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NAILING CORRUPTION: THOUGHTS FOR A GARDENER

A Comment on World Duty Free Company Ltd v The Republic of Kenya

Sophie Nappert*

Professor Hans van Houtte is a gardener. This is to be distinguished from the lover of gardens, a dilettante content to sit back and enjoy the fruits of the gardener's toil. The gardener is concerned with the cycles of nature and seasons, the nitty-gritty of parasites and helpful insects, the minutiae of light and soil conditions. The gardener, therefore, is in close contact with matters of life and death, blossoming and decay; in short, with the very essence of human nature.

It will therefore come as no surprise that Professor van Houtte enjoys a deserved reputation as a wise and respected international arbitrator, because international arbitration is a microcosm for the complexity and paradox of human nature – and in no other aspect does international arbitration come more closely in contact with human nature than in its frustration and limitations in dealing with allegations of corruption.

Corruption flourishes in the occult and the unsaid, and thrives behind outwardly licit façades. It is as notoriously difficult to resist as it is to prove. It may be found anywhere, and defies long-established rules of due process. Its ramifications are far-ranging, and devastating: the World Bank estimated that corruption can reduce a country's growth rate by 0.5 to 1.0 percentage point per year.[1] We are therefore entering the 21st century with a history of corruption in international

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[1] Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders http://www.un.org/events/10thcongress/2088b.htm

business that is as old as man himself, and a significant number of international conventions that confirm that it is a cause for global concern.[2]

The problem is vast, and scholarship abounds. This contribution will focus on one case, *World Duty Free Company Limited v The Republic of Kenya* ('WDF')[3] where, unusually, circumstances of corruption were squarely put into evidence. Then, considering the phenomenon of corruption as akin to a global oil spill of future indeterminate proportions, the precise cause of which remains generally intractable to direct evidence, it will suggest that a variation on the precautionary approach to the standard of proof, similar to that applied in cases hinging on scientific uncertainty, might assist arbitration tribunals in their consideration of allegations of, and attempts at proving, corruption.

'More odious than theft': *World Duty Free v Kenya*

The claimant contracted with the Republic of Kenya to run duty-free operations at Nairobi and Mombassa Airports, and to renovate and upgrade their passenger facilities. In 1990, the complexes created in Terminals 1 and 2 of Nairobi Airport were formally opened by the President and Vice-President of Kenya.

In the ICSID proceedings started in June 2000, the claimant alleged that Kenya had breached the agreement by, inter alia, manipulating its judiciary into appointing a receiver over WDF's operations, thus indirectly expropriating the claimant's investment.

In the course of the proceedings, the claimant's representative, Mr Ali, stated that, upon asking in Kenyan business circles how best he could arrange to obtain the necessary licenses to establish the duty-free complexes at the airports, he was advised by a well-connected Kenyan businessman

[2] *"It should therefore come as no surprise to anyone that corruption is internationally abhorred and vigorously denounced. There is a global convergence of legal rules, authorities, and opinions condemning corruption, supporting the claim that there exists an international public policy, even a transnational public policy, against corruption"* (and related footnotes): M Hwang and K Lim, "Corruption in Arbitration – Law and Reality" (2011), to be published in the *Asian International Arbitration Journal* 2012, available at http://www.arbitration-icca.org/articles.html.

[3] ICSID Case No. ARB/00/7, Award, 4 October 2006.

that 'local protocol' demanded that he should make a 'personal donation' in cash to President Moi, amounting to USD2 million, in order to do business with the Government of Kenya. This Mr Ali did.

Upon application by the Republic of Kenya for dismissal of the claim with prejudice, on the basis that the contract was unenforceable as a matter of public policy, the tribunal found:

1. That the payment made to President Moi by Mr Ali amounted to a bribe, on the basis of the '*indisputable'* relevant facts on the evidence adduced before the tribunal;[4]

2. 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. If it were otherwise, the payment would not be a bribe*";[5]

3. That, "[i]*n light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy*";[6]

4. That nothing in the applicable English or Kenyan law would render legal any part of the Claimant's conduct, and that consequently it was unnecessary for the Tribunal to consider the effect of a local custom ('*harambee*') which "*might render legal locally what would otherwise violate transnational public policy or the foreign applicable law chosen by the contractual parties for their transaction*". The Tribunal added, *obiter*, that, had it been necessary, it would "*have been minded to decline in the present case to recognise any local custom in Kenya purporting to validate bribery committed by the*

[4] Award, para. 136.

[5] Award, para. 169.

[6] Award, para. 157.

Claimant in violation of international public policy and (if different) English public policy as part of English law”.[7]

5. Consequently, the tribunal found that as a matter of public policy under both English law and Kenyan law (treated by the tribunal as materially identical), and *ordre public international*, the claimant was not legally entitled to maintain any of its pleaded claims on the ground of *ex turpi causa non oritur actio*.

The case is notable for the Tribunal’s unequivocal pronouncements in confirmation of bribery as a one of “*the most heinous crimes*” of global proportions, and enormous adverse economic impact:

“*In the Tribunal’s view, it is significant that in England, historically, the common law has traditionally abhorred the corruption by bribery of officers of state, ranking its offence next to high treason. Such 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*.”[8]

The Tribunal was not oblivious to the long shadow cast by President Moi over the proceedings, despite his not being a party, and over whom the Tribunal had no jurisdiction:

“*It remains nonetheless a highly disturbing feature in this case that the corrupt recipient of the Claimant’s bribe was more than an officer of state but its most senior officer, the Kenyan President; and that it is Kenya which is here advancing as a complete defence to the Claimant’s claims the illegalities of its own former President. Moreover, on the evidence before this Tribunal, the bribe was apparently solicited by the Kenyan President and not wholly initiated by the Claimant. Although the Kenyan President has now left office and is no longer immune to suit under the Kenyan Constitution, it appears that no attempt has been made by Kenya to prosecute*

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[7] Award, para. 172, citing the English House of Lords in *Kuwait v Iraqi Airways (Nos 4 & 5)* [2002] AC 883 at 1100 et seq., which declined to recognise as a matter of English public policy a local Iraqi law, as part of the applicable law, which formed part of flagrant breaches of international law by Iraq.

[8] Award, para. 173.

him for corruption or to recover the bribe in civil proceedings. It is not therefore surprising that Mr Ali feels strongly the unfairness of the legal case now advanced by Kenya (...).

The answer, as regards public policy, is 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. (...)"[9]

Corruption and the standard of proof

Most cases do not present evidence as straightforward as that proffered in WDF. In the large majority of instances, a party seeking to prove corruption has to face a near-absence of tangible signs that something untoward has taken place.[10] Tribunals are left to their own devices in their approach to these allegations and treatment of the elements brought to their attention, falling short of full-blown evidence. Thus, "*uneven responses"* are being provided,[11] the unpredictability of which is a cause for concern in dealing with a disease as rampant as corruption, especially in the context of a 'fragmented' international law. The cases range from the 'Eyes Shut' variety, where tribunals apparently seek "*to rationalize avoiding inquiry into strong indicia of corruption on thin procedural grounds, or because the state had not itself pursued – or concluded – domestic criminal investigations of corruption allegations*"[12] to 'Zero

[9] Award, paras. 180-181.

[10] *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 221: "*In any case, however, corruption must be proven and is notoriously difficult to prove since, typically, there is little or no physical evidence*."

[11] *International Investment Law & the Fight Against Corruption*, Workshop Agenda, 17 June 2009, The Open Society Justice Initiative and the Vale Columbia Center on Sustainable International Investment, at < http://www.vcc.columbia.edu/events/documents/WorkshopAgendaChairs.pdf>.

[12] *Ibid*., citing, in the investment arbitration context, *Siemens v Argentina, Azurix v Argentina, Wena v Egypt, African Holdings v Congo, Siag and Vecchi v Egypt*. One could also add to the list *EDF (Services) Limited v Romania, supra*.

Tolerance' cases, where the State's defence of bribery or fraud in inducement of the investment opportunity serves as a complete bar to the claim.[13]

And then there is the oft-cited case of *Himpurna California Energy v PLN*, possibly an Eyes Shut case, in which attempts by the Respondent, the State electricity corporation of Indonesia, to demonstrate instances of illegality were met with the following rebuttal:

"*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.*

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."[14]

Is it sufficient for international arbitral tribunals to be content to use the civil standard of proof as a shield, when faced with a problem as complex and multi-faceted as corruption? Is it consistent with their duty as upholders of the rule of law?

Suggestions that the standard of proof should be reversed have been made, and are generally rejected as inconsistent with due process.[15] A prevailing arbitral practice appears to be that

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[13] *Ibid*., citing, in addition to *WDF, Inceysa v El Salvador, Plama v Bulgaria, Fraport v Philippines.* Arguably *WDF* does not really belong in that category and stands on its own in that the 'defence' of corruption was provided on the back of the Claimant's own admission of giving a bribe.

[14] *Himpurna California Energy Ltd (Bermuda) v. PT. (Persero) Perusahaan Listruk Negara (Indonesia),* Final Award, 4 May 1999, para.118, reported in Mealey's International Arbitration Report Vol. 14, #14, 12/99. The author was part of one of the legal teams acting for the Respondent.

[15] Hwang and Lim, *supra*, para. 37.

applied, *inter alia*, in *EDF v Romania*, namely to raise the standard of proof to the level of "clear and convincing evidence", "conclusive evidence", and the like. Thus the *Himpurna* tribunal required 'clear and convincing proof' of illegality, unobtainable in the circumstances: "*there is a presumption in favour of the validity of contracts; that this presumption is healthy; that it is strengthened when contracts have provided the basis upon which many persons have acted over time, and that a finding of illegality or other invalidity must not be made lightly, but must be supported by clear and convincing proof.*"[16]

This of course makes the task of the complaining party, bereft of traceable evidence even on a 'normal' standard of proof, harder still. Query therefore whether it amounts to the tribunal blithely avoiding the problems of evidence,[17] and indeed working against the international consensus of a vigorous fight against corruption.

It behoves the international arbitration process, as the premier means of dispute resolution in global business, to put its reputation for flexibility and adaptability to the test and devise a more appropriate way, consistent with principles of fairness and due process.

To this end, inspiration could be drawn from other fields presenting equally demanding challenges to the application of the traditional standard of proof, and where there are signs that changes are afoot.

Scientific Uncertainty

In an era where international law is endeavouring to come to terms with environmental protection, sustainable development, and public health and safety regulations and policies, international tribunals are called upon to adjudicate matters of extreme scientific complexity. Science, in essence, presents both technical complexity for non technically-trained tribunal members, as well as inherent uncertainty and peer disagreement. These core attributes sit

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[16] *Himpurna* Final Award, *supra*, para 116.

[17] H Raeschke-Kessler and D Gottwald, 'Corruption in Foreign Investment – Contract and Dispute Settlement between Investors, States and Agents' in P Muchlinksi, F Ortino, and C Schreuer (Eds.): *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008).

uneasily with legal adjudication, which typically looks for a binary, right-or-wrong outcome of retributive redress, in a largely adversarial procedural setting.

The International Court of Justice (ICJ) itself recently showed that matters have reached a crisis point. In the *Case concerning Pulp Mills on the River Uruguay,*[18] Argentina claimed that Uruguay, in allowing the building and operation of two pulp mills on the River Uruguay, a common boundary between the two States, was in violation of the 1975 Statute of the River Uruguay and other international law, including the international law relating to watercourses. The ICJ found that Uruguay had breached its procedural obligations of prior notification under the Statute, but not its substantive obligations. Argentina was held not have discharged the burden of proving that one of the mills had harmful effects contravening the Statute, and its claim that the burden of proving compliance should be shifted to Uruguay was dismissed.

The ICJ's judgment comprises a Joint Dissenting Opinion by Judges Al-Khasawneh and Simma that is a vigorous indictment of the majority's conservative approach to the presentation and gathering of scientific evidence:

"(…) *the Court has clung to the habits it has traditionally followed for the assessment and evaluation of evidence to arrive at the finding in operative paragraph 2. It has had before it a case on international environmental law of an exemplary nature – a "textbook example", so to speak, of alleged transfrontier pollution – yet, the Court has approached it in a way that will increase doubts in the international legal community whether it, as an institution, is well-placed to tackle complex scientific questions* (…). *The Court on its own is not in a position adequately to assess and weigh complex scientific evidence of the type presented by the Parties.*"[19]

Proposals have been made in scholarship regarding the possible reversal of the burden of proving that a contested measure is harmful.[20] It is recognized that traditional evidentiary and procedural rules, whereby the complainant must discharge the burden of proving its case, sit awkwardly with established scientific uncertainty. It has been suggested that a fairer allocation of the

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[18] *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment of 20 April 2010, ICJ Reports 2010.

[19] *Ibid*., Joint Dissenting Opinion of Judges Al-Khasawneh and Simma, paras 3-4.

[20] C E Foster, *Science and the Precautionary Principle in International Courts and Tribunals*, Cambridge Studies in International and Comparative Law, CUP, 2010.

burden of proof might involve, in those cases of established scientific uncertainty only, the application of a precautionary approach such as to make it incumbent on those taking the disputed course of action to show that it is *not* harmful. Indeed the precautionary approach has recently been recognized by the International Tribunal for the Law of the Sea as forming part of customary international law in environmental disputes.[21] Whether it will find wider application remains to be seen.

A threat to the public good

In the domestic context, the English courts have considered circumstances where the inherent unlikelihood of a particular event may heighten the 'cogency' of the evidence required to establish its occurrence, "[b]*ut the question is always whether the tribunal thinks it more probable than not*". Thus the standard of proof remains that of a balance of probabilities, but there is more.

In the case of *Secretary of State for the Home Department v Rehman*,[22] the House of Lords considered an appeal from a decision that Mr Rehman, a Pakistani national who had been refused indefinite leave to stay in the United Kingdom, should be deported on the ground that this would be 'conducive to the public good in the interests of national security' in light of his association with Islamic terrorist groups. On appeal before the House of Lords, counsel for Mr Rehman argued that the Court of Appeal were in error when rejecting the Commission's ruling that the Secretary of State had to satisfy them, "*to a high civil balance of probabilities*", that the deportation of the appellant, a lawful resident of the United Kingdom, was made out on public good grounds because he had engaged in conduct that endangered the national security of the United Kingdom and, unless deported, was likely to continue to do so.

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[21] *Case No 17: Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Advisory Opinion, 1 February 2011, para.135, at http://www.itlos.org.

[22] [2001] UKHL 47.

In dismissing the appeal, Lord Slynn of Hadley underlined the importance of a decision on deportation taken 'in the public good', and that given the high stakes it was appropriate for precautionary and preventative principles to inform the decision to deport, rather than wait until harmful activities have taken place, or continue to take place:

"*Here the liberty of the person and the practice of his family to remain in this country is at stake and when specific acts which have already occurred are relied on, fairness requires that they should be proved to the civil standard of proof.* ***But that is not the whole exercise****. The Secretary of State, in deciding whether it is conducive to the public good that a person should be deported, is entitled to have regard to all the information in his possession about the actual and potential activities and the connections of the person concerned****. He is entitled to have regard to the precautionary and preventative principles rather than to wait until directly harmful activities have taken place****, the individual in the meantime remaining in this country. In doing so he is not merely finding facts but forming an executive judgment or assessment.* ***There must be material on which proportionately and reasonably he can conclude that there is a real possibility of activities harmful to national security but he does not have to be satisfied, nor on appeal to show, that all the material before him is proved, and his conclusion is justified, to a "high civil degree of probability"****. Establishing a degree of probability does not seem relevant to the reaching of a conclusion on whether there should be a deportation for the public good.*

Contrary to Mr Kadri's argument this approach is not confusing proof of facts with the exercise of discretion—specific acts must be proved, and an assessment made of the whole picture and then the discretion exercised as to whether there should be a decision to deport and a deportation order made."[23] (emphasis added).

Lord Hoffmann, in turn, underscores the limitations of the concept of standard of proof:

"(...) *I agree with the Court of Appeal that* ***the whole concept of a standard of proof is not particularly helpful in a case such as the present****. In a criminal or civil trial in which the issue is whether a given event happened, it is sensible to say that one is sure that it did, or that one*

[23] Paras 22-23.

thinks it more likely than not that it did. But the question in the present case is not whether a given event happened but the extent of future risk. This depends upon an evaluation of the evidence of the appellant's conduct against a broad range of facts with which they may interact. The question of whether the risk to national security is sufficient to justify the appellant's deportation cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee."[24]

One could object at this stage that the distinction to be made between cases of scientific uncertainty, and for that matter the future likelihood of disruption of the public good by an alleged terrorist, with that of the proof of illegality, is that the former look to preventing a future risk, rather than to the establishment of a past event, such as the giving of a bribe. It is correct that this dichotomy exists but, adopting an approach similar to the House of Lords' in *Rehman*, it is suggested that a broader picture must be looked at in considering the role of international tribunals in the fight against corruption.

If one accepts that international arbitration tribunals need to play a part in the global fight against corruption, if one accepts the status of corruption as one of our world's 'most heinous crimes', then this puts cases in which corruption is alleged, and the evidence thereof, on a par with cases of environmental disasters and threats to public order. Consequently arbitration tribunals are failing to discharge their duty if they simply look at the evidence of corruption as a series of one-off, past events to be proven on the same basis as other factual events in the case, foregone and not to be repeated. The many international instruments in place denouncing corruption tell us that events of illegality are part of a larger fabric of repeated, endemic instances. It is in that sense that they too constitute a future risk of an uncertain nature, warranting an approach to evidence and the standard of proof that differs from that applied to "*more mundane matters, such*

[24] Para. 56.

as whether, for instance, words amounting to a contractual offer were conveyed by one party to another".[25]

How does this translate in practical terms for arbitral tribunals faced with allegations of corruption? It is suggested that, in the words of Lord Slynn, arbitrators should ask for, and consider, material on which proportionately and reasonably they can conclude that there is a real possibility of corruption, but they do not have to be satisfied that all the material before them is proved, and their conclusion justified, to a "high civil degree of probability". They are assisted in this task by their ability to draw inferences in appropriate circumstances. Overall, however, what truly emerges from the above overview is the current need for best practice guidelines as to what thresholds international tribunals should seek before drawing such inferences.

By way of conclusion

It would be tempting, from a lover of gardens to a gardener, to quote Voltaire's *Candide*.[26] Instead this contribution will close with the following, from an equally famed French author:

"*Chaque génération, sans doute, se croit vouée à refaire le monde. La mienne sait pourtant qu'elle ne le refera pas. Mais sa tâche est peut-être plus grande. Elle consiste à empêcher que le monde se défasse*."[27]

International arbitration has an important role to play in the global fight against corruption. It has the means of doing so at its disposal. A concerted effort towards achieving a degree of predictability and compatibility in how it approaches this task would constitute a big step forward in the process of preventing, at its own level, 'an unravelling of the world'.

London, February 2012.

[25] Hwang and Lim, *supra*, para. 39.

[26] "*Cela est bien dit*", répondit Candide, "*mais il faut cultiver notre jardin*."

[27] Albert Camus, *Discours de Suède*, Nobel Prize for Literature, 10 December 1957.