Deconstructing *Duty Free*: Investor-State Arbitration as Private Anti-Bribery Enforcement

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INTRODUCTION

"[A]s regards public policy, . . . the law protects not the litigating parties but the public; or in this case, the mass of tax-payers and other

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citizens making up . . . the poorest countries in the world."[1] So states the arbitration award in *World Duty Free v. Kenya*, in which the panel dismissed an investor's claim against the Republic of Kenya for expropriating its investment. The panel did so because the investor admittedly procured a government contract by bribing then-President Daniel Arap-Moi. That President Moi had solicited and accepted the bribe proved of little consequence.

Despite its proffered intent to help the poor and advance global anti-corruption policy, the award does neither. Indeed, in practice it will tend to do the opposite. In creating an absolute defense for state officials who solicit and accept bribes, *Duty Free* exacerbates existing imbalances and distortions in anti-bribery enforcement and ultimately undermines global anti-corruption policy.

Though *Duty Free* has become part of the anti-bribery enforcement problem, investor-state arbitration could actually be part of the solution. As this article will show, the problems in global anti-bribery enforcement can be explained in part by the nearly exclusive reliance on public enforcement. Almost all we do to hold companies accountable for overseas bribery is done by those companies' home-country governments. As Professor Paul Carrington has previously observed,[2] investor-state arbitration could supply a partial remedy to this problem: it could become a venue for the private enforcement of anti-bribery norms. Among the principal impediments to realizing arbitration's potential as a mode of private anti-bribery enforcement is the *Duty Free* holding.

But all is not lost. *Duty Free* rests upon a kind of three-legged stool of legal argumentation. Those legs are: 1) the common law of contract; 2) principles of state liability for official misconduct; and 3) global anti-corruption policy. As this article will show, each leg of that stool is fundamentally flawed; the legal arguments are unpersuasive and occasionally incorrect. This article seeks to deconstruct that stool, exposing the fatal structural flaws in each leg. It thus clears the way for building an arbitral jurisprudence of corruption that actually does what *Duty Free* attempted: advance global anti-corruption policy in a way that will inure to the true victims of corruption, who are the citizens of the world's developing countries.

Accordingly, Part I describes global anti-corruption policy and the problems that inhere in this, a nascent stage of worldwide

[1] World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, ¶ 181 (Oct. 4, 2006), 46 I.L.M. 339 (2007).

[2] Paul D. Carrington, *Enforcing International Corrupt Practices Law*, 32 MICH. J. INT'L L. 129, 160-64 (2010).

enforcement. Part II makes the case for private anti-bribery enforcement. It locates the original international anti-bribery law, the U.S. Foreign Corrupt Practices Act ("FCPA"),[3] in the broader context of U.S. white-collar enforcement, and shows how the use of concurrent public and private enforcement in white-collar law generally has produced benefits that could partially mitigate the problems of anti-bribery enforcement. It further shows how companies have thus far searched in vain for an effective venue for private anti-bribery enforcement, and how investor-state arbitration could become that venue. In Part III, I first describe the *Duty Free* holding and its dangers. I then pick apart each of the three legs on which it rests, one at a time. In conclusion, I allude to some of the issues that must be resolved if investor-state arbitration is to become a venue for the private enforcement of anti-bribery norms, and show how permitting foreign companies to pursue corruption claims would actually serve to defend investor-state arbitration from some of its fiercest critics.

I. ANTI-BRIBERY POLICY AND ITS PROBLEMS

The statute that heralded the beginning of the modern anti-corruption movement — the FCPA — was very much a creature of the geo-political climate in which it arose. That climate was the Cold War, and the FCPA was thought to be an instrument of foreign policy. But although the Cold War's rhetoric and worldview now seem antiquated, the underlying policies of the FCPA are not. This section will show how those who testified before Congress on the need for a foreign bribery prohibition consistently argued, irrespective of partisan affiliation, that the FCPA's purpose was to promote economic and legal development abroad. That is, the prohibition on the business-related bribery of foreign officials would promote the kind of transnational investment that strengthened, rather than weakened, host-country economic and legal institutions. The FCPA, in turn gave rise to a global movement to prohibit such bribes. After briefly summarizing this historical arc in Section A, Section B will show how the current moment in the historical evolution of anti-bribery

[3] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)–(h), 78dd(1)–(3), 78ff (2012)), *amended by* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified as amended at 15 U.S.C. §§ 78dd(1)–(3), 78ff); International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified as amended at 15 U.S.C. §§ 78dd(1)–(3), 78ff); *see also infra* Part I.A.

enforcement is, perhaps not surprisingly, fraught with problems. But these problems must be acknowledged if we are to fashion an arbitration jurisprudence that advances, rather than retards, global anti-bribery policy.

A. The Policy

Prior to the mid-1970s, foreign bribery was a foreign law issue. Capital exporting nations generally assumed that it was the province of the foreign jurisdiction, the host country, to address bribery occurring within its jurisdiction. On its face, this was not an entirely indefensible position; virtually every government in the world has on its books a prohibition on the bribing of domestic officials. Accordingly, none of the major capital exporting nations had yet to adopt a prohibition on the bribery of foreign officials. Indeed, with one curious but obscure exception,[4] such laws were completely unknown. Considerations of comity counseled deference to domestic laws and, just as importantly, to those jurisdictions' judgment as to how to enforce, or whether to enforce, the prohibition. It was simply assumed among capital-exporting nations that the host countries would decide how, or whether, to prosecute bribery, even if that bribery was committed by foreign corporations.

Events of the mid-1970s would expose the shortcomings of this approach. Two concurrent historical events combined to precipitate enactment of the FCPA. In the wake of the Watergate scandal, the U.S. Securities and Exchange Commission ("SEC") conducted an investigation into the use of corporate slush funds for campaign contributions. The investigation revealed that in addition to using these funds to contribute to U.S. campaigns, hundreds of U.S. corporations were similarly using these funds to bribe overseas government officials.[5]

The second event[6] was the discovery that the Lockheed Corporation, the flagship U.S. defense contractor, had paid bribes to

[4] Sweden had actually enacted a prohibition on the bribery of foreign public officials, a fact little-appreciated by the capital exporting nations at that time or by more contemporary commentators. *See* Philip M. Nichols, *The Myth of Anti-Bribery Laws as Transnational Intrusion*, 33 CORNELL INT'L L.J. 627, 638 n.60 (2000), *available at* http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1477&context=cilj.

[5] U.S. SEC. & EXCH. COMM'N, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 2-3 (1976).

[6] This discussion of the Lockheed revelations and subsequent congressional testimony originally appeared in Andrew Brady Spalding, *Corruption, Corporations,*

government officials in Japan, the Netherlands, and Italy to win bids. Each of these countries was thought critical to the growth of liberal-democratic institutions, and revelations of corporate bribery undermined liberalism's credibility. A sample of congressional testimony in support of what would become the FCPA proves illustrative. Congressman Stephen Solarz, a Democrat from New York, testified in 1976: "It is important to look at the problem of overseas payments in broader terms than simply a matter of economics or even morality."[7] Solarz explained that Lockheed's payments to Japanese officials put "'[t]he democratic system in Japan . . . in grave danger.'"[8]

Solarz thought the "most serious" and "delicate" situation was Italy, whose government was equally split between a liberal party and the Communist Party.[9] He noted that "[a]llegations of payments by Lockheed served to advance the Communist cause in Italy where the Communist bloc was strengthened by the sight of corrupt capitalism."[10]

Members of Congress feared that the Communist Party could gain a majority in the Italian parliament and the prospects for building democratic institutions would be lost.[11] The implications of corporate bribery for the U.S. effort to promote the growth of democratic institutions were thus "staggering and in some cases, perhaps

and the New Human Right, 91 WASH U. L. REV. 1365, 1371-75 (2014) [hereinafter *Corruption*]. For a discussion of these foreign policy events, and their significance in understanding the purposes of the FCPA, see generally U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 3 (NOV. 14, 2012) [hereinafter RESOURCE GUIDE], *available at* http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf.

[7] *Foreign Payments Disclosure: Hearings Before the Subcomm. on Consumer Protection and Finance of the Comm. on Interstate and Foreign Commerce*, 94th Cong. 140 (1976) [hereinafter *1976 House Consumer Protection Subcommittee Hearing*] (statement of Rep. Stephen S. Solarz).

[8] *Unlawful Corporate Payments Act of 1977: Hearings Before the Subcomm. on Consumer Protection and Finance of the Comm. on Interstate and Foreign Commerce*, 95th Cong. 172 (1977) [hereinafter *1977 Protection Hearings*] (statement of Rep. Stephen S. Solarz) (quoting "a very senior politician close to former [Japanese] Prime Minister Takeo Mike"). Solarz further testified that Japanese opponents to the U.S.-Japan alliance were "handed a terribly effective weapon to drive a wedge between two close allies. At a time of uncertainty due to the shifting balances of power in Asia, our strongest and most stable ally in the region [was] undergoing unnecessary turbulence, and [a] relationship which is at the very heart of our foreign policy [was] potentially jeopardized." *1976 House Consumer Protection Subcommittee Hearing*, *supra* note 7, at 141.

[9] *See 1976 House Consumer Protection Subcommittee Hearing*, *supra* note 7, at 141.

[10] *1977 Protection Hearings*, *supra* note 8, at 173.

[11] *See 1976 House Consumer Protection Subcommittee Hearing*, *supra* note 7, at 141.

irreversible."[12] The example of Italy demonstrated that "Communist and other anti-U.S. forces are quick to take advantage of any evidence of immorality or corruption associated with pro-Western governments. Both fear and resentment are generated among foreign officials who become increasingly hostile as the United States continues to expose traditional corrupt practices abroad."[13] This view would actually prove non-partisan. It was articulated with equal force by members of both the Ford and Carter administrations,[14] and expressed most forcefully by Democrat George Ball, who had become famous as a member of the Kennedy and Johnson administrations for his opposition to the Vietnam War. Ball explained:

> The vast volume of speeches, pamphlets, and advertising copy and propaganda leaflets extolling the virtues of free enterprise are cancelled every night when managements demonstrate by their conduct that a sector of multinational business activity is not free; it is bought and paid for. This is a problem that, like so many others, has relevance in the struggle of antagonistic

[12] *Id.* at 2.

[13] *1977 Protection Hearings*, *supra* note 8, at 173.

[14] Mark B. Feldman, Deputy Legal Adviser in the Department of State under President Ford, testified that corruption "jeopardizes the important interests we share with our friends abroad" because it undermines a form of government "upon which social progress, economic justice, and perhaps, ultimately, world peace depends . . . ." *The Activities of American Multinational Corporations Abroad*: *Hearings Before the Subcomm. on International Economic Policy of the H. Comm. on International Relations*, 94th Cong. 23 (1975) (statement of Mark B. Feldman, Deputy Legal Adviser, U.S. Department of State). Treasury Secretary William E. Simon further stated that it "adversely affect[s] our relations with foreign governments and can contribute to a general deterioration in the climate for fair and open international trade and investment." *Foreign and Corporate Bribes: Hearings Before the Comm. on Banking, Housing, and Urban Affairs,* 94th Cong. 85 (1976) [hereinafter *1976 Senate Banking Hearings*] (statement of William E. Simon, Secretary of the U.S. Department of the Treasury). Ford's Commerce Secretary, Elliot L. Richardson, further articulated: "Bribery . . . threatens to poison relationships between the United States and nations with which we have long had mutually beneficial political and commercial ties." *Id.* at 76. Ultimately, President Ford would formally state that reports of bribery "tend to destroy confidence" in liberal-democratic institutions. Gerhard Peters and John T. Woolley, *Gerald R. Ford: "Special Message to the Congress Transmitting Proposed Foreign Payments Disclosure Legislation," August 3, 1976*, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=6254. When the Carter Administration moved in, his Treasury Secretary stated, "The Carter Administration believes that it is damaging both to our country and to a healthy world economic system for American corporations to bribe foreign officials." *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 95th Cong. 67 (1977) (statement of W. Michael Blumenthal, Secretary of the U.S. Department of the Treasury).

> ideologies; for, when our enterprises stoop to bribery and kickbacks, they give substance to the communist myth — already widely believed in Third World countries — that capitalism is fundamentally corrupt.[15]

Thus, even the most liberal, reform-minded advocates recognized the implications of international corporate bribery for the countries in which the bribes occurred. With the integration of these themes into both the Senate[16] and House[17] Reports, a notably bipartisan vision of the FCPA's overseas role emerges. This new anti-bribery statute was designed not merely to improve U.S. corporate governance, but to build liberal-democratic institutions abroad. The United States adopted this law not to wash its hands of foreign corruption, but to create institutions that protect fundamental rights and promote economic prosperity.

The resulting legal regime criminalized the payment[18] of bribes[19] to foreign officials.[20] Among the major capital exporting nations, the

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15 *1976 Senate Banking Hearings*, *supra* note 14, at 41-42.

16 *See* S. REP. NO. 95-114, at 3 (1977).

17 *See* H.R. REP. NO. 95-640, at 4-5 (1977).

18 The FCPA forbids any act "in furtherance of an offer, payment, promise to pay or authorization of the payment . . . ." The DOJ has indicated that this prohibition only applies to corrupt payments that are made with the intent to induce or influence action from the foreign official recipient. Since this section focuses on the corrupt intent, the FCPA does not require that the payment or action be completed or that the recipient of the bribe be known. *See* RESOURCE GUIDE, *supra* note 6, at 14, 92.

19 The phrase "anything of value" is not defined through the statutory language or legislative history. Yet, since foreign officials can be persuaded in more ways than just through monetary payments, the FCPA has been enforced if "anything of value" was given, directly or indirectly, to a foreign official. This term can include cash, jewelry, gift certificates, travel, electronics, donations, or cars. BUSINESS CRIME ¶ 18.04(3)(c) (MB 2015).

20 The FCPA defines "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof . . . ." 15 U.S.C. § 78dd-1(f)(1)(A) (2012). Until recently, the notion of an "instrumentality" was ambiguous and remained undefined by the courts. Due to the lack of clarification, the idea that state-owned entities or enterprises qualified as an "instrumentality" had been challenged in recent cases. In *United States v. Esquenazi*, the U.S. Court of Appeals for the Eleventh Circuit held that state-owned enterprises do qualify as an "instrumentality," as it was defined "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own." *See* Christopher Hoffmann, Note, *The Dark World of Interpreting the Foreign Corrupt Practices Act: Arguments, Cases and Critiques Illuminating Whether Employees of State Owned Enterprises Are "Foreign Officials,"* 12 J. INT'L BUS. & L. 115, 116 (2013); Richard L. Cassin, *Supremes Won't Review Esquenazi "Foreign Official" Challenge*, FCPA BLOG (Oct. 6, 2014), http://www.fcpablog.com/blog/2014/10/6/supremes-wont-review-esquenazi-foreign-official-challenge.html.

FCPA was the first and only such statute in the world. Post-enactment, sentiment arose among the U.S. business community and then in Congress that unilateral enactment of this prohibition put U.S. companies at a competitive disadvantage. Perhaps for this reason, and content to have made a symbolic gesture, the U.S. Government hardly enforced the statute at all. Then, in 1988, Congress formally requested that the President negotiate an international instrument with the Organisation for Economic Co-operation and Development ("OECD") to require member nations to enact FCPA-type prohibitions on the business-related bribing of foreign officials.[21] After ten years of U.S. lobbying, the OECD enacted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[22]

This same period of time saw an explosion of international instruments that collectively went beyond the FCPA's and OECD's prohibition on the supply of bribes and prohibited the demand of bribes as well. The year 1996 saw the enactment of the Inter-American Convention against Corruption ("IACAC") by the Organization of American States.[23] A year later, the European Union ("EU") enacted the Convention on the Fight Against Corruption Involving Officials.[24]

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[21] *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1107 (1988). The amended statute included the following directive: "It is the sense of the Congress that the President should pursue the negotiation of an international agreement, among the members of the Organization of Economic Cooperation and Development, to govern persons from those countries concerning acts prohibited with respect to issuers and domestic concerns by the amendments made by this section. Such international agreement should include a process by which problems and conflicts associated with such acts could be resolved." *Id.*; *see also* S. REP. NO. 105-277, at 2 (1998) (describing efforts by Executive Branch to encourage U.S trading partners to enact legislation to FCPA).

[22] *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 1, Dec. 18, 1997, 37 I.L.M. 1.

[23] Organization of American States: Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724, O.A.S.T.S. No. B 58. This Convention directs the participating governments to create criminal sanctions for corrupt acts involving public officials and/or those acting on their behalf. (Neither civil remedies nor corrupt acts involving only private entities/individuals are included in the directives of the Convention.) The prohibited acts include "the solicitation or acceptance, directly or indirectly, *by* a government official or a person who performs public functions . . . ." and/or "[t]he offering or granting, directly or indirectly, *to* a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions." *Id.* art. VI (1)(a)–(b).

[24] Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, May 26, 1997, O.J. (C 195) 40. The governments of Belgium, Denmark, Germany, Greece,

Then in 1999, the Group of States Against Corruption, whose forty-nine members include the United States, EU member nations, and others, adopted the Criminal Law Convention on Corruption[25] and the Civil Law Convention on Corruption.[26] The year 2003 saw another regional convention, the African Union Convention on Preventing and Combating Corruption,[27] and then ultimately a truly global agreement,

Spain, France, the Republic of Ireland, Italy, Luxembourg, the Netherlands, Austria, Portugal, Poland, Finland, Sweden, and the United Kingdom of Great Britain and Northern Ireland on May 26, 1997 entered into this Convention. The Convention prohibits both the active (supply) and passive (demand) participation in corrupt activities. The Convention states that the request or receipt of "*advantages of any kind whatsoever*" by a government official "directly or through an intermediary" for himself or a third party (passive corruption) is a criminal act and punishable as such. Additionally, any person who "promises or gives, directly or through an intermediary, an *advantage of any kind whatsoever* to an official for himself or for a third party" (active corruption) is also a criminal act, punishable by the applicable laws of the country in which the offense took place. *Id.* (emphasis added).

[25] *See* Criminal Law Convention on Corruption, Jan. 27, 1999, E.T.S No. 173. On January 27, 1999, forty-nine governments including the members of the European Community as well as other nonmember states, such as the United States, entered into this Convention. *See id.*; *Group of States Against Corruption*, COUNCIL OF EUROPE, http://www.coe.int/t/dghl/monitoring/greco/general/3.%20What%20is%20GRECO_en.asp. This group of nations is known as GRECO ("Group of States Against Corruption"). The Convention directs the participating states to create criminal liabilities for acts of corruption involving public officials, as well as similar corrupt acts between private entities, but does not call for the creation of civil remedies. Both active and passive corruption (bribery) is included in the prohibited acts and the bribery can involve any "*undue advantage*" given, received, promised, or requested, either directly or through a third party. The Convention also calls for criminal liabilities for those who 1) aid and abet bribery, 2) trade in influence, 3) launder money from the proceeds of bribes, and/or 4) alter or create accounting records in an attempt to conceal corrupt activity. Criminal Law Convention on Corruption, *supra*.

[26] *See* Civil Law Convention on Corruption, Nov. 4, 1999, E.T.S. No. 174. The Civil Law Convention on Corruption was entered into on November 4, 1999, by the same forty-nine governments that constitute GRECO. The Convention expands the Criminal Law Convention on Corruption by directing the participating nations to create legislation that would provide civil (private) remedies for those who have "suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage." The acts of corruption referred to in this Convention relate directly to the prohibited acts in the Criminal Law Convention and include corrupt acts involving public officials and between private entities. *See id.*

[27] African Union Convention on Preventing and Combating Corruption, Jul. 11, 2003, 43 I.L.M. 5, *available at* http://www.au.int/en/content/african-union-convention-preventing-and-combating-corruption. The Member States of the African Union entered into the African Union Convention on Preventing and Combating Corruption on July 11, 2003. This Convention deals with acts of corruption involving public officials and between private entities. The Convention speaks to both the "supply" and the "demand" sides of corrupt activities, and provides for criminal penalties for any

the United Nations Convention Against Corruption.[28] Truly, a global public policy against transnational bribery, on both the supply and demand sides, had emerged.

These international instruments remain important statements of policy, and harbingers of future enforcement commitments. Such policies, and aspirations, were captured quite well in the *Duty Free* award. But as the next section shows, the *Duty Free* panel seemed not to recognize how far removed these ideals are from current enforcement, the problems that this intermediate state of enforcement creates, and how the *Duty Free* logic will compound them.

B. Its Problems

In principle, international anti-bribery law could achieve a near-perfect degree of success in either of two ways. If all capital importing countries enforced their domestic bribery prohibitions, the problem would be solved: any company that did business in Nigeria or Venezuela or Bangladesh would know that it could not pay bribes there and would suffer the consequences for doing so. Alternatively, we could achieve the same measure of success by implementing effective enforcement across all capital-exporting countries: no matter where they did business, companies subject to the jurisdiction of the United States, U.K., Germany, China, and Turkey would all play by the same rules, subject as they were to the effective enforcement of their home country's foreign bribery prohibition. But neither is true today; anti-bribery enforcement remains highly nascent and, as such, suffers from a number of deep structural imperfections.

and all participants, whether directly or indirectly involved. The prohibited acts include solicitation or acceptance and offer or grant of any 1) "undue advantage;" 2) goods of monetary value; 3) other benefits, including gifts, favors, promises, or advantages; and/or 4) illicit enrichment (any significant increase in assets that the public official or private entity "cannot reasonably explain in relation to his or her income"). The Convention does not state that any civil remedies are to be provided by the participating countries. *See id.*

[28] United Nations Convention Against Corruption, Dec. 14, 2005, 2349 U.N.T.S. 41. Nearly every member of the United Nations has entered into the United Nations Convention Against Corruption, dated December 14, 2005. This Convention states that participating nations must provide civil remedies and criminal liabilities for the corrupt acts of public officials as well as private entities. Additionally, the nations are instructed to implement measures to aid in the prevention of private and public corrupt actions. The prohibited acts include offering or providing and requesting or accepting an "undue advantage," either directly or indirectly. Undue advantage is not defined; however, the Convention specifically notes bribery, laundering of proceeds of corrupt act, embezzlement, trading in influence, illicit enrichment, concealment, and obstruction of justice as prohibited acts. *Id.*

Until these imperfections are overcome, new players in the anti-corruption arena, such as International Centre for Settlement of Investment Disputes ("ICSID"), should not aggravate them. More to the point, ICSID should not do so in the name of fighting corruption or, worse yet, helping the poor. As this section will show, modern anti-bribery enforcement suffers from at least three distinct problems: first, it disproportionately focuses on the supply of bribes (as opposed to the demand); second, supply-side enforcement is disproportionately concentrated in a small fraction of the world's capital exporters; and third, this state of enforcement now produces uncertain results in reducing overseas bribery, and may in some instances even exacerbate bribery. The *Duty Free* jurisprudence compounds each problem.

Anti-bribery enforcement began in earnest only after the international conventions were ratified. With the so-called playing field of international business now supposedly leveled,[29] and given a number of other changes both domestic and international,[30] the once-dormant FCPA grew teeth. Though the U.S. Department of Justice ("DOJ") and SEC had brought only a negligible number of enforcement actions since 1977,[31] beginning around 2004 enforcement became quite aggressive.[32] But the enforcement stage mirrored the enactment stage: having previously enacted unilaterally a foreign bribery prohibition, the United States was now unilaterally enforcing one.

[29] The metaphor of the FCPA "leveling the playing field" is imbedded in the statute's legislative history. For a critique of this metaphor, see, for example, Spalding, *Corruption*, *supra* note 6, at 1370, noting: "If business is a game and multinational companies are the players, what then are the developing countries in which they do business? The spectators? Or the turf?"

[30] *See* Laura E. Kress, *How The Sarbanes-Oxley Act Has Knocked the "SOX" off the DOJ and SEC and Kept the FCPA on Its Feet*, 2009 PITT. J. TECH. L. & POL'Y 1, 1 (arguing that the Sarbanes-Oxley Act invigorated enforcement of the FCPA).

[31] In the first two decades after the FCPA was passed, the DOJ and SEC only prosecuted seventeen companies and thirty-three individuals, in total. This equates to only about two prosecutions per year. *See* Cortney C. Thomas, Note, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 439-49 (2010).

[32] *See id.* The last decade has seen a drastic increase in the number of FCPA-related cases prosecuted. In 2002, only three cases were being investigated. The number of FCPA prosecutions then doubled between 2006 and 2007, and in contrast, there was a total eighty-four open investigations by the end of 2007. *Id.* Further, the DOJ and SEC pursued eighty-five enforcement actions between 2007 and 2012, which yielded almost four billion dollars in settlement amounts. Mike Koehler, *Keeping FCPA Enforcement Statistics in Perspective*, FCPA PROFESSOR (Jan. 23, 2013), http://www.fcpaprofessor.com/keeping-fcpa-enforcement-statistics-in-perspective.

While some capital-exporters within the OECD have begun to follow the United States' example, the data shows a playing field that is far from level. The OECD has compiled enforcement data for the years 1999 to 2013, the life of the OECD Convention. Of the 41 parties to the OECD Convention, the United States and Germany each stand out as substantial enforcers. Total criminal and civil/administrative sanctions (against persons both legal and natural) for the United States is approximately 250, and for Germany, approximately 190.[33] From there, the drop off is precipitous: the unlikely candidates of Korea and Hungary have roughly 20 actions each; France, Italy, the UK and Japan have about 10 each; and all other members are at or near zero.[34] These numbers do not include the major capital exporting nations that have not joined the OECD Convention. Though Brazil and Russia have each joined the Convention while not (yet) being full members of the OECD,[35] conspicuous nonparties to the Convention include India and, much more significantly, China.[36]

[33] *See Working Group on Bribery: 2013 Data on Enforcement of the Anti-Bribery Convention*, ORG. FOR ECON. CO-OPERATION & DEV. (Sept. 2014), http://www.oecd.org/daf/anti-bribery/Working-Group-on-Bribery-Enforcement-Data-2013.pdf.

[34] *Id.* Transparency International uses a point system to analyze the enforcement level of OECD countries. Points are allotted based on the level of action that the country takes, such as initiating an investigation or commencing a case. Further, more points will be allotted if the case involves a major company bribing senior officials, or if it ends in sanctions. The sum of these points is then multiplied by the country's share of world exports over a four-year period. Following the calculations, the country will be designated into one of the following categories of enforcers: Active Enforcement (U.S., U.K., Germany, and Switzerland); Moderate Enforcement (Italy, Canada, Australia, Austria, Finland); and then the remainder OECD nations falling under Limited Enforcement or Little to No Enforcement. In contrast, the report from the Working Group on Bribery only considers foreign bribery convictions that have been reported by government representatives. Transparency International instead examines cases of money laundering, tax evasion, accounting fraud or violations of the requisite disclosure standards, and the data is collected through the organization's selected experts. *See* Fritz Heimann et al., *Exporting Corruption: Progress Report 2014: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery*, TRANSPARENCY INT'L (2014), http://www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2014_assessing_enforcement_of_the_oecd (discussing the status of enforcement in all of the parties to the OECD Anti-Bribery Convention, with the exception of Latvia).

[35] *See* Elizabeth K. Spahn, *Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption*, 23 IND. INT'L & COMP. L. REV. 1, 11 (2013) (describing the globalization of anti-bribery laws since the implementation of the FCPA).

[36] *See* Jeffery R. Boles, *The Two Faces of Bribery: International Corruption Pathways Meet Conflicting Legislative Regimes*, 35 MICH. J. INT'L L. 673, 684-85 (2014) (analyzing the dynamics of bribery through public and private sectors and the different legislative approaches to criminalizing bribery). China has adopted a foreign bribery prohibition

Because this enforcement is uneven, the enforcing states — principally but not exclusively the United States — are actively pressuring other countries to follow suit and ramp up enforcement. This pressure is exerted primarily through the peer review mechanism of the OECD Convention, whereby member states are periodically reviewed for their enforcement efforts.[37] While this naming and shaming of peer review has produced incremental increases in enforcement, the increments are modest by any account, as the above data show.

Non-enforcement among OECD member states is due to a host of reasons. Some countries may lack political will, having not yet decided that foreign bribery is a high-priority item. Or, where the political will exists, the funding might not; states have not yet allocated the needed resources to enforcement agencies.[38] Similarly, enforcement theories and practices that have made FCPA enforcement possible in this country — particularly the independent investigation, voluntary disclosure, and cooperation credit — do not exist in many countries.[39] Finally, the structure or culture of enforcement agencies may not

very recently, ostensibly to honor its obligations under the United Nations Convention against Corruption ("UNCAC"). The UNCAC requires states create and enforce anti-corruption and anti-bribery measures, and for the member states to exhibit cooperation between the other ratifying states to promote the implementation of the Convention. China, unlike its western counterparts, originally opposed any mechanism other than self-review, including the peer review system. Without a method for rigorous enforcement, China gradually has begun to implement the conditions of the UNCAC despite the fact that China ratified the Convention in 2006. India has not even gone that far, and presently has no foreign bribery prohibition on its books. Samuel R. Gintel, *Fighting Transnational Bribery: China's Gradual Approach*, 31 WIS. INT'L L.J. 1, 26-27 (2013) (explaining the weak framework of China's adopted legislation that criminalizes bribery of foreign public officials).

[37] The peer review mechanism is used by OECD member states on other OECD member states to review the policies implemented and practices used in a wide range of areas concerning economic and social development, including but not limited to bribery. The review creates a way for states to learn from each other and to insure compliance with OECD principles and standards by facilitating discussions regarding best practices and policymaking in a less formal manner. The review does not involve judgments, hearings, or punishments; instead, at the conclusion of the review, a report is published, which includes the state's areas of accomplishments as well as recommendations for areas that may need improvement. *What Is Peer Review?*, OECD, http://www.oecd.org/site/peerreview/whatispeerreview.htm (last visited July 5, 2015).

[38] *See* Heimann et al., *supra* note 34, at 8.

[39] *See* Misty Robinson, *Global Approach to Anti-Bribery and Corruption, an Overview: Much Done, but a Lot More to Do*, 37 T. MARSHALL L. REV. 303, 311-20 (2012) (discussing enforcement in the U.S. compared to other countries).

encourage or incentivize the kind of entrepreneurial innovation that gave rise to FCPA enforcement.[40]

This intermediate stage of anti-bribery enforcement suffers from three distinct problems. The first and most obvious is that uneven enforcement among capital-exporters delays the pace at which the world's multinational corporations reform their overseas practices; because companies outside the jurisdiction of the United States, Germany, and perhaps the U.K. may bribe without fear of penalty, we can only assume that they are doing so to a significant degree. Assuming bribery reduction to be a good thing, limited enforcement is a problem in and of itself.[41]

Second, the emerging international anti-bribery enforcement regime is almost exclusively supply-side. While countries like China and Brazil are notably going through historic changes in the culture and practice of domestic bribery enforcement, the majority of anti-bribery enforcement in international business transactions occurs on the supply side. That is, the law focuses on the supply of bribes — the multinational corporation entering a foreign market — rather than on the "demand" of bribes from the host country government officials.[42] Companies are therefore penalized for participating in endemic bribery environments that existed long before the companies arrived on the scene. Believing that the DOJ's zeal for near-unilateral and exclusively supply-side enforcement is fundamentally an attack on their legitimate interests, U.S. businesses launched via the U.S. Chamber of Commerce, an aggressive campaign to reform (or allegedly weaken) the FCPA.[43]

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[40] *See* Heimann et al., *supra* note 34, at 8.

[41] Paul Carrington has also acknowledged the current limitations of public enforcement. *See* Carrington, *supra* note 2, at 142-49.

[42] This distinction is often made through use of the terms "active" and "passive" bribery (corresponding to the supply and demand, respectively). These terms were defined and implemented into the sphere of bribery law when the European Union adopted the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union in 1997, and again when the Council of Europe adopted the Criminal Law Convention on Corruption in 1999. Both Conventions explicitly criminalized active and passive bribery, but the Criminal Law Convention on Corruption extended this requirement to forty-seven countries, extending past the twenty-seven countries in the European Union. *See* Eric C. Chaffee, *The Role of the Foreign Corrupt Practices Act and Other Transnational Anti-Corruption Laws in Preventing or Lessening Future Financial Crises*, 73 OHIO ST. L.J. 1283, 1301 (2012).

[43] The U.S. Chamber of Commerce proposed amendments to the FCPA that would include a defense of compliance, restrict a company's liability for a subsidiary or actions that occurred before it acquired a secondary company, creating a definition of "foreign

The third problem may be even more troubling, and springs from the first two. As I have argued at length in previous articles[44] and will only summarize here, both empirical data and basic economic modeling suggest the alarming possibility that uneven enforcement might not reduce net levels of bribery in the host country. Indeed, in certain circumstances, it may actually increase net levels of host-country bribery. Consider the perfect storm. Host-country bribery is systemic, but the host country's laws prohibiting the bribing of its own officials are not enforced. Foreign companies are entering that host country and playing by different rules: some firms are subject to their home country's prohibition on foreign bribery while some are not. Given poor incomes, pervasive bribery, and a culture of tolerance, the host country's officials will tend to confer benefits to the bribe-paying firms. This combination produces the following effect. Where transactions shift from firms subject to an anti-bribery law to firms not so subject (what economists have called ownership substitution),[45] net

official," and requiring "willfulness" for a corporation to be held criminally liable. *See* ANDREW WEISSMANN & ALIXANDRA SMITH, U.S. CHAMBER INST. FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 1, 7 (Oct. 2010), https://jenner.com/system/assets/publications/216/original/Restoring_Balance_Proposed_Amendments_to_the_Foreign_Corrupt_Practices_Act.pdf?1318976610.

[44] *See generally* Andrew Brady Spalding, *The Problem of Deterring Extraterritorial White-Collar Crime*, 17 CHAP. L. REV. 355 (2014) (arguing that in international business law, enforcement authority will tend to fail); Andrew Brady Spalding, *Restorative Justice for Multinational Corporations*, 76 OHIO ST. L.J. 357 (2015) [hereinafter *Restorative Justice*], *available at* http://ssrn.com/abstract=2403930 (providing a model for extraterritorial white-collar criminal punishment); Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351 (2010) (proposing various reforms to the text and enforcement of international anti-bribery legislation to deter bribery without deterring investment).

[45] *See* Alvaro Cuervo-Cazurra, *Who Cares About Corruption?*, 37 J. INT'L BUS. STUD. 803, 819 (2006). This also assumes that the enforcement of foreign bribery prohibitions achieves a measure of success in deterring bribery. Deterrence theories stem from the notion that law and economics serve to promote social welfare as a whole, and can be promoted through a series of cost and reward calculations. This equation is premised upon the idea that individuals will refrain from committing an illegal act due to their fear of being punished. Once the cost of enforcing and imposing the punishment is weighed against the burden being placed on the taxpayer, the type of punishment associated with a crime can be manipulated as to make it the most effective policy possible. Although this is domestically an effective method, deterrence in an international setting actually increases crime in developing countries rather than decreasing it. For one, the punishments associated with certain crimes that are not equal in severity can encourage individuals to commit the more severe crime since the ultimate penalty is the same. Second, criminalizing a certain action and increasing the "price" associated with it can cause individuals to decide to substitute that crime for another as the penalty is lower. Ultimately, deterrence methods tend to increase crime

levels in the host country may not go down, and may even go up. Given the FCPA's unmistakable founding in a concern for overseas institution-building, an enforcement regime that fails to reduce bribery, and may actually increase it, is self-evidently ineffective.

As the next section will show, these problems are due in large part to anti-bribery's undue reliance on public enforcement. Private enforcement has, in the U.S. context, compensated for similar shortcomings in the public enforcement of myriad other areas of white-collar crime. However, appreciating the potential upside of private anti-bribery enforcement is a necessary precursor to recognizing the harm of *Duty Free*.

II. THE NEED FOR PRIVATE ENFORCEMENT

In current global anti-corruption enforcement, states prosecute natural and legal persons, and states pressure other states to do the same. But as the following sections will show, the limits on political will and enforcement resources are themselves characteristics of a public enforcement regime. Introducing a dimension of private enforcement would circumvent these problems, while also addressing demand-side bribery as a counterbalance to the current supply-side focus, producing a global enforcement regime that more effectively reduces overseas bribery. Section A describes the U.S. experience in using concurrent public and private enforcement to achieve public policy goals, and details its benefits. Section B will briefly describe the impulse to find a venue for the private enforcement for violations of the FCPA, and its obvious shortcomings. Section C will introduce investor-state arbitration as a potential new venue for promoting anti-bribery norms.

A. U.S. Experience with Concurrent Public/Private Enforcement

As explained above, the global anti-bribery enforcement regime was instigated by passage and then enforcement of the U.S. FCPA. It is a little-known fact that the FCPA is actually a component of U.S. securities law; the statute is an amendment to the 1934 Securities and Exchange Act, thus integrating the FCPA into the context of securities fraud enforcement and the broader regime of federal white-collar crime of which it is a part.[46] Both U.S. securities enforcement, and

and then place a larger burden on the taxpayer, thereby failing to achieve any of its goals. *See* Spalding, *Restorative Justice*, *supra* note 44, at 361-71.

[46] The SEC has always had broad jurisdiction over accounting and disclosure

myriad other areas of federal law, famously rely on a combination of public and private enforcement.

While concurrent public/private enforcement is deeply embedded in the federal white-collar regime, this article takes four examples that especially illustrate the purposes and benefits of dual-enforcement: securities, antitrust, environmental, and employment law. The benefits of concurrent enforcement can be sorted into three categories: the first concerns available funding for enforcement; the second concerns the substantive knowledge and ideas that private enforcement might access or generate; and the third concerns political pressures.

The reliance of U.S. securities law on concurrent public/private enforcement[47] resulted from a recognition of the inherent limitations of public enforcement to address the variety and complexity of securities transactions. While the government can file civil, criminal, or administrative proceedings against natural and legal persons,[48] the securities laws expressly provide a number of remedies to private parties claiming damages,[49] and the courts have implied a series of private rights of action.[50] As these implied private rights of action grew

standards of U.S. corporations. The FCPA, as it amended the Securities and Exchange Act of 1934, provided the SEC with a broader range of duties, powers, and jurisdiction that included the ability to combat the bribery of both foreign and domestic officials. *See generally* RESOURCE GUIDE, *supra* note 6 (describing the history of the passage of the FCPA).

[47] For an excellent description of the SEC's authority, drafted by a former commissioner, see Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority*, 107 HARV. L. REV. 963, 976-1017 (1994).

[48] The SEC can prosecute violations of the Securities Act of 1933 ("Securities Act") through administrative or civil enforcement proceedings. 15 U.S.C. § 77a (2012); *see id.* §§ 78a, 78u, 78aa, 77x, 78ff(a).

[49] These include: § 11 of the Securities Act, 15 U.S.C. § 77k (2012), which imposes liability for misstatements or omissions in registration statements; § 12 of the Securities Act, 15 U.S.C. § 77l, which imposes liability for the sale of unregistered securities and for fraud in the sale of securities; § 15 of the Securities Act, 15 U.S.C. § 77o, which imposes liability on controlling persons; § 9 of the Exchange Act, 15 U.S.C. § 78i (2012), which imposes liability for specified manipulations of exchange-traded securities; § 16 of the Exchange Act, 15 U.S.C. § 78p, which imposes liability for "short-swing" profits; § 18 of the Exchange Act, 15 U.S.C. § 78r, which imposes liability for misleading statements in periodic reports filed with the Commission; § 20 of the Exchange Act, 15 U.S.C. § 78t, which imposes liability on controlling persons; and § 20A of the Exchange Act, 15 U.S.C. § 78t-1, which imposes insider trading liability on contemporaneous traders. *See* Musick, Peeler & Garrett v. Employers Ins., 508 U.S. 286, 294-96 (1993).

[50] These include a number of provisions under the Exchange Act: § 10(b), 15 U.S.C. § 78j and Rule 10b-5, 17 C.F.R. § 240.10b-5 (1993), which establish the general antifraud provision under the federal securities laws; § 14(a), 15 U.S.C.

in number and importance, plaintiff lawyers came to be known as "private attorneys general" (a term first coined in 1943 in a Second Circuit case[51] and used in a U.S. Supreme Court dissent later that year[52]), so-called because they advance public policy goals embedded in the securities laws by filing claims against alleged violators, typically but not exclusively[53] in the form of class action lawsuits.[54]

Private enforcement remains highly robust today as legal reforms have tempered its alleged abuses. The growth of allegedly frivolous and otherwise abusive private filings in the 1970s and 1980s, and the explosion in both popular and academic commentary, produced and a reform movement. The result was the imposition in 1995 of new procedural barriers including a heightened pleading standard and mandatory stay on discovery.[55] Notably, this movement's aim was the curtailment of abusive private litigation, but not its elimination. Scholars continue to acknowledge[56] that owing to the SEC's inherent constraints — including limited resources, political pressure, and even the danger of agency capture — private enforcement remains critical to advancing the public policy goal of promoting transparency and fairness in the capital markets,[57] concurring with the U.S. Supreme Court that it is a "necessary supplement" to public enforcement.[58]

§ 78n(a), and Rule 14a-9, 17 C.F.R. § 240.14a-9, prohibiting fraud in the solicitation of proxies; § 14(e), 15 U.S.C. § 78n(e), and Rule 14e-3, 17 C.F.R. § 240.14e-3, prohibiting fraud in connection with tender offers; and § 13(e)(1), 15 U.S.C. § 78m(e)(1), prohibiting fraud in connection with an issuer's repurchase of its own shares. *See* Grundfest, *supra* note 47, at 964.

[51] Associated Indus. of N.Y. State v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943), *vacated*, 320 U.S. 707 (1943) ("Such persons, so authorized, are, so to speak, private Attorney Generals.").

[52] FCC v. NBC, 319 U.S. 239, 265 n.1 (1943) (Douglas, J., dissenting).

[53] In addition to the typical class action lawsuit, private attorneys are sometimes hired by the U.S. government to litigate on behalf of the public, as occurred in the tobacco cases and the Microsoft antitrust litigation, and are referred to as private attorneys general. *See* Carl W. Hittinger & Jarod M. Bona, *The Diminishing Role of the Private Attorney General in Antitrust and Securities Class Actions Cases Aided by the Supreme Court*, 4 J. BUS. & TECH. L. 167, 170 n.32 (2009).

[54] *See id.* at 168.

[55] *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 101, 109 Stat. 737 (1995).

[56] *See, e.g.*, Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301 (2008) (first characterizing the position that private enforcement is a "necessary supplement" to public enforcement as "oft-cited, but undertheorized," and sharply criticizing certain features of private enforcement, but nonetheless proposing no more radical a remedy than SEC authority to screen class action lawsuits).

[57] *See, e.g.*, Elizabeth Chamblee Burch, *Securities Class Actions as Pragmatic Ex Post*

The private attorney general is likewise active in the enforcement of antitrust law. From its onset, federal antitrust enforcement rested explicitly on both private and public enforcement. While public enforcement authority is shared by the DOJ and Federal Trade Commission ("FTC"),[59] Congress also provided a private right of action in the federal antitrust laws. These express grants of a private right of action included the rights to a trial by jury, a provision that any damages the jury awards are to be trebled by the court,[60] and attorney's fees to a prevailing plaintiff.[61] Scholars have identified various purposes of the private right of action. Antitrust violations are difficult to detect, and private parties may have unique access to evidence; treble damages provide that incentive to bring the evidence to light.[62] Obviously, private enforcement aims for general deterrence. Of particular importance to this paper, the legislative history and case law make clear that among the most important goals of private enforcement is compensating the victims of illegal behavior.[63] Today,

Regulation, 43 GA. L. REV. 63 (2008) (arguing the SEC is faced with scarce resources and agency capture).

[58] *See* J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964).

[59] *See, e.g.*, Joseph P. Bauer, *Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?*, 16 LOY. CONSUMER L. REV. 303, 306 (2004) (describing enforcement responsibilities of the DOJ and FTC).

[60] Awards of treble damages are very rare, and scholars surmise that settled cases rarely involve more than single damages. *See* Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879, 883 (2008).

[61] 15 U.S.C. § 15 (2012).

[62] *See, e.g.*, Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & ECON. 445, 449-52 (1985) (providing an economic analysis of damages).

[63] In 1890, Senator Coke commented upon a bill that provided only for double damages as follows: "How would a citizen who has been plundered in his family consumption of sugar by the sugar trust . . . recover his damages under that clause? It is simply an impossible remedy offered him. . . . [H]ow could the consumers of the articles produced by these trusts, the great mass of our people — the individuals — go about showing the damages they had suffered? How would they establish the damage which they had sustained so as to get a judgment under this bill? I do not believe they could do it." 21 CONG. REC. 2615 (1890). Similarly, Representative Webb stated that the damages provision "opens the door of justice to every man whenever he may be injured by those who violate the antitrust laws and gives the injured party ample damages for the wrong suffered." 51 CONG. REC. 9073 (1914). He also stated that "we are liberalizing the procedure in the courts in order to give the individual who is damaged the right to get his damages anywhere . . . you can catch the offender." *Id.*; *see also* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("[The treble damages remedy was passed] as a means of protecting consumers from overcharges resulting from price fixing."). A large number of Supreme Court cases hold that both deterrence and compensation are purposes of the treble damages remedy. *See, e.g.*, Atl. Richfield

the ratio of private to public antitrust litigation is 10 to 1.[64] Although Supreme Court cases of the last decade evidence a skepticism concerning the private right of action,[65] scholars have noted that the Court's concerns are not inherent in the concept of private enforcement, but instead reflect unique features of U.S. civil procedure such as notice pleading, broad pretrial discovery, and jury trials.[66]

Though the private attorney general is perhaps most widely associated with securities and antitrust enforcement, numerous other areas of federal law depend just as heavily on private enforcement, and quite by design. Environmental law, for example, contemplates private-sector suits of two kinds. First, citizen suit provisions provide a cause of action for any citizen to file suit against a private, state, or local entity for noncompliance, provided a public enforcement action is not already underway. Myriad environmental laws contain citizen suit provisions.[67] Once a citizen suit is initiated, the Environmental Protection Agency has a right to intervene and prosecute on behalf of

Co. v. USA Petroleum Co., 495 U.S. 328, 360 n.20 (1990); California v. ARC Am. Corp., 490 U.S. 93, 102 (1989); Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 575 (1982); Pfizer, Inc. v. India, 434 U.S. 308, 314 (1978); Ill. Brick Co. v. Illinois, 431 U.S. 720, 746, 748-49 (1977); Fortner Enters. v. U.S. Steel Corp., 394 U.S. 495, 502 (1969); *see also* Lande & Davis, *supra* note 60, at 881 n.14.

[64] Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1179 (2008).

[65] *See, e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 566-67 (2007); Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 415-16 (2004). Concerns include the fear of false positives, lack of confidence in judges and juries to achieve correct outcomes, the difficulty federal judges have in managing the costs of antitrust litigation, and a preference for regulation over judicial intervention. *See, e.g.*, Edward D. Cavanagh, *The Private Antitrust Remedy: Lessons from the American Experience*, 41 LOY. U. CHI. L.J. 629, 636 (2010) (examining the private remedy through the lens of the American system and offering some observations about designing private remedies schemes in antitrust regimes abroad).

[66] *See* Cavanagh, *supra* note 65, at 640. A robust academic literature, using economic methodologies, debates the merits of private enforcement. Some scholars find that private enforcement has a neutral effect on total enforcement; some find that it leads to more optimal enforcement; while some contend that private enforcement negatively affects total antitrust enforcement. *See generally id.* (discussing the private right of action).

[67] Environmental statutes with citizen suit provisions include: Toxic Substances Control Act, 15 U.S.C. § 2619(a)(1) (2012); Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(1)(A) (2012); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(a)(1) (2012); Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427(a)(1) (2012); Clean Water Act, 33 U.S.C. § 1365(a)(1) (2012); Marine Protection, Research, and Sanctuary Act, 33 U.S.C. § 1415(g)(1) (2012); Energy Policy and Conservation Act, 42 U.S.C. § 6305(a) (2012); Solid Waste Disposal Act, 42 U.S.C. § 6972(a)(1) (2012); Clean Air Act, 42 U.S.C. § 7604(a)(1) (2012); and Outer Continental Shelf Lands Act, 43 U.S.C. §1349(a)(1) (2012).

the government. Citizen enforcers may seek penalties as well as compliance and mitigation orders, though all penalty money is deposited with the U.S. Treasury.[68] Secondly, a party with standing can sue for judicial review of agency action under section 702 of the Administrative Procedure Act ("APA"). APA review actions can challenge interpretation and implementation of a statute, as well as failure to take action.[69] Both the legislative and executive branches have spoken publicly to the importance of private enforcement as a supplement to public enforcement, in large measure because the private sector can bring so many more suits, and exert so much more pressure on would-be violators, than can the public sector.[70] Today, the number of actions brought by private enforcement actions is several times that brought by the federal government.[71]

Likewise, Congress's "massive"[72] reliance on private litigation to advance the policy goals of employment discrimination law has important lessons for anti-bribery enforcement. The modern employment discrimination regime arose in 1964 with Title VII of the Civil Rights Act.[73] Civil rights advocates wanted strong public

[68] *See, e.g.*, Wendy Naysnerski & Tom Tietenberg, *Private Enforcement of Federal Environmental Law*, 68 LAND ECON. 28 (1992) (describing the varying remedies, limitations, and reimbursement procedures that can affect both the level and patterns of litigation activity as well as the compliance consequences); Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81 (2002) (arguing that agency enforcement is often preferable to citizen suit enforcement).

[69] *See* Bennett v. Spear, 520 U.S. 154, 173 (1997).

[70] *See Clean Water Act Reauthorization: Hearings Before the Subcomm. on Env't and Natural Res. of the H. Comm. on Merch. Marine and Fisheries*, 103d Cong. 212-13 (1994) (statement of Steven A. Herman, Assistant Administrator for Enforcement, Environmental Protection Agency); *The Water Quality Act of 1994, and Issues Related to Clean Water Act Reauthorization: Hearings on H.R. 3948 Before the Subcomm. on Water Res. and Env't of the H. Comm. on Pub. Works and Transp.*, 103d Cong. 290 (1994) (statement of Carol M. Browner, Administrator, Environmental Protection Agency); *Report of the Committee on the Environment*, 19 ENERGY L.J. 181, 192 (1998) ("Environmental citizen suits are a very significant aspect of federal environmental enforcement litigation in terms of both the frequency of these suits and the severity of the sanctions imposed . . . citizen suit enforcement under . . . federal environmental statutes, such as the CAA, the Resource Conservation and Recovery Act (RCRA), and the Emergency Planning and Community Right-to-Know Act (EPCRA), is growing.").

[71] *See, e.g.*, David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1609 (1995) (discussing private and public enforcement).

[72] Stephen B. Burbank, Sean Farhang, & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 691 (2013).

[73] *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012).

enforcement through administrative adjudicative powers, modeled after the National Labor Relations Board, with no private litigation.[74] However, the Democratic Party, though it held a majority in both houses, was divided on the civil rights issue largely between the North and South. Accordingly, the passage of Title VII depended on conservative Republicans forming a majority with the non-southern Democrats.[75] These Republicans succeeded in stripping the Equal Employment Opportunity Commission ("EEOC") of the stronger enforcement powers that civil rights advocates had sought, thus expressing their preference for limiting the growth of bureaucracy as well as their inherent distrust of the Kennedy and Johnson administrations. Congress thus authorized private lawsuits with economic incentives such as attorney fee awards for prevailing plaintiffs.[76] Accordingly, enactment of Title VII depended on a political horse trade in which Republicans accepted private lawsuits in exchange for eschewing public bureaucracy.

As civil rights groups saw private litigation grow dramatically in the following years, they too came to embrace private litigation.[77] In 1991, with support of these civil rights groups, Congress augmented the private enforcement regime by adding compensatory and punitive damages and the right to trial by jury.[78] This choice was again shaped by the political cleavages in the 1980s between a predominately Democratic Congress and the Reagan administration.[79] The decision to pursue private enforcement was thus a result of lack of political will to buttress public enforcement; this lack of political will was the result of ideological divisions, inter-branch power struggles, and rising concerns about the bureaucracy's limited energy, resources, and innovation.[80] Between 2001 and 2010, 17,253 employment discrimination suits were filed; of these, 98% were privately prosecuted and a mere 2% were prosecuted by the EEOC or DOJ.[81] To

[74] Burbank, Farhang & Kritzer, *supra* note 72, at 691. A bill was introduced to this effect. Federal Equal Employment Opportunity Act, H.R. 405, 88th Cong. (1st Sess. 1963).

[75] Burbank, Farhang & Kritzer, *supra* note 72, at 691-92 (citing SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 94 (2010)).

[76] *Id.* at 692 (citing SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 95, 101 (2010)).

[77] *Id.* at 693.

[78] Civil Rights Act of 1991, Pub. L. No. 102-166 § 102, 105 Stat. 1071, 1072-73 (codified at 42 U.S.C. § 1981(a) (2012)).

[79] Burbank, Farhang & Kritzer, *supra* note 72, at 694.

[80] *Id.* at 695.

[81] *Id.*

the extent one believes that employment discrimination enforcement has resulted in a reduction in discrimination, compensation to victims, and changing workforce culture, those gains are due almost exclusively to private enforcement.

Given a reliance on private enforcement that is both broad and deep, a robust academic literature has emerged to chronicle and debate the benefits of private enforcement in its myriad manifestations.[82] A catalogue of these benefits shows just how applicable they are to the current anti-bribery enforcement regime. These benefits might be sorted into three categories. As indicated above, the first concerns available funding for enforcement; the second concerns the substantive knowledge and ideas that private enforcement might access or generate; and the third concerns political pressures.

First and most obviously, private enforcement increases the total amount of enforcement resources available. Government agencies are inherently constrained by the limitations of public budgets.[83] Where private enforcement is robust, the aggregate resources devoted to enforcement may greatly exceed available public funding; this has proven especially true in anti-trust enforcement.[84] Moreover, where public enforcement agencies are aware of an effective private enforcement regime, they may concentrate their efforts in prosecuting cases that do not hold out sufficient incentives to private litigants.[85] Put another way, private enforcement distributes the financial burden of enforcement between public and private sources. This is particularly attractive where enhancing public enforcement capacity is either too expensive, or politically unpopular.[86] Although robust private litigation will increase the courts' docket and therefore the

[82] For an excellent summary of the private enforcement literature, see *id.* at 643-48.

[83] *See* Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights,* 100 COLUM. L. REV. 1384, 1410 (2000); Susan Rose-Ackerman, *Judicial Review and the Power of the Purse*, 12 INT'L REV. L. & ECON. 191, 200 (1992); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 221 (1992).

[84] *See* Kent Roach & Michael J. Trebilcock, *Private Enforcement of Competition Laws*, 34 OSGOODE HALL L.J. 461, 479-91 (1996).

[85] *See* John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 224-25 (1983); Steven D. Shermer, *The Efficiency of Private Participation in Regulating and Enforcing the Federal Pollution Control Laws: A Model for Citizen Involvement*, 14 J. ENVTL. L. & LITIG. 461, 468-69 (1999).

[86] *See, e.g.*, SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 129-71 (2010) (discussing how private enforcement of the Civil Rights Act furthered civil rights at a time where political support and government budgetary concerns made public reform unattractive).

costs to the public, these costs are not easily traceable by voters and are therefore more politically viable.[87]

Substantively, private enforcement taps into sources of innovation and substantive knowledge that is not always available to the public agencies. Private enforcement is widely recognized as encouraging innovation. Given the inherently bureaucratic, hierarchical, and politically constrained nature of public enforcement agencies, private attorneys tend to be far more innovative in the legal theories they adopt, potentially expanding the strategies that public enforcers adopt, not to mention the law itself.[88] This may be true not only of the theories of liability and methods of proof, but also of policy justifications and solutions.[89] Similarly, private enforcers often have access to information that is not available, or at least far less readily available, to public enforcers. Given that the private litigants have been directly harmed by the alleged violations and often have expertise in the industry, they have information that the public enforcement agencies often could not access through monitoring.[90]

Third, private enforcement is less susceptible to political pressures that tend to push toward under-enforcement. While regulated industries tend to oppose enforcement and to readily concentrate their lobbying efforts, pro-enforcement interests are often more diffuse. This can result in a disproportionate anti-enforcement influence in the public arena and perhaps even in agency capture.[91] So too might periodic political changes result in ideologically-driven episodes in enforcement. By contrast, private enforcement tends to "produce durable and consistent enforcement pressure."[92] Private enforcement can also serve to address issues that public enforcement agencies may have neglected or overlooked due to political or budgetary constraints. In so doing, private enforcers can "shame or prod" the public agencies into action.[93] Similarly, private enforcement grants citizens access to

[87] Burbank, Farhang & Kritzer, *supra* note 72, at 663.

[88] *See* Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1403-04 (1998).

[89] Burbank, Farhang & Kritzer, *supra* note 72, at 664-65.

[90] *See* Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 5, 8 (2002).

[91] *See* Sanford C. Gordon & Catherine Hafer, *Flexing Muscle: Corporate Political Expenditures as Signals to the Bureaucracy*, 99 AM. POL. SCI. REV. 245, 245 (2005); Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1039-40 (1997).

[92] Burbank, Farhang & Kritzer, *supra* note 72, at 664.

[93] *Id.* at 665 (citing Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 TEMP. ENVTL. L. & TECH. J. 55, 56 (1989)); Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 350 (1991); Zinn, *supra* note 68, at 133-37.

opportunities to vindicate their rights, and in so doing increases democratic participation and enhances institutional legitimacy. Often the victims of such abuses are otherwise vulnerable and underrepresented, and thus private enforcement is a rare chance to have their voices heard and interests protected.[94] Such citizens become less vulnerable to those momentary political trends that are too often influenced by lobbying efforts in which they cannot afford to participate. Private enforcement thus creates a sphere of influence that is protected from these political pressures.[95]

Note the relevance of these benefits to the current conundrum of anti-bribery enforcement. Uneven enforcement is due in very large part to constraints on political will and enforcement resources; circumventing these constraints and augmenting resources are among the principal benefits of private enforcement. Private enforcement does not depend on the political will or resource commitment of public agencies; where a right of action exists, entrepreneurial private enforcers can seize the opportunity without needing the government's financial or political support. So too will private enforcers have access to information that poorly funded public investigative agencies cannot discover, again compensating for restraints on public resources.

The impulse to augment public enforcement with private enforcement has found some expression in the anti-bribery context. Companies have indeed been searching for a venue for private anti-bribery litigation. But as the next section shows, the efforts have heretofore been unsuccessful.

B. The Search for a Private Enforcement Venue

Though the FCPA has no private right of action, three forms of private anti-bribery enforcement have tried to get off the ground. None has made a major impact in the United States, nor will any have much impact outside the United States.

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[94] *See* Burbank, Farhang & Kritzer, *supra* note 72, at 666 (citing Susan E. Lawrence, *Justice, Democracy, Litigation, and Political Participation*, 72 SOC. SCI. Q. 464, 472 (1991)); Frances Kahn Zemans, *Legal Mobilization: The Neglected Role of the Law in the Political System*, 77 AM. POL. SCI. REV. 690, 695 (1983).

[95] This literature is not without its critics and detractors. Criticisms of public enforcement include that it: empowers judges to make policy when they may lack policy expertise; produces inconsistent rulings from courts; undermines the state's ability to articulate a coherent regulatory scheme; undermines prosecutorial discretion; discourages voluntary disclosure and cooperation; weakens legislative and executive oversight; and lacks democratic legitimacy and accountability. Burbank, Farhang & Kritzer, *supra* note 72, at 667.

Shareholders have availed themselves of two mechanisms of private securities enforcement: the class action lawsuit and the shareholder derivative suit. Alleging various claims for common law fraud, Racketeer Influenced or Corrupt Organizations Act ("RICO"), breach of fiduciary duties, or other securities law violations, plaintiffs' attorneys have begun augmenting the public enforcement authority of the SEC and DOJ.[96]

However, class actions and, to a lesser extent, shareholder derivative suits are mainly a U.S. phenomenon.[97] They only seek to hold liable the very same companies that are already subject to public FCPA enforcement. While these private enforcement mechanisms surely enhance public enforcement against U.S. companies, they address none of the problems of international anti-bribery enforcement. They do not increase the capacity of other capital-exporters to enforce their prohibitions, and apply almost exclusively to companies within U.S. jurisdiction. They do nothing to bring non-U.S. companies within the ambit of anti-bribery law, and thus neither promote the global promotion of an anti-bribery norm nor help to ensure that enforcement actually reduces bribery in developing countries. So too do they reinforce the current disproportionate focus on bribery's supply side, an approach of uncertain benefit to the countries where the bribes occur.

Yet another nascent form of private enforcement has gained some traction, but is again a uniquely U.S. phenomenon. The FCPA has been privately enforced under RICO.[98] RICO was passed in 1970 in

[96] *See, e.g.*, United States v. Panalpina World Transp. (Holding) Ltd., No. 10-769 (S.D. Tex. filed Nov. 4, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/panalpina-world/11-04-10panalpina-world-info.pdf; Complaint at 4-5, Sec. & Exch. Comm'n v. Baker Hughes Inc., No. H-07-1408 (S.D. Tex. Apr. 26, 2007), *available at* https://www.sec.gov/litigation/complaints/2007/comp20094.pdf. Opinion Procedure Release 08-02 "was issued on a timely basis in the middle of a fast-paced, dynamically changing competition for a foreign target." *See* Andrew M. Baker, Michael J. Barta & Michael G. Pattillo, Jr., *Baker Botts Assists Client in Obtaining Groundbreaking FCPA Opinion Release from the Department of Justice Regarding International Mergers and Acquisitions Allowing a U.S. Company to Compete on a Level Playing Field*, BAKER BOTTS LLP, *available at* http://files.bakerbotts.com/file_upload/documents/FCPAOpinionClientUpdate112.pdf (last visited Oct. 18, 2015). Historically, the U.S. allowed private enforcement of corruption claims generally through the False Claims Act as well as qui tam actions. *See* Carrington, *supra* note 2, at 149-54.

[97] Martin Gelter, *Why Do Shareholder Derivative Suits Remain Rare in Continental Europe?*, 37 BROOK. J. INT'L L. 843, 847-48 (2012).

[98] *See generally* Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968 (2012) ("RICO"); *Notable RICO Decision and Development*, FCPA PROFESSOR (Aug. 6, 2013), http://www.fcpaprofessor.com/notable-rico-decision-and-

response to the growing threat of organized crime in the United States. It prohibits acts such as illegal gambling, bribery, money laundering, counterfeiting, and embezzlement, and provides for civil and criminal penalties for the prohibited activities performed as part of a continuing criminal undertaking.[99] RICO establishes both criminal and civil liability, and allows civil prosecution by both the federal government and by injured private persons.[100] Once a person or company has been subjected to or has resolved a FCPA enforcement action, private entities, such as injured persons or competitor companies, may bring RICO claims using the FCPA offense as a predicate act. Though RICO does not include FCPA offenses as a predicate offense,[101] it does list violations of the Travel Act,[102] which the U.S. government frequently uses in connection with foreign bribery prosecutions.[103] While there have been a few examples of successful litigation of civil suits for FCPA offenses using RICO, these claims very rarely survive the pleading stage.[104] RICO, like the class action and derivative suit, does not seem poised to provide a meaningful supplement to public enforcement.

Representing yet another tactic, a U.S. congressman has tried, albeit futilely, to introduce the use of private bribery enforcement to "level the playing field" by statute. A Democratic congressman from Colorado introduced in multiple congressional sessions[105] a bill that would create a private right of action under the FCPA. It would grant the right to persons who are already subject to FCPA jurisdiction to sue persons who are not subject to FCPA jurisdiction for overseas

development.

[99] *Id.* § 1961 (defining "racketeering activity").

[100] *Id.* §§ 1963–1964.

[101] *See id.* § 1961(1)(B).

[102] *See id.* § 1952(b) (2012).

[103] *See id.* The Travel Act forbids the use of "foreign commerce . . . with [the] intent to . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity," and the unlawful activity is performed or attempted. *Id.* § 1952(a).

[104] For a counter example, see *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 582-603 (S.D.N.Y. 2014), in which Chevron Corporation successfully sued Donziger, an attorney for the indigenous people of the Amazon, for FCPA offenses using RICO. Chevron alleged, among other things, that Donziger violated the Travel Act and the Hobb's Act (bribery of a foreign judge, fraud, and extortion) and the court found the claims sufficient for predicate acts under RICO. *Id.*

[105] *See* Foreign Business Bribery Prohibition Act of 2011, H.R. 3531, 112th Cong. (2011); Foreign Business Bribery Prohibition Act of 2009, H.R. 2152, 111th Cong. (2009); Foreign Business Bribery Prohibition Act of 2008, H.R. 6188, 110th Cong. (2008).

bribery. The bill states that only "foreign concerns" (a term that does not appear in the FCPA) may be liable,[106] and defines a foreign concern as "any person other than" those subject to FCPA jurisdiction. The plaintiff would have to prove essentially three elements: 1) that the foreign person made a payment otherwise proscribed under the FCPA; 2) that the payment "prevented the plaintiff from obtaining or retaining business for or with any person;" and 3) that the payment "assisted" the foreign concern in obtaining or retaining business.[107] Damages would be three times either the value of the business that the defendant gained, by virtue of the bribe, or the value of the business that the plaintiff lost due to the bribe.[108]

This proposal would at least in theory tend toward more uniform global compliance with anti-bribery laws. It could potentially compensate for the non-enforcement of other capital exporters and push toward a more uniform bribery regime for multinational companies doing business abroad. However, the bill has proven politically unviable, never making it out of committee.[109] Far more preferable would be a venue that already existed and required no statutory authorization, and which companies could access irrespective of nationality. Investor-state arbitration just may fit the bill.

C. Looking to Investor-State Arbitration

Investor-state arbitration represents a kind of "grand bargain" that capital-importing states make with capital-exporting states, by which the importing states voluntarily promise to provide legal protections to foreign capital in order to attract more such capital.[110] To make that promise effective, countries will frequently include a commitment to

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[106] *See* H.R. 3531; H.R. 2152; H.R. 6188.

[107] H.R. 3531; H.R. 2152; H.R. 6188.

[108] H.R. 3531; H.R. 2152; H.R. 6188

[109] *See Bill Summary & Status 112th Congress (2011-2012) H.R. 3531*, LIBR. CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR03531:@@@X (last visited Feb. 13, 2013) (explaining that the last major action on this bill was referral to a House subcommittee); *Bill Summary & Status 111th Congress (2009-2010) H.R. 2152*, LIBR. CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR02152:@@@X (last visited Feb. 13, 2013) (explaining that the last major action on this bill was referral to a House subcommittee); *Bill Summary & Status 110th Congress (2007-2008) H.R. 6188*, LIBR. CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR06188:@@@X (last visited Feb. 13, 2013) (explaining that the last major action on this bill was referral to the House Judiciary).

[110] *See* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 77 (2005).

submit to binding arbitration in a bilateral investment treaty, typically before tribunals created under the ICSID pursuant to the Washington Convention,[111] or the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules.[112]

These commitments to settlement disputes by arbitration are designed to provide a forum less tainted by nationalistic or protective tendencies of domestic courts. Ultimately, the goal is "the promotion of the respect for the rule of law,"[113] thereby "promoting foreign investment by providing effective protection to foreign investors."[114] It is part and parcel of the broader policy of improving an investment environment and thereby attracting developed-world capital which contributes to the economic development of the host state.[115] In so doing, it also increases protections for domestic investors by "increasing the State's general standards of business protection"[116] thereby generally promoting the rule of law.

While approximately 20 ICSID and UNCITRAL cases have seen allegations of corruption, overt judicial reasoning addressing the corruption claims is scarce. Llamzon speculates that arbitrators recognize the unfairness of ruling in favor of the plaintiff where almost certainly both parties consented to and participated in the corruption.[117] He finds that in arbitration rulings, "the calibration of right and wrong is often not viewed by those participating in corruption and by those judging corruption alike solely in terms of what is legal; and that the moral function of decision-making cannot be reduced to or articulated in its entirety as legal principles."[118] Where this is true generally, and the arbitrators do not have at their disposal legal principles that render equitable outcomes, the arbitral jurisprudence of corruption becomes "jurisprudence confidentielle," or "the jurisprudence in the shadows."[119] Corruption will be "a consideration borne in the minds of arbitrators, but the import and

111 *See* 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 36-40, Mar. 18, 1965, No. 8359, 575 U.N.T.S. 159.

112 *See UNCITRAL Arbitration Rules*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html (explaining that the UNCITRAL provides a comprehensive set of procedural rules for arbitration).

113 ALOYSIUS P. LLAMZON, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION ¶ 1.23 (Loukas Mistelis et al. eds., 2014).

114 *Id.* ¶ 1.24.

115 *See id.* ¶ 1.24.

116 *Id.* ¶ 1.25.

117 *See id.* ¶ 8.14.

118 *Id.* ¶ 8.22.

119 *See id.* ¶ 8.22.

effect given to those allegations will remain largely unarticulated in the final award or decision."[120]

This paper seeks to facilitate the process of bringing corruption-related arbitral decision-making out of the shadows. It aims to begin building a jurisprudence that more accurately captures the moral intuitions of arbitral panels as well as the nuances of global anti-corruption policy, and in so doing, turn investor-state dispute settlement ("ISDS") into an effective forum for the private enforcement of anti-corruption norms. Were ISDS to become that forum, it would supply many of the benefits that the United States has seen in concurrent public/private enforcement. Companies could file claims irrespective of whether their home country was enforcing its own foreign bribery prohibition, thus compensating for the lack of political will that often explains non-enforcement. So too would companies and their counsel bring financial and other resources to enforcement irrespective of how well-resourced other states' enforcement efforts may be. In both these ways, investor-state arbitration would "level the playing field" by bringing more actors within the jurisdiction of anti-bribery enforcement. To the extent that the defendants were states, arbitration would also compensate for the present disproportionate focus on supply-side bribery.

But constructing an alternative to the *Duty Free* logic will require attacking each of three legs on which it now rests.

III. NEUTRALIZING *DUTY FREE*

The previous section argued that global anti-bribery enforcement now needs private enforcement, that companies have been searching for it, and that investor-state arbitration could serve that purpose. However, the obstacle now standing in the way of realizing arbitration's potential for private anti-bribery enforcement is *Duty Free*. This section exposes both the flaws of *Duty Free's* holding and its dangers. Section A briefly describes the facts and holding of the arbitral award, and the dangerous trend that it has already produced. Section B identifies and deconstructs the three-legged stool on which the *Duty Free* award rests. Section C begins to sketch an alternative structure that would better support global anti-bribery policy.

[120] *Id.* ¶ 8.25.

A. Duty Free*'s Danger*

The danger of *Duty Free* lies not just in the weakness of its holding. Rather, it also lies in the prospect of subsequent tribunals relying on its holding, even in the face of materially different facts and applicable law. This prospect has already reared its head.

In *Duty Free*, the claimant World Duty Free ("WDF") was a company incorporated under the laws of the Isle of Man and owned by Nasir Ibrahim Ali.[121] WDF had concluded an agreement in 1989 with the Kenya Airports Authority, acting on behalf of the government of Kenya, for the construction, maintenance, and operation of duty-free complexes at Nairobi and Mombassa International Airports.[122] WDF also entered into a ten-year lease for the complexes that was to last from 1990 to 2000. WDF was to pay the government $1 million per year for rent, and WDF spent about $27 million to renovate the airport terminals.[123] Ali freely admitted that he made a "personal donation" of $2 million to the Kenyan president, Daniel Arap Moi, which Ali had been advised was "required" as part of the "consideration" for the agreement.[124] Unique among ISDS cases was the plaintiff's admission that he had been advised to bribe the President, and that he had indeed paid the bribe. *Duty Free* is ultimately noteworthy because it involved a contract with the host government for a legitimate purpose, and the outcome of the case was based on an affirmative finding of bribery.[125]

While the parties heavily disputed what happened next and why, there was no dispute as to the ultimate fate of this transaction. Kenya eventually placed the duty-free complexes into receivership and then expropriated WDF's investment completely.[126] WDF then filed a claim

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[121] World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, ¶ 62-64 (Oct. 4, 2006), 46 I.L.M. 339 (2007). Ali personally owned 10% of the company's shares, and the remaining 90% were registered under the entity Dinky International SA, 90% of whose shares Ali owned (with his wife owning the remaining 10%).

[122] *Id.* ¶ 62.

[123] *Id.* ¶¶ 62, 67.

[124] *Id.* ¶ 66. The bribe money was brought to Mr. Moi in a suitcase and left in his office. When Ali retrieved the suitcase, he found that the cash had been replaced with ears of corn, a sign of the President's acceptance of the business proposition. *Id.* ¶ 130.

[125] *See id.* ¶¶ 130-181.

[126] *See id.* ¶ 74. The disputations as to this sequence of events is most colorful. Ali contended that Moi and his government used WDF without Ali's knowledge or consent to perpetrate an international fraud designed to raise campaign funds from foreign sources for Moi's re-election campaign. Ali further alleged that when he was made aware via media inquiries of Moi's use of his company, Ali objected, and only then did the government begin the process of seizing ownership and control of his

in arbitration alleging a number of violations of the original contract.[127]

Kenya argued that the agreement was unenforceable by virtue of Ali's bribe to Moi. It observed that Kenyan law criminalized the "corrupting" of government officials,[128] framing this transaction as a corrupt, aggressive bribe-payor tempting an otherwise innocent government official. It neglected to mention that the solicitation of bribes is also criminal under Kenyan law. WDF countered that making such payments to President Moi was routine practice in Kenya, rooted in cultural practices of "Harambee"[129] and widely regarded as a "matter of protocol" among the Kenyan people, even to the point that Kenya's "domestic public policy" made such personal donations "not only acceptable, but fashionable."[130]

As the subsequent section will break down in detail, the tribunal's ultimate award rested on the interplay between three asserted legal principles. First, there exists a transnational public policy against bribery.[131] Second, while Ali and President Moi both participated in the bribery (in contravention of public policy) Ali's conduct was attributable to WDF but Moi's conduct was not attributable to the Republic of Kenya.[132] Third, as a matter of contract law, the bribe rendered the agreement illegal.[133]

Standing alone, *Duty Free* would likely do little harm. But in a subsequent arbitration award in which corruption was also "explicitly outcome-determinative,"[134] the tribunal relied heavily on *Duty Free's* logic, thus beginning a dangerous pattern. *Metal-Tech v. Republic of Uzbekistan*[135] differed from *Duty Free* in important respects: it was

company. Kenya responds that Ali defaulted on rent payments and that Ali's home country of the UAE had issued an arrest warrant for financial fraud Ali allegedly committed in that country. *Id.* ¶¶ 66-72, 83-85.

127 *Id.* ¶ 74.

128 *Id.* ¶ 106.

129 *See id.* ¶¶ 120, 133. "Harambee" means "let's pull together" in Swahili and refers to the Kenyan tradition of mobilizing community resources to tackle social problems, in particular to finance community projects. *See id.*; *see also* HARAMBEE, www.harambeeproject.com (last visited Aug. 27, 2015) (defining "Harambee" under mission statement).

130 World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, ¶ 120 (Oct. 4, 2006), 46 I.L.M. 339 (2007).

131 *Supra* Part I.A.

132 *Infra* Part III.A.2.

133 *Infra* Part III.A.1.

134 LLAMZON, *supra* note 113, ¶ 6.43.

135 Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, (Oct. 4, 2013).

based on a treaty rather than a contract, and did not involve the laws of England, much less Kenya. Nevertheless, the judgment seemed to rely heavily on *Duty Free*'s holding, thus demonstrating the importance of redirecting this area of arbitration jurisprudence.

Claimant Metal-Tech was an Israeli company that entered into a joint venture ("JV") with two Uzbek State-owned companies related to mineral production. The joint venture became the subject of criminal proceedings related to the misconduct of its officials, after which the Uzbekistan government abrogated the JV's right to purchase raw materials and cancelled Metal-Tech's exclusive right to export the JV's refined product. One of the two state-owned JV partners then terminated its contract with the JV and initiated bankruptcy proceedings, during which the state-owned partners' claims were accepted while Metal-Tech's were rejected.[136] Metal-Tech then initiated arbitration proceedings under the Israel-Uzbekistan BIT, alleging that Uzbekistan breached its obligations under both Uzbek law and the BIT. Uzbekistan countered that the arbitration panel lacked jurisdiction because Metal-Tech's investment was obtained by and operated through bribery.[137] In particular, Metal-Tech had paid extraordinarily large amounts of money under the guise of "consultancy agreements" to several individuals, one of whom was the brother of the Prime Minister of Uzbekistan. Finding the payments extraordinary in their amount, the lack of evidence showing that the consultants actually provided services, and the consultants' lack of qualifications, the tribunal concluded that the agreements were a "sham," amounting to bribery.[138]

Because the bribery violated Uzbek law, the arbitral panel followed the *Duty Free* precedent in concluding that a claimant who participated in bribery could state no claim for relief, even where the host state's public officials were complicit.[139] Further mirroring the prior decision, the *Metal-Tech* panel acknowledged the apparent unfairness of this holding to the claimant: "[i]t 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."[140] Nonetheless, the panel adopted precisely the position of the *Duty Free* panel, that "the idea, however, is not to punish one party at the cost of the other, but rather to ensure the

136 *Id.* ¶¶ 37-53.

137 *Id.* ¶¶ 107-110.

138 *Id.* ¶¶ 199-218.

139 LLAMZON, *supra* note 113, ¶ 6.56.

140 *Metal-Tech Ltd.*, ICSID Case No. ARB/10/3, ¶ 389.

promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act."[141]

Though not involving English or Kenyan law, or implicating the law of contract, the *Metal-Tech* holding exactly parallels *Duty Free*. In so doing, it creates the very same problems for global anti-corruption policy. If arbitration is to become an effective venue for the litigation of corruption-related claims, the slate must be wiped clean. The next section undertakes to do so.

B. Deconstructing the Three-Legged Stool

Doctrinally, the *Duty Free* award rests upon a three-legged stool: 1) global anti-corruption policy; 2) state liability for official bribery; and 3) the law of contract. This subsection deconstructs each of these legs, one at a time.

1. The Common Law of Contract: Reclaiming Restitution

Owing to the agreement's choice of law provisions, the contracts issues were analyzed under the English common law of contracts.[142] A foray into traditional English common law contracts doctrine renders a subtle, and underappreciated, error in the *Duty Free* award. The panel held that the contract between the claimant and the Republic of Kenya was both voidable and illegal. The former is right, but the latter represents a misapplication of English contract law. The difference is not merely technical or academic. Were Ali's contract with Kenya deemed voidable, and not illegal, he could still have stated a claim under an alternative theory of contract (or quasi-contract): unjust enrichment. Recognizing the potential validity of an unjust enrichment claim even where the contract is admittedly procured by bribery would direct the arbitration jurisprudence of corruption along a very different path.

The panel relied on the prominent English contracts treatise, *Chitty on Contracts*,[143] for its discussion of illegality. It might have read the treatise just a bit more deeply. The panel first addresses illegality, noting that a contract may be illegal in formation or performance.[144] The doctrine of illegality at formation applies if "in all the

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[141] *Id.*

[142] *See* World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, ¶ 159 (Oct. 4, 2006), 46 I.L.M. 339 (2007). The law of Kenya was also invoked, but as a commonwealth country, English law was deemed the law of Kenya.

[143] CHITTY ON CONTRACTS (H.G. Beale et al. eds., 30th ed. 2008).

[144] *World Duty Free Co.*, ICSID Case No. ARB/00/7, ¶ 161.

circumstances it would be an affront to public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct."[145] The panel finds that because Ali freely chose to invest in Kenya and was advised of the prevalence of bribery, he "chose, freely, to pay the bribe," and now granting him relief for breach of such a contract would "appear to assist and encourage the plaintiff in his illegal conduct," thus committing the proscribed affront.[146]

However, though the panel rightly acknowledged the important distinction between illegality at formation and at performance, it did not apply the distinction correctly. The same treatise on which the panel relied, *Chitty on Contracts*, explains the distinction further. Illegality at formation means that it cannot be performed without committing an illegal act.[147] An example that *Chitty* provides is a contract for a theater production to be performed without a license when such licenses were required by law; the parties knew at the formation stage that the contract was for an illegal purpose.[148] By contrast, a contract is illegal as to performance when one or both parties intends to perform an otherwise legal contract in an illegal manner.[149] *Chitty* cites as an example a contract to transport some equipment; the contract was not itself illegal, but when the mover used a vehicle that could not legally handle the weight, the contract became illegal as to performance.[150]

The contract at issue in *Duty Free* was neither: it was neither illegal at formation nor at performance. Both categories — illegal at formation and at performance — go to the good or service to be provided under the contract, not the manner in which the contract was formed. Illegal at formation means that the good or service to be provided under the contract was inherently illegal, not that the manner in which the contract was formed was illegal. The contract in *Duty Free* did not concern an object that was inherently illegal: that object, namely, was an otherwise valid license to legally operate a duty-free complex in an airport. Neither did the parties allege that this valid and legal agreement became illegal upon performance. Rather, the only wrongful act here was the manner in which the contract was

145 *Id.* ¶ 161.

146 *Id.* ¶ 178.

147 CHITTY ON CONTRACTS, *supra* note 143, § 16-008.

148 *See id.* (citing Levy v. Yates, 8 A. & E. 129 (1838)).

149 *Id.* § 16-009.

150 *Id.* § 16-0010.

initially formed, and this is not what the doctrine of illegality concerns in the English common law of contract.

Perhaps fortunately for the panel, illegality was not the only principle of contract law on which it relied. The other, voidability, proves far stronger, and this has much significance for the ruling's anti-corruption implications. The panel explains at some length the difference between a void and a voidable contract. A void contract appears to satisfy the elements of a contract but "is in reality so defective as to make it entirely ineffectual in the eyes of the law. It is from the outset empty of content."[151] A voidable contract, by contrast, is "intrinsically valid" but due to the "circumstances of its making" the court will not enforce it.[152] Here, the injured party has the option of rescinding the contract, but the contract is not inherently void. For that reason, the claimant must take a "positive action to set it aside" but has the option of waiving his right to rescind, and keeping the contract in force.[153] Perhaps surprisingly, given its previous finding that the contract was illegal, the panel found that Kenya "formally avoided the [a]greement" in submitting its Counter-Memorial,[154] apparently concluding that the contract between Ali and Kenya was voidable, and not void. That is, the agreement was not inherently ineffectual and unenforceable, but was unenforceable at the discretion of the respondent and upon its affirmative act of avoidance. [155]

While the distinction between void and voidable is not important for present purposes,[156] the contrast with illegality most certainly is: it matters for purposes of restitution. Under the English common law of contract, a claimant cannot recover under a contract if that contract is deemed illegal. But where the contract is avoided, the claimant can recover under restitution principles.[157] Though the panel did not address restitution, it made clear that this was only because the

[151] *World Duty Free Co.*, ICSID Case No. ARB/00/7, ¶ 164.

[152] *Id.*

[153] *Id.*

[154] *Id.* ¶ 182.

[155] For a more general discussion of the harms to anti-corruption policy that come from deeming contracts induced by bribery invalid, see generally Mathias Nell, *Contracts Obtained by Means of Bribery: Should They Be Void or Valid?*, 27 EUR. J.L. ECON. 159 (2009).

[156] It may be important in contract negotiations. *See* Olaf Meyer, *The Formation of a Transnational* Ordre Public *Against Corruption: Lessons for and from Arbitral Tribunals*, *in* ANTI-CORRUPTION POLICY: CAN INTERNATIONAL ACTORS PLAY A CONSTRUCTIVE ROLE? 229, 241 (Susan Rose-Ackerman & Paul D. Carrington eds., 2013).

[157] CHITTY ON CONTRACTS, *supra* note 143, § 29-077 (citing Parkinson v. Coll. of Ambulance Ltd., 2 K.B. 1 (1925)).

claimant had not pled it.[158] This is a most unfortunate strategic choice on the part of the claimant's counsel.

Restitution is a claim distinct from contract, sometimes called "quasi-contract." As an oft-cited English jurist explained,

> any civili[z]ed system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep . . . Such remedies in English law are generically different from remedies in contract or in tort, and are now recogni[z]ed to fall within a third category of the common law which has been called quasi-contract or restitution.[159]

Restitutionary remedies are thus available where the defendant has been unjustly enriched at the expense of the claimant. Restitution differs from contract in that the liability is imposed on the defendant "irrespective of the agreement of the parties."[160] Moreover, at common law the defendant's duty to provide restitution may be based upon the involuntariness of the transfer.[161] Note the obvious relevance to the *Duty Free* facts.

The *Duty Free* panel hinted that any potential restitution claim that Ali might have made (had he so pled) would depend on the existence of a "legal or equitable property interest" that would in turn require establishing title "without relying on his own illegality."[162] However, the panel failed to recognize that a legitimate property interest is but one of several principles on which restitution may be awarded, and is conceptually distinct from unjust enrichment. English law now recognizes several distinct principles upon which restitution may be granted: unjust enrichment is one; the existence of a legitimate property interest with which the defendant has interfered is another.[163]

Whether founded upon unjust enrichment or a legitimate property interest, the elements of restitution are quite simple: the defendant's enrichment by the receipt of a benefit; the enrichment occurred at the

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158 *See World Duty Free Co.,* ICSID Case No. ARB/00/7, ¶ 184.

159 CHITTY ON CONTRACTS, *supra* note 143, § 29-001 (citing Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd. A.C. 32, 61 (1943)).

160 *Id.* § 29-002. At equity, restitution has been awarded in particular where the defendant can be said to have exploited the claimant. *See id.* § 29-003.

161 *Id.* § 29-002.

162 *World Duty Free Co.,* ICSID Case No. ARB/00/7, ¶ 162.

163 CHITTY ON CONTRACTS, *supra* note 143, § 29-017.

claimant's expense; the retention of the enrichment must be deemed unjust; and the absence of a defense or bar to the claim.[164] English courts have recognized a variety of grounds on which the enrichment may be deemed unjust, including the defendant's unconscionable conduct.[165]

The potential applicability of this doctrine to the *Duty Free* facts is striking. The claimant could have, and likely should have, pled that the Republic of Kenya was enriched by expropriating the duty-free complex; that it did so at the claimant's expense; and that retention of that investment, absent the showing of a legitimate reason, was unjust. Given a broader policy of promoting foreign investment, such expropriation constitutes unconscionable conduct. The fact that the original contract was obtained by bribery would in no way undercut these claims; restitution does not depend on the existence of an enforceable underlying agreement. Neither would the claimant have to demonstrate that it had obtained title to the duty-free complexes without relying on illegality; the claimant would be relying on unjust enrichment principles rather than on the legality of the contract that granted him the property interest. That contract may very well be void or voidable, but this in no way precludes the claimant from pleading a valid unjust enrichment claim.

The *Duty Free* facts could easily have given rise to an alternative theory of contract in which the claimant had a protectable interest even though the contract was obtained by bribery. That it did not was due in part to the unfortunate strategic choices of claimant's counsel and the limited contractual analysis of the panel. Neither should now control the future validity of corruption claims in arbitration.

2. State Liability for Official Bribery: The ILC Articles

The panel also held that the state was not liable for the conduct of President Moi. This leg of the *Duty Free* stool proves no less faulty. The state liability rationale has three potential sources of legal justification: English and Kenyan law; the arbitral precedents; and international law. None of them can justify the panel's holding.

The tribunal finds that Moi "received"[166] (note the emphasis here on passive receipt rather than active solicitation) Ali's bribe and that

[164] *Id.* § 29-018.

[165] *Id.* § 29-028 (citing Rowe v. Vale of White Horse DC, [2003] EWHC (Admin) 388, [2003] 1 Lloyd's Rep. 418 (Eng.)).

[166] *World Duty Free Co.,* ICSID Case No. ARB/00/7, ¶ 169.

Moi's receipt is "not legally to be imputed to Kenya itself."[167] It first held that "[t]here is no warrant at English or Kenyan law for attributing knowledge to the state (as the otherwise innocent principal) of a state officer engaged as its agent in bribery."[168] The panel put the burden of persuasion on WDF to show that the bribery could be attributed to the State; in the absence of any specific law on point concerning the State's liability, the panel assumed that the act could not be thus attributed to the State. This reflects a curious and unfounded choice by the panel. Though it may well be true that no "warrant" existed in English or Kenyan law for holding the State liable, neither did the panel provide a warrant for *not* holding the State liable. That is, the law appears neutral on this point: the Kenyan Constitution and national legislation appear to be largely silent on whether and when the State is liable for the conduct of its officials.[169] Neither does English law appear to address the issue conclusively.[170]

[167] *See id.* ¶ 168. The opinion asserts, but does not explain, that a covert payment by definition cannot be attributed to the State. Further, because the payment was covert, the Republic did not make an affirmation or waiver of the bribery; while Moi knew of the bribery scheme, the State did not. *See id.* ¶ 184.

[168] *Id.* ¶ 185.

[169] The Constitution of Kenya, while qualifying that its provisions are considered superior to customary international law in Kenyan courts, nonetheless states, "The general rules of international law shall form part of the law of Kenya." CONSTITUTION, art. 2 (2010) (Kenya). In addition, the government is bound by the judgment rendered in ICSID arbitrations. The Arbitration Act, (2012) Cap. A 4/95 § 41 (Kenya); *see also* Investment Disputes Convention Act, (2012) Cap. 522 § 4 (Kenya) ("An award rendered pursuant to the Convention, and not stayed pursuant to the relative provisions of the Convention, shall be binding in Kenya, and the pecuniary obligations imposed by the award may be enforced in Kenya as if it were a final decree of the High Court.").

[170] The State Immunity Act ("Act") is the primary legislation controlling issues of state liability in English law. Section 1(1) of the Act grants general immunity to a foreign State within English courts unless the conduct of the State falls within enumerated exceptions described in subsequent sections of the Act. State Immunity Act 1978, c. 33, § 1. Relevant to World Duty Free, "[w]here a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration." *Id.* § 9(1). The statutory language suffers no defect in clarity; English courts have consistently held "the Act is as plain as plain can be." Al-Adsani v. Government of Kuwait (No. 2), [1996] 107 I.L.R. 536, 549 (Eng. A.C.).

The Act contemplates that the scope of the "State" extends to "include references to (a) the sovereign or other head of that State in his public capacity; (b) the government of that State; and (c) any department of that government." State Immunity Act § 14. In practice, English courts regard heads of State as servants or agents of the State such that their conduct renders the State liable under the Act. *See, e.g.*, R. v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 3), [2000] 1 A.C.

The panel thus provided no legal basis for placing this burden on the claimant. Frankly, it seems to represent a smuggled-in policy preference for releasing the state from liability for its official's bribery.

A second potential legal foundation for not holding Kenya liable for Moi's acts — one which the *Duty Free* panel did not use — would be the precedents in investor-state arbitration; but these provide no help. Two arbitration cases touched on the issue of state responsibility, but neither ultimately resolved the substantive question of whether a state official's solicitation and/or acceptance of a bribe can be attributed to the state.[171] Another case dealt with solicited but unconsummated

147 (H.L.), ¶ 270 (appeal taken from Eng.). This approach parallels traditional English tort liability theory, which holds the Crown jointly and severally responsible "in respect of torts committed by its servants or agents." Crown Proceedings Act, 1947, 10 & 11 Geo. 6, c. 44, § 2(1)(a).

Reading § 9(1) and § 14 together, nothing in the Act immunizes the State from liability in an international investor-state arbitration if, according to § 9(1)(a), the head of State acts in his or her public capacity. Few English cases, however, have addressed what constitutes a servant or agent of the State acting in a public capacity. The English Court of Appeal (Civil) has suggested that State liability is not imputed from a State agent who violates the law while acting in a private undertaking. *See* Propend Finance Pty. Ltd. v. Sing, [1997] 111 I.L.R. 611, 613-14 (A.C.). Prior to passage of the Act, the House of Lords had immunized the State from responsibility where public officials were *not* engaged in a private undertaking. *See* Rahimtoola v. Nizam of Hyderabad, [1958] A.C. 379, 395-96 (H.L.) (appeal taken from Eng.). English common law recognized absolute state immunity when *Rahimtoola* was decided, whereas the Act permits state liability through its enumerated exceptions. *See* Jones v. Saudi Arabia, [2006] UKHL 26, ¶¶ 9-10 (H.L.) (appeal taken from Eng.) (upholding state immunity where claims did not fall within any of the Act's enumerated exceptions). English law, however, has not addressed State liability where a claim falls within the enumerated exception and the State agent acts in a public capacity. *See generally* Zachary Douglas, *State Immunity for the Acts of State Officials*, 82 BRIT. Y.B. OF INT'L L. 281 (2012), *available at* http://bybil.oxfordjournals.org/content/82/1/281.full#xref-fn-4-1.

171 Southern Pacific Properties v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, (May 20, 1992), 3 ICSID Rep. 189 (1995), is the earliest case that Llamzon reports on where an ICSID tribunal addressed corruption to any significant degree. There, a Hong Kong company and an Egyptian public sector entity formed agreements to develop two tourist complexes in Egypt. When ancient artifacts were discovered in the area to be developed, the Egyptian government cancelled the project and placed the venture in trusteeship. When the claimant alleged an illegal expropriation, Egypt raised the defense that the venture had been formed through bribery. The majority ultimately declined to address the corruption claims either factually or legally, though the dissent argued at length that Egypt had met the burden of proof and that the panel should have addressed the legal implications of bribery. *See* LLAMZON, *supra* note 113, ¶¶ 6.71-6.80. Similarly, in Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/03/25, (Aug. 16, 2007), (ICSID 2007), a German company invested in a Philippine company for the construction of an airport terminal. For a variety of reasons, the Philippine government eventually

corruption, and produced a holding that juxtaposes with *Duty Free* in the most curious of ways. Atypically, it was the investor, and not the state, who alleged corruption, and did so as his principal claim rather than as a defense. The claimant, a UK investor, alleged that the then-Prime Minister of Romania solicited a $2.5 million bribe after forming the original agreement related to the operation of duty-free stores.[172] When the investor declined to pay the bribe, the government allegedly changed the regulations concerning duty-free complexes so as to effectively expropriate the claimant's investment.[173] Ultimately the tribunal concluded that the claimant had not met his burden of proof with respect to bribery solicitation.[174] However, the panel conceded that the solicitation of a bribe, if proven, would constitute a violation of the fair and equitable treatment obligation under the BIT as well as a violation of international public policy.[175]

This precedent actually cuts against the *Duty Free* holding: it suggests that the state should indeed be held liable for the bribery solicitation of its head of state. Though *EDF v. Romania* is materially different in that the claimant had not participated in the bribery scheme, that fact alone may not require a different outcome. Nonetheless, the difference underscores the "near-singularity of *World Duty Free* in the case law."[176] The arbitral precedents ultimately provide no guidance on the question presented in *Duty Free*: whether the state should be liable for the bribery of its head of state where the private party was complicit in the bribery.

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voided the agreement, and the German investor sued for breach of the investment treaty. The Philippines government alleged that the German investor had engaged in various forms of corruption in violation of Philippine law, thus taking the investment outside the protections of the investment treaty. The claimant argued that the government was estopped from asserting the illegality defense because it knew the agreements were illegal. However, the tribunal held that because the agreements were covert, and not generally known to the relevant government agencies, the State did not have knowledge of the transaction and therefore the estoppel argument fails. *See* LLAMZON, *supra* note 113, ¶¶ 6.169-6.190.

172 EDF (Services) Ltd. v. Romania, ICSID Case No. ARB/05/13, Award ¶ 71 (Oct. 8, 2009).

173 *See id.* ¶ 69.

174 *Id.* ¶ 237.

175 *Id.* ¶ 221. Notably, because the panel ultimately found that the claimant had not met his burden of proof, its statements concerning state responsibility are dicta. So too are they basically asserted, with virtually no supporting argumentation. While the principle thus endorsed in dicta is normatively agreeable to this author, it must be conceded that the case hardly provides a bedrock precedent for anti-corruption law in international arbitration.

176 LLAMZON, *supra* note 113, ¶ 10.26.

A third potential source of law on state responsibility for corruption is international law, particularly the United Nations' International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts.[177] Although the ILC Articles were drafted in the form of a treaty but never adopted,[178] "international courts and tribunals have applied the Articles virtually in full, treating them as a functional equivalent of the customary international law on State responsibility."[179] The ILC Articles lay out general principles of state responsibility for wrongful acts, without specifying particular kinds of violations (such as corruption).

The *Duty Free* panel did not rely upon the ILC Articles, or any other source of international law, in its award; why it avoided this area of law is unclear. Part, but only part, of the answer is that the contract at issue contained a choice of law provision that specified English and Kenyan law. And Article 42(1) of the ICSID Convention provides that "[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties."[180] However, this does not necessarily preclude application of the articles insofar as they constitute customary international law. While the tribunal was thus to apply English and Kenyan law, customary international law can be deemed a part of English law.[181] So too does the Kenyan Constitution

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[177] *Id.* ¶ 10.59 (quoting Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, *in* Rep. on the Work of Its Fifty-Third Session, U.N. GAOR, 53rd Sess., Supp. No. 10, U.N. Doc. A/56/10, cmt.150 at 46 (2001)).

[178] *See* Daniel Bodansky et al., *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AM. J. INT'L L. 857, 872-73 (2002).

[179] LLAMZON, *supra* note 113, ¶ 10.12.

[180] INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, ICSID/15, ICSID CONVENTION, REGULATIONS AND RULES, art. 42(1) (Apr. 2006).

[181] In the case of *World Duty Free*, the issue turns on whether the ILC Articles are considered customary international law such that the arbitration panel should have consulted their guidance when determining whether the President implicated the Kenyan government when soliciting bribes from the WDF investor. The Arbitration Tribunal has held up the ILC Articles in the past as a "fair expression" of customary norms in international law but not customary international law *per se* such that arbitrators are compelled to apply ILC Articles when gaps in the applicable State law are present. *See* Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Annulment Proceeding (June 29, 2010) ¶ 168, *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1550_En&caseId=C8 ("[T]he ILC Articles, although not constituting a source of customary law still . . . represents a fair expression of such law . . . ."). Where gaps ("lacunae") in the applicable body of law specified in the choice-of-law provision of either an international arbitration treaty or concessions

provide that the "general rules of international law shall form part of the law of Kenya."[182] Accordingly, it appears that the panel made a conscious decision to stay away from international law generally and the ILC Articles specifically when deciding the question of Kenya's liability for Moi's solicitation and acceptance of the bribe.

The omission is regrettable,[183] because reliance on the ILC Articles would have produced a very different precedent. Under the ILC Articles, the conduct of any State organ is attributable to the State, irrespective of whether the organ exercises executive, legislative, judicial, or any other functions.[184] This is true regardless of the official's level of authority within the agency, be it high-level or low-level.[185] That is, whether a head of state such as Moi or a low-level administrator or clerk engages in the corruption is irrelevant for attributing responsibility to the State.

Because corruption is generally defined as the abuse of public office for private gain,[186] corruption by definition involves a personal motivation for the wrongful conduct, that is, a motivation to benefit

contract are present, customary international law acts as a gap filler pursuant to ICSID Art. 45(1). *See* Andrea K. Bjorklund, *Mandatory Rules of Law and Investment Arbitration*, 18 AM. REV. INT'L ARB. 175, 176 (2007); *see also* LLAMZON, *supra* note 113, ¶ 10.28 n.51 (citing W. Michael Reisman, *The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Its Threshold*, 15 ICSID REV.-FOREIGN INV. L.J. 362 (2000)) (explaining that an ICSID panel should apply international law, *inter alia*, where the law of the contracting State party to the dispute calls for the application of international law, including customary international law, and where the subject matter of the dispute is directly regulated by international law).

182 CONSTITUTION, art. 2 (2010) (Kenya).

183 *See* LLAMZON, *supra* note 113, ¶ 10.29.

184 Article 4 reads in full, "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State." Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, *in* Rep. on the Work of Its Fifty-Third Session, U.N. GAOR, 53rd Sess., Supp. No. 10, U.N. Doc. A/56/10, ch. IV.E.1, art. 4 (2001) [hereinafter *2001 ILC Report*].

185 *Id.* at 31, 39 ¶ 5 (2001) (citing LaGrand (Ger. v. U.S.), Provisional Measures, 1999 I.C.J. Reports 9, at 16 ¶ 28 (Mar. 3, 1999)).

186 The language was adopted by the World Bank and is considered the most common substantive legal definition of corruption in circulation. Alternatively, Black's Law Dictionary defines corruption more precisely as "a fiduciary's or official's use of a station or office to procure some benefit either personally or for someone else, contrary to the rights of others." Minor variants of either definition appear in various legal contexts and scholars disagree whether either is an adequate representation of the term. *See* Spalding, *Corruption*, *supra* note 6, at 1388-90 (tracing and analyzing the intellectual roots of modern definitions of corruption and proposing a new definition).

personally and privately rather than for the benefit of the state. Such personal motives however do not take the conduct outside of the ILC Articles. The Commentary to the ILC Articles makes this clear: "It is irrelevant . . . that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State."[187] The comment cites prior cases to explain that public conduct that is abused for private gain is different from private conduct,[188] and cross references a separate Article which provides that an official's conduct "shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."[189] Indeed, this section almost seems to be drafted with corruption in mind.

Note that these passages are entirely consistent with the dicta in *EDF*, in which the panel agreed with the Claimant that the unconsummated solicitation of a bribe should be attributed to the state (but found that the Claimant had failed to meet the standard of proof for the bribery). Why the *Duty Free* panel ruled otherwise where the act of bribery was consummated is far from clear.

In his leading academic treatise on corruption in arbitration, Llamzon tries to draw from the ILC Articles an inference that the State responsibility question does in fact hinge on whether the corruption is consummated; he argues that the ILC Articles support the holdings of both *EDF v. Romania* and *Duty Free v. Kenya*. That is, though the State bears responsibility for an unrequited bribery solicitation by one of its officials, the State is not responsible when the bribe is actually paid: the payor's participation in the bribe thus strips the solicitor's State of liability for the State official's solicitation and receipt. Put another way, although a State is liable when its official solicits a bribe that is not paid, the State is not liable when its official solicits a bribe that is paid; the State is liable for unsuccessful solicitation, but not for successful solicitation. Given the starting point that is plain in the ILC Articles and acknowledged by Llamzon — that the State is responsible for its official's abusive acts even when motivated by private gain — this would seem a formidable task. The chasm between State liability for an unsuccessful bribe solicitation and lack of liability for a successful solicitation is wide indeed.

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[187] *2001 ILC Report*, *supra* note 184, at 42 ¶ 13.

[188] *See id.* (citing Francisco Mallén (United Mexican States) v. United States, 4 R.I.A.A. 173, 173-78 (1927).

[189] *Id.* at 45.

To bridge that gap, Llamzon makes much of the following comment to the ILC Articles:

> One form of *ultra vires* conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction . . . So far as responsibility for the corrupt conduct is concerned, various situations could arise which it is not necessary to deal with expressly in the present articles. Where one State bribes an organ of another to perform some official act, the corrupting State would be responsible either under article 8 or article 17. The question of the responsibility of the State whose official had been bribed towards the corrupting State in such a case could hardly arise, but there could be issues of its responsibility towards a third party . . .[190]

This comment would seem to admit of a natural and unproblematic reading. When a State official accepts a bribe — note the word "acceptance" and not merely "solicitation" — Article 7 would apply. And Article 7 is precisely the section that explains that an official's act is attributed to the State "even if it exceeds authority or contravenes instructions."[191] Quite simply, this comment clarifies what would seem to be a rather intuitive notion — that the bribe payor's participation in the bribery scheme does not strip the soliciting official's State of responsibility.

The comment further explains that in the rather uncommon situation in which the bribe payor is not a private citizen but the official of another State, the bribe payor's State also becomes liable.[192] That is, State liability attaches for both the official supply and the official demand of bribes. But the solicitor's State would not be liable to the payor's State; this could "hardly arise." Rather, the solicitor's State could be liable to a third party (presumably a private litigant). Again, this seems a straightforward reading of the comment.

However, Llamzon reads this comment to suggest that the willing participation of the bribe payor "may" render a different outcome even where the bribe payor is a private party. He asserts that the willing participation of the bribe-paying investor, who knows the State official

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[190] *Id.* at 46 n.150; LLAMZON, *supra* note 113, ¶ 10.59.

[191] *2001 ILC Report, supra note 184,* at 45.

[192] These articles concern conduct directed or controlled by a State. *See id.* at 47. Because these articles are invoked in the comment only to describe a bribery transaction between two states, rather than between a state and a private party, I do not discuss them at length here.

is acting illegally and for private gain, "arguably negates the application of ordinary attribution rules."[193] But Llamzon never clearly explains precisely why this is so — that is, why the payor's complicity and knowledge of the solicitor's illegality negates State responsibility. The closest he gets is the recognition that when the payor is another State, the solicitor's State is not liable to the payor's State. Llamzon restates that principle to hold that "[t]he corrupt official's acts are *not* attributable to the State if the entity invoking such responsibility had participated in the corrupt conduct"[194] But the comment makes clear this principle applies only where the "entity" is a State. Importantly, this principle follows the comment's plain statement that the State official's acceptance of a bribe would trigger liability under Article 7. In sum, while Llamzon discusses at some length the distinction between the presence and absence of a knowing and willing bribe payor in investor-state transactions, it remains a distinction without a difference. He simply never establishes the causal link between the investor's participation and the negation of state responsibility.[195]

In sum, the *Duty Free* holding on state liability for an official's corruption appears to have no legal justification. It is not required by English or Kenyan law; it draws no support in the arbitral precedents; and international law's principle document on state liability almost certainly recommends the opposite outcome.

3. Anti-Corruption Policy: Dislodging Lagergren

The third leg on which the *Duty Free* holding rests — anti-corruption policy — is perhaps the least weak of the three. It, at least, establishes a solid footing in an accurate account of the global anti-corruption instruments. However, the panel's effort to build an argument upon this footing ultimately fails. The award draws upon the award of the highly regarded Judge Lagergren, a Swedish jurist, who developed an early jurisprudence of corruption in a commercial bribery arbitration case. But in trying to apply the Lagergren logic to the problem of consummated official bribery, the missile gets sideways. Not appreciating the critical differences between a

193 LLAMZON, *supra* note 113, ¶ 10.58.

194 *Id.* ¶ 10.62.

195 For an argument for the importance of recognizing state responsibility in the arbitration of corruption claims, but that does not involve the ILC Articles, see Hilmar Raeschke-Kessler & Dorothee Gottwald, *Corruption in Foreign Investment — Contracts and Dispute Settlement Between Investors, States, and Agents*, 9 J. WORLD INV. & TRADE 5, 15-16 (2008).

commercial contract for the bribery of a government official and a contract procured by bribery, the *Duty Free* award undermines the very policies it claims to advance.

The *Duty Free* award begins by describing the international (or "transnational") public policy — which it defines as "an international consensus as to universal standards and accepted norms of conduct" — against corruption.[196] It acknowledges the importance of caution in claiming the "objective existence" of such a policy and, heeding its own warning, then takes great pains to document that existence. The panel should be commended for the careful choice of words that follows. It notes that "bribery or influence peddling, as well as both active and passive corruption" are prohibited in virtually every country in the world.[197] Note the careful attention to what is more widely described as the "supply side" and the "demand side" of bribery: both the offering and paying of a bribe as well as the solicitation and acceptance.[198] The tribunal then provides a litany of international anti-corruption conventions to support the objective existence of a norm against both the supply and demand of bribes. These include the OECD Convention Against Bribery, several regional instruments from Europe, the Americas, and Africa, and then ultimately the U.N. Convention Against Corruption.[199] Notably, the Tribunal does not, at the onset, aim to focus its condemnation on

[196] World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, ¶ 139 (Oct. 4, 2006), 46 I.L.M. 339 (2007).

[197] *Id.* ¶ 142.

[198] "Active" bribery refers to the offering and payment, while "passive" refers to the acceptance; "bribery" and "influence peddling" may refer to either. *See id.*

[199] *See id.* ¶¶ 143-45. *See generally* United Nations Convention Against Corruption, Oct. 31, 2003, S. TREATY DOC. No. 109-6, 2349 U.N.T.S. 41 (agreeing to adopt measures to prevent and combat corruption); African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5 (agreeing to adopt measures to prevent, detect, punish, and eradicate corruption); Council of Europe: Civil Law Convention on Corruption, Nov. 4, 1999, E.T.S. No. 174, *available at* http://www.conventions.coe.int/Treaty/EN/Treaties/Html/174.htm (agreeing to pass measures that provide remedies to those who suffer damages as the result of corruption); Council of Europe: Criminal Law Convention on Corruption, Jan. 27, 1999, E.T.S. No. 173 (agreeing to pass measures criminalizing active and passive bribery of government officials); Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, 37 I.L.M. 4 (agreeing to adopt standards criminalizing bribery of government officials in international business transactions, focusing on the supply side of bribery transactions); Organization of American States, Inter-American Convention Against Corruption, Mar. 29, 1996, S. Treaty Doc. No. 105-39 (agreeing to enforce standards preventing, detecting, punishing, and eradicating bribery of government officials).

either side of the corrupt transaction; it condemns the supply and demand of bribes alike.

However, the opinion then takes a turn, so subtle that its impact on the ultimate resolution of the case may at first go unnoticed. Having documented the transnational public policy, it then cites an impressive number of arbitral awards where the tribunals had to "consider . . . corruption."[200] It begins with the foundational arbitral award issued in 1963 by the respected Judge Lagergren.[201] That case involved an agreement between two private parties for the payment of a commission that, in the course of the arbitral hearing, Lagergren came to believe would be used in substantial part to pay bribes.[202] In other words, it was a contract between two private parties to bribe a public official. Importantly, it was not a contract between a private party and a government official obtained through bribery. Lagergren concluded that this contract for the payment of bribes involved "such gross violation of good morals and international public policy" that the arbitration panel lacked jurisdiction.[203]

But the *Duty Free* tribunal seemingly fails to appreciate a simple but profound material difference between the facts before Judge Lagergren and the *Duty Free* facts. Because it was a contract for the bribery of an official, and not a contract with an official procured through bribery, it involved neither expropriation nor state bribery. Simply put, neither of the parties was the state, and expropriation by the state was not implicated.[204] Similarly, the Lagergren holding could not incentivize the state official's solicitation and acceptance of a bribe because again, none occurred. While Lagergren's holding disincentivized the supply of bribes — the panel refused to hear a claim for breach of a contract for official bribery — it had no bearing on the demand for bribes. Just as with expropriation, the solicitation and acceptance of a bribe was not part of the facts that gave rise to Lagergren's jurisprudence.

For both these reasons, the Lagergren holding did not, and could not, incentivize or protect official bribery. Because the state had not expropriated property (or, for that matter, done anything else

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200 *World Duty Free Co.*, ICSID Case No. ARB/00/7, ¶ 148.

201 The award is reprinted in J. Gillis Wetter, *Issues of Corruption Before International Arbitral Tribunals: the Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case No. 1110*, 10 ARB. INT'L 277, 282-94 (1944).

202 *See id.* at 294.

203 *World Duty Free Co.*, ICSID Case No. ARB/00/7, ¶ 148.

204 The panel observes, without comment, that in Judge Lagergren's facts neither party to the case had been able to "reap the fruits of his own dishonest conduct by enriching himself at the expense of the other." *Id.*

wrongful) the state is not reaping a reward from a prior act of bribery (as occurred in *Duty Free*). More fundamentally (and obviously), a state official had not, in the Lagergren facts, solicited or accepted bribery, so the holding did not serve to provide a defense to state bribery. In both respects — the absence of both an underlying act of bribery and a subsequent wrongful state action that flowed from prior official bribery — the Lagergren logic does not incentivize or protect official bribery.

As has been widely noted in the commentary, the *Duty Free* holding does this very thing. The Republic of Kenya is insulated from the bribery of its former head of state and is able to keep the $30 million business it expropriated. While others have objected that *Duty Free* protects, if not incentivizes, expropriation,[205] from the perspective of anti-corruption policy the problem runs far deeper.

Relying on Lagergren, *Duty Free* exacerbates preexisting problems in global anti-corruption enforcement. First, it exacerbates the disproportionate focus on supply-side enforcement. ICSID, like the DOJ, is left punishing only the supply of bribes to public officials, leaving the demand untouched. Despite the international instruments' focus on both the supply and demand side of bribes, and *Duty Free*'s claim of advancing global policy, *Duty Free* in fact merely reinforces existing shortcomings in the global effort to translate policy into practice.

Second, *Duty Free* will tend to discourage investment in developing countries among companies that are subject to a prohibition on foreign bribery. Indeed, the panel explicitly stated that Ali freely chose to pay the bribe — that is, was not pressured to pay it by the government's solicitation — because he freely chose to invest in Kenya. Put another way, if he wanted to retain his rights in commercial transactions, he should invest somewhere else. This runs counter both to the original policies behind anti-bribery law as well as to the purposes of arbitration: incentivizing foreign investment in developing countries to build those countries' economies and raise their legal standards.

Third, the focus on supply-side enforcement, combined with the discouragement of investing in developing countries, will in turn tend to exacerbate ownership substitution. Because *Duty Free* does not address the demand side, it signals to government agencies that their

[205] *See* Michael A. Losco, *Streamlining the Corruption Defense: A Proposed Framework for FCPA-ICSID Interaction*, 63 DUKE L.J. 1201, 1233 (2014) (describing how investigations by the FCPA could incentivize expropriation of assets and is fueled partially by the award in *Duty Free*).

officials may continue to solicit bribes without fear of being held accountable in arbitration. Where companies that are reluctant to pay bribes are discouraged from entering a market, and that market's officials continue to solicit foreign investment and condition that investment upon bribes, these conditions will tend to invite companies from countries that do not enforce foreign bribery prohibitions. As this article alluded to above and has been demonstrated elsewhere, this will not always tend to drive down rates of bribery in foreign countries. Indeed, it may tend to drive them up. And if one assumes that a corrupt government will tend to perform more poorly for its citizens, it is precisely those citizens whom the *Duty Free* logic fails to help. They become vulnerable to the predations of companies who bribe without fear of penalty.

Finally, it must not be forgotten that many of the government officials whom *Duty Free* protects are themselves charged with deciding whether to enforce domestic anti-bribery laws. In signaling to government officials that they will not be held accountable for soliciting and accepting bribes, so too does it signal that they will continue to profit from the non-enforcement of their own laws. As one scholar explained, the state's "monopoly on initiating sanctions under the criminal law creates a conflict of interest that impedes effective enforcement."[206] In this way, *Duty Free* retards the movement toward effective domestic enforcement that could otherwise counter the uneven supply-side enforcement and tend to level the playing field.

The panel acknowledged that the effect of its interpretation of the contract is to provide the Republic of Kenya a complete defense to its officer's bribery: the head of state solicited and received the bribe, but the state would keep the expropriated business and the claimant would lose his $30 million investment.[207] The tribunal noted that it "remains nonetheless a highly disturbing feature" that the solicitor and recipient of the bribe was Kenya's head of state, and yet the Republic of Kenya benefitted from the decision. But, it argued, as a matter of public policy and its impact on contract law, "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."[208]

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[206] Abiola O. Makinwa, *Defining a Private Law Approach to Fighting Corruption*, *in* ANTI-CORRUPTION POLICY: CAN INTERNATIONAL ACTORS PLAY A CONSTRUCTIVE ROLE? 267, 268 (Susan Rose-Ackerman & Paul D. Carrington eds., 2013).

[207] *See World Duty Free Co.*, ICSID Case No. ARB/00/7, ¶ 180.

[208] *Id.* ¶¶ 180-81. Citing 200-year-old case law, the tribunal maintained that the validity of this contract interpretation in no way hinged on the injustice of the result

But this line of reasoning perfectly encapsulates the shortcomings of *Duty Free*. However sound Lagergren's logic may be in matters of commercial bribery,[209] when applied to contracts with the state in which a state official solicited and accepted a bribe, the Lagergren logic proves simply disastrous. For the reasons stated above, this logic will compound the very problems that now plague anti-bribery enforcement. And it is precisely the citizens of poorer countries who will bear the brunt of these failures.

CONCLUSION

This article has detailed the systemic weakness of the *Duty Free* award, exposing the fundamental flaws in each of its three legal supports. It has sought to remove the impediment that is *Duty Free* to developing the potential of ISDS as a form of private anti-bribery enforcement. I have been careful to avoid wading into any of the more technical questions of arbitration procedure, including the issue of whether corruption relates to the jurisdiction of the panel or the admissibility of the claim;[210] the extent to which the fact-finding capacities of arbitration tribunals constrain their ability to serve as a venue of private enforcement;[211] or the availability of remedies. Accordingly, this article does not purport to provide a comprehensive blueprint for the arbitration of corruption claims; rather, it has deconstructed the stool that now stands, clearing the way for the construction of a new and far more effective arbitral jurisprudence of corruption.

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to the claimant; the panel declared the contract null in the name of the public. *Id.* ¶ 181 (citing Holman v. Johnson, (1775) 1 Cowp. 341, 343). It cited a treatise for the common law principle that a plaintiff whose cause of action arises from the transgression of a positive law "has no right to be assisted;" that is, because the plaintiff violated anti-bribery laws in procuring the contract, the agreement is void and he has no right against the expropriation. The tribunal explained that "[i]t is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff." *Id.*

209 *See, e.g.*, Mohamed Abdel Raouf, *How Should International Arbitrators Tackle Corruption Issues?*, 24 ICSID REV.: FOREIGN INV. L.J. 116, 119-20 (2009).

210 *See, e.g.*, Zachary Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, 29 ICSID REV. 155, 177 (2014) (discussing question of admissibility); Divya Srinivasan et al., *Effect of Bribery in International Commercial Arbitration*, 42 INT'L J. PUB. L. & POL'Y 131, 132 (2014) (discussing admissibility, arbitrability, and investigative powers).

211 *See* Carrington, *supra* note 2, at 163 (arguing that it would be necessary to include provisions empowering exposure of governmental records and examination of witnesses).

In so doing, it has challenged the claim, perhaps made most prominently by Jason Yackee, that *Duty Free* represents a "zero-tolerance"[212] approach to bribery. A holding that provides an absolute defense to the state's solicitation and acceptance of bribes does no such thing. Rather, it reinforces and exacerbates deep structural imbalances that now exist in anti-bribery enforcement, whereby select capital-exporters enforce prohibitions against those companies subject to their jurisdiction, while corrupt officials continue to demand bribes without penalty and companies from non-enforcing home countries do the same. *Duty Free* represents a zero-tolerance approach to the supply of bribes, but facilitates the demand side.

So too has this article sought to bring out of the "shadows" the intuition, articulated at such length in arbitration conferences and academic commentary, and intimated in the *Duty Free* award itself, that this state of affairs simply does no good. That intuition need not remain clandestine, for it actually stands upon far stronger legal footing than the *Duty Free* award. That footing has three components. First, just as a corporation will be held liable for the bribery of its head officer, so too should a state be liable for the bribery of its chief officer. There is simply no reason why it should not, and ample reason in law and policy why it should. Second, where a state has taken the advantage of a contract founded on reciprocal bribery, the aggrieved business may state a claim for unjust enrichment that does not depend upon the enforceability of the underlying contract. Third, global anti-corruption policy condemns with equal force the supply and demand of bribes, and an arbitral jurisprudence that prohibits one while incentivizing the other does not advance that policy; indeed, it only makes current problems in anti-bribery enforcement worse.

A better jurisprudence could make those problems better. It could compensate for existing imbalances between supply-side and demand-side enforcement, as well as discrepancies in the amounts of enforcement resources that capital-exporting countries may or may not dedicate to anti-bribery law. The benefits of private enforcement could thus begin to supplement existing public enforcement, and help to create a truly "level," equitable, and effective global anti-corruption regime.

So too might a better jurisprudence help to insulate investor-state dispute settlement from one of its most formidable attacks. Perhaps the most robust criticism of ISDS today concerns its alleged

[212] *See* Jason Yackee, *Investment Treaties and Investor Corruption: An Emerging Defense for Host States?*, 52 VA. J. INT'L L. 723, 732-33 (2012).

empowering of corporations to assert rights against host countries that may limit those countries' ability to legislate for the public welfare. This is variously framed in terms of encroachments on sovereignty, or "regulatory chill." The flashpoint for this criticism has been the arbitration claims of Philip Morris against Uruguay for requiring prominent health warnings on tobacco packaging.[213]

But whatever the extent to which investor protections of other kinds may cause regulatory chill, a protection against corruption would not. An investor's claim against a host country for corruption would not encroach upon any legitimate state prerogative; it would chill nothing, save corruption. Indeed, this may be among the best examples of how empowering foreign corporations to bring claims against host governments would actually enhance the state's capacity to regulate for the public welfare. It would tend to render governments more transparent, responsive, and legitimate. Developing a more balanced corruption jurisprudence may ultimately serve to protect ISDS from its detractors and increase the chances of its inclusion in future transnational agreements.

[213] *See* Patricia Ranald, *Expropriating Public Health Policy: Tobacco Companies' Use of International Tribunals to Sue Governments over Public Health Regulation*, 73 J. AUSTL. POL. ECON. 76, 91 (2014).