World Duty Free v The Republic of Kenya: a Unique Precedent?

A summary of the Chatham House International Law discussion group meeting held on 28 March 2007.

The meeting was chaired by Elizabeth Wilmshurst, senior fellow of international law at Chatham House. Participants included legal practitioners, academics, NGOs and government representatives.

The event was sponsored by Freshfields Bruckhaus Deringer.

Main Speaker:

Constantine Partasides, Partner, International Arbitration Group, Freshfields Bruckhaus Deringer.

"Transparency International defines corruption as "the misuse of entrusted power for private gain". It counts the "cost" of corruption as four-fold: economic, political, social and environmental. I would suggest a fifth, and it certainly is not the most modest cost; it is the cost to the rule of law.

The rule of law unquestionably suffers in the face of corruption with impunity. But occasionally the law provides an answer. In the hands of the right judge or arbitrator, it can be transformed from victim to victor. And so I come to the recent and remarkable case of *World Duty Free v. The Republic of Kenya*.

In June 2000, an Isle of Man corporation, World Duty Free Company Ltd, launched proceedings against the Republic of Kenya under the auspices of the World Bank's International Centre for the Settlement of Investment Disputes (ICSID). It did so pursuant to an arbitration clause in a contract by which World Duty Free had been awarded the exclusive concession to run the duty free operations at Kenya's international airports in Nairobi and Mombassa.

Six years later, in October 2006, this ICSID case ended in extraordinary circumstances, resulting in an international award in which an Arbitral Tribunal composed of President Gilbert Guillaume (a former President of the International Court of Justice), Professor Andrew Rogers QC (a former Chief Justice of the Court of Appeals of New South Wales) and V.V. Veeder QC, a leading English commercial silk:

- found that the contract under which the Claimant brought its claims was procured by the payment of a cash bribe to the then sitting Head of State, President Daniel arap Moi; and, on that basis

- held that the Claimant's claims should be dismissed immediately and in their entirety.

I speak to you today as counsel of record for the Republic in that arbitration. But I don't think that one has to have been involved in this case to recognise the importance of an international procedure, in which:

- 3 arbitrators were confronted with hard evidence of the payment of a cash bribe to a sitting head of state; and

- proceeded, emphatically, to draw the legal consequences.

During this lunchtime address, I shall: (1) try to describe for you the key features of this extraordinary arbitration; (2) the arguments that claimant's counsel deployed to argue against dismissal; (3) the Tribunal's final decision; and finally, (4) I shall reflect on what this case tells us more generally about how well-suited the international arbitral process is to dealing with the instances of corruption that continue to disfigure more than a few investment contracts concluded with governments of developing states around the world.

1. The Facts

Let me begin with the facts of our case, and the evidence of corruption that finally emerged.

In bringing an ICSID claim, World Duty Free alleged that Kenya expropriated its duty free concession by mis-using its corrupt judiciary to appoint a receiver over WDF's Kenyan operations. Its case was, itself, thus, founded on allegations of corruption. However, in its only witness statement, that of its owner and CEO, a Mr Nassir Ibrahim Ali of Dubai (and Pakistan, and Iran, and Canada – to judge by his various passports), Mr Ali volunteered - by way of background - a quite extraordinary description of the facts relating to the manner in which his concession contract had originally been procured.

Let me read you an extract:

> "As a leading businessman in Dubai, I met in normal business circles, one Mr X, a Kenyan … From my discussions with X, I came to understand that he was politically and powerfully connected in the Kenya government. Wishing to diversify my business into Kenya, I asked X his advice on arranging the necessary licences and authorisations for the establishment of duty-free complexes in Nairobi and Mombassa airports. …
>
> X informed me that although my concept for establishing duty-free complexes at Nairobi and Mombassa airports … would require significant investment, which I believed would be for the national benefit of Kenya, protocol in Kenya required that I should in addition make a "personal donation" to President Moi. …
>
> X advised me that the appropriate donation **…** was US$2 million. I was further advised by him that the donation should be in cash.

> I brought [part of the cash in Kenyan shillings] to my meeting with President Moi in a brown briefcase. When we entered the room where the President received us, [I] put the briefcase by the wall and left it there. After the meeting [I] collected the briefcase from where [I] had left it. On the departing journey I looked in the briefcase and saw that the money had been replaced by fresh corn.
>
> I felt uncomfortable with the idea of handing over this "personal donation" which appeared to me to be a bribe. However, this was the President, and I was given to understand that ... I didn't have a choice if I wanted my investment contract".

Let's reflect on this for a second.

This is the Claimant adducing evidence to the effect that it paid a cash bribe to procure the very contract under which its claims arose.

This was the evidence. How did the parties react?

2. The Parties' positions

Let me begin with the Republic of Kenya, which since the start of the arbitration had undergone elections which resulted in a change of President. Its position was straightforward. It saw no reason to take the extraordinarily paradoxical step of assisting the Claimant by denying its evidence as to how the investment contract had been procured.

And so it simply held the Claimant to its word, and invited the Tribunal to do so as well.

Accordingly, the Republic of Kenya applied immediately for the dismissal of all claims with prejudice on the basis that, as a matter of public policy, the concession contract was unenforceable, and that, as a matter of public policy, the machinery of international justice was not available to enforce the fruit of such an illegality.

The Claimant's position, on the other hand, was a little less straightforward. How do you legally explain away such incriminating evidence that you yourself have submitted?

The Claimant was well represented by a talented legal team led by the eminent Geoffrey Robertson QC, who constructed three main arguments in response to the Republic's dismissal application:

(i) First we were told that "gifts" of this kind are customary practice and culturally sanctioned in Kenya, and thus could involve no illegality;

(ii) Secondly, as this "gift" had been paid to the head of state, the personification of the state, the state itself had received the payment, and had relevant knowledge of the payment, and had therefore affirmed the contract – even if there had been any earlier illegality; and

(iii) thirdly and finally, the Claimant asked the Tribunal to "accept" the "messy realities of international business in the 1970s and 1980s in the developing word", and to "balance the venality" of the "giving" and "taking" of a bribe so as not to punish the payer to the advantage of the "receiver".

Those were the three principle arguments. Let us see how the Tribunal dealt with each in turn.

(i) Harambee

Let us begin by addressing the Claimant's argument that Mr Ali's secret payment to President Moi was an example of the customary Kenyan practice known as "Harambee", which translates from Kiswahili loosely as "pulling together for the good of the community". It is a kind of community collection.

Let me begin by explaining what the concept usually means. Harambee is a kind of community collection. By way of public harambees, members of the Kenyan public would combine resources informally to contribute towards the building and development of village schools, hospitals and other facilities for public use where no such funds were forthcoming from the treasury.

That's what harambee usually means. Let's now turn to Mr Ali's cash payment. In support of its proposition that Mr Ali's heavily disguised cash payment amounted to harambee, the Claimant submitted an expert report produced by a Kenyan sociologist, Dr Pius Mutie, who opined that such gifts:

> "are given as a way of saying 'hello' or recognising the authority of the leader in many African communities in Kenya. In many cultural settings, when one visits friends or a relative, one doesn't go "empty-handed" nor does he leave the homestead of that friend or relative empty-handed. Exchange of gifts irrespective of their worth is customarily sanctioned and failure to comply with those customary practices is indicative of either extreme poverty, meanness or rebellion against cultural norms."

On this basis, Dr Mutie opined that it would be an "insult" – his word – to "the African people" – his word again – to describe such "philanthropy" – his word once again – as corruption.

Adopting Dr Mutie's terms, there could be no risk of Mr Ali being accused of "meanness" given the size of his $2 million "hello". And he certainly did not leave Mr Moi's homestead "empty-handed" given the instantaneous award of his valuable duty -free concession.

It was surely unsurprising, therefore, that the Tribunal found that Mr Ali's "cash for corn" was no philanthropy destined for "public good", and that Dr Mutie's evidence of the existence of a Kenyan cultural practice did not rebut the presumption that such cash payments were made with the intention of influencing a public official.

So much – thankfully – for cultural relativism. Let me turn next to the Claimant's more traditional legal argument of affirmation; although – once again – there was nothing "traditional" about the way in which the Claimant presented its argument.

(ii) L'Etat, c'est moi

There used to be a saying in Kenya during the presidency of Daniel arap Moi, to the effect that:

> "L'Etat, c'est Moi".

A play on words perhaps, but World Duty Free's counsel proceeded to make a legal argument out of it, which went a little like this:

- As head of state, President Moi was contended to be not an agent of the Republic, but the personification of the Republic;
- As such, his receipt and knowledge of the bribe was attributable to the state; and
- As a result, in proceeding partially to perform the Duty Free contract following its receipt and knowledge of the bribe, the Republic had *affirmed* the contract, thereby losing any legal right that it might have had to avoid it as a matter of law for a prior illegality.

Ingeniously, therefore, World Duty Free argued that by bribing the head of state (instead, I suppose, of any other state official or civil servant), it had in effect immunised the contract from the consequences of any illegality.

For its part, the Republic responded that the bribe was not received by President Moi in the exercise of his legitimate function as president, and that given the extraordinary lengths that Mr Ali and President Moi went to keep the payment covert, it was factually and legally impossible to impute receipt and knowledge of the bribe upon the Republic.

In this regard, the Republic referred to the Vienna Convention on the law of treaties provides at Article 50, that:

> "If the expression of a state's consent to be bound by a treaty has been procured through the corruption of its representative [defined to include the head of state] …, the state may invoke such corruption as invalidating its consent to be bound by the treaty."

In the same way that international law allows a state to disavow a treaty entered into corruptly by a head of state, so national courts have refused to grant sovereign immunity to heads of state whose acts have been manifestly devoid of any semblance of legality. Thus, when Manuel Noriega, the president of Panama, was tried in the United States on various charges relating to drug trafficking, he pleaded, inter alia, his immunity as an acting head of state. The Court of Appeals of the 11th Circuit, however, summarily dismissed the objection on the basis that "the charges

relate to Noriega's private pursuit of personal enrichment", and not the activities of the Panamanian state.[1]

Our arbitral tribunal in World Duty Free agreed, holding simply that:

> "Mr Ali's payment was received corruptly by the Kenyan head of state; it was a covert bribe; and accordingly its receipt is not legally to be imputed to Kenya itself."[2]

(iii) The "balance of venality"

And so we come, thirdly, to the Claimant's invitation to the Tribunal to weigh the parties' "relative moral culpability" or, as Geoffrey Robertson QC put it: strike the "balance of venality".

In suggesting a way to strike that balance, the Claimant's counsel warned the Tribunal that:

> "Care must be taken to see that one party is not enabled to reap the fruits of his own dishonest conduct by enriching himself at the expense of the other".

The Republic of Kenya responded to this submission by asking who the Claimant was referring to when it referred to "*his* own dishonest conduct" and "enriching *himself*" in its warning. The bribe, so the Claimant told us, was paid to President Moi personally. In contrast, the Claimant's US$500 million claim in the arbitration was brought against the Republic, and stood to be paid – if successful – not by President Moi, but by the Kenyan taxpayer.

If the law accommodated a "balancing of turpitude", then the scales of justice surely would not weigh against the Kenyan taxpayer in favour of Mr Ali's World Duty Free.

But the law does not accommodate any such exercise. Rather, the policy reason for dismissing claims founded on illegality is the benefit to the public, and not the advantage of the defendant. That fundamental principle was stated over 200 years ago by Lord Mansfield in *Holman v Johnson*, remains good law to this day, and formed the basis of the Tribunal's decision in this regard. Let me read you an extract from Lord Mansfield's judgement, because I think it is noteworthy, and deals squarely with what our claimant suggested would be the "unfairness" of a dismissal of its claim.

> "The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; … The principle of public policy is this; *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. … It is upon that ground the court goes; not for the

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1 *U.S. v Noriega*, 117 F 3d 1206, at 1212 (11th Circuit 1997).

2 Para 169.

> sake of the defendant, but because they will not lend their aid to such a plaintiff."

Our Arbitral Tribunal agreed and noted, lest there be any doubt, that:

> "the law protects not the litigating parties but the public; or in this case, the mass of tax-payers and other citizens making up one of the poorest countries in the world."

On this basis, not only did the Tribunal hold that, as a matter of law, the Contract was unenforceable, but it also held that, as a matter of procedure, the Claimant's claim was inadmissible. As such, this constitutes the first strike out of an ICSID award on non-jurisdictional grounds that I am aware of.

And in striking out the Claimant's claim in its entirety, this tribunal was not shy in giving voice to the moral dimension of the issues before them, holding that corruption:

> "is more odious than theft; but it does not depend upon any financial loss and it requires no immediate victim. Corruption of a state officer by bribery is synonymous with the most heinous crimes because it can cause huge economic damage; and its long-term victims can be legion … a state contract procured by bribing a state officer is legally unenforceable, as an affront to the public conscience."

This award has, quite rightly, been applauded by many in international arbitration circles. But we should also recognise that it is destined to remain an unusual decision because of the particular circumstances in which it was rendered.

How often can we expect a claimant itself to offer the evidence of illegality that will – in all likelihood – consign its claim to failure?

There were unusual circumstances resulting in an unusual award. However, the broader question we need to ask ourselves is this: is a dispute resolution process such as international arbitration equipped to identify and deal with concealed corruption when the relevant parties don't have an ulterior motive for indulging in self-defeating transparency?

Let us assume, for these purposes, that the party implicated in illegality is unlikely to self-incriminate.

Let us go further and recognise that in certain circumstances both parties to an arbitration might be implicated in the illegality and have every reason not to subject the issue to the rigours of the adversarial process.

Such circumstances are not so difficult to imagine, and unfortunately are not just hypothetical. Suppose an arbitrator is confronted with a case where an agent is claiming a commission from a supplier, expressed to be payable in the event that the supplier obtains a certain contract in a certain developing country. Suppose the arbitrator begins to notice that both parties are carefully skating around the question of what the agent was actually supposed to do to earn his commission.

Should the arbitrator press them on it? Could it be that the reason why they have gone to arbitration, rather than to court, is precisely because that is an area they would prefer not to discuss openly?

Well, it is often said that arbitrators are creatures of contract, servants of the parties, with a contractual mission alone. But I am pleased to say that there is today a consensus, nevertheless, that arbitrators cannot allow their proceedings to become a public policy free zone.

An arbitral tribunal:

(1) has the power and jurisdiction to consider issues of illegality; and

(2) can do so of its own motion, *ex officio*, if the issue has not been put before it by the parties.

The jurisdiction and procedural discretion may exist on the part of arbitral tribunals to address and determine issues of public policy, such as illegality of their own motion. But the question remains, however, whether tribunals have the procedural means of getting to the bottom of such issues without the assistance of the parties given that:

(1) they do not have the broad investigatory resources of a criminal investigating agency, such as the Serious Fraud Office in the UK; and

(2) they do not have the same powers of compulsion over the parties before them, and most certainly not over third parties to their proceedings, as the courts do.

In these circumstances, some commentators have suggested innovative solutions to this investigatory/compulsion gap.

In a paper delivered at the ICCA Congress in London in 2002, entitled "Corruption and Other Illegality in the Formation and Performance of Contracts", an arbitrator with significant experience of contracts involving governments from developing economies described in detail the various forms which corrupt payments may take, and then commented as follows:

> "It is clear that, like most crimes and intentional misconduct, and perhaps more so, acts of corruption and collusion are specifically designed not to be able to be identified or detected. … how can we, as arbitrators sitting on tribunals established to adjudicate disputes that have arisen under such projects, ensure that we do not allow ourselves to overlook such corruption, and, by so doing, perpetuate the damage that has been inflicted thereby.
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> …
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> Certainly the corrupt party will make every effort to obscure or disguise the corrupt conduct. And often the party victim of such corruption, which in infrastructure projects may be the government-related party, will have been denied access to the evidence necessary to establish it and/or worse, prohibit

> it from presenting what evidence they may have by the very officials who benefit it.
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> …
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> Because of the near impossibility to "prove" corruption, where there is a reasonable indication of corruption, an appropriate way to make a determination may be to shift the burden of proof to the allegedly corrupt party to establish that the legal and good faith requirements were duly met."[3]

Whilst one can understand and sympathise with the sentiment motivating the views expressed in this paper – particularly from a lawyer who has practised for many years, as that author has, in Indonesia, a jurisdiction that has been ravaged by corruption – a shifting of the burden of proof is difficult for any lawyer to accept.

As an international arbitral tribunal deciding an UNCITRAL arbitration between Calenergy's Himpurna California Energy Ltd and the Republic of Indonesia's state electricity corporation, PLN, in which intimations of illegality were made, held in 1999:

> "The members of the Arbitral Tribunal do not live in an ivory tower. Nor do they view the arbitral process as one which operates in a vacuum, divorced from reality. … The arbitrators believe that cronyism and other forms of abuse of public trust do indeed exist in many countries, causing great harm to untold millions of ordinary people in a myriad of insidious ways. They would rigorously oppose any attempt to use the arbitral process to give effect to contracts contaminated by corruption.
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> But such grave accusations must be proven. There is in fact no evidence of corruption in this case. Rumours or innuendo will not do. Nor obviously may a conviction that some foreign investors have been unscrupulous justify the arbitrary designation of a particular investor as a scapegoat."[4]

Now I should mention that the author of the proposition that the burden of proof be shifted was counsel of record for the Republic of Indonesia in that arbitration, and this award may have contributed to some extent to her radical proposal. Be that as it may, I am absolutely convinced that the views expressed in the award are correct – allegations of illegality must, like any other allegation, be proven.

There are some that go further and suggest that such allegations are not like any other allegation and, therefore, should be subject to a higher, more rigorous standard

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3 Karen Mills, "Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto", *ICCA Congress Series* no. 11, Kluwer 2003, at page 295.

4 Final Award in *Himpurna California Energy Ltd (Bermuda) v. PT. (Persero) Perusahaan Listruk Negara (Indonesia)*, rendered in Jakarta on 4 May 1999, paras 219 and 220, published in Mealey's International Arbitration Report Vol. 14, #14, 12/99.

of proof. Some tribunals have talked of requiring “clear and convincing evidence”, a “preponderance of evidence”, or proof “beyond doubt”.

Is such a heightened burden appropriate? I would suggest not.

In the same way as I would argue against the shifting of the burden of proof, I would similarly argue against any enhancement of that burden, which in the circumstances of well-disguised illegality is already difficult enough to meet.

Put simply, the burden of proof on the balance of probabilities – no more, no less – should apply to allegations of illegality.

Where, however, I think tribunals can, and indeed on rare occasions have, shown flexibility in taking account of the often disguised nature of corruption, is in the way in which they determine whether that burden has been discharged. More specifically, tribunals: (1) do have power to require evidential production from the parties before them, and (2) have on some occasions been willing to draw adverse inferences from the absence of evidence emanating from the party against which an allegation of illegality is made.

There exists a handful of examples of this kind of flexibility, and I will finish this address by referring you to one of them, which occurred in ICC Case No. 3916 in 1982 between an Iranian claimant and a Greek respondent.

In the early 1970s, the claimant, an Iranian public functionary, and the respondent, a Greek company, entered into a contract under which the claimant promised to assist the respondent in the procurement of public contracts in Iran, by the provision of information and advice, and also by “personal actions”. In return for those “personal actions”, Respondent was to pay a commission of at least 2% of the price of any contracts obtained.

In the event, the respondent obtained several public contracts, but paid only part of the commission promised. The claimant proceeded to initiate arbitration before the ICC; a sole arbitrator was appointed, and the seat was to be in Paris. In defence of the claims for unpaid commissions, the respondent argued that the commissions contract was null and void under the laws of France and Iran for being contrary to good morals and public order.

During the arbitration proceeding, the claimant refused repeatedly to disclose the precise nature of the “personal actions” taken towards procuring the public contracts in question.

In the circumstances, the sole arbitrator held that, since the claimant had repeatedly refused to give any indication of the actions he had taken in order to assist the procurement of the public contracts, it could be presumed that these resulted in unlawful influence, contrary to both French and Iranian law. Accordingly, he held the commissions contract was a nullity, and the claimant’s action for unpaid commission could not succeed.

In my view, this flexibility, this willingness to draw inferences, this recognition of the elusive nature of direct evidence of corruption, is justified, and more tribunals should be willing, in the right circumstances, to manifest it.

One might argue that this sole arbitrator had, in effect, come close to inverting the burden of proof by presuming, rather than requiring proof of, illegality. But there is an important difference. Where an inversion of the burden of proof would have resulted in the Greek respondent simply asserting, and not needing to prove its defence of illegality, in this case it still did need to prove its case, but was assisted in discharging that burden by the claimant's unwillingness to provide evidence that ought to have been available and reasonably forthcoming if his contractual performance did not stray into illegal conduct.

Some may contend that the distinction between a willingness to draw inferences and the shifting of the burden of proof is a fine one. Perhaps. But the distinction nevertheless remains, in my view, both identifiable and important. And given that the odds are, in any event, stacked against the party seeking to demonstrate a well-disguised illegality, let us not stack those odds even further in favour of those that are concealing bribery by an unwillingness to draw such distinctions.

Let me end with an ancient exhortation.

> "And thou shall take no gift, for the gift blindeth the wise, and perverteth the words of the righteous." (Exodus, Chapter 23, line 8)

Over the ages, this exhortation has been ignored by generation after generation, often with impunity. That is the historical reality and, let us not be naïve, it remains so today. If you have a moment's doubt about this, spend another moment checking Transparency International's website and that doubt will vanish. In conveying the spread of corruption around the world, it paints the globe various shades of red, which in this context is not a positive colour.

In the face of this reality, and as we continue to reflect on how to optimise our international system of justice, let us do our utmost to ensure that our wise decision-makers are not constrained to stay blind to such "gifts"."

Discussion

The following points were included in the discussion.

Clarification of the facts in World Duty Free

The relationship between Kenya and Mr. Ali was active for many years. Mr. Ali made the payment in 1989. The contract was procured some days and weeks later. Mr. Ali operated the duty free operations at Kinyata and Moi international airports in Nairobi and Mombassa for most of a decade. During that period he had a very close relationship with President Moi and played some role in providing funds for Moi's election campaign in 1992. The *World Duty Free* case evolved and came to ICSID because a Mr Pattni and Ali got into an ownership dispute over World Duty Free. The courts in Kenya found that Pattni was the rightful owner of this company. Bringing a claim against Pattni in Kenya would have been useless, so Ali brought the arbitration against Kenya in 2000 alleging that the Government had facilitated an expropriation by siding with Pattni and misusing the judiciary in the appointment of a receiver to oversee the company during the period of this ownership dispute.

In anticipation of a *quantum meruit* claim that never arose, the Republic of Kenya tried to establish how much money Ali had made from his concession. The reports were that Ali would leave Nairobi every Friday on a flight to Dubai with sacks full of cash that were never accounted for.

The evidence of corruption in this case was overwhelming. Not only did the Claimants present evidence of corruption in their only witness statement, but Mr Ali attached bank statements showing the transfer of the $2m payment was made and led to the cashing of the amount in cash. Further, photographs of the President at his home shaking hands with Mr Ali were presented to the tribunal. Although the photographs alone prove nothing, they are illustrative of the relationship between Moi and Ali.

The relevant law

The proper law of the contract in the *World Duty Free* case was unclear. The arbitration clause contained a reference to English law, but the contract as a whole was to be governed by Kenyan law. When it came to issues of corruption, there was very little difference between English and Kenyan law. The Kenyan Prevention of Corruption Act was in all material respects word for word the same as the English Prevention of Corruption Act.

Public international law was cited in places, in particular the Vienna Convention on the Law of Treaties and the *Noriega* decision from the United States. The references to international law, though not strictly necessary, allowed the development of an argument about the separate identity of the State and the Head of State which was not possible through the use of domestic law alone.

Finding the source

The most effective way to combat corruption is for States that find themselves on the wrong end of arbitration proceedings to combine the efforts of their anti-corruption agencies with the authorities in other countries, particularly countries with a tradition of holding monies, in an effort to trace the proceeds of major contracts. It is only by making the mutual legal assistance route available in the civil context that we will see real progress.

The Institut de Droit International recently passed a resolution on immunities of Heads of State and Heads of Government. At the urging of two of the members, a provision was included which imposed an obligation on States in which banks are receiving money from a Head of State to check that the underlying transaction was proper. It is not clear if the provision has been, or will be, included in cooperation treaties, but it is a good start.

Of interest is that in February 2005 the Swiss Federal Supreme Court passed down a judgment in *Abacha*. The Supreme Court found that Abacha was the head of a criminal organisation. The result of that finding was that the Court had no difficulty in ruling that the money that had been stolen from Nigeria should be returned to Nigeria.

Changing the behaviour of major companies

Increasing the risks faced by large companies that customarily undertake contracts in developing countries is crucial to changing their behaviour. Transparency International in particular sees the fight against corruption informed by considerations of risk. The international business community, and governments, must be made aware that share prices and credibility depend on avoiding any perceptions of corruption. Partasides and his team have greatly contributed to this movement by focusing this case on the corruption issue and publicising the award very widely. However, It is difficult to tell the degree to which this case will disincentivise people from entering into contracts procured by corruption. It may be that the stakes are too high.

The role of lawyers

There is a danger that the result of ratcheting up the consequences faced by corrupt parties will only be to drive corruption underground. Lawyers instructed in cases where there are hints of corruption ought to explore every possible element of the case in order to dig up the truth about the ways in which contracts are formed. Such exploration will frequently involve stepping outside the immediate parameters of the case and enlisting the assistance of the authorities. Anti-corruption officials will be able to help the lawyer by coming at the facts from a different angle and exposing direct breaches of corruption laws.

There is some controversy over the duty owed by counsel for a corrupt party in arbitration proceedings. The commonly accepted position is that lawyers are subject to the ethical rules of their home jurisdiction when appearing in international proceedings. Although the 'duty to the Court' will not strictly apply, as the international arbitral panel is not a 'court', there does exist an analogous duty to the tribunal. Further, many legal systems, and certainly the English system, impose a duty on lawyers to act with integrity towards other lawyers. Lying to questions about corruption when aware that the party they represent is corrupt would be a breach of these ethical rules. If asked such question, the duty to act with integrity and the duty of confidentiality conflict and the lawyer must explain to his client that unless the corruption is disclosed, he must cease to act.

It is important to note that in *World Duty Free* both parties were not corrupt. The participants to the bribe were Mr. Ali and the then President Daniel arap Moi. President Moi was not a party to the arbitration.

It is perhaps surprising that bodies such as UNCITRAL, ICSID or even national bar associations do not lay down guidance as to the ethical rules to be followed by counsel. The arbitral bodies see their role as no more than providing a set of rules for arbitration, and the provision of conduct codes may be considered by them to be beyond their remit. The American Bar Association has made some effort to look into the codes that could be adopted. However, in the view of some the system works quite well on the basis that lawyers are subject to the ethical rules of their home jurisdiction. It is these professional bodies that are expected to police the lawyers who eventually come to the world stage. It would be difficult to formulate a generally acceptable code of ethics. Common lawyers and civil lawyers tend to have very different conceptions of what is unethical. However, this may be a field that would benefit from more work.

When lawyers are presented with evidence of corruption, money laundering legislation may be an issue, and the criminal penalties that can follow if they do not

blow the whistle. There are sometimes exemptions in such legislation for information gained by lawyers in the context of litigation.

The burden of proof

In the discussion of the burden of proof in relation to corruption cases, there were two considerations which lead to opposite results. Firstly, the difficulties in proving corruption militate towards a lowering of the burden of proof, and perhaps a reversal. Secondly, the seriousness of corruption allegations militates towards a higher burden of proof. The ICJ in the recent case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* clearly held that the more grave the allegations, the higher you ratchet up the degree of proof required. That case was considered in the context of state responsibility, which although not strictly civil liability, is certainly not criminal. There is an argument to be made that in civil matters the standard of proof should uniformly stay at the balance of probabilities. Further, public policy considerations, mainly the fight against corruption, force rejection of a higher standard of proof. The consequences of a higher standard would be that corruption would almost never be demonstrated.

In reality, many arbitrators will allow corruption allegations to colour their judgement without actually stating that that is the case, chiefly due to the evidential difficulties faced if they were explicit in their views.

Affirmation and procedural propriety

In *World Duty Free*, the Republic of Kenya continued to do business with World Duty Free for many years. Problems of affirmation are raised, as they often are in cases of this type. In Head of State transactions, local law is almost always used to ratify the illegality committed. In fact in this case, other than the corruption, there was no procedural impropriety. Procurement legislation had been followed. The argument really rested on the corruption not the procedure. In order to affirm an illegal act, there must be knowledge of it, and the contention by the Republic of Kenya was that President Moi's knowledge could not be attributed to the State.

Agency

It is important to correctly identify the position of agents and middlemen in corruption cases. One of the purposes of proceedings such as *World Duty Free* is to disincentivise those who are participating in corrupt transactions. If the contract stands because the corruption was by middlemen, we will not be benefiting from that disincentivisation as much as we should be. English law is very clear in this regard. The *Logicos* case in particular draws no distinction between the middleman and the principal.

Enforceability

The finding in *World Duty Free* has far reaching implications. There was a finding, as a matter of law, that the contract was unenforceable and also a finding, as a matter of procedure, that the claim was inadmissible. The claim was in contract and the contract was the fruit of an illegality - that is why procedurally and substantively, the claim was held to be inadmissible and unsustainable.

The tribunal makes two things clear at the end of their award. Firstly, that the award relates to contractual claims. If a restitutionary claim had been made in this case, it would not have been a claim based on the contract. It would not have been a claim that was founded on as a breach of an illegality. It would have been a claim for moneys had and received in unjust enrichment. If such a claim had been brought after this case was rendered, it is likely to have been rejected on the basis of preclusion – it being exactly the kind of claim that ought to have been brought at the time of the original claim, perhaps as an argument in the alternative.

The Situation in Nigeria

Parallels can be drawn between the corruption in Kenya and that in the Federal Republic of Nigeria – particularly during the 'cement armada' of the mid-1970s. Some thought that the most appropriate follow up to that litigation, after losing on the issue of sovereign immunity, was to establish that the eighty or so contracts involved had been procured by corruption. The Nigerian Government made investigations into the allegations of corruption, however the report was suppressed. Initially the report was only released to the Head of State and the most senior officer in the Nigerian Army. It was 20 years before the report was generally available. The long suppression of the report supports what has been said about Kenyan officials covering for each other.
The allegation of corruption has long been recognised as a possible way of forcing arbitration claims to be dismissed. However, it is very difficult in practice to establish corruption as a defence. The difficulties involved, and the resultant hesitation in running the defence, undermines the efforts being made under the UN Convention on Corruption and those being made to promote international cooperation in this field, particularly through mutual legal assistance.

Discussion summary by Maziar Jamnejad

Text of award may be found on http://www.asil.org/ilib/2007/02/ilib070220.html#j1