Bribery within the Private Sector

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I. INTRODUCTION

In the 2007-2008 Global Competitiveness Report of the World Economic Forum,[1] the Philippines ranked 71st and was found to have gained competitive advantage from its market size. Despite improvement in its ranking, the country's overall competitive performance is strained by low rankings in four key pillars: labor market efficiency,[2] institutions,[3]

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1. World Economic Forum, The Global Competitiveness Report 2007-2008, *available at* http://gc107.weforum.org (last accessed Sep. 22, 2009) [hereinafter GC Report]. In 2007, the Philippines ranked 24th and 25th in terms of its domestic market size and foreign market size, respectively.
2. *Id.* at 30-31. The country's labor market suffers from "severe brain drain problem, little flexibility for firms in wage determination, and excessively high firing costs, reducing the incentive for hiring." *Id.*

infrastructure,[4] and health and primary education. The four key pillars are governmental issues whose pressing status has earned them top slots in every administration's agenda. Thus, government participation in addressing or aggravating[5] these issues is undeniably relevant.

Corruption in the Philippines continues to be the major impediment to the country's political and economic maturity, just as it is "extensively perceived to be the most formidable impediment to development and economic growth in developing nations."[6] As a response to this, laws were enacted to govern graft and corrupt practices of public officials, such as the Anti-Graft and Corrupt Practices Act[7] and the Code of Conduct for Public Officers.[8] Both statutes serve as bases for the particular codes of conduct in government offices.

However, while the government has an important role in developing competitiveness, consideration should be given to "many other national and local actors *outside of government* [that] have a role in competitiveness and economic development"[9] such as the private sector. The private sector plays a crucial role in development[10] and is inevitably part of the issues affecting development. Particularly in corruption,[11] the private sector may either be the giver or the receiver. In the country's thriving economy, corruption is a

3. *Id.* "High business costs of terrorism, low public trust of politicians, excessive red tape, and concerns related to the diversion of public funds and the wastefulness of government spending" lead to public distrust in public and private institutions. *Id.*

4. *Id.* Poor transportation and communication infrastructure remains a source of disadvantage despite consistently forming part of the government's priority plans. *Id.*

5. The involvement of government in frustrating the country's global competitiveness is evidenced by local news replete with exposés on corruption in government in which public and private individuals take part. Corruption, in all its forms and variations, remains identified with the government and the public office. To put it blatantly, corruption equals government, and corrupt government equals injustice.

6. Marie M. Dalton, *Efficiency v. Morality: The Codification of Cultural Norms in the Foreign Corrupt Practices Act*, 2 J. OF LAW & BUSINESS 583, 585 (2006).

7. Anti-Graft and Corrupt Practices Act, Republic Act No. 3019 (1960).

8. An Act Establishing a Code of Conduct and Ethical Standards for Public Officials and employees, to Uphold the Time-Honored Principle of Public Office being a Public Trust, Granting Incentives and Rewards for Exemplary Service, Enumerating Prohibited Acts and Transactions and Providing Penalties for Violations Thereof and For Other Purposes [Code of Conduct and Ethical Standards for Public Officials and Employees], Republic Act No. 6713 (1989).

9. GC Report, *supra* note 1 (emphasis supplied).

10. *Id.* at 59.

11. Corruption is a phenomenon in the public and private interface.

major obstacle in the flow of investment, trade, and other economic activities. Investors consider "facilitation payments"[12] as a norm and as part of the cost of doing business creating a negative image of the economic environment in the country. In the face of globalization, such perception discourages both foreign and local investments.

The prevalence of corruption may greatly be attributed to poor governance.[13] The incompetence to enforce the laws, the lack of political will to expose corrupt practices, and the failure to prosecute offenders all contribute to the perpetuation of corrupt practices in the public sector.

"Corruption is always a two-way transaction with a supply and a demand side."[14] With corruption, a relationship is forged wherein the state either solicits or receives favor from the private sector.[15] However, some aspects of corruption such as fraud and the misappropriation of assets or funds can occur entirely within the private or public sector.[16] Thus, the privatization of utilities and public services does not prevent corruption. This shows that corruption is not only present in the government but can also penetrate private entities, separate and distinct from the government. Corruption, as a national issue involving both the public and private sectors, separately and interactively, needs to be addressed with laws for the public-private interface and the private-private interface.

The primary thrust of this Note is to analyze within a legal framework for the integration of bribery in the private sector into the Philippine legal

12. This refers to "payments to civil servants for routine administrative services to which the enterprise is clearly entitled. Kathryn Gordon & Maiko Miyake, *Business Approaches to Combating Bribery: A Study of Codes of Conduct* 5 (2001). It also includes "'grease money' that lubricates the squeaky wheels of rigid bureaucracy and commerce." George R.G. Clarke & Lixin Colin Xu, *Privatization, Competition and Corruption: How Characteristics of Bribe Takers and Payers Affect Bribe Payments to Utilities* (World Bank, FEEM Working Paper No. 82.2002, 2002), at 2 (citing Samuel Huntington, *Political Order in Changing Societies* (1968) and Nathaniel Leff, *Economic Development through Bureaucratic Corruption*, *in* American Behavioral Scientist, 1964, 8 (3), 6-14), *available at* http://ww.feem.it /Feem/Pub/Publications/WPapers/default (last accessed Sep. 22, 2009).

13. The Commonwealth, *Fighting Corruption, Promoting Good Governance,* (2000) *available at* http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BC628DA6C-4D83-4C5B-B6E8-FBA05F1188C6%7D_framework1.pdf (last accessed Sep. 22, 2009).

14. *Id.*

15. THOMAS TARO LENNERFORS, THE VICISSITUDES OF CORRUPTION: DEGERENATION-TRANSGRESSION-JOUISSANCE 34 (2008) (citing ROSE-ACKERMAN, S., CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 113 (1999)).

16. *Id.*

system by identifying the acts punishable and the parties who may be held liable. Through such integration, the government will be able to regulate private economic activities which are essential in national development. The Note aims to provide a comprehensive approach in the private sector in support to its integration in Philippine law.

The principal-agent model[17] will be used as framework to identify the source of liability — the breach of duty to the principal.[18] This Note will also address the remedy of the injured principal against the third party participating in the agent's corrupt act. Thus, the determination of rights, duties, and liabilities of the parties shall include that of the principal, the agent, and the third party.

Thus, this Note seeks to answer the following questions: (1) What is bribery in the private sector? (2) What are the remedies available under Philippine law for violation of principal-agent relationship? (3) Are such remedies adequate? (4) Does the Philippines need to have bribery laws applicable to the private sector? and, (5) How will a law against bribery in the private sector affect the political and economic status of the Philippines?

The phenomenon of corruption transcends interrelated issues arising from the public and private sectors, but to achieve the objectives set forth above, this Note shall be limited to certain parameters.

First, this Note shall provide a review of the development of the concept of corruption. However, corruption shall be understood in its general sense, that is, commission of acts in violation of a duty for personal gain. The use of foreign materials shall be limited to pertinent definitions and efforts of domestic legislation. Thus, the Note will not present a detailed and complete account of all anti-bribery laws.

Second, this Note will present important nuances of such definitions. As such, this Note adheres to the position against the deleterious effects of corruption on development.[19]

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17. Agent based models are usually used to investigate learning or evolution of some kind. They are used to explore the dynamics of a multi-generational model with heterogeneous agents and adaptive expectations. *See* Rajesh Chakrabarti, *Corruption: A General Equilibrium Approach* (Indian School of Business, Working Paper, July 2001), at 7, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=296859 (last accessed Sep. 22, 2009).

18. Harvey S. James, Jr., *When is a Bribe a Bribe? Teaching a Workable Definition of Bribery* (University of Missouri, Teaching Paper, Sep. 12, 2001), at 21, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=295745 (last accessed Sep. 22, 2009).

19. The author acknowledges other scholars and commentators arguing for the positive economic effects of corruption under the claim that grease money has

Third, the focus will be on bribery within the private sector in the context of a principal-agent relationship. Thus, principal-principal transactions shall be dispensed with.

Finally, this Note will not discuss the process of prosecuting the offense, but would only identify the elements of the proposed crime. Furthermore, liabilities will be limited to natural persons as possible subjects of the proposed offense.

II. CORRUPTION AND DEVELOPMENT

Corruption as "taboo and accepted as a necessary evil"[20] dates back to the early beginnings of society. The term corruption originated from the Greek word *corruzione* and the Latin word *corruptus*, which mean the "deterioration of government and in the quality of governance."[21] In the context of governance and public service, it is "the concept of deviating from the purity and integrity of governance and government."[22]

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positive effects particularly in slow economies, and that bribe may serve as incentives for government to work harder. They further argue that corruption creates opportunities for international businesses to penetrate foreign markets through avoidance of costly interruptions by certain standards and procedures. (*See generally* LENNERFORS, *supra* note 15, at 114 (citing LEFF, N. H., ECONOMIC DEVELOPMENT THROUGH BUREAUCRATIC CORRUPTION. POLITICAL CORRUPTION — CONCEPTS AND CONTEXTS (2002); HUNTINGTON, S. P., POLITICAL ORDER IN CHANGING SOCIETIES (1968); ADES, A. & R. DI TELLA, THE CAUSES AND CONSEQUENCES OF CORRUPTION: A REVIEW OF RECENT EMPIRICAL CONTRIBUTIONS (1996); Weber, J. & K. Getz, *Buy Bribes or Bye-Bye Bribes: The Future Status of Bribery in International Commerce in* Business Ethics Quarterly 14(4) 698 (2004); Gould, D. J. & J. A. Amaro-Reyes, *The effects of corruption on administrative performance: illustrations from developing countries* (1983)).

20. Schellenberg Wittmer, The Tightening of Swiss Anti-Corruption Legislation, Particularly in the Field of Bribery in the Private Sector (Private Bribery), Sep. 2006, *available at* http://www.swlegal.ch/Publications/Newsletter/The-tightening-of-Swiss-anti-corruption-legislatio.aspx (last accessed Sep. 22, 2009).

21. Nelson J.V.B. Querijero & Ronnie V. Amorado, Transnational Civil Society Movements: The State of Anticorruption Efforts (United Nations Research Institute for Social Development, Programme Paper Number 26, Aug. 2006), at 125 (citing Machiavelli and Polybius in Hirschman 1997), *available at* http://www.unrisd.org/unrisd/website/document.nsf/240da49ca467a53f80256b4f005ef245/1404746209e9ac08c1257230003 5f650/$FILE/querijero-pp.pdf (last accessed Sep. 22, 2009).

22. *Id.* at 125 (citing Amorado 2003:5).

Corruption is commonly defined as the abuse of public office for private gain.[23] Although limited to governmental work, "corruption in the public interface" has broadened to cover the abuse of all offices of trust for private gain through facilitation payments, bribes, extortion, influence peddling, nepotism, speed money, fraud or embezzlement.[24] Corruption may also either be petty or grand. Petty corruption exists among public employees "who may be grossly underpaid depend on small kickbacks from the public to feed their families and pay school fees."[25] On the other hand, there is grand corruption when the corrupt act involves high-ranking public officials who make decisions on large public contracts.[26]

Monetary or non-monetary considerations vary from large sums paid by businesses to high-level politicians and/or government officials to substantial bribes to public officials to obtain licenses and permits or to avoid confiscation of licenses. Despite the different forms of corrupt acts, "[a]ll forms of corruption entail high economic and social costs; transaction costs are increased; public revenues are reduced; resource allocation is distorted; investment and economic growth is retarded; and the rule of law is weakened."[27]

Thus, at the end of the spectrum of corruption, the people and their rights suffer the adverse consequences because "[corruption] privatizes valuable aspects of public life, bypassing processes of representation, debate, and choice."[28] Indeed, "[a] state with endemic corruption can be especially brutal to the very poor, who have no resources to compete with those willing to pay bribes."[29] Essentially public in nature, corruption directly pierces the form and quality of governance. It "impairs the integrity and efficient functioning of public administration, frustrates the trust of the public in organs of the state, [and] undermines the rule of law and democracy."[30] In addition to its apparent economic and political effects, the

23. Wittmer, *supra* note 20. *See* JOHANN GRAF LAMBSDORFF, THE INSTITUTIONAL ECONOMICS OF CORRUPTION AND REFORM: THEORY, EVIDENCE, AND POLICY (2007).

24. United Nations Development Program, *Fighting Corruption to Improve Governance*, February 1999, at 7 [hereinafter UNDP, Fighting Corruption].

25. *Id.*

26. *Id.*

27. Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption, Preamble, *supra* note 13.

28. LAMBSDORFF, *supra* note 23, at 109. The author opines that changing hands of money and benefits or the motives of participants do not make corruption bad.

29. UNDP, Fighting Corruption, *supra* note 24, at 10 (citing Osborne, 1998).

30. 74 International Review of Penal Laws, *Corruption and Related Offenses in International Business Relation* (2004).

greater danger is that it is a "means used by organized crime to influence and to penetrate political, administrative and economic structures."[31]

Corruption increases the nation's vulnerability to crisis[32] which may be attributed to the debilitating effects of corruption on public institutions. Thus:

> Corruption disrupts normal business and public policy decision-making by benefiting the few at the expense of the majority. It distorts the allocation of financial and human resources to inefficient uses often inconsistent with a nation's social, political and economic objectives and needs. It discourages small business, entrepreneurs, and consumers who simply cannot afford the costs of bribery. It discourages foreign investment. And it *damages the respect for law and public and financial institutions, undermines the credibility and effectiveness of both elected and appointed government officials, and creates an environment conducive to crime in the private sector, including organized crime.*[33]

Corruption is no longer just a local phenomenon, but a global concern. This may be validly attributed to the spillover of the effects of corruption from the local level. Consequently, the transnational character of corruption and the dangers arising therefrom renders it a pressing issue[34] in the global economy.

Globalization, cross-boundary transactions, and unstable nations and economies coupled with the risk of corruption have actually facilitated the proliferation of organized crimes, including corruption itself.[35] The utility of corruption in other crimes justifies the necessity for curbing or hopefully effacing corruption. Thus, from the words of a noted scholar:

> As a world evil, corruption is not as bad as the exploitation of children by child slavery, child prostitution, child pornography, and child labor. Corruption is not as destructive of life as AIDS or as tobacco or some

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31. *Id.*

32. Peter M. German, *To Bribe or Not to Bribe — A Less than Ethical Dilemma, Resolved*? (International Society for the Reform of Criminal Law, Conference Paper, July 2008), *available at* http://www.isrcl.org/Papers/German.pdf (last accessed Sep. 23, 2009).

33. *Id.* (citing former United States Treasury Secretary Robert E. Rubin) (emphasis supplied).

34. *Id.* at 17-18. "Globalization of world economies, the rapid flow of money across international borders, the flight of capital to offshore havens and the weakness and instability of many nations contribute to the increase in corruption around the world." *Id.*

35. LENNERFORS, *supra* note 15, at 17. The Executive Director of Interpol, Raymond Kendall, described the growth of corruption as the greatest obstacle to effectively combating organized crime and "a cancer to the world which must not be underestimated." (citing Berliner Morgenpost (Gy.), reported by Transparency International).

> drugs. Corruption control may not be as vital to the planet's health as arms control. All of these subjects may be more important globally than bribery. But *the reduction, if not the elimination, of bribery may be the key to reducing each of the other evils*.[36]

More than merely affecting the operations of public institutions, "corruption is principally a governance issue — a failure of institutions."[37] Public institutions are weakened such that, they are incapable of abiding with the legal procedures for the performance of their respective functions. For instance, in employment, corrupt activities thwart the observance of equality and fairness.[38] An individual may gain employment in a government office through a relative in the prospective office. In procurement, bribery of public official results in bid rigging and the eventual award of a contract to an unqualified bidder. The collapse of public institutions is also very evident in tax collection. The treasury experiences reduced revenue for inefficient and dishonest collection of tax, customs duties and other costs[39] ultimately leading to reduced public services. Clearly, corrupt acts in the public sector are due to the government's failure to instill and promote transparency and accountability.

Governance refers to the "exercise of economic, political and administrative authority to manage a country's affairs at all levels."[40] At the core of good governance are the principles of participation, transparency, and accountability. These principles characterize the institutions and procedures by which the people exercise their rights and communicate their interests. Thus, good governance ensures that the government's priorities are identified and attained "based on a broad consensus in society, and that the voices of the poorest and the most vulnerable are heard in decision making over the allocation of developmental resources."[41] By raising the standards of governance and ensuring compliance with the procedures, there is a greater opportunity to curb corruption and to prevent the deterioration of public institutions.

Corruption is therefore an outcome and a symptom of poor governance,[42] which consequently results in stagnated economic growth.[43]

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36. *Id.* at 13-14 (citing Noonan, J. T. J., *Struggling Against Corruption in Private and Public Corruption* (2004)) (emphasis supplied).

37. UNDP, Fighting Corruption, *supra* note 24, at 10.

38. *Id.*

39. *Id.* at 11.

40. *Id.* at 13.

41. *Id.* Good governance is therefore essential to economic development and minimization of poverty.

42. Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption, Preamble, *supra* note 13.

This is based on the fact that "[c]orruption and bribery distort economic judgments, impede the development of cross-border commercial relationships, debase governmental and bureaucratic systems, and erode the foundations of social structures. Bribery and corruption undermine public confidence in the integrity of the capitalistic free market system."[44]

Economic transactions ridden with corruption may be treated as contracts made according to the "value of the bribe, rewarding and preserving the survival of inefficient entities producing marginal products,"[45] summarily foregoing the quality of products or services, standards, and competition. As a result, transnational investments are discouraged, and both domestic and international commercial transactions are hampered. Countries with high levels of corruption are simply unfavorable investment grounds for businesses because they expose businesses to an uncertain environment.[46] In particular, "[b]ribery embeds a degree of arbitrariness and uncertainty into commercial relationships, exalting secrecy over transparency."[47]

The inverse proportion between corruption and development holds true in the economic and social sense of development. Since bribery decreases foreign investment, there exists a "negative association between corruption and investment, as well as growth."[48] Using the theory that low investment rates impede the increase of gross domestic product, the conclusion is that the degree of a country's economic development is inversely proportional to the rate of corruption thriving therein.[49] Thus, corruption can either slow down or even reverse development.[50] The negative impact of corruption on growth becomes more apparent in countries with deteriorating quality of governance.[51] Corruption discourages investors not only because it means

43. Kathryn Gordon & Maiko Miyake, *Business Approaches to Combating Bribery: A Study of Codes of Conduct* (Organisation for Economic Co-operation and Development (OECD), Working Paper 2000/1, January 2001) *available at* http://www.oecd.org/dataoecd/45/32/1922830.pdf (last accessed, Sep. 23, 2009).

44. Dalton, *supra* note 6, at 585. Thus, "corruption is extensively perceived to be the *most formidable impediment to development and economic growth in developing nations*" *Id.* (emphasis supplied).

45. *Id.*

46. The uncertainty of the business environment involves the longevity and profitability of a business coupled with the reliability of state mechanisms to protect the business.

47. *Id.* at 586-87.

48. *Id.* at 587.

49. *Id.*

50. UNDP, Fighting Corruption, *supra* note 24, at 10.

51. LAMBSDORFF, supra note 23, at 75 (citing Sosmeña 1995:14).

disregard of law, but practically because it increases the cost of doing business.

A. Corruption and Bribery: A Public-Centered Approach

Filipino sociologist and journalist, Randolf S. David, defines corruption within the traditional context of public office, and correlates the social metaphor of corrupting the virtues of people and institutions:

> I've sometimes wondered why corruption is the word used for acts of dishonesty committed by people in positions of trust. Corruption means debasement, decay, deterioration, weakening. These terms are usually applied to metal and, in particular, to living matter. So, what is it that decays, deteriorates, or weakens in corrupt people think that what corruption signifies when applied to human behavior is the weakening of instincts — in this case, the instinct for honesty. On this simple instinct depend many of our social institutions. Instincts are sources of energy, and corruption is energy in decline.[52]

Traditionally defined as the abuse or misuse of official power for private gain and enrichment, corruption also points to "behaviour that digresses from the formally prescribed duties of a public role because of private and pecuniary gains."[53] In public office, corruption is defined as "a dysfunctional and pathological condition in the bureaucracy that negates the accomplishment of its constitutional mandate of promoting public interest."[54] Other public-centered definitions of corruption include:

(a) a "behavior of public officials which deviates from accepted norms in order to serve private ends;"[55]

(b) "the practice of using the power of office for making private gain in breach of laws and regulations nominally in force;"[56]

(c) something that is "systematically and actively supported by members of the organization through their direct participation in the corrupt act by covering for it and in the sharing of the rewards generated through the process;"[57]

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52. Querijero & Amorado, *supra* note 21, at 3 (citation omitted).

53. *Id.* at 2 (citing Nye 1967 and Scott 1972 in Saxonhouse 2000:4–5).

54. LAMBSDORFF, supra note 23, at 16 (citing Sosmeña 1995:14).

55. Querijero & Amorado, *supra* note 21 (citing Huntington 1968 in Coronel 1998:10).

56. *Id.* (citing Andreski 1968 in Coronel 1998:10).

57. *Id.* (citing Alfiler 1986:28; Lim and Amorado 2002:13).

(d) "abuse of public resources for private gain, through a hidden transaction that involves the violation of some standards of behavior;"[58]

(e) or simply, "misuse of public power for private benefit."[59]

The term "misuse" may relate either to "a behavior that deviates from the formal duties of a public role ... in contrast to informal rules (established by public expectations or somewhat standardized as codes of conduct), or, more generally, where narrow interests are followed at the expense of the broader interests of the public at large."[60] Among the common corrupt practices committed by public officials include "bribery, extortion, fraud, nepotism, graft, speed money, pilferage, theft, embezzlement, falsification of records, kickbacks, influence peddling[,] and campaign contributions."[61]

Thus, corruption is defined in relation with the public office based on the formal obligations imposed upon the public official.[62] The duties of public officials defines the range and the limits of their authority, such that, an act not falling under the description of the office constitutes a transgression of the authority given by law. Such transgression results in the frustration of the expectations pertaining to the duty.[63] Hence,

> [Corruption is] behaviour which deviates from the normal duties of a public role because of private-regarding (family, close private clique), pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence. This includes such behaviour as bribery (use of rewards to pervert the judgment of a person in a position of trust); nepotism (bestowal of patronage by reason of ascriptive relationship rather than merit); and misappropriation (illegal appropriation of public resources for private-regarding uses).[64]

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58. LENNERFORS, *supra* note 15, at 33 (citing DELLA PORTA, D. & A. VANNUCCI, CORRUPT EXCHANGES: ACTORS, RESOURCES, AND MECHANISMS OF POLITICAL CORRUPTION 16 (1999).

59. LAMBSDORFF, *supra* note 23, at 16.

60. *Id.*

61. Querijero & Amorado, *supra* note 21, at 2.

62. LAMBSDORFF, *supra* note 23, at 16-17. The formal obligations pertain to the duties expected (by the public) from a public official in line with public interest.

63. *See* Appendix: Figure 1. (LAMBSDORFF, *supra* note 24, at 17).

64. LENNERFORS, *supra* note 15, at 33 (citing Nye, J. S., *Corruption and Political Development: A Cost-Benefit Analysis, in* American Political Science Review 61(2) (1967), at 419). For example, the public's interest to health requires reliable and affordable health services, which should be made available by local health centers. Health workers in the said agency are duty-bound to make available affordable vaccination to any resident of the locality. The unjustified refusal of the workers to give free vaccination, as instructed under the mandate

B. *Principal-Agent Model under the Public-Centered Definition of Corruption*

The government and public employees take the central role in the discourse on corruption. They are the primary actors for the diversion of resources, the inefficient collection of taxes, custom fees, and other costs, and the corrupt practices mentioned above.[65] This role is better understood by using the principal-agent model,[66] which was originally used in describing the relationship in the private sector. Relating this model to the traditional definition of corruption, the self-serving bureaucrat is the agent and the government takes the role of principal.[67] Thus,

> From a principal-agent approach the design of rules becomes the actual object of analysis. A principal (i.e. the government) is assumed to create rules directed at assigning tasks to the agent (e.g. the tax authorities). These rules are intended to regulate exchange with a client (e.g. the taxpayer) … By nature of individual goals tending to differ, a conflict of interest arises between the principal and the agent. This conflict is unavoidable because both actors depend on each other.[68]

Corruption in the form of bribery represents a mutually beneficial exchange, wherein the briber and the bribed are better off after the consummation of a corrupt arrangement.[69] It is an exchange of favors between two actors — an agent and a client. The principal delegates a task to the agent and sets up the rules as to how the task is to be fulfilled. On the other hand, the agent is duty-bound to serve the client in accordance with these rules.[70] Bribery, extortion, embezzlement, and fraud in the public sector, as variants of corrupt behavior, amount to the agent "defecting" from his rule-bound duty. In bribery, the client acts as a briber and makes a payment (also called kickback, backsheesh, sweetener, payoff, speed or grease-money) to the agent, who is referred to as the bribed. In return the client obtains an advantage such as a service or a license he or she is not entitled to obtain.[71]

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of their office, unless a consideration, whether monetary or otherwise, is given constitutes corruption.

65. UNDP, Fighting Corruption, *supra* note 24, at 7.

66. LAMBSDORFF, *supra* note 23, at 62-63. "The principal-agent model was initially developed for analyzing the relation between private contractual parties such as owners and managers of a firm, it has also been utilized to model bureaucracy and public institutions." *Id.*

67. *Id.* at 58.

68. *Id.* at 62-63 (emphasis supplied).

69. Querijero & Amorado, *supra* note 21, at 2.

70. *Id.* at 19. *See* Appendix: Figure 2.

71. *Id.* at 18.

Beyond the principal-agent paradigm is the third-party, otherwise known as the client. A client, in fact, adds to the paradigm "because he provides further opportunities for the agent to cheat."[72] Simply put, "[c]orruption is deemed to take place when an agent trespasses on the rules set up by the principal by colluding with the client and promoting her won benefits."[73]

C. *Evolution of the Concept of Corruption*

Traditionally, criminal sanctions were reserved for corruption of public officials based on the assumption that the state should intervene where public funds or public duties are at stake.[74] In the commonly used definitions of corruption, the government is regarded as a major arena for corrupt and corruptible behavior.[75] Early common law definition of bribery was limited to the corruption of judges.[76] Thereafter, it was defined as an offense involving a judge or "other person concerned in the administration of justice" and included both the giver and the receiver of the bribe.[77] Moreover, the crime of bribery had been expanded to include the corruption of any public official and the bribery of voters and witnesses as well.[78]

However, by the 20th century, a new wave of understanding corruption, particularly bribery, emerged. Commercial bribery of agents and employees was criminalized and punished in England through the adoption of the Prevention of Corruption Act.[79] In the United States (U.S.), the Supreme Court in the case of *Perrin v. U.S.*,[80] stated that the U.S. Congress intended the generic definition of bribery, rather than the common-law definition limited to public officials. Moreover, the U.S. Supreme Court asserted that draftsmen of the U.S. Travel Act used "bribery" to include payments to private individuals in order to influence their actions and recognized that bribery of private persons was extensively employed in

72. LAMBSDORFF, *supra* note 23, at 65.

73. *Id. See* Appendix: Figure 2 for a diagram identifying the interrelationship among the actors.

74. Wittmer, *supra* note 20.

75. Querijero & Amorado, *supra* note 21, at 2 (citing Huntington 1968 in Coronel 1998:10)

76. Perrin v. U.S., 444 U.S. 37 (1979) (citing 3 E. Coke, Institutes *144, *147 (1628)).

77. *Id.* (citing 4 W. Blackstone, Commentaries *139 -*40 (1765)).

78. *Id.* (citing J. Stephen, Digest of the Criminal Law 85-87 (1877)).

79. *Id.* (citing Act of 1906, 6 Edw. 7, ch. 34, amended by the Prevention of Corruption Act of 1916, 6 & 7 Geo. 5, ch. 64).

80. *Id.*

highly organized criminal efforts to infiltrate and gain control of legitimate businesses.[81] Federal and state statutes have also extended the term bribery from its common-law definition to cover "bribery" of agents or employees of common carriers,[82] television game show contestants,[83] labor officials,[84] participants in sporting events,[85] and bank employees.[86]

A wider definition of corruption now includes the instance "[w]hen a private firm's sales manager takes kickbacks in exchange for contracts, he misuses 'entrusted' power. But clearly, the position of power was not provided by the public."[87] The abandonment of the public-centered understanding of corruption came to force upon realization that privatized firms also experience a privatized form of corruption where bribes are requested within the private sector.[88] The Asian Development Bank emphasized the misuse of public or private office for personal gain, defining corruption as "a behavior on the part of officials in the public and private sectors, in which they improperly and unlawfully enrich themselves and those close to them, or induce others to do so, by misusing the position in which they are placed."[89]

Therefore, the involvement of the private sector in corruption is no longer limited to satisfying the supply side of public corruption, but is now identified to be a class of its own. Indeed, in view of the crucial role played by the private sector in the global economy and the continuing privatization of governmental enterprises and activities, it is now high time to look at the reality of corruption in the private sector and to combat the same. In consideration of privatization, the role played by the private sector must be judiciously evaluated where important public functions such as health, transportation, energy, water supply, and telecommunication, among others, have been deregulated and transferred to private entities. Deregulation,

81. *Id.* (citing Cf. United States v. Nardello, 393 U.S. 286, 45-49).

82. *Perrin*, 444 U.S. at 44 (citing Transportation Act of 1940, 49 U.S.C. § 1 (17) (b)).

83. *Id.* (citing 1960 Amendments to the Communications Act, 47 U.S.C. § 509 (a) (2)).

84. *Id.* (citing House Hearings 84).

85. *Id.* (citing Third Interim Report of the Special Committee to Investigate Organized Crime in Interstate Commerce, S. Rep. No. 307, 82d Cong., 1st Sess., 160-61 (1951)).

86. *Id.* (citing Final Report of the Select Committee on Improper Activities in the Labor or Management Field, S. Rep. No. 1139, 86th Cong., 2d Sess., 772-73 (1960)).

87. LAMBSDORFF, *supra* note 23, at 19-20.

88. *Id.* at 5.

89. Querijero & Amorado, *supra* note 21, at (citing Huntington 1968 in Coronel 1998:10).

therefore, enhances the need to protect the public from the damaging effects of corruption in private business.[90] Corruption in the private sector is usually addressed by means of civil remedies and self-regulation in the private sector. However, the global trend towards the criminalization of private bribery affirms the gravity of the problem and the necessity of promptly addressing the same.[91]

III. BRIBERY WITHIN THE PRIVATE SECTOR

A. General Notion of Bribery within the Private Sector

Bribery within the private sector pertains to "a situation where a bribed individual acts in breach of the duties of loyalty and trust towards a third party."[92] It "requires a triangular relationship: the briber 'offers, promises or grant[s]' an 'undue' advantage to the person bribed who is under a loyalty obligation vis-à-vis a third party (e.g., his or her employer)."[93] The competing interests among the players include: 1) for the principal: profit and continued growth of the business; 2) for the agent: the interest for private gain; and 3) for the party taking part in the bribery: favor or advantage over a future transaction with the principal.

Bribery in the private sector may either be active or passive. Active bribery is generally defined as "offering, promising or giving, at any time, any undue advantage to an executive or agent of any enterprise in exchange for an improper act or omission relating to the affairs of the principal."[94] In such case, the employee (agent), in pursuit of his or her own interest, offers or receives a bribe from another party in breach of his or her duty to the employer.[95] On the other hand, passive bribery within the private sector generally pertains to "demanding, agreeing to accept, or accepting, at any time, any undue advantage in exchange for an improper act or omission relating to the affairs of the principal."[96]

Private bribery may occur in simple commercial transactions, such as, when an antique store purchasing officer undertakes to purchase an antique furniture for his client at the best possible price but, instead, "negotiates" a higher price with the seller in breach of his or her contractual duty of loyalty

90. Wittmer, *supra* note 20.

91. *Id.*

92. *Id.* In most instances, the third party is the individual's employer.

93. Walder Wyss & Partners, *Newsletter No. 73*, *available at* http://www.wwp.ch/publications/486.pdf (last accessed Sep. 23, 2009).

94. International Review of Penal Laws, *supra* note 30.

95. As a result of such breach, the employer is deprived of its own interest.

96. International Review of Penal Laws, *supra* note 30, at 573.

towards the principal, with the intent of sharing the profit with the seller and obtaining a "kick-back" payment for his own benefit. On a larger scale, private bribery may occur, such as, when a researcher of a pharmaceutical company accepts a bribe, in order to certify an unqualified drug supplier to the company, thus endangering the reputation of the company and the health of the buying public.

B. Survey of Laws

The following laws on private bribery will provide the rationale underlying its criminalization, the definition of punishable acts, the elements of the crime, and the prescribed penalties.

1. The Criminal Law Convention on Corruption of the Council of Europe[97]

The Convention was of regional significance in the combat against corruption. Article 7 thereof specifically imposes criminal responsibility for bribing the private sector. The Convention defines active bribery in the private sector as "the promising, offering or giving, directly or indirectly, of any undue advantage to any persons who direct or work for, in any capacity, private sector entities, for themselves or for anyone else, for them to act, or refrain from acting, in breach of their duties."[98] Article 8 of the Convention punishes passive bribery in the private sector which it defines as the "request or receipt of any undue advantage or the promise thereof committed intentionally in the course of business activities."[99]

Under the Convention, there is bribery upon proof of the following elements: first, the acts must be committed "in the course of business," excluding any non-profit activities of associations and non-government organizations; and second, there must be a "breach of the general duty of loyalty in relation to the principal's affairs or business."

2. Framework Decision of the Council of Europe[100]

The Decision, made on 22 July 2003, was aimed towards ensuring that "both active and passive corruption within the private sector are criminal offenses in all Member States."[101] This was based on the belief that the private sector

97. Council of Europe, *The Criminal Convention on Corruption*, ETS No. 173, (Jan. 27, 1999) [hereinafter Council of Europe, *Criminal Convention*].

98. *Id.* art. 7.

99. *Id.* art. 8.

100. Council of Europe, *Council Framework Decision 2003/568/JHA*, O.J. L. 192, (July 31, 2003) [hereinafter Framework Decision].

101. *Id.* whereas clause 10.

also poses a threat to a law-abiding society as well as distorts competition in relation to the purchase of goods and commercial services, and impedes sound economic development.[102] Article 1 of the Framework Decision provides that "breach of duty" as an element of the crime shall be understood in accordance with the national law of the Member State.[103] The breach covers "as a minimum[,] any disloyal behaviour constituting a breach of a statutory duty, or, as the case may be, a breach of professional regulations or instructions, which apply within the business of a person who in any capacity directs or works for a private sector entity."[104] Article 2 requires that the acts punishable be committed "in the course of business activities." Thus,

> 1) Member States shall take the necessary measures to ensure that the following intentional conduct constitutes a criminal offence, when it is carried out in the course of business activities:
>
> (a) promising, offering or giving, directly or through an intermediary, to a person who in any capacity directs or works for a private-sector entity an undue advantage of any kind, for that person or for a third party, in order that that person should perform or refrain from performing any act, in breach of that person's duties;
>
> (b) directly or through an intermediary, requesting or receiving an undue advantage of any kind, or accepting the promise of such an advantage, for oneself or for a third party, while in any capacity directing or working for a private-sector entity, in order to perform or refrain from performing any act, in breach of one's duties.
>
> 2) Paragraph 1 applies to business activities within profit and non-profit entities.
>
> 3) A Member State may declare that it will limit the scope of paragraph 1 to such conduct which involves, or could involve, a distortion of competition in relation to the purchase of goods or commercial services.[105]

Article 4 provides that the offense shall be "punishable by a penalty of a maximum of one to three years of imprisonment."[106] The same provision

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102. *Id.* whereas clause 9.

103. *Id.* art. 1.

104. *Id.* art. 1.

105. *Id.* art. 2.

106. Framework Decision, *supra* note 100, art. 4, ¶ 2. This paragraph states that "[e]ach Member State shall take the necessary measures to ensure that the conduct referred to in Article 2 is punishable by a penalty of a maximum of at least one to three years of imprisonment." *Id.*

states that upon conviction for the acts under Article 2, and in accordance with the constitutional rules of the Member State, the offender "may, where appropriate … be temporarily prohibited from carrying on this particular or comparable business activity in a similar position or capacity, if the facts established give reason to believe there to be a clear risk of abuse of position or of office by active or passive corruption."[107] Moreover, Article 5 provides that natural persons may be held liable as "perpetrators, instigators, or accessories" of the acts defined under Article 2.

3. Swiss Legislation on Private Sector Bribery

The legislature of Switzerland criminalized active and passive bribery in the private sector under the Swiss Unfair Competition Act (UCA).[108] Under the law, active bribery is committed by someone who "offers, promises or grants" an "undue advantage," if such advantage is intended to influence the recipient to act or to omit something "in violation of his duties" or "subject to discretion." Passive bribery constitutes "requesting, receiving promises of or accepting" an advantage.

The law does not qualify who a briber is, but requires that the recipient of the advantage must be "an employee, partner agent or any other auxiliary person of a third party in the private sector." The law on private bribery primarily aims to protect the duty of loyalty owed to the third party. Hence, there must be an express or implicit "obligation of loyalty" owed by the recipient of the bribe. However, actual breach of such duty is irrelevant as it is sufficient that the advantage was "intended to cause" such result.

An important aspect of the law is the determination of parties-in-interest who may bring the action against the offender. The law does not limit the cause of action in favor of the defrauded principal, but includes the "disadvantaged co-competitors, clients and certain organisations such as

107. *Id.* art. 4, ¶ 3. This paragraph states:

> Each Member State shall take the necessary measures in accordance with its constitutional rules and principles to ensure that where a natural person in relation to a certain business activity has been convicted of the conduct referred to in Article 2, that person may, where appropriate, at least in cases where he or she had a leading position in a company within the business concerned, be temporarily prohibited from carrying on this particular or comparable business activity in a similar position or capacity, if the facts established give reason to believe there to be a clear risk of abuse of position or of office by active or passive corruption.

Id.

108. Bundesgesetz gegen den unlauteren Wettbewerb [UWG] [Unfair Competition Act] Dec. 19, 1986, SR 241, art. 4a (Switz.). *See generally* Wittmer, *supra* note 20 (citing UCA, art. 4a).

consumer protection groups and business associations," which might have been injured by the corruptive act. Guilty offenders are made to suffer an imprisonment of up to three years and a fine of up to 100,000 Swiss francs (or both).[109]

Under the UCA, there is private bribery when the following circumstances concur: (1) there must be an obligation of loyalty owed by the recipient of the bribe to the third party; (2) there must be a competitive relationship between the offender and the defrauded principal or disadvantaged co-competitors; (3) "there needs to be an impact on a competitive relationship between two parties in terms of the UCA;"[110] and, (4) "fair competition is threatened by the payment of a bribe."[111] Thus, payment of bribes to non-profit organizations for the allocation of sports events to countries or towns, does not constitute private bribery, as no competitive relationship between the parties exist. Proceeds of the crime cannot be made objects of money laundering since it is exclusive to bribery in the public sector.[112]

4. Foreign Cases of Bribery within the Private Sector

In the case of *Perrin*, the U.S. Supreme Court had to pass upon the issue of "whether commercial bribery of private employees prohibited by a state criminal statute constitutes 'bribery ... in violation of the laws of the State in which committed' within the meaning of the Travel Act."[113] The case involved Petty-Ray, a Louisiana-based company engaged in the business of conducting geological explorations and selling the data to oil companies. The company had a long-standing policy of confidentiality of the data in order to preserve its economic value and the company's relations with its customers.

LaFont, a co-defendant, induced Roger Willis, an employee of Petty-Ray, to steal confidential geological exploration data from his employer. In consideration thereof, LaFont promised Willis a percentage of the profits of the corporation which had been created to exploit the stolen data. Willis was an analyst of seismic data and consequently had access to the relevant material, which he surreptitiously supplied the conspirators.

In order to interpret and analyze the stolen data, appellant Perrin, a consulting geologist, was engaged by the other defendants. After meeting with defendants Willis, LaFont, and Levy, Perrin directed Willis to call a

109. Unfair Competition Act. art 23.

110. Wittmer, *supra* note 20, at 2.

111. *Id.*

112. *Id.*

113. *Perrin*, 444 U.S. at 42 (1979) (citing The Travel Act, 18 U.S.C. (1952)).

firm in Richmond, Texas to obtain gravity maps that will aid him in his evaluation. After the meeting, Willis contacted the Federal Bureau of Investigation and disclosed the details of the scheme. Appellant and his co-defendants were charged of violating "the Travel Act, which makes it a federal offense to travel or use a facility in interstate commerce to commit, inter alia, 'bribery ... in violation of the laws of the State in which committed'" by using the facilities of interstate commerce for the purpose of promoting a commercial bribery scheme in violation of the laws of the State of Louisiana. Louisiana's commercial bribery statute provides:

> Commercial bribery is the giving or offering to give, directly or indirectly, anything of apparent present or prospective value to any private agent, employee, or fiduciary, *without the knowledge and consent of the principal or employer, with the intent to influence such agent's, employee's, or fiduciary's action in relation to the principal's or employer's affairs.*[114]

After trial, Perrin was convicted on the conspiracy count and two substantive Travel Act counts. On appeal, the United States Court of Appeals for the Fifth Circuit affirmed Perrin's conviction thereby rejecting his contention that Congress intended "bribery" in the Act to include only bribery of public officials.

Before the United States Supreme Court on appeal, Perrin argued that the "Congress intended 'bribery' in the Travel Act to be confined to its common-law definition, i.e., bribery of a public official."[115] He also contended that "because commercial bribery was not an offense [in] common law, the indictment fails to charge a federal offense."[116] To this contention, the Supreme Court held otherwise, thus, affirming the conviction. The Supreme Court stated that "by 1961 the common understanding and meaning of 'bribery' had extended beyond its early common-law definitions."[117] Further, "[i]n 42 States and in federal legislation, 'bribery' included the bribery of individuals acting in a private capacity,"[118] which is also the basis for the Travel Act. The Court, after looking at the legislative history of the Act, underscored that although "[t]here are ample references to the bribery of state and local officials, ... there is no indication that Congress intended to so limit its meaning."[119] In fact, said history provided that "Members, Committees, and draftsmen used

114. LA. REV. STAT. ANN., § 14:73 (1974) (emphasis supplied).

115. *Perrin*, 444 U.S. at 42.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

'bribery' to include payments to private individuals to influence their actions."[120]

In a more recent case in Britain, the British courts had occasion to rule on the biggest bribery scandal in Britain in twenty years.[121] In 2001, the Chief Executive Officer of Hobsons, a food manufacturer was prosecuted for stealing £2.4 million ($3.8 million) from the bank account of a subsidiary company for the purpose of extending a profitable contract with the Cooperative Wholesale Society (CWS). Two senior officials of the contractee were convicted of receiving corrupt payments of £1 million ($1.6 million) each and were ordered to suffer three and a half years of imprisonment and to pay back the bribes and legal costs.

The corrupt payments were made in the context of an expiring contract to supply own-brand foods between Hobsons and CWS stores. Hobsons Chief Executive Officer Andrew Regan claimed that he was approached by a businessman who offered to broker an extension of the deal through his contacts at CWS headquarters. The £2.4 million ($3.8 million) paid to the businessman was accounted for as a 'brokerage fee,' but after investigation, it was found that the money was transferred through Swiss bank accounts to companies in the British Virgin Islands whose beneficial owners were the executives from CWS.

The Hobsons-CWS scandal coincided with the preliminary stages of reforming British laws on corruption which began in February 2002 with the implementation of the OECD Convention.[122] Moreover, Britain's Anti-Terrorism, Crime and Security Act 2001[123] stated that corruption could be prosecuted under British laws regardless of where the offense was committed. The proposed criminal law was also intended to provide a single

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120. *Id.*

121. Transparency International, *Global Corruption Report 2003*, (January 2003) *available at* http://www.transparency.org/publications/gcr/gcr_2003 (last accessed Sep. 23, 2009). The report states that:

> The importance of prosecuting cases of private-to-private bribery was given great publicity in 2001 by the passage through the British courts of the biggest bribery scandal in two decades. The case was particularly significant because detecting and prosecuting the payment of bribes within the private sector is given far less attention than corruption in the public service. Although the Organisation for Economic Co-operation and Development (OECD) has found that Britain is among those countries with a greater will to prosecute, fewer than 10 cases of private to- private bribery have gone to trial in the last 20 years.
>
> *Id.*

122. OECD, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, DAFFE/IME/BR(97)20 (Dec. 17, 1997).

123. The Prevention of Terrorism Act, 2000, (Eng.).

offense of corruption with a statutory definition of 'acting corruptly,' which is applicable to the public and private sectors. The need to address crimes in the private sector was further strengthened with the proposal of the crime "trading in influence." More consideration of the private sector is based on a widespread recognition that "stamping out corrupt payments is of greater importance for a company's long-term interest than avoiding scandal in the short term."[124]

C. Distinction between Private-Public Sector Bribery vis-à-vis Bribery within the Private Sector

As previously discussed, bribery within the private sector is limited to bribery of private individuals for them to act in breach of the duties of confidence and trust vis-à-vis the principal.[125] While a law against such form of bribery aims to protect the duty of loyalty and to promote fair and genuine competition, laws on public bribery aim to protect the integrity and reliability of the government.[126] Moreover, "undue advantage" as regards public bribery must be "with regard to his official functions," whereas bribery in the private sector requires a "closer connection between the advantage and the (intended) act or omission of the recipient."[127]

First, bribery within the private sector is restricted to the domain of business activity, excluding non-profit activities. Second, it covers persons who direct or work, in any capacity, for private sector entities. Third, participation in the bribery must be in breach of the duties. On the other hand, public bribery covers all the functions of government, whether proprietary or not.

The employee, partner, or managing director who accepts a bribe to act or refrain from acting in any manner contrary to his principal's interest, will be betraying the trust reposed upon him and the loyalty owed to his principal. This justifies the inclusion of corruption within the private sector as a criminal offense. The Criminal Law Convention of Europe retained this philosophy and requires, in Article 7 thereof, the additional element of breach of duty in order to criminalize private sector corruption. Breach of duty can be also linked to secrecy, which characterizes "the acceptance of the gift to the detriment of the employer or principal and without obtaining the latter's authorization or approval."[128] Such secrecy has been identified as

124. Catherine Courtney, *Confronting Cash for Contracts in Britain,* GLOBAL CORRUPTION REPORT, 2003, at 67.

125. Wittmer, *supra* note 20, at 1.

126. *Id.* at 2.

127. Walder Wyss & Partners, *supra* note 93.

128. Peter Csonka, Administrator, Economic and Organised Crime Unit Directorate of Legal Affairs, Council of Europe, Speech given at the 9th International Anti-

the essence of the offense which threatens the interests of the private sector entity.

D. Present Status of Bribery within the Private Sector

Corruption, which generally occurs at the public and private sector interface, is now globally recognized as an occurrence within the private sector. In fact, incidents of fraud and misappropriation of assets or funds in the public sector can occur entirely within the private sector.[129] Therefore, (1) the protection of corporate assets; (2) the duty of loyalty owed by the person accepting the bribe to the principal; and, (3) the promotion of fair competition are the varying interests underlying the criminalization of private bribery.[130]

The criminalization of private bribery has solid foundations in the United Nations Convention Against Corruption (UNCAC).[131] The UNCAC is the first global agreement comprehensively addressing corruption both in the domestic and international level.[132] It has a global scope of application and obligates Member States to undertake certain commitments and to observe common standards in their respective jurisdictions.[133] It rests on four pillars: Prevention, Criminalization, International Cooperation and Asset Recovery. The Convention covers corruption in both the private and public sector, including private-to-private corruption, and criminalizes foreign and domestic bribery, embezzlement, trading in influence, and money laundering.[134]

While negotiating the UNCAC, criminalization of bribery within the private sector was one of the most contentious issues faced by participating States. The European Union (E.U.) with Latin American and Caribbean States supported the adoption of the provision on private sector bribery. On the contrary, the U.S. opposed the criminalization on the ground that such bribery is not a crime in its jurisdiction. The UNCAC affirmed in its

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Corruption Conference (IACC) (Oct. 10-15, 1999), *available at* http://www.9iacc.org/papers/day1/ws6/d1ws6_pcsonka.html (last accessed Sep. 23, 2009).

129. Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption, Preamble, *supra* note 13.

130. Wittmer, *supra* note 20 at 2.

131. G.A. Res. 58/4, U.N. Doc. A/58/422 (Oct. 31, 2003).

132. Rajesh Babu, *The United Nations Convention Against Corruption: A Critical Overview* (Asian African Legal Consultative Organization, Working Paper, Mar. 1, 2006), at 8, *available at* http://ssrn.com/abstract=891898 (last accessed Sep. 23, 2009).

133. *Id.* at 1.

134. *Id.* at 8.

preamble that its objective is not only preventing public sector corruption but also corruption in the private sector.

Article 12 of the UNCAC requires State Parties to take three types of preventive measures in accordance with the fundamental principles of its national law. The first is to take measures to prevent corruption in the private sector. The second and third obligations pertain to concrete steps to be undertaken. The former consists of enhancing accountability and auditing standards in the private sector to promote transparency and to detect malpractice within the sector, while the latter pertains to undertaking "effective, proportionate and dissuasive civil, administrative or criminal penalties" for failure to comply with standards set forth under the second measure.[135] However, it is worth noting that the UNCAC does not oblige State Parties to criminalize bribery within the private sector but encourages them to consider adopting legislative and other measures for such purpose.

Article 21 of the UNCAC criminalizes active and passive corruption in the private sector. It aims to uphold integrity and honesty in economic, financial, or commercial activities. Accordingly, the offenses are deemed committed when the following acts are done intentionally in the course of economic, financial, or commercial activities:

> (a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;
>
> (b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

Other international instruments particularly addressing the role of the private sector in corrupt practices include the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted by the OECD in 1997, the United Nations Declaration Against Corruption and Bribery in International Commercial Transactions and the Council of the European Union's Framework Decision.

The International Chamber of Commerce (ICC) has noted that private sector corruption has grown in scale in recent years, notably as a result of the continuing positive trends of privatization and market liberalization. The ICC has drawn the attention of the business world, national governments and international organizations to the damage that private corruption inflicts upon international business transactions. In particular, it has conveyed to the

135. *Id.* at 19.

OECD Working Group on Bribery in International Business Transactions that private-to-private corruption undermines the smooth functioning and credibility of free, open, and global competition. The cost of corruption adds to the cost of business, thereby distorting the "terms of exchange of international business transactions and penalizes loyal market participants."[136] Furthermore, the ICC believes that combating private corruption will be a key to the creation of a "level playing field for all market participants, to build public and private sector trust in the rule of law and to lower trans-border transaction costs."[137]

Considering the proliferation of cross-border transactions often made by multinational companies, and the adverse effects resulting from bribery, there is an imminent need for laws addressing bribery within the private sector in order to thwart the use of influence and financial pressure by multinational corporations primarily against developing countries. Needless to say, "private corruption is detrimental to fair trade and the smaller businesses are more likely to be affected."[138]

IV. ANALYSIS

A. Bribery Within the Private Sector in the Philippines

In a survey of companies by the Social Weather Station in 2006, substantial incidents of bribery to win private contracts were recorded. In the same year, 20% to 31% of the respondent-businessmen claimed that bribery by competing businesses was resorted to in order to obtain private contracts. Although not constituting a majority of the respondents, the seriousness of the problem may be gleaned from the relative proximity of the percentages over the period of time.[139] However, at present, the Philippine legal system is devoid of any criminal law addressing private bribery. Philippine criminal laws on bribery continue to be public-centered, such that, it only addresses corruption with respect to the public-private interface.

136. International Chamber of Commerce, Memorandum to the OECD Working Group on Bribery in International Business Transactions (Sep. 13, 2006).

137. *Id.*

138. Babu, *supra* note 132, at 18.

139. Social Weather Stations (SWS), 2006 SWS Survey of Enterprises on Corruption (July 2006), *available at* http://www.sws.org.ph/2006-2007%20SWS%20Surveys%20of%20Enterprises%20on%20Corruption.pdf (last accessed Sep. 22, 2009). *See* Appendix: Figure 4.

Common to the crimes of public officials is the element that the public officer must fall under the definition under Article 203 of the Revised Penal Code (RPC)[140].

Under the principal-agent model, the government is the principal whose primary interest is to maintain a peaceful community. The definition above provides that the public officer serves as an agent to the government, who is tasked by a provision of law, or by the mandate of the position held through popular election or through appointment, to perform public functions either "as an employee, agent, or subordinate official, of any rank or class." Thus, an act which contravenes the performance of their official duties, resulting from an inducement by gift or other consideration, is a breach of his or her duty towards the government.

Under the RPC, the crimes of direct bribery, indirect bribery, qualified bribery, and corruption of public officials are committed in the interaction between public officers and private individuals.

Article 210 of the RPC addresses three forms of direct bribery committed by a public officer, namely: (1) "agreeing to perform, or by performing, in consideration of any offer, promise, gift or present — an act constituting a crime, in connection with the performance of his official duties;"[141] (2) "accepting a gift in consideration of the execution of an act which does not constitute a crime, in connection with the performance of his official duty;"[142] and, (3) "agreeing to refrain, or by refraining, from doing something which it is his official duty to do so, in consideration of gift or promise."[143]

Conviction for direct bribery of the first form penalizes the public officer with the "penalty of *prision mayor* in its medium and maximum periods and a fine of not less than the value of the gift and not less than three times the value of the gift in addition to the penalty corresponding to the crime agreed upon;" for the second form a penalty of *prision correccional* in its medium period and a fine not less than twice the value of such gift; and for the third form, the penalty of *prision correccional* in its maximum period to *prision mayor* in its minimum period and a fine of not less than three times the value of such gift. In addition to these penalties is the penalty of special temporary disqualification.

Article 211 of the RPC addresses indirect bribery which consists of accepting of gifts by the public officer offered to him by reason of his public office and is punished by the penalty of *arresto mayor*, suspension in its

140. An Act Revising the Penal Code and Other Penal laws [REVISED PENAL CODE], Act. No. 3815, (1932).

141. 1 LUIS B. REYES, THE REVISED PENAL CODE 352 (2001).

142. *Id.*

143. *Id.*

minimum and medium periods, and public censure. Qualified bribery, on the other hand, is committed when a public officer entrusted with the enforcement of the law "refrains from arresting or prosecuting an offender who has committed a crime punishable by *reclusion perpetua* and/or death in consideration of any offer, promise, gift, or present."[144] In corruption of public officials under Article 212 of the RPC, the offender is the "person who shall have made the offers or promises or given the gifts or presents" who shall suffer the penalties imposed upon the officer corrupted, except those of disqualification and suspension.

It is important to note that the present criminal law on bribery covers both the active and passive aspects of the corrupt act. Articles 210, 211 and 211-a constitute the passive aspect of bribery, wherein the public officer receives the bribe. On the other hand, Article 212 pertains to active bribery where the private individual offers, promises, or gives the gift.

For the purpose of upholding the principle that public office is a public trust, the Philippine Legislature enacted the Anti-Graft and Corrupt Practices Act which provides for more concrete measures "to deter public officials and employees from committing acts of dishonesty and improve the tone of morality in public service."[145] It was declared to be a state policy "in line with the principle that a public office is a public trust, to repress certain acts of public officers and private persons alike which constitutes graft or corrupt practice or which may lead thereto."[146]

B. Remedies for Violation of Principal-Agent Relationship under Philippine Law

To facilitate the discussion of the operation of Philippine legal provisions and remedies, a case involving a principal-agent relationship shall be used as a subject of analysis. This is the case of the collusive consultant.[147] The facts of the case are as follows:

The head of a research at one major corporation is responsible for "farming out" special projects to qualified consultants and subcontractors. A subcontractor bidding on a large project invites her to discuss business over lunch. The research head mentions that money has been tight and raises small at her company in recent years. She is hoping to supplement her income by doing some outside consulting. Independent consultants are often used by his firm, says the subcontractor. If he is awarded this particular job, his firm could probably use the services of someone with her professional expertise. At subsequent meetings the research head and subcontractor

144. REVISED PENAL CODE, art. 211-a.

145. Morfe v. Mutuc, 22 SCRA 424 (1968).

146. *Id.*

147. COUNCIL OF BETTER BUSINESS BUREAUS, HOW TO PROTECT YOUR BUSINESS FROM FRAUDS, SCAMS, & CRIME 181 (1992).

become more at ease in discussing the arrangement. They agree on a mutually beneficial plan — she will provide outside professional advice for a monthly fee of ₱ 30,000; the silent arrangement will run the length of the contract. The subcontractor is recommended for the project and approved. Work runs several months longer than expected but is completely satisfactory, according to the report submitted by the research head to her superiors. Subsequent projects are bid on and awarded to the same subcontractor. Over the following ten years, the research head receives more than $3,000,000 in consultant fees from the subcontractor. These fees are passed along in the subcontractor's bills — which were approved by the head of research.

In this problem, the interests include:

> (a) for the company: (1) profit, (2) qualified contractors, and (3) loyal conduct of the head researcher in order to achieve the second interest and ultimately the first interest;
>
> (b) for the researcher: (1) additional income, (2) exercise of consulting skills outside the company's premises; and,
>
> (c) for the subcontractor: (1) advantage from other subcontractors, (2) award of the contract, and (3) subsequent contracts with the company. To properly determine the liabilities of each party, it is necessary to map out the rights and obligations of each, so that the source of liability may accurately be identified.[148]

The company, as the principal, has the rights to earn profit and to demand and expect loyalty from its employees. These rights have the corresponding duty of paying the salary of the employees and being accountable to the shareholders. On the other hand, the head researcher, as an agent, has the right to payment but subject to the duty of loyalty to the principal and the proper performance of his or her function as to screening qualified contractors. On the part of the contractor rests the duty to comply with the company's standards and procedures as to prospective contractors, and upon compliance thereto, possesses the right to be awarded with the contract.

148. *See* figure 3.

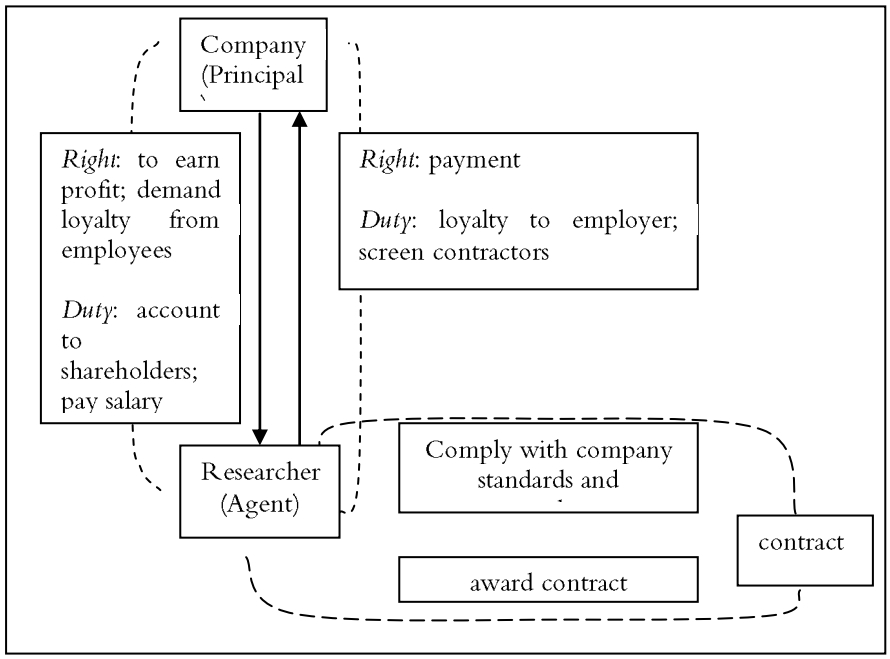

Figure 3.[149]

1. Action for Damages based on the Breach of the Contract of Agency

The New Civil Code (NCC) provides that "[b]y a contract of agency a person binds himself to render some service or to do something in representation or on behalf of another, with the consent or authority of the latter.[150] The parties constituting the agency are the principal and the agent. The principal must intend that the agent shall act for him, while the latter must intend to accept the authority and act in accordance with the directions of the former.[151] "An agency is either general or special."[152] A general agency consists of "all the business of the principal,"[153] while a special agency consists of "one or more specific transactions."[154]

149. Modified figure 1.

150. An Act to Ordain and Institute the Civil Code of the Philippines [NEW CIVIL CODE], Republic Act No. 386, art. 1868 (1950).

151. HECTOR S. DE LEON, COMMENTS AND CASES ON PARTNERSHIP, AGENCY, AND TRUSTS 350 (2005 ed.) [hereinafter DE LEON, AGENCY] .

152. NEW CIVIL CODE, art. 1876.

153. *Id.*

154. *Id.*

An agency relationship is characterized by a fiduciary duty towards the principal based on trust and confidence,[155] such that "[t]he agent is bound by his acceptance to carry out the agency"[156] "in accordance with the instructions of the principal."[157] The agent acts primarily for the benefit of the principal[158] and conversely avoids any conflicts of interest.[159] The NCC further states that: "He may do such acts as may be conducive to the accomplishment of the purpose of the agency."[160] In addition to diligent compliance with the instructions of the principal, the agent is prohibited from committing any act which "would manifestly result in loss or damage to the principal."[161]

Article 1889 of the NCC provides that the agent shall be liable for damages should the agent fail to perform his or duties as enumerated above, and as laid down by the principal. Thus, "[t]he agent shall be liable for damages if, there being a conflict between his interests and those of the principal, he should prefer his own."[162] Further, Article 1908 of the NCC provides that the agent shall also be responsible for any fraudulent act against the principal.

In the test case above, the researcher is bound by a fiduciary duty to the company to screen prospective contractors, such that, the company shall only contract with a competent and competitive contractor. On the other hand, the company has a right to expect loyalty from the researcher to comply with such duty. However, the agent's interest to additional income from an outside source and from a prospective contractor conflicts with the interest of the principal. When the agent preferred to pursue the surreptitious agreement with the contractor, he violated his duty and the right of the principal. As such, the agent should be held liable for damages under Article 1908 of the NCC.

It must be noted that the remedy is afforded only to the principal and that the cause of action is only against the agent. The principal cannot use the same remedy against the contractor, whose acts accompanied the agent's breach of duty. Although an agency is preparatory, such that "it is entered into as a means to an end, that is, the creation of other transactions or

155. Severino v. Severino, 44 Phil. 343 (1923).

156. NEW CIVIL CODE, art. 1884.

157. *Id.* art. 1887.

158. DE LEON, AGENCY, *supra* note 151, at 361 (citing restatement of the Law on Agency, 45).

159. *Id.* at 362.

160. NEW CIVIL CODE, art. 1881.

161. *Id.* art. 1888.

162. *Id.* art. 1889.

contracts,"[163] the contractor cannot be held liable by the principal under the principle of relativity of contracts.

2. Termination of Employment

Another remedy for breach of duty by reason of conflicting interest may be availed of under the Labor Code.[164] It must be noted that this remedy can only be availed of on the basis of an employer-employee relationship which is not covered under the broad characterization of an agency.[165] Under Article 282 of the Labor Code, the employer may terminate an employee for "[f]raud or willful breach by the employee of the trust reposed in him by his employer or duly authorized representative."[166]

In the test case above, the employer reposed trust on the agent that the latter will thoroughly evaluate prospective contractors in order to protect the interests of the company. Inasmuch as the agent committed an act directly contrary to said directive, the employer has a valid ground to terminate him from employment. Further, it is worth underscoring that the Labor Code specifically requires willful breach of the trust in order to constitute a valid ground for termination. In the test case, the deliberate act of the agent to award the contract in exchange for a monetary consideration is sufficient to constitute a ground for termination under the Labor Code.

3. Shareholders' Remedy

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163. DE LEON, AGENCY, *supra* note 151, at 349.

164. A Decree Instituting a Labor Code Thereby Revising and Consolidating Labor and Social Laws to Afford Protection to Labor, Promote Employment and Human Resources Development and Insure Industrial Peace Based on Social Justice [LABOR CODE], Presidential Decree No. 442 (1974).

165. DE LEON, AGENCY, *supra* note 151, at 347.

166. LABOR CODE, art. 282. The provision states:

> Termination by employer. – An employer may terminate an employment for any of the following causes:
>
> a. Serious misconduct or willful disobedience by the employee of the lawful orders of his employer or representative in connection with his work;
>
> b. Gross and habitual neglect by the employee of his duties;
>
> c. Fraud or willful breach by the employee of the trust reposed in him by his employer or duly authorized representative;
>
> d. Commission of a crime or offense by the employee against the person of his employer or any immediate member of his family or his duly authorized representative; and
>
> e. Other causes analogous to the foregoing.

Id.

In the context of the modern corporation, directors and officers serve as agents who advance the interests of their principals — the corporation's shareholders. The directors of a corporation have a fiduciary relation with the corporation, such that they are deemed its agents.[167] They are "under the obligations of trust and confidence to the corporation and its stockholders"[168] in the performance of their official duties. They are mandated to diligently make informed decisions,[169] act in good faith, and uphold the interest of the corporation.

The fiduciary relation springs from the fact that the directors have the control of the affairs and property of the corporation, and ultimately of the stockholders. The potential conflict of interest between the agent and the principal creates agency costs.[170] Thus, breach of such duty renders the trustees liable for damages and requires them to account for the profits, which would have otherwise accrued, to the corporation. The Corporation Code of the Philippines[171] provides:

> Sec. 31. — Liability of directors, trustees, or officers. – Directors or trustees who willfully and knowingly vote for or assent to patently unlawful acts of the corporation or who are guilty of gross negligence or bad faith in directing the affairs of the corporation or *acquire any personal or pecuniary interest in conflict with their duty as such directors or trustees shall be liable jointly and severally for all damages resulting therefrom suffered by the corporation, its stockholders or members and other persons.*
>
> When a director, trustee, or officer attempts to acquire or acquires, in violation of his duty, any interest adverse to the corporation in respect of any matter which has been reposed in him in confidence, as to which equity imposes a disability upon him to deal in his own behalf, he shall be liable as a trustee for the corporation and must account for the profits which otherwise would have accrued to the corporation.[172]

The fiduciary relation between a trustee and the corporation is emphasized in *Gokongwei, Jr. v. Securities and Exchange Commission*[173] where the Court, citing *Pepper v. Litton*,[174] stated that, "[a] director is a fiduciary …

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167. HECTOR S. DE LEON, THE CORPORATION CODE OF THE PHILIPPINES ANNOTATED 291 (2006 ed.).

168. *Id. See also,* NEW CIVIL CODE, art. 1887.

169. O.C. FERRELL, ET AL., BUSINESS ETHICS: ETHICAL DECISION MAKING AND CASES 40 (2008 ed.).

170. Peter R. Ezersky, Intra-Corporate Mail and Wire Fraud: Criminal Liability for Fiduciary Breach, 94 YALE L.J. 1427, 1433 (1985).

171. The Corporation Code of the Philippines [THE CORPORATION CODE OF THE PHILIPPINES], Batas Pambansa Blg. 68 (1980).

172. *Id.* § 31 (emphasis supplied).

173. Gokongwei, Jr. v. Securities and Exchange Commission, 89 SCRA 336 (1979).

174. Pepper v. Litton, 308 U.S. 309 (1939).

Their powers are powers in trust ... He who is in such fiduciary position cannot serve himself and his *cestuis* second. He cannot manipulate the affairs of his corporations to the detriment ... He cannot utilize his inside information and strategic position for his own preferment.[175] As such, the trustees are personally liable for any loss or injury to the corporation because of unauthorized acts or violation of their duties.[176]

C. Criminalization of Bribery Within the Private Sector

1. Fiduciary Duties and Breach

Common to all remedies is the existence of a duty and the willful breach thereof on the part of the agent in relation to the principal. Whether it is civil, labor, or corporate in nature, such primary elements are always present. This observation with reference to the crimes punished under the RPC, there is clearly no legal impediment in criminalizing the breach of duty, specifically bribery between private persons.

As previously explained, a principal-agent relationship exists when a principal delegates a task to an agent,[177] whose authority and powers are defined by the principal. Such relationship is "the source of the agent's liability [and] is in many respects a private system of norms, in which the principal defines for the agent the acts of the agent that the principal will treat as its own."[178] As a fiduciary, the agent may not benefit through the relationship without the principal's consent. Moreover, in performing the tasks, the fiduciary nature of an agency "serves as an interpretive benchmark" that guides the agent in interpreting instructions in the best interest of the principal.[179]

The legal consequences of agency bind the agent's interactions with third parties to the principal. When an agent enters in to a contract, the contract pertains to the principal, such that, the relationship of the third party to the principal is the same as if the contract was entered into without the agent. Thus, third party liability is enforceable against the principal and not the agent, who only acted on behalf of the former.[180] Under the doctrines of "apparent agency" and "apparent authority," anent the absence of "real

175. *Gokongwei, Jr.,* 89 SCRA 336.

176. DE LEON, AGENCY, *supra* note 151, at 295 (citing Steinberg v. Velasco, 52 Phil. 953 (1952)).

177. James, *supra* note 18, at 13.

178. Deborah A. DeMott, Organizational Incentives To Care About The Law, 60 AUT LAW & CONTEMP. PROBS. 39, 48 (1997).

179. *Id.* at 48

180. DE LEON, AGENCY, *supra* note 152, at 353.

authority," the principal is still held directly accountable to a third party for the acts of the agent.[181]

The determination of liability under a penal statue for private bribery necessarily requires an accurate characterization of the duty and the instances of breaching such duty. Thus, Justice Frankfurter introduced the following inquiries to answer whether a person is bound by a fiduciary duty:

> (1) To whom is he a fiduciary?
>
> (2) What obligations does he owe as a fiduciary?
>
> (3) In what respect has he failed to discharge these obligations?
>
> (4) And what are the consequences of his deviation from duty?[182]

These questions map out the source of liability of the agent and gives direction for the identification of the elements of the proposed criminal offense.

The first question identifies the parties — the principal and the agent, the former having a right to demand a faithful performance of duty from the latter. The second question recognizes two primary fiduciary duties — a duty of care in managing the affairs of the corporation and loyalty to the corporation.[183] These duties are particularized through specific functions delegated to the agent, which the third question pertains to. The third question points out the particular function and manner by which the agent has breached his duty to the principal. The last question identifies the extent and nature of the injury caused to the principal which serves as the basis for availing a particular remedy provided by law.

Conflict of interests arises when "the agent is induced to take actions that benefit himself at the expense of the principal."[184] More concretely, it arises "when employees at any level have private interests that are substantial enough to interfere with their job duties; that is, when their private interests lead them, or might reasonably be expected to lead them, to make decisions

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181. DeMott, *supra* note 178, at 49. The principal's liability arises from his own acts that led the third party to believe that the agent was acting within the authority given by the principal.

182. SEC v. Chenery Corp., 318 U.S. 80, 85-86 (1943).

183. Ezersky, *supra* note 170, at 1439. *See*, U.S. v. Gautreau, 860 F. 2d 357 (10th Cir. 1998), where the Tenth Circuit held that Colorado's commercial bribery statute prohibiting the solicitation or acceptance of a benefit in violation of a duty of fidelity as an agent or employee, was not unconstitutionally vague. The use of the term fidelity gave sufficient notice of what was prohibited based on its everyday usage.

184. James, *supra* note 18, at 13 (citing Stiglitz, J.E., *Principal and Agent,* The New Palgrave: Allocation, Information, and Markets, (1989)).

or act in ways that are detrimental to their employer's interests."[185] The conflict is brought about by inducements, which may either be in form of "money, gifts, entertainment, or preferential treatment."[186] In the test case, the inducement consisted of additional income from consultation services rendered to the prospective contractor, which amount was made part of the contracting fees — clearly unfavorable and unjust for the company. Thus, the research head, as an employee of the company is expected to fulfill his obligation of getting the best deal, in terms of price and quality to serve the best interest of the company.

The first and second questions having been adequately answered by the previous discussions, this analysis will now proceed to the third question: "In what respect has he failed to discharge these obligations?" This may be subdivided into the following sub-queries: 1) What constitutes a bribe?; 2) What constitutes an act of bribery within the private sector?; and conversely, 3) What would not qualify as an act of bribery?

1.1. Bribe

A "bribe" is commonly defined as "a remuneration for the performance of an act that is inconsistent with the work contract or the nature of the work one has been hired to perform. The remuneration can be money, gifts, entertainment, or preferential treatment."[187] Under the principal-agent model, it is "a payment, made by a third party to an agent of a principal, in which the agent explicitly or implicitly agrees to take an action that is contrary to his duty as an agent of the principal and is thus not in the interest of the principal." Based on this definition, where the payment is reported or forwarded to the principal, it is not a bribe. On other hand, where the payment is neither forwarded nor reported to the principal, but is kept by the agent, then, the payment is a bribe.[188] The transaction may also be presented as: "On my account, P accepts a bribe from R, if and only if P agrees for payment to act in a manner dictated by R rather than doing what is required of him as a participant in his practice."[189]

Using the definitions above, a payment is considered a bribe when it strikes at the duty of the agent towards the principal. The determining factor is whether the payment is directed at the agent, for the latter's abdication of

185. WILLIAM H. SHAW & VINCENT BARRY, MORAL ISSUES IN BUSINESS 360 (1995 ed.).

186. *Id.* at 365.

187. *Id.*

188. James, supra note 18, at 14 (citing Michael Philips, *Bribery, Consent and "Prima Facie" Duty: A Rejoinder To Carson's "Bribery, Extortion And The Foreign Corrupt Practices Act," Journal of Business Ethics* 361(1987)).

189. *Id.*

an obligation owed to a principal or to take an action that the principal would not accept.[190]

1.2. Act of Bribery

The principal-agent model is focused on conflict of interests. Under this model, bribery occurs in a context of "dual agency" wherein the bribee is the agent of two principals: the legitimate principal to whom the agent has a fiduciary duty and the principal from whom the agent receives the bribe. The agent's preference for his self-interest is both detrimental to the principal and a betrayal of trust, which defeats the essence of the relationship. Although the risk[191] of conflict is recognized by the principal, he contracts the agent to perform tasks which the latter may have special knowledge thereon or simply for reason of division of labor. As the test case provides, the researcher head, contracted for his specialized knowledge, may breach his duty by employing an unqualified contractor for a consideration.[192]

A corrupt activity, under the principal-agent model, must satisfy the following criteria: a) it must have a positive expected economic value to the bribed agent,[193] that is, the agent must "be primarily motivated by the undue advantage"[194] being offered, promised, or given; b) it must be in violation of the fiduciary duties, that is, the nature of the corrupt act contradicts the authority given by the principal; and, c) it must adversely affect the economy,[195] or causes injury to the principal. These factors may further be evaluated by looking at the value of the gift and the position or power of the person receiving the bribe.

2. Passive bribery

It may be apt to examine the instance of private bribery as existing criminal law on bribery are primarily characterized by a passive disposition of the public officer who merely "accept or receive a gift in consideration for either violation or non-performance of a duty." The Council of Europe provides a helpful definition of passive bribery, with the use of the word "requests,"

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190. *Id.*

191. The risk involved is the agency's susceptibility to the agent's corrupt acts.

192. Marco Celentani & Juan-José Ganuza, *Corruption and Competition in Procurement* (Universitat Pompeu Fabra, Working Paper No. 464, Jan. 2001), at 3-4, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_ id=230544 (last accessed Sep. 23, 2009).

193. *Id.* at 7-8.

194. Home Office, Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials: A Consultation Paper, 6 (Dec. 2005).

195. Celentani & Ganuza, *supra* note 192, at 7-8.

which in proper terms would amount to extortion deviating from the passive nature of the offense. Thus, a person who "directly or through an intermediary, requesting or receiving an undue advantage of any kind, or accepting the promise of such an advantage, for oneself or for a third party, while in any capacity directing or working for a private-sector entity, in order to perform or refrain from performing any act, in breach of one's duties"[196] commits passive bribery.

The elements of this act may be broken down into the following:

(1) The offender is in a capacity of directing or working for a private-sector entity;

(2) The offender, directly or through an intermediary, receives an undue advantage or a promise thereof;

(3) The advantage is either for oneself or for a third party; and,

(4) The offender performs or refrains from performing any act, in breach of one's duties.

Thus, the relationships in this case may properly be understood as follows:

2.1 Principal-Agent

The illustration is a modified version of Figure 2, in which the rights and duties of the parties have been identified. In this particular instance, it is made apparent that a principal-agent relationship should be balanced by justice: that the principal is entitled to exercise and realize his right but is duty bound to comply with his respective duty to the agent. On the other hand, the agent is entitled to his right as defined under the agency, and is duty bound to comply with his fiduciary duties of loyalty and proper performance of his duties. Failure in any of these aspects results in an injustice committed against the agency; such that, rights are violated and duties are breached. In the case of private bribery, the agent breaches his fiduciary duty thus causing an injustice to the principal for impairing the latter from fully realizing his right. Clearly, the breach of duty caused an impairment of the principal's right to loyalty, performance of duty, and ultimately, the protection of the business.

196. *Id.*

It appears that nowhere in the enumeration of elements contemplate damage to the principal, as an element of the crime. Indeed, there is no requirement that the principal must have suffered injury. In fact, mere intent to cause such injury would be sufficient.[197] However, the factor of injustice becomes necessary to establish that act sought to be criminalized pierces through the very core of an agency relationship, without which, there can be no rationale for the criminalization of private bribery.

2.2.

Although the Study uses a principal-agent model, as a backdrop for the proposal, it is necessary to show how the agency facilitates a collective interplay of rights and duties with a third party. As stated above, third party liability is enforceable against the principal, considering proper exercise of powers by the agent. However, there is yet to be a determination of the kind of liability which may be enforced by the principal against the third party for participating in the bribery, in effect, conspiring in committing the injustice towards the principal.

In bribery within the private sector, the participation of the third party is not considered. It is because the offense identifies the actor as the agent, the act as receiving for personal gain, and the victim as the principal. However, determining the liability of the third party is necessary where the punishable act has the effect of excluding another guilty party (in so far as the rationale for the crime holds, that is, violation of the rights of the principal resulting from breach of duty).

Under the law on agency, a third party may be constituted as a second principal of the agent. In such case, where the second principal is "aware of the dual employment, but the principal is not, the latter has the right to affirm or rescind the transaction and recover damages from the third party and the agent irrespective of any proof of actual fraud or that an improper advantage has been gained over him."[198] This pertains to a civil remedy by which the principal can recover damages solely on the basis of dual employment regardless of any fraud committed against him. On this aspect, a criminal sanction for private bribery should be made available. The nexus of the criminal action shall be the fraudulent act committed against the principal supported by proof of the injury suffered by him. However, there being no contractual relation between the two, the liability of the third party arises

197. Wittmer, *supra* note 20.

198. DE LEON, AGENCY, *supra* note 151, at 365.

from the criminal act committed with the agent. Hence, the third party's liability is derived from the agent's liability.

The doctrine of derivative liability[199] provides a method of deriving criminal liability based upon the commission of a criminal offense by another person. Because it is derivative, criminal liability depends entirely upon the crime that has been committed. This concept is the source of accomplice liability, which renders a party who abets or aids in the commission of a crime criminally liable. Thus, where the law only speaks of the passive form of bribery, such that there is no way of impleading the third party in the crime, his liability may be established by means of derivative liability based on the fact of the commission of the crime.

In this situation, the interplay of rights and duties, as illustrated above, involves the right of the principal to expect and demand fair dealing from the prospective subcontractor and the former's duty to award the contract should the latter be able to comply with the principal's terms and conditions. On the other hand, the third party is duty bound to observe fair dealing and to avoid any act that will afford him undue advantage in violation of the principal's rights. Although there no binding contractual relation yet, their relations are governed by the principal's standards and procedure to which the third party abides by voluntarily. Thus, gaining undue advantage through participating in a violation of the principal's right to loyalty, which in turn is also a violation of the right to fair dealing, constitutes sufficient basis for the third party's liability.

3. Active bribery

Active private bribery includes "promising, offering or giving, directly or through an intermediary, to a person, who, in any capacity directs or works for a private-sector entity an undue advantage of any kind, for that person or for a third party, in order that person should perform or refrain from performing any act, in breach of that person's duties."[200]

The elements of this act may be broken down into the following:

1. The offender is a third party who promises, offers or gives, directly or through an intermediary, an undue advantage of any kind;
2. The offender promises, offer, or gives, the undue advantage in order that the person should perform or refrain from performing any act, in breach of the recipient's duties; and,

199. Larry M. Lawrence, II, *Part VII. Accomplice Liability: Derivative Responsibility*, 36 LOY. L.A. L. REV. 1524 (Summer 2003).

200. Framework Decision, *supra* note 100.

3. The recipient of an undue advantage is a person in capacity to direct or work for a private-sector entity.

3.1.

A provision on active bribery responds to the deficiency in passive bribery with regard to imputing liability to the third party. Moreover, the liability of the third party in active bribery is direct and need not be derived from the liability of the agent. Thus, the principal is afforded a cause of action against the third party even in the absence of a contractual relation. The discrepancy between the elements and the illustration, for lack of unwarranted benefit in favor the offender in the enumeration of elements, may well be settled by inserting a requirement that the offender commits the bribery in order "to gain an unwarranted benefit," otherwise, the essence of bribery would be lacking. Thus, the elements should recite:

4. the offender is a third party who promises, offers or gives, directly or through an intermediary, an undue advantage of any kind;
5. the offender promises, offer, or gives, the undue advantage in order that the person should perform or refrain from performing any act, in breach of the recipient's duties;
6. the offender promises, offer, or gives, the undue advantage, in order to obtain an unwarranted benefit; and,
7. the recipient of an undue advantage is a person in capacity to direct or work for a private-sector entity.

V. CONCLUSION

Corruption is a pattern of behavior that may or may not be criminal.[201] The present Philippine legal system addresses public corruption, totally ignoring the reality that it also occurs in the private sphere, "as people take advantage of their positions to defraud their companies or shareholder for personal benefit."[202] The expanded notion of corruption has paved the way for the recognition of the fact that the private sector may also be a victim thereof.

201. Carol MacLennan, *Corruption in Corporate America: Enron — Before and After*, CORRUPTION: ANTHROPOLOGICAL PERSPECTIVES, 2005, at 165.

202. David W. Lovell, *Corruption as a Transitional Phenomenon: Understanding Endemic Corruption in* POSTCOMMUNIST STATES, CORRUPTION: ANTHROPOLOGICAL PERSPECTIVES 67 (2005).

Indeed, the private sector has a role in the supply-demand aspect of corruption. As presented, the private sector has fed public corruption into the global problem it is today. However, it cannot be denied that the perpetuation of this crisis, as it exists in the more regulated sphere of the public sector, is present and growing in the less regulated private sphere. With less protection for victims in the private sector and the imminence of bribery within the private sector, the State can only hope that the private sector would not be reduced into a business in itself, diminishing the quantity and quality of production.

It is worth noting that there cannot be zero tolerance to bribery in the private sector. Indeed, there may be instances where small payments may be made in order to facilitate business but not necessarily to betray the trust reposed upon an individual by virtue of his or her position. Thus, one must be well aware of the thin line that separates a gift from a bribe. As presented in this Note, a bribe is that which is given with an expectation of reciprocity to the detriment of the beneficiary. Being a manifestation of betrayal of trust, the proposal to criminalize bribery in the private sector is therefore an effort to provide the principal with an additional remedy to defend his or her rights.

Criminalization of bribery in the private sector primarily aims to protect the trust reposed by the principal on the person who is bribed. Where there is consent of the principal, any advantage accepted does not constitute a breach of duty. As a consequence, any advantage offered to loyalty trustee should be disclosed to the beneficiary whenever possible.[203] This is because such disclosure is contrary to the nature of bribery itself. However, pursuant to the state's initiative to comprehensively address corruption, criminalizing bribery in the private sector is a necessary effort to fill in the gaps in the strategy to combat corruption.

There are several reasons for introducing criminal law sanctions for corruption in the private sphere. First, corruption in the private sphere undermines values like trust, confidence, or loyalty, which are necessary for the maintenance and development of social and economic relations, and damages society as a whole. Second, penalizing corruption in the private sector ensures respect for fair dealing and competition. Lastly, increased privatization of several public functions and services (education, health, transport, telecommunication, etc.) require proper safeguards in order to afford the public the best quality of services. It is therefore logical and just to protect the public from the damaging effects of corruption in businesses."[204]

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203. *Id.*

204. Csonka, *supra* note 128, at 4.