CONTRACTS PROCURED THROUGH BRIBERY OF PUBLIC OFFICIALS: ZERO TOLERANCE VERSUS PROPORTIONAL LIABILITY

KEVIN E. DAVIS*

Bribery in public contracting is a serious problem, particularly in societies with weak public institutions. The trend in the law applicable to contracts between states and foreign firms is to refuse to enforce contracts procured through bribery and to bar the firm from recovery in restitution. This zero-tolerance approach may have perverse consequences. Proof that a firm obtained a contract through bribery does not necessarily indicate the extent to which the firm has fallen short of its obligations to combat bribery. The zero-tolerance approach fails to take into account the extent to which the firm has not only attempted to prevent bribery but also monitored and punished employees, cooperated with law enforcement authorities, and created value for the government in the course of performing its side of the contract. Less compellingly, several commentators have complained that the zero-tolerance approach dilutes governments' incentives to prevent their officials from soliciting bribes. Subjecting bribe-payers to liability that is proportional to fault is preferable on a number of grounds.

* Beller Family Professor of Business Law. An earlier version of this paper was circulated under the title, Civil Remedies for Corruption in Government Contracting: Zero Tolerance versus Proportional Liability, Institute for International Law and Justice Working Paper 2009/4. I am grateful to Jennifer Arlen, Tony Duggan, Nelson Enonchong, Franco Ferrari, Clayton Gillette, Robert Howse, Guillermo Jorge, Catherine Kessedjian, Benedict Kingsbury, Lewis Kornhauser, Yaw Nyarko, Tunde Ogowewo, Barak Richman and Susan Rose-Ackerman, as well as participants in presentations at NYU, the University of Minnesota, the University of Toronto, and the NYU-Abu Dhabi Institute for helpful comments and conversations. I am also grateful for the support of the Filomen D'Agostino and Max E. Greenberg Research Fund at NYU School of Law as well as to Deborah Kalu and Stefan Rajiyah for research assistance. All errors are my own.

I. INTRODUCTION

In March 1989, Nasir Ibrahim Ali, a Dubai businessman, had a fateful meeting with His Excellency Daniel arap Moi, the then President of Kenya.[1] Ali was seeking the President's approval of a venture that involved the establishment and operation of duty-free complexes at the Nairobi and Mombasa International Airports. At Ali's side was Rashid Sajjad, a Kenyan businessman—the bagman. In a brown briefcase, Sajjad was carrying US $500,000 in cash, a portion of the US $2,000,000 he had recently received from Ali. As they entered the room to meet the President, Sajjad left the briefcase by the wall. After the meeting Ali retrieved the briefcase and saw that the cash had been replaced with fresh corn. The President approved the project, and on April 27, 1989, the Republic of Kenya concluded an agreement with Ali's company.

Nasir Ali's story became public after a dispute arose between him and the Kenyan government. According to Ali, the Kenyan government violated its agreement with his company, World Duty Free Company Limited (World Duty Free), by es-

1. The story told in this paragraph is recounted in World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, ¶ 130 (Oct. 4, 2006), 46 I.L.M. 339 (2007).

sentially expropriating his interest in the company.[2] As contemplated by the agreement between the parties, World Duty Free sought to have this dispute resolved by a panel of arbitrators convened under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID). In the course of those proceedings, Mr. Ali took the highly unusual step of voluntarily providing information about the circumstances under which his investment agreement came into being. He argued that the payment to President Moi was "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 . . . ."[3] The lawyers for the Republic of Kenya argued that the payment was an illegal bribe.[4]

The ICSID panel acknowledged that it was "disturbing"[5] that the bribe had been solicited by Kenya's head of state and that Kenya had made no effort to either prosecute him or hold him civilly liable for his misconduct.[6] Nonetheless, the panel dismissed World Duty Free's claim on the ground that upholding a claim based on a contract obtained by bribery would be contrary to international public policy.[7] The panel also concluded that Kenya was entitled to avoid the contract under English and Kenyan law—which the parties had chosen to govern their agreement—and that World Duty Free was not entitled to recover the value of its investment under the law of restitution.[8] At least one other ICSID panel has taken a similarly

2. World Duty Free alleged that these events were triggered by its decision to co-operate with officials investigating the Goldenberg Fraud. *Id.* ¶¶ 68–72

3. *Id.* ¶ 133. Harambee is a Kenyan practice that involves fund-raising in support of specific projects. Harambees originally involved raising of funds from the public in support of projects such as dispensaries and schools. By the 1980's, however, public Harambees were commonly used as a means for politicians to distribute funds to favored projects, particularly during election years. *See* TRANSPARENCY INT'L KENYA, HARAMBEE: POOLING TOGETHER OR PULLING APART? 7-13 (2001), http://library.fes.de/pdf-files/bueros/kenia/01394.pdf

4. World Duty Free, ¶¶ 105-108.

5. *Id.* ¶ 180.

6. *Id.* ¶ 180.

7. *Id.* ¶¶ 138-157.

8. Some commentators suggest that the panel affirmatively decided that the Republic of Kenya was not liable or legally responsible for Moi's misconduct. *See, e.g.*, Andrew Brady Spalding, *Deconstructing Duty Free: Investor-State Arbitration as Private Anti-Bribery Enforcement*, 49 U.C. DAVIS L. REV. 443,

tough stance toward claims based on illegally obtained government contracts,[9] and the only international instruments directly on point appear to endorse this approach.[10]

At the time it was decided, *World Duty Free* was an exceptional case. The factual backdrop actually was, and, sadly, is, commonplace. There are many countries in which bribery in government contracting is widespread—though perhaps not quite so widespread as in Kenya under President Moi.[11] The main reason why *World Duty Free* was exceptional is because, before the case was decided, it was rare for a legal tribunal to

480–82 (2015); R. Zachary Torres-Fowler, Note, *Undermining ICSID: How the Global Antibribery Regime Impairs Investor-State Arbitration*, 52 VA. J. INT'L L. 995, 1014 (2012). This conclusion seems to be based a misreading of the portions of the opinion in which the panel found that 1) the payment qualified as a bribe because it was received by Moi rather than the state, and 2) Moi was not able to affirm the contract on behalf of Kenya. World Duty Free, ¶¶ 169, 184–85. Llamzon gives a similar impression, ALOYSIUS P. LLAMZON, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION ¶¶ 10.02, 10.52, 10.95 (2014), but provides a more accurate description of the situation. *Id.* ¶¶ 10.31–.32.

9. Metal-Tech Ltd. v. Republic of Uzb., ICSID Case No. ARB/10/3, Award, ¶¶ 389-390 (Oct. 4, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw3012.pdf.

10. United Nations Convention Against Corruption, G.A. Res. 58/4 (Oct. 31, 2003), Art. 34 [hereinafter "UN Convention"]; Civil Law Convention on Corruption, Nov. 4, 1999, E.T.S. No. 174 (entered into force Nov. 1, 2003), Art. 8 [hereinafter Civil Law Convention]. *See infra* Section II.E.

11. The Moi regime was by all accounts extremely corrupt. *See* Xan Rice, *The Looting of Kenya*, GUARDIAN (Aug. 31, 2007), https://www.theguardian.com/world/2007/aug/31/kenya.topstories3 (describing report on corruption under the Moi regime). Data on the prevalence of bribery were not collected systematically during the time frame of the events that gave rise to the claim in World Duty Free. Transparency International's Corruption Perceptions Index was first published in 1995. Data for Kenya were first published in 1996 and in that year it ranked 54th out of 56 countries—indicating widespread perception that the country was corrupt. TRANSPARENCY INT'L, TI CORRUPTION PERCEPTION INDEX (1996), https://www.transparency.org/files/content/tool/1996_CPI_EN.pdf. Since 2010 country-level data on the relative prevalence of bribery have been collected by the World Economic Forum to produce its Global Competitive Index and the data are published by the World Bank as part of its GovData360 dataset. WORLD ECON. FORUM, WORLD BANK, GLOBAL COMPETITIVENESS INDEX, http://reports.weforum.org/global-competitiveness-index-2017-2018/competitiveness-rankings/?doing_wp_cron=1530335857.3100349903106689453125 (last visited June 30, 2018). Between 2010 and 2017 Kenya ranked between 134th and 94th in terms of the commonness of irregular payments and bribes; this was not a case in which a lower ranking was preferable. *Id.*

be presented with conclusive evidence of bribery.[12] However, that situation is changing as a consequence of the recent increase in enforcement of anti-bribery law.

There is little doubt that bribery in public contracting is a serious problem.[13] It typically either increases the cost to the government of procuring goods and services or reduces the benefits the government receives in exchange for the resources under its control. In extreme cases bribery may induce public officials to award contracts that generate no benefit to the government whatsoever or, even worse, cause it affirmative harm. In addition, there are harms to members of the broader society represented by the government. Those harms include: loss of public faith in, and thus support for, the government; excessive investments in obtaining, and conflicts over, appointments to public office; distortion of the composition of the public service as honest officials are replaced by corrupt ones; and unjust skewing of the distribution of wealth in favor of corrupt public officials. These problems are particularly serious in relation to the governments of poor countries, where corruption is more likely to be prevalent, and especially when they deal with large multinational firms.[14] However, corruption in public contracting is also a problem for the governments of wealthier countries.[15]

Over the past two decades, lawmakers and law enforcement officials around the world have invested heavily in legal

12. For surveys of similar cases decided by international investment tribunals see LLAMZON, note 8, at 128-189; Hilmar Raeschke-Kessler & Dorothee Gottwald, *Corruption in Foreign Investment – Contracts and Dispute Settlement Between Investors, States, and Agents*, 9 J. WORLD INV. & TRADE 5, 12 (2008); Torres-Fowler, *supra* note 8, at 1023–29.

13. *See generally* SUSAN ROSE-ACKERMAN & BONNIE J. PALIFKA, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 27–36 (2d ed. 2016) (summarizing empirical cross-country literature on causes and consequences of corruption). Throughout this paper the term "government" will be used to refer to both governments and a range of public actors they might represent, including State, provincial, and municipal authorities.

14. *Id.* at 29, 35 (documenting correlation between corruption and per capita income), 491-492 (describing role of multinational firms in facilitating corrupt practices and the influence of large firms relative to smaller or poorer nation-states).

15. *Id.* at 94-96 (explaining that "[G]rand corruption is not limited to developing nations dealing with multinational businesses" and providing examples of corruption in public procurement in wealthier countries).

mechanisms to combat bribery in government contracting—along with other forms of corruption. Bribery is condemned by a number of international conventions, including the Organization for Economic Co-operation and Development Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (OECD Convention),[16] the United Nations Convention Against Corruption,[17] as well as regional conventions and regional instruments produced by bodies such as the African Union,[18] the Council of Europe[19] and the Organization of American States.[20] In the United States, transnational bribery has been a distinct criminal offence since the enactment of the Foreign Corrupt Practices Act of 1977 (FCPA).[21] All of the parties to the OECD Convention have enacted similar legislation.

Since the beginning of the twenty-first century, the United States has dramatically ramped up enforcement of the FCPA.[22] Several other parties to the OECD Convention have followed suit.[23] These enforcement actions have brought to

16. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. No. 105–43, 37 I.L.M. 1 (entered into force Feb. 15, 1999) [hereinafter "OECD Convention"].

17. UN Convention, *supra* note 10.

18. African Union (AU), Convention on Preventing and Combating Corruption, Jul. 11, 2003, 43 I.L.M. 5 (2004).

19. Civil Law Convention, *supra* note 10.

20. Organization of American States, Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724 (1996).

21. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95–213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78a, 78dd–1 to dd–3, 78ff, 78m (2006)).

22. *See* Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611, 1614-15 (2017) (discussing time trends in enforcement of the FCPA).

23. FRITZ HEIMANN, ÁDÁM FÖLDES & SOPHIA COLES, TRANSPARENCY INT'L, EXPORTING CORRUPTION: PROGRESS REPORT 2015: ASSESSING ENFORCEMENT OF THE OECD CONVENTION ON COMBATTING FOREIGN BRIBERY 7-8, 12-13 (2015); Org. for Econ. Co-operation & Dev. [OECD], OECD Working Grp. on Bribery, *2016 Data on Enforcement of the Anti-Bribery Convention: Special Focus on International Co-operation*, at 1 (2017) ("443 individuals and 158 entities have been sanctioned in criminal proceedings for foreign bribery between the time the [OECD Convention] entered into force in 1999 and the end of 2016."); John Bussey, *The Rule of Law Finds Its Way Abroad—However Painfully*, WALL ST. J. (Jun. 24, 2011), https://www.wsj.com/articles/SB100014240527 02304569504576404074009682988.

light many instances of government contracts procured through bribery.[24] It seems inevitable that governments and other stakeholders will use the evidence generated by those enforcement actions to challenge the enforceability of the contracts in question, if only as part of efforts to renegotiate the terms.[25]

This article is concerned with how the law—defined broadly to include norms propounded by legislators, judges, arbitrators, and international or intergovernmental organizations—ought to deal with the enforceability of government contracts procured through bribery. The central argument is that, although the tribunal in *World Duty Free* may have arrived at the correct result on the facts of that case, the zero-tolerance approach endorsed by the panel is flawed, at least as a matter of policy, and an alternative remedial approach is warranted.

The basic problem with the zero-tolerance approach is that it essentially punishes firms for two types of actions: (1) failing to prevent contracts from being procured through bribery and (2) making investments in reliance on those contracts rather than walking away. This approach is misguided because it ignores the potential limits of preventive efforts and exit as responses to bribery. It also ignores the range of alternative ways in which both firms and governments can help combat bribery in public contracting. No matter how unequivocally legal institutions state their opposition to enforcement of corruptly-obtained contracts, there will always be corruptible government officials and employees of private firms willing to deal with those officials. At the same time, even if there is nothing (short of shunning entire governments) that firms can do to

24. For recent examples see *Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History*, U.S. DEP'T OF JUSTICE (Dec. 21, 2016), https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve (detailing bribes paid to obtain construction contracts in many countries); *Alcoa World Alumina Agrees to Plead Guilty to Foreign Bribery and Pay $223 Million in Fines and Forfeiture*, U.S. DEP'T OF JUSTICE (Jan. 9, 2014), https://www.justice.gov/opa/pr/alcoa-world-alumina-agrees-plead-guilty-foreign-bribery-and-pay-223-million-fines-and (highlighting bribes paid to obtain supply agreement in Bahrain).

25. *See, e.g.*, Juan Montes, Pemex Cancels $100 Million Contract with Odebrecht, WALL ST. J., July 11, 2017.

prevent their employees from resorting to bribery, they can still monitor and punish the ones who lapse and report them to law enforcement authorities. Firms also may create value for their counterparties, and society as a whole, by continuing to invest in reliance upon their contracts rather than abandoning them. However, the zero-tolerance approach condemns firms unequivocally, regardless of whether they have taken any of these steps.[26] The argument here is simply that a firm whose agents pay bribes ought to receive at least some credit on the basis of factors such as their role in exposing the extent of corruption and the value created by their investments.[27]

Several commentators have criticized the ruling in *World Duty Free* and the zero-tolerance approach on a different ground, namely, it does not hold governments responsible for failing to prevent their officials from soliciting bribes.[28] It is difficult to predict the consequences of abandoning the zero-tolerance approach for one that places greater responsibility on states for the harmful consequences of contracts procured through bribery. Some governments might respond by increasing their efforts to combat corruption among their officials. However, for a variety of reasons, other governments might not respond at all. Moreover, since contract litigation between government and firms is a zero-sum game, any effort to use the rules of contract law to place greater responsibility on states will diminish the duties of firms.

---

26. The perverse effects on incentives to report bribery are examined in detail in Mathias Nell, *Contracts Obtained by Means of Bribery: Should They be Void or Valid?*, 27 EUR. J. L. & ECON. 159, 165-70 (2009).

27. For a similar proposal, which in turn builds upon an earlier version of the present article see Rashna Bhojwani, Note, *Deterring Global Bribery: Where Public and Private Enforcement Collide*, 112 COLUM. L. REV. 66, 99 (2012).

28. *See, e.g.*, LLAMZON, *supra* note 8, at 238-43, 253-56, 274-81; Margareta Habazin, *Investor Corruption as a Defense Strategy of Host States in International Investment Arbitration: Investors' Corrupt Acts Give an Unfair Advantage to Host States in Investment Arbitration*, 18 CARDOZO J. CONFLICT. RESOL. 805, 813 (2017); Michaela Halpern, *Corruption as a Complete Defense in Investment Arbitration or Part of a Balance?*, 23 WILLIAMETTE. J. INT'L L. & DISP. RESOL. 102, 108-11 (2016); Bruce W. Klaw, *State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles, and Opportunities*, 33 BERKLEY J. INT'L L. 60, 63, 91-93 (2015); Matt Reeder, *Estop That! Defeating a Corrupt State's Corruption Defense to ICSID BIT Arbitration*, 27 AM. REV. INT'L ARB. 311, 321-25 (2016); Spalding, *supra* note 8, at 480-88; Michael A. Losco, Note, *Streamlining the Corruption Defense: A Proposed Framework for FCPA-ICSID Interaction*, 63 DUKE L.J. 1201, 1215-22 (2014); Torres-Fowler, *supra* note 8, at 1017-18, 1030-34.

Part II of this article describes the complex web of legal doctrines addressing bribery in government contracting, particularly in cases involving contracts with foreign firms, and the extent to which those doctrines provide room to deviate from the zero-tolerance approach. For practical reasons, this article focuses on situations in which the relevant body of domestic law is either English law or the law of one of the U.S. states.[29] Part III describes and then critiques the policy arguments used to justify the zero-tolerance approach. Part IV sets out an alternative remedial approach inspired by contemporary approaches to corporate criminal liability. Part V discusses how the proportional liability approach can be reconciled with existing doctrine. Part VI concludes.

II. Existing Doctrine

Suppose that an agent or employee of a firm pays a bribe to a government official in order to induce the government to conclude a contract with that firm. Assuming that there is no binding legislation or contractual provision, what effect does this have on the rights and duties of the parties to the contract? The answer is not entirely clear, partly because resolving these disputes may require the application of norms derived from both private law and, since one of the parties to the contract is a government, public law. The situation is likely to be even more complicated when governments contract with foreign firms, particularly in cases involving governments of developing countries. In these cases, principles of private international law will determine which state's private law ought to be used to resolve the dispute.[30] In addition, some tribunals

29. For surveys of the law on these topics in selected civil law jurisdictions see, The Impact of Corruption on International Commercial Contracts (Michael Joachim Bonell and Olaf Meyer ed., 2015) and The Civil Law Consequences of Corruption (Olaf Meyer ed., 2009). For more in-depth discussions of English law on this topic see Alan Berg, *Bribery—Transaction Validity and Other Civil Law Implications*, 2001 Lloyd's Mar. & Com. L.Q. 27 (discussing remedies for contracts procured through bribery); David Kraft, *English Private Law and Corruption: Summary and Suggestions for the Development of European Private Law*, in The Civil Law Consequences of Corruption 207 (Olaf Meyer ed., 2009) (same).

30. Private international law is a body of law that governs transboundary contractual disputes. *See* Cheshire, North & Fawcett, PRIVATE INTERNATIONAL LAW, 3, 3-7, (Paul Torremans, James J. Fawcett eds., 15th ed., 2017). Don Ford, *Private International Law,* 2013, AMERICAN SOCIETY OF

like to refer to principles of so-called transnational law to resolve transnational disputes.[31] Public international law also comes into play in various ways: to the extent that it requires states to adopt particular rules in their domestic law; where a dispute relating to a contract is heard in a forum governed by an international instrument such as a bilateral investment treaty (BIT); or where a breach of contract with a foreign investor qualifies as a breach of some other type of international obligation besides those found in a BIT. The principles derived from each of these sources of law are outlined below.

As a preliminary matter it is worth noting that, although it is difficult to describe the legal consequences of bribery in doctrinal terms, it is not so difficult to describe functionally. In those terms, proof that a public contract was obtained through bribery commonly creates four main types of entitlements for the government, and correlative duties for the contractor.

First, the government might be entitled to recover *compensation* for losses caused by the corrupt act. Those losses might be calculated by taking the difference between the net benefits the government would have received if no bribery had taken place and the net benefits it received by entering into the contract tainted by bribery.[32] Alternatively, the amount of the bribe can be used as a proxy for the government's losses. Second, the government might be entitled to *disgorgement*, namely, a right to recover any benefits the contractor earned as a con-

INTERNATIONAL LAW, 3 (describing private international law as regulating private relationships across national borders).

31. *See infra* Section II.D. *See generally* Emmanuel Gaillard, *Transnational Law: A Legal System or a Method of Decision Making*, 17 ARB. INT'L 59, 60-63, (2001) (discussing the approaches of tribunals to transnational law in cross border disputes), PHILIP JESSUP, TRANSNATIONAL LAW, 1, 1-2, (1956) (defining "transnational law" as body of law that governs actions or events that transcend national frontiers).

32. The net benefits in the absence of bribery might be calculated by reference to either 1) the contract that would have been negotiated by an honest and prudent negotiator owing undivided loyalty to the principal, or 2) terms that would have been negotiated by the particular agent in question – as opposed to a hypothetical prudent person – if they had not been corrupted. *Compare* Charles Mitchell, *Civil Liability for Bribery*, 117 L.Q.R. 207 (2001) (bribery is a sui generis tort of fraud) with K.R. Handley, *Civil Liability for Bribery* (No. 2), 117 L.Q.R. 536 (2001) (bribery is a form of deceit). The difference between these two approaches is that the first risks compensating the principal for having chosen an imprudent or even incompetent agent. Mitchell, *supra*.

sequence of the corrupt act. Third, the government might be entitled to recover *punitive damages*—supra-compensatory damages designed primarily to punish. Fourth, the government might be entitled to *avoid* its obligations under the contract. The avoided obligations may not be replaced. Alternatively, the government may become obligated either to pay for any value received pursuant to the contract—that is, to make *restitution*—or to compensate the contractor to the extent of its *reliance* on the contract. In principle, contract avoidance may be limited to obligations owed to the bribe-payer—as opposed, for instance, to a person to whom the bribe-payer assigns its rights.[33] Avoidance may also take effect either retroactively—i.e. as of the time the contract is signed—or as of the time that the government gives notice of intention to avoid the contract.

Entitlements to compensation, avoidance, or disgorgement can also vary along at least two additional dimensions. First, they may vary in *duration*. In some cases, the government may lose these entitlements if it fails to exercise them within a reasonable time, after the relevant facts were or ought to have been discovered.[34] Second, these entitlements may vary in terms of their *waivability*. In other words, the government may or may not be able to surrender its entitlements by, for example, agreeing not to assert them against assignees of the bribe-payer, compromising its claims, or ratifying or affirming the contract.[35] Saying that the government's entitlement to avoid

33. Bankers Trust Co. v. Litton Sys., 599 F.2d 488, 490-494 (2d Cir. 1979). *Cf.* Lee C. Buchheit, G. Mitu Galati, and Robert B. Thompson, *The Dilemma of Odious Debt*, 56 DUKE L. J. 1201, 1234 n. 104 (2006) (arguing that Bankers Trust was wrongly decided).

34. This may result from the application of either a statutory limitation period or an equitable defense of laches or acquiescence. *See, e.g.*, NEW YORK CIVIL PRACTICE AND RULES, § 213 (establishing limitation period of six years for various civil actions), Conan Properties Inc. v. Conan Pizza Inc, 752 F.2d 145, 153, (5th Cir. 1985) (discussing defenses of laches and acquiescence), Dwinell-Wright Co. v. White House Milk Co. 132 F.2d 822, 825 (2d Cir. 1943) (discussing defense of acquiescence).

35. *Compare e.g.*, CHITTY ON CONTRACTS, ¶¶ 29-163, 29-164 (H.G. Beale et al. eds., 32d ed. 2015) (a principal may choose to ratify contracts where a fiduciary receives bribe from a third party), World Duty Free, ¶164 (quoting Lord Mustill's explanation that a contract procured through bribery is voidable and the injured party has the option of waiving his right to rescind), Bankers Trust, 599 F.2d 488 (enforcing promise not assert defenses against assignees in a case where the promisor's defense was founded on bribery) with, Sirkin v. Fourteenth St. Store, 108 N.Y.S. 830, 834 (App. Div. 1908)

a contract is completely non-waivable is equivalent, in legal terminology, to saying that the contract is void rather than voidable.

A. *Private Law I: Agency Law*

In the absence of any special statutory, constitutional, or contractual provisions, contractual disputes between governments and private actors tend to be governed by the same doctrines that govern disputes between private actors—in other words, they are governed by private law. Private law is also applicable whenever the parties explicitly opt out of any special norms applicable to government contracts in favor of a specific body of private law.[36]

The private law norms that govern contracts procured through bribery can be derived by analogy from the principles that govern two types of cases. First, there are the cases involving transactions resulting from a breach of trust on the part of a faithless agent. Second, since bribery is illegal, analogies can be drawn to other transactions tainted by some form of illegality. In *World Duty Free*, the panel examined and applied both lines of analysis, even though Lord Mustill, a former member of the United Kingdom's House of Lords, tendered an expert opinion expressing the view that as far as English law was concerned the cases on illegality "shed no light on the question before [the panel]."[37] Following Lord Mustill's example, it is convenient to begin with the principles of agency law.

In common law courts which do not rely on the lens of illegality, a principal whose agent has received a bribe—a benefit given with the view of influencing the agent and received without knowledge or consent on the part of the principal—is entitled to avoidance of a contract with the bribe-payer.[38]

(contracts procured through bribery cannot be ratified), Ballin v. Fourteenth Street Store, 123 App.Div. 582, 108 N.Y.S. 26 (App.Div.1908), aff'd 195 N.Y. 580, 89 N.E. 1095 (Ct.App.1909) (same),

36. *See e.g.* World Duty Free, ¶¶ 158-159.

37. World Duty Free, ¶ 164.

38. CHITTY ON CONTRACTS, *supra* note 35, ¶ 31–073; RESTATEMENT (THIRD) OF AGENCY § 8.02 (AM. LAW INST. 2006) ("An agent has a duty not to acquire a material benefit from a third party in connection with transactions conducted or other actions taken on behalf of the principal . . . ."); *id.* § 8.02 cmt. e ("The principal may recover monetary relief from the agent and, in appropriate circumstances, from any third party who participated in the

Some courts hold that these contracts are voidable rather than void, meaning that avoidance is not automatic. If the principal chooses not to avoid the contract, waives its right to avoid the contract, or fails to exercise the right of avoidance within a reasonable time, then the contract remains in force.[39] Some commentators have suggested, however, that contracts procured through bribery ought to be regarded as void rather than voidable on the ground that the bribe-payer typically is aware that the agent lacks authority to make the contract and contracts made in such circumstances are generally void.[40] On this view, a contract procured through bribery is only enforceable if it is explicitly adopted by the principal.

In the event of avoidance, the principal's contractual obligations are replaced by an obligation to make restitution—to return any benefits conferred upon the principal by the

---

agent's breach. A principal may avoid a contract entered into by the agent with a third party who participated in the agent's breach of duty."); Logicrose Ltd. v. Southend United Football Club Ltd. [1988] WLR 1256 (Ch) at 1260-61 (Eng.); Pan. & S. Pac. Telegraph Co. v. India Rubber [1875] 10 Ch App. 515 at 527-28 (Eng.); UBS AG (London Branch) v. Kommunale Wasserwerke Leipzig GmbH [2017] EWCA (Civ) 1567 [106]–[121] (Eng.). *See also* INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS art. 2.2.7 (2016) [hereinafter UNIDROIT PRINCIPLES], https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016 (detailing guidelines for conflicts of interest); *id.* at art. 3.18 (discussing damages). The fact that the bribe has been paid by someone who themselves acts as an agent of the counterparty rather than a principal seems to be irrelevant to the application of these principles. So long as the bribe-payer is acting within the course of his employment or the scope of their authority as an agent their principal is liable for the agent's bribery. Armagas Ltd. v. Mundogas S.A. [1986] AC 717 (HL) 4 (Eng.). In some situations even a bribe paid by a third party might trigger a right of avoidance. *See,* UBS AG (London Branch) v. Kommunale Wasserwerke Leipzig GmbH, *supra* (holding that rescission was available where bribe was paid by financial advisor to a municipal water company even though the advisor was not the agent of the counterparty).

39. CHITTY ON CONTRACTS, *supra* note 35, ¶¶ 29-163, 29-164 (a principal may choose to ratify contracts where a fiduciary receives bribe from a third party), World Duty Free, ¶164 (quoting Lord Mustill's explanation that a contract procured through bribery is voidable and the injured party has the option of waiving his right to rescind).

40. CHITTY ON CONTRACTS, *supra* note 35, ¶ 31–074; Berg, *supra* note 29, at 39–40. *See also* Kraft, *supra* note 29, at 210-11 (endorsing Berg's conclusion).

counterparty on account of the contract.[41] However, the tribunal in *World Duty Free* declined to give World Duty Free the benefit of this aspect of English doctrine on the dubious ground that its counsel had failed to request restitution as an alternative to a claim for breach of contract.[42]

In addition to avoidance, a principal whose agent has been bribed is entitled to seek compensation from either the bribe-payer or the corrupt agent.[43] Some courts have awarded the principal disgorgement, reasoning by analogy to cases in which third parties who aided in other sorts of breach of fiduciary duty were made to account for their profits.[44] Finally, in some common law jurisdictions—and in particular, the United States—punitive damages can be awarded against the bribe-payer.[45] Typically, the decision to award punitive damages is a discretionary one based on the outrageousness of the defendant's conduct.[46] This discretion may be particularly relevant

41. UBS AG (London Branch) v. Kommunale Wasserwerke Leipzig GmbH [2014] EWCA (Comm) 3615 [720-24] (Eng.), *aff'd* [2017] ECWA (Civ) 1567 [210]; Logicrose Ltd., *supra* note 38, at 1260–61; UNIDROIT PRINCIPLES, *supra* note 38, at art. 3.17 (discussing the retroactive effect of avoidance).

42. World Duty Free, ¶¶ 76–79, 179, 186 (stating that World Duty Free's counsel expressly requested restitution without clearly establishing that the request was predicated solely on a claim for breach of contract).

43. Continental Mgmt., Inc. v. United States, 527 F.2d 613, 618-9 (Ct. Cl. 1975); Mahesan s/o Thambiah v. Malay. Gov't Officers' Coop. Hous. Soc'y Ltd. [1977] AC 374 (Malay.); Fyffes Group Ltd. v. Templeman [2000] 2 Lloyd's Rep. 643 (QB) 668-71 (Eng.); RESTATEMENT (THIRD) OF AGENCY, *supra* note 38, § 8.02 cmt. e; CHITTY ON CONTRACTS, *supra* note 35, ¶ 31–073 (explaining that bribe-payer and agent may be sued either in tort or for money had and received).

44. CHITTY ON CONTRACTS, *supra* note 35, ¶ 31-073; Novoship (UK) Ltd. v. Mikhaylyuk [2014] EWCA Civ 908, [2015] QB 499 [67]-[93] (Eng.) ("[T]he remedy of an account of profits is available against one who dishonestly assists a fiduciary to breach his fiduciary obligations, even if that breach does not involve a misapplication of trust property."); Fyffes Group Ltd. [2000] 2 Lloyd's Rep, at 669–70 (citing Cook v. Deeks [1916] AC 554 (disgorgement provided against party who aided in breach of duty of loyalty) and Attorney Gen. v. Guardian Newspapers [1990] 1 AC 109 (disgorgement awarded against party who aided in breach of duty of confidentiality)).

45. *See* Jaclyn, Inc. v. Edison Bros. Stores, Inc., 406 A.2d 474, 492-4 (N.J. Super. Ct. Law Div. 1979) (discussing availability of and awarding punitive damages).

46. RESTATEMENT (SECOND) OF TORTS § 908 (AM. LAW INST. 1965).

when deciding what consequences to visit upon a principal whose agent has paid a bribe.[47]

B. *Private Law II: Illegality and Related Doctrines*

Lord Mustill recommended that we analyze the problem of contracts procured through bribery using agency law principles. However, it is also important to examine the second set of private law principles considered by the panel in *World Duty Free*, namely, the principles that govern contracts whose formation or performance involves activity that is illegal or otherwise deemed reprehensible.[48] Courts in the United States seem particularly willing to extend these principles to cases involving contracts procured through bribery.

We begin our discussion with the cases in which illegality is raised as a defense to a claim for breach of contract. The defense rests on two distinct legal principles, both of which are motivated by the notion of respect for the rule of law.[49] The first principle is that a contract whose performance involves a legal wrong will not be enforced.[50] The outer bounds of this principle are unclear in many circumstances, including: when performance may, but need not, involve illegality; where performance of the contract represents only a minor step toward completion of the illegal act; or where only one party is aware

---

47. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 544–46 (1999) (stating that it may be inappropriate to hold employers who make good faith efforts to comply with the prohibition on sex discrimination in Title VII of the Civil Rights Act of 1964 liable for punitive damages). For discussion of the conflicting views about the state of U.S. law on this point see Exxon Shipping Co. v. Baker, 554 U.S. 471, 482–84 (2008).

48. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981); LAW COMM'N, ILLEGAL TRANSACTIONS: THE EFFECT OF ILLEGALITY ON CONTRACTS AND TRUSTS, Consultation Paper No. 154 (1999) [hereinafter ILLEGAL TRANSACTIONS]; LAW COMM'N, THE ILLEGALITY DEFENCE: A CONSULTATIVE REPORT, Consultation Paper No. 189 (2009) [hereinafter ILLEGALITY DEFENCE]. The UNIDROIT PRINCIPLES explicitly decline to address the topic of whether contracts can be invalidated on the grounds of immorality or illegality. UNIDROIT PRINCIPLES, *supra* note 38, at art. 3.1 (detailing matters not covered).

49. The Law Commission draws a similar distinction in its consultation paper on the subject. *See* ILLEGALITY DEFENCE, *supra* note 48, at 18–32 (distinguishing statutory illegality and common law illegality).

50. *Id.* (discussing "illegality under the common law" which covers cases in which the contract's performance requires, is intended to facilitates or involves the commission of a legal wrong).

of the illegality.[51] In any event, it is clear that this principle bars enforcement of contracts whose performance entails paying a bribe. Common cases involve selling or buying agents who have paid bribes being barred from suing for their commissions.[52] It is not, however, obvious that this principle applies to a contract procured through bribery whose performance does not in and of itself involve any illegal conduct.[53]

The second principle that underpins the defense of illegality is that a contract cannot be enforced where some legal norm expressly or impliedly bars enforcement.[54] This principle has the potential to affect virtually any contract procured through bribery. For instance, a tribunal might hold that a criminal prohibition on bribery impliedly bars enforcement of any resulting contract by the briber; the tribunal may even bar enforcement by the recipient of the bribe on this ground.[55] Even more plausibly, a tribunal might hold that a statute which prescribes a particular procedure for forming government contracts impliedly bars enforcement of contracts formed in violation of that procedure.[56] Naturally, the idea

---

51. ILLEGAL TRANSACTIONS, *supra* note 48, at 21–27.

52. Oscanyan v. Arms Co., 103 U.S. 261 (1881); McConnell v. Commonwealth Pictures Corp., 166 N.E.2d 494, 497 (N.Y. 1960).

53. Spalding argues forcefully that for this reason the panel in World Duty Free erred in applying the doctrine of illegality to the contract at issue there. He does not, however, consider the applicability of the doctrines of unclean hands and public policy discussed in this section. Spalding, *supra* note 8, at 476–478.

54. ILLEGALITY DEFENCE, *supra* note 48, at 18-21 (describing "statutory illegality" as cases in which legislation expressly or impliedly renders the contract unenforceable).

55. Bankers Trust Co. v. Litton Systems, 599 F.2d 488, 491 (holding that a contract that is not itself illegal is unenforceable in a suit brought by the wrongdoer if there is a direct connection between the illegal bribe and the obligation sued upon). The court in *Bankers Trust* went on to hold that under New York law the right to avoid a contract procured through bribery could be waived as against innocent assignees of the bribe-payer. *Id.* at 492. This meant that when a contract procured through bribery assigned by the bribe-payer to a bank, the bank was able to enforce the contract because the victim of the bribery 1) waived its right to assert defenses against an assignee that it would normally have against the bribe-payer and 2) the bank received the assignment in good faith without knowledge of the bribery. *Id.* at 491–93.

56. See *e.g.*, Manning Eng'g, Inc. v. Hudson Cty. Park Comm'n, 376 A.2d 1194, 1207 (N.J. 1977) (asserting that claims of illegality in public contracting often are based on failure to conform to bidding requirements that

that the civil consequences of violating a particular legal prohibition can be derived by implication, even in the absence of express language, grants adjudicators considerable discretion.

The defense of illegality is often virtually indistinguishable from two other doctrines: the unclean hands doctrine (*ex turpi causa*) and the defense of public policy. In its traditional form, the unclean hands doctrine "closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant."[57] In some jurisdictions the doctrine has been extended to bar plaintiffs from seeking legal as well as equitable relief.[58] In other cases, including *World Duty Free*, rather than refer to the unclean hands doctrine, tribunals simply refer to something called the doctrine of public policy, which has similar features.[59] The unclean hands doctrine and the doctrine of public policy are broader than the doctrine of illegality because the inequitable conduct or contravention of public policy that triggers these doctrines need not be strictly illegal.[60] Consequently, there is little doubt that paying a bribe can trigger the application of these doctrines against a party seeking a legal remedy.[61]

---

create the potential for favoritism or corruption). *See* also, Theodor Meron, *Repudiation of Ultra Vires State Contracts and the International Responsibility of States* 6 INT'L & COMP. L. Q. 273 (1957) (discussing the general principle that states are entitled to repudiate ultra vires contracts and decisions of international tribunals qualifying that principle by resorting to doctrines such as unjust enrichment, ratification, estoppel, or customary rules of state responsibility).

57. Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945). *See also* Holmann v. Johnson (1775) 98 Eng. Rep. 1120, 1121 ("No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.").

58. *See, e.g.*, Adler v. Federal Republic of Nigeria, 219 F.3d 869, 872-78 (9th Cir. 2000).

59. *See, e.g.,* World Duty Free, ¶¶ 139, 160, 161; Sirkin, 108 N.Y.S. 830, 834; McConnell v. Commonwealth Pictures Corp., 166 N.E.2d 496 (N.Y. 1960).

60. The court in McConnell, 166 N.E.2d at 496, went out of its way to endorse this proposition, implying that its decision could be justified under either public policy or illegality. ("The issue is not whether the acts alleged in the defenses would constitute the crime of commercial bribery under section 439 of the Penal Law, Consol. Laws, c. 40, although it appears that they would.").

61. *See, e.g.*, Sirkin, 108 N.Y.S. 830, 834 (applying the doctrine of public policy to bar enforcement of contract procured through commercial brib-

In functional terms the defenses of illegality, public policy, and unclean hands all provide entitlements to avoid tainted contracts in remarkably harsh ways.[62] First of all, when a party's entitlement to a contractual remedy is avoided on these grounds, it usually is not replaced by an entitlement to restitution. The general rule is that there is no obligation to make restitution of benefits conferred under an illegal contract unless the plaintiff can show that it was less culpable than the defendant (not *in pari delicto*).[63] In practice, this has been taken to mean that a bribe-payer is only entitled to restitution if it can show that it paid the bribe under duress or while mistaken about the legality of its conduct.[64] A second facet of the doctrine of illegality is that several courts have held that contracts procured through illegal bribery cannot be ratified.[65] However, it has also been held that the defense of public policy simply does not arise if the principal of the agent who has been bribed is aware of the bribery.[66]

Courts appear to have some latitude in deciding whether to apply the defense of illegality.[67] Some commentators sug-

ery); Berg, *supra* note 29, at 41–45 (endorsing application of the doctrine of *ex turpi causa* to render government contracts obtained through bribery unenforceable at the suit of the briber); *Cf.* Kraft, *supra* note 29, at 211 (restating Berg's view, but indicating preference for view that these contracts are void).

62. *See, e.g.*, Adler, 219 F.3d at 877-78 (denying relief to a U.S. national who advanced over $5 million that he knew would be used to bribe Nigerian government officials in furtherance of what he understood to be an illegal agreement to defraud the Nigerian government).

63. Parkinson v. Coll. of Ambulance, Ltd. [1925] EWHC (KB) 1114, [1925] 11 KB 2 at 14-16 (Eng.); Mohamed v. Alaga & Co. [2000] 1 WLR 1815 (AC) at 1823-25 (Eng.); RESTATEMENT (SECOND) OF CONTRACTS § 198 cmts. a, b (AM. LAW INST. 1981).

64. ILLEGALITY DEFENCE, *supra* note 48, at 66; RESTATEMENT (SECOND) OF CONTRACTS § 198. For a critique of this construction of the *in pari delicto* requirement see ILLEGALITY DEFENCE, *supra* note 48, at 74–78.

65. Sirkin, 108 N.Y.S. at 835; Ballin, 108 N.Y.S. 26, 27.

66. Ballin, *supra* at 28.

67. *See, e.g.*, Marlwood Commercial Inc. v. Kozeny [2006] EWHC (Comm) 872 (QBD) [172] (Eng.) ("The mere proof of illegality will not cause the Court 'to draw up its skirts and refuse all assistance to the plaintiff.' The illegality or immorality must be central to the case, and not merely collateral."); Courage Ltd. v. Crehan [2001] ECW (Civ) 1930, [2001] 3 WLR 1646 at 1660-63 (Engl.). The Law Commission has endorsed a flexible application of the illegality defense. *See* ILLEGALITY DEFENCE, *supra* note 48, at 76–78 (recommending a case-by-case application of the illegality defense).

gest that, in exercising their judgment in this area, it is important that courts maintain proportionality between the seriousness of a plaintiff's misconduct and the severity of the penal effect of denying relief.[68] Similarly, some of the courts asked to apply the doctrines of unclean hands or public policy have considered the relative seriousness of the misconduct of the plaintiff and the defendant, and whether denying the plaintiff relief would unjustly enrich the defendant.[69] However, the traditional view, adopted by the tribunal in *World Duty Free*, is that even a culpable defendant—in this case, a government whose leader solicited a bribe—is entitled to raise the defenses of illegality, unclean hands, and public policy because of the public interest in condemning and discouraging the plaintiff's misconduct.[70]

C. *Public Law*

In common law jurisdictions, contracts with the government are often governed by legal principles which resemble, but are not necessarily identical to, principles that govern contracts among private actors.[71] Therefore, depending on the jurisdiction, the principles that govern the effects of bribery on contracts between private actors may or may not apply to government contracts procured through bribery.

There are several reasons why it makes sense to resist drawing analogies from private law principles. To begin with, there are reasons why judges and lawmakers might view bribery in public contracting as a form of illegality, even if bribery in private settings is considered an agency problem. First, whereas bribery of an agent of a private firm is not always criminalized, bribery of government officials is almost universally criminalized.[72] Second, many jurisdictions have passed

68. RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981).

69. *See, e.g.*, Adler v. Federal Republic of Nigeria, 219 F.3d 869, 877 (9th Cir. 2000); Nelson v Nelson [1995] HCA 25 (Austl.).

70. World Duty Free, ¶ 181.

71. *See, e.g.*, Anne C. L. Davies, THE PUBLIC LAW OF GOVERNMENT CONTRACTS 7 (2008) ("[Government contracts] are subject mainly to the ordinary private law of contract.").

72. UN Convention, *supra* note 10, at Art. 15, imposes a duty on states to adopt measures criminalizing bribery of national public officials. A handful of states are not parties to the Convention, namely, Antigua and Barbuda, Barbados, Democratic Republic of Korea, Eritrea, Somalia, St. Vincent and

legislation specifying procedures that must be followed in the course of awarding public contracts. Examples include requirements to solicit bids through open advertising or to award the contract to the lowest qualified bidder.[73] Contracts procured through bribery often contravene these types of procedural rules—for example, the contractor might have paid a bribe to induce an official to breach rules requiring confidentiality of bids.[74] When this happens, the performance—not just the formation—of the contract will be illegal, placing these cases right in the core of the doctrine of illegality.[75] Third, if one assumes that the state generally has greater power and influence than private firms, then bribery in government contracting seems like a more serious public policy concern than commercial bribery.[76]

There is another set of reasons for rejecting private law analogies when the recipient of a bribe is a head of state like President Moi. In these situations, analogies to either contracts formed by faithless agents or contracts tainted by illegality appear inapt. A head of state seems less like a faithless agent and more like an avaricious principal; a contract made by a head of state looks less like an illegal act that is contrary to public pol-

the Grenadines, Suriname, Syria, and Tonga. All of these states, with the possible exception of North Korea, criminalize bribery of domestic public officials. *See*, U.S. State Department, Bureau of Economic and Business Affairs, INVESTMENT CLIMATE STATEMENTS, https://www.state.gov/e/eb/rls/othr/ics/index.htm (database reporting under "corruption" that in 2017 Antigua and Barbuda, Barbados, Eritrea, St. Vincent and the Grenadines and Suriname criminalized corruption, and containing the same information for Syria in 2015 and Tonga in 2014), Kaunain Rahman, *Somalia: Overview of Corruption and Anti-Corruption: U4 Expert Answer*, 8 https://knowledgehub.transparency.org/assets/uploads/helpdesk/Somalia_2017.pdf (Somalia criminalizes bribery of national public officials).

73. See *e.g.* UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, UNCITRAL MODEL LAW ON GOVERNMENT PROCUREMENT (2014); For cross-country data on one category of procurement procedures *see* WORLD BANK, PROCURING INFRASTRUCTURE PUBLIC-PRIVATE PARTNERSHIPS REPORT 2018: ASSESSING GOVERNMENT CAPABILITY TO PREPARE, PROCURE, AND MANAGE PPPS, 44-48 (2018).

74. Rose-Ackerman and Palifka, *supra* note 13, at 105 (citing examples).

75. These contracts may also be *ultra vires*. For a discussion and critique of the principles applicable to *ultra vires* government contracts under both municipal and international law see Meron, *supra* note 56.

76. *See, e.g.*, Jaclyn, 406 A.2d 474, 484 n.7 (drawing a distinction between public and private contracts, citing Manning Eng'g, 376 A.2d 1194, 1208–9).

icy and more like a definitive expression of public policy. Courts and arbitral tribunals generally reject these arguments on the theory that the head of state is still an agent of the state and bound by the prohibitions on bribery of public officials set out in the law of virtually every jurisdiction.[77] This response is not always wholly convincing.[78]

In the United Kingdom, the standard terms employed in connection with many public contracts embody principles resembling those of agency law. According to those terms, government contractors must promise not to provide inducements to any public officials in connection with the award or performance of a public contract[79] Breach of this covenant gives the government an entitlement to terminate the contract—or, in my terminology, to avoid it—and sue for compensation.[80]

U.K. governmental authorities employ a somewhat different set of terms in contracts that govern public-private partnerships covered by the government's Private Finance Initiative (PFI)[81] These partnerships necessarily involve long-term relationships and substantial sums of money.[82] According to the standard terms that govern PFI contracts, breach of the covenant against bribery only gives the government an automatic

77. World Duty Free, ¶ 185. *See also* Republic of the Phil. v. Westinghouse Elec. Corp., 774 F. Supp. 1438, 1452–54 (D.N.J. 1991) (rejecting argument that Ferdinand Marcos did not owe a fiduciary duty to the Republic of the Philippines).

78. Consider, for example, the BAE affair in which the monarch of Saudi Arabia, which is a kingdom without a written constitution, explicitly condoned the alleged bribery of a public official in connection with a public contract. *See* Nelson D. Schwartz & Lowell Bergman, *Payload: Taking Aim at Corporate Bribery*, N.Y. TIMES (Nov. 25, 2007), https://www.nytimes.com/2007/11/25/business/25bae.html (describing BAE scandal). *See also* R v. Dir. of the Serious Fraud Office [2008] UKHL 60, [2008] 3 WLR 568, 584-86 (appeal taken from Eng.) (discussing whether the UK government's refusal to prosecute BAE was consistent with its obligations under the OECD Convention).

79. GOV'T LEGAL SERV., MODEL SERVICES CONTRACT cl. 39 (2018), https://www.gov.uk/government/publications/model-services-contract.

80. *Id.*

81. HM TREASURY, A NEW APPROACH TO PUBLIC PRIVATE PARTNERSHIPS (2012), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/205112/pf2_infrastructure_new_approach_to_public_private_parnerships_051212.pdf.

82. *Id.* at 15-19.

entitlement to terminate the contract and sue for compensation when the relevant breach is committed by an employee who "does not act independently" of the Contractor.[83] The phrase "does not act independently" is defined in such a way that the government only enjoys these rights when the covenant is breached by an employee who acts under the authority or with the knowledge of a director of the contractor.[84] If the breach is committed by an employee who acts independently of the contractor, or by a sub-contractor, then termination of the main contract is only permitted if the contractor fails to dismiss the employee or sub-contractor within 30 days.[85] These provisions are explicitly designed to balance the government's interest in distancing itself from a corrupt partner against the contractor's desire to avoid the risk of termination for reasons beyond its control.[86]

The situation is different again in the United States, where many courts view bribery in public contracting through the lens of the doctrines surrounding illegal contracts. This has resulted in very harsh treatment of parties who pay bribes to obtain public contracts. A classic example is the leading New York case, *S. T. Grand, Inc. v. City of New York*.[87] The case concerned a contractor who paid a bribe to obtain a no-bid contract to clean a New York City reservoir. The court held that not only was the contractor barred from recovering either its unpaid fees or the fair value of the work done, but, in addi-

---

83. HM TREASURY, STANDARDISATION OF PF2 CONTRACTS § 23.4.2 (2012), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/207383/infrastructure_standardisation_of_contracts_051212.pdf.:

> 23.4.3 Termination for Corrupt Gifts and Fraud
> (b) . . .if a Prohibited Act is committed by the Contractor or by an employee not acting independently of the Contractor, then the Authority may terminate the Contract by giving notice to the Contractor provided that, if the Prohibited Act is an offence under section 7 (1) of the Bribery Act 2010, the Authority may not terminate the Contract unless, acting reasonably, it considers termination of the Contract to be in the best interests of the Project. (footnote omitted)

84. *Id.* at note 89 ("[Not acting independently] means the employee acts under the authority of or with the knowledge of a director of the Contractor (rather than a majority board decision").

85. *Id.*

86. *Id.* § 23.4.1.2.

87. S.T. Grand, Inc. v. City of New York, 298 N.E.2d 105 (N.Y. 1973).

tion, the city could recover all the fees it had already paid the vendor. In other words, using the terminology introduced above, the court held that the city was entitled to retroactive avoidance without restitution. The court in *S.T. Grand* held that, in exceptional cases, a government might only be awarded compensatory damages, as opposed to retroactive avoidance, for entering into a tainted contract if it could be shown that the decision to award the contract was not tainted and the damages were easy to compute.[88] However, other courts in the United States have explicitly rejected these efforts to mitigate the impact of avoiding illegal public contracts.[89]

New York's harsh approach to contracts obtained through bribery has been followed by courts in other states[90] and is embodied in the standard provisions that govern most federal government procurement contracts.[91] Other courts have added the wrinkle that the government is entitled to avoid these sorts of contracts even if the superiors of the corrupt official condoned the conflict of interest.[92] In a case involving a conflict of interest but not a bribe, the U.S. Supreme Court explained;

88. *Id.* at 108–09 (N.Y. 1973) (citing Gerzof v. Sweeney, 211 N.E.2d 826 (N.Y. 1965) (awarding damages to the municipality for the loss caused by failing to contract with the lowest bidder when a contract to install a power generator was improperly, but without any proof of bribery, awarded to the higher of two bidders)).

89. *See* Thomson v. Call, 699 P.2d 316, 327–28 (Cal. 1985).

90. *See generally* Pan Am Petroleum & Transp. Co. v. United States, 273 U.S. 456 (1927); K & R Eng'g Co., Inc. v. United States, 616 F.2d 469 (Ct. Cl. 1980); Thomson, 699 P.2d 316, *cert. denied*, 474 U.S. 1057 (1986); Cty. of Essex v. First Union Nat'l Bank, 891 A.2d 600 (N.J. 2006). *See also* Sheridan Strickland, Municipality of Anchorage v. Hitachi Cable, Ltd. — *Time for Adoption of a Void Contract Remedy for Alaska Public Contracting Authorities*, 6 ALASKA L. REV. 227, 238–43 (1989).

91. The Federal Acquisition Regulation gives federal government agencies the authority to declare void and rescind contracts where a final conviction for bribery, conflict of interest or a similar violation has been entered. The agency may also recover the amounts expended and the property transferred by the agency under the terms of the contracts involved. Federal Acquisition Regulations System, 48 C.F.R. § 3.700–.705 (2018).

92. United States v. Miss. Valley Generating Co., 364 U.S. 520, 561 (1961). *See also,* Thomson, 699 P.2d at 326 (holding that an officer's disclosure of a conflict of interest did not prevent avoidance of a contract under state legislation).

> [Congress] recognized that an agent's superiors may not appreciate the nature of the agent's conflict, or that the superiors might, in fact, share the agent's conflict of interest. The prohibition was therefore designed to protect the United States, as a Government, from the mistakes, as well as the connivance, of its own officers and agents.[93]

D. *Transnational Law*

Disputes involving contracts with a transnational dimension can plausibly be adjudicated under the laws of at least two jurisdictions, but ordinarily the laws of one particular jurisdiction ultimately apply. Typically, the contract itself will point to the law of either the jurisdiction of one of the parties or a prominent neutral jurisdiction such as England or New York State. A tribunal called on to resolve a contract dispute may choose to give effect to this kind of choice-of-law clause. Alternatively, if it decides to ignore the choice-of-law clause or in the absence of such clause, the tribunal may use its own choice-of-law principles.[94] In either event, the substantive principles applied will be drawn from the internal law of one jurisdiction or another.

Even when they choose to apply a specific jurisdiction's laws to a transnational transaction, tribunals sometimes deviate from the principles that would govern a wholly domestic transaction in that jurisdiction. The usual motivation is to strike a balance between the laws and policies of the chosen jurisdiction and the conflicting laws or policies of other jurisdictions implicated by the transaction.[95] For example, when deciding whether to avoid transnational contracts on the basis that they violate public policy, both domestic courts and arbitral tribunals often apply a narrow version of the doctrine of public policy sometimes known as "transnational public pol-

93. Miss. Valley Generating Co., 364 U.S. at 561.

94. *See, e.g.,* World Duty Free ¶¶158-59, Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors [2012] EWCA Civ 638 at ¶¶ 11-14.

95. *See, e.g.*, Westacre Invs. Inc. v. Jugoimport-SPDR Holding Co. Ltd. [1999] EWCA (Civ) 1401, [2000] QB 288 [304]–[305] (Eng.) (divided English court deciding to enforce Swiss arbitral award in the face of evidence that it was based on a contract to pay a bribe that would be contrary to English public policy).

icy."[96] Transnational public policy is intended to embody values that reflect an international consensus as opposed to the potentially idiosyncratic values embodied in the conventional doctrine of public policy.[97]

The issue of whether to apply transnational public policy typically arises when there is some basis for arguing that the bribe recipient's legal system condoned the bribe. Some courts are not shy about enforcing their own conceptions of public policy in the face of inconsistent policies of other states. The U.S. Supreme Court's decision in *Oscanyan v. Arms Co.* exemplifies this approach.[98] In that case, the Turkish consul-general in New York sued for the sum of $136,000, which he claimed was owed to him as a commission for exercising his influence to induce his government to purchase Winchester rifles from the defendant.[99] The U.S. Supreme Court decided that this amounted to a contract to pay a bribe to a government official that was contrary to public policy under the laws of the United States.[100] The court went on to decide that evidence of Turkish law permitting such contracts was irrelevant, holding;

> In any view of the contract here, whether it would be valid or invalid according to Turkish law and customs, it is intrinsically so vicious in its character and tendency, and so repugnant to all our notions of right and morality, that it can have no countenance in the courts of the United States.[101]

In the context of international commercial arbitrations, the concept of transnational public policy has been applied on numerous occasions to agreements whose performance involves bribery.[102] The leading award on point comes from the International Chamber of Commerce (ICC)—Judge Lagergren's

96. *See e.g.,* World Duty Free ¶¶ 139, 148, Pieter Sanders, *Transnational (or Truly International) Public Policy and International Arbitration,* 258, ¶¶ 1-12, 50-69, ICCA Congress Series, New York Volume 3, (Kluwer Law International, 1987)

97. World Duty Free, ¶¶ 138–57.

98. Oscanyan v. Arms Co., 103 U.S. 261, 277-78 (1881).

99. *Id.* at 262.

100. *Id.* at 277-78.

101. *Id.*

102. *World Duty Free, supra* note 1, ¶¶ 148-56.

award in ICC Case No 1110.[103] In that case, an Argentine engineer brought a claim for breach of a contract to pay him a commission for selling electrical equipment to the Argentine government. The size of the commissions suggested that performance of the contract would have involved bribery of government officials. Judge Lagergren declared that the claim involved such a "gross violation of good morals and international public policy" that he declined to exercise jurisdiction over the case.[104]

The tribunal in *World Duty Free* cited Lagergren's award, as well as other awards and the burgeoning network of anti-corruption treaties, in support of its conclusion that bribery was contrary to transnational public policy.[105] This in turn formed the basis for the conclusion that "claims based on corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal."[106]

E. *Public International Law*

Governments whose officials solicit or accept bribes from foreign counterparties or that breach the resulting contracts risk violating international law. First, a government whose official has solicited or accepted a bribe might be in violation of obligations to combat corruption contained in anti-corruption treaties, investment treaties, or regional trade agreements.[107] Second, repudiation of a contract with a foreign actor might amount to violation of a government's obligations under either an investment treaty or customary international law—especially if the breach can be characterized as part of an unfair,

103. Case No. 1110 of 1963, 21 Y.B. Comm. Arb. 47 (ICC Int'l. Ct. Arb.).

104. *Id.* ¶ 23.

105. World Duty Free Co. Ltd., *supra* note 1, ¶¶ 142–57.

106. *Id.* ¶ 157. Recall however that the tribunal's alternative ground for decision was that the contract was voidable under principles of agency law. To similar effect *see* Westacre, [1999] EWCA (Civ) 1401. While it is clear that an English court will not directly enforce a contract that contravenes public policy against corruption of public officials, it is less clear whether it will enforce an arbitral award upholding such a contract, especially if the contravention of public policy is not evident on the face of the award. *Compare* Westacre. [1999] EWCA (Civ) 1401 (award enforced) *with* Soleimany v. Soleimany [1999] QB 785 (CA) (award not enforced). *See generally* Nelson Enonchong, *The Enforcement of Foreign Arbitral Awards Based on Illegal Contracts*, 2000 LLOYD'S MAR. & COM. L.Q. 495.

107. LLAMZON, *supra* note 8, ¶¶ 10.63–.70; Klaw, *supra* note 28, at 66-87.

arbitrary or discriminatory pattern of conduct.[108] These kinds of international obligations can be enforced either by private actors, as in the case of investor-state arbitration, or by governments through a variety of methods, including under the doctrine of diplomatic protection.[109]

Notwithstanding these principles, at least three other aspects of public international law seem to encourage avoidance of contracts procured through bribery—in the sense of excusing the government whose official was bribed from obligations under both domestic and international law.

First, many governments have signed international treaties that encourage them to avoid contracts procured through bribery under domestic law. Article 34 of the United Nations Convention Against Corruption provides; "States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action."[110] The Council of Europe's Civil Law Convention on Corruption speaks in more mandatory terms. Article 8 provides; "[e]ach Party shall provide in its internal law for the possibility for all parties to a contract whose consent has been undermined by an act of corruption to be able to apply to the court for the contract to be declared void, notwithstanding their right to claim for damages."[111] International financial institutions (IFIs) may require governments that borrow from them to adopt anti-corruption clauses in their procurement contracts. Those clauses obligate the borrower to terminate or suspend the relevant procurement contracts and to demand restitution of funds advanced by the IFI if the contractor is sanctioned by the IFI for corruption.[112]

Second, international law can functionally allow governments to avoid obligations arising from or in relation to con-

108. *See generally* Julian Arato, *The Logic of Contract in the World of Investment Treaties*, 58 WM. & MARY L. REV. 351 (2016) (discussing legal principles that are and ought to be applied when a breach of contract is characterized as a breach of an investment treaty).

109. Klaw, *supra* note 28, at 88.

110. UN Convention, *supra* note 10, at art. 34.

111. Civil Law Convention, *supra* note 10, at art. 8.

112. *See, e.g.*, WORLD BANK, GUIDELINES ON PREVENTING AND COMBATING FRAUD AND CORRUPTION IN PROJECTS FINANCED BY IBRD LOANS AND IDA CREDITS AND GRANTS ¶¶ 9(d), (f) (2006).

tracts procured through bribery by preventing those claims from being heard in fora created by international instruments. By far the most important fora of this sort are arbitral tribunals created under bilateral investment treaties (BITs) that allow investors to bring claims against host states. At least one tribunal has interpreted a BIT to exclude investments obtained through bribery. In that case, *Metal-Tech v. Republic of Uzbekistan,* the relevant BIT followed the common practice of limiting the definition of covered investments to those "implemented in accordance with the laws and regulations" of the host state.[113] The panel held that, as a result of this legality requirement, a contract procured through bribery was not covered by the BIT and dismissed the investor's $173 million claim on the grounds of lack of jurisdiction.[114] The panel noted that this outcome might seem unfair because it exonerated a defendant which might itself have been involved in a corrupt act.[115] Other arbitral panels have cited the doctrines of equitable estoppel and good faith as bases for barring governments from raising less morally-charged jurisdictional objections.[116] The *Metal-Tech* panel did not explicitly refer to the doctrine of estoppel but explained its conclusion by saying: "The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of

113. Metal-Tech Ltd., Award, ¶ 130. *See also,* Jason Webb Yackee, *Investment Treaties and Investor Corruption: An Emerging Defense for Host States?,* 52 VA. J. INT'L L. 723, 739-745 (2012) (describing the terms of other bilateral investment treaties).

114. This interpretation of the legality requirement is by no means obvious. For discussion see Yackee, *supra,* 739-745 (2012) (identifying ambiguities in the scope and effect of this type of clause and recommending that states clarify the language of their treaties).

115. Metal-Tech Ltd., Award, ¶ 389.

116. Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18, Decision on Jurisdiction, ¶ 194 (Jul. 6, 2007) (estopping state from arguing that concession agreement was ultra vires and thus void because content of agreement was approved for many years); Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Phil., ICSID Case No. ARB/03/25, Award, ¶ 346 (Aug. 16, 2007) ("Principles of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law."). *See generally* Reeder, *supra* note 28 (arguing that ICSID tribunals should use estoppel to bar states from raising corruption as an obstacle to jurisdiction).

law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act.[117]"

By justifying its decision as a means of promoting the rule of law, the *Metal-Tech* tribunal appeared to embrace the notion that a tribunal brings the administration into disrepute by lending its assistance to a party who has acted unlawfully. This notion also underlies illegality and related doctrines.

A third important aspect of international law concerns whether governments can raise bribery as a substantive defense—rather than a jurisdictional objection—to claims that they have violated their international obligations. There is some support for the idea that an international equivalent to the unclean hands doctrine bars a bribe-payer, or a government acting on its behalf, from enforcing international obligations resulting from its own misconduct. Specifically, in the famous *Tinoco Arbitration*, the panel held that there is no international obligation to honor a debt arising from a loan nominally made to the government if the creditor knew that the proceeds of the loan were being put to the personal use of a government official rather than legitimate government purposes.[118] In that case, the British government's claim against Costa Rica on behalf of the Royal Bank of Canada—which at the time qualified for British diplomatic protection—failed because the loan the bank was seeking to enforce was obviously used to finance the escape of a fleeing dictator and his brother.[119]

In a similar vein, the commentary to the United Nations' Draft Articles on State Responsibility presents a hypothetical in which one State bribes an official of another and then offers the cryptic statement, "[T]he question of the responsibility of the State whose official had been bribed towards the corrupting State in such a case could hardly arise . . . ."[120] Neither of these authorities is explicit about their underlying rationale, and the Draft Articles do not purport to cover the case in

117. Metal-Tech Ltd., Award, ¶ 389.

118. Aguilar-Amory & Royal Bank of Can. Claims (Gr. Brit. v. Costa Rica), 1 R.I.A.A. 369 (1923).

119. *Id.* at 393–94.

120. Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, U.N. Doc. A/56/10, at art. 7, cmt. 8 n.150 (2001).

which the bribe is paid by a private actor.[121] Nonetheless, these authorities are in tension with the proposition that a government is estopped from raising corruption of its own officials as a defense.[122]

III. The Logic of the Zero-Tolerance Approach

A. *The Case for Zero-Tolerance*

The panel decision in *World Duty Free*—which is consistent with the predominantly U.S. cases that analyze the effects of bribery in public contracting through the lens of the doctrine of illegality—takes an uncompromising stance toward efforts to enforce government contracts procured through bribery.[123] In these cases, proof of bribery has meant giving the government an entitlement to retroactive avoidance without restitution, and it seems safe to assume that, in some of these cases, the government could have relied on principles of agency law to obtain compensation, disgorgement, or punitive damages as

121. Spalding, *supra* note 8, 487–88 (stating that this principle applies only when the entity seeking to hold a state responsible for the actions of a corrupt official is a state). *Cf.* Llamzon, *supra* note 8, ¶¶ 10.57–.62 (suggesting that principle from hypothetical precludes responsibility to any entity that participates in the corrupt act).

122. *See* Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18, Decision on Jurisdiction, ¶ 194 (Jul. 6, 2007); Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Phil., ICSID Case No. ARB/03/25, Award, ¶ 346 (Aug. 16, 2007). *See generally* Reeder, *supra* note 28 (recognizing tension between *World Duty Free* and *Metal-Tech*, on the one hand, and, on the other hand, the proposition that states ought to be estopped from raising the corruption of its own official as a defense). Also worth noting was Siemens's decision to withdraw a claim against Argentina after admitting to U.S. and German authorities that the contract had been procured through bribery, even though it had already received an arbitral award in its favor of over $200 million on the grounds that Argentina had repudiated the contract in breach of an applicable investment treaty. *See* Kevin E. Davis, Guillermo Jorge & Maíra R. Machado, *Transnational Anticorruption Law in Action: Cases from Argentina and Brazil*, 40 Law & Soc. Inquiry 664, 675–77 (2015) (describing proceedings); Yackee, supra note 114, at 723–25 (same). If it was based on legal grounds, then Siemens' decision supports the view that bribery gives rise to some sort of defense for a state charged with breach of an international obligation. Siemens may, however, have been motivated by non-legal considerations. Yackee, *supra* note 113 at 725 (Siemens's decision to settle was probably driven by "considerations of the public relations costs of having the allegations of corruption remain in the public eye").

123. World Duty Free, ¶¶ 161-79 and cases cited in section II.B *supra.*

well.[124] Some of those cases go even further than the panel in *World Duty Free* and suggest that it is impossible for a government to waive its right to avoid contracts procured through bribery, holding that they are void rather than voidable.[125] The decisions in these cases clearly reflect the view that firms dealing with the government have an overriding obligation to combat bribery and endorse a *zero-tolerance* approach to the design of remedies for breach of that obligation. A striking feature of this approach is that fault on the part of the government whose official has solicited or accepted a bribe, is almost completely irrelevant.

At first glance the package of remedies that makes up the zero-tolerance approach appears to do a reasonably good job of satisfying four characteristic objectives of private law remedies for wrongs: expressing society's condemnation, protecting the victims from lasting harm, preventing future misconduct, and maintaining the integrity of the legal system.[126]

First, the zero-tolerance approach satisfies the impulse to *condemn* bribery as immoral. Refusing to protect rights obtained through bribery signals the wrongfulness of bribery.[127] This sort of condemnation arguably serves the interests of both the members of the legal system and the public at large.[128] It serves the interests of legal actors by allowing them

124. *See supra* Sections II.A and II.B.

125. See cases cited *supra* note 65.

126. See scholars cited *infra.*

127. There are obviously exceptions to the blanket statement that bribery of public officials is wrongful. For example, bribes may be paid to avoid the application of unjust laws or laws that inefficiently inhibit productive activity. For a striking example see Liebman v. Rosenthal, 57 N.Y.S.2d 875 (Sup. Ct.), *aff'd*, 59 N.Y.S.2d 148 (App. Div. 1945) (presenting factual scenario where defendant agreed to pay bribe to secure visa for family trying to escape approaching German Army). Presently, however, there is a broad consensus that the bribery of government officials is wrongful, and it seems appropriate for the law of government contracts to reflect that consensus. Strong evidence of this consensus is the widespread acceptance of the UN Convention *supra* note 10, at arts. 15, 16. As of June 26, 2018, the Convention had 186 parties. *Signature and Ratification Status*, UNITED NATIONS OFFICE ON DRUGS & CRIME (June 26, 2018), https://www.unodc.org/unodc/en/corruption/ratification-status.html.

128. A liberal purist might argue that the law should not be concerned with enforcing morality. However, even liberalism seems to allow room for the law to enforce norms whose respect is essential to the functioning of a just society. *See, e.g.*, Seana Valentine Shiffrin, *The Divergence of Contract and*

to demonstrate their commitment to upholding the law—which they must do in order to maintain their integrity—in the way suggested by the tribunal in *Metal-Tech*.[129] At the same time, moral condemnation can be instructive to the broader community. If people take their cue from the law in forming beliefs about how they ought to behave, then having courts unequivocally denounce bribery might play a useful role in combating a culture of corruption.[130]

A second virtue of the zero-tolerance approach is that it is roughly consistent with the goal of trying to *protect* the government, and by extension the public it represents, from the dangers posed by contracts procured through bribery.[131] The combined effect of avoiding a contract retroactively, refusing to award restitution, and allowing a claim for compensatory damages with the possibility of disgorgement or punitive damages, ought to leave the government at least as well off as it was before the corrupt contract was formed. In fact, if the contractor has transferred any value whatsoever to the government, then this package of remedies should leave the government better off than when the contract was formed. In this sense, the zero-tolerance approach admirably serves the purpose of protecting the government and its constituents.

A third reason for zero-tolerance is to *prevent* other parties from engaging in bribery in the future, either directly or indirectly.[132] If the goal is to encourage firms to prevent bribery,

Promise, 120 HARV. L. REV. 708, 714 (2007) (arguing that contract law ought to support the morally decent person).

129. On the significance of this sort of expression see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1528–30 (2000) (discussing impact of laws that communicate negative attitudes).

130. For a recent argument that contract law plays this sort of role in fostering liberal morality see Shiffrin, *supra* note 128, 740–43 (arguing that practices encouraged by contract law will tend to influence habits and expectations that in turn affect moral practices).

131. For an argument that this kind of protection—more commonly referred to as compensation—is a particularly important objective of private law *see* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995).

132. THEODORE H. MORAN, CTR. FOR GLOB. DEV., COMBATING CORRUPT PAYMENTS IN FOREIGN INVESTMENT CONCESSIONS: CLOSING THE LOOPHOLES, EXTENDING THE TOOLS, 7 (2008) ("[Investors] will be forced to think twice about using bribes to obtain concessions if they understand that their rights will not subsequently be recognized if at any point in the long life of their projects they find themselves engaged in investor arbitrations."); Nell, *supra*

then the penalties must be severe enough to ensure that failing to prevent bribery is no longer worthwhile for a rational contractor, even taking into account the fact that some instances of bribery will go undetected. This implies that the penalty for failing to prevent bribery should be equal—at the very least—to the benefit the firm would have expected to derive from causing or permitting bribery, adjusted upward to reflect the less-than-one-hundred percent probability of detection. The penalties imposed under the zero-tolerance approach have at least the potential to approach this level. The zero-tolerance approach also increases the probability that bribery will be detected to the extent that bribe-payers' competitors will monitor and report misconduct in the hopes that contracts will be avoided and awarded to them.[133]

Finally, a fourth argument in favor of the zero-tolerance approach arises where performance of the corruptly procured contract would be intrinsically illegal. Imagine, for example, if the contract provides a concession to log trees in an area protected by environmental legislation. In cases like this, granting an entitlement to avoid the contract allows the court to refrain from recognizing a duty on the part of the bribe-recipient to violate the law. To recognize that someone has a duty to break the law would be inconsistent with the principle of respect for the rule of law, a principle which seems vital to the *integrity* of tribunals that claim to act in the name of the law.[134] Therefore, according to this argument, the integrity of the legal system requires avoidance of contracts whose performance involves illegality.[135]

---

note 26, at 163, quoting, JEREMY POPE, CONFRONTING CORRUPTION: THE ELEMENTS OF A NATIONAL INTEGRITY SYSTEM. TI SOURCE BOOK 2000, 277 (2000) ("A bidder's knowledge that such contracts rest on shaky ground may be a further inducement against corrupt conduct."). Analysis of the merits of legal rules by reference to their effects on future behavior, including prevention of undesirable behavior, is characteristic of economic analysis of law. *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW, 1-2 (2004).

133. Nell *supra* note 26, 169-71 (discussing merits of allowing competitors to impugn corruptly procured contracts).

134. For a famous argument that judges ought to decide cases in a manner which promotes legal integrity, that is to say, in a way that makes the legal system as a whole coherent, *see* RONALD DWORKIN, LAW'S EMPIRE (1986).

135. The argument in the text is distinct from the Metal-Tech tribunal's argument that legal integrity demands condemnation of bribery. *See supra* note 117 and accompanying text. The Metal-Tech argument presumably is

B. *Objections*

So, what are the objections to the zero-tolerance approach? The main problem is that under the zero-tolerance approach the magnitude of liability effectively depends on two factors: whether the firm in question has managed to prevent bribery, and the extent to which the firm has invested in reliance upon the illicitly procured contract. Failure to prevent bribery automatically triggers liability, and the more a firm invests in reliance on the contract, the greater the impact of avoidance without restitution.

The implicit justification for this approach seems to be that the best way for firms to fulfill their obligation to combat bribery in public contracting is to distance themselves from contracts procured through bribery—either by preventing such contracts from being formed in the first place or treating them as unenforceable. From this premise, it follows that firms that fail to prevent their representatives from obtaining contracts through bribery deserve to be condemned unequivocally, that they ought to be discouraged from treating them as enforceable agreements, and that other firms should be deterred from similar lapses.

However, the implicit premise is flawed. It is flawed because it fails to recognize either the full variety or the relative importance of the actions that firms and governments can take to limit the harm caused by bribery in public contracting. By targeting only a subset of the forms of harmful conduct, the zero-tolerance approach provides for equal condemnation of actions that ought to be condemned in different ways and differentiates actions that ought to attract identical reprobation.[136] It also fails to protect the interests of the government and the public because it does not encourage bribe-paying

---

based on the idea that bribery is unlawful. A legal system that failed to condemn bribery would lack integrity because it would contradict the principle that individual public officials must obey the law. That argument is less than compelling because failing to condemn or even assisting someone who has violated the law does not clearly contradict the principle that the law must be obeyed, particularly if the relevant law provides for other forms of condemnation. By contrast, the argument in the text is concerned with the principle that the state and its counterparties must obey the law.

136. These defects are the same ones that plague any regime which imposes strict liability on corporate actors for agents' wrongdoing. *See generally* Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Anal-*

firms to take actions that offset the harms caused by bribery. Finally, it is doubtful that the zero-tolerance approach can be defended on the non-instrumental basis that it is necessary to uphold the integrity of the legal system.

1. *There are Alternative Ways for Firms to Combat Bribery*

The main virtue of the zero-tolerance approach lies in its effects on firms' incentives to engage in *prevention*: it encourages firms to prevent contracts tainted by bribery from being formed.[137] The most straightforward form of prevention is to avoid contracting with governments whose officials solicit or are likely to solicit bribes. Prevention can also encompass measures that fall short of "just say no,"[138] such as demanding more onerous terms from governments whose officials are likely to solicit bribes.

Prevention can be costly. To begin with, bribes are often paid by representatives of organizations rather than individuals acting on their own behalf.[139] Prevention is still feasible for organizations: they can screen prospective employees for evidence of bad character, train them to believe that bribery is contrary to organizational values, closely supervise dealings with governments known to be corrupt or corruptible, and refrain from giving agents excessively strong incentives to secure

---

ysis of Corporate Liability Regimes, 72 N.Y.U. L. REV. 687 (1997) (analyzing incentive effects of alternative corporate liability regimes).

137. THEODORE H. MORAN, CTR. FOR GLOB. DEV., COMBATING CORRUPT PAYMENTS IN FOREIGN INVESTMENT CONCESSIONS: CLOSING THE LOOPHOLES, EXTENDING THE TOOLS, 7 (2008) ("[Investors] will be forced to think twice about using bribes to obtain concessions if they understand that their rights will not subsequently be recognized if at any point in the long life of their projects they find themselves engaged in investor arbitrations."); JEREMY POPE, CONFRONTING CORRUPTION: THE ELEMENTS OF A NATIONAL INTEGRITY SYSTEM. TI SOURCE BOOK 2000, 277 (2000) ("A bidder's knowledge that such contracts rest on shaky ground may be a further inducement against corrupt conduct.").

138. https://en.wikipedia.org/wiki/Just_Say_No (describing advertising campaign against drugs that popularized the expression).

139. This is evident from the number of organizations that have been sanctioned for transnational bribery. *See* OECD Working Group on Bribery, *supra* note 23 (reporting that parties to the OECD Convention have sanctioned 158 entities in criminal proceedings for foreign bribery between the time the Convention entered into force in 1999 and the end of 2016, in addition to individuals who may have been acting on behalf of organizations).

contracts. However, those measures are likely to be costly.[140] Those costs may be immaterial for small closely-held firms like World Duty Free Ltd., but for larger firms with more far-flung operations, the costs of compliance programs may be substantial.

Firms' preventive efforts can, if successful, impose indirect costs on members of society who stand to benefit from the formation and performance of government contracts. For instance, if the effect of the *World Duty Free* decision were to discourage all large firms from doing business with the government of Kenya, the costs would be borne not only by the Republic of Kenya—in the form of foregone royalties and taxes—but also by Kenyans who would have been employed by prospective trading partners. There is statistical evidence that the enactment of laws sanctioning foreign bribery in OECD countries has reduced imports and flows of foreign direct investment into countries perceived to have high levels of corruption, suggesting that harsh sanctions will discourage firms from doing business in countries like Kenya under Moi.[141] However, in principle, firms' preventive efforts need not cause a net reduction in the amount of government contracting. Governments might simply switch to firms beyond the reach of the zero-tolerance regime.[142] Alternatively, as discussed below, those efforts might instead induce government officials to stop soliciting bribes. Nonetheless, the point remains that there

---

140. KEVIN E. DAVIS, REGULATION OF TRANSNATIONAL BRIBERY: BETWEEN IMPUNITY AND IMPERIALISM (unpublished draft on file with the editors), chapter 8 (describing the costs of corporate self-regulation using costs incurred by Siemens as an illustration).

141. Alvaro Cuervo-Cazurra, *The Effectiveness of Laws Against Bribery Abroad*, 39 J. INT'L BUS. STUD. 634, 638, 643-44 (2008) (analyzing flows of foreign direct investment to 103 host countries between 1993 and 2002); Anna D'Souza, *The OECD Anti-Bribery Convention: Changing the Currents of Trade*, 97 J. DEV. ECON. 73, 80-87 (2012) (analyzing exports involving 143 exporters and 155 importers for the period 1992-2006).

142. Spalding, *supra* note 8, at 492 (arguing that if companies that are reluctant to pay bribes are discouraged from entering a market but the country's officials continue to solicit bribes, "these conditions will tend to invite companies from countries that do not enforce foreign bribery prohibitions.").

may be costs to society associated with deterring firms from contracting with governments.[143]

The fact that prevention is costly is not in itself an argument that it ought to be discouraged. What is significant is that prevention may be particularly costly when compared to the alternatives. Prevention here means any effort to combat bribery undertaken before the bribe is paid. However, efforts directed at bribes which have already been paid can also be effective means of combating bribery. For instance, an organization might commit itself to a scheme of *self-policing*—meaning both monitoring and punishment for bribery—in a way that convinces most employees that bribery is not worth their while. Moreover, if punishment imposed by the organization is insufficient, then the organization can adopt a policy of *reporting* individual bribe-payers to the press and public prosecutors, thereby exposing both the organizations and culpable individuals to reputational, criminal, and civil sanctions. Those sanctions might well include forfeiture of the benefit of a contract to a government as proceeds of crime.[144] The potent sanctions associated with public shaming and criminal prosecution may be effective ways to deter individuals from paying bribes and to condemn those who succumb to temptation.[145] This is particularly true now that developments in international law have led many countries to claim the authority to launch criminal prosecutions against people who pay bribes to foreign public officials.[146] In any given context, the most cost-effective way to de-

143. *Id.* at 491 (World Duty Free "runs counter both to the original policies behind anti-bribery law as well as to the purposes of arbitration: incentivizing foreign investment in developing countries to build those countries' economies and raise their legal standards."); Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 368-74, 396-98 (2010) (portraying FCPA as a de facto economic sanction that tends to discourage investment in emerging markets and thereby limit their economic development).

144. *See, e.g.*, 18 U.S.C. § 981 (2012) (detailing civil forfeiture); 18 U.S.C. § 982 (detailing criminal forfeiture).

145. DAVIS, *supra* note 140, chapter 8 (discussing the possibility that corporate liability will distract prosecutors from prosecuting individual perpetrators and why this would be undesirable), U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, § 9-28.210 (2017) ("individual criminal liability may provide the strongest deterrent against future corporate wrongdoing").

146. *See, e.g.*, UN Convention, *supra* note 10, at Art. 16 Civil Law Convention, *supra* note 10, at art. 5; DAVIS, *supra* note 140, chapter 4 (describing international diffusion of transnational anti-bribery law).

ter bribery, from the perspective of society as a whole, is likely to include a mix of self-policing, reporting, and prevention on the part of firms.[147]

Bribe-payers may also be able to offset the harm caused by bribery in the inception of a contractual relationship through the *investment* they undertake over the course of the relationship. At first, this may sound implausible given that bribes are often paid to induce governments to sign contracts that are less advantageous to them than the ones that they would have signed in the absence of a bribe. However, even the less advantageous contracts may still leave the government better off than it would have been in the absence of the contract. For example, even World Duty Free presumably offset some of the harm caused by the way it procured its concession as it invested in constructing, operating, and maintaining its duty-free stores.[148] Those actions not only benefited the Kenyan government—by boosting its royalties[149]—but also conceivably could have benefitted the broader population by generating employment and making the local airports more attractive to visitors.

2. *Governments Can Also Combat Bribery*

Governments' actions can also combat bribery—after all, bribery is not an individual crime, it is a corrupt bargain that has at least two sides. As with firms, governments can combat corruption through a combination of prevention, policing, and reporting to other enforcement agencies.[150] It is an open question, however, whether governments or firms are best placed to undertake cost-effective anti-corruption efforts.

In general, firms facing a zero-tolerance regime should either avoid dealing with governments represented by corrupt officials or offer those governments less favorable terms. In theory, therefore, the desire to trade on more favorable terms should give governments incentives to combat corruption.

---

147. *See* Arlen & Kraakman, *supra* note 136 (arguing that optimal regime induces firms to prevent, detect and sanction misconduct on the part of their agents).

148. World Duty Free, ¶¶ 62, 78.

149. *Id.* ¶ 62.

150. For the form those efforts might take see ROSE-ACKERMAN & PALIFKA, *supra* note 13, at 39–88, 143–74.

However, there is no guarantee that the zero-tolerance regime will have this effect on the incentives of either firms or governments. Some firms simply may not respond to the incentives created by the zero-tolerance regime and continue to offer bribes to government officials. In addition, firms' managers are likely to find it difficult to observe the risk of corruption associated with particular governments.[151] As a result, the terms of trade they offer to governments may not be sensitive to efforts to combat bribery. In either case, government incentives to combat bribery will be limited. The incentives created by diminished trading prospects also will be muted if governments have short time horizons or if they are so thoroughly corrupt that the relevant decision-makers view the elimination of bribery as a risk rather than a benefit.

Ironically, to the extent that the zero-tolerance approach fails to deter firms from offering bribes, it may decrease rather than increase governments' incentives to engage in prevention. This is because the potent remedies associated with the zero-tolerance approach provide relatively high rewards to a government that discovers a corruptly procured contract. Zero-tolerance may have the perverse effect of inducing governments to turn a blind eye to officials who conclude corrupt contracts, wait until the bribe-paying firms have made substantial expropriable investments in reliance upon the contracts, and then repudiate the contract.[152] This course of action is

151. The quality of data on the incidence of corruption is notoriously poor. For discussion of the sources *see* TINA SØREIDE, CORRUPTION AND CRIMINAL JUSTICE: BRIDGING ECONOMIC AND LEGAL PERSPECTIVES (2016), 64-73 and Sandra Sequeira, *Advances in Measuring Corruption in the Field*, in DANILA SERRA & LEONARD WANTCHEKON (eds.), NEW ADVANCES IN EXPERIMENTAL RESEARCH ON CORRUPTION (2012), 145-175 (surveying methods of measuring the prevalence of corruption).

152. Spalding, *supra* note 8, at 492 ("*Duty Free* retards the movement toward effective domestic enforcement . . . ."); Bhojwani, *supra* note 27, at 99 ("[F]or bribe receivers, the additional penalties from private multijurisdictional enforcement increase the returns to bribery without an increase in countervailing deterrence . . . ."); Losco, *supra* note 28, at 1204 ("[T]he corruption defense creates a perverse incentive that encourages states to expropriate investors' assets—or to renegotiate for burdensome new terms. . . ."); Torres-Fowler, *supra* note 8, 1017–18 (A "strict approach to the corruption defense creates perverse incentives for host states to solicit bribes in order to automatically acquire this defense in the event of future ICSID arbitration."). *See also VJIL Symposium: Andrea Bjorklund & Daniel Litwin Comment on "Investment Treaties and Investor Corruption,"* OPINIO JURIS (May 31, 2012),

particularly attractive if it is feasible for the government to recover compensation for losses incurred as a result of avoidance by suing either the firm or the individuals involved. However, this pattern of incentives may arise independently of the zero-tolerance approach to contract enforcement if the non-contractual sanctions for bribery are high. In that scenario, host countries may be able to repudiate tainted contracts with impunity merely by threatening to report the bribe-payer to enforcement authorities. Moreover, as noted above, governments with short time horizons will not respond to incentives based on gains that will be earned far in the future.

3. *The Zero-Tolerance Approach Focuses Unduly on One Method of Combating Bribery.*

In light of the above, there are two main difficulties with the zero-tolerance approach. First, while the magnitude of a firm's sanction depends on whether it has managed to prevent bribery, it does not depend on the extent to which the firm polices itself or decides to report bribery. Second, the magnitude of the sanction depends heavily on the extent to which the firm has chosen to invest in reliance on the contract. Many

---

http://opiniojuris.org/2012/05/31/vjil-symposium-andrea-bjorklund-and-daniel-litwin-comment-on-investment-treaties-and-investor-corruption/ (World Duty Free approach "would effectively create for the host state a 'license to expropriate.'"); Giacomo Rojas Elgueta, *The Legal Consequences of Corruption in International Arbitration: Towards a More Flexible Approach?*, KLUWER ARBITRATION BLOG (Jan. 20, 2016), http://kluwerarbitrationblog.com/2016/01/20/the-legal-consequences-of-corruption-in-international-arbitration-towards-a-more-flexible-approach/ ("Knowing from the outset that only the other party is in the position to commence an arbitration represents an incentive for the future respondent to promote a corruption scheme in order to establish in advance the 'illegality defense.' This is the case in Investment Treaty Arbitration, where the host State always acts as respondent . . . ."); *VJIL Symposium: Jarrod Wong Comments on "Investment Treaties and Investor Corruption,"* OPINIO JURIS (May 31, 2012), http://opiniojuris.org/2012/05/31/vjil-symposium-jarrod-wong-comments-on-investment-treaties-and-investor-corruption/ ("Would the World Duty Free outcome not perversely incentivize host states to encourage bribery behind dummy anticorruption legislation since this gives license to flout BIT obligations?"); Nell, *supra* note 26, at 166 ("[The government] may even have an explicit interest in the corruptive behavior of [its employee] in order to come into the possession of a valuable opting-out clause or to have significant bargaining power in renegotiations with [the employee] at a later stage.").

commentators also complain that zero-tolerance will undermine governments' incentives to prevent bribery.[153] However, for the reasons given above, that argument is speculative, and should be discounted accordingly.[154]

The first major concern is straightforward. Under the zero-tolerance approach, firms are effectively punished rather than rewarded for self-policing or reporting. This is because the information generated in the course of self-policing and reporting is likely to expose instances of failure to prevent bribery—which will in turn lead to harsh civil sanctions.[155] After seeing how World Duty Free was rewarded for its principal's bizarre self-reporting, other firms have little reason to be forthcoming about their own misdeeds.[156] Consequently, the zero-tolerance approach gives firms an overriding incentive to engage in prevention rather than self-policing and reporting. As noted above, prevention may entail considerable direct costs for firms.[157] Furthermore, firms' preventive efforts may fail to induce governments to make their own efforts to combat bribery. This can happen either because firms are unable to observe the risk of bribery associated with different governments or because those governments fail to respond to long-term economic incentives. Under these circumstances the only effective form of prevention is refusing to do business with certain governments entirely—which may have unacceptable private and social costs.[158]

The second concern about the zero-tolerance approach is that the avoidance remedy it prescribes has the perverse effect

153. *Supra* note 152 and accompanying text.

154. *Id.*

155. Nell, *supra* note 26, at 161-70, raises this concern about the effects of avoidance on incentives to report. *See also* Bhojwani, *supra* note 27, at 90–94. On the effects of corporate liability on incentives to self-police see Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994); Arlen & Kraakman, *supra* note 136.

156. *Supra* notes 6-9 (describing Mr. Ali's highly unusual disclosure and the consequences for World Duty Free).

157. *Supra* note 140 and accompanying text.

158. The argument in the text is consistent with Richard Craswell's argument that defenses to contractual liability based on the fact that the defendant's consent was improperly obtained should not be defined as property rules when it would have been costly for the plaintiff to secure consent properly. *See* Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 3-12 (1993).

of discouraging firms from making investments designed to enhance the value of their contractual rights.[159] Consider the incentive a concessionaire like World Duty Free has to invest in the maintenance and improvement of its concession under a zero-tolerance regime, particularly in a volatile political climate. The greater the risk that the stores might be taken away if the circumstances surrounding the award of the concession agreement come to light, the weaker the investor's incentive to make further investments. By contrast, if the penalty for the bribery were fixed independently of the amount invested then the concessionaire's incentives to maximize the value of the concession would be unaffected by the prospect of its bribery being detected and punished.[160]

The longer the duration of the government's entitlement to avoid the contract, the more significant the counterparty's disincentive to make reliance investments. Giving the government a long-lived entitlement to avoid the contract effectively forces its counterparty to write an option on the government's contractual obligations. The longer the duration of the entitlement, the more likely that option is to be exercised and the less incentive the counterparty has to make potentially uncompensated investments in enhancing the value of the contract.

---

159. Spalding, *supra* note 8, at 491 ("*Duty Free* will tend to discourage investment in developing countries. . .").

160. The perversity only arises to the extent that factors such as explicit contractual obligations are insufficient to motivate the bribe-paying firm, but this is not an implausible scenario. It is often difficult to decide in advance what behavior counts as adequate performance and after the fact it is difficult for third-party decision-makers such as courts to determine whether adequate performance has been provided. For example, in theory, a duty-free store concessionaire could be made to sign a detailed contract that spells out exactly how the stores will be built, operated, and maintained. Every aspect of the design of the stores, the merchandise to be put on sale and the training of the staff could be spelled out in the contract. That, of course would be impractical. Not only would it take too long to write such a contract, even with all the time in the world the parties may not be able to anticipate all of the possible changes in consumer demand and traffic patterns that might warrant deviations from the original plan. Moreover, the government would probably lack the expertise to assess the reasonableness of such a contract. This is why parties often rely upon simple profit-sharing agreements to create incentives for one another. However, those sorts of contracts only work if the promise to share the profits is credible, which typically entails legal enforceability. That is why the prospect of the government's obligation being avoided is so pernicious.

Making it difficult for a government to waive its entitlement to avoid a contract also encourages prevention at the expense of counterparties' investment incentives. Permitting waiver allows a government to affirm a corruptly procured contract if it places a sufficiently high value on its counterparty's continued performance. A counterparty that anticipates such a waiver has an incentive to invest in reliance on the contract. That incentive disappears, along with the benefits of continued performance, if the government's entitlement to avoid the contract is not waivable.

As noted above, a countervailing benefit of avoidance is that it increases competitors' incentives to report. However, a variety of factors, such as uncertainty about whether reports will be heeded and the loss of future opportunities to cooperate with bribe-paying firms, may discourage competitors from reporting.[161] In any event, awarding damages to competitors would also create incentives to report.

4. *Enforcing Contracts Procured Through Bribery Need Not Compromise Legal Integrity*

Any proposal to abandon the zero-tolerance approach must address the argument that the integrity of the legal system demands avoidance of at least those contracts where performance involves illegality. As already discussed in section II.B above, this class of cases is potentially large because many legal systems prohibit performance of government contracts that were not formed in accordance with prescribed procedures.[162] There are two reasons why this argument is not compelling. First, it does not squarely apply to cases in which the legal system whose norms govern the enforceability of the contract is distinct from the legal system whose norms declare its performance illegal. This scenario is not uncommon in cases involving transnational activity, where the governing law of the contract might be different from the local law that makes it illegal for a particular contract to be performed. It does not

---

161. Tina Søreide, *Beaten by Bribery: Why Not Blow the Whistle?*, 164 J. INSTITUTIONAL & THEORETICAL ECON. 407, 412-13 (2008) (presenting survey evidence that a clear majority of Norwegian exporters are reluctant to report competitors who engage in corrupt practices and suggesting incentive-based explanations).

162. *See supra* text accompanying note 56.

automatically compromise the integrity of a tribunal to declare that a party has a duty to violate a law that is independent of the law from which the tribunal derives its authority.[163]

A second and more general point is that there is a distinction between holding that a contract is legally enforceable and holding that there is a legal duty to perform it.[164] A tribunal which holds that a contract granting an illegally awarded concession is enforceable but also says that the only available remedy is damages and not specific performance arguably respects the law that would render performance illegal. For these two

163. This idea is consistent with English law's approach to enforcement of contracts that contravene public policy in the place of performance but do not contravene domestic public policy in England. *See* Westacre [2000] QB 288 [304] (Eng.) ("[I]f all that can be said of a contract is that performance in a foreign country will be contrary to the domestic public policy of that state, enforcement will only be refused if performance would be contrary to the domestic public policy in England."). On the other hand, English law does not permit the enforcement of contracts whose main object is to break the laws of a foreign state. *See* Foster v. Driscoll [1928] 1 KB 470 (Eng.) (voiding a contract to smuggle liquor into the United States during Prohibition for the sake of "international comity"); Regazzoni v. K.C. Sethia [1957] AC 301 (HL) 319 ("Just as public policy avoids contracts which offend against our own law, so it will avoid at least some contracts which violate the laws of a foreign State, and it will do so because public policy demands that deference to international comity."). For discussion of these potentially conflicting principles see DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS at 32–238 to 32–241 (Sir Lawrence Collins, ed. 2006). The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 202(2) (AM. LAW INST. 1971) suggests that U.S. common law embodies a somewhat stronger presumption that the law of the place of performance will determine the effects of illegality. However, this position may be altered by statute and so, for instance, New York law on this point resembles English law. *See, e.g.*, Lehman Bros. Commercial Corp. v. Minmetals Int'l Non–Ferrous Metals Trading Co., 179 F. Supp. 2d 118, 138–39 (S.D.N.Y. 2000) (N.Y. GEN. OBLIG. L. § 5–1401 requires courts to enforce certain contractual provisions selecting New York as the governing law, including New York law which says that illegality in the place of performance only renders a contract unenforceable if the parties entered in to the contract with a view to violate the laws of that other jurisdiction).

164. This claim reflects the view that an enforceable contract represents an obligation to either perform or pay damages. In other words, a contract does not create an unconditional obligation to perform. This view is often attributed to Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L REV. 457, 462 (1897) ("[the duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,-and nothing else.") For an argument that this represents a misreading of Holmes *see* Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 FORDHAM L. REV. 1085 (2000).

reasons, the zero-tolerance approach should not be viewed as a necessary corollary of the need to maintain the integrity of the legal system.

IV. An Alternative Approach: Proportional Liability

A. *General Principles*

The force of the objections to the zero-tolerance approach suggests that there are many circumstances in which it should be abandoned in a favor of a new approach. At the same time, there are compelling pragmatic reasons to believe that any realistic alternative ought to respect as much of the underlying logic of the zero-tolerance approach as possible. That approach starts from the premise that firms have an obligation to combat bribery in public contracting, for the sake of not only the governments with which they deal but also the societies represented by those governments. It also presumes that the legal remedy for breaching that obligation should condemn the violator's conduct, protect the government and the broader public from any harm that might flow from performance of the resulting contracts, prevent similar violations and their associated harms, and maintain the integrity of the legal system. These principles are not necessarily mutually compatible.[165] As a practical matter though, they all appear to be too deeply embedded in modern anti-bribery law to be ignored.[166]

These theoretical considerations generally point toward a proportional liability remedial scheme which makes bribe-paying firms' liability proportional to their fault and where fault is a measure that considers all dimensions along which a firm might attempt to combat bribery. In other words, the extent of liability—meaning, the quantum of damages awarded—

165. The potentially divergent implications of these principles for transnational anti-bribery law are examined throughout Davis, *supra* note 140.

166. *Id.*, chapter 5 (explaining that the UN Convention commits its parties to prevention, condemnation and compensation). We shall leave to another day the question of whether privately appointed arbitrators are justified in believing that their mandate is limited exclusively to the application of legal principles adopted by the parties. For arguments that arbitrators ought to apply transnational public policy see Catherine Kessedjian, *Transnational Public Policy* in International Arbitration 2006: Back to Basics? 857, 857–70 (Albert Jan van den Berg, ed. 2007).

should depend not only on proof that the firm failed to prevent bribery, but also on evidence of whether it made reasonable efforts to monitor, supervise, and punish its employees and co-operate with law enforcement authorities. Implementing this proposal would be consistent with imposing a certain residual level of liability on bribe-paying firms for failing to prevent bribery. The existence of that residual liability—which for reasons to be discussed below might involve substantial amounts of money—ought to allay concerns that either the purpose or the effect of this proposal is to allow bribe-paying firms to escape condemnation. The key feature of proportional liability is that beyond this residual level, the extent of liability should vary according to evidence that the firm has engaged in self-policing or reporting. The duration of the government's entitlement to pursue such liability and its ability to waive that entitlement should be determined by context-specific considerations such as the time it typically takes to obtain evidence of bribery and the extent to which the relevant branches of government can be trusted to waive legal entitlements.

To see how this might work in practice, consider two hypothetical cases.

> *Case 1*: The regional sales manager of a large multinational firm (Firm 1) pays a bribe through an intermediary styled as a "consultant", to an official of a poor country known to have weak public institutions. Assume that the $100,000 bribe is paid to secure a contract supplying high-voltage transmission lines required to connect a newly-constructed power plant to the national grid. The official improperly awards the contract to the bribe-paying firm without putting the contract out to tender. As a result, the firm is able to charge a price of $10 million for goods with a fair market value of only $5 million. There is a change in government following the conclusion of the contract. The new government is first made aware of the bribe by a report from the bribe-paying firm, which discovers it as a result of its ongoing efforts to monitor its employees' compliance with anti-bribery legislation. The firm terminates the sales manager and shares its information about the matter with authorities in its

home jurisdiction responsible for enforcing criminal prohibitions against bribery.

Case 2: A $100,000 bribe is paid by the chief executive officer and principal shareholder of a multinational firm (Firm 2) to an official of the national government of a middle-income country to secure a logging concession covering an area in which logging is not usually permitted. The firm expects to pay a total of $5 million for the concession. Experts estimate that if the government had solicited bids for the concession the highest bidder would have paid $10 million. The bribe is discovered by other officials after an election which results in a change in the governing party.

The proportional liability approach suggests that Firm 1 ought to be treated differently from Firm 2. Both firms should be punished for failing to prevent bribery, but Firm 2 should also be punished for failing to take steps after the bribe was paid to punish its officer or to report the offense to the authorities. Moreover, whatever penalty is imposed on Firm 1 should not encourage the firm to respond to a change in government by halting either deliveries under the contract or investments in additional capacity required to make those deliveries.

These recommendations are consistent with giving the government an entitlement to compensation from Firm 1. On these facts, this would entail awarding damages of $5 million. The recommended approach also is consistent with giving the government an entitlement to supra-compensatory damages from one or both firms. The proportional liability approach would not, however, be consistent with awarding identical levels of damages in the two cases. Nor would it necessarily be consistent with avoiding the contracts and denying the firms any entitlement to restitution. However, depending on the reasons why logging is prohibited in the area subject to the concession, once Firm 2 has begun exploiting the concession, it may have difficulty establishing that doing so would confer net benefits upon the government. Similarly, once the government's entitlement to compensation is considered, Firm 2 may also have difficulty establishing that it would obtain any net benefit from preserving the government's obligation under the contract. If the contract is worthless to the government, then avoidance may be appropriate. In each case though, barring evidence of bad faith, a tribunal should respect the incumbent government's decisions to waive any of its entitlements, including any entitlement to avoid the contract.

World Duty Free lies somewhere in between these two hypothetical cases. On the one hand, like Firm 2, World Duty Free made essentially zero effort either to prevent bribery or to punish bribery after the fact. On the other hand, it did self-report, although only late in the day, and it may have had a stronger basis for arguing that its investments conferred a net benefit on the government of Kenya.[167] As for the question of waiver, the tribunal properly rejected the idea that President Moi ratified his own corrupt agreement and thereby effectively waived the Republic of Kenya's entitlement to avoid the contract.[168]

B. *Rationale*

Although the proportional liability approach set out above is concerned with the imposition of civil sanctions—it is inspired by the approach taken to impose criminal liability on organizational actors in certain leading jurisdictions.[169] In U.S. federal law, factors such as self-policing and reporting are relevant in determining the exercise of prosecutorial discretion and the appropriate sentence for corporate misconduct.[170]In

---

167. World Duty Free, ¶¶ 67 (". . .Mr. Ali spent approximately US$27 million to construct and equip the Duty Free complexes at Nairobi and Mombasa Airports, and to renovate and upgrade their passenger facilities") and 130 (reporting bribery in statement to arbitral tribunal dated November 30, 2002).

168. *Id.* ¶ 185

169. Org. for Econ. Co-operation & Dev. [OECD], *The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report*, at 66 (2016) (surveying approaches to corporate liability among members of the OECD Convention and identifying states in which the existence of internal compliance programs can preclude liability). For academic endorsements of regimes that take self-policing and reporting into account when imposing criminal liability on organizations see BRENT FISSE & JOHN BRAITHWAITE, CORPORATIONS, CRIME AND ACCOUNTABILITY 162-69 (1993) and Arlen & Kraakman, *supra* note 136, at 735-40.

170. *See* U.S. DEP'T OF JUSTICE, *supra* note 145 § 9-47.120 (2017) (offering credit for voluntary self-disclosure, cooperation and remediation in FCPA matters); U.S. SENTENCING GUIDELINES MANUAL § 525–72 (U.S. SENTENCING COMM'N 2016) (establishing federal sentencing guidelines for organizational defendants).

Australia, those factors determine whether an agent's misconduct ought to be attributed to the corporation in the first place.[171] In the United Kingdom, the Bribery Act of 2010 provides a defense to criminal liability for an organization that can show it had in place adequate procedures designed to prevent employees and agents from undertaking prohibited forms of bribery.[172]

The proportional liability approach is appealing because it has the potential to satisfy the basic impulses that motivate the zero-tolerance approach. To begin with, making sure that the punishment fits the crime enhances the expressive qualities of the remedy. Tailoring how a firm is condemned to reflect the wrongfulness of its conduct makes the remedy a more accurate expression of the moral concerns that motivate the sanction. In effect, it allows the legal system to express the view that the organization is being condemned *both* for failing to prevent and report bribery.

A remedial scheme that conditions a bribe-paying firm's liability on the specific set of wrongs it has committed also promises to create a better pattern of incentives for both firms and governments to combat bribery. For one thing, it provides firms with incentives to take steps to mitigate the impact of their mistakes. Perhaps more importantly, a well-designed scheme of proportional liability may induce firms that will not do everything possible to combat bribery to exert at least some effort. For instance, treating self-policing or reporting of bribery as mitigating factors in setting liability encourages firms to offset the impact of mistakes at the prevention stage—whether those mistakes are deliberate or inadvertent.[173] At the same time, residual liability triggered by the failure to prevent bribery creates incentives for firms to undertake various unobserv-

---

171. *Criminal Code Act 1995* (Cth) pt 2.5 (Austl.).

172. Bribery Act 2010, c. 23, § 7(2) (UK). *See also* LAW COMM'N, REFORMING BRIBERY 120 (2008) (recommending that criminal liability only be imposed on limited liability entities for bribes paid by their agents where the entity has negligently failed to prevent the bribe from being paid).

173. An alternative approach would be to treat failure to self-police or report as aggravating factors in setting liability. However, using evidence of deliberate failure to report in this fashion will not be effective if the tribunal finds it difficult to observe such incidents. *See* Arlen & Kraakman, *supra* note 136, 737–41 (describing and comparing regimes that allow for mitigation and aggravation for self-reporting).

able forms of prevention, including altering the terms upon which those firms deal with corruptible governments.

The residual liability imposed on firms can also be tailored to optimize governments' incentives to combat bribery, including their incentives to pursue civil claims against bribe-paying firms. Imposing high-levels of residual liability on firms indirectly creates incentives for governments that are motivated to improve their trading prospects to discourage their officials from demanding bribes. Moreover, the greater the portion of bribery-related losses that can be recovered through civil litigation, the greater the government's incentive to sue.

As discussed above, this pattern of incentives will only be desirable if prevention is relatively inexpensive from the perspective of both firms and the broader society, and assuming that governments will respond in an appropriate fashion to economic incentives. For instance, a high level of residual liability may be appropriate when firms deal with reasonably effective governments in jurisdictions which are familiar to them. In this setting, encouraging firms to just say no to contracts procured through bribery may be an effective method of inducing governments that want to attract trading partners to engage in prevention. However, lower levels of residual liability may be appropriate when firms deal with foreign governments that have only a limited presence in the international economy or which have received low scores on independent evaluations of governmental quality and integrity.[174] In these settings, encouraging firms to just say no is likely to have little impact on governmental behavior—either because the relevant actors are too short-sighted or personally implicated in corrupt activity to change their ways, or because the more far-sighted actors expect firms with limited information to refrain from dealing with honest and corrupt governments alike.

Finally, a remedial scheme that imposes liability proportional to fault may be compatible with the goal of protecting the government. A scheme of this sort requires that the relative liability imposed for different acts satisfy a criterion of proportionality. This says nothing about the absolute level of liability. As in our illustration, the minimum level of liability under a proportional liability regime can be set at a level suffi-

174. For discussions of the limitations of these kinds of measures of institutional quality see ROSE-ACKERMAN & PALIFKA, *supra* note 13, at 14–27.

cient in absolute terms to compensate the government for any harm caused by the wrongdoer's actions.

C. *The Relevance of the Bribe-Recipient's Fault*

Several commentators have suggested that it would be appropriate to consider what might be called "comparative fault" in determining the legal consequences that follow when government contracts are procured through bribery.[175] This would entail reducing the bribe-paying firm's liability—possibly to nothing—to the extent that the government has failed to take adequate steps to combat bribery. This might be accomplished by, for example, allowing the firm to claim restitution after the contract has been avoided or by making it easier for the firm to claim that the state ratified or waived its right to avoid the contract. Alternatively, firms might be permitted to estop the state from raising illegality, unclean hands, or public policy as a defense because it is not *in pari delicto*. Yet another possibility is that firms could be allowed to bring claims against states under public international law for violation of treaty obligations to prevent corruption.[176]

---

175. Habazin, s*upra* note 28, at 826–28 (arguing that international tribunals should "take into account the actions of both parties."); Raeschke-Kessler & Gottwald, *supra* note 12, at 19 ("The arbitral tribunal must also consider the role both parties have played in the corrupt activity."); Reeder, *supra* note 28, at 325 (arguing that investment tribunals should estop states from raising corruption as a defense and should assert jurisdiction over investors' claims but then "apportion damages in recognition of any harm suffered by the state due to corruption."); Spalding, *supra* note 8, at 480–88, 494 (arguing that a state should be liable for corruption of its officers); Torres-Fowler, *supra* note 8, at 1030–35 (advocating a contributory fault standard for investor-state disputes in ICSID arbitration); *VJIL Symposium: Bjorklund & Litwin*, *supra* note 152 (favoring "a balanced approach that would proportionally ascribe blame to all parties involved in a corrupt exchange."); *VJIL Symposium: Wong*, *supra* note 152 (discussing an approach similar to Bjorklund & Litwin). Here, the term comparative fault designates an entire class of regimes whose common feature is that the victim's misconduct is a factor in determining the extent of the wrongdoer's liability. *See* Ariel Porat, *A Comparative Fault Defense in Contract Law*, 107 MICH. L. REV. 1397, 1397 (2009) (describing comparative fault in tort and contract law as a regime that allows for apportionment of damages between an injurer and the contributorily negligent victim).

176. Halpern, *supra* note 28, at 112-18 (arguing that World Duty Free should have been able to recover under theories of ratification, state responsibility, estoppel, waiver and restitution); Klaw, *supra* note 28, at 76-86 (argu-

The comparative fault approach would arguably provide a desirable fine-tuning of the expressive content of a determination of liability.[177] It might also enhance governments' incentives to combat bribery. In addition, if the bribe-paying firm remains subject to a residual obligation to compensate governments whose officials have been bribed, it need not be in tension with the objective of ensuring protection of the public purse.

However, introducing an element of comparative fault into the assessment of liability would also affect the incentives of firms and governments in complex and potentially undesirable ways.[178] If the government is short-sighted or thoroughly corrupt, the incentives created by this initiative will have little impact on its behavior. At the same time, to the extent that governments' efforts to combat bribery can be expected to fail, introducing comparative fault will reduce the amount of liability that bribe-paying firms expect to bear—thereby diluting those firms' incentives to combat bribery. This outcome is particularly undesirable if firms' anti-corruption efforts are more cost-effective than those of governments.[179] In addition, reducing the level of damages recoverable by a government that has failed to prevent bribery of its officials will reduce its incentives

ing that states whose officials solicit or accept bribes should be liable under public international law); Reeder, *supra* note 28, at 324-25 (arguing that firms like World Duty Free and Metal-Tech should be able to raise estoppel and violations of obligations under BITs); Spalding, *supra* note 8, at 480–88, 494 (suggesting that a state should be liable for bribery of its officers without specifying any substantive basis the basis for such liability other than the obligation to make restitution after a contract has been avoided).

177. For a discussion of why fairness supports comparative liability see Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 721–27 (1978).

178. The analysis here parallels the analysis of the incentive effects of introducing a contributory negligence defense in product liability settings, with the government playing the role of the consumer. *See generally* Shavell, *supra* note 132, at 212–23 (2004) (analyzing the deterrent effect of product liability law).

179. Jason Yackee makes similar points in defending his proposal to give host states a defense against claims brought under BITs by investors who have procured contracts through bribery. *VJIL Symposium: Jason Webb Yackee Responds to Bjorklund/Litwin and Wong*, OPINIO JURIS (May 31, 2012), http://opiniojuris.org/2012/05/31/vjil-symposium-jason-webb-yackee-responds-to-bjorklundlitwin-and-wong/ (arguing that firms are the least cost avoiders of corruption).

to initiate civil proceedings against bribe-paying firms. In light of these competing considerations, it is difficult to make a strong case either for or against supplementing a proportional liability regime with comparative liability.

D. *A Mandatory or a Default Rule?*

For all the reasons given so far, the proportional liability approach ought to appeal to any lawmaker charged with determining a bribe-paying firm's civil liability. But what if the parties to the corruptly-procured contract attempt to reject proportional liability in favor of a different approach, whether by including an explicit provision in the original agreement or through a subsequent effort to ratify it? This scenario raises the question of whether the legal norms that establish a government's entitlements vis-à-vis bribe-paying firms ought to be mandatory rules—meaning that they bind the parties regardless of their wishes—or default rules, which the parties are free to vary.

The answer any particular lawmaker gives to this question ought to turn on whether the parties' reasons for disagreeing with the lawmaker's preferred approach are benign or malign. Consider first a benign explanation for rejecting the proportional liability approach. Parties to a contract may share the lawmaker's commitments to condemning past bribery, deterring future bribery, and upholding the integrity of the legal system, yet still disagree with the lawmaker's approach to achieving those objectives. For instance, a particular pair of contracting parties may believe that the proportional liability approach is ill-suited to their situation because it will be too costly to administer; the sort of fact-intensive analysis of organizational compliance efforts called for by the proportional liability approach may simply be too expensive and time-consuming. Alternatively, they may dislike the level of unpredictability associated with the proportional liability approach. For either of these reasons, firms might reasonably reject the proportional liability approach in favor of a simpler one, such as some form of stipulated damages, or perhaps even the zero-tolerance approach. It would be reasonable for a lawmaker to defer to this decision on the grounds that the parties are likely to have a better sense than the lawmaker of how to achieve the common objective of combating bribery.

Unfortunately, there are also malign reasons why parties might reject a lawmaker's preferred approach to contracts procured through bribery. The main concern is that the parties may place less weight than the lawmaker on the objective of combating bribery. In the extreme case where a contract is drafted by the same agents who have paid and received the bribe, the contract's terms may reflect a complete lack of interest in controlling bribery. Left to their own devices, corrupt agents can be expected to draft an agreement providing that the bribe-payer's firm faces no liability whatsoever. A similar problem may arise if the responsible members of the firm and the government are poorly informed about the risk of corruption on the part of their agents. Recall the U.S. Supreme Court's observation that, "an agent's superiors may not appreciate the nature of the agent's conflict, or [the superiors] might, in fact, share the agent's conflict of interest."[180] Yet another problem is that the parties may care about some but not all of the harm that the lawmaker associates with bribery and treat the other harms as externalities. For example, suppose that the government cares about the pecuniary losses it suffers as a result of bribery but is insensitive to harm inflicted on the broader society in the form of lost faith in government institutions or evasion of policies designed to protect health and safety or the environment. In any of these situations a lawmaker could reasonably decline to adopt the approach to bribery adopted by a government and its counterparty.

Unfortunately, in many cases it will be difficult to decide whether a government's motivations for opting in or out of the proportional liability approach merit respect. It is easy to see that it would be wrong to give conclusive effect to an anti-corruption clause drafted by President Moi in a contract he has negotiated on behalf of the Republic of Kenya. However, terms endorsed by the Kenyan Legislature might warrant less suspicion.

V. Comparison to Existing Doctrine

The proportional liability approach most closely resembles the pattern of obligations set out in the standard terms of

180. United States v. Mississippi Valley Generating Co., 364 U.S. 520, 561 (1961).

U.K. PFI contracts. Those terms make the contractor's liability proportional to its fault in a crude way by conditioning the governmental actor's entitlement to avoid a contract on whether the person who paid the bribe acted "independently."[181] In its most elaborate form the proportional liability approach would involve taking a somewhat broader set of factors into account in determining whether to hold the contractor liable, including the contractor's conduct after the bribe payment. It would also permit the extent of liability to vary more continuously in proportion to fault. However, the PFI standard terms are certainly consistent with the spirit of the proportional liability approach and may even reflect the most practical way of embodying it in contractual language.

As far as common law doctrine is concerned, the proportional liability approach seems closer to the principles found in agency law than those found in the law of illegality and related doctrines—unless the latter set of doctrines is interpreted quite flexibly. This seems fitting given that the thrust of this article's analysis above is that in determining the legal effects of bribery in public contracting it is a mistake to focus too narrowly on the illegal transaction and ignore the broader context. In many cases that context involves two organizations—often large ones—struggling to deal with the fact that they are compelled to interact through potentially unreliable agents. As Lord Mustill concluded in his expert opinion in *World Duty Free*, the agency law lens seems likely to offer a better view of the critical features of this problem than the somewhat broader lenses of illegality and related doctrines.[182] This analysis in turn implies that principles of public law, transnational public policy, and public international law ought to be construed to allow the consequences of bribery in the procurement of government contracts to be determined primarily in accordance with principles of agency law.

One of the central features of agency law is that a principal is entitled to compensation from a person who bribes an agent in connection with a transaction concluded by the principal.[183] This principle is generally consistent with the proportional liability approach. The proportional liability approach is

181. *Supra* notes 83-89.
182. World Duty Free, ¶¶ 117, 164, 183.
183. *Supra* note 38.

also consistent with existing law which gives tribunals some flexibility in deciding whether to award punitive damages or other forms of supra-compensatory damages to an aggrieved principal. Whatever flexibility is available under existing law ought to be used to treat the firm's efforts to control or police its employees and to cooperate with authorities as mitigating factors.[184]

There are many cases in which courts purporting to apply principles of agency law have held that a principal is entitled to avoid a contract procured through bribery.[185] Those rulings are not necessarily consistent with the proportional liability approach. As discussed above, avoidance is not a particularly good strategy to provide compensation, to deter, or to condemn. It also has the undesirable effect of discouraging bribe-payers from investing in reliance on a contract that might become forfeit. This all suggests that the idea of giving governments an automatic entitlement to avoid contracts procured through bribery should be rejected.

This recommendation must be qualified, however, to take into account cases in which an entitlement to avoid a contract serves as a good proxy for an entitlement to compensation for

---

184. It also seems reasonable to presume that the civil law ought to be less worried about creating incentives for self-policing and reporting when alternative methods of detecting and sanctioning bribery, such as investigation and prosecution by public authorities, are relatively effective. At the very least this argument weighs in favor of allowing criminal or administrative penalties imposed upon a bribe-paying firm to be offset against damages awarded in civil proceedings. More generally though, this argument implies that the principles which govern the imposition of criminal and administrative penalties on bribe-paying firms, including the principles concerning confiscation or forfeiture of proceeds of crime, may have to be re-examined in order to ensure that they are compatible with the proportional liability approach. Bhojwani, *supra* note 27, 102–11 (recommending that penalties imposed by arbitral tribunals be offset against penalties under the FCPA); Losco, *supra* note 28, at 1231–41 (recommending coordination between FCPA enforcement authorities and ICSID panels). On the potential magnitude of criminal and administrative penalties see CRIMINAL DIV. OF U.S. DEP'T OF JUSTICE & ENF'T DIV. OF U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 68–72 (2012) (describing penalties under the FCPA) and Org. for Econ. Co-operation & Dev. [OECD], *OECD Foreign Business and Finance Outlook 2016*, at 207–22 (2016) (describing penalties for foreign bribery in parties to the OECD Convention).

185. See cases cited *supra* in Section II.A.

misconduct in its formation. The best examples are cases in which the contract is for the procurement of goods or services for which the government has no use whatsoever, and where the only explanation for the existence of the contract is the fact that money changed hands illicitly. In a situation like that, the only way to protect the public from harm is to excuse the government from its future obligations under the contract and to recover the cost of its performance to date. To the extent that the value of the contract to the government is difficult to ascertain, avoidance is an appropriate remedy. This may capture a large proportion of the cases in which contracts are procured through bribery.

Generally, it is possible to reconcile the approach to avoidance dictated by the proportional liability approach—namely, that avoidance should not be permitted unless it is necessary to compensate the victim of the bribery—with principles of agency law. For instance, in one leading case the English rule was described as conferring an entitlement to avoid a contract only upon a party who has been "deprived of the disinterested advice of their agent by or at least to the knowledge of [the bribe-paying firm]."[186] This principle is consistent with the proportional liability approach if avoidance is limited to bribes which deprive the principal of disinterested advice on whether to enter into a transaction, as opposed to bribes which deprive the principal of disinterested advice about the terms upon which to conclude such a transaction.[187] There is also room to argue that a bribe paid by the agent of a firm which has made reasonable efforts to self-police and self-report should not be legally attributable to the bribe-payer's principal, particularly in jurisdictions which adopt a flexible approach to attribution.[188]

---

186. Logicrose, [1988] WLR 1256, at 1261.

187. The feasibility of drawing this kind of distinction is illustrated by the decisions in Gerzof, 211 N.E.2d 826, and Fyffes Group, [2000] 2 Lloyd's Rep. 643.

188. *See e.g.* Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500, 507 (emphasizing that attribution depends on the legal purpose for which the conduct or state of mind is to be attributed), Jetivia SA & Anor v Bilta (UK) Ltd & Ors [2015] UKSC 23, ¶ 202 (opinion of Lord Toulson and Lord Hodge recommending purposive approach to attribution).

The proportional liability's approach to restitution is not difficult to reconcile with principles of agency law. Even in cases in which avoidance is inevitable, the proportional liability approach suggests that the government's obligations should typically be replaced with an obligation to make restitution. This is consistent with the principles of agency law outlined above.[189] Since the fact of the bribe creates a distinct possibility that the contract does not create anything of value for the government, the conventional requirement that places the burden of proof on the bribe-payer seems appropriate. However, if the bribe-payer can satisfy that burden then there are strong reasons to grant restitution. To reiterate, there are more direct ways of expressing condemnation for the bribe-payer, protecting the public, and deterring other firms. The prospect of avoidance without restitution may serve as an unfortunate disincentive for bribe-payers to make mutually beneficial investments. In addition, the duration of the entitlement to avoid a contract should be limited, perhaps following the UNIDROIT Principles, which require the entitlement to be exercised within a reasonable time.[190]

Finally, the agency law principle that a contract procured through bribery can be either authorized ex ante or ratified ex post by the principal of the recipient of the bribe is consistent with the proportional liability approach recommended above in cases where the principal's motivations for opting out of the ordinary regime are benign. In many cases, though, the principal's motivations will be more suspect and so the law of illegality's more restrictive approach to authorization and ratification ought to be adopted.

VI. Conclusion

It may seem intuitive to respond to a problem as pernicious as bribery in public contracting with a tough zero-tolerance approach. However, this article argues for a more nuanced response—one which considers the range of ways in

189. *Supra*, Section II.A.

190. *Supra* note 38, art. 3.2.12(1 ("Notice of avoidance shall be given within a reasonable time, having regard to the circumstances, after the avoiding party knew or could not have been unaware of the relevant facts or became capable of acting freely").

which firms and governments can and should participate in combating bribery and the importance of adopting legal remedies that encourage them to explore all of those possibilities.