6-2017

Demand side of corruption and foreign investment law

Austin Ignatius PULLE
Singapore Management University, austinc@smu.edu.sg

Published in Journal of International and Comparative Law, 2017 July, Volume 4, Issue 1, Pages 1-37
https://heinonline.org/HOL/LandingPage?handle=hein.journals/jintcl4&div=4&id=&page=

DEMAND SIDE OF CORRUPTION AND FOREIGN INVESTMENT LAW

Austin I Pullé*

Abstract: The United Nations Convention against Corruption, the regional anti-corruption conventions, the US Foreign Corrupt Practices Act and the laws against foreign bribery passed pursuant to the OECD Convention on Bribery have not operated to substantially reduce foreign corrupt practices. The "design flaw" in these instruments and laws is that they abandon the model of domestic anti-bribery laws that target both the supply and the demand side of corruption and instead focus only on the supply side of corruption. Shielded from international accountability, corrupt officials in the demand side continue to extort bribes from investors and other businessmen who wish to operate in their countries. Arbitration decisions that consider corruption in the context of investment disputes also leave unsanctioned corrupt conduct on the part of host country officials. While foreign policy objectives of capital exporting states would discourage and prevent a full scale attack on supply side corruption, less controversial measures to discourage and even punish demand side corruption should be established and enforced if foreign commercial bribery is to be meaningfully addressed.

Keywords: *foreign corrupt practices; foreign bribery; bribery and foreign investment; investment protection treaties and bribery; demand side corruption*

I. Introduction

The national and international regimes that attempt to deter and control overseas commercial bribery have failed to prevent foreign officials from demanding and receiving massive bribes from foreign investors and other business persons. The legislatures of the major capital exporting countries must address this failure by amending their foreign anti-bribery laws. Likewise, the governments of these countries need to negotiate much needed changes that deal with demand-side bribery in their international investment agreements (IIAs).

The alarming spike in foreign commercial bribery necessitates such changes. The serious flaws in national laws that attempt to prevent foreign commercial bribery only by punishing investors and others doing business across borders hinder efforts to combat bribery as a worldwide phenomenon.

---

* Associate Professor (Practice), School of Law, Singapore Management University, Singapore; Member, Panel of Experts on Constitutional Law Reform, Sri Lanka.

Host country foreign anti-bribery laws, by ignoring the demand side of corruption which domestic bribery laws invariably criminalise, result in enforcement actions that are unbalanced and are also neither rational nor effective in combating foreign commercial bribery. First, these laws present their foreign investors with a Hobson's choice. In effect, enforcers of such laws tell their nationals:

> "either pay the sum demanded by the foreign official and invest in the host country thereby exposing yourself to an expensive and harassing local investigation with possibly heavy criminal penalties at home or resist paying the bribe and forego a business opportunity to increase your shareholder value and contribute to the development of the host country".

Second, the data contained in the Corruption Perceptions Indices (CPS),[1] released by Transparency International, the best-know anti-corruption civil society group, show that these foreign bribery laws have little impact on countries that are described as "highly corrupt". Corruption appears to be rife and corrupt payments even by companies, from countries which are regarded as the least corrupt and punish overseas bribery, continue to be made. In other words, the main objective of anti-foreign corrupt practices legislation and international treaties that condemn bribery in the strongest terms, which is to eradicate or at least drastically reduce foreign commercial bribery, remains unrealised. Third, national foreign anti-bribery laws contain no meaningful deterrent against host country kleptocrats. These kleptocrats continue to flourish, living a life free of accountability or retribution, and continue to inflict political violence on host country populations. Fourth, where honest investors refuse to pay bribes, their less scrupulous competitors replace them, and the results are often overpriced products/services, sub-standard performance and an oligopolistic economy.[2] Finally, in a typical highly corrupt but resource-rich host country, the population, despite being the real owners of the abundant natural riches in their homeland, live in squalid poverty; democracy and human rights are undermined if not destroyed; and their masters plunder the national heritage from the true owners.

Unless credible deterrents directed at host country corrupt officials are put in place and acted upon, the looting and violence associated with corruption in these countries will continue. This article proposes that the international community rebalance various components of the existing anti-bribery regime but which at the same time acknowledges the legitimacy of foreign policy objectives that may rule out harsh measures against officials and countries on the demand side. This would require modifying the existing regime that directs deterrence exclusively on the supply side of corruption to a regime that is more responsive to the reality of doing business overseas, is more effective in combating overseas corruption and

---

1 CPS 2015, available at http://www.transparency.org/cpi2015#results-table (visited 28 June 2016).

2 Susan Rose-Ackerman, "The Law and Economics of Bribery and Extortion" (2010) 6 Ann Rev L and Soc Sci 217–238; Joseph W Yockey, "Solicitation, Extortion and the FCPA" (2011) 87 Notre Dame L Rev 781–839.

allocates penalties and sanctions in a more equitable manner. Such a rebalancing is supported by compelling policy reasons and can be justified by relevant principles of international law.

The most recent CPS[3] shows that the majority of the countries in the global south and countries that comprised the former Soviet Union, especially those resource-rich countries, can be described as "highly corrupt".[4] Yet these very same countries continue to attract significant foreign investment in high-value projects. Many of the areas in which such investments are made — resource exploitation and extraction, government procurement of mega-infrastructure development and telecommunications and broadcasting — involve a high level of host country official involvement. Presidents, ministers and senior officials examine investment proposals and decide which ones to approve. Because these transactions provide these officials an opportunity to demand and collect massive bribes, the governments of many developing countries choose grandiose projects such as ultra-modern airports and other infrastructure over hospitals and schools as the latter have no potential to generate large kickbacks. Evidence collected by Trace International shows that in these high-value transactions, the rent-seeking that is so endemic in these corrupt countries virulently manifests itself with continuous demands for high commissions and kickbacks.[5]

However, it would be a mistake to conclude that corruption is only a problem in backward developing countries. The Korean president has been impeached on the ground that her administration engaged in widespread corruption. This type of corruption, it is alleged, is embedded in the cosy relationship between government and business.[6] While the American authorities fined JP Morgan several hundred million dollars for their notorious influence peddling programme, the "Sons & Daughters Program",[7] the US Supreme Court unanimously read the principal anti-corruption statute directed at officials as requiring a clear nexus between the alleged conduct, the *quid* and the favour received, the *quo*.[8] If the Court had perused the US Foreign Corrupt Practices Act of 1977 (FCPA),[9] the iconic American statute

---

3 CPS 2015 (n.1).

4 See Jon ST Quah, "Curbing Asian Corruption: An Impossible Dream?" (2006) 105 Current History 176–179 who notes that most of the 22 Asian nations receive low rankings in the CPS; and Yahong Zhang and Cecilia Lavena (eds), *Government Anti-Corruption Strategies: A Cross Cultural Perspective* (London: Routledge, 2015).

5 See generally, https://www.traceinternational.org/blog (visited 26 February 2016).

6 See Se-Woon Koo, "South Korean Corruption Will Endure" (9 December 2016), available at http://www.nytimes.com/2016/12/09/opinion/south-korean-corruption-will-endure.html?action=click&pgtype=Homepage&clickSource=story-heading&module=opinion-c-col-right-region&region=opinion-c-col-right-region&WT.nav=opinion-c-col-right-region&_r=0 (visited 10 December 2016).

7 See Antonine Gara, "JP Morgan Agrees to Pay $264 Million for 'Sons and Daughters' Hiring Program in China" *Forbes* (17 November 2016), available at http://www.forbes.com/sites/antoinegara/2016/11/17/jpmorgan-agrees-to-pay-264-million-fine-for-sons-and-daughters-hiring-program-in-china/#17ad75db597e (visited 6 December 2016).

8 *McDonnell v US* 579 US ___, 136 S Ct 2355 (2016).

9 15 USC § 78dd-1, *et seq.*

on foreign bribery but which does not get a mention in the opinion, it would have noticed that s.78dd-1(a)(1)(A)(i) makes it an offence for anything of value to be given with the intention of "influencing any act or decision of such foreign official in his official capacity". This is than much wider *quid pro quo corruption.* This decision has dismayed anti-corruption activists because it ignores the reality that corruption is hardly a one-off transaction and that companies could spend millions in cultivating relationships with officials which will be reciprocated at the proper time. Indeed, the ancient Chinese practice of *Guan Xi* is premised on this understanding.

Countries, typically in the global south, rich in natural resources such as minerals, metals, fossil fuels and timber, are said to suffer from the "resource curse".[10] The resource curse in the global south manifests itself mainly in widespread looting of government funds and resources by officials, blood diamond fuelled civil wars, political violence involving egregious human rights violations of these populations and the evolution of a crony elite that will not surrender power peacefully.[11] Resource exploitation, unhindered by meaningful environmental protections, contributes to massive deforestation and species extinction and aggravates the environmental crisis that confronts the world.[12] If no meaningful changes are made to the current foreign anti-bribery regime, this state of affairs will continue with detrimental consequences for global security, human rights, the global environment, the spread of democracy and efficient markets. An expert on the economics of corruption has estimated that corruption costs nearly a trillion dollars annually to the global public.[13] The people of this world cannot afford to continue to be burdened thus. Not included in this annual price of $1 trillion are the numerous human rights violations of host country populations, denial of opportunities to improve health and sanitation and to reduce high infant mortality, education opportunities and denial of basic infrastructure such as hospitals and schools.[14]

---

10 See Macartan Humphreys, Jeffrey D Sachs, Joseph E Stiglitz (eds), *Escaping the Resource Curse* (New York: Columbia University Press, 2007).

11 See Tom Burgis, *The Looting Machine: Warlords, Oligarchs, Corporations, Smugglers, and the Theft of Africa's Wealth* (New York: Public Affairs, 2015). The so-called War on Terror has also seen corrupt allies loot billions of money received to fight terror groups. See Matthieu Aikins, "The Bidding War: How a Young Afghan Military Contracts Became Spectacularly Rich" *The New Yorker Magazine* (7 March 2016), available at http://www.newyorker.com/magazine/2016/03/07/the-man-who-made-millions-off-the-afghan-war (visited 9 March 2016); and Sarah Chayes, *Thieves of State: Why Corruption Threatens Global Security* (New York: WW Norton & Co, 2015).

12 See EO Wilson, *Half-Earth: Our Planet's Fight for Life* (New York: Liveright Publishing Corporation, 2016).

13 Daniel Kaufmann, "Six Questions on the Cost of Corruption", available at http://go.worldbank.org/KQH743GKFI (visited 1 December 2016).

14 See Nicholas Hildyard, "Global Looting — A Snapshot" (16 November 2015), available at http://www.thecornerhouse.org.uk/resource/global-looting-snap-shot (visited 11 March 2016). [This was written as a background paper for Nicholas Hildyard, *Licensed Larceny: Infrastructure, Accumulation and the Global South* (Manchester: Manchester University Press, 2016).]

The prominent foreign anti-bribery statutes[15] of capital exporting states address the supply side of foreign commercial bribery but steer clear of attempting to restrain or deter, much less punish, those who control the demand side. Unlike petty bribery, usually engaged in by low-level customs and law enforcement personnel, the officials making the demands in foreign investor transactions, such as infrastructure procurement and resource exploitation, would typically be officials in the boards of investment, presidents and ministers, senior officials and powerful local cronies acting as proxies for the officials. Such persons have the status necessary to make demands for bribes backed up by credible threats. But the main weapon of foreign bribery statutes is to punish the bribe giver only. This lopsided enforcement directed at the supply side is largely to blame for the failed war on foreign commercial bribery. This is no surprise for a fight against bribery cannot be won by ignoring the demand side. In investor–state dispute arbitrations, a similar emphasis on supply-side corruption relieves corrupt host state officials of accountability. In these investment disputes, judges and arbitrators, despite bemoaning the fact that the corrupt host country officials have got off scot-free, nevertheless assert that their hands too are tied, this time by contract law principles that only permit them to avoid the voidable transaction, and that they are powerless to do anything more. Even where the investor–claimant obtained approval for the foreign investment project or concession by means of bribery demanded by a powerful corrupt official, the blame is placed entirely on the investor.[16]

Such punitive measures against the bribe payer, whether enforced in the home country or by a sanctions regime imposed by development banks, such as the World Bank, have had no deterrent effect on those corrupt individual officials of the host countries that extort the bribes.[17] This does little to improve governance and reduce corruption in these countries where an embedded culture of corruption continues to metastasise. These corrupt local elites, presently undeterred by meaningful sanctions, will continue with their depredations so long as they are not accountable anywhere to anyone. The negative utility resulting from placing such a heavy emphasis on punishing the supply side is that fear of sanctions often deter companies from attempting to do business in the host country. Presently, companies planning to invest in corrupt countries must plan on allocating management resources to ensure compliance with domestic anti-bribery law. The sanctions for violating domestic

---

15 FCPA, 15 USC § 78dd-1, *et seq*; the UK Bribery Act 2010; Singapore Prevention of Corruption Act (Ch.241). To fulfill their obligations to pass legislation implementing the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention, states have enacted foreign corrupt practices legislation. See "OECD Anti-Bribery Convention National Implementing Legislation", available at http:/ www.oecd.org/daf/anti-bribery/oecdanti-briberyconventionnationalimplementinglegislation.htm (visited 12 January 2016).

16 See, Hilmar Raeschke-Kessler and Dorothy Gottwald, Chapter 5, "Corruption" in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008).

17 See Tina Søreide, Linda Gröning and Rasmus Wandall, "An Efficient Anticorruption Sanctions Regime? The Case of the World Bank" (2015–2016) 16 *Chicago Journal of International Law* 523–552.

foreign corrupt practices laws are so severe that a massive compliance industry of accountants and lawyers has developed. This is so wasteful of management time and company resources that one US enforcement official has described it as "aimlessly boiling the sea".[18] Some have even suggested that there are vested interests that have a stake in maintaining the *status quo*.[19] The compliance costs and the chilling effect of these laws on potential investors have resulted in reduced competition and a tendency by corrupt officials to encourage unsolicited bids from cronies and call for sole source bidders where the opportunity for extortion will be even higher. It is therefore no surprise that many countries with a poor record of integrity are oligopoly markets in which a few well-connected players operate.

It is trite law that if a person, to satisfy an extortion demand, pays a blackmailer, that person will not have committed an offence. Many bribe providers in international transactions are in a position little different from the victim of extortion or blackmail.[20] Anti-bribery law punishes a bribe giver because he is regarded as inducing a person in authority, the government official who could be a humble traffic policeman or a president for life, to violate duties owed by such official to the principal, the state.[21] The element of "corruptly inducing" by the offeror of bribes so central to the concept of bribery is missing in high-value foreign investment transactions where it is the corrupt official who demands the bribe payment. The requirement of "inducing" incorporates a *mens rea* element. The typical scenario that influenced anti-bribery legislation a century or more ago envisaged a conscientious and honest official who is seduced away from doing his duty by a bribe dangled before him by an unscrupulous investor or a business person. In 21st century, reality in most investment cases is quite different. Usually, it is the officials who make incessant demands backed up with credible threats on the foreign investor to pay the demand or suffer unpleasant consequences.[22] In the "pay-to-play" culture of

---

18 "Daft on Graft" *The Economist Magazine* (9 May 2015), available at http://www.economist.com/news/leaders/21650547-hard-line-commercial-bribery-right-system-becoming-ridiculous-daft-graft (visited 1 March 2016).

19 "A more cynical explanation for the government's focus on the FCPA is based on the 'revolving door' between government and private sector employment. The rise in FCPA enforcement has produced a cottage industry of FCPA experts, including lawyers, accountants and consultants at prestigious firms, which DOJ and SEC personnel often join after leaving their federal jobs for considerably higher compensation."

See Yockey, "Solicitation, Extortion and the FCPA" (n.2) p.793.

20 See Alexandra Addison Wrage, *Bribery and Extortion: Undermining Business, Governments, and Society* (Westport, CT: Praeger Security International, 2009), p.26.

21 But see, *Public Prosecutor v Leng Kah Poh* [2014] 4 SLR 1264, where the Singapore Court of Appeal reversed a holding by the High Court, and held that under Singapore's Prevention of Corruption Act it was not necessary that the corrupt conduct should have been "induced" in order for the offence of corruption to be committed.

22 See "Extortion Outflanks Business on Bribery's Russian Front" (11 March 2009), available at https://www.traceinternational.org/blog/719/Extortion_Outflanks_Business_on_Bribery_s_Russian_Front (visited 11 March 2016); see also, Yockey, "Solicitation, Extortion, and the FCPA" (n.2).

many developing host countries,[23] the investor is hardly a serpent tempting honest officials but simply a legitimate business entity which has spent large amounts of money preparing for the investment only to be stopped at the entry point of some dystopian developing country by a corrupt official who demands a massive bribe to approve the investment. Managers of businesses are usually guided by principles of ethical egoism when considering what action they should take. Principles of rational egoism command such managers to act in a way that promotes the best interests of the company. The stark choice confronting managers of a business would be to either to make the bribe demanded or face inevitable rejection for failure to pay the bribe. If the manager does pay, his employer and he will face massive criminal prosecution in those industrialised countries, which pursuant to the OECD Anti-Bribery Convention have enacted anti-bribery legislation, and if the manager does not, his employer would lose out on the opportunity to make a profit and contribute to the economic development of the host country as well as suffer a loss by having to write off sunk costs. A rational and equitable anti-bribery system should not produce such welfare reduction outcomes. National laws always punish both the bribe giver and the bribe taker.[24] Depending on the context, lawmakers could regard the bribe taker as more blameworthy for abusing a position of trust. For example, the US Constitution includes the taking of a bribe as a part of the class of "high crimes and misdemeanours", which are impeachable offences when committed by an American president and high officials.[25] The time-tested wisdom of controlling bribery by punishing both the bribe giver and the bribe taker found in perhaps all the anti-bribery national laws is conspicuously ignored in the foreign anti-bribery statutes. The disappointing results from such a lopsided approach should surprise no one.

II. Denying Kleptocrats Entry into Western Playgrounds

The amount of wealth amassed as a result of corruption in the developing countries and the blatant flaunting of such wealth by kleptocrats shock the conscience of many people concerned about economic growth, poverty alleviation, good

23 The culture is not confined to developing countries. Investigative journalists have uncovered this type of culture in various states in the United States where participation in procurement projects was conditioned on such payments. See Elizabeth Brackett, *Pay to Play: How Rod Blagojevich Turned Political Corruption into a National Sideshow* (Chicago: Ivan R Dee, 2009); also see, Zephyr Teachout, *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* (Cambridge, MA: Harvard University Press, 2016) which is a comprehensive survey of corruption in the United States. The author argues that political corruption in the United States has increased because of the Supreme Court's narrow definition of political corruption to mean only *quid pro quo* corruption. See *McDonnell v US* (n.8).

24 18 USC § 201.

25 US Constitution, art.II, s.4.

governance and human rights and the growing income inequality among populations in poor countries.

An army of bureaucrats, accountants and lawyers in capital exporting countries help enforce foreign anti-bribery laws. Regional and international conventions declare that corruption is a global problem that threatens peace and security. Arbitral and judicial decisions condemn bribery as "an evil practice that threatens the very foundations of a civilized society".[26] Despite the foregoing, corruption continues to flourish in scores of poor but resource-rich host countries. International conventions such as the OECD Convention on Combating Bribery[27] and United Nations Convention Against Corruption[28] and domestic laws such as the Singapore Prevention of Corruption Act[29] and the FCPA[30] try to deter corruption with severe penalties, but, as noted earlier, the annual CPS maps show that these instruments appear to be having little discernible impact on the level of corruption in most countries in Eastern Europe, Africa and Asia.[31] If the existing laws on foreign bribery were effective, they would not fail so badly in deterring the paying of bribes to officials in countries perceived as most corrupt.[32] The officials of governments of countries that are ranked as corrupt obviously do not fear their own toothless laws on bribery because they control the enforcement of these laws. And for them, foreign bribery laws of the major capital exporting countries are but "Paper Tigers" that pose no threat to their well-being. Until foreign governments begin to target these foreign officials and make them accountable for their corruption that harms the nationals of the former group of countries, these officials will continue to be indifferent to the outrage of the world over their corruption.

Anti-corruption activists, law enforcement officials and business persons[33] regularly vent their outrage and frustration, but the demand side continues to flourish. Not only do bribe-taking officials and their cronies remain beyond the reach of the law in their own countries but they also with complete ease enter and leave the glamorous capitals and cities of the West and spend their looted gains by buying luxury properties in these countries. The charge that looted wealth is used to fund luxury lifestyles in Europe and the United States is credible. Critics of the present anti-bribery regime cite the case of Teodorin Obiang, the notorious son of

---

26 *A-G for Hong Kong v Reid* [1994] 1 AC 324, 330 (Lord Templeman).

27 Available at http://www.oecd.org/corruption/oecdantibriberyconvention.htm.

28 Available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

29 Hildyard, "Global Looting" (n.14).

30 FCPA, 15 USC § 78dd-1, *et seq.*

31 See works referred to in note 4.

32 Bruce W Klaw, "A New Strategy for Preventing Bribery and Extortion in International Business Transactions" (2012) 49 Harv J on Legis 303–371 and Bruce W Klaw, "State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles and Opportunities" (2015) 33 Berkeley J of Int'l Law 60–113.

33 See Richard Levick, "Winning the Anti-Corruption War: Go after the Bribe Takers" *Forbes* (10 June 2013), available at http://www.forbes.com/sites/richardlevick/2013/06/10/winning-the-anti-corruption-war-go-after-the-bribe-takers/2/#617e8d952ca0.

Equatorial Guinea's even more notorious dictator.[34] By any measure, Teodorin is the poster boy for the egregious and extravagant flaunting by kleptocrats of corrupt wealth in capital exporting countries that have enacted foreign anti-corruption laws.

Examples of Teodorin's extravagant lifestyle are many, but just two of his many acquisitions illustrate the obscene use of corrupt wealth. The civil society group, Global Witness, has alleged that Teodorin commissioned the construction of a superyacht worth $380 million, almost three times more than Equatorial Guinea spends annually on health and education programmes.[35] Gavin Hayman, Director of Campaigns at Global Witness stated that:

> "[e]vidence points to corruption by Teodorin on a scale that would not be possible or attractive if countries like Germany and the US were not safe havens, in terms of free passage for him and for his questionable private wealth".[36]

A second example of Teodorin's extravagance was his purchase of a $35 million house in Malibu, California, where his neighbours included the actor Mel Gibson and the singer Britney Spears.[37] The prospect of luxury acquisitions and the opportunity to fund their children in the top-notch schools and the universities of the West are irresistible temptations for kleptocrats. A prominent human rights lawyer has made the same point.[38]

However, Teodorin's conspicuous extravagance in the United States was perhaps too blatant to be ignored by the authorities even though many foreigners buy without hindrance luxury properties in the United States with funds of criminal or suspect origin.[39] The US Department of Justice, acting under its Kleptocracy Asset Recovery Initiative,[40] investigated Teodorin's purchases and conduct while

---

34 "New Documents Detail Alleged Grand Corruption in Equatorial Guinea" (13 June 2012), available at https://www.globalwitness.org/en/archive/new-documents-detail-alleged-grand-corruption-equatorial-guinea/ (visited 8 February 2016).

35 "Global Witness: Son of Equatorial Guinea's Dictator Plans $380M Superyacht" (28 February 2011), available at http://diplopundit.net/2011/02/28/global-witness-son-of-equatorial-guineas-dictator-plans-380m-superyacht/.

36 "Son of Equatorial Guinea's Dictator Plans One of World's Most Expensive Yachts" (28 February 2011), available at https://www.globalwitness.org/en/archive/son-equatorial-guineas-dictator-plans-one-worlds-most-expensive-yachts/ (visited 8 February 2016).

37 See C Bohlen, "A Push to Stop Kleptocrats from Cashing in Abroad" (2 June 2009), available at http://www.nytimes.com/2009/06/02/world/europe/02iht-letter02web.html (visited 8 February 2016).

38 See Carl Gershman, "Unholy Alliance: Kleptocratic Authoritarians and Their Western Enablers", available at http://www.worldaffairsjournal.org/article/unholy-alliance-kleptocratic-authoritarians-and-their-western-enablers (visited 30 November 2016).

39 "One co-owner of a $6.5 million house is a 19-year-old college student, the daughter of the chief executive of a company the state controls." Karen Weise, "Why Are Chinese Millionaires Buying Mansions in a LA Suburb?" (16 October 2014), available at http://www.bloomberg.com/news/articles/2014-10-15/chinese-home-buying-binge-transforms-california-suburb-arcadia (visited 12 March 2016).

40 Available at http://www.enoughproject.org/files/BankruptingKleptocacy_AML_Brief.pdf (visited 26 May 2017).

he was in the United States. The result of this investigation was that the Department of Justice and Teodorin entered into a settlement that was signed and lodged with the US District Court for the Central District Court of California.[41] Under the settlement, the US Government required Teodorin to sell his $30 million mansion located in Malibu, a Ferrari automobile and various items of Michael Jackson memorabilia purchased with the proceeds of corruption. The Assistant Attorney-General observed that:

> "[t]hrough relentless embezzlement and extortion, Vice President Nguema Obiang shamelessly looted his government and shook down business in his country to support his lavish lifestyle, while many of his fellow citizens lived in extreme poverty".[42]

Among the industrialised countries, the United States has the most extensive asset recovery programme and the ability to detect those assets that are acquired from funds of foreign criminal or corrupt origin. Other countries may not be able to match the extent of this programme because the United States operates the most extensive surveillance programme in the world and can be alert for and detect suspicious transactions. The World Bank together with the UN Office of Drugs and Crime offers a "Stolen Asset Recover Program" or "STAR", but the programme is usually effective only when a government has been replaced and the new government seeks to pursue the corrupt wealth of the previous government's officials.[43] But even in the United States, the most potent of the options available to the American authorities appears to be "Non-Conviction Based Confiscation" that does not even require a criminal defendant nor a conviction.

The efficacy of these asset recovery initiatives depends on the availability and affordability of forensic services for uncovering assets purchased with corrupt money within the jurisdiction of the enforcing country. When the purchases with corrupt money are not conspicuous or where luxury assets are purchased through a string of companies and middlemen, detection becomes more difficult. The ingenuity of the criminal class in hiding their ill-gotten gains in creditor-unfriendly jurisdictions and alter-ego companies has always provided challenges to law enforcement. In the era of globalisation, corrupt officials can choose from a menu of the many escape hatches. These include banking and tax havens, poor countries that welcome money laundering, alter-ego companies and nominees and agents

---

41 See, James V Grimaldi, "When US Targets Foreign Leaders for Corruption, Recovering Loot Is a Challenge", available at http://www.wsj.com/articles/u-s-reaches-34-million-corruption-settlement-with-equatorial-guinea-official-1412948259 (visited 10 March 2016).

42 See http://www.ft.com/intl/cms/s/0/700a81d6-51f0-11e4-b55e-00144feab7de.html#axzz3zqdu1iyj; see also "Assistant Attorney General Leslie R Caldwell Speaks at Duke University School of Law" (23 October 2014), available at http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-duke-university-school-law (visited 7 February 2016).

43 See the homepage at http://star.worldbank.org/star/.

who will disguise the beneficial ownership of the assets. Some international banks have been exposed as facilitating tax evasion and perhaps could also be relied on to provide expert advice on how to hide corrupt wealth.[44]

Despite the actions taken against Teodorin, commentators pointed out that what he got was really a slap on the wrist because he was not even required to admit guilt.[45] That kleptocrats labouring under a sense of impunity become incorrigible is illustrated by recent reports that a fleet of luxury cars were seized in an enormous mansion owned by him.[46] There seems to be a general aversion in countries with foreign bribery laws to punishing kleptocrats with deterrent sanctions like imprisonment. In fact, luxury real estate in the great cities of the world still continue to be an irresistible lure for kleptocrats who find an ever willing cadre of local real estate agents, lawyers and accountants who will help them to acquire the dream properties on their wish list.[47]

III. Pursuing Multiple National Priorities While Combating Bribery

Combating overseas bribery is just one of the many priorities of the capital exporting countries. In an increasingly inter-connected world challenged by terrorism, political adventurism, competition for markets and the continuing games by the big powers of enlarging spheres of influence, the priorities accorded to fighting foreign bribery are usually subordinated to other national goals such as trade promotion, friendly relations with allies and sustaining military alliances.

Countries like Switzerland that do not have a large political footprint can deal with overseas bribery differently than a country like the United Kingdom, a permanent member of the UN Security Council. The Swiss Attorney-General, for example, is reported to be aggressively pursuing inquiries into an allegedly

---

44 The disclosure of business persons and politicians hiding their money in Panama has re-focused attention on abusive tax havens, see Nicholas Shaxson, "Panama Is One Head of the Tax Haven Hydra", available at http://www.ft.com/intl/cms/s/0/d01062a0-fa71-11e5-8f41-df5bda8beb40.html#axzz45JlC77II (visited 6 April 2016); Nicholas Shaxson, *Treasure Islands: Tax Havens and the Men Who Stole the World* (Vintage, 2012); Tom Burgis, "HSBC Freezes At Least $87 Million in Accounts Linked to China's Sam Pa", stating that Mr Pa laundered funds for President Mugabe after the sale of illicit diamonds, *Financial Times* (14 March 2016), available at http://www.ft.com/intl/cms/s/0/e003f136-e9fa-11e5-888e-2eadd5fbc4a4.html#axzz433tjLwVk (visited 14 March 2016).

45 "Not a Bang, But a Whimper: US Justice Department Settles in Signal Graft Case" (14 October 2014), available at https://100r.org/2014/10/not-a-bang-but-a-whimper-u-s-justice-department-settles-in-signal-graft-case/ (visited 7 February 2016).

46 "Nguema's Porsche, Bugatti and Ferraris Seized by Swiss authorities", available at http://www.africanews.com/2016/11/03/teodorin-nguema-s-porsche-bugatti-and-ferraris-seized-by-swiss-authorities/. (visited 7 December 2016).

47 See Roman Borisovich, " 'Kleptocracy Tours' Expose State Failure to Stop Dirty Money Buying up London" *The Guardian* (2 March 2016), available at http://www.theguardian.com/uk-news/2016/mar/02/kleptocracy-tours-russia-ukraine-london; see also, http://www.ClampK.org.

massive scandal in Malaysia that allegedly implicates no less an official than the Malaysian Prime Minister (PM).[48] The turmoil caused by this alleged scandal in Malaysia has resulted in public unrest over the sacking of an attorney-general who was investigating the matter. His replacement has completely exonerated the Malaysian PM from any wrongdoing. The Swiss Attorney-General, determined to continue with his investigation, will not have to worry about political blowback either from the Malaysians or the Swiss authorities. Despite the need to maintain cordial relations with Malaysia, the Singapore authorities have provided an example to many banking centres by shutting down banks that had played a part in the money laundering scheme associated with this scandal.[49]

Unlike Switzerland, the United Kingdom has a much wider range of national interests that it must pursue. Like many countries in Europe, the United Kingdom continues to be vulnerable to terrorist attacks and is sensitive to such vulnerabilities especially after the terrorist bombings in London in July 2005. Sharing of information among states is an essential strategy to deter terrorism. When a foreign bribery investigation by the British comes up against a threat to discontinue such cooperation from another state, it is the bribery investigation that must be snuffed out. The *Corner House* litigation[50] was about the legality of the British Serious Frauds Office (SFO) discontinuing investigations into a bribe amounting to $1billion allegedly paid by BAE Systems to a prominent Saudi prince and former diplomat to facilitate the sale of fighter aircraft to the Saudi Kingdom. The Saudi government, which was the principal, ratified this payment.[51] However, the SFO continued to probe the transaction and sought the help of the Swiss banking authorities to identify a trail of payments. The Saudis responded to these moves by threatening not to share information about terrorism with the British authorities. That such a threat was made astonishing. The majority of the September 11 hijackers who committed mass murder when they piloted aircraft into the World Trade Center were from Saudi Arabia. Britain was a permanent member of the UN Security Council and Security Council Resolution 1611, passed unanimously in the wake of the July 7 bombing, which condemned terrorism.[52] It would have been a simple task for the United Kingdom to follow up on Resolution 1611 and sponsor a binding UN Security Council resolution requiring all member

---

48 See, John Revill, "Swiss Prosecutors Investigating 1MDB Say Malaysia Funds Were Diverted" *The Wall Street Journal* (30 January 2016), available at http://www.wsj.com/articles/swiss-attorney-general-expresses-concern-over-halt-of-malaysian-1mdb-probe-1454083061 (visited 10 March 2016).

49 Ann Williams, "MAS Shuts Down Falcon Private Bank in Singapore, Slaps Fines on DBS and UBS after 1MDB Probe" (11 October 2016), available at http://www.straitstimes.com/business/banking/mas-shuts-down-falcon-private-bank-in-singapore-slaps-fines-on-dbs-and-ubs-after (visited 6 December 2016).

50 *R (Corner House Research) v Director of the Serious Fraud Office* [2009] 1 AC 756.

51 Unless legislation explicitly permits payments that would be regarded as a bribe, the FCPA does not allow a government of a country to state that a payment was not a bribe and thereby sanitise the payment.

52 Available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/411/79/PDF/N0541179.pdf? (visited 10 March 2016).

states to share intelligence relating to terrorism and impose sanctions on states that deliberately withheld such information. Instead, the SFO discontinued the investigation in response to the threat. Corner House challenged the decision of the Director of the SFO to discontinue the investigation in response to the Saudi threat. The Divisional Court of the Queen's Bench Division ruled that the SFO Director should not discontinue the investigation.[53] Moses LJ stated the English law as follows:[54]

> "Had such a threat been made by one who was subject to the criminal law of this country, he would risk being charged with an attempt to pervert the course of justice. The course of justice includes the process of criminal investigation … But whether or not a criminal offence might been committed, the essential feature is that it was the administration of public justice which was traduced, it was the exercise of the Director's statutory powers which was halted.
>
> Threats to the administration of public justice within the United Kingdom are the concern primarily of the courts, not the executive. It is the responsibility of the court to provide protection."

However, the House of Lords overruled this decision and upheld the action of the SFO Director. It held that the Director could take into account the possible threat to the British public if the Saudis carried out their threat and ceased cooperation in sharing information on terrorism. Lord Bingham in his speech acknowledged that art.5 of the OECD Convention required member states to exclude being influenced by certain considerations when enforcement was at issue. He went on to ask whether "negotiators [could] have intended to include multiple loss of life" within the class of factors that should not be taken into account by enforcement authorities.[55] He concluded that they did not so intend and that the Director was justified in discontinuing the investigation. Lady Hale stated that she would have liked to have upheld the decision of the Divisional Court, but the real risk to "British lives on British streets" compelled her to uphold the legality of the Director's actions.[56] At the same time, she found it "extremely distasteful that an independent public official should feel himself obliged to give way to threats of any sort".[57] Since this decision, the United Kingdom has enacted the Bribery Act 2010, but the result under the Bribery Act would have not been any different. Purists demand effective anti-corruption action but "realists" in most countries prioritise trade promotion

---

53 See http://image.guardian.co.uk/sys-files/Guardian/documents/2008/04/10/judgment_corner_house_100408.pdf (visited 10 March 2016).

54 See *R (Corner House Research) v Director of the Serious Fraud Office* (n.50), [59]–[60].

55 *Ibid.*, [56].

56 *Ibid.*, [52].

57 *Ibid.*

over anti-corruption enforcement. Anti-corruption activists regularly allege that Western countries put the interests of large, especially arms manufacturer, exporters ahead of concerns of those interested in combating cross-border commercial corruption.[58] Any government prioritises its foreign policy agenda. The challenge is to accommodate the fight against foreign corruption in this agenda.

IIAs provide for inter-government arbitration over disputes concerning the interpretation and application of the treaty.[59] Accordingly, it is possible, though unlikely, that if a host country rejects an investment application because a bribe was not paid, the home state could make this refusal a subject of arbitration under this dispute settlement clause. No record exists of any country that is a party to a bilateral investment treaty (BIT) requesting dispute settlement under this provision on account of corruption in the host state. Investor–state dispute resolution has displaced diplomatic protection, and the expectation is that all disputes are really those between the investor and the host state. However, if the potential investor has been turned away at the gate because of a refusal to pay a bribe, the investor lacks standing to request an arbitration against the state. The BIT between Singapore and Indonesia, typical of many BITs, would sustain a complaint by a state under an inter-state dispute resolution provision if a potential investor is turned away because of a refusal to pay a bribe. The Preamble to this BIT states that it was intended "to create favorable conditions for investments by investors" of the home state in the host state. Article II(1) requires each Contracting Party to "encourage and create favorable conditions for investors" of the other Contracting Party. A demand for a bribe would clearly violate this obligation applying the rules of interpretation of the Vienna Convention on the Law of Treaties (VCLT).[60] In practice, the foreign offices of most home states would object to the home state invoking the inter-state

---

58 See Frank Vogl, "Trade Trumps Anti-Corruption" *Huffpost*, available at http://www.huffingtonpost.com/frank-vogl/trade-trumps-anticorrupti_b_6075936.html (visited 9 March 2016).

59 Eg, Article IX "Settlement of Disputes Between the Contracting Parties" in Agreement Between the Government of the Republic of Singapore and the Government of the Republic of Indonesia on the Promotion and Protection of Investments: Article IX applies to disputes between the states "concerning the interpretation or application of" the Bilateral investment treaty (BIT). Decisions reached by a majority of votes of an ad hoc tribunal set up under Article "shall be final and binding" and the parties are required to "abide by and comply with the terms of the award". This is an issue separate from whether parties to a BIT could deliver authoritative interpretations of the provisions of the BIT. See, James Crawford, "A Consensualist Interpretation of Article 31(3) on the Vienna Convention on the Law of Treaties" in George Nolte (ed), *Treaties and Subsequent Power* (Oxford: Oxford University Press, 2013); and Eleni Methymaki and Antonios Tzanakopoulos, "Master of Puppets? Reassertion of Control through Joint Investment Treaty Interpretation" (Oxford Legal Studies Research Paper No 10/2016, 29 February 2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2740127 (visited 9 March 2016).

60 VCLT:

> "Article 31, GENERAL RULE OF INTERPRETATION 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including *its preamble* and annexes" (emphasis supplied.)

arbitration provision. This is because it would appear to be unfriendly, if not hostile, to the host state and would damage the good relations between the two states.

The corruption provisions of Trans-Pacific Partnership Agreement (TPP)[61] illustrate how states discourage other states from raising the level of scrutiny of corrupt conduct that occurs within the borders of the former. The TPP appears to acknowledge the legitimacy of claims made by states that scrutiny of corruption, especially appraisal of the enforcement of their domestic corruption laws, by the home state must not be intrusive. Chapter 26 of the TPP deals specifically with the issue of corruption. Article 26.6 states that the parties to the TPP "affirm their resolve to eliminate bribery and corruption in international trade and investment". Article 26.7 requires the parties only to:

> "adopt or maintain legislative and other measures as may be necessary to establish as criminal offences under its law, in matters that affect international trade or investment, when committed intentionally, by any person subject to its jurisdiction".

Article 26.9.1 then states that "no Party shall fail to effectively enforce its laws or other measures… through a sustained or recurring course of action or inaction". To breach this obligation, a state's failure to enforce its anti-corruption laws must be "sustained or recurring". Thus, a failure by state to protect investors from the extortionate demands of officials, even if repeated, does not breach this obligation unless the failure to enforce domestic bribery laws can be said to be part of a sustained and recurring pattern. However, art.26.12, dealing with important issue of dispute settlement when it comes to enforcing the anti-bribery provisions of Chapter 26, illustrates the hands-off approach to the sensitive issue of enforcement of domestic bribery statutes by a host state. Article 26.12.2 defines the scope of the disputes covered by the article to include failure by a state to carry out an obligation under Section C, entitled "Anti-Corruption" of Chapter 26. Article 26.12.3 then drastically cuts the scope of the disputes that can be the subject of discussion under art.12.6. This is because the subject of enforcement, which is an obligation under art.26.9, is taken outside the scope of art.26. Put simply, parties to the TPP are required to enact and maintain a fine set of anti-bribery laws. If they fail to do this, such failure can qualify as a "dispute" under art.26.12. But if a party fails to enforce such laws, however, egregiously or in bad faith, then under art.26.12.3, such failure would not qualify as a "dispute" under art.26.12. The problem about cross-border commercial bribery is not that the notoriously corrupt countries lack bribery laws. The problem is that these laws, many of which are state of the art and drafted by foreign legal consultants, are not enforced, or if enforced,

---

61 Available at https://ustr.gov/sites/default/files/TPP-Final-Text-Transparency-and-Anti-corruption.pdf (visited 28 February 2016). The President-elect of the United States, Mr Donald Trump, has pledged to withdrawn from this partnership on his first day in office.

enforced only against the "flies".[62] By making the concession in art.26.12.3 that the proper enforcement of anti-bribery statutes is the business of the host state, and the host state alone, capital exporting states that are parties to the TPP have surrendered a powerful weapon against bribery. Accordingly, Chapter 26 of the TPP on examination turns out to be just another anti-bribery paper tiger with superficial cosmetic appeal.

Article 26 of the TPP not only avoids the main problem of dealing with the demand side but also dilutes the force of the inter-state arbitration provisions of existing IIAs. As stated earlier, in IIAs, the inter-state arbitration provision on disputes would include a failure of the host state to protect the home state's investors or potential investors from corrupt demands from officials of the host state. This would not be possible under the TPP because art.26.12.3 removes the subject of enforcement from the class of disputes and places the subject of enforcement outside the scope of dispute settlement. Second, in the standard IIAs, under the inter-state dispute settlement provision, disputes are settled by arbitration with awards that are binding for both parties. However, under art.26.12, disputes will be settled only by consultations, and there is no guarantee of a principle-based outcome that would bind the host state. A host state also could argue that the impact of Chapter 26 on the inter-state dispute settlement provisions of other IIAs among the parties to the TPP would be to *pro tanto* amend those former provisions by removing the topic of host state corruption as an arbitrable matter.

It would be desirable for capital exporting states to target the demand side by effective deterrents in the new generation of regional trade agreements. Chapter 26 of the TPP affords a preview of the success of such an initiative. A realistic assessment of the many priorities that should be attended to by governments would show that overseas commercial bribery is just one of many pressing objectives that confront capital exporting countries. Chapter 26 of the TPP appears to acknowledge that corruption is an extremely sensitive subject in host countries. Malaysia has been in political upheaval because of the allegations of corruption involving state funds and supposed deposits to the PM's bank account. Even when the bill that was to become the FCPA was being discussed, legislators feared that going after the demand side would lead to unacceptable upheavals in foreign countries.[63] Foreign policy and strategic concerns perhaps deserve to be so prioritised ahead of fighting foreign commercial bribery. For example, after China's claim to the entire South China Sea and its construction of settlements on reefs and islets there, it is unrealistic to expect a major capital exporting country like the United States to

---

62 As in the colourful metaphor of the present Chinese anti-corruption drive which is going after tigers and not merely flies. Tania Branigan, "Xi Jinping Vows to Fight 'Tigers' and 'Flies' in Anti-Corruption Drive" *The Guardian* (22 January 2013), available at http://www.theguardian.com/world/2013/jan/22/xi-jinping-tigers-flies-corruption (visited 10 March 2016).

63 See floor statement of Sen Church introducing S3379 International Contributions, Payments, and Gifts Disclosure Act 1976, stating that "[w]hen these payments become known … [they can lead to] revolution … and *may* very well advance the communists". 122 Cong Rec S6516 (1976).

pursue vigorously corruption in the littoral states of the Association of South East Asian Nations, most of which score poorly in the CPS indices. If undertaken, the governments of these littoral states may deny the US warships' logistical support and access to vital ports in the region.

As will be argued later, capital exporting states could do much more short of an aggressive intrusion into the societies of corrupt countries to disincentive cross-border commercial bribery directed at their citizens. First, they could take into account the genuine problems faced by the supply-side entities such as their companies and amend and improve what many regard as a draconian sanctions regime. It could make such entities partners instead of antagonists in the fight against cross-border commercial bribery. Second, home states could undermine and diminish the impunity presently enjoyed by corrupt officials and their crony elites so as to disrupt current "pay-to-play" practices with regard to large projects. Finally, they could deny kleptocrats and their apparatchiks the opportunity to enjoy the rewards of their corrupt conduct. Home states could restrict corrupt elites from purchasing those much sought after luxury properties and deplete the "oxygen" that nourishes kleptocratic systems.

IV. Should Host States Be Responsible for the Corruption of Officials?

A. Ethics and private law analogies

Typically, corruption involving millions of dollars in bribes occurs in poor developing host countries, although Russia and China are examples of rich countries which have massive bribery problems. These poor developing countries, however much they may be endowed with rich natural resources, have a poor population ruled over by a dictator like Teodorin's father. If the country is made to pay for investor losses resulting from corruption, the burden will undoubtedly fall on the poor. North Korea is an extreme though not untypical example of the callous indifference of rulers to the needs of the population. In North Korea, the population may starve, but the rulers enjoy a life of comfort and luxury that surpasses the lifestyle enjoyed by the pharaohs of ancient Egypt. Imposing liability on the host state in these circumstances means in effect that the victims of any liability will not be the corrupt elites but the general population already suffering from a denial of much needed resources for schools, hospitals and potable water. Such a result is unduly harsh if not cruel and totally unconscionable. This reality raises both ethical[64] and legal issues.

Bribery violates norms of both deontological and consequentialist ethics. Bribery can never be justified under Kant's first maxim because it can never be willed as a universal law.[65] If bribery were to be translated into a universal law, the whole concept of a principal–agent relationship would be meaningless. A deontologist would deny the morality of a rule that would impute the conduct of the corrupt agent to the principal. Consequentialist ethical theory when applied to bribery would also excuse the principal. The damage caused by bribery impacts not only the principal or the state but also millions of citizens in the host country. Thus, ethical theory can hardly justify holding the innocent principal morally culpable for the wrongs committed by a faithless agent.

The law, for practical rather than ethical reasons, holds the principal liable for the conduct of the agent, including wrongs committed by a corrupt agent. Tort law imposes liability on an employer or a principal for the consequences resulting from the corrupt conduct of an employee or agent. To avoid liability, it is the principal who must prove that the agent was on a frolic on his own or that a third party would have known that the agent was acting outside his mandate. Company law, through doctrines like the indoor management rule and the rule of ostensible authority, likewise makes the company liable for unauthorised conduct of the agent. In the law of sexual harassment, the employer is usually liable for the consequences of sexual harassment unless it can show that it had an anti-harassment policy in place and had provided a safe channel of complaint strengthened with anti-retaliation assurances.[66] The FCPA itself makes the company liable for conduct that breaches the FCPA.[67] The recent investigations of the "Sons & Daughters" programme in Asia by US regulators shows that under American law, companies can be held responsible for corruption furthering conduct of employees in far-flung branches located in the Far East.[68]

Liability in all these cases rests on the principle that, as regards third parties, it is only fair that the principal must bear the loss because of the principal's role in selecting the agent. The principal had the opportunity to freely choose its agents, directors and employees. Hence, any burden resulting from unauthorised or corrupt conduct of the agent should be borne by the principal because it was the principal who chose the person who engaged in corrupt conduct. But this rationale simply does not hold in the case of states dominated by kleptocratic

---

65 "Act only according to that maxim whereby you can at the same time will that it should become a universal law without contradiction." — Immanuel Kant, *The Groundwork of the Metaphysics of Morals* (1785) edited and translated by Allen W Wood with essays by JB Schneewind *et al* (Yale University Press, 2002).

66 *Harris v Forklift Systems, Inc* 510 US 17 (1993).

67 FCPA, §§ 78dd-1, 78dd-2 and 78dd-3. See also Frank C Razzano and Travis P Nelson, "The Expanding Criminalization of Transnational Bribery: Global Prosecution Necessitates Global Compliance" (2008) 42 Int'l Lawyer 1259–1286, 1275–76.

68 See, Leslie Hook, "Qualcomm Fined for Hiring Relatives of Chinese Officials" *Financial Times* (1 March 2016), available at http://www.ft.com/intl/cms/s/0/a37b0fe4-dfda-11e5-b072-006d8d362ba3.html?siteedition=intl#axzz433tjLwVk (visited 12 March 2016).

rulers. Under international law, they undoubtedly represent the state. The state is the principal, but the state is an abstraction. The harsh reality is that people who should have been able to freely choose their rulers had no chance of doing so. So where dictators have forcibly taken over the government and emulate the Sun King, the principal and the agent are one and the same, because the state is one in name only. Accordingly, the main rationale for holding the principal liable does not hold in situations of state capture by rouge elements.

Despite these moral concerns, international law appears to hold the state liable for the corruption of its officials, in most cases at least. International lawyers unanimously accept the VCLT in the 21st century as a restatement of customary international law. Article 50 of the VCLT entitled "Corruption of a Representative of a State"[69] reads:

> "If 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."

Article 50 may appear to support the proposition that corrupt conduct by a representative of that state is so egregiously wrong that to attribute that conduct to the state represented by the corrupt official would be repulsive to universal standards of justice and morality. If this proposition is a rule of customary international law or a general principle of law recognised by civilised nations within the meaning of art.38(c) of the statute of the International Court of Justice,[70] then it would be wrong for arbitral tribunals to impose liability on the host state because of the corrupt conduct of the official, however high his status in the host country.

However, a contextual reading of art.50 of the VCLT does not support any such inference. The travaux and a reading of the language of art.50 require a narrow and context-specific interpretation of art.50. The context of the article is about vitiating factors in treaty making. The purpose of art.50 seems to be that of dissuading powerful states from exerting pressure through bribery or coercion and thereby inducing a state representative to betray his duty. The Treaty of Versailles is perhaps the paradigmatic example of a treaty that was obtained as a result of coercion. History attests to the consequences when the freedom of consent, so important for the *grundnorm* of treaty law, *pacta sunt servanda*, is destroyed. As a commentary states, "[o]nly corruption effected directly or indirectly by another negotiating State" may be invoked as invalidating the consent to be bound.[71] Corruption induced by a third state as described in art.50 may be contrasted with

---

69 O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (Berlin: Springer, 2012) pp.849–855.

70 Available at http://www.icj-cij.org/documents/?p1=4&p2=2.

71 Dörr and Schmalenbach, *Vienna Convention* (n.69) p.853.

a situation where the state representative betrays his duties for a bribe but at the bidding of non-state actors. If, for example, a group of local cronies or foreign investors bribe the representative to provide favourable terms to foreign investors in a BIT and there was no corruption by another state, then art.50 cannot be used to vitiate the BIT.

International practice confirms the legitimacy of sanctions and penalties that causes massive hardship and even the loss of innocent lives which is a response to conduct of rulers, usually brutal dictators. Sanctions against Iraq, North Korea and the apartheid regime of South Africa have been imposed because of the conduct of vicious rulers, but it is the innocent populations in these countries that did suffer and bear the brunt of the punishment. However troubling the morality of this practice may be, most states will not surrender the remedy of imposing sanctions against states appearing to threaten peace and stability or more realistically their vital national interests.

B. Responsibility of the host state for the corruption of its officials

In 2001, the International Law Commission adopted the Articles on State Responsibility that in draft form had been discussed and analysed by experts for decades.[72] At the time the Articles were adopted, the problem of corruption had become a prominent subject of discussion mainly because commercial bribery had increased significantly, the work of TI had publicised widely the evil effects of corruption and the Internet had been used as a platform to give voice to various groups who agitated against corruption. The International Law Commission could also not have been unaware of the importance of the question of attribution of corrupt conduct by a state representative to the state because of Commission members were aware of art.50 of the VCLT and would have been familiar with the award of the International Centre for the Settlement of Investment Disputes (ICSID) tribunal in *World Duty Free v Republic of Kenya*.[73] Yet, the Commission did not consider it fit to carve out an exception by excluding corrupt conduct from the class of conduct that would be attributed to the state. Such an omission is significant because the choice of the International Law Commission not to exempt corruption from the scope of attributability is conspicuous as well as meaningful. If they had made such an exception, they would have departed from accepted international law principles because the VCLT art.69.3 itself acknowledges imputablity when it clarifies that certain obligations will not apply "with respect to the party [the state] to which the fraud, the act of corruption or the coercion is *imputable*".[74]

---

72 The International Law Commission adopted the articles at its 53rd session in November 2001, and reported to the General Assembly at the 56th session 85th meeting on 12 December 2001, where it was annexed to the General Assembly Resolution 56/83 of the same date. Resolution 56/83 commended the Articles to "the attention of Governments".

73 Discussed in Section IV(C)(i) of this article.

74 Emphasis supplied.

The applicable provisions of the Articles on State Responsibility provide the basis for attributing the corrupt conduct of high officials and the resulting violation of international law to the state. Article 1 confirms that internationally wrongful acts of a state entail international responsibility of that state. In the context of IIAs, breach of the host state's obligations to create favourable conditions for the home state's investors entails international responsibility because it is a treaty breach that amounts to a dispute as envisaged by the inter-state dispute settlement article in IIAs. Under art.2, when conduct is attributable to the state and the result is a breach of an international obligation of the state, an international wrongful act is committed. Article 4(1) attributes the conduct of any organ of the state to the state itself. Under the Articles, the conduct of a corrupt president is unquestionably attributed to the state. No exception has been carved out for cases of corruption.

Should the conduct of state owned enterprises be attributable to the state? Article 5 deals with the conduct of persons or entities exercising elements of governmental authority. For the purposes of attribution, the conduct of such entities may be attributed only if and when they are acting in some governmental capacity.[75] In effect, when managers of a state-owned enterprise extort bribes from a foreign investor but through commercial pressure and threats which cannot be styled as governmental action, such conduct will not be attributable to the state under art.5. Article 8 requires that the entity, eg, a state owned enterprise, must act on the instructions or under the control of the state in carrying out the conduct in order for the conduct of the enterprise to be attributed to the government. It is not enough that the enterprise was generally under the control of the state or was acting on its instructions. The enterprise must also have been acting under state instruction when it engaged in the corrupt conduct. This would be difficult to prove. Because many governments establish powerful state-owned enterprises that are run by officials or cronies and wield enormous power, veil piecing principles derived from company law may be employed to make the government accountable.

C. Arbitral awards where corruption was successfully pleaded

(i) World Duty Free v Republic of Kenya[76]

This investment dispute and the resulting award had several unique features. First, it was a dispute where the investor openly acknowledged that it had given a payment of $2 million to the highest official in the respondent state, the former president Daniel Arap Moi, to secure two duty-free concessions in the Kenyan airports of Nairobi and Mombassa. Whether the payment was a bribe or a traditional payment known as "*Harambee*" was a matter for the tribunal to decide. Second,

---

75 *Emilio Maffezini v Kingdom of Spain* Case No ARB/97/7, available at http://www.italaw.com/sites/default/files/case-documents/ita0481.pdf (visited 11 March 2016).

76 ICSID Case No Arb/00/7, available at http://www.italaw.com/cases/documents/3281 (visited 9 March 2016).

the investor alleged that the host government harassed and eventually expropriated its investments because it blew the whistle on an export fraud after it discovered that it had been fraudulently named as a consignee in forged export documentation, the "Goldenberg Affair". This fraud allowed certain persons to wrongly claim rebates on the basis of fictitious gold exports involving one of the claimant's companies. In other words, had the claimant gone along with the fraud, it would not incurred the wrath of the government officials who took revenge by attacking its investment. Third, the jurisdiction of ICSID was invoked but not pursuant to a BIT or other IIA but under a commercial agreement between the investor and the Government of Kenya that provided for ICSID arbitration. Finally, the governing law of this agreement was English and Kenyan law.

The tribunal had little difficulty in rejecting the claimant's argument that the payment it made was a socially approved form of payment, *harambee*, and not a bribe. The next issue was whether the tribunal had jurisdiction over the dispute or whether the bribe was relevant only at the stage when considering the admissibility of the claim. Because investments must be made in accordance in local laws, a contract obtained by bribes violated this requirement. The Government of Kenya argued that because the claimant acquired the duty-free concessions by paying a bribe, there was no legal investment and accordingly the tribunal lacked jurisdiction. However, this argument did not take into account the well-known rule in arbitration law that the arbitration clause is severable from the rest of what could be an invalid contract. Kenya's argument challenging the jurisdiction of the tribunal to decide the dispute because the investment was illegal might have had some force if the dispute had been brought pursuant to an investor–state dispute settlement provision in a BIT. But the argument fails where the contract is a commercial contract which incorporates an arbitration clause, albeit between an investor and a state. This is because arbitration law recognises that the agreement to arbitrate is severable from the main contract, even though the main contract is illegal. The real issue was whether the claim was admissible.

The tribunal extensively discussed statements by arbitral tribunals on the treatment of contracts obtained by corruption. The consideration of these statement led the tribunal to conclude "that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy".[77]

Counsel for the claimant argued the tribunal must take into account the relative misconduct of the investor and the former Kenyan President. It seemed unfair, counsel argued, that the investor would suffer loss, while the Kenyan authorities had not even filed any charges against the former Kenyan President.[78] The tribunal acknowledged that the strict English rule favouring the defendant had attracted both judicial and extra-judicial criticism, but stated that the strict English rule was

77 *Ibid.*, [157].
78 *Ibid.*, [176].

still the law and the Tribunal had no choice but to apply the law.[79] Relying on the opinion on English law provided by Lord Mustill, the Tribunal concluded that under English and Kenyan contract law, the contract in question was not void but could be avoided by the Kenyan government which it had legally done.

Three significant observations of the Tribunal require comment:

First, the Tribunal stated that even if it were minded to exercise some discretion in favour of the claimant, it would not do so because the former Kenyan President and the claimant were *par delictum:*

> "The bribe was not procured by coercion or oppression or force by the Kenyan President nor by 'undue influence'; and as regards any investment, there was at the material time no 'hostage factor' because there was then no investment or other commitment in Kenya by Mr Ali or his principal. Prior to paying the bribe, Mr Ali retained a free choice whether or not to invest in Kenya and whether or not to conclude the Agreement."[80]

This reasoning is unpersuasive, and the emphasis on the "hostage factor" is commercially unrealistic. Whenever there is a "pay-to-play" situation, there is also an asymmetric power relationship. If Mr Ali did not pay, someone else would have paid. He "retained a free choice" in the most narrow sense. In the context of BITs and regional investment treaties, a sweeping proposition on bribery and corruption does not do justice to the realities of foreign investment transaction. IIAs require the host state to promote investment. If the local officials extract bribes from the potential investor to approve his investment application so that he can enjoy the benefits of the treaty, it cannot be argued that the parties are *in pari delicto* and that the investor should have walked away from the transaction. Ironically, the claimant's investment got jeopardised only because the claimant did something legal and praiseworthy by reporting the Goldenberg fraud to the Kenyan authorities. The "hostage factor" came into place after the claimant started doing business in Kenya.

Second, the Tribunal stated that it "does not identify the Kenyan President with Kenya; and in any balancing exercise between Kenya and the Claimant, the balance against the Claimant would remain one-sided".[81] Principles of international law do not support the implicit proposition that the corrupt conduct of a head of state cannot be attributed to the state. The Tribunal, composed of eminent international lawyers, did not explain why well-known attribution principles contained in the then Draft Articles of State Responsibility did not apply. Indeed, Draft art.4, would justify attributing corrupt conduct in the field of investment to the state. Corrupt officials of a host government could unlawfully expropriate the property of the

79 *Ibid.*, [177].
80 *Ibid.*, [178].
81 *Ibid.*

investor or they could harass the investment by conduct that breaches the fair and equitable treatment standard or the minimum standard. Such conduct is attributable to the state. If breaches of a BIT were committed because the corrupt president demanded kickbacks or shares in the enterprise for him or his family, it will be no excuse for a subsequent government to plead the ex-president's corruption as a defence before a tribunal in a claim brought by the investor. Accordingly, it is submitted that the tribunal's analysis is erroneous.

Finally, the tribunal noted that "no attempt has been made by Kenya to prosecute him (the former President) for corruption or to recover the bribe in civil proceedings".[82] It then went on to observe that as regards public policy "the law protects not the litigating parties but the public, or in this case, the mass of tax-payers and other citizens making up one of the poorest countries in the world".[83] There is an irony here. ICSID tribunals have not had any qualms about awarding hundreds of millions of dollars to investors as a result of bureaucratic bungling in desperately poor developing countries. In such cases, the fact that these huge sums would eventually be paid by "the mass of tax-payers and other citizens making up one of the poorest countries in the world"[84] was not a factor that appeared to have troubled the conscience of members of such tribunals. Leaving aside the issue of public policy, the mass of poor taxpayers do pay for corrupt behaviour by their officials after the investment has been made. For example, an investment may be expropriated by a corrupt executive to transfer the asset to a crony. Corrupt officials may harass investors who do not pay bribes and breach the obligation relating to Fair and Equitable treatment. In all these cases, the actions are not undertaken for a public purpose. They are undertaken to satisfy the greed of corrupt officials and have nothing to do with the public good. Yet, in all of these cases, the host country is liable for breaches of obligations under the treaty and the poorest of the poor in developing countries bear the brunt of the suffering resulting from these massive damage awards. The right of the investor to consequential damages in the millions, instead of reliance damages, privileges investors, which could sometimes have treaty shopped and have qualified for BIT privileges merely by having a post office box address in the home country, over the fate of poor host country populations. If a new government in the host country government were to prove that the conduct giving rise to the claim was corruptly executed by the displaced president or government, it will not succeed in avoiding liability.

The Tribunal cited a judgment by Lord Mansfield handed down in 1775 in support of its statement on public policy.[85] As the recent judgment of the UK Supreme Court in *Patel v Mirza*[86] much has changed since 1775, and blanket

82 *Ibid.*, [180].
83 *Ibid.*, [181].
84 *Ibid.*
85 *Ibid.*, [182].
86 [2016] 3 WLR 399.

statements on public policy do not capture the many nuances of public policy as it relates to corruption in foreign investment.

A starting point is the balancing approach suggested by Bingham LJ in *Saunders v Edwards*, where he notably observed:

> "Where issues of illegality are raised, the courts have (as it seems to me) to steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. *On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct.*"[87]

In a well-reasoned judgment that considered the developments in Canada and Australia, Lord Toulson writing for the majority advocated a range of factors approach. Such an approach would see the spotlight focused on the shameful and egregious conduct of the former President of Kenya, the extortionate demand made by his agent, the failure of the Government of Kenya to even indict him but rely on the bribe as a defence and the circumstances where the investor was hounded because he did not proceed with nefarious schemes hatched by Kenyan officials to subvert foreign exchange laws.

A modern formulation of a public policy principle that is supportable by the judgement of Lord Toulson would require that all the corrupt parties must be made to share in the consequences flowing from a corrupt transaction. Lord Toulson proposed a trio of factors that required consideration of the underlying purpose of the prohibition which had been transgressed, the consideration conversely of other relevant public policies which may be rendered ineffective or less effective by denial of the claim and the need to keep in mind the possibility of overkill unless the law was applied with a due sense of proportionality.[88] The public policy of punishing the head of state for such an egregious betrayal of his oath of office should have been a countervailing claim. Likewise, denial of any relief to WDF seems exceptionally harsh given the context of the Goldenberg scandal. If the tribunal had awarded some damages against Kenya, then public opinion in Kenya would perhaps have demanded that some type of reparation be made by the former president. Civil society groups and even the attorney-general of Kenya could have tried to impose a constructive trust on the property of the former president. If in a successful case brought against Mr Moi, the Kenyan courts had followed the

87 [1987] 1 WLR 1116, 1134 (italics supplied.)

88 *Patel v Mirza* (n.86), [101].

precedents of the Privy Council in *A-G for Hong Kong v Reid*[89] and the Singapore High Court in *Sumitomo Bank Ltd v Kartika Ratna Thahir*[90] instead of *Lister and Co v Stubbs*,[91] the Kenyan government would not only have been able to recover the bribe money paid to the former president but also could have compelled him to disgorge gains that he might have made from investing the bribe money either in real property or in bank accounts. There would have been demands for a commission of inquiry, and the salutary effect of all these actions would have been that not only successor Kenyan governments, but also governments in many developing countries, would have borne this lesson in mind and hesitate to act with the same sense of impunity as "His Excellency" Daniel Arap Moi or "HEDAM" as he is referred to in the award.

Public policy, it has been observed, is an "unruly horse".[92] An unruly horse cannot be controlled by a rider unmindful of the specific terrain. Public policy statements made in specific contexts should not be extended uncritically to corruption in investment disputes. An intelligent application of public policy would not be to shut out the dispute *in limine* but hear the parties and allocate fault on an equitable basis.

(ii) Corruption in other arbitral decisions[93]

In *Metal-Tech Ltd v Republic of Uzbekistan*,[94] an ICSID tribunal considered the defence of corruption in a claim based on a BIT. The allegation of corruption was based on certain "consultancy payments", a favourite euphemism for corrupt payments, to the brother of the PM of Uzbekistan. The tribunal had no difficulty in concluding that corruption had occurred. It examined criteria that would raise "Red Flags" and indicate that the "consultancy" was in fact a corrupt payment.[95]

---

89 *A-G v Reid* (n.26).

90 [1992] 3 SLR (R) 638.

91 (1890) 45 Ch D 1.

92 *Richardson v Mellish* (1824) 2 Bing 229, 130 ER 294 (Burrough J).

93 See, Aloysius P Llamzon, *Corruption in International Investment Arbitration* (Oxford: Oxford University Press, 2014) pp.117–192 and 304–320 for a helpful summary of cases where corruption and its relevance in an investment dispute was discussed by arbitral tribunals.

94 ICSID Case No ARB/10/3, available at http://www.italaw.com/sites/default/files/case-documents/italaw3012.pdf (visited 12 March 2016).

95 *Ibid.*, [293]. Lord Woolf included on his list of "Key Red Flags" among other things (1) "an Adviser has a lack of experience in the sector;" (2) "non-residence of an Adviser in the country where the customer or the project is located;" (3) "no significant business presence of the Adviser within the country;" (4) "an Adviser requests 'urgent' payments or unusually high commissions;" (5) "an Adviser requests payments be paid in cash, use of a corporate vehicle such as equity, or be paid in a third country, to a numbered bank account, or to some other person or entity;" (6) "an Adviser has a close personal/professional relationship to the government or customers that could improperly influence the customer's decision". See Woolf Committee Report on Business Ethics, Global Companies and the Defence Industry: Ethical Business Conduct in BAE Systems Plc (May 2008) pp. 25–26. A similar set of "Red Flags" could be developed to identify luxury purchases made by a nominee of a corrupt official. For example, the purchase of a hotel for hundreds of millions of dollars by a person of no discernible means.

The Tribunal considered the amount of the consultancy fees, a staggering $3.5 million amounting to almost 20 per cent of the entire project costs, the payments under the consultancy agreement had to be paid regardless of the services provided and the designated consultants did not have the professional qualifications of the experience to perform the services for which they were retained. Indeed, one of the consultants during the hearing admitted that he was not qualified to perform the required services and denied having performed any of the services alleged to have been performed by the claimant.

The Tribunal did not go into the issue of admissibility or consider how the evidentiary rules relating to burden of proof. Instead, it dismissed the claim on jurisdictional grounds. Uzbekistan's consent to arbitrate under art.8(1) of the BIT, the Tribunal held, was only to arbitrate disputes over lawfully implemented investments. Under art.1(1) of the BIT, the protections of the BIT were extended only to those investments that were in accordance with Uzbek laws. Like in *World Duty Free v Republic of Kenya*, this dispute clearly showed the extraordinary power of corrupt officials to demand and receive massive bribes. However, the tribunal believed that the applicable law left it no alternative but to let the consequences of the transactions fall entirely on the bribe-giver claimant. The Tribunal went on to observe:

> "It is true that the outcome in cases of corruption often appears unsatisfactory because, at first sight at least, it seems to give an unfair advantage to the defendant party. The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that at a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act."[96]

Arbitral tribunals could contribute to a principle-based development of law relating to foreign commercial bribery by abandoning talismanic invocations of public policy and derive a more focused set of principles from international conventions such as the UN Convention Against Corruption (UNCAC). The emphasis in the many anti-bribery treaties is on the danger to global values posed by corruption. This emphasis would justify modification of international public policy which would abandon the present approach and permit the investment tribunal to assess the culpability of the host country and its officials.

In two cases, *Siemens AG v Argentina Republic*[97] and *Azpetrol International Holdings BV, Azpetrol Group BV and Azpetrol Oil Services Group BV v Republic of Azerbaijan*[98] corruption allegations were involved but they were settled between the respondent states and the claimants before a decision on the merits. In *Siemens AG v Argentina Republic*, the claimant had obtained an ICSID award against

96 *Metal-Tech v Uzbekistan* (n.94), [389].
97 ICSID Case No ARB/02/8.
98 Final Award, ICSID Case No ARB/06/15.

Argentina. After the award, investigative journalists reported that Siemens had paid massive bribes in Argentina in connection with a national identity card programme. The US Department of Justice commenced an investigation. These developments influenced Siemens to negotiate a settlement with Argentina. Siemens waived all of its rights under the ICSID award as part of the settlement. In *Azpetrol v Republic of Azerbaijan*, a key witness for the claimant testified that he had paid a bribe to Azerbaijani officials to protect unnamed officials who were allegedly under investigation by the government. Here too the parties settled and there was no completed hearing on the merits.

Respondent states have raised the defence of corruption in other arbitration proceedings but they were not outcome determinative. Tribunals are reluctant to find that senior officials in the host state have engaged in corruption. This is partly because of the difficulty of obtaining evidence. Host state officials are reluctant to testify about the corrupt actions of their colleagues. For example, in *SPP v Egypt*,[99] the respondent state claimed that the investment contracts were obtained through corruption. It alleged the "wholesale purchase" of the loyalties of key officials. But the Government of Egypt was unwilling to accuse high-ranking authorities. The Tribunal held that the alleged bribery was not proven because the accusations were vague and Egypt indeed conceded that it lacked concrete evidence. In several other cases, respondent states failed in challenging the legality of the investment by alleging bribery because it could not provide probative evidence of corruption.[100]

(iii) International law standards and corruption

National laws, arbitral tribunals and international treaties evidence a consensus that foreign bribery and corruption endanger democracy, peace and stability. As the former UN Secretary General, Kofi Annan, remarked that:

> "[c]orruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish".[101]

The Preamble to the UNCAC affirms that corruption undermines the "institutions and values of democracy, ethical values and justice". It refers to the "vast quantities of assets, which may constitute a substantial proportion of the resources" of states

---

99 ICSID Case No ARB/84/3 (1992).

100 See, Aloysius P Llamzon, *Corruption in International Investment Arbitration* (Oxford: Oxford University Press, 2014)pp.130–192.

101 Kofi A Annan's Foreword in UN Office on Drugs and Crime, *United Nations Convention against Corruption* (New York: United Nations, 2014), available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

that may be looted by corrupt persons. It then goes on to declare that "the prevention and eradication of corruption is a responsibility of all States and they must cooperate with one another…". Article 15(b) of the UNCAC targets the demand side when it obligates parties to criminalise the:

> "solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself… in order that the official act or refrain from acting in the exercise of his or her official duties".

The UNCAC attempts to reconcile a universal condemnation of corruption with the claims of national sovereignty. Article 4.2 of the UNCAC emphasises the importance of the territorial jurisdiction of the host country by stating that nothing in the UNCAC will entitle a party "to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law". Article 4.1 requires states to comply with their obligations in a way that is consistent with sovereign equality and the principle of "non-intervention in the domestic affairs of other States". The precise scope on the limits set on third state action required by these provisions is unclear. They cannot be read to mean that a home state cannot punish bribery by its nationals that take place within the borders of the host state because state practice contradicts this reading. Likewise, they cannot be read to mean that a host state cannot punish overseas bribery when the transaction touches the home state either when its banks are used or when the effects of the bribery are experienced in the state. It is submitted that these provisions only mean that a state may not assume an enforcement jurisdiction within the host state or assume an adjudicative jurisdiction for conduct that takes place wholly within the host state and has no effects on the enforcing state.

Read as a comprehensive statement on corruption by the community of nations, the UNCAC represents an unambiguous declaration that corruption threatens peace and stability and that proportionate responses by any state that does not infringe the territorial sovereignty of any other state would be legitimate. National courts and arbitral tribunals must regard this as the compelling public policy statement. The UNCAC refers to the complexity of corruption as a phenomenon. Public policy principles shaped by judicial decisions made centuries ago must be re-evaluated in light of 21st century conditions and must be refined to promote the goals of the UNCAC.

(iv) Relevance of investment treaty provisions

States have entered into more than 3,000 bilateral investment agreements and regional trade agreements that include investment protection. Apart from Ch.26 in the TPP, in none of these IIAs is there any obligation imposed on the host state to protect the potential or actual investor from corrupt demands or actions by host state officials. Asian BITs typically do not accord a right of establishment to a

potential investor, and there is a gateway provision that empowers the host country authority to review and approve the proposed investment. It is only after approval that the investment benefits from the protection of the BIT.[102] Typically, the gateway provision states that the benefits of the BIT will be extended only to all investments made by investors "which are specifically approved in writing" by an authority in the host country. Some other BITS also provide that the approval of the investment could be conditioned on "such terms and conditions" as the approving host country authority "deems fit". This gateway provision is a prudent recognition by the host state that if all investments, regardless of their need for the developmental needs of the host country, automatically benefit from the protections in a BIT, the host state exposes itself to a wide range of claims from investors who just do business in the host country without in any specific way contributing to the development of the host country. For instance, the host state could consider a proposal to develop and process natural resources as beneficial to the country. However, if an investor were simply to be allowed without any pre-condition to open a grocery store, then that investor has privileges that local owners of grocery stores do not have. While the gateway provision performs a useful function in filtering appropriate from unneeded investments, it also provides an opportunity for rent extraction by corrupt officials. If an investor must pass through this gateway maintained by corrupt officials who extract tolls from a prospective investor, the purpose of the gateway provision is subverted. Investments that would objectively not qualify to be admitted under this provision could slip through on the payment of money to corrupt officials. The bribe paying investor would accomplish the feat of the camel passing through the eye of the needle and would enjoy the undeserved but wide range of benefits under the BIT. Conversely, officials could delay approval of investments that would benefit the host country by imposing unreasonable conditions that would be removed only upon the applicant investor paying a bribe. These officials could even reject an investment that would benefit both the investor and the host country because the requested bribe was not paid.

Corrupt officials could also deny national treatment and most favoured nation treatment to a qualified investment. However, the most likely breaches because of corrupt motives and extortion demands by host country officials would likely occur in situations where the host government would expropriate the investment but not for a public purpose as required by customary international law incorporated in BITs but for a corrupt private purpose. The government could expropriate because the investor does not pay a bribe or because a host country crony wants to own the assets. Both senior officials and their subordinates could engage in harassment that breach the Fair and Equitable obligation.

---

102 Eg, Article X of the Singapore–Indonesia BIT requires prior approval before an investor obtains the protection of the BIT. On the other hand, in the US–Singapore FTA, Ch.15, art.15.4.1 entitles, eg, a national of the United States to the same rights that a Singapore national enjoys to start a business in Singapore.

V. Legal Strategies to Combat Demand-Side Corruption

A. Safe harbour programmes and whistle-blowing strategies

Stringent domestic foreign anti-bribery statutes have a chilling effect on the business plans of companies subject to such laws. Sometimes a company will be confronted by implacable officials in a pay-to-play host country. If country X is reputed to be notoriously corrupt, then even if an investor manages to secure an investment approval without paying a bribe, the mere fact that the investor is doing business in that country would trigger alerts in the regulatory systems of the home state. Such an investor may also have to spend large amounts of funds on compliance measures to ensure that it will be safe from domestic investigation. Once an investigation is launched, the costs of complying with the probe might involve spending large sums on lawyers and accountants as well as requiring the senior company officials to dissipate valuable managerial time attending to an inquiry. Unless the proposed investment is an industry that involves profits that would justify the costs of complying with domestic anti-bribery laws, a company may decide to avoid the corrupt country altogether. The negative utility caused by such a decision is that the investor-company loses an opportunity of profit maximisation, and at the same time, the domestic consumers in the host state lose out in terms of choice, better products and good employment. An effective way of cutting this Gordian knot is for home countries to amend their anti-bribery laws to provide for a safe harbour to companies encouraging them to report the extraction of bribes by threats. A whistle-blower provision that would reward whistle-blowers both from the supply side as well as the demand side and anti-retaliation protection should complement a safe harbour provision.

The United States has safe harbour provisions and whistle-blower provisions in the FCPA[103] and the Dodd-Frank Wall Street Reform and Consumer Protection Act.[104] Self-reporting under the FCPA is taken into account may result in enforcement agency not taking any action, but this is no guarantee. The US Securities and Exchange Commission takes the reasonable position that when self-reporting is combined with an attempt to rectify illegal conduct, large expenditures of government and shareholder resources can be avoided. The cooperative conduct of the self-reporting entities influences prosecutorial decisions. The agency addressed self-reporting in a document called the "Seaboard Report",[105] which listed 13 criteria it would consider when deciding what action it would take with

---

103 See Larissa Lee, "Certainty in Coming Clean: Establishing an FCPA Safe Harbor for Self-Reporting Companies", available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2492307 (visited 11 March 2016).

104 Pub L No 111-203, 124 Stat 1376 (2010).

105 Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No 44,969 (23 October 2001).

respect to the disclosed information. The Dodd-Frank Act includes a whistle-blower protection provision. It allows qualifying whistle-blowers who provide information about FCPA violations to be rewarded. If the sanctions are greater than $1 million, the whistle-blower can obtain between 10 and 30 per cent of the sanction.[106]

In September 2015, Deputy-Attorney-General Sally Yates issued a policy memorandum containing six key stems that Department of Justice attorneys must follow when investigating corporate misconduct unveiled as a result of self-reporting.[107]

These safe harbour and whistle-blowing principles do not target the demand side of corruption. It is submitted that if demand-side corruption were to be addressed effectively, the FCPA, Dodd-Frank Act and anti-foreign bribery statutes of other countries would have to be amended on the following principles:

(1) In pay-to-play corruption situations, the self-reporting company must be presumed to have been subject to extortion and to have not acted corruptly if certain conditions are met.
(2) To prove that a pay-to-play occurrence took place, the reporting company must show that the investment involved a project over a particular amount, eg, $5 million, that it had expended significant sunk costs in preparing for the investment application, that the nature of the investment was fairly unique — eg, resource exploitation or infrastructure — that the consequence of not paying the price demanded would have been the loss of the opportunity and that it did not initiate the payment of the bribe and made best efforts to make the investment without the bribe.
(3) The reporting company must make full disclosure of the amount and form of the corrupt payment, the recipient and evidence of payment and
(4) must cooperate with enforcement authorities by delivering evidence and recordings, if any, of the corrupt transaction.
(5) Finally, these companies will be able to claim safe harbour protection if they have strong internal whistle-blower procedures that encourage whistle-blowing by employees in the field.

B. Enforcement of anti-money laundering laws

Most countries have now adopted anti-money laundering legislation. Singapore, a country located in a region where most countries are ranked as very corrupt by the CPS, enacted the "Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act".[108] A review of some key provisions of this Act

106 See https://www.sec.gov/whistleblower (visited 30 March 2016).
107 "DOJ Issues Guidance on Individual Accountability for Corporate Misconduct" (11 September 2015), available at https://www.ropesgray.com/newsroom/alerts/2015/September/DOJ-Issues-Guidance-on-Individual-Accountability-for-Corporate-Misconduct.aspx.
108 Chapter 65A.

could provide insights into effective controls of the proceeds of corruption being used in developed countries.

Section 2(1)(a) of the Act defines a "foreign serious offence" as "an offence… against the law of a foreign country or part thereof that consists of or includes conduct which, if the conduct had occurred in Singapore, would have constituted a serious offence". The Second Schedule lists offences under the Prevention of Corruption Act as "serious offences" to which the Act applies. Section 44 of the Act makes it an offence for a person who assists a person who has funds of criminal origin to deposit funds in Singapore or are used to benefit the foreign corrupt individual to acquire property by way of investment or otherwise and knows or has reasonable ground to know that the other person has engaged in criminal conduct or has benefitted from criminal conduct.

The efficacy of this section is supported by other provisions that incentivise disclosure and support a thorough investigation of conduct that launders funds in Singapore obtained by corruption in a foreign country.

Singapore, because of its stability and reputation for good governance, tends to attract investment from wealthy individuals in the region. It is reasonable to assume that some of this investment is made by individuals who received money by corrupt means. It is unlikely that even Singapore would have the resources to pursue investigations into each high-value transaction entered into by a foreign national from any country that is widely regarded as corrupt. However, it is a useful tool in that it can be used in clear cases of corrupt money being used. The legislation provides a model for other countries.

C. Legislation modelled on the Magnitsky Act targeting corrupt officials

On 14 December 2012, President Obama signed into law a bill that prohibited entry into the United States of Russian officials thought to be responsible for the death of Sergei Magnitsky, a Russian rights campaigner who died in jail. The Act also prohibits these officials from using the US banking system. The Australian human rights lawyer, Geoffrey Robertson, in an essay entitled "Europe Needs a Magnitsky Law"[109] has suggested that an effective way of deterring human rights violators from enjoying a lifestyle of impunity is to deprive them, as well as their children and friends, from entering Europe and buying property there. He would like the law to apply to officials from all countries and not merely to officials from Eastern European countries. He goes on to state that:

> "[n]ormally, sanctions try to avoid hurting children but human rights violators, especially those who profit from the violation, are frequently motivated by a desire to benefit their children. Corrupt benefits should

109 See http://magnitskybook.com/wp-content/uploads/pdfs/ROBERTSON.pdf.

be stripped from the children in these circumstances. Denying the family (including grandparents) of abusers the right to enter other countries for medical treatment would also work as a deterrent".[110]

Robertson goes on to observe that the "EU should be ashamed of the way that its members and their banks welcome assassins and blood money".[111] He calls for a law that put "a ban on them entering the places where they like to play and to keep their money — Cannes and Zurich, Helsinki, London, Jersey and Monaco".[112]

National laws could also amend existing suspicious transactions reporting laws by requiring property acquisitions over a certain amount to the reported to the government. It should be an offence for anyone to act as a nominee on behalf of a foreign person without full disclosure to corruption enforcement officials.

D. Shifting focus of enforcement of anti-corruption remedies against the host state and host states officials to home country trade departments/ministries

Foreign bribery is ultimately a trade problem. When European members of the OECD balked at agreeing to a convention on foreign bribery, the then US Trade Representative Mickey Kantor threatened that the United States would file a trade complaint with the World Trade Organization (WTO).[113] Foreign bribery issues are not best handled by the foreign ministries because the goal of foreign ministries is to maintain good relations with foreign states. Foreign ministry officials would not want to disrupt the status quo by actions that target foreign governments and their officials. Law enforcement officials in most countries would not have the capacity or experience to investigate bribery of foreign officials. Departments of trade are perceived as dealing with trade-related issues. Oversight of foreign bribery issues by a department of trade will not evoke the same hostile and defensive response of host country officials as would a department of justice investigation.

Departments of trade or commerce routinely handle trade disputes with even the closest of allies without risking damaging diplomatic relations. Commerce departments usually conduct anti-dumping investigations either on the issue of dumping or on injury or both, and more importantly enforces anti-subsidies laws. Unlike dumping which is engaged in by companies, governments engage in providing subsidies. A commerce department can conclude that a country illegally subsidised an industry without negative diplomatic fallout. Demands for bribes that effectively keep out the investors of the home state can be questioned by a Department of Trade

110 *Ibid.*, p.165.
111 *Ibid.*, p.164.
112 *Ibid.*, p.164.
113 Marlise Simons, "US Enlists Rich Nations in Move to End Business Bribes" *The New York Times* (12 April 1996), available at http://www.nytimes.com/1996/04/12/world/us-enlists-rich-nations-in-move-to-end-business-bribes.html (visited 12 March 2016).

as a form of "reverse anti-subsidies" or a trade restriction issue that is less likely to inflame host government sensibilities. The essence of subsidies law is to prevent a foreign government engaging in unfair competition in the territory of the home state. Requiring the host state to treat investors by complying with the minimum standard of customary international law will be a legitimate demand. The complaint can be packaged as a trade dispute because the department is in effect taking action to remedy unfair competition in the host state's territory.[114]

E. Amending existing BITS and new generation BITs

The diffident approach to targeting the demand side, as illustrated by Chapter 26 of the TPP, would probably prevent states from inserting provisions that aggressively target the demand side. However, the new generation of BITs as well as those BITs that are being re-negotiated could address some of the issues of demand-side bribery issues. The following are some provisions that could be considered.

First, an obligation imposed on states to ensure that none of its officials will demand a bribe to approve a proposed investment. Second, a principle that conducts involving corruption would be attributable to the host country should be expressly acknowledged in the BITs. Third, the provisions requiring that all investments must be made in accordance with the host country law, to obtain the protection of the BIT, shall not be read to mean that investments tainted by bribery will be denied the benefits of the BIT. Fourth, an explicit statement that bribes demanded by or received by host state officials from the investor will breach an affirmative obligation on the host state to promote investment and this obligation explicitly includes the obligation protect the investor from corrupt demands prior to and during the life of the investment should likewise be acknowledged by the parties to the BITs. Fifth, where there have been allegations of bribery by an investor, the home state has the right to seek consultations with officials of the host state to resolve the issue. Sixth, an obligation on host states to ensure that its officials do not retaliate against any investor who has complained about corruption to officials of the home state. Seventh, an amendment to the dispute settlement provisions that (1) deprive a tribunal of the option to hold that it has no jurisdiction because the investment was procured or maintained by corrupt payments; and (2) notwithstanding any governing law, provide the arbitration tribunal with authority to decide the dispute on an *ex aequo et bono* basis and allocate blame on just and equitable grounds which could require the host state to pay at least reliance damages adjusted for inflation and currency fluctuations, and consequential damages if the conduct of the host country officials can be termed extremely blameworthy. Consequential damages should also be awarded if the tribunal finds that the payments were part

114 A bribe accepted by a foreign official to favour another investor or bidder, while attributable to the state, would not qualify as a subsidy by the host state to that competitor under the definition of the WTO Anti-Subsidies Code which generally covers subsidies to an industry by the importing state.

of a pay-to-play scheme operated by board of investment or other officials. On the other hand, if the tribunal finds that it was the investor that was the first mover and aggressively initiated the corrupt transaction and took elaborate steps to conceal the corruption, the normal principles of denying relief should apply. Finally, the host country must commit itself to making best efforts to take such remedial steps following an adverse finding of corruption against it. This would include investigating the officials who allegedly engaged in corruption and establishing such prophylactic measures that would serve to prevent harassment of investors by corrupt officials in the future.

VI. Conclusion

In a world starved of the resources necessary to eliminate hunger and poverty, improve education for the poor and the under-privileged, cope with natural disasters and improve environmental protection, the annual loss of $1 trillion into the private bank accounts and pockets of a group of vile predators who are just another band of robbers cannot be sustained, much less justified. Decades of anti-bribery laws, cynical ratifications of the UNCAC by corrupt states that have no intention of taking the obligations of the UNCAC seriously, and occasional claw-back of the proceeds of looted funds, as in the case of the incorrigible Teodorin, have done little to reduce the incidence of bribery worldwide.

When the Speaker of the New York Assembly and many high-level officials from this iconic state are arrested for bribery,[115] when the utterly corrupt officials of FIFA[116] remain free for many years when it was an open secret that they were corrupt, and the reports of corruption in China[117] continue to make the headlines, it is easy for local corrupt elites to justify their behaviour on the ground that "everyone does it". In the not too distant future, a jaded and browbeaten population will accept this as a grim reality of life.

In their Anti-Corruption Action Plan, the G-20 Leaders made the ringing declaration that:

> "[c]orruption threatens the integrity of markets, undermines fair competition, distorts resource allocation, destroys public trust, and undermines the rule of law. Corruption is a severe impediment to

115 See, Rich Calder, Carl Campanile, Aaron Short and Bruce Golding, "Sheldon Silver Arrested for Taking $4 Million in Bribes, Kickbacks" *New York Post* (22 January 2015), available at http://nypost.com/2015/01/22/sheldon-silver-arrested/ (visited 10 March 2016).

116 See Rebecca Ruiz, Matt Apuzzo and Sam Borden, "FIFA Corruption: Top Officials Arrested in Pre-Dawn Raid at Zurich Hotel" *The New York Times* (3 December 2015), available at http://www.nytimes.com/2015/12/03/sports/fifa-scandal-arrests-in-switzerland.html (visited 11 February 2016).

117 See, "China Corruption: Life Term for Ex-Security Chief Zhou" *BBC News* (11 June 2015), available at http://www.bbc.com/news/world-asia-china-33095453 (visited 15 March 2016).

economic growth, and a significant challenge for developed, emerging and developing countries".[118]

The citizens of most countries need not be told this. They have experienced its effects. Bribery and corruption have been a millennia old problem. While avoiding utopian solutions that are impractical, it is also necessary to not be fatalistic and accept the present dystopian reality that prevails in many developing and resource-rich countries. Given the stakes so eloquently enunciated in the G20 statement, complacency is not an option. Small steps can be effectively leveraged to pressurise the demand side into abandoning the looting spree of insatiable host country officials. The law can no longer afford to "draw up its skirts" at the first allegation of illegality but must be willing to balance the range of complex factors that are involved in corruption cases. Teodorin should be the contemptible exception and not the new normal as he is at present.

118 See Annex III: G20 Anti-Corruption Action Plan, available at https://www.oecd.org/g20/topics/anti-corruption/G20_Anti-Corruption_Action_Plan.pdf (visited 20 March 2016).