind that the provisions of the Convention do not all have the same level of obligation. In general, provisions can be grouped into the following three categories: (a) Mandatory provisions which consist of obligations to legislate (either absolutely or where specified conditions have been met); (b) Measures that State parties must consider applying or endeavor to adopt; (c) Measures that are optional. See Para. 11 Legislative Guide UNCC.

31 Para. 12 Legislative Guide UNCC.

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or fundamental rules and that allow states to adopt certain measures ‘*subject to [their] constitution and the fundamental principles of [their] legal system.*’<sup>32</sup>

Turning to the wording of Art. 35, the pre-eminence of national law becomes very clear. Art. 35 provides that states *shall* take measures to grant entities or persons the right to initiate legal proceedings for damage suffered as a result of corrupt acts *in accordance with principles of its domestic law*. The use of this *safeguard measure* subjects the measures that states are required to take to national law. This makes it clear that there is no new basis of liability or right of action created by the UNCC. A private right of action for the victim of corruption under the UNCC exists only to the extent that it is provided within the principles of national law.

Furthermore, according to the UNCC, national law determines the sanctioning processes for corruption. Art. 30(9) UNCC provides that:

‘Nothing contained in this Convention shall affect the principle that the description of the offenses established in accordance with this Convention and of the applicable legal defenses or other legal principles controlling the lawfulness of conduct *is reserved* to the domestic law of a State Party and that such offenses *shall be prosecuted and punished in accordance with that law.*’<sup>33</sup>

The Legislative Guide to the UNCC explains that Art. 30(9) means that the domestic law of a State party governs: (a) the description of offenses established in accordance with the Convention; (b) applicable defenses; (c) legal principles controlling the lawfulness of conduct; and (d) prosecution and punishment.<sup>34</sup>

Subjecting the private right of action under Art. 35 UNCC to the principles of domestic law shows that national law plays the determining role in (a) what measures for private remedies for corruption are possible and (b) what provision for compensation for damage is available for persons who have suffered damage. National rules remain the defining point for the right to private remedies for corruption as well as the focal point of questions such as the meaning of ‘measure,’ ‘entities or persons,’ ‘damage,’ ‘legal proceeding,’ and ‘responsibility for damage’ as stipulated under Art. 35. This means that Art. 35 UNCC cannot stand alone without supporting national law as the source of a private right of action for persons who have suffered damage as a result of corruption.

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32 Para. 13 Legislative Guide UNCC.

33 Emphasis added.

34 Para. 33 Legislative Guide.

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### 9.4.1.3 Art 35: Pre-Conditions for Private Right of Action

Art. 35 requires that states should ensure that entities or persons who have suffered damage as a result of an act of corruption ‘have *the right to initiate legal proceedings* against those responsible for that damage *in order to obtain compensation.*’ The term ‘*suffered damage*’ can be considered in a general or technical sense. The word ‘damage’ can be used to mean loss in a general sense suffered by a victim of corruption for which a right of redress ought to be given. Damage can also be used in a technical sense where it refers to a *specific* and *quantifiable* loss suffered by a plaintiff for which *specific loss* the plaintiff should be indemnified.

Goldberg emphasizes the effect of the difference in these two formulations. One approach looks beyond the wrong suffered by the plaintiff to the entire transacting environment. In this approach, the:

‘character of the defendants conduct, mitigating circumstances that do not rise to the level of recognized defences, and the power and dynamic between the two parties are surmised in the notion of damage.’<sup>35</sup>

The other approach depicts damages as a loss or setback which is restricted to compensation as indemnification and ‘requires the fact finder to set damages at an amount equal to the losses suffered by the tort victim as a result of the tort.’<sup>36</sup> From the perspective of a private right of action for corruption, a logical objective within the context of the UNCC would be a notion of damages that looks beyond the specific damage to a particular plaintiff to a view that serves a broader purpose of deterring the conduct of the defendant. In other words, this point of view embraces the entire transaction and sees the purpose of damages not just as compensatory but also with the objective of deterring the defendant’s conduct.

This is particularly important because formulating a right of action for corruption in strict compensatory terms restricts the category of persons that can initiate legal proceedings. Art. 35 speaks of an action ‘*to obtain compensation.*’ A broad reading of the term ‘*compensation*’ would include all types of damages awarded to a person injured by the wrongful act of another and would encompass all the purposes for which such damages are given including compensation, the determination of rights, punishment and

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35 J. Goldberg, ‘Two conceptions of tort damages: fair v. full compensation’, *DePaul Law Review*, Vol. 55, 2006; Vanderbilt Public Law Research Paper No. 06-11. Electronic copy available at SSRN: <http://ssrn.com/abstract=903813>, at p. 437.

36 *Id.*, at p. 438.

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deterrence, and the vindication of the injured party.<sup>37</sup> A narrower reading would see ‘*compensation*’ as referring solely to damages provided as compensation, indemnity or restitution for harm sustained by a party and exclude broader purposes such as deterrence and vindication.<sup>38</sup>

An examination of the formulation of Art. 35 supports a narrow reading of the term compensation. Art. 35 links the right to initiate legal proceedings solely to actions for compensatory damages. It speaks of the ‘*right to initiate legal proceedings ... in order to obtain compensation*’ for the injury suffered by the party initiating the claim. The damage claimed by the plaintiff must be *the* consequence of the wrongdoer’s conduct. This is the manner in which Art. 35 UNCC identifies the victims of acts of corruption that have been violated by the commission of a *wrong*. The direct link of relationship between the plaintiff and the defendant plays a central role.

As such, Art. 35 grants a right to initiate legal proceedings that is clearly linked to the injury *caused* by the defendant to a *particular* plaintiff. In this sense, the formulation of Art. 35 is quite specific and provides a private right of action only in instances where there is a direct causal link between the injury and the party bringing the action. This condition is not stated expressly in Art. 35 but can be implied from its clear wording. Art. 35 speaks of the right to initiate legal proceedings ‘*against those responsible for that damage.*’ The damage caused is not damage to the whole world, but *damage to the plaintiff*. The measure of redress is compensation to *repair the injury caused*. There is no definition of the term *responsible* in the UNCC, but Art. 35 indicates that the person must have been involved in the act of corruption, that there must have been damage caused by the act of corruption and that damage must have caused injury to the party seeking to initiate the legal proceedings. When and how these conditions will be met, is not defined by the UNCC but is rather left to the principles of domestic law of states.

Only where there is a direct causal link does a right to initiate legal proceedings arise. This is the classic traditional basis for actions based on non-

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37 See for example Sec. 901 of the Restatement (2nd) Torts, American Law Institute, St. Paul MN, 1965, (hereinafter Restatement (2nd) Torts), which explains that the purpose for which a provision is made for a right of redress for non-contractual claims (torts) is linked to the types of damages that are awarded by the court. These purposes are: (a) to give compensation, indemnity or restitution for harms; (b) to determine rights; (c) to punish wrongdoers and deter wrongful conduct; and (d) to vindicate parties and deter retaliation or violent and unlawful self-help. *Winfield v. Jolowicz* points to contemptuous, nominal, punitive damages as serving different purposes in relation to the right of redress of a party who has suffered injury by the wrongful act of another. W. Rogers (Ed.), *Winfield and Jolowicz on Tort*, 18th edn, Sweet & Maxwell, London, 2010, pp. 552-559.

38 Sec. 903 Restatement (2nd) Torts.

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contractual obligations in tort, namely to compensate the plaintiff for injury *caused by* another party. As such, Art. 35 is directed at specific instances where there is (a) damage *to* the claimant and (b) that is caused by an act of corruption as defined under the convention. The normative basis of compensation is to correct the loss suffered by the plaintiff by making the defaulting party *responsible* for that *specific* loss. This suggests that there is no special private right of action that is created under Art. 35 for all victims of corruption. Rather, Art. 35 is inward-looking, directed at the particular plaintiff and seeks merely to compensate that particular plaintiff for that particular loss.

### 9.4.2 Art. 35 UNCC: Effect of Pre-Conditions

The UNCC ostensibly seeks the support and involvement of *citizens* and *groups outside the public sector*, such as civil society, non-governmental organizations and community-based organizations in the fight against corruption. However, the methodology for the private right of redress adopted under the UNCC falls short of any such objective. The combination of the principle of sovereignty, the subjection of Art. 35 to national law as well as the pre-conditions in Art. 35 leaves the right to redress at the discretion of the state and limits in any event the category of persons that have the right to initiate legal proceedings under the Convention.

One may argue that given the variety of civil processes for redress available in different legal systems it is perhaps understandable that the language the UNCC adopts is a narrow formulation as a minimum standard, leaving states free to broaden its remit to the extent their particular laws and public policy permit. Indeed, states are encouraged to ‘adopt more strict or severe measures than those provided for’ in the Convention to prevent and combat corruption.<sup>39</sup> However, there does seem to be a lack of symmetry between the desire stated in the preamble of the UNCC for a broader participation by citizens and civil society in the enforcement of the anti-corruption rules and the provisions of Art. 35 UNCC.

The effect of Art. 35 is that the UNCC falls short in harnessing civil society as a partner in enforcement with the public sector. It also does not address the rights of all ‘persons who have suffered damage’ as a result of corruption but rather only those persons that are relationally so placed as to enable a direct link to be made to the party responsible for the acts of corruption and where such a loss is quantifiable. This significantly limits the scope of redress only to actions for compensatory damage where there is a very specific link between the party responsible for the damage and the person bringing the claim. This

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<sup>39</sup> Art. 65 UNCC.

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poses a formidable challenge to the ultimate, indirect victims of corruption who also suffer the effects but are not relationally directly connected to the party responsible for the damage. This leaves a large group – the indirect victims of the corruption – outside the ambit of the UN framework of a private right of redress for corruption. Even for the direct victim of corruption, the burden of establishing loss is not likely to encourage potential litigants. The absence of any motivation beyond compensatory damages coupled with the evidential burden may present too meager a payoff for the direct victim who may consider the risk of instituting an action as simply throwing good money after bad. This does not encourage an environment where private persons can partner with states in the fight against corruption.

Apart from this hurdle of causality, subjecting the private right to institute legal proceedings to ‘the principles of domestic laws’ of member states implies that the scope of the right of redress will be determined by already existing provisions of domestic laws. The argument can be made that the mandatory nature of Art. 35, which states that members ‘shall’ provide a right to initiate legal proceedings, is not met where the member refuses to grant a right of action in its entirety and that the subjection to national law must accommodate this minimum commitment by states. The Legislative Guide, however, suggests that the effect of the subjection to principles of domestic laws is a safeguard designed to do precisely that. This empties Art. 35 of any effect on national law except to the degree granted by the State. Indeed, the fact of the matter is that the narrow formulation of Art. 35 does not in fact add to the right of actions under existing theories for redress under domestic laws.

To achieve symmetry with the goals of the UNCC a broad reading of the convention may be necessary to bring the letter of the UNCC in line with its spirit. Since the Convention lays down a minimum standard, states are provided a platform that can be expanded in ways that encourage the private litigant. If compensation for harm suffered can be interpreted in a *general* sense where compensation may be interpreted to mean *any form* of redress for the plaintiff, this would include punitive and non-restitutionary forms of compensation. Broadening the right of action to include purposes such as punishment and deterrence is more in keeping with the spirit of the UNCC.

Is such a broad reading possible, with the current formulation of Art. 35? It would require stretching the meaning of ‘damage’ to include not only direct damage but also consequential damage. It may also require stretching the term ‘compensation’ to include not just specific loss to the plaintiff but also to instances where it is difficult to quantify loss but corruption is proven. This would shift the focus from proof of loss, to proof of the commission of a legal wrong, and would result in a strict liability framework for wrongs attributable to corruption. Finally it may require an interpretation of damages that allows it to serve purposes beyond compensation to allow for the punishment of the

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offender and a reward for the plaintiff, who in undertaking the action against the commission of the legal wrong of corruption acts not only in his own interest but ultimately in the interest of the general public. If taken a step further by adopting schemes that reward or reduce the costs, the private litigant would also encourage the objective of a 'multidisciplinary approach' and the involvement of non-public actors in the fight against corruption.

### 9.4.3 Art. 35 UNCC: Effect in US, England and the Netherlands

None of the three jurisdictions studied in this book have interpreted Art. 35 as creating a private right of action or as requiring any change in their domestic private laws regarding a private right of action for acts of corruption. Indeed the response has been that national laws already make adequate provision for the citizen who seeks redress for damage suffered as a result of corruption. The overview of rules regulating corruption in these countries shows that while they have criminalized commercial and international corruption, there is no new express private right of action that is granted to the private citizen to enforce any of the anti-corruption laws. The private rights of action exist only to the extent provided under domestic laws and processes.

#### 9.4.3.1 Position in the US

The US has taken the most formal position with respect to Art. 35. The US Congress, for example, has asserted that US law sufficiently meets the objectives of Art. 35 and that there is no need to broaden or enhance current US law 'in any way' because under US law, parties who have suffered from criminal acts are afforded the right to remedies under various legal principles.<sup>40</sup> Under US tort law, for example, where there is no express provision for a remedy in a legislative provision that protects a certain class of persons or requiring certain conduct, the court may impose a remedy.<sup>41</sup> The US was concerned that Art. 35 would impose an obligation on the courts to open the door to 'any' person who had suffered damage as a result of corruption that went beyond the parties directly involved in the acts of corruption.<sup>42</sup> As a

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40 Senate Treaty Documents Nos. 1-8, 109th Congress-1st Session 4 January-22 December 2005, US *Congressional Serial Set Serial Number 14941*, US Government Printing Office Washington, 2006, at p. 10.

41 Sec. 874(A) Restatement (2nd) Torts, provides that 'When a legislative provision protects a class of persons or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and need to ensure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.'

42 Senate Treaty Documents Nos. 1-8, 109th Congress-1st Session 4 January-22 December 2005, *id.*, Note 40 above.

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result, the US resorted to a complete rejection of Art. 35 by making a reservation to the effect that '[N]one of the provisions of the Convention creates a private right of action.'<sup>43</sup> The US Senate pushed against the notion that a victim of corruption could via the application of Art. 35 have a private right of redress that was not already provided under domestic law. The Senate felt that a reservation was important to avoid any possibility that Art. 35 would be construed as granting any requirement to 'broaden or enhance current US law or practice.'<sup>44</sup> The Senate also rejected the possibility of Art. 35 founding the basis of a private claim under the Alien Tort Statute.<sup>45</sup>

By making this reservation to Art. 35, the US is not under the obligation imposed by the UNCC to take 'measures as may be necessary' to provide *entities or persons* who have suffered damages as a result of corruption with a right of action. This could leave the US at odds with the spirit of the UNCC, which arguably seeks to broaden the scope of measures available to victims of corrupt acts as a category of plaintiffs.<sup>46</sup> However, analysis suggests even in the absence of an express reservation by the US, the formulation of Art. 35 does not in any event create an express right of action beyond what is available or adopted under domestic law.

The reservation made by the United States out of the fear that Art. 35 may extend a private right of action beyond the direct parties to the corrupt exchange helps to bring into focus the schism between direct and indirect victims of corruption. The UNCC and indeed domestic rules in most cases do not recognize the rights of all victims of corruption but rather only the rights that accrue to a *particular class of victim*.

### 9.4.3.2 Position in England/the Netherlands

Neither the UK nor the Netherlands have entered reservations in respect of Art. 35. This means that in both these countries there have to be 'measures' that meet the requirements of Art. 35 and provide the victim of corruption with the 'right to initiate legal proceedings.' Art. 35 gives a platform to victims of corruption in the UK and the Netherlands upon which to seek private redress

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43 United Nations Convention against Corruption Declaration and Reservations, available at <http://www.unodc.org/unodc/en/treaties/CAC/signatories-declarations-reservations.html>.

44 Senate Treaty Documents Nos. 1-8, 109th Congress-1st Session 4 January-22 December 2005, id., Note 40 above.

45 Id.; the US Senate also referred to the ruling in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). Furthermore, with regard to a private right of action arising under the domestic laws regarding foreign corruption, as for example the US Foreign Corrupt Practices Act, the US Courts have also declared that there is no private right of action created by the FCPA. See *Lamb v. Philip Morris, Inc.*, 718 N.Y.S. 2d.

46 If indeed the formulation of civil liability under Art. 35 achieves this purpose.

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from the courts of law. However, as the above analysis shows, this right is restricted to what is permitted under domestic law. Art. 35 does not add any new content to domestic provisions regarding private remedies for corruption.

In the Netherlands, the Commission on Private Bribery pointed out that the criminalization of private bribery labels it as a tort and that this increases the possibilities and range of civil law responses and private actions by parties that have suffered damage.<sup>47</sup> The Dutch Minister of Justice commented that the ratification of the UNCC did not require any amendment to Dutch law.<sup>48</sup> However, the position in the Netherlands is affected by the coming into effect of the Civil Law Convention on Corruption (CLC), which deserves special mention.<sup>49</sup>

On 6 November 1997, the Committee of Ministers of the Council of Europe adopted *20 Guiding Principles for the Fight against Corruption* in Resolution (97) 24. The Resolution calls for a multi-disciplinary approach to the fight against corruption, and the purpose of Principle 17 is to encourage states to ‘ensure that civil law takes into account the need to fight corruption and in particular provides for effective remedies for those whose rights and interests are affected by corruption.’<sup>50</sup>

The Civil Law Convention, which is in force in the Netherlands, has provisions for private remedies for corrupt acts. Art. 1 CLC provides that each Party shall provide in its internal law for *effective remedies* for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage. Similar to Art. 35 UNCC, the CLC is not substantive law in itself but merely requires that states ‘shall provide effective remedies.’<sup>51</sup> This introduces a

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47 See *Report of the Committee on Private Bribery*, Explanatory Memorandum, Parliamentary Papers, Session 1965-1966, No. 8473, p. 11, at Note 2. (Rapport van de Commissie ‘Niet Ambtelijk Corruptie’ also referred to as the Commissie-Mulder) Bijlage bij de Memoire van Toelichting, Zitting 1965-1966, No. 8437, Subnote 4, pp. 5-16 (hereinafter referred to as the Report of the Committee on Private Bribery).

48 Burgerrechtelijk Verdrag inzake Corruptie, Strasbourg, 4 November 1999, No. 1, Brief van de Minister van Buitenlandse Zaken aan de Voorzitters van de Eerste en van de Tweede Kamer der Staten-Generaal), The Hague, 21 September 2007, 31 230 (R 1833), Session 2007-2008, Toelichtende Nota (hereinafter referred to as the Explanatory Report to the Dutch Parliament on the Civil Law Convention), [www.eerstekamer.nl/brief/20070921/burgerrechtelijk\\_verdrag\\_inzake](http://www.eerstekamer.nl/brief/20070921/burgerrechtelijk_verdrag_inzake).

49 The Civil Law Convention has not been signed by the US. It has been signed but not ratified by the UK. See Chapter 3.

50 Council of Europe Committee of Ministers Resolution 97(24) on The Twenty Guiding Principles for the Fight Against Corruption, Adopted by the Committee of Ministers on 6 November 1997 at the 101st session of the Committee of Ministers.

51 Art. 1 Civil Law Convention on Corruption, Strasbourg, 4 November 1999, in force 1 November 2003, 174 CETS (hereinafter the CLC).

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requirement of ‘effectiveness.’ Unlike the UNCC, which leaves the question of efficacy open by subjecting the private right of action to the extent of redress provided under national laws, the CLC provides a minimum level of compliance. Not only does it provide for private redress, a victim is entitled to remedies that are ‘effective’ in providing redress for the rights and interests that are negatively affected by acts of corruption.

The CLC is also more expansive in scope than Art. 35. Art. 1 CLC provides a broader framework and requires member states to ensure that parties who have suffered damage as a result of corruption have the remedies necessary to ‘... defend their rights and interests including the possibility of obtaining compensation for damage.’ It is clear that these rights and interests include but are not limited to the right to initiate an action for compensation by the use of the word ‘including’ in reference to the remedy of seeking compensation. This opens the doors to remedies beyond mere compensation. Redress could include other measures such a punitive or exemplary damages or restitution. This is in contrast to the UNCC where the right to initiate legal proceedings for corrupt acts is restricted to actions instituted ‘in order to obtain compensation.’

The CLC also focuses on the issue of compensation for damage suffered by victims of corruption. In this regard there is also a requirement for a strict causal link. While the conditions for causality are implied in the formulation of Art. 35 UNCC, they are set out quite clearly in the CLC as follows:

‘Each Party shall provide in its internal law for the following conditions to be fulfilled in order for the damage to be compensated: (1) the defendant has committed or authorised the act of corruption, or failed to take reasonable steps to prevent the act of corruption; (2) the plaintiff has suffered damage; and (3) there is a causal link between the act of corruption and the damage.’

The CLC provides that compensation for damage suffered as a result of corruption is dependent on the plaintiff showing that ‘there is a causal link between the act of corruption and the damage.’<sup>52</sup> In the explanatory notes to this article, this is referred to as damage that is the ‘ordinary’ consequence corruption.<sup>53</sup>

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52 Art. 4 Para. 1(iii) CLC.

53 An adequate causal link must exist between the act and the damage, in order for the latter to be compensated. The damage should be an ordinary and not an extraordinary consequence of corruption. Thus, for instance, ‘loss of profits’ by an unsuccessful competitor who would have obtained the contract if an act of corruption had not been committed, is an ordinary consequence of corruption and should normally be compensated. On the other hand, there would be no adequate connection if, for example, an unsuccessful competitor, in his or her anger and disappointment over the loss of business, fell down the stairs resulting in a broken

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### 9.4.4 No Change in Existing Civil Liability Regimes

The platform created by Art. 35 is a very limited one. The subjection of the provisions of Art. 35 to the national law means that to the extent that no express private right of action is provided under national rules, there is no new private right of action for corrupt acts provided as a result of the ratification of the UNCC. It is to domestic practice, therefore, that one must look rather than any overarching legal instrument for guidance regarding the right to initiate legal actions, the types of claims that may be brought, and the precise nature of the interests protected and compensated. This is clearly the case in the US, where there is in any event an express rejection of Art. 35 UNCC. It is, however, not the case with the UK or the Netherlands, who have not made any reservation in respect of Art 35. Nonetheless, in these three countries the position of the private litigant in the absence of other provisions is not significantly altered by the provisions of Art. 35.

Furthermore, Art. 35 refers only to a private civil action for compensation. The formulation under Art. 35 is a narrow one that focuses on compensatory damages that are owed to direct victims of corruption. This is the traditional response to damage suffered as a result of legal wrong in all three jurisdictions considered. Art. 35 does not add anything new to these existing positions. National laws do provide indeed provide redress, but only for a very narrowly defined group of potential plaintiffs where this narrow group can overcome the burden of quite stiff pre-conditions to the right to bring a claim. However, the question is whether the existing rules determining the category of persons who have the standing to bring a private action for corruption is sufficiently flexible to allow for the realization of justice for all victims, both direct and indirect, of corruption. It is also open to question whether the framework of the existing principles allows for the active participation of non-public actors and civil society in the enforcement of anti-corruption rules as desired under the UNCC. If national laws already adequately provided for private remedies for corruption, the introduction of Art. 35 would be superfluous.

Art. 35 focuses on compensatory damages and would seem to exclude other purposes such as disgorgement of profits, constructive trusts, or punitive damages.<sup>54</sup> The requirements of causality under Art. 35 and the restriction of

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leg. See Art. 4 Explanatory report on the Civil Law Convention, available at <http://conventions.coe.int/Treaty/en/Reports/Html/174.htm>.

54 In 1843, the circuit court in *Bishop v. Stockton* offered the following instruction to a jury faced with a suit by a passenger against a common carrier: 'If the defendants [are found liable], then the enquiry will be what amount of damages shall be given? Shall they be compensatory or exemplary? Compensatory damages are given to restore or make whole again, or make reparation for loss, injury, or suffering, past and future .... But further vindictive or exemplary damages may be given to indemnify the public for past injuries and damages, and to protect the

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the amount of compensation to amounts that can be proven as direct damage suffered, place a burden on the plaintiff that is in no way offset by other incentives for the plaintiff in the form of exemplary punitive damages or other methods of reward that may encourage such a party to undertake the challenges of a civil action.

In recent times there has certainly been an increase in the prosecution of international corruption and a great increase in the fines paid for the violation of anti-corruption rules. However, there is a gap, or what has been referred to as a ‘disparity in payment of damages,’ which is considered ‘unfair.’<sup>55</sup> Unfortunately Art. 35 simply cements this narrative at the international level by adopting a narrow compensatory damages formula. Art. 35 does not address the damages gap between direct and indirect victims of corruption but caters strictly to the group of persons who are arguably most able to bear the damage resulting from a corrupt act.

Looking into the future, in the UK and the Netherlands, where Art. 35 is applicable without reservation, it has the potential to serve as additional support for an expanding role of the private actor. This will lie in the hands of courts, which may be called upon to determine its scope in the particular case through processes of statutory interpretation. At the very least, Art. 35 raises the bar for countries that have ratified it without reservation to ensure (1) that civil processes are available to victims of corruption to initiate legal proceedings and (2) this is a right that accrues to *every party* that has suffered damage that can be linked to the corrupt transaction.

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community from future risks and wrongs.’ *Bishop v. Stockton*, 84 3 F. Cas. 453, 454-55 (Pa. Cir. Ct. [1843]).

- 55 In a petition dated Tuesday 2 August 2011, for example, the Nigerian Socio-Economic Rights and Accountability Project (SERAP) petitioned the Chairman of the Economic and Financial Crimes Commission (EFCC), Mrs. Farida Waziri, requesting her to take steps in ensuring that multinational corporations which were found guilty in the United States of committing foreign bribery in Nigeria pay adequate compensation for their actions. SERAP Executive Director Adetokunbo Mumuni has argued that many multinational corporations operating in the country have paid several millions of dollars in bribes to government officials and to some political parties, adding that while huge payments have been made in settlements in the US, Germany and the UK, only a paltry amounts have been paid in Nigeria. The group added that in spite of this, the Nigerian people have suffered more from the effects of foreign bribery, arguing that foreign bribery has caused immense damage and devastation to the economy and the institutions of governance, and directly undermined the full and effective enjoyment of internationally recognized human rights, especially economic, social and cultural rights by the citizens. ‘The disparity in payment of damages is unfair and violates the fundamental provisions of the UN Convention against Corruption, which Nigeria has ratified.’ See report by Davidson Iriekpen in *This Day Newspaper*, 3 August 2011, available at <http://www.thisdayonline.com/>. Emphasis added.

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### 9.5 Scope of Private Remedies

#### 9.5.1 Corruption as an International Legal Wrong

A legal wrong that has caused injury is recognized as founding a right of civil action.<sup>56</sup> Wrongs may be criminal or civil, or both.<sup>57</sup> A right to bring an action arises where an interest recognized and protected by the law is infringed. Where a party acts contrary to obligations imposed by the anti-corruption instruments, the breach of this obligation creates corresponding infringements of rights that can be enforced by the party whose rights have been interfered with.<sup>58</sup> Under the common law systems, this category of actions fall under the law of torts, while in civil law countries this is generally referred to as the law of non-contractual obligations. The civil action for the legal wrong of corruption has the purpose of addressing the harm to the victim while at the same time seeking to deter conduct that is injurious to the public.<sup>59</sup>

The UNCC grants a private right of redress action to ‘persons who have suffered damage as a result of an *act of corruption*.’ The UNCC does not provide a definition of the legal wrong of corruption but rather provides a taxonomy of acts that constitute corruption. States are expected to have laws

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56 Sec. 7 Restatement (2nd) Torts explains that injury is the violation of some legally protected interest while harm is the infliction of any loss or detriment on the person of the plaintiff. Recognized heads of legal injury, which are of relevance to the issue of corrupt acts is the damage suffered, are the common law causes of breach of fiduciary duty and fraud; damages that result from misrepresentation (Chapter 22 Restatement (2nd) Torts), interference with contractual relations, (Chapter 37 Restatement (2nd) Torts) as well as interference with economic relations (Chapter 37A Restatement (2nd) Torts). The European Principles of Private law speak in terms of legally relevant damage as a loss or injury which results from a right conferred by law or worthy of protection by law. Book 6 Sec. 2:101 C. von Bar, E. Clive, H. Schulte-Nölke (Eds.), *Principles, Definitions and Model Rules of European Private Law*. Draft Common Frame of Reference (DCFR), Outline Edition, Sellier, Munich, 2009 (hereinafter DCFR). Particular instances of legally relevant damage that have a bearing on the act of corruption are losses that result from the reliance on incorrect advice or information, Book 6, Sec. 2:207 DCFR; losses incurred upon unlawful impairment of business Book 6, Sec. 2:208 DCFR; and losses resulting from the inducement of non-performance of an obligation. Book 6 Sec. 2:210 DCFR.

57 B. Zipursky, ‘Rights, wrongs, and recourse in the law of torts’, 51 *Vanderbilt Law Review*, Vol. 85, No. 1, 1998.

58 J. Goldberg, B. Zipursky, ‘Torts as wrongs’, *Texas Law Review*, Vol. 88, 2010; Fordham Law Legal Studies Research Paper No. 1576644.

59 This is referred to as the compensation-deterrence theory of torts. Goldberg writes that ‘[H]istorically, it advances the notion that tort law has moved from being an institution for the adjudication of private wrongs to an institution that empowers judges and juries to legislate for the public good. Functionally, it suggests that the regulatory aim of such adjudicative ‘legislation’ is to deter anti-social conduct and compensate those injured by such conduct.’ J. Goldberg, B. Zipursky, ‘Torts as wrongs’, *id.*, at p. 16. He further states that ‘tort ha[s] transformed itself from private to “public” law, whereby it functioned to achieve “collective,” not “corrective,” justice.’ J. Goldberg, B. Zipursky, ‘Torts as wrongs,’ *id.*, at p. 35.

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criminalizing these corrupt acts in their domestic laws. The implementation of the UNCC by member states creates a uniform set of legal wrongs regarding corrupt actions. In other words, the UNCC can be said to create a global standard for acts of corruption that provides a common language of interaction and a ‘framework for stronger co-operation’ between states.<sup>60</sup>

The acts of corruption that are recognized by the UNCC are very broad and all-encompassing going well beyond the core corrupt act of bribery. By grouping them all together as ‘acts of corruption’ the UNCC creates a common normative thread between these various acts. This implies that all the acts of corruption characterized by the UNCC are legal wrongs that have criminal and private law consequences on a global scale. The establishment of UNCC-defined ‘acts of corruption,’ which are accepted by over 140 countries, establishes a common normative framework that creates a significant platform for the shaping of international public policy as well as a basis for an international tort law regime regarding corruption. However, in the absence of a private right of action under the UNCC, the recourse the citizen has for injury suffered as a result of corruption is in a traditional private law claim. The growth of an international framework is therefore very much limited by national principles.

### 9.5.2 Acts of Corruption

Art. 35 UNCC speaks of ‘entities or persons who have suffered damage as a result of an *act of corruption*.’ There are 11 categories of ‘acts of corruption’ under the UNCC.<sup>61</sup> Art. 35 is a part of Chapter 3 of the UNCC, which deals with criminalization and law enforcement. The activities that are criminalized in Chapter 3 are legal wrongs for which the law will provide redress. These acts of corruption described in the UNCC are typically crimes under most legal systems. By classing all these activities under the common umbrella of corruption, the UNCC emphasizes the link between these activities and their collective negative effect on governance, economic and political stability. The acts of corruption are not restricted to bribery but cover the entirety of actions that undermine the relationships of trust that are central to effective business and effective governance. This is a more accurate reflection of the international transacting environment

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60 Kofi Annan, the former Secretary General of the UN, emphasizes that the ‘Convention introduces a comprehensive set of standards, measures and rules that all countries can apply in order to strengthen their legal and regulatory regimes to fight corruption.’ See Foreword to the UNCC.

61 See p. 292 above. Art. 15-26 UNCC.

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where corruption manifests in more facets than solely the giving and receiving of bribes.

In the jurisdictions studied in this book, the private claim for corruption is centered in the core act of bribery. US Federal law refers in Title 18 Chapter 11 to the crime of bribery, graft and conflicts of interests, which it describes in terms of the bribery of public officials.<sup>62</sup> Similarly the commercial statutes under US state laws are framed in terms of bribery.<sup>63</sup> In the UK, the new Bribery Act speaks strictly in term of ‘offences relating to bribery’;<sup>64</sup> English common law refers to corruption in terms of bribery which is defined as the payment of a secret commission;<sup>65</sup> in the Netherlands, corruption is described in terms of unlawful acts or omission by public offers that consist of the active giving or receipt of a gift or promise.<sup>66</sup> The CLC, which is in force in the Netherlands, also takes a narrow construction of a corrupt act and restricts it to the ‘requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof.’<sup>67</sup>

### 9.6 Interests Protected against Acts of Corruption

Damage is generally considered as accruing for the violation of a legally protected interest.<sup>68</sup> A private law claim for corruption results from damage to the person or property of the party seeking redress. Legally protected interests are defined by rules of law. In the case of corruption, the criminalization of a certain act as corrupt acts stigmatizes it as illegal and a violation of a legally defined interest. Interests protected under the UNCC can be distinguished as acts of corruption that primarily affect private interests such as the principal of

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62 See 18 USC Sec. 201- 227.

63 See Chapter 4 above, at p. 112. The judgment in *Perrin v. United States*, 444 U.S. 37, 44 nn. 9 & 10 [1979], provides a listing of state laws that outlaw commercial bribery. ‘[T]here are seventeen states which have statutes making it a crime to bribe a particular type of employee, notably agents or employees in charge of purchasing or hiring: Arizona, California, Connecticut, Indiana, Kentucky, Maine, Michigan, Montana, Nevada, New Jersey, New York, Oregon, Tennessee, Texas, Utah, Washington and Wisconsin.’ The Judge referred to the article ‘Control of nongovernmental corruption by criminal legislation’, *University of Pennsylvania Law Review*, Vol. 108, 1960, p. 848, at pp. 864 and 866.

64 See Bribery Act 1020 C. 23, the title of which is amended with the description ‘An Act to make provision about offences relating to bribery; and for connected purposes.’

65 Justice Slade in *Industries & General Mortgage Co. Ltd v. Lewis* [1949] 2 All ER 573, stated that for the purposes of the civil law a bribe means the payment of a secret commission.

66 Arts. 177, 177(a), 178, 178(a) 362- 364 and 328 Dutch Penal Code.

67 See Art. 2 CLC.

68 In the US Restatement of its common law rules, this is referred to in terms of injury and harm. Injury is the violation of some legally protected interest while harm is the infliction of any loss or detriment on the person of the plaintiff. Sec. 7 Restatement (2nd) Torts. The European Principles of Private Law speak in terms of legally relevant damage as a loss or injury which results from a right conferred by law or worthy of protection by law. See Book 6 Sec. 2:101 DCFR.

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a disloyal agent, shareholder, and third-party competitors facing uncompetitive behavior on the one hand and those that primarily affect the public interest on the other. The public interest is a euphemism for the indirect victims of corruption. Where there is damage to the public interest, this damage is suffered by the indirect victims of corruption who stand outside the contractual relationships that characterize the bribery exchange but yet are the true victims of its consequences.

Claims relating to damage to the private interest broadly fall within the traditional core areas of corruption *i.e.* bribery centered on abuse of the agency relationship; while claims for damage suffered primarily by the public interest relate to bribery but also include activities that generally fall outside the traditional legal definitions of bribery and are included in the taxonomy of legal wrongs of corruption under the UNCC. This categorization into private or public interests notwithstanding, it must be emphasized that corruption undermines the governance, economic and political process of a society regardless of whether it primarily affects the public or private interest.

The definitions of the various acts of corruption under the UNCC reflect the type of interest that a violation will primarily affect. Thus the bribery of national public officials<sup>69</sup> will result in harm to the national government or citizens to whom the public official owes a duty of loyalty. Similarly the bribery of foreign public officials and officials of public international organizations<sup>70</sup> results in damage to the foreign government and foreign nationals as well as international organizations to which the foreign public official owes a duty of loyalty. Embezzlement by a public official results in damage to the owner of the property, funds or securities, which will usually be a public entity.<sup>71</sup> Trading in influence,<sup>72</sup> as well as the abuse of function by a public official,<sup>73</sup> result in harm to the public institution or authority whose trust has been abused. Illicit enrichment<sup>74</sup> by a public official results in harm to the owner of the property or assets that have been illicitly acquired. Bribery<sup>75</sup> and embezzlement<sup>76</sup> by citizens in the private sector results in harm to the private sector entity. Finally, laundering the proceeds of crime,<sup>77</sup>

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69 Art. 15 UNCC.  
70 Art. 16 UNCC.  
71 Art. 17 UNCC.  
72 Art. 18 UNCC.  
73 Art. 19 UNCC.  
74 Art. 20 UNCC.  
75 Art. 21 UNCC.  
76 Art. 22 UNCC.  
77 Art. 23 UNCC.

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concealment<sup>78</sup> and obstruction of justice<sup>79</sup> will result in harm to the state attempting to enforce and prosecute these crimes.

Claims for damage primarily to private actors are well-represented in the three jurisdictions studied in this book. These are founded mainly on the breach of the fiduciary duty in the agency relationship as well as tortious interference. However, there are also claims that center on securities litigation, racketeering and antitrust rules that are at this moment only characteristic of the US system. Private claims for damage to the public interest, on the other hand, are more difficult to articulate because there is no clear cause of action within the three jurisdictions considered. However, several examples are given in this chapter of actions by private actors for redress for damage caused primarily to the public interest drawn from a variety of jurisdictions to show the type of initiatives that are emerging in this regard.

Bribery occurs where a public or private official or agent uses this position to personal advantage by to the detriment of the party to whom such a party owes a duty of loyalty. The UNCC in Arts. 15, 16 and 21 criminalizes the bribery of national public officials, foreign public officials, public officials of public international organizations as well as private bribery. These provisions reference the triangular relationship that characterizes bribery. This triangle of persons is fundamental to the act of bribery, which results from the abuse of the representational relationship between the bribe taking party and the state or private person. This breach of a duty causes an injury that the private law seeks to repair.

Art. 15 UNCC deals with the domestic bribery of national public officials and provides that:

‘Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offenses, when committed intentionally: (a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties; (b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.’

Art. 15 UNCC references a breach of duty that occurs on the part of a public official who is an employee of the State.<sup>80</sup> A person qualifies as a public

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78 Art. 24 UNCC.

79 Art. 25 UNCC.

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official whether appointed or elected, whether permanent or temporary, whether paid or unpaid and irrespective of that person's seniority.<sup>81</sup> Any person who performs a public function for a public agency or public enterprise, or provides a public service also falls within the definition of a public official.<sup>82</sup> In addition any other person defined as a public official, under the domestic law of a state, falls within the definition of a public official.<sup>83</sup>

The act of corruption under Art. 15 UNCC occurs where a bribe is paid 'in order that *the official act or refrain from acting in the exercise of his or her official duties*' is made intentionally.<sup>84</sup> The act of solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, also constitutes an act of corruption under this heading.<sup>85</sup> The duty that founds a civil claim is owed primarily to the state or public agency that employs the public servant. This party is the *direct recipient* of any damage that results from the violation of the duty and has a right to institute legal proceedings under Art. 35 UNCC.

Art. 15 UNCC collapses the artificial division between domestic and foreign by including acts of national bribery within the international framework of rules prohibiting corruption. This is an important link between the principles that underlie the prohibition of private commercial bribery and the bribery of public officials in the acquisition of business. The commercial agents and public officials that are instrumental in the acquisition of international contracts are closely related in an integrated market.

The UNCC also requires that states criminalize foreign bribery of foreign officials, public officials and private workers. Art. 16 UNCC provides that:

'1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, *the promise, offering or giving to a foreign public official or an official of a public international organisation*, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.<sup>86</sup>

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80 A public official is any person holding a legislative, executive, administrative or judicial office of a state in any capacity, Art. 2(a)(i) UNCC.

81 Id.

82 Art. 2(a)(ii) UNCC.

83 Art. 2(a)(iii) UNCC.

84 Art. 15(a) UNCC.

85 Art. 15(b) UNCC.

86 Emphasis added.

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2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, *the solicitation or acceptance by a foreign public official or an official of a public international organisation*, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.<sup>87</sup>

Art. 16 UNCC prohibits the active or passive bribery of foreign public officials and officials of public international organizations. A foreign public official is any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise.<sup>88</sup> An official of a public international organization is an international civil servant or any person who is authorized by such an organization to act on behalf of that organization.<sup>89</sup> Here the party to whom a duty of proper representation is owed is a *foreign government* who is the *direct recipient* of the duty and the primary holder of the right to receive proper representation from the public official.

Art. 21 UNCC tackles bribery in the private sector. It provides:

‘Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities: (a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting; (b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.’

Here the party to whom a duty of proper representation is owed is a *private person* who is the *direct recipient* of the duty and the primary holder of the right to proper representation by an employee or commercial agent.

An additional element of damage to the private interests is the inclusion of Art. 22, which prohibits the embezzlement of property in the private sector as an act of corruption. This occurs where a person who directs or works, in any capacity, in a private sector entity embezzles any property, private funds or

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87 Emphasis added.

88 Art. 2(b) UNCC.

89 Art. 2(c) UNCC.

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securities or any other thing of value *entrusted to him* or her by virtue of his or her position intentionally in the course of economic, financial or commercial activities.<sup>90</sup> The party who suffers damage is the owner of the private property that is embezzled.

The following sections examine the nature of the legal wrongs affecting private and public interests as well as the types of claims filed pursuant to damage caused by the infliction of these wrongs.

### 9.7 Damage Primarily to Private Interests

It should be noted that the claims for damage primarily to the private interest do not coincide with the government on the one side and the private citizen on the other. In some instances the government may take the role of a contractor in the market and in some instances a private entity may take on public functions. The overview of national law and the UNCC shows that claims for damage primarily to a private interest arise mostly in the following instances: (1) claims by the principal of the disloyal agent, (2) claims for intentional interference in business and contracts by a third party suffering from uncompetitive behavior caused by corrupt actions, (3) claims by shareholders on their own behalf (class actions) and on behalf of their corporations (derivative suits), and (4) FCPA based antitrust claims.

#### 9.7.1 Private Redress by Principal of Disloyal Agent

The claim by the principal of the disloyal agent is the foundational claim for all the claims relating to damage to the private interest. This is because it is the agency relationship that defines the act of bribery. In the US, England and the Netherlands as well as under the UNCC there is an interplay between a public official or private person who has a duty not to take a bribe on the one hand and the party to whom this duty is owed on the other. The party to whom the duty is owed can be described as the *principal* and the party who owes the duty is an *agent*. Under US law, an agency relationship occurs where ‘one person (a principal) manifests assent to another person (an agent) that the agent shall act on the principal’s behalf and subject to the principal’s control.’<sup>91</sup> This relationship is regarded as a fiduciary relationship, which means that an agent must act loyally in the principal’s interest as well as on the principal’s behalf.<sup>92</sup>

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90 Art. 22 UNCC.

91 Sec. 1.01, Restatement of the Law (3rd) Agency.

92 Id., see also Comment (e) on S.1.01 at p. 23 Restatement of the Law (3rd) Agency.

## PRIVATE REMEDIES FOR CORRUPTION

The key feature of bribery is that it puts the agent in a position of conflict between a personal interest and the duty of loyalty to the principal.<sup>93</sup> Bowstead, a leading writer on the English Law of Agency, remarks that:

‘[A]gency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as the third party.’<sup>94</sup>

In a similar fashion, the duty of proper representation under Dutch law requires that a party representing another should only act within the scope of the mandate to represent.<sup>95</sup> Commercial representatives and agents are a special class of representative (mandatory) who is owed a right of proper representation because the acts of the mandatee bind the party granting the mandate.<sup>96</sup>

This frames the act of national and international private bribery described in Arts. 15, 16 and 21 of the UNCC in the context of agency. A cause of action arises in favor of the principal where the duty of proper representation from an agent is violated in favor of a third party. The key aspect of the relationship between these three parties is the fact that the bribe-giver interacts with the agent on the basis of the fact that the agent is in a position to influence the acquisition of an advantage or other favor for the bribe-giver. The agent to the principal, national or state government of a private person is in a position to create a contractual relationship between the principal and a bribe-giving third party.

The overview of the position of the principal in Chapters 4-6 of this book shows that the breach of the duty of loyalty is an injury that the courts will repair. There is, however, a discernible difference in the purpose of the

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93 It has been noted that the ‘key to the determination of ... whether or not a payment or other inducement made to an agent constitutes a bribe is whether or not the making of it gives rise to a conflict of interest, that is to say, puts the agent into a position where his duty and his interest conflict.’ Per Leggatt J. in *Anangel v. IHI* [1990] 1 Lloyd’s Law Reports, p. 526. See also *Ross River Ltd v. Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch), (per Briggs J., taking a bribe puts the agent into the ‘moral debt of the third party against the interest of the principal’).

94 F.M.B. Reynolds, *Bowstead and Reynolds on Agency*, 19th edn, Sweet & Maxwell, London, 2010, [1-001].

95 Art. 66 Para.1 Book 3.

96 Art. 7:414 Dutch Civil Code. See also J. Chorus, P. Gerver, E. Hondius (Eds.), *Introduction to Dutch Law*, 4th edn, Kluwer, The Hague, 2006, at p. 163.

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intervention by the courts. In the US and England the focus is as much on the act of bribery itself as it is on compensating the principal. In seeking to deter the occurrence of the ‘evil act’ of bribery, the courts vigorously attempt to deprive the agent and the party giving the bribe of any profit from their actions. This has meant that the courts allow the principal to proceed against the agent for the moneys, profits and other benefits resulting from the bribe transaction. The courts will also allow the principal to avoid the contract resulting from the bribe transaction entered into with the party giving the bribe as well as an account for any benefits resulting from the transaction. There is a clearly stated punitive and deterrent purpose to court intervention. In contrast, the focus of court intervention in the Netherlands is to compensate the wronged principal and to put such a principal back in the position he would have been in but for the act of bribery. A principal may seek compensatory damages if the principal can establish a causal link between the act of bribery and the damage suffered. The principal under Dutch law may also seek to vitiate a contract but must be able to establish a defect of consent in seeking to avoid the contract that has resulted from the commission of a legal wrong.

In the US, the acceptance of a bribe by an agent is regarded as a breach of the fiduciary relationship between the principal and the agent because it causes the agent to act disloyally.<sup>97</sup> This duty of loyalty has several facets; of particular relevance to the issue of corruption is that the agent has a duty ‘not to acquire a material benefit from a third party in connection with transactions conducted or taken on behalf of the principal.’<sup>98</sup> The agent must account to the principal for all transactions taken on the principal’s behalf.<sup>99</sup> Where an agent takes a bribe in breach of this duty, the principal may:<sup>100</sup>

1. Recover monetary relief from the agent, and in appropriate circumstance the third party who participated in the agent’s breach.<sup>101</sup>
2. Seek contractual damages for the breach of the express or implied terms or the duty of good faith and loyalty of the employment or agency contract.
3. Avoid the contract entered into by the agent with a third party who participated in the agent’s breach of duty.<sup>102</sup>

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97 Sec. 8.01 Restatement of the Law (3rd) Agency.

98 Id., Sec. 8.02.

99 Sec. 8.01 Restatement (2nd) Torts, Comment (c). See also in *re Niles*, 106 F.3d 1456, 1461-1462 (9th cir. 1997).

100 See generally discussion in Chapter 5 above, at pp.126-137.

101 Comment (e), Sec. 8.02 Restatement (2nd) Torts. The bribe-payor and bribe-recipient may both be liable for repayment of the amount of the bribe. *Continental Management, Inc. v. United States*, 208 Ct. Cl. 501, 527 F.2d 613, 620 [1975] (common law right of government to sue bribers for the amount of bribes paid to government employees; ‘the amount of the bribe provides a reasonable measure of damage, in the absence of a more precise yardstick.’)

102 *U.S. v. ACME Process Equip. Co.*, 385 U.S. 138, 87 S. Ct. 350 [1966] (a government may, as a matter of public policy, avoid a contract that is tainted by fraud, kickbacks, conflicts of interest, or bribery.)

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4. Recover any material benefit, the value of the benefit or proceeds of the benefit retained by the agent, received by the agent through the agent's breach.<sup>103</sup>
5. Seek damages for any harm caused by the agent's breach.<sup>104</sup>
6. Seek damages from the offeror of the bribe for intentionally causing an agent to breach a fiduciary duty.<sup>105</sup>
7. Seek damages from the offeror of the bribe for intentionally interfering with the performance of the agency contract or causing the agents performance to be more expensive or burdensome.<sup>106</sup>
8. Seek an account for profits from the bribe-giver.

The act of bribery taints the resulting transaction that is binding on the principal. The fact that the principal may be bound by transactions that are the result of the pursuit of the agent's self-interest may result in a contract that is not to the advantage of the principal. The 'vulnerability' of the principal that results from the relationship of places a duty of loyalty on the agent the breach of which is an injury for which the US law provides a remedy.<sup>107</sup>

The actions of the bribe-giver result in the agent being placed in a position of conflict of interest, where the agent's interest in receiving a secret payment may take precedence over the agent's duty to obtain the best terms for his principal in the process of negotiating the contract with the third party. Under US law the bribe-giver is also liable for damages to the principal, on the basis that the bribe-giver is liable for harm resulting to the principal if the bribe-giver knew that the conduct of the agent constituted a breach of the duty of the agent and gave substantial assistance or encouragement to the agent to undertake such actions.<sup>108</sup>

There are some presumptions that work in the principal's favor. The principal *does not need to establish the actual harm* caused by the agent's actions and has a right to receive from the offeror of the bribe the amount of the bribe paid

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103 Where an agent profits as a result of the breach of a fiduciary duty, the courts may impose a constructive trust on the agent's profits. *Ellison v. Alley*, 852 S.W.2d 605, 608; *Mischke v. Mischke* 530 N.W.2d 235,241 (Neb. 1995); *Chicago Park District v. Kenroy, Inc.*, 78 Ill.2d 555, 402 N.E.2d 181 (Ill. 1980); see *Jackson v. Smith*, 254 U.S. 586 [1921] (the party who participates in a breach of fiduciary duty must disgorge all profits made as a result of wrongful conduct, without regard to whether the plaintiff suffered a corresponding loss). The party could then trace the proceeds of the bribe.

104 Sec. 874 Restatement (2nd) Torts provides that '[O]ne standing in a fiduciary duty with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.'

105 Sec. 876(b) and (c) Restatement (2nd) Torts.

106 Sec. 766A Restatement (2nd) Torts.

107 See Matthew Conaglen, 'The nature and function of fiduciary loyalty', *Law Quarterly Review*, Vol. 121, 2005, p. 452.

108 Sec. 876(b) Restatement (2nd) Torts.

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to the agent.<sup>109</sup> The principal also *does not have to establish that the agent profited* from the breach of the fiduciary duty to recover damages.<sup>110</sup> The measure of damages that a principal is entitled to is *more than just the amount of the bribe*. The principal is entitled to ‘the amount of loss sustained, including the lost opportunities for profit.’

In England, the agent as a fiduciary is defined as ‘... someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary.’<sup>111</sup> The agent has a (1) duty to act in good faith; (2) duty not to make a profit; (3) duty not to assume a position where the duty and personal interest of the agent conflict and, (4) a duty not to act for personal benefit or the benefit of a third person without the informed consent of the principal.<sup>112</sup>

The principal can make the following claims against the disloyal agent and the party that offered the bribe or other inducement:

1. At common law claim *in personam* for money had and received.<sup>113</sup>
2. In equity a proprietary claim for the recovery of the bribe itself.<sup>114</sup>
3. Recovery of any benefits resulting from the bribery transaction.<sup>115</sup> This remedy is now open to question in view of a recent 2011 ruling by the English Court of Appeal.<sup>116</sup>
4. Contractual damages for the breach of the express or implied terms or the duty of good faith and loyalty of the employment or agency contract.

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109 Sec. 8.01 Restatement (2nd) Torts, Comment (c). *Franklin Med. Associates v. Newark Pub. Sch.*, 828 A.2d 966, 975 (N.J. Super. App.) [2003].

110 Sec. 8.01 Restatement (2nd) Torts, Comment (c).

111 *Bristol and West Building Society v. Mothew*, per Millett L.J. [1998] 75 P. & C.R. 241, at p. 254.

112 *Id.*

113 The Privy Council in *Mahesan v. Malaysia Government Officers*, [1978] 2 W.L.R 444, at p. 448, established that a principal whose agent has been bribed can recover the amount of the bribe from the briber in an action for money had and received, and alternatively, recover damages from the briber in an action for the tort of fraud.

114 The Courts in *Hovenden and Sons v. Milhoff*, [1900] 83 L.T. 41, established that there is an irrebuttable presumption that the true price of the goods as between the principal of a disloyal agent and a purchaser company must be taken to have been less than the price paid by at least the amount or value of the bribe.

115 Where a fiduciary accepted a bribe as an inducement to betray the duty of loyalty the bribe and any benefits resulting from the bribe are considered as were held in trust for the person to whom the duty of loyalty was owed. *Attorney General for Hong Kong v. Reid*, [1993] 3 W.L.R. 1143.

116 The recent case of *Sinclair Investments v. Versailles*, [2011] EWCA Civ. 327, handed down on 29 March 2011, has changed this position holding that the gain made on secret or unauthorized profits is not held on trust by the agent for the benefit of his principal..

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5. The agent can also sue for damages actually suffered as a consequence of the bribe.<sup>117</sup>
6. Avoid the contract entered into by the agent with a third party who participated in the agent's breach of duty.<sup>118</sup>
7. A claim in equity for knowingly assisting the agent to breach a fiduciary duty to the principal.
8. An account for profits.
9. A claim for improper interference with another's contracts.<sup>119</sup>

It is interesting to note that the English courts have discountenanced the need for the plaintiff to show intention on the part of the bribe-giver. An irrebuttable presumption in favor of the plaintiff means that such a plaintiff does not have to prove fraud, motive,<sup>120</sup> inducement<sup>121</sup> or loss up to the amount of the bribe (amounts in excess of the bribe have to be proven). Even where the bribery does not result in a contract, the harm done by the action of giving and taking a bribe will be addressed by the court. In other words, the wrong is complete with the act of bribery regardless of whether or not any consequential damage results from it.<sup>122</sup>

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- 117 The agent and the third party are jointly and severally liable to account for the bribe, and each may also be liable in damages to the principal for fraud or deceit or conspiracy to injure by unlawful means. *Daraydan Holdings Ltd v. Solland International Ltd*, [2005] Ch. 119.
- 118 In *Logicrose Ltd v. Southend United Football Club*, [1988] 1 WLR 1256, Justice Millett said that the principal, having been deprived by the other party to the transaction of the disinterested advice of his agent, is entitled to a further opportunity to consider whether it is in his interests to affirm it. In *Ross River Ltd v. Cambridge City Football Club Ltd*, Justice Briggs stated that where a contract ensues following a secret payment received by a party's agent, the principal is entitled to rescission if he neither knew nor consented to the payment. If he knew of it but did not give his informed consent, the court may award rescission as a discretionary remedy, if it is just and proportionate to do so.
- 119 The giver of the bribe knows that the giving of the bribe will cause the agent to stand in breach of the contract with the principal. For discussion on the tort of interference with contractual relations see *Lumley v. G*, [1853] 2 E & B 216, *OBG v. Allan*, [2007] UKHL 21.
- 120 *Hovenden and Sons v. Millhoff*, [1900] (83 LT 43) (If a bribe is established the court will not inquire into motive of the bribe giver or allow evidence to be introduced to establish it); *Daraydan Holdings Ltd v. Solland International Ltd*, [2004] EWHC 622 (Ch) (there is no need to prove that the payer of a bribe acted with a corrupt motive; *Industries & General Mortgage Co Ltd v. Lewis*, [1949] 2 All E.R. 573 (proof of corruptness or corrupt motive is unnecessary in a civil action); see also C. Mitchell, 'Civil liability for bribery', *Law Quarterly Review*, Vol. 117, April 2001, p. 207, who argues that bribery is a *sui generis* tort of fraud.
- 121 *Hovenden and Sons v. Millhoff*, *id.* The court held that there is an irrebuttable presumption in favor of the principal, namely that the agent was influenced by the bribe. See also *Industries & General Mortgage Co Ltd v. Lewis*, [1949] 2 All ER 573 (strong presumption that payment by principal is increased by at least the amount of the bribe). *Fyffes Group Limited v. Templeman et al.*, [2000] 2 Lloyd's Law Rep., Vol. 643, at p. 660, (per Toulson, J.), at p. 577. However, if the principal can show that agreement negotiated by the bribed agent is less advantageous to him than an agreement negotiated at arm's length by an honest and prudent agent, the principal can claim damages to the extent he has been disadvantaged.
- 122 *Petrotrade v. Smith*, [2001] 1 Lloyd's Rep. 486 at Para. 18; *Daraydan Holdings Ltd v. Solland International Ltd*, [2005] Ch. 119.

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In the Netherlands, the principal of a disloyal agent may seek the return of the bribe or other performance, seek compensation for damages suffered or seek the dismissal of the agent. An agreement to give a bribe is forbidden under the Penal Code and is a nullity.<sup>123</sup> A payment made in respect of null transaction will constitute an undue payment as there is no legal basis for the payment of the bribe.<sup>124</sup> Art 6:203 of the Dutch Civil Code requires that the sum of the bribe or other advantage that is made to the agent must be restored to the giver of the bribe because such a payment is made without a legal ground or legal fact that justifies the making of the payment.<sup>125</sup> The position of the principal is, however, not so clear. What position is the principal to be restored to? De Savornin argues that the performance of the bribe-recipient should be viewed as one that cannot be quantified in money where the purpose of giving the bribe has not been reached and where it has been reached, to be as quantified in terms of the amount of the bribe.<sup>126</sup> This position is supported by Art 6:211 DCC, which bars a counter-performance in the case of a contract that is null and by nature cannot be reversed and is a performance that ought not to be valued in money.

The agent is a mandatee under the Dutch Civil Code.<sup>127</sup> Where such a mandatee acts outside of the authorization granted by the principal or mandator, the principal may claim damages for any loss sustained as a result of the null act unless he knew or should have known that the mandatee was acting outside the remit of his power or that the mandatee had given the third party full information about the extent of his powers.<sup>128</sup> As the *Goudse Bouwmeester* case shows, where the agent has received moneys for the principal, the agent must account for such moneys.<sup>129</sup>

The principal in the Netherlands is entitled to damages for any injury that is attributable to the agent.<sup>130</sup> However, there has to be a loss incurred to property, right or other interest, and secondly there has to be a link between the

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123 Art. 328ter DPC, which criminalizes private bribery.

124 Art. 6:203 DCC.

125 *Lotisico* case H.R. May 1923 W.11113, Rb Assen, 23 October 1984, NJ, 1985, p. 829. See generally, H. van Kooten, *Restitutionary Consequences of Invalid Agreements (Restitutierechtelijke gevolgen van ongeoorloofde overeenkomsten)*, Kluwer, Deventer, 2002.

126 O. de Savornin Lohman, Certain Civil Law Consequences of Corruption (Enige civielrechtelijke gevolgen van omkoping), in *Lugdunum Batavorum Juri Sacrum: 1882-30 januari-1982: rechtsgeleerde opstellen vervaardigd door leden van het Leids Juridisch Dispuut 'Juri Sacrum' ter gelegenheid van het honderdjarig bestaan van het Dispuut*, Kluwer, Deventer, 1982, p.127 at p.136.

127 See Art. 3:66(1) DCC.

128 Art.3:70 DCC.

129 See Art. 7:403 DCC; HR 12 March 1926, NJ 1926, 777 (*Goudse Bouwmeester*).

130 Art. 6:74 DCC provides that every failure of an obligation shall require the obligor to repair the damage to which the obligee suffers there from, unless the failure is not attributable to the obligor.

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act of the agent and the injury claimed by the principal.<sup>131</sup> Only where the damage suffered by the principal can *be imputed* to the agent is there an obligation on the agent to repair such damage.<sup>132</sup> This is a significant obstacle to recovery by the principal who has entered into a contract as a result of the alleged bribery transaction between an agent and a third party. Only where the principal can show that the terms of the contract were grossly unfair or misleading can such a claim be made. Furthermore, not only must the principal show that he has suffered damage as a result of the contract resulting from the bribery transaction, he must also show that it was the actions of the agent that led to the damage incurred from an onerous contract.

Dutch law provides that the principal can also have a claim against the offeror of the bribe for the commission of an unlawful act.<sup>133</sup> The term unlawful act can be understood as ‘an act of omission which violates another person’s right or conflicts with the defendant’s statutory duty, or is contrary either to good morals or to the care which is due in society with regard to another’s person or property.’<sup>134</sup> Furthermore, the principal may summarily dismiss the agent for an urgent reason.<sup>135</sup> Bribery falls under the circumstances described in under the Dutch Civil Code as constituting an urgent reason on the basis of which the principal’s contract with the agent can be terminated.<sup>136</sup>

### 9.7.2 Remedies for Tortious Interference

Bribery to attain business not only has a negative effect on the principal whose agent is bribed, it also affects third parties who are competing for the same contracts. Attaining or attempting to influence the granting of a contract by bribery causes damage to the third party who is faced with unfair competition. For this reason, bribery falls into the group of actions referred to as economic torts. The intentional interference with the prospect of a contractual

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131 Art. 6:98 DCC provides that ‘reparation of damage can only be claimed for damage which is related to the event giving rise to the liability of the obligor, which, also having regards to the nature of the liability and of the damage, can be attributed to him as a result of such event.’

132 Art. 6:162 DCC states that ‘a person who commits an unlawful (tortious) act towards another which can be imputed to him, must repair the damage which the other person suffers as a consequence thereof.’ The tortious act must be imputable to the party to be sued.

133 Art. 6:162 (2) DCC.

134 HR 31 January 1919, *NJ* 1919, 161 (*Lindenbaum-Cohen*). This ruling is codified in Art. 6:162 (2) DCC which states that except where there is a ground for justification, the following acts are deemed tortious: the violation of a right, or act or omission violating a statutory duty or rule of unwritten law pertaining to proper social conduct. Art. 6:162(3) states that a tortfeasor is responsible for the commission of a tort if it is due to his fault or to a cause for which he is accountable by law or pursuant to generally accepted principles.

135 Art. 7:677 DCC provides that each of the parties to a contract of employment may give notice of termination of employment for ‘an urgent reason.’

136 Art. 7:678 DCC.

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relationship by an act of bribery can found a claim by a competitor who loses a bid for a contract.<sup>137</sup> The US, England and the Netherlands have provisions in respect of this kind of loss. In the US and England this is a distinct cause of action while in the Netherlands it falls under the general principle of compensation for unlawful acts.

In the US interference with economic relations is regarded as an *intentional* tort and is referred to as the intentional interference with prospective contractual relations.<sup>138</sup> The two elements of intention and impropriety of the interference are essential conditions for the occurrence of this tort. The party giving a bribe is liable for unlawful interference only where the damage caused *to the party* bringing the claim was the intended consequence or was certain to occur as a result of the corrupt exchange.<sup>139</sup> Thus only where a party giving a bribe intended the specific negative consequence of for example the loss of the contract being competed for by that third party, does a right to bring a claim by the wronged third party arise. This is a significant hurdle as in most competitive bids there may be no knowledge of the other parties that are competing for the bid. Yet to found an interference claim it must be shown that the bribe-giver acted with the specific intention or with the substantially certain result that the bribery of the agent would cause the particular complaining company not to get the contract. Even if there are only two companies competing for the contract, it would usually be difficult to prove that but for the bribe, the losing company would have won the contract as such a party may not have been awarded the contract in any event.

The second requirement is that interference must be improper. In determining whether or not the actions of the bribe-giver are improper several factors are taken into consideration.<sup>140</sup> The commentary on Sec. 767 of the Restatement

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137 Per Bowen L.J. in *Mogul Steamship Co Ltd v. McGregor, Gow, & Co.*, [1889] 23 QBD 598, p. 614:

‘What, then, are the limitations which the law imposes on a trader in the conduct of his business as between himself and other traders? ... No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it.’

138 See Sec. 766B Restatement (2nd) Torts: ‘One who intentionally and improperly interferes with another’s prospective contractual relation is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation ....’

139 See Sec. 8A Restatement (2nd) Torts.

140 See Sec. 767 Restatement (2nd) Torts, where these include: (a) the nature of the actor’s conduct, (b) the actor’s motive, (c) the interests of the other with which the actor’s conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interest in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor’s conduct to the interference, and (g) the relations between the parties.

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(2nd) Torts indicates that a conduct that is in violation of a statutory provision or contrary to established public policy may render interference improper. Examples of such conduct would include conduct that is in violation of antitrust provisions or in restraint of trade, or conduct that is in violation of statutes and regulations.<sup>141</sup> Clearly bribery is a conduct that is in violation of the FCPA, several State commercial bribery laws, the UNCC and OECD Conventions, which the US is party to as well as other federal laws for which bribery is a predicate offense.<sup>142</sup> As such the giving of a bribe would constitute an improper interference within the meaning of the tort.

The economic injury to a business that may result from an act of bribery places this tort within the scope of unfair competition laws in the US. A party will be subject to liability where harm is caused to the commercial relations of another by acts or practices determined to be actionable as an unfair method of competition taking into account (a) the nature of the conduct and its likely effect on both the person seeking relief and the public, and (b) where the acts or practices are actionable under federal or state statutes, international agreement or general principles of common law.<sup>143</sup>

An example of such a claim for the intentional tort of bribery based on unfair competition laws is the case of *Korea Supply Company v. Lockheed Martin Corp.*<sup>144</sup> Korea Supply sued Lockheed Martin under the California's Unfair Competition Law<sup>145</sup> UCL, alleging that Lockheed Martin was awarded the contract by unlawfully bribing South Korean officials, in violation of the Foreign Corrupt Practices Act and also in tort for unlawful interference with prospective economic advantage. The Californian Supreme Court held that the plaintiff had a right to damages in tort particularly in view of the fact that the alleged bribery was an FCPA violation.<sup>146</sup>

In England the interference with a trade or business by unlawful means is also an intentional tort and occurs where a party uses intentionally unlawful means to cause economic loss to another. A party is liable for causing such economic loss where the giver of a bribe induces a third party not to enter into or continue a business transaction with another or prevents a competitor from

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141 Comment on Sec. 767(a) Restatement (2nd) Torts, at p. 31; Sec. 766B (a) and (b) of the Restatement (2nd) Torts detail interference as consisting of inducing or otherwise causing a third person not to enter into or continue a contract as well as preventing the acquisition or continuation of a prospective contract.

142 See discussion in Chapter 5.

143 See Sec. 1 Restatement Unfair Competition, (3rd) American Law Institute St. Paul MN, 1995.

144 See *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 94142 (Cal. 2003). *Korea Supply Co. v. Lockheed Martin Corp., et al.*, 29 Cal. 4th 1134 [2003].

145 The Californian Unfair Competition Law (Business and Professions Code) Sec. 17200.

146 For full details of this case see discussion in Chapter 5.

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acquiring or continuing with a business relationship because the agent of the owner of the prospective contract has been bribed, thus the offeror of the bribe may be liable for harm resulting from the loss of the benefits of the relation.<sup>147</sup>

The unlawful interference must be intentional.<sup>148</sup> That is, the party offering the bribe must have desired to cause the consequences of this act, or believe that the consequences are substantially certain to result from it.<sup>149</sup> In other words, ‘[T]he defendant must *intend* to injure *the claimant*. This intent must be a cause of the defendant’s conduct.’<sup>150</sup> A bribe can be considered unlawful interference with a contract to the extent that the giver of the bribe is committing a legal wrong, and knows that a legal wrong is being committed in the proffering of a bribe.<sup>151</sup> As compared with the existing position of the law on bribery, there is not much merit in pursuing this course of action. Bribery as a *sui generis* tort does not require proof of reliance or intention. These are irrebuttably presumed against the person offering the bribe. It does, however, require proof of loss (beyond the actual sum of the bribe) as do most torts. Therefore, taking the route of the bribery claim as a *sui generis* tort is a simpler route than economic torts of unlawful interference with business affairs.

In the Netherlands, Art. 6:162(2) DCC allows for liability where damage is caused to another as a result of a legal wrong referred to as an unlawful act. Art. 6:163 DCC restricts the scope of the obligation to repair damage only in

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147 *Lonrho Plc v. Fayed et al.*, [1992] 1 A.C. 448 Para. 455 (a person who does an intentional unlawful act in the furtherance of his own business interest, or who aims to injure another and as a result causes damage to that other in the form of economic loss, or alternatively, economic loss relating to his business, has committed an actionable tort). See also Lord Reid, ‘[T]he respondent’s action [in calling a strike] made it practically impossible for the appellants to do any new business with the barge hirers. It was not disputed that such interference with business is tortious if any unlawful means are employed,’ per Lord Reid in *J.T. Stratford & Son Ltd v. Lindley*, [1965] AC 269, 324. See also *Allen v. Flood*, [1989] AC 1; *OBG v. Allan*, [2007] UKHL 21.

148 ‘[T]he gist of this tort is intentionally damaging another’s business by unlawful means. Intention is an essential ingredient. The tort is not one of strict liability for harm inflicted on another’s business, nor is it a tort based on negligence. The defendant must have intended to inflict the harm of which complaint is made. That is the starting point. I shall have to return to this point later.’  
Per Lord Nicholls of Birkenhead in *OBG v. Allan*, [2007] UKHL 21, at Para. 141.

149 *Lonrho plc. v. Fayed et al.*, [1992] 1 A.C. 448, at Para. 455; *OBG v. Allan*, [2007] UKHL 21 at, Para. 47. The essence of the tort therefore appears to be (a) a wrongful interference with the actions of a third party in which the claimant has an economic interest and (b) an intention thereby to cause loss to the claimant.

150 *OBG v. Allan*, [2007] UKHL 21, at Para. 166.

151 ‘Unlawful means therefore consists of acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party and which is intended to cause loss to the claimant. It does not in my opinion include acts which may be unlawful against a third party but which do not affect his freedom to deal with the claimant.’ Per Lord Nicholls of Birkenhead, Lord in *OBG v. Allan*, [2007] UKHL 21, at Para. 51.

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instances where the statutory provisions were aimed at protecting the persons claiming a remedy. The act of bribery is criminalized under the Dutch Penal Code and the various international instruments that the Netherlands is a party to. This clearly makes the act of bribery an unlawful act for which an action for damage may lie under Dutch law. It is also a breach of the statutory duty of loyalty owed by the agent to a principal.

However, it is open to question whether the laws prohibiting bribery are specifically intended for the protection of the losing competitor. The action of bribery can still be viewed within the context of Art. 3:40 as an act that is contrary to public policy and the duty of care owed to society for which liability in damages can occur. In the *Lindenbaum-Cohen* case, which was decided when there was no provision prohibiting private bribery and therefore no direct statutory prohibition involved the bribery or another employee, the Dutch Supreme Court held that even where there was no contractual undertaking an action could lie against the offeror of the inducement and that the term unlawful act was to be understood ‘an act of omission which violates another person’s right or conflicts with the defendant’s statutory duty, or is contrary either to good morals or to the care which is due in society with regard to another’s person or property.’<sup>152</sup>

A European case that illustrates a claim based on the notion of interference is *ADT Projekt Gesellschaft der Arbeitsgemeinschaft Deutscher Tierzüchter mbH v. Commission of the European Communities*.<sup>153</sup> In this case, an unsuccessful bidder alleged improper conduct against the Commission and claimed that it had carried out the tendering procedure relating to Project FD RUS 9603 in an unlawful manner. ADT sought the annulment of the decision by the Commission not to award the applicant the contract relating to Project FD RUS 9603 (‘The Russian Federation: Adapting Russian Beef and Dairy Farming to Restructuring’) and, secondly compensation for the harm, allegedly suffered by the applicant, as a result of the Commission’s conduct.

ADT alleged infringement of the rules governing tendering procedures and of the principle of ‘fair competition’, against AGRER, Mr. Van de Walle (the expert entrusted by the Commission with drawing up the specifications for

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152 HR 31 Jan. 1919, *NJ* 1919 161 (*Lindenbaum-Cohen*). This ruling is codified in Art. 6:162(2) DCC, which states that except where there is a ground for justification, the following acts are deemed tortious: the violation of a right, or act or omission violating a statutory duty or rule of unwritten law pertaining to proper social conduct. Art. 6:162(3) states that a tortfeasor is responsible for the commission of a tort if it is due to his fault or to a cause for which he is accountable by law or pursuant to generally accepted principles. See also provisions of Book 6 Art. 2:208 DCFR, which identifies loss upon the unlawful impairment of business as legally relevant loss.

153 Case T-145/98 European Court Reports Page II-00387.

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Project), SATEC (one of the applicant's competitors in the contested tendering procedure), as well as against the Commission. The applicant claimed that Mr. Van de Walle had been involved in an attempt to bribe a Mr. Cherokee, the representative of the Project, to award the project to the successful bidder company, AGRER. They also referred to an attempt to bribe a member of the Russian administrative authorities by the company SATEC.<sup>154</sup>

ADT argued that 'such acts constitute serious infringements of the principle of *fair competition* which underlies any tendering procedure and should have led the Commission to annul the procedure at issue, in accordance with Art. 24(2) (f) of the General Regulations.'<sup>155</sup> The unsuccessful bidder claimed that it had accordingly suffered injury equivalent to the loss of profit estimated at DEM 550,000, consequent upon the award of the project to another tenderer or, at the very least, to the cost of drawing up its tender, assessed at DEM 225,250.

The application was not successful for lack of evidence. The court held that an application seeking compensation for damage allegedly caused by a Community institution must state the evidence from which the conduct alleged by the applicant against the institution may be identified as well as the reasons for which the applicant considers there to be a causal link between the conduct in question and the damage which he claims to have suffered, and the nature and extent of that damage. The court further held that '*in order for an allegation of attempted bribery in the course of a tendering procedure for a contract to be regarded as proven, it must be founded on irrefutable evidence or, at the very least, on a body of objective, relevant and consistent evidence.*'<sup>156</sup> This burden was not discharged by ADT and the plea for annulment and compensation was rejected.

### 9.7.3 Securities Litigation

Where a company engages in acts of corruption, the shareholders are in a similar same position as a principal who is betrayed by a disloyal agent. A key difference is, of course, that the officials of the company are not acting in the interests of a third party in engaging in the corrupt action, but rather in the interests of the company itself in trying, by whatever means, to increase the margins of profit. Shareholders in the United States have demonstrated a willingness to challenge corrupt acts by officers of corporations in direct, class and derivative lawsuits. Even though there is no private right of action under the FCPA, shareholders have used other US rules to bring these actions.

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154 Id., Para. 118.

155 Id.

156 Para. 121 Case T-145/98 European Court reports Page II-00387.

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Shareholders have for example filed actions relating to bribery charges under the Securities Exchange Act.<sup>157</sup> These shareholders claims center upon damage suffered as a result of misleading financial statements. Such misleading statements can lead to inflated share prices which lead to losses for the shareholder when the inflated stock subsequently drops in value.

In *re Immucor*,<sup>158</sup> shareholders filed a complaint under sections 10-b and 20(a) of the Exchange Act claiming that Immucor had mislead the shareholders by understating exposure to FCPA liability. The court allowed the shareholders' action, stating the extent of Immucor's FCPA violations was a significant piece of information that would have affected a reasonable investor's decision. Similarly a securities class action filed by Legion Partners, LLP,<sup>159</sup> on behalf of itself and all persons who bought the publicly traded shares of the Willbros Group Inc., was brought against the company and its officials as a result of a 'campaign of illegal and illicit bribery of foreign government officials' in Bolivia, Nigeria and Ecuador to successfully obtain construction projects. As a result of government investigations into Willbros' conduct, the company estimated that there would be 35% to 44% reductions in its previously reported income for the 2002-2003, which meant that the company had overstated its net income for this period. The shareholders claimed that the defendants' public misrepresentations or omissions were material and would tend to induce a reasonable investor to misjudge the value of a company's securities.<sup>160</sup> In addition, because of the FCPA violation, the company could be prohibited from bidding for US contracts. This information led to a shock on the market which resulted in an immediate loss of 31% on Willbros shares.

The logic behind a class action for damage caused by corruption was aptly stated in the Willbros' petition. The plaintiffs argued that a class action was 'superior to all other available methods for two reasons: firstly, because a joinder of persons who had suffered similar damage would be impracticable, and secondly, because damages suffered by individual members of the Class may be relatively small and the expense of individual litigation would make it impossible for such persons to individually redress the wrongs suffered.'<sup>161</sup> The shareholders sought damages, attorney fees, and an order for an accounting of the defendant's insider trading proceeds, and an accounting and imposition of a

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157 15 USC Sec. 78a.

158 *In re Immucor Inc.*, No. 1:05-CV-2276-WSD, 2006 WL 3000133 (N.D. Ga. 4 October 2006).

159 *Legion Partners, (LLP, on behalf of itself and all others similarly situated) v. Willbros Group Inc., Mincheal F. et al.*, 4:05-cv-01778 S.D. Tex.

160 *Id.*, at Para. 37.

161 *Id.*, at Para. 13.

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constructive trust of asset freeze on the defendant's insider trading proceeds.<sup>162</sup> Willbros settled the shareholder class action for \$10.5 million.<sup>163</sup>

Apart from claims based on allegations of misleading financial information, shareholders have also brought actions on behalf of their companies against company officials who have caused harm to the company by engaging in acts of corruption. While the damages awarded go to the corporation itself and not to the shareholders who file the actions, the derivative suit ensures that shareowners, who are the owners of the company, have a means of protecting the reputation and well-being of a company from corrupt activity by appointed officials. The derivative action by the shareholder can help to preserve the integrity of the corporation especially in the eye of the public by drawing a line between activities that shareholders will permit and condone and activities that are in breach of public laws for which the shareholders will demand the personal accountability of the officials involved. This could help to rehabilitate the image of a company as well as act as a corporation-led sanctioning process for corporate corruption. Furthermore, the derivative action allows the shareholders to hold these officials responsible and to associate the damage caused by such disloyal officials with the officials themselves rather than the company.

A good example of such rejection of wrong doing by company officials by means of a derivative suit on behalf of the corporation is the case brought by an institutional shareholder, the Detroit Police and Fire Fighters Pension Fund, brought on behalf of Halliburton and its former subsidiary Kellogg Brown and Root (KBR) against the officials of the corporation.<sup>164</sup> These officials were accused of improperly bribing Nigerian officials, overcharging the government contracts, accepting illegal kickbacks, human trafficking and conspiring to defraud the US government among other things. This culture of 'complete lawlessness' had caused the company 'to suffer hundreds of millions in damages and to be exposed to substantial additional judgments in the future.'<sup>165</sup>

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162 Id., at Para. 54ff.

163 S. Huggard, J. Gardner, 'Another reason to fear the Foreign Corruption Practices Act: the private tag-along suit', *Bloomberg Law Reports*, Vol. 2, No. 10, 2009, p. 3.

164 See *Petition of the Policemen and Firemen Retirement System of the City of Detroit, Derivatively on behalf of Halliburton Company and KBR, Inc., v. Albert O. Cornelius, Jr., et al.*, in the District Court of Harris County Texas, Cause No. 2009 – 29987 filed 14 May 2009. [http://www.contractormisconduct.org/ass/contractors/149/cases/1140/1585/halliburton-and-kbr-pfrs-of-detroit\\_complaint\\_abr.pdf](http://www.contractormisconduct.org/ass/contractors/149/cases/1140/1585/halliburton-and-kbr-pfrs-of-detroit_complaint_abr.pdf).

165 The Company had to pay to fines the SEC and Department of Justice including a \$402 million fine for the Nigerian bribery scheme; (\$177 million in disgorgement to the SEC for the Nigerian bribery scheme; \$54 million for dumping hazardous waste; \$8 million to settle

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The shareholders claimed that the officials had failed to exercise the loyalty, good faith, due care and diligence it owed to Halliburton as well as to its shareholders. The company and shareholder had as a result been substantially injured for which injury the shareholders sought compensation on behalf of the corporation. In their petition the shareholders emphasized the reputational damage to the company that had resulted from this breach of fiduciary duty in stating that '[u]nder the defendants' watch and supposedly under their control and supervision, the companies were permitted to engage in conduct so notorious that the name of "Halliburton" has become virtually synonymous with "corruption," just as Enron became the poster-child for fraud.'<sup>166</sup> The shareholders sought for indemnification by the company officials for the damages sustained by Halliburton as a result of their breaches of fiduciary duty.

The overview of the US, England and the Netherlands shows that shareholder actions for corruption remain primarily a US affair.<sup>167</sup> An attempt by shareholders to bring a class action against BAE systems, a UK company, was dismissed primarily based on the English rule in *Foss v. Harbottle*<sup>168</sup> that disallows minority shareholder suits except in cases of *ultra vires* or 'fraud on the minority.' Such shareholder action may become more realizable under UK law with the passage of the Bribery Act, which creates the offense of negligently failing to prevent bribery<sup>169</sup> coupled with the slightly more liberal conditions under the new UK Companies Act 2006 for derivative actions. Part 11 of the Companies Act 2006 effectively widens the circumstances in which shareholders can bring derivative actions in the company's name to protect their interests and obtain a remedy on the company's behalf. Sections 261-3 of the Act give shareholders a statutory right to pursue claims against the company officials for misfeasance on behalf of a company. However, such shareholders must first obtain the consent of the court to proceed with such a claim and must have established a *prima facie* case against the company.

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charges of overcharging and other procurement irregularities; \$6.3 million to cover the 'estimated impact' of a possible violation of the Anti-Kickback Act). *Id.*, at Para. 149.

<sup>166</sup> *Id.*, at Para. 1.

<sup>167</sup> A study on the private enforcement of corporate law in two common law jurisdictions with highly developed stock markets – the United Kingdom and the United States – that examined how often directors of publicly traded companies are sued, and the nature and outcomes of those suits, found that, based on a comprehensive search for filings over 2004-2006, lawsuits against directors of public companies alleging breach of duty are nearly nonexistent in the UK. The study also found that even in the US, based on a nationwide search of decisions between 2000-2007, only a small percentage of public companies faced a lawsuit against directors alleging a breach of duty that is sufficiently contentious to result in a reported judicial opinion, and a substantial fraction of these cases are dismissed. See J. Armour, B. Black, B. Cheffins, R. Nolan, 'Private enforcement of corporate law: an empirical comparison of the UK and US,' *Journal of Empirical Legal Studies*, Vol. 6, 2009, pp. 687-722.

<sup>168</sup> *Foss v. Harbottle*, [1843], 67 ER 189.

<sup>169</sup> See Chapter 5 above.

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In the Netherlands, Van Boom et al. point out that the notion of the class action is not a feature of European litigation stating that ‘... there is neither a European class action nor a common group action for disgorgement or compensation. On the contrary, most member states are just beginning to discover the need for efficient and effective mass damage settlement.’<sup>170</sup> An example of such a group action is found in Art. 305(a) DCC, which allows for foundations of associations to bring a representative action on behalf of a group of persons with similar interests to the extent that the articles of the foundation promote this interest.<sup>171</sup> There is also the possibility of voluntary settlement under the Dutch Collective Settlement Act of 2005. In both these instances, the emphasis is on providing a medium for the parties to reach a voluntary agreement amongst themselves. The role of the court is essentially to supervise the agreement that has already been reached between the parties.

### 9.7.4 FCPA Antitrust Cases

The overview of the US position in Chapter 5 shows that apart from third-party claims based on tortious interference, parties have used the FCPA as a springboard to file actions for uncompetitive behavior by competitors who have engaged in corrupt activity even though there is no private right of action under the FCPA.<sup>172</sup> Losing competitors have used the FCPA as a ‘trigger’ for private suits for corrupt transactions by using alternative criminal statutes such as the Racketeering Influenced Corrupt Organizations Act,<sup>173</sup> the Clayton Antitrust<sup>174</sup> and Robinson-Patman Acts.<sup>175</sup> The foreign element of international

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170 W. van Boom, M. Loos, ‘Effective Enforcement of Consumer Law in Europe: Synchronizing Private, Public, and Collective Mechanisms’, January 2008, at p. 7, electronic Copy available at SSRN: <http://ssrn.com/abstract=1082913>.

171 Art. 3:305a(1) DCC.

172 *Lamb v. Philip Morris Inc.*, 498 US 1086; 111 S Ct 961; 112 L Ed 2d 1048 (19 February 1991) The court dismissed an attempt to use the FCPA as the basis for an action alleging the payment of unlawful inducements designed and intended to restrain trade in a foreign market stating that the FCPA did not apply to the plaintiffs but was primarily designed to protect the integrity of American foreign policy and domestic markets. The court concluded that in view of the general tenor of the FCPA, which requires the Attorney General to participate actively in encouraging and supervising compliance with the Act, the plaintiffs, as competitors of foreign tobacco growers and suppliers of the defendants, could not claim the status of intended beneficiaries of the FCPA.

173 Codified at 18 USC Sec. 1961-1968.

174 The Clayton Antitrust Act of 1914 (Pub. L. 63-212, 38 Stat. 730, enacted 15 October 1914, codified at 15 USC Sec. 12-27, 29 USC Sec. 52-53) follows the Sherman Antitrust Act (Sherman Act, [1] 2 July 1890, ch. 647, 26 Stat. 209, 15 USC Sec. 1-7) to provide for a private right of action for persons who have suffered anti-trust injury in Sec. 15(a).

175 The Robinson-Patman Act of 1936 (or Anti-Price Discrimination Act), (Pub. L. No. 74-692, 49 Stat. 1526, codified at 15 USC Sec. 13) prohibits the payment of a commission where there has been no service rendered in respect of a sale of goods where this distorts healthy competition. The courts have applied this act in cases of bribery. See for example *Rangen, Inc. v. Sterling Nelson Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965), cert. denied 383 U.S. 936.

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corruption cases involving the FCPA does not prevent US courts from entertaining such suits. The Act of State doctrine has been held not applicable to bar US courts from entertaining actions alleging foreign bribery.<sup>176</sup>

### 9.8 Damage Primarily to the Public Interest

On the other end of the spectrum of claims for damage suffered by private interests such as principals, shareholders and losing competitors are claims for damage suffered primarily by public interests. The UNCC criminalizes acts of corruption where the party that suffers the damage is not an identified individual but rather the public at large. In these instances the state can be designated as the party against whom the legal wrong is directed. Art. 17 of the UNCC, for example, prohibits the embezzlement, misappropriation or other diversion of property by a public official. Property is defined as ‘assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets.’<sup>177</sup> The act of corruption occurs with the intentional embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.<sup>178</sup> The party who suffers the damage caused by this act of corruption is the *state that entrusted the property* to the public official.

Art. 18 UNCC prohibits the intentional trading influence as an act of corruption. Trading in influence occurs with the intentional promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person.<sup>179</sup> It also occurs with the intentional passive solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.<sup>180</sup> The party who suffers damage resulting from such trading in influence is the state employing

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176 *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Intern.* 493 U.S. 400, 110 S. Ct. 701 U.S.N.J., 1990. 17 January 1990.

177 Art. 2(d) UNCC.

178 Art. 17 UNCC.

179 Art. 18(a) UNCC.

180 Art. 18(b) UNCC.

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such a public official whose decision-making process has been unduly corrupted by the acts of the public official.

Similarly, Arts. 19 and 20 prohibit, respectively, the abuse of function and illicit enrichment. These corrupt acts of abuse of function occurs with the intentional abuse of functions or position, *i.e.* the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself, or for another person or entity.<sup>181</sup> Illicit enrichment occurs where there is a significant intentional increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.<sup>182</sup> In both instances the state whose governing processes have been abused or whose official has been corrupted by unexplained fund is the party that suffers the damage of these corrupt acts.

Included in the acts of corruption is the laundering of the proceeds of crime,<sup>183</sup> concealment or continued retention of property that result from any of the acts of corruption,<sup>184</sup> and the obstruction of justice.<sup>185</sup> Each of these acts results from criminal activity and hinders the prosecution or seeks to conceal the proceeds of crime. In each of these instances the primary party addressed by these acts of corruption is the state.

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181 Art. 19 UNCC.

182 Art. 20 UNCC.

183 Art. 23 UNCC prohibits the following actions as acts of corruption when committed intentionally: (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action; (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime; (iii) Subject to the basic concepts of its legal system, the acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime; (iv) Subject to the basic concepts of its legal system participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the above mentioned offenses.

184 Art. 24 UNCC prohibits as an act of corruption the intentional concealment or the continued retention of property when the person involved knows that such property is the result of any of the corruption offenses established under the UNCC after the commission of any of the corruption offenses established under the UNCC and without having participated in such offenses.

185 Art. 25(a) UNCC includes as an act of corruption when committed intentionally the use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of the corruption offences established under the UNCC. Similarly, the intentional use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of the corruption offences is prohibited.

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Unlike the claims for damage suffered by private interests, there is no clear provision for a *private cause of action* in such instances. This is understandable because the traditional defender of the public interest is the government. Indeed the examples cited below show examples of private remedies for corruption sought by variously by a state government using private law processes to protect the *interest of the state and people*; a state company seeking redress for international corrupt activity affecting its officials; and a succeeding government using the processes of private law to seek remedies for corrupt actions. Other examples show attempts by NGOs and private citizens to seek redress on the behalf of the general citizenry for damage caused by a corrupt activity. Several of these examples are taken from jurisdictions beyond the US, England and the Netherlands because they chart new territory and are a window into the variety of methods emerging to seek private remedies for corrupt activity.

### 9.8.1 Claim for Social Damages

A Costa Rican case involving international corruption by the multinational corporation Alcatel-Lucent provides a novel approach of suing for *social damage* for damage suffered as a result of corruption. Alcatel-Lucent, a provider of telecommunications equipment and services, reported in its SEC 2009 Annual Report (Form 20) that in July 2007, the Costa Rican Prosecutor's Office indicted eleven citizens, including the former president of Alcatel de Costa Rica, on charges of aggravated corruption, unlawful enrichment, simulation, and fraud.<sup>186</sup> High-level government officials in Costa Rica were alleged to have received millions of dollars in bribes to ensure that Alcatel obtained or retained three contracts to provide telephone services in Costa Rica. These indictments by the Costa Rican prosecutor's office resulted from information that came to light from an investigation into the activities of Alcatel by the US Authorities.<sup>187</sup>

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186 The Attorney General's claim superseded two prior claims, of 25 November 2004 and 31 August 2006. On 25 November 2004, the Costa Rican Attorney General's Office commenced a civil lawsuit against Alcatel-Lucent France ('CIT') to seek pecuniary compensation for the damage caused by the alleged payments described above to the people and the Treasury of Costa Rica, and for the loss of prestige suffered by the Nation of Costa Rica (social damages). The ICE claim, which supersedes its prior claim of 1 February 2005, sought pecuniary compensation for the damage caused by the alleged payments described above to ICE and its customers, for the harm to the reputation of ICE resulting from these events (moral damages), and for damages resulting from an alleged overpricing it was forced to pay under its contract with CIT. Reported in Alcatel-Lucent 2009 Annual Report on Form 20-F, p. 72, available at: [http://www.sec.gov/Archives/edgar/data/886125/000130817910000036/alc200920f.htm#\\_Toc256703761](http://www.sec.gov/Archives/edgar/data/886125/000130817910000036/alc200920f.htm#_Toc256703761).

187 Id.

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In December 2010 a settlement with the US Securities and Exchange Commission was reached and Alcatel-Lucent agreed to pay a total \$45,372 million in disgorgement to the SEC as well as a \$92 million criminal fine to the US Department of Justice. At this point, the Costa Rican Attorney General's Office and El Instituto Costarricense de Electricidad ('ICE'), one of the Costa Rican state-owned entities whose officials' were bribed by Alcatel Lucent consultants, filed amended civil claims against the eleven criminal defendants, as well as five additional civil defendants including, Alcatel-Lucent France ('CIT'), seeking compensation for *social damages* in the amounts of US \$52 million (in the case of the Attorney General's Office) and US \$20 million (in the case of ICE). On 20 January 2010 Alcatel-Lucent France entered into a settlement whereby the claim for social damages by the Attorney General would be dismissed in exchange for a payment of \$10 million to compensate for the social damage brought about by the corrupt activity.<sup>188</sup>

The action filed by the government of Costa Rica under the Criminal Procedural Rules in Costa Rica, to seek pecuniary compensation for damage suffered by the collective interests of the state and peoples of Costa Rica, illustrates a resort to private law notions of compensation for damage suffered as a result of corrupt activity.<sup>189</sup> This provision for *social damage* has been described as a relatively new concept provided by Art. 50 Costa Rican Constitution and Art. 38 Criminal Procedure Code. Art. 38 of the Costa Rican Criminal Procedural Code provides that a '[C]ivil action for social harm civil action may be brought by the Attorney General's Office, in the case of offenses involving collective or diffuse interests.' This imposes a liability on persons who have caused damage to society by acts of corruption to claim civil compensation for such damage.<sup>190</sup>

### 9.8.2 Claim for Mandatory Restitution by a State Company

On 20 April 2010, El Instituto Costarricense de Electricidad ('ICE'), one of the Costa Rican state-owned entities whose officials' were bribed by consultants acting for Alcatel Lucent,<sup>191</sup> filed a civil RICO action in a Florida state court seeking \$73 million as damages for the bribery of its officials which resulted in the company overpaying for and receiving poor service in

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188 Id.

189 See J. Olaya, K. Attisso, A. Roth, 'Repairing Social Damage out of Corruption Cases: Opportunities and Challenges as Illustrated in the Alcatel Case in Costa Rica', (6 December 2010), (Unpublished), electronic copy available at SSRN: <http://ssrn.com/abstract=1779834>.

190 Special Session– Finding the Real Cost of Corruption: How to Use the Concept of Social Damage for the Anti-Corruption Struggle, 14th International Anti-Corruption Conference, available at [14iacc.org/wp-content/uploads/SocialDamagePaper20.01.2011.pdf](http://14iacc.org/wp-content/uploads/SocialDamagePaper20.01.2011.pdf).

191 Id.

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respect of the contract that resulted from the bribery exchange.<sup>192</sup> This claim was dismissed by the Florida court on the grounds of *forum non conveniens* in April 2011. An appeal is pending.<sup>193</sup>

In a related petition for *mandamus* before the Florida Court of Appeals, ICE objected to the settlement and deferred prosecution agreements reached between the Department of Justice and Alcatel-Lucent France, S.A., Alcatel-Lucent Trade International, A.G., and Alcatel Centroamerica, S.A. to the tune of a payment of \$92,000,000 in fines, as a result of a Deferred Prosecution Agreement, and the payment of \$45,372,000 in disgorgement in a related SEC civil enforcement proceeding.<sup>194</sup> ICE sought to be regarded as a victim to benefit from the Mandatory Victims Restitution Act (18 USC Sec. 3663A). As Alcatel was pleading guilty to conspiracy, a Title 18 crime, ICE argued that it was entitled to mandatory restitution.

The SEC denied ICE's request for a 'Fair Fund' and the government subsequently argued in its response to ICE'S Petition for *Victim Status and Restitution* that the state-owned entity at which corruption was so pervasive in the tender process should not be permitted status as a victim or awarded restitution.<sup>195</sup> The SEC argued that it was not just the corrupt ICE officials who were to blame for the corruption that existed at ICE, but ICE itself as an organization, because it appeared from the facts to have had 'a deeply ingrained culture of corruption' and that this corrupt conduct did not just involve some low-level employees but rather that nearly half of the Board of Directors of ICE received bribes. Thus the component of the business

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192 *Instituto Costarricense de Electricidad v. Alcatel-Lucent, S.A.*, Complaint, Case No. 10-25859 CA 13 (Fla. Cir. Ct. 13 April 2010), at p. 1. ICE was a co-plaintiff in the case filed by the Costa Rican Attorney General's Office against several defendants including Alcatel Lucent France claiming social damages in the amounts of \$52 million (in the case of the Attorney General's Office) and \$20 million (in the case of ICE). ICE did not participate in Alcatel-Lucent's agreement with Costa-Rican prosecutors and proceeded to file this suit in a Florida Court seeking \$73 million for damages suffered by the State Company as result of Alcatel-Lucent's 'worldwide scheme of bribery and corruption.'

193 *Instituto Costarricense de Electricidad v. Alcatel-Lucent*, Order, Case No. 10-25859 CA 13 (Fla. Cir. Ct. 11 January 2011). See Generally L. 'Low, Analysis Alcatel-Lucent's \$137 Million FCPA Settlements Reflect Expansive Jurisdiction, New Compliance Standards, International Cooperation, and Collateral Risks.' Newsletter, 10 March 2011, Steptoe & Johnson, LLP, available at [www.steptoel.com/publications-newsletter-pdf.html/pdf/?item\\_id=124](http://www.steptoel.com/publications-newsletter-pdf.html/pdf/?item_id=124).

194 *United States v. Alcatel-Lucent, France, S.A. et al.*. Petition for relief pursuant to 18 USC Sec. 3771(d)(3) and objection to plea agreements and deferred prosecution agreement in Case No. 10-20906-CR COOKE (S.D. Fla.).

195 See *Government's Response to ICE'S Petition for Victim Status and Restitution. United States v. Alcatel-Lucent, France, S.A. et al.*, Case No. 10-20906-CR COOKE, Case No. 10-CR-20907-COOKE (S.D. Fla.), p. 4.

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corporation most ‘in control of and responsible’ for the actions of ICE was profoundly corrupt.<sup>196</sup>

Furthermore the government argued that even if ICE could be regarded as a victim, restitution could not in this case be awarded for two reasons. Firstly, because of the compensatory nature of restitution, the government argued that restitutionary award would not be possible because any attempt to determine the amount of loss actually caused by the actions of the bribed officials would be speculation since restitution is limited to the ‘victim’s provable actual loss.’ In this case, the ‘conduct involved a corrupt tender process in which it is impossible to know which company would have won the bid and at what price, and thus, trying to unwind this process a decade later and determine the amount of loss, if any, would be sheer speculation.’

Secondly, the SEC argued that the complexity of the questions of fact concerning the quality of products and services provided by the subsidiaries of Alcatel Lucent et al. would complicate and prolong the sentencing process to such a degree that this burden on the sentencing process should far outweigh the need to provide restitution to ICE especially as reparations had already been paid to the Costa Rican Government and the various avenues of redress available to ICE in Costa Rica.<sup>197</sup>

The District Court found that ICE was not a victim but actually a co-conspirator and denied the petition. This ruling was affirmed on appeal.<sup>198</sup> Nonetheless this case opens the interesting possibility for corporations who are able to separate themselves from the act of their officers to seek mandatory restitution in respect of SEC settlements under US law.

### 9.8.3 Private Citizens Challenging Acts of Corruption by State Officials

Citizens and non-governmental organizations have teamed up to initiate actions against national leaders alleging corruption that has had negative consequences for the general populations of countries like the Congo Brazzaville, Equatorial Guinea and Gabon. Private citizens have sought to compel the authorities to commence investigations or make declarations and recommendations that will initiate prosecutions or impose accountability mechanisms on state leaders.

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196 Id at p. 12.

197 Id at p. 6.

198 In *Re: Instituto Costarricense de Electricidad US Court of Appeals, Eleventh Circuit, In the Matter of Petition for a Writ of Mandamus*, Case No. 11-12707-G; Case No. 11-12708-G (S.D. Fla.).

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In March 2007, three French NGOs – Sherpa, Survie and the Fédération des Congolais de la Diaspora – filed a legal complaint before the French Public Prosecutor alleging the diversion of public funds by three African Presidents – Denis Sassou N’Guesso (of Congo-Brazzaville), the now deceased Omar Bongo-Ondimba (of Gabon) and Teodoro Obiang Mbasogo (of Equatorial Guinea) – as well as by their family members and close associates.<sup>199</sup> In response to the complaint, a preliminary police investigation confirmed most of the allegations and further uncovered various additional assets, properties and goods (luxury cars, bank accounts). The investigation revealed: former President Bongo and his relatives owned 70 French bank accounts, nine cars, and 39 apartments – many located in the wealthiest district of Paris. The moneys at issue have also reportedly been traced to 24 apartments and 112 bank accounts in France owned by President Sassou N’Guesso and his relatives, and to eight cars and an apartment in France owned by the Obiang family.

The case was dismissed on 7 November 2007, as the prosecutor ruled the grounds on which it was brought were ‘insufficiently characterized.’ In July 2008 TI France, together with Congolese and Gabonese citizens, lodged another complaint before the French Public Prosecutor. This complaint was strictly identical to the one filed by Sherpa sixteen months before and in a similar vein to the previous complaint, the Public Prosecutor decided on 3 September 2008 not to pursue the case. Again on 2 December 2008, TI France and Gregory Ngbwa Mintsas, a Gabonese citizen, filed a complaint with a civil party petition in the hope of triggering a judiciary inquiry.

The court admitted the claim of Transparency International but dismissed that of Gregory Ngbwa Mintsas on the grounds that he had no standing in this case. The Public Prosecution, however, appealed the decision. In October 2009 the Paris Court of Appeal ruled that the TI was admissible as a civil party. TI (France) appealed to the Supreme Court (Cour de Cassation). The Supreme Court overruled the decision of the Paris Court of Appeal by ruling the complaint filed by TI France was admissible. This is viewed as ‘a considerable *legal milestone*,’ as ‘[F]or the first time in France, the *collective action of an anti-corruption association is deemed admissible before a criminal court*.’

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199 See Press release by Transparency International (France) [http://www.transparency.org/news\\_room/latest\\_news/press\\_releases\\_nc/2010/2010\\_11\\_9\\_paris](http://www.transparency.org/news_room/latest_news/press_releases_nc/2010/2010_11_9_paris), and the report ‘Mal Acquis: A Qui Profite le Crime?’ June 2009. <http://www.cfd.asso.fr/BMA/>.

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This, in the view of TI France, will help to ‘overcome the inertia of public prosecution in sensitive cases of political or financial nature in the future.’<sup>200</sup>

### 9.8.4 The NGO Acting in the Public Interest

In 2007, the Asociacion pro Derechos Humanos de Espafia (APDHE), a Spanish human rights organization, EG Justice, a US-based rights organization, and the Open Society Justice Initiative filed a complaint before the African Commission on Human and Peoples’ Rights, arguing that a systematic spoliation of the peoples’ wealth had been perpetrated over decades on Equatorial Guinea by the ruling elite. The complaint asserted that in spite of the fact that Equatorial Guinea had a small population of about 550,000, when compared with a vast wealth of natural resources, namely, abundant hydrocarbon deposits, forestry, fishing, titanium, iron ore, manganese, uranium, and alluvial gold, as well as the fact that Equatorial Guinea had never suffered the negative consequences of civil war and invasion – because of large-scale corruption, Equatorial Guinea was at or near the bottom for every major development and governance indicator, far below countries whose per capita wealth should make them peers.<sup>201</sup>

The plaintiffs alleged that the diversion of the peoples’ wealth was accomplished through several means, including but not limited to expropriation of property from citizens, sham investments with foreign corporations, direct diversion of government revenue into private accounts, and of particular relevance to the issue of international corruption, the ‘... [R]igged Government procurement, construction, and licensing contracts “negotiated” by officials irremediably tainted by conflicts of interest’ and ‘[S]ecret off-the-books “contributions” by foreign companies of educational scholarships and other payments to or for the benefit of leading members of the Nguemo Mongomo group ...’<sup>202</sup>

The APDHE requested that the Commission issue recommendations to the Government of the Republic of Equatorial Guinea that will oblige it to: (i) engage with representatives of all sectors of civil society to ensure genuine oversight by the people of revenues, investments, and expenditures comprising

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200 For details of the complaint see:  
[http://www.transparency.org/news\\_room/latest\\_news/press\\_releases\\_nc/2008/2008\\_12\\_02\\_stolen\\_assets\\_tifrance](http://www.transparency.org/news_room/latest_news/press_releases_nc/2008/2008_12_02_stolen_assets_tifrance). Subsequently the French Appeals Court has halted the lawsuit and ruled that the activists could not act against foreign heads of State. See *BBC News Report*, ‘France Halts African Leaders Case’, <http://news.bbc.co.uk/2/hi/africa/8331372.stm>.

201 Communication to the Commission, APDHE, Justice Initiative, and EG Justice, 12 October 2007, at pp. 3-4.

202 *Id.*, at pp. 7-8.

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or deriving from the peoples' resources, including rapid and full implementation of all steps necessary for compliance with its obligations under the Extractive Industries Transparency Initiative; (ii) establish and enforce a compulsory system of regular and meaningful financial disclosure under direct monitoring of the Commission applicable to all government departments without exception, in order to help 'prevent potential conflicts of interest, help to detect illicit enrichment of public officials, and ... help to deter corrupt practices'; (iii) ensure full and fair rights of appeal regarding land condemnation decisions, and prompt and adequate compensation, including provision for comparable alternative housing; (iv) ensure that the dire needs of Equatoguineans in the spheres of health, education, and housing are adequately addressed, including by provision of adequate resources for such needs in the Government's budgets; and (v) take such other remedial measures as may come to appear appropriate during the course of the proceedings relating to this case.<sup>203</sup> The case is pending.

In a related development, in 2008 the APDHE filed a citizen's complaint calling for an investigation into money laundering and corruption by the Obiang family. According to the complaint, in April 2004, the United States Senate Permanent Subcommittee on Investigations submitted a report on money laundering and foreign corruption focusing on the activities of the US entity Riggs Bank.<sup>204</sup> During the course of the investigations, a number of accounts held by the Government of Equatorial Guinea, by senior government officials and by some of their family members were found in this bank.<sup>205</sup> The case is under investigation.

A case that deals with a high level corruption and the right to private remedies, is the recent suit by the *Registered Trustees of the Socio-Economic Rights and Accountability Project SERAP v. The Federal Republic of Nigeria and the Universal Basic Education Commission* before the Community Court of the Economic Community of West African States (ECOWAS).<sup>206</sup> This case was based on a report of investigations conducted into the activities of the Universal Basic Education Fund centered on the mismanagement of funds

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203 Id., at p. 10.

204 *The Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act. Case Study involving Riggs Bank. United States Senate, Permanent Subcommittee on Investigations, Committee on Governmental Affairs, Chairman Norm Coleman, Ranking Minority Member. Carl Levin. Prepared by the minority staff of the permanent subcommittee on investigations. Released in conjunction with the permanent subcommittee on investigations hearing on 15 July 2004.*

205 See criminal complaint APDHE v. Obiang Family, available at <http://www.soros.org/initiatives/justice/litigation/obiangfamily>.

206 *SERAP v. Federal Republic of Nigeria and Universal Basic Education Commission, ECW/CCJ/JUD/07/10.*

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allocated for basic education in ten states of the Federation of Nigeria submitted to the Nigerian Presidency on 13 April 2004.<sup>207</sup> In October 2007 the Independent Corrupt Practices Commission set up by the FG to handle matters of corruption within government establishments (ICPC) reported having recovered 488 million naira of funds looted from state offices and headquarters of the UBEF and that it was still battling to recover another 3.1 billion naira looted by officials of the UBEF.<sup>208</sup>

SERAP alleged in its civil suit that these findings by the ICPC were not an isolated case but rather an illustration of the high-level corruption and theft of funds meant for primary education in Nigeria with the result that over five million Nigerian children have no access to primary education. SERAP further alleged that the Nigerian government had contributed to this problem by ‘failing to seriously address allegations of corruption at the highest levels of government and the level of impunity that facilitate corruption in Nigeria.’<sup>209</sup> SERAP sought from the ECOWAS court a declaration that every Nigerian child is entitled to free and compulsory education<sup>210</sup> and asked that the court should (1) order the Nigerian government to make adequate provisions for the compulsory and free education of every Nigerian child; (2) arrest and prosecute public officers who diverted 3.5 billion naira from the UBE fund; (3) compel the Nigerian government to fully recognize primary school teachers unions freedoms; and (4) compel the Nigerian government to assess progress in realizing the right to education as well as obstacles impeding the access of Nigerian children to education.<sup>211</sup>

The ECOWAS Court found that the ICPC Report that made conclusive findings of corruption would not *per se* amount to a denial of the right of education without more.<sup>212</sup> There has to be, in the opinion of the court, a clear linkage between the acts of corruption and a denial of the right of education. The court pointed out that ‘in a vast country like Nigeria with her massive resources, one can hardly say that an isolated act of corruption contained in a report will have such devastating consequence as a denial of the right to education ....’<sup>213</sup>

The court rejected what it referred to as a sweeping conclusion made by the applicant that this was not an ‘isolated case but an illustration of high-level

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207 Id., Para. 3.

208 Id., Para. 4.

209 Id., Para. 6.

210 By virtue of Art. 17 African Child’s Rights Act.

211 Id., Para. 9.

212 Id., Para. 19.

213 Id.

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corruption in Nigeria. However, the court held that the right to free and compulsory education was *justiciable under the African Charter of Human and Peoples' Rights*. While the court did not consider the evidence presented sufficient for it to make a finding regarding the illegality or constitutionality in respect of the plaintiffs' allegations, they conceded that the fact of embezzlement or theft of part of the funds allocated to the basic education sector would have a negative impact since the shortage of funds would disable the sector from performing as envisaged. As such the court held that pending the attempts to recover the funds by the ICPC it was necessary that the government of Nigeria should 'take the necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education programme ....'<sup>214</sup>

### 9.8.5 The Succeeding Government

A category of victim that is more likely to have the 'will' to bring a private action is the victim that is left 'holding the can' of a looted treasury or unsustainable transactions entered into as a result of bribes. For such victims, private civil remedies may offer a more effective method of recovery and relief.

In March 1999, the High Court in London ordered the freezing of all accounts belonging to former Nigerian ruler Sanni Abacha's family. This followed revelations by the UK monetary regulator – the Financial Services Authority (FSA) – that it had discovered 23 banks in the UK that had handled \$1.3 billion of the transactions on behalf of the Abacha family between 1996 and 2000. The Financial Times reports that the banks included the London branches of Germany's Deutsche Bank and Commerzbank, France's BNP Paribas and Credit Agricole as well as Switzerland's leading banks, Credit Suisse and UBS. The court order also reportedly named Britain's high street banks HSBC, Barclays and NatWest. American banks Goldman Sachs, Merrill Lynch and Citibank were also featured in the list seen by the FT alongside several Nigerian banks.<sup>215</sup>

According to the report, the lawyers acting for the Nigerian Government obtained the court order after delays in pursuing criminal prosecutions in Britain. The government was able to freeze \$30 million stashed in UK banks. Toby Graham points out that this case shows that when it comes to the recovery of corruption proceeds, the civil law route is quicker. He remarks in

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214 Id., Paras. 27-28.

215 Reported in *BBC News Report*, "'Abacha Accounts' to be Frozen", Wednesday, 3 October 2001, available at <http://news.bbc.co.uk/2/hi/africa/1576527.stm>.

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respect of the Abacha case ‘Nigeria’s case in the High Court illustrates this. The action started in June 1999 and many of the issues were dealt with at a hearing just over a year later in December 2000.’<sup>216</sup>

### 9.8.6 Summary

While the cases discussed above show that that complainants seeking to institute a claim for damage to the public interest were faced with a variety of challenges, there is nevertheless a discernible movement towards the use of private remedies, and so it may be argued that the victim of corruption is gradually moving to the center stage. This group of private actors is developing a new dynamic in the fight against corruption by using private methods of redress as opposed to the public-criminal state-centered processes of enforcement. Encouraging such private litigants should be a deliberate aspect of anti-corruption policy as a viable and important method of ensuring that corrupt activity is more reported, investigated and litigated.

### 9.9 Encouraging the Private Litigant

As regards empowering the private litigant, the issue of private remedies can be viewed from (1) the perspective of legal standing to sue; (2) the cost of instituting legal proceedings and (3) the retaliation that may be suffered by the whistle-blower that exposes corrupt activity. The private victim is an untapped resource in the fight against corruption. Encouraging the ability of the private victim to enter into the sanctioning processes of corruption is an important method of confronting the realities of the negative consequences of corruption on governance and political structures. A system compromised by corruption can be assisted not only by external agencies (such as tackling the supply side of corruption) but also by empowering individuals within the system. Creating mechanisms that enable such local challenges to the status quo is an important step in this regard. The following sections detail some responses to these challenges.

#### 9.9.1 Standing to Sue: Rights *ius quaesitum tertio*

As discussed above, a primary problem for such a potential private litigant seeking a claim for damage to the public interest is the lack of legal standing to bring a claim. Such a potential plaintiff may suffer the consequences (but not

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216 See generally T. Graham, ‘The Implications for Intermediaries Handling the Proceeds of Corruption: The Abacha Case Study’. Presented at the ‘Stop Money Laundering!’ Conference - 26 February 2002, London, available at <http://www.antimoneylaundering.ukf.net/papers/tgraham.htm>.

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be a direct party) of the contract tainted by corruption. A suggestion is made below about encouraging the use of *third-party beneficiary* clauses in a bid to provide legal standing and empower these as yet underutilized actors in the fight against corruption.

There are typically two bilateral contracts that accompany the corrupt exchange. The first is the primary contract to give a bribe where the parties are typically the bribe-giver on the one hand and the bribe-recipient on the other. The second is the secondary contract that results from a successful bribery exchange between the bribe-giver and the principal of the bribe-recipient. Contractual rights and obligation flow from these two sets of contracts to the principal, bribe-recipient and bribe-giver, respectively. Parties affected by these contracts that fall outside of these configurations are third parties.<sup>217</sup>

Contracts entered into with government officials will often have a public purpose. A contract to build a school, provide telecommunications, equip a hospital, provide electricity, roads, clean water, telecommunications to give a few examples, are intended to benefit more persons than simply the immediate parties to the contract.<sup>218</sup> Does a party who stood to gain some benefit under a contract have a right of enforcement or damages with respect to such a contract. Can third-party rights *ius quaesitum tertio* arise with respect to contracts tainted by corruption? Or put in another perspective: can 'contracts be used as a tool to extend and enforce public values?'<sup>219</sup>

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217 The route of a bribe may be deliberately circuitous in order to conceal the fact of bribery. The bribe-giver may not proceed directly from the bribe-giver to a government official but be paid through a company who enters into an agreement with a consultant who then pays the bribe to an agent who then pays the bribe into an appointed company. In the process of this journey, the character of the bribe as a bribe may or may not be apparent to the persons involved in the transacting process. Such persons can also be described as third parties.

218 I. Alvik discusses the state contract from the perspective of contractual commitments under international law emphasizing the fact that the increased volume of investment treaty arbitration raises fundamental questions about the legal and structural basis of contractual commitments under international law. Part of the dilemma occasioned by such contracts is the political and economic development issues that are usually tied up with such contracts. See I. Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration*, Hart, Oxford, 2011, pp. 2- 4.

219 See L. Dickinson, 'Public law values in a privatized world', *Yale Journal of International Law*, Vol. 31, 2006, pp. 383-426, at p. 401. Dickinson points out that:

'the contracts governments enter into with non-state actors can include many provisions that would help to create both standards of behavior, performance benchmarks, and a means of providing some measure of public accountability. While such contractual provisions are not a panacea, they may be at least as effective as the relatively weak enforcement regime of public international law.' *Id.*, at p. 401.

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The question that arises with regard to the rights of such third parties is the extent to which these parties can sue on the contract tainted by corruption.<sup>220</sup> There is no new standard established under the UNCC in this regard and recourse must be made to the fundamental principle of domestic law to determine the extent to which such third parties are allowed to bring a claim for non-performance. In the three jurisdictions studied in this book, the rights of a stranger to a contract, or third party to seek the performance of obligations under certain circumstances, are well accepted.<sup>221</sup>

The general principle of privity of contract in all jurisdictions, as well as the requirement for consideration in common law jurisdictions in the US and England would ordinarily shut the door on a right of persons who have not provided any consideration to sue on a contract. While a particular group of persons may well benefit from the performance of a contract that is tainted by corruption, the right of enforcement is restricted to the parties to the contract. A company, for example, who performs a shoddy job or does not perform optimally because the bidding process was compromised by bribery, does not owe a contractual obligation to the citizens who are deprived of the benefit of the contract, but only to the government authorities with whom the contract was entered into.

However, all three jurisdictions studied in this book recognize the right of persons who are not parties to a contract to sue on the contract under certain circumstances. In general, the third party has to become a beneficiary of the contract within the contemplation of the parties to the contract. In the US, parties to a contract can by agreement give rights to a beneficiary that is not a

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220 A related question, outside the scope of this book, that arises with regard to corruption as a relevant factor in assessing the validity or enforceability of contracts is the rights of such innocent third parties or holders in due course of assignments of rights under the contracts such as the banks and other financial institutions that finance commercial transactions where a contract is declared unenforceable as result of corruption. See further Chapter 1, Footnote 48 above in this regard.

221 See for example Sec. 302 of the Restatement (2nd) Contracts, which provides that: (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. In the United Kingdom the Contract (Rights of Third Parties) Act of 1999 recognizes that 'a person who is not a party to a contract (in this act referred to as a third party) may in his own right enforce the contract if: (a) the contract contains an express term to that effect; or (b) subject to subsection (2) the contract purports to confer a benefit on the third party.' Art. 6:253 Dutch Civil Code provides that a contract creates a right for a third party to claim a performance from one of the parties or to invoke the contract in another manner against one of them if a contract contains a stipulation to that effect and if the third party accepts it.

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party to the contract.<sup>222</sup> Sec. 302(1) of the Restatement states that a beneficiary of a promise under a contract is an intended beneficiary if the recognition of such a right of performance by the beneficiary reflects the intention of the parties.<sup>223</sup> An intended beneficiary can be distinguished from an incidental beneficiary who has no enforcement rights as there was no intention or promise by the parties to the agreement to confer rights on such a person.<sup>224</sup>

In the UK, the Contracts (Rights of Third Parties) Act 1999 provides for a limited right of action by third parties if the *contract expressly provides* that the third party may enforce a contractual term<sup>225</sup> or where the contract purports to confer a benefit on the third party.<sup>226</sup> There is no right of enforcement by the third party if on a proper construction of the contract it appears that the parties to the contract did not intend the term to be enforceable by the third party,<sup>227</sup> or the third party is not expressly identified in the contract by name as a member of a class or as answering a particular description.<sup>228</sup>

The Dutch Civil Code provides for a limited right by third parties to seek performance where ‘the *contract provides* the right for a third party to claim performance from one of the parties or to otherwise invoke the contract against any of them if the contract contains a stipulation to that effect and the third party so accepts.’<sup>229</sup> Once the third party has accepted the stipulation, the third party is deemed to be a party to the contract.<sup>230</sup>

The three jurisdictions considered in this book make it possible for parties to a contract to extend the right to sue on the contract to third parties. As Farnsworth notes, ‘[i]f the parties have provided either that the third party has the right to enforce the agreement or that the third party does not have the right the court will give effect to that provision.’<sup>231</sup> Using the contract as a tool to extend public values repudiating corruption by creating standing for the group of persons most often directly affected by the negative influence of corruption in contracts with a public dimension, raises interesting possibilities with regard to the fight against corruption. Farnsworth notes that government contracts for public services are subject to the rules on third-party beneficiaries but that

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222 The rights of third party beneficiaries were recognized very early in the United States. See *Lawrence v. Fox*, 20 N.Y. 268 (1859).

223 Sec. 302 (1) Restatement (2nd) Contracts.

224 Sec. 302 (2) Restatement (2nd) Contracts.

225 UK Contracts (Rights of Third Parties) Act 1999 Sec. 1(1)(a).

226 Id Sec. 1(1)(b).

227 Id Sec. 1(2).

228 Id Sec. 1(3).

229 Art. 6:253(1) DCC.

230 Art. 6:254(1) DCC.

231 E. Farnsworth, id., pp. 657-661. See also Note, ‘The third party beneficiary concept: a Proposal’, 57 *Colum. Law Review*, 406, 1957.

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courts are sensitive to problems such as the possibility of excessive financial burden, the risk of a multitude of claims, the likelihood of impairments of services as well as the difficulty in determining the intent of the government as factors that have caused the courts to be reluctant to accord individual members of the public rights as beneficiaries.<sup>232</sup>

However, giving third parties standing to bring a claim with respect to contracts tainted by corruption is a method of empowering and protecting the public.<sup>233</sup> Therefore a balance should be struck between ‘circumscribing third-party standing to enforce government contracts to protect private parties who contract with the government from endless litigation,’<sup>234</sup> on the one hand, and the fact that lack of standing to bring a suit may leave members of the public with no recourse especially where the government has a monopoly on initiating sanction. Zalesne writes that where the ‘government is the only party that can enforce a contract on behalf of the public, the government failure to act is particularly devastating ....’<sup>235</sup>

Avoiding frivolous suits or opening the floodgates to litigation is an important consideration to support a very restrictive approach to third-party beneficiary rights.<sup>236</sup> However, the actors in the international transactions tainted by corruption may have in the *third-party beneficiary clause* a method of creating a self-regulatory mechanism that encourages compliance with the anti-corruption laws. The third-party beneficiary doctrine can provide an opportunity for a private-public partnership in the fight against corruption by using a sleeping clause to expressly make a clearly defined group of individuals who will benefit from a public contract, either by location or performance, intended beneficiaries and stipulating evidence of corruption or fraud in the contracting process as the trigger to activate the clause. If there is no evidence of corruption, the clause will not come into effect. If there is evidence of corruption (on terms that can be stipulated in the contract), the

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232 E. Farnsworth at p. 667. See also R. Adelson, ‘Third party beneficiary and implied right of action analysis: the fiction of one governmental intent,’ *Yale Law Journal* 875, Vol. 94, No. 4, March 1985, p. 875.

233 D. Zalesne, ‘Enforcing the contract at all (social) costs: the boundary between private contract law and the public interest,’ *Texas Wesleyan Law Review*, Vol. 11, p. 579, at p. 602.

234 *Id.*, at p. 603.

235 *Id.*, at p. 605.

236 This is a necessary balance that needs to be struck. Ruggie points out that ‘States should strengthen judicial capacity to hear complaints and enforce remedies against all corporations based in their territory, while also protecting against frivolous claims.’ See J. Ruggie, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights’, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5, 2008, 7 April 2008, available at <http://www.reports-andmaterials.org/Ruggie-report-7-Apr-2008.pdf>, at Para. 91.

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third-party beneficiary clause will come automatically into effect. The identified third-party beneficiaries will become parties to the contract and acquire standing to sue on the contract as a party to the contract.

A third-beneficiary clause could serve as an additional incentive for parties to contract in such a manner as not to activate the clause. Such a clause will be to the benefit of the government seeking to fight corruption by providing an incentive for companies to comply with anti-corruption rules and it could also be an incentive for corporations as it provides one more argument for the choice to comply. The fact that the trigger is linked to evidence of corruption, limits the scope of frivolous suits but at the same time by increasing the risks associated with bribery, can further level the playing field. Such a clause can be instituted by governments and international agencies in public procurement contracts. It can also be adopted independently of the state as a standard in large-scale contracting. Companies involved with contracts of a public dimension may show evidence of commitment to society by the inclusion of such a clause. The real value of such a clause is, of course, where it is never triggered into operation but rather serves as a self-regulatory incentive for compliant behavior.

The advantage of an intended beneficiary clause is that once inserted, it can kick in automatically where corruption is established and give a right of suit to the parties that ultimately bear the brunt of corrupt transactions. It can also circumvent the conflict of interest problems where a compromised government is the same entity charged with initiating the sanctioning process by creating independent standing for the indirect victims of corruption.

### 9.9.2 Public Interest Litigation

Even if the right to initiate a legal action is granted or exists, this may be more illusory than real, where the cost of undertaking such a measure by a plaintiff is too great. To encourage a public/private partnership in the fight against corruption, strategies to encourage the private litigant are essential. The overview of the position in the US, England and the Netherlands, shows that the US with its robust litigation culture also provides the most incentives by way of reward for the private litigant. The UK provides some encouragement by way of assistance with the costs of litigation while the Netherlands provides the least incentive.

In the US there is a very long tradition of encouraging the private litigant. A good example of legislation that incentivizes public/private co-operation is the

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False Claims Act,<sup>237</sup> which is based on the ancient common law principle of *qui tam*.<sup>238</sup> The False Claims Act imposes liability on persons that commit fraud against the Federal Government, and very importantly, provides for civil actions for such fraudulent claims as, for example, instances where a federal contract is obtained through the payments of bribes or other corrupt payments. The person who suffers in this instance is the American taxpayer in terms of lost revenues to the government as well as the social costs of contracts that are acquired via uncompetitive processes.<sup>239</sup> The right to bring a civil action is given to both the Attorney General and private persons.<sup>240</sup>

The False Claims Act creates a private interest in the form of a reward for successful prosecution.<sup>241</sup> The citizen bringing a claim under the False Claims Act is not bringing a claim based on the citizen's private injury, but rather on the assignment of an injury that is inflicted on the public. Sturycz points out that it is accepted that the standing of the relator (the citizen who brings the claim under the False Claims Act) is 'assigned' by the Act from the fraud claim that vests in the government as a result of the injury caused to the general public. This assignment theory has been explained in terms of an enforceable unilateral contract, the terms and conditions of which are accepted by the relator at the filing of an action.<sup>242</sup> This gives the relator the interest and the standing to bring a claim.

Apart from the False Claims Act, another initiative that encourages a public/private partnership in the fight against corruption is the recent Dodd-Frank Wall Street Reform and Consumer Protection Act,<sup>243</sup> which was signed into law by President Barack Obama on 21 July 2010. This Act creates new incentives for a public/private partnership with regard to the provisions of the

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237 The False Claims Act, enacted during the US civil, was revised in 1986 to strengthen the right of private parties to sue if codified in 31 U.S.C. Sec. 3729-3733.

238 *Qui tam* is abbreviated from the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, meaning '[he] who sues in this matter for the king as [well as] for himself.'

239 See Information on False Claims Act Litigation, (31 January 2006), available at: <http://www.gao.gov/new.items/d06320r.pdf>. S. REP. NO. 99-345, at p. 2 (1986), as reprinted in 1986 USCC.A.N. 5266, 5266-67. This Information states that 'From fiscal years 1987 through 2005, settlements and judgments for the federal government in FCA cases have exceeded \$15 billion, of which \$9.6 billion, or 64 per cent, was for cases filed by whistle-blowers under FCA's *qui tam* provisions. The whistle-blowers share of the *qui tam* settlements and judgments was over \$1.6 billion during this period.'

240 Sec. 3730. Civil Actions for False Claims.

241 See generally N. Sturycz, 'The King and I?: an examination of the interest *qui tam* relators represent and the implications for future False Claims Act litigation', *St. Louis University Public Law Review*, Vol. 28, No. 459, 2009. He notes that the US Ninth Circuit has held that 'the only private interest at stake in a *qui tam* action is the interest which Congress has created in a reward for successful prosecution,' at p. 31.

242 N. Sturycz, *id.*, at p. 9.

243 Pub. L. pp. 111-203, H.R. 4173.

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Securities and Exchange Commission or Department of Justice. With the Dodd-Frank Act, private citizens who report information that leads to successful enforcement actions under the FCPA which result in monetary sanctions exceeding \$1 million are entitled to between 10-30% of the penalty recovered.<sup>244</sup> The Dodd-Frank Scheme essentially incentivizes whistleblowing and creates a private interest in the form a reward that encourages a plurality of plaintiffs to initiate the disclosures of information that may bring secret bribery transactions to light.

There is no similar pattern of incentivizing public/private co-operation in the United Kingdom and the Netherlands. The closest processes that encourage private participation in the institution of legal proceedings for corrupt acts are strategies that reduce the cost of instituting private suits in the interest of the public on the one hand and strategies that protect the informant who blows the whistle on corrupt activity on the other. However, both of these methods fall short of motivating a broad range of potential plaintiffs, as there is no private interest in the form of reward created. Indeed public interest litigation is associated with the work of nonprofit civil society organizations. The following section looks at protective cost orders, alternative fee arrangements and whistle-blower protection under in the UK and the Netherlands as the closest approximation of a process to engage private citizens in the fight against corruption in these jurisdictions.

### 9.9.2.1 Protective Cost Orders

The need to encourage private actions can also be interpreted from a costs-perspective. In the UK a strategy that emerges from the anti-corruption jurisprudence is an order to ensure that the plaintiff bringing the claim will not be required to pay the costs of the defendant or any third party regardless of who wins the suit. A *Protective Costs Order* allows a judge to award costs out of central funds where it is in the interest of justice to allow a private party to initiate a claim that is in the interest of the general public.<sup>245</sup>

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244 Sec. 922. Dodd-Frank Wall Street Reform and Consumer Protection Act H.R. 4173 Whistle-blower provisions provided by amending The Securities Exchange Act of 1934 (15 USC 78a et seq.) by inserting after Sec. 21E the following: 'SEC. 21F. SECURITIES WHISTLEBLOWER INCENTIVES AND PROTECTION.'

245 Examples of Protective Costs Orders are *R v. Lord Chancellor, ex parte CPAG*, (1999) 1 WLR 347 (Dyson J. set down restrictive guidelines, and refused to grant protective costs orders on the facts.); *Campaign for Nuclear Disarmament v. Prime Minister et al.*, [2002] EWHC 2777 (Admin) (Divisional Court made a partial protective costs order (capping costs to £25,000) in CND's challenge to the legality of the Iraq war); *R (Refugee Legal Centre) v. SSHD*, [2004] EWCA Civ. pp. 1296 and 1239 (Court of Appeal granted a protective costs order by consent to allow the Refugee Legal Centre to challenge the UK's fast-track asylum system).

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The *Corner House* case made UK legal history in public law litigation by establishing the full extent of the protective costs order. According to the Corner House statement on this dispute, the Corner House instituted legal proceedings against the UK's Secretary of State for Trade and Industry on the grounds that the Export Credits Guarantee Department (ECGD) had, in November 2004, significantly weakened its rules aimed at reducing corruption without consulting the Corner House or other interested NGOs. The ECGD had, however, 'carried out extensive and detailed consultation with its corporate customers and their representatives,' who had lobbied the ECGD intensively on these rules. 'The one-sided nature of the consultation that did occur ... led to a result biased in favor of the ECGD's commercial customers.' The Corner House's claim before the court was that that the ECGD's failure to consult with other interested organizations 'was a serious breach of basic public law standards of fairness and the ECGD's own published consultation policy.'<sup>246</sup>

The Corner House was awarded an unprecedented full 'protective costs order' for a judicial review.<sup>247</sup> This meant that it would not have to pay the government's legal costs if it lost because it was bringing the case in the public interest.<sup>248</sup> On 13 January 2005, just as a two-day hearing in the High Court was to begin, the government settled out of court. It agreed to instigate a full public consultation on its changes to its anti-corruption rules, and to pay the Corner House's legal costs.<sup>249</sup>

The Court of Appeal in this case remarked that the general purpose of a Protective Cost Order is to allow a claimant of limited means access to the court in order to advance his case without the fear of an order for substantial costs being made against him, a fear which would disinhibit him from continuing with the case at all.<sup>250</sup> In the words of the Court of Appeal in this case, the traditional practice of the losing party paying the winning parties costs has led to a growing feeling that '... access to justice is sometimes unjustly impeded if there is slavish adherence to the normal private law costs regime.'<sup>251</sup>

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246 The Corner House press release, 25 January 2005, <http://www.thecornerhouse.org.uk/resource/corner-house-double-victory-uk-government-departments-anti-bribery-rules-and-public-intere-0>.

247 *R (Corner House Research) v. Secretary of State for Trade and Industry*, [2005] EWCA Civ.

248 The Corner House press release, id., Note 245.

249 Id.

250 *R (Corner House Research) v. Secretary of State for Trade and Industry*, [2005] EWCA Civ., Para. 6.

251 Id., Para. 28.

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In a case cited by the Court of Appeal in *The Corner House* case, Lord Diplock emphasizes the need, in some instances, for a public/private partnership in the interests of the rule of law and justice. He states:

‘It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The Attorney-General, although he occasionally applies for prerogative orders against public authorities that do not form part of central government, in practice never does so against government departments. It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.’<sup>252</sup>

The Court of Appeal laid down the criteria that should be taken into consideration in granting a Protective Costs Order as follows:

A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:

- i. The issues raised are of general public importance;
- ii. The public interest requires that those issues should be resolved;
- iii. The applicant has no private interest in the outcome of the case;
- iv. Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;
  - a. If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
  - b. If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.
  - c. It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.<sup>253</sup>

In coming to its decision the court stated among other things that:

‘the case raised issues of general public importance. The first reason was that it relates to the way in which major British companies, supported by credit guarantees backed by the taxpayer in accordance with a statutory scheme, do business abroad. Obtaining contracts by bribery is an evil which offends

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252 House of Lords in *IRC v. National Federation of Self-Employed and Small Businesses Ltd*, [1982] AC 617.

253 *Id.*, Para. 74.

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against the public policy of this country. When the interests of the taxpayer are involved, the question whether or not companies are obliged to provide details of money paid to middlemen, such as were required by ECGD with the strong endorsement of the relevant minister before the changes were made, is a matter of general public importance.<sup>254</sup>

### 9.9.2.2 Alternative Fee Arrangements

Other measures that can encourage a private litigant to initiate claims for corrupt activities can be generally grouped in strategies that relieve the costs of instituting actions.<sup>255</sup> These are contingency, conditional and third party funding schemes to bear the cost of instituting litigation.

*Contingency fee arrangements* center around paying legal fees for the lawyer as a percentage of the monies recovered from the claim. Contingency fees are widely used in the United States but are not permitted in the United Kingdom and the Netherlands. Another alternative fee arrangement is the *conditional fee agreement* (otherwise referred to as ‘success’ or ‘uplift’ fees). This arrangement differs from the contingency fee regimes that are allowed in the United States, which are based on a percentage of the compensation received by the successful claimant. Conditional agreement fees, on the other hand, are contingent on the success of the case and not on the damages awarded. If the lawsuit is won, the conditional fee arrangement allows that an agreed additional percentage of the normal fees charged (that is not related to the amount recovered) to be paid to the lawyers over and above the normal fee. Conditional fee arrangements are allowed in the United Kingdom under the Courts and Legal Services Act of 1990.<sup>256</sup> However, a recent ruling by the European Court of Human Rights calls into question the recoverability of such

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254 Id., Para. 137.

255 For an overview of the alternative fee arrangement see: ‘The Law Reform Commission of Hong Kong Report on Conditional Fees’, 2007. Available at <http://www.hkreform.gov.hk>.

256 Sec. 51 provides that a conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; ... Sec. (2)(a) defines a conditional fee agreement as ‘an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances; and (b) a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances.’ Sec. 51(3) provides that every conditional fee agreement (a) must be in writing, (b) it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement; and (c) it must comply with such requirements (if any) as may be prescribed by the Lord Chancellor. In April 2000 the Courts and Legal Services Act 1990 was amended by the Conditional Fee Agreements Regulations 2000. On 1 November 2005 these regulations were revoked. In March 2011, following the review of civil litigation costs carried out by Lord Justice Jackson, the ministry of Justice announced plans to reform conditional fee arrangements.

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success fees.<sup>257</sup> Conditional fee agreements are also not allowed in the Netherlands.<sup>258</sup>

Third-party funding by professional investors is another mechanism to fund private litigation. Such professional funders see the court case as an investment opportunity and will take a certain percentage of the compensation or settlement reached between the parties.<sup>259</sup> This is a new and emerging method of spreading the risk of financing private litigation. Also of value to the private litigant is the spreading of the costs via class actions. Clearly there has to be a real investment opportunity such as the possibility of punitive damages, triple damages or some other form of award that would make such third-party funding an attractive proposition.

### 9.9.2.3 Encouraging the Whistle-Blower

Another group of persons to be encouraged to step up are the onlookers who seek to blow the whistle on a corrupt act. The UNCC requires that each State

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257 *MGN Limited v. the United Kingdom*, Application No. 39401/04, the European Court of Human Rights, 18 January 2011, decision that the requirement to pay success fees, as an unsuccessful defendant in breach of confidence proceedings, constituted an interference with an applicant's right to freedom of expression. Whilst the interference was prescribed by law and had a legitimate aim of achieving the widest public access to legal services for civil litigation, the depth and nature of the flaws in the CFA system were such that the Court concluded that the impugned scheme exceeded even the broad margin of appreciation to be accorded to the UK. Here, Ms. Campbell was wealthy and not excluded from access to justice for financial reasons and her lawyers did limited CFA work (which limited their potential to act for impecunious claimants with access to justice problems) and MGN's case was not without merit, yet it was required to pay a large success fee. In such a case, the requirement to pay success fees was disproportionate.

258 'Resultaat gerelateerde beloningssystemen voor advocaten: Een vergelijk ende beschrijving van beloningssystemen voor advocaten in een aantal landen van de Europese Unie en Hong Kong', Eindrapport Kenmerk 1347/5381972/05, M. Faure, T. Hartlief, N. Philipsen. <http://wode.nl/onderzoeksdatabase/internationale-vergelijking-beloningssystemen-advocatuur.aspx>.

259 In *Arkin v. Borchard Lines Ltd & Ors*, [2005] EWCA Civ. 655, 26 May 2005, the Court of Appeal set down guidelines for the use of third-party funding. 'We consider that a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party to the extent of the funding provided ... Overall justice will be better served than leaving defendants in a position where they have no right to recover any costs from a professional funder whose intervention has permitted the continuation of a claim which has ultimately proved to be without merit. If the course which we have proposed becomes generally accepted, it is likely to have the following consequences. Professional funders are likely to cap the funds that they provide in order to limit their exposure to a reasonable amount. This should have a salutary effect in keeping costs proportionate. In the present case there was no such cap, and it is at least possible that the costs that MPC had agreed to fund grew to an extent where they ceased to be proportionate. Professional funders will also have to consider with even greater care whether the prospects of the litigation are sufficiently good to justify the support that they are asked to give. This also will be in the public interest.' At Paras. 41 and 42.

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party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offenses established in accordance with this Convention.<sup>260</sup> All jurisdictions provide incentives for persons who provide information leading to the discovery of corrupt acts by way of whistle-blower protection. Again, the US leads the way with the recent Dodd-Frank Act, while the UK and the Netherlands provide varying degrees of protection.

All three jurisdictions have provisions that encourage the ‘whistle-blower’. These provisions seek to protect rather reward. Persons who of their own volition seek to protect the public interest and who may risk their livelihood or welfare in the process are encouraged to make such public interest disclosures by allowing such persons a right to civil actions for redress should they suffer any victimization as a result. The US Sarbanes-Oxley Act of 2002 encourages the whistle-blower by allowing a civil action to be instituted in respect of any act of retaliation against an employee of a publicly quoted company who provides information about FCPA violations.<sup>261</sup> The Whistle-blower Protection Act of 1989<sup>262</sup> protects federal employees who face retaliation for disclosing information about Government illegality, waste, and corruption. Whistle-blowers facing retaliation can raise this as a defense before an administrative Panel – the United States Merit Systems Protection Board.

In the United Kingdom, under the Public Interest Disclosure Act of 1998,<sup>263</sup> where a disclosure that is in the public interest is made to an employer, legal adviser, minister of the crown, or person ‘prescribed’ by the order of the Secretary of State, the worker has a right not to be subjected to any detriment.<sup>264</sup> A worker may make a complaint to an employment tribunal if any such detriment is suffered.<sup>265</sup> The worker may be entitled to compensation<sup>266</sup> and, if dismissed, compensation for unfair dismissal.<sup>267</sup>

The Act defines as ‘protected disclosures’ information that shows that a criminal offense has been committed, is being committed, or is likely to be

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260 See Art. 33 UNCC.

261 Sec. 806 of the Sarbanes-Oxley Act of 2002, Pub. L. pp. 107-204, 116, Stat. 745 amends US 15 with Sec. 1514A, which stipulates for civil action to protect against retaliation in fraud cases.

262 Pub. L. pp. 101-12, 103 Stat. 16.

263 The Public Interest Disclosure Act of 1998 amends the Employment Rights Act 1996 by adding Part IVA after Part IV of that Act.

264 See Sec. 43 and 47(B) Employment Rights Act.

265 See Sec. 48.

266 See Sec. 49.

267 See Sec. 127(B).

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committed; that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject; that a miscarriage of justice has occurred, is occurring, or is likely to occur; that the health or safety of any citizen has been, is being, or is likely to be endangered; that the environment has been, is being, or is likely to be damaged, or that information tending to show any matter falling within any one of the preceding paragraphs has been, is being, or is likely to be deliberately concealed.<sup>268</sup> Knowledge of a corrupt act, as defined under the UK laws and the UK ratification of the UNCAC, would clearly fall within the scope of this definition of protected disclosures.

In the Netherlands, the STAR (Stichting van de Arbeid), Code Tabaksblat, the Ambtenarenwet,<sup>269</sup> as well as the Decision Besluit melden vermoeden van misstand bij Rijk en Politie, 572 (2009), published in the Staatsblad 2009, 572.<sup>270</sup> Under the Code Tabaksblat, all publicly listed enterprises are obligated to implement a whistle-blower arrangement that should protect employees in their legal rights, which should have a self-regulating effect, as the compliance of the Code is annually reported by the Frijns committee. Under the Code, companies in the Netherlands must ensure that employees have the possibility of reporting alleged irregularities. Dutch companies must report on their compliance with the code, and in cases where requirements have not been met, the company must explain why, according to the code's 'comply or explain' rule.

The Public Servant Law (Ambtenarenwet) requires that government agencies have whistle-blower arrangements to protect public servants who disclose undesirable practices. Such whistle-blowers are encouraged to make an internal report. In the alternative, if the public servant feels that an internal report will not suffice, an external report can be made to the Integrity Commission of the Government (Commissie Integriteit Overheid), which can investigate the case and make recommendations to the necessary authorities. In addition the Civil Law Convention against Corruption, which is in force in the Netherlands, requires that state should provide '... for appropriate protection' against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.<sup>271</sup>

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268 See Sec. 43B Employment Rights Act.

269 Public Servants Law (Ambtenarenwet) Art. 125quinquies.

270 Besluit melden vermoeden van misstand bij Rijk en Politie (*Stb.* 2009, 572).

271 See Art. 9 CLC.

### 9.10 Observations

Private remedies for corruption involve moving beyond the criminal law and using mechanisms provided under the private law in seeking a remedy. The motivation for doing this is clear. It allows an action to be instituted independently of an unwilling state, it allows the wronged party to have a voice in the process of sanction, and it restores the wrong done to a victim of corruption either by compensating the victim or using the action against the defendants as an example to deter others from engaging in the causative wrongful activity.

Apart from these motivations, the private action also encourages a plurality of intervention points in the fight against corruption and encourages a broad range of persons to act not only on their behalf, but also in the general public interest by instituting action-seeking redress for wrongs occasioned by corruption. This helps to shape an environment where victims are more aware and wrongdoers are more open to the risk of litigation. Arguably such an environment plays a positive role in the fight against corruption. The examination of the provisions of the UNCC alongside the position of the right to private remedies in the US, England and the Netherlands leads to the following findings.

#### 9.10.1 Effect of Art. 35 UNCC

##### 9.10.1.1 Civil Liability as Sanction and as Right of Redress

Civil liability for corruption finds global expression as a part of the sanctioning processes for corruption under Art. 26 UNCC and a right to institute legal proceedings by the individual who has suffered damage under Art. 36 UNCC. While Art. 26 cannot be regarded as a foundation for private remedies for acts of corruption inasmuch as it advises civil liability as a sanction to be resorted to by governments where criminal liability for legal persons may not be available, it introduces the notion that in the sanctioning processes for corruption, 'liability should be achieved' by whatever means. This emphasizes the gravity of corruption and the necessity to find effective methods of sanction and deterrence. In this regard, Art. 26 civil liability is an important tool in the mix of strategies not just where a country does not have criminal liability for artificial persons but for all members of the UNCC in a bid to ensure that liability for corrupt acts is established and effective punishment and sanction schemes are developed.

##### 9.10.1.2 Limited Scope of Private Right of Action under Art. 35 UNCC

Art. 35 UNCC is the cornerstone on which the notion of private redress is built. One of the important features of the UNCC as a global instrument is the

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right it gives to private persons to institute legal proceedings for damage suffered as a result of corruption. Art. 35 mirrors the desire expressed in the preamble of the convention where the need to involve ‘citizens and groups *outside the public sector* such as civil society, non-governmental organizations and community based organizations’ is seen as an important element in ensuring the ‘effective’ prevention and eradication of corruption. However, an examination of the content of Art. 35 shows that it is mostly symbolic in character because of the narrowness of its application.

Art. 35 promises a private right of action for victims of corruption but delivers, at best, a confirmation of such a right as already exists under national systems of law. Art. 35 gives a very limited right of redress to only a very particular group of people. This is because (1) Art. 35 subjects its provisions to the principle of sovereignty and non-interference; (2) it subjects the implementation of Art. 35 to the fundamental principles of domestic laws of participating states; and (3) by virtue of its pre-conditions to applicability only where a causal link can be established between the person instituting the claim and the party responsible for the damage. This places a significant evidential burden on the plaintiff seeking redress under Art. 35.

In substance, Art. 35 does not add much in terms of civil liability regimes, as they already exist under domestic laws. The US has, in any event, formally indicated that Art. 35 does not provide a novel private cause of action under US law. In England and the Netherlands, where there is no reservation to Art. 35, the substance of the articles does not create a new private right of action nor does it add to existing civil liability regimes. The benefit of Art. 35 is that it does impose a requirement on states to ensure that the domestic legal processes provide measures to seek compensation for *every* party who is linked causally to damage suffered by corruption. This may add a layer of argument to courts considering questions of jurisdiction in such claims.

### 9.10.1.3 Art 35 UNCC: No Change to Civil Liability Regimes

This chapter shows that the framework for private remedies for corruption is very much still a national affair. There is no stand-alone private right of action created for victims of corruption under the Convention. Only to the extent a private right of action to enforce criminal anti-corruption laws exists under national laws can a victim stake a direct claim to the protections provided by the international criminalization of corruption. The different jurisdictions studied in this book, namely the US, England and the Netherlands, do not grant any novel private right of action to enforce criminal anti-corruption rules as a result of Art. 35. Any right of action as may exist is found in traditional principles of civil liability and not in any specially devised regime of a private right of action for acts of corruption.

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### 9.10.1.4 Articulation of *Acts of Corruption* as Legal Wrongs

The foundation for the private action for corruption lies in the criminalization of acts of corruption that renders these acts legal wrongs. With the worldwide consensus repudiating international corruption, grand scale corruption, and corruption in national and international business is recognized worldwide as both a criminal and civil wrong. The UNCC in Arts. 15-25 defines *acts of corruption* for which private actions may be instituted. These acts of corruption are typically crimes under most legal systems. However, by grouping them together under the umbrella of acts of corruption the UNCC creates a normative link between these different activities. In the US, England, and the Netherlands corruption as a legal wrong is conceptualized in terms of bribery in the public and private sectors. It is notable that the acts of corruption defined in the UN Corruption move far beyond the traditional act of bribery but covers all actions that undermine the processes of governance, such as embezzlement of property both in the public and private sectors, trading in influence, abuse of function, illicit enrichment, laundering of proceeds of crime, concealment of crimes as well as obstruction of justice. This establishes an international platform on which a consensus regarding of the rectification for damage caused by such corrupt acts in an international tort liability regime for corruption could emerge.

### 9.10.2 Claims for Damage to Private Interests

The interests that are protected by the criminalization of acts of corruption fall primarily into two groups. The first groups consist of acts where damage accrues primarily to a private interest, and the second groups are acts of corruption for damage that accrues primarily against the public interest. In the first group are the traditional acts of corruption such as domestic, foreign and private bribery under Arts. 15, 16 and 21 UNCC as well as the embezzlement of property in the private sector under Art. 22. The interests damaged by these acts of corruption are the employer of a national public servant under Art. 15, the employer of a foreign public official under Art. 16, the employer or principal of employee or commercial agent in Art. 21, as well as the owner of embezzled private property under Art. 22.

By including domestic, international, public and private bribery under the collective umbrella of acts of corruption, the artificial distinction between these substantively similar acts is avoided. This is a helpful development that allows for greater coherence. In the US, England and the Netherlands, bribery is criminalized across both the private and public sectors as well as with respect to national and international bribery.

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*The Claim by the Principal:* The position in the US and England is fashioned by the common law principle of the fiduciary relationship. This has led to the development in England of a *sui generis* approach to the issue of establishing liability for damage caused as a breach of the duty of loyalty. All three jurisdictions provide for monetary relief to the principal for the breach of the fiduciary duty of loyalty as it is referred to under the common law or the duty to act in the best interest of someone in a position of trust. Under the US and English common law constructive trust, the principal may also recover the benefit received by the agent. This benefit is not solely restricted to the amount of the bribe but may also include any profits or any other benefit that has resulted from the abuse of the fiduciary duty. However, after the recent *Sinclair Investments* case in the UK, the vehicle of the constructive trust is in some doubt.

Central to the position in the US and England is the notion that harm is occasioned by the act of abuse of the position of the fiduciary regardless of whether or not there is a consequential contract or proven loss to the principal. There is a strong moral connotation to the court's rulings, which seek to deter the taking of commissions received honestly and those taken 'behind the master's back'. The principal must have the 'fullest information' of the activities of the agent. The courts are called upon to 'hold the precise and firm line' against secret payments. This is not just to protect the private interest of the principal but more importantly to protect the public interest as well as the 'interests of efficiency.' Thus the law is willing to make presumptions about the motive of the agent, the harm to the principal and assume a minimum level of damage in the sum of the bribe.

In the absence of presumptions in favor of the plaintiff under Dutch law as well as the strict requirements for causality, proof of damage and the quantification of damage, is a major hurdle for the plaintiff in the Netherlands. However, where a plaintiff can establish a causal link, a plaintiff has a right to 'full compensation,' which includes material damage, loss of profit and non-pecuniary loss.

*The Claim for Tortious Interference:* Apart from cases centered on the agency relationship, third parties have sued in tort for damage caused as result of bribery. In the US and England, tortious liability will lie in cases of bribery on the basis of interference with contractual relations and prospective business relations. However, the limitation of this approach is that as an *intentional tort* to prove intention, the plaintiff must show that the defendant intended to cause a particular injury to the plaintiff in giving a bribe. In England, seeking redress for bribery as an international tort of interference may for this reason not be the most efficient route, since the position of the civil law on bribery does not require proof of reliance or intention. Bribery as a *sui generis* tort, which presumes intentionality and reliance, is a desirable step that lightens the burden

## CHAPTER 9 – INSTITUTING PRIVATE LEGAL PROCEEDINGS

of proof on the prospective litigant because it enables proof of the occurrence of an act of corruption to serve without more as the basis for liability. This is in keeping with a desire not only to restore the rights of the plaintiff that have been breached, but also emphasizes the sanctioning element of seeking to deter the occurrence of such corrupt actions. This is a model that is immensely helpful in encouraging the private litigant.

The central feature of the interference torts is the unlawfulness of the conduct of the party offering a bribe. As has been stated quite rightly, the ‘freedom to compete necessarily contemplates the probability of harm to the commercial relations of other participants in the market.’<sup>272</sup> The criminalization of corruption on a global scale removes bribery practices from accepted practices to foster competition. The nature of bribery is that it undermines the very notion of free competition. The intentional interference in the business activities of another by giving bribes may result in liability to party who suffers economic loss. In the US and England, bribery can serve as a foundation for liability for the economic torts. In the Netherlands, while there is no special category of economic torts, the general principle of liability for unlawful acts renders parties liable for damage caused by bribery in tort.

The requirement for intentionality remains a weak spot in the use of the intentional tort of economic interference to fight corruption. Rarely will the damage be shown to have been intended particularly where there is an open call for bids. Again, the establishment of causal link between the act complained of and the damage suffered by the claimant, as the ADT case shows, can be a difficult burden to shift. Furthermore, it will be a significant challenge to establish that for the bribery transaction the claimant would have won the contract.<sup>273</sup>

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272 See Restatement (3rd) Unfair Competition, Comment (a) Sec.1 at p.4.

273 It is interesting to note the successful claim by a losing competitor from another jurisdiction. In the South African case of *Transnet Ltd v. Sechaba Photoscan (Pty) Ltd*, [2005] (1) SA 299 (SCA) the Supreme Court of Appeal dismissed an appeal brought by Transnet Ltd against a Johannesburg High Court judgment ordering it to pay damages of R57 654 550.00 to an unsuccessful tenderer in a tender process that Transnet admitted was irregular, fraudulent and dishonest. There were ‘strong’ indications from Transnet that Sechaba, the losing competitor, would be awarded the tender, however another company Skotaville was unexpectedly awarded the contract. Secheba alleged that the award of the tender to Skotavillie was the result of a fraudulent tender process and sued Transnet for damages. It claimed compensation in the sum of R60 million being the net profit which it would allegedly have been able to make in the three years following the award of the contract. The principal question before the Supreme Court was whether on the facts of the case the loss of prospective profits was recoverable. The court held that the losing competitor was entitled to recover the full amount of prospective profits it would have made if it had won the tender.

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*Shareholder Actions:* In addition to agency-based suits, in the United States third parties are also using allegations of FCPA violations to file FCPA-related antitrust and securities claims. Losing competitors alleging loss of contracts as well as governments claiming damage due to international bribery have filed civil suits for corrupt transactions by using alternative criminal statutes such as the Racketeering Influenced Corrupt Organizations Act, the Clayton Antitrust and Robinson-Patman Acts. FCPA-related suits have also been filed by shareholders who have brought class actions for damage resulting from false and misleading information about a company's bribery activities which cause a fall in share prices as well as derivative suits where shareholders seek indemnity from the actions of its executive officers who have engaged in corrupt activity. There is no parallel securities litigation in the UK or the Netherlands, but with the coming into effect of the new UK Bribery Act as well as provisions in the New UK Companies Act (2006), the scope of shareholders' rights to bring derivative suits is increased to some extent. This may well increase the opportunity for securities litigation as a feature of remedies for corruption under UK law.

### 9.10.3 Claims for Damage to Public Interest

In each of the acts of corruption described in Arts. 17-10 of the UNCC as well as Arts. 23-24, the party who suffers the effect of the legal wrong is the general public as represented by the state. Where the primary party that suffers damage is the state, the notion of private remedies is more complicated. This group of government and civil actors seeking redress for damage examined in this chapter are acting on behalf of the indirect victims of corruption that do not have as clear a path to redress as compared with the methods available to direct victims such as principals, shareholders and third parties affected by uncompetitive behavior. A section of cases drawn from several jurisdictions, however, shows the different strategies that have been employed by parties seeking to protect the public interest. This includes a governments seeking damages under theories of *social damage* from Costa Rica; a state company seeking *mandatory restitution* for a settlement reached in respect of corruption involving its officials; a private citizen instituting claims to compel state authorities to commence an investigation into alleged corruption against sitting and former African presidents; and several examples of civil society seeking to compel the state government into taking action or complying with international commitments against corruption. This list is drawn from a variety of jurisdictions and points to the growing emergence of a new group of players and strategies that may shape developments in the fight against corruption in the years to come. These attempts point to a new dynamic in the fight against corruption by using private law mechanisms to seek redress. However it must be emphasized that this is still a difficult path to follow.

9.10.4 Schemes to Encourage the Private Litigant

(a) Exploiting Third-Party Beneficiary Principles

Contracts tainted by grand corruption very often fall into the category of state or public contracts where the government enters into contractual obligations with a private sector entity in an international environment. The direct parties to the contract are the government on the one hand and the corporation on the other. The primary *beneficiaries* of the contract on the other hand are often the individuals who stand to benefit if the contract is properly executed. Using the interventions of third-party beneficiaries, who have the motivation to seek remedies for the damage suffered as a result of harm caused by lack of performance on public contracts, could also have an important policing effect in the fight against corruption. All three jurisdictions studied in this book provide for the possibility to include third parties as intended beneficiaries. This provides an example of how existing private law principles can be exploited to meet both public and private sector interests. It would be inefficient and counter-productive to open the flood gates of litigation with respect to public contracts. However, if the intention is to encourage compliance with anti-corruption rules by creating an environment where the choice to comply is a logical choice for the corporation, the intended beneficiary clause could play an interesting role. An intended beneficiary clause that is triggered into operation only where there has been evidence of corruption relating to the contract may serve as a helpful tool to encourage compliance with anti-corruption laws.

(b) Incentivizing the Private Litigant

Other important aspects in the use of private remedies in the fight of corruption are the costs and financial risks of bringing such claims. Incentivizing public/private co-operation in the fight against corruption is an important step in broadening the participation of private actors. In the US, the False Claims Act and the Dodd-Frank Act and well established contingency and alternative fee arrangements provide a reward as a percentage of the sums recovered that can help to motivate the risk undertaken by the private litigant. Such claims are clearly to be encouraged as not only being in the interest of the public, but also as an important facilitator of claims against corruption where the involvement of private actors is an essential aspect of circumventing a conflicted state.

There is no similar pattern of incentivizing public/private cooperation by way of reward in the United Kingdom and the Netherlands. The nature of encouragement of the private litigant is found in the measure that reduces the costs of taking such actions and whistle blowing measures that protect the party making the disclosures. The *Corner House* case in the UK made legal

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history as regards the availability of *protective costs order*, which allows a judge to award costs out of central funds where it is in the interest of justice to allow a private party to initiate a claim that is in the interest of the general public. This should greatly facilitate the capacity organization and other private actors to bring claims to fight damage caused by corruption to the general public. With regards to alternative fee arrangements, such as conditional fees, contingency fees and third-party funding, none of these are allowed in the Netherlands, and only contingency fees and third party funding are allowed in the UK.

Information about corrupt activity is a crucial element in fighting corruption. All the jurisdictions considered in this study have provisions to protect the whistle-blower. Art. 33 UNCC and Art. 9 Civil Law Convention require that states put into place measures to protect persons who disclose information about corrupt acts. The US, UK and the Netherlands all have provisions that to varying degrees protect the whistle-blower. The provisions of the Whistle-blower Protection Act of 1989 and Sarbanes-Oxley Act of 2002 provide protection for persons that provide information about FCPA violations and other corruption-related activity. The UK Public Interest Disclosure Act of 1998 protects the discloser of any information that is given is in the public's interest. In the UK and the US, State administrative boards help to ensure redress for any retaliatory acts taken against such persons. In the Netherlands there is a strong element of self-regulation, and persons making disclosures are encouraged to first make internal disclosures to their employer. The Stichting van de Arbeid, Code Tabaksblat encourages the establishment of procedures to enable employees report on irregularities, and the Public Servants Law (Ambtenarenwet) sets up an Integrity Commission to oversee external disclosures by whistle-blowers where an internal disclosure is thought unlikely to have the desired effect.

### 9.11 Conclusion

This chapter shows that there are two levels of private remedies for corruption. The first level can be described as the level of the direct victim (damage to private interests). This level is well articulated in the US, England and the Netherlands and bears some elements of commonality. Direct redress is centered on the agency relationship between the principal and agent. In all three jurisdictions there are strategies available to the principal of the disloyal agent for seeking redress for damage caused as a result. Beyond this area of commonality, in agency-related actions and tort-related claims, there is great dissimilarity regarding the use of antitrust rules and securities law to found corruption related claims. While these are commonplace in the US, there is so far no an equivalent legal provision or actions by shareholders or third parties affected by uncompetitive behavior in the UK and in the Netherlands.

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The second level – the level of the indirect victim (damage to the public interest) – is an emerging area. An examination of illustrative cases shows that government, citizens and NGOs are pushing the boundaries of redress using private law. Attempts to use concepts such as a *social damage* and to benefit from provisions providing *mandatory restitution* demonstrates creativity in seeking for private redress for the indirect victims of corruption. Furthermore the efforts of government and civil society in public interest litigation emphasize the importance of public/private co-operation in the fight against corruption. Private law claims for the public wrong of corruption can positively influence the environment in which acts of corruption affecting public interests occur.

A suggested method for increasing private participation is the use of third-party beneficiary principles to make groups of people intended beneficiaries with a limited right of suit that is triggered on evidence of bribery by a party to the contract. This could serve as a control mechanism that encourages compliance with anti-corruption rules by all parties bidding for such contracts. Such a requirement could be imposed by the contracting state as part of the conditions for prospective bidders.

The benefits of engaging in a public/private partnership in the fight against corruption is most clearly articulated under US law, where reward schemes such as those found under the False Claims Act and the Dodd-Frank Act may motivate the private actor to file anti-corruption suits that benefit the general public. The absence of such incentives under the UK and Dutch law will no doubt have a negative impact on attracting private actors to partner with the state in fighting corruption. The protective cost order regime of the UK is certainly a step in the right direction and will encourage civil society to file public interest claims, although this is a much narrower group of potential plaintiffs than those that may be attracted under a reward model of the private/public partnership. A critical element in encouraging a public/private partnership is the need for information about corrupt activity. Protecting the whistle-blower is essential and having this is recognized not just in the UNCC but in the UK, the US and the Netherlands. This is an area of commonality where there is sufficient convergence to found a common approach to protect whistle-blowers that provide information on corrupt transactions.

In conclusion it can be stated that while the UNCC, in its call for a right to institute legal proceedings for damage suffered by corruption, has not significantly changed existing civil liability regimes, the breadth of the international framework of rules repudiating corruption as well as the civil liability provisions of the UNCC itself are changing the tenor of the anti-corruption discourse by giving expression to efforts to seek redress not just for the direct victims of corruption such as principals, shareholders and parties that suffer the effects of unfair competition, but also for, and probably more

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importantly, the indirect victims that often bear the brunt of the political, economic and social unrest that corruption causes.

On a final note it may be argued that the private right of redress also serves a restorative function. It provides a modality for the person wronged and the party that caused the wrong to enter into a dialogue. Such a direct confrontation creates more awareness for all parties and creates the opportunity for negotiated settlements that can assuage the victim and at the same time does not 'punish' the corporation adversely in a manner that affects its viability as a contributor to economic growth. Effective schemes for private remedies provide may also add weight to voices within a corporation that push for ethical business over profit by any means. This is probably the most important argument for private remedies, *i.e.* its ability to shape the environment in which the rational choice for a corporation would be compliance with anti-corruption rules.



# CHAPTER 10

## TOWARDS A TRANSACTION APPROACH<sup>1</sup>

*'The framing of policy challenges can have profound consequences for assigning responsibilities to relevant actors and determining whether the combination is capable of meeting the overall policy objectives.'*  
J. Ruggie.<sup>2</sup>

### 10.1 Introduction

A constant theme in this book has been the need for a conceptual shift in the approach to fighting international corruption.<sup>3</sup> The motivation for this shift is the difficulty in translating national criminal law-centered approaches to fighting corruption into effective strategy in the environment in which corruption in international business occurs. Chapter 2 emphasized the complexity of the challenges faced in fighting corruption and how these are exacerbated by the fact that corruption in international business occurs in a situation where there is no clear nexus of governance, no super regulatory system, where states with a monopoly on the criminal processes of sanction, play a diminished role, and where multinational corporations are important shapers of the regulatory agenda. This is an environment where dislocated agreements and contracts are the primary medium of control rather than state-based models of punishment and sanctions.

Chapter 3 charted the genesis and development of the worldwide consensus against international corruption and showed how the Foreign Corrupt Practices Act and the international regulatory framework against corruption have led to a model of public/private partnership in the fight against corruption. This can be seen as an acknowledgement of the limitations of the state in uncovering,

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1 The chapter is based in part on a paper presented at the Governing Security under the Rule of Law International Conference of the Research Programme Monitoring, Safety & Security Erasmus University Rotterdam on the 23rd April 2010, and subsequently published as: A. Makinwa 'A Transaction Approach to Fighting International Corruption.' in J. Blad, M. Hildebrandt, K. Rozemond, M. Schuilenburg & P. Van Calster (Eds.), *Governing Security under the Rule of Law?*, Eleven International Publishing, The Hague 2010, at pp. 175-194.

2 J. Ruggie, Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5, 20087 April 2008, Available at <http://www.reports-andmaterials.org/Ruggie-report-7-Apr-2008.pdf>. at Para. 10.

3 See development of definition of international corruption in Chapter 3 at Sec. 3.10ff.

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investigating and establishing corruption by large complex organizations. This public/private collaboration suggests that the future of the fight against corruption lies in a shift beyond the traditional focus on the offender in classical state-centered approaches to sanction, to methods of engaging stakeholders in a process of mutual co-operation.

Chapters 4, 5, 6 and 7 provide national models of private remedies to fight corruption from the United States, England and the Netherlands as well as under international arbitration. Individuals using processes of private law to seek redress for damage suffered as a result of corruption are illustrative in showing how a focus on the consequences of corruption is an important medium for empowering the private litigant in a manner that addresses some of the conflict of interest problems inherent in the criminal law approach. It also changes the dynamics of the anti-corruption discourse by bringing the silent victim into the mainstream of the sanctioning processes for corruption. This opens the door for a change of focus in the anti-corruption discourse that recognizes the importance of a holistic approach to fighting corruption which is more complete in its identification of the full range of interactions involved in the corrupt exchange as the template for the construction of strategy.

In Chapters 8 and 9 the international framework for private remedies that is articulated in the UNCC against corruption is compared with the positions on private remedies from the various jurisdictions studied. The picture that emerges is one where the need for consistency between the public wrong of corruption and the private law consequences is still a work in progress. The traditional divisions between private and public law need to arrive at consonance. A public law approach may be too limited and a private law approach may be too abstracted. This suggests the need for a framework that works towards consonance. This may imply the need to reframe the problem of how to best tackle international corruption.

Chapter 10 seeks to reframe the problem by using the insights drawn from this study to propose a conceptual framework that brings the various threads followed in this book together in the transactions that characterize corrupt exchanges.<sup>4</sup> By charting the interactions negatively affected by corrupt activity, a multi-level approach helps to organize the transactions embodied in

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4 This is in some ways analogous to Philips Allott's description of practical theory, thinking as action – the level at which theory is actualized in the process of our acting in relation to actual situations. He notes that the 'functioning of theory is ... highly biologically adaptive, as the human mind is able to assimilate changing needs and opportunities, and to respond efficiently by modifying its action in relation to an ever-changing environment .... To change the way in which we present the world to our minds is to begin to change the world.' P. Allot, *The Emerging Universal Legal System*, in J. Nijman, A. Nollkaemper (Eds.), *New Perspectives of the Divide between National and International Law*, OUP, Oxford, 2007, p. 61, at p. 64.

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the interactions in a coherent narrative that is not artificially bound by traditional public and private law categorizations. The objective is to restore transactions damaged by corrupt activity in the hope of creating an environment where the risk of engaging in acts of international corruption outweighs the gains of non-compliance. Such an environment could act as a catalyst for increased private/public partnerships in the fight against corruption with government authorities as well as private actors playing important roles in the sanctioning processes against corruption.

Shearing aptly summarizes the need for changes in conceptual thought patterns in today's regulatory environment when he asks, how a theoretical jump can be made to:

‘positions that recognize a diversity of governing auspices; that is, to positions that recognize the role of the state while at the same time recognizing, and bringing clearly and explicitly into the equation, the role of non-state auspices as well as non-state providers of governance.’<sup>5</sup>

This chapter attempts to make this jump with the *transaction approach* to fighting corruption. This approach sees the transactions that are influenced by the corrupt acts as an important point of intervention in the fight against corruption. It emphasizes the need for an approach that reflects the more diffuse processes of sanction and the plurality of sources of governance that characterize the international business society.

In the first part of this chapter, the motivation for a *transaction approach* to fighting corruption is outlined by examining the pitfalls in the current sanctioning environment. The single-level approach of criminalization results in conflict of interest problems as well as a schism between the public law consensus to criminalize international corruption and the private law contracts and transactions that result from the successful violation of the anti-corruption laws. This creates a paradox that encourages inefficient implementation and encourages risk taking.

In the second section the various levels of transacting that are affected by the corrupt exchange are identified. Effective anti-corruption strategy must anticipate the issues that arise across the identified *mandate*, *violation* and *consequence* levels to the extent that they create and influence the environment in which international corruption occurs. Anticipating and addressing the

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5 C. Shearing, Reflection on the Refusal to Acknowledge Private Governments, in J. Wood, B. Dupont (Eds.), *Democracy, Society and the Governance of Security*, CUP, Cambridge, 2006, at pp. 1-32, 26.

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issues that arise across levels of interaction and in particular the contract that results from the successful violation of the anti-corruption rules, provides more coherency and effectiveness in devising anti-corruption strategy. The corollary is also true. Pursuing a single-level approach in the face of interconnected levels can create paradoxes and fault lines of incoherence. Furthermore, a multi-level approach enlarges the conceptual scope of redress for damage caused by corrupt activity, thus increasing accountability and risk for corporations engaging in corrupt behavior.

The final section summarizes the advantages of a *transaction approach*. The *transaction approach* proposed in this chapter embraces a multi-level perspective of the interactions affected by a corrupt exchange in a single narrative. This creates an opportunity to change this environment in a manner that increases the risk of engaging in corrupt activity and, by so doing, positively impact the fight against international corruption.<sup>6</sup>

### 10.2 The Paradox of ‘Consensus’ and the ‘Successful Violation’

Corruption in international business is typically referred to as *grand corruption*. It occurs at the highest levels of governance and ‘distorts the central functions of government.’<sup>7</sup> International corruption properly defined has three primary elements: (1) an international element, (2) a commercial element, and (3) as involving government officials.<sup>8</sup> This means that while the criminalization of international corruption is an important and necessary first step, it presents a structural conflict-of-interest problem. Implementation using the criminal process is dependent on government officials, who are key actors in international corruption. Implementation is also strongly influenced by political as well as economic interests.<sup>9</sup> The dependence on the apparatus of

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6 Thaler and Sunstein argue that by carefully designing the architecture of the environment in which people make choices, we can positively influence the choices peoples make (choice architecture). While Thaler and Sunstein argue that government and business can ‘nudge’ the consumer into making better decisions (liberal paternalism), this book focuses on government and the private actor as the ‘nudging’ factors that influence corporate choices. The environment in which businesses transact is a motivator to the choices that corporations make. Therefore an environment that makes the transaction tainted by corruption a more risky propositions is more likely to encourage compliance than an environment that focuses on the offender and treats the transactions as an after-thought. See T. Thaler, C. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness*, Penguin, New York, 2009.

7 UN Convention against Corruption New York, 31 October 2003, in force 14 December 2005, 2349 UNTS p. 41; (2004) 43 *ILM* 37 (hereinafter, the UNCC).

8 See Chapter 3 above on the key elements of international corruption. See also Art. 1 OECD, 1997, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 37 *ILM* 1998, at p. 1 (hereinafter the OECD Convention).

9 The attempts by the Blair government to stop the investigations into bribery allegations involving BAE, a British defence, security and aerospace company, are a rather apt example of this. See *Corner House Research & Campaign against Arms Trade, R (on the application of)*

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the state in initiating, investigating and sanctioning international corruption is a grave impediment to prosecution. The degree of success is dependant not so much on the fact of criminalization but on the political will to prosecute.<sup>10</sup>

The positive effect of the international regulatory framework has been the emergence of a global standard or consensus condemning international corruption.<sup>11</sup> This consensus is symptomatic of an international society held together not by territory or sovereignty but by the dynamics of mutually dependent relationships in a series of collaborative agreements.<sup>12</sup> The consensus against international corruption has shaped the objectives of the international anti-corruption discourse in its acceptance of three basic propositions.

The first proposition is that international corruption is detrimental to the common good.<sup>13</sup> The rhetoric of the international instruments condemning corruption describes the ‘seriousness of the problems and threats posed by corruption to the stability and security of societies.’<sup>14</sup> It is also linked to organized and economic crime involving ‘vast quantities of assets, which may constitute a substantial proportion of the resources of states.’<sup>15</sup> Not surprisingly, it has been described as ‘the greatest obstacle to economic and social development.’<sup>16</sup> This has resulted in international business practices that were once regarded as legal, becoming criminalized as a violation of the norms that co-exist for the good of the international society. Ilias argues that

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*v. Director of the Serious Fraud Office* [2008] EWHC 714; *Corner House Research & Ors, R (On the Application of) v. The Serious Fraud Office*, [2005] EWCA Civ 192.

10 The United States stands in the forefront of prosecuting anti-corruption cases. This is to be contrasted with the very meager levels of enforcement demonstrated by the rest of the World. Cf. for statistics on US anti-corruption enforcement efforts under the Foreign Corrupt Practices Act: *Trends and Patterns in FCPA Enforcement*, 2008, Shearman & Sterling LLP, available at [www.shearman.com/files/upload/FCPA\\_Trends.pdf](http://www.shearman.com/files/upload/FCPA_Trends.pdf).

11 A. Makinwa, ‘The rules regulating transnational bribery: achieving a common standard?’, *International Business Law Journal*, Vol. 1, 2007, at p. 17.

12 Velasquez points out the importance of a core common morality as necessary for international economic interaction. Without this, economic interactions would be ‘nasty and brutish if not short’. M. Velasquez, ‘International business morality and the common good’, *Business Ethics Quarterly*, 1992, pp. 2-27.

13 In G. Abed, S. Gupta (Eds.), *Governance, Corruption & Economic Performance*, International Monetary Fund, Washington, 2002; S. Rose-Ackerman, *Corruption and Government: Causes, Consequences and Reform*, CUP, Cambridge, 1999; A. Dreher, T. Herzfeld, ‘The Economic Costs of Corruption: A Survey and New Evidence’, Monograph on file at Wageningen University and Research Center Publications (Netherlands), 2005, at: <http://129.3.20.41/eps/pe/papers/0506/0506001.pdf>.

14 Preamble Para. 2 UNCC.

15 *Id.*

16 See World Bank Website on Corruption: <http://www1.worldbank.org/publicsector/anticorrupt/index.cfm>.

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corruption should in fact be viewed as a crime against humanity.<sup>17</sup> The establishment of a base line of legality is the first requirement of the rule of law. It removes international corruption from the realm of purely private commercial agreements. At this point, the private activities of international traders move into the domain of public security. Criminalization is thus the litmus test against which the norm eschewing international corruption is identified.

The recognition of a norm condemning international corruption implies a necessary response where the norm is violated. Hildebrandt remarks that punitive interventions are the counter actions that nullify the initial action.<sup>18</sup> The consensus about criminalization has resulted in a wide-reaching international framework of rules that prohibit, stigmatize and punish international corruption.<sup>19</sup> The punitive reaction to international corruption is the necessary precursor of a co-coordinated strategy to fight international corruption. It is also the logical consequence of the proposition that international corruption is detrimental to the social and economic development of nations.

The second proposition posited by the consensus is that there is a need for common rules to tackle international corruption. The need for a collaborative response is necessary in an integrated world market, which is characterized by high volumes of trade occurring outside the domestic jurisdictions of states. International corruption occurs within the purview of international trade, which is an activity fostered and promoted by the State but carried out mainly by private persons.<sup>20</sup> The business practices in this supranational space emanate not so much from national institutions but from the actors and merchants in an essentially self-regulatory environment. Considerations of pragmatism coupled with party autonomy result in ‘a self-validating legal discourse.’<sup>21</sup> Private

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17 B. Ilias, ‘Corruption as an international crime and crime against humanity: an outline of supplementary criminal justice policies’, *Journal of International Criminal Justice*, Vol. 4 No. 3, 2006, pp. 466-484.

18 M. Hildebrandt, Trial and Fair Trial: From Peer to Subject to Citizen, in A. Duff, L. Farmer, S. Marshall, V. Tadros (Eds.), *The Trial on Trial Judgment and Calling to Account*, Hart Publishing, London, 2006, at p. 20.

19 Criminal law has a definitional function. It helps to categorize certain acts as detrimental to the public good and therefore prohibited. S.1.01 of the American Model Penal Code illustrates this when it states that ‘the general purposes of the provisions governing the definition of offences are: (a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests ....’

20 Teubner points out that the ‘*lex mercatoria*, the transnational law of economic transactions, is the most successful example of global law without a state,’ *id.*, at p. 3.

21 Teubner emphasizes that ‘the new living law of the world is nourished not from stores of tradition but from the ongoing self-reproduction of highly technical, highly specialized, often formally organized and rather narrowly defined, global networks of an economic, cultural, academic or technological nature.’ *Id.*, at p. 7.

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actors have fashioned a ‘common platform’ of interaction that caters privately to private interests, which has drifted further and further away from the control of individual states in a process that proceeds on a ‘case-by-case basis’ rather than as a ‘comprehensive system.’<sup>22</sup>

The fashioning of common rules to fight corruption occurs against the backdrop of criminalization. This has introduced a moral and public tone into the fight against international corruption.<sup>23</sup> It is no longer simply a matter of private agreement between parties. Drawing on the views of writers such as Philippe Platteau,<sup>24</sup> Bukovansky asserts that ‘capitalism requires a generalized and universalistic, rather than particularistic and limited, moral code, because the operation of markets requires trust.’<sup>25</sup> As Donaldson and Dunfee point out, international trade is capitalistic and opportunistic, yet it is predictable in its need for certainty that transactions will be honored, contracts upheld, property respected and all of this in the absence of a supranational enforcing body.<sup>26</sup> The articulation of the rule of law<sup>27</sup> becomes imperative as globalization and integration make national borders opaque. However, there is no clear route to the proclamation of this rule. The rule of law is closely associated with the role of the state within its own territory and struggles with a ‘relocation’<sup>28</sup> to the gap between states without descending into ‘meaninglessness’<sup>29</sup> or ‘mere

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22 Teubner points out that ‘[t]oday’s globalization is not a gradual emergence of a world society under the leadership of interstate politics, but a highly contradictory and fragmented process in which politics has lost its leading role.’ See Teubner, id., p. 5.

23 See M. Bukovansky, ‘Corruption is Bad: Normative Dimensions of the Anti-Corruption Movement’, Working Paper No. 2002/5, Australian National University, Department of International Relations, 2002, at p. 3.

24 J.P. Platteau, ‘Behind the market stage where real societies exist—Part I: The role of public and private order institutions’, *Journal of Development Studies*, Vol. 30 No. 3, 1994, p. 533.

25 In his view, the texts of the global anti-corruption regime imply, but fail to reflect upon, the notion that some sort of universal, generalized morality is necessary’ for the continuous capitalistic growth of markets. See M. Bukovansky, id., Note 23 above.

26 In their ‘integrative social contracts theory’, Donaldson and Dunfee argue that ‘all particular or “macrosocial contracts” whether they exist at the national industry or corporate level, must conform to a hypothetical “macrosocial” contract that lays down objective moral boundaries for any social contracting.’ See T. Donaldson, T. Dunfee, *Ties That Bind: A Social Contracts Approach to Business Ethics*, Harvard Business School Press, Cambridge, MA, 1999, at p. 6.

27 The expression ‘rule of law’ was coined by Albert Venn Dicey in his treatise ‘An Introduction to the Study of the Law of the Constitution’, 10th edn, Macmillan, London, 1959. From Plato and Aristotle to modern-day writers, the rule of law represents the essential idea that laws should govern societies rather than the arbitrary compulsions of men. As such no one is above the law and good governance is best represented by a ‘government of laws and not of men.’ See J. Adams, ‘Part the First: A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts’, *The Constitution of the Commonwealth of Massachusetts* (1780), Art. XXX.

28 Expression taken from the title of the Conference, ‘Relocating the Rule of Law’ held at the European University Institute, Florence, Italy, on 8-9 June 2007.

29 J. Shklar, *Political Theory and the Rule of Law*, in A. Hutchinson, P. Monahan (Eds.), *The Rule of Law, Idea or Ideology*, Carswell, Toronto, 1987, p. 1.

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sloganeering.<sup>30</sup> The moral tone is evidenced by the condemnation of international corruption and the public effects of the damage it inflicts.

A third proposition embraced in the consensus on criminalization is that systems of ‘effective restraint’ should accompany the de-legitimization of corrupt practices. Minor and Morrison write that the predominant response to criminal behavior today:

‘...reflects an adversarial conception of justice and is characterized by retribution and utilitarianism. The aims of traditional sanctions are to achieve vengeance, just deserts, deterrence, incapacitation, and/or rehabilitation by punishing offenders and placing them in treatment programs.’<sup>31</sup>

The assumption in classical criminal punishment theory is that effective punishment of the offender will deter the commission of further acts of international corruption that harm society.

These propositions are at the heart of the global consensus criminalizing international corruption and undeniably hold true. However, the stability of this consensus is challenged by the paradox of the contract that results from the successful violation of the rules prohibiting international corruption. If the norm prohibiting international corruption is successfully violated, the proof of success is the contract that comes into being as a result of the bribe that has changed hands. The persistence of international corruption as a transnational crime confirms the fact that contracts tainted by international corruption continue to flourish.

Anti-corruption rules have criminalized international corruption, but the status of transactions resulting from the successful violation of the prohibition is not so clear. This is not uncommon, and MacQueen speaks about the ‘silence of regulatory legislation’ that accompanies criminal prohibitions.<sup>32</sup> The ‘silence’ on the part of regulation raises the question of the effect of criminalization on resulting private transactions. As shown in Chapters 9 and 10, this leaves the question about the effects and status of these transactions to be determined by national courts. This leads to the uncertainty of national values and

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30 J. Raz, ‘The rule of law and its virtue’, *Law Quarterly Review*, Vol. 93, 1977, at p. 195.

31 K. Minor, J. Morrison, A Theoretical Study and Critique of Restorative Justice, in B. Galaway, J. Hudson (Eds.), *Restorative Justice: International Perspectives* Monsey, Criminal Justice press/Kugler Publications, NY, USA/Amsterdam, 2004, p. 118.

32 H. MacQueen, Illegal and Immoral Contracts: Towards European Principles, in M. Hesselink, E. Hondius, C. Joustra, M. Veldman (Eds.), *Towards a European Civil Code*, 3rd edn, Ars Aequi Libri, Nijmegen, 2004, pp. 287-289.

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interpretations. This uncertainty undermines the proportionality of response that should discourage further acts of international corruption.<sup>33</sup> A system that does not address with equal severity the consequence of the successful commission of international corruption but rather focuses principally on its perpetrators, leaves open windows of opportunity that encourage risk-taking.

Beck remarks that the principle of proportionality requires ‘a reasonable relation between the goal pursued and the means used.’<sup>34</sup> He argues that the principle can only come into operation once a specific aim has been selected. Courts confronted with contracts tainted by corruption must balance the need to fight the insecurity caused by corruption on the one hand and the freedom of contract on the other. Decision making in respect of contracts tainted by corruption must not lose sight of the public interest that the criminalization of international corruption seeks to protect.

### 10.3 Pitfalls of Current Approach

Two major windows of opportunity emerge as a result of the dichotomy between the criminalization of corruption and the contracts that it leaves in its wake. The first window is the potential trade off of the gains to be made from the contract that results from a corrupt exchange. The second window is the potential to protect the contract tainted by corruption with the private law principles of freedom of contract as well as resorting to international arbitration. The windows of the ‘trade-off’ and ‘resort to international arbitration’ undermine current approaches to tackling international corruption to the extent that the element of uncertainty they engender supports an environment where the risk of engaging in corrupt behavior may not offer significant advantages over compliance.

#### 10.3.1 The Trade Off

The choice between the violation of the prohibition and the contract that results from successfully committing acts of international corruption presents a net gain or net loss proposition. The choice here is not based so much on the deterrent effect of the criminal prohibition and the threat of punishment, as it is on the fact that such criminal behavior brings into place a transaction or contract of financial value. This creates a choice between the value to be gained as a result of the successful violation of the criminal rules, or the loss to

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33 C. Beccaria, *On Crimes and Punishment (Chapter 12, The Purpose of Punishment)*, Translation by D. Young, Hackett Publishing Company, Indianapolis, 1986.

34 G. Beck, ‘The idea of human rights between value pluralism and conceptual vagueness’, 25 *Penn State International Law Review*, 2007, p. 615, at pp. 650-651.

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be borne by adhering to the rules. The fact that the contract stands apart from the criminal process makes this choice possible. The contract left standing encourages speculative behavior that is premised on several factors: firstly, how high the risk of discovery is; secondly, even if discovered, how high the risk of successful prosecution and punishment is; and thirdly, whether in any case the potential profit to be made from the resulting contract outweighs the risk posed by punishment.

The fundamental ethic of a corporation is the need to make a profit. Companies will favor a course of action that best boosts company earnings and satisfies shareholders. An environment that is essentially 'silent' on the contract tainted by corruption motivates choices that may not be present to the same degree in an environment that extends the punitive effects of criminalization to resulting contracts or transactions. Furthermore, where the *satisfaction* of shareholders can be quantified in terms other than company profits, the choices of corporations will be influenced by those terms. An environment that seeks to restore the interactions damaged by corrupt activity increases awareness about a corporation's corrupt activity, damage caused to peoples or the environment, penalties, fines, disgorgement of profits, reputational implications, and suits by shareholders themselves. The risk to the corporation and changing considerations of shareholders that result from such an environment can positively influence compliance.

The view of the corporation as an entity that makes rational choices<sup>35</sup> combined with the efficiency theories of law and economics,<sup>36</sup> writers as well as public choice arguments<sup>37</sup> suggest a growing understanding of the role of the environment on crime as well as preventative measures.<sup>38</sup> Rational choice would defer to the most profitable course of action. On the supply side of the corruption equation, companies will weigh the course of action that will best boost company earnings and satisfy shareholders. The conditioning effect of the environment applies equally to the demand side of the bribery equation. The government official demanding a bribe benefits from the fact that the contracts resulting from the corrupt exchange are treated apart from the

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35 D. Cornish, R. Clarke (Eds.), *The Reasoning Criminal: Rational Choice Perspectives on Offending*, Springer-Verlag, New York, 1986.

36 R. Posner, 'Optimal sentences for white collar criminals', *American Criminal Law Review*, Vol. 17, at p. 409.

37 S. Khanna, 'Corporate crime legislation: a political economy analysis', *Washington University Law Quarterly*, Vol. 82, 2004, p. 95.

38 See for example the study by C.R.A. van der Sloot, where she argues that all recent crime control policy plans include preventative measures that target the facilitating circumstances present in the legitimate environment. C. van der Sloot, *Organised Crime Prevention in the Netherlands: Exposing the Effectiveness of Preventative Measures*, Boom Juridische Uitgevers, Den Haag, 2006, at p. 225

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criminal acts. This strengthens the hand that demands the bribe. The environment in which a corrupt exchange takes place fundamentally influences the choice for compliance. From this viewpoint, creating an environment that encourages the choice for compliance is a critical factor in moving the fight against corruption forward.

### 10.3.2 Resorting to Private Justice

A second window opened by the contract left standing is the opportunity to protect the contracts by utilizing private systems of dispute settlement. For several decades the internationalization of world trade has resulted in strategies to minimize the risks associated with the lack of uniformity in national laws and practices. International arbitration is regarded as a risk-efficient, neutral method to resolve disputes regarding contracts of an international character and is premised on the fact that within the private sphere, persons are given the freedom to regulate their private transactions. The arbitration process is controlled by the parties to the dispute in a confidential process.<sup>39</sup>

International arbitration is a private process of dispute settlement that is underpinned by the principle of freedom of contract. It is premised on the fact that within the private sphere persons are given the freedom to regulate their private transactions. The state ensures that the legitimate expectations created by such private agreements are met by giving into properly constituted agreements to arbitrate the force of law. The arbitration process is a private one, controlled by the parties to the dispute in a secret and confidential process.<sup>40</sup> The principle of party autonomy gives parties to the dispute the freedom to decide on the place of arbitration, the rules that will govern the dispute, the procedure to be followed and most importantly the arbitrators that will decide the dispute.<sup>41</sup> This process is safeguarded by an international

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39 See Chapter 7 for a full description of the role of international arbitration and contracts tainted by corruption.

40 See generally A. Redfern, M. Hunter, *The Law and Practice of International Commercial Arbitration*, Sweet and Maxwell, London, 2004, pp. 1-130.

41 Lord Hoffmann in the recent case of *West Tankers Inc (Respondents) v. RAS Riunione Adriatica di Sicurtà SpA et al.*, [2007] UKHL 4, At Para. 17, states that:

‘People engaged in commerce choose arbitration in order to be outside the procedures of any national court. They frequently prefer the privacy, informality and absence of any prolongation of the dispute by appeal which arbitration offers. Nor is it only a matter of procedure. The choice of arbitration may affect the substantive rights of the parties, giving the arbitrators the right to act as *amiables compositeurs*, apply broad equitable considerations, even a *lex mercatoria* which does not wholly reflect any national system of law.’

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framework of rules that ensure worldwide enforcement of arbitration awards<sup>42</sup> and limited court intervention.<sup>43</sup>

The fact that the bulk of international commercial contracts contain an arbitration clause means that contracts tainted by international corruption are more likely to fall under the jurisdiction of a private international arbitration panel than a national court of law.<sup>44</sup> In short, the confidentiality of the international arbitration process can act as a layer of protection for contracts tainted by international corruption.

### 10.3.3 Effect of Pitfalls

The reality of the contract left standing creates an incentive for actors in the corrupt exchange to influence the discourse in a manner that protects the contract. This leads to a sort of double speak. There is on the one hand the worldwide acknowledgement of the detrimental consequences of international corruption and collective desire to see it eliminated, and, on the other hand, the exasperation of companies faced with real losses where the contract left standing goes to a more ‘amenable’ competitor. The official dialogue may become no more than mere talk, while the business of corruption continues in the ‘real’ world. Blundo describes this in terms of the ‘real’ functioning and the ‘official’ functioning of a state beset by corruption.<sup>45</sup> Thus, while the existence of the anti-corruption rules may lend itself to best practices, the reality of the ‘street’ sustains a strong incentive to do what it takes to survive the competitiveness of international business. A tipping point of futility may be reached where the gains of the anti-corruption rules are eclipsed by the inadequacy of the system. This dynamic may lead to cracks in the consensus and the unified front against corruption. The contract left standing is at the

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42 See in particular the United Nations Economic and Social Council 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. United Nations Commission on International Trade Law 1985 UNCITRAL Model Law on International Commercial Arbitration (MAL).

43 Art. 5 Model Arbitration Law adopted in many countries worldwide provides that ‘in matters governed by this Law, no court shall intervene except where so provided in this Law.’ In Art. 8 it states that ‘A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.’

44 A. Makinwa, Civil Remedies for International Corruption: The Role of International Arbitration, in O. Meyer (Ed.), *Civil Law Consequences of Corruption*, (Schriftenreihe des Zentrums für Europäische Rechtspolitik an der Universität Bremen) 53 (ZERP), Nomos Verlag, Baden Baden, 2009, pp. 257-280.

45 G. Blundo, O. de Sardan, *Everyday Corruption and the State*, Zed Books, London/ New York 2006, p. 4.

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heart of this dichotomy, and profoundly influences the environment that shapes the occurrence of international corruption.

Tarrullo remarked in 2004 that despite the impressive institutionalization of anti-corruption obligations and programs, ‘there is little evidence of any diminution in the incidence of corruption in, and by nationals of the ... participating countries.’<sup>46</sup> It would seem that this still holds true today. While there has certainly been a paradigm shift in the rhetoric against corruption and periodic high-profile cases that shows that it is no longer business as usual, there is also the view from the street, where the perception of ordinary citizens is that corruption is still a very present problem.

As a response to the problem of international corruption, governments the world over have resorted, as a first line of defense, to more and more regulation. However, such regulation only superficially addresses the major conflict of interest problem at the core of international corruption. The conflict of interest problem is based to some degree on the fact that the realities of international commerce and globalization have made the public/private divide and the distinctions between public and private bribery, foreign and domestic bribery, and criminal as opposed to civil approaches to tackling bribery, more nuanced. Globalization is changing the frontiers of what used to be the realm of private as opposed to public law. The traditional role of the State as the provider of security is challenged by the increased participation of the private sector in the provision of security.<sup>47</sup> It is also challenged by the instances where the State has joined in the fray as a private contractor and shareholder. It has indeed been asserted that states ‘acting alone are no longer a sufficient means of producing security [...]’.<sup>48</sup> The private sector plays an increasingly important role in determining the rules that govern international trade, and the role of government is challenged by the blurring of the boundaries between public and private interests.

On the part of the corporate world there has been a surge of initiatives in the establishment of compliance departments and corporate codes. In their

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46 D. Tarullo, ‘The limits of institutional design: implementing the OECD Anti-Bribery Convention’, Vol. 44, Iss. 3, *Virginia Journal of International Law*, 2004, pp. 665-666.

47 Some authors have referred to the TRIPS (Agreement on Trade Related Aspects of Intellectual Property Rights) as a ‘spectacular’ example of nodal governance that blurs the line between the public and private spheres and which ultimately has global consequences. They state ‘far from remaining in the realm of contract, under state regulation, the firms at the center of the TRIPS story are in essence wielding the power of state and international trade law through nodal means. Here the private sector steers and the state rows.’ S. Burris, P. Drahos, C. Shearing, ‘Nodal governance’, *Australian Journal of Legal Philosophy*, Vol. 30, 2005, at pp. 46-47.

48 L. Loader, N. Walker, ‘Locating the Public Interest in Transnational Policing,’ EU Working Paper no. 2007/17, European University Institute, 2. Electronic copy available at SSRN :<http://ssrn.com/abstract=1022882>.

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response to the increasingly regulated business environment, the emphasis seems to be to institute and implement internal compliance systems. Indeed, the experience of prosecution in the United States suggests that the existence and consistency of application of such compliance systems can have a dramatic effect on the negotiating ability of a company where an infringement of anti-corruption laws does occur. The presence or absence of an effective compliance system may also significantly increase or reduce the severity of punishment. It is therefore not only desirable, but also a matter of responsible management to establish such monitoring and compliance systems within a corporation. Indeed the corollary is true, that a multinational corporation in today's business climate that does not have such a monitoring and compliance structure in place could well be liable for a breach of the duty of care.<sup>49</sup> However such a 'cover-my-back mechanism' may not suffice to displace the fundamental ethic of the corporation to make profit. The company culture may be reflected not so much in its codes and compliance structures as it is in the driving need to turn a profit.

Increased regulation and high profile prosecutions certainly do imply that there is a changing tide, but they may also mean that international corruption has become more complex. The stakes of being caught are higher and therefore the amounts demanded as well as the strategies to avoid detection and distance the corruption from the corporation will also necessarily become more finely tuned. Criminalization creates a false separation between transactions that occur in the corrupt exchange and those that occur after the commission of the offense. Yet, all these transactions are in fact connected and shape the environment in which international corruption occurs. This suggests the need for an approach to sanctioning international corruption that accommodates transactions occurring at all levels of interaction.

### 10.4 Anti-Corruption in a Quandary?

Where does this state of affairs leave the fight against corruption? On the one hand there is no doubt that impressive strides have been made in the last three decades. The normative framework in which international corruption occurs has radically changed. There is content, definition and sanction for what has been identified as a common international problem. To this extent, this can be

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49 In *Re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del Ch. 1996) the Delaware Chancery Court held that the failure to have an adequate corporate information and reporting system in place could constitute a breach of fiduciary duty by the company's board of director stating, 'A director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses.'

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described as triumph for the rule of law. The tendency toward disorder, where each party sets its own rules according to its own interests, has been set aside for a collective agreement that punishes international corruption for the benefit of all. Why then is international corruption still such a problem and why must we continue in our search for an efficacious strategy to combat corruption?

Given the antiquity of the problem of corruption, it could be argued that corruption is an existentialist problem that is simply a part of human nature. It may even be the case that continuing to fight against such an inevitable aspect of human nature is the surest way to entrench it in deeper and make it more complex. This will consequently make international corruption more difficult to tackle and uncover. If this is the case, then criminalization and other attempts to solve the problem of international corruption may well serve to make the problem more systemic.

The contrary argument to this point of view is that, the problem faced in tackling international corruption is symptomatic of the problems of governance in a global environment that lacks a nexus of governance. To articulate the rule of law in this context, strategies that anticipate dispersed sovereignty and sanction must be adopted. The challenge faced by traditional sovereign-centered strategies characterized by the criminal law approach should not be seen as a sign of the intractableness of the problem, but rather as an indication that the approach adopted may need to be adapted to meet the challenges posed by a society that is supranational in character. At this level, traditional divisions between the public and private sectors, and public and private law are changing.<sup>50</sup> Perhaps, not surprisingly, traditional approaches may prove insufficient to meet the particular issues raised by this form of society.

The aforementioned conflict of interest cut across several levels. Governments are on the lookout for economic growth and expansion for the good of their citizens. This produces a lack of political will to prosecute companies that are bringing in that economic growth and expansion. Again, government officials engaged in acts of international corruption represent the very group in society that is charged with the protection of the public against such acts of corruption. Thus a conflict emerges that pits the private interests of an elite group against the interests of the common population. Another conflict of interest emerges at the level of the corporation that is on the losing side of a corrupt deal. This is the conflict between throwing good money after bad, or cutting one's losses.

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50 Johnston and Shearing note that 'It is now virtually impossible to identify any function within the governance of security in democratic societies that is not, somewhere and in some circumstances, performed by non-state authorities as well as by state ones.' L. Johnston, C. Shearing, *Governing Security: Explorations of Policing and Justice*, Routledge, Oxon, UK, 2003, p. 32.

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Often, the participants affected by a corrupt exchange may have good reasons to let sleeping dogs lie.

Fighting against the status quo must contend with the fault lines of conflicts of interest and recognize the limitations faced by such a deeply conflicted group of actors. Beccaria's dream of a society protected by its sovereign, who uses punishment to deter the commission of harmful acts, falters where sovereignty is dispersed; where the sovereign is a part of the problem and society itself is complex, fragmented and self-regulatory. Nonetheless, the detrimental effects of international corruption and its negative social consequences motivate the need to continue seeking effective schemes of restraint. The first has been the restraint sought in criminalization. The question that arises in view of the mixed results of criminalization is whether an alternative conceptual framework may help to concretize the foundation laid by criminalization.

### **10.5 Changing the Conceptual Framework**

Three features stand out in the environment that influences international corruption: the first is the regulatory framework; secondly, the contracts that come into being as a result of the successful violation of the anti-corruption rules and are the immediate result of international corruption; and thirdly, the damage suffered by persons affected directly or indirectly by the effects of the contract. There is a clear distinction between the influence exerted by the contract that results from the violation of anti-corruption rules and the corruption damage suffered by victims as a result of corruption. The former embodies the actions of parties acting on their own free will to enter into and negotiate a binding agreement, while the latter is founded in the occurrence of a legal wrong that arises in the absence of any contractual relationship. This is typical of the division between contract and tort obligations. Both of these obligations fall within the purview of private law. However, there is a line of congruence in that in both cases the redress sought in consequence of the breach of obligations arising under contract or tort law is initiated independently of the state.

The direct line of consequence between the legal rules prohibiting international corruption and the resulting contract as well as the damage resulting from international corruption is one that is somewhat blurred by the strict division between public and private law. In real life such demarcations are not so clear-cut. This divide creates a distortion that influences the environment in which the prohibited acts of corruption take place. While some aspects of the corruption in interaction are caught within the ambit of the traditional criminal law regulation, several aspects of this interaction lie beyond the reach of criminalization in the sphere of private law. An artificial public/private boundary does not accord with the realities of the corruption environment. Adopting a transaction approach places the corrupt exchange in the context of

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its environment and provides a holistic view of the processes of the corruption exchange.

Corruption occurs in interaction. It stands to reason that attempts to curtail corruption should address that *process of interaction*. Changing the focus of the fight against corruption from the individual to the transactions that arise between the various participants involved in the corrupt exchange, enables the complex mechanisms that underlie the process of international corruption to be viewed as a cohesive whole. Typical international business interactions that may involve corruption include corporate fraud, private-to-private corruption, private-to-public corruption, market collusion, cartels, as well as corporate lobbying.<sup>51</sup> Attempts by succeeding governments,<sup>52</sup> the competitor who has lost a bid as a result of unethical practices,<sup>53</sup> shareholders,<sup>54</sup> principals,<sup>55</sup> and non-governmental organizations along with ordinary citizens<sup>56</sup> to institute claims based on acts of bribery and corruption provide a rough typology of 'victims.'<sup>57</sup> For such victims private remedies may offer a more effective method of recovery and relief.<sup>58</sup> There is, however, an even larger group of

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51 Transparency International, 2009, 'Report on Corruption in the Private Sector', Global Corruption Barometer Report, pp. 13-75.

52 See for example the *BBC News* report 'Abacha Accounts to be Frozen', available at <http://news.bbc.co.uk/2/hi/africa/1576527.stm>.

53 An example is the US case of *Lamb v. Philip Morris* 915 F.2d 1024, (6th Cir. 24 August 1990), where Kentucky tobacco farmers filed a civil suit against Philip Morris and BAT arguing that the 'donations' promised by the defendants' subsidiaries amounted to unlawful inducements designed and intended to restrain trade.

54 A good example is in *re Immucor*, 2006, U.S. Dist. LEXIS 72335 (N.D. Ga. 4 October 2006). After Immucor announced that it was to be formally investigated by the SEC for violations under the Foreign Corrupt Practices Act, this prompted shareholders to file a complaint under Sections 10-b and 20(a) of the Exchange Act. The shareholders claimed that Immucor had understated the potential number of FCPA violations for improper payments that it was facing, reporting the SEC investigations as an 'isolated event.' It turned out that there had been several acts of corruption committed by Immucor over a period of several years.

55 For example in the 2003 *Tesco Stores* case, Mr. Pork, a manager in Tesco's e-commerce, was found to have received a bribe of £323,749.99 from a customer that did business with Tesco, Delta Computer Systems (UK) Ltd.

56 *E.g.* the civil action by Transparency International (France) and Mr. Gregory Ngbwa Mintsa, a Gabonese citizen, in December 2008 to call for an investigation into how large amounts of real estate and other assets were acquired in France by presidents Denis Sassou N'Guesso of Congo, Omar Bongo-Ondimba of Gabon and Teodoro Obiang Mbasogo of Equatorial Guinea. See Press release by Transparency International (France), [http://www.transparency.org/news\\_room/latest\\_news/press\\_releases\\_nc/2009/2009\\_05\\_06\\_france\\_case](http://www.transparency.org/news_room/latest_news/press_releases_nc/2009/2009_05_06_france_case).

57 See Chapter 8 for a full discussion of the international framework for private redress and the methods and strategies that have been used to institute private legal actions for harm suffered as a result of corrupt acts. See also A. Makinwa, International Corruption and the Privatization of Security, in M. Hildebrandt, M. Makinwa, A. Oehmichen (Eds.), *Controlling Security in a Culture of Fear*, Boom Publishers, The Hague, 2010, p. 99, at pp. 112-119.

58 T. Graham, 'The Implications for Intermediaries Handling the Proceeds of Corruption: The Abacha Case Study'. Presented at the 'Stop Money Laundering!'- Conference, 26 February 2002, London.

persons that suffer the damage of international corruption. These are the indirect victims, citizens of states whose social, economic and political progress is negatively impacted by corruption. The direct and indirect victims of international corruption are much closer to the damage suffered than a paternalistic state. They are also motivationally better situated to seek redress for the harm they have suffered.

An approach to fighting international corruption that takes into cognizance the factors in the legal environment that encourage or catalyze the occurrence of corruption and also those factors that result from it, provides a coherent view of the processes of the corrupt exchange. The legal environment that surrounds the commission of international corruption includes not just the perpetrators of the offense, but also the persons whose trust has been abused by acts of corruption as victims who have suffered damage as a result of the corruption that has occurred, as well as the consequences of corruption in the transactions and contracts that remain following acts of corruption. A multi-level framework in the fight against corruption reflects the complexity of the factors that play a role in shaping the environment in which corruption occurs. Articulating these levels of interaction is an important conceptual basis upon which to formulate strategies to fight corruption.

### **10.6 Levels of Interaction**

The interconnectedness of acts of corruption and their consequences suggests that to effectively address the damage caused by international corruption, the various levels of interactions impacted by the corrupt exchange should be taken into account. This book identifies three main levels of such interactions, which can be referred to as the mandate, violation and consequence levels.

#### **10.6.1 The Mandate Level**

Government officials do not exist in a vacuum but are bearers of a mandate granted to them as the representatives of citizens. The government official is an agent not just of the government on whose behalf the official negotiates but, more pertinently, of the people, who put the government in power. Actions that harm the public interest are outside the mandate of representatives. Where an act of international corruption occurs, there is a breach of mandate. This affront to the public interest is at the heart of anti-corruption regulations and strategy.

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International corruption represents a classic case of a breach of trust. This trust embodies the duty to act in the best interest of the public to whom this trust is owed. The breach of the public trust has far-reaching consequences and eventually threatens the social fabric. The abuse of mandate by international corruption results in the coming into being of contracts that are won not on the basis of the best bid, but on the basis of the party most willing to give a bribe. This results in the systematic corrosion of the institutions of government, as the responsibility to the public is abdicated for the pursuit of private gain. Ultimately the public interest also embodies private interests because in the absence of an effective and efficient public sector, the private sector cannot function optimally. Framing the discussion in these terms immediately broadens the scope of anti-corruption strategies to include the articulation and protection of the interests of the grantees of the public mandate. Seen this way, a primary function of anti-corruption strategy is the restoration of the trust breached by addressing the damage done to the givers of the public mandate by acts of corruption.

It is clear that from a mandate perspective, in every instance where an act of corruption occurs, there is a breach of mandate. Outside of this foundational context, corruption is sometimes viewed as a victimless crime because it is conceptualized as a private agreement occurring with the consent of transacting parties.<sup>59</sup> Ruggiero makes the point that the study of corruption tends to focus on the individuals who have been involved in the corrupt exchange with the result that corruption ends up 'being assimilated to a form of victimless crime, where the actors involved are equally determined to participate in the exchange and pursue their private if illegal interest.'<sup>60</sup> Ruggiero rightly argues that 'the impact of the corrupt exchange may not be perceived when attention is only centered on the specific setting in which it takes place.'<sup>61</sup> Indeed the full impact of corruption is felt beyond the specific instances in which it takes place precisely because it represents an abuse of a mandate that results in harm to the givers of that mandate. Beyond the specific contractual relationships of the bribe-giver, the bribe recipient and the person to whom the bribe-recipient stands in a position of trust, there is a larger group of indirect victims who are affected by the consequences of corruption. These

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59 Some writers argue that there is also a psychological reason for corruption being perceived as a victimless crime. They state that 'On most cases of public corruption, given that there is a mishandling of public resources, it is often stated that the whole society is being harmed and because the whole society isn't a proper name or a person, harming society as a whole is a sentence that won't trigger regret or aversion.' They further state that when a victim is not identified or perceived, there is no reason for thinking that harm is being inflicted and mirror areas of the brain are not activated. See E. Salcedo-Albarán, I. De León-Beltrán, M. Rubio, 'Feelings, brain and prevention of corruption', Vol. 3, Iss. 3, *International Journal of Psychology*, 2008, p. 2, at pp. 11ff.

60 V. Ruggiero, *Crime and Markets: Essays in Anti-Criminology*, OUP, Oxford, 2006, at p. 106.

61 Id.

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are the mandate-givers who suffer damage and loss as a result of the corrupt actions of their governing officials and elite.

In the corruption exchange, the norm violation is directly linked to the relationship between the parties. It is the damage to that relationship that triggers the injury that is occasioned by international corruption.<sup>62</sup> Entering into a position of conflict of interest is a breach of mandate because of the secrecy that accompanies the agreement to give a bribe. In the interactions between the parties involved or affected by the corrupt exchange, the mandate-giver is kept in the dark. Clearly if the agreement to accept a bribe has the consent of the party to whom the duty is owed, there is no question of bribery or corruption. The element of secrecy by the bribe-recipient is directed at the mandate-giver, and is an abuse of the mandate. This secrecy can only be directed at the mandate-giver and from this perspective the injury caused by this act of secrecy accrues to the mandate-giver. This identifies the real victims at the violation level of corruption in interaction.

Secrecy has been referred to as a key distinguishing element of the bribery transaction.<sup>63</sup> It has been remarked that ‘the real evil is not the payment of money but the secrecy attending to it’.<sup>64</sup> The term secrecy in the international corruption discourse is probably best interpreted as a lack of consent.<sup>65</sup> The fact is that in many countries, particularly those rated poorly on the Transparency International Indexes, corruption is an open secret. The perception of people is that it is an increasing phenomenon and that their government officials are on the take. Clearly there is knowledge about the general fact of bribery if not necessarily the specific case. However, general knowledge does not equate to consent. For a bribe to lose its character as a bribe there has to have been consent to its occurrence. Referring to the lack of

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62 Discussing the meaning of fiduciary relationship, the courts in *Wilson v. Hurstanger Ltd* [2007] EWCA Civ 299, stated that it was one where the agent was required to ‘act loyally for the defendants and not put himself into a position where he had a ‘conflict of interest’; see Para. 34.

63 Lord Romer remarked on the definition of a bribe, ‘If a gift be made to a confidential agent with the view of inducing the agent to act in favour of the donor in relation to transactions between the donor and the agent’s principal and that gift is secret as between the donor and the agent—that is to say, without the knowledge and consent of the principal—then the gift is a bribe in the view of the law.’ *Hovenden and Sons v. Millhoff* [1900] 83 L.T. 41, at p. 40.

64 *Chitty J. Shipway v. Broadway* [1889] 1 QB p.369 and p. 373. As has been remarked, ‘If a gift be made to a confidential agent with the view of inducing the agent to act in favour of the donor in relation to transactions between the donor and the agent’s principal and that gift is secret as between the donor and the agent – that is to say, without the knowledge and consent of the principal – then the gift is a bribe in the view of the law.’ See *Hovenden and Sons v. Millhoff*, [1900] 83 L.T. 41, at p. 43.

65 Consent requires that the party to whom the fiduciary duty is owed has ‘full knowledge of all the material circumstances and of the nature and the extent of [the agent’s] interest’. *Wilson v. Hurstanger Ltd* [2007] EWCA Civ 299, Para. 35.

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secrecy as a lack of consent is representative of the nature of bribery across various levels of interaction.

Referring to the lack of secrecy in terms of a lack of consent further emphasizes the relationship between the mandate-giver and the perpetrators of acts of corruption. A *transaction approach* sees the party whose trust is betrayed not only in the narrow terms of the classic 'principal' of a corrupted agent, but more broadly in terms in the mandate-givers who have entrusted a public official with specific duties. The challenge lies in formulating the theoretical framework for this notion of 'trust' and the consequent remedies for its breach.

A transaction approach makes a direct link between acts of international corruption and the abuse of mandate that it represents. Such a perspective views criminal law boundaries as artificial to the extent that the definition of the criminal offense excludes the actual victims. Seen in this way, a primary function of anti-corruption rules should be the restoration of the trust breached by addressing the damage suffered to the grantees of the abused mandate. The challenge this raises is how to encourage and facilitate the process of restoration of trust in the sanctioning processes for international corruption. The mandate level of the corrupt exchange brings to the fore the particular problem of the indirect victim of the corrupt exchange and the larger issue of the nature of the social contract in a global age.

### 10.6.2 The Violation Level

The next level interaction can be described as the violation level, where the giving and acceptance of a bribe occurs. This is the familiar terrain of criminal law. It is also the level at which the private law discourse about corruption primarily occurs. The public and private articulations of corruption share a common core and the fundamental substance of the interaction is the same. Public law looks to the bribe-recipient and the bribe-giver as the offenders who stand on both sides of the corruption agreement, and sanction their actions via punishment. Private law looks at the relationships and contracts that arise between the bribe-giver, the bribe recipient and the principal of the bribe-recipient the resulting contracts as tainted by the breach of the obligation to act in the best interest of that principal. The remit of public and private law is the agreement (contract) to give a bribe. The focus of criminal law is somewhat narrower than private law in that it focuses solely on the bribe-giver and the bribe-recipient, whereas private law also addresses the position of the mandate giving principal. To the extent that the contract to give a bribe is central to public and private law discourse, it can be asserted that the substance of the interaction is the same. Indeed the actors are the same. If this is the case then the outcome of that interaction from the viewpoint of the law should be

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consistent. From a violation perspective the logical result of an interaction that is in substance alike, is that the consequential response is similar.

The nature of a bribe in public and private law discourse is fundamentally the same. The giving of a bribe creates a conflict-of-interest situation.<sup>66</sup> This conflict-of-interest situation causes the injury that both the public and private law seek to avoid in their responses. The Civil Law Convention highlights this conflict-of-interest issue where it describes corruption as an act that ‘distorts the proper performance of any duty or behavior required of the recipient of the bribe.’<sup>67</sup> The criminal law statutes do not explicitly focus on the conflict-of-interest issues that occur in the violation of the duty to act in the best interest of the party to whom the duty is owed. However, this is implied in the description of the offense, which speaks of corruption as an act that causes an ‘official to act or refrain from acting in the exercise of his or her official duties.’<sup>68</sup> The official duty of the official is owed to a mandate-giver that stands just outside of the criminal law formulation. The acting or refraining from acting creates a conflict situation between the government official and the party to whom the official owes the duty to act properly.

The violation level brings to the fore the need for a broader notion of sanction when applied to artificial persons. The emphasis is not so much on fines or incarceration as it is on taking the profit out of corrupt exchanges, punitive damages, disgorgement, constructive trusts, disbarments from bidding for public contracts and strategies that encourage corporate behaviour that enables sanction to be negotiated and the avoidance of public processes of criminal prosecution. The violation level also raises questions about the access to justice by the direct but also the indirect victims of corruption, as well as the role of international arbitration in the policing of corruption. Most importantly, the development of a public-private partnership is particularly crucial at this level to encourage voluntary self-policing and disclosure by actors in the corrupt exchange.

### 10.6.3 The Consequence Level

A third level of corruption in interaction is the consequence level. This level of interaction results from the breach of trust at the mandate level and the

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66 In *Anangel Atlas v. Ishikawajima-Harima* [1990] 2 Lloyd’s Rep. 526, a UK court posed the question, ‘what is the essential nature of a bribe? ...’ In the view of the court the test for determining whether a payment constituted a bribe was: ‘whether or not the making of it gives rise to a conflict of interest, that is to say, puts the agent into a position where his duty and interest conflict.’

67 Art. 2 CLC.

68 Art. 15 UNCC; Art. 1 OECD Convention.

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successful breach of the anti-corruption rules that occurs at the violation level of interaction. The focus of interaction at this level is the contract that comes into existence as a result of the fact that the anticorruption rules have been successfully violated. The contract left standing influences behavior and affects the deterrent effect of anti-corruption strategies. Allowing persons to benefit from contracts resulting from bribery transactions is a contradiction to the logic of the anti-corruption rules. Without due consideration of the effects of the consequence level, progress in the fight against international corruption is seriously compromised. The contract left standing, as a contract between 'consenting parties,' is often a private contract to which the rules and principles of private contracts should apply. However, to adopt this reasoning is to ignore the manner in which the contract came into being in the first place, which could set up private law as a cloak for transactions that go against the public interest.

The interactions at the consequence level are also complicated by the blurring of the lines between the public and private sectors. The normative framework that gives content and definition to international corruption puts the state through its government officials, and international companies at the center of the corruption conundrum. These are the principal parties to the transactions that result from international corruption and raises questions about the ability of the state via its government officials to act as an effective and independent provider of security regarding such corruption. As Friedmann points out, 'the increasing participation of public authorities in contracts creates the wider and as yet generally unexplored problem of the dual function of the state, *as a superior and as an equal*.'<sup>69</sup>

The interaction between the public and private sectors is all the more complicated because the traditional dichotomy between the sectors is collapsing. Inherent principles in liberal thinking are the freedom of the individual and the limited role of the state, which assumes a distinction between the private and public spheres of activity. The liberal notion of freedom of contract assumes a freedom to create and confer legal rights and obligations in a private self-regulating system.<sup>70</sup> In this private sphere the interest of the individual is the primary focus and not that of the society. Yet, in modern times, the state is increasingly joining the fray as a private contractor and shareholder.<sup>71</sup> This challenges the notion that the state

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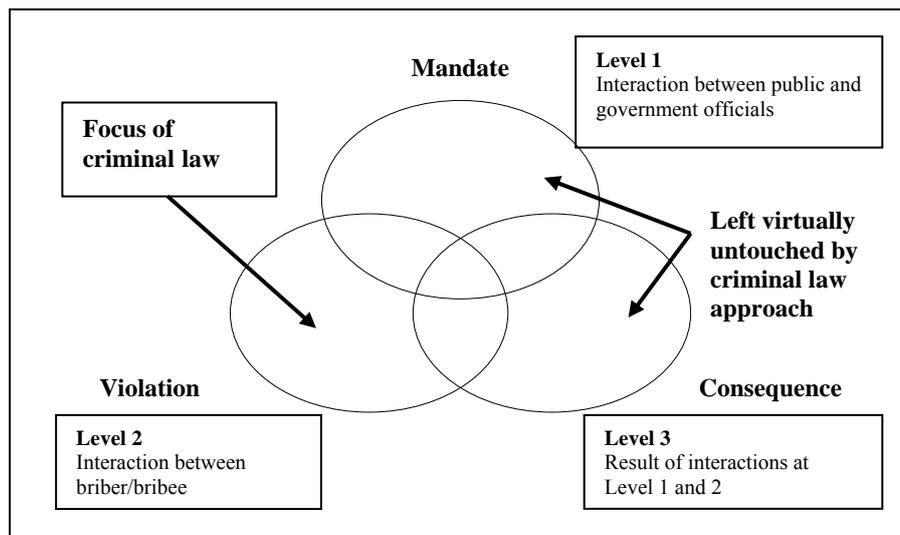
69. W. Friedmann, 'Changing functions of contract in common law', *University of Toronto Law Journal*, Vol. 9, No. 15, 1951-1952, at p. 23.

70. H. Collins, *Regulating Contracts*, OUP, Oxford, 1999, at pp. 57-58.

71. L. Backer, 'The private law of public law: public authorities as shareholders, golden shares, sovereign wealth funds, and the public law element in private choice of law', *Tulane Law Review*, Vol. 82, No. 1, 2008, p. 62.

represents and protects the public interest in a public/private transaction. The autonomy of the private contractor conflicts with the paternalistic state. In such a framework, where does the nexus of governance lie? Clearly the provision of security in this overlapping zone cannot be easily ascribed to the state.

**Figure 2. Summary – Levels of Interaction**



Where private transactions impact the society because of their public dimension, the role of the private contractor state as protector of the public interest merges with the actions of a private player in a contract transaction. How does one reconcile the role of the state as a private contractor with that of the protector of the public interest? Where the government becomes a private actor, governance must be abdicated or reconstructed. Harden remarks that the conceptual divide between ‘public’ and ‘private’ has ceased to correspond to the way the world actually works. ‘Legal structures and ways of thought need to be re-adapted accordingly’.<sup>72</sup>

Some of the issues that are emphasized at the consequence level of the corrupt exchange are the status of contracts tainted by international corruption, the contract as a regulatory tool, the empowerment of individuals seeking redress in private rights of action, the encouragement of private litigation by extending

72 I. Harden, *The Contracting State*, Open University Press, Buckingham, UK, 1992, p. 4.

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standing to sue to indirect victims who suffer damage as a result of acts of corruption, facilitating private litigation in the fight against corruption by adopting schemes that reward the private litigant for protecting the public interest as well as the facilitation of class actions and defrayment of litigation costs. Furthermore at the consequence level developing an environment where the choice for compliance becomes the rational choice means expanding the potential for private disclosure of acts of corruption by developing robust whistle-blower protection.

### 10.7 Advantages of a Transaction Approach

A transaction approach anticipates and addresses issues that occur at the various levels of the corrupt exchange in a single coherent narrative. Focusing on the transaction can be viewed broadly as a restorative approach that ‘emphasizes repairing the harm caused by crime,’<sup>73</sup> in a restitutive process.<sup>74</sup> It is a form of restorative justice where the aim is to repair the ‘harm caused or revealed by criminal behavior.’<sup>75</sup> It also portrays security in terms of a process that seeks to retie the cords of broken interactions in a bid to promote social harmony. By addressing the injury caused to victims, stripping away profits made from corruption and challenging the validity of transactions tainted by or resulting from international corruption, a transaction approach can expiate the ‘outrage to morality.’<sup>76</sup> This translates the need for vengeance into a format that corresponds with a ‘soulless’ corporation. The effect of undoing the injury caused by the transaction may provide a powerful incentive to ensure that transactions are not of the sort that may suffer the risk of ‘being undone.’

Where government officials are key players in the corruption equation, recourse must certainly come from other sources. A transaction approach to fighting corruption enables a change in perspective that identifies the areas that catalyze such recourse. This approach broadens the purpose of the sanction in the fight against corruption from not just punishment of the offender, but also to the effect of breaches of mandate and the contract left standing as a result of a successful violation of the anti-corruption rules. Looking at *corruption in*

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73 See <http://www.restorativejustice.org/>. There is no consensus definition of the term ‘restorative justice’. However, one aspect that seems to be shared by writers in this field is the viewpoint from the perspective of the victim rather than the offender or in terms of restoring the social contract of society rather than punishment of the victim. See general discussion in H. Zehr, B. Toews (Eds.), *Critical Issues in Restorative Justice*, Criminal Justice Press, Monsey, NY, William Publishing, Devon, UK, 2004, pp. 1-47.

74 Durkheim’s view of the devolution of repressive law and the growth of restitutive law as societies become more complex is particularly relevant in the context of the highly complex and differentiated society of trading nations represents. A. Giddens (Ed.), *Emile Durkheim: Selected Writings*, CUP, Cambridge, 1972, p. 126, at pp. 130-140.

75 <http://www.restorativejustice.org/>.

76 A. Giddens (Ed.), *Emile Durkheim: Selected Writings*, id., at p. 126.

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*interaction* enables these perspectives to be viewed in a process that encourages coherency.

The normative foundation laid by criminal law at the violation level is augmented by the potential of private law in addressing issues raised at the mandate and consequences level. Here lies the potential of private law and the involvement of civil society.<sup>77</sup> At the consequence level, the ability of private law to follow the money and not just the offender brings economic and reputational consequences that can be of serious significance for commercial players. In this sense, private law may in many ways be better equipped to ensure that the principal actors in international corruption – the multinational corporations and government officials – do not profit from their crimes.

Looking at corruption in a series of interactions helps to emphasize the fact that the path to progress in the fight against corruption must explore methods of overcoming the monopoly of the state in the initiation of the sanctioning process. Private law processes of dispute settlement have a role to play in the fight against corruption. The private action brought by litigants before courts of law or, as is more likely in international commercial disputes, before international arbitration tribunals, can play a vital role in ensuring that the ramifications of the criminalization of international corruption are consistently applied in private transactions amongst individuals.<sup>78</sup>

A transaction approach encourages coherency across the public and private law divide in the fight against international corruption by, on the one hand recognizing the role of criminal law and regulation, and on the other recognizing the role of private law in policing the transactions, rights and obligations that occur in corrupt interactions. The transaction approach also recognizes that the intricateness of the interaction between the public and private sectors as well as between private and public law implies that a solely criminal law approach or private law approach may not be sufficiently flexible to deal with the range of issues that occur in the corrupt exchange. A lack of flexibility leaves vital elements out of the process of redress. Yet, these elements interact together and influence the final outcomes of successful anti-corruption strategy. The process of identifying and restoring transactions and relationships compromised by corruption broadens the corruption discourse to

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77 A. Portnoy and J. Murino speak of an imminent front that is being opened by 'private parties now joining the fight against corruption.' See 'Private actions under the U.S. Foreign Corrupt Practices Act: an imminent front?', *IBA's International Litigation News*, April 2009.

78 A. Makinwa, *Civil Remedies for International Corruption: The Role of International Arbitration*, id., Note 44 above.

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embrace elements such as breaches of trust, contracts, assets, and damage caused by corrupt exchanges. A transaction approach encourages a broader perspective in juristic formulations.

The existing normative framework that gives content and definition to international corruption puts the state, government officials and international companies at the center of the corruption conundrum. This raises questions about the ability of the state, via its government officials, to act as an effective and independent provider of security regarding international corruption. The persistence of international corruption motivates the need for new models of intervention. By linking the interactions affected by the corrupt exchange at the various levels and drawing a consistent line from mandate to consequence, a *transaction approach* provides a basis to review existing principles and theory in a coherent single narrative.

The transaction approach throws up three basic challenges. These challenges are firstly, the articulation of the notion of trust and the consequences for its breach that occurs at the mandate level; secondly, the incorporation of the process of restoration of trust in the sanctioning processes for violations of anti-corruption rules; and thirdly, the regulation of the consequences of corruption in the differentiation, interpretation and enforcement of contracts tainted by international corruption. Addressing these challenges may help to move the fight against corruption in a positive direction.

### **10.8 Conclusion**

This chapter proposes a shift in the conceptual framework in the fight against corruption that moves the corruption discourse beyond its traditional focus on sanctioning the offender to focusing on the transactions that are tainted by the corrupt exchange. The *transaction approach* proposed in this chapter identifies the mandate, violation and consequence levels of interactions as critical stages in the corrupt exchange where interventions can be made to provide security. By seeking to restore interactions damaged by corrupt exchanges, the *transaction approach* can empower victims, bypass the monopoly of the state to initiate sanctions, and exploit the pragmatism of the international marketplace. In this terrain, the dynamics of contracting that underpin the entire trading system can be harnessed as a regulatory tool.

In a changing international society, principles of justice must adapt to this new terrain. Looking at corruption as a series of interactions helps to emphasize the fact that the path to progress in the fight against corruption must explore nodes of governance beyond the state and capitalize on the fact that a vital node of governance is emerging from the growing role of private actors in international society. By addressing 'broken' interactions, the environment in which

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corruption occurs becomes less predictable in that there are several points of intervention to trigger the sanctioning processes for corrupt acts. Such an environment is arguably one that better encourages compliance with anti-corruption rules.

The transaction approach to fighting corruption looks to the environment of international trade as the critical element in encouraging or discouraging compliance with the anti-corruption rules. The purpose of sanction is seen not so much in terms of vengeance and retribution but rather in terms of *creating an environment* that encourages compliance. Looking beyond state-centered theories of punishment opens the door to developing models of sanction that may be more consistent with the realities of the agreement-based environment in which international corruption occurs. Finally, while this chapter is specific to the challenge of international corruption, a larger script that emerges is a viewpoint that sees the provision of security as a *shared function* of public and private law in an emerging international society.

# Chapter 11

## Final Conclusions

*'The human donkey requires either a carrot in front or a stick behind to goad it into activity.'*  
*The Economist*<sup>1</sup>

The last 30 years have witnessed a fundamental change in the approach to fighting corruption. There has been a shift from a focus on fighting corruption on the so-called demand-side of corruption to tackling corruption at the place of origin of bribes and other inducements i.e. the supply-side of corruption. There has also been a shift from fighting primarily domestic corruption to fighting corruption that occurs in other countries. Furthermore there is global consensus on the criminalization of corruption occurring in business transactions. This progress notwithstanding the ominous scale of corruption world-wide makes it clear that these are only the first steps of what is still a challenging journey. The perception remains that governments are 'ineffective in the fight against corruption'

This book has argued that one of the causes of the seeming 'ineffectiveness' in the fight against corruption are the structural gaps of criminalization especially when transposed into an international environment. These gaps, to a certain extent, can be overcome by private law processes. Where the state is a major actor in grand scale corruption, the monopoly on initiating sanction held by that same state under the criminal processes creates a conflict of interest that impedes effective enforcement. Furthermore, the international environment of an integrated world economy renders state-based solutions to international crimes problematic. A lack of effective enforcement sets into motion a vicious cycle of impunity. The failure of the rule of law leads to a further breakdown of order and development.

This book has tried to show that the consequences of successful acts of bribery are not sufficiently addressed within the existing criminal law formulations. Yet, these consequences play a central role in the international

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<sup>1</sup> 'The Carrot and the Stick', *The Economist*, 29 June 1946. Reprinted in *American Affairs*, Vol. 8, No. 4, 1946, p. 282.

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transacting environment. They act as an incentive for risk taking on the part of corporations. As a result of this, corruption may in fact become more complex and even harder to detect as a response to criminalization. Simply put, corruption is not an abstraction but takes shape in the form of agreements, payments, kickbacks and other transactions. The disconnect between public deterrence and private consequence is one that needs to be surmounted in order to bring coherency to the fight against corruption.

A central theme of this book is that private remedies can change the sanctioning environment for corruption in a manner that positively influences compliance. An environment that makes contracts tainted by corruption open to challenge, encourages and rewards private litigants and encourages self-reporting by offenders can fundamentally change the behavior of corporations and other actors in corrupt exchanges. Simply put, it is the environment, not the anti-corruption rules per se, that influences the choice for or against compliance. The *rule* merely creates the standard against which choices are made. The *environment* influences the choice that is made.

This book suggests that private actors will play an important role in filling the remedial gaps in the fight against corruption. Private remedies for corruption cover the range of private-actor led legal actions to remedy harm occasioned as a result of corruption. Unlike public law, which concentrates on punishing the offender, private remedies are centered on transactions. This book places the private actor in a central role in the fight against corruption and represents a shift from traditional state centered-criminal law approaches. This is a logical extension of the international repudiation of corruption in business transactions as well as of the changing international regulatory environment. The future of the fight against corruption will see the increasing use of private initiatives as well as private-public partnerships. This concluding chapter presents the final conclusions on the foundations for private remedies, the models of private remedies and the emerging international framework discussed in this book.

### **11.1 The Foundation for Private Remedies**

The challenges of fighting corruption are complex and far-reaching. Therefore, it is important to put any discussion about strategies to fight corruption within the larger context of the social, economic and political realities that present great challenges to fighting corruption. The slow progress in turning the tide and the yearly statistics from data collection institutes such as Transparency International emphasizes the fact that there are no easy solutions to be had. Corruption is insidious and resilient. The motivation for continued attempts to develop effective strategies to fight it is in response to the threat corruption poses to our way of life, to social security and economic development. The stark effects of corruption make it imperative to continually evaluate current approaches and, by identifying gaps, to shift the focus of anti-corruption

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strategy to these areas. This is the principal motivation for this book. *Private remedies for corruption* address a gap in the present anti-corruption discourse that predominantly revolves around state-centered approaches in the fight against corruption.

The challenges and threats posed by corruption have occasioned an international response in a line that can be drawn from the watershed US FCPA to the global UNCC. This can be viewed as a first-stage response to corruption in international business transactions. The resulting international regulatory framework provides a baseline of legality upon which rules repudiating corruption across diverse jurisdictions and legal systems have taken shape. The criminalization of corruption in international business, whether of a public or private nature, is now a fundamental principle of worldwide application. To the extent that bribery in business transactions is now criminalized by a variety of national, regional, intergovernmental and international instruments, the horizon for private remedies has become more visible.

The fundamental first-level consensus regarding *international corruption* that has taken shape over the last three decades provides the foundation and motivation for this work on private remedies. However, it should be noted that the technical definition of *international corruption* is only a starting point. The repudiation of international corruption has provided a baseline of legality that is expanded in its application. It provides a common basis of agreement and strategy in the fight against corruption, but also, and maybe more importantly, it provides a global basis for national public policy against corruption in business transactions in general. Furthermore, as the cases and laws reviewed in this book show, the business environment and the legal mechanisms supporting it have outgrown the public and private distinction. The one category that remains the focal point of strategy and reform is *corruption in commercial transactions*.

In a global trading system characterized by a plurality of systems and values, this first-level consensus provides a 'starting point', where the *public policy* of 140 state parties of the UNCC is the same. In many ways the private law approach to corruption in an international environment is a *second-level response* that must piggyback a first-level international consensus repudiating and defining corruption. In the absence of such a consensus, talk of an international framework for private remedies is grossly premature. However, the corollary is also true. In the presence of an international consensus repudiating acts of corruption in business transactions as criminal acts, the expansion of the role of private remedies for corruption is inevitable.

The central role of the FCPA in these developments cannot be overemphasized. The FCPA not only catalyzed the movement that led to the

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worldwide criminalization of corruption in business transactions; the *process of implementing the FCPA* has produced a model of the private-public partnership that is providing great impetus to the role of the private actor in the sanctioning of corruption. This is creating a convergence of law, public policy and best practices that hangs over every business transaction whether national or international. The model of implementation of the FCPA has significantly affected the anti-corruption discourse from punishment *ex post* to prevention and compliance *ex ante*.

This process is shifting the focus of the sanctioning environment from a singular focus on the punishment of the offender to the role of the private actor. One can draw a lesson from the principle of functional equivalence adopted under the OECD Convention as a pragmatic strategy to ensure the attainment of regulatory aims by seeking compliance in a manner '*tailored to local legal traditions and fundamental concepts*.' The FCPA is not perfect but it does represent, at least for now, the spider in the web in the fight against corruption in business transactions. The carrot-and-stick approach to compliance that has emerged in the implementation of the FCPA creates an incentive for companies to self-police and self-disclose instances of corruption. More importantly, it also catalyzes a process whereby companies put in place mechanisms that can change internal corporate culture. This creates a ripple effect through the corporation's sphere of influence in a manner that places the private actor, acting alongside the state, in a central role in the fight against corruption.

The primary profiteer of an effective system of compliance in the fight against corruption is the international business community where the bottom line is an impartial motivator of choices. The critical mass of compliant companies that level the playing field is as much an imperative of regulation by government as it is of private actor led mechanisms. Business standards, codes, corporate reporting and verification schemes can be positively exploited by the savvy corporation in a world that is *connected* to a degree that is completely unique in history. This provides great business opportunity as well as risk. New emphasis is given in this environment to the opportunities the private actor has by way of remedy in the fight against corruption.

This changes the sanctioning environment in a manner that recognizes the importance of the private actor to fill the gaps of the criminal process. Three such gaps are discussed in this book. Firstly, the conflict of interest that results where the state, a key player in business transactions involving grand scale corruption, is also the party who initiates the sanctioning process under criminal law approaches. Criminalization gives the state a monopoly on the right to initiate sanction for corruption. This, however, means that implementation using the criminal process is dependent on government officials. This dependence on the apparatus of the state in initiating,

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investigating and sanctioning corruption is a grave impediment to fighting corruption. The degree of success is dependant not so much on the fact of criminalization but on political will, economic interest and the capacity of the state in question. Secondly, the fact that the criminal law focuses on the offender leaves the resulting contracts and transactions as an incidental part of anti-corruption strategy. The persistence of these contracts incentivizes risk tackling and undermines the effectiveness of the criminal process. Thirdly, the criminal law approach leaves the victim who has suffered harm as a result of corruption outside the sanctioning process.

Private remedies help to bridge these gaps to some degree. The motivated private actor can, independently of the state, initiate a sanctioning process for corruption wherever a jurisdictional link can be founded. This can encourage contracting in a manner that avoids such private suits, protects the validity of resulting contracts, as well as avoids the increased possibility of reputational harm that they occasion. This book is not a rejection of the criminal law approach but rather a response to the foundations set by the criminalization of corruption in a global world. Private remedies are complementary to the criminal process and a necessary step to make the gains of criminalization more concrete.

The findings of the Nigerian case study illustrate that where the process of criminal sanctions for corruption is compromised by historical, political, economic or social factors, alternative methods of tackling corruption must be explored. In the absence of global governance, methods of bypassing the compromised state become the logical way forward in the fight against corruption. Private remedies, private actors and public/private partnerships create the opening that enables consequences of corruption to be challenged independently of the state.

### **11.2 Models of Private Remedies**

The foundation set by the FCPA and the normative framework that has taken shape do not sufficiently address the regulatory vacuum created by a criminal approach that is essentially 'silent' about the transactions that result from corrupt exchanges. This presents choices that have a negative effect on compliance. Grand corruption often comes packaged as international contracts, which usher in welcomed foreign direct investment, yet, at the same time encourage practices that erode the capacity of institutions of governance. The resulting social inequality and social unrest undermines the message of the liberal trading system. A complicating element with international contracts is that oversight over such transactions is often dislocated from domestic processes by virtue of arbitration clauses that subject such contracts to the jurisdiction of private arbitration panels rather than national courts of law. The

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confidentiality of the international arbitration process further insulates the contract tainted by corruption by removing it from the ‘public eye.’

Corruption occurs in transactions, and by focusing on these transactions in place of the traditional offender, new strategies in the fight against corruption can be developed. A functional comparative approach was adopted in this book to assess the legal responses in the US, England and the Netherlands to the two major contracts associated with the corrupt exchange. The same functional approach was used to evaluate the legal responses in these three jurisdictions to the question of instituting legal proceedings for damage suffered as result of corruption.

### *The Primary and Secondary Contract*

The global consensus against corruption has implications for the private law where it concerns the agreements and transactions resulting from the corrupt exchange. Ultimately the corrupt exchange is an agreement between individuals. It also results in an agreement or contract between parties. The consequences of corruption do not stop at the boundary of public law but spill into areas governed by private law. It stands to reason, therefore, that measures to tackle these consequences must anticipate a plurality of sources of intervention: by courts; by administrative agencies; and by arbitration tribunals, all working in concert across different legal systems. The review of private remedies in the three jurisdictions chosen for study as well as under international arbitration show some interesting areas of convergence but also of dissonance with regard to the status of the contracts tainted by corruption.

These contracts have been described in this book as the *primary contract* and the *secondary contract*, respectively. This classification has been adopted to emphasize the origin, distinction and connection between the two main contracts that emerge from the corrupt exchange. The primary and secondary contracts are both tainted by the fact of corruption. It is, however, important in discussing anti-corruption strategy to distinguish between these two categories to facilitate clear analysis as well as a better understanding of how their status is affected by public policy considerations.

The primary contract evidences the agreement to give and receive a bribe. It may take the shape of a commission, consultancy, or other agency agreement. The parties to the primary contract are the bribe-giver and a bribe-recipient, who stands in a special position to a third party with whom the bribe-giver eventually seeks to enter into a contract. It is the relationship between the bribe-recipient and this third party that provides the foundation for the bribery exchange. In the absence of this relationship there would no basis for the

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primary contract. As such, the primary contract between the bribe-giver and the bribe-recipient is the nexus around which the entire bribery exchange and consequential transactions hang.

The secondary contract is best viewed as the positive result of a corrupt exchange. As the name implies, it is the contract that comes into being between the successful bribe-giver and the party (the principal or employer) with whom the bribe-recipient stands in a special relationship. This contract is dependent on the prior existence of the primary contract to give a bribe. It would never have come into being but for the successful execution of the primary contract. For these reasons it is referred to in this book as the secondary contract to emphasize this aspect of dependency.

In the three jurisdictions studied, the grounds for invalidating the primary and secondary contracts are founded in the fact of incompatibility with statutory criminal prohibitions and public policy. There is some question about the actual scope of the criminal prohibition of bribery. As a result of rules criminalizing bribery in all three jurisdictions, there is a clear prohibition of the conduct of giving and taking a bribe. However these prohibitions do not make mention of the resulting contracts. On the face of it, the contracts resulting from the corrupt exchange are not touched by the criminal prohibition. A distinction should be made here between the primary and secondary agreement. The primary agreement, though not mentioned in the criminal prohibition, is evidence of the very conduct, *i.e.* the giving and taking of a bribe, which is prohibited by the rules. The secondary contract, on the other hand, does not evidence or involve the giving or taking of a bribe between the parties to the contract.

The logic of the criminal prohibition that makes corruption a criminal act is applied to the primary and secondary contracts by Art. 34 UNCC, which requires that states should take the fact of corruption into consideration with respect to contracts tainted by corruption. Art 34. of the UNCC sets corruption apart from the generally accepted vitiating elements of mistake, misrepresentation, duress, undue influence, unconscionability as well as frustration and illegality. Art 34 gives corruption the status of an independent vitiating element in countries that have ratified the UNCC. This gives added impetus to the general jurisprudence regarding contracts tainted by corruption and underscores the existence of international public policy regarding the status of the primary and secondary agreements.

The central question before the court is whether the primary and secondary contracts are contracts that the court will enforce. Several factors determine the judicial response to this question. Firstly, if there a statutory prohibition with respect to the making of such a contract, the court is clearly mandated to uphold the law. Secondly, even if there is no express statutory prohibition,

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public interest may require that such contracts are not enforceable on grounds of public policy.

With regard to the *primary contract*, jurisprudence in the US, England and the Netherlands shows that the courts will consider a contract that evidences conduct that is prohibited by law in the same light as the conduct itself. The effect of the prohibition of bribery is to render the contract that evidences the giving of a bribe unenforceable because it is incompatible with the statutory prohibition. Even where a literal interpretation of the criminal statute can arguably restrict the criminal prohibition to the conduct and not to the contract, in all three jurisdictions, public policy serves as the barrier to enforceability of the primary contract. The courts will not enforce a contract that evidences a breach of the criminal law in the public interest.

As such, there is a general consensus regarding the status of the primary contract, *i.e.* the agreement to give and receive a bribe. In the eyes of the law it is unenforceable. In England and the US, the courts make it clear that the corridors of justice are closed to the parties to such a contract. The courts will not intervene with respect to such a contract but leave the parties as they have found them. The Netherlands arrives at a similar result. A contract to give a bribe is a nullity as it is contrary to good morals and public order. Parties can derive no rights under such a null agreement and no recourse to the courts of law beyond an act of the court or declaration by the party seeking to annul the contract. This renders the contract to give a bribe a very unstable proposition because it has no status within the national court system.

As has been pointed out, international transactions are often subject to private dispute settlement processes and may well be beyond the reach of national courts. Does the availability of private international arbitration provide protection to the parties of the primary contract? The answer to this is negative. There is a convergence of international public policy as well as mandatory national prohibitions that constrain the members of arbitration panels. Tribunal awards show that there is a general acceptance of the fact that a contract to give a bribe is unenforceable. Arbitrators have a duty to render awards that will be upheld in the place of enforcement and are ill-advised to grant a ruling with respect to a contract that is in contravention of mandatory law. Given the world-wide scope of the criminal prohibitions of bribery in business transactions, it is unlikely that there will be any jurisdiction where such bribery is not a criminal act.

Apart from this duty to act in a manner that will produce enforceable awards, the arbitration process, along with the courts, is a custodian of the public interest. The state in delegating dispute settlement powers to the arbitration tribunal sets a boundary as to what the arbitration process can achieve. The boundary that is set reflects matters of public interest whose effect on society is

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such that private parties cannot opt out of public prohibitions by private agreements. In this regard the ability of the international arbitration to apply a consistent standard to the primary and secondary contract regardless of whether the contracting parties are from a civil or common law jurisdiction affirms the importance of an international arbitration system. The primary contract will not be enforced by an international arbitration tribunal.

However, in the absence of mandatory reporting requirements or independent oversight of the arbitration process, the *discretion as to whether or not to enter into a determination* on the merits of a primary (or secondary contract for that matter) is left with members of the arbitration tribunal. This book has highlighted the dangers of leaving the arbitration panel with this discretion. Essentially, by making determinations on matters of public dimension the machinery of the state is bypassed by private agreement and the arbitration process closes the door to the full scope of recourse that would be available to both the direct and indirect victims of corruption. This raises questions about the appropriateness of international arbitration as a legitimate forum in respect matters that infringe on public rights.

Furthermore, where a matter involves allegations of corruption, parties by agreement should not be able to exclude the rights of participation of other stakeholders, affected by the occurrence of corruption. These factors lead to the suggestion in this book for the socially responsible arbitration tribunal that links the strengths of private international arbitration with those of public criminal law. Beyond a certain defined threshold, the primary obligation of the arbitrator, as agent to the parties, is replaced by an obligation to the larger society. Where it is clear that a contract is tainted by corruption, tribunals should have a mandatory reporting responsibility to the society that displaces their responsibility to the parties in dispute before them.

The response of the courts and international arbitration tribunals show that the primary contract is an intrinsically unstable transaction from the point of enforceability. The courts will not intervene and the arbitration panel is constrained. Where there is a dispute, the position of the law leaves the defendant with a clean walk-away. It is a shield in the hands of the unscrupulous party who can rely on the law to avoid responsibility under the contract. In the US and in England the courts have noted that this position is not for the benefit of the defendant, but for the interests of justice. In the Netherlands the primary agreement to give bribe will fall within the category of immoral transactions that ought not to be valued in money for which a claim for a counter-performance or reimbursement is barred. With this outcome in all three jurisdictions, it is inopportune that a defendant may unfairly benefit, but this is not the overriding factor for consideration. As regards the primary contract, the private law is utilized in an instrumentalist manner as a means of

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shaping conduct and as a deterrent to activities that are contrary to the public interest.

The *secondary contract* in all the three jurisdictions studied is recognized as a contract that is valid on its face. It is in no fashion prohibited by the criminal rules. In the US and in England, the courts have extended the public policy against enforcing the primary agreement to the secondary agreement. However, an important difference is the prerogative that is left in the hands of the betrayed principal. Jurisprudence suggests that the secondary contract that comes into being between the bribe-giver and the principal of the bribe-recipient is unenforceable *at the instance of the principal*. This is to avoid the double injury of first a betrayal of the duty of trust and then an unenforceable contract. This means that the onus rests with the principal. The bribe-giver will have no competence to compel the principal who seeks to walk away from a contract that is the result of a bribery transaction. This can serve as a warning to potential bribe payers who may be left with an unstable contract where the bribery of the agent becomes known to the principal who then decides to repudiate the agreement.

In the Netherlands, the position does not tilt in the principal's favor in this manner. Similar to the position in the US and England, the secondary contract is regarded as a valid contract. This means that the principal has to establish some defect of consent sufficient to annul the contract. This is not a straightforward proposition because of the onus of proof on the part of the principal seeking annulment. For reasons explained in this book, the most promising ground in this regard is that of error. To this extent, the law in the Netherlands regarding the secondary contract is not as favorable as the position in the US and England. Establishing a global consensus on the non-enforceability of the primary and secondary contracts is an important step in moving the fight against corruption forward. The public dimension of contracts tainted by corruption should play a role in distinguishing such contracts as regards validity and the measure of damages for breach.

The public interest dimension of the primary and secondary contracts leads to the suggestion in this book that such contracts should be differentiated when it comes to enforcement. The public dimension of contracts tainted by corruption should play a role in distinguishing such contracts as regards validity and the measure of damages for breach. Such contracts should be assessed in a manner that reflects the *process* by which they came into existence. Where it is in the public interest to deter that *process*, arriving at determinations of invalidity of such contracts may be helped by separating them into a class where considerations of public interest supplant party autonomy.

The vulnerability of the primary contract, and to some degree the secondary contract tainted by corruption, is a factor that can be utilized by the informed

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litigant and civil society. It is in the interest of justice to extend the public policy considerations that have resulted in the criminalization of corruption to these contracts. An international framework regarding private remedies should work towards the repudiation of both the primary and secondary contracts setting public policy as the overriding consideration. Where such a public interest defined policy is consistently applied across jurisdictions there will be a *second-level private law consensus* that corresponds with the first-level consensus on criminalization that has already been achieved. The protection and empowerment of the contracting party who repudiates the primary or the secondary contract is a key manifestation of such a second-level consensus. To paraphrase an oft-quoted statement, at this juncture of the private process of contracting, party autonomy is trumped by public interest, not for the sake of the parties but for the good of society and global justice.

### *Instituting Legal Proceedings*

Private law processes have the potential to by-pass the monopoly on initiating sanction held by the state. The potential of the private law is that it creates a plurality of points at which the sanctioning process for corruption can be initiated and/or enforced. Instituting legal proceedings with respect to corruption is however centered on the availability of legal standing to bring a claim. Private claims for corruption have been broadly classified in this book into claims primarily based on *damage to private interests* on the one hand, and claims primarily based on *damage to the public interest* on the other. As might be expected the jurisprudence for redress for damage to private interest is more developed than claims for damage to the public interest where the jurisprudence is still very tentative.

The claim for *damage to the private interest* in the three jurisdictions studied centers on harm caused by the abuse of the agency relationship. The primary victims of harm caused by corruption are principals, shareholders as well as third parties affected by uncompetitive behavior. With regard to claims to the private interest under the common law in the US and England, the basis of the claim is expressed in terms of a fiduciary relationship while under Dutch law it is expressed in terms of a position of trust or mandate. This is characteristic of the classic relationship between an agent and a principal, the agent's power to put the principal in a contractual relationship with a third party is the platform that is abused for personal advantage by the agent. The act of bribery is complete, whether or not it results in a contract between the principal and the offeror of the bribe. The focus of right of redress is on the breach the duty to act in the best interests of the principal and the very negative implication this has on society and business.

There is a strong moral element to the remedial schemes in the US and England which focus not only on compensation for loss but also on stripping

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away any profit or benefit that may accrue to the agent or person that offers the bribe. The principal may recover the bribe and, under the notion of the constructive trust, any other material benefit including proceeds of such benefits from the agent. However this position is now open to question with the recent ruling rejecting the principal's claim to all proceeds in *Sinclair Investment v. Versailles*. It is hoped that in moving the fight against corruption forward, mechanisms such as the constructive trust will be supported and especially applied to disputes involving contracts tainted by corruption. The measure and purpose of damages in such cases cannot be separated from the illegal foundation of these contracts. The private claim for damages in respect of the primary or secondary contract and public criminal prosecution of persons who commit acts of bribery should strive for a similar result.

In England and the US, the principal may in addition sue for damages for any harm that was caused by the agent's conduct from both the agent and the offeror of the bribe. Certain irrebuttable presumptions about motive of the bribe-giver, the effect of the bribe and loss to the value of the bribe ease the burden of proof on the principal and make the tort of bribery, some have argued, *sui generis*. However, the principal must elect between remedies and not recover twice on the same account.

Under Dutch law, damage caused by bribery falls within the notion of unlawfulness (*Lindenbaum-Cohen*), which is applied to cases of performance or non-performance by a person that is against good morals or the duty to take care. The betrayal of trust due to an agent's bribery results in an obligation to redress such damage as may be caused to the principal as a result of such action. There are no presumptions in favor of the principal under Dutch law and compensation has to be strictly proven. To establish a claim it must be shown that the principal was put into a disadvantageous position and loss was suffered as a result of the bribery transaction. This puts a significant burden of proof on the plaintiff principal that provides little incentive for the pursuit of such claims. This is not in keeping with the spirit of Art 34 UNCC. For problems of international dimension such as corruption, the emergence of an international standard of criminalization means that there is a need to have similar treatment of parties that suffer damage regardless of jurisdiction. As the world seeks for models of transnational governance it is hoped that Art 34 UNCC will provide a basis for an eventual convergence in the treatment of the plaintiff principal across common and civil law systems.

With regards to *damage to the public interest*, the notion of private remedies is more complicated. This group of claimants do not have as clear a path to redress as compared with the methods available to direct victims such as principals, shareholders and third parties affected by uncompetitive behavior. A selection of cases drawn from several jurisdictions, however, shows the different strategies that have been employed by parties seeking to protect the

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public interest. These cases include governments seeking damages under theories of *social damage* from Costa Rica; a state company seeking *mandatory restitution* in respect of a settlement reached in respect of corruption involving its officials; a private citizen instituting claims to compel state authorities to commence an investigation into alleged corruption against sitting and former African presidents; several examples of civil society seeking to compel the state government into taking action or complying with international commitments against corruption. This list is drawn from a variety of jurisdictions and points to the growing emergence of a new group of players and strategies that may shape developments in the fight against corruption in the years to come. These attempts point to a new dynamic in the fight against corruption by private actors using private law mechanisms to seek redress.

The overview of the US law shows the vigorous nature of the plaintiff bar. The creativity shown by claimants in bringing claims has resulted in the most diverse palette of private proceedings. Apart from the traditional principal/agent claims, class actions and derivative suits using unfair competition and securities laws have been used to seek damages caused by bribery in business transactions. In addition there are laws such as the False Claims Act that present opportunities for the private prosecution of anti-bribery laws. This has not as yet been used as a significant avenue for bribery-related litigation but it does have potential for the prospective claimant. In many ways the development of private remedies from a US perspective is very much a plaintiff-led process.

In the UK the focal point of private remedies is restricted primarily to claims centered on a breach of the fiduciary relationship between a principal and agent. There is little class or derivative action with regard to bribery-related damage. Judicial policy is, however, very supportive of the plaintiff principal not because of the justice of the case but because of the abhorrence in which bribery is held by the court. The courts have refused to aid the bribe-giver whether in the role of the plaintiff or as the defendant in suits brought by the betrayed principal. This is clearly to the advantage of the party who seeks to repudiate the obligations under a contract because there is no sanction if this party chooses to walk away from the primary or secondary agreement. The English model of private remedies can be characterized as a judiciary-led process.

In the Netherlands, the private litigant plays a rather limited role as is probably to be expected in a non-litigious society. The Netherlands model can be characterized as a rules-led process where the provisions regarding causality present a significant hurdle to the potential litigant. There is also no class or derivative action along the lines of the practice in the US and the rather limited practice in the UK. The emergence of court-sanctioned collective settlements

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seems to point to an approach that leans more towards amicable resolution of bribery-related claims than active litigation.

The private litigant is faced with problems of the costs of litigation, relatively small claims and problems of legal standing. The US provides the most favorable environment for the private claimant, with reward schemes to encourage the private actor. Incentives for whistle-blowers, private prosecutors as well as established class actions, support the private claimant in the quest to hold government and companies accountable. In the UK, favorable rulings with regard to public interest litigation are an encouragement to civil society participation in the fight against corruption. However, the class action does not have the same development as in the US nor are there established reward schemes for the private prosecutor.

In this sense, England and the Netherlands present a similar restrictive landscape for the private claimant. Alternative fee arrangements, such as contingency fee arrangements, are not allowed in these countries. A conditional fee upon successful outcomes of cases is however, allowed in England as are third party funding schemes. None of these schemes are allowed in the Netherlands. As such while the private litigant in the US can rely on mechanisms that support and reward the private actor, this is not the case in England and particularly the Netherlands. Ultimately the advantage of vigorous private litigation in the fight against corruption is to make the environment in which corruption exchanges take place more susceptible to challenge. As such, schemes of reward for the private litigant in matters arising out of the corrupt exchange should be developed and encouraged.

This book suggests a method of encouraging the indirect victim in a manner that avoids opening the floodgates of litigation, but at the same time provides legal standing in cases involving damage to the public interest. Parties to contracts can use principles relating to *third party beneficiaries*, which are present in all three jurisdictions studied in this project, to provide standing for persons who are not parties to the contract under conditions that are carefully calculated to act as an incentive for compliant behavior by all parties connected to the contract. Evidence of corruption (on terms that can be stipulated in the contract) will trigger the third party beneficiary clause to come into effect. Identified third party beneficiaries could then become parties to the contract and acquire standing to sue on that contract. Such a *sleeping third party beneficiary clause* could both encourage the indirect victims of corruption to become more active by creating legal standing to sue, and also serve as an additional incentive for parties seeking contracts with a public dimension to contract in such a manner as not to activate the clause.

The models of legal redress show that the rules about causality, standing to sue, and the cost of litigation are obstacles in the way of the private litigant.

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Where this private litigant is a key to overcoming the conflict of interest problems that undermine the effective implementation of anti-corruption rules, and where actions by private litigants have the ability to shape the environment in which corruption in international business takes place by exposing corporations to less predictable risk, mechanisms that overcome these obstacles should be encouraged and exploited. The increasing activity from private actors in initiating the sanctioning process in areas where the state is compromised or less effective is a welcome development and an important tool of social engineering in today's deterritorialized and integrated world economy.

### 11.3 Towards an International Framework

The UNCC provides the broad framework for private remedies for international corruption along two flanks: (1) the validity of transactions resulting from or tainted by acts of corruption (Art. 34 UNCC), and (2) the right to privately institute claims for damage suffered as a result of corruption (Art. 35 UNCC). The UNCC has almost universal reach with 140 countries, including all the major economies as parties. However, the international framework that emerges from an analysis of these provisions is one that provides *mere regulatory guidance* as opposed to the introduction of any real changes in legal processes of member states. The subjection of Art 34 and 35 UNCC to national law and the principles of non-intervention mean that they bring no real change to domestic laws.

There is no new legal regime introduced by Art. 34 UNCC regarding contract validity for contracts tainted by corruption. However, the UNCC does introduce a new level of convergence for contract law doctrine by instilling the notion of corruption as an independent vitiating factor for contracts tainted by corruption. This enables the development of principles that differentiate such contracts from generalized notions of contract law and enable a 'bottom up' convergence of judicial responses that are consistent with the UNCC with regard to such contracts. This is particularly significant in countries like the Netherlands, where judicial policy in respect of the secondary contract presents the plaintiff seeking to annul the contract with significant challenges. The primary and secondary contracts tainted by corruption lose to some extent the trappings of a particular legal culture and become deculturalized within the framework of international public policy established by the UNCC.

In a similar vein to Art. 34 UNCC, Art. 35 UNCC does not change the position of the private litigant or expand the scope of the right to private remedies under national systems. It provides a right of action only to the extent that this is already provided under national laws. It also does not ease the requirements of standing and causality necessary for legal proceedings to be instituted. Art. 35 is formulated in narrow terms of causality that favor only the direct victims of

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corruption who are faced with a burden of proving quantifiable damage caused by the act of corruption. This subjection to domestic laws and the language of the Art. 35 UNCC shows that for the time being there is no new international platform for the private plaintiff.

This fact notwithstanding, Art. 35 UNCC gives moral weight to the notion of private actions by citizens and civil society for harm suffered as a result of corruption. It is hoped that a broadest interpretation of the notion of damage, beyond quantifiable compensation, will be associated with the notion of damage under Art. 35. The focus of the UNCC is not merely to restore the harm done to the particular parties to the transaction but also the harm done to society at large. Encouraging and empowering civil society is part of the avowed aim of the UNCC framework of private remedies. As such, the purpose of damages contemplated by the Convention is arguably more than merely compensatory but also has a punitive and deterrence objective. A strict interpretation of the notion of damage in Art. 35 as merely ‘compensatory’ arguably falls short of the purpose of the UNCC.

Art. 35 of the UNCC represents international acknowledgement of the role of the private actor. Governments that are serious about fighting corruption should consider methods of incentivizing the potential plaintiff. Art 35 UNCC recognizes the need to look beyond the state in charting a path forward in the fight against corruption. Creating and encouraging possibilities to empower the private actor is one such mechanism. The UN in its sphere of influence should give credit to nations that encourage the private plaintiff and seek strategies to bring the letter of the convention in line with its spirit and the fundamentally important objective of encouraging and equipping citizens and groups outside the public sector to partner in the fight against corruption. Furthermore, a real measure of success of the UNCC will be the bridging of the schism between the direct and indirect victims of corruption.

A logical step in reviewing anti-corruption strategy is a re-examination of the basic premises of current approaches to fighting corruption. This book emphasizes the need to develop environment sensitive conceptual frameworks triggered by the real world in which corrupt exchanges occur. To this end, the insights drawn from this book are used to propose a *transaction approach* to fighting corruption that places the transaction, not the offender, as the logical central point of intervention in the fight against corruption. The transaction approach acknowledges the symbiotic relationship between the interaction in a corrupt exchange and environment in which this exchange occurs. It recognizes that there are several layers of interaction and that each level of interaction plays a role in creating the environment in which international corruption occurs. Addressing only one level (*e.g.* the violation) fails to address issues that arise at other levels of interaction leaving an incoherent environment that encourages risk taking. Each level of interaction needs to be

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addressed to create an environment that is cohesive for compliance. A transaction approach encourages exploiting opportunities for reform that are found in the *real interactions* between parties to transactions affected by corruption.

### **11.4 Areas for Future Research**

This book has sought to maintain a very clear course on the questions of (1) transaction validity and (2) the right to institute legal proceedings, which are the primary aspects of the private law framework provided under the UNCC. Several related areas however warrant future inquiry.

From an empirical standpoint, it will be helpful to develop a method to test the impact of criminalization and private remedies on the fight against corruption. This book has referred to the need to develop effective sanctions for corruption and postulates public/private so-operation as one method to achieve this. This raises the question, what is the measure of effectiveness? What quantifiable difference does the changing regulatory environment have on the way business is conducted and how has this impacted the fight against corruption? Developing indices for measurement will provide concrete evidence of the veracity of some of the assumptions about the compliance inducing nature of the regulatory environment developed in this book.

Another area of inquiry is the notion of the contract tainted by corruption as an instrument for deterrence. This is an area where more clarity is needed especially with the recent UK *Sinclair Investment* ruling. What is the proper function of private law at the junction of the private and public law? A related question is the proper approach towards contracts that have a public dimension. Should such contracts be differentiated as a separate class to enable the development of rules that are specific to such contracts? If so, what would be the conceptual basis of such differentiation? Can such a differentiation serve as a basis for similar treatment across the civil /common law divide? Furthermore, how does the originating criminal act of bribery affect the position and role of holders in due course of rights assigned or derived from contracts tainted by corruption in the fight against corruption?

An idea proposed in this book is using a third party beneficiary clause as a self-regulatory mechanism in inducing compliance. Of interest in further research would be the assessment of the acceptability of such a mechanism and the development of a standard form third party beneficiary clause. Developing such a clause could be an easily achievable self-regulatory mechanism that can emerge from an agreement about business practices and standards by the contracting parties themselves.

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The chapter on international arbitration ends with a suggestion for a socially responsible arbitration panel. The growing acceptance of the arbitrability of matters of public dimension and the expanding role of the arbitrator suggest the need for research into the nature of dispute settlement at the crossroads of private and public law. Developing a model that maintains the intrinsic advantages of commercial arbitration yet reconciles the public elements of criminality that are present in transactions tainted by corruption is an important challenge.

Finally, an important area for further research is the development of sector-specific conceptual frameworks and models such as the *transaction approach* suggested in this book. Understanding how sector specific models interact with the broader questions of transnational governance will be an interesting and needed area of inquiry.

### 11.5 Final Words

Developing a common strategy of private remedies is a necessary step in the international fight against corruption. Just as the international consensus criminalizing corruption has shaped the fight against corruption by creating a normative framework that influences policy and practice in international business on a global scale, it can be expected that an international consensus on private remedies for corruption will also impact the environment in which corruption occurs in a manner that pushes the fight against corruption a step further. This is not an alternative to the criminal process but rather a complementary process that recognizes the overlapping roles of the private and public law in the regulation of transnational transactions.

A corollary with a team sport is appropriate. A game with no rules is no game at all. Players from different cultures, speaking different languages, holding different norms, customs and rules, can and do play together in a team. In so doing they accept and are bound by the rules of the game. To the extent that they play by the rules, there is a game. To the extent that they do not, there is none. International business is a ‘game’ with very definite rules that are dislocated from a single, particular society but are no less binding. The binding force is located not in a state but in the ‘game.’ This discussion about private remedies for corruption is located within this framework. Private remedies can influence the transacting environment or ‘game’ in which corruption in international business occurs in a manner that motivates a choice for compliance with anti-corruption rules. This is a logical extension to the ‘FCPA approach’ to implementation, and contributes to the creation of an environment where preventive measures, hard and soft law mechanisms, self-regulation, self-policing and self-referral acquire real significance for the short and long-term interests of the corporation.

## PRIVATE REMEDIES FOR CORRUPTION

This book advocates an approach to fighting corruption that is not self-regulation because there is a real 'stick.' Neither is it a solely state-centered process of sanction and punishment because the possibility of negotiating punishment presents a real 'carrot.' It is a hybrid, third way that uses choices occasioned by 'pleasure' and 'pain' to the corporation to instigate fundamental changes in the way it does business. On the international stage this will have a 'trickle-down' effect that has the potential to change international and domestic business practices. This provides a counter-balance to the impunity of compromised governance systems and can serve as a powerful agent for change.

Pragmatism should be the guiding principle of anti-corruption policy. Sometimes a half loaf is better than none. The traditional criminal process where an offender is punished may provide more psychological satisfaction than processes of private-public partnerships. If, however, the objective is to change an environment in a manner that encourages compliance, for many reasons traditional methods have failed to live up to expectations. The opportunity of private remedies for corruption lies in its potential to change company practices and culture from within (for example suits by shareholders and challenges to the validity of contracts entered into by the corporation) and also from external pressures (such as private actions by a variety of actors, the opportunity to negotiate sanction with enforcement authorities). This creates a strong basis for *a choice* for compliance and, more importantly, for the integration of mechanisms *to ensure* compliance into company operations. This is a model of fighting corruption that concedes to the reality of the international market place.

From a methodological viewpoint by:

- (1) classifying and distinguishing between the primary and secondary contracts resulting from corruption as well as private and public interests seeking redress for harm suffered as a result of corruption;
- (2) introducing the possibility of using third party beneficiary clauses to provide legal standing for victims of corruption;
- (3) suggesting the need for a socially responsible arbitration tribunal; and
- (4) advocating a *transaction approach* to fighting corruption;

this book provides a method of thinking about private remedies for corruption in a manner that, it is hoped, will clarify and stimulate further development of anti-corruption law and policy.

## CHAPTER 11 – FINAL CONCLUSIONS

In closing, it is important to acknowledge the inter-woven nature of the societal triggers for corruption. This makes it clear that there is no easy legal solution to be had. Tackling underlying factors of social inequality and social mobility are probably a more far-reaching strategy in breaking the cause-and-effect dynamics of corruption. Recognizing the limitations of the law should add impetus to efforts to humanize the effects of globalization and capitalism.

In essence, the law cannot be isolated from the social problems created by the cycle of poverty and lack of governance. Indeed the law itself can become a victim of the cycle. For this reason any attempt to solve the problem of corruption normatively is only half the story. Fortunately, the need for order and stability in the global market is a driving force for creative solutions to even this most intractable of social problems. One such creative development is the expanding role of private actors and processes in the fight against corruption. For this reason, one may safely assert, that the journey towards an international framework on private remedies for corruption is certainly underway.

*'... Now that they see some kind of partnership developing ... with the supply side beginning to tighten its belt ... yes I think that it hands out hope ... early days yet, but I think it hands out hope.'* (00:14:16)

(Participant 4)

## Summary In Dutch

### Privaatrechtelijke Handhaving en Corruptie

#### De ontwikkeling van een internationaal raamwerk

##### *Inleiding*

In de afgelopen 30 jaar zijn we getuige geweest van een fundamentele verandering in de aanpak van corruptie. Bij de bestrijding van corruptie is de aandacht verschoven van de zogeheten vraagzijde van corruptie naar de herkomst van corrupte gelden, d.w.z. de aanbodzijde van corruptie. Er heeft tevens een verschuiving plaatsgevonden van het bestrijden van corruptie die hoofdzakelijk in eigen land wordt gepleegd naar het bestrijden van corruptie in andere landen. Bovendien bestaat er nu mondiale overeenstemming over het strafbaar stellen van corruptie die zich bij zakelijke transacties voordoet. Ondanks het feit dat er vooruitgang is geboekt, maakt de nog altijd zorgwekkende omvang van corruptie wereldwijd duidelijk dat slechts de eerste stappen zijn gezet en dat er nog een lange en moeilijke weg te gaan is.

In dit boek wordt betoogd dat een van de oorzaken van het uitblijven van vooruitgang in de strijd tegen corruptie wordt gevormd door de structurele leemtes die ontstaan bij de strafbaarstelling ervan, vooral wanneer de corruptie plaatsvindt in een internationale omgeving. Op het terrein van de grootschalige corruptie, dat in dit boek centraal staat, zijn multinationals en overheden vaak de belangrijkste spelers. Daar waar de staat deelneemt aan criminele activiteiten, creëert het monopolie dat bij diezelfde staat rust op het instellen van traditionele strafrechtelijke sancties een belangenverstremgeling die doeltreffende handhaving in de weg staat. Bovendien maakt het internationale karakter dat eigen is aan een geïntegreerde wereldeconomie het moeilijk om op nationaal niveau oplossingen voor internationale misdrijven te formuleren. Door een gebrek aan doeltreffende handhaving ontstaat een vicieuze cirkel van straffeloosheid, waarbij het falen van het recht leidt tot een verdere afbraak van ordening en ontwikkeling.

In dit boek wordt tevens beargumenteerd dat binnen het strafrecht onvoldoende aandacht wordt besteed aan de gevolgen van corruptie. De gevolgen, die bestaan uit de totstandkoming van een of meerdere overeenkomsten, vervullen echter een centrale rol in de internationale context waarin transacties plaatshebben en zetten bedrijven aan om risico's te nemen. Corruptie kan als gevolg van strafbaarstelling juist complexer en nog moeilijker traceerbaar

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worden. Om een effectieve strijd tegen corruptie te kunnen voeren, zal deze discrepantie tussen publieke afschrikking en private gevolgen opgeheven moeten worden. Corruptie is immers geen abstractie, maar neemt de vorm aan van overeenkomsten, betalingen, steekpenningen en andere transacties. Dit roept vragen op over hoe het privaatrecht dient te reageren op corruptie. Een tweede aspect van dit onderzoek is te analyseren hoe de uiteenlopende civielrechtelijke en strafrechtelijke benaderingen kunnen worden samengebracht in een overkoepelend, coherent raamwerk. De scheiding tussen publiekrecht en privaatrecht, die het bestaande anti-corruptieonderzoek kenmerkt, creëert een stel onsamenhangende regels van wat in werkelijkheid één verhaal is.

Dit boek betoogt tevens dat de bestaande delictomschrijvingen van corruptie binnen het strafrecht onvoldoende recht doen aan het resultaat van succesvolle vormen van corruptie. Geslaagde omkoping resulteert namelijk in contracten en overeenkomsten die op hun beurt een centrale rol spelen in internationale handelsmarkten. Dit zet bedrijven mogelijk aan tot het nog heimelijker uitvoeren van corruptie. Strafbaarstelling kan daarom tot gevolg hebben dat corruptie nog complexer en moeilijker op te sporen zal worden.

Deze discrepantie tussen publieke afschrikking en private gevolgen moet worden opgeheven om samenhang te brengen in de strijd tegen corruptie. Corruptie is eenvoudig gezegd geen abstractie maar neemt de vorm aan van overeenkomsten, betalingen, smeergeld en andere transacties. Dit roept vragen op over het privaatrechtelijke antwoord op dergelijke transacties. Een tweede, aspect van dit onderzoek was te bezien hoe de uiteenlopende civielrechtelijke en strafrechtelijke benaderingen moeten worden samengebracht tot één samenhangend raamwerk. De scheiding tussen publiekrecht en privaatrecht die het huidig anticorruptieonderzoek kenmerkt, creëert een stel onsamenhangende regels van wat in werkelijkheid één verhaal is.

Het VN-verdrag tegen corruptie uit 2003 (*UN Convention against Corruption*, verder: UNCC) biedt een kader waarbinnen deze vragen kunnen worden beantwoord. Het UNCC geeft een model voor privaatrechtelijk ingrijpen in de strijd tegen corruptie en wel op twee punten: ten eerste in artikel 34 dat een regeling bevat betreffende de rechtsgeldigheid of verbindende kracht van overeenkomsten die het gevolg zijn van corrupte activiteiten en, ten tweede, in artikel 35 dat tot doel heeft personen die schade hebben geleden als gevolg van corruptie een privaatrechtelijk middel te bieden om schadeloos gesteld te worden. Samengevat gaat het enerzijds om de rechtsgeldigheid van transacties en anderzijds om het recht om een vordering aanhangig te kunnen maken. Deze twee manieren van ingrijpen vormen de grondslag van het onderzoek in dit boek.

## PRIVATE REMEDIES FOR CORRUPTION

De onderzoeksvraag die in dit boek centraal staat, bestaat uit vier delen: (1) Waarom is een internationaal raamwerk voor privaatrechtelijk handhaving van anti-corruptieregels nodig en wat moet de grondslag daarvan zijn?; (2) Wat bieden nationale rechtsstelsels momenteel op het gebied van privaatrechtelijk handhaving bij corruptie?; (3) In hoeverre vormt het nationale recht een aanvulling op het raamwerk voor privaatrechtelijke handhaving, zoals geboden door het UNCC?; (4) Kan er een conceptueel raamwerk worden geformuleerd waarin de uiteenlopende elementen van straf- en civielrechtelijke strategieën in de strijd tegen corruptie zijn opgenomen?

### *Methodologie*

Om de onderzoeksvraag te beantwoorden, is gekozen voor een functionele rechtsvergelijkende benadering. Deze benadering kan om een aantal redenen worden gerechtvaardigd. Aangezien grootschalige corruptie een probleem van internationale omvang is, vereisen voorstellen voor hervorming een methodologie die toepasbaar is op uiteenlopende nationale posities om uiteindelijk te komen tot een ‘*gemeenschappelijke oplossing*’. Bovendien moet de handhaving volgens het internationale anti-corruptieraamwerk op staatsniveau gebeuren, waardoor er vanwege verschillen tussen rechtssystemen een groot aantal handhavingsmethoden bestaat. Door de functionele rechtsvergelijking te hanteren, waarbij de aandacht dus uitgaat naar de functie in plaats van de inhoud, kan een beeld worden geschetst van hoe het privaatrecht in uiteenlopende jurisdicties op corruptie reageert.

Leidend bij de keuze van de jurisdicties voor de rechtsvergelijking in dit boek was de geschiedenis die voorafging aan de totstandkoming van het wettelijke anti-corruptieraamwerk. De Verenigde Staten was in 1977 het eerste land dat verstrekkende anti-corruptiewetgeving aannam (de ‘*Foreign Corrupt Practices Act*’), die de basis legde voor het internationale raamwerk tegen corruptie. Belangrijk zijn ook de landen waarvan het recht het internationale handelssysteem sterk heeft beïnvloed en dat nog steeds doet. Grootschalige corruptie is een kwestie van internationaal handelsrecht en wordt sterk beïnvloed door de Westerse traditie. Gekozen is voor Engeland en Nederland omdat deze landen tamelijk representatief zijn voor twee grote rechtsfamilies (*civil* en *common law*), waarvan de onderlinge verschillen in sociale en rechtshistorische ontwikkeling worden weerspiegeld in de reikwijdte en de inhoud van het handelsrecht. Het feit dat het onderzoek zich richt op de anti-corruptieregelgeving en -praktijk in deze jurisdicties, betekent dat de bevindingen in dit boek specifiek gelden voor deze landen. Niettemin werpen zij tevens een licht op de problemen, beginselen en concepten waarmee men te maken krijgt bij de ontwikkeling van een internationaal, privaatrechtelijk antwoord op het corruptieprobleem. Het feit dat de meeste internationale overeenkomsten een arbitragebeding bevatten, betekent waarschijnlijk dat het merendeel van de geschillen over internationale handelsovereenkomsten die

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besmet zijn door corruptie wordt behandeld door een internationaal arbitragetribunaal in plaats van door een rechtbank. Om deze reden wordt in dit boek tevens onderzocht hoe in de internationale arbitrage wordt gereageerd op het probleem van de rechtsgeldigheid van transacties alsook welke rol de internationale arbitrage speelt bij de privaatrechtelijke handhaving van anti-corruptiewetgeving.

Om beter zicht te krijgen in de problemen die bij het ontwikkelen van een privaatrechtelijk antwoord op corruptie kunnen worden verwacht, is in het kader van dit onderzoek een preliminaire, kwalitatieve casestudy verricht over Nigeria, zodat de kwestie van privaatrechtelijke handhaving in een sociale context kan worden geplaatst. Deze contextualisering verschaft inzicht in de onderling samenhangende omstandigheden waaronder grootschalige corruptie zich voordoet. Hoewel de casestudy louter illustratief bedoeld is, heeft zij een aanzienlijke invloed gehad op de richting en reikwijdte van het onderzoek en de ingenomen standpunten in dit boek.

### *Samenvatting van dit boek*

Het eerste deel van dit boek, *The Foundation for Private Remedies* (De grondslag voor privaatrechtelijke handhaving), gaat in op het eerste aspect van de onderzoeksvraag, te weten: Waarom is een internationaal raamwerk voor privaatrechtelijke handhaving bij corruptie nodig en wat moet de grondslag daarvan zijn? In hoofdstuk 1 en 2 worden de uitdagingen besproken waarmee rekening moet worden gehouden bij pogingen om strategieën te ontwikkelen ter bestrijding van corruptie. Deze uitdagingen bestaan ruwweg uit het probleem van definiëring, de uitdaging voor bestuurlijke processen, de uitdaging waarmee bedrijven te maken krijgen, de uitdaging voor het gerechtelijke apparaat en de uitdaging die voortvloeit uit een herschikking van de internationale samenleving. Deze uitdagingen bieden een illustratieve achtergrond voor het internationale normatieve raamwerk waarbinnen het plegen van grootschalige corruptie wordt veroordeeld. Dit raamwerk staat centraal in hoofdstuk 3, waarin het proces wordt beschreven dat heeft geleid tot een wereldwijde consensus over het verwerpen van internationale corruptie: van de hierboven vermelde Amerikaanse *Foreign Corrupt Practices Act* (verder: FCPA) tot aan de verscheidenheid aan regionale, intergouvernementele en internationale instrumenten. Deze wereldwijde consensus biedt een legitimatie die als basis dient voor de bespreking van privaatrechtelijke handhaving bij corruptie door (a) internationale corruptie aan te merken als een onrechtmatig daad en (b) door nieuwe inzichten te bieden in de implementatieprocessen waarbij private actoren zijn betrokken.

In deel 2 van het boek, *Models of Private Remedies* (Modellen van privaatrechtelijke handhaving) wordt het tweede aspect van de onderzoeksvraag behandeld, namelijk: wat bieden nationale rechtsstelsels op het gebied van

privaatrechtelijke handhaving bij corruptie? Om deze vraag te beantwoorden, wordt het nationale recht van drie rechtsstelsels geanalyseerd en wordt gekeken naar het perspectief van internationale arbitrage. In hoofdstuk 4 tot en met 7 wordt ingegaan op de vier voornaamste relaties die door corruptie worden beïnvloed. De eerste relatie is de relatie tussen de persoon die de steekpenningen betaalt en de persoon die de steekpenningen ontvangt (de agent), waarbij de laatste zich in een vertrouwenspositie bevindt ten opzichte van een derde (de principaal) om de onderhandelingen in diens belang te voeren. Deze relatie komt tot uitdrukking in de overeenkomst die in dit boek het *primary contract* (de primaire overeenkomst) wordt genoemd omdat daaruit de betaling van steekpenningen blijkt en omdat deze het begin vormt van een reeks van transacties en overeenkomsten. De tweede relatie is die tussen de betaler van de steekpenningen en de principaal. De overeenkomst tussen deze partijen is het gevolg van de betaling van steekpenningen aan de agent en wordt het *secondary contract* (de secundaire overeenkomst) genoemd omdat deze het resultaat is van de uitvoering van de primaire overeenkomst. De derde relatie die de basis vormt voor de beschouwingen in dit boek is die tussen de principaal en de deloyale agent. De term principaal wordt ruim uitgelegd en ziet op elke partij die vertrouwen stelt in een ander om zijn belangen zo goed mogelijk te behartigen. De relatie tussen degene die de steekpenningen betaalt en de agent werkt als een katalysator op corruptie. Zonder de vertrouwensbasis tussen deze partijen zou er geen grond zijn voor de betaler van de steekpenningen om met de agent te onderhandelen en zou er evenmin een secundaire overeenkomst tot stand komen waardoor de principaal jegens de betaler van de steekpenningen wordt gebonden. Een vierde verhouding, die indirecter van aard is, ontstaat wanneer een persoon als gevolg van corruptie schade lijdt maar met geen van de partijen een contractuele relatie heeft. Deze persoon wordt in dit boek de *indirect victim* (het indirecte slachtoffer) genoemd.

In deel 3 van het boek, *Towards an International Framework* (De ontwikkeling van een internationaal raamwerk), worden het derde en vierde deel van de onderzoeksvraag beantwoord, te weten: op welke gebieden heerst overeenstemming en wat zijn de verschillen met het oog op een internationaal raamwerk voor privaatrechtelijke handhaving bij corruptie en hoe kan dit raamwerk worden geconceptualiseerd? Daartoe wordt in hoofdstuk 8 onderzoek gedaan naar de verschillende benaderingen ten aanzien van de rechtsgeldigheid van overeenkomsten die besmet zijn door internationale corruptie en worden deze benaderingen vergeleken met het raamwerk van artikel 34 UNCC. Vervolgens worden in hoofdstuk 9 de benaderingswijzen van de gekozen rechtsstelsels geanalyseerd ten aanzien van de mogelijkheid om in geval van corruptie een gerechtelijke procedure aanhangig te maken, waarbij deze ook worden vergeleken met het kader van artikel 35 UNCC. In hoofdstuk 10 worden de verschillende onderdelen samengebracht en wordt een conceptueel raamwerk gepresenteerd dat in de toekomst kan worden gebruikt

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in de strijd tegen corruptie, waarbij de omgeving waarin internationale corruptie plaatsvindt en de interacties die corruptie kenmerken als uitgangspunt worden genomen. In dit conceptuele raamwerk moet de strijd tegen corruptie zich logischerwijs richten op de transactie en niet op de pleger. In hoofdstuk 11, het laatste hoofdstuk van het boek, worden op basis van de bevindingen conclusies getrokken en worden suggesties gedaan voor verder onderzoek.

### *Bevindingen*

De belangrijkste bevindingen van dit boek kunnen als volgt worden samengevat:

#### *Deel 1: Grondslagen voor privaatrechtelijke handhaving*

De strafbaarheid van corruptie in het internationale zakenleven, of deze nu van publieke of private aard is, is tegenwoordig een beginsel dat wereldwijd wordt toegepast. De fundamentele *first level consensus* over internationale corruptie die in de afgelopen drie decennia vorm heeft gekregen, biedt de grondslag voor dit onderzoek naar privaatrechtelijke handhaving bij corruptie. Hij biedt een gemeenschappelijke basis van overeenstemming en strategie in de strijd tegen corruptie, maar tevens, en wellicht belangrijker: in de strijd tegen corruptie geldt die consensus als uitgangspunt, omdat zij inhoudt dat alle UNCC-verdragsstaten de corruptie in het internationale bedrijfsleven aanmerken als een schending van de openbare orde. Wanneer een internationale consensus bestaat over de kwalificatie van corrupte handelingen bij zakelijke transacties als criminele gedragingen, dan is een grotere rol van privaatrechtelijke handhavingsmiddelen bij corruptie onvermijdelijk.

Het implementatieproces van de FCPA heeft een model opgeleverd voor publiek-private samenwerking die een grote stimulans inhoudt voor de rol van de private actor in het proces van sanctionering van corruptie. De convergentie van recht, openbare orde en '*best practices*' die hiermee wordt gecreëerd, hangt boven elke nationale en internationale zakelijke transactie. Het implementatiemodel van de FCPA heeft het anti-corruptiediscours, van bestrafing 'ex post' tot preventie en naleving 'ex ante', aanzienlijk beïnvloed. Dit proces zorgt ervoor dat de sanctionering van corruptie niet langer uitsluitend gezien wordt als de bestrafing van de dader door de autoriteiten maar dat daarbij ook een rol voor de private actor is weggelegd. Dit zorgt voor een prikkel voor bedrijven om zich vrijwillig te houden aan anti-corruptieregels en gevallen van corruptie te onthullen alsmede om te zorgen voor mechanismen die uiteindelijk de interne bedrijfscultuur kunnen veranderen. Het voorgaande zorgt voor een sneeuwbaaleffect in de invloedssfeer van de onderneming waarbij de private actor samen met de staat een centrale positie inneemt in de strijd tegen corruptie.

*Deel 2: Modellen van privaatrechtelijke handhaving*

Transactiegeldigheid

Uit het onderzoek naar privaatrechtelijke handhavingsmiddelen in de drie gekozen jurisdicties en in de internationale arbitrage komt naar voren dat er enkele interessante gelijkenissen én verschillen zijn wat betreft de juridische status van overeenkomsten die door corruptie besmet zijn. Deze overeenkomsten, respectievelijk het *primary contract* en *secondary contract* in dit boek genoemd, dienen van elkaar te worden onderscheiden. De primaire overeenkomst vormt het bewijs van de corruptie, omdat hieruit blijkt dat in strijd met de regels steekpenningen zijn aangeboden en aangenomen. Uit de secundaire overeenkomst blijkt niet dat een contractspartij steekpenningen heeft betaald of geaccepteerd. In de drie onderzochte jurisdicties wordt de nietigverklaring van de primaire en secundaire overeenkomst gebaseerd op het feit dat zij in strijd zijn met wettelijke bepalingen en/of de openbare orde. Onduidelijk is echter of het strafrechtelijke verboden zich ook uitstrekken tot deze contracten. De relevante strafrechtelijke bepalingen die het aanbieden of aannemen van steekpenningen verbieden, maken nergens melding van de contracten die als gevolg hiervan zijn gesloten.

Met betrekking tot de primaire overeenkomst laat de jurisprudentie uit de Verenigde Staten, Engeland en Nederland zien dat rechters een overeenkomst waaruit wettelijk verboden gedrag blijkt op dezelfde manier beschouwen als het gedrag zelf. Het gevolg van een verbod op omkoping is dat de overeenkomst waaruit omkoping blijkt nietig is omdat zij is aangegaan in strijd met een wettelijk verbod. De nakoming van een dergelijke overeenkomst is daardoor erg onzeker omdat nakoming niet kan worden afgedwongen. Omdat er tevens een convergentie plaatsvindt op het gebied van de internationale openbare orde alsmede van dwingende nationale verboden, die door de leden van arbitragepanels toegepast moeten worden, blijkt ook uit de uitspraken van arbitragepanelen dat algemeen wordt aangenomen dat een overeenkomst om steekpenningen te betalen nietig is.

De secundaire overeenkomst wordt in alle drie onderzochte jurisdicties in eerste instantie als geldig erkend. Zij wordt op grond van het strafrecht op geen enkele wijze verboden. In de Verenigde Staten en Engeland hebben de rechtbanken het openbare orde-begrip echter uitgebreid zodat niet alleen het primaire contract maar ook het secundaire contract niet in rechte kan worden afgedwongen. Een belangrijk verschil met de primaire overeenkomst is echter dat de bedrogen principaal een belangrijke bevoegdheid toekomt. De jurisprudentie wijst uit dat in deze landen de secundaire overeenkomst die tot stand komt tussen de betaler van de steekpenningen en de principaal van de ontvanger van de steekpenningen door de principaal vernietigd kan worden. Ook in Nederland wordt de secundaire overeenkomst in beginsel als een rechtsgeldige overeenkomst beschouwd. Dit betekent dat de principaal een gebrek in de

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wilsovereenstemming moet aantonen en wel een zodanig gebrek dat de overeenkomst nietig kan worden verklaard. Dit is geen eenvoudige opgave omdat de bewijslast op de principaal rust. In dit boek wordt beargumenteerd dat de grondslag van dwaling in dit verband als meest bruikbaar kan worden aangemerkt. Met het oog op de strijd tegen corruptie is de Nederlandse regelgeving met betrekking tot de secundaire overeenkomst niet zo gunstig als de positie die in het Amerikaanse en Engelse recht wordt ingenomen.

Het ondernemen van gerechtelijke stappen

Bij het aanhangig maken van een privaatrechtelijk geding wegens corruptie is van cruciaal belang of de eiser bevoegd is tot het indienen van een vordering. De particuliere vorderingen die kunnen worden ingesteld wegens corruptie worden in dit boek ingedeeld in twee categorieën: aan de ene kant de vorderingen die hoofdzakelijk zijn gebaseerd op *schade aan private belangen* en aan de andere kant vorderingen die primair zijn gebaseerd op *schade aan het publieke belang*. Dit boek laat zien dat, in lijn met de verwachtingen, het recht betreffende vergoedingen voor schade aan private belangen verder ontwikkeld is dan op het gebied van particuliere vorderingen wegens schade aan het publieke belang, waar het recht nog in de kinderschoenen staat. De rol van de staat als hoeder van het algemeen belang blijkt een obstakel te vormen om procesbevoegdheid toe te kennen aan private partijen die een vordering willen indienen wegens schade aan publieke belangen.

Een vordering wegens schade aan een privaat belang betreft in de drie onderzochte jurisdicties de schade die is veroorzaakt door misbruik van de principaal-agentrelatie. De voornaamste slachtoffers van de schade die is veroorzaakt door corruptie zijn principalen en aandeelhouders. Onder de *common law* in de Verenigde Staten en Engeland wordt deze verhouding aangeduid met de term '*fiduciary relationship*', terwijl zij op grond van het Nederlandse recht afwisselend 'vertrouwenspositie' of 'mandaat' wordt genoemd. Er zit een sterk moreel element in de schadevergoedingsregelingen in de VS en Engeland, die zich niet uitsluitend richten op compensatie van geleden nadeel maar ook op het wegnemen van het eventuele voordeel of dito winst voor de agent of de persoon die de steekpenningen aanbiedt.

Het Amerikaanse en Engelse recht kent bepaalde presumpties met betrekking tot schade en '*reliance*', waardoor de bewijslast van de principaal verlicht wordt en die ervoor zorgen dat de *tort of bribery* als *sui generis* moet worden aangemerkt. Onder het Nederlandse recht is geen sprake van dergelijke presumpties en gelden de normale bewijsregels. Naast een actie tegen de agent wegens het schenden van de loyaliteitsplicht, kan de principaal de agent of de aanbieder van de steekpenningen ook wegens onrechtmatige daad voor de rechter dagen. Het blijkt echter moeilijk om een oorzakelijk verband te bewijzen tussen de daad en de schade. De principaal moet aantonen dat hij als gevolg van de omkoping in een onvoordeligere positie is gebracht.

## PRIVATE REMEDIES FOR CORRUPTION

Daar waar de schade door corruptie is geleden door het grote publiek, brengt de notie van privaatrechtelijke handhaving meer problemen met zich mee. De weg die deze categorie eisers moet afleggen om vergoeding te verkrijgen, is moeizamer dan die van directe slachtoffers (zoals de principaal en aandeelhouders). Uit zaken die voor dit onderzoek uit verschillende jurisdicties zijn geselecteerd blijkt echter dat er door partijen die het algemeen belang nastreven, verschillende strategieën worden gehanteerd. Het onderzoek laat voorbeelden zien van derden die schadevergoeding proberen te krijgen op grond van oneerlijke concurrentie, van overheden die op grond van theorieën van ‘*social damage*’ (maatschappelijke schade) schadevergoeding proberen te krijgen van Costa Rica; van een staatsonderneming die ‘*mandatory restitution*’ probeert te verkrijgen in verband met een schikking die was getroffen naar aanleiding van corruptiepraktijken waarbij haar functionarissen betrokken waren; van een burger die eist dat de autoriteiten een onderzoek instellen naar vermeende corruptie door huidige en voormalige Afrikaanse presidenten en enkele voorbeelden waarbij burgers de overheid proberen te dwingen tot actie over te gaan of tot nakoming van internationale afspraken op het gebied van corruptie. Deze voorbeelden zijn afkomstig uit uiteenlopende jurisdicties en wijzen op de opkomst van een nieuwe groep spelers en nieuwe strategieën die de ontwikkelingen in de strijd tegen corruptie in de komende jaren vorm kunnen gaan geven.

Private procespartijen wordt geconfronteerd met procedeeerkosten, relatief geringe vorderingen en problemen die te maken hebben met procesbevoegdheid. In de Verenigde Staten zijn de voorwaarden voor private eisers om een vordering in te stellen wegens corruptie het gunstigste, met compensatieregelingen die in het leven zijn geroepen om particuliere actoren aan te moedigen gerechtelijke stappen te ondernemen. Ook beloningen voor klokkenluiders, private aanklagers en ‘*class actions*’ hebben een vaste plaats gekregen in het Amerikaanse rechtssysteem en helpen de particuliere eiser om de overheid en ondernemingen ter verantwoording te roepen. In het Verenigd Koninkrijk hebben gunstige rechterlijke uitspraken over publieke belangen de deelname van burgers in de strijd tegen corruptie bevorderd. De *class action* heeft er echter niet dezelfde groei doorgemaakt als in de Verenigde Staten en ook bestaan er geen vaste vergoedingsregelingen voor private aanklagers. In deze zin bieden Engeland en Nederland eenzelfde restrictieve omgeving voor de particuliere eiser. Terwijl de private procespartij in de Verenigde Staten kan rekenen op mechanismen die hem stimuleren en belonen om een vordering in te dienen, is dit niet het geval in Engeland en nog minder in Nederland.

In dit boek wordt een methode voorgesteld om het indirecte slachtoffer te stimuleren om een vordering in te stellen op een wijze die de sluisdeuren niet opent maar waarbij wel procesbevoegdheid kan worden toegekend in zaken waarin schade is toegebracht aan het algemeen belang. Contractspartijen kunnen

## SUMMARY IN DUTCH

een beroep doen op de rechtsfiguur van de derde-begunstigde, *'third party beneficiaries'* die aanwezig is in alle drie onderzochte jurisdicties. Op deze manier wordt aan particuliere actoren die partij zijn bij overeenkomsten met een publieke dimensie onder bepaalde voorwaarden procesbevoegdheid toegekend, welke voor alle betrokkenen fungeert als een prikkel om de anti-corruptieregels na te leven.

### *Deel 3: Naar een internationaal raamwerk*

Het eerdergenoemde VN-verdrag biedt een breed raamwerk voor privaatrechtelijke handhaving bij corruptie en doet dat op twee punten: (1) de rechtsgeldigheid van transacties die het gevolg zijn van corruptie of besmet zijn door corruptie, en (2) het recht om een vergoeding te vorderen wegens geleden schade die het gevolg is van corruptie. Het feit dat deze bepalingen onderworpen zijn aan nationale rechtsregels en aan het non-interventiebeginsel betekent dat het nationale recht vrijwel hetzelfde blijft. Artikel 34 UNCC introduceert dan ook geen nieuwe rechtsmiddelen om de geldigheid te betwisten van contracten die besmet zijn door corruptie. Wat het verdrag wel doet, is een nieuw niveau van verbintenisrechtelijke convergentie introduceren door corruptie aan te merken als een onafhankelijke factor die contracten die besmet zijn door corruptie nietig maakt.

Op vergelijkbare wijze als artikel 34 biedt ook artikel 35 UNCC slechts een vorderingsrecht voor zover dit aanwezig is in het nationale recht. Ook de procesbevoegdheids- en causaliteitsvereisten die nodig zijn om een proces aan te spannen worden niet versoepeld. In artikel 35 is de causaliteit strikt geformuleerd, waardoor uitsluitend de directe slachtoffers, die kwantificeerbare schade door corruptie hebben opgelopen, onder het beschermingsbereik van deze bepaling vallen. De toepasselijkheid van nationaal recht en de formulering van artikel 35 impliceren dat de private eiser voorlopig geen nieuw internationaal platform tot zijn beschikking heeft. Desondanks kent artikel 35 UNCC een moreel gewicht toe aan de notie van private acties door burgers wegens schade die is geleden als gevolg van corruptie. Dit is relevant voor een ieder die belang heeft bij een *'level playing field'* omdat het een tot nu toe onvoldoende benutte methode toepast om naleving van anti-corruptiewetgeving te bevorderen. Het zou wenselijk zijn als het schadebegrip van artikel 35 ruim zou worden geïnterpreteerd, waardoor ook schade die niet kwantificeerbaar is eronder kan worden geschaard. Het UNCC richt zich immers niet alleen op de vergoeding van schade aan de partijen die direct bij de transactie betrokken zijn maar ook op het herstel van de schade aan de maatschappij als geheel. Onderdeel van het openlijk beleden doel van het raamwerk voor privaatrechtelijke handhaving van het UNCC is om de burgers en de *'civil society'* aan te moedigen om een vordering in te stellen.

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De verkregen inzichten uit dit boek worden gebruikt om een *Transaction Approach* (transactiebenadering) ten aanzien van corruptie te formuleren, waarbij niet de overtreder maar de transactie een centrale positie inneemt. De *Transaction Approach* erkent de symbiotische relatie tussen de interactie in een corrupte transactie en de omgeving waarin deze transactie plaatsvindt. Verder wordt in deze benadering onderkend dat er verschillende interactielagen zijn en dat elke laag een rol speelt in het creëren van een omgeving waarin internationale corruptie plaatsvindt. Door uitsluitend één niveau aan te pakken (zoals de overtreding), blijven andere niveaus buiten schot, waardoor een onsamenhangende omgeving ontstaat die risicovol gedrag stimuleert. Om internationale corruptie terug te kunnen dringen, moet een omgeving worden gecreëerd waarin naleving van anti-corruptieregels wordt aangemoedigd. Om dit te bereiken, moet elk interactieniveau als zodanig te worden aangepakt.

### *Tot slot*

Privaatrechtelijke handhaving van anti-corruptieregels vormt een aanvulling op de strafrechtelijke handhaving. In dit boek wordt geenszins gesuggereerd dat zij een alternatief vormt voor strafrechtelijke sancties. Privaatrechtelijke handhaving moet eerder gezien worden als het logische gevolg van strafbaarstelling en een noodzakelijke stap om de voordelen van strafbaarstelling te benutten. Een belangrijke bevinding, die naar voren komt in de zaken die voor dit boek zijn bestudeerd, is dat privaatrechtelijke handhaving de omgeving waarin corruptie voorkomt kan veranderen op een wijze die de naleving van anti-corruptieregels bevordert. Een omgeving waarin contracten die besmet zijn door corruptie aangevochten kunnen worden, die private procespartijen aanmoedigt en beloont en overtreders aanspoort zichzelf aan te geven heeft een positief effect op de handhaving van anti-corruptieregelgeving. Doordat privaatrechtelijke handhaving zich richt op de gevolgen van corruptie, krijgt het slachtoffer, dat in het strafrechtelijk proces buiten spel staat, een centrale positie in de strijd tegen corruptie.

Vanuit een methodologisch oogpunt biedt dit boek, door onderscheid te maken tussen de *primaire overeenkomst* en *secundaire overeenkomst* die het gevolg zijn van corruptie, tussen de *private* en *publieke* belangen die worden geschaad en waarvoor vergoeding kan worden gevorderd, door de mogelijkheid te onderzoeken van het gebruik van bestaande beginselen en rechtsfiguren zoals het beding ten behoeve van de derde *third beneficiary clauses* om te voorzien in procesbevoegdheid, en door te pleiten voor een *Transaction Approach* ten aanzien van corruptie, een methode die de verdere ontwikkeling van anti-corruptiebeleid kan verhelderen en bevorderen met betrekking tot publiek-private samenwerkingsverbanden in het algemeen en privaatrechtelijke handhaving in het bijzonder.



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Abiola has presented and published several papers at conferences, in scientific journals as well as chapters in books. With regards to this research, she presented papers at the first European conference on the Civil Law Consequences of Corruption in Bremen, Germany (2008) and at a Yale Law School Workshop on Anti-Corruption Policy in Bellagio, Italy (2010). She participated in the Workshop on Enhancing the Role of Civil Society in the Fight against Corruption, and a special session on Peoples Empowerment at the 14th International Anti-corruption Conference in Bangkok, Thailand (2010). In February 2008 Abiola was awarded the Erasmus University Female Ph.D. Stipend and in August 2010 Abiola was awarded the first HIIL Young Talent Essay Award for her essay entitled 'Future Thinking through the Prism of International Corruption.' In June 2011 she was invited to join the Group of Experts Meeting of the World Legal Forum on the Inclusion of 'International Fraud and Corruption' in The Hague Utilities for Global Organizations (HUGO) project.