

Issues in Combatting Transnational Corruption

LIDS Global, Volume I

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Harvard Law & International Development Society

a community dedicated to challenges at the intersection of law, policy and development

EDITORIAL NOTE

The contributions to LIDS Global Volume I represent the views of the respective authors. The opinions expressed herein do not reflect the positions of Harvard Law School, the Harvard Law and International Development Society (LIDS), or the Volume I editors. The editors have merely reviewed and compiled the finished work products of the contributing schools. The authors were responsible for verifying their own source material. Writing and citation styles have been maintained in their original form to the fullest extent possible.

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INTRODUCTION

The Harvard Law & International Development Society (LIDS) is a student-run organization that focuses on issues intersecting with law, policy, and international development. The LIDS current and former Co-Vice Presidents of Global Collaborations are proud to present Volume I of the LIDS Global Initiative.

In the past, LIDS members have participated in various pro bono projects supervised by Orrick, Herrington and Sutcliffe, LLP, which have produced legal and policy analysis for a variety of clients. LIDS also formed and maintained networks with the local international development community. During the 2013-2014 academic year, LIDS launched a pilot initiative, LIDS Global, to facilitate collaborations and networks with students also interested in development outside of the United States. Additionally, LIDS Global provided a platform for students around the world to share their invaluable insight on development issues and to more broadly participate in academic discourse on relevant development topics. Law schools from Singapore, Tanzania, India, the Philippines, and Sri Lanka formed the inaugural LIDS Global research teams and Volume I presents the research papers of the first four schools. Sri Lanka's contribution will be published in Volume II, which will examine the relationship between corruption and freedom of information laws.

The topic of Volume I, corruption, is a follow-up to a 2012-2013 LIDS project that was published in the American Bar Association's *Criminal Justice Magazine*, "Access to Remedies for Transnational Public Bribery." The paper proposed that victims of corruption in developing countries should be compensated for their injuries through the U.S. anti-corruption law, the Foreign Corrupt Practices Act.

While the main argument of the paper explored the need for more robust transnational compensation, the paper left significant unanswered questions related to how compensation should be distributed. The paper did not consider how corruption uniquely affects different countries or non-civil suit alternatives for combatting corruption.

As a result, LIDS developed a collaborative research project and invited law students from Singapore, Tanzania, India, the Philippines, and Sri Lanka to address at least one of the gaps of "Access to Remedies for Transnational Public Bribery" with respect to corruption in either their country or geographic region. Each contribution to Volume I is expansive and ambitious. Indeed, corruption is a multi-faceted challenge that can only be overcome by broad cooperation and free thought.

Below are brief abstracts of the partner school papers, which comprise the chapters that follow the opening section: "Access to Remedies for Transnational Public Bribery."

National University of Singapore; p. 24

Our partners at the National University of Singapore have provided an excellent in-depth look at the success of their country's own anti-corruption laws and their potential for improving the development prospects of Singapore's neighbors, and they conclude that Singapore's robust anticorruption laws are guiding Southeast Asia to a cleaner future. The authors respond directly to the "Access to Remedies for Transnational Public Bribery" LIDS article, finding that compensation for victims is, at this time, unworkable and unnecessary in the Singaporean context. Indeed, the best way to facilitate relief to citizens of "demand-side" countries is to set a good example for their own governments.

University of Dar es salaam Law and Development Organization (UDLDO), Tanzania; p. 37

UDLDO was in the unique and invaluable position of being able to directly evaluate the effectiveness of providing access to remedies for victims of corruption. In a widely publicized case, British Aerospace was fined millions of pounds for bribing Tanzanian government officials. The United Kingdom's Serious Frauds Office decided, in 2012, to send nearly thirty million pounds of the disgorged funds to bolster the Tanzanian government's education budget. The students in UDLDO concluded that this was an inappropriate solution, and that future efforts to compensate victims of corruption should involve local civil society.

University of the Philippines Student Organization for Law and International Development (U.P. SOLID); p. 53

U.P. SOLID ambitiously proposes a private right of action (as opposed to a *cause* of action) for any citizen to sue corrupt actors on behalf of the government. This model is based on the "derivative lawsuit" model found in many corporate legal codes in the Philippines, but it specifically rejects providing compensation for "victims." Instead, the disgorged funds would be returned to the government. This is a specific proposal to involve the public in the fight against corruption.

National Law School of India University, Bangalore; p. 75

This team chose to tackle one of anti-corruption's most complex problems—deciding where corruption stops and legitimate political activity begins. The authors argue that anti-corruption efforts should not be limited to the government abuse of power, such as the Foreign Corrupt Practices Act, but should also address bureaucratic corruption. In the context of India, the authors conclude that identifying the victims of corruption and options for civil remedies or compensation is less likely solution for reducing both political and bureaucratic corruption. In the alternative, they suggest that the protection of whistle blowers or stringent accountability measures through criminal law be strengthened.

Access to Remedies for Transnational Public Bribery: A Governance Gap

The Harvard Law and International Development Society

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Transnational public bribery—that is bribery of foreign public officials by corporations—is a practice that victimizes the foreign country’s population. Its impacts are particularly adverse when the bribery occurs in developing countries. The home states of corporate bribe-givers should provide access to remedies for public harm caused by transnational public bribery. U.S. law does not currently provide for adequate legal avenues to recompense this transnational public harm. This article sets forth reasons for opening these legal avenues and explores a few proposals for doing so in the United States.

THE HARMFUL PUBLIC IMPACT

As asserted by the World Bank, corruption is “the single greatest obstacle to economic and social development.” (Harry Seldadyo & Jakob de Haan, *The Determinants of Corruption. A Literature Survey and New Evidence* (European Public Choice Society Annual Conference, paper, Apr. 24, 2006) (*citing* unavailable link, www1.worldbank.org/publicsector/anticorrupt/index.cfm), *available at* <http://tinyurl.com/ndnu8tz>.) The harm caused by transnational public bribery is especially significant in developing countries for at least three reasons. First, transnational public bribery buttresses the culture of corruption that exists in many developing countries and, in turn, undermines the legitimacy of and confidence in governments. (See Mary Hallward-Driemeier, *Who Survives? The Impact of Corruption, Competition and Property Rights across Firms* (World Bank Dev. Research Grp., Policy Research Working Paper No. 5084, 2009).) Second, it contributes to larger fiscal deficits, undermining a government’s ability to exercise sound fiscal control. (Vito Tanzi, *Corruption Around the World. Causes, Consequences, Scope and Cures*, 45 Int’l Monetary Fund Staff Papers No. 4, at 582-583 (1998).) Finally, public corruption of all types increases income inequality. (*Id.*) This means that the costs of corruption are ultimately borne by society, especially the poor.

Transnational public bribery’s role in public harm is seen more starkly in other cases. For instance where the alleged payment of bribes secures the forced eviction of people from their homes and lands (Don Bauder, *Did Sempra Bribe Mexicans?*, SAN DIEGO READER (May 16, 2012), <http://tinyurl.com/pfykqpw>), or where bribes secure public procurement contracts without due regard for the quality of the goods or services delivered to consumers. Bribery in securing business property might even be used for violence by public security forces against private civilians. (John M. Miller, *Strike at Freeport Settled, Even as Mine’s Scars Linger*, WAGING NONVIOLENCE, (Dec. 17, 2011), <http://tinyurl.com/p8asz6>.)

WHY PROVIDE REMEDIES TO FOREIGN PLAINTIFFS?

Recognizing that corruption is not a victimless crime, the United Nations Convention against Corruption (UNCAC) and the Council of Europe Civil Law Convention on Corruption (COECLCC) require state parties to ensure that victims of corruption have a right to compensation. As stated by the Council of Europe, victims of corruption should be enabled to safeguard their interests and obtain effective remedies where their rights and interests have been affected. (*Explanatory Report*

of the Council of Europe Civil Law Convention against Corruption, ¶12 (Nov. 4, 1999), C.E.T.S. 174, available at <http://tinyurl.com/qhvxlq>.) This should apply with equal force to the public harm caused to developing countries by transnational public bribery. As observed by the U.N. Working Group on the Right to Development, equitable development demands recourse to remedies for those who bear the adverse consequences of development. (U.N. Comm'n on Human Rights, 60th Sess., Feb. 11-20, 2004, 19-20, U.N. Doc. E/CN.4/2004/WG.18/2 (Feb. 17, 2004).) The harm caused by transnational public bribery, which often accompanies the influx of foreign investment needed for development, is one such adverse consequence that deserves remedy.

Providing recourse in the home states of corporate bribers, where most of their assets are, is efficacious if the enforcement of a successful claim can take place in the same jurisdiction. Further, avenues for recourse may be unavailable in the country where the harm occurred. Developing and transitional countries often have weak rule of law and institutional capacity because of high levels of corruption (Cheryl W. Gray, *Reforming Legal Systems in Developing and Transition Countries*, FINANCE AND DEVELOPMENT, Sept. 1997, at 14.) Political, economic or legal considerations may present obstacles to those who wish to seek remedy for transnational bribery (*id.*), and judicial mechanisms often lack the capacity to provide effective remedies for victims of corporate abuse. (Julius Court et al., *The Judiciary and Governance in 16 Developing Countries* (U.N. Univ. World Governance Survey Discussion Paper No. 9, 2003), available at <http://tinyurl.com/n52cgyl>.)

Significantly, countries throughout the world increasingly recognize the importance of providing remedies for public harm caused by transnational public bribery. This recognition is manifested in payments to countries harmed (**Table 1**), pursuant to official orders or as part of prosecution settlements.

The United States has, in prosecuting transnational public bribery, accorded similar recognition to the need for restitution for public harm. U.S. courts have ordered restitution to foreign governments harmed by foreign public bribery that violates the U.S. Foreign Corrupt Practices Act (FCPA). (**Table 2**) (5 U.S.C. §§ 78dd-1, et seq.) However, such restitution has rarely been ordered.

While it is laudable that governments are taking responsibility for providing remedies for the extraterritorial harm caused by their corporations, whether remedies are provided is subjected to the vagaries of negotiations between the corporate briber and the prosecutor. Given the public harm wrought by transnational public bribery, the provision of remedies should instead be a consistent practice.

Table 1

REMEDYING TRANSNATIONAL PUBLIC BRIBERY

The United Kingdom

- In 2009, the bridge company, Mabey & Johnson, admitted to paying bribes to secure contracts for construction projects in Jamaica, Iraq, and Ghana. In connection with its prosecution settlement with the U.K. Serious Fraud Office, the company agreed to pay compensation to each of these three countries. (Rob Evans & David Leigh, *Mabey and Johnson Admits Bribing Officials Abroad to Secure Contracts*, THE GUARDIAN (Jul. 10, 2009), *available at* <http://tinyurl.com/lbs4op>.)
- In December 2010, the British aerospace and defense company, BAE Systems, which was found guilty of false accounting offenses in connection with the sale of radar equipment to Tanzania, reached an agreement with the U.K. Serious Fraud Office to pay GBP 29.5 million to the Tanzanian people. (Press Release, U.K. Serious Fraud Office, BAE Fined in Tanzania Defence Contract Case (Dec. 21, 2010) *available at* <http://tinyurl.com/l67st9c>.) The U.K. Department for International Development and the Tanzanian government were involved in drawing up the plans for the use of the sum, which was eventually disbursed directly to the Tanzanian government to be used in support of education in Tanzania. (Press Release, U.K. Serious Fraud Office, BAE Systems will Pay Towards Educating Children in Tanzania after Signing an Agreement Brokered by the Serious Fraud Office (Mar. 15, 2012) *available at* <http://tinyurl.com/7amm6ye>.)

Switzerland

- In late 2011, the Swiss Office of the Attorney General ordered Alstom Network Schweiz AG and its French parent company, Alstom SA, to pay compensation of CHF 36.4 million and CHF 1 million respectively in relation to the bribery of foreign public officials in Latvia, Tunisia and Malaysia. (Press Release, Office of the Attorney General of Switzerland, Criminal Proceedings Against Alstom Entities are Brought to a Close (Nov. 22, 2011), *available at* <http://tinyurl.com/mhqmdhr>.) Alstom SA's CHF 1 million in reparations was transferred to the International Committee of the Red Cross, part of which was for use in its projects within these three nations. (*Id.*) Although the disbursement of the compensation from the Alstom case has not been transparent, it is clear that the Swiss courts recognized the public nature of the harm caused by transnational public bribery.

Table 2

CASES RESULTING IN RESTITUTION TO FOREIGN GOVERNMENTS FOR FCPA VIOLATIONS:

- United States v. F.G. Mason Eng'g, Inc. and Francis G. Mason, No. B-90-29 (D. Conn. 1990) (ordering defendant to make restitution to German government because of corrupt arrangement with West German military intelligence service official).
- United States v. Kenny Int'l Corp., Cr. No. 79-372 (D.D.C. 1979) (ordering restitution to the government of Cook Island for providing financial assistance in connection with an election, in return for the renewal of a stamp distribution agreement).
- United States v. Diaz, No. 20346-CR-JEM, Transcript of Sentencing Hearing at 22-23 (S.D. Fla. Aug. 5, 2009) (ordering restitution to the government of Haiti for improper payments to Haitian telecommunication company).

With regards to the United States in particular, providing remedies for transnational public bribery as a consistent and sustained practice furthers the United States' foreign policy goals underlying the FCPA. A U.S. court of appeal has held that the FCPA was "designed to protect the integrity of American foreign policy." (*Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1029 (6th Cir. 1990).) As observed by a U.S. Senate Committee report regarding the enactment of the FCPA, foreign public bribery undermines "the image of American democracy abroad." (S. REP. NO. 95-114, at 3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4101.) Providing a forum for foreign victims to vindicate their rights and hold U.S.-based corporations accountable would protect the integrity and safeguard the image of the United States.

Transnational access to remedies for transnational public bribery is therefore justified on principled and pragmatic grounds. However, legal frameworks internationally and in the United States have failed to adequately meet this need.

THE INTERNATIONAL GOVERNANCE GAP

International legal frameworks fail to adequately promote access to remedies for transnational public bribery. Of the five regional and international conventions on corruption (namely, the Inter-American Convention Against Corruption by the Organization of American States (1996), the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted by the Organization for Economic Cooperation and Development (1999), the Criminal Law Convention on Corruption adopted by the Council of Europe (1998), the COELCC (1999), the Convention on Preventing and Combating Corruption adopted by the African Union (2003), and finally, the UNCAC (2003)), only the COELCC and UNCAC oblige state parties to provide for the right of victims of corruption to obtain damages in a private cause of action.

However, neither of these conventions obligates state parties to ensure that private rights of action cover transnational public bribery. Nor do they ensure that private rights of action are available to victims located outside their territory. The Council of Europe's Multidisciplinary Group on Corruption has simply stated that "rules concerning jurisdiction need to be as flexible as possible. There might be difficulties in deciding which courts have jurisdiction in corruption cases . . . [T]o that respect, the provisions of existing Conventions should be considered as a useful basis, when drafting future international legal instruments on the matter." (*Feasibility Study of the Working Group on Civil Law of the Multidisciplinary Group on Corruption on the Drawing up of a Convention on Civil Remedies for Compensation for Damage Resulting from Acts of Corruption*, at § 4.10, (Jan. 15, 1997), *available at* <http://tinyurl.com/kq7rqjj>.) The UNCAC's travaux préparatoires states that "[w]hile article 35 [i.e. the provision requiring state parties to provide for a private right of action for corruption] does not restrict the right of each State party to determine the circumstances under which it will make its courts available in such cases, it is also not intended to require or endorse the particular choice made by a State party in doing so." (UNITED NATIONS OFFICE ON DRUGS AND CRIME, TRAVAUX PRÉPARATOIRES OF THE NEGOTIATIONS FOR THE ELABORATION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION 299 (2010), *available at*

<http://tinyurl.com/kdoy84a>.) Accordingly, state parties have wide discretion in implementing the obligation to provide access to remedies for corruption.

Implementation of article 35 of the UNCAC appears inconsistent. A considerable number of state parties have not created a private right of action for victims of corruption. In implementation reports submitted to the UNCAC Implementation Review Group (*available at* <http://tinyurl.com/ksjwezt>), Chile, Fiji, Finland, Mongolia, Bolivia, Costa Rica, Cuba, Haiti, Mexico, Peru and Uruguay did not report on how they complied with Article 35 of UNCAC. According to research by Transparency International, Nigeria and Burundi were not compliant with article 35 of the UNCAC. (LILIAN EKEANYAWU, REVIEW OF LEGAL AND POLITICAL CHALLENGES TO THE DOMESTICATION OF THE ANTI-CORRUPTION CONVENTIONS IN NIGERIA 24 (2006), *available at* <http://tinyurl.com/mgaoydy>; MICHEL MASABO, COUNTRY REVIEW OF LEGAL AND PRACTICAL CHALLENGES TO THE DOMESTICATION OF THE ANTI-CORRUPTION CONVENTIONS IN BURUNDI 18 (2006), *available at* <http://tinyurl.com/kypkvjs>.)

Even where private rights of action are provided for in domestic laws, they are often not “corruption-specific.” Based on the implementation reports submitted by state parties to the UNCAC Implementation Review Group (*available at* <http://tinyurl.com/ksjwezt>), many state parties rely on laws relating to intentional and economic torts, negligence, and deceit, or laws providing for the initiation of civil proceedings for compensation upon conviction, to fulfill their obligation under article 35 of UNCAC. However, these laws may not cover all of the practices that are considered “corruption” under UNCAC.

Another important gap in international legal frameworks is how the harm caused by transnational public bribery is conceived. The typical causes of action available as civil remedies for corruption rely on narrow conceptions of victimhood, “harm,” and “causation” that do not sufficiently recognize the adverse impacts of transnational public bribery on the public at large. For example, the Council of Europe explained, in relation to instituting a right to compensation for corruption, that “the damage . . . must be sufficiently characterised, particularly as regards the connection with the victim himself . . . an adequate causal link must exist between the act and the damage, in order for the latter to be compensated. The damage should be an ordinary and not an extraordinary consequence of corruption.” (*Explanatory Report of the Council of Europe Civil Law Convention against Corruption, supra*, at ¶43, 45.) However, the public harm caused by transnational public bribery may not have a unique personal connection to any particular individual and hence would not meet these conventional requirements, despite broad effects on the community at large. For example, Wal-Mart has been accused of bribing Mexican officials to quickly obtain permits to open stores (Steven Gandel, *Not just Wal-Mart: Dozens of U.S. companies face bribery suspicions*, CNNMONEY (Apr. 26, 2012), *available at* <http://tinyurl.com/7ssj62c>). For this particular incident, it is difficult to determine which consumers actually suffered from these bribes and the extent of such harm.

THE GOVERNANCE GAP IN THE U.S.

A. LIMITATIONS OF THE FCPA

The FCPA specifically targets transnational public bribery. Originally passed in 1977, the FCPA is a federal statute that contains two major sets of provisions: the “anti-bribery” provisions and the “accounting” provisions. The anti-bribery provisions criminalize companies or individuals paying anything of value to foreign officials for the purposes of “obtaining or retaining business.” (15 USC § 78dd–1 (1977).) The accounting provisions address practices that make it difficult to detect bribery violations (e.g., off-the-record slush funds for illegal payments and false entries that make payments look legitimate). (1 FOREIGN CORRUPT PRACTICES ACT REPORTER § 1:20 (2d. ed. 2012).) This article focuses on the anti-bribery provisions.

Criminal and civil enforcement of the anti-bribery provisions are generally the responsibility of the Department of Justice (DOJ). The U.S. Securities and Exchange Commission (SEC) is responsible for civil FCPA enforcement against issuers. (CRIMINAL DIVISION OF THE U.S. DEPARTMENT OF JUSTICE AND THE ENFORCEMENT DIVISION OF THE U.S. SECURITIES AND EXCHANGE COMMISSION, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 4 (2012).) (An “issuer” is any entity required to register or file reports with the SEC under the under §§12 and 15 of the Securities Exchange Act. (*Id.* at 11)) Enforcement of the FCPA was initially slow, with an average of three prosecutions per year from 1978 to 2000, although enforcement has increased exponentially since 2000. (Eugene R. Erbstoesser et al., *The FCPA and Analogous Foreign Anti-Bribery Laws—Overview, Recent Developments, and Acquisition Due Diligence*, 2 CAP. MARKETS L.J. 381, 386 (2007).) Because of the FCPA’s potential for heavy fines and broad jurisdiction, however, the threat of prosecution ostensibly made a significant impact on corporate behavior (Veronica Foley & Catina Haynes, *The FCPA and Its Impact in Latin America*, CURRENTS: INT’L TRADE L.J. 27, 39 (2009).). Moreover, many companies are quick to settle in order to avoid negative publicity, potentially heavier fines, and criminal enforcement. (1 FOREIGN CORRUPT PRACTICES ACT REPORTER § 1:17 (2d ed. 2012).)

The FCPA has a wide reach. It has been used against U.S. corporations even when that conduct takes place entirely abroad. (E.g. SEC v. Triton Energy Corp., Civ. Action No. 97-0401 (filed Feb. 27, 1997).) Foreign companies that are issuers in the U.S., or that act as representatives or agents of a U.S. company or a company whose place of business is the U.S., would be covered by the FCPA. (H. Lowell Brown, *The Extraterritorial Reach of the U.S. Government’s Campaign Against International Bribery*, 22 HASTINGS INT’L & COMP. L. REV. 407, 439 (1999).) The FCPA also covers foreign companies that carry out an act in furtherance of a bribe in the U.S., including, for example, wiring funds through a U.S. bank account or sending an email to approve a bribe. Courts may also exercise jurisdiction over foreign companies where the conduct outside of the U.S. had a substantial effect within the U.S., including the filing of inaccurate reports with the SEC and the dissemination of false or misleading information to U.S. investors. (*Id.* citing SEC v. Montedison, S.p.A., No. 1:96CV02631 (D.D.C. filed Nov. 21, 1996).)

As it targets transnational public bribery directly, the FCPA is the most suitable statutory foundation in the U.S. for establishing a civil right of action for foreign public bribery. However, it does not expressly permit any private right of action, despite this being a live issue throughout the course of its enactment. During its drafting, a proposed text of the FCPA included a private right of action “for any person who could establish actual damage to his business resulting from illegal payments made by a competitor.” (S. REP. No. 1031 (1976).) This idea was regarded as having merit, but the proposed text was found to be too ambiguous. (*Id.*) A Senate committee requested that the text be revised, but it appears that no follow-up action was taken and the provision never became endorsed by the Senate. (S. REP. No. 95-144 (1977).) Another proposed private right of action under the FCPA was endorsed by the House of Representatives. That proposed text stated “courts shall recognize a private cause of action... on behalf of persons who suffer injury as a result of prohibited corporate bribery.” (H.R. REP. No. 640 (1977).) Notably, unlike the draft text proposed by the Senate, the House’s proposal did not limit its protection to businesses. It was reasoned that a private right of action would be instrumental in “enhanc[ing] the deterrent effect” of the FCPA and “provide a necessary supplement to the enforcement efforts” of the SEC and DOJ. (*Id.*) However, the matter was never addressed in the subsequent documented legislative history of the FCPA.

Subsequently, the Supreme Court and several lower courts have held that the FCPA provides no implied private right of action (**Table 3**), on grounds that this was not the legislative intent and would be inconsistent with the legislative scheme.

Table 3

Implied Private Right Of Action in the FCPA Rejected By The Courts

- *Lewis on Behalf of Nat. Semiconductor Corp. v. Sporck*, 612 F. Supp. 1316 (N.D. Cal. 1985): In a shareholder derivative action brought for alleged falsification of data in connection with sales and theft of trade secrets, the court held that no private right of action was implied in the accounting provisions of the FCPA. The court found that the legislative history showed there was no legislative intent to create a remedy, that a remedy would not be consistent with the legislative scheme, and that the acts alleged in the complaint are traditionally compensated under state law as breach of fiduciary obligations.
- *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990), cert denied, 59 U.S.L.W. 3562 (Feb. 19, 1991): Domestic tobacco growers brought suit for FCPA and antitrust violations against tobacco importers for various agreements that were designed to keep the price of foreign tobacco low. The court held that domestic competitors were not the intended beneficiaries of the FCPA, and that a private right of action under the FCPA would not be consistent with its legislative history or legislative scheme.
- *Citicorp Int’l Trading Co., Inc. v. W. Oil & Ref. Co., Inc.*, 771 F. Supp. 600 (S.D.N.Y. 1991): Following *Lamb*, the court found no support for a private right of action from the legislative history or purpose, and further, that the plaintiff’s would have redress for their claim under tortious interference with contractual relations.

According to the U.S. government after it ratified UNCAC, Article 35 of the Convention does not require a private right of action under the FCPA. A report issued by then Secretary of State

Condoleezza Rice after the ratification asserted that the “current laws and practices of the United States are in compliance with Article 35,” and significantly, that UNCAC should not be interpreted as “requiring the United States to create a private right of action under the [FCPA].” (SEC’Y OF STATE CONDOLEEZZA RICE, DEP’T OF STATE, DETAILED ANALYSIS OF THE PROVISIONS OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION 10 (2005).) The report further expressed concern that a private right of action under the FCPA could lead to civil suits that were “unrelated or only tangentially related” to the United States and for “acts only marginally related to the act of corruption.” (*Id.*) The Senate Foreign Relations Committee concurred that Article 35 of UNCAC did not require amending the FCPA. (STAFF S. COMM. ON FOREIGN RELATIONS, 109TH CONG., REP. ON UN CONVENTION AGAINST CORRUPTION (Comm. Print 2006).)

In 2011, Representative Ed Perlmutter (Colorado) introduced the Foreign Business Bribery Prohibition Act of 2011. Under this proposed bill, the FCPA would be altered to “authorize certain private rights of action... for violations by foreign concerns that damage domestic businesses.” (H.R. 3531, 112th Cong. (2011).) The proposed bill, however, never progressed past the consideration of two House sub-committees, (Foreign Business Bribery Prohibition Act of 2011, H.R. 3531, 112th Cong. (2011), <http://tinyurl.com/q6wy4bx>), and Representative Perlmutter did not renew the bill for the 113th Congress. (See LEGISLATION SPONSORED OR COSPONSORED BY ED PERLMUTTER, available at <http://tinyurl.com/oz43dzw>). While future legislative action regarding an FCPA amendment remains unknown, the issue is still relevant. On June 14, 2013, the Honorable George J. Terwilliger III prepared a statement for a House Committee hearing on over-criminalization and over-federalization. (See *Defining the Problem and Scope of Over-criminalization and Over-Federalization: Hearing Before the H. Comm. on the Judiciary Over-Criminalization Task Force*, 113th Cong. 10 (2013)(statement of Hon. George J. Terwilliger III, Partner, Morgan, Lewis & Bockius LLP).) In his statement, Terwilliger recommended that Congress “consider long-overdue reforms to the FCPA” in part, because of statutory ambiguities. (*Id.* at 10.)

Experts, academics and commentators have argued for an FCPA amendment to include a private right of action. (See, e.g., Richard L. Cassin, *The FCPA Is No Private Matter*, FCPA BLOG (Mar. 2, 2008), <http://tinyurl.com/mx23f6x>.) For example, Gideon Mark argues that the bill proposed by Representative Perlmutter is overly restrictive, and plaintiffs should be permitted to sue U.S. companies and individuals, as well. (Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 487 (2012).) Paul D. Carrington argues for amending the FCPA to allow private enforcement of its anti-bribery provisions by foreign citizens in U.S. courts, on behalf of their governments whose officials were bribed. (Paul D. Carrington, *Enforcing International Corrupt Practices Law*, 32 MICH. J. INT’L L. 129, 154 (2010).)

LIMITATIONS OF OTHER PRIVATE RIGHTS OF ACTION

Other private rights of action exist that could be used to obtain civil remedies for activities that would violate the FCPA. In fact, more litigation related to the FCPA is brought by private parties

than by the DOJ or SEC. (Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J. ON LEGIS. 425, 464 (2009).) The existing possible avenues for bringing a private right of action for foreign public bribery are (1) claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), (2) causes of action based on tort law, (3) securities litigation by stockholders in the corporate briber, (4) antitrust claims, and (5) whistleblower suits. However, these avenues only remedy collateral harm, and are not viable substitutes for a private right of action under the FCPA (see Gideon Mark, *supra*, at 460), for the following reasons:

A. THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO)

RICO permits “[a]ny person injured in his business or property by reason of a violation of [the Act]” to institute a civil action. (18 U.S.C.A. § 1964 (West).) To prove a prohibited activity is to demonstrate (a) that defendant committed two or more activities that (b) constituted a pattern (c) of racketeering. (171 A.L.R. Fed. 1 (2001).) Racketeering includes repeated and systematic bribery (*id.*) and both businesses and not-for-profits can be held accountable under the statute. (See Nat’l Org. of Women, Inc. v. Scheidler, 510 U.S. 249, 260 (1994).) Private companies have successfully brought RICO actions against their business competitors for the bribery of foreign officials, (W.S. Kirkpatrick & Co., Inc. v. Env’tl. Tectonics Corp., Int’l, 493 U.S. 400 (1990),) and employees have sued their employer corporations. (Brown v. Cassens Transp. Co., 546 F.3d 347 (6th Cir. 2008).) Foreign plaintiffs have been permitted to bring suit under RICO, and suits may also be brought against foreign defendants. (Richard L. Cassin, *Bribery Allegations Against Sojitz*, FCPA BLOG (Dec. 20, 2009), <http://tinyurl.com/n543yqz>.)

Limitations relevant to remedying transnational public bribery:

- RICO does not cover all acts that would violate the FCPA’s anti-bribery provisions. The American Bar Association has noted that “situations do exist ... where the conduct in question may be subject to criminal liability under the FCPA but not to civil liability under RICO.” (Vega, *supra*, at 468.) Circuits are split as to whether a single bribery scheme can constitute a continuous, systematic pattern necessary for RICO liability. See Amy Franklin et al., *Racketeer Influenced and Corrupt Organizations*, 45 AM. CRIM. L. REV. 871, 878–879 (2008).
- RICO applies a limited conception of injury. Only plaintiffs suffering injuries to “property or business” have a cause of action under RICO. (18 U.S.C.A. § 1964 (West).)
- RICO’s extraterritorial reach is limited. Courts have held that private lawsuits regarding corrupt activity forming part of the impugned conduct must have occurred within the U.S. (See, e.g., Norex Petroleum Ltd. v. Access Indus., Inc., 631 F.3d 29, 33 (2d Cir. 2010).)

B. TORT-BASED CAUSES OF ACTION

Plaintiffs have, under common law and state statutory law, successfully pleaded intentional tortious interference with economic relations, (*Rotec Indus., Inc. v. Mitsubishi Corp.*, 348 F.3d 1116 (9th Cir. 2003),) and retaliatory discharge. (*Dooley v. United Technologies Corp.*, 786 F. Supp. 65, 81 (D.D.C. 1992) *abrogated on other grounds by* *FC Inv. Grp. LC v. IFX Markets, Ltd.*, 529 F.3d 1087 (D.C. Cir. 2008).)

Limitations relevant to remedying transnational public bribery:

- State law tort claims are a more cumbersome avenue for redress than a federal cause of action might be, due to the multiplicity of state laws, the complexity of choice of law provisions, and the limited powers of state courts to govern international behavior. (*Vega, supra*, at 475.) Courts have refused to apply American tort law in cases predicated on FCPA violations and held that foreign law governs, whether or not it provides a legal remedy. (*See, e.g., Integral Res. (PVT) Ltd. v. Istil Grp., Inc.*, 155 F. App'x 69, 74-75 (3d Cir. 2005).)
- Disparate enforcement between state jurisdictions could lead to inconsistent applications of the FCPA and might prove challenging for compliance with the statute. (*Vega, supra*, at 475.)

C. SECURITIES LITIGATION

Government scrutiny of alleged corporate bribery under the FCPA, whether or not proven, can lead to shareholder suits. First, plaintiff shareholders institute a securities fraud claim under section 10(b) of the Securities Exchange Act and companion SEC Rule 10b-5 after a company discloses potential FCPA violations or settles with the government. Shareholders typically allege that, prior to these disclosures, the company had fraudulently failed to disclose or deliberately misled them regarding the company's FCPA violations or the strength of its compliance controls. (*See, e.g., In re Faro Technologies Sec. Litig.*, 534 F. Supp. 2d 1248, 1254-55 (M.D. Fla. 2007).) Most companies whose stock price reacted at a statistically significant level to news of FCPA action related to the company had resulting 10b-5 actions filed against them. (Raymund Wong & Patrick Conroy, *FCPA Settlements: It's a Small World After All* 10-12, NERA ECON. CONSULTING (Jan. 28, 2009), <http://tinyurl.com/mzsnyz2>.) Second, shareholders can also bring derivative lawsuits on behalf of the corporation against its officers for violating their duties to the corporation. (*See, e.g., In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 35 (Del. 2006).) The settlements of derivative litigation can be much larger than the fines companies pay to the government. (*See, e.g.,* Litigation Release No. 17887, Sec. and Exch. Comm'n, SEC Obtains \$500,000 Penalty Against Syncor International Corporation for Violating the Anti-Bribery Provisions of the Foreign Corrupt Practices Act, (Dec. 10, 2002), *available at* <http://tinyurl.com/bxkcwjy>.)

Limitations relevant to remedying transnational public bribery:

- While securities actions have proliferated in the past decade, they only benefit a limited class of plaintiffs, namely, the corporation's stockholders.
- The category of viable suits is relatively small. Shareholders bring securities actions if the company is harmed by the bribery, which only occurs if the conduct "backfires or the company gets caught by regulators." (Vega, *supra*, at 473.)
- Securities fraud requires misleading/false statements of fact, made with the intention to defraud, in connection with the plaintiff's sale or purchase of securities that subsequently damaged the plaintiff. The cause of action is not based on the act of bribery, and is instead dependent on the nature of the fallout to the corporation and stock price accompanying an FCPA investigation. (In re Faro Technologies Sec. Litig., 534 F. Supp. 2d at 1258-59.)

D. ANTITRUST CLAIMS

The Supreme Court has held that Section 2(c) of the Robinson-Patman Act, which was introduced in 1936 under the 1914 Clayton Antitrust Act, is a basis for actions involving commercial bribery in the context of antitrust injuries. (California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972).)

Limitations relevant to remedying transnational public bribery:

- This cause of action covers only the narrow category of antitrust injuries.
- This cause of action may not apply to extraterritorial acts. (NewMarket Corp. v. Innospec, Inc., 3:10CV503-HEH, 2011 WL 1988073 at *4 (E.D. Va. May 20, 2011).)

E. WHISTLEBLOWER SUITS

Section 922 of the Dodd-Frank Act provides for a whistleblower program that rewards individuals who help the SEC uncover securities violations, (Joel Androphy et. al., *The Intersection of the Dodd-Frank Act and the Foreign Corrupt Practices Act: What All Practitioners, Whistleblowers, Defendants, and Corporations Need to Know*, 59 THE ADVOC. (TEXAS) 19, 19 (2012),) including FCPA-related cases. (Richard L. Cassin, *SEC Posts Cases Eligible for Whistleblower Rewards*, FCPA BLOG, (Nov. 10, 2011), <http://tinyurl.com/mjlpqgf>.) The Act additionally prohibits employers from engaging in retaliation against a whistleblower, and creates a private right of action for whistleblowers alleging employer retaliation. (Dodd-Frank Act, Pub. L. No. 111-203, § 922(h)(1)(B)(i), 124 Stat. 1376, 1744 (2010) (codified at 15 U.S.C. § 78u-6) (h)(1)(B)(i).)

This provision has recently been used by employees who claim they were wrongfully discharged in retaliation for reporting, either internally or to regulators, conduct that

violated the FCPA. (George H. Brown et al., *Strategies for Mitigating Civil Liability Consequences of FCPA Investigations*, 9 SEC. LITIG. REP., April, 2012, at 4.)

Limitation relevant to remedying transnational public bribery:

- The class of plaintiffs protected by the anti-retaliation private right of action is very limited; only employees who were whistleblowers are protected.

LIMITATIONS OF STATUTORILY MANDATED RESTITUTION

Victims of foreign public bribery may have redress under the federal Crime Victims Rights Act (CVRA) and the Mandatory Victims Restitution Act (MVRA). The CVRA provides that a crime victim has the “right to full and timely restitution as provided in law,” and provides safeguards for ensuring the right is effective. (18 U.S.C. § 3771 (2006).) The MVRA allows the court to order “that the defendant make restitution to the victim of the offense,” defined as “a person directly and proximately harmed as a result of the commission for which restitution may be ordered.” (18 U.S.C. §3663(A)(2) (2006).) Such harm could include physical injury or pecuniary losses. In this regard, U.S. courts have ordered restitution to foreign governments harmed by foreign public bribery that violates the FCPA, pursuant to the MVRA. (United States v. Diaz, *supra* at 22-23).

However, such restitution is contingent on a prosecution being brought in the first place. Moreover, despite mandatory restitution under these acts, orders for restitution in FCPA cases have been rare. (See, Jordan Maglich, *What Are Victim’s Rights Under the FCPA?*, WIAND GUERRA KING (May 17, 2011), <http://tinyurl.com/mmfvevg>.) This can be attributed to a number of factors. First, the vast majority of FCPA prosecutions are settled before trial, preventing victims from being eligible for restitution, even though the FCPA enforcement, between 2002 and 2008 has resulted in over \$1.2 billion in settlements and penalties. (Raymund Wong & Patrick Conroy, *FCPA Settlements: It’s a Small World After All* (Jan. 28, 2009), available at <http://tinyurl.com/l7qcz6m>.) Second, according to the MVRA, restitution is only mandatory if the plea “specifically states” that the offense pleaded gives rise to it. (18 USC § 3663A(c)(2) (2012).) Hence, if a corporation settles without taking criminal responsibility, or takes responsibility for an offense other than one listed as requiring restitution, victims are not compensated. Also, during the settlement process, defendants may waive pre-sentence procedures that might otherwise allow courts to order restitution. (See Richard L. Cassin, *Costa Rican ‘Victim’ Objects To Alcatel-Lucent Settlement*, FCPA BLOG (May 5, 2011), <http://tinyurl.com/mhxlytm>.)

Third, similar to the MVRA, the application of the CVRA has imposed limitations on a victim’s access to restitution. Case law developed by federal courts indicates that access to such restitution under the CVRA for an FCPA violation is not guaranteed. Federal courts have held that a victim is not entitled to appeal the imposition or denial of a restitution award under the statute. (See U.S. v. Monzel, 641 F.3d 528, 541 (D.C. Cir. 2011); U.S. v. Hunter, 548 F.3d 1308, 1314 (10th Cir. 2008)). A court has stated that the victims of crimes lack a “substantive interest” in the outcome of a criminal trial, and interpreted the CVRA as precluding victims from intervening with the outcome of the trial. (U.S. v. Alcatel-Lucent France, SA, 688 F.3d 1301, 1306 (11th Cir. 2012).)

If the defendant in an FCPA trial appeals an adverse decision, victims in this circuit may have no right to intervene even if a lower court has awarded them restitution. (See Alan J. Bozer & Minryu Sarah Kim, *Crime Victims' Rights in Appellate Courts*, THE DAILY RECORD (Feb. 12, 2013), available at <http://tinyurl.com/n5z4huf>.)

Fourth, even in respect of the class of cases where restitution under the MVRA or CVRA might be awarded, restitution may not be ordered if (1) the number of identifiable victims is so large as to make restitution impracticable or (2) "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process" such that the need for restitution is "outweighed" by the burden on the sentencing process. (18 USC § 3663A(c)(3) (2012).) Restitution is sometimes impracticable where the defendant has insufficient financial means. For example, in an FCPA proceeding against a Morgan Stanley employee for FCPA violations, the judge found that Morgan Stanley would have been eligible for victim restitution. No restitution, however, was ordered because the defendant had limited funds. (Memorandum on Proposed Settlement Agreement, U.S. v. Garth Peterson, 12-CR-224 (E.D.N.Y. May 10, 2012).)

Furthermore, the availability of restitution through the MVRA or CVRA for harm caused by a breach of the FCPA's anti-bribery provisions is minimal in comparison to the restitution available for other corporate crimes. For example, the Sarbanes-Oxley Act of 2002 (SOX) gives the SEC authority to include civil penalties in "Fair Fund" distributions to injured investors. (15 U.S.C.A. § 7246 (2010).) Since the passage of the SOX, the SEC has ordered the return of USD 9.6 billion and has so far returned approximately USD 7 billion in fair funds to investors. The Government Accountability Office found that from 2002 through February 2010, 199 "Fair Fund" distributions had been ordered, with 73 of them established through SEC administrative proceedings and 126 by the courts. (Letter from the Government Accountability Office to Chairman Dennis Moore (Apr. 22, 2010), available at <http://tinyurl.com/lonrax7>.) The disparity in restitution available for these two categories of corruption-related wrongdoing calls for reform.

IDEAS FOR REFORM

In view of the above limitations, reforms are needed to ensure access to remedies for public harm caused by transnational public bribery. The U.S. government could consider either of the following two proposed reforms. The first involves introducing mechanisms for redistributing the FCPA penalties collected by the U.S. Treasury to the foreign countries harmed by the bribery. The second entails creating a public interest-based right of action under the FCPA.

A. REFORMING DISTRIBUTION OF FCPA PENALTIES

Compensation to victims of transnational public bribery under the FCPA can and should be more robust. Fines paid during and after FCPA investigations could be used to compensate victims. Between 2002 and 2008, FCPA enforcement resulted in over "\$1.2 billion in settlements and

penalties involving more than 30 countries.” (Matt. A. Vega, *Balancing Judicial Cognizance and Caution: Whether Transnational Corporations Are Liable for Foreign Bribery Under the Alien Tort Statute*, 31 MICH. J. INT’L L. at 3 (2010).) At least one foreign corporation claiming to have been harmed by conduct in violation of the FCPA has taken issue with the fact that current FCPA enforcement practice resembles the distribution of “illegal proceeds obtained from victims” to the U.S. federal government. (Cassin, *Costa Rican ‘Victim’ Objects To Alcatel-Lucent Settlement*, *supra*.)

Rather than regarding FCPA fines as national revenue, an institutional mechanism could be established to channel the monies collected towards public purposes, pursuant to a broad conception of “remedy”. For example, the United States could distribute proceeds to a multilateral financing mechanism working directly with individuals in countries with weak rule of law in order to allow those individuals to pursue redress for damages caused by public corruption, thereby addressing the “root causes of corruption worldwide.” (Margaux Hall and Vivek Maru, *From Bribery to Empowerment*, PROJECT SYNDICATE (Nov. 2, 2012), <http://tinyurl.com/m74mb95>.)

Alternatively, U.S. authorities could distribute proceeds directly to injured foreign states or to public interest NGOs working within them, as was done by the Swiss and U.K. authorities respectively in the Alstom and BAE cases (**Table 1**). Notably, this would also emulate current practices for enforcing environmental crimes in the United States. Associated with the settlement of Environmental Protection Agency (EPA) cases are the “Supplemental Environmental Projects” (SEP) in which defendants may voluntarily agree to help fund projects that benefit the environment. (*Id.*) The creation of SEPs did not arise from Congress or from judicial approval; they were created through voluntary agreements between enforcement agencies, defendants, and the recipient organization. (*Id.*) For example, after the BP oil spill in the Gulf of Mexico, an SEP was established to help compensate the communities and ecosystems that suffered the most as a consequence of the spill. (*Id.*) One academic has suggested that the settlement of FCPA cases could be similar to the settlement of EPA cases. (Andy Spalding, *Wal-Mart’s Victims, Part XIII: Learning from Environmental Law*, FCPA BLOG (June 6, 2013), <http://tinyurl.com/lz5ch6y>.) The DOJ could similarly form funding agreements with defendants for an FCPA violation. The voluntariness of this EPA practice is however a disadvantage if a more consistent practice of compensation is desired.

These proposals are admittedly not flawless. Direct repayment to the governments of harmed foreign states may in certain situations be akin to “paying the fox to guard the henhouse.” (Hall & Maru, *supra*.) Distributing funds to NGOs has its own problems, among them the difficulty of selecting the appropriate NGO, ensuring its accountability, and determining the project or projects to be financed. Research and monitoring of existing distribution practices is needed to refine these solutions.

Despite these potential implementation issues, the United States’ practice in relation to restitution of foreign governments and the DOJ’s Kleptocracy Asset Recovery Initiative show that reforming the distribution of FCPA penalties is feasible and within the realm of current legal

practices. The Kleptocracy Asset Recovery Initiative recovers the proceeds of public bribery that have been laundered into or through the United States “for the benefit of the people of the country from which it was taken.” (Press Release, U.S. Department of Justice, Department of Justice Seeks to Recover More Than \$70.8 Million in Proceeds of Corruption from Government Minister of Equatorial Guinea (Oct. 25, 2011), *available at* <http://tinyurl.com/3buj6ce>.) Since 2004, the United States has forfeited and returned over USD 168 million to victims abroad (UNITED STATES DEPARTMENT OF STATE, U.S. ASSET RECOVERY TOOLS AND PROCEDURES: A PRACTICAL GUIDE FOR INTERNATIONAL COOPERATION 1 (2012), *available at* <http://tinyurl.com/n64mbxe>.)

One example of asset forfeiture related to bribery, was the prosecution of James Giffen, who was accused of paying USD 84 million in bribes to the president and other foreign officials of Kazakhstan. (Richard L. Cassin, *No Punishment For ‘Hero’ Giffen*, FCPA BLOG (Nov. 22, 2010), <http://tinyurl.com/mlpwzwwq>.) In 2010, Giffen pled guilty to a misdemeanor tax charge related to the payment of bribes- roughly seven years after the prosecution first began. (*Id.*) Although Giffen did not face any jail time (*id.*), roughly USD 80 million in funds traceable to the bribes was forfeited to the United States and thereafter used to finance an NGO in Kazakhstan. (Andy Spalding, *Wal-Mart’s Victims, Part XIV: We Did It Before, We Can Do It Again*, FCPA BLOG (June 10, 2013), <http://tinyurl.com/l9eg7c8>.) The NGO, called the BOTA Foundation, assists underprivileged youth and children in the country. (*Id.*) The board of trustees includes government representatives from the United States and Switzerland; however, no Kazakhstani government officials are part of the board. (*Id.*)

B. CREATING A PUBLIC INTEREST-BASED RIGHT OF ACTION UNDER THE FCPA

Proposals to create a private right of action under the FCPA are, as mentioned, not new. However, many of these proposals have set forth plans intended to benefit U.S. corporations harmed by transnational public bribery without accounting for the *public* harm caused by the bribery.

To remedy this public harm, a cause of action would need to be based on a public interest rationale, and contain a broad definition of harm or expanded provisions for defining who can bring a suit. The need for a public interest-based private right of action in relation to corruption has already been recognized. The Council of Europe’s Multidisciplinary Group on Corruption has acknowledged the possibility of “defending the public interest” as a justification for proceedings for civil damages for corruption. (*Feasibility Study of the Working Group on Civil Law of the Multidisciplinary Group on Corruption on the Drawing up of a Convention on Civil Remedies for Compensation for Damage Resulting from Acts of Corruption*, *supra*, at § 4.1.)

The *qui tam* provision in the False Claims Act (FCA) may provide a framework for a public interest-based right of action. A *qui tam* suit allows a citizen, known as a “relator”, to commence and maintain a claim on behalf of the United States to secure compensation from persons such as government contractors who engage in corrupt practices’ (Paul D. Carrington, *Enforcing*

International Corrupt Practices Law, 32 MICH. J. INT'L L. 129, 150 (2010).) A relator can bring an FCA complaint along with supporting evidence to the DOJ, which then has 60 days to decide whether it wants to act. (31 U.S.C. § 3730(b)(2) (2000).) If the DOJ chooses to intervene, it takes primary responsibility for the suit, but the relator can remain a party to the suit with substantial rights. (31 U.S.C. § 3730(c) (2000).) If the DOJ declines to intervene, the relator can continue the suit independently of the DOJ. (U.S.C. § 3730 (c)(3) (2000).)

The underlying rationale for a *qui tam* suit is that the plaintiff contributes to the “common good” of society. Thus, a plaintiff who brings a *qui tam* suit does not need to have directly suffered harm from the defendant’s conduct. This reasoning is transferable to the context of transnational public bribery. As proposed by Carrington, the FCPA could be amended to enable a citizen of another nation to take on the role of a relator and bring suit on behalf of his or her government in a U.S. court against a company that allegedly bribed public officials in the relator’s country. (Carrington, *supra*, at 155.) A relator could also be a public interest organization that files a suit on behalf of the public in a developing country. The Council of Europe’s Multidisciplinary Group on Corruption has noted the possibility that public interest organizations could be entrusted with a status in civil suits for corruption.

Importantly, a *qui tam*-inspired private right of action for transnational public bribery would serve to remedy the public harm caused only if the relator distributes monies obtained to the people of the affected country.

Advantages

A public interest-based right of action for transnational public bribery has a number of advantages. First, it could provide beneficial judicial review and interpretation of the FCPA because many prosecutions result in a settlement. (*Id.*) This advantage would be especially helpful when considering statutory ambiguities. During a House of Representatives hearing on the FCPA, many FCPA experts, including the former Attorney General Mark Mukasey, provided testimony on the lack of sufficient statutory interpretation. Mukasey stated “[i]f the definitions of these fundamental statutory terms vary by circumstance and by case . . . it becomes impossible for companies to figure out in advance what conduct may and may not provide a meaningful risk of violating the FCPA.” (*Foreign Corrupt Practices Act: Hearing Before the House of Representatives Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary*, 112th Cong. 2, 20 (2011) (testimony of Michael Mukasey, former Attorney General, Partner, Debevoise & Plimpton LLP).) Second, from an international law perspective, amending the FCPA would conform to various international treaties and conventions that mandate access to remedies for corruption such as UNCAC. (Gideon Mark, *Private FCPA Enforcement*, 49 Am. Bus. L.J. 419, 422 (2012).)

The benefits of amending the FCPA to include a private right of action can also be realized through the advantages of civil suits in general. Civil suits can play a role in promoting greater enforcement of the law because government resources available for prosecution are limited. For

example, the Supreme Court has noted that “implied private actions are a most effective weapon in the enforcement of the securities laws.” (J.I. Case Co. v. Borak, 376 U.S. 426, 432 (1964).) With regard to the FCPA specifically, the DOJ and SEC have limited resources to regulate an ever-increasing number of multinational corporations. There were 24 DOJ FCPA enforcement actions between 2003 and 2007, and 16 in 2008. (Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 Harv. J. on Legis. 425, 441 (2009).) A further benefit is that civil suits can be more efficient because private citizens are faced with fewer bureaucracies and administrative procedures necessary for government regulation, which can create “diseconomies of scale.” (Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1298 (1982).)

A closely related advantage is that private rights of action can be of use to agencies charged with the enforcement of a particular statute. Private rights of action can ease the administrative and resource burdens that arise from prosecuting FCPA violations. (Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 Va. L. Rev. 93, 111-12 (2005).) Further, civil FCPA actions can alert the DOJ and the SEC to potential misfeasance. For example, in a case between Aluminum Bahrain B.S.C. (“Alba”), a Bahraini corporation, and Alcoa AA, a Pennsylvania corporation, Alba alleged that Alcoa violated the FCPA. (Daniel Lovering, *Justice Dept. Opens Alcoa Bribery Probe*, USA Today (Mar. 21, 2008), <http://tinyurl.com/ptaf59j>.) Federal prosecutors subsequently initiated criminal investigations into Alcoa. (*Id.*)

Challenges

Various challenges could affect the efficacy and the feasibility of a public interest based private right of action under the FCPA. These challenges include (1) interference with government prosecutions, (2) foreign policy concerns, and (3) the viability of a private right of action for ordinary plaintiffs.

1. Interference with Government Prosecutions

One of the most salient issues with regard to constructing a public interested based private right of action under the FCPA relates to the nature of possible interactions between plaintiffs exercising this right and government prosecutorial activity. A private right of action could compromise the DOJ’s prosecutorial discretion by putting undesirable pressure on the DOJ to enforce an FCPA violation or to not go forward with enforcement. Further, since the enactment of the FCPA, the DOJ has enjoyed much discretion in statutory interpretation. The rise of civil suits and judicial interpretation could narrow the scope of transnational bribery that is recognized under the FCPA and limit the DOJ’s negotiating power in reaching settlements. This would also consequently reduce the amount of funds that go to the United State Treasury. In this regard, between 2002 and 2008, FCPA enforcement resulted in over “\$1.2 billion in settlements and penalties involving more than 30 countries”, (Raymund Wong & Patrick Conroy, *FCPA Settlements: It's a Small World After All* 1, NERA ECON. CONSULTING

(Jan. 28, 2009), <http://tinyurl.com/mzsnysz2>); a majority of these funds have gone to the U.S. government. (Luke Balleny, *Foreign Bribery Fines and Settlements: Who Should Get the Money?*, Reuters (May 9, 2012), <http://tinyurl.com/mjy3p64>.)

Nevertheless, additional cases arising from civil suits might not infringe on current enforcement actions. First, the DOJ may seek the stay of civil proceedings where these are related to its investigations. In 2008, for instance, the DOJ asked a federal judge to halt a civil lawsuit between Aluminum Bahrain B.S.C. ("Alba"), a Bahraini corporation, and Alcoa AA, a Pennsylvania corporation. (See Daniel Lovering, *Justice Dept. opens Alcoa bribery probe*, USA TODAY, Mar. 21, 2008, <http://tinyurl.com/ptaf59j>.) The lawsuit had alleged that Alcoa AA had violated the FCPA by bribing Bahraini officials. (*Id.*) For *qui tam* proceedings in particular, the private right of action could be made contingent on consent from the DOJ. This would give the DOJ discretion to intervene and take primary responsibility for a suit. (See, e.g., 31 U.S.C. § 3730(c) (2006) ("Rights of the Parties to Qui Tam Actions" under the False Claims Act).)

2. Foreign Policy Concerns

Creating a private right of action under the FCP, including one based on an FCA *qui tam* model, may also have foreign policy implications as it may hinder U.S. foreign relations. The very nature of the FCPA's anti-bribery offense leads to many allegations that involve foreign public officials soliciting or accepting bribes. The adjudication of matters involving the conduct of foreign public officials has hence implicated the act of state doctrine. This doctrine "precludes American courts, both federal and state, from inquiring into the validity of the public acts which a recognized foreign sovereign power commits within its own territory," and arguably reflects the United States' policy goal of "a strong foreign relations position expressed in a singly-voiced foreign policy." (Maureen A. Dowd & Theodore B. Eichelberger, *Act Of State Doctrine: An Emerging Corruption Exception In Antitrust Cases*, 59 Notre Dame L. Rev. 455 (1984) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) and *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)).) Defendants in civil suits for bribery of foreign officials have, unsurprisingly, invoked the act of state doctrine to preclude plaintiffs from proving their claims. (See *id.*)

The Supreme Court's decision in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International*, however, indicates that the act of state doctrine would not entirely prohibit a private right of action under the FCPA. In this case, a civil RICO suit was brought as a follow-on from a successful FCPA prosecution. The Court held that the act of state doctrine only prevents the adjudication of a question that requires the determination of the validity of an official act of a foreign sovereign performed within its own territory. (*Id.*) Significantly, the Court declined to accept the point made by the Solicitor General that the doctrine may need to be applied where an inquiry into the motives for actions of foreign public officials might embarrass a foreign sovereign or interfere with the conduct of U.S. foreign policy. The Supreme Court's ruling appears consistent with the opinion of an amicus curiae in the same case, which called for the doctrine to be founded on conflicts of laws considerations (as

opposed to the possibility “embarrassment”) for purposes of greater predictability. (Peter D. Trooboff, *Case Note on W.S. Kirkpatrick*, 84 AM. J. INT’L L. 550–553 (1990).)

The prevailing narrow interpretation of the act of state doctrine gives ample scope for the introduction of a private right of action under the FCPA. Most, if not all, civil lawsuits for bribery of foreign officials would not require inquiry into the validity of a foreign government’s actions in the determination of causation of injury. The focus instead would be on the actor who provided the bribe. The position taken by the Solicitor General in *Kirkpatrick*, however, evinces a concern to rein in the political implications of judicial pronouncements relating to the bribery of foreign public officials. The Solicitor General’s position could also foreshadow resistance from the executive to such an enactment, at least on foreign policy grounds.

3. Viability of a Private Right of Action for Ordinary Foreign Plaintiffs

For foreign plaintiffs, and those in developing countries in particular, practical challenges related to expense and length of litigation would arise during an FCPA civil suit. While expense is a general problem associated with litigation in the U.S., this issue would be aggravated in a transnational lawsuit. Additional costs could arise from translating and reviewing documents, traveling, hearing witnesses in different countries, and contracting specialized attorneys from both the U.S. and the country where the bribery occurred. Directly connected with expense is the length of litigation. Due to its complexity, it is likely that an FCPA related lawsuit would last for years. This problem, however, may be mitigated over time once precedents have been established for FCPA lawsuits.

For a public interest-based right of action, the burdens of litigation for ordinary foreign plaintiffs may be ameliorated with assistance from public interest organizations. A challenge regarding the legal standing of a public interest organization could, however, arise. In this regard, the Council of Europe’s Multidisciplinary Group on Corruption has raised the question of whether organizations “defending the public interest in the fight against corruption, as in the environmental field, could be entrusted with a status in proceedings.” (*Feasibility Study of the Working Group on Civil Law of the Multidisciplinary Group on Corruption on the Drawing up of a Convention on Civil Remedies for Compensation for Damage Resulting from Acts of Corruption, supra*, at § 4.1) While the question was left unanswered, this evinces a view that the harm caused by corruption to a country’s public may deserve civil remedies under the law, and that public interest organizations can play a role in securing such remedies.

CONCLUSION

This article has sought to draw attention to the public harm caused by foreign public bribery, and the need for remedies for such harm. Recourse to such remedies is at present limited by gaps in legal frameworks and limited conceptions of harm and extraterritorial application. Rather than serving to facilitate social justice, the law instead has a limiting effect.

This article has highlighted two possible reforms in the U.S. that have the potential to address these gaps, namely, redistributing fines collected by the U.S. Treasury for FCPA violations, and the creation of a private right of action based on a “common good” rationale. Implementing these reforms would entail challenges, but could have potentially far reaching effects for global economic development and provide justice for individual plaintiffs harmed by transnational public bribery.

The Anti-Corruption Regime in Singapore:

**A Look at its Extraterritorial Nature and its Impact
on Other Countries**

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1. INTRODUCTION

Corruption is undoubtedly a serious problem in numerous Asian countries, judging by the rankings on Transparency International's Corruption Perceptions Index (CPI). In this sea of corruption, several countries such as Singapore stand out with a clean reputation. Singapore has constantly been rated well on the CPI, and our successful fight against corruption through anti-corruption legislation has been well recognized internationally and regionally. Moving beyond the domestic impact of our anti corruption laws, this paper hopes to examine the extraterritorial reach of Singapore's anti-corruption laws to cover offences committed by Singapore companies overseas. Further, this paper also hopes to draw the link between this extraterritorial effect of our anti-corruption laws and how such laws may assist in the development of emerging economies. Accordingly, this paper is structured generally into two sections.

Firstly, it will interrogate the anti-corruption regime in Singapore and the extraterritorial dimension to it, in that Singapore can impose liability for corrupt acts committed overseas by natural or legal persons. In discussing this, this paper also aims to discuss the issue of disbursement of monies obtained from penalizing corrupt acts. Due to the dearth of reported case law on corporate and individual liability for transnational bribery, as well as other practical considerations, this paper submits that it may yet be premature for Singapore to possess a disbursement mechanism for moneys collected from anti-corruption prosecutions.

Secondly, the paper examines the potential impact of Singapore's extraterritorial anti-corruption laws, both direct and indirect. Apart from the direct impact achieved through Singapore's extraterritorial anti-corruption laws, it is submitted that these extraterritorial anti-corruption laws are part of a greater anti-corruption policy, which in itself has some reach in encouraging and inspiring similar anti-corruption attitudes in several other countries. In itself however, the extraterritorial anti-corruption laws as enshrined in the statutes have no proven effect on the development of emerging economies.

2. THE ANTI-CORRUPTION REGIME IN SINGAPORE

A. THE PREVENTION OF CORRUPTION ACT AND ITS EXTRATERRITORIAL EFFECT

The bedrock of the anti-corruption regime in Singapore is the Prevention of Corruption Act ("PCA"),¹ which is the primary legislation dealing with corruption offences in Singapore. While other statutory provisions deal with corruption offences as well, they are rarely invoked.²

¹ Cap 241, 1993 Ed

² The other statute which lists a number of corruption offences is the Penal Code (Cap 224, 1985 Ed) (§§ 161 to 165 on corruption of public servants, § 204B on bribery of witnesses, § 213 and 214 on corrupt screening of offenders, ss 219 and 220 on corrupt discharge of judicial or legal authority -- of these, §§ 213 and 214 have been occasionally used).

Under Section 5 of the PCA, any “person[s]” that has engaged in the “corrupt” receipt and giving of “gratification” would be liable for an imprisonment term of 5 years or a fine up to \$100,000 or both. Three important terms ought to be highlighted here. Firstly, “person” has been defined in Singapore’s Interpretation Act to include “any company or association of body of persons, corporate or incorporated.”³ Secondly, whether the receipt or giving of gratification is “corrupt” depends on the application of a two-limbed test.⁴ Third, “gratification” has been defined expansively in the PCA to include any “money,” “gifts,” “office,” “contract,” or “services.”⁵

Section 7 PCA further empowers the courts to increase the imprisonment term to 7 years for a convicted “person” where the corrupt offence was in relation to a transaction with the “Government,” “any [of its] department,” or with any “public body.”⁶ Finally, pursuant to Section 13 PCA, the court can impose on a convicted “person” a penalty equal to the amount of the corruptly obtained gratification to be imposed on the wrongdoer.

It is clear that the provisions of the PCA do not distinguish between natural or legal persons. Accordingly, the PCA is broad enough to encompass corporate liability for corrupt conduct.⁷

Another legislation of interest is the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (“CDSA”),⁸ which empowers the court to order the confiscation of any benefits derived from a PCA offence. Section 10(1) read together with Section 8(2) of the CDSA permits the court to recover from the wrongdoer the benefits derived from the corrupt conduct.

The combined effect of the PCA and CDSA is as such. Not only will persons convicted under the PCA and CDSA suffer custodial and pecuniary penalties, they will also be forced to fully disgorge

Other statutes also include corruption offences: eg Customs Act (Cap 70, 2004 Ed) § 138, Parliamentary Elections Act (Cap 218, 2007 Ed) § 60 and Presidential Elections Act (Cap 240A, 2007 Ed) § 41.

³ Interpretation Act

⁴ To determine if a gratification is given or received corruptly, the courts apply a two-limb test. Both of these limbs must be fulfilled beyond a reasonable doubt. Firstly, was there an objectively corrupt element in the transaction? This depends on ascertaining the intention of the giver or receiver. Secondly, did the accused person know that what he was doing was, by an ordinary and objective standard, corrupt? This depends on ascertaining whether the accused had relevant knowledge that what he did was objectively corrupt. See *PP v Low Tiang Choon* [1998] 2 SLR 878 at para 34, *Chan Wing Seng v PP* [1997] 2 SLR 426 at para 25, *Fong Ser Joo William v PP* [2000] 4 SLR 77 at para 33 and *PP v Low Tiang Choon* [1998] 2 SLR 878 at para 29.

⁵ Section 2, PCA.

⁶ “Public body” is defined in Section 2 PCA as being “any corporation, board, council, commissioners or other body which has power to act under and for the purposes of any written law relating to public health or to undertakings or public utility or otherwise to administer money levied or raised by rates or charges in pursuance of any written law”.

⁷ This has also been affirmed in cases such as *Tom Reck Security Services Pte Ltd v PP* [2001] 2 SLR 70, where it was stated in obiter that corporate liability may be imposed on companies for crimes committed by their employees or agents. In *Trade Facilities Pte Ltd v Public Prosecutor* [1995] 2 SLR(R) 7, it was also held that a company may be liable to criminal prosecution for acts committed by their managers, if such acts can be attributed to that of the company.

⁸ Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 64A, Rev Ed 2000).

the entirety of benefits so derived through corruption.⁹ The legislative intent was to create a deterrent effect through the imposition of criminal sanctions, coupled with the disgorgement of all corrupt gratification.¹⁰

This deterrent effect extends to activities beyond the borders of Singapore, for Section 37 PCA imposes the same liabilities on all Singaporean citizens for any corrupt acts committed in any place outside of Singapore. Accordingly, if, for example, a Singaporean company were to bribe a Burmese public official, by the operation of Section 37 PCA, it would be liable for corruption under Section 5 or more specifically, Section 12 of the PCA (which targets the bribery of “members of a public body”).

B. DEARTH OF REPORTED CASE LAW ON INDIVIDUAL AND CORPORATE LIABILITY FOR TRANSNATIONAL BRIBERY

While it appears legally possible to hold Singapore registered corporations liable for corrupt acts under the PCA, to date, there have been no reported cases in Singapore of such instances. Likewise, no cases of transnational bribery of a foreign public official by Singapore companies have been reported.

Rather, reported cases applying the PCA have only addressed *individual* liability for corrupt offences committed within Singapore. Reference can be made to *Teo Chu Ha v. Public Prosecutor*,¹¹ where the appellant was a senior director of a firm when he acted corruptly. He, instead of the firm, was charged. In *Public Prosecutor v. Lim Teck Chye*,¹² a director of Coastal Bunkering Services Pte Ltd (“CBS”) had conspired with other employers of CBS to corruptly pay gratification to marine surveyors. It was found that a “work culture founded on deceit and corruption” pervaded the company.¹³ Despite this, the company was not held liable for corruption – rather, it was an employee of the company that was prosecuted.

Other cases similarly buttress the trend of prosecuting individuals and not the company for corruption. For instance, in China Aviation Oil cases, the management of the company was prosecuted, but not the company itself. In *PP v Chen Jiulin*,¹⁴ the defendant (CEO of China Aviation Oil) was prosecuted for the company’s failure to notify the Singapore Exchange of its

⁹ For example, consider the case of *PP v Ng Sing Yuen* [2007] SGDC 203, where the gratification obtained totaled \$434,800, and the accused was made to pay a sum of \$298,800, after taking into account the amount of \$140,000 that was initially surrendered.

¹⁰ See Second Reading of the Prevention of Corruption Act Bill 1960. See also *Leong Wai Kay v Carrefour Singapore Pte Ltd* [2007] SGCA 26; *PP v Ng Sing Yuen* [2007] SGDC 203; *Tan Kwang Joo v PP* [1989] SLR 496 at p 498D.

¹¹ [2013] 4 SLR 86

¹² [2004] SGDC 14

¹³ *Ibid.*, at [370].

¹⁴ DAC 23240 of 2005 & 14 Ors

losses. The offences of the company were thus attributed to the employee's failure to fulfill their duties.

In sum, the reported case law applying the PCA has thus far only addressed individual and not corporate liability for corruption occurring within Singapore. There have been no reported cases of individual or corporate liability for transnational bribery.

C. WHAT HAPPENS TO THE FINES AND PENALTIES IMPOSED?

A perusal of relevant local legislation with corruption offences reveals that there are no provisions for the application of the penalties and fines collected from corrupt wrongdoers. Neither the PCA nor CDSA contains provisions that address how the moneys collected would be applied. This legislative silence implies that these moneys would simply form part of the state "revenue." This also means that there is currently no statutory disbursement mechanism in Singapore by which it would be possible to apply the moneys collected towards foreign governments, let alone victims, when transnational public bribery has been committed by Singaporean persons.

However, it must be noted that the provisions of the PCA and CDSA do not contain any legal prohibition against making restitution for victims of transnational bribery committed by Singaporean persons. Furthermore, the powers of the High Court and Court of Appeal of Singapore include the jurisdiction to grant "all reliefs and remedies at law and in equity."¹⁵ As such, it may be argued that the Singapore courts can order restitution for victims of transnational corruption despite the lack of a statutory disbursement mechanism.

There is also another avenue by which victims may recover directly against the wrongdoer for his corrupt acts. When a person has given any gratification in contravention of the PCA to an agent, the principal is entitled to bring a civil suit against either its agent or that person to recover that sum of money. As defined by the PCA, "agents"¹⁶ include employees of companies as well as civil servants, while "principals"¹⁷ include corporate employers as well as the government or public bodies. The principal can still succeed in recovery even if the wrongdoer has already had to pay state-imposed penalties and fines.¹⁸ Thus for example, where an employee of the Singapore Government has received bribes, the Government standing as a principal can bring an action to

¹⁵ See Section 18, Supreme Court of Judicature Act (Cap 322) and Section 14 of its First Schedule.

¹⁶ Under Section 2 PCA, an 'agent' means any person employed by or acting for another, and includes a trustee, administrator and executor, and a person serving the Government or under any corporation or public body, and for the purpose of Section 8 includes a subcontractor and any person employed by or acting for such subcontractor.

¹⁷ Under Section 2 PCA, a "principal" would include an employer, a beneficiary under a trust, and a trust estate as though it were a person and any person beneficially interested in the estate of a deceased person and the estate of a deceased person as though the estate were a person, and in a case of a person serving the Government or a public body includes the Government or the public body, as the case may be.

¹⁸ This issue was brought up in the case of *Leong Wai Kay v Carrefour Singapore Pte Ltd*, where the accused had earlier paid the penalty of \$292,800 and was faced with a civil suit demanding payment of the civil debt. It was held by the highest court in Singapore that the state penalty and the civil debt were intended to operate independently of each other, and as distinct and separate, there is no question of double recovery of the bribe as far as the respondent is concerned.

recover for the bribes obtained by that civil servant. Likewise, Singapore companies can sue their agents to recover for bribes received. This cause of action is simply a statutory embodiment of the principle at equity that a principal should be able to recover a bribe or secret commission received by his agent. However, this has limited relevance for victims of transnational public bribery committed by Singaporean companies, since they will most certainly not be in any principal-agent relationship.

Accordingly, there appears to be no clear, explicit mechanisms by which victims of transnational public bribery committed by Singaporean persons can obtain compensation for harm suffered. However, as mentioned above, there is a possibility that the Singapore courts can order compensation for such victims due to the absence of any statutory prohibitions against such restitution. There is thus scope for considering if the Singapore courts should do so, taking a leaf from the United States Foreign Corrupt Practices Act ("FCPA") jurisprudence, which has seen restitution to such victims being ordered in certain cases.¹⁹

D. SHOULD SINGAPORE ENACT LEGISLATION TO PROVIDE FOR RESTITUTION TO VICTIMS OF TRANSNATIONAL PUBLIC BRIBERY?

This paper takes the view that at this stage in time, there is no need for Singapore to have disbursement mechanisms which can be used to compensate victims of transnational public bribery committed by Singapore registered entities, such as corporations.

There are two reasons for this position. Firstly, the situation in Singapore is unlike that in the United States, where there has been an ongoing stream of prosecution against US corporations that have engaged in transnational public bribery.²⁰ The FCPA and other legislation that permits for restitution of FCPA enforcement monies collected were enacted in response to the realities of the US legal and economic system.²¹ In contrast, there is a dearth of transnational bribery cases involving Singaporean persons (whether legal or natural).²² No case law has been reported in which Singaporean individuals or registered companies have been held liable for transnational

¹⁹ 15 U.S.C. §§ 78dd–1 et. seq.

²⁰ *U.S. v. F.G. Mason Engineering and Francis G. Mason, Case No. B-90-29 (D. Conn. 1990)* and *U.S. v. Diaz, No. 09-cr-20346-JEM (S.D. Fla. Aug. 5, 2010)* are some cases of successful prosecution against US companies for transnational public bribery, resulting in restitution being ordered to the foreign governments for losses suffered as a result of their officials being bribed. Another prominent case has been the 2011 prosecution against Wal-Mart for the bribing of Mexican officials to obtain approval for the building of its new store in Teotihuacan.

²¹ Apart from the FCPA, which allows for restitution of FCPA enforcement moneys to foreign governments (although this has been rarely done), other US legislation permits for restitution to victims harmed by transnational public bribery committed by US companies. Such legislation include the Victims of Crime Act, Victim Witness Protection Act, Mandatory Victim Restitution Act, and the Crime Victims' Rights Act. See Shane Frick, "'Ice' Capades: Restitution Orders and the FCPA" 12 Rich. J. Global L. & Bus. 433 (2013).

²² Although in 2012, ST Kinetics, a Singapore government-linked corporation was implicated in bribery investigations conducted by the Indian Criminal Investigation Bureau over the awarding of certain Indian defense contracts. See ST Engineering, "ST Engineering Land Systems Arm Clarifies Media Reports On the Debarment By Indian Ministry of Defense" (Press Release, March 6 2012) <<http://www.stengg.com/press-centre/press-releases/st-engineering's-land-systems-arm-clarifies-media-reports-on-the-debarment-by-indian-ministry-of-defence>> accessed 5 April 2014.

public bribery under the PCA. As such, there are currently no penalties or fines that require disbursement.

A second reason is that a disbursement mechanism carries with it certain difficulties. Firstly, there could be practical problems with identifying the victims of transnational public bribery. This is especially so where victims are unnamed or too numerous, such as when transnational public bribery results in destruction of ancient artifacts, increased traffic congestion, or intangible harm to culture and heritage.²³ Even if this problem may be circumvented by making restitution directly to foreign governments, there is concern that compensating those governments whose own officials have been implicated is like “paying the fox to buy new chickens.”²⁴ These issues, coupled with the fact that there are currently no funds collected from prosecuting Singapore individuals and corporations for transnational bribery, would mean that the current local context makes having any disbursement mechanisms premature.

3. IMPACT OF SINGAPORE’S ANTI-CORRUPTION LAW

Given the success of Singapore’s anti-corruption laws domestically in reducing corruption levels significantly, it appears prudent to consider the impact of Singapore’s extraterritorial anti-corruption law. When evaluating the potential impact, there is a need to distinguish between Singapore’s extraterritorial anti-corruption law as enshrined in the PCA (discussed above), and Singapore’s anti-corruption *policy*. Our anti-corruption laws are certainly limited to persons or entities with some nexus to Singapore, however, it is not impossible to see the potential of our anti-corruption policies having a more far-reaching effect. As part of our anti-corruption policy, Singapore has also formulated several organs and bodies that have since inspired similar bodies in the region.

This next section will examine both the direct impact as a result of our anti-corruption provisions and potential indirect impact that results from our general anti-corruption policy.

A. DIRECT IMPACT OF THE EXTRATERRITORIAL ANTI-CORRUPTION LAW

As the PCA only covers Singapore and Singaporean nationals, the impact of the PCA and the extraterritorial anti-corruption laws of Singapore on other countries remains limited. However, there are certainly some direct and immediate consequences for Singaporeans and Singaporean registered corporates.

²³ These were among the harms allegedly suffered by Mexicans as a result of Wal-Mart bribing Mexican officials to allow for the building of a new store near the World Heritage site of Teotihuacan. See Shane Frick, “‘Ice’ Capades: Restitution Orders and the FCPA” 12 Rich. J. Global L. & Bus. 433 (2013).

²⁴ *Ibid.*, at 21.

On Singaporeans Doing Business Overseas

Naturally, fear of prosecution rings true and deep. In addition, companies fear other numerous possible ramifications of bribery allegations. These range from embarrassing fines and exposure to litigation from shareholders or even a jail sentence should an officer of the company be found guilty of bribing a foreign public official.²⁵ The stigma of being labeled a corrupt company is extremely difficult to shed. While the cases in which a country has prosecuted a foreign direct investor overseas are very rare,²⁶ the fact that Singapore's anti-corruption regime has an extraterritorial effect with severe consequences may cause Singaporean companies and nationals to think twice before committing corrupt acts. Singapore courts have also shown that they will not hesitate to prosecute individuals who have been corrupt while doing business with foreign companies.²⁷

On MNCs With Regional Offices In Singapore

Further, Singapore is and has been a top location for regional Asia-Pacific headquarters and offices for decades. It has scored highly on many dimensions as a location for such offices based on studies conducted by consultancy firms,²⁸ and it is currently home to numerous MNCs seeking to expand their businesses into the Asia-Pacific region. Business decisions with respect to actions outside of Singapore, undertaken by senior management of these regional HQs or joint ventures, may nevertheless attract the sanctions of the PCA due to its extraterritorial effect. As pointed out above, even though prosecutions for corrupt acts have been against individuals thus far, Singapore law permits corporate entities to be held liable as well. Accordingly, the extraterritorial application of the PCA is likely to deter the commission of transnational public bribery by all Singapore registered entities.

In Developing A General Corporate Norm

One might even go so far as to argue that as foreign or local corporations registered in Singapore engage in compliance with the PCA, a general corporate norm against bribery of foreign public

²⁵ Bert Denolf, "The Impact of Corruption on Foreign Direct Investment" (2008) 9 J World Investment Trade 249, at 268

²⁶ One example of this would be the case of Lesotho, which is a very poor developing country landlocked by South Africa, who has taken the commendable initiative to prosecute North American and European companies for corrupt payments to a Lesotho public official. These bribes enabled them to secure a government and donor funded contract that was funded under the Lesotho Highlands Water Project of which the World Bank was the main donor.

²⁷ See *Lam Khing Lang @ David v PP* (MA 522/92/01), where the offender was convicted of obtaining money from four companies in South East Asia as rewards for arranging the shipment of construction materials and equipment from Singapore to destinations in South East Asia. He was charged with 8 months imprisonment and made to pay the penalty of the sums he had obtained. See also *PP v Wong Teck Long* [2005] SGDC 44, where the accused corruptly obtained a sum of money from a Malaysian company in return for recommending the Malaysian firm for a grant of RM 14.5 million in Revolving Short Term Multi Currency Loans.

²⁸ There is a growing trend among MNCs towards establishing regional headquarters in Asia Pacific. The gradual global economic shift towards the Asia-Pacific region has many MNCs placing an increasing strategic importance in this region, especially as regional GDP and consumer demand growth rates outperform those in other regions. See Roland Berger Strategy Consultants, "European Business in China, Asia-Pacific Headquarters Study" (April 11, 2011) <http://www.rolandberger.com/media/pdf/Roland_Berger_Asia_Pacific_Headquarters_20110411.pdf> Accessed June 24, 2006.

officials might take root. Such a corporate culture might be exported along corporate lines of communication and decision-making to offices elsewhere in the world. This ripple effect resulting from compliance with Singapore's laws would in turn decrease acts of corporate bribery in other countries.

B. POSSIBLE IMPACT FROM SINGAPORE'S GENERAL ANTI-CORRUPTION POLICY

While it is not possible to forcibly make all countries corruption-free through enforcement of Singapore's extraterritorial anti-corruption laws, it is arguable that these laws and provisions reflect a strong anti-corruption policy that, taken together, have some potential for a greater reach. To consider the impact of Singapore's anti-corruption **provisions** without considering other related institutions and bodies that make up our general anti-corruption **policy** would be to shortchange the overall effect greatly. It is thus submitted that while it may be said that our extraterritorial anti-corruption laws per se have no proven direct impact in influencing rule of law or in reducing corruption in other countries, such laws have formed part of an overall anti-corruption policy that has since inspired some countries. It is also conceivable that this policy has the potential to inspire and influence more.

Broadly speaking, the potential reach of our anti-corruption policy can visibly manifest itself in two possible ways. Firstly, through Singapore's widely applauded and successful CPIB which has been lauded with helping Singapore remain corruption free, and secondly, via foreign direct investment.

1. The Role of the CPIB

Singapore's Corrupt Practices Investigation Bureau, or CPIB for short, is a pioneering institution established in 1952 by the British colonial government before Singapore attained self-governance. Interestingly enough, the CPIB existed before the first draft of our PCA in 1960. Prior to the enactment of the PCA, corruption was made illegal via the Penal Code of the Straits Settlements,²⁹ and subsequently, the Prevention of Corruption Ordinance that was first enacted on 10 December 1937. More learned authors such as Quah³⁰ have covered the topic of Singapore's anti-corruption policy and legislative history extensively and have opined that the PCA came about in 1960 primarily because the newly elected People's Action Party (PAP) government, which assumed office in June 1959, was determined to eradicate corruption and accord to the CPIB increased and wider powers.

²⁹ Jon S.T. Quah, "Combating Corruption in Singapore: What Can Be Learned?" (2001) 9 *Journal of Contingencies and Crisis Management*

³⁰ Jon S. T. Quah, "Bureaucratic Corruption in the ASEAN Counties: A Comparative Analysis of Their Corruption Strategies" (1982) 13 *Journal of Southeast Asian Studies* 153, at 163; Soh Kee Hean, 2008, "Strategies for Business, Government, and Civil Society to Fight Corruption in Asia and the Pacific", Proceedings of the 6th Regional Anti-Corruption Conference for Asia and the Pacific, ABD/OECD Anti-Corruption Initiative for Asia and the Pacific

For its track record and in recognition of its role in eradicating corruption in Singapore, the Corrupt Practices Investigation Bureau ("CPIB") has since been applauded by numerous scholars and ministers alike. Many countries have since dispatched teams to Singapore to study the workings of the CPIB and our anti-corruption regime. Quah notes that in the early 1970s, Hong Kong sent a task force to Singapore and set up the Independent Commission Against Corruption (ICAC) in 1974 which was modeled after Singapore's CPIB shortly after.³¹ Today, Singapore and Hong Kong are perceived to be the least corrupt Asian countries according to the Transparency International's 2010 CPI and the World Bank's 2009 Control of Corruption governance indicator.

The creation and immense success of the CPIB and ICAC has led to them being models for numerous countries seeking to institute an anti-corruption framework. Numerous other countries, such as Brunei (Anti-Corruption Bureau), Nepal (Commission for the Investigation of Abuse of Authority), Sri Lanka (Commission to Investigate Allegations of Bribery or Corruption), Pakistan (National Accountability Bureau), Thailand (National Counter Corruption Commission), Macao (Commission against Corruption), and Korea (Korea Independent Commission Against Corruption) have since implemented similar frameworks.³² One of the most successful bodies, Indonesia's Corruption Eradication Commission (KPK), was also said to be modeled on Hong Kong's ICAC. In 5 years, the KPK has built a reputation for professionalism and integrity and achieved attention-grabbing results: a 100% conviction rate, the recovery of more than 350 billion rupiah in state assets and over 40 convictions, including governors, members of parliament, ministers and the entire election committee.³³

Since then, countries like Ukraine³⁴ and South Africa³⁵ have likewise looked upon the Hong Kong and Singapore models when drafting a structure for their respective anti-corruption bodies. Many academics have done comparisons between the CPIB model and the framework existing in their own countries and have recommended an emulation of Singapore's CPIB model,³⁶ thereby inspiring many countries to follow in our footsteps.

Our anti-corruption provisions may not have sparked off a similar trend in countries around the world and the extraterritorial effect of those provisions have also not been proven to have had any impact beyond persons or entities with a nexus to Singapore. However, our anti-corruption provisions and laws, extraterritorial or otherwise, are part and parcel of our anti-corruption policy.

³¹ J.S.T. Quah, "Curbing Corruption and Enhancing Trust in Government: Some Lessons from Singapore and Hong Kong", *Handbook of Asian Criminology*, at 39.

³² Jon S.T. Quah, "Combating Public Sector Corruption in Singapore and Hong Kong: Lessons for the Private Sector in Asian Countries", APSAC Conference 2011 Paper.

³³ Gabriel Kuris, "Holding the High Ground with Public Support: Indonesia's Anti-corruption commission digs in, 2007-2011" (2012), *Innovations for Successful Societies Series*, at p2.<http://www.princeton.edu/successfulsocieties/content/data/policy_note/PN_id212/Policy_Note_ID212.pdf>

³⁴ Mike Runey, "Formulating an Anti-Corruption Agency for Ukraine" (2002) Transparency International Ukraine, TORO Creative Union, accessed from http://ti-ukraine.org/en/system/files/research/anti-corruption_agency_by_ti_ukraine_eng.pdf [when was this accessed?]

³⁵ Chantelle Benjamin, "Political will, Independence the key", *Corruption Watch*, 14 June 2012 <http://www.corruptionwatch.org.za/content/political-will-independence-key>.

³⁶ Sudhir Krishnaswamy, "India Needs a multi-agency model to tackle corruption" *The Sunday Guardian*, <<http://www.sunday-guardian.com/analysis/india-needs-a-multi-agency-model-to-tackle-corruption>> Accessed June 24, 2014.

Our strong anti-corruption policy and the creation of bodies such as the CPIB to further the enforcement of our anti-corruption laws have arguably served as an exemplar and role model to other countries. While we lack data on any countries that may have looked toward our PCA to enact similar extra-territorial anti-corruption laws, we have clear examples of countries who have clearly looked at Singapore's CPIB as a role model.

2. Through Foreign Direct Investment

Finally, the practice of our anti-corruption policies extra-territorially can potentially influence and impact others through creating a corruption free corporate norm that rides on Singapore's FDI, diffusing itself into the business practices. FDI remains one of the crucial links through which we can hope to encourage a similar commitment to anti-corruption from countries that Singaporeans and Singaporean companies invest in, and countries that invest in Singaporean companies. This is especially so for countries where the proportion of investments from Singapore are comparatively high, where there is greater reliance on FDI from Singapore, or where there are significant business ties with Singaporeans or Singapore registered companies. Through doing business with Singapore companies which are covered by the PCA and hence barred from engaging in corrupt practices, foreign companies may potentially clean up their act so as to comply with such standards, secure business contracts and deals, or to attract investment from Singaporeans or Singaporean registered companies.

The connection between corruption and FDI is certainly present. It is not uncommon in other jurisdictions to hear of companies withdrawing investments in certain economies due to high corruption levels,³⁷ and sources also suggest that the enforcement of similar extraterritorial anti-corruption laws in other countries has led to a reduction in investment by their countries in countries perceived to be relatively corrupt.³⁸ One can perhaps hope that with a strong anti-corruption policy permeating our corporate practices, countries that are reliant on Singapore for FDI to further economic growth will be encouraged to clean up their act to conform with Singapore's corporate norms and retain our investments.

Regardless, this paper hesitates to delve into the intricacies and many implications of Foreign Direct Investment (FDI) data and its numerous connections with anti-corruption as firstly, we believe it to be beyond the scope of this paper and secondly, there is currently insufficient data available to make concrete conclusions.

Nevertheless, we recognize the important role of FDI in serving to perpetuate anti corruption policies beyond Singapore's borders. Through the spread of our anti-corruption policy extra-

³⁷ The famous example of Motorola announcing its plan to withdrawn from Ukraine, cancelling a planned investment of \$500 million in the cellular market due to less than transparent practices of the Ukrainian government is just one out of the many examples of companies being deterred by corruption, see Bert Denolf, "The Impact of Corruption on Foreign Direct Investment" (2008) 9 J World Investment Trade 249, at 267

³⁸ Andrew Brady Spalding, "Four Unchartered Corners of Anti-Corruption Law: In Search of Remedies to The Sanctioning Effect" (2011) Wisconsin Law Review Symposium Draft 12/20/11, <http://www.law.northwestern.edu/colloquium/international/documents/SpaldingUnchartered.pdf>.

territorially, we are hopefully able to indirectly encourage, through tangible economic benefits, the formation of a corruption-free corporate norm elsewhere.

C. POTENTIAL FOR GREATER IMPACT IN THE FUTURE

Given that Singapore's framework is well established and has proven itself to be successful, there is much potential for development of our extraterritorial anti-corruption law and framework so as to positively impact other countries as well. As a starting point, given that there is a dearth of reported case law on holding Singaporean individuals or corporations liable for corruption committed overseas pursuant to the PCA, there can be three possible conclusions. One, there are no such cases at all; two, there are cases but they do not come before the Attorney General Chambers; or three, the prosecutors choose not to go through with the charges. Should the lack of case law be due to the latter two reasons, then the way forward would be to improve upon detection and prosecutions so as to more effectively enforce the PCA and other anti-corruption legislation.

Finally, Singapore is well known worldwide for its stellar anti-corruption framework. This puts it in an excellent position to pioneer initiatives like the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions or the OECD Anti-Corruption Initiative for Asia and the Pacific. The OECD Anti-Bribery Convention³⁹ establishes legally binding standards to criminalize bribery of foreign public officials and provides for numerous mechanisms for cooperation between countries to eradicate corruption. Perhaps a similar initiative can be formed between the ASEAN states in line with the ASEAN Political-Security community blueprint A.1.7, which serves to prevent and combat corruption.⁴⁰

3. CONCLUSION

This paper has sought to analyze two broad issues. Firstly, it has examined the anti-corruption regime in Singapore. Salient points to note include the extraterritorial dimension of the PCA, the possibility of holding Singapore registered corporate entities liable for corruption, but the lack of legal precedents for doing so. The paper also submits that due to the dearth of reported cases on individual and corporate liability, as well as other practical considerations, there is no real need at the moment for Singapore to possess disbursement mechanisms in line with those found in the US's FCPA jurisprudence.

³⁹ OECD Anti-Bribery Convention, <<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/>> Accessed June 24, 2014.

⁴⁰ ASEAN Political-Security Community Blueprint <<http://www.asean.org/archive/5187-18.pdf>> Accessed June 24, 2014.

Secondly, Singapore's extraterritorial anti-corruption laws, while well intended and proven effective in curbing corruption domestically, have a very limited effect outside Singapore waters and on persons with no nexus to Singapore. The impact of our extraterritorial anti-corruption laws remain largely limited, as evidenced by the lack of reported cases. It is definitely difficult to go beyond mere conjecture when trying to analyse the impact of the laws per se. However, these extraterritorial anti-corruption laws are part of a larger anti-corruption policy that has been adopted by Singapore since the 1800s under the British rule. While the exact laws per se may not have been adopted elsewhere or proven to have any effect, there is sufficient evidence to suggest that a by-product of these laws, i.e. the creation of bodies like the CPIB which was aimed at enforcement of these laws, have contributed in its own way to inspiring similar bodies regionally and internationally.

Looking forward, there is also great potential for further impact through the pioneering of regional initiatives and through greater enforcement of the laws. Should Singapore really see herself as a leader in spreading and sharing her anti-corruption framework and perpetuating transparency worldwide instead of merely celebrating an incidental impact of her anti-corruption laws, more initiatives can definitely be taken up and the possibilities remain endless.

Effective Access to Compensation in Transnational Corruption A Fortiori Question

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ABBREVIATIONS

APNAC -African Parliamentarian Network against Corruption

BAE- British Aerospace

CPI – Corruption Perceptions Index

CSOs - Civil Society Organizations

DFID - Department for International Development

DPP- Director of Public Prosecution

EOCA – Economic Organized Crime Act

FCPA – Foreign Corrupt Practices Act

NACSAP- National Anti - Corruption Strategy and Action Plan

NGO - Non-Government organization

PCAC – Presidential Commission Against Corruption

PCCA – Prevention and Combating of Corruption Act

PCCB -Prevention and Combating of Corruption Bureau

PPAA - Public Procurement Appeals Authority

SFO - Serious Fraud Office

UN – United Nations

UNCAC – United Nation Convention Against Corruption

INTRODUCTION

"...Corruption must be treated with ruthlessness because I believe myself corruption and bribery is a greater enemy to the welfare of a people in peacetime than war. I believe myself corruption in a country should be treated in almost the same way as you treat treason." Mwalimu JK Nyerere, May 1960¹

Corruption, a serious issue plaguing developing countries, remains a concern in Tanzania. In Tanzania, corruption has been a long-standing problem recognized as early as before the country gained independence from the United Kingdom in 1961. As stated by Mwalimu JK Nyerere in 1960, *"I think I would be less than honest if I said that all is well, because it is not. There is corruption ... if people cannot have confidence in their Government, if people can feel that justice can be bought, what hope are you leaving with the people? They have no other hope."*²

Unfortunately, globalization, privatization, and foreign investment policies have exacerbated the growth of corruption in Tanzania, particularly transnational bribery.³ In response to the alarming rate of corruption, the former President of Tanzania Benjamin W Mkapa formed The Presidential Commission against Corruption (PCAC) in 1996.⁴ The commission issued a report that identified various causes of corruption in Tanzania and made recommendations for reducing corruption rates.⁵ Although the creation of the PCAC was a significant step forward in the fight against and elimination of corruption, Tanzania has consistently received low scores on Transparency International's Corruption Perceptions Index Score.⁶ These scores are below the average for the Africa region from roughly 1998 to 2007.⁷

Additionally, the Tanzanian government has been involved in a series of grand corruption⁸ that has reportedly contributed to the loss of the government's budget by at least 20 percent.⁹ After the creation of PCAC, grand corruption scandals included the Bank of Tanzania paying fraudulent sums to twenty-two companies during the 2005/2006 financial year, former Prime Minister Edward Lowasa improperly pressuring the Tanzanian government to enter a contract with

¹ Prof Maina P, "Independence of the Judiciary in Tanzania," Many Rivers to Cross (2012) at 4.

² *Ibid.*

³ Defined as foreign actors bribing national public officials.

⁴ Integrity Environment and Investment Promotion, "The Case of Tanzania," Alliance for Integrity- Government & Business Roles in Enhancing African Standards of Living (2005) at 7.

⁵ *Ibid.*

⁶ See "Corruption by Country/Territory," Transparency International, <<http://www.transparency.org/country>> Accessed August 26, 2014; "Transparency International Corruption Perceptions Index 2012," Transparency International (2012) at 5. ,

⁷ Cooksey, B. 2007a. *Trends in Corruption Control in Tanzania: Why Perceptions Matter*. Paper presented to the Annual Research Workshop of the Norwegian Development Research Association, CMI Bergen. Nov 5-7, 2007.

⁸ See Robin Palmer, "Combatting Grand Corruption in Africa: Should it be an international crime?," Open Society Initiative for Southern Africa at 31.. Grand corruption is defined as corruption occurring at the highest levels of government in a way that requires significant subversion of political, legal and economic systems. It can occur at the formation of public policies and may involve the appropriation or embezzlement of government funds.

⁹ Chêne, M. *Overview of Corruption in Tanzania*. U4 (2009) (estimate from Tanzania's Auditor General); "Global Integrity Report 2006" <<http://back.globalintegrity.org/reports/2006/tanzania/index.cfm>> Accessed August 26, 2014 ; US State Department, *Country Report on Human Rights Practices*. (2006), www.state.gov/g/drl/rls/hrrpt/2006/78761.htm> Accessed August 26, 2014.

Richmond Development company during the 2006 energy crisis which contributed to the loss of 172 billion Tanzania shillings, and British Aerospace (BAE) bribing the Tanzania government for supply of an air traffic control system in 1999.¹⁰

As corruption scandals such as the ones involving the Tanzanian government have come to light around the world, various international, state, and regional actors have made efforts to reduce corruption. For example, an international treaty on corruption, the UN Convention Against Corruption (UNCAC) came into effect in 2005. Additionally, some countries, including the United States, the United Kingdom, and Brazil have created statutes penalizing transnational corruption.¹¹

The international momentum on combating corruption has also raised important questions related to the anti-corruption discourse. Mainly, how punishment for corruption cannot remove the suffering of victims of such corrupt acts, and thus compensation in addition to punishment is crucial. A few notable corruption cases, including the BAE case in Tanzania resulted in a defendant company being ordered to pay compensation in the country where the bribe occurred.¹² After the British government investigated BAE's conduct in Tanzania, it ordered BAE to pay the Tanzanian government £29.5 million.¹³ This payment, however, came with stipulations and the United Kingdom (UK) Department for International Development (DFID) and the Tanzanian government had to come to an agreement about distributing the compensation. One of the judges in the UK noted the challenges of arranging the distribution; *"We wished to ensure that BAE Systems' payment to Tanzania would be used effectively for development purposes in accordance with the settlement agreement. A problem in achieving this was the lack of precedents"*¹⁴ (emphasis added).

Because of the lack of precedent on compensation, the BAE case serves as a noteworthy study on how compensation for corruption should be distributed. The remainder of this paper will provide a critical analysis of the compensation system arranged for the BAE case and propose recommendations for how compensation should be distributed in Tanzania. Section I summarizes the BAE case and its compensation agreement. We will provide a critical analysis of the government's and BAE's role in the compensation agreement in Section II. Sections III and IV will outline proposals for reform entailing joint collaborations between civil society and the government and provide recommendations for the Tanzanian government and the international community.

¹⁰ Norad, *Joint Evaluation of Support to Anti-Corruption Efforts—Tanzania*, Report 6/2011 (2011) at 13. ,

¹¹ See 15 U.S.C. §§ 78dd-1, et seq. (United States Foreign Corrupt Practices Act); 2010 c.23 (United Kingdom Bribery Act 2010); LEI 12.846/2013 (Brazil Anti-Corruption Law).

¹² Delphia Lim, Maryum Jordan et. al, *Access to Remedies for Transnational Public Bribery: A Governance Gap*, 28-FALL Crim. Just. 38.

¹³ Mark Tran, "BAE finally pays out £29.5m for educational projects in Tanzania," *The Guardian*, 15 March 2012.

¹⁴ House of Commons International Development Financial Crime and Development, *Eleventh Report of Session 2010–12 Volume I: Report, together with formal minutes, oral and written evidence* (2010) at 10.

I. BAE CASE: FACTS AND JUDGMENT

BAE Systems, a British corporation, agreed to a £29.5 million settlement with the UK Serious Fraud Office (SFO) in order to end the SFO's investigation into the 1999 sale of a \$40 million military radar to the Tanzanian government.¹⁵ BAE admitted to improper record keeping, specifically in relation to a payment of over \$12 million to a single individual from the Tanzanian government for "marketing."¹⁶ As a result of the plea bargain, charges of corruption were not actually brought against BAE.¹⁷ This case may prove seminal in the field of transnational corruption due to its uniquely negotiated compensation agreement.

The Government of Tanzania issued the original tender for a new air traffic control system in 1992.¹⁸ At this time Siemens Plessey Electronic Systems Ltd retained Mr. Shailesh Vithlani to assist with negotiations for the tender, and in 1997 BAE Systems group acquired the UK operations of Siemens Plessey Systems, including Siemens Plessey Electronic Systems Ltd, which was renamed British Aerospace Defence Systems Ltd (BAEDS).¹⁹ In September 1999 the Government of Tanzania and BAEDS entered into a contract for the sale of the radar system in question, priced at US\$39.97 million.²⁰ The price of the sale provoked outrage and led to a subsequent SFO investigation.²¹ The investigation found a high probability that the \$12.4 million (31% of the contract price) paid to Mr. Vithlani was used in the negotiation process to persuade relevant persons from the Tanzanian government to favour British Aerospace Defence Systems (BAEDS).²² To close the investigation, BAE agreed to pay back Tanzania £29.5 million²³. This figure was not broadly equivalent to the value of the contract to supply the air traffic system nor was it an estimate of the amount of the contract overcharged BAE; it was a negotiated sum agreed upon by the corporation and the SFO.²⁴

In November 2010, the UK's Department for International Development (DFID) and the Government of Tanzania drew up plans on how to spend the money for education purposes.²⁵ The funding could be invested in education through the following means: £4.4m for school textbooks, 200,000 desks, 1,196 teachers' houses, and 2,900 pit latrines.²⁶ As a lead donor in Tanzania, DFID was involved in planning for the dispersal of the funds, as it would be in a position to help verify that the money was being used for the intended purpose.²⁷

¹⁵ *Ibid* at 3,5.

¹⁶ *Ibid.* at 6.

¹⁷ *Ibid.*

¹⁸ *Ibid.* at 5.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.* at 7.

²³ *Ibid.* at 9.

²⁴ *Ibid.*

²⁵ *Ibid.* at 10.

²⁶ *Ibid.* at Ev 28.

²⁷ *Ibid.* at 10.

BAE, however, then decided to attach conditions to its payment of the funds. BAE informed the UK and Tanzanian governments that it would initially only pay out one third of the settlement, and would be forming a commission to supervise the use of the money.²⁸ After a period of twelve months, the commission would review the projects that had received the funds to evaluate whether the money was being used appropriately, and based upon this assessment, would determine the suitability of disseminating additional funds to that particular project.²⁹ The response from both the Tanzanian and UK governments was swift. Foreign Affairs and International Cooperation Minister Bernard Membe declared Tanzania would not allow British NGOs commissioned by BAE Systems to operate in the country.³⁰

Additionally, the British House of Commons Overseas Development Committee strongly criticized BAE for dragging its feet and questioned the right of the company to set up its own advisory board to decide on how the money should be spent rather than giving the funds directly to the government of Tanzania, as Tanzanian Members of Parliament (MPs) had requested.³¹ Committee Chairman Malcolm Bruce MP asked whether it was not “offensive” for the company to suggest it knew how to spend the money better than the government of Tanzania.³²

II. CRITICAL ANALYSIS OF BAE’S COMPENSATION AGREEMENT

A. ROLE OF THE TANZANIAN GOVERNMENT

There are various laws and institutions in Tanzania that address corruption. Laws relevant to corruption are the following: The Public Finance Act of 2001, The Public Procurement Act of 2004, The Criminal Procedure Act of 2010, The Economic and Organized Crime Control Act, The Prevention and Combating of Corruption Act of 2007, and the Anti-money Laundering Act.³³

In addition to these laws, four institutions have been created to prevent and prosecute corruption in Tanzania. Each of these institutions has its shortcomings, however, which are summarized below in **Table 1**.

²⁸ *Ibid.* at Ev 5.

²⁹ *Ibid.*

³⁰ “Current Cases in Tanzania,” Tanzanian Affairs, 1 September 2011, <<http://www.tzaffairs.org/2011/09/current-cases-in-tanzania/>> Accessed August 27, 2014.

³¹ *Ibid.*

³² *Ibid.*

³³ Norad, *supra* note 10, at 119.

Table 1: Summary of Anti-Corruption Institutions in Tanzania

Name of the institution	Information and scope	Challenges
Prevention and Combating of Corruption Bureau (PCCB)	PCCB was established by the Prevention and Combating of Corruption Act of 2007; it is an independent body with the power to investigate subject to the Director of Public Prosecutions (DPP). ³⁴	The PCCB's decision to prosecute is subject to the Director of Public Prosecutions' discretion.
Director of Public Prosecutions (DPP)	It was introduced so as to professionalize the prosecution services, separating prosecutions from the police. ³⁵	The DPP has enormous power over the decision whether to prosecute any crime including corruption ³⁶ .
Public Procurement Appeals Authority (PPAA)	Dedicated to government procurement, it plays an investigative role but it is not a core anti-corruption institution. ³⁷	The results of its investigations are handed to the PCCB for follow-up prosecution.
Ethics Secretariat	Under the Public Leadership Code of Ethics Act of 1995, the Secretariat receives declarations of assets, investigates complaints, and educates leaders. ³⁸	The public has limited access to the records held by the Secretariat.

Notably, the Tanzanian government has also made efforts to identify the causes of corruption through the Presidential Commission Against Corruption (PCAC). President Benjamin Mkapa created the PCAC in 1996 to review and assess the corruption situation in the country and to put forward recommendations.³⁹ The commission issued a report identifying the following as factors that contributed to the presence of corruption in Tanzania:

³⁴ *Ibid.* at 16.

³⁵ *Ibid.*

³⁶ Tanzania Criminal Procedure Act CAP20 R.E 2002 Section 90(1)(c): the power "to discontinue any criminal proceedings instituted or undertaken by him or any other authority or person."

³⁷ Norad, *supra* note 10, at 16.

³⁸ *Ibid.*

³⁹ Integrity Environment and Investment Promotion: "The Case of Tanzania," *supra* note 4, at 7.

1. Laxity in administration and lack of accountability and transparency.
 2. Lengthy and difficult procedures.
 3. Scarcity of essential commodities.
 4. Low salaries coupled with a rapid rise in the cost of living and insecurity of employment tenure.⁴⁰
 5. Lack of political will and weakness in government organs, such as the courts and police.
 6. Monetary expansion in the economy (trade liberalization which has encouraged tax evasion, nonpayment of customs duties, illicit trade, land scams, drug trafficking, etc.)
 7. Appointment of leaders without due regard to established procedures and erosion in the integrity of leadership.
- Emergence of conspicuous consumption.⁴¹

Shortcomings in the Government's Anti-corruption Efforts

After examining the PCAC report, the government committed itself to combatting corruption. According to Tanzania's ranking on Transparency International's Corruption Perceptions Index, the government has had some success in reducing corruption—the score improved between 1998 and 2007 from 1.9 to 3.2 (out of a maximum score of 10 indicating no corruption).⁴² By 2009, however, Tanzania's score was back to the 2003 score.⁴³ It has consistently scored and ranked below the average for the Africa region over the period. In the CPI report for 2013, Tanzania scored 33 out of 100, where 69% of all countries that score under 50 have a serious corruption problem.⁴⁴ The question remains: why, with all of the progress in legal and institution frameworks, did Tanzania's corruption score decline? As the Swedish Ambassador has said, "...the reality behind the figures is...[that]...people do not seem to perceive that corruption is decreasing, which obviously should be the desired trend."⁴⁵

⁴⁰ Interestingly, there are assessments and research that demonstrate the controversy surrounding whether or not low salaries are a legitimate cause of corruption. **DFID's 2008 Fiduciary Risk Assessment** identifies the main causes or vectors of corruption in mainland Tanzania as: *low pay and limited instances of prosecution* (emphasis added); the existence of discretionary and monopolistic powers; and, "a multiplicity of incomplete and complex processes and reporting requirements", which also provide significant opportunity for corrupt practice. But on the contrary the **Fighting Fiscal Corruption: lessons from the Tanzania Revenue Authority (TRA) (Fjelstad 2003)** suggested that, in the Tanzania context, *the link between pay and corruption is tenuous* (emphasis added). (National Democratic Institute May 2010. *Statement of the National Democratic Institute (NDI) Pre-Election Delegation to Tanzania's October 2010 Elections*. May 21 2010, Dar Es Salaam. Cited in NORAD, (2011) *Joint Evaluation of Support to Anti-Corruption Efforts Tanzania Country Report; Report 6/2011 – Study*. P.14).

The same view was considered by the **Pay Reform and Corruption in Tanzania's Public Service (Mutahaba, 2005)** that even with relatively high wages and good working conditions, corruption may continue to thrive where there is a high demand for corrupt services. (Mutahaba, G. 2005. *Pay Reform and Corruption in Tanzania's Public Service*. A paper presented at the seminar on Potential for Public Service Pay Reform to Eradicate Corruption among Civil Servants in Tanzania, 26 May 2005, ESRF Conference Hall, Dares Salaam. President's Office Public Service Management. Cited in NORAD op cit P.14).

⁴¹ *Measures to combat Corruption at the Local, National and International Level*; Paper presented at the 15th International Conference on Politics, Crime and Criminal Justice, Organized by the International Society for the Reform of Criminal Law, Canberra, Australia, 26-30 August 2001.

⁴² Norad, *supra* note 10, at 11.

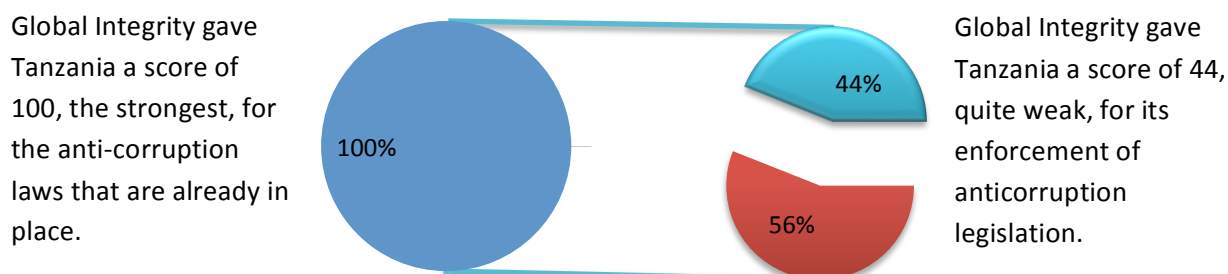
⁴³ *Ibid.*

⁴⁴ "Corruption Perception Index 2013," Transparency International.

⁴⁵ Speech by Swedish Ambassador Staffan Herrström at the National Anti-corruption Forum May 3, 2010.

The Tanzania's Global Integrity Scorecards are also a good start for discussing the missing link, which is the gap between the anticorruption *laws* and the agencies *enforcing* those laws. This is Tanzania's greatest weakness in the fight against grand corruption and is illustrated in **Table 2**.

Table 2



GLOBAL INTEGRITY REPORT, Tanzania Scorecard 2010

As illustrated in **Table 2**, the 44% score for the failure to enforce anticorruption legislation is the major reason for the existence of grand corruption in Tanzania. Reportedly, at least 20% of the government's annual budget is lost to corruption."⁴⁶ One survey found that 49.5% of companies expected to make informal payments to accomplish tasks with the government bureaucracy, while in another survey 42% of companies expected to give 'gifts' to secure government contracts.⁴⁷ These are undeniably the sources of Tanzania's low ranking in Transparency International's Corruptions Perceptions Index. The reason the poor 44% enforcement score in **Table 2** exists is obviously attributed to the challenges facing the institutions responsible for preventing and prosecuting corruption that are discussed in **Table 1**.

Since the creation of the PCAC, various grand corruption scandals in Tanzania have come to public attention in addition to the BAE case. Two notable examples, discussed below, involved members of the Tanzanian government. Although neither are transnational corruption cases in nature, they serve to illustrate the scale of the challenges Tanzania faces with respect to governance and perceptions of corruption.

⁴⁶Chêne, M. 2009. Overview of Corruption in Tanzania. U4. (estimate from Tanzania's Auditor General); Global Integrity Report (2006) <http://back.globalintegrity.org/reports/2006/tanzania/index.cfm> Accessed August 27, 2014; The Citizen. 10 July 2009. Tanzania: Over 30 Percent of Budget Eaten by Corrupt Officials, Says President. Reporting a speech made by President Kikwete on the opening of PCCB's new offices. <http://allafrica.com/stories/200907100964.html> Cited in Joint Evaluation of Support to Anti-Corruption Efforts Tanzania Country Report June 2011 Page 11.

⁴⁷ Marie Chene, "Overview of Corruption in Tanzania," U4 Anti-Corruption Resource Center (2009).

EPA (External Payment Arrears) Scandal

In the 2005/2006 financial year, the Government of Tanzania lost about US\$131 million from the External Payment Arrears (EPA) account which was held by the Bank of Tanzania (BoT).⁴⁸ The EPA account was originally set-up by the Government of Tanzania to help service the balance of payments, whereby local importers would pay into the account in local currency, and Foreign Service providers could then be paid by the BoT in foreign currency.⁴⁹ Due to low foreign currency availability in the 1980s and 1990s, the debt within the account reached \$677 million by 1999.⁵⁰ Efforts under the government's Debt Buyback Scheme and cancellations negotiated within the Paris Club helped to reduce the debt level to \$233 million by 2004.⁵¹ Officials at the Bank of Tanzania and businesses corruptly took advantage of one of the strategies devised to reduce the account debt, whereby a creditor could endorse debt repayment to a third party.⁵² Foreign donors pressed the government to fully disclose the outcome of the investigation that ensued when the scheme was discovered. A special audit conducted by Ernst & Young discovered that the lost sum had been fraudulently paid to 22 companies during 2005/2006 financial year.⁵³ Thirteen companies had used falsified records to claim third party status and received BoT payments, while the other 9 companies couldn't account for the payments they had received. Among these, two companies, one of which was Deep Green Finance, were not even registered by the Business Registrations and Licensing Agency.⁵⁴ Although about 70 percent of the \$131 million defrauded from the EPA account was stashed in foreign banks,⁵⁵ this case cannot be thought of as a transnational corruption case because no foreign entity induced the fraud. The investigators were finally able to return the lost sum and handed down jail sentences to a few of the conspirators involved and convicted.⁵⁶

Richmond Development Company Scandal

Following a serious energy crisis in 2006, the government decided to enter a contract with the Richmond Development Company, which claimed to be a company from the United States, to provide 100 Megawatts of power at a cost of 172 billion Tanzanian shillings.⁵⁷ The generator failed to arrive on time, and when it did, the company failed to complete the contract.⁵⁸

"Bank of Tanzania (BoT) External Payment Arrears (EPA)," Asset Recovery Knowledge Centre, <<http://www.assetrecovery.org/kc/node/c3db0290-6a0e-11de-805d-551e161363cd.0.jsessionid=EA658D69DF694B8846C03ED33C3CB925>> Accessed August 27, 2014.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ "Kikwete sacks his Central bank governor over corruption," 10 January 2008, <<http://tzcommoncents.com/>> Accessed August 27, 2014.

⁵² "Bank of Tanzania (BoT) External Payment Arrears (EPA)," *supra* note 51.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.* This occurred mainly in Dubai and Switzerland.

⁵⁶ See Felix Lazaro, "Kikwete's pardon of inmate clarified," The Citizen, 25 January 2014. Farijala Shabani is serving 11 years in jail and Rajabu Maranda is serving 10 years in jail.

⁵⁷ "Assessing The Production process of Tender Emergency Power", Executive Summary of the Report of the Select Committee created by the Parliament of the Republic of Tanzania (2007).

⁵⁸ *Ibid.*

Similar to the first case, this is not a transnational corruption case in nature because, according to the Mwakyembe Report to Parliament, the company was never registered in the United States or in Tanzania.⁵⁹ Former Prime Minister Edward Lowasa, who exerted pressure to have Richmond selected, made the final decision to award the contract to Richmond. In light of the corruption scandal, Prime Minister Lowasa resigned.⁶⁰

B. GOVERNMENTAL ROLE IN COMPENSATION

The U.K. Department for International Development endorsed the proposal from the Government of Tanzania for the ex gratia payment to be used to fulfill the country's 'non-salary education block grant'.⁶¹ By providing essential teaching materials and improving classroom facilities and teachers' accommodation, this proposal would undoubtedly benefit the people of Tanzania. The proposal's requirement of an 'external audit' of the grants,⁶² to be carried out according to international standards, would help ensure the appropriate and demonstrable use of the funds.⁶³

Grand corruption damages domestic institutions to the point where they are not safe repositories for the offenders' stolen assets⁶⁴ or the victims' compensation. Such corruption also involves high officials with significant influence over the entire system of government.⁶⁵ For these reasons, the state is not safe to receive and administer the compensation. Already, the state misuses money from outside donors that are meant for anti-corruption activities.⁶⁶ For example, Norway supported the Management of Natural Resources Programme (MNRP) in Tanzania for 12 years, from 1994 to 2006.⁶⁷ Total funding for the programme amounted to around US\$60 million, about US\$5 million a year.⁶⁸ In 2006, an independent final evaluation raised doubts about the financial management of the programme.⁶⁹ An independent audit firm was called in to audit 5 out of the 11 projects in the programme.⁷⁰ Although only a sample of financial records were audited and no audit report received by the Norwegian Embassy documents misuse of such a magnitude, half of the US\$60 million was estimated to have been lost through corruption and mismanagement.⁷¹

With this situation how will the same government be able to use and allocate compensation money as required for the benefit of the taxpayer or the victims? Malcolm Bruce MP asked

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ House of Commons International Development Financial Crime and Development (2010), *supra* note 14, at 3.

⁶² As the Norway incident highlights in this paper (*See* note 71), there are many challenges of independent or external audits, which suggests that these audits do not work.

⁶³ House of Commons International Development Financial Crime and Development (2010), *supra* note 14, at 11.

⁶⁴ United Nations Office on Drugs and Crime, "Recovery and Return of Proceeds of Corruption," at 638. .

⁶⁵ *See Ibid.*

⁶⁶ Norad, *supra* note 10, at 29. This evaluation is concerned with support to Anti-Corruption (AC)-related programs over the period 2002-2010 by Denmark, Norway, Sweden and the United Kingdom (UK).

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

whether it was “offensive” for the BAE board to suggest it better knew how to use the money in comparison to the Tanzanian government.⁷² Giving compensation funds to corrupt government hands is also extremely offensive. In fact, this system is not safe, as it can open the floodgates to further corruption problems. Not all countries are devoted to the fight against corruption. If the government is corrupt there is no guarantee that the agreement funds would be genuinely used to benefit the victims.

The country of the compensating party may also be suspect. The economies of most developed countries are highly controlled by multinational corporations. Multinational corporations can influence governments through political donations and direct lobbying. For example in the United States of America, according to the Center for Responsive Politics (CRP), companies, interest groups, and unions spent more than \$3.21 billion lobbying the federal government in 2013.⁷³ Large corporations are also avid contributors to political campaigns. Political contributions and lobbying can be effective in influencing public policy, decisions, and power. Under these circumstances, the role of the state in holding these corporations fully responsible is questionable.

C. THE ROLE OF THE OFFENDER IN COMPENSATION

BAE indicated that it wanted to be involved in deciding how the money should be spent, and that it had appointed Lord Cairns to head an Advisory Board that would ‘guide the company as to the optimum means of applying the £29.5m for the benefit of the people of Tanzania in accordance with all applicable company policies.’⁷⁴ This proposition was rejected.⁷⁵

It was the view of the company that it will be responsible and ensure the payment is for the benefit of the people of Tanzania. In order to achieve this, the company had a plan to review the operation of the scheme after a 12-month period to make sure that it is meeting its objectives and it will appropriate for further funds to be made available for that particular scheme.⁷⁶

This might seem simple on paper but it is a messy business to conduct distribution of compensation for victims of transnational corruption; the risk is obvious that the funds, although given, are likely to be applied in a way purposely to benefit the company. It was rejected and condemned by both the United Kingdom and the government of the United Republic of Tanzania; compensation for corruption is not a charity nor a foundation but rather a punishment as asserted by Anas Sarwar, the Labour MP for Glasgow central in a statement addressed to BAE: *“You are not setting up a charity trust, or a personal or a private foundation, or some kind of outward branch... you are paying a fine, a punishment.”*⁷⁷

⁷² Mark Doyle, “BAE criticised by UK MPs over Tanzania corruption,” BBC News, 19 July 2011.

⁷³ Center for Responsive Politics, “Lobbying Database,” <<https://www.opensecrets.org/lobby/>> Accessed August 27, 2014.

⁷⁴ *Current Cases in Tanzania*, *Supra* note 31.

⁷⁵ *Ibid.*

⁷⁶ House of Commons International Development Financial Crime and Development (2010) *supra* note 14, at Ev 5.

⁷⁷ Frederika Whitehead, “BAE urged to pay £29.5m fine to Tanzania,” *The Guardian*, 22 July 2011.

III. PROPOSALS FOR REFORM

Transparency is vital to any option for distributing compensation for the harms of corruption. To achieve this, civil society⁷⁸ and the government, particularly Parliament, should collaborate together. A possibility would be the involvement of civil society in the government's National Anti-corruption Strategy and Action Plan (NACSAP). Civil society involvement is crucial for ensuring the proper use of the funds paid as compensation to benefit the victims of corruption. Civil society's work should complement the anti-corruption efforts of the government, media, and rule of law.

Compared to government efforts alone, Tanzanian civil society is more likely to ensure that the funds obtained through compensation for corruption benefit the victims. A high number of civil society organizations work directly with people adversely affected by corruption such as impoverished communities. Because civil society addresses most government activities, it would be prudent for the government to involve the civil societies organization (CSOs) for compensating corrupt activities relevant to the mandate of the CSO such as agricultural CSOs working with the government to remedy corruption in the agriculture sector.

Additionally, the aim of joint civil society and government collaboration would be to reach individual victims instead of the state "victim." Conventional legislation could become a barrier to recovering compensation for state victims because it may not recognize a State as a possible crime victim for purposes of return or compensation⁷⁹ as it becomes very difficult to prove that a government has been directly affected by corruption. Furthermore, the notion of a "state victim" would likely only apply to certain government entities in addition to society as a whole. For example, in the BAE case, if the money used to pay for the radar came from the ministry or department of aviation, individuals from the department, such as workers, would have been affected in addition to taxpayers who provide the funds for the department.

A. CIVIL SOCIETY IN THE BAE RADAR CASE

In terms of compensation for the BAE case, in which the funds were directed to the education sector, education civil society should be involved, such as **HakiElimu**, one of the most important NGOs in the education sector. In one of its evaluations on the effects of corruption *How Corruption Kills our Children's Education: Media Year in Review 2009*, HakiElimu provided a useful overview demonstrating how the money lost to the grand corruption scandals discussed earlier, Richmond, BAE Radar, and EPA, could have contributed to education. For example, the money lost by the Richmond scandal could have been used to build 19,211 houses for primary school

⁷⁸ Civil society is comprised of different entities that often unite together for a single purpose and common interest. Membership includes Community Based Organisations and Non-Governmental Organisations, voluntary and self-help groups, community based groups and societies, social movements, networks of organizations, and professional associations.

⁷⁹ United Nations Office on Drugs and Crime *supra* note 68.

teachers.⁸⁰ This is notable in consideration of that fact that the Ministry of Education allocated less than Tsh 5 billion toward housing for teachers in 2008/2009 although the Primary Education Development Program (PEDP) II called for Tsh 153 billion.⁸¹ While the government only met 3% of what PEDP II recommended, the money lost in the Richmond case would have been more than enough to meet the PEDP II target.⁸² As to the BAE RADAR case, the Tsh 70 billion lost in corruption could have built 2,412 science labs for secondary students—enough to cover the shortage recognized by the Parliamentary Committee on Community Development.⁸³ In 2008/2009, the Government only spent Tsh 7.38 billion to build 187 labs at A-level schools, which is equivalent to Tsh 39.5 million per lab.⁸⁴ The Secondary Education Development Plan (SEDP), however, has stated that one lab costs Tsh 14 million.⁸⁵ If the average cost to construct a lab is between the government's and the SEDP's estimate, for example, Tsh 29 million, then the Tsh 70 billion lost in the BAE Radar case would have been enough to build all 2,412 laboratories needed for secondary schools.⁸⁶ As to the external payment arrears (EPA) scandal, the money lost in corruption could have trained more than enough new teachers to meet the desired national teacher-pupil ratio.⁸⁷ According to statistics from 2009, Tanzania has a national teacher-pupil ratio of 1:54 while the desired ratio is 1:40.⁸⁸ With a cost outlined by PEDP II adjusted for inflation of Tsh 917,000 to train one new teacher, Tsh 157 billion could provide 171,210 new teachers.⁸⁹ Together with existing teachers, this would cut the teacher-pupil ratio in half to 1:26.⁹⁰ HakiElimu's analysis on corruption and education costs indicates that the Tanzanian government should have considered civil society involvement, such as HakiElimu, to help arrange, manage, and supervise the use of BAE Radar compensation funds.

B. LIMITATIONS OF INVOLVING CIVIL SOCIETY

Although we argue that Tanzanian civil society should be involved in the distribution of compensation for corruption, civil society did not play a role in the disbursement of the BAE funds.⁹¹ While there are undoubtedly various reasons for this lack of participation, one of the chief reasons is likely that, as a collective, Tanzania civil society organizations are very weak and rather young.⁹² Structural factors—particularly the dependence of many Tanzanian organization on donor funds—keep nascent organizations from developing independent and capable means of capacity building,⁹³ including the ability to implement effective anti-corruption measures. Civil

⁸⁰ HakiElimu, *How Corruption Kills our Children's Education: Media Year in Review 2009*, Leaflet 10.1 E, at 1.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.* at 2.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.* at 4.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ See House of Commons International Development Financial Crime and Development (2010) *supra* note 14.

⁹² Embassy of Belgium in Dar Es Salaam, *Summary: Civil Society in Tanzania*, (2009) at 6-8.

⁹³ *Ibid.* at 7.

society should be involved in anti-corruption campaigns, but they should be included in a way, which ensures they are neither co-opted by state actors nor sources of corruption themselves.

Tanzania is attempting to surmount this obstacle through the NACSAP Phase II, which has as a goal the empowerment of civil society organizations and other non-state actors and their inclusion into anti-corruption processes.⁹⁴ If this is successful, civil society organizations may be viable option in the distribution of corruption compensation funds.

IV. ADDITIONAL RECOMMENDATIONS

In conjunction with civil society involvement with compensation initiatives, we make the following recommendations for governance at the national and international level:

A. NATIONAL LEVEL

NACSAP is among the best options for fighting corruption in Tanzania. While Phase I and II has already been implemented,⁹⁵ the next Phase is the most appropriate for addressing the issue of compensation for corruption.

NACSAP is the main vehicle for carrying out the intent of the National Anti-Corruption Policy by involving the entire stakeholders and anti-corruption institutions in a discussion on different ways to tackle corruption.⁹⁶ As a result, NACSAP would be the best equipped to debate the adoption of legislation similar to the FCPA and further to redress the law on compensation.⁹⁷

B. INTERNATIONAL LEVEL

As the international community is moving forward to the new economic order in international business by governing multinational corporations from infringing human rights,⁹⁸ the 'do no harm' principle should be expanded from not only focusing on the protection of human rights but also to mandate that multinational corporations and states do not deprive the victim of any wrongful act to benefit from compensation, whether given to the state or an agent. In addition to this core provision of the "Guiding Principles on Business and Human Rights" by John G. Ruggie,⁹⁹

⁹⁴ Norad, *supra* note 10, at 19.

⁹⁵ United Nations Office of Drugs and Crime, *NACSAP II Progress Report, January – June 2010*, at 5-7.

⁹⁶ *Ibid.* at 5.

⁹⁷ *See Ibid.* at 5-7. These issues were clearly marginalized in the NACSAP Phase II, which for it to be fully implemented required the implementation of the 8 fundamental goals, which included combating corruption in a more scientific way, and by addressing its root causes.

⁹⁸ *See* Connie De La Vega, Amol Mehra, and Alexandra Wong, *Holding Businesses Accountable for Human Rights Violations: Recent Developments and Next Steps*, Dialogue on Globalization (2011).

⁹⁹ *See* "Report of the Special Representative of the Secretary-General on the issue of human rights and transactional corporations and other business enterprises," John Ruggie, 17th Session, Human Rights Council, 21 March 2011.

is greater victim access to effective remedy—both judicial and non-judicial. There is a need in international law to have provisions address compensation/remedy as a right; this will be a new avenue for direct compensation if a private right of action is rejected.

Furthermore, the link between human rights and anti-corruption activities should be addressed. At the 1999 Davos World Economic Forum, UN Secretary-General Kofi Annan proposed a United Nations Global Compact based on shared values in the areas of human rights, labor, and the environment, and to which *anti-corruption has been added in 2004*.¹⁰⁰ The ten principles of the Global Compact are derived from different international treaties including the United Nations Convention against Corruption.¹⁰¹ By 2013, more than 10,000 companies had joined, from about 130 countries.¹⁰² If these principles were modified to recognize the right to compensation for corruption and the relationship between human rights and anti-corruption, it is likely the international community would modify international anti-corruption law to more concretely address the issues of compensation for victims. This will also result in states adopting national legislation that views the victim as beneficiary and the government as a trustee trying to fulfill its obligation to the right of the beneficiary.

CONCLUSION

Through this paper, one will hopefully realize the number of ways for distributing the funds paid as a compensation for a corrupt transaction. Nevertheless our research indicates, through a focus on the BAE Radar case, that the best method for compensation entails joint civil society and government effort. We view this option as most appropriate with regards to Tanzania's economic and socio-political structures. In addition, understanding the strength and weakness of the Tanzanian law and policies, the capacity of anti-corruption bodies and their weaknesses, is important for the struggle against corruption, especially grand corruption.

¹⁰⁰ United Nations Global Compact, "Transparency and Anti-corruption", <<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/anti-corruption.html>> Accessed August 27, 2014.

¹⁰¹ United Nations Global Compact, "The Ten Principles," <<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>> Accessed August 27, 2014.

¹⁰² EY, "EY Proud to be a Member of the United Nations Global Compact," (Press Release, March 11, 2014).

Civil Action Against Corruption

Empowering the Filipino People in a Captured State Situation

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“If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.
[The Federalist Papers, Federalist No. 51, 08 February 1788]

INTRODUCTION

The year of 2013 was a year of unraveling for Philippines, having been rocked recently by two corruption scandals with the “Pork Barrel” scam at the forefront, followed by typhoon Yolanda foreign aid furor. Both issues expose the extent to which corruption has permeated every rung of the Philippine bureaucracy. The staggering amount involved in the recent pork barrel scandal has seemingly bared the politics behind systemic corruption. Janet Lim Napoles, a businesswoman, was accused of laundering for lawmakers by creating bogus non-government organizations through which individual pork barrel allocations of certain senators and members of the congress were allegedly channeled.¹ Almost a year after the scandal erupted, only several members of the Senate and Congress have been indicted, including Senators Bong Revilla, Juan Ponce Enrile, and Jinggoy Estrada.² Then came Typhoon Yolanda (Haiyan) foreign aid scandal, which resulted in the loss of donations. Currently, charges have not been filed against those responsible.

Corruption, from petty to grand, is said to be endemic in all levels of government in the Philippines.³ That corruption is severe in the country is evident in the fact that high-ranking politicians involved in corrupt practices, including two ousted presidents, have never been truly punished. Former president Joseph Ejercito Estrada was convicted of plunder but was quickly pardoned and has been elected as Mayor of Manila. His successor, Gloria Macapagal-Arroyo, who granted the pardon is now facing corruption charges herself.⁴ Despite the many laws passed to curb corruption and the number of anti-corruption enforcement bodies, corruption simply, persistently thrives.

The objective of this paper is to propose a civil action grounded on public participation—empowering the citizens themselves with the proper legal tools to fight corruption. This is in recognition of the public as center of all democratic systems and the citizens’ right to prosecute breach of fiduciary duty. The first part of the paper will be devoted to defining corruption and explaining its social damage. A brief discussion on the laws passed and bodies constituted in the Philippines to combat corruption and an analysis of their efficacy will then follow. This paper will

¹ Charlie Campbell, *Philippines: Pork Barrel Graft Scandal Sparks Massive Protests*, TIME, September 11, 2013, available at <http://world.time.com/2013/09/11/philippines-pork-barrel-graft-probe-has-lawmakers-squealing/#ixzz2wN3tGon7>.

² Phil. Daily Inquirer, *Ombudsman Oks plunder raps vs Enrile, Estrada, Revilla, Napoles*, INQUIRER.NET, Apr. 1, 2014, available at <http://newsinfo.inquirer.net/590812/ombudsman-oks-plunder-raps-vs-enrile-estrada-revilla-napoles>.

³ Alex Brillantes, Jr. & Maricel Fernandez, *Toward a Reform Framework for Good Governance: Focus on Anti-Corruption*, 54 PHIL. J. PUB. ADM. 88 (2010).

⁴ Leila Salaverria, *Another Plunder Charge Filed vs Arroyo*, Inquirer.net, July 26, 2011, available at <http://newsinfo.inquirer.net/30411/another-plunder-charge-filed-vs-arroyo>.

show that the seeming disconnect in the goals of the government and that of the public is a form of an *agency problem*, which, along with the *state capture* situation of the Philippines is in large part responsible for extent and gravity of corruption in the country. It is from the twin perspectives of the *agency problem* and *state capture* that the persisting corruption cycle will be discussed. Given the fiduciary relationship between the government and the public, the second part of the paper will examine the recent efforts to promote transparency and citizen participation in the fight against corruption, and highlight the need for a more active participation of the citizens in prosecuting the same. The third part will then discuss the proposal of the paper: a substantive law giving the citizens right of action to prosecute corruption. Finally, this paper will identify the challenges and limitations of the proposal, and give brief remarks about each of them.

I. CORRUPTION AND ANTI-CORRUPTION MEASURES

In the Philippines, corruption is defined in depth by an enumeration of corrupt practices in the Anti-Graft Act and Corrupt Practices Act.⁵ The Code of Conduct and Ethical Standards for Public

⁵ Rep. Act No. 3019, at § 3-4, *provides*: “Corrupt practices of public officers. - In addition to acts or omissions of public officers already penalized by existing law, the following shall constitute corrupt practices of any public officer and are hereby declared to be unlawful:

- (a) Persuading, inducing or influencing another public officer to perform an act constituting a violation of rules and regulations duly promulgated by competent authority or an offense in connection with the official duties of the latter, or allowing himself to be persuaded, induced, or influenced to commit such violation or offense.
- (b) Directly or indirectly requesting or receiving any gift, present, share, percentage, or benefit, for himself or for any other person, in connection with any contract or transaction between the Government and any other part, wherein the public officer in his official capacity has to intervene under the law.
- (c) Directly or indirectly requesting or receiving any gift, present or other pecuniary or material benefit, for himself or for another, from any person for whom the public officer, in any manner or capacity, has secured or obtained, or will secure or obtain, any Government permit or license, in consideration for the help given or to be given, without prejudice to Section thirteen of this Act.
- (d) Accepting or having any member of his family accept employment in a private enterprise which has pending official business with him during the pendency thereof or within one year after its termination.
- (e) Causing any undue injury to any party, including the Government, or giving any private party any unwarranted benefits, advantage or preference in the discharge of his official administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence. This provision shall apply to officers and employees of offices or government corporations charged with the grant of licenses or permits or other concessions.
- (f) Neglecting or refusing, after due demand or request, without sufficient justification, to act within a reasonable time on any matter pending before him for the purpose of obtaining, directly or indirectly, from any person interested in the matter some pecuniary or material benefit or advantage, or for the purpose of favoring his own interest or giving undue advantage in favor of or discriminating against any other interested party.
- (g) Entering, on behalf of the Government, into any contract or transaction manifestly and grossly disadvantageous to the same, whether or not the public officer profited or will profit thereby.
- (h) Directly or indirectly having financial or pecuniary interest in any business, contract or transaction in connection with which he intervenes or takes part in his official capacity, or in which he is prohibited by the Constitution or by any law from having any interest.
- (i) Directly or indirectly becoming interested, for personal gain, or having a material interest in any transaction or act requiring the approval of a board, panel or group of which he is a member, and which exercises discretion in such approval, even if he votes against the same or does not participate in the action of the board, committee, panel or group. Interest for personal gain shall be presumed against those public officers responsible for the approval of manifestly unlawful, inequitable, or irregular transaction or acts by the board, panel or group to which they belong.

Officials additionally declares unlawful certain prohibited acts and transactions of any public official and employee.⁶ Justice Roman G. Del Rosario, however, noted that most acts are assessed

(j) Knowingly approving or granting any license, permit, privilege or benefit in favor of any person not qualified for or not legally entitled to such license, permit, privilege or advantage, or of a mere representative or dummy of one who is not so qualified or entitled.

(k) Divulging valuable information of a confidential character, acquired by his office or by him on account of his official position to unauthorized persons, or releasing such information in advance of its authorized release date.

The person giving the gift, present, share, percentage or benefit referred to in subparagraphs (b) and (c); or offering or giving to the public officer the employment mentioned in subparagraph (d); or urging the divulging or untimely release of the confidential information referred to in subparagraph (k) of this section shall, together with the offending public officer, be punished under Section nine of this Act and shall be permanently or temporarily disqualified in the discretion of the Court, from transacting business in any form with the Government.

Sec. 4. Prohibition on private individuals. - (a) It shall be unlawful for any person having family or close personal relation with any public official to capitalize or exploit or take advantage of such family or close personal relation by directly or indirectly requesting or receiving any present, gift or material or pecuniary advantage from any other person having some business, transaction, application, request or contract with the government, in which such public official has to intervene. Family relation shall include the spouse or relatives by consanguinity or affinity in the third civil degree. The word "close personal relation" shall include close personal friendship, social and fraternal connections, and professional employment all giving rise to intimacy which assures free access to such public officer.

(b) It shall be unlawful for any person knowingly to induce or cause any public official to commit any of the offenses defined in Section 3 hereof."

⁶ Rep. Act No. 6713, AN ACT ESTABLISHING A CODE OF CONDUCT AND ETHICAL STANDARDS FOR PUBLIC OFFICIALS AND EMPLOYEES, TO UPHOLD THE TIME-HONORED PRINCIPLE OF PUBLIC OFFICE BEING A PUBLIC TRUST, GRANTING INCENTIVES AND REWARDS FOR EXEMPLARY SERVICE, ENUMERATING PROHIBITED ACTS AND TRANSACTIONS AND PROVIDING PENALTIES FOR VIOLATIONS THEREOF AND FOR OTHER PURPOSES, § 7 provides "Prohibited Acts and Transactions. - In addition to acts and omissions of public officials and employees now prescribed in the Constitution and existing laws, the following shall constitute prohibited acts and transactions of any public official and employee and are hereby declared to be unlawful:

(a) Financial and material interest. - Public officials and employees shall not, directly or indirectly, have any financial or material interest in any transaction requiring the approval of their office.

(b) Outside employment and other activities related thereto. - Public officials and employees during their incumbency shall not:

- (1) Own, control, manage or accept employment as officer, employee, consultant, counsel, broker, agent, trustee or nominee in any private enterprise regulated, supervised or licensed by their office unless expressly allowed by law;
- (2) Engage in the private practice of their profession unless authorized by the Constitution or law, provided, that such practice will not conflict or tend to conflict with their official functions; or
- (3) Recommend any person to any position in a private enterprise which has a regular or pending official transaction with their office.

These prohibitions shall continue to apply for a period of one (1) year after resignation, retirement, or separation from public office, except in the case of subparagraph (b) (2) above, but the professional concerned cannot practice his profession in connection with any matter before the office he used to be with, in which case the one-year prohibition shall likewise apply.

(c) Disclosure and/or misuse of confidential information. - Public officials and employees shall not use or divulge, confidential or classified information officially known to them by reason of their office and not made available to the public, either:

- (1) To further their private interests, or give undue advantage to anyone; or
- (2) To prejudice the public interest.

(d) Solicitation or acceptance of gifts. - Public officials and employees shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan or anything of monetary value from any person in the course of their official duties or in connection with any operation being regulated by, or any transaction which may be affected by the functions of their office.

As to gifts or grants from foreign governments, the Congress consents to:

- (i) The acceptance and retention by a public official or employee of a gift of nominal value tendered and received as a souvenir or mark of courtesy;
- (ii) The acceptance by a public official or employee of a gift in the nature of a scholarship or fellowship grant or medical treatment; or
- (iii) The acceptance by a public official or employee of travel grants or expenses for travel taking

on a case by case basis, “considering the extreme difficulty to contain all the elements of the different types of graft’ or ‘corruption’ in one sweeping generalization.”⁷

In light of these complications noted by Justice Del Rosario, this paper will utilize the definition offered by Susan Rose-Ackerman as opposed to the definition under Philippine law. Rose-Ackerman simply defines corruption as the misuse of public office for private gain.⁸ This definition will be employed for two reasons: first, it implicitly recognizes that corruption is not limited to specific acts such as bribery but encompasses all acts connected to misuse of public office, and second, such definition by using the term “private gain” does not purport to limit the scope of benefits derived from corrupt acts to pecuniary benefits.

A. CAUSES AND SOCIAL DAMAGE OF CORRUPTION

John S.T. Quah, in his study titled “*Curbing Corruption in the Philippines: Is it an impossible dream,*” examined the causes of corruption in the country, tracing its history to as far back as the Spanish occupation more than four centuries ago.⁹ He attributed its causes to low salaries of public officials, which cannot keep pace with the rising cost of living, the excessive red tape and inefficiency of the Philippine Civil Service, and the low risk of detection and low probability of punishment “contributing to its perception as a ‘low risk high reward’ activity.”¹⁰ Other causes of corruption include the importance of family kinship ties and *utang na loob*¹¹, as well as lack of political will.¹²

Whatever its causes, corruption results in wasted resources, diminished government revenue, and encouragement of criminality. But its costs are not limited to direct costs measured in terms of money because, more often than not, the damage inflicted by acts of corruption are intangible and indirect—but no less destructive.¹³ Rose-Ackerman’s definition of corruption as “misuse of public office for private gain” finds special relevance in the Philippine context because it recognizes these intangible opportunity costs. Indeed it is difficult to estimate the total losses involved in corruption. One measure, according to Philippine National Police (PNP) Academy

place entirely outside the Philippine (such as allowances, transportation, food, and lodging) of more than nominal value if such acceptance is appropriate or consistent with the interests of the Philippines, and permitted by the head of office, branch or agency to which he belongs.

The Ombudsman shall prescribe such regulations as may be necessary to carry out the purpose of this subsection, including pertinent reporting and disclosure requirements.”

⁷ Roman G. Del Rosario, *Measures to freeze, confiscate and recover proceeds of corruption including prevention of money laundering in the Philippines*, http://www.unafei.or.jp/english/pdf/PDF_ThirdGGSeminar/Third_GGSeminar_P39-71.pdf.

⁸ Susan Rose-Ackerman, *Corruption*, in READINGS IN PUBLIC CHOICE AND CONSTITUTIONAL POLITICAL ECONOMY 551 (C.K. Rowley & F.G. Schneider eds., 2008).

⁹ John S.T. Quah, *Curbing Corruption in the Philippines: Is this an Impossible Dream?*, 54 PHIL. J. PUB. ADM. 10 (2010).

¹⁰ *Id.*, at 11-13.

¹¹ Richard L. Langston, *Bribery and the Bible: Applied to the Philippines*, 74 (1991).

¹² *Id.*, at 14-16

¹³ Brima Karl Samura, *The Negative Effects of Corruption in Developing Nations*, available at <http://gnpai.org/researchlibrary/corruption/THE%20EFFECTS%20OF%20CORRUPTION.pdf>.

Dean Nelson Moratalla in his article "*Graft and Corruption: The Philippine Experience*," is the amounts involved in cases filed with the Ombudsman.¹⁴ While the amounts involved are literally the damages sought to be compensated in cases filed with the Ombudsman, it would not yield an accurate amount for calculating how much personal damage a person suffered because of a corrupt act. Further it is highly possible that cases filed with the Ombudsman only form a small part of the total number of corruption cases, as some cases may have remained undetected or undocumented.

This may be due in large measure to the fact that the corrupt transactions remain unobserved as they take place between people who are most conscious of keeping the transaction secret. Consequently, research regarding the measure and costs of corruption mostly employs experts to make estimates of its causes and consequences; but this practice is vulnerable to biased, highly inaccurate estimates inasmuch as they fail to take into consideration of what is now called "social damages".

"Social damage" is a relatively new concept in the global fight against corruption. In their December 6, 2010 paper "*Repairing Social damage Out of Corruption Cases: Opportunities and Challenges as Illustrated in the Alcatel Case in Costa Rica*," Dr. Juanita Olaya, Kodjo Atisso, and Anja Roth give the following definition of social damages:¹⁵

"Social damage is the loss experienced in aspects and dimensions of the collective or the community relevant to the law (thus legally protected). In a similar way to the concept used in Costa Rica, it is a type of damage that falls upon individuals, as members of a community but not on an individual in particular. This includes therefore the environment, social trust, the trust and credibility of the institutions, collective fundamental rights like health, security, peace, education and good governance and good public financial management among others. It is different from damages to collective rights in that collective rights belong to a restricted and identifiable group of individuals or legal entities. Social damage can be pecuniary and non-pecuniary. This only makes measurement and restoration more complicated but not less necessary."

Social damages as costs of corruption then touch on a myriad factors both estimable and inestimable. The term incorporates an individual's basic rights to health, peace, education, and good governance, government funds allotted for which are reduced because the gains derived from corruption in large scales fall into private pockets, consequently reducing welfare optimization, and eroding social trust in government institutions. The concept of "social

¹⁴ Nelson Nogot Moratalla, *Graft and Corruption: the Philippine Experience*, Philippine Public Safety College, 113th International Training Course Participants' Papers, Resource Material Series No. 56, at 501.

¹⁵ Dr. Juanita Olaya et al., *Repairing Social Damage out of Corruption Cases: Opportunities and Challenges*, available at http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1779834_code104380.pdf?abstractid=1779834&mirid=4.

damage,” then emerged as a way to quantify and repair the consequences of corruption with the premise that every Philippine peso lost in corruption is one peso taken from welfare optimization: education, social services, and job creations.

B. ANTI-CORRUPTION MEASURES

Anti-corruption measures to combat corrupt practices and their resulting social damages have not been lacking in the Philippines. In fact Quah observed that the Philippines has one of the highest numbers of anti-corruption measures in Asia.¹⁶ It is worth noting that Philippines ratified the United Nations Convention against Corruption in 2006. Corrupt practices are further addressed by the Anti-Graft and Corrupt Practices Act, the Anti-Money Laundering Act of 2001, and the Whistleblower Protection, Security and Benefit Act of 2011. Anti-corruption agencies include the Office of the Ombudsman, the Presidential Anti-Graft Commission, the Anti-Money Laundering Council, and the Lifestyle Check Coalition.¹⁷ Since 1930 more than forty (40) anti-corruption laws and policies have been passed, and around twenty (20) anti-corruption bodies have been organized and constituted since 1950.¹⁸ In fact, current President Benigno Aquino III, in his first executive order, attempted to create a fact-finding body called the “Truth Commission” in 2010.¹⁹ He empowered it to investigate corrupt practices of the predecessor administration but the Supreme Court struck down the commission immediately after its creation and declared it as unconstitutional.²⁰

C. SHORTCOMINGS OF ANTI-CORRUPTION MEASURES

Despite the apparent efforts to minimize corruption in the country, the Philippines still suffers from widespread and endemic corruption. In the 2009 Corruption Perception Index (CPI) of Transparency International, the Philippines ranked 139th out of 177 countries. In the 2013 CPI, the Philippines jumped forty-five places higher to rank 94th.²¹ While the Philippines has scored higher in recent years, such improvement does not necessarily translate to reality and is not indicative of an improving system of governance. The recent pork scandal opened the gateway to a wealth of information regarding the network of corruption on pork barrel transfers.

In the September 16, 2013 Executive Summary on the Priority Development Assistance Fund (PDAF) probe, the National Bureau of Investigation (NBI) categorically stated that they uncovered a detailed picture of the *modus operandi* used by those involved in the pork barrel scandal, but

¹⁶ John S.T. Quah, *supra* note 10, at 17.

¹⁷ Business Anti-Corruption Portal, Philippines Country Profile. *See more* at <http://www.business-anti-corruption.com/country-profiles/east-asia-the-pacific/philippines-version/initiatives/public-anti-corruption-initiatives.aspx>.

¹⁸ Alex Brillantes, Jr. & Maricel Fernandez, *supra* note 4, at 91-92.

¹⁹ Exec. Order No. 1 (2010). This creates the Philippine Truth Commission of 2010.

²⁰ *Biraogo v. The Philippine Truth Commission of 2010*, G.R. Nos. 192935 & 193036, Dec. 7, 2010, *available at* <http://sc.judiciary.gov.ph/jurisprudence/2010/december2010/192935.htm>.

²¹ *See more* at <http://cpi.transparency.org/cpi2013/results/>.

"[t]here's really nothing to monitor because all the funds that were supposed to be used for the project had in reality already been pocketed by the lawmaker" and accomplices.²²

The controversial Commission on Audit Special Report 2012-03, released a month after the NBI report, details highly irregular PDAF disbursements of individual lawmakers and reveals a general pattern of abuse on PDAF transfers. It exposed, among a host of other findings, that disbursements amounting to P1.289 Billion were not compliant with procurement requirements of the government as stated in Republic Act No. 9184, with some even supported by documents of questionable validity. Around P234.213 million in allocations likewise remain undocumented, with vouchers still not submitted despite repeated requests.²³

Then came Typhoon Yolanda (Haiyan), which snatched the attention from the pork barrel probe to the typhoon's devastating effects on several provinces in Southern Philippines. The tragic loss of lives only magnified the growing concern that the foreign aid coming in, which at present totals \$13,000,000, would find itself in the wrong hands, lost again to corruption.²⁴ Accusations were further leveled at government officials who were alleged to have been distributing relief on the basis of vote instead of need.²⁵ Foreign aid in the form of cash donations were in fact channeled through private organizations instead of the local government units. The Secretary appointed to supervise the rehabilitation efforts, Panfilo Lacson, shifted the blame on local officials who he claimed were taking advantage of rehabilitation funds. But more than seven months after he sat as rehabilitation czar, no charges have been filed against those responsible.²⁶

While the PDAF and Typhoon Yolanda issues are recent, they cannot be considered isolated, quarantined incidents. And although the Philippine Supreme Court, in the midst of public uproar, recently declared the PDAF unconstitutional, it is worth mentioning that PDAF is just one of the many forms of lump sum funds in the national budget. University of the Philippines Professor Emeritus Leonor Magtolis Briones, pointed out that these lump sum funds are prone to misuse.²⁷ Senator Panfilo Lacson, who declined to receive his pork allocation since 2001, reportedly stated that the pork barrel fund is a "[b]ig mafia or syndicate involving the executive and legislative

²² Executive Summary by the National Bureau of Investigation regarding the PDAF complaints filed against Janet Lim-Napoles, et al., September 16, 2013. *See more* at <http://www.gov.ph/2013/09/16/executive-summary-by-the-nbi-on-the-pdaf-complaints-filed-against-janet-lim-napoles-et-al/>.

²³ *Id.*

²⁴ Amita Legaspi, *Foreign aid for Yolanda victims will be audited, accounted for – Abad*, GMA News Online, Nov. 12, 2013, *available at* <http://www.gmanetwork.com/news/story/335102/news/nation/foreign-aid-for-yolanda-victims-will-be-audited-accounted-for-abad> <http://newsinfo.inquirer.net/529795/corruption-magnifies-effects-of-typhoon-yolanda>.

²⁵ Ted Thornhill, *Are Philippine officials only handing out food to the people who voted for them?*, THE DAILY MAIL Online, Nov. 15, 2013, *available at* <http://www.dailymail.co.uk/news/article-2507790/Philippines-officials-accused-prioritising-Typhoon-Haiyan-aid-areas-voted-them.html>.

²⁶ Bea Cupin, *PNP: Investigation 'deterred' Yolana corruption*, RAPPLER.com, Mar. 4, 2014, *available at* <http://www.rappler.com/nation/52107-pnp-cidg-yolanda-rehabilitation>.

²⁷ Leonor Magtolis Briones, *Three reasons why the 2014 national budget is prone to misuse*, INTERAKSYON.com, Aug. 14, 2013, *available at* <http://www.interaksyon.com/article/68608/leonor-briones--three-reasons-why-the-2014-national-budget-is-prone-to-misuse>.

branches of the government[...]in circles of kickbacks, corruption, patronage politics, and wasteful spending.”²⁸

A 2013 Survey of Enterprises conducted by the Social Weather Stations, in cooperation with Australian Aid - The Asia Foundation in the Philippines, National Competitiveness Council and the Manila Business Club showed that the number of people who said they “saw a lot” of corruption in the public sector rose to 56 percent in 2013 from 2012’s 43 percent.²⁹ Those saying that government “often/almost always” punishes corrupt government officials fell to 20 percent in 2013, from 27 percent in 2012.³⁰

The conviction rate of the Ombudsman in cases filed at the anti-graft court Sandiganbayan reveals a poor performance in prosecuting corruption. As of August 2013, the records of Sandiganbayan showed the Ombudsman only managed to secure 24 convictions (12.83 percent), including two guilty pleas, out of 187.³¹ The 2013 conviction rate is even lower than the rates posted in the last three years.³²

In the Philippines, clearly, improvements in CPI ranking can be misleading. It is also worth noting that the period (2010 up to the present) during which there was a steady increase in the country’s CPI ranking coincides with the term of President Benigno Aquino III, the son of two iconic heroes of Philippine democracy. It would not be farfetched to assume that the ranking may have been influenced not by any institutional changes made, but by the personality of the country’s leader.

D. STATE CAPTURE AND AGENCY PROBLEM

Because it is evident that anti-corruption measures have remained largely unsuccessful in the Philippines, discussion on possible reasons behind this inefficacy is warranted. Quah attributes this ineffectiveness to lack of political will.³³ The authors of this paper, however, are of the belief that the lack of political will in the Philippines is more of an institutional rather than a personality-based problem. This may be adequately explained by the phenomenon of *state capture* permeating Philippine political and bureaucratic system and creating a fertile breeding ground for corruption.

²⁸ Malou Mangahas, *Scam, no! PDAF a ‘mafia’ of executive & legislature*, July 21, 2013, Philippine Center for Investigative Journalism, available at <http://pcij.org/stories/scam-no-pdaf-a-mafia-of-executive-legislature/>.

²⁹ Social Weather Station, *The SWS Survey of Enterprises on Corruption (2013)*. The 2013 Survey is based on face-to-face interviews of executives of 951 enterprises in National Capital Region, Metro Angeles, Cavite-Laguna-Batangas, Metro Iloilo, Metro Cebu, Metro Davao, and Cagayan de Oro-Iligan over the period July 31 to November 29. The 2013 Survey of Enterprises on Corruption is the 11th in a series of surveys done by SWS since 2000. See more http://www.sws.org.ph/pr20140115b_2013%20Survey%20of%20Enterprises%20Executive%20Summary.pdf.

³⁰ *Id.*

³¹ John Constantine Cordon, *Ombudsman wins 1 out of 10 cases in the Sandiganbayan*, MANILA TIMES, Oct. 29, 2013, available at <http://www.manilatimes.net/ombudsman-wins-1-out-of-10-cases-in-sandiganbayan/48819/>.

³² Cynthia Balana, *Ombudsman’s conviction rate declines in first 3 quarters of 2013 – report*, INQUIRER.NET, Nov. 3, 2013, available at <http://newsinfo.inquirer.net/519625/ombudsmans-conviction-rate-declines-in-first-3-quarters-of-2013-report>.

³³ John S.T. Quah, *supra* note 10, at 26.

A World Bank study defined state capture as “[s]haping the formation of laws, rules, decrees and regulations through illicit and non-transparent private payments to public officials.”³⁴ This definition contemplates interactions between private and public officials. Applied in the Philippine context, however, the concept of state capture goes beyond such interactions between private and public firms and falls short of mapping in precise strokes the realities in the country. The authors believe that state capture in the Philippines exists both between public and private firms, and ultimately extends between the government appointee and the appointing power.

That state capture is acute in the Philippines is demonstrated by the fact that anti-corruption bodies themselves, designed to prosecute acts of corruption, are susceptible to capture by the very instrumentality or person they are supposed to prosecute. The captured state situation applied in the Philippine context then is more sweeping and extensive in the sense that it covers the existence of state capture on government instrumentalities and agencies in general, and even agencies in charge of prosecuting corruption, including the Ombudsman. One case in point is the situation of former Ombudsman Merceditas Gutierrez, an appointee of President Gloria Macapagal-Arroyo. She had allegedly failed to take prompt and immediate action on complaints filed against various public officials, including former President Arroyo, regarding high-profile and corruption-laden government projects. The House of Representatives later cited this as one of the grounds for Gutierrez’s eventual impeachment, and she later resigned.³⁵ Gutierrez’s case may be seen as an illustration of the captured state condition, when the instrumentality of the state, constitutionally placed in charge of prosecuting corruption, is no longer immune to state capture.

In the Philippines, state capture is further manifested in the highly entrenched *compadre* system, patronage system, and cultural value of *utang na loob*. The *compadre* system, as generally understood, is the extension of kinship ties to a *compadre* who is usually a prominent man in the community chosen as the godfather of one’s child. That prominent man, influential as he is, acts as an intermediary in government dealings.³⁶ Patronage, the custom of government officials in position of filling government positions with relatives or persons of their own choosing, even if unqualified, is also a practice deeply embedded in Filipino culture, attributed to the Filipino’s reverence for family and *utang na loob*.³⁷ *Compadre* system and patronage were particularly prevalent during the time of dictator Ferdinand Marcos, as well as during the presidency of Joseph Ejercito Estrada. The common characteristic of these systems is the concept of reciprocity, which is best, explained in the context of the Filipino cultural value of *utang na loob*. The term *utang na loob*, a concept without any direct equivalent in English, is a Filipino brand of duty that implies a deep sense of obligation on the part of the receiver of favor to reciprocate

³⁴ Joel J. Hellman et al., *Seize the State, Seize the Day: State Capture, Corruption, and Influence in Transition*, World Bank Policy Research Working Paper No. 2444, at 2 (2000).

³⁵ Mark Marueñas & Amita Legaspi, *House transmits impeachment articles to Senate*, GMA News Online, Mar. 23, 2011, available at <http://www.gmanetwork.com/news/story/215977/news/nation/house-transmits-impeachment-articles-to-senate>.

³⁶ John S.T. Quah, *supra* note 10, at 14.

³⁷ *Id.* at 15.

when the appropriate moment comes.³⁸ The appointee cannot be expected to go after the one who appointed him, as this will constitute an act of ingratitude.

If the government is at risk of capture, or worse, already captured, there is little reason to rely solely on the political will of government officials to prosecute their peers in the government, as well as private individuals who wield considerable influence over them. There is then a systemic culture of impunity that cannot be remedied by mere reliance on the existing system enforced to curb corruption, a situation contrary to the explicit thrust of the constitution, where public office is considered public trust.

This problem of state capture is all the more disturbing because of the fiduciary relationship that a government assumes in any democratic and representative government, where power is derived from the people as the sovereign.³⁹ The people, empowered by the Constitution, then repose their trust in the government officials who are mandated to act only within the scope of the authority given to them following the principle of public office being a public trust.⁴⁰ Because of this fiduciary duty, government officials and employees have the cardinal responsibility of managing the affairs of the government with efficiency and integrity, and must at all times be accountable to the people, serving with utmost responsibility, integrity, loyalty, and efficiency.⁴¹ Only those who can live up to these constitutional standards deserve the honor of continuing in public service.⁴²

In this relationship, the people may be analogized as the principal with the Government deputized to act as agent on their behalf to carry out state functions and maintain a working community.⁴³ The Filipino people's aspirations are embodied in the Preamble of the Philippine Constitution where the intention to establish a Government that "shall embody [their] ideals and aspirations, promote the common good, conserve and develop [their] patrimony, and secure to [themselves] and [their] posterity, the blessings of independence and democracy under the rule of law and a regime of truth, justice, freedom, love, equality, and peace" was clearly articulated.⁴⁴

³⁸ Richard L. Langston, *supra* note 12.

³⁹ CONST. Preamble, art. II, §1 (Phil.).

⁴⁰ CONST. art. XI, §1 (Phil.).

⁴¹ CONST. art. XI, §1 (Phil.).

⁴² *Dumduma v. Civil Service Commission*, G.R. No. 182606, Dec. 4, 2011, *available at* <http://sc.judiciary.gov.ph/jurisprudence/2011/october2011/182606.htm>; *See also* *Duque v. Veloso*, G.R. No. 196201.

⁴³ The Philippine government is canalized into three main branches of government: the Legislative, the Executive and the Judiciary. The Philippine Constitution provides for the election of members of Congress as well as the President and Vice-President. The members of the Supreme Court as well as the judges of lower courts are appointed by the President from a list of nominees prepared by the Judicial and Bar Council. The President likewise appoints the Ombudsman and their Deputies as well as other government officials as provided by law. Under this arrangement, elective officials directly receive their mandate from the electorate when they are chosen by election. Their continued stay in office is contingent on their satisfactory performance; should their constituents find their performance unsatisfactory, they will take this into account in considering their reelection. On the contrary, appointive officials receive their mandate indirectly through the intervention of an appointing power. The good opinion of the public then has no bearing on their continued stay in office and they are less subject to the public control, making the relationship between the appointive officials and the public seem tenuous, their duties minimized. Ultimately, however, the principle that *public office is a public trust* does not make any such distinction between elective and appointive officials. Appointive officials then are no less bound by their fiduciary duty.

⁴⁴ CONST., Preamble (Phil.)

Yet from the moment of election, state capture may immediately come into play as politicians become beholden to their sponsors and the latter may demand *quid pro quo* concessions.⁴⁵ This moves them to advance their own personal interests, or those of their campaign contributors, at the expense of public interest. This situation is made more complex by the *compadre* system, patronage, and *utang na loob*, resulting in the systemic capture of the government where officials are spurred to action only to further their own interests. The interests of the intended principal are relegated to the background, forgotten.

This situation is akin to what has been called an *agency problem*, which arises “[w]hen the welfare of one part, termed the ‘principal,’ depends upon actions taken by another party termed the ‘agent’ and there is a problem in motivating the agent to act in the principal’s interest rather than simply the agent’s own interest.”⁴⁶ Though this concept is more easily applied in the context of agency relationships in the commercial setting, no cogent reason exists as to why this concept may not as well apply in the government setting, where government officials acting as agents depart from the *public office-public trust* principle and start pursuing their own interests at the expense of the public, their principal.

Attorney Leandro Angelo Aguirre has applied the “agency problem” framework in the case of state-owned enterprises in the Philippines.⁴⁷ He ratiocinated that because these state-owned enterprises, or Government-Owned and Controlled Corporations (GOCCs), exist for the benefit of the Filipino people, the latter should be considered as the ultimate shareholder and principal of the GOCCs, while the directors and officers should be considered as their agents.⁴⁸

The agency problem is more pronounced in cases involving the Ombudsman, as the Ombudsman is tasked to prosecute with jurisdiction over cases involving public officials. When the Ombudsman receives a complaint against the President from a concerned citizen, a problem may arise when the Ombudsman hesitates to file the case. As an official appointed by the President, the Ombudsman may refuse to file a case against the very person who appointed him or her. After all, the Ombudsman’s decision on the matter is generally not subject to judicial review unless there is a showing of grave abuse of discretion.⁴⁹ This shows that even supposedly independent bodies like the Office of the Ombudsman, being an instrumentality of the state, are also susceptible to capture. The agency problem arises because the agent, in this case, the Ombudsman, is being prevailed upon to act not in the interest of the principal, the public, but in the interest of the appointing power, the President.

⁴⁵ Farzana Nawaz, *Overview of Corruption and Anti-Corruption in the Philippines*, U4 Expert Answer, Anti-Corruption Resource, Center, Transparency International and CHR Michelsen Institute (2008), available at <http://www.u4.no/publications/overview-of-corruption-and-anti-corruption-in-the-philippines/>.

⁴⁶ Reinier Kraakman et al., *The Anatomy of Corporate Law: A Comparative and Functional Approach*, at 35 (2009).

⁴⁷ Leandro Angelo Aguirre, *Shifting Paradigms: The Need to Recognize Agency Problems in Government-Owned and Controlled Corporations in the Philippines*, 87 PHIL. L.J. 820, 833 (2013).

⁴⁸ *Id.* at 834.

⁴⁹ *Domondon v. Sandiganbayan*, G.R. No. 129904, Mar. 16, 2000, available at <http://sc.judiciary.gov.ph/jurisprudence/2000/mar2000/129904.html>; See also *Garcia-Rueda v. Pascasio*, G.R. No. 118141, September 5, 1997; *Bagatua v. Revilla*, G.R. No. L-12247, Aug. 26, 1958.

II. CITIZENS' PARTICIPATION: A FRAMEWORK AGAINST AGENCY PROBLEM

A proposed remedy to corruption must revolve around the framework of government fiduciary duty. The Civil Code and Corporation Code provide an analogy for such a framework. When the agent acts against the interest of the principal, he may be considered in breach of the agency. The Civil Code of the Philippines provides for remedies, which protect the interest of the principal in such cases. In particular, the principal has a remedy in case the agent (1) prefers his own interest in case of a conflict of interest⁵⁰; (2) fails to render an accounting and deliver to the principal what he has received by virtue of the agency⁵¹; and (3) commits fraud or negligence in the conduct of his agency.⁵² Furthermore, should the principal find that the agent has been guilty of corrupt practices, he may, as a general rule, revoke the agency at will.⁵³

In the fiduciary relationship between shareholders or members and directors, trustees or corporate officers, the Corporation Code of the Philippines also provides certain remedies in favor of stockholders in cases of breach of fiduciary duty. It provides for liability of directors for patently unlawful acts, gross negligence or bad faith⁵⁴, and liability for disloyalty when they acquire a business opportunity that should belong to the corporation⁵⁵. It also provides that certain documents such as the corporate by-laws, records of transactions, minutes of board meetings and the stock and transfer book shall be open to inspection by stockholders at reasonable hours on business days.⁵⁶ It is further provided that directors or trustees may be removed with or without cause upon vote by the stockholders meeting the required number.⁵⁷

It may be remarked that in both the Civil Code and the Corporation Code, there are provisions for access to information regarding the conduct of the fiduciary, and provisions allowing for direct action in case of breach. The provisions requiring the agent to render an account to the principal and requiring that corporate books and records be kept open to inspection provide for access to information, while the other provisions provide for actions to hold the fiduciary liable or to remove the same from their duties.

Likewise, in applying the concept of fiduciary duty to government officials, the proposed remedy to corruption must also revolve around the framework of, first, providing for access to information regarding the conduct of the fiduciary and, second, providing for a right of action against the fiduciary.

⁵⁰ CIVIL CODE, art. 1889 (Phil.).

⁵¹ CIVIL CODE, art. 1891 (Phil.).

⁵² CIVIL CODE, art. 1909 (Phil.).

⁵³ CIVIL CODE, art. 1920 (Phil.).

⁵⁴ CORPORATION CODE, §31 (Phil.).

⁵⁵ CORPORATION CODE, §34 (Phil.).

⁵⁶ CORPORATION CODE, § 46, 74 (Phil.).

⁵⁷ CORPORATION CODE, §28 (Phil.).

These sets of remedies are important in light of the observation of Rose-Ackerman in her article that among the added incentives for corruption is the inability of the citizens to learn about the government activities, file complaints, and obtain redress.⁵⁸ A public administration expert likewise proposed active citizens engagement as part of his four-pronged strategy to curb corruption.⁵⁹

A. LEGAL INSPIRATIONS FOR REFORM

Active citizen engagement must be accompanied by a series of reforms that relate to transparency, anti-corruption prosecution, and derivative suits. This section will proceed by examining in further detail how such reforms can reinforce active citizen engagement and combat corruption.

1. TRANSPARENCY AND PUBLIC ACCOUNTABILITY

Proposed active citizen engagement highlights the need for transparency. Active participation of the citizens is the central idea behind the pending Freedom of Information Bill, otherwise known as “*An Act Implementing the People’s Right to Information and the Constitutional Policies of Full Public Disclosure and Honesty in the Public Service.*”⁶⁰ This draft bill is the product of a long and arduous consultation to balance the government’s need for confidentiality in transactions affecting public interest with the citizens’ right to know.

The policy behind the FOI Bill is the recognition of the right of the people to information on matters of public concern and the adoption and implementation of a policy of full public disclosure of all transactions involving interest. The bill likewise recognizes the widening role of the citizenry in government decision-making as well as in checking abuse in government.⁶¹ Senator Franklin Drilon, an ardent supporter of the Senate version, reportedly declared that “[t]he disclosure of government actions under the FOI bill will be a crucial and effective deterrent against possible malfeasance and corrupt practices by those in power. The proposed legislation is our way of acknowledging that the people’s eye is the most potent tool against corruption in our government.”⁶² This kind of public activism is expected to have a tremendous impact in the fight against corrupt practices. The idea is to allow for a tangible way for interested parties to monitor corrupt activities and to allow the people a measure of protection against the excesses of power. The bill recognizes that citizen engagement does not end in the electoral process, but should

⁵⁸ Susan Rose-Ackerman, *supra* note 9, at 557.

⁵⁹ Alex Brillantes, Jr. & Maricel Fernandez, *supra* note 4, at 96.

⁶⁰ Senate Bill No. 1733. The FOI Bill was passed on the third and final reading by the Philippine Senate last March 10, 2014.

⁶¹ *Id.* at §2.

⁶² PNA, *Senate, voting 21-0, passes FOI bill on third reading*, BUSINESSMIRROR.com, Mar. 10, 2014, available at <http://businessmirror.com.ph/index.php/en/news/top-news/28763-senate-voting-21-0-passes-foi-bill-on-third-reading>.

extend to active monitoring of the government officials' conduct. Citizen engagement, therefore, is an important reform imperative in fighting corruption.⁶³

2. PRIVATE RIGHT OF ACTION AGAINST CORRUPTION AS A TWIN REMEDY

While citizens' participation in public accountability and transparency are all significant steps toward the right direction in an anti-corruption strategy, the authors believe that transparency alone is not enough to combat corruption, unless coupled with adequate prosecutorial reforms. Quah's assertion in another study that an incorruptible anti-corruption agency is essential in designing a successful anti-corruption campaign is squarely applicable in the Philippine case;⁶⁴ but such campaign has not proven as effective, in view of the captured state situation of the country. Under Philippine laws, criminal actions are prosecuted under the direct control and supervision of the public prosecutor,⁶⁵ or the Ombudsman in cases of graft and corrupt acts committed by public officers.⁶⁶ As discussed earlier, it is recognized that to successfully prosecute corrupt government officials, one has to hurdle possible captured institutions. This is particularly magnified by broad discretionary powers given to the public prosecutor or the Ombudsman to determine whether or not a criminal action should be filed, subject to review only in cases of grave abuse of discretion.⁶⁷

As the problem is institutional and systemic, reliance on existing institutions to correct themselves is not only inadequate, but is proving to be counterintuitive in the long run. A fight against corruption to be sustainable must depend on a reliable and stable system of deterrence, not on something as ephemeral as personality. The numerous laws notwithstanding, the creation of a substantive law that not only recognizes the fact that the government is susceptible to capture, but also imposes a special kind of deterrence to discourage perpetrators of corruption is imperative. Such law must be one that reaffirms the fiduciary relationship of the government and individual citizens, giving the much-needed support to the FOI Bill and the overall anti-corruption efforts.

Two Theories to Support a Private Right of Action against Corruption

James Alt and David Dreyer Lassen in their paper titled "*Enforcement and Public Corruption: Evidence from US States*"⁶⁸ investigates the possible effects of increasing prosecutorial resources

⁶³ Alex Brillantes, Jr. & Maricel Fernandez, *supra* note 4, at 106.

⁶⁴ John Quah, *Curbing Corruption in Asia: A Comparative Study of Six Countries*, Singapore: Eastern University Press (2003).

⁶⁵ RULES OF COURT, Rule 110, § 5.

⁶⁶ Rep. Act No. 6770 or An Act Providing for the Functional and Structural Organization of the Office of the Ombudsman, and for other Purposes, § 15, *available at* http://www.ombudsman.gov.ph/docs/repUBLICacts/Republic_Act_No_6770.pdf.

⁶⁷ Domondon v. Sandiganbayan, *supra* note 50.

⁶⁸ James Alt and David Lassen, *Enforcement and Public Corruption: Evidence from US States*, University of Copenhagen Department of Economics EPRU Working Paper No. 2010-08 (2010), *available at* http://www.econ.ku.dk/eprn_epru/Workings_Papers/wp-10-08.pdf.

on corruption and posits that these two theories, system overload theory and deterrence theory, may be utilized to make an empirical analysis on corruption. These theories are equally applicable in the Philippine setting, and may be utilized to show how the remedy of allowing a right of action addresses corruption. The deterrence theory suggests that more law enforcement resources will discourage corruption and thus reduce the number of convictions. The “system capacity” or “system overload” hypothesis holds that the police and courts do not have sufficient resources to bring every case to its end.

The deterrence theory holds that people make the choice to violate or follow the law after weighing the resulting advantages and the disadvantages of their action. There are two kinds of deterrence: general and specific. General deterrence is a way of preventing the commission of criminal acts in the general population, such as enactment of laws to cause lower incidence of such behavior. General deterrence then is a result of the general public perception that there is a risk of detection and punishment due to the abundance of prosecutorial resources as well as strict enforcement of laws targeting corruption. On the contrary, specific deterrence is designed to discourage an individual offender by imposing penalties to discourage repetition of the offense in the future.⁶⁹ Whereas general deterrence is the net effect of law enforcement on the public, specific deterrence is may result from an individual’s actual brushes with law enforcement, such as imprisonment, search, subpoena, trials, and conviction.

The system overload theory operates on the premise that there is limited amount of funding allocated to the criminal justice and law enforcement system. These limitations cause the amount of workload and resources to be spread too thinly, reducing, in effect the effectiveness of the system due to “overload”.⁷⁰ Compromises then are made, resulting in reduction as well of certainty of punishment of some offenders. This situation is particularly true in the Philippines where government corruption is difficult to investigate and examine due to its complexity as white-collar crime.

James Alt and David Lassen in the same study used data on corruption convictions from 1977 to 2003 to estimate the impact of prosecutorial resources on levels of criminal convictions in cases of corruption. They later made the following conclusion:

“We find that greater prosecutor resources result in more convictions for corruption, other things equal. The results are robust to various ways of measuring the number of convictions, including moving averages and deflation by both population and the number of state and local government employees, and to various estimators addressing complications arising from the nature of the data. The results suggest that effects of system overload dominate those of

⁶⁹ Ihekwoaba Onwudiwe et al., *Deterrence Theory*, in *ENCYCLOPEDIA OF PRISONS AND CORRECTIONAL FACILITIES* (Mary Bosworth ed., 2004), 233.

⁷⁰ James Alt & David Lassen, *supra* note 69, at 80.

deterrence on convictions, though probably to a lesser extent in more recent years.”⁷¹

This study then supports the view that a public official’s decision to engage in corrupt practices would depend on the results of an assessment on whether the benefits of honest behavior outweigh the benefits of dishonest behavior, taking into consideration the probability of being prosecuted and punished for it.

3. DERIVATIVE SUIT AS A MODEL

Derivative suit, an action employed in corporate law to address agency problem, may be used as a template for a citizen-initiated prosecution to address breach of fiduciary duty by government agents. In a typical civil action, the person who was injured or will be injured must bring the suit. In some instances, a representative of such person may bring the action on behalf of another. Filing a derivative suit is one of those instances.

Under the Corporation Code of the Philippines, a derivative suit is one brought by a shareholder on behalf of a corporation against a third party. Its purpose is to enforce a legal claim, usually against an officer of the corporation, when the latter through its board of directors fails to do so.

Notwithstanding the absence of an express provision under the Corporation Code, Section 36, read in relation to Section 23,⁷² impliedly recognizes the ability of a stockholder to institute derivative suits. Under the said sections, an individual stockholder is permitted to institute a derivative suit on behalf of the corporation in order to protect or vindicate corporate rights, whenever the officials of the corporation refuse to sue, or are the ones to be sued, or hold the control of the corporation. In such actions, the suing stockholder is regarded as a nominal party, with the corporation as the real party in interest.⁷³

In the U.S. case of *Cohen and Beneficial Industrial Loan Corporation*, the Court observed that derivative suit was “[b]orn of stockholder helplessness and was long the chief regulator of corporate mismanagement[...] without it there would be little practical check on such abuse.”⁷⁴ Indeed, the importance of derivative actions cannot be overemphasized; it is “[t]he sword that

⁷¹ *Id.*

⁷² CORPORATION CODE, §36, 23, *provides* “Corporate powers and capacity.—Every corporation incorporated under this Code has the power and capacity:

1. To sue and be sued in its corporate name;

...

SEC. 23. The Board of directors or trustees.—Unless otherwise provided in this Code, the corporate powers of all corporations formed under this Code shall be exercised, all business conducted and all property of such corporations controlled and held by the board of directors or trustees to be elected from among the holders of stocks, or where there is no stock, from among the members of the corporation, who shall hold office for one (1) year until their successors are elected and qualified.”

⁷³ *Gamboa v. Victoriano*, G.R. No. L-40620, May 5, 1979, *available at* <http://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/20315>.

⁷⁴ *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 548 (1949).

minority wields for their protection, and ultimately and more importantly, that of the corporation's."⁷⁵

An analogy may then be made between the stockholders of the corporation as the people, and the corporation as the state. Because of the existence of the fiduciary duty in both the corporate and the government settings it is then not farfetched to make a parallel comparison between the stockholders of a corporation and citizens of a state, to give the latter a right of action to sue government officials who acted in violation of their fiduciary duty. Similar analogies had in fact been employed to underscore the value of a fiduciary relationship in order to prosecute legislators involved in an illegal insider trading.⁷⁶ By analogy, when public officers fail to exercise their mandate for the benefit of the government and the people through their corrupt practices, a suit must also be made available to the corporation, or derivatively to the stockholders to enforce a legal claim. The actual ownership of the suit however remains to be the corporation, or the government in the above analogy. Only the identity of the person bringing the suit is changed, hence the label "derivative". The same may be said of suits against public officers: while the plaintiff bringing the claim is treated as the representative, the owner of the claim remains to be the state, or the government.

III. PROPOSAL: A SUBSTANTIVE LAW GIVING A PRIVATE RIGHT OF ACTION AGAINST CORRUPTION

In light of the above discussions, it is the authors' proposal, as an alternative remedy to public corruption, that a substantive law giving a right of action to an individual citizen be passed. The authors are not proposing a new cause of action as the cause of action remains to be the act or omission which constitutes corruption as defined by the anti-graft and corrupt practices act. In the same way that a derivative suit does not recognize a new cause of action on the part of the shareholders, the proposed law does not create a new cause of action for the citizens. Rather, what the authors propose is a right of action to prosecute the civil liability arising from the crime of corruption. As in a derivative suit where the corporation remains to be the real party in interest even if it was a stockholder who brought action, the government remains to be the real party in interest in this case; hence, an individual suing under this proposed law must implead the government as a necessary party.⁷⁷ The significance of this proposal is that it is essentially a

⁷⁵ Earla Kahlila Mikhaila Langit & Jewellyn Gay Zareno, *Upholding Equity: An Analysis of the Requisites for the Institution of Derivative Actions* 86 Phil. L.J. 752 (2012).

⁷⁶ Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 Cornell L. Rev. 845 (2013), available at <http://cornelllawreview.org/files/2013/05/Kimfinal.pdf>.

⁷⁷ RULES OF COURT, RULE 3, § 8-9, provides "Necessary party. — A necessary party is one who is not indispensable but who ought to be joined as a party if complete relief is to be accorded as to those already parties, or for a complete determination or settlement of the claim subject of the action.

Section 9. Non-joinder of necessary parties to be pleaded. — Whenever in any pleading in which a claim is asserted a necessary party is not joined, the pleader shall set forth his name, if known, and shall state why he is omitted. Should the court find the reason for the omission unmeritorious, it may order the inclusion of the omitted necessary party if jurisdiction over his person may be obtained.

The failure to comply with the order for his inclusion, without justifiable cause, shall be deemed a waiver of the claim against such party.

control mechanism devised to remove the discretion given to public prosecutors who, like other instrumentalities of the government, are susceptible to capture. With this proposal in place, if the prosecutor refuses or fails to take action on corrupt practices committed by public officers, concerned individual citizens will not be left without remedy.

Both system overload and the deterrence theory, specific and general, are instrumental to the proposed right of action in this paper insofar as they address specific problems in the Philippines. Using the deterrence theory as a framework, government officials may possibly be dissuaded from acting against the interests of the principal when they consider the ease with which a civil action, grounded on the proposed substantive law that gives a right of action to private citizens, may be lodged against them. The fact that the suit based on the right of action proposed, if successful, may reach to their personal properties to satisfy consequential damages is another factor they may contemplate in weighing whether they will pursue an illegal act. This will add to their considerations in carrying an illegal act to its end. On the other hand the system overload theory addresses the *agency problem* and *state capture* as discussed in the earlier sections by giving a right of action against erring government officials if the officer in charge to bring the suit or to discipline them refuses or neglects to do so. Using this theory by analogy, whenever an officer, such as the Ombudsman, fails to file a case against an erring official where there is a clear case of corruption, any private citizen can institute a civil action on behalf of the government on the strength of a right of action granted by the proposed substantive law. This will eliminate the process of going through a captured agency in order to vindicate breach of fiduciary duty.

The authors believe that the proposed action should be civil and not criminal in nature to give deference to the long-standing principle that a criminal offense is a crime against the State, hence, the latter should be the one prosecuting the same. Also a civil action will avoid conflict with the well-established procedural rule that criminal action should be initiated and prosecuted under the direction and control of the public prosecutor (or the Ombudsman). What the authors propose is to allow private individuals to prosecute the civil liability arising from the crime either in the form of restitution, reparation or indemnification for consequential damages.⁷⁸ The proposed law may also allow confiscation and forfeiture of the fruits of the crime in favor of the government.⁷⁹

The non-inclusion of a necessary party does not prevent the court from proceeding in the action, and the judgment rendered therein shall be without prejudice to the rights of such necessary party.”

⁷⁸ REVISED PENAL CODE, art. 104 (Phil.), *provides* “What is included in civil liability.- The civil liability established in Articles 100, 101, 102, and 103 of this Code includes:

1. Restitution;
2. Reparation of the damage caused;
3. Indemnification of consequential damages.”.

⁷⁹ REVISED PENAL CODE, art. 45, *provides* “Confiscation and forfeiture of the proceeds or instruments of the crime. – Every penalty imposed for the commission of a felony shall carry with it the forfeiture of the proceeds of the crime and the instruments or tools with which it was committed. Such proceeds and instruments or tools shall be confiscated and forfeited in favor of the Government, unless they be the property of a third person not liable for the offense, but those articles which are not subject of lawful commerce shall be destroyed.”

The enactment of a substantive law recognizing such right of action is significant because it will recognize 'social damage' as sufficient compliance with the jurisdictional requisite of 'injury' in a typical civil action case. This will differentiate the action under this proposed law from an ordinary civil action based on torts or its Philippine equivalent *quasi-delict*. As regards the awards, civil liability must be imposed on the respondent public official in his personal capacity. When a public official commits corrupt acts, he acts beyond the authority given to him by law. Consequently, the public official should answer personally for his own misdeeds. This is an important component of the proposal because it will significantly contribute to the deterrence effect of the proposed law. In terms of the recipient of the award, damages may be awarded to the government since the cause of action, if the framework of a derivative suit is followed, actually belongs to it.

The authors believe that this will be an effective remedy because of the following reasons: first, the burden of proof required in civil case is only preponderance of evidence as opposed to the quantum of proof that a criminal case requires which is proof beyond reasonable doubt; second and more importantly, the filing of the case need not rely on the discretion of anti-corruption agencies, hence, *state capture* will not play a role in the initiation of the complaint.

IV. CHALLENGES ENCOUNTERED

The authors recognize the challenges that this proposal may present. Giving private individuals, not personally injured, a right of action against graft and corrupt practices acts of public officials would mostly likely open the floodgates to a barrage of suits against the latter. This is an important consideration in drafting the proposed law since this may be used to harass public officers, and may unnecessarily hamper the regular performance of their duties. Another drawback would be the clogging of the dockets of the courts, which is the policy consideration behind the rule on multiplicity of suits. Clogged dockets would mean incredible delays in the court proceedings, which will defeat the purpose of instituting the suit. The proposed law must then include necessary filters and safeguards to avoid these results.

The free rider problem must be considered as well. As the success of this proposal depends on the willingness of the person suing to shoulder the initial cost of the suit, it is safe to assume that some people would rely on others to prosecute the same because of lack of personal incentives on their part. It would be understandable that the idea of a clean and honest government would strike an ordinary person as no more than ideal, impossible to achieve. The prosecution of public officials might not be enough to pique their interest to initiate a complaint, especially so when they are not personally injured by the acts of said officials. While the proposed law can easily provide reimbursement of the cost of the suit, there are other factors such as time, energy, and security that need to be considered in order to encourage individual persons to participate in the anti-corruption campaign. While it can be reasoned that the individual filing the suit may be given part of the proceeds of the award, this may present further policy problems and challenges. Allowing an individual plaintiff to get part of the proceeds might create an opening for

compromises between the individual plaintiff and the respondent public official, and might even be counterproductive as this may encourage acts of bribery. This will eventually result in a settlement, and the dropping of the suit, a result opposite to that contemplated by the proposed law by giving the respondent officials an escape.

Then there is the challenge on government immunities. The Constitution and the laws provide certain immunities to government officials in order to protect them from malicious suits.⁸⁰ This paper does not advocate an exception. It should be emphasized, however, that these legal immunities are not absolute immunities; they are not meant to be used as shield by public officers for their illegal acts. This should be part of the consideration, nonetheless, especially on the discussion of the government officials covered by the proposed law.

The concept of exhaustion of administrative remedies must also be taken into consideration, as in a derivative suit, the stockholder must show that he exerted all reasonable efforts to have grievances redressed within the corporation. This will be particularly challenging since the proposal itself eliminates the discretion and participation of public prosecutors. These are significant discussion points in the drafting of the proposed law, in order to avoid clashing with this long standing doctrine and at the same time addressing the problem of *state capture*.

CONCLUSION

The interrelatedness of the problem of state capture, agency problem, and local manifestations of corruption cannot be understated. State capture as a manifestation of the agency problem, is a problem which, left unresolved, will impede all pathways to growth, invading all facets of governance. Its existence must first be recognized in order to effectively counter its effects and its local manifestations in the form of *compadre system*, patronage and *utang na loob*. The problem of state capture, which allows officials to bend to their favor the rule of law must not bar any attempt to vindicate the fiduciary duty imposed by no less than the Philippine constitution.

Various concepts used in private law such as derivative suits may be borrowed to create an alternative anti-corruption remedy. To this end the authors believe that using the idea of citizen participation, with the derivative suit as a general framework to account for social damages must generate a right of action that will be effective in combating corruption. As a result the commission of more corrupt acts may be deterred, and additional measures to supplement an overloaded system of law enforcement established.

⁸⁰ Take for instance the legislative immunity embodied in Section 11, Article IV of the Philippine Constitution, which states:

“A Senator or Member of the House of Representatives shall, in all offenses punishable by not more than six years imprisonment, be privileged from arrest while the Congress is in session. No Member shall be questioned nor be held liable in any other place for any speech or debate in the Congress or in any committee thereof.”

Chief among the proposal's objectives is to lay emphasis on the significant role of the citizens in the anti-corruption campaign by recognizing the superior position that the people occupy in the hierarchy of fiduciary relations and giving them a right of action against erring public officials in violation of their fiduciary duties. In so doing the paper does not mean to denigrate the integrity or capability of the prosecutors; it is rather an attempt at understanding the situation of the Philippines as a captured state, the local manifestations of such capture, and one feasible solution to this situation.

The authors hope that this paper will stimulate discussions on the topic. The authors likewise hope that this paper will eventually attract the interest of legal scholars to contribute to the development of other remedies against corruption, and of legislators to look into the merits of these remedies and ultimately make these proposed remedies a reality.

Shades of Corruption:

Thoughts on Why Compensation May Not be a Viable Solution

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The idea of corruption has an overwhelming import and connotation in the modern social milieu. While the extent of the meaning of the word is closely connected to the notion of power¹ and influence of an individual or collection of individuals, there are tangible and legal categories in which corruption as a phenomenon can be pigeonholed. As Bayley attempts to define, "corruption, while being tied particularly to the act of bribery, is a general term covering the misuse of the authority as a result of considerations of personal gains which need not be monetary."² Harsch has broadened the substantive element of corruption as an offence and has elaborated "theft, embezzlement or appropriation of other state properties, nepotism, abuse of public authority and the position to exact payments and privileges."³ There has not been a single definition of corruption that has successfully captured the substance of the act or the shades of possibilities that convert them into legal categories. It would be impractical and also reductive to strictly confine the act of corruption to its constitutive elements, especially when there is no consensus as to the ingredients of corruption or a value system that sustains corruption. There have been several attempts to justify the modern discourse on corruption, which speaks in the language of economic efficiency (or the want of it), on the basis of differential value systems and the institutionalization of corruption⁴ that merely fails to address the preliminary problem of definitions and limitations.

Corruption is a discord in the harmonious narration of ideals like 'good governance' or 'rule of law' and goes against the fundamental aspirations and prescriptions of the constitution.⁵ This has been the essential framework for understanding the issue across jurisdictions including the West where the nature of corruption has diverged significantly from its popular understanding in the underdeveloped or developing economies of Asia and Africa. While the Western developed economies have struggled with corruption at an advanced level, at the level of top bureaucracy through lobbying by private enterprises or allowing individual entities to massively influence the decisions of the governments and its policies, the under developed and developing economies have seen it as less of a political phenomena and more of an everyday act that hits the common people through bribery and subornation. Hence, the existence of concrete laws like the UK Bribery Act and the Foreign Corrupt Practices Act would only address the problem vis-a-vis a particular individual or an authority abusing his power but would never incorporate the subtler forms of corruption where good governance and equality as envisaged under the constitution are at stake.

The two broad categorization of political corruption and bureaucratic corruption, which represent the influences on the government-favoritism and actual bribes changing hands respectively, have been common to most of the countries. Nevertheless, their reception as immediate problems to

¹ Rajesh Chakraborty and Ajay Subramaniam, "Power, Compensation and Corruption: Theory and Evidence". Available at: fic.wharton.upenn.edu/fic/papers/07/0711.pdf (Last visited: 03 April, 2014).

² *Id.*

³ C.Raj Kumar, "Corruption and Human Rights in South Asia: Comparative Perspectives on Transparency and Good Governance" (2008).

⁴ *Ibid* at 24.

⁵ L. Cockcroft, "Corruption and Human Rights: A Crucial Link", Working Paper (Berlin 1998). Available at: http://www.baselgovernance.org/fileadmin/docs/publications/working_papers/04_An_Evaluation_of_National_Integrity_Systems.pdf (Last visited: 03 April, 2014).

be addressed appear to be different and remain to be probed in some of the instances. While we are unclear on the definitional limits of corruption, the menace has spread its tentacles in every walk of life. There is corruption and nepotism burning and present in all aspects of governance, functioning of the legislative and executive machinery and in some unfortunate cases, even in the judiciary. However, there has been a steady rise in the demand for “transparency,” from international standards set in Millennium Development Goals or United Nations resolutions to domestic legislations.⁶ There have been evolving legal frameworks that address the question of corruption, bribery and money laundering in most of the nations. Although they are inherently limited by the scope of corruption that they seek to address, they have been nevertheless an effective tool in bringing corrupt practices under the scanner of the criminal law.

The laws seek to regulate any conduct that is in the detriment of rule of law through sanctions, penalties and sometimes even imprisonment. In the context of criminal law, the absolute lack of definitions have made it problematic in punishing particular conduct and determining which of the acts would be tried in the court of law and which would be excluded. The predictability problem notwithstanding, there have been major concerns as to the apportionment of the punishment and prevention of the larger problem of corruption. This problem is mirrored in the concern of lobbying and private interests controlling democratically elected governments, which has been so deeply rooted in the system.⁷ As Lawrence Lessig points out in his work, it comes as a little surprise why we find it difficult to deal with the corruption legislatively. The parties in power vitiate the ideal form of government by succumbing to funding and raising resources from quarters that hinder the free working of institutions.

Thus, corruption assumes an institutional form where the nature of governance may be taken for granted; it becomes more or less natural for the establishment to be favoring the private enterprises that bankroll them. The policies are formulated in certain ways that cannot be questioned or in a way that the ambiguous text of the law provides immunity from prosecution. For instance, there might be a mining group or an oil exploration company that gets its way through the legal hassles to operate on the resources of a nation in spite of the fact that there were no legal channels to achieve the same. Its relevance as a funder to parties and individuals may be the reason why the state would be willing to put laws and approvals in place. Theoretically, these instances indeed fall into the realm of corruption; however, the avenues for redressal are limited. These practices are necessarily in the modern form of corruption where monetary consideration alone will not be the driving force in the conduct of the parties. The terrain of venality has changed with the actions and consequences becoming subtler and camouflaged in order to escape the scrutiny of law. In a country like India, there is a great deal of pressure to subscribe to the universal model of development as an indicator of good governance. Hence one finds the state governments vying to invite the industries to invest in them in spite of the legal barriers. This would be a test case of the preceding point.

⁶ John Mukum Mbako, “Bureaucratic Corruption in Africa: The Futility of Clean-Ups”, Vol.16(1), *Cato Journal*, (Spring 1996).

⁷ See for instance: *A.Wati v. State of Manipur*, AIR 1996 SC 361 and *Mahesh Chand Bisht v. Union of India*, 1997 SCALE SP-22., where the charges of corruption were grave but the sentence was only limited to simple imprisonment.

But, in spite of the disguise, the effect on constitutionalism, governance and legitimate expectations of the people, the effect of corruption has been uniformly disastrous. This paper is a brief attempt to capture the modern faces of corruption as witnessed in India in the recent times. There have been several sectors and policy decisions that have been confronted by the judiciary for violating the legal framework and amounting to corrupt practices by various players in the government. However, these policy matters are difficult to be adjudicated by the judiciary and hence there has been no remarkable solution flowing out of it. At the foundation, this entire project has been focusing on the possibility and viability of awarding compensation to the victims of corruption. Accordingly, this paper tries to address the nuances of the issue in the Indian context where the limits of corruption have largely remained unstated.

It is our argument made in the paper that anti-corruption has moved from a political and legal issue to the plane of ideology. As the recent trends in Indian democracy exhibit, there are parties and lobbying civil society groups that have made anti-corruption a platform for political discourses. The judiciary and the executive have gradually begun to make themselves amenable for the possibilities of prosecution on unconventional lines or for newer offences. However, the category of offences, the gravity and the probability of identifying the victims make civil remedies or compensation an unlikely solution in India. We argue that in a democratic set up like India, there are no working models for a successful compensation disbursement. Nor has one existed theoretically. It would also be unjust and against the spirit of the equality principle to award monetary compensation where the consequences of corrupt practices may not be quantifiable through money or may be too remote to include all the victims. In the alternative, we suggest that existing concerns like protection of whistleblowers or stringent accountability measures through criminal law be strengthened in order to curb the evil of corruption in the political and bureaucratic realms.

CORRUPTION AND HUMAN RIGHTS

The idea of compensation as one of the remedies for corruption arises from the long surviving debate of whether corruption is indeed a violation of human rights. There have been several international legal instruments that have dealt with the broader question of corruption as not a mere legal wrong but a violation of human rights that requires the nations to act and restore the constitutionally guaranteed rights to its citizens. The United Nations Convention on Corruption adopted in 2003 also speaks about the corrosive effect of corruption on societies and vows to root it out through individual and community efforts.⁸

In India, the constitutional challenge to corruption and the allegation that it is violative of human rights are founded on the premise that the citizens of the country are entitled to equal treatment and that they should be governed by the rule of law.⁹ While the bureaucratic corruption reflects

⁸ General Assembly Resolution 58/4, UN convention against Corruption, 2003. Available at: http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (Last visited: June 24, 2014).

⁹ *Supra* note 75.

on the laxity and inefficiency in the government machinery, which makes it difficult for the people to access services or benefits, the political corruption is indicative of the larger malaise of resource drain/depletion through economic and social policies. These are *prima facie* mala fide with no apparent justification. The most affected classes of the people are also delineated in the context of third world economies. Although it is reductive to classify the masses as victims and beneficiaries, the theoretical classification of restrictive and expansive corruption appears to have minimal value in addressing the issue of corruption that induces poverty, deprivation and injustice.¹⁰ Hence, there has always been a division of opinions when it comes to the means through which solutions can be roped in, in order to address the problem.

India's demography represents a diverse range of people, socially and economically divided into various sub-groups. It is difficult to gauge the impact of corruption on these categories in a single measuring standard. There have been several arguments in the context of developing nations as to the impact and value assessment of the idea of corruption. It must be clarified that the exotic depiction of the orient and the projected 'normative' understanding of corruption as a positive community value belonging and accepted by the people has very well been discarded.¹¹ The nation stands by the constitutional values endorsed in the text of the law and corruption is indeed an evil that excludes more than three-quarters of the population from what it has been rightfully entitled to, like the right to access resources, entitlement to equal protection and benefits through the governments, etc. The values and the standards subscribed to internationally and the perception that corruption is something that needs to be rooted out collectively operate in our democratic set up as well. However, the victims of corruption indeed suffer differentially and hence, the rights violation may be graded differently for different classes of people. In a vertically and horizontally divided social set up, the economic determinants of individuals have made India an increasingly class conscious space.

While the lower- and the middle-income groups make up for most of the population of the nation, the corruption suffered by the middle classes occupy most of the headline space than the subtle and overt discrimination suffered by the poor of the country. For the convenience of structure and efficiency, this paper chooses not to talk about the corruption as suffered by the rich. It must also be noted that the magnitude of corruption suffered is infinitely inferior to the one experienced at other levels.¹² Thus, it needs to be noted that the poor of this country bear the brunt of corruption and nepotism and at the same time are deprived from any proportionate benefit that might arise from rendering such favours. The general deprivation and the inability to access justice continues to handicap their lives, pushing them to margins of perpetual victimization both by the State and private machinery. The middle classes, who are the primary determinants of governments that come to power and the policies that are made, are an aspirational group who have both the ability to pay bribes and, in all probability, would get proportionate benefit for the consideration that

¹⁰ See also: Rajesh Chakraborty and Ajay Subramaniam, "Compensation, Inequality and Corruption", (2003). Available at: www.idfresearch.org/pdf/wp0302.pdf (Last visited: 03 April, 2014).

¹¹ *Supra* note 75 at 10.

¹² See also: Nicholas Robinson, "Qui Tam Enforcement: A Legal Remedy for Corruption". Available at: <http://www.livemint.com/Opinion/Bf4Mn1tuacpMPd8BIxLQhI/Qui-tam-enforcement-A-legal-remedy-for-corruption.html> (Last Visited: 03 April, 2014).

has been paid. They continue to be victims of corruption and enthusiastically see themselves in that category. However, the issue for this class has not so much been the evil of unconstitutionality as much as the drain of resources from individuals. They have been largely the professional class protesting the select forms of corruption, only those that affect them, like delays in bureaucracy, red-tapism and demanding of the bribes by lower bureaucracy. The anti-corruption movements in India have, therefore, been largely centered around the bureaucratic corruption and corruption at the grassroots level, where the practices are limited to paying bribes in order to keep the government machinery greased. The middle classes which have spearheaded the movement have not looked beyond at the questions of political corruption and corruption by private entities which are more problematic and hence become relevant to the study.

NATURE OF CORRUPTION AND UNVIABILITY OF THE NOTION OF "COMPENSATION"

The paper intends to look at institutional corruption, a more sophisticated form which takes into its fold political corruption and the way political parties are covertly and overtly influenced by private stakeholders, in order to assert the expansive nature of the category of victims. This also gives way to a discussion around a class of victims who are oppressed by the state but are never within the evolving definitions of corruption. In post-globalized India, there has been a sea change in the nature of political parties and governance. The polity is more in the hands of coalition politics where there are no determinate players within certainty in ideology. The economy has moved towards the free market with greater participation of private entities and corporations operating as a handful of individuals. Lobbying and decision-making by funders for political entities have translated into the local context and the principles of democracy have been gradually treading the path of erosion. It is in the last two decades that the country has seen an increased reporting of the instances of 'scams' and 'scandals' where the government at the helm has come under the scanner for its wrongdoings. The major political parties like the Congress or the Bharatiya Janata Party (BJP) have been unequivocal about the business tycoons and the corporate houses that fund them. It is also natural from the policy decisions and the concessions they receive that the private establishments have been wooed in the name of development and have been given excessive leeway in how they determine the policy decisions of the nation. While this may not fall within the traditional definition of corruption, it is certainly a definitive means of siphoning out resources, an act against the rule of law and an act that patently deprives the citizens of this nation the resources and good governance promised under the constitution. In order to illustrate the nature of corruption in such category and to move on to the larger point of compensation for corrupt practices, we take the examples of the mining scandal and the coal-gate scam, which rocked the country and which currently stand in the Supreme Court of India.

From the 2010 to present, the nation saw three major environmental scandals that were quickly brought before the judiciary, due to the great media and public participation in denouncing the same. The United Progressive Alliance (UPA II), which was in power, had misled the nation, creating flexible policies that allowed for unregulated mining of iron ore and other minerals like

Uranium, Thorium etc. This liberal policy extended even to Coal, which resulted in the coal gate scandal where the allocation of coal blocks was determined in the absence of legal policies. The iron ore mining scandal spread across the nation where various state governments also came under the scanner for lax and injudicious policies. The central government also had a hand in all of it, especially in the mining scandal of Goa, where the ruling party was Congress, the majority party in the UPA coalition. In Karnataka, another state which was deeply affected by the mining industry, there were several parties which were discovered to have participated in the corrupt schemes of reckless mining. BJP was the prominent player followed close at heels by Congress and another regional party, Janata Dal (Secular). Soon before the emergence of these series of corruption scandals, the government was caught in long-term litigation of oil price allocation where one of the biggest funders of the Congress party, Reliance Industries, was given a huge concession on the oil prices at a price inferior to the market rate available at that time. The Supreme Court had slammed the Central Government for the discrimination and the unreasonability of the action. The government failed to give a rational explanation for its decision. The oil exploration was called off and the court ordered the reallocation and pay back of all the pending costs by Reliance.¹³

The major boost for litigation came when the Centre was dragged to the Supreme Court once more as the 2G spectrum allocation was disputed. The Court successfully overturned all the allocation that had taken place up to that time and asked for a reallocation in the backdrop of a stated policy on first come first served basis. This encouraged further litigation by public-spirited individuals and activists from civil society who questioned the policies and the programs of the government in the court of law. It is imperative to note that the people at the helm of this movement and resistance were entirely different from the composition of the movement on anti-corruption. Here, we had the activists who had always questioned the state on its policies and governance that blatantly favoured the private players, thereby rendering a different shade of corruption into the mainstream. This was quite a contrast and counterintuitive to the traditional understanding of corruption, which limited itself to bribery. Initial spates of litigation rose in Karnataka, where *Samudaya*, a Karnataka based environment group filed a petition in the Supreme Court questioning the indiscriminate mining policy allowed by the BJP government at the State level and also the participation of many politicians as a private players in the mining lobby. It was one of the first instances where an environmental litigation was viewed from the perspective of corruption and the executive action was categorically challenged in the court of law. Year 2013 saw an eruption of another scandal regarding the unprincipled coal block allocation that had arbitrarily prioritized one player over the other. The court indeed triggered the process of judicial inquiry and reprimanded the government in harsh terms. However, the constitution does not bestow upon the courts more power than that required to oversee and check the powers exercised by the executive in order to ensure that they do not exceed the powers endowed on them. Therefore, the coal gate scandal has been under enquiry with the

¹³ G. Vishnu, "A Missing Link in the Mining Scam?", 9(52), Tehelka, (2012). Available at: <http://www.tehelka.com/a-missing-link-in-the-mining-scam/> (Last visited: June 24, 2014)

court asking for independent inquiry reports and records on the same.¹⁴ However, there are more similar policy decisions, which need to surface.

Then, there is a third category of environmental scandals that have missed the media scanner or the ambit of the courts. The media, in fact, has not been an objective, reliable entity. Most of the media houses have been owned and controlled by the very corporate houses and individuals who control the governments. Hence the meaningful debates regarding government policies, which are the hallmark of democracy, never take place on significant issues like the plunder of resources by companies like Vedanta in Orissa or reckless uranium mining in the North Eastern states. The incidents of environmental degradation as a consequence of the “developmental policies” of the State are not sporadic or limited to few states. The instances are found across the country, however, only a few make it to the court where the policy indiscretions are questioned and remedied. There have been traceable and untraceable kickbacks flowing out of such transactions. People are internally displaced, their benefits and livelihood destroyed and are continuously persecuted if they refuse to fall in place with larger scheme of deception. The extreme left resistance from the Maoists, which has surged a consequence, speak to the anti-people policies of the government that invoke backlash. Hence, these decisions and actions make for a legitimate case for including them within the definition of corruption. However, nothing has so far been challenged or accepted in courts for they also fall within the grey area of good faith legislative action, which cannot be brought under the supervision of the courts.

WHY “COMPENSATION” WOULD BE AN INADEQUATE IDEA

The legal definition of compensation would assume the fulfillment of the following ingredients:¹⁵

1. There needs to be an actionable wrong or damage.
2. There needs to be a legal remedy to address the same.
3. The remedy should be quantifiable monetarily.
4. There has to be an individual who has suffered as a consequence of such wrong.

If these ingredients are satisfied, the court can trigger the process of assessment where the wrong is amended by a grant of compensation offsetting the damage done. From the instance we have taken, where the Indian experience with the developmental policies and institutional corruption have been elaborated, it is evident that the victims are innumerable and the suffering of varying magnitude is endured at different stages. Even with the concrete litigation in the courts of law, it is doubtful how the remedies would be conceived. With a limited array ranging from specific performance to penalties, from which the courts would be compelled to choose, it is unlikely that compensation would be envisaged. These damages or wrongs are usually not quantifiable unless the court decides to levy exemplary damages. Further, in a country of over one billion people who bear the consequences of faulty and corrupt decisions, it is difficult to identify a “victim” who

¹⁴ *Id.*

¹⁵ Kemp & Kemp, “Quantum of Damages”, Sweet & Maxwell, (2008).

needs to be compensated. The most important challenge would be the inadequacy of determining every remedy in monetary terms. The civil remedies have their limitations especially when it comes to preventive or regulatory action. Should the final objective be good governance and fair and just policy making, then the governments need to be monitored from rendering explicit or implicit favours to private parties or entertaining ministers who use government machinery to serve their cause. In neither of the aforementioned cases could we have envisaged the court rendering justice through awarding compensation to the nation as an entity. Even if they do award some form of compensation, that would be in the nature of penalty which needs to be paid to the government and will not make a difference to the current system. The best solution would only be to have the concerned ministers and entities suffer criminal consequences for their actions and cancel the existing allocations or projects in the realm of resource management.

It would be even more imperative to have the fortification mechanism in place to prevent future instances of corruption especially by strengthening witness protection and extending the protection to the whistleblowers. Nothing can be more effective in prevention of corruption as much as the fear of being busted by an anonymous insider. This mechanism can be strengthened with the plausible incentivising of the potential whistleblowers. There have been many instances where India has lost many of its whistleblowers who were critical in bringing forth various instances of corruption. At a very theoretical level, the nation needs to adopt itself to the duality of 'petty' and 'grand' corruption. There has to be a sensitization to the fact that corruption is not limited to bribery or nepotism but will extend to ideologies that favour free market economy over constitutional governance thereby putting individual interests over that of the community. It must also be acknowledged that the over-simplification of the problem into a wrong-compensation equation would entail the dangers of losing out on other details of the issue like the power relations and the caste and class dynamics embedded within. While the law would take its own course and prosecute offenders where there have been violations of the provisions of law, there ought to be a sociological study of the reasons for institutional and political corruption and how they could be systemically rooted out in a constitutional democracy. That alone can make the framework of solutions complete with feasible and just remedies.

INSTITUTIONALIZED CORRUPTION

ELECTIONS AND GOVERNANCE

Corruption in India has seen several phases and has seen very different reaches over time in which the republic has existed. Every successive election has the promise of corruption being eradicated. Politician after politician gains trust on the premise of zero tolerance until the next scam or scandal is unearthed. From the Aadarsh housing scam to the 2G Spectrum allocation irregularities to the Bofors missiles case, the common connect through all of these has been the role of politicians and state services. This segment looks at the issue of corruption in the sphere of politics and elections and how the two have an almost inseparable nexus.

Victory based on the promise of eradicating corruption has been the norm since the '70s. The wave of disbelief in the government after the National Emergency of 1975-77, got the public looking for an alternative to the Congress government. At such time opponent parties entered the fray on promises of countering the corruption that ran rampant in the government.¹⁶ Over time, several governments did come and go, but the only constant was the fact that corruption continued because it remained in the manifestos of all parties, regardless of their ideologies. The internal remedy to this was the Lokpal mechanism. This was a proposition to set up an internal review to help the government look into complaints from the public. These would include complaints against public functionaries and Members of Parliament. This bill remained in the stage of discussion in the houses of Parliament for almost five decades from being tabled in 1968 the first time to 8 successive failures of tabling it. Ultimately, the resentment in the public grew to such a level that the public got together led by social activist Anna Hazare outside the Jantar Mantar at Delhi. This happened in April 2011. Mr. Hazare led this movement with a fast unto death until the government assured fast action on the Lokpal bill. The government, not wanting to come under bad light halfway into its term, came to common grounds with the protesters and began the process by reintroducing the bill in the legislature.¹⁷ The final procedures from Parliament only happened two years later in December 2013. This is reflective of how the issue of corruption that is high on the priorities of candidates at the time of elections is relegated to a secondary position when it comes to actually acting on the same.

One of the stronger tools available to the Indian public is the Right to Information Act 2005 according to which the public can make an RTI application to obtain public records and information from most public authorities and pay only a nominal price for the same. This movement grew so big that it bred a species of persons who used this provision in order to highlight discrepancies in public bodies and make their own efforts to bring justice to the people. However, this has not been a definite answer to corruption as there have been cases where these activists have been attacked or even murdered for their actions unravelling fuel mafias and other such public-government nexuses.¹⁸

In the most recent elections at New Delhi, citizens elected Mr Arvind Kejriwal, an activist who grew to fame with the Hazare Lokpal movement who further went to start his own party, the *Aam Aadmi Party*, or the common man party which sought to eradicate corruption by placing someone who the public could all relate to. Mr Kejriwal does not hail from a political dynasty and hence gained support amongst the middle class which did not believe that honest politicians existed. In

¹⁶ L. Cockcroft, "*Despite the election, India still isn't confronting corruption*", Dawn International (6 May, 2014) Available at <http://www.dawn.com/news/1104443/despite-the-election-india-still-isnt-confronting-corruption> (Last visited: June 24, 2014).

¹⁷ For more on the same and to see a complete time line, see "*A to Z of Lokpal Bill: India's answer to fighting corruption*", Hindustan Times, (18 December, 2013) Available at: <http://www.hindustantimes.com/india-news/a-to-z-of-lokpal-bill-india-s-answer-to-fighting-corruption/article1-1163814.aspx> (Last visited: June 24, 2014)

¹⁸ For statistics on the same, See "*Maharashtra tops country in attacks, murder of RTI activists*", (Dec 22, 2013) Available at: <http://timesofindia.indiatimes.com/india/Maharashtra-tops-country-in-attacks-murder-of-RTI-activists/articleshow/27743408.cms> (Last visited: June 24, 2014).

fact his party's symbol-a broom- was used as a metaphor for cleaning up politics.¹⁹ In all fairness, Mr Kejriwal did seek to reduce corruption through his tactics, though rather unconventional. One of the first things he did was to protest against the police who allegedly refused to cooperate and protect women. It was a first where the leader of the government was protesting against his own functionary. The reasoning was that the police and its corruption had seeped to the lowest levels including making *haftas* or weekly collections from autorickshaw drivers and push-cart vendors as "protection fees." The matter was so rampant that the Chief Minister admitted to being an anarchist for the sake of bringing protection of the law to the common man.²⁰ His next stint was about catching officials accepting or demanding bribes while on duty. Mr Kejriwal prompted the public to conduct "sting operations" of such persons by making AV recordings and submitting the same to his team of persons. While this may seem like a good and even appealing way of dealing with the matter, one must remember that there is no jurisprudence on entrapment in India and that established watchdog mechanisms already exist-complete with helpline numbers and contact details of the Anti-Corruption Bureau. It would appear to one that this was nothing but a popularity measure. What also further dilutes the credibility of this entire scheme of things was a sting operation that showed Mr Kejriwal asking of favours from another person, off the record. The common man was once again betrayed and the AAP government fell as quickly as it rose.

It is not tough to see and understand that corruption is deeply rooted in Indian life. Several popular culture depictions of government services are based on showing the individual as a go-to person when his palms are greased. Although, this is possibly not far from the truth, it only acts as a means to reinforce the belief. This has gotten many people to turn away from joining government services and politics. In the entire scheme of things, the best result has been the awakening of the general public. Although this may be a small number in urban India, this is still a big improvement over what the disgruntled citizen used to see around earlier. The general elections of 2014 have seen several youth-led campaigns calling for smart voting by people aiming at eradicating society of its many evils, corruption being the foremost.

¹⁹ See Mayank Bhardwaj "Anti-corruption crusader Kejriwal stuns Indian politics with election surge", Reuters India, (December 8, 2013) Available at <http://in.reuters.com/article/2013/12/08/india-elections-delhi-aap-kejriwal-idINDEE9B705120131208> (Last visited: June 24, 2014).

²⁰ "Arvind Kejriwal protests outside Rail Bhawan against Delhi Police", (20 January, 2014) Available at <http://www.livemint.com/Politics/t1AUNJMqY6afmztlXGHBcM/Arvind-Kejriwal-stopped-from-proceeding-to-North-Block-for-d.html> (Last visited: June 24, 2014).

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