Part I Transnational Corruption and International Efforts at its Control, 2 The Nature of Transnational Corruption

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A. A Working Definition of Corruption

2.01 ‘Corruption’ is a polyvalent word. Like other terms used to describe complex human phenomena having moral underpinnings, ‘corruption’ identifies a concept everyone instinctively understands but would find hard to articulate completely. Etymologically, the word ‘corruption’ can be traced back to the Latin corrumpere, meaning ‘to break’.\textsuperscript{1} The Oxford English Dictionary defines ‘corrupt’ as ‘perverted from uprightness and fidelity in the discharge of duty’ and ‘to induce to act dishonestly or unfaithfully, to make venal’.\textsuperscript{2} The key factor distinguishing corruption from mere preference is the fact of inducement by one to another in order to show favour, rather than the showing of favour itself.\textsuperscript{3}

2.02 Colloquially, ‘corruption’ is vast in scope and reach. The term spans everything from taking a payment in secret as a government official, to the pocketing of funds entrusted to him or her as a private bank or store employee, to even the perceived overall degeneration of morality among the youth in their rejection of tradition. The common denominator among these disparate examples is the abuse of a duty owed to the public or a third person. As a term of art in the area of foreign investment, ‘corruption’ has many modalities and its manifestations change over time, but the underlying notion of a bilateral relationship between capital-provider and the public official who is the repository of public trust, and the private payment made to that official in exchange for a favourable public decision, will endure as basic elements of corruption in foreign investment.

2.03 Translating that understanding into a universally acceptable legal definition has been difficult. The leading NGO on this area, Transparency International, operationally defines corruption as the ‘abuse of entrusted power for private gain’.\textsuperscript{4} One of the principal anti-corruption treaties, the OECD Anti-Bribery Convention,\textsuperscript{5} does not contain a definition of corruption at all. Instead, it focuses on ‘bribery of a foreign public official’, which the treaty defines in the following terms: ‘to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage….’.\textsuperscript{6} One readily sees that these definitions carry a degree of uncertainty—terms such as ‘improper’ or ‘undue’ advantages and ‘abuse’ of power are used often, necessitating the exercise of judgement on the part of the observer. It is also evident from these definitions that corruption in its broad sense does not refer merely to illegal acts done by public officials by the nature of their powers and duties; they are meant to include

\textsuperscript{1}See Oxford English Dictionary (OED) Online. Available at: https://dictionary.oed.com.
\textsuperscript{2}See OED Online.
\textsuperscript{3}See id.
\textsuperscript{4}See Transparency International. Available at: https://www.transparency.org.
\textsuperscript{5}See Organisation for Economic Co-operation and Development (OECD). Available at: https://www.oecd.org.

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discretionary acts or omissions that are per se legal, but are motivated by private gain considerations.

2.04 The United Nations Office on Drugs and Crime has resisted attempts to lay out a precise definition, maintaining that there is ‘no single, comprehensive, universally accepted definition of corruption’, and that ‘attempts to develop such a definition invariably encounter legal, criminological and, in many countries, political problems’.\(^7\) Instead, the U.N. prefers to identify its particular forms, including ‘corruption, bribery, embezzlement, theft and fraud, extortion, abuse of discretion, favoritism, nepotism and clientelism, conduct creating or exploiting conflicting interests, and improper political contributions’.\(^8\) Similarly, jurists and legal scholars prefer to discuss particular manifestations of corruption that lend themselves to ready legal analysis, such as ‘illicit commissions’.\(^9\) While it would be unwise to attempt a comprehensive typology of corrupt practices, it is helpful to explore two forms of corruption that bookend the spectrum of corrupt acts. These are bribery and extortion.

1. Bribery

2.05 ‘Bribery’ is perhaps the most instantly recognizable modality of corruption; indeed, in studies that deal with relationships between private business and public officials (such as this book), ‘bribery’ and ‘corruption’ are often given practical equivalence. Nonetheless, bribery is a more specific term: it refers to payments made privately to a public official designed to receive some benefit, and describes a more immediate \textit{quid pro quo} when compared to less direct methods that influence the decisions of public officials towards acting in a manner that results in private benefit (such as nepotism, social bonds, etc.—all of these would instead be subsumed under the more amorphous ‘corruption’).

(p. 21) 2.06 Another essential concept concerning bribery is that the tender and acceptance of a private reward for a defection from duty involves not only a violation of law, but also the conscious and premeditated corruption of the \textit{processors} of the law (or of some relevant normative system).\(^10\) For those committed to the integrity of the normative system in place, bribing the custodians of the system may be more troublesome than the particular act of corruption itself, as the wholesale weakening of restraints within the class of public officials entrusted with control over the public order and economy leads to a distortion of purpose—public officials are no longer engaged in a public trust for public welfare; instead, public officials become no more than seekers of private benefit, only this time at the public’s direct expense. When those charged with implementation of the law have been compromised, all law within that polity is undermined.

2.07 Still another element of bribery is the \textit{voluntariness} of the agreement to the corrupt aspect of the transaction. Corruption is generally recognized by legal scholars and case law alike as a form of fraud,\(^11\) but unlike many of the other species within that genus, the typical bribe involves the free and knowing participation of the parties to the act.

2. Extortion

2.08 ‘Extortion’ (sometimes also called ‘blackmail’) is another important type of corruption. One can distinguish extortion from bribery by looking into whether the payer receives ‘better than fair treatment’ or must pay to be treated fairly. Put another way, ‘extortion’ is a situation in which the capacity of the official to withhold a service or benefit otherwise required by law exceeds the capacity of the private party to sustain the loss of that service or benefit.\(^12\) The degree of divergence between bribery and extortion lies in the extent to which the payment made is \textit{voluntary} or dictated by necessity. It is not unknown for government officials to engage in outright extortion; but for the most part, a
combination of greed, incentive, and threat usually occur in practice, making differentiation difficult.\textsuperscript{13}

2.09 Low-level extortion is often considered more annoying than truly burdensome, leading to the utilization of ‘facilitation payments’ from businesses and common citizens alike. In this case, money is used to induce functionaries (usually low-ranking government workers and officials) to perform their duties efficiently. It is a response to ‘extortion’ considered largely acceptable (the U.S. Foreign Corrupt Practices Act actually exempts this form of corruption from the application of that law)\textsuperscript{14} because the degree of deviance from the law the payment seeks to obtain is small at best—the official is usually paid just to ‘do their job’. Examples of facilitation payments abound, with recent innovations from anti-corruption (p. 22) NGOs having exposed the banality of some of these practices through the internet—claiming a legitimate income tax refund in Hyderabad, for example, purportedly costs about US$200, while obtaining a driver’s licence after having passed the test in Karachi is said to cost about US$33.\textsuperscript{15}

2.10 Overall, extortion can be visualized as one extreme of a continuum of corruption bounded by the degree of freedom and mutuality with which the corrupt act is executed by the counterparties. In the case of foreign investment, corruption can at one extreme be completely initiated by the private party (e.g. the investor) who proposes and then actively induces the public official to accept a bribe in exchange for performing an act within that official’s control. At the other end of the continuum, a public official can, through various coercive means tied to his position, force the investor to pay money in order to receive a benefit or (more likely) to be spared from the exercise of State power in a manner detrimental to the investment. The terms \textit{blackmail} and \textit{extortion} are convenient shorthand and can be used for this extreme. The midpoint of this continuum would be where both private investor and public official freely and mutually negotiate and participate in the corrupt act for mutual gain.

2.11 The difficulty of providing an all-encompassing definition notwithstanding, it helps to have at least a working definition of corruption, as any legal decision-maker’s understanding of the term is central to its treatment in law. For purposes of this book, corruption is the \textit{knowing application or refusal to apply laws in a manner that benefits private demands at the expense of public needs}. Such a definition goes one step further than the Transparency International definition, as it incorporates the idea, so fundamental to public sentiment, that corruption is at its core a developmental issue—its persistence in government does real damage to the welfare of the polity.

2.12 Finally, while this working definition speaks of corruption in the public sector, this should not imply that \textit{private sector} corruption is of less venality. This study will not deal with private sector corruption principally because investment arbitration necessarily involves the public sector—a host State or its instrumentalities are always party to any investment case). While obviously related, the condemnation of private commercial bribery has not been as prominent,\textsuperscript{16} given uncertainties about policy goals\textsuperscript{17} and legal foundations,\textsuperscript{18} among others. However, as the global economy continues to integrate and increasing affluence across the developing world causes the eclipse of government’s role in national economies, private (p. 23) bribery, with all its effects on efficiency, fiduciary relationships, and fairness, will merit more serious international attention than it has thus far been given.

B. The ‘Inevitability’ of Corruption in Social Development

2.13 Most people, regardless or nationality, social class, or age, view corruption as an intrinsic evil—it is a ‘deadly virus’,\textsuperscript{19} an ‘evil practice which threatens the foundations of any civilized society’.\textsuperscript{20} Any suggestion that corruption is an inevitable, even necessary, by-product of economic development and evolution into a ‘mature’ democracy, is viewed as dangerous apologia and compromise. In both academic circles and in business, however,
one used to hear sporadic voices of permissiveness or nuance. This kind of talk has largely disappeared from public discourse over the last two decades. Academics, particularly in the social sciences, are increasingly adopting the view that corruption has no real benefits, and that zero-tolerance is the proper attitude in regulating corrupt behaviour.

2.14 The 1960s saw some social scientists adopt revisionist approaches in which they argued that a moral foundation to corruption was unacceptable, as a working definition of corruption would have to be based on an a priori condemnation grounded on moral principles supposedly not universally shared by all societies. These scholars emphasized the ‘unavoidable character of corruption at certain stages of development and the contributions of the practice to processes of modernization and development’. Professor J.S. Nye, for example, not only attacked the moralist analysis of corruption, but went on to outline the possible benefits and costs of corruption and bribery, including (1) economic development, because some kinds of corruption may be an important source of capital formation; (2) the cutting of red-tape; (3) encouragement of entrepreneurship and incentives by allowing minority groups access to political decisions; (4) national integration, particularly overcoming the divisions among the ruling elite; and (5) a preferable alternative to violence.

2.15 Indeed, from a broader historical perspective, every measured advance of civilization from pre-history onward has been accompanied by corruption, as an inevitable consequence of the evolution of human societies. Civilizations of whatever stripe were ordered in a remarkably similar fashion: common citizens (or peasants, to use feudal nomenclature) would produce and consume what was necessary for bare existence, and then provide rulers with most of their surplus. Surpluses were given, as Bertrand Russell had observed, as part of a duty one had initially been compelled, but then eventually freely chose to give, to one’s sovereign. Indeed, tribute of (p. 24) this kind had developed into such a deeply engrained expression of their societies that many (if not most) thought it only right for rulers and clergymen to have such surpluses. And while the change of epochs to the modern age has made the idea of absolute power lodged in unelected sovereigns untenable, the idea that high public officials should have some right to the excesses of production has not dissipated entirely.

2.16 The dilemma fundamental to all centrally governed, non-egalitarian societies from chiefdoms to modern States in all their forms of government, is the tendency inherent in the structure to be susceptible to the personal interests of the controlling elites. Centralized authorities are, at best, benign optimizers and allocators of a community’s resources for the common good, and at worst, ‘function unabashedly as kleptocracies, transferring net wealth from commoners to upper classes’. The incidents of modern corruption move along this spectrum even today, between ‘decentralized’ corruption where the State is weak and the opportunities for many low-level officials to extract rents abound, and ‘centralized’ corruption where one leader seeks to maximize the efficient extraction of payments from investors and other economic actors.

2.17 The difficulties in making the leap from traditional to modern modalities of government, and the change in the nature of corruption resulting from that transition, were perhaps best articulated by the sociologist and political economist Max Weber. Identifying three pure types of legitimacy underlying the authority of the State—legal authority, traditional authority, and charismatic authority—Weber distinguishes among them by locating the source of the political superior’s power. For societies governed through legal authority, legitimacy is derived from a system of rules applied according to known principles. These principles are administered by appointed or elected officials whose powers are limited and whose official duties are kept separate from their private lives. The second type, traditional authority, derives its legitimacy from history or social convention; power is inherited in these societies, and those engaged in administration are chosen based on personal loyalty to those in authority (such as feudal lords and their relationships with
their vassals). Lastly, charismatic authority is grounded upon the personal charisma of the leader (in the past perhaps, through demonstrations of mystical or prophetic powers, but more now through personal heroism and virtue), instead of legal rules or tradition; administrators are picked based on personal loyalty as well, or perhaps because of similar charisma.  

2.18 Sudden changes in forms of authority, along with the intermingling of personality or tradition-based forms with rules-based democracies is commonplace in our modern world. Legal prescriptions alone would not be able to survive imperatives considered more important to particular elite actors, who remain a potent social force even as a new form of government comes in. There are many societies where fealty to the law is overshadowed by fealty to a particular group with commonalities—blood ties, language, class. Nepotism and patronage, for example, will be decried even by those who practise it; and yet these practices persist almost unabated in every society. Indeed, for someone of the Weberian inclination, a genuine transition from traditional forms of social organization to the modern bureaucratic State is characterized by ever-increasing loyalty for the law and the constructs of the State instead of local interest groups. It has been observed that ‘[c]orruption is essentially a sign of conflicting loyalties pointing primarily to a lack of positive attachment to the government and its ideals’. So while corruption has strong economic underpinnings, it also has an under-emphasized non-monetary element: corruption flourishes the most in States that still maintain strong factional loyalties and whose elite have not yet internalized (whether altruistically or because they are forced by the public) the idea of primary loyalty to the State instead of to kinship or partisan interests.

2.19 Weber’s three categories of authority serve as an important tool for explaining corruption in government. In societies where rulers govern and regulate in ways that blur the distinction between public and private property despite the presence of the ‘rule of law’, it becomes clear that legal rulers hide the true basis by which that society is ruled, which would either be charismatic or traditional (as applicability of the law is dependent upon the ruler’s will), and obtaining reward depends not on adherence to formal law but to the either personal loyalty or conventions set by tradition or by the charismatic leader. The point at which legal authority truly prevails in a society—thus consolidating the modern bureaucratic state—is when public office is no longer considered a source of income to be exploited for rents, and when the personal loyalty developed through kinship or patronage institutionalized through social conventions no longer serves as the primary mode of advancement and retention for public officials. Instead, public office is no longer linked to a personal relationship with a (mostly) patrimonial authority, but is rather dedicated to functional and impersonal purposes.

C. Perspectives from Economics

2.20 Corruption can also be viewed in purely economic terms. Some economists have previously claimed that transnational corruption is an efficient market-clearing mechanism that affords foreign capital the ability to compete with local elites. This view perceives corrupt payments as the monetized value of personal and social structures in a given community, allowing foreign investors the ability to neutralize the embedded advantages of local elites. In a weaker version of this claim, other scholars have provided empirical evidence suggesting that corruption is not per se a disincentive to the attraction of foreign direct investment.

2.21 The idea that transnational corruption is sometimes a useful market-clearing mechanism is shared not only by some economists, but also by many directly involved in foreign investment who would not be as candid with their views if identified. An interview conducted with a partner of a prominent Wall Street law firm based in an overseas office bears this out. Asked about his views on corruption and foreign investment, this partner intimated (and he mentioned that this was a view shared by many clients) that corruption
was actually essential to the furtherance of foreign investment in developing countries, because corruption guaranteed that the return received by that foreign investor for his capital would be at a rate greater than what he would receive in less risky investment climates, a rate enough to justify the additional risk of investing in a developing State.  

2.22 As a descriptive matter, the foregoing perspective (particularly when thinking of transnational corruption) has cogency, as it partly explains why foreign investment would enter into risky environments. However, as a prescriptive matter, this same logic can be used to legitimize corrupt practices that nonetheless promote ‘economic efficiency’, i.e. efficiency for the immediate participants of the economic relationship that corruption enables. However, the price mechanism, which in other contexts is a highly productive shaper of economic efficiency, does in the form of bribery lead to the undermining of the legitimacy and effectiveness of government, and adds to overall inefficiency, as the corrupt payments made are inevitably recouped by the foreign investor through other means (higher prices and/or reductions in quality). Indeed, some corporations are highly pragmatic in this regard: they couch corrupt payments in purely monetary terms as an additional tax.  

2.23 These revisionist theories, which have mostly adopted a narrow, micro-economic view of efficiency, have never quite taken root. Since at least the 1990s, the academic study of corruption has with increasing urgency emphasized the lasting effects corruption has upon governance, the rule of law, and the economic development of States. Tracing the issue back (p. 27) to that most basic insight of economics upon human nature—the fact that persons and societies as a whole respond to incentives—Professor Rose-Ackerman states that

a. there is one human motivator that is both universal and central to explaining the divergent experiences of different countries [concerning corruption]. That motivator is self-interest, including an interest in the well-being of one’s family and peer group. Critics call it greed. Economists call it utility maximization. Whatever the label, societies differ in the way they channel self-interest. Endemic corruption suggests a pervasive failure to tap self-interest for productive purposes.  

2.24 This unbridled pursuit of self-interest leads to a familiar phenomenon in economics: ‘rent-seeking’ is a way of describing situations where scarce resources are employed not only for productive purposes, but also for economic actors to gain an advantage in dividing up the benefits of economic activity. Corruption in the public sector falls right at the point where productive economic activity begins to fall entirely within unproductive rent-seeking. As an example of its incentive-distorting capacity, corruption has been found to promote excessive new infrastructure investments at the expense of maintaining existing infrastructure. Corruption affects the competitiveness of the entire global economy through mis-channeled and inefficient investments. It has been shown that corruption acts like a tax on foreign direct investment: the difference between relatively clean Singapore and relatively corrupt Mexico was found to be the equivalent of an additional tax rate of over 20 percentage points. Even more severe is the example of Indonesia. A comprehensive recent study of governance there presented a bleak picture concerning ‘Corruption, Collusion, and Nepotism’ (known by the acronym KKN): KKN is rampant in every sector of government activity and on every level, and is perceived to be on the rise rather than decreasing. A bureaucrat in Central Java described the practical impact of
KKN as follows: ‘... in the tender of projects, price manipulation occurs to the point that the level of a building project inefficiently can reach 30 per cent.’

2.25 Thus, the perception of corruption as an enhancement or debasement of economic efficiency seems to depend upon who the observer is. In a situation of freely transacted bribery (as contrasted with extortion), the immediate participants clearly benefit, and the transaction is ‘efficient’ in their eyes, leading to results desired by them at a price they are willing to pay. However, for the larger populace, investments and commercial transactions that are entered into with the aid of corruption are clearly inefficient once one looks at the distortive effect corruption has upon government’s resource use prioritizations—whenever officials (p. 28) can influence the quantity and quality of services provided and the identity of beneficiaries, corruption will almost certainly lead to inefficiency. Corruption thus encompasses more than just the giving and acceptance of payments; beyond that bilateral relationship, it represents a breakdown in the system of governance within a State. It also represents a failure of the transnational corporation to effectively police its own ranks.

2.26 Economic analysis helps highlight the fact that bribery leads to inefficient decision outcomes, thereby leading to pathological decisions. It is a bane to the efficient ordering of economic activity in the aggregate by bringing the transaction affected by bribery away from the optimal utilization of scarce resources and towards the benefit of the few instead of the many. More importantly, it helps us understand that the dispassionate economic case against corruption is every bit as persuasive as the passionate moral one.

D. Prohibited Corruption vs. Permitted Inducement

What’s legal is bigger in my view than what’s illegal. There aren’t a lot of people breaking the law. You don’t need to break the law. The laws are written in a way that, frankly, the lines are so skewed that you can operate very corruptly within the law for a very long time.

—Jack Abramoff, 2011

2.27 One way to elucidate the nature of corruption is to explore the relationship between legal proscriptions and acts considered ‘corrupt’. Is monetary inducement offered to a public official to achieve private gain for both the giver and recipient to be considered ‘corruption’, even if that act is not considered illegal under the relevant national statute? If not, should this be the case? This is not a theoretical exercise. Matters such as campaign contributions and the employment of former government officials in the industries they had previously regulated point to the difficulties in insulating corruption from other forms of influence used to affect an official’s private interests that society seems to consider valid.

2.28 When one conceives of corruption, the incidents envisaged often centre on acts of outright bribery. ‘Grand’ corruption and kleptocracies possess very little moral ambiguity; it would take a high degree of delusion for perpetrators and public alike to view these acts as legal. By contrast, in developed countries such as the United States, the institutionalization and regulation of interactions between the private sector and public officials have given rise to an elaborate formal system of lobbying and campaign finance that outsiders would view as a blurring of lines between acts that are legal, moral, illegal, and corrupt.

2.29 Adding further complication to the issue is the fact that the use of personal connections to secure certain advantages not given to others is effectively permitted even today. Cultural norms in all societies condone or at least tolerate, in varying degrees, practices that stop just short of a direct quid pro quo but are nonetheless meant to influence the decision outcomes of public officials for reasons other than intrinsic merits. Characterizing a monetary or non-monetary payment to secure a divergence from a public duty as a bribe instead of something that would be considered permissible under prevailing societal norms or the operating (p. 29) norms of a community depends, of course, on which
criterion for judging is employed by the person evaluating the act. A good example of this would be to compare what is called ‘lobbying’ in the United States with similar conduct performed in other States.

2.30 ‘Lobbying’ is a term that is formally meant to describe the process by which relevant information is provided to legislators by those most concerned about a particular area that is potentially the subject of legislation. However, this innocuous definition does not begin to capture the potential for abuse that appears to have corrupted much of the legislative process in the United States. ‘The extent and routine toleration of [lobbying] practices, which often cause deviations from the myths of equality of political opportunity and representative government, are attributable to their social unobtrusiveness.’ Nonetheless, ‘[t]hey are probably integral to the United States political system’. 47 Permitted ‘lobbying’ by former elected officials having personal relationships with (and thus access to) those still in power, a practice accepted in the U.S., might be considered intolerable ‘influence-peddling’ by other societies, including other developed countries. 48

2.31 For many lobbyists, the idea that they would be engaging in unlawful corruption would not even be contemplated; the informal discussions and exchanges, coupled with demonstrations of ‘politeness’ by giving gratuities, all form part of what is typically done by the entire lobbying industry. As stated by the infamous lobbyist Jack Abramoff after having been imprisoned on corruption charges, ‘[a]t some level, unfortunately, corruption has seeped its way into even honest dealings there, where you have the exchange of gratuities, you have the exchange of contributions and money, and it’s not viewed as it should be, as bribery; it’s viewed as a polite way that business is done’. 49 Lobbyists are often hired from the ranks of those who worked in congress and who therefore know those persons still there and the processes necessary to hurdle. To address these issues, Mr Abramoff’s suggested reform is to completely disallow representation of any kind, even a glass of water, because gratuity of any kind can lead to bribery. 50

2.32 Another phenomenon to consider would be campaign contributions. Corporations having a financial interest in securing favourable legislation or a contract would understandably devote considerable financial resources into securing its objectives. One of the principal ways they would do so is to support the campaigns of public officials that they believe would support such objectives. Some would consider this ability to use money to persuade public (p. 30) officials for such purposes an inherent part of freedom of expression; the United States Supreme Court is of this view, for example. 51 However, other States take a much more restrictive view; some disallow private contributions outright, deeming it better for public funds to be used for campaigns. Interestingly, when considering the legality of such contributions, the foreign-ness of the giver is considered a relevant factor—payments made to a foreign public official (for example, to that official’s ‘re-election campaign’) will be viewed in some countries as improper meddling with domestic affairs and as possible bribery; indeed, in many countries, campaign contributions by foreigners are considered unlawful regardless of the intention. 52 Similar foreign payments made in Washington, D.C. may sometimes be considered lawful, albeit distasteful. 53 Thus, under different systems, the same act would be characterized differently.

2.33 Interestingly, international arbitration has considered this issue in the case of Methanex v. United States. 54 There, it was alleged that the then-California Lieutenant Governor Gray Davis, who was running for governor of that state, received campaign contributions by a competitor of foreign investor Methanex in exchange for his aid in enacting a decree that would ban the gasoline additive MBTE (Methanol, which Methanex produced, was an ingredient of MBTE). The arbitral tribunal emphasized that since campaign contributions of the kind in question were legal in the United States, a case of corruption could generally not be sustained. Nonetheless, the tribunal expressed a willingness to look into ‘whether the evidence adduced can event support, by way of inference, Methanex’s view’ that a dinner between Methanex’s competitor ADM and Lt.
Gov. Davis held in Illinois (the seat of ADM’s offices), which in and of itself was a typical way to gain ‘access’ to a candidate, was sufficient evidence ‘to justify inferring that the exchange at the dinner was unlawful’.\footnote{55} After an extensive review of the evidence, the tribunal concluded that an inference of corruption was not warranted, especially given the realities of the legislative process in democracies, where ‘private individuals and interest groups’ may participate:

> Legislation in democratic systems involves, by its nature, participation by a wide spectrum of private individuals and interest groups in addition to the members of the legislature and the executive, insofar as its endorsement is also necessary for a bill to become law. While there may be circumstances in which facts would support an inference that one ‘invisible hand’ was lurking behind and controlling a seemingly democratic process which had been elaborately contrived to conceal its machinations, it is clear beyond peradventure that the facts in the record do not warrant such an inference here.\footnote{56}

\textbf{2.34} Although the 	extit{Methanex} tribunal ultimately did not find that corruption was present, it was clarified that even acts considered legal under a particular national law could still be the subject of international scrutiny for possible corruption. The case thus suggests the possibility of a distinct and more stringent conception of corruption that can be applied by international tribunals in lieu of more permissive national laws. Equally important, the 	extit{Methanex} tribunal clarified that even if campaign contributions are per se legal, if that contribution was made on a \textit{quid pro quo} basis, whereby campaign contributions would be made in exchange for specific governmental action, such contributions would still be considered illegal. The intent behind the contribution is thus a vital determinant of the legality of that contribution. However, intent is of course difficult to prove. The idea that companies bidding for government contracts or receiving subsidies be banned from giving any money whatsoever politically thus merits serious consideration.\footnote{57}

\textbf{2.35} Lobbying and campaign contributions are but two of the many ways in which public decision-making is influenced by the often inchoate offer of private reward at some undetermined time. These inducements are generally considered by businessmen simply part of the cost of doing business, and are not considered corruption even by the most fastidious of companies. As noted by Professor Reisman, ‘our system of law tolerates and facilitates through the device of the licit business expense the practice of transacting business not by exclusive reference to the quality of the product or service but by reference to essentially unrelated personal favors’.\footnote{58}

\textbf{2.36} From the standpoint of community expectations, what separates the more-tolerated use of personal connections from less-tolerated bribery? First, it seems to matter what type of public official is being approached. Few, for example, would agree that interested parties can discuss their pending cases outside the courtroom.\footnote{59} By contrast, legislators being lobbied by industries seeking preferential treatment are tolerated. The role the particular public official plays thus accounts for a lot—legislation, which involves hearing ‘the people’ out and reflecting their concerns, seems to be afforded the most leniency; the closer one gets to officials who adjudicate actual cases, the less tolerated material persuasion is. Second, the degree of transparency seems important. In the U.S., the fact that campaign contributions must be publicly disclosed by candidates for office seems to contribute to its acceptance. In contrast, payments made in a non-transparent (though not necessarily clandestine) manner will be suspected of corruption regardless and ‘free expression’ will likely not be looked upon as a valid justification. The third component would be the absence
of a quid pro quo; although it (p. 32) seems a little naïve, it appears that so long as favours are not explicitly promised in exchange for money, campaign contributions are allowable.

2.37 In the eyes of most societies, therefore, not every use of personal relationships in order to influence public decision-making is invidious. The legal prohibition of certain practices depends on judgements made independently by that community as to which practices are allowable or amount to corruption.

E. The Natural Habitat of Transnational Corruption

2.38 Despite the trillion-dollar annual costs of transnational corruption, comparatively few reported and proven instances exist to aid our understanding of the phenomenon. One example extracted from recent headlines involves among the most coveted of all natural resources—oil and gas, particularly from the Middle East. Government officials are notoriously corrupt in the region, and the oil industry there has a particular reputation for playing along, enabling the ‘epidemic’ to grow. When accusations of bribery involving the French oil giant Total surfaced, for example, the company’s chief executive was placed under investigation and spent a night in jail in early 2007 on suspicion of paying bribes to win a huge gas project in Iran.

2.39 Total had invested $2 billion in the project, building two offshore drilling platforms linked by more than 100 miles of pipeline to a vast processing complex. It is one of the largest natural gas projects in the Middle East. From media reports, it appears that to obtain this contract, $7.8 million had been transferred in 1997 to the account of an Iranian living in Switzerland, who in turn was an employee of a former Iranian President, as ‘consulting fees’. Swiss authorities eventually traced the money back to Total, discovering that millions more had been paid from 1999 to 2003. These corrupt practices may be emblematic of the direction in which the rest of the industry is headed, as shrinking reserves force energy companies to search harder for deals in difficult parts of the world.

2.40 When one parses through the example of Total and other documented instances of corruption for large-scale foreign investment, the repeated presence of the following elements becomes apparent: (i) a foreign investor, (ii) committed to investing large sums of money or resources, (iii) entering into specific negotiations with the host State’s government, (iv) through a local intermediary that has access to the relevant public officials, (v) over an area of the economy in which the government has an established monopoly (such as public works or natural resource extraction). Transnational corruption finds its natural habitat with the presence of all these elements. Indeed, the combination of these elements so regularly breeds corruption that one might almost consider them as forming a transnational corruption ‘equation’—whenever foreign investors and host States come into direct contact (p. 33) for purposes of entering into large-scale investments in areas of the economy for which the government has a monopoly, corruption is far likelier to have occurred at some point in the relationship. As with all research on corruption, it is difficult to marshal empirical data to support the conclusion that a ‘corruption equation’ exists, but the evidence that does exist, particularly in the form of U.S. investigations under the Foreign Corrupt Practices Act, is robust and consistent.

2.41 The foreign element is important here. Few activities developing government officials deal with present more opportunities for corruption than foreign investment, which usually involves valuable goods, services, and technology, and massive amounts of money, all provided by persons or entities who by definition are not familiar with the way things are done in that country, thereby relying on local intermediaries who have close relationships with those in power. Because they are less familiar with the effective power structures prevalent in a host State, they often resort to the familiar, and often very true, statement that corruption is a ‘fact on the ground’ and part of the price that every investor pays if they want to do business in that country. The reality is that in many places, bribes are unfortunately part of the way government interfaces with business, and rent-seeking cannot
be done away with without grave jeopardy to a going concern’s continued viability. Not ‘paying to participate’ is, for example, often fatal to one’s participation in a tender process. It is one thing (and admirable indeed) to refuse to be drawn into corrupt practices and thus withdraw entirely from certain States; it is simply naïve, however, to suppose that of the many foreign investments actually made in many States, bribery was unnecessary to begin or maintain a concern. In many States, if you are not an insider already, you must pay; otherwise, you simply cannot participate. In these situations, all investors are equally placed in their having paid bribes to take part in a lucrative aspect of the host State’s economy.

2.42 In the end, one has to acknowledge, however grudgingly, the fact that in most if not all of the developing world, every foreign investor who has made long-term commitments of large amounts of capital would have had to engage in some form of corruption, either as a precondition to investing in the country from the outset, or as a hedge to ensure that the investment continues to be productive. The degree of voluntariness and the amounts involved may vary, but improper payments will have been made.

Footnotes:

1 Colin Nicholls et al., Corruption and the Misuse of Public Office (1st edn., Oxford University Press, 2006), para.1.01.
2 Nicholls et al., Corruption, paras.1.01–1.02.
6 OECD Convention, Art. 1(1).
8 U.N. Office on Drugs and Crime, Global Programme against Corruption, ch. 1.
11 In recent commentaries on corruption under international investment law, there has been some preference to conceptualize corruption within the broader principles of fraud and other illegalities that may attend foreign investments vis-à-vis host States. See e.g. Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties (Kluwer, 2009), 282; Gabriel Bottini, ‘Legality of Investments under ICSID Jurisprudence’, in The Backlash Against Investment Arbitration (Michael Waibel et al. (eds.), Kluwer, 2010), 297.
12 The term extortion may be reserved for those situations in which the capacity of the official to withhold a service or benefit otherwise required by law exceeds the capacity of the private party to sustain the loss of that service or benefit.’ Reisman, Folded Lies (n 10), 38.

See Chapter 4, section B.

See Stephanie Strom, ‘Web Sites Shine Light on Petty Bribery Worldwide’, N.Y. Times, 6 March 2012 (calling such payments “retail corruption”, the sort of nickel-and-dime bribery, as opposed to large-scale graft, that infects everyday life in so many parts of the world. [...] [I]n August 2010 [...] they started ipaidabribe.com, a site that collects anonymous reports of bribes [...]. About 80 percent of the more than 400,000 reports to the site tell stories [...] of officials and bureaucrats seeking illicit payments to provide routine services or process paperwork and forms.’)

Unlike public sector corruption, private bribery has not received the same attention from international institutions, and no general convention has thus far been established to curtail such practices. See generally Günter Heine et al. (eds.), *Private Commercial Bribery* (International Chamber of Commerce, 2003 edn.).

‘[T]here is no unanimity about the policy goal(s) which private-sector bribery law should vindicate. Is the purpose to curb unfair competition, penalize violations of loyalty due to employers and/or to an economic system, or ensure the protection and proper management of corporate assets? Or a plurality of purposes?’ Heine et al., *Private Commercial Bribery* (n 16), 3.

While some countries criminalize private sector bribery, most continue to consider the problem within the ambit of either unfair competition, breach of trust or fiduciary duty, or tortious interference with employment obligations. See Heine et al., *Private Commercial Bribery* (n 16), 4.

U.K. Home Secretary, White Paper: Raising Standards and Upholding Integrity: The Prevention of Corruption, Cm 4759, June 2000: ‘Corruption is like a deadly virus. Left unchecked it weakens economies, creates huge inequalities and undermines the very foundations of democratic government.’


Bertrand Russell tied this sentiment to the industrial revolution, when societies experiencing the jump from subsistence to surplus were no longer forced (as they were in medieval times) to hand over their surpluses to rulers; instead, it became ethically ingrained upon citizens to feel a duty to support the ruling classes. ‘To this day, 99 per cent of British wage-earners would be genuinely shocked if it were proposed that the King should not have a larger income than a working man. The conception of duty, speaking historically, has been a means used by the holders of power to induce others to live for the interests of their masters rather than for their own.’ Bertrand Russell, *In Praise of Idleness* (1932), available at: <http://www.zpub.com/notes/idle.html>.


Diamond, *Guns, Germs and Steel* (n 24), 276.
26 See William Easterly, *The Elusive Quest for Growth* (MIT Press, 2001), 247–8 ("Two different kinds of corruption could affect growth: decentralized corruption and centralized corruption. Under decentralized corruption, there are many bribe takers, and their imposition of bribes is not coordinated among them. Under centralized corruption, a government leader organizes all corruption activity in the economy and determines the shares of each official in the ill-gotten proceeds. [...] [A] strong dictator will choose a level of corruption that does not harm growth too badly, because he knows his rake-off depends on the size of the economy. A weak state with decentralized corruption doesn’t have this incentive to preserve growth. Each individual bribe taker is too small to affect the overall size of the economy, so he feels little restraint on getting the most out of his victims.’)

27 For an extended discussion, see Max Weber, ‘The Three Types of Legitimate Rule’ (Hans Gerth trans.) (1958) 4 *Berkeley Publications in Society and Institutions* 111.

28 One would not have to look far for examples of these oscillations; the developments in contemporary Russia over the last 25 years, from the fall of communist party rule to Boris Yeltsin up through the presidencies of Vladimir Putin, are a prime example.

29 See e.g. ‘Pakistan: A Great Deal of Ruin in a Nation’, *The Economist*, 31 March 2011 (’[d]emocracy in Pakistan has been subverted by patronage. Parliament is dominated by the big landowning families, who think their job is to provide for the tribes and clans who vote for them. Except for the Jamaat-e-Islami, parties have nothing to do with ideology. The two main ones are family assets—the Bhuttos own the PPP, and the Sharifs... own the Pakistan Muslim League.’)


31 Or, in Weber’s words, when societies are organized hierarchically and collectively (instead of individualistically, where equal treatment applies to all persons), societies tend to be controlled by certain groups and governed by social convention instead of law: ‘The firm appropriation of opportunities, especially of opportunities for domination, always tends to result in the formation of status groups. The formation of status groups in turn always results in monopolistic appropriation of powers of domination and sources of income [...] Hence, a status society always creates [...] the elimination of individuals’ free choice [...] [and] hinders the formation of a free market.’ Max Weber, *On Charisma and Institution Building* (S.N. Eisenstadt (ed.), University of Chicago Press, 1968), 177–80.


33 A number of empirical studies have shown, in various times and contexts, that perceptions of corruption are not significantly correlated to levels of foreign direct investment. See e.g. Alberto Alesina and Beatrice Weder, *Do Corrupt Governments Receive Less Foreign Aid?*, Nat’l Bureau Econ. Research (Working Paper No. 7108, Cambridge, MA) (1999) (insignificant finding between perceived corruption and investment, using foreign direct investment data from 1970–95); Pierre-Guillaume Méon and Khalid Sekkat, ‘Does the Quality of Institutions Limit the MENA’s Integration in the World Economy?’ (2004) 27 *The World Economy* 1475–98 (no significant impact of corruption on inflows of foreign direct investment for a small sample of middle eastern counties).

However, other studies provide evidence that corruption does indeed have a negative effect on foreign direct investment. See S.-J. Wei, ‘How Taxing is Corruption on International Investors’ (2000) 82 *Rev. Econ. & Stat.* 1–11 (detects a significant negative impact of corruption on FDI between 14 course and 45 host countries in 1990–91, e.g. an increase in the corruption level from that of Singapore to that of Mexico is equivalent to raising the tax rate by over 20 per cent); J. Graf Lambsdorff, ‘How Corruption Affects Persistent Capital Flows’ (2003) 4 *Econ. Gov.* 229–44 (in a cross-section of 64 countries, corruption decreases...
capital inflows, e.g. an increase in Tanzania’s level of integrity to that of the U.K. increases net annual capital inflows by 3 per cent of GDP).

34 Interview conducted in Hong Kong, June 2008 (on file with author).
35 Rose-Ackerman, *Corruption and Government* (n 13), 9.
36 ‘Bribery is regarded as immoral by most Americans, but this is not the universal view, and there are many people, among them heads of some of our multinational corporations, who regard it simply as another form of taxation.’ R. Rovere, Letter from Washington, *New Yorker*, 3 March 1977, 113.
37 Susan Rose-Ackerman, *Corruption and Government* (n 13), 2.
40 Rose-Ackerman, *Corruption and Government* (n 13), 178.
43 See Hofman et al., *Corruption and Decentralization* (n 42), 104.
44 See Hofman et al., *Corruption and Decentralization* (n 42), 106.
45 Rose-Ackerman, *Corruption and Government* (n 13), 13.
47 Reisman, *Folded Lies* (n 10), 58. Professor Reisman then recalls an observation made by scholars about the function of ‘the bribery of patronage and corruption’ in getting legislation enacted within the vast and heterogeneous population of New York: ‘although deals are denounced with regularity, they are an essential tool of the democratic process. The alternatives to ‘deals’ are legislation by fiat, in which the chief executive employs almost dictatorial powers’, 58–9.
48 One particularly unsightly example of corruption in the developed world from the 1970s involved payments made by virtually all major oil companies (including Exxon, Mobil, Chevron, Total, British Petroleum, and Shell) at that time to Italian political parties (including the Christian Democrats and the Socialist Parties) in order to obtain favourable legislation. In some cases, the payments made were calibrated against expected profits (a 5 per cent cut). Reisman, *Folded Lies* (n 10), 65–7 (citations omitted).
50 ‘[Y]ou also can’t give any gratuity: a meal, tickets to ball games, nothing indirectly, directly, not even a glass of water. Basically, cut out entirely the bribe. And that’s what it is. It’s not polite to say it, but that’s what it is. It’s a bribe. Whenever you’re giving money or you’re conveying some financial interest to a person who works for the government, and you are lobbying to get things from them or you’re trying to get something from them,
you’re bribing them, that’s it.’ Interview of Jack Abramoff reprinted in David Sirota, A Reformed Jack Abramoff? (n 46).


52 Under the Philippine Omnibus Election Code, for example, ‘[i]t shall be unlawful for any person, including a political party or public or private entity to solicit or receive, directly or indirectly, any aid or contribution of whatever form or nature from any foreign national, government or entity for the purposes of influencing the results of the election.’ Batas Pambansa Blg. 881, Sec. 96 (1985, as amended).

53 The matter of foreign participation in U.S. election campaigns and in lobbying has long been debated. Current United States law prohibits foreign States and nationals from contributing to federal, state, or local elections. Nevertheless, loopholes exist allowing American subsidiaries of foreign corporations to establish separated segregated funds for the purpose of campaign fund-raising. “Foreign” Campaign Contributions and the First Amendment’ (1986) 110 Harv. L. Rev. 1886, 1903. In the 2010 case of Citizens United, the U.S. Supreme Court held that the First Amendment prohibited the U.S. government from restricting political broadcasts during elections even when such broadcasts were funded by corporations or unions. While the majority in the Citizens United decision did not deal with the issue of foreign contributions, the four dissenting justices concluded that foreign nationals have no such First Amendment rights.

54 Methanex Corporation v. United States of America, NAFTA/UNCITRAL Arbitration Rules, Final Award on Jurisdiction and Merits dated 3 August 2005. For a detailed summary of Methanex v. US, see Chapter 6, section B.

55 Methanex, Part III, Ch. B, para. 38.

56 Methanex, Part III, Ch. B, para. 46.

57 ‘[I]f you’re going to get a contract and you’re going to get a government relationship that isn’t appropriate or you’re lobbying them, you shouldn’t be able to give one dollar politically. You basically should be prohibited from giving any contribution politically to any federal member or anybody who is running for federal office.’ Interview of Jack Abramoff reprinted in David Sirota, A Reformed Jack Abramoff? (n 46).

58 Reisman, Folded Lies (n 10), 48.

59 Elaborating upon familiar principles of judicial conflict-of-interest, the U.S. Supreme Court stated: ‘Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen’s respect for judgments depends in turn upon the issuing court’s absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.’ Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002).

60 ‘Unfortunately, this sort of corruption has become an epidemic in Africa and the Middle East.’ Craig Smith, ‘Tough Days to be a French Oilman’, N.Y. Times, 27 March 2007, quoting Nicolas Sarkis, Director of the Arab Center for Petroleum Studies, Paris.

61 Smith, ‘Tough Days’ (n 60).

62 Smith, ‘Tough Days’ (n 60).

63 See Smith, ‘Tough Days’ (n 60). (‘A lot of the oil majors actually are going to have to move toward Total’s model rather than the other way around,’ said Jon Rigby, an oil analyst with UBS in London, ‘as they replace volumes from the United States and the North Sea.’)