

INTERNATIONAL ACTORS AND THE PROMISES AND PITFALLS OF ANTI-CORRUPTION REFORM

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Policies to control corruption will always be controversial and contested. Those subject to increased surveillance or limits on their discretion will bewail the lack of trust these constraints imply. They will complain that the new controls are politically motivated and that they fail to respect cultural norms. These objections will be particularly evident when anti-corruption measures are imposed or supported by international actors—most notably aid and lending bodies, global non-profits, or international treaty regimes. The role of international institutions is necessarily limited, given the dominant position of nation-states. Nevertheless, well-executed efforts can benefit ordinary people and may help, rather than harm, domestic and global businesses. The losers are those who benefited from corrupt transactions both in government and in the private sector.

International institutions began to promote an anti-corruption agenda in the mid-nineties. The end of the Cold War facilitated these initiatives. For a time, these institutions and their powerful backers in wealthy countries faced no significant opposition. Corrupt government leaders in developing countries could no longer play off the Communist and anti-Communist blocs against

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one another. The bargaining power of domestic anti-corruption advocates increased.

But recently, the rise of global investment from China and other middle-income countries, which were not part of the initial anti-corruption consensus, has given some political leaders leverage to resist reform, especially if the host state is resource rich. I do not mean to suggest that the leaders of emerging middle-income countries actively encourage their investors' corruption or benefit from it personally. In fact, they may also be trying to limit its impact. Nevertheless, the growing importance of multinationals from countries outside the 1990s "anti-corruption consensus" poses a challenge. On the positive side, these firms increase competition in global markets, but on the negative side, their use of corrupt tactics increases the pressure on all firms to follow suit.

My inquiry begins with the fundamental political/economic problems facing modern states, and it then asks how corruption can exacerbate these problems. With that background, I consider feasible options for international bodies operating under severe political and financial constraints. Here are the key questions:

What is the particular problem of most concern? Is it stagnating or uneven economic growth in low-income countries or regions? Is it persistently high levels of poverty and low levels of human development? Is it the lack of a competitive international environment for international trade and investment? Is it disillusionment with the state—its electoral institutions, the bureaucracy, or the judiciary—fueled by the belief that government officials are unconcerned with ordinary citizens' rights and interests?

What special problems arise in new democracies with fragile and untested institutions or in ones where the military is the only well-organized institution? Are post-conflict environments especially vulnerable, or do they provide opportunities for breaking with a dysfunctional past?

How does corruption in its various forms affect each of these issues? A satisfactory approach must disaggregate the concept of "corruption" and measure the impact of each component on the particular problem of interest. Thus, one could focus either on bribery and extortion in the day-to-day interactions between citizens, domestic firms, and state officials or on high-level malfeasance involving top officials (e.g., politicians, top bureaucrats, military brass) and large firms—often multi-nationals

seeking contracts or concessions. Should reformers extend their reach beyond outright bribery and extortion to consider the different legal routes through which private wealth, both domestic and foreign, influences public actors?

Given the conceptual and empirical connections between corruption and policy outcomes, what anti-corruption policies might succeed in advancing these goals? Limiting corruption is a means to an end. The ends of most interest to reformers should determine which policies deserve emphasis. As John Dugard argues, freedom from corruption ought not to be classified as a human right on its own. Rather, its control can help further a variety of human rights if targeted at areas where corruption undermines rights.¹ In choosing between means, one should trace the link between policy initiatives and outcomes—often a difficult job, because information on the costs and benefits of alternatives is often hard to obtain.

Finally, what do international actors contribute? International actors are constrained by their own distinctive institutional and resource limitations. For example, there is some evidence that presidential democracies are more corruption-prone than parliamentary systems.² However, no international institution is prepared to encourage regime change of that sort—except perhaps in a post-revolutionary or post-conflict situation, where the country itself is rethinking its constitutional arrangements.³ Even

¹ See John Dugard, *Corruption: Is There a Need for a New Convention?*, in ANTI-CORRUPTION POLICY: CAN INTERNATIONAL ACTORS PLAY A CONSTRUCTIVE ROLE? 159 (Susan Rose-Ackerman & Paul Carrington eds., forthcoming 2013) [hereinafter, ANTI-CORRUPTION POLICY] (discussing how corruption can undermine human rights but arguing that corruption should not be treated as a *per se* human rights violation).

² See generally Jana Kunicová & Susan Rose-Ackerman, *Electoral Rules and Constitutional Structure as Constraints on Corruption*, 35 BRIT. J. POL. SCI. 573 (2005) (providing statistical evidence that presidential democracies are likely to be more corrupt than parliamentary systems). See also, Tina Søreide, *Democracy's Shortcomings in Anti-Corruption*, in ANTI-CORRUPTION POLICY 129, *supra* note 1 (contending that a democratic system with checks and balances may not suffice to combat corruption).

³ Of course, constitutions are amended and replaced with some frequency, for example, in the aftermath of the breakup of the Soviet Union and democratization of Eastern Europe and in the current Middle East. The changes, however, may enhance, not limit, rent-seeking possibilities. Thus, in Africa over the last three decades, eighteen of twenty-one countries that began the post-colonial period as parliamentary democracies shifted to presidential systems. See James A. Robinson & Ragnar Torvik, *Endogenous Presidentialism* 34 (Nat'l Bureau of Econ. Research, Working Paper No. 14603, 2008). A majority of those that

if outsiders take the fundamental constitutional structure as given, they can point out particular risks and recommend ways to limit corruption within constitutional constraints.⁴

In short, international institutions face a linked set of issues: from defining the underlying problem, to defining corruption and understanding how it can exacerbate (or defuse) the problem, to seeking policy levers that might limit the impact of corruption, and, finally, to identifying appropriate routes for international influence. These complexities and tensions are disguised if anti-corruption goals are formulated at too high a level of generality. But once international actors move to concrete initiatives, limitations of knowledge and capacity will become apparent, and conflicts between different types of anti-corruption efforts will surface.

Section 1 presents a taxonomy of international actors involved in anti-corruption activity. Section 2 connects corruption policy to its ultimate objectives: global market efficiency, economic growth, poverty alleviation, and government legitimacy. Section 3 links international anti-corruption initiatives with these underlying goals. Finally, section 4 broadens the focus by moving beyond illegal corruption to consider the legal routes through which private wealth can influence public power.

1. INTERNATIONAL ACTORS: A TAXONOMY

Four types of international actors play important roles, but they do not always agree on anti-corruption priorities and strategies. First, and most obvious, are the aid and lending organizations—International Financial Institutions (IFIs), such as the World Bank, and bilateral donors. They sponsor governance and anti-corruption projects in member countries and also seek to avoid corruption in their own lending and grant programs. They

switched are resource rich, suggesting choices consistent with results cited by Kunicová & Rose-Ackerman, *supra* note 2, at 579, 587–600 (linking corruption to the diversion of public resources for self-interested uses and subsequently connecting corruption with presidentialism). Robinson and Torvik develop a model where the constitutional structure is endogenous to the level of rents available to political elites.

⁴ For a study that takes this point of view, see, e.g., Joseph Ayee et al., *Political Economy of the Mining Sector in Ghana 1* (World Bank, Policy Research Working Paper No. 5730, 2011) (arguing for “appropriate reforms” in Ghana’s governance and “greater awareness of incentive problems at the political level and their possible implications for sector performance and the economy at large”). The study is, of course, a working paper, not a statement of World Bank policy.

support reforms that aim to limit corrupt incentives and to improve domestic oversight of the public sector. Programs seek to reform government service delivery and establish accountability institutions.⁵ Sometimes programs directly target domestic anti-corruption laws and law enforcement systems. The IFIs also seek to enforce their own “law” that forbids payoffs and kickbacks.⁶ They are concerned with the goals of economic growth and poverty alleviation, but also with the integrity and legitimacy of their own governance structures.

The second set is directly concerned with civil and criminal law enforcement across borders. There are two institutional frameworks. One focuses on catching and punishing miscreants using the civil and the criminal law. The offenders are firms engaged in international business, the firms’ managers, organized crime groups, and country leaders who enrich themselves through kickbacks and extortion. These institutions provide information on national legal regimes covering money laundering, asset recovery, and extradition, and they may help train prosecutors and police for domestic anti-corruption work. They generally do not have an explicit development or poverty alleviation agenda.

The other international legal regime resolves commercial disputes. Corruption may have facilitated a disputed contract up front, but the international arbitration system has only recently

⁵ Two chapters in ANTI-CORRUPTION POLICY highlight aspects of this work at the World Bank. See, Jana Kunicová, *The Role of the World Bank in Promoting Good Governance and Anti-Corruption Reforms: A View from the Europe and Central Asia Region*, in ANTI-CORRUPTION POLICY 41, *supra* note 1 (exploring the World Bank’s efforts to fortify public financial management and service delivery, among other aspects of governance); Francesca Recanatini, *Tackling Corruption and Promoting Better Governance: The Road Ahead*, in ANTI-CORRUPTION POLICY 55, *supra* note 1 (discussing World Bank efforts to promote ownership and sustainability of anti-corruption reforms by governments). See also Francesca Recanatini, *Assessing Corruption at the Country Level*, in HANDBOOK OF GLOBAL RESEARCH AND PRACTICE IN CORRUPTION 34 (Adam Graycar & Russell G. Smith eds., 2011) (describing a diagnostic tool that uses empirical data to establish corruption reform goals specific to individual countries).

⁶ See, e.g., Int’l Bank for Reconstruction & Dev. [IBRD] & Int’l Dev. Ass’n [IDA], *World Bank Sanctions Procedures*, WORLD BANK (Jan. 1, 2011) (setting forth a sanctions regime for misuse of World Bank funds through fraud or corruption). See also, Pascale Hélène Dubois & Aileen Elizabeth Nowlan, *Global Administrative Law and the Legitimacy of Sanctions Regimes in International Law*, 36 YALE J. INT’L L. ONLINE 15 (2010), <http://www.yjil.org/docs/pub/o-36-dubois-nowlan-global-administrative-law-sanctions.pdf> (explaining the World Bank’s sanctions procedures). More information is available at the website of the World Bank’s investigative unit. See *Integrity Vice Presidency*, WORLD BANK, <http://www.Worldbank.org/integrity> (last visited May 5, 2013).

recognized a responsibility to deal with such allegations and to provide damages *ex post*. Even when it does confront the issue, the existing arbitration system is not well equipped to investigate and punish corruption, which often falls under the criminal law. Arbitrators, however, are beginning to seek ways to respond constructively. Going beyond the commercial arbitration regime, private litigants are seeking other forms of redress before international tribunals and ordinary domestic courts, sometimes invoking private rights of action under existing statutes.

One justification for strengthened international law enforcement is to level the playing field for multinational firms so that honest firms do not operate at a disadvantage. If leveling down is unacceptable, honest global actors may seek to level up. The goal is a more competitive and transparent global marketplace for trade and investment. The international legal regime does not deal with the root causes of poverty but, rather, seeks to deter high-level corruption by making it costly and risky. Economic development and poverty alleviation may also be furthered if it becomes more difficult for corrupt leaders to operate with impunity and to transfer their gains abroad with ease. The result may be better and more fairly distributed economic outcomes.

The third set of institutional actors is a diverse group of international nonprofit institutions with an anti-corruption and good government agenda, including organizations that support investigative journalism and freedom of the press. Here I would also include individual investigative journalists and writers, some associated with major for-profit media outlets and others operating on a free-lance basis. These diverse institutions have no official role within states or internationally; they obtain their legitimacy from their own integrity and the convincing nature of their arguments and information they disclose. They operate through franchises in the form of local chapters, such as Transparency International; seek the cooperation of businesses and governments through a standard-setting and monitoring process, such as the Extractive Industries Transparency Initiative ("EITI"); gather and organize country-level data, such as Global Integrity; and expose corruption and other forms of wrongdoing, such as Global Witness.⁷ Most groups straddle several of these categories. Global

⁷ Transparency International is an anti-corruption organization with more than one hundred national chapters worldwide. See *Our Organisation: Overview*, TRANSPARENCY INT'L, <http://www.transparency.org/whoweare/organisation> (last visited May 5, 2013). The Extractive Industries Transparency Initiative (EITI)

Witness, for example, has no national chapters, but uses exposés as a way to push for policy changes and to promote institutional reforms such as the EITI.⁸

These unofficial groups operate variously as pressure groups that seek to put corruption on the reform agenda of other institutions, and as information-providers that put domestic reform efforts in an international context and publicize both positive and negative developments. They may support research on the causes and consequences of corruption and on the effect of reforms, but faced with budgetary limits and the need to demonstrate progress to funders, they sometimes must trade off long-term research projects against short-term efforts to influence current debate.⁹ They differ in their degree of confrontation with sitting governments. Some groups have tried to build broad coalitions to counteract the power of corrupt elites without openly challenging them or by trying to co-opt them into anti-corruption initiatives. Others focus on exposing corruption and using scandals as a mechanism to raise public awareness so that people will push for change. Each has risks. The former strategy risks giving cover to ongoing corrupt arrangements; the latter risks increasing public cynicism by revealing the pervasive character of official malfeasance.

Fourth and finally, international business firms work through some of the nonprofit groups listed above. Transparency International-USA, for example, operates with extensive business

“is a coalition of governments, companies, civil society groups, investors and international organizations.” *What is the EITI?*, EITI, <http://eiti.org/eiti> (last visited May 5, 2013). Global Integrity annually investigates the “transparency of the public procurement process, media freedom, asset disclosure requirements, [and] conflicts of interest regulations” in dozens of countries. See GLOBAL INTEGRITY REPORT, <http://www.globalintegrity.org/report> (last visited May 5, 2013). Global Witness is an organization that investigates and exposes natural resource-related conflict and corruption. See *Our Work*, GLOBAL WITNESS, <http://www.globalwitness.org/> (last visited May 5, 2013).

⁸ Thus, Global Witness’s Publish What You Pay (PWYP) campaign led to the establishment of the PWYP coalition, which, in turn, led to the creation of the EITI. See *History*, PUBLISH WHAT YOU PAY, <http://www.publishwhatyoupay.org/about/history> (last visited May 5, 2013); *History of EITI*, EITI, <http://eiti.org/eiti/history> (last visited May 5, 2013).

⁹ Global Witness (“GW”) has avoided these tradeoffs by planning long-term campaigns and raising money to finance them up front, and then reporting on their progress. GW integrates long-term campaigns (the oldest is sixteen years) with case studies that further inform its demands for policy change. Short-term gains are steps on the way to long-term objectives. See E-mail from Patrick Alley, Co-founder, Global Witness, to author (Aug. 12, 2011) (on file with author).

support and board membership because U.S. multi-nationals, subject to the U.S. Foreign Corrupt Practices Act, have an interest in controlling corruption in business worldwide. Other firms work with business associations, such as the International Chamber of Commerce or their own trade associations, to promote codes of good conduct and promote anti-corruption policies. Voluntary initiatives, such as the EITI, provide public relations benefits for firms that comply with their standards. Top management and board members of a few global firms have spoken out individually in support of strong anti-corruption policies. Business interests both interact with, and are in some tension with, the other actors listed above. Sometimes preventing corruption in global business improves a firm's profits; at other times it limits their trade and investment opportunities.

2. GOALS AND STRATEGIES

How can anti-corruption initiatives further the fundamental goals of efficient international markets, poverty alleviation, economic growth, and government legitimacy? I outline general approaches here that may or may not involve international institutions. My discussion is necessarily brief, but it draws on a body of research that has deepened and developed exponentially in recent years. This summary sets the stage for consideration of specific international responses in Section 3.

2.1. *Efficient International Markets*

Anti-corruption efforts can promote efficiency in international markets. High-level international corruption may suppress competition in global markets by discouraging some investors from taking advantage of otherwise profitable opportunities. Corrupt rulers may commit their countries to foolish, uneconomic public projects that place a burden on taxpayers into the future and that starve needed services, such as education and health. With widespread corruption, even nominally beneficial infrastructure projects, such as roads, bridges, port facilities, or power plants, may be too large, poorly located, and shabbily constructed.

Because of underlying monopoly power, some corrupt deals may just redistribute profits between multi-national corporations ("MNCs") and corrupt officials with no impact on market efficiency. In such cases, the fundamental inefficiency arises from monopoly power, not bribery. However, this inefficiency seems to

be a special case; in general, corrupt public officials and their business firm counterparts can exclude competitors and can influence the content of contracts, not just the price. They have incentives to distort public choices in order to increase the rents available to share and in order to design projects where bribes are easy to hide—for example, one-of-a-kind capital-intensive projects that are poorly adapted to local conditions.

Efficient international markets can promote growth in low- and middle-income countries if they lower transaction costs and reduce the risks of trade and investment. However, the evidence suggests that free trade and open investment are not sufficient to secure growth if poor governance is pervasive. A corrupt but stable country could be quite attractive to investors even if few of the benefits of its activity flow to local businesses and ordinary citizens. Consider, for example, the cases of Greece and Italy, which were able to borrow billions on international markets in spite of high levels of corruption and otherwise dysfunctional governments.¹⁰ When corrupt or self-serving leaders set priorities, there are both efficiency and distributive consequences. Those individuals in power favor projects that benefit them, neglecting investments with larger social gains that would be more broadly distributed. Thus, those whose primary focus is on economic growth, poverty alleviation, or good government will not be content with an international anti-corruption strategy that concentrates on international business deals. International actors should not just focus on a country's levels of foreign direct investment (FDI) as a measure of success. They need to examine the impact of FDI on ordinary people and the local business climate; they need to ask if corruption at the top has limited the flow of benefits to the citizenry.

2.2. Economic Growth and Poverty Alleviation

Broadly speaking, if economic growth and poverty alleviation are the main goals, then anti-corruption efforts enter the picture to assure that poor citizens, as well as domestic small- and medium-sized business, benefit from development. Anti-corruption efforts are necessary, but not sufficient: local officials must also deliver public services competently. An abrupt drop in corruption

¹⁰ For a popular account of the Greek case, see Michael Lewis, *Beware of Greeks Bearing Bonds*, VANITY FAIR (Oct. 1, 2010), <http://www.vanityfair.com/business/features/2010/10/greeks-bearing-bonds-201010.print>.

without affirmative efforts to assure competence can have disastrous consequences. Because corruption is a symptom of a poorly functioning government, reform programs should never simply target law enforcement. They should be part of a broader effort to change the way state officials interact with society.¹¹

A first round of reforms should examine corrupt programs to see whether some might simply be eliminated along with their corrupt incentives. This initial step could lead either to the repeal of certain rules and regulations or to the privatization of whole sectors under public ownership. This strategy implies both that such programs, even if honestly administered, do not serve important public purposes and that repeal lowers overall corruption, rather than just shifting it someplace else.¹² But privatization brings its own problems. If public firms are privatized with their monopoly power intact, commercial bribery may replace public corruption as suppliers jockey for advantage and private monopoly profits substitute for payoffs. Even if a public monopoly is broken up in the privatization process, the resulting entities may operate corruptly by obtaining contracts through bribery and debasing product quality.¹³ Thus, the risk of shrinking the state as an anti-corruption strategy provides a stark reminder that anti-corruption policies need to be embedded in a broader context of overall government functioning. A narrow focus on limiting corruption can backfire.¹⁴

¹¹ The arguments summarized here are developed in SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* 9–68 (1999). For an overview of empirical studies of corruption and reform efforts in particular contexts, see Susan Rose-Ackerman & Rory Truex, *Corruption and Policy Reform*, in *GLOBAL PROBLEMS, SMART SOLUTIONS: COSTS AND BENEFITS* (Bjørn Lomborg ed., forthcoming 2013).

¹² See Liam Wren-Lewis, *Anti-Corruption Policy in Regulation and Procurement: The Role of International Actors*, in *ANTI-CORRUPTION POLICY* 91, 97–98, *supra* note 1.

¹³ See generally LAURENCE COCKCROFT, *GLOBAL CORRUPTION: MONEY, POWER AND ETHICS IN THE MODERN WORLD* (2012) (illustrating this concept with examples of cotton ginners in Tanzania who adulterated their cotton and pharmaceutical companies in China that bribed hospitals).

¹⁴ For recent research that emphasizes this general point, see Emmanuelle Auriol & Stéphane Staub, *Privatization of Rent-Generating Industries and Corruption*, in *INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION, VOLUME II* 207 (Susan Rose-Ackerman & Tina Søreide eds., 2011); Antonio Estache & Liam Wren-Lewis, *Anti-Corruption Policy in Theories of Sector Regulation*, in *INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION, VOLUME II* 269 (Susan Rose-Ackerman & Tina Søreide eds., 2011); Ariane Lambert-Mogiliansky, *Corruption and Collusion: Strategic Complements in Procurement*, in *INTERNATIONAL HANDBOOK*

Second, a country can reduce corruption by repealing laws protecting the environment or preserving public health or by eliminating taxes—but at an unacceptable loss in public welfare. In such cases, structural reforms can reduce corrupt incentives and provide public benefits. Countries can simplify these regulations and tax laws so that officials have less discretion, and so that outsiders can easily observe violations. If some rules are so stringent that organizations and individuals routinely violate them in return for payoffs, the law should be redesigned to make compliance plausible. For example, in some post-communist states, tax collection descended into a vicious spiral where high tax rates led to widespread violations, fueled by payoffs. The resulting inadequate level of revenues led to further increases in tax rates, encouraging even more taxpayers to pay off tax collectors. It would have been better to lower tax rates and increase support for a credible anti-corruption effort.

Third, scarcity spurs payoffs. If a public benefit is not available to all who can qualify and if it is allocated at the discretion of officials, bribes can allocate the benefit to the unscrupulous applicants who are willing to pay the most. Legalizing the payments can limit corruption—for example, by auctioning off the benefit to the high bidders. This change would expand the pool of beneficiaries to include all who are willing to pay, not just those willing to break the law. The problem, of course, is that many public programs are not meant to benefit those willing to pay the most for them. Benefits for businesses, such as quotas for the import of capital goods or licenses to harvest timber consistent with environmental values, might be auctioned off with a gain to the Treasury and no loss of social value. Auctioning off places in public housing, eligibility for university places, or access to a limited public health benefit, however, will undermine the redistributive or merit-based goals of such programs. In those cases, countries must deal with corruption through techniques that mix monitoring with program redesign to limit official discretion. The state can monitor internally or encourage whistleblowers who earn rewards for their activities. Furthermore, even when auctions appear efficient or socially acceptable—for example, in the allocation of limited timber concessions or capital imports—the state should assure that the winners do not engage in corruption *ex*

ON THE ECONOMICS OF CORRUPTION, VOLUME II 108 (Susan Rose-Ackerman & Tina Søreide eds., 2011).

post to increase their profits. For example, they might mislabel capital imports or tropical timber exports and then pay off customs agents to overlook their behavior.

Fourth, a fully compromised bureaucracy may need to be replaced wholesale. For example, the Georgian government fired all its traffic police and then rehired one-third of them, seeking to disrupt established patterns of corruption by giving the police new cars and uniforms and hoping to instill a new pride in honest service.¹⁵ This change in attitudes required both personnel changes and changes in the mode of operation. Gradual change is not feasible if the system is in a low-level trap where corrupt expectations build on themselves.

2.3. Government Legitimacy

Governments appear more legitimate to their citizens if they are more open and transparent and have established ways for citizens to hold officials accountable. Of course, political leaders might manipulate information and access to persuade the public to support a secretive regime, but such a state hardly counts as a legitimate expression of popular will. In addition to the key role of elections, other institutions help citizens monitor the state, and they deserve support even in non-democratic regimes. These institutions include freedom of information acts, ombudsmen, and independent oversight bodies such as audit agencies, electoral commissions, anti-corruption commissions, and constitutional courts. Laws governing conflicts of interests and ethical standards for civil servants, politicians, and business people can also help. The protection of whistleblowers can complement these efforts by encouraging those inside government to come forward without fear of losing their jobs and by rewarding those in the private sector who report malfeasance. Whistleblowers are often looked on with distaste, especially in societies where loyalty to kin and close associates is a primary value. However, such protections are necessary to break up the tight links that permit corruption and self-dealing to become entrenched. Even so, they are of little practical use unless the law enforcement system operates well. If

¹⁵ WORLD BANK, FIGHTING CORRUPTION IN PUBLIC SERVICES: CHRONICLING GEORGIA'S REFORMS 15-18 (2012), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/01/20/000356161_2012012001093/Rendered/PDF/664490PUB0EPI0065774B09780821394755.pdf (summarizing the reforms to the traffic police).

the system does not, corrupt allegations can serve as a simple, convenient way to take revenge on a rival.

Some countries have adequate laws on the books, and these countries may even enforce these laws relatively well against low-level offenders. The government then argues that it is successfully tackling corruption. In practice, however, one law exists for civil servants and another for top officials. Above a certain level, the political elite may operate with impunity. Sectoral reform does not touch such self-dealing. The phenomenon is particularly common in resource-rich states where concessions for oil and other minerals are handled at the highest levels and often involve generous signing bonuses that may or may not be kept secret. Sometimes the payoffs are so much a part of ordinary practice that they are not illegal even though they obviously only benefit the leadership. Their transparency hardly matters because there are no effective mechanisms for the citizenry to hold leaders to account.¹⁶

2.4. *Post-Conflict Countries*

Post-conflict countries are a special case where both political and economic rebuilding must occur and where weak institutions combine with financial inflows to create corrupt opportunities. The large influx of foreign funds in a short time frame makes control difficult but also extremely important. Evidence from many post-conflict countries such as Guatemala, Burundi, and Angola, as well as Iraq and Afghanistan, suggests that corruption is often a serious problem that may undermine the credibility of both the post-conflict government and international donors. If a foreign military presence follows conflict, corrupt deals may involve its contractors, both domestic and international, undermining the legitimacy of the rebuilding effort.¹⁷

¹⁶ See, e.g., Ayee et al., *supra* note 4, at 20–21 (reporting on the lack of vertical and horizontal controls of political corruption in Ghana, generally and in specific industries); Tina Søreide et al., Chr. Michelson Inst. & Centro de Estudos e Investigação Científica, *Public Construction Projects – Angola: A Need to Fortify the Barriers Against Corruption*, 1 ANGOLA BRIEF 1 (2011), available at <http://www.cmi.no/publications/file/4019-public-construction-projects-angola.pdf> (outlining a similar struggle in Angola).

¹⁷ See Susan Rose-Ackerman, *Corruption in the Wake of Domestic National Conflict*, in CORRUPTION, GLOBAL SECURITY, AND WORLD ORDER 66 (Robert I. Rotberg ed., 2009); Raymond June & Nathaniel Heller, *Corruption and Anti-Corruption in Peacebuilding: Toward a Unified Framework*, 14 NEW ROUTES 10, 11 (2009) (stating that peace building efforts are at risk of corruption, especially given that these efforts rarely include a strong anti-corruption component); STUART W. BOWEN, JR.,

2.5. Structural Reform, Culture, and Law Enforcement

States will have difficulty implementing anti-corruption reforms successfully if officials and ordinary citizens accept bribery, cronyism, and favoritism as facts that keep the system running, and if they view some forms of special treatment as desirable because, for example, they further kinship or ethnic ties. However, anthropological work shows that people may simultaneously accept and condemn corruption. They condemn the malfeasance of their political leaders but spend their lives in a world full of favoritism and rule-breaking.¹⁸ This paradox suggests that if reformers do come to power, they need to work hard to inform citizens of the overall social costs of corruption. At the same time, they need to implement a credible criminal and civil law enforcement regime that ends the impunity of public and private actors.¹⁹ Once corruption has become a risky activity, reformers can then get public support to redesign programs so that honest people can operate without looking like dupes or suckers. The structural approach developed in this essay suggests that pure efforts at moral reform and law enforcement are unlikely to be effective unless underlying changes in government functioning make it is relatively easy and cheap to be honest.

3. THE ROLE OF INTERNATIONAL INSTITUTIONS

A range of nonprofit international institutions, including IFIs, civil society groups, treaties, and dispute resolution systems, confront corruption either as a primary goal or as a complement to their main activity. These institutions act in many different ways.

HARD LESSONS: THE IRAQ RECONSTRUCTION EXPERIENCE 6 (2009), available at <http://www.sigir.mil/publications/hardLessons.html> (explaining that, as the Special Inspector General for Iraq Reconstruction, Bowen faced “[i]nstitutionalized corruption infect[ing] both the government [of Iraq] and the supporting UN programs”).

¹⁸ See Susan Rose-Ackerman, *Corruption: Greed, Culture, and the State*, 120 YALE L. J. ONLINE 125, 130 (2010), <http://yalelawjournal.org/2010/11/10/rose-ackerman.html> (“Ordinary people condemn corruption at the elite level, but they themselves participate in networks that socially reproduce corruption.”).

¹⁹ Effective law enforcement, of course, does not mean zero corruption because, as Johann Graf Lambsdorff points out, such enforcement could result in costs that are relatively high compared to the benefits. He recommends various ways to destabilize the corrupt relationship so that participants become unsure that the other person will reciprocate. Johann Graf Lambsdorff, *Securing Investor Confidence or Fighting Corruption? How Intergovernmental Organizations May Reconcile Two Opposing Goals*, in ANTI-CORRUPTION POLICY 215, *supra* note 1.

They carry out concrete reform programs in an effort to strengthen government capacity. They train domestic officials, journalists, and civil society to identify and publicize corruption, and they monitor international financial flows and business deals for evidence of corruption. Other institutions provide a framework for resolving cross-border commercial disputes, seek to persuade other international actors—notably, business and financial firms—to adopt a broader view of their social obligations, and produce and disseminate information on corruption, government quality, and successful reforms.

For-profit international actors—including global business firms, financial institutions, as well as organized crime—may be embedded in corrupt networks that they either struggle against or actively promote. Business and financial firms may try to remain within the law by creative organizational and legal strategies. Terrorist groups and guerilla armies may finance their activities through the undercover sales of natural resources, using corruption to smooth their operations. International actors may sometimes contribute to the corrupt environment; if so, they have a special obligation to counteract these tendencies, perhaps in cooperation with nonprofit institutions that focus on limiting corruption.

The options for international actors fall into three broad categories: information provision, international frameworks, and domestic reform projects.²⁰ They range from those likely to generate little pushback from domestic actors, to those that depend on the voluntary participation of nation states, to efforts to reform a state's internal methods of operation. Not all of these policies are explicitly aimed at limiting corruption; the underlying goals sketched previously may be the explicit justification for programs whose proximate effect is to reduce corruption.

Table 1 presents the three policy goals as columns and the three broad types of international action as rows.²¹ This produces nine options but, in practice, there are only six important categories. The blank spaces are not absolutely empty. Rather, policies discussed under one category may have an indirect effect on

²⁰ See also the somewhat different framework in Wren-Lewis, *supra* note 12, (distinguishing between providing aid to governments that are actively fighting corruption and to those which do not prioritize such reforms).

²¹ I list growth and poverty alleviation together, recognizing that a more complete analysis ought to treat them separately because growth can occur at the same time as poverty rates stagnate or increase.

another. For example, an anti-corruption program directed toward promoting economic growth in poor countries (case E) may enhance competitiveness and contribute to the development of more efficient global markets. The discussion is organized by strategies to highlight the possible tensions between the activities of international institutions and the aims of powerful domestic political and economic actors, some of whom may be involved in corrupt activities and all of whom are eager to defend national sovereignty against outside meddling. Other international actors, such as organized crime bodies, terrorist groups, and corrupt multinational firms, may seek to undermine reform efforts. In the most difficult cases, they ally with domestic groups that benefit from the corrupt status quo.

Table 1: International Initiatives

Goals → Strategies ↓	Growth & Poverty Alleviation	Government Legitimacy	Efficient International Markets
Information Provision	A	B	
International Institutions		C	D
Anti-Corruption Programs	E	F	

3.1. *Information Provision [Cases A&B]*

Information provision seems relatively unproblematic because it simply aids domestic policymakers and leaves it to them to use or ignore this material as they wish.²² There is no conditionality and no direct funding for governments or domestic groups.

However, although information provision is relatively unobtrusive, gathering that information can be fraught with controversy. Three sorts of information are relevant: social science evaluations of reform policies, cross-country data on corruption levels and government quality, and investigative reporting by journalists or advocacy groups. This material can contribute to

²² See Wren-Lewis, *supra* note 12, at 95-96 (arguing that providing access to adequate information may lead to reduced corruption).

both economic and political reform so I consider these two goals together (cases A and B).

3.1.1. Social Science Information

Information about possible policy initiatives needs to be grounded in valid studies that document the success or failure of policies in a variety of settings. Results in one country can help establish benchmarks for reforms elsewhere. To do this, governments must cooperate with donors up-front in the design of projects that include competent social science evaluations. Unfortunately, evaluation may seem risky both to incumbent politicians who fear objective data and to donors who worry that evidence of failure will undermine their credibility. Even when governments and donors cooperate, studies must comply with social science protocols, including the collection of baseline data, valid study design, and competent statistical analysis. This compliance will require international institutions to design, carry out and monitor pilot programs. Providing information on what works and what does not is impossible without hands-on projects in countries at risk of corruption.

There is an ongoing debate in economics and political science over the best evaluation methods. Nevertheless, there is widespread agreement on the limitations of many current claims for policy efficacy. International bodies, possessing staff expertise in evaluation, need to do more to incorporate evaluation procedures into projects for governance and anti-corruption reform. This may require them to provide some tailored benefits (“carrots”) to governments willing to accept evaluation as part of an aid program and to incorporate the stick of reduced funding if they do not. It is not sufficient merely to provide information about on-going projects; the projects themselves must be set up with built-in evaluation processes.

Assuming that these evaluations locate successful interventions, IFI staff should bring these positive cases to the attention of officials in other countries. At a minimum, IFIs should be information banks that public officials worldwide can turn to for help.²³ IFIs should have a toolkit of options that developing

²³ See Dani Rodrik, *Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank's Economic Growth in the 1990s: Learning from a Decade of Reform*, 44 J. ECON. LITERATURE 973, 982–86 (2006) (arguing that institutions such as the World Bank ought to tailor reform options based on

countries can use to develop their domestic strategies. This does not imply that one-size-fits-all. Some countries might well reject particular reforms as incompatible with their own situation, but if they want financial assistance from aid agencies, they should have the burden of explaining why they won't adopt good governance and anti-corruption reforms shown to work elsewhere. The difficulty, of course, is that corrupt officials and contractors will try to neutralize and undermine programs that aim to improve government accountability and transparency. Representatives of donor agencies may be similarly reluctant to support serious and systematic evaluation, especially after working closely with host governments over the years.

At present, we still don't have a good data on the relative effectiveness of most reform programs.²⁴ After fifteen years of effort to promote anti-corruption and good governance, it would be valuable to consolidate experience across projects sponsored by aid and lending organizations—sharing successes, failures, and ambiguous cases. A fundamental problem concerns public information that names countries and projects. Specific context is needed to be able to decide if a program that worked in one country will succeed elsewhere. Domestic policymakers need to know how to evaluate programs that worked in other countries in order to generate local buy-in. Yet, country leaders often object to publicizing projects that will put them in a bad light. Publicizing an anti-corruption program, even a successful one, may suggest that corruption is a particular problem in that country. Alternatively, incumbent politicians may be too eager to flag the malfeasance of the previous government in the hope of assuring their own reelection. Thus, some evaluations will be easier to accomplish than others, and some political contexts will simply be impossible to use as sites for evaluation studies.

individual country experiences, eschewing the so-called "Washington Consensus").

²⁴ Nevertheless, some thoughtful efforts exist. For example, see JENNIFER BUSSELL, CORRUPTION AND REFORM IN INDIA: PUBLIC SERVICE IN THE DIGITAL AGE (2012) (evaluating the anti-corruption effects of one-stop-shops in India and relating their impact to the political situation in the Indian states). For an overview of recent studies that evaluate anti-corruption policy reforms, see REMA HANNA ET AL., THE EFFECTIVENESS OF ANTI-CORRUPTION POLICY: WHAT HAS WORKED, WHAT HASN'T, AND WHAT WE DON'T KNOW—A SYSTEMATIC REVIEW (2011), available at http://r4d.dfid.gov.uk/pdf/outputs/systematicreviews/anti_corruption_2011hanna.pdf.

In particular, to enhance government legitimacy (case B), institutions that promote accountability and transparency need more study. At a theoretical level, their role in promoting anti-corruption and good governance seems clear, but we do not know much about their practical operation, or about what conditions are required to make them effective. Complicating any effort at solid analysis, both country officials and representatives of donor agencies may benefit from the lack of solid data on the effect of good governance programs. Suppose, for example, that an anti-corruption program involves a series of seminars and workshops for public officials with per diems set to encourage attendance. Given the lack of hard measures of corruption reduction, attendance at these events may be reported as a measure of success with the officials benefiting from the expense-paid trips.²⁵

To begin to close this knowledge-gap, World Bank researchers are studying the role of anti-corruption authorities (ACAs). They find that the success or failure of ACAs depends crucially on the national context, but they have also isolated common characteristics that predict success.²⁶ The World Bank has launched a broader initiative to promote the demand for good governance, and can point to some positive cases.²⁷ However, more research is needed both to conceptualize the way accountability institutions operate and to understand how these institutions behave in different national settings.

²⁵ For a study about per diem compensation in connection with seminars and workshops, see TINA SØREIDE, ARNE TOSTENSEN, & I.A. SKAGE, HUNTING FOR PER DIEM: THE USES AND ABUSES OF TRAVEL COMPENSATION IN THREE DEVELOPING COUNTRIES (2012), available at <http://www.norad.no/en/tools-and-publications/publications/evaluations/publication?key=390706>.

²⁶ See Francesca Recanatini, *Anti-corruption Authorities: An Effective Tool to Curb Corruption?*, in INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION, VOLUME II, *supra* note 14, at 565 (describing political will and commitment as “the cornerstone of every successful anti-corruption effort”). Recanatini chairs the Anti-Corruption Thematic Group at the World Bank that is studying the effectiveness of Anti-Corruption Authorities in collaboration with the United Nations Office of Drugs and Crime, the U.S. State Department, and the European Commission. Data from this project are available at <http://www.acauthorities.org>.

²⁷ See *Social Accountability & Demand for Good Governance*, THE WORLD BANK, <http://go.worldbank.org/09MJLAICW0> (last visited May 5, 2013) (highlighting citizen-driven initiatives that seek to achieve better governance by engaging in discussion and providing resources to others); see also *Anticorruption*, THE WORLD BANK, <http://go.worldbank.org/QYRWVXVH40> (last visited May 5, 2013) (posting news articles about fighting corruption in different nations).

Whatever other strategies are pursued, the compilation and distribution of project-level information provide valuable background information. But knowledge alone may have little impact. Corrupt officials and contractors may ignore the information and continue to undermine development projects. They may announce programs to improve government accountability and transparency, and even draw on information provided by international actors, but it all may be a sham designed only to produce good publicity.

3.1.2. *Cross-Country Data*

Cross-country data can and should be produced independently of individual country governments. These indices are likely to provoke criticism from governments that score poorly on dimensions such as the control of corruption, voice and accountability, and money laundering. The weaknesses of indices that purport to capture a country's overall level of corruption are well known, but this data has, nevertheless, helped to spur the global debate and given reformers in poorly ranked countries a lever to push for change. The more important these indices become in shaping policy, the more important it is that they bear some relationship to reality and do not convey a false sense of precision.²⁸

Anti-corruption programs, even seemingly successful ones, do not quickly translate into improved index numbers. Unlike some measures of macro-economic performances, the link between policies and index numbers is weak. The indices are imperfect, and the causal links between policies and corruption levels are poorly understood. Cross-country data will continue to be produced, and they help keep the issue before the public, but they should be supplemented by project-level research that looks in detail at causal links.

Sometimes organizations that publish cross-country information go beyond the simple production of indices to apply direct pressure on countries that score poorly. For example, the

²⁸ See Kevin E. Davis, Benedict Kingsbury & Sally Engle Merry, *Introduction: Global Governance by Indicators*, in GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH QUANTIFICATION AND RANKINGS 1, 9 (Kevin E. Davis et al. eds., 2012) ("Indicators often have embedded within them . . . a much more far-reaching theory – which some might call it an 'ideology' – of what a good society is, or how governance should ideally be conducted to achieve the best possible approximation of a good society or good policy.").

Financial Action Task Force (FATF) not only scores countries on their control of illicit financial flows, but also lists some as falling below acceptable levels.²⁹ Similarly, although they do not single out especially bad actors, civil society organizations, such as Transparency International and Global Integrity, nevertheless, use their own and others' data to argue for reform. They go beyond the simple provision of information to advocate for change through local chapters or through alliances with local actors.

Objective cross-country information about the possible results of corruption and inefficiency can help spur reforms in individual countries. International bodies could compile benchmark data on the cost and performance of public projects to alert potential whistleblowers and to provide ammunition to reformers.³⁰ Data on the costs of power projects, road building, hospital and school construction, and port renewal, for example, could be assembled from multiple sources. Defense spending is one area of particular concern because of the secrecy that accompanies such purchases. Nevertheless, even there, egregious examples of overpricing may surface.³¹ Of course, the data would be quite rough and could not be used to prove corruption on their own, but if the cost of one country's project is far out of line with the global benchmark, this discrepancy could trigger an investigation. It operates like a red flag.

²⁹ See *Laundering the Proceeds of Corruption*, FINANCIAL ACTION TASK FORCE (July 2011), available at <http://www.fatf-gafi.org/dataoecd/31/13/48472713.pdf> (measuring and analyzing political corruption's link to money laundering across countries).

³⁰ See Wren-Lewis, *supra* note 12, at 100-01 (advocating for increased whistleblowing in order to increase available information, while also mentioning the need for international organizations to make whistle-blowers feel safer). See generally Miriam A. Golden & Lucio Picci, *Proposal for a New Measure of Corruption, Illustrated with Italian Data*, 17 *ECON. & POL.* 37 (2005) (detailing efforts to detect fraud by comparing productivity of public infrastructure spending across Italian regions).

³¹ For example, Uganda recently purchased at least eight Russian fighter jets for \$744 million dollars. Nicholas Bariyo, *Uganda Buys Fighter Jets*, *WALL ST. J.* (Apr. 7, 2011), <http://online.wsj.com/article/SB10001424052748704013604576248094099823846.html>.

3.1.3 Investigative Reporting³²

If the local media is weak and dependent either on the government or on wealthy private interests, then outside actors can help to support any remaining independent outlets and can engage in reporting activities independent of local entities. These groups might supply well-researched stories to local outlets. They can be a place for whistleblowers to report and could provide protection to those who reveal corruption when that is a risky activity. They can seek reform in libel laws that make it easy for journalists to “insult” the political and economic elite in ways that “violate national sovereignty” and to be subject to fines and imprisonment. One way to do this is to defend journalists under these laws, publicize cases, and attempt to raise popular awareness of the harm caused by such restrictive laws.³³ These actions will be controversial. Sitting governments are unlikely to welcome investigative reporting and whistle blowing from any source unless it reveals malfeasance by political opponents. International actors may be accused of meddling in domestic politics, and their domestic counterparts may be labeled enemies of the state and tools of external interests. This puts a high premium on getting the facts right and providing documentation that insiders can use to work for reform. Otherwise, news reports risk manipulation by insiders eager to discredit each other. The basic reality is that anti-corruption strategies always have political overtones even if the targets are low-level officials. The stakes are especially high, however, if the targets are political leaders, private sector elites, or multi-national firms.

International actors may also be able to help local media make effective use of new electronic sources of communication and to help members of the public participate in newsgathering and dissemination, what Alan Rusbridger calls “the mutualization” of the news.³⁴ The line between journalists and the public is

³² In this section I draw heavily from Michela Wrong’s work regarding media’s role in exposing corruption. See Michela Wrong, *How International Actors Can Help the Media in Developing Countries Play a Stronger Role in Combating Corruption*, in ANTI-CORRUPTION POLICY 103, *supra* note 1.

³³ See REPORTERS WITHOUT BORDERS, <http://en.rsf.org> (last visited May 5, 2013) (supporting reporters assigned to dangerous areas and combating censorship of print and digital media).

³⁴ Alan Rusbridger, *The Splintering of the Fourth Estate*, THE GUARDIAN (Manchester), Nov. 19, 2010, <http://www.guardian.co.uk/commentisfree/2010/nov/19/open-collaborative-future-journalism>; see also COCKCROFT, *supra* note 13.

becoming blurred. Although the media's influence is deeply dependent upon its local character, outsiders can help with training and by providing software to facilitate the move away from conventional media to "social media."

3.1.4. Links between Information Provision Strategies

In practice, the three forms of information provision are interrelated. Journalists publicize research results and help make the data salient. They use cross-country indices and evaluation reports to suggest where to probe further. Conversely, scandals uncovered by journalists and advocacy organizations can prompt more systematic social science research. Activists and the media may be impatient with the caution that researchers display in expressing strong conclusions, but over the past two decades, social scientists have given credibility to the alarms raised by investigative reporting. Furthermore, "grand" corruption at the top of the state is not easily amenable to statistical analysis, but it may be the most harmful to a country struggling to escape from poverty or the ravages of war. It can be revealed both by the investigative reporting of journalists and NGOs, and by lawsuits that reveal corrupt dealings.

3.2. International Actions to Control Corruption [Cases C & D]

International institutions can supplement domestic anti-corruption efforts without directly intervening in domestic practices. A country that ratifies a treaty or joins a cooperative effort may commit to domestic anti-corruption policies, but it does this voluntarily as part of its responsibilities under the international body's rules.

There are two main types of international bodies: multinational bodies that coordinate and supplement local anti-corruption and good governance efforts, including those based on domestic criminal law, and bodies that have independent authority to resolve cross-border commercial disputes where corruption may be alleged. The first strategy will mainly supplement domestic efforts to control corruption (case C). The second may help as well, but its primary aim is to resolve disputes so as to promote the efficiency of international markets (case D). Some of these bodies are established by treaty. Others are the result of voluntary efforts by states or private parties.

3.2.1. *International Support for Domestic Efforts [Case C]*

Some international institutions concentrate on promoting the legitimacy and transparency of domestic governments, using a variety of approaches. I discuss international professional networks, voluntary business standards, and help for domestic law enforcement efforts.

3.2.1.1. *Professional Networks*

Global professional associations of comptrollers general, ombudsmen, electoral commissioners, and other public officials meet to share ideas and to establish codes of ethics and good practice.³⁵ These bodies also provide training for officials in emerging economies, and support embattled incumbents whose independence is threatened.

Similarly, international civil society organizations, not connected with governments, help their non-governmental counterparts working in difficult environments. For example, international associations of journalists provide training in investigative reporting and can also supply legal advice and international publicity to newspapers facing government harassment. Advocacy groups can support and train domestic civil society activists and help to protect those who face criticism and even arrest in hostile environments.

3.2.1.2. *Voluntary Business Initiatives*

Several efforts are underway to obtain the voluntary cooperation of businesses. The International Chamber of Commerce has established a code of conduct for firms. The United Nations Global Compact and ISO 26000 encourage firms to sign on to a set of ethical principles including anti-corruption.³⁶ The Global Compact contracted with Transparency International in 2009 to produce a guidance document for firms, but the process is just beginning, and the groups' websites are not very informative. As Tina Søreide has pointed out, the incentives of top firm managers may not align with those lower down, employees may be reluctant

³⁵ ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 126 (2004).

³⁶ See UN GLOBAL COMPACT, <http://www.unglobalcompact.org> (last visited May 5, 2013); Int'l Org. for Standardization, *Guidance on Social Responsibility*, ISO 26000 (July 1, 2008), available at <https://www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:en>.

to speak out, and legal systems differ in the way they apply anti-corruption laws to organizations and employees.³⁷ Nevertheless, the ongoing efforts are a positive step.

A recent endeavor, the Extractive Industries Transparency Initiative (EITI) seeks greater transparency in corporate/country agreements in the mining, oil, and gas industries. The EITI does not measure corruption directly. The goal is to permit individuals and advocacy groups to monitor the flow of funds with the aim of benefitting the citizens of countries with valuable resources. This effort grew out of the Publish What You Pay initiative that targeted only multi-national firms. Under EITI, countries can become candidate countries, and then have two and half years to propose plans that are compliant with EITI standards. These standards focus on transparent reporting and auditing of payments from firms to countries. Firms that support the initiative must publish what they pay to compliant countries and submit a self-assessment to EITI.³⁸

These efforts respond to the possibility that, for some international deals, neither host country elites nor their counterparts in the capital-providing nations have an interest in revealing and limiting corruption unless pressured by outsiders. Both buyers and sellers benefit from the weak legal environment in host countries. The leaders of host countries enrich themselves, and home countries support the business operations of their multinational firms.

Generally, these monitoring mechanisms have no legal force, but they can produce public relations difficulties for lagging firms and countries. That is the goal of the EITI. Similarly, the FATF, mentioned above, has no hard legal power but relies on the black mark of a bad rating in the control of financial flows (money laundering) to spur change. Other organizations may piggyback off of these ratings in making decisions about funding and other forms of engagement.³⁹ Civil society bodies also rank countries on

³⁷ Tina Søreide, *The Governance of Infrastructure Regulation: An Economist's View*, in EMERGING ISSUES IN COMPETITION, COLLUSION, AND REGULATION OF NETWORK INDUSTRIES 191, 207-08 (Antonio Estache ed., 2011).

³⁸ See, e.g., EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <http://eiti.org> (last visited May 5, 2013).

³⁹ Roberto de Michele, *How Can International Financial Institutions Support Countries' Efforts to Prevent Corruption Under International Treaties and Agreements?*, in ANTI-CORRUPTION POLICY 179, *supra* note 1.

levels of corruption, government accountability, and freedom of the press and media.

3.2.1.3. *Treaties and Domestic Prosecutions of International Offenses*

International institutions and treaties help in the prosecution of domestic corruption offenses and push cooperating states to expand the reach of domestic law. Interpol and the UN Convention against Corruption require inter-state cooperation, including extradition and help with asset recovery. Going further, the Organisation for Economic Co-operation and Development (OECD) Convention against Corruption and the World Trade Organization (WTO) procurement guidelines deal with corruption that crosses national boundaries. The OECD Convention came into force in 1999 and builds on the U.S. Foreign Corrupt Practices Act of 1977. It requires ratifying countries to make it an offense for their firms to pay bribes abroad to obtain and retain business, and it also requires them to make the companies' officials liable.⁴⁰ The OECD Convention is monitored by a Working Group whose only sanction is bad publicity. Nevertheless, its actions appear to be having an impact. The United States remains the most active enforcer of the OECD Convention, but other countries are beginning to bring cases, and the reach of the U.S. law is broad. In addition, the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) requires firms in extractive industries to file reports that mimic the EITI. It applies to all firms listed on U.S. exchanges wherever their headquarters are located. This development is an example of a "soft law" initiative becoming hard law in one country. It may set an example for other countries, and again, the reach of the U.S. law is broad because so many multi-national firms are listed on U.S. exchanges.

In a few cases, the courts of one country, such as the United States, can be used to address offenses that occurred in countries with weak or corrupt judiciaries. Sometimes foreign courts help

⁴⁰ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Apr. 18, 1998, 37 I.L.M. 4, available at http://www.oecd.org/document/21/0,2340,en_2649_201185_2017813_1_1_1_1,0.html; Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1495 (1977). See Mark Pieth, *From Talk to Action: The OECD Experience*, in ANTI-CORRUPTION POLICY 151, *supra* note 1.

with recovery of assets held abroad.⁴¹ Even the Swiss have recently frozen questionable assets of deposed rulers and have transferred those funds to incumbents who claim that the funds belong to the state. The World Bank's Stolen Asset Recovery Initiative (StAR) aims to assist countries seeking to recover illicitly appropriated assets, but the task is difficult.⁴² Sophisticated money launderers hide funds in major financial centers, disguising the funds' origin through a chain of shell companies. Although domestic actions can be useful in particular cases, especially when aided by information from banking havens, they hardly represent a general solution.⁴³

⁴¹ Recently, the U. S. Supreme Court held that the presumption against extraterritoriality applies to claims under the Alien Tort Statute (ATS) in a case outside the corruption area, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ___ (2013). The opinion below held that the ATS did not apply to corporations, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). However, that issue was not resolved by the Supreme Court. The opinion in IV only states that mere corporate presence was not sufficient for the ATS to apply, and the concurrence in III found the corporate presence "minimal and indirect" because they only had offices in New York and were traded on the New York Stock Exchange. See also *Doe v. Exxon Mobil*, 654 F.3d 11 (D.C. Cir. 2011), and *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013 (7th Cir. 2011). In the former case the D.C. Circuit held that the ATS applied to corporate conduct and allowed a case against Exxon Mobil brought by Indonesian villagers claiming human rights violations to go forward. The Seventh Circuit opinion held that the ATS applies to corporations but that the plaintiffs, twenty-three Liberian children, had not shown that Firestone violated customary international law. Other foreign litigants have used the Racketeer Influenced and Corrupt Organizations Act (RICO) to seek damages from companies under the jurisdiction of the U.S. courts that are alleged to have engaged in corrupt or fraudulent behavior. For a recent example, see *Ukrvaksina v. Olden Group, LLC*, 2011 WL 5244697 (2011).

⁴² See THE WORLD BANK: STOLEN ASSET RECOVERY INITIATIVE (STAR), <http://star.worldbank.org/star> (last visited May 7, 2013) (explaining the assistance provided to countries seeking to recover assets). See generally Dubois & Nowlan, *supra* note 6 (evaluating the effect of sanctions on fraud and corruption in the World Bank's poverty reduction efforts).

⁴³ For an example of the reluctance of U.S. courts to judge the validity of allegedly corrupt and fraudulent bankruptcies abroad, see generally *Films by Jove, Inc. v. Berov*, 250 F. Supp. 2d 156 (E.D.N.Y. 2003). See also Vadim Volkov, *The Selective Use of State Capacity in Russia's Economy: Property Disputes and Enterprise Takeovers, 1998-2002*, in *CREATING SOCIAL TRUST IN POST-SOCIALIST TRANSITION* 126, 136, 146 n.15 (János Kornai et al. eds., 2004) (discussing the background of *Films by Jove v. Berov*). For a discussion of tax havens, see generally NICHOLAS SHAXSON, *TREASURE ISLANDS: TAX HAVENS AND THE MEN WHO STOLE THE WORLD* (2010).

3.2.1.4. Weaknesses in the Existing System

Kevin Davis critiques enforcement systems that depend too heavily on international regimes.⁴⁴ He worries that they will not reflect domestic priorities in states where high-level corruption is pervasive. He also argues that if a state relies too heavily on international institutions to further anti-corruption aims, it may fail to reform internally. International solutions need to be accountable to the domestic public in deciding where and how to intervene.

Even on their own terms, the international instruments have weaknesses. None has strong international legal mechanisms for controlling corruption that crosses national borders. Even when the offense occurs in connection with international trade or investment, law enforcement is domestic.⁴⁵ Indeed, the Dodd-Frank law has only a reporting requirement, although it could spur investigations under the U.S. Foreign Corrupt Practices Act (FCPA).

Some international institutions help domestic efforts to fight corruption, while others seek to improve state functioning. Professional bodies share information and experiences and support embattled domestic reformers. Extradition treaties and procedures for sharing information via Interpol help local police and prosecutors develop strong cases. The OECD Convention requires signatories to make it a domestic offense for their businesses and individuals to pay bribes abroad, but enforcement depends upon prosecutorial priorities. There are no private rights of action for either domestic or foreign individuals.

There are weaknesses on two fronts. First, the treaties and institutions that seek to control international corruption are voluntary systems that nation states join only if they are willing to accept the treaties' conditions. Second, domestic courts seldom take on foreign bribery cases, unless they involve domestic firms under the OECD Convention or concern the transfer of assets held in a country's financial institutions. Law enforcement bodies may extradite accused offenders, but they do not bring the cases themselves. However, one system has legal force—the international arbitration regime—to which I now turn.

⁴⁴ See Kevin Davis, *Does the Globalization of Anti-Corruption Law Help Developing Countries?*, in ANTI-CORRUPTION POLICY 169, *supra* note 1 (noting that “relying on foreign institutions also has significant limitations”).

⁴⁵ See Pieth, *supra* note 40 (pointing to these and other domestic enforcement weaknesses while urging stronger actions to monitor and hold firms accountable).

3.2.2. *International Arbitration and Domestic Court Cases*
[Case D]

The international arbitration regime is the main international forum for resolving commercial disputes where corruption may be alleged. Corruption, although recognized as an important issue, remains a vexing and difficult problem for arbitrators, given their insulation from domestic criminal law institutions.⁴⁶ Nevertheless, the institutions that organize arbitrations are stepping gingerly into this arena as litigants seek to void contracts tainted by corruption. As Mark Pieth writes, "Arbitration is no longer an exclusive area of party-interest, especially as far as large infrastructure projects are involved. It is right to consider corruption an issue of (domestic and international) public interest."⁴⁷

One study identified thirty-eight international arbitration cases that dealt with corruption,⁴⁸ but the arbitral system has not yet settled on an appropriate framework. In an ironic twist, the first set of disputes arose between firms and their local intermediaries who allegedly had paid bribes. The firms were seeking to avoid paying their agents on the ground that bribery was illegal, even if

⁴⁶ See Joost Pauwelyn, *Different Means, Same End: The Contribution of Trade and Investment Treaties to Anti-Corruption Policy*, in ANTI-CORRUPTION POLICY 247, 261-62, *supra* note 1 (arguing that an enforcement gap exists because arbitrators pursue the same ends as domestic criminal institutions but pursue these ends through different means). See generally Olaf Meyer, *The Formation of a Transnational Ordre Public against Corruption: Lessons for and from Arbitral Tribunals*, in ANTI-CORRUPTION POLICY 229, *supra* note 1 (noting that arbitrators are still developing standards for corruption cases). The other venue for settling international economic disputes between states is the WTO. According to Pauwelyn, *supra* at 248, the term "corruption" did not appear in the WTO rulebook prior to the 2011 Plurilateral Government Procurement Agreement. WTO tribunals can consider corruption to the extent that it affects trade, but their reach is limited insofar as only nation states can bring claims, the tribunals only judge government conduct and not the conduct of private parties, and the penalties involve only reciprocal trade restrictions.

⁴⁷ Mark Pieth, *Contractual Freedom v. Public Policy Considerations in Arbitration*, in PRIVATE LAW: NATIONAL-GLOBAL-COMPARATIVE: FESTSCHRIFT FÜR INGENBORG SCHWENZER ZUM 60. GEBURTSTAG 1375, 1385 (Andrea Büchler & Markus Müller-Chen eds., 2011). See also Pauwelyn, *supra* note 46 (noting both the public and private interests in reducing corruption).

⁴⁸ Pauwelyn, 257, *supra* note 46 ("Olaya finds 'approximately 38 international arbitration cases . . . known to deal with corruption'" (citing Juanita Olaya, *Good Governance and International Investment Law: The Challenges of Lack of Transparency and Corruption*, presented at The Second Biennial SIEL Conference (July 8-10, 2010)).

they knew that payoffs were taking place.⁴⁹ In such cases, arbitrators generally refuse jurisdiction on the ground that they have no authority to resolve criminal allegations. Going beyond disgruntled intermediaries, the arbitral status of contracts allegedly obtained by corruption is unclear, especially because they are plagued by problems of proof. This result is unsatisfactory if the corrupt nature of the deal has harmed the complainant and if the domestic law enforcement system is dysfunctional or corrupt. In many cases, neither the host state nor the international investor has an interest in raising corruption charges—even if they can be proved. The exception, which has arisen in a number of cases, is when a new host government introduces evidence of corruption under the previous regime.⁵⁰

There are two types of forums. One is the private commercial arbitration regime; the second, the World Bank's International Center for the Settlement of Investment Disputes (ICSID), only considers cases where investors sue nation states, usually under the provisions of bilateral investment treaties (BITs). In both cases, private firms can initiate the arbitration process, but only if they are parties to the contracts in question. Disappointed bidders, or other outsiders to the contract, have no standing. Joost Pauwelyn argues that BIT provisions requiring "fair and equitable treatment" could be extended to cover corruption, but so far no cases have made that connection.⁵¹

These weaknesses in the present system have led to reform proposals that range from the more explicit incorporation of corruption charges into the arbitral process to the creation of a separate body, either a formal court or another type of arbitral tribunal that would explicitly deal with claims that corruption should void a contract or, at least, lead to its renegotiation. Reforms may require structural changes. Paul Carrington, for example, argues for a new international body to hear cases initiated by outsiders to the deal. In the alternative, he suggests an

⁴⁹ See Meyer, 232–34, *supra* note 46 (describing the types of corruption cases often arising in arbitration).

⁵⁰ For an example from ICSID, see *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7 (Oct. 4, 2006) (voiding a contract obtained by bribery). For a detailed explanation of *World Duty Free Co. v. Republic of Kenya*, see Pauwelyn, 259–60, *supra* note 46.

⁵¹ See Pauwelyn, 258–59, *supra* note 46 (explaining "fair and equitable treatment" provisions and stating that "[s]o far . . . no case of corruption has been found to constitute a breach of a BIT").

expanded mandate for arbitrators to accept submissions from *amici curiae* that provide evidence of corruption.⁵²

However, even with this reform, arbitrators could not influence state governance structures directly. They would simply invalidate contracts on the basis of evidence that corruption tainted the original deal. Carrington's ultimate goal is to increase the cost of paying and receiving bribes. Even if a country's criminal justice system is weak or corrupted, an arbitral decision that invalidates a contract, or awards damages to a successor government, ought to deter kickbacks up front. This deterrent will be most effective in a multi-party democracy or in an autocracy whose leader is aging or losing popular support.

Within existing domestic legal frameworks, corruption charges have been incorporated into the resolution of private law disputes in different ways.⁵³ Litigants can sometimes use the legal system to obtain compensation for their losses, helping to deter corruption in the first place. In the United States they have used private rights of action under U.S. securities and anti-trust laws, as well as fiduciary duty class actions, to seek redress. Losing competitors have also claimed unfair competition or tort damages from firms convicted of overseas bribery in the United States and the European Union (EU).⁵⁴ These cases may be a growth area for anti-corruption

⁵² See Paul D. Carrington, *Enforcing International Corrupt Practices Law*, 32 MICH. J. INT'L L. 129, 154-64 (2010) (describing how "moderately successful efforts in the United States since 1862 to reward private citizens serving as enforcers of laws prohibiting corrupt practices" could be adapted by international organizations to improve enforcement of "new public international laws"); Paul D. Carrington, *Law and Transnational Corruption: The Need for Lincoln's Law Abroad*, 70 LAW & CONTEMP. PROBS. 109, 137-38 (2007) (concluding that the weakness of the current system justifies the creation of an international forum for resolving such disputes). See also, Paul Carrington, *Private Enforcement of International Law*, in ANTI-CORRUPTION POLICY 285, *supra* note 1 (stating that the "need clearly exists" for the World Bank to "create a legal forum on the ICSID model that could enable and reward effective private enforcement of international anti-corruption law").

⁵³ See generally Meyer, *supra* note 46 (discussing the rise of the international anti-corruption industry and the relationship between national and international standards in corruption cases).

⁵⁴ In the United States, see *Boyd v. AWB Ltd.*, 544 F. Supp. 2d 236 (S.D.N.Y. 2008) (illustrating a failed antitrust claim, in which the plaintiff alleged defendants bribed the United States government to maintain a monopoly in the Iraqi wheat market). In the EU, see Case T-145/98, *ADT v. Comm'n*, 2000 E.C.R. II-391 (discussing applicants' claim that there was an "infringement of the rules governing tendering procedures and of the principle of fair competition"). In South Africa, see *Transnet Ltd. v. Sechaba Photoscan (Pty) Ltd.* 2004 (1) SA 299 (SCA) (noting that the award of purchase contract to the competitor of the respondent

efforts if domestic courts in industrialized countries prove ready to accept jurisdiction.⁵⁵

As Johann Graf Lambsdorff suggests, simply voiding the entire deal may be very costly for the ordinary citizens who benefit from the contract.⁵⁶ Transaction-specific investments already in place can become worthless. Furthermore, the sanction of invalidity is not tailored to the amount of harm; repeating the tender is costly and time consuming, and the firm may have little incentive to police its own employees. This reality leads Lambsdorff to argue that contracts generally should be enforced but that the firm should pay damages of thirty times the bribe to wipe out its illicit gains.⁵⁷ However, he recognizes that sometimes the entire deal is so tainted that it should be entirely void. It may truly be a “white elephant” that is draining state resources. In such cases, the contract should not be retendered; the project simply should be abandoned and damages levied. Lambsdorff would also give the

was the result of a “fraudulent tender process”). I am grateful to Abiola Makinwa for supplying these citations.

⁵⁵ Governments have also sometimes turned to ordinary courts for redress. See, e.g., *Republic of Nigeria v. Santolina Inv. Corp.*, [2007] EWHC 3053 (QB) (U.K.) (holding that assets of a former Nigerian official held in British banks and real estate were bribes and should be transferred to Government of Nigeria). The background of the case is discussed in GLOBAL WITNESS, INTERNATIONAL THIEF THIEF: HOW BRITISH BANKS ARE COMPLICIT IN NIGERIAN CORRUPTION (2010), available at http://www.globalwitness.org/sites/default/files/pdfs/international_thief_thief_final.pdf. See also an effort in U.S. court by a state-owned Costa Rican company to block Alcatel-Lucent’s FCPA settlement. It sought restitution from the firm under a federal victim’s rights law. See Richard L. Cassin, *Costs Rica ‘Victim’ Objects to Alcatel-Lucent Settlement*, FCPA BLOG (May 5, 2011, 7:02 AM) <http://www.fcpablog.com/blog/2011/5/5/costa-rican-victim-objects-to-alcatel-lucent-settlement.html>. After losses in the lower courts, the Costa Rican telephone company filed a petition for a writ of certiorari to the U.S. Supreme Court in December 2012. See Thomas Fox, *ICE Appeals Victims’ Rights Case to Supreme Court*, FCPA BLOG (Dec. 3, 2012, 11:23 AM), <http://www.fcpablog.com/blog/2012/12/3/ice-appeals-victim-rights-case-to-supreme-court.html>. The Alcatel case is discussed in Abiola Makinwa, *Defining a Private Law Approach to Fighting Corruption*, in ANTI-CORRUPTION POLICY 267, 278 n. 36, *supra* note 1.

⁵⁶ See Lambsdorff, *supra* note 19, at 224 (“Maintaining the validity of contracts and imposing fines on bribe-paying companies would reconcile anti-corruption with the preservation of investor confidence.”). See also Mathias Nell, *Contracts Obtained by Means of Bribery: Should They Be Void or Valid?*, 27 EUR. J. L. & ECON. 159 (2008) (explaining that nullifying corrupt contracts is counterproductive because it does not promote voluntary disclosure).

⁵⁷ To act as a deterrent, these payments would need to be a multiple of actual damages because those who pay bribes are often not caught.

host state the option to terminate future performance of the contract even if it is enforced with respect to completed actions.⁵⁸

I agree that a project with social value should be completed, but it does not follow that the original firm should do the work. If it does not have special contract-specific expertise and can't sabotage completion by a rival, the state should auction off the right to complete the contract. More generally, there is a tradeoff between penalizing the corrupt firm and assuring the smooth completion of the project. The underlying problem is that once a firm has been accused of corruption, it may simply seek to sabotage, loot, and undermine the project instead of instituting good internal monitoring systems. The corrupt firm may be able to hold the state agency hostage and prevent effective enforcement.

Lambsdorff's proposals, however one evaluates them, highlight Pieth's claim that the international arbitral system ought to go beyond the claims of the parties to consider the broader social implications of disputes. The goal should be to deter corruption in the future, not just resolve the individual case in a satisfactory way. However, as the experience of the International Criminal Court illustrates, as soon as international bodies take up criminal offenses, they are no longer neutral arbiters of disputes. The judges may be neutral, but the prosecutors will argue for conviction. Public officials and firms accused of crimes will begin to push back, and questions will arise about the role of prosecutors with an anti-corruption mandate. Yet, if the dispute remains a purely civil one, and if the contract remains in place, an opportunity for exerting leverage against corrupt firms and officials will be lost. Reformers should seriously consider new ways of combining international dispute resolution with domestic criminal law enforcement.⁵⁹

⁵⁸ This is the second option presented by Meyer, *supra* note 46. Kevin Davis also argues for enforcing the contract going forward so long as it remains a valuable deal for the host country. See Kevin E. Davis, *Civil Remedies for Corruption in Government Contracting: Zero Tolerance Versus Proportional Liability* (Inst. for Int'l Law & Justice, Working Paper 2009/4, 2009), available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1184&context=nyu_lewp (arguing that remedies can be structured to create incentives for the generation of information that can facilitate the imposition of other sanctions).

⁵⁹ See Dugard, *supra* note 1 at 160–62 (critiquing the argument that corruption is actually a crime against humanity and therefore should be handled by the International Criminal Court). See also Abiola O. Makinwa, *A Transaction Approach to Fighting International Corruption*, in *GOVERNING SECURITY UNDER THE RULE OF LAW?* 175, 175 (J. Blad et al. eds., 2010) (advocating a “transaction approach” which attempts to “recognize the role of the state while at the same time

3.3. *Anti-Corruption Projects and Programs [Cases E & F]*

The most intrusive forms of international intervention are aid and lending programs that seek directly to limit corruption or to assure that it doesn't undermine program goals (cases E and F). In both cases, funders from IFIs, bi-lateral donors, and private foundations intervene to support government reform and to limit waste and corruption. They do this directly by supporting specific programs and indirectly, through "policy based" lending that provides budgetary support conditional on domestic government safeguards or "good governance" policies. Nonprofits and the media play a subsidiary role in keeping anti-corruption on the agenda of IFIs and in helping in the design and monitoring of programs.

International actors cannot legitimately force domestic governments to become honest and corruption-free. They must induce governmental cooperation—sometimes by supporting projects that benefit the elite even though other priorities would better serve ordinary people.⁶⁰ The pressure to approve projects can undermine efforts to hold governments to account. The Paris Declaration on Aid Effectiveness includes a pillar labeled "ownership." This principle includes strategies to improve institutions and tackle corruption.⁶¹ However, it may also induce donors to defer to local demands even when they suspect corruption and self-dealing. Aid agencies typically impose audit requirements as a condition for aid, but they could make stronger efforts. The claim that better auditing works to reduce corruption seems borne out by EU aid programs in Africa. The EU uses its own auditors. Observers in Africa believe that projects co-funded by the EU are less corrupt than others.⁶² In projects with weak financial controls, cost-overruns can simply lead the recipient

recognizing . . . the role of non-state auspices as well as non-state providers of governance" in fighting international corruption); Susan Rose-Ackerman, *The Law and Economics of Bribery and Extortion*, 6 ANN. REV. L. SOC. SCI. 217 (2010) (discussing the law and economics of bribery and extortion in criminal law).

⁶⁰ See GLOBAL WITNESS, <http://www.globalwitness.org> (last visited May 6, 2013) (chronicling instances of corruption in resource-rich nations).

⁶¹ See *Paris Declaration and Accra Agenda for Action*, OECD, http://www.oecd.org/document/18/0,3343,en_2649_3236398_35401554_1_1_1_1,00.html (last visited May 6, 2013).

⁶² See Søreide, Tostensen, & Skage, *supra* note 25, at 26 (mentioning EU auditing standards).

country to ask for and obtain more funds.⁶³ The tension between projects that benefit ordinary people and those that benefit elites makes the concept of “ownership” problematic.

Civil society groups can sometimes promote anti-corruption projects without central government approval—usually through monitoring activities, information gathering, or pilot projects. Sometimes IFIs and NGOs can work at the grassroots with local governments. They may find local allies able to support reform without generating a backlash from the central government. The goal is to finance development projects that benefit the population without triggering rent-seeking.

These anti-corruption initiatives predictably generate tension and backlash. Sometimes the very existence of aid funds fuels corruption in poor countries, because there are few other resources available. There is a risk, as Wren-Lewis points out, that aid dependence makes government reform harder, not easier.⁶⁴ Civil servants may be enlisted to further the anti-corruption agenda by aid funds that supplement their salaries, provide per diems for travel and conference attendance, and supply incentive payments for effective performance. Such programs risk a backlash if they are terminated after a few years. Local institutions cannot develop sustainable anti-corruption strategies if they are overly dependent on foreign financial and technical assistance.

3.3.1. *Economic Development and Anti-Corruption Policies*

Some reforms favored by IFIs on general development principles are also touted as anti-corruption strategies. These reforms include fair bidding procedures for government procurement, improved financial auditing, transparent public decision-making processes, streamlined and simplified bureaucratic procedures, civil service reform, easy access to information, and prompt and easy-to-use appeals processes (case E). Such reforms can both limit corrupt incentives and reduce other forms of waste and inefficiency. They may be less

⁶³ See SPECIAL INSPECTORS GENERAL FOR IRAQ AND AFGHANISTAN, <http://www.SIGIR.mil> (last visited May 6, 2013) (providing numerous examples drawn from the rebuilding experiences in Iraq and Afghanistan). For an overview of corruption in Afghanistan, see UNITED NATIONS OFFICE ON DRUGS AND CRIME, CORRUPTION IN AFGHANISTAN: RECENT PATTERNS AND TRENDS (2012), available at http://www.unodc.org/documents/frontpage/Corruption_in_Afghanistan_FINAL.pdf.

⁶⁴ Wren-Lewis, *supra* note 12 at 96.

threatening to national leaders and more difficult for them to oppose if the benefits are improved service delivery and more effective implementation of tax and regulatory laws.

Of course, procedures that increase transparency and invite public participation can lead to delay and invite controversy—so there may be tradeoffs between more government accountability and speed. But quick action isn't a virtue if it means that public officials can easily satisfy their own aims without concern for public or expert opinion.

3.3.2. *Promoting Government Legitimacy*

International institutions are likely to have a more limited impact when they try to promote government legitimacy (case F). A corrupt elite can simply condemn them as outside meddlers seeking to undermine state sovereignty. Nevertheless, there are a few points of entry.

I have already pointed to the utility of information-generating strategies. Going beyond the mere provision of information, IFIs could condition their loans and grants on the host country's adoption of mechanisms shown to work elsewhere. These requirements must be real reforms, not just shams set up for international consumption.⁶⁵ Furthermore, such conditionality will not be credible unless donors control corruption in their own projects and send a signal to suppliers and contractors that corruption will not be tolerated.⁶⁶

If payoffs and favoritism are deeply embedded in local practices, IFIs' programs that mandate bureaucratic and programmatic reforms may be hard-pressed to show results. Local officials must buy into the reforms, or they will fail. Donors' monitoring ought to build on baseline data on service delivery (or tax and customs receipts, environmental quality, etc.) so their staff can return after a time to see if the anti-corruption program had any impact. This data need not always include actual measures of payoff levels. Household and business surveys can get at individual experiences, especially when corruption is endemic, but there may also be other objective measures such as gaps between program goals and actual performance, levels of tax and tariff

⁶⁵ See Recanatini, *supra* note 26 (stressing this problem in her analysis of anti-corruption agencies).

⁶⁶ See Dubois & Nowlan, *supra* note 6, at 16–17 (arguing that the Global Administrative Law approach will help donors hold institutions accountable).

collections, and road quality. Failures are just as important as successes and need to be part of an ongoing process of learning.

Unfortunately, some countries may simply not be worth the time, funding, and trouble that it takes to provide help beyond the provision of information. Geopolitical concerns may push the IFIs to continue to work in such countries, but those individuals at the staff level should argue that development goals are poorly served by continued funding of projects riddled with corruption. In the worst case, aid fuels corruption by setting off an illicit competition for funds.⁶⁷ Funds should be redirected to countries and projects that can credibly reduce poverty and aid growth and to projects that explicitly address governance challenges where points of leverage exist.

3.3.3. *Post-conflict Countries*

Post-conflict countries are a special case. After the conflict ends, they often promptly receive massive aid flows for rebuilding but suffer from weak institutions that create opportunities for corruption. If care is not taken, corruption can substitute for institutional development and become entrenched in the embryonic regime. Of course, in some cases, former combatants, at both the high and low levels, may need to be bought off with one-time cash and in-kind benefits.⁶⁸ These transfers may be a condition for obtaining peace, but they need to be structured as lump-sum benefits that do not permanently distort the operation of the economy or the government. Don't give the rebel army turned political party a fifty percent ownership stake in the national oil company or promise warring ethnic groups a fixed share of the public pie.⁶⁹ The aim should be to buy off such groups with lump-sum payments, not give them an ongoing incentive to stay together and divide the country. Furthermore, do not give the regular

⁶⁷ See June & Heller, *supra* note 17 (stressing how corruption can be exacerbated by the potential for competition for funds).

⁶⁸ For example, in Mozambique, the United Nations provided generous funding to former rebels on the condition that they establish a political party and run candidates in elections. Although much of the funding supported party development, many observers noted that funds also were used to provide direct financial benefits to former rebel leaders. See Rose-Ackerman, *supra* note 17, at 76-80 (providing further details and sources for this case).

⁶⁹ Such a division of benefits occurred in the post-conflict constitution in Burundi. For a critical view of the result, see Rose-Ackerman, *supra* note 17, at 80-82.

military a stake in non-defense government programs and monitor its involvement in defense contracts, or it may use its coercive power to extort payoffs.

International nonprofits such as TI, Global Witness, and Global Integrity, can be helpful here in monitoring the situation on the ground, but outside monitoring is not sufficient. The donors' own internal auditing and oversight bodies also need sufficient funding and support. If international funders put speed ahead of integrity, they may be institutionalizing structural corruption problems in just those cases where aid might otherwise have had the biggest positive impact.⁷⁰

3.3.4. *Emerging Economies*

Finally, Brazil, Russia, China, and India and other emerging economies will play an increasing role at the World Bank and at other IFIs that are developing anti-corruption initiatives. Even when they cannot influence the IFIs overall policy, they can shape individual decisions through their own interactions with these institutions. For example, IFIs are in no position to impose a comprehensive anti-corruption program on China even though corruption remains high there and may be increasing.⁷¹ Nevertheless, top leadership expresses great concern about the problem and may be willing to learn from experiences elsewhere.

4. "LEGAL" CORRUPTION: PRIVATE WEALTH AND PUBLIC POWER

This essay concentrates on corruption that violates legal rules. Both the payment and the receipt of bribes and kickbacks are crimes in most countries—as are extortion threats and the embezzlement of public funds. But private wealth influences public choices in many legal ways, such as campaign contributions, lobbying expenses, financial conflicts of interests, consultancy payments to the politically connected, and public relations campaigns designed to influence public opinion on particular

⁷⁰ See June & Heller, *supra* note 17, at 20–21 (describing an impasse developing between rival political alliances following troop withdrawal from Lebanon); see generally Rose-Ackerman, *supra* note 17.

⁷¹ On the continuing high levels of corruption in China, see generally Fu Hualing, *The Upward and Downward Spirals in China's Anti-Corruption Enforcement*, in *COMPARATIVE PERSPECTIVES ON CRIMINAL JUSTICE IN CHINA* 390 (Mike McConville & Eva Pils eds., 2013).

issues.⁷² A crackdown on illegal payoffs may lead to a shift toward legal campaign contributions or lobbying. Conversely, overly stringent limits on legal gifts are likely to push campaign contributions underground and into outright corrupt payoffs. Politicians who are overly dependent on wealthy interests may face defeat at the polls, but only if citizens know and care about the sources of candidates' funds. This suggests that crackdowns on political corruption should be complemented by increased transparency for campaign funding or by a move toward public financing.⁷³ Limiting the role of money in politics requires a holistic approach that covers legal as well as illegal funds.

In democracies the tension between private wealth and majoritarian values is as fundamental as that between organized groups and the general public, and each may feed off the other. Small groups of wealthy firms and individuals are likely to be able to organize more easily than broad publics. If concentrated, well-funded groups attempt to influence public opinion in their favor, and if they face few countervailing efforts, policies may obtain majority support even though the main beneficiaries are the wealthy elite.

In authoritarian systems, there may be no overt tension because public and private elites are deeply interconnected. Arms-length bribery and kickbacks are not necessary because top officials and the business elite are part of the same group that controls both the political and the economic systems. Multi-national firms seeking business advantage cultivate ties with this elite and become part of the system. In the extreme, the notion of "conflict-of-interest" is meaningless. There is simply no public interest with a voice in the operation of the state.

⁷² The issues discussed here were emphasized by Daniel Kaufmann and Tina Søreide in the discussions at the Anti-Corruption Policy workshop. See also Pauwelyn, *supra* note 46 (noting that failures at the sector level can be traced to political corruption); Søreide, *supra* note 2 (noting the influence of the private sector); Daniel Kaufmann & Pedro C. Vicente, *Legal Corruption*, 23 *ECON. & POL.* 195 (2011) (analyzing the private sector's influence gained through corruption); Daniel Kaufmann, *Corruption and the Global Financial Crisis*, *FORBES* (Jan. 27, 2009), http://www.forbes.com/2009/01/27/corruption-financial-crisis-business-corruption09_0127corruption.html (arguing that systematic corruption contributed significantly to the financial crisis).

⁷³ For one recommendation for public financing, see generally BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS* (2004) (recommending a publicly funded voucher system and a secret donation booth for private donations).

In general, whatever the form of government, there are tensions between the interests of even honest multi-nationals and the general public in host countries. Multi-nationals seek profits and are not directly concerned with benefits to host nations' citizens unless they show up in the bottom line. International actors who engage with MNCs should go beyond a narrow anti-corruption agenda. In addition to urging MNCs support for curtailing corruption, these advocates should encourage corporate social responsibility policies that include a broader concern with host nation welfare. Anti-corruption policy is not just about directly limiting bribes.

Efforts to benefit ordinary people, improve the competitiveness of the economy, and enhance government accountability may all be stymied by the link between private wealth and public power. Worse yet, private wealth has a threat advantage. Both local elites and multinational firms can invest outside the country if their privileged position is threatened. This threat advantage points to another role for the international community. It can help to smooth transitions to a more competitive market and a more accountable government, whether or not illegal payoffs are a major factor. Although outright corruption in the form of bribes and kickbacks will remain a problem facing all polities for the foreseeable future, those interested in promoting economic growth, poverty alleviation, governance reform, and market efficiency also need to consider how the legal exercise of financial power undermines these values.

5. CONCLUSIONS

My basic message is that international efforts to reduce corruption ought to be linked to the ultimate goals of economic development, government legitimacy, and international competitiveness. Reductions in corruption are not ends in themselves but are part of the global focus on improving human well-being and government functioning. In the past, reform of the state and the economy proceeded with little acknowledgment of the risks of corruption and self-dealing. Some even argued for corruption's functionality. Now that the pathologies of bribery are well known, there is a risk of overreacting. The temptation is simply to concentrate on creating clean government and honest aid projects without asking how economic and political power actually is distributed. Conversely, initiatives that stress local "ownership,"

such as the Paris Declaration, risk downplaying the accountability of governments both to donors and to their own citizens. Although the Paris Declaration is full of language stressing results and accountability, it is not clear how to achieve “ownership” of these goals if the leadership is corrupt. This suggests that the three roles for international actors—information provider, international facilitator, and domestic project sponsor—should be rethought.

Under some conditions, neither domestic governments nor donor representatives see benefits from documenting corruption and from taking concrete steps to reduce its impact. Both domestic and foreign investors may share this reluctance. Here is where independent groups and the media need to concentrate attention. These watchdogs are unlikely to be funded well enough to carry out valid social science research on a large scale, but they can prod donors and governments to take corruption seriously enough to study it themselves.

We need to learn more about how corruption operates in practice, both at the grassroots and at high levels. Micro-analytic research should document successes and failures on the ground that go beyond reporting inputs, such as attendance at integrity workshops. Corruption is a complex phenomenon that is difficult to measure, but in recent years researchers have developed a number of clever strategies to measure corruption or its impact, both directly and indirectly. Hence, one relatively straightforward recommendation is to forge stronger links between aid projects and information provision so that governments can learn from others’ experiences. At the top of the state, both cross-country benchmarking research and investigative reporting by journalists and civil society groups should be encouraged along with programs that train local investigative journalists and help to protect those facing harassment or worse.

The system of international dispute resolution should consider corruption and self-dealing. Arbitrators are beginning to acknowledge that their decisions reach beyond the parties and have an impact on the citizens of host countries—as well as on the integrity of the international trade and investment regime as a whole. Perhaps a new international institution is needed to highlight these concerns or perhaps the arbitral regime can open up, but the current situation is clearly unacceptable given the costs of high-level corruption.

Criminal prosecutions are likely to remain the province of domestic courts for the foreseeable future, but international bodies

can do more to help develop criminal cases and to support reform of criminal justice systems so that they are independent of politics and operate fairly and honestly. A major risk of relying heavily on the criminal law, however, is that it can easily be abused to discredit political opponents. Thus, international institutions should tread cautiously in promoting criminal law approaches.

Anti-corruption initiatives need to take a more holistic approach. A country's development agencies should talk to counterparts that promote business, and financial regulators must talk to the police.⁷⁴ This recommendation at the country level applies internationally as well. There may be too much specialization of function, permitting corruption to flourish in the grey zones where no agency can act, or worse, where no one has an interest in acting. Fighting corruption is too complex a task to reduce to a simple checklist for international actors. My taxonomy, however, aims to help different actors to see how their own priorities overlap or conflict with others who are also trying to fight corruption throughout the world.

⁷⁴ This argument is made by Global Witness. See Global Witness, *A Joined-Up Approach to Tackling Natural Resource-Related Corruption, and How There Isn't One!*, in ANTI-CORRUPTION POLICY 113, *supra* note 1 (describing how a "joined-up" approach is required to tackle natural resource corruption).

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APPENDIX

Attendees; Anti-Corruption Policy: Can International Actors Play a Constructive Role? (Affiliation at time of Bellagio workshop, June 2011)

Patrick Alley – Global Witness
Paul Carrington – Duke University Law School
Kevin Davis – New York University Law School
Roberto de Michele – Inter-American Development Bank
Pascale Hélène Dubois – World Bank
John Dugard – University of Pretoria
Fu Hailing – University of Hong Kong
Nathaniel Heller – Global Integrity
Robin Hodess – Transparency International
Daniel Kaufmann – The Brookings Institution
Jana Kunicová – World Bank
Johann Graf Lambsdorff – University of Passau
Abiola Makinwa – Erasmus University (Rotterdam)
Olaf Meyer – University of Bremen
Joost Pauwelyn – Graduate Institute of Int’l Studies (Geneva)
Mark Pieth – University of Basel Law School
Francesca Recanatini – World Bank
Susan Rose-Ackerman – Yale University
Tina Søreide – Chr. Michelson Institute (Bergen)
Jose Ugaz – Benites, Forno, Ugaz & Ludowieg, Andrade (Lima)
Liam Wren-Lewis – Oxford University
Michela Wrong – journalist and author (London)