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## State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles, and Opportunities

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# State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles, and Opportunities

Bruce W. Klaw\*

*This Article explores how bribery and extortion in international business transactions and foreign direct investment may be prevented by holding States accountable under international law for the demand-side causes of corruption, improving the viability of investor-State arbitration for corruption claims, and making appropriate use of State-to-State dispute resolution mechanisms like diplomatic protection. It examines the content of States' obligations to prevent and eradicate corruption and considers the conditions and circumstances under which a State may be held responsible under international law for the solicitation and extortion of bribes from foreign investors, and the denial of justice to foreign investors subjected to such corruption. It then assesses the opportunities and obstacles currently associated with invoking State responsibility through investor-State arbitration and State-to-State dispute resolution mechanisms such as diplomatic protection. Based on this analysis, it offers a series of suggested improvements that should better enable these international dispute-resolution mechanisms to help prevent corruption by encouraging its disclosure, securing redress for foreign investors subjected to it, and holding States accountable for it.*

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#### INTRODUCTION

Bribery and extortion remain persistent and disturbing realities in international business and foreign direct investment. In a survey by Transparency International of more than 2700 business executives in twenty-six countries, almost forty percent reported being requested to pay a bribe in the previous year.<sup>1</sup> The percentage of survey respondents reporting bribe solicitation increased to as much as sixty percent when the results were focused solely on high-risk sectors, such as telecommunications and energy, or limited to certain high-risk developing countries.<sup>2</sup> There is also reason to think that such alarmingly high percentages may actually *understate* the scope of the problem, as available evidence indicates that many people are solicited for payments multiple times per year, often by the same person or segment of government.<sup>3</sup>

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1. TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 2009: CORRUPTION AND THE PRIVATE SECTOR (2009), available at [http://files.transparency.org/content/download/107/431/file/2009\\_GCR\\_EN.pdf](http://files.transparency.org/content/download/107/431/file/2009_GCR_EN.pdf).

2. *Id.* at 4–5.

3. See, e.g., TRACE INTERNATIONAL, BUSINESS REGISTRY FOR INTERNATIONAL BRIBERY AND EXTORTION (BRIBELINE), 2010 BRAZIL REPORT 1 (“Nearly half of all respondents reported being solicited for a bribe by the same source more than onetime in a given year. Of these respondents, over 75% indicated that they were solicited for a bribe by the same source between two and twenty times in a given year and 15% reported being approached by the same source more than 100 times in a given year.”); TRACE INTERNATIONAL BRIBELINE, 2010 MEXICO REPORT 1 (“Over

Thus, while the vast majority of governments around the globe proclaimed a decade ago in the United Nations (UN) Convention Against Corruption (2003) that “the prevention and eradication of corruption is a responsibility of all States,”<sup>4</sup> it remains evident that corruption is far from gone, and it is doubtful States are effectively fulfilling their international responsibilities.

Part of the reason that corruption has continued to persist notwithstanding the acknowledged State responsibility to eradicate it appears to lie in the fact that many States have seemingly viewed their concrete and actionable international anti-corruption obligations as largely limited to addressing the supply-side of bribery transactions, that is, the bribe givers. Over the last two decades, for example, a number of States have taken steps to enact statutes like the United States’ Foreign Corrupt Practices Act (FCPA) that prohibit corrupt payments to foreign officials and remove the tax deductibility of such payments.<sup>5</sup> Yet, while States have focused attention on disrupting and prosecuting bribe payers, they have largely ignored or been reluctant to robustly address the demand side of bribery, that is, the corrupt officials who solicit or demand bribes.

Unsurprisingly, much of the corruption literature in the legal academy also tends to concentrate on supply-side bribery issues, the bulk of it demanding more regulatory guidance and judicial oversight over enforcement of the FCPA and United Kingdom Bribery Act,<sup>6</sup> or seeking specific reforms to such domestic supply-side legislation.<sup>7</sup>

There is, however, also a growing literature seeking to direct attention to the demand-side aspects of global corruption. Aided by data provided by organizations such as Transparency International and TRACE International, scholars, such as Professor Beets, have helped us better understand the political, economic, cultural, and geographic factors associated with levels of corruption

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55% of survey respondents reported that a bribe demand was recurring.”); TRACE INTERNATIONAL BRIBELINE, 2009 RUSSIA REPORT 4–5 (“In Russia, just over half of reporters were solicited more than once; in India, slightly less than half of reporters were solicited more than once. In China, on the other hand, 73% of reporters said they had been solicited more than once, and of those reports, nearly 20% indicated they had received more than 100 requests.”)

4. U.N. Convention Against Corruption pmbl., *adopted* Oct. 31, 2003, T.I.A.S. No. 06-1129, 2349 U.N.T.S. 41.

5. See *OECD Anti-Bribery Convention: National Implementing Legislation*, OECD, <http://www.oecd.org/daf/anti-bribery/oecdanti-briberyconventionnationalimplementinglegislation.htm> (last visited Feb. 24, 2015).

6. See, e.g., Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907 (2010); see also Bruce W. Bean & Emma H. MacGuidwin, *Expansive Reach—Useless Guidance: An Introduction to the U.K. Bribery Act 2010*, 18 ILSA J. INT’L & COMP. L. 323 (2012).

7. See, e.g., Daniel Pines, *Amending the Foreign Corrupt Practices Act To Include a Private Right of Action*, 82 CALIF. L. REV. 185, 192 (1994); Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2012 WISC. L. REV. 609 (2012).

in foreign countries.<sup>8</sup> Likewise, researchers at the World Bank and scholars, including Professor Rose-Ackerman, have highlighted the social and economic costs associated with secret and pervasive bribe solicitation and extortion.<sup>9</sup> In recognition of these ills, and seeking demand-side solutions to help curtail the problem, scholars, including Kaushik Basu (currently Chief Economist at the World Bank) and I, have separately urged rethinking of one of the current approaches to preventing such corruption—which involves criminalizing virtually all payments made in response to solicitation and extortion by foreign officials—to focus instead on the disclosure and prevention gains likely to be made if reluctant payers were unafraid of prosecution and instead felt free to come forward to report corrupt officials.<sup>10</sup> In that same vein, Professor Yockey, others, and I have separately called for increased legal accountability of corrupt foreign officials,<sup>11</sup> echoing similar pleas by members of the business community<sup>12</sup> and media.<sup>13</sup> To date, however, research into legal remedies aimed at the demand side of corruption has largely focused at the level of the individual corrupt foreign official—that is, strengthening transparency and reporting regimes,<sup>14</sup> augmenting forfeiture mechanisms, and/or utilizing other available extraterritorial criminal laws (like anti-money laundering laws) in order to hold corrupt foreign officials accountable for bribe solicitation and

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8. See S. Douglas Beets, *Understanding the Demand-Side Issues of International Corruption*, 57 J. BUS. ETHICS 6581 (2005).

9. See, e.g., Cheryl Gray & Daniel Kaufman, *Corruption and Development*, FINANCE AND DEVELOPMENT, March 1998, at 7, 8, available at <https://www.imf.org/external/pubs/ft/fandd/1998/03/pdf/gray.pdf> (concluding that bribery “impedes long-term foreign and domestic investment”); see also Susan Rose-Ackerman, *The Law and Economics of Bribery and Extortion*, 6 ANN. REV. L. & SOC. SCI. 217 (2010); Joseph W. Yockey, *Solicitation, Extortion and the FCPA*, 87 NOTRE DAME L. REV. 781 (2011).

10. See, e.g., Kaushik Basu, *Why, for a Class of Bribes, the Act of Giving a Bribe Should Be Treated As Legal* (Gov’t of India, Working Paper S. No. 1/2011-DEA, 2011), available at [http://finmin.nic.in/workingpaper/act\\_giving\\_bribe\\_legal.pdf](http://finmin.nic.in/workingpaper/act_giving_bribe_legal.pdf); see also Bruce W. Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, 49 HARV. J. ON LEGIS. 303, 343–49 (2012); Thomas L. Carson, *Bribery, Extortion and The Foreign Corrupt Practices Act*, 14 PHIL. & PUB. AFF. 1, 66–90 (1985); Susan Rose-Ackerman, *supra* note 9, at 217–36.

11. See Yockey, *supra* note 9, at 834–38; Klaw, *supra* note 10, at 361–68.

12. See, e.g., *OECD’s Role in Fighting Solicitation of Bribes, Statement to Meeting of the OECD Council at Ministerial Level*, BUS. & INDUS. ADVISORY COMM. TO OECD (May 13, 2004) at 4, available at <http://member.biac.org/statements/investment/bribe/2004MinisterialRoomDoc1.pdf> [hereinafter *OECD’s Role*]; see also *Assistance Against Solicitation of Bribes: A Possible Answer to the Problem of Extortion in International Business Transactions*, BUS. & INDUS. ADVISORY COMM. TO OECD (Oct. 1998) at 3, available at <http://www.member.biac.org/statements/investment/bribe/98-10-Solicitation-Stmt.pdf> [hereinafter *Assistance Against Solicitation*].

13. Richard Levick, *Winning The Anti-Corruption War: Go After The Bribe Takers*, FORBES (June 10, 2013), <http://www.forbes.com/sites/richardlevick/2013/06/10/winning-the-anti-corruption-war-go-after-the-bribe-takers/>.

14. See Klaw, *supra* note 10, at 349–57.

extortion under U.S. domestic laws.<sup>15</sup> But even with the increase in mutual legal assistance and civil society pressure that has been wisely suggested by some,<sup>16</sup> solutions to address the demand side of corruption that involve prosecuting foreign officials in U.S. courts will necessarily face practical, if not jurisdictional, impediments and remain largely reliant on cooperation by foreign States. Currently, however, many foreign States lack the political will to assist in the investigation and prosecution of their own officials.<sup>17</sup> Part of the reason for this, I submit, is because such foreign States do not regularly face real consequences when they do not cooperate in the battle against corruption.<sup>18</sup>

Scholars have recently recognized that “State responsibility [can] assist in the speedy criminal prosecution of corrupt public officials by imposing real consequences for the failure of a State to take corruption seriously,”<sup>19</sup> and by providing upside incentives for investor victims of solicitation and extortion to report their experiences. To date, however, “relatively little attention has been paid to the international law on State responsibility, particularly the degree to which host States can, if at all, be held responsible for the corrupt acts of their public officials.”<sup>20</sup>

The goal of this Article is therefore to elucidate States’ international obligations with respect to preventing corruption by focusing on the demand side of bribery, and exploring the mechanisms by which States may be held accountable under international law for failing to do so.

15. See Yockey, *supra* note 9, at 834–38; Klaw, *supra* note 10, at 361–68.

16. See Yockey, *supra* note 9, at 836–38.

17. See, e.g., Jon S. T. Quah, *Curbing Asian Corruption: An Impossible Dream?*, 105 CURRENT HIST. 176, 176, (2006) (noting that “curbing corruption in most Asian nations is difficult, mainly because of a lack of political will”).

18. Although there is growing empirical evidence that “corruption is found to lower investment and economic growth,” Paolo Mauro, *The Effects of Corruption on Growth, Investment, and Government Expenditure* (IMF Working Paper 96/98), available at <http://www.imf.org/external/pubs/cat/doctext.cfm?docno=WPIEA0981996>, and anecdotal evidence that international donor aid occasionally may be denied to corrupt States, see Sahr J. Kpundeh, *Political Will in Fighting Corruption*, in CORRUPTION & INTEGRITY IMPROVEMENT INITIATIVES IN DEVELOPING COUNTRIES 93, at 100, U.N. Sales No. E. 98.III.B.18 (1998) (citing 1997 IMF decision to deny loan to Kenya for failure to curb widespread wrongdoing), such consequences remain indirect, inconsistently applied and subject to a host of other factors relevant to the investor and donor community, see Alberto Alesina & Beatrice Weder, *Do Corrupt Governments Receive Less Foreign Aid?* 4 (National Bureau of Econ. Research, Working Paper No. 7108, 1999), available at <http://www.nber.org/papers/w7108> (finding that “more corrupt governments receive more foreign aid”). Indeed, certain countries near the bottom of Transparency International’s 2013 corruption perceptions index, such as Uzbekistan (ranked 168), have nonetheless experienced dramatic increases in FDI in the last decade. See *Uzbekistan—Foreign Direct Investment*, INDEXMUNDI, <http://www.indexmundi.com/facts/uzbekistan/foreign-direct-investment> (last visited Feb. 26, 2015).

19. See A.P. Llamzon, *State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration*, TRANSNAT’L DISP. MGMT, May 2013, at 14.

20. *Id.* at 1.

Part I of this Article summarizes the general framework under which responsibility is attributed to States under international law and applies that framework to the persons and/or entities typically involved in international business transactions and foreign direct investment, including foreign public officials in executive, legislative, and administrative roles; State-owned or government-affiliated corporate entities; and local agents, consultants, and “fixers.”

Part II considers whether and how a State may breach its international obligations under existing multilateral anticorruption treaties, bilateral investment treaties (BITs), human rights treaties, and customary international law by engaging in, failing to prevent, and failing to provide redress for bribe solicitation and extortion of foreign nationals.

Part III applies these principles of State responsibility to two principal mechanisms for invoking such responsibility in international transactions and investment disputes. Part III.A analyzes the obstacles that currently inhibit the initiation and ultimate success of corruption claims by foreign investors against States in international arbitration. It suggests certain changes to make international arbitration more attractive and viable for foreign nationals subjected to corruption, including augmenting nonretaliation protections, shielding persons who unwillingly acquiesce to extortion from domestic prosecution, appropriately lowering the heightened burden of proof for corruption claims, reiterating within BITs established legal principles for the proper attribution to States of their agents’ ultra vires acts, and clarifying the well-intentioned but insufficiently refined notion that claims relating to or involving corruption are either nonarbitrable or necessarily unenforceable. Part III.B analyzes the prospect of using State-to-State dispute resolution mechanisms, such as diplomatic protection, to address and resolve international corruption claims. After considering various legal obstacles and practical objections to State-to-State resolution of corruption claims, it argues that elevating foreign corruption to the level of a State-to-State disputes can create incentives for additional disclosure of bribery and extortion, assist victims of bribe solicitation and extortion in obtaining redress, pressure foreign States to remove their own corrupt officials, and further strengthen international norms against bribery and extortion in international business transactions and foreign direct investment.

## I.

### STATE RESPONSIBILITY FOR CORRUPTION INVOLVING FOREIGNERS UNDER INTERNATIONAL LAW

Although the concept of using principles of State responsibility to help prevent corruption remains largely untested, the practice of holding States responsible under international law for unlawful actions affecting the property



and financial interests of foreigners is not new. As early as 1929, scholars of international law prepared a Draft Convention on the Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners.<sup>21</sup> The United Nations' International Law Commission (ILC) further developed this work. During its very first session in 1948, the ILC included State responsibility within its provisional list of topics to be codified. By 1953, the UN General Assembly formally requested the ILC to undertake codification of the principles of State responsibility under international law.<sup>22</sup> After nearly a half century of work gathering evidence of State practice and *opinio juris*, the ILC adopted Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles) in August 2001. The Draft Articles have since been commented upon extensively and, except for a few articles that probably constitute progressive development of the law,<sup>23</sup> currently enjoy widespread support as a reflection of customary international law.<sup>24</sup> Accordingly, the Draft Articles provide a sound basis for analyzing whether and when corruption that affects foreign investors may give rise to State responsibility under international law.

The first two Draft Articles offer a starting point for analyzing whether corruption may entail State responsibility. Draft Article 1 makes clear that “[e]very internationally wrongful act of a State entails the international responsibility of that State,”<sup>25</sup> while Draft Article 2 provides that “[t]here is an internationally wrongful act of a State when conduct consisting of an act or omission: (a) is attributable to the State under international law, and (b) constitutes a breach of an international obligation of the State.”<sup>26</sup>

#### A. *Attributing Corrupt Conduct to the State*

In the first instance, the question of whether a State may be responsible for acts of corruption involving foreign nationals involves consideration of whether the act or omission at issue is attributable to the State. If the conduct or omission at issue is not attributable to the State, then there generally can be no State responsibility.<sup>27</sup> Since “the conduct of private persons is not as such attributable

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21. See *Draft Convention on the Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners*, 23 SPEC. NO. AM. J. INT’L. L. SPEC. SUPP. 133, 156–57 (1929).

22. G.A. Res. 799 (VIII), U.N. Doc. A/RES/799(VIII) (Dec. 7, 1953).

23. See Int’l Law Comm’n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, with Commentaries Rep. of the Int’l Law Comm’n, 53rd Sess., Apr. 23–Jun. 1 and Jul. 2–Aug. 10, U.N. GAOR, 56th Sess., Supp. No. 10, A/56/10, arts. 41, 48, 54 [hereinafter *Draft Articles on Responsibility*].

24. See *Gabcikovo-Nagyymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 7, ¶ 47 (Sept. 25) (citing earlier version of *Draft Articles on Responsibility*).

25. *Draft Articles on Responsibility*, *supra* note 23, art. 1.

26. *Id.* art. 2.

27. *Draft Articles on Responsibility*, *supra* note 23, ch. II, cmt. 2 (“The general rule [under

to the State,”<sup>28</sup> the corrupt person’s identity and function is critical in determining whether the conduct of such persons may be attributable to the State under international law.<sup>29</sup>

In the context of international business transactions, an investor may have dealings with many different individuals and entities in the foreign country during the lifetime of a transaction or investment. Recent experience shows that no person or position involved in such international transactions is wholly immune to corruption, as each of the following persons has recently been implicated in solicitation, bribery, or extortion schemes:

- Foreign executive officers of central and local governments, including presidents,<sup>30</sup> prime ministers,<sup>31</sup> and mayors, in order to obtain permission to engage in the foreign investment;<sup>32</sup>
- Foreign legislators, who may be responsible for key legislative committees with oversight over applicable business sectors such as telecommunications;<sup>33</sup>

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customary international law] is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the State . . .”).

28. *Id.* ch. II, cmt. 3.

29. It should be noted at the outset that while “the internal law and practice of each State are of prime importance” in ascertaining who or what is an organ of a State for the purposes of State responsibility, the legal characterization of such persons or entities as “organs” or as “independent” under the domestic law of the foreign State is not dispositive of the issue of attribution under international law. Nor is a State relieved of responsibility under international law simply because the foreign person may have been acting outside of his or her powers or competence, as set forth in the applicable foreign law. The same is true for the domestic law of the foreign investors’ State. The characterization of a person as a “foreign official” under the law of the investors’ State—while it may be decisive on matters involving criminal liability under laws like the U.S. Foreign Corrupt Practices Act (FCPA) and U.K. Bribery Act—does not necessarily resolve the issue of whether a State may be held responsible for that “foreign official’s” acts. Accordingly, the fact that the FCPA defines a “foreign official” as an “officer or employee of a foreign government or any department, agency, or instrumentality thereof” and U.S. law enforcement officials at the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) currently interpret “instrumentality” to include “State-owned enterprises” does not resolve the question of whether a State may be held responsible for the actions of such entities under international law.

30. *See* *World Duty Free Company Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006), <http://italaw.com/documents/WDFv.KenyaAward.pdf> (alleging bribe solicitation involving the Kenyan President).

31. *See* *EDF (Servs.) Ltd. v. Republic of Romania*, ICSID Case No. ARB/05/13, Award (Oct. 8, 2009), <http://www.italaw.com/sites/default/files/case-documents/ita0267.pdf> (alleging bribe solicitation involving the Romanian Prime Minister).

32. *See* David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES, Apr. 21, 2012, <http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html> (detailing payments allegedly made by Wal-Mart to local mayors).

33. *See* *SEC v. BellSouth Corporation*, Civil Action No. 1:02-CV-0113 (N.D. Ga., filed Jan. 15, 2002) (alleging bribery involving the wife of the Nicaraguan legislator who was the chairman of

- Foreign regulatory officials of national or local governments, who may be responsible for authorizing, administering, and/or enforcing applicable regulatory requirements, such as environmental impact statements,<sup>34</sup> customs inspections,<sup>35</sup> and land permits;<sup>36</sup>
- Quasi-governmental foreign professionals, who are licensed and required (and, in some cases paid) pursuant to foreign law to conduct examinations of the investor's business, products or services;<sup>37</sup>
- Foreign officers, directors, and employees of wholly or partially State-owned or State-controlled enterprises or joint-ventures partially owned by State-owned enterprises;<sup>38</sup>
- Foreign police officers, prosecutors, and judges charged with protecting, investigating, and determining the legal interests of the foreign investor;<sup>39</sup> and

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the Nicaraguan legislative committee with oversight of Nicaraguan telecommunications).

34. See Press Release, Dep't of Justice, Monsanto Company Charged with Bribing Indonesian Government Official: Prosecution Deferred for Three Years (Jan. 6, 2005), [http://www.justice.gov/archive/opa/pr/2005/January/05\\_crm\\_008.htm](http://www.justice.gov/archive/opa/pr/2005/January/05_crm_008.htm) (alleging attempted bribery involving a senior environmental official of the Indonesian government).

35. *United States v. Kay*, 513 F.3d 432 (5th Cir. 2007) (alleging bribery involving Haitian customs officials).

36. See Richard L. Cassin, *Wal-Mart Uncertain About Size of "Probable" FCPA Loss*, FCPABLOG (Mar. 27, 2003), <http://www.fcpablog.com/blog/2013/3/27/wal-mart-uncertain-about-size-of-probable-fcpa-loss.html>.

37. See *United States v. Tyson Foods Inc.*, No. 1:11-cr-00037-RWR (D.D.C. filed Feb. 10, 2011) (alleging bribery and extortion involving Mexican veterinarians required by Mexican law to inspect Tyson's poultry facilities).

38. See, e.g., Press Release, Dep't of Justice, Florida Telecommunications Company, Two Executives, an Intermediary and Two Former Haitian Government Officials Indicted for Their Alleged Participation in Foreign Bribery Scheme (Dec. 7, 2009), <http://www.justice.gov/opa/pr/two-florida-executives-one-florida-intermediary-and-two-former-haitian-government-officials> (alleging bribery involving former directors of international relations at the Republic of Haiti's State-owned national telecommunications company, Telecommunications D'Haiti); see also Press Release, Dep't of Justice, Former General Manager of Texas Business Arrested for Role in Alleged Scheme To Bribe Officials at Mexican State-Owned Electrical Utility (Nov. 23, 2009), <http://www.justice.gov/opa/pr/former-general-manager-texas-business-arrested-role-alleged-scheme-bribe-officials-mexican> (alleging bribery involving officials of the Comisión Federal de Electricidad (CFE); Litigation Release No. 21618, SEC, SEC Files Anti-Bribery Charges Against Two Global Tobacco Companies (Aug. 6, 2010), <http://www.sec.gov/litigation/litreleases/2010/lr21618.htm> (alleging bribery by Alliance One International, Inc. and Universal Corporation, Inc. involving officials of the Thailand Tobacco Monopoly); *United States v. Kellogg Brown & Root, LLC*, No. 09-071 (S.D. Tex., filed Feb. 6, 2009) (concerning bribery allegations involving officials of Nigerian State-owned enterprises involved in oil production joint venture).

39. *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, ¶ 61 (Feb. 5).

- Unofficial local “agents,” and “consultants” purporting to work on behalf of the above foreign governmental organs, entities, and officials.<sup>40</sup>

For purposes of analysis, each of these persons and entities can generally be categorized into one of three different groups: (1) organs of government; (2) persons working for entities exercising elements of governmental authority; and (3) in, some cases, de facto agents of the State, State employees or State organs. The ability of each of these groups to trigger attribution to the State is considered below.

### *1. Organs of Government*

The clearest case for State attribution occurs when the organs of a State’s government undertake acts. Article 4 of the Draft Articles provides that “[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions,<sup>41</sup> whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.”<sup>42</sup> It adds that “[a]n organ includes any person or entity which has that status in accordance with the internal law of the State,” and the Commentary explains that “person or entity” includes “any natural or legal person, including an individual office holder, a department, commission or other body exercising public authority.”<sup>43</sup> As one international tribunal aptly explained, this means “a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity.”<sup>44</sup>

Yet the actions of such organs of government when performed in an “official capacity” are not the only ones that are attributed to the State under

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40. See Press Release, SEC, SEC Sues the Titan Corporation for Payments to Election Campaign of Benin President (Mar. 1, 2005), <http://www.sec.gov/news/press/2005-23.htm> [hereinafter SEC Sues The Titan Corporation] (announcing that Titan Corporation settled an SEC action for \$23.5 million and pled guilty to a three-count criminal information charging it with FCPA violations in connection with Titans payments to an agent who claimed to have close ties to the then-President of Benin).

41. The fact that a State may be engaging in commercial activity as opposed to more classical aspects of governance does not diminish or discount its State responsibility. *Cf.* 28 U.S.C. § 1605(a)(2) (2013) (stating that a foreign State may be held accountable in U.S. courts, notwithstanding the Foreign Sovereign Immunities Act, when it takes “an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States”).

42. Draft Articles on Responsibility, *supra* note 23, art. 4(1).

43. *Id.* art. 4(2).

44. *Cf. id.* art. 4, cmt. 6 (quoting *Salvador Commercial Company*, 15 R.I.A.A. 455, 477 (1902)).

international law; so too are certain unlawful acts that are enabled by an official's position yet exceed the scope of the official's authority.

It is important not to confuse ultra vires acts (like soliciting a self-enriching bribe in exchange for official action) with purely private acts (like when a president cheats on his personal tax returns). In the former case, the organ is purporting to exercise an official function or acting in the name of the State (albeit wrongly), and in the latter case he is not. Accordingly, the Commentary to Article 4 of the Draft Articles makes clear that it is "irrelevant for [purposes of attribution] that the person concerned may have had ulterior or improper motives or may be abusing public power."<sup>45</sup> It adds that "[w]here such a person acts in an apparently official capacity, or under color of authority, the actions in question will be attributable to the State."<sup>46</sup> This rule makes particular sense in the context of bribery and extortion, as it is the person's official position of authority or apparent authority that makes the solicitation and/or extortion possible.

To that end, Article 7 of the Draft Articles explains that "[t]he conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, *even if it exceeds its authority or contravenes instructions*."<sup>47</sup> This rule was established in international matters such as the *Caire* case, in which two Mexican officers, after failing to extort money from a French citizen, took him to the local barracks and shot him. In that case, the French-Mexican Claims Commission held

that the two officers, even if they are deemed to have acted outside their competence . . . and even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposal on account of that status.<sup>48</sup>

Based on Draft Articles 4 and 7, when a bribe is solicited and/or extorted by a foreign official from an investor belonging to another State, it is a classic case of ultra vires action for which a State may be held internationally responsible. The Commentary to Draft Article 7 specifically explains that "[o]ne form of ultra vires conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction."<sup>49</sup> Thus, for example, where a president, prime minister, mayor, legislator, or administrative

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45. *Id.* art. 4, cmt. 13.

46. *Id.*

47. *Id.* art. 7 (emphasis added).

48. *Id.* art. 7, cmt. 5 (quoting *Estate of Jean-Baptiste Caire v. United Mexican States*, 5 R.I.A.A. 516, 531 (1929)).

49. *Id.* art. 7, cmt. 8 n.150.

official of a foreign State solicits or extorts a private payment in exchange for official action, her conduct is clearly attributable to the State.<sup>50</sup> Likewise, the acts of local police, prosecutors, or city council members who solicit or demand private payment in exchange for protection or to grant building permits,<sup>51</sup> for example, are also attributable to the State, as Article 4 makes clear that State responsibility “is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State.”<sup>52</sup> Rather, “it extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level.”<sup>53</sup>

### 2. *Persons or Entities Exercising Elements of Governmental Authority*

Article 5 of the Draft Articles is instructive on the issue of whether the conduct of directors, officers, and employees of State-owned enterprises or other government-affiliated enterprises may be attributable to the State. It provides that “[t]he conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”<sup>54</sup>

Reflecting the understanding that “a State will not necessarily escape responsibility for wrongful acts or omissions by hiding behind a private corporate veil,”<sup>55</sup> the Commentary to Article 5 explains that the State may be

50. *Id.* art. 4, cmt. 6 (citing *Salvador Commercial Company*, 5 R.I.A.A. 477 (1902)) (“[A] State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity.”).

51. See David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES, Apr. 21, 2012, <http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html?pagewanted=all>.

52. Draft Articles on Responsibility, *supra* note 23, art. 4, cmt. 6.

53. *Id.*; see also *id.* art. 4, cmt. 7 and n.113 (collecting cases of mixed commissions after World War II holding that the conduct of minor organs of the State, such as administrators of enemy property, mayors and police officers were attributable to the State).

54. This language is consistent with the 2012 U.S. Model BIT, which provides that “[a] [State] Party’s obligations . . . shall apply: (a) to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party” and specifically adds that “government authority that has been delegated includes a legislative grant, and a government order, directive or other action transferring to the state enterprise or other person, or authorizing the exercise by the state enterprise or other person of, governmental authority.” U.S. Model Bilateral Investment Treaty art. 2(2)(a) n.8 (2012), available at <http://www.italaw.com/investment-treaties> [hereinafter 2012 U.S. Model BIT].

55. *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Objections to Jurisdiction, ¶ 78 (Jan. 25, 2000), 40 I.L.M. 1129 (2001) (determining whether the acts of a private corporation, with which the claimant had contractual dealings, were imputable to Spain).

held accountable for the actions of “parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.”<sup>56</sup> This may include:

public corporations, semipublic entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned.<sup>57</sup>

So what does it mean to be empowered by the law of the State to exercise elements of “governmental authority” or “functions of a public character”? The Commentary does not attempt to precisely define these terms. Rather, since “what is regarded as ‘governmental’ depends on the particular society, its history and traditions,”<sup>58</sup> the Commentary commands that attention be paid to the “content of the powers” held by the entity, as well as “the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise.”<sup>59</sup>

To aid in interpretation of when the actions of non-State organs exercising governmental power may be attributable to the State, the Commentary to the Draft Articles also provides certain exemplars, including private security firms charged with guarding prisons, State-owned airlines authorized to conduct certain immigration responsibilities, and foundations established and controlled by a State to identify, seize, and hold State property for charitable purposes.<sup>60</sup> By highlighting examples of entities that carry out functions classically belonging to the State (like crime control and border security) and entities that perform services ostensibly on behalf of the public (like gathering and holding property for public charitable purposes), the Commentary guides us toward a functional approach to determining the circumstances under which the conduct of private entities and their personnel may be attributable to the State.<sup>61</sup>

This functional approach mirrors the approach taken by a number of U.S. federal courts when deciding whether payments to employees of a government-affiliated entity for the purpose of obtaining or retaining business comes within the purview of the FCPA’s prohibition against corrupt payments made to an

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56. Draft Articles on Responsibility, *supra* note 23, art. 5, cmt. 1.

57. *Id.* art. 5, cmt. 2.

58. *Id.* art. 5, cmt. 6.

59. *Id.*

60. *Id.* art. 5, cmt. 2.

61. Other commentators have argued that the assessment of whether the acts of an entity exercising governmental authority should be attributable to a State should be based upon a comparative standard, and whether the act is normally regarded as governmental in a contemporary setting should be determined from an objective point of view. See RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 200 (2d ed. 2008).

instrumentality of a foreign government, department, or agency. In *United States v. Esquenazi*, for example, the Eleventh Circuit Court of Appeals recently held that “[a]n ‘instrumentality’ under . . . the FCPA is an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.”<sup>62</sup> While recognizing that what constitutes control and what constitutes a government function are fact-bound questions, the court provided additional guidance, explaining that

[t]o decide if the government “controls” an entity, courts and juries should look to the foreign government’s formal designation of that entity; whether the government has a majority interest in the entity; the government’s ability to hire and fire the entity’s principals; the extent to which the entity’s profits, if any, go directly into the governmental accounts, and, by the same token, the extent to which the government funds the entity if it fails to break even; and the length of time these indicia have existed.<sup>63</sup>

Similarly, in *United States v. Carson*, the U.S. District Court for the Central District of California explained that

[s]everal factors bear on the question of whether a business entity constitutes a government instrumentality, including:

- The foreign state’s characterization of the entity and its employees;
- The foreign state’s degree of control over the entity;
- The purpose of the entity’s activities;
- The entity’s obligations and privileges under the foreign state’s law, including whether the entity exercises exclusive or controlling power to administer its designated functions;
- The circumstances surrounding the entity’s creation; and
- The foreign state’s extent of ownership of the entity, including the level of financial support by the state (e.g., subsidies, special tax treatment, and loans).<sup>64</sup>

Using such a functional approach, it may be possible to identify, *ex ante*, a number of general types of government-affiliated entities commonly involved in international business transactions and foreign direct investment whose actions would be attributable to the State. These include entities that are wholly-owned, controlled, or financed by the government as well as certain entities that, while not wholly-owned, controlled, or financed by the government, are authorized by the government to “conduct [the government’s] business,”<sup>65</sup> such as carrying

62. *United States v. Esquenazi*, 752 F.3d 912, 925 (11th Cir. 2014).

63. *Id.*

64. *United States v. Carson*, Case No. SACR 09-000777-JVS, 2011 U.S. Dist. LEXIS 88853, at \*11–12 (C.D. Cal. May 18, 2011); *see also* *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1113, 1115 (C.D. Cal. 2011) (finding the Comisión Federal de Electricidad (CFE) could be an instrumentality of the Mexican government and its employees deemed “foreign officials” under the FCPA where CFE provided the “quintessential government function” of providing electricity to the populace).

65. *Carson*, 2011 U.S. Dist. LEXIS 88853, at \*18.



out quintessential government functions<sup>66</sup> or providing essential public services.<sup>67</sup> And indeed, if the international law of State responsibility were to mirror emerging U.S. law on this issue, even State-controlled entities that do not just perform “core government functions” would be attributable to the State, as in the case of entities that supply telephone services.<sup>68</sup> For the elimination of doubt on this issue, investors and States could also agree in advance on whether a particular entity with which the investor seeks to do business may trigger State responsibility. Indeed, to a limited extent, the 2012 U.S. Model Bilateral Investment Treaty (BIT) endeavors to do this.<sup>69</sup>

### 3. *De Facto Agents of the State*

Article 8 of the Draft Articles is instructive on the issue of whether the conduct of unofficial “advisors,” “consultants,” and “fixers” may be attributed to the State

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66. One of the most quintessential government functions—inherent in the concept of sovereignty itself—is the power to regulate the exploration, exploitation, disposition and allocation of the public natural resources within its territory. *See, e.g.*, Charter of Economic Rights and Duties of States art. 2(1), G.A. Res. 3281 (XXIX), U.N. Doc. A/RES/3281(XXIX) (Dec. 12, 1974) (“Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.”); U.N. Convention on the Law of the Sea art. 56(a), Dec. 10, 1982, 1833 U.N.T.S. 397 (affirming that a coastal State within its exclusive economic zone has “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds”); *id.* art. 81 (“The coastal State shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes.”). Thus, Article 5 should at a minimum cover entities in the following sectors (whether they are wholly or partially State-owned): (1) land management, including logging, agriculture and exploitation of land-based energy resources such as oil, natural gas, coal, and geothermal; (2) water management, including fishing and exploitation of sea-based energy resources (e.g., off-shore drilling, hydroelectric); and (3) air management, including broadcasting and exploitation of wind-based energy resources. *See Phillips Petroleum Co. Iran v. Iran*, Iran-U.S. Cl. Trib. Rep. 425-39-2, ¶ 89 n.22 (1989) (holding the State of Iran responsible for the National Iranian Oil Company’s taking of American owned property where 1974 Iranian Petroleum law had vested “the exercise and ownership right of the Iranian nation on the Iranian Petroleum Resources”); *see also Aguilar*, 783 F. Supp. 2d 1108.

67. The determination of which services are “essential” should, at a minimum, include those that are commonly provided by, at the direction of, using the public resources of, or with the substantial assistance of, the majority of governments, such as the provision of electricity to the citizenry.

68. *United States v. Esquenazi*, 752 F.3d 912, 922–24 (11th Cir. 2014) (affirming FCPA conviction for payments made to employee of State-controlled Haitian telecommunications company after finding provision of telephone service to be a governmental function).

69. *See* 2012 U.S. Model BIT, *supra* note 54, art. 2(2) n.8 (clarifying that State-owned or State-controlled enterprises must comply with the treaties’ requirements when exercising governmental authority, regardless of whether such authority was delegated by legislative grant, directive or other action).

and State actors for whom they work. Since the conduct of purely private parties may not be attributed to the State without some additional involvement of the State itself, Article 8 provides that “[t]he conduct of a person or group of persons shall be considered an act of a State under international law *if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.*”<sup>70</sup> This is a fact-bound issue that requires analysis of whether the “advisor,” “consultant,” or “fixer” is taking orders from a government official or is getting paid by such an official.

In a number of well-publicized bribery cases under the FCPA, a “business advisor,” working for an official of the country in which the investor wishes to do business, has approached an investor and solicited a bribe on behalf of his governmental principal.<sup>71</sup> In such situations, the conduct of such individuals is attributable to the State itself under international law.

*B. Bribe Solicitation, Extortion, and Denial of Justice as Breaches of the Host State’s International Obligations*

Having considered the circumstances and conditions under which the acts of certain persons and entities commonly involved in international business transactions and foreign direct investment may be attributable to the State, the question of whether States may be held internationally responsible for corruption affecting such foreign persons turns on whether the alleged corruption at issue “constitutes a breach of an international obligation of the State.”<sup>72</sup>

Under international law, an act or omission that is attributable to the State will give rise to State responsibility when it is “not in conformity with what is required” of the State under its international legal obligations.<sup>73</sup> “International obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order.”<sup>74</sup> It is irrelevant under international law whether the State’s obligation—and consequential breach—is in the nature of a contract, tort, or crime.<sup>75</sup> All may give rise to State responsibility. This is particularly important because one could envision a range of different legal theories that could be alleged against a State,

70. Draft Articles on Responsibility, *supra* note 23, art. 8 (emphasis added).

71. See, e.g., SEC Sues the Titan Corporation, *supra* note 40 (announcing that Titan Corporation settled an SEC action for \$23.5 million and pled guilty to a three-count criminal information charging it with FCPA violations in connection with Titan’s payments to an agent who claimed to have close ties to the then-President of Benin).

72. Draft Articles, *supra* note 23, art. 2(b).

73. *Id.* art. 12.

74. *Id.* art. 12, cmt. 3.

75. *Id.* art. 12, cmt. 5.

including (1) liability for the solicitation and extortion of bribes,<sup>76</sup> (2) liability for the receipt of bribes,<sup>77</sup> (3) liability for the failure to prevent bribery,<sup>78</sup> and (4) liability for failing to provide redress to victims of solicitation and extortion.<sup>79</sup>

### *1. Obligations Under Multilateral Corruption Suppression Treaties*

Over the last two decades, several multilateral treaties have been concluded on the issue of corruption.<sup>80</sup> One driver for these treaties is aptly recognized in

76. Under this theory of liability, the State would be held liable for the solicitation or extortion of bribes by its organs and de jure or de facto agents. To differentiate bribery (for which no State liability would exist because it is the payer's own corrupt intention and acts that gave rise to the payer's harm, if any) and extortion (for which State liability would exist, because it is the State agent's corrupt intention and acts that gave rise to the investor's harm), Professor Lindgren's proposed distinction between bribery and extortion could be used, under which extortion is "a corrupt benefit paid under an implicit or explicit threat to give the payor *worse than fair treatment* or to make the payor worse off than he is now." James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 825 (1988) (emphasis added).

77. Under this theory of liability, the alleged harm would consist of a foreign State agent's acceptance of a bribe willingly paid, and indeed, perhaps suggested by the foreign investors. In such cases, it should be understandably difficult for the investor who paid the bribe to have legal standing. Even though a State may have agreed by treaty to criminalize the receipt of bribes, neither the investor who willingly paid the bribe nor the investor's State should be able to make a claim regarding the breach of this obligation. Arguably, only those third-party investors and their States who have suffered nonspeculative losses as a result of the State agent's receipt of such bribes from another investor should be in a position to make a claim against the State under this theory.

78. Under this theory of liability, the alleged harm consists in a State's failure to take measures to stop the occurrence of bribery and extortion. By its very nature, this theory of liability does not center upon corrupt actions taken by an official or agent of the State, but rather of omissions attributable to the machinery of the State. In theory, such a "failure to prevent" claim could sound in strict liability or in negligence. Standing should not present a significant obstacle under this theory, as harm would be suffered by the unwilling giver of a bribe as well as third parties who have suffered nonspeculative losses as a direct result of such corruption.

79. Under this theory of liability, the alleged harm consists of a State's failure to rectify the harms suffered when a bribe is extorted from a foreign investor by an agent of the State or a foreign investor is punished for its failure to make such a payment. Claims of this sort resemble those alleging a denial of justice.

80. See, e.g., Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724 [hereinafter Inter-American Convention]. See also Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, U.N. Treaty Registration No. I-49274, available at <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/49274/Part/I-49274-080000028030953a.pdf>; Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, May 26, 1997, 1997 O.J. (C 195) 1 [hereinafter EU Convention Against Corruption]; Criminal Law Convention on Corruption, 27 Jan. 1999, 2216 U.N.T.S. 225 [hereinafter COE Criminal Law Convention]; Civil Law Convention on Corruption, Nov. 4 1999, 2246 U.N.T.S. 3 [hereinafter COE Civil Law Convention]; Convention on Preventing and Combating Corruption, July 11, 2003, U.N. Treaty Registration No. I-50008, available at <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/50008/Part/I-50008-0800000280337f3b.pdf> [hereinafter African Union Convention on Corruption];

the Preamble to the UN Convention Against Corruption which explains that “the prevention and eradication of corruption is a responsibility of all States and that they must cooperate with one another.”<sup>81</sup> However, because mere aspirational statements in preambles to treaties are insufficient to create binding and actionable international obligations, it is valuable to flesh out the precise obligations to which States have agreed to be bound.

Perhaps unsurprisingly, none of the existing multilateral corruption suppression treaties contains an express commitment on behalf of States that the State and its organs and agents will refrain from soliciting or extorting bribes from foreign investors. For this reason, a claim of State responsibility based on one single act of solicitation or extortion is likely to fail, if based on a multilateral corruption-suppression treaty like the UN Convention Against Corruption.

Instead of imposing an absolute obligation to prevent bribery and extortion, these multilateral treaties typically impose upon States the following related obligations:

- the obligation to criminalize under domestic law the request or receipt of a bribe by its public officials;<sup>82</sup>
- the obligation to prosecute or extradite a State’s domestic officials engaging in such corruption;<sup>83</sup>
- the obligation to “develop and implement or maintain effective, coordinated anti-corruption policies,” including codes of conduct and anticorruption training for public officials;<sup>84</sup> and
- the obligation to “take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.”<sup>85</sup>

While these treaty provisions are important and positive steps in the battle against international bribery and extortion, their carefully crafted language likely

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U.N. Convention Against Transnational Organized Crime, G.A. Res. 55/25 U.N. Doc. A/RES//5525 (Jan. 8, 2001); U.N. Convention Against Corruption, *supra* note 4.

81. U.N. Convention Against Corruption, *supra* note 4, at 4.

82. *See, e.g.*, U.N. Convention Against Corruption, *supra* note 4, arts. 15(b), 18, 19; COE Criminal Law Convention, *supra* note 79, art. 3; EU Convention Against Corruption, *supra* note 80, art. 2; Inter-American Convention, *supra* note 80, arts. 6–7.

83. *See, e.g.*, Inter-American Convention, *supra* note 80, art. 13; EU Convention Against Corruption, *supra* note 80, art. 8; COE Criminal Law Convention, *supra* note 80, art. 27.

84. *See* Inter-American Convention, *supra* note 80, art. 3.

85. U.N. Convention Against Corruption, *supra* note 4, art. 35.

falls short of creating a clearly accepted international obligation by the State that would be actionable against it if one of its agents solicited, demanded, or received a bribe.<sup>86</sup> Rather, the only potentially viable claims of State responsibility that could be based on an alleged breach of multilateral corruption-suppression treaties are ones alleging a breach of the obligation to criminalize the corrupt behavior, develop anticorruption policies and training programs, or provide avenues of redress for victims of corruption. And, of course, such claims would require proof of additional State omissions beyond the mere act of solicitation or extortion itself.

### *2. Obligations Under Bilateral Investment Treaties and Free Trade Agreements*

The most promising treaties on which to found an international obligation for the State to refrain from, or prevent, bribe solicitation and extortion are BITs and regional trade agreements, including free trade agreements (FTAs). These agreements generally provide for the reciprocal encouragement, promotion, and protection of trade and investments in each other's territories by persons or companies based in either country.<sup>87</sup> According to the United Nations Conference on Trade and Development (UNCTAD), there were some 2265 BITs in force as of 2003, involving 176 different countries.<sup>88</sup> According to the World Trade Organization (WTO), there were some 398 regional trade agreements in force globally in 2015.<sup>89</sup>

Although the exact terms of BITs and FTAs vary, they are frequently based on models such as the 2012 U.S. Model BIT and thus include common clauses. These common clauses typically require compensation in the event of expropriation and mandate that covered investments from the persons and entities of one State party in the territory of the other State party be afforded "national treatment,"<sup>90</sup> "most-favored-nation treatment,"<sup>91</sup> and a "minimum standard" of treatment in line with customary international law<sup>92</sup> that

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86. *But see* Llamzon, *supra* note 19, at 63 (contending that "[w]hatever vagaries there may be in the content of international anti-corruption law, it is almost inconceivable that an arbitral tribunal would sanction the idea that international anti-corruption norms would not extend to a prohibition of public official corruption").

87. *See What Are BITs?*, U.N. CONF. ON TRADE & DEV. (Aug. 17, 2004), [http://www.unctadxi.org/templates/Page\\_\\_\\_1006.aspx](http://www.unctadxi.org/templates/Page___1006.aspx).

88. *See UNCTAD Analysis of BITs*, U.N. CONF. ON TRADE & DEV. (Aug. 17, 2004), [http://www.unctadxi.org/templates/Page\\_\\_\\_1007.aspx](http://www.unctadxi.org/templates/Page___1007.aspx).

89. *Regional Trade Agreements*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm) (last visited Feb. 26, 2015).

90. 2012 U.S. Model BIT, *supra* note 54, art. 3.

91. *Id.* art. 4.

92. There is some debate whether the minimum standard of "fair and equitable" treatment, as set forth in BITs, is (a) simply synonymous with the customary-international-law standard or (b) is

specifically includes “fair and equitable treatment” as well as “full protection and security.”<sup>93</sup> Many also include general provisions aiming to safeguard foreign investments from arbitrary or discriminatory measures.<sup>94</sup>

Several of these common investment treaty provisions provide a basis to conclude that the solicitation, demand, and/or extortion of a bribe from a foreign investor by a person or entity attributable to a State would violate the State’s international legal obligations, and could thus give rise to a valid claim of State responsibility.

*i. Obligation to Provide Fair and Equitable Treatment*

Under the 2012 U.S. Model BIT, for example, the “minimum standard of treatment” clause provides, in pertinent part, that “[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment . . . .”<sup>95</sup> The primary aim of such a provision is to promote a stable and predictable investment environment in a host State.<sup>96</sup>

Commentators have recognized that “[i]t is difficult to reduce the words ‘fair and equitable treatment’ to a precise statement of a legal obligation,” and international arbitral tribunals have generally “proved unwilling to provide a specific definition of the content of this provision.”<sup>97</sup> Most agree, however, that the “fair and equitable treatment” standard includes obligations of (i) transparency and treatment in accordance with the investor’s legitimate expectations, (ii) a State’s compliance with contractual obligations, (iii)

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independent and requires treatment that is above or beyond customary international law. In line with the binding interpretative statement of the NAFTA commission, the United States takes the former view. *Id.* art. 5(2) (“The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.”).

93. *Id.* art. 5.

94. See, e.g., Ecuador Bilateral Investment Treaty, U.S.-Ecuador, art. II 3(b), Aug. 27, 1993, available at <http://www.state.gov/documents/organization/43558.pdf> (“Neither party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investments . . . .”).

95. 2012 U.S. Model BIT, *supra* note 54, art. 5.

96. Florian Haugeneder & Christoph Liebscher, *Corruption and Investment Arbitration: Substantive Standards and Proof*, in AUSTRIAN ARBITRATION YEARBOOK 2009 539 (Christian Klausegger et al. eds., 2009).

97. ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 581 (4th ed. 2009); see also EDF (Servs.) Ltd. v. Republic of Romania, ICSID Case No. ARB/05/13, Award, ¶ 215 (Oct. 8, 2009), <http://www.italaw.com/sites/default/files/case-documents/ita0267.pdf> (recognizing that there is not “a general consensus on the meaning of this phrase by ICSID tribunals”).

procedural propriety and due process, (iv) good faith, and (v) freedom from coercion and harassment.<sup>98</sup>

Because the “fair and equitable treatment” standard includes obligations of “transparency,” “treatment in accordance with an investor’s legitimate expectations,” and, most notably, “freedom from coercion,” the “fair and equitable treatment” standard would be breached if a person or entity attributable to the State were to solicit, demand, or extort a bribe from a foreign investor, or were to threaten or impose disadvantageous treatment against a foreign investor in the event a bribe is not paid. Accordingly, in *EDF v. Romania*, for example, an ICSID tribunal was asked to consider whether an alleged demand for a \$2.5 million bribe by the Chief of Cabinet to the Prime Minister of Romania—and the State’s subsequent refusal to extend an investment contract allegedly because the bribe was not paid—amounted to a violation of the fair and equitable treatment standard. It explained:

[A] request for a bribe by a State agency is a violation of the fair and equitable treatment obligation owed to the Claimant pursuant to the BIT, as well as a violation of international public policy, and that exercising a State’s discretion on the basis of corruption is a . . . fundamental breach of transparency and legitimate expectations.<sup>99</sup>

#### *ii. Obligation to Provide Full Protection and Security*

The “full protection and security” obligation within a BIT might also be violated by the solicitation, demand, or extortion of a bribe from a foreign investor by a person attributable to the State. Such a violation would likely occur only under circumstances where the State failed to take reasonable measures to avoid the corruption, such as failing to provide adequate training or oversight of the officials, police, or other agents involved in the corrupt acts.

Although the “full protection and security” requirement suffers from the same vagueness as “fair and equitable treatment,” it is commonly understood to “[impose] an obligation upon the host state to actively protect the investment from adverse actions by the host state itself, by its authorities or by third parties.”<sup>100</sup> The State’s obligation is one of due diligence.<sup>101</sup> And while there is

98. Haugeneder & Liebscher, *supra* note 96.

99. *EDF (Servs.) Ltd. v. Republic of Romania*, ICSID Case No. ARB/05/13, Award, ¶ 221 (internal quotation marks omitted).

100. Haugeneder & Liebscher, *supra* note 96, at 560.

101. REDFERN & HUNTER, *supra* note 97, ¶¶ 11–28; *see also e.g.*, Mahnaz Malik, *The Full Protection and Security Standard Comes of Age: Yet Another Challenge for States in Investment Treaty Arbitration*, *The International Institute For Sustainable Development*, INT’L INST. FOR SUSTAINABLE DEV. BEST PRACTICES SERIES, Nov. 2011, at 1, 10, available at [http://www.iisd.org/pdf/2011/full\\_protection.pdf](http://www.iisd.org/pdf/2011/full_protection.pdf) (noting that “tribunals have emphasized that there is no need to prove negligence or bad faith for a state to be liable”); *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, ¶ 77 (June 27, 1990),

a divergence of opinions as to the extent of such a treaty provision, a substantial and growing number of modern arbitral tribunals have recognized that this obligation includes providing protection from physical violence against the assets and individuals connected with an investment as well as protection of investors' commercial and legal rights.<sup>102</sup> Accordingly, a claim of State responsibility for corruption could arguably be based on the obligation to provide full protection and security under a bilateral investment treaty, but presumably only under relatively limited circumstances demonstrating a lack of appropriate due diligence.

### *iii. Obligation to Refrain from Arbitrary or Discriminatory Action*

A State may also violate its international obligation, under most BITs, to refrain from "arbitrary" or "discriminatory" action by taking (or threatening to take) adverse action against a person who fails to pay a bribe.

Although the terms "arbitrary" and "discriminatory" are generally not defined within BITs, international tribunals have fleshed out the meaning of these terms under international law. The International Court of Justice has explained that "arbitrary" actions are those that fly in the face of the rule of law:<sup>103</sup> an action may be deemed "arbitrary" when it is a "wilful disregard of

<http://www.italaw.com/sites/default/files/case-documents/ita1034.pdf> ("According to modern doctrine, the violation of international law entailing the State's responsibility has to be considered constituted by 'the mere lack or want of diligence,' without any need to establish malice or negligence.").

102. *Asian Agricultural Products Ltd.*, ICSID Case No. ARB/87/3, Award (June 27, 1990), <http://www.italaw.com/sites/default/files/case-documents/ita1034.pdf>; *see also, e.g., Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶ 408 (Jul. 14, 2006), [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC507\\_En&caseId=C5](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC507_En&caseId=C5) (noting that full protection and security is "not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view" and holding that "[w]hen the terms 'protection and security' are qualified by 'full' and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security"); *National Grid P.L.C. v. Argentine Republic*, Award, ¶ 189 (UNCITRAL Trib. 2008) <http://www.italaw.com/documents/NationalGrid-Jurisdiction-En.pdf> ("[T]he phrase 'protection and constant security' as related to the subject matter of the Treaty does not carry with it the implication that this protection is inherently limited to protection and security of physical assets."); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, ¶ 729 (Jul. 24, 2008), <http://www.italaw.com/sites/default/files/case-documents/ita0095.pdf> ("[W]hen the terms 'protection' and 'security' are qualified by 'full', the content of the standard may extend to matters other than physical security" [and] 'implies a State's guarantee of stability in a secure environment, both physical, commercial and legal.'). *But see, e.g., Saluka Investments B.V. v. The Czech Republic*, Partial Award, ¶ 484 (UNCITRAL Trib. 2006), <http://www.italaw.com/sites/default/files/case-documents/ita0740.pdf> ("[T]he 'full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force.")

103. *Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.)*, 1989 I.C.J. 15, ¶ 128 (July 20) ("Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule



due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.”<sup>104</sup> And an act is “discriminatory” when it results “in a treatment of an investor different from that accorded to other investors in a similar or comparable situation.”<sup>105</sup>

Where a public official solicits or demands a bribe—or punishes or privileges an investor based on their willingness to pay a solicited bribe—such action should be considered both “arbitrary” and “discriminatory” within the meaning of BITs, and thus violate a State’s international obligations.<sup>106</sup>

*iv. Obligation To Refrain from Takings Without a Public Purpose*

Lastly, by extorting a bribe from a foreign investor, a State may violate its international obligation to refrain from uncompensated takings that are not for a public purpose. The 2012 U.S. Model BIT provides that “[n]either Party may expropriate . . . a covered investment either directly or indirectly. . . except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law.”<sup>107</sup> These provisions are most commonly used to guard against uncompensated nationalization of foreign investments or host government regulation that unduly impairs an investor’s property rights. They are seldom litigated. However, these provisions could arguably provide an additional legal basis for a claim that extortion of a bribe from a foreign investor by a State agent for personal gain entails State responsibility.<sup>108</sup> After all, assuming the payment itself were a part of a covered investment, extortion of a private payment necessarily would involve the taking of covered property that was certainly not for a public purpose.

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of law.”)

104. *Id.*

105. REDFERN & HUNTER, *supra* note 97, ¶¶ 11–30 (citing *Goetz v. Republique du Burundi*, ICSID Case No. ARB/95/3, Award (Feb. 10, 1999), 6 ICSID 5 (2004)).

106. *Cf.* U.N. CONF. ON TRADE AND DEV., ILLICIT PAYMENTS, at 71–72, U.N. Doc. No. UNCTAD/ITE/IIT/25, U.N. Sales No. E.01.II.D.20 (2001) (“Bribery of a public official leads to a decision by that official that is unfair and discriminatory, especially when the competitors of the bribe giver are thereby put at a disadvantage. Thus, to the extent that a decision arising from an illicit payment could be imputed to a Government as an official measure, such a measure would be prohibited by the relevant treatment standards of an applicable [international investment agreement].”)

107. 2012 U.S. Model BIT, *supra* note 54, art. 6(1).

108. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §712, cmt. (e) (1987); *see also* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 792 (Chester Brown ed., 2013) (stating that “[a] taking of property by a sovereign for purely private gain would likely run afoul of the requirement” within Article 6(1)(a) that takings be done only for a public purpose).

### 3. *Obligations Under Human Rights Treaties*

The “denial of justice” to a foreigner that has been extorted and has sought legal recourse in a host State would also give rise to State responsibility as a breach of a State’s obligations under human rights treaties. Section 711 of the Restatement (Third) of the Foreign Relations Law of the United States provides, *inter alia*, that “[a] state is responsible under international law for injury to a national of another state caused by an official act or omission that violates (a) a human right that . . . a state is obligated to respect for all persons subject to its authority.”<sup>109</sup>

With this in mind, an argument could be made that a State’s failure to investigate and compensate a foreigner victimized by extortion violates the equal justice provisions of the International Covenant on Civil and Political Rights (ICCPR).<sup>110</sup> Such a violation would thereby constitute a breach of the international treaty obligations of any State that has become signatory to the ICCPR.<sup>111</sup>

### 4. *Obligations Under Customary International Law*

In addition to violating international obligations under existing treaties, the solicitation or extortion of an illicit payment from a foreign investor, or the denial of justice to a foreign investor who has been solicited or extorted, would likely also violate the State’s obligations under customary international law.<sup>112</sup>

As discussed above in Section I.B.2(a), the minimum standard of “fair and equitable” treatment required by most current BITs largely captures the customary-international-law standard of treatment with respect to foreign investors,<sup>113</sup> and international case law makes clear that that requirement of

109. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §712.

110. *See* International Covenant on Civil and Political Rights art. 14(1), Nov. 16, 1996, S. Treaty Doc. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR] (“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”); *id.* art 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”).

111. As of February 2015, some 168 States were a party to this legally binding treaty. *See* UNITED NATIONS OFFICE OF LEGAL AFFAIRS, Status of International Covenant on Civil and Political Rights, U.N. TREATY COLLECTION, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=IV~4&chapter=4&lang=en> (last visited Feb. 25, 2015).

112. *Cf.* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES §711 (1987) (“[A] State is responsible under international law for injury to a national of another state caused by an official act or omission that violates (a) a human right that . . . a state is obligated to respect for all persons subject to its authority; (b) a personal right that, under international law, a state is obligated to respect for individuals of foreign nationality; or (c) a right to property or another economic interest that, under international law, a state is obligated to respect for persons, natural or juridical, of a foreign nationality . . .”).

113. Article 5(2) of the 2012 U.S. Model BIT explains that the obligations to provide “fair and

“fair and equitable treatment” would be violated by solicitation and extortion of a bribe.<sup>114</sup> Likewise, the obligation of States under the ICCPR to provide equal justice to a foreigner also substantially includes the obligations of States under customary international law not to deny justice to those subjected to solicitation or extortion, at least insofar as natural persons are concerned.<sup>115</sup> However, a few additional comments are in order regarding the requirements of customary international law in respect of solicitation, bribery, and extortion.

*i. State Practice*

Notwithstanding that bribe solicitation and extortion remain distressingly commonplace, there is growing State practice publicly condemning such acts. Most notable in this respect is the fact that virtually every country in the world criminalizes the solicitation, demand, or receipt of a bribe by its public officials.<sup>116</sup> Indeed, such criminalization was expressly mandated by the United Nations Convention Against Transnational Organized Crime, which has 171 parties,<sup>117</sup> and by the United Nations Convention Against Corruption, which has 161 parties.<sup>118</sup> Likewise, the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948 without dissent and accepted by many as a codification of customary international law,<sup>119</sup> provides that “[n]o one shall be arbitrarily deprived of his property.”<sup>120</sup> In addition, in September 2013, members of the G20 agreed to establish an information-sharing network to deny corrupt foreign officials entry into their countries.<sup>121</sup>

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equitable treatment” and “full protection and security” as outlined in Article 5(1) “prescribe[] the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments.” 2012 U.S. Model BIT, *supra* note 54.

114. See *EDF (Servs.) Ltd. v. Republic of Romania*, ICSID Case No. ARB/05/13, Award, ¶ 221 (Oct. 8, 2009), <http://www.italaw.com/sites/default/files/case-documents/ita0267.pdf>.

115. Notably, the obligations set forth in the ICCPR apply only to natural persons, not juridical persons. Thus, a corporation or other entity seeking to enforce its “human rights” not to be solicited, extorted or denied justice following such crimes would be required to develop an argument based on customary international law, rather than treaties. See ICCPR, *supra* note 110.

116. Cf. Yockey, *supra* note 9, at 789 (“[N]o country currently has laws expressly permitting bribery.”).

117. U.N. Convention Against Transnational Organized Crime, *supra* note 80, art. 8(1)(b).

118. U.N. Convention Against Corruption, *supra* note 4, art. 15(2).

119. See, e.g., *Filártiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980) (noting that “several commentators have concluded that the Universal Declaration has become, in toto, a part of binding, customary international law”).

120. Universal Declaration of Human Rights, G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III), art. 17(2) (Dec. 10, 1948).

121. *G20 Leaders To Share Info To Reject Entry by Corrupt Officials*, GLOBAL TIMES (Sept. 7, 2013), <http://www.globaltimes.cn/content/809264.shtml#UjyOw2TXgVk>.

*ii. Opinio Juris Sive Necessitatis*

There is also ample and growing evidence that (a) preventing solicitation, bribery, and extortion, (b) punishing and removing the corrupt officials responsible for such corrupt acts, and (c) providing redress to victims of such solicitation and extortion are required by, and are perceived by States to be required by, international law.

Evidence that preventing solicitation, bribery, and extortion is an international legal obligation of States may be found in the numerous anticorruption declarations and resolutions passed by an overwhelming majority of the State members of the UN General Assembly, including but not limited to the UN Declaration Against Corruption and Bribery in International Commercial Transactions,<sup>122</sup> the UN Declaration on Crime and Public Security,<sup>123</sup> and the UN Declaration on International Cooperation Against Corruption and Bribery in International Commercial Transactions.<sup>124</sup> Likewise, the Preamble to the UN Convention on Corruption expressly recognizes a shared understanding that “corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential,” that corruption jeopardizes “the rule of law,” and that “the prevention and eradication of corruption is a responsibility of all States.”<sup>125</sup>

As to the belief that punishing and removing corrupt officials who solicit or extort illicit payments is an international legal obligation, evidence of *opinio juris* may be found in the various multilateral anticorruption conventions that invoke (and obligate State parties to follow) the jurisdictional principle of “prosecute or extradite.”<sup>126</sup>

And, as to a legal obligation to provide redress to foreign investors affected by corruption, evidence of *opinio juris* may be found in the widely accepted and

122. G.A. Res. 51/191, U.N. Doc. A/RES/51/191 (Dec. 16, 1996).

123. G.A. Res. 51/60, U.N. Doc. A/RES/51/60 (Jan. 28, 1997).

124. G.A. Res. 51/191, U.N. Doc. A/RES/51/191 (Dec. 16, 1996); *see also* G.A. Res. 56/260, U.N. Doc. A/RES/56/260 (Apr. 9, 2002) (“Terms of reference for the negotiation of an international legal instrument against corruption”); G.A. 55/188, U.N. Doc. A/RES/55/188 (Dec. 20, 2000) (“Preventing and combating corrupt practices and illegal transfer of funds and repatriation of such funds to the countries of origin”); G.A. Res. 55/61, U.N. Doc. A/RES/55/61 (Dec. 4, 2000) (“An effective international legal instrument against corruption”); G.A. Res. 54/205, U.N. Doc. A/RES/54/176 (Jan. 27, 2000) (“Prevention of corrupt practices and illegal transfer of funds”); G.A. Res. 54/128, U.N. Doc. A/RES/54/128 (Dec. 22, 1999) (“Action against corruption”); G.A. Res. 53/176, U.N. Doc. A/RES/53/176 (Jan. 25, 1999) (“Action against corruption and bribery in international commercial transactions”); G.A. Res. 51/59, U.N. Doc. A/RES/51/59 (Dec. 12, 1996) (“International Code of Conduct for Public Officials”).

125. *See* TRACE INTERNATIONAL, *supra* note 3.

126. *See* African Union Convention on Corruption, *supra* note 80, arts. 4(1)(a), (c), and art. 13(1)(c).

exalted Universal Declaration of Human Rights pursuant to which States have declared that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”<sup>127</sup> and “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations . . . .”<sup>128</sup>

Commenting more than a decade ago, at least one scholar has argued that these declarations and others like them in the numerous regional organizations around the world provide evidence of the gradual formation of customary international law against corruption:

[T]he discourse on corruption within the United Nations, and the various regional organizations, has generated shared understandings of the negative impacts of corruption on the economic and development objectives of nations and people. It also illustrates the emergence of an international normative consensus against corruption. This consensus represents the emerging *opinio juris sive necessitatis* of the international community, thus, the beginning of the process of formation of a customary international law on corruption.<sup>129</sup>

Since that time, the evidence of State practice and *opinio juris* has only grown and is likely to continue doing so. Accordingly, an increasingly strong argument could be made that the solicitation and/or extortion of a bribe from a foreign investor by a person whose actions are attributable to the State, or the denial of justice to a foreigner harmed by such corrupt acts, constitute violations of the State’s international obligations under customary international law.

## II.

### INVOKING STATE RESPONSIBILITY FOR CORRUPTION

Having determined that certain acts of corruption may be legally attributable to the State and constitute a breach of the State’s international obligations, the following sections examine the obstacles and opportunities associated with invoking such State responsibility.

In the context of investment disputes, there are two primary methods of invoking State responsibility under international law. The first method involves the foreign investor invoking State responsibility in international arbitration. The second method involves the home State of the affected investor invoking State

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127. Universal Declaration of Human Rights, G.A. Res. 217 (III), *supra* note 120, art. 8.

128. *Id.* art. 10.

129. Alhaji B.M. Marong, *Toward a Normative Consensus Against Corruption: Legal Effects of the Principles To Combat Corruption in Africa*, 30 DEN. J. INT’L L. & POL’Y 99, 101 (2003); see also Ilias Bantekas, *Corruption as an International Crime and Crime Against Humanity: An Outline of Supplementary Criminal Justice Policies*, 4 J. INT’L CRIM. JUSTICE 466, 470 (2006) (“From an international law point of view it is important to comprehend that the recognition by the 1997 Convention of bribery as a transnational offence means that the offender incurs criminal responsibility not only under national law but also international law.”).

responsibility through State-to-State dispute resolution, including under the doctrine of diplomatic protection.<sup>130</sup>

To a large extent, and in almost all cases, these avenues of State responsibility are mutually exclusive. Under Article 27 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), States are prohibited from giving

diplomatic protection, or bring[ing] an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.<sup>131</sup>

Likewise, “[a]lthough Article 27 is directed to Contracting States, investors have a corresponding obligation under Article 26 not to pursue diplomatic protection,”<sup>132</sup> in cases that they have submitted to ICSID arbitration.

The only potential loopholes for sidestepping this choice of method are (1) when a State has not become a party to the ICSID Convention,<sup>133</sup> (2) when a State fails to respect an award that has been issued,<sup>134</sup> or (3) when the assistance given by the investor’s State does not qualify as “diplomatic protection” within the meaning of the ICSID Convention, as Article 27(2) explains that “diplomatic protection” shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.” In nearly all other cases and situations, an aggrieved foreign investor must usually choose which method of State responsibility they wish to invoke.

#### *A. Investor-State Dispute Resolution Through International Arbitration*

If a foreign investor wishes to directly seek damages from the State of a corrupt foreign official that has solicited, demanded, or extorted a bribe, or

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130. See, e.g., Daniel Bodansky et al., *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT’L L. 798, 812 (2002) (noting that, historically, “foreign investor claims were viewed largely in terms of diplomatic protection, as claims brought by a state for injury to its nationals” and “within the last decade or two, however, investors have increasingly resorted directly to international dispute settlement procedures for breaches”).

131. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 27(1), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

132. *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 3 (Jan. 18, 2005), <http://www.italaw.com/sites/default/files/case-documents/ita0865.pdf>.

133. ICSID Convention, *supra* note 131, art. 27(1) (“No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.”).

134. *Id.*

failed to provide appropriate redress for such acts, she often may initiate international arbitration pursuant to an investment contract and/or a BIT/FTA.

The dominant forum for the arbitration of such investor-State disputes is the International Centre for the Settlement of Investor State Disputes, which was established by the ICSID Convention and operates under the aegis of the World Bank. Under the ICSID Convention, investors may pursue arbitration when a State breaches its obligations towards investors under applicable treaties and/or investment contracts.

Although bribe solicitation and extortion of a foreign investor by a State's de jure or de facto agents should, as set forth above, constitute a clear breach of the State's international obligations under these treaties, investors have rarely used ICSID arbitration to hold States responsible for such corruption.<sup>135</sup> This appears to be due to the obstacles that currently impede successful claims and to the factors that must be considered in deciding whether to bring an arbitration claim in the first place.

### *1. Obstacles to Initiating Arbitration of Corruption Claims*

The following section identifies some of the major obstacles to pursuing a successful claim of State responsibility through arbitration.

#### *i. Fears of "Poisoning the Well" and Having Contracts Rescinded*

The dearth of international arbitration by foreign investors seeking to hold States responsible for corruption is undoubtedly due in part to the fact that investors who wish to continue investment in a country may not want to "poison the well" by taking a contentious posture against their host State, let alone making overt corruption allegations against the State or the officials currently responsible for its investment. This recognition may make arbitration an undesirable avenue for all except those whose investment has already terminated or who have lost substantial business to another person that has paid a bribe.<sup>136</sup>

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135. Typically, international arbitration involving allegations of corruption arises when a new government modifies an existing contractual arrangement with a foreign investor. The investor may institute arbitration on the basis of the obligations accepted in the contract with the prior regime, while the new foreign government regime may claim that the agreement was tainted by corruption. See ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 152 (3d ed. 1999).

136. See *Grynberg v. Grenada*, ICSID Case No. ARB/10/6, Award, ¶ 5.1.4 (Dec. 10, 2010), <http://www.italaw.com/sites/default/files/case-documents/ita0726.pdf> (alleging a breach by Grenada of the 1986 Treaty Between the United States and Grenada Concerning the Reciprocal Encouragement and Protection of Investment by, *inter alia*, replacing RSM Production Corp. with another investor that was willing to pay a bribe).

*ii. High Cost of International Arbitration*

The tremendous cost of arbitration may also be partly responsible for the dearth of corruption-related investor-State arbitration. In a recent international arbitration concerning corruption, the costs and fees associated with the arbitration totaled more than \$6 million for the claimant and \$18 million for the respondent State.<sup>137</sup> Although the traditional rule in investment arbitration, under which the costs of the arbitration are split between the parties regardless of which party ultimately prevails, is less strict than the loser-pays rule traditionally adopted in commercial arbitration, this nonetheless meant that the claimant in that case was required to pay a total of \$12 million in connection with the arbitration.<sup>138</sup> In light of the hefty costs of arbitration, the only parties likely to take advantage of this avenue of State responsibility are those whose probable outcome is likely to exceed the costs. This requires consideration not only of the amount at issue, but also the likelihood of success on the merits.

*iii. Risks of Exposure to Criminal Liability*

Another substantial obstacle to bringing a corruption claim is the fear of exposure to liability under the law of the sending State. Indeed, investors who acknowledge paying a bribe—even unwillingly—are likely to face civil and criminal charges under the law of the sending State, if not the host State as well. Under the FCPA, for example, any issuer, domestic concern or other person, who uses interstate commerce to corruptly offer, promise or pay, anything of value to a foreign official for purposes of influencing official decisions in order to obtain or retain business, is subject to severe penalties and/or imprisonment.<sup>139</sup> Moreover, since domestic criminal enforcement officials in the United States (and other countries that follow the OECD framework) currently make little distinction between those who make payments willingly (in the absence of coercive pressure or extortion) or unwillingly (in the presence of implied or express coercive pressure or extortion),<sup>140</sup> arbitration may make little sense for any who have paid a bribe. Under current U.S. law, only those who have been solicited to pay a bribe but not paid it or those who have lost business due to a competitor's payment of a bribe may be willing to pursue this avenue.<sup>141</sup>

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137. See *EDF (Servs.) Ltd. v. Republic of Romania*, ICSID Case No. ARB/05/13, Award, ¶¶ 321–30 (Oct. 8, 2009), <http://www.italaw.com/sites/default/files/case-documents/ita0267.pdf>.

138. *Id.*

139. See 15 U.S.C. § 78dd-1, dd-2, dd-3 (2013).

140. See Klaw, *supra* note 10, at 320–34 (noting that under the FCPA, only victims of “true extortion,” i.e., threats of physical violence to person or property, and not economic extortion, are likely to evade enforcement action).

141. See *EDF v. Romania*, ICSID Case No. ARB/05/13 (instituting arbitration at an investor's request following allegedly adverse official action for nonpayment of bribe); *Grynberg v. Grenada*,



## 2. Obstacles to Succeeding in Arbitration of Corruption Claims

Even assuming that foreign investors—such as those whose relationships with the host State are sufficiently soured—are willing to initiate arbitration against a host State for the allegedly corrupt acts of its officials and agents, there remain significant obstacles to success on such claims. The following section highlights three such obstacles.

### i. Heightened Burden of Proof

One significant barrier is the high burden of proof frequently imposed on those alleging instances of corruption.<sup>142</sup> In *EDF v. Romania*, for example, the tribunal determined that there is “general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption,” and that allegations of corruption require “clear and convincing” evidence, as opposed to a mere preponderance.<sup>143</sup> This heightened standard proved too difficult to satisfy for EDF, particularly since the tribunal refused to credit the testimony of various witnesses, to afford weight to an email memorializing the solicitation written contemporaneously with the alleged bribe solicitation, or to admit into evidence an audio recording of the verbal solicitation.<sup>144</sup>

### ii. Failure to Properly Attribute Acts of Corruption to the State

A second barrier to successful investor-State arbitration of corruption claims stems from the fact that arbitrators sometimes fail to attribute the corrupt actions of State agents to the State itself. Indeed, “there has simply never been a case in international investment arbitration where public official corruption has been attributed to the host state.”<sup>145</sup> Two cases are illustrative in this regard.

#### a. *World Duty Free v. Kenya*

In *World Duty Free v. Kenya*,<sup>146</sup> World Duty Free (WDF) requested ICSID arbitration against the Republic of Kenya under an investment contract, governed by English and Kenyan law, relating to the construction, maintenance,

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ICSID Case No. ARB/10/6 (instituting arbitration at the request of non-bribe-giving investor after Grenada replaced investor with one who allegedly paid bribe).

142. See Haugeneder and Liebscher, *supra* note 96.

143. See *EDF v. Romania*, ICSID Case No. ARB/05/13, Award, ¶ 221.

144. *Id.* ¶ 225.

145. See Llamzon, *supra* note 19, at 4.

146. *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award (Oct. 4 2006), <http://www.italaw.com/documents/WDFv.KenyaAward.pdf>.

and operation of duty free stores in Nairobi and Mombasa airports.<sup>147</sup> WDF was initially incorporated in the United Arab Emirates, was placed in receivership, and was subsequently represented by its former general manager.

Among the claims asserted by WDF was that Kenya, through its executive, judiciary, and de facto agents, had improperly used WDF in campaign finance fraud, illegally expropriated the company, wrongfully placed it in receivership, damaged it through mismanagement during the receivership, refused to protect it from crime, and unlawfully deported its CEO in retaliation for his failure to acquiesce to the misconduct.<sup>148</sup>

In its defense, Kenya denied responsibility for the actions against WDF. It petitioned for dismissal of the claim because the investment contract “was procured by paying a bribe of US \$2 million to the then President of Kenya, Daniel arap Moi” and was thus allegedly unenforceable as a matter of English law, Kenyan law, and international public policy.<sup>149</sup>

In its reply, WDF did not deny that it made a \$2 million payment to the Kenyan President. Instead, its former general manager explained that while attempting to secure the investment contract with Kenya he was informed by a well-connected middleman that “[p]rotocol in Kenya required” him to make a personal donation to the Kenyan President.<sup>150</sup> He was allegedly told that \$2 million in cash was an appropriate amount and was “given to understand that it was lawful and that [he] didn’t have a choice if [he] wanted the investment contract.”<sup>151</sup> Accordingly, during the director’s first meeting with the Kenyan president, the middleman arranged for a briefcase containing approximately \$500,000 to be left for the President.<sup>152</sup> The former manager further asserted that, at the time the payment was made, he understood the payment to be a lawful a gift of protocol or a personal donation made to the President to be used for public purposes within the framework of the Kenyan system of *harambee* (a traditional system of public collections).<sup>153</sup> He added that he paid the money on behalf of the investment entity, documenting it fully, and treating it as part of the consideration for the agreement.<sup>154</sup>

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147. While *World Duty Free* alleged the breach of an investment contract that chose English and Kenyan law to govern, rather than a BIT governed expressly by principles of international law, the case is instructive on how arbitrators tend to resolve issues of State attribution and claims enforceability under international public policy.

148. *Id.* ¶¶ 62–79.

149. *Id.* ¶ 105.

150. *Id.* ¶ 130.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

While the Tribunal ultimately concluded that “the bribe was apparently solicited by the Kenyan President,”<sup>155</sup> it rejected the director’s assertion that the payment was legal. Rather, the Tribunal determined that the \$500,000 payment was in fact a bribe made in order to obtain the conclusion of the 1989 Agreement, in violation of the English and Kenyan laws that governed the contract.<sup>156</sup>

Although the Tribunal’s characterization of the nature and purpose of payment likely was correct, one of the conclusions that the Tribunal drew from this determination is more troubling: that the bribe could *not* be attributed to Kenya. While WDF contended that “the actions of President Moi and his colleagues were the action of the Government of Kenya,”<sup>157</sup> the Tribunal instead concluded that the “payment was received corruptly by the Kenyan head of state; it was a covert bribe; and accordingly its receipt is not legally to be imputed to Kenya itself.”<sup>158</sup> This conclusion, based in part on the distinction between the Government of Kenya (the party to the investment contract) and the Republic of Kenya (the party to the ICSID Convention that was being sued), flies in the face of Article 4 and Article 7 of the Draft Articles on State Responsibility, which hold that the actions of an organ of the State (here, its chief executive) are attributable to the State, even if they are *ultra vires*.<sup>159</sup>

#### *b. EDF (Services) Ltd. v. Romania*

The case of *EDF v. Romania* similarly highlights the troubling tendency of arbitral tribunals to fail to appropriately attribute acts of corruption to the State.<sup>160</sup>

EDF was a U.K. company that formed a joint venture with Romanian State-owned companies to operate a business selling duty-free goods in Romanian airports.<sup>161</sup> EDF brought a claim against Romania, under the U.K.-Romania BIT, which authorized ICSID arbitration for claims arising from a breach of the obligations under the BIT, including the customary-international-law obligation

155. *Id.* ¶ 180.

156. *Id.* ¶¶ 169, 170.

157. *Id.* ¶ 114.

158. *Id.* ¶ 169. The tribunal also found that Kenya could not have waived the illegality and/or otherwise affirmed the contract as a result of the Kenyan President’s knowledge of the illegality because, under Kenyan and English law, the President’s knowledge could not be attributed to the State. *Id.*

159. See Draft Articles on Responsibility, *supra* note 23, § II.A.1. See also *id.* ch. II, cmt. 2 (“The general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State.”).

160. *EDF (Servs.) Ltd. v. Republic of Romania*, ICSID Case No. ARB/05/13, Award (Oct. 8, 2009), <http://www.italaw.com/sites/default/files/case-documents/ita0267.pdf>.

161. *Id.* ¶¶ 1, 46, 51–55, 60.

of affording “fair and equitable treatment.”<sup>162</sup> As the basis for its claim, EDF alleged that its contractual arrangements at the Bucharest airport were not extended beyond their ten-year term because it refused to pay a \$2.5 million bribe allegedly solicited by staff members of the Romanian Prime Minister.<sup>163</sup>

Addressing the allegations, the majority of the tribunal recognized that Romania’s conduct, if proven, *could* give rise to State responsibility. It determined that “a request for a bribe by a State agency is a violation of the fair and equitable treatment obligation as well as a violation of international public policy, and that exercising a State’s discretion on the basis of corruption is a . . . fundamental breach of transparency and legitimate expectations.”<sup>164</sup> Nevertheless, the panel unanimously decided:

[C]lear and convincing evidence should have been produced by the Claimant showing not only that a bribe had been requested . . . *but also that such request had been made not in the personal interest of the person soliciting the bribe, but on behalf and for the account of the Government authorities in Romania, so as to make the State liable in that respect.*<sup>165</sup>

By requiring proof that the solicitation was not made in the personal interest of the individual soliciting the bribe, but “on behalf of and for the account of the foreign official’s government,”<sup>166</sup> the tribunal in *EDF v. Romania* appears to have ignored the customary international law of State responsibility for the ultra vires acts of organs of the State under Articles 4 and 7 of the Draft Articles.<sup>167</sup>

Moreover, under the troubled reasoning of the EDF arbitral award, it is difficult to see how a State could ever be held responsible for bribery or extortion since, by their very nature, those crimes are *always* designed for personal benefit. Indeed, as the *World Duty Free* tribunal recognized, if the payment were solicited or made on behalf of the State itself, “the payment would not be a bribe.”<sup>168</sup>

### iii. The “Corruption Defense” to Claims

The third potential obstacle to a successful investor-State arbitration of corruption claims lies in the fact that some tribunals deem issues of corruption to be nonarbitrable. Even the growing number of tribunals willing to decide such matters in arbitration generally hold that the existence of corruption renders any

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162. *Id.* ¶¶ 64, 103.

163. *See id.* ¶ 221.

164. *Id.* (internal quotations omitted.)

165. *Id.* ¶ 232 (emphasis added).

166. *Id.*

167. *See* Draft Articles, *supra* note 23, § II.A.1

168. *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 169 (Oct. 4, 2006), <http://www.italaw.com/documents/WDFv.KenyaAward.pdf>.

contractual claims at issue unenforceable, whether as a matter of the domestic law chosen by the parties to govern their contract or pursuant to international public policy. Although there is unquestionably a significant difference between an investor seeking to enforce a contract that he procured by bribery and an investor seeking to bring a claim based on the State's solicitation or extortion of an illicit payment, the tendency of arbitral tribunals to provide States with what effectively amounts to a "very potent defense" could pose substantial difficulties for those who have acquiesced to a State agent's solicitation and/or extortionate demand for the payment of a bribe.<sup>169</sup>

Judge Lagergren's 1963 Award in ICC Case No. 1110 is one of the most famous examples of arbitrators refusing to enforce claims tainted by bribery.<sup>170</sup> In that case, the claimant, who purported to have a significant degree of influence with Argentine officials responsible for awarding energy contracts, sought to enforce his contractual right to ten-percent commission payments for all Argentine energy contracts awarded to the respondent.<sup>171</sup> Recognizing that the commission payments, if awarded, would be used to bribe Argentine officials and reasoning, *sua sponte*, that "[p]arties who ally themselves in an enterprise [tainted by bribery] must realise that they have forfeited any right to ask for assistance of the machinery of justice," Judge Lagergren concluded that he did not have jurisdiction over the dispute.<sup>172</sup>

Since Judge Lagergren's seminal decision, many arbitrators have shifted their view on the arbitrability of disputes involving bribery.<sup>173</sup> Yet, although it is now generally recognized that cases involving allegations of bribery are arbitrable,<sup>174</sup> the end result remains the same, as claims based on contracts tainted by bribery or extortion are commonly held unenforceable.

In *World Duty Free*, for example, the tribunal explained that, while the matter was arbitrable, the claimant was "not legally entitled to maintain any of its pleaded claims in these proceedings as a matter of *ordre public international*

169. Llamzon, *supra* note 19, at 38 (surveying arbitral decisions and noting that corruption is a "very potent defense" for states because the "case law thus recognizes corruption as a complete defense when invoked by the host State").

170. See *Argentine Engineer v. British Company*, Case No. 1110 of 1963, 21 Y.B. Comm. Arb. 47 (ICC Int'l Ct. Arb.); see also Gary Born, Kirsten O'Connell & Nathalie Allen, *Bribery and an Arbitrator's Task*, KLUWER ARB. BLOG (Oct. 11, 2011), <http://kluwerarbitrationblog.com/blog/2011/10/11/bribery-and-an-arbitrator%E2%80%99s-task/>.

171. *Argentine Engineer*, Case No. 1110 of 1963.

172. *Id.* ¶ 23.

173. Born, *supra* note 170.

174. See *id.* (citing *National Power Corp v. Westinghouse*, 949 F.2d 653 (3rd Cir. 1991) and *Westacre Investments Inc. v. Jugoimport SPDR Holding Co.* [1999] Q.B. 740 (Eng.)). Notably, some tribunals nonetheless deny jurisdiction in cases where the investment contract was procured by illegality due to "legality clauses." See Llamzon, *supra* note 19, at 5.

and public policy under the contract's applicable laws."<sup>175</sup> This meant that, even though "the bribe was apparently solicited by the Kenyan President," the existence of an illicit payment provided a complete defense to all claims against the Kenyan State. Indeed, there is no contributory-fault doctrine in international arbitration of corruption claims.<sup>176</sup> Thus, as has been recognized by some scholars, the result is an "attribution asymmetry" in terms of responsibility for corruption, whereby "a public official's actions in soliciting or extorting bribes from foreign investors is [in theory] attributable to the host State; but when solicitation meets acceptance . . . consummated corruption binds the investor to the acts of its agent, but the corruption of the public official is *not* attributable to the host State."<sup>177</sup> As one commentator has noted, this legal asymmetry may provide a perverse incentive for some States to strategically engage in or tolerate corruption (including by soliciting bribes) "in order to automatically acquire this defense in the event of future ICSID arbitration."<sup>178</sup>

And while there was some language in *World Duty Free* suggesting that the case could be different had there already been an investment in Kenya or some other "hostage factor" at the time of the improper solicitation,<sup>179</sup> it is by no means guaranteed that future arbitral tribunals will enforce investor claims involving corruption. Indeed, the doctrine originally designed to deter corruption by denying those who engage in it access to legal process may actually now incentivize corruption.<sup>180</sup>

### 3. Opportunities To Remove Obstacles to Arbitration of Corruption Claims

Having considered various obstacles that may currently inhibit investors from initiating or succeeding in international arbitration against States in

175. *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 188(3) (Oct. 4, 2006), <http://www.italaw.com/documents/WDFv.KenyaAward.pdf>.

176. R. Zachary Torres-Fowler, *Undermining ICSID: How the Global Antibribery Regime Impairs Investor-State Arbitration*, 52 VA. J. INT'L L. 996, 999 (2012).

177. Llamzon, *supra* note 19, at 76.

178. Torres-Fowler, *supra* note 176, at 1018, 1021–23.

179. Recognizing the apparent windfall this would give Kenya, the tribunal added:

Albeit that the balance of illegality may not be factually identical between [the foreign investors] and the Kenyan President, this remains a case, legally, of *par delictum*. The bribe was not procured by coercion or oppression or force by the Kenyan President nor by 'undue influence'; and as regards any investment, there was at the material time no 'hostage factor' because there was then no investment or other commitment in Kenya by [the foreign investors]. Prior to paying the bribe, [the investors] retained a free choice whether or not to invest in Kenya and whether or not to conclude the Agreement; but [the investors] chose, freely, to pay the bribe. [It] would be 'an affront to public conscience' to grant to the Claimant the relief which it seeks because this Tribunal 'would thereby appear to assist and encourage the plaintiff in his illegal conduct.'

*World Duty Free*, ICSID Case No. ARB/00/7, Award, ¶ 178.

180. See Torres-Fowler, *supra* note 176, at 1000 ("[W]hile the corruption defense's original intent is to deter and punish acts of bribery, its effect may be the exact opposite.").

response to acts of corruption that are attributable to such States under international law, this section discusses certain steps States could take to reduce or eliminate such barriers.

*i. Eliminating Barriers to the Initiation of Corruption Arbitration*

As previously explained, foreign investors who are deciding whether to pursue to arbitration against a host State for allegedly corrupt acts appear to face at least three major obstacles: (1) fears of “poisoning the well” when it comes to the investment relationship with a foreign State, including having existing contracts rescinded, (2) the often prohibitively high cost of international arbitration, and (3) the significant risk of exposure to criminal liability upon admitting that one has acquiesced to the payment of a bribe.

Unfortunately, there is little that can be done to meaningfully address the high cost of complex arbitration. It also seems wise for States to retain the flexibility to modify contracts and projects that misallocate resources due to the improper influence of bribery at the time of their formation. There are, however, other concrete steps that can be taken that would tip the balance of what is largely a risk-management decision in favor of reporting and arbitrating corruption claims.

To assuage a foreign investor’s fears of “poisoning the well,” States could and should strengthen nonretaliation provisions in multilateral corruption-suppression treaties in order to protect the persons and property of those who make nonfrivolous allegations of official corruption. Existing provisions providing for nonretaliation are generally weak. For example, while the United Nations Convention on Corruption requires signatory States “to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation,” it does not require States to ensure the ability of investors to *safely* initiate legal proceedings against States and, indeed, it only requires each State to “*consider* incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.”<sup>181</sup> Likewise, for example, while the African Union Convention on Preventing and Combating Corruption obliges States to “[a]dopt measures that ensure *citizens* report instances of corruption without fear of consequent reprisals,”<sup>182</sup> it would appear to offer little protection for noncitizen foreign investors. Changes to these nonretaliation provisions could

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181. U.N. Convention Against Corruption, *supra* note 4, art. 33 (emphasis added).

182. *Id.* art. 5(6) (emphasis added).

provide substantial assurances against the risk of “poisoning the well” that may concern foreign investors who are deciding whether to initiate arbitration.

Another meaningful step toward reducing barriers to the initiation of arbitration of corruption claims against a host State would be to make changes to current domestic laws, such as the FCPA, that currently create significant exposure to criminal liability for those who report making payments to foreign officials, even where such payments were made unwillingly. For example, by decriminalizing foreign bribery and replacing it with a robust mandatory disclosure regime, more solicited and extorted persons would be likely to come forward, and the incidence of bribery and extortion would be likely to decrease in the long run as foreign officials become afraid of being reported.<sup>183</sup> Adopting such measures would have a profound effect upon investors’ decisions to initiate arbitration against States in response to corruption. In turn, more arbitration would mean more disclosure of corruption, and a greater likelihood of reducing or eliminating solicitations and extortions in the long run, as rational foreign officials and their States take steps to avoid arbitration.

#### *ii. Eliminating Barriers to Successful Corruption Arbitration*

In addition to reducing the barriers to the initiation of corruption claims, there are also at least three actions that States can and should undertake to address the above-referenced problems of burden of proof, improper State attribution, and the corruption defense, thereby making international arbitration of corruption-related claims more successful.<sup>184</sup>

First, because most of the international arbitration rules, national arbitration laws, and international arbitration conventions do not contain provisions on the burden and standard of proof to be applied,<sup>185</sup> investment treaties or the ICSID Arbitration Rules should be amended to make clear that the level of proof required for corruption claims is merely a preponderance of the evidence, rather than “clear and convincing” evidence. By reducing the threshold of proof often required for corruption claims, more foreign investors would be likely to pursue

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183. See Klaw, *supra* note 10, at 344–61.

184. It should be noted that certain modifications to the 2004 U.S. Model BIT that were made in the 2012 U.S. Model BIT were laudable, albeit minor, improvements from the perspective of preventing and addressing corruption. For example, the 2012 Model BIT clarified in a footnote that State-owned or State-controlled enterprises must comply with the treaties’ requirements when exercising governmental authority, regardless of whether such authority was delegated by legislative grant, directive or other action. See 2012 U.S. Model BIT, *supra* note 107; see also Lise Johnson, *The 2012 US Model BIT and What the Changes (or Lack Thereof) Suggest About Future Investment Treaties*, POLITICAL RISK INSURANCE NEWSLETTER, Nov. 2012, at 2, available at <http://www.robertwraypllc.com/wp-content/uploads/2012/11/RWPLLC-POLITICAL-RISK-INSURANCE-NEWSLETTER-VOLUME-VIII-ISSUE-2-2.pdf> (discussing augmented transparency requirements).

185. See Haugeneder & Liebscher, *supra* note 96.



such claims, and corrupt officials would be on notice that successful arbitration is more likely. Not only would this make redress more readily available to victims of extortion, but it would also make rational public officials less likely to solicit or demand bribes in the first place.

Second, States could seek to correct and prevent erroneous applications of law regarding attribution, such as that made in *EDF v. Romania*,<sup>186</sup> by expressly reiterating that solicitation and *extortion by a foreign official is attributable to a State, even if the official had a personal profit motive*.<sup>187</sup> While it is somewhat doubtful that all States will be willing to take active steps to further expose themselves to legal liability, those that are serious about preventing corruption will recognize that such a correction would follow international precedent,<sup>188</sup> adhere to the Council of Europe Civil Law Convention on Corruption,<sup>189</sup> and be consistent with Article 7 of the Draft Articles on State Responsibility, which expressly provides that “[t]he conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, *even if it exceeds its authority or contravenes instructions*.”<sup>190</sup>

Third, States should consider concluding an express agreement that makes it clear that the solicitation or extortion of a bribe is intended to be actionable by certain foreign investors that have suffered nonspeculative losses as a consequence of State-attributable bribe solicitation or extortion. While it is undoubtedly true that persons ought not to benefit from their corruption, it is equally important to recognize that a claim based on the harm caused by solicitation and extortion is different from a claim brought to enforce a contract procured by willing bribery. Moreover, where there exists some “hostage factor” at the time of a bribe solicitation, such implicit coercion ought to render

186. See Draft Articles, *supra* note 23, § III.A.2(b)(2).

187. See, e.g., Draft Articles on Responsibility, *supra* note 23, art. 4, cmt. 13 (noting that it is “irrelevant for [purposes of attribution] that the person concerned may have had ulterior or improper motives or may be abusing public power”); *id.* art. 7 (“The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, *even if it exceeds its authority or contravenes instructions*.”) (emphasis added).

188. See *Estate of Jean-Baptiste Caire v. United Mexican States*, 5 R.I.A.A. 516, 531 (1929) (as reported in Draft Articles, *supra* note 23, n.125).

189. COE Civil Law Convention, *supra* note 80, art. 5 (“Each Party shall provide in its internal law for appropriate procedures for persons who have suffered damage as a result of an act of corruption by its public officials in the exercise of their functions to claim for compensation from the State or, in the case of a non-state Party, from that Party’s appropriate authorities.”). The United States has not signed the Civil Law Convention on Corruption and does not anticipate becoming a signatory or party because the Civil Law Convention is viewed as being incompatible with U.S. civil law practice and procedure.

190. Draft Articles on Responsibility, *supra* note 23, art. 7.

the foreign investor not morally or legally culpable.<sup>191</sup> Solicited and extorted foreign investors ought to be permitted to recover their losses, provided the payment was made in order to protect an existing investment. International consensus on those points would not only facilitate successful litigation by aggrieved investors, but also serve to further deter rational foreign officials from extorting improper payments from foreign investors in the first place.<sup>192</sup>

### B. State-to-State Dispute Resolution

Notwithstanding these proposed modifications to current international law and practice, pursuing international arbitration against a foreign State for acts of corruption is likely to remain a difficult, expensive, and risky endeavor for investors, at least in the short term. Accordingly, the invocation of State responsibility for the solicitation and/or extortion of a foreign investor through State-to-State dispute resolution mechanisms must also be strongly considered, whether as a claim for direct injury to the State of the aggrieved investor or on behalf of the injured investor through diplomatic protection.

By treaty and under customary international law, injured natural and legal persons generally may request from the State of their nationality, and their State may give, diplomatic protection against an act or omission by a foreign State.<sup>193</sup> This rule stems from the Vattelian fiction that an injury to the national of a State is an injury to the State itself.<sup>194</sup>

Diplomatic protection has long been used as a means of obtaining redress for violations of international law, including for economic injuries to nationals

191. For an additional discussion of this argument, see Klaw, *supra* note 10, at 344–46 (setting forth the case for decriminalizing unwilling bribery) and 368–70 (arguing that qualified U.S. persons who promptly disclose extortion and the unwilling payment, if made, should be provided meaningful ways to recover their nonspeculative losses, provided that the payment was made to protect an existing business in the country, rather than secure a new business opportunity).

192. David A. Gantz, *Investor-State Arbitration Under ICSID, the ICSID Additional Facility and the UNCTAD Arbitral Rules*, U.S.-VIETNAM TRADE COUNCIL EDUCATION FORUM (2004), available at [http://www.usvtc.org/trade/other/Gantz/Gantz\\_ICSID.pdf](http://www.usvtc.org/trade/other/Gantz/Gantz_ICSID.pdf) (recognizing that “[w]hile relatively few investment disputes will ever be the subject of international arbitration, governments that accept obligations regarding treatment of foreign investment under an international treaty are probably more likely to comply with those obligations in their dealings with foreigners (and, perhaps, with their own nationals) than some of those, which have not accepted such obligations.”).

193. See, e.g., Vienna Convention on Diplomatic Relations art. 3(1)(b), Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

194. Special Rapporteur on Diplomatic Protection, *First Rep. on Diplomatic Protection*, Int’l Law Comm’n, U.N. Doc. A/CN.4/506 ¶¶ 19–21 (Mar. 7 and Apr. 20, 2000) (by John R. Dugard); see also M. SORNARAJAH, *THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES* 131 (2000) (“The intercession is justified on the basis of the fiction of the law that an injury committed against an alien by the host state is an injury to the home state.”); *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, ¶ 61 (Feb. 5).

of the home State, although it has fallen out of favor since the advent of direct arbitral claims by investors.<sup>195</sup> The Permanent Court of International Justice explained the concept of diplomatic protection in the *Mavromattis* case:

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on its behalf, a State is in reality asserting its own rights—its rights to ensure, in the person of its subjects, respect for the rules of international law.<sup>196</sup>

Under the doctrine of diplomatic protection, and “within the limits prescribed by international law,” the home nation of the natural or legal person may exercise diplomatic protection “by whatever way and to whatever extent it thinks fit.”<sup>197</sup> While a simple objection from the Secretary of State may suffice to redress the problem, the home State may also institute formal legal proceedings to obtain redress from an international court, if necessary.

The idea of raising corruption claims to the international level is not a novel one. On September 25, 1975, U.S. Senator Abraham Ribicoff introduced Senate Resolution 265, which called for international corruption to be included within the discussions on the General Agreement on Tariffs and Trade (GATT).<sup>198</sup> The Business and Industry Advisory Committee to the OECD (BIAC) has also repeatedly called for the establishment of internationally mandated mechanisms to facilitate diplomatic protection on behalf of persons subjected to bribe solicitation and extortion. To this end, BIAC has proposed the following amendment on Solicitation and Extortion to the OECD Anti-bribery Convention:

The Party or Parties to which such a report [of extortion] is made shall promptly and thoroughly investigate such report using all sources of information at their

195. See, e.g., *Barcelona Traction*, 1970 I.C.J. 3; see also *Elettronica Sicula S.p.A. (ELSI)* (U.S. v. It.), 1989 I.C.J. 15 (July 20).

196. *Mavromattis Palestine Concessions* (Greece v. Gr. B.) 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30).

197. *Barcelona Traction*, 1970 I.C.J. 3, ¶¶ 78–79.

198. S. Res. 265 called upon the President’s Special Representative for Trade Negotiations, officials of the Departments of State, Commerce, Treasury, and Justice as well as congressional delegates for trade agreements, to “initiate at once negotiations within the framework of the current multilateral trade negotiations in Geneva, and in other negotiations of trade agreements pursuant to the Trade Act of 1974, with the intent of developing an appropriate code of conduct and specific trading obligations among governments, together with suitable procedures for dispute settlement, which would result in elimination of [bribery] practices on an international, multilateral basis, including suitable sanctions to cope with problems posed by nonparticipating nations, such codes and written obligations to become part of the international system of rules and obligations within the framework of the General Agreement on Tariffs and Trade, and other appropriate international trade agreements pursuant to the provisions and intent of the Trade Act of 1974.” Unfortunately, S. Res. 265 was referred to the Senate Committee on Finance and never was passed into law. See Decl. of Prof. Michael J. Koeler ¶ 56, *U.S. v. Carson*, No. SA CR 09-00077-JVS (C.D. Cal. Nov. 4, 1999).

disposal and, if the report shall appear to such Party or Parties to be substantiated, then the Party of which the person making the report is a national shall immediately extend comprehensive and effective diplomatic protection and support to such person with the objective of securing all the rights to which such person is entitled in respect of the matter reported and of preserving, forwarding and protecting the commercial position of such person in the market or territory concerned; all other Parties shall co-operate in the discharge of such obligation.<sup>199</sup>

Given the longstanding history of diplomatic protection in cases involving injuries to foreign nationals, and the numerous issues that currently stymie investor-State dispute resolution in the context of corruption, the potential advantages and disadvantages of using State-to-State dispute resolution to help address and prevent corruption will be assessed in the following section.

### *1. Opportunities and Advantages of State-to-State Resolution of Corruption Claims*

The use of State-to-State dispute resolution to resolve corruption claims affecting foreign investors carries numerous potential benefits, both to the persons specifically victimized by bribe solicitation and extortion and to the larger international community seeking to prevent the occurrence of such corruption.

One obvious benefit of using diplomatic protection to combat bribe solicitation and extortion would be that the payer might be able to recover the bribe money it was forced to pay. This is an appropriate goal because extortion is a crime and, as the U.S. Supreme Court has recognized, “[t]he victim of an extortion . . . has a right to restitution.”<sup>200</sup>

By incentivizing investors to raise such claims to the State-to-State level, disclosure of solicitation, extortion, and bribery should rise, and the incidence of such transactions should fall. If the investors forced to pay bribes by foreign officials knew that their States would help vindicate their claims against the foreign State rather than punish them for paying the bribe (as the United States currently does under the FCPA, for example), they would be more likely to divulge improper demands for payments.<sup>201</sup> Increased disclosure of corruption, in turn, might prompt the governments of corrupt foreign officials to replace them, whether through shame, diplomatic pressure or otherwise. Finally, if foreign officials knew that their corrupt activities would become the subject of international scrutiny—and might realistically lead to their dismissal as host

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199. *OECD's Role*, *supra* note 12, at 4; *see also Assistance Against Solicitation*, *supra* note 12, at 3.

200. *James v. United States*, 366 U.S. 213, 216 (1961).

201. *Klaw*, *supra* note 10, at 347; *accord Basu*, *supra* note 10.

States took steps to avoid conflicts with investors' States—they would be less likely to request or accept bribes in the first place.<sup>202</sup>

## 2. Overcoming Legal Obstacles to State-to-State Dispute Resolution

As with investor-State arbitration of corruption claims, there are also certain potential legal obstacles associated with State-to-State resolution of corruption claims. This section considers such obstacles and provides suggestions for overcoming them.

### i. Exhaustion of Local Remedies

One potential legal obstacle to the use of diplomatic protection to resolve instances of bribe solicitation and extortion relates to the fact that, generally, under customary international law, a foreign national must exhaust local remedies in the receiving State prior to the assertion of a formal claim of diplomatic protection.<sup>203</sup>

Requiring exhaustion in certain investment disputes makes good sense in principle, as States ought to be given first opportunity to vindicate the rule of law within their jurisdiction,<sup>204</sup> and thereby reassure foreign investors.

In certain corruption cases, however—such as those where the level of corruption within a country is sufficiently pervasive, where the official charged with such corruption is sufficiently influential, or where corruption affects the local justice system—the requirement of local exhaustion might be inappropriate because it is “obviously futile.”<sup>205</sup> To the extent States could reach consensus on the fact that there are certain categories of corruption claims (such as those just enumerated) for which the requirement of exhaustion would be clearly inappropriate, States could agree, within future BITs or FTAs, to dispense with the exhaustion requirement with respect to such claims.<sup>206</sup>

202. Cf. Klaw, *supra* note 10, at 347.

203. See *Interhandel Case (Switz. v. U.S.)*, 1959 I.C.J. 6, 27 (Mar. 21) (“The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law.”); see also *Elettronica Sicula S.P.A. (ELSI) (U.S. v. It.)*, 1989 I.C.J. 15, ¶ 51 (Jul. 20) (noting that the exhaustion of local remedies “is a rule of customary international law developed in the context of the espousal by a State of the claim of one of its nationals”).

204. Cf. Klaw, *supra* note 10, at 361–68 (arguing that U.S. law enforcement officials can and should prosecute corrupt foreign officials, if the official’s own government is unwilling or unable genuinely to carry out the investigation or prosecution).

205. *Claim of Finnish Shipowners Against Great Britain in Respect of the Use of Certain Finnish Vessels During the War*, 3 R.I.A.A. 1479, 1494 (1934) (Bagge, Single Arbitrator) [hereinafter *Finish Shipowners Arbitration*] (recognizing that “the parties in the present case, however, agree—and rightly—that the local remedies rule does not apply where there is no effective remedy”).

206. See *ELSI*, 1989 I.C.J. 15, ¶ 50 (noting that there is “no doubt that the parties to a treaty

Moreover, even if an agreement to waive the exhaustion requirement could not be reached in advance, it is appropriate to remember, as ICJ Judge Hersch Lauterpacht noted in the *Norwegian Loans Case*, that the requirement of exhaustion of local remedies is a rule that should be applied “with a considerable degree of elasticity.” In cases where there are, as a practical matter, “no effective [local] remedies owing to the law of the State concerned *or the conditions prevailing in it*,” exhaustion is not required.<sup>207</sup>

It should also be noted that the requirement of exhaustion would be inapplicable, and indeed inappropriate, if the corruption were to give rise to a direct injury to the investor’s State (such as harm to the investor’s State’s economy, for example) as opposed to an indirect-injury claim (for harm solely to the investor).<sup>208</sup>

### ii. “Calvo Clauses” and Other Waivers by Foreign Investors

Another potential legal obstacle to the use of State-to-State dispute resolution of corruption claims involving foreign investors could stem from efforts by certain States to require foreign investors to expressly waive their rights to diplomatic protection as a condition of direct investment pursuant to “Calvo clauses” inserted within investment contracts.<sup>209</sup> An example of such a

can therein agree that either the local remedies rule shall not apply to claims based on alleged breaches of that treaty; or confirm that it shall apply”).

207. Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 39 (July 6) (separate opinion of Judge Lauterpacht) (emphasis added).

208. See, e.g., Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31) (Mexico was not required to exhaust local remedies in the United States in respect of its direct claim for alleged violations of the Vienna Convention on Consular Relations); see also *ELSI*, 1989 I.C.J. 15, ¶ 51 (reiterating without objection the United States’ contention that “to such a direct injury the local remedies rule . . . would not apply”). Although the ICJ in the *ELSI* case required the United States to prove that its direct-injury claim was “distinct from, and independent of” the claim of its national, *ELSI*, 1989 I.C.J. 15, ¶ 51, the ICJ in *Avena* recognized that the exhaustion of local remedies is not required where there is an “interdependence of the rights of the State and of individual rights,” *Avena*, 2004 I.C.J. 12, ¶ 40.

209. Such waivers are often known as “Calvo clauses,” after an Argentine jurist named Carlos Calvo, who popularized the Calvo doctrine, which states:

First, that sovereign states, being free and independent, enjoy the right, on the basis of equality, to freedom from “interference of any sort” . . . by other states, whether it be by force or diplomacy, and second, that aliens are not entitled to rights and privileges not accorded to nationals, and that therefore they may seek redress for grievances only before the local authorities.

DONALD R. SHEA, *THE CALVO CLAUSE* 19–20 (1955). The Calvo Doctrine reached the height of its popularity in Latin America and was ultimately embodied in Article 2(2)(c) of the U.N. Charter of Economic Rights and Duties of States, a U.N. General Assembly resolution passed in 1974, providing that

[i]n any case where the question of compensation [due to a foreign national after an expropriation] gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed

waiver is the following: “Disputes and controversies which may arise with regard to the interpretation or execution of this contract shall be resolved by the tribunals of the Republic in accordance with the laws of the nation, and shall not in any case be considered as a motive for international reclamations.”<sup>210</sup>

Although States have markedly relaxed their efforts to extract waivers from investors and increasingly accept international arbitration,<sup>211</sup> these shifts may be related not only to the trends of globalization and economic liberalization of the 1980s and 1990s.<sup>212</sup> They may also be a function of the reluctance of investor’s States over the past two decades to provide diplomatic protection<sup>213</sup> in conjunction with the ICSID Convention requirement that investors choose between international arbitration and the seemingly illusory option of diplomatic protection.<sup>214</sup> If investors’ States were to once again extend a viable option for diplomatic protection in cases relating to corruption, and investors were to begin opting for State-to-State dispute resolution of such corruption claims, one might reasonably expect to witness a resurgence in the number of Calvo clauses.

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by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

G.A. Res. 3281(XXIX), U.N. Doc. A/RES/29/3281 (Dec. 12, 1974) (adopted by a vote of 104-16-6); *see also, e.g.*, G.A. Res. 3171 (XXVIII), U.N. Doc.A/RES/3171(XXVIII), pmb. (Dec. 17, 1973) (“[E]ach State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures . . . .”); Trade and Dev. Board, Res. 88(XII), Rep. of the Trade and Development Board, 12th Sess., Sept. 22, 1971–Oct. 25, 1972, U.N. GAOR 27th Sess., Supp. No.15, A/8715/Rev.1, art. 2 (Oct. 19, 1972) (“[M]easures of nationalization as States may adopt in order to recover their natural resources are the expression of a sovereign power . . . and any dispute which may arise in that connexion falls within the sole jurisdiction of its courts . . . .”). The United States has long disputed the validity of the Calvo Doctrine on the theory that the right of diplomatic protection—which is ultimately a State’s right—cannot be waived by an injured national. *See* LORI DAMROSCH ET AL., INTERNATIONAL LAW, CASES AND MATERIALS 762 (2000).

210. Manning-Cabrol, *The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors*, 26 LAW & POL’Y INT’L BUS. 1169, 1173 (1995) (quoting Venezuelan contract with foreign investor).

211. *See, e.g.*, Wenhua Shan, *Is Calvo Dead?*, 55 AM. J. COMP. L. 123, 135 (2007) (noting that “recent BITs have generally accepted non-local remedies and general international law as the governing norms, departing significantly from the Calvo principle” and adding that “a ‘silent revolution’ has taken place, particularly in the sense that some BITs accept international arbitration for state-investor disputes”).

212. *Id.* at 130.

213. Although it is difficult to obtain precise figures on the frequency of informal diplomatic efforts by States on behalf of investors, it is clear that the frequency of diplomatic protection cases has substantially declined in the ICJ over the last several decades.

214. *See* ICSID Convention, *supra* note 131, arts. 26–27.

*iii. Nationality of Claims*

A final potential legal obstacle to the use of diplomatic protection to redress foreign investor solicitation and extortion relates to the nationality of the investor affected by the corruption. Under international law, a State may only assert diplomatic protection when the injured party is a national of the claimant State because it is “the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection.”<sup>215</sup>

In the case of natural persons, the issue of nationality should present an easy prerequisite to be satisfied, except possibly in cases where the genuineness of the bond of nationality is dubious,<sup>216</sup> or where the nationality of the person concerned changes between the time the claim arises and the time it is presented.<sup>217</sup>

In respect of legal persons such as multinational investment vehicles, however, the situation is more complex. The International Court of Justice noted in *Barcelona Traction* that “the traditional rule [of international law] attributes the right of diplomatic protection of a corporate entity to the State under the law of which it is incorporated and in whose territory it has its registered office.”<sup>218</sup> It added that “where it is a question of an unlawful act committed against a

215. *Panevezys-Saldutiskis Railway Case (Est. v. Lith.)*, 1939 P.C.I.J. (ser. A/B) No. 76, at 16 (Feb. 28).

216. The bond of nationality might be dubious where the individual concerned holds dual nationality and the more dominant or effective nationality is not of the State espousing diplomatic protection. *See, e.g.*, *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4 (Apr. 6) (denying as inadmissible Liechtenstein’s diplomatic protection claim against Guatemala where the national concerned lived in Guatemala for thirty-four years and only changed nationality to Liechtenstein in 1939 to avoid association with wartime Germany); *see also Mergé Case*, 14 R.I.A.A. 236 (Italian-U.S. Conciliation Comm’n 1955) (rejecting petition of the United States to present diplomatic protection claim on behalf of dual national whose dominant nationality was not that of the United States).

217. *See, e.g.*, Statement of Assistant Legal Advisor to the U.S. Department of State, 8 Whiteman 1243 (“Under generally accepted principles of international law and practice, a claim may properly be espoused on behalf of a national of the government espousing the claim, who had that status at the time the claim arose and continuously thereafter to the date of the presentation of the claim.”). This general rule regarding continuity of nationality has also been extended to corporate entities. *See Int’l Law Comm’n, Draft Articles on Diplomatic Protection*, Rep. of the Int’l Law Comm’n, 58th Sess., May 1–Jun. 9 and Jul. 3–Aug 11, 2006, U.N. GAOR, 61st Sess., Supp. No. 10, A/61/10 art. 10 (1) [hereinafter *Draft Articles on Diplomatic Protection*] (“A State is entitled to exercise diplomatic protection in respect of a corporation that was a national of that State, or its predecessor State, continuously from the date of injury to the date of the official presentation of the claim.”).

218. *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, ¶ 70 (Feb. 5). Article 9 of the *Draft Articles on Diplomatic Protection*, *supra* note 217, further adds that, although corporate nationality generally derives from the State of incorporation, “when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.”



company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim,<sup>219</sup> not the national State of its shareholders.<sup>220</sup>

In view of this general rule, the admissibility of a diplomatic protection claim might be jeopardized if an entity harmed by a corrupt act is incorporated in the host State, particularly if the entity was not required to be incorporated there by the host State. This might be a particular concern for participants in a joint venture in the host State. Accordingly, investors hoping to preserve an option for diplomatic protection in the event of corruption would be wise to ensure they are truly *foreign* investors.

### 3. Practical Objections to State-to-State Dispute Resolution and Responses

Aside from the legal obstacles to State-to-State resolution of corruption claims affecting foreign investors, there are likely to be a series of practical objections to using such mechanisms. The following section outlines and responds to these anticipated objections.

First, it may be argued that States are already doing enough to prevent corruption by enacting extraterritorial statutes like the FCPA and United Kingdom Bribery Act such that they ought not to be expected or required to engage in State-to-State dispute resolution of cases involving bribe solicitation and/or extortion. This argument, however, fails to appreciate that the goal of preventing and eradicating corruption involves more than just punishing those who pay bribes. It involves taking active steps to encourage the disclosure of corrupt acts, to facilitate the identification and removal of corrupt officials, and to provide effective mechanisms of redress for those affected by corruption.<sup>221</sup>

Second, some might object to the use of a State-to-State dispute resolution mechanism such as diplomatic protection to address claims of corruption

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219. *Barcelona Traction*, 1970 I.C.J. Reports 4, ¶ 88; see also Draft Articles on Diplomatic Protection, *supra* note 217, art. 11 (“A State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of injury to the corporation unless: (a) the corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or (b) the corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation was required by it as a precondition for doing business there.”).

220. In some circumstances, the State of the shareholder’s nationality may be entitled to bring a claim of diplomatic protection on behalf of the shareholders such as when the host State injures the shareholder’s right to dividends, to attend and vote at general meetings, and share in the assets of the company after liquidation. See Phobe Okowa, *Issues of Admissibility and the Law of International Responsibility*, in INTERNATIONAL LAW 472 (Malcolm D. Evans ed., 2003); see also Draft Articles on Diplomatic Protection, *supra* note 217, art. 12 (“To the extent that an internationally wrongful act of a State causes direct injury to the rights of the shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.”).

221. See Klaw, *supra* note 10.

involving a foreign investor by justifiably asking: “Why should States help investors that have become involved in corruption? These are investors that have paid bribes, aren’t they?” This objection has some merit, but it is only partially correct. To be sure, these State-to-State dispute resolution mechanisms are designed to assist *some* investors who do make private payments to foreign officials, but not all. To understand who should be assisted and why it would be appropriate to do so, it is important to recognize the distinction between payments made “willingly” and payments made “unwillingly.” The distinction rests in the presence or absence of implied or express coercion or extortion by a public official.<sup>222</sup> If an investor has paid a bribe in order to receive *more* than fair treatment or an advantage, the bribe should be deemed “willing” and diplomatic protection should not be provided.<sup>223</sup> By contrast, if an investor has made a payment to an official in order to avoid receiving *less* than fair treatment, the payment ought to be considered “unwilling.”<sup>224</sup> From a moral perspective, the difference matters.<sup>225</sup> Willing bribe payers should not be entitled to the assistance of their State.

Only those who suffer retaliation after refraining from making illicit payments or who make such payments “unwillingly” in response to solicitation or extortion should be permitted to receive State assistance. With respect to assisting those who have been harmed after declining to pay a bribe, surveys by Transparency International suggest that there are many investors who have been solicited for bribes, refused to pay them, and then lost business to a competitor that was less scrupulous or less fearful of criminal prosecution under statutes like the FCPA.<sup>226</sup> These victims of corruption deserve State assistance. With respect to those who seek State assistance after acquiescing to coercive solicitation or extortion, this Article proposes the following additional prerequisites to avoid rewarding those who have engaged in culpable wrongdoing or already received the benefit of their bargain by gaining access to a foreign country in which they had no initial right to invest.<sup>227</sup> First, only unwilling payers who promptly report such payments to the State of their nationality so their claims of extortion may be verified through sworn statements and government investigation should be entitled to receive State assistance. Second, the unwilling payment must have been made in order to protect an

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222. *See id.* at 320–23.

223. *Id.* at 320–23, 368–70.

224. *Id.* at 320–23.

225. *See Carson, supra* note 10, at 83–89.

226. *See* TRACE INTERNATIONAL, *supra* note 3 (referencing survey of 1000 executives in which nearly twenty percent of respondents claimed to have lost business to a competitor who paid a bribe).

227. *See id.*; *see also* M. SORNARAJAH, THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES 128 (2000) (“Aliens fall under the sovereignty of the state they enter. The state has a right to control their entry and subject it to conditions.”).

existing investment, rather than secure a new business opportunity.<sup>228</sup> Limiting State assistance to these categories of investors will not only ensure that “bad” behavior is not rewarded, but will also facilitate the disclosure of corruption, as such persons would see an “upside” to voluntary disclosure that arguably does not currently exist.<sup>229</sup>

Third, it might be argued that investors’ States ought not to care about corruption that occurs abroad. While issues of *domestic* corruption are sufficiently plentiful to lead many reasonable people to conclude that a State’s focus ought to be national before it is global, this objection nonetheless appears shortsighted. There is ample empirical evidence from the IMF and World Bank that more corruption necessarily means less investment.<sup>230</sup> If that is true, then by taking this argument one step further, one ought to see that less foreign investment may mean, among other things, fewer jobs in the investors’ State that are related to foreign investment, and fewer revenues flowing to and within the investors’ home State. Accordingly, sending States would be wise to care about corruption abroad.

Fourth, some might be skeptical about how the system might work and express concern over whether elevating corruption claims into State-to-State disputes might trigger a return to the era of “gun-boat diplomacy” that marred international relationships in decades past.<sup>231</sup> To address this concern, the exercise of diplomatic protection over corruption claims should begin— as it typically does—with nonpublic diplomatic dialogue, consultation, negotiation, conciliation or mediation in the first instance.<sup>232</sup> Not only are these informal means likely to be the least expensive, but they may also suffice to prompt the host State to provide compensation or at least replace its corrupt personnel, the latter of which should be the primary goal from the perspective of the investors’ State. Moreover, if handled judiciously and sparingly, there is little reason to

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228. For an in-depth discussion of the mechanics and rationales for these additional prerequisites, see Klaw, *supra* note 10, at 368–70.

229. *Id.* at 337–40.

230. See, e.g., Mauro, *supra* note 18 (explaining that “corruption is found to lower investment and economic growth”); see also Vito Tanzi & Hamid Davoodi, *Roads to Nowhere: How Corruption in Public Investment Hurts Growth*, ECONOMIC ISSUES, Mar. 1998, at 1, available at <http://www.imf.org/external/pubs/ft/issues12/issue12.pdf> (concluding that corruption-laden investments can harm growth); Cheryl Gray & Daniel Kaufman, *Corruption and Development*, WORLD BANK PREM NOTES, May 1998, at 1 available at [https://openknowledge.worldbank.org/bitstream/handle/10986/11545/multi\\_page.pdf?sequence=1](https://openknowledge.worldbank.org/bitstream/handle/10986/11545/multi_page.pdf?sequence=1) (concluding that bribery “impedes long-term foreign and domestic investment”).

231. See SORNARAJAH, *supra* note 227, at 140.

232. See *id.* at 129 (“Where two states have a dispute of any type, the logical first step is to settle it themselves though negotiations. Such diplomatic means of settlement of disputes are among the oldest forms of dispute settlement in international relations. The large majority of disputes are settled in this manner.”) (internal citations omitted).

think that such diplomatic efforts would seriously harm international relationships.

Fifth, another likely practical objection is that by raising investor-State disputes concerning bribe solicitation and corruption to the level of State-to-State disputes, one might be “making mountains out of molehills.” After all, do we really want to turn every \$500 bribe into international litigation that could take years and cost millions of dollars? This understandable fear can be assuaged by recognizing that, as a preliminary matter, the State whose national was extorted is in control of the decision of whether, when and how to raise such claims with foreign governments.<sup>233</sup> The sending State could choose to overlook, delay or aggregate minor claims until the timing is right or the appropriate threshold for State intercession has been reached.

Sixth, if the nonjudicial avenues explained above fail to produce meaningful results, and the claims at issue are sufficiently meritorious and consequential, this Article argues that the claim could and should then be brought as an international legal claim of State responsibility in an international body. This would have the advantage of bringing the misconduct to light and prompting formal adjudication from a neutral finder of fact. However, if formal adjudication of such a diplomatic protection claim were to be sought, the choice of fora is likely to become an issue, and it would be necessary to consider what sort of body has the expertise and jurisdiction to resolve such claims. Listed below are a few such options:

- *Ad-Hoc Arbitral Tribunal or Inquiry Commission.* Ad-hoc arbitral panels or inquiry commissions could be established by agreement between the two States concerned to address allegations of corruption. Indeed, Article 37 of the current U.S. Model BIT expressly provides for State-to-State resolution of matters “concerning the interpretation and application” of the treaty through State-to-State arbitration under the UNCITRAL Arbitration Rules.<sup>234</sup>
- *International Court of Justice.* To resolve disputes arising under diplomatic protection and resulting from bribe solicitation, extortion or the denial of justice to a foreign national, the ICJ could also be used, much in the way that States have previously used it to address other economically

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233. See Draft Articles on Diplomatic Protection, *supra* note 217, art. 2, cmt. 2 (“A State has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so.”).

234. See 2012 U.S. Model BIT, *supra* note 54, art. 37(1) (“Subject to paragraph 5, any dispute between the Parties concerning the interpretation or application of this Treaty, that is not resolved through consultations or other diplomatic channels, shall be submitted on the request of either Party to arbitration for a binding decision or award by a tribunal in accordance with applicable rules of international law.”).

oriented diplomatic protection claims.<sup>235</sup> One benefit of using the ICJ as a dispute-resolution forum for diplomatic protection claims of this nature is that the ICJ has jurisdiction over States that have: (1) recognized the compulsory jurisdiction of the Court under Article 36(2) of the Statute of the ICJ; (2) agreed to ICJ jurisdiction for disputes arising out of the interpretation or application of certain existing bilateral treaties; or (3) ratified without reservation Article 66(2) of the UN Convention Against Corruption.<sup>236</sup> While the ICJ's relative lack of experience on such criminal-related claims could present initial difficulties, the increased use of that forum should lend itself quickly to additional expertise.

- *Permanent Multilateral Tribunal on Bribery and Extortion in Internal Investment.* Although no permanent tribunal for investment claims or State corruption claims currently exists, the existence of such a tribunal was contemplated under the draft Multilateral Agreement on Investment, which called for an OECD dispute resolution body to resolve State-to-State and investor-State disputes.<sup>237</sup> States ought to consider revisiting the creation of such a tribunal.

Seventh, some might question whether such a mechanism would actually help the victims aggrieved by the solicitation or extortion. After all, there is no obligation under international law for States to make a claim on behalf of their national, and no obligation for States to remit any compensation received to the nationals on whose behalf the State's claim was made.<sup>238</sup> While retaining

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235. See, e.g., *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5); *Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.)*, 1989 I.C.J. 15, ¶ 128 (July 20).

236. Article 66(2) provides for ICJ jurisdiction for disputes arising out of the Convention's "interpretation or application" following six months' worth of attempts at negotiation or arbitration. U.N. Convention Against Corruption, *supra* note 4, art. 66(2).

237. In 1995, OECD member States launched negotiations on a Multilateral Agreement on Investment, but such negotiations failed to reach agreement on certain key points and were effectively terminated by 1998. A consolidated draft of the agreement may be found at *The Multilateral Agreement on Investment, Draft Consolidated Text*, OECD Doc. DAF/MAIL(98)7/REV1 (Apr. 22, 1998), available at <http://www.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf>.

238. See Special Rapporteur on Diplomatic Protection, *Seventh Rep. on Diplomatic Protection*, Int'l Law Comm'n, U.N. Doc. A/CN.4/567, ¶¶ 94–96 (Mar. 7, 2000) (by John R. Dugard) [hereinafter *Seventh Report on Diplomatic Protection*] (recognizing that "[t]he rule in the *Mavrommatis Palestine Concessions* case would seem to dictate that a claimant State has absolute discretion in the disbursement of any compensation it may receive in a claim brought on behalf of an injured national" and noting that "judicial decisions, both international and national, emphasize that the injured national has no right to claim any compensation received by the State"); see also AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW (THIRD), FOREIGN RELATIONS LAW OF THE UNITED STATES § 902, cmt. 1 (1987) ("The money received from a foreign government as a result of

States' flexibility on whether to make a claim of diplomatic protection would appear to be wise for the "mountains out of molehills" reasons discussed above, States' current flexibility on whether to remit any compensation ultimately received for a harm caused to a national is, indeed, a problem for any system that aims to prevent or eradicate corruption. Without the prospect of compensation, many people are unlikely to disclose their experiences with foreign corruption. Accordingly, both fairness and practicality would appear to dictate that States ought to remit payment to victims (less expenses) in cases where compensation is obtained from another State.<sup>239</sup>

Finally, it might well be argued that it is inappropriate for host States to be held responsible for their corrupt foreign officials because the citizens of such States would in effect be victimized twice—*first*, by having corrupt officials abuse their position of public trust, and *second*, by having their public coffers drained to compensate (usually wealthier) foreigners and their sending States for such wrongdoing. Although this objection has substantial force, the perceived inequity can be blunted somewhat by remembering that any such States made to pay for their officials' corruption always have the ability to seek forfeiture and restitution from the wrongdoing official, hopefully accompanied by a successful criminal prosecution. Moreover, by engaging in this process, host States and their citizenry will have the knowledge and incentive to finally rid themselves of their corrupt officials, ultimately attracting additional investment and prosperity in the long run.

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an international award, or in settlement, belongs to the United States and is placed in the Miscellaneous Receipts account of the Treasury, but Congress has usually provided for payment to private claimants, especially to those whose claims are settled in accordance with decisions of a special United States claims commission dividing a lump-sum settlement.”).

239. A similar suggestion for progressive development of the international law of diplomatic protection was proposed by Professor John Dugard, the U.N. Special Rapporteur on Diplomatic Protection. His proposal stated, “When a State receives compensation in full or partial fulfillment of a claim arising out of diplomatic protection it shall [should] transfer that sum to the national in respect of whom it has brought the claim [after deduction of the costs incurred in bringing the claim].” Seventh Report on Diplomatic Protection, *supra* note 239, ¶103 (brackets in original). The Drafting Committee of the ILC subsequently adopted Draft Article 19 on Diplomatic Protection, entitled “Recommended Practice,” which states:

A State entitled to exercise diplomatic protection according to the present draft articles should: (a) give due consideration to the possibility of exercising diplomatic protection especially when a significant injury has occurred; (b) take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and (c) transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.

Int'l Law Comm'n, Titles and Texts of the Draft Articles on Diplomatic Protection Adopted by the Drafting Committee on Second Reading, U.N. Doc. A/CN.4/L.684 (May 19, 2006). Draft Article 19 was subsequently adopted by the full ILC, with the recognition that it was “an exercise in progressive development” of the law “supported by [growing] State practice and equity.” Draft Articles on Diplomatic Protection, *supra* note 217, at 100.

#### CONCLUSION

This Article has aimed to elucidate how bribery and extortion in international business transactions and foreign direct investment may be prevented by expanding the current scope of State responsibility to address the demand side of bribery, by improving the viability of investor-State arbitration for corruption claims, and by using State-to-State dispute mechanisms like diplomatic protection. It has sought to identify the content of States' international obligations regarding bribery, solicitation, and extortion, and it considered the conditions and circumstances under which a State may be held responsible under international law for any such corrupt acts. It then proceeded to address the opportunities and obstacles currently associated with seeking to hold States responsible for such acts through the mechanisms of investor-State arbitration and State-to-State diplomatic protection.

Based on this analysis, it suggested certain changes that could make international arbitration more attractive and viable for victimized foreign nationals, including (1) augmenting nonretaliation protections, (2) shielding persons who unwillingly acquiesce to extortion from domestic prosecution, (3) lowering the heightened burden of proof for corruption claims, (4) reiterating within foreign investment agreements principles of proper State attribution, and (5) clarifying the well-intentioned but perhaps insufficiently refined notion that any claims involving corruption are either nonarbitrable or necessarily unenforceable against a State.

This Article also considered the prospect of using long-established but underutilized State-to-State dispute-resolution mechanisms, such as diplomatic protection, to address and resolve international corruption claims. After considering various legal obstacles and practical objections to State-to-State resolution of corruption claims, it argued that elevating foreign-investor corruption claims to the level of a State-to-State disputes can create incentives for additional disclosure of bribery and extortion, assist victims of solicitation and extortion in obtaining redress, pressure foreign States to remove their corrupt officials, and further strengthen international norms against bribery and extortion.

In these ways, and through additional development of international law, it is hoped that States can and will fulfill their stated responsibility to "prevent and eradicate" corruption in international business transactions and foreign direct investment.