American University Business Law Review

Volume 9 | Issue 1 Article 2

2020

Prosecuting Foreign Bribery in National Projects: A Multi-Phased Approach to Reduce Corruption

Julia E. Johnson
Duke University School of Law

PROSECUTING FOREIGN BRIBERY IN NATIONAL PROJECTS: A MULTI-PHASED APPROACH TO REDUCE CORRUPTION

JULIA E. JOHNSON*

"Without strong watchdog institutions, impunity becomes the very foundation upon which systems of corruption are built. And if impunity is not demolished, all efforts to bring an end to corruption are in vain."
– Rigoberta Menchú Tum (2001).[1]

The gradual establishment of an international mechanism to review and prosecute allegations of corruption could help to deter fraudulent conduct. Fraudulent conduct often reduces the economic benefits associated with large-scale development or investment projects.[2] These projects are generally awarded through contract bidding; the bidding outcome may be dictated by bribery and other corrupt behaviors by local officials overseeing the project. The money earmarked for the project may in turn be siphoned off to the bribe recipients for private gain, leaving citizens unable to appreciate the fruits of any such project. For this reason, reducing corruption should remain a key priority. Many national jurisdictions have a vested interest in reducing corruption, yet lack the capacity and political stability to reduce corruption through domestic efforts.[3] International efforts to reduce corruption, as evidenced by previous attempts at developing new, topic-specific, stand-alone international courts, have also been insufficient.[4]

---

* J.D., Duke University School of Law. The author would like to thank her former colleagues at the World Bank for their input on this article.

1. *Global Corruption Report 2001*, TRANSPARENCY INTERNATIONAL, https://issuu.com/transparencyinternational/docs/2001_gcr_inaugural_en (Oct. 13, 2001).

2. *See Combatting Corruption*, THE WORLD BANK [hereinafter *Combatting Corruption*], http://www.worldbank.org/en/topic/governance/brief/anti-corruption (last updated Oct. 4, 2018).

3. *See id.* (describing consequences of corruption).

4. *See* Marie Chêne, *Successful Anti-Corruption Reforms*, TRANSPARENCY INT'L, 1, 4 (Apr. 30, 2015), https://www.transparency.org/files/content/corruptionqas/Successful_anti-corruption_reforms.pdf; *see also* Maíra Martini, *Anti-Corruption*

Mindful of the mixed results of previous anti-corruption efforts, this Article proposes a new anti-corruption framework, based upon a hybrid, multi-phased approach. The approach is pragmatic, flexible, cost-effective, and realistic.

Step-by-Step Approach:

1. *Create a new, unified anti-corruption and anti-bribery prosecutorial sanctions board and system for national governments, multilateral development banks ("MDBs"), and United Nations ("U.N.") agencies to investigate and prosecute allegations of fraudulent conduct. The specific structure of the unified board is not described in depth here, but the envisioned structure would be changed over time pursuant to its charter such that it transitions into a more involved governing body that prosecutes both government and civilian corruption. As the board gains legitimacy, jurisdiction will be gradually expanded pursuant to ratification by its signatories.*
2. *Install requirements for information sharing by pursuing joint investigations and case oversight efforts. These requirements will facilitate the new board's access to information and serve as a potential conduit for information sharing between national agencies facing cross-border corruption.*
3. *Expand the board to oversee civil administrative actions against civil servants accused of bribery and corruption. National judicial and legal systems would assist with enforcing decisions issued by the board.*
4. *Expand the board to oversee criminal bribery and corruption cases against civil servants as well as certain outside matters brought before the board. The precise parameters of this jurisdiction are not explored here. The intention for such a board at this phase is to prosecute civil and criminal wrongdoing by civil servants and would not prosecute allegations of wrongdoing by private actors.*
5. *Once the board has gained legitimacy and has developed efficiency, an international anti-corruption "court" may be created, though the proposed structure should not carry the rigidities associated with prior efforts to create an international prosecutorial body. Instead, provisions must be installed to ensure that the court remains fiscally effective and practical. At this point, the court's jurisdiction would include prosecution of civil and*

Specialisation: Law Enforcement and Courts, TRANSPARENCY INT'L, 1, 8–10 (Jan. 28, 2014), https://knowledgehub.transparency.org/assets/uploads/helpdesk/Anti-corruption_specialisation_Law_enforcment_and_courts_2014.pdf (analyzing the effectiveness of specialized corruption courts in Croatia, Bulgaria, and Slovakia).

criminal wrongdoing by civil servants relating to large-scale projects associated with MDBs, U.N. agencies, and similar entities, as well as prosecution of large-scale cross-border corruption for which a national government may be unable to adequately address without outside assistance.

I. INTRODUCTION

Corruption, which is particularly rampant in developing nations, reduces the benefits associated with large-scale projects. By some metrics, global

corruption by public officials causes losses measuring approximately one trillion dollars annually.[5] Corruption, spurn out of human proclivities for greed and desire for illicit gain, is unlikely to ever be wholly eradicated even under the most effective legal framework. However, with proper safeguards, international corruption and its corresponding losses can be significantly reduced. To achieve this goal, a hybrid, multi-phased approach must be employed.

Before refining the existing anti-corruption framework, a general explanation of certain laws and treaties is warranted. In the private sector, the national governments are responsible for prosecution of corruption associated with large-scale projects. There are international treaties that require signatory nations to adopt anti-corruption laws within their jurisdictions. There is, however, no supranational overarching mechanism investigating and prosecuting international corruption, particularly as it affects the procurement and development of large-scale projects that require government participation.

Like private sector procurement anti-corruption efforts which are largely prosecuted by national governments, corruption associated with bidding awards by multilateral development banks ("MDBs") is also prosecuted in a piecemeal fashion — current anti-corruption efforts are typically comprised of debarment sanctions honored through reciprocity.[6] These treaties are fragmented in nature, with differing obligations at the national and international levels.[7] For example, a development bank may have a sanctions board that will sanction a particular entity once it is found to have engaged in corruption. Other sanctions boards need not necessarily consider the decisions imposed by another sanctioning entity and may instead chose to award certain large-scale contracts notwithstanding prior evidence of corruption and bribery. To this end, a unified sanctions board, comprised of a prosecutorial body and utilizing the assistance of national police and judicial assistance, may assist with deterring corrupt behaviors in large-scale, cross-border projects, as well as other acts of civil service

5. *See* Rodrigo Campos, *Corruption Costs $1 Trillion in Tax Revenue Globally: IMF*, REUTERS (Apr. 4, 2019, 10:10 AM), https://www.reuters.com/article/us-imf-corruption/corruption-costs-1-trillion-in-tax-revenue-globally-imf-idUSKCN1RG1R2.

6. *See generally* THE WORLD BANK, THE WORLD BANK GROUP'S SANCTIONS REGIME: INFORMATION NOTE [hereinafter INFORMATION NOTE], http://siteresources.worldbank.org/EXTOFFEVASUS/Resourcces/The_World_Bank_Group_Sanctions_Regims.pdf (last visited Apr. 25, 2020) (describing World Bank's cross-debarment policy, through which an MDB can sanction a party that has already been sanctioned by another MDB).

7. *See id.* at 9 (explaining that MDBs may opt out of debarment decisions as part of the Bank's cross-debarment policy).

corruption for which a national government (or, if the bidding award was issued by an MDB, its respective sanctions board) may be unable to adequately prosecute.

First, this Article reviews the need for an international anti-corruption enforcement body by reviewing the prevalence of corruption. Second, this Article considers the limitations of similar stand-alone, international courts. Third, this Article proposes creation of a new, unified prosecutorial sanctions board to oversee the review instances of corruption and bribery, as well as the possible use of certain enforcement mechanisms at the national and international level. Fourth, this Article discusses the need for a gradual phased expansion of the proposed sanctions system. Particularly, this Article will focus on the need for information sharing among and between agencies and national governments and the proposed board. It will further note the weaknesses inherent in the existing systems and ways to address them.

Lastly, the Article proposes a multi-phased approach for establishing an international mechanism for prosecuting corruption cases, including the creation of a new international anti-corruption court. The suggested framework could be expanded over time to address administrative actions and criminal cases against civil servants. As the anti-corruption court gains legitimacy, the court could also investigate and prosecute acts of corruption affecting both the private and public sectors. The court's jurisdiction should be described in its charter and ratified by its signatories as its authority increases.

II. SCALE OF THE PROBLEM OF CORRUPTION

Despite its significant effect on the efficacy of development projects and the quality of life of the affected persons, corruption cannot be encapsulated by a single definition.

A. Definition of Corruption

Scholar Linn Hammergren defines corruption as the "abuse or misuse of public resources" (material resources, including funds and equipment, and less tangible resources such as power, decision-making authority, and position) for "private benefit."[8] Corruption is defined under the World

8. *See* Linn Hammergren, *The Multilateral Development Banks and Judicial Corruption*, 9 CTR. FOR INDEPENDENCE JUDGES & LAWS. Y.B. 73, 75 (2000) (defining corruption as "abuse or misuse of public resources for private benefit" and explaining that objects of corruption include both material and nonmaterial resources, corrupt actors often include both public and private sector officials, and examples of corruption include kickbacks for government contracts and favorable legislation).

Bank Guidelines as "[t]he offering, giving, receiving or soliciting, directly or indirectly, of anything of value to influence improperly the actions of another party."[9] Wrongdoing by recipients of large-scale projects can be one of several forms, including bribery, collusion, fraudulent practices, and obstruction.[10] In addition, Article 1 of the Organization of Economic Cooperation and Development ("OECD") Anti-Bribery Convention defines corruption as:

> any person intentionally to offer, promise or given any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.[11]

Corruption may be one of many types — it may be (1) "mutual or unilateral," (2) "'soft' or 'hard,'" and (3) found in the contract's procurement or as the contract's objective.[12] Unilateral corruption means that only one party is involved, whereas multilateral corruption means that both the benefactor and the recipient are fully aware of the corrupt behavior.[13] Mutual corruption is seldom grounds for defense against a corruption allegation; unilateral corruption is more likely to be a valid defense.[14] Similarly, whether corruption is hard or soft is determined by

---

9. *Guidelines on Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loan and IDA Credits and Grants*, THE WORLD BANK 3 (July 1, 2016), https://policies.worldbank.org/sites/ppf3/PPFDocuments/40394039anti-corruption%20guidelines%20(as%20revised%20as%20of%20july%201,%202016).pdf.

10. *See* The World Bank Borrowers, *Guidelines — Procurement of Goods, Works, and Non-Consulting Services*, 6 ¶ 1.16(a)(i)–(iv) (revised July 2014) [hereinafter *Guidelines*] (defining corrupt practice, fraudulent practice, collusive practice, and coercive practice).

11. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 1 ¶ 1, Nov. 21, 1997, OECD [hereinafter OECD Art. 1].

12. *See* Michael A. Losco, *Streamlining the Corruption Defense: A Proposed Framework for FCPA-ICSID Interaction*, 63 DUKE L.J. 1201, 1218 (2014); *see also* Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C.J. INT'L L. & COM. REG. 83, 87 (2007) (describing legislation passed by Congress in response to an SEC investigation that discovered questionable payments made by U.S. firms to foreign governments).

13. *See* Fragport AG Frankfurt Airport Servs. Worldwide v. Republic of the Phil., ICSID Case No. ARB/03/25, Award, ¶ 332 (Aug. 16, 2007) (holding multilateral corruption present where both parties were knowingly aware of an illegal intent). *See generally* ANDREAS KULICK, GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW 18 (2012) (emphasizing the importance of differentiating between multilateral and unilateral conduct when categorizing case law and explaining that corruption is usually multilateral while fraud is usually unilateral).

14. *See, e.g.*, World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶¶ 156–57 (Aug. 31, 2006) (holding that even where it was alleged

the degree of interference. For instance, hard corruption often takes the form of an explicit offer by a benefactor made to a public official or other individual for some improper motive; hard corruption need not occur directly and may occur through an intermediary.[15] In contrast, soft corruption is an indirect form of corruption and involves the utilization of a middleman who alleges that he or she may be able to "influence peddle" another public official who wields authority.[16] Three out of four foreign bribery cases involve intermediaries.[17]

B. Measure of Corruption

In 2014, the OECD estimated that the losses caused by public official corruption measured a trillion dollars per year.[18] The World Bank has likewise suggested that about twenty to forty percent of financial assistance provided for development in the poorest countries is squandered from the national public budget through corruption.[19]

Corrupt deals account for more than five percent of the global GDP.[20] The World Bank's research estimates that "around [$]20 billion to [$]40 billion a year — a figure equivalent to 15–30% of all Official Development Assistance" is lost due to bribery.[21] The effects of foreign bribery are

---

corruption may be widespread within the particular sector of activity, the legal consequences are not to be altered).

15. *See* OECD Art. 1, *supra* note 10, ¶ 1; KULICK, *supra* note 13, at 309 (explaining that hard corruption requires an intentional act meant to gain an "undue advantage").

16. Losco, *supra* note 12, at 1220; Hilmar Raeschke-Kessler & Dorothee Gottwald, *Corruption in Foreign Investment — Contracts and Dispute Settlement Between Investors, States, and Agents*, 9 J. WORLD INV. & TRADE 5, 7 (2008) (defining influence peddling).

17. *See* THE WORLD BANK OFFICE OF SUSPENSION AND DEBARMENT, REPORT ON FUNCTIONS, DATA AND LESSONS LEARNED 2007-2013 29 (2014).

18. OECD, ILLICIT FINANCIAL FLOWS FROM DEVELOPING COUNTRIES: MEASURING OECD RESPONSES 73 (2014) [hereinafter MEASURING OECD RESPONSES], https://www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf.

19. OECD, *The Rationale for Fighting Corruption*, CLEANGOVBIZ (2014) [hereinafter *The Rationale for Fighting Corruption*], http://www.oecd.org/cleangovbiz/49693613.pdf ("The World Bank (Baker 2005) estimates that each year US$ 20 to US $ 40 of official development assistance, is stolen through high-level corruption from public budgets in developing countries and hidden overseas.").

20. *See* Mark L. Wolf, *The Case for an International Anti-Corruption Court*, BROOKINGS INSTITUTION: GOVERNANCE STUDIES 1, 8–9 (July 23, 2014), https://www.brookings.edu/research/the-case-for-an-international-anti-corruption-court/.

21. MEASURING OECD RESPONSES, *supra* note 18, at 73 ("A $1 million dollar bribe can quickly amount to a USD 100 million loss to a poor country through derailed projects and inappropriate investment decisions which undermine development.").

particularly pronounced in developing countries: between the years 2000 and 2009, corrupt financial practices resulted in $8.4 trillion in losses in these nations.[22]

Corruption also impacts the national economy through metrics that are less easily quantified. In addition to reducing cash flows, the harms caused by corruption comprise decelerated economic development and a number of trade flows issues, such as effects on public service and public procurement bids, including those for necessities such as electricity, roads, and water.[23] Foreign corruption is often concentrated within certain industry sectors, including transportation, mining, and infrastructure,[24] causing artificial economic imbalances in these industry sectors.[25] OECD research has found that corruption and bribery may result in excessive investment in more lucrative sectors such as large-scale infrastructure projects, while other less profitable sectors, such as education and public sector social programs, lose funding.[26]

Corruption constitutes a major impediment to economic development and growth.[27] As one example of this impediment, corruption increases transaction costs associated with doing business by increasing the uncertainty of the return on an investment.[28] Heightened uncertainty reduces both domestic and foreign investors' desire to invest.[29] Corruption causes instability that frequently reduces economic growth.[30] The

22. Wolf, *supra* note 20, at 3 (noting that "[a]n estimated $8.4 trillion was lost in developing regions due to illicit financial flows between 2000 and 2009, which was ten times more than those regions received in foreign aid, and roughly the annual GDP of China in 2012.").

23. MEASURING OECD RESPONSES, *supra* note 18, at 73.

24. OCED, STATE-OWNED ENTERPRISES AND CORRUPTION 20 (2018), https://read.oecd-ilibrary.org/governance/state-owned-enterprises-and-corruption_9789264303058-en#page21.

25. *See* Hamid Davoodi & Vito Tanzi, *Roads to Nowhere: How Corruption in Public Investment Hurts Growth*, INT'L MONETARY FUND 6 (Mar. 1998), http://www.imf.org/external/pubs/ft/issues12/index.htm.

26. *The Rationale for Fighting Corruption*, *supra* note 19, at 2–3; *see also* Wolf, *supra* note 20, at 4, 12 ("[C]orruption is an enormous obstacle to the realization of all human rights — civil, political, economic, social, and cultural, as well as the right to development.").

27. *See Combatting Corruption*, *supra* note 2 (contending that corruption impedes investment and undermines the social contract with government).

28. *See id.* (describing the costliness of corruption in international financial flows); *see also The Rationale for Fighting Corruption*, *supra* note 19, at 2.

29. *Combatting Corruption*, *supra* note 2 ("Corruption impedes investment, with consequent effects on growth and jobs.").

30. JUNE S. BEITTEL ET AL., CONG. RESEARCH SERV., R45733, COMBATTING CORRUPTION IN LATIN AMERICA: CONGRESSIONAL CONSIDERATIONS 15–16 (2019), https://crsreports.congress.gov/product/pdf/R/R45733 (stating scholars report that

instability brought about by this uncertainty is particularly harmful for developing countries where other forces of economic uncertainty have already dampened some investors' willingness to invest in a particular region.[31] Funds lost to corruption frequently detract from other societal efforts, such as reducing crime. [32] For example, police officers may refuse to perform routine services without bribes.[33] Bribery may impute bias to public works when the government officials improperly select the winning bidder.[34] Corruption may also affect institutions that are intended to serve the public.[35] Without addressing each type of corruption, meaningful change cannot occur.[36]

Corruption's effects are ascertainable on a macroeconomic level. Corruption can reduce the efficacy of government initiatives, result in heightened levels of terrorism, and reduce or render ineffective the integrity of nascent democracies.[37] Corruption may also reduce trade flows into developing nations, which may in turn negatively affect their economic growth.[38] Lastly, government corruption frequently crosses party lines: as one domestic regime loses power in a nation, the regime is often replaced by a new government that will likewise succumb to corruption.[39]

The most vulnerable victims of corruption are those most likely to suffer

---

corruption affects developing countries' ability to obtain loans, lowers economic competitiveness, reduces GDP, and encourages migration).

31. *The Rationale for Fighting Corruption*, *supra* note 19, at 2.

32. BEITTEL ET AL., *supra* note 30, at 15.

33. *Combating Corruption*, *supra* note 2.

34. *Id.*

35. *Id.*

36. *Id.*

37. Phillippa Webb, *The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?*, 8 J. INT'L ECON. L. 191, 192 (2005); *see* Dileep Nair, Under-Secretary-General for Internal Oversight Services, Secretary-General's Message to the Third Global Forum on Fighting Corruption and Safeguarding Integrity (May 29, 2003), www.un.org/sg/en/content/sg/statement/2003-05-29/secretary-generals-message-third-global-forum-fighting-corruption (emphasizing the broad negative consequences of corruption and the United Nations' role in addressing these externalities).

38. *See* Bert Denolf, *Impact of Corruption on Foreign Direct Investment*, 9 J. WORLD INV. & TRADE 249, 249, 253–55, 261–62, 264, 269, 271 (2008) (identifying the levels and nature of corruption as operative variables when predicting the negative effects of corruption of foreign direct investment).

39. Susan Rose-Ackerman, *Establishing the Rule of Law*, in WHEN STATES FAIL: CAUSES AND CONSEQUENCES 182, 185 (Robert Rotberg ed., Princeton University Press 2004) (illustrating how the consolidated systems of power are abused by replacement governments in a similar manner to how the incumbent government abused those systems).

its effects.[40] Empirical studies have found that in Paraguay, the poor lose on average 12.6 percent of their income to bribes, while high-income families lose 6.4 percent.[41] Similarly, in Sierra Leone, the poor lose on average thirteen percent of their income to bribes, while high-income families lose 3.8 percent.[42] Likewise, the African Union has found that twenty-five percent of the continent's GDP is lost to corruption annually. [43]

While poor nations are most affected by corruption, wealthier countries, where the pecuniary ramifications are less severe, are also affected as the public loses faith in its leaders and government institutions lose legitimacy.[44] Former U.S. Attorney Patrick Fitzgerald has stated that America's corruption victims are "both those who are shaken down for bribes and kickbacks, and the members of the general public, who pay for corruption through inflated costs and loss of faith in government."[45]

Corruption, while not specific to any particular nation, often affects developing nations. According to the U.S. Government Accountability Office ("GAO"), these nations share certain "fundamental challenges" that foster corruption.[46] These challenges include "low civil service salaries, a lack of transparency and accountability in government operations, ineffective legal frameworks and law enforcement, weak judicial systems, and tolerant public attitudes."[47] A number of recent high-profile scandals spanning numerous developing countries have shown that action to address corruption must be taken now.[48]

These nations' inability to adequately address corruption leads to a

40. BEITTEL ET AL., *supra* note 30, at 15.

41. *Combating Corruption*, *supra* note 2.

42. *Id.*

43. Karen Alter & Juliet Sorensen, *Let Nations, Not the World, Prosecute Corruption*, U.S. NEWS & WORLD REP. (Apr. 30, 2014), https://www.usnews.com /opinion/articles/2014/04/30/dont-add-corruption-to-the-international-criminal-courts-mandate.

44. *See id.* (detailing corruption leads to inflated costs in wealthier nations such as the United States).

45. *Id.*

46. *See* U.S. GENERAL ACCOUNTING OFF., GAO-04-506, FOREIGN ASSISTANCE: U.S. ANTICORRUPTION PROGRAMS IN SUB-SAHARAN AFRICAN WILL REQUIRE TIME AND COMMITMENT (Apr. 2004), https://www.gao.gov/assets/250/242162.pdf (indicating pervasive corruption in sub-Saharan Africa). In July 2004, the General Accounting Office changed its name to the Government Accountability Office.

47. *Id.*

48. *See* JUNE S. BEITTEL, CONG. RESEARCH SERV., IF10802, SPOTLIGHT ON PUBLIC CORRUPTION IN LATIN AMERICA, (Jan. 9, 2018) [hereinafter BEITTEL, SPOTLIGHT ON PUBLIC CORRUPTION IN LATIN AMERICA], https://crsreports.congress.gov/product/pdf/ IF/IF10802.

reduction in foreign investment.[49] This occurs because politicians overseeing public works bidding often expect a payout or other remuneration to award a project to a particular bidder.[50] The perception of public corruption, in turn, reduces outside direct investment.[51]

As one example, Latin America has been particularly befallen by corruption, which has stifled economic growth in the region.[52] The 2016 CPI reported that "nearly a third of all Latin American respondents said they had paid a bribe for a public service such as health care or education in the past twelve months."[53] Corruption has deepened Latin American inequality and weakened the region's ability to provide public services.[54] In Latin American nations where corruption runs rampant, economic performance has failed to keep pace with foreign direct investment ("FDI").[55] For example, El Salvador's low FDI flows have been attributed, in part, to the nation's high levels of corruption.[56]

Similarly, in Mexico, corruption has been estimated to cost the country up to five percent of its gross domestic production annually.[57] The name of the incumbent Institutional Revolutionary Party has become tantamount with corruption.[58] Moreover, no fewer than eight of Mexico's state governors have come under investigation for corruption.[59] Mexican officials are also thought to have played a role in the 2014 disappearance of forty-three students who went missing in Guerrero.[60]

By contrast, Brazil's comparatively higher FDI flows have been

---

49. *See* BEITTEL ET AL., *supra* note 30, at 15 (noting that World Economic Forum has found a nation's inability to address corruption serves as a "barrier to investment").

50. *See id.* at 2, 13, 16 (detailing corrupt ways in which politicians distort the public-works bidding process in exchange for money or political favors).

51. *See id.* at 16 (attributing Chile's success in achieving growth and foreign investment to the nation's low level of perceived corruption).

52. BEITTEL, SPOTLIGHT ON PUBLIC CORRUPTION IN LATIN AMERICA, *supra* note 48 (highlighting the growing awareness of corruption in Latin America's public services that is interfering with economic growth "through lost productivity and skewed incentives").

53. *Id.*

54. *Id.*

55. BEITTEL ET AL., *supra* note 30, at 15.

56. *Id.*; *see also* Klaus Schwab, *Global Competitiveness Report 2018*, THE WORLD ECON. FORUM 209 (Oct. 16, 2018), http://www3.weforum.org/docs/GCR2018/05FullReport/TheGlobalCompetitivenessReport2018.pdf.

57. BEITTEL, SPOTLIGHT ON PUBLIC CORRUPTION IN LATIN AMERICA, *supra* note 48.

58. *Id.* at 13 ("In Mexico, corruption investigations of 20 former state governors, most from the PRI, diminished the party's legacy.").

59. *Id.*

60. *Id.*

attributed to its use of the judiciary to staunchly prosecute corruption.[61] By way of further example, Chile has attracted high levels of FDI, which may be partially attributed to the perception that it provides a non-corrupt business climate.[62] When corruption scandals took place in 2015 and 2017, the country worked quickly to avoid damage to this reputation.[63]

The private sector, which is often reactive to market forces, has also been ineffective in reducing corruption.[64] The private sector can play a key role in reducing corruption by "demanding clean, non-corrupt governance and can serve as [a] strong advocate[] for laws to prohibit bribery and extortion to end the distorted impact of corruption on competition."[65] Indeed, the strength of the business community to both positively and negatively affect corruption is already evident. In some instances, private sector heavyweights have promoted anti-bribery legislation in Latin America.[66] For example, in Mexico, COPARMEX — a business association — has advocated for full implementation of the National Anti-Corruption System.[67] One of the most significant developments of this system would be the creation of an independent prosecutor's office.[68] Business leaders in other nations, such as Honduras and Guatemala, by contrast, have taken steps to reduce the efficacy of anti-corruption controls.[69]

C. Human Rights and Corruption

Corruption is frequently linked to human rights infractions because of its effect on the economic and quality of life metrics for the persons affected. Corruption can sharply reduce the quality of life and overall wellbeing of individuals residing in both developed and developing nations.[70] Research has linked higher rates of corruption with poorer performance on public health indicators, such as infant mortality and immunization rates.[71] The consequences of corruption include lower life expectancy rates, poorer

61. BEITTEL ET AL., *supra* note 30, at 15.

62. *Id.* at 16.

63. *Id.*

64. *Id.* at 15.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* (referring to examples of corruption in Chile, Argentina, Brazil, and Colombia).

71. Maureen Lewis, *Governance and Corruption in Public Health Care Systems*, CTR. FOR GLOBAL DEV. (Jan. 2006), http://www1.worldbank.org/publicsector/anticorrupt/Corruption%20WP_78.pdf.

nutrition, and reduced access to education and healthcare facilities for both adults and children.[72] Corruption also obstructs access to public amenities and reduces the efficacy of local initiatives aimed at reducing poverty and improving national wellbeing.[73] In some cases, impoverished individuals may be excluded from using public amenities altogether.[74]

D. Corruption as an International Legal Crime

Due to the adverse human rights impacts and inefficiencies of prosecuting corruption domestically, corruption is often considered an international crime.[75]

By reducing the quality of life for already impoverished populations, corruption becomes a causative factor in human rights violations, leading some scholars to believe it should be classified as an international legal crime.[76] As one scholar has noted, "corruption is directly connected to a violation of human rights when the corrupt act is delivery used as a means to violate the right . . . [f]or example, when an individual must bribe a doctor in order to obtain medical treatment, or bribe a teacher in order to be allowed to attend a class, his right of access to health and education has been infringed by corruption."[77] Providing a less direct example, if a corrupt government allows environmental contamination or degradation, it will result in toxic waste or cause harmful environmental conditions.[78] Though not every incident of corruption causes a human rights violation, many forms of corruption materially reduce the quality of life for impoverished populations. Under this approach, corruption can constitute an international legal crime when human dignities are harmed.[79]

---

72. Ben Bloom, Comment, *Criminalizing Kleptocracy? The ICC As a Viable Tool in the Fight Against Grand Corruption*, 29 AM. U. INT'L L. REV. 627, 655–56 (2015) (outlining consequences of grand corruption).

73. *Id.*

74. *The Rationale for Fighting Corruption*, *supra* note 19, at 3 (explaining that the poor could be "excluded from basic services like health care or education" because they cannot afford to pay for bribes requested from a corrupt government).

75. *See generally* Ilias Bantekas, *Corruption as an International Crime and Crime Against Humanity: An Outline of Supplementary Criminal Justice Policies*, 4 J. INT'L CRIM. JUSTICE 466 (2006) (noting the criminalization of transnational corrupt practices is now an international offense).

76. *See* Julio Bacio-Terracino, *Linking Corruption and Human Rights*, 104 AM. SOC'Y INT'L L. PROC. 243, 243 (2010); *see also* Joel M. Ngugi, *Making the Link Between Corruption and Human Rights: Promises and Perils*, 104 AM. SOC'Y INT'L L. PROC. 246, 246, 249–50 (2010).

77. Bacio-Terracino, *supra* note 76, at 243–44.

78. *See id.*

79. *See id.* at 243.

As one example, the United States has defined "international crime" as "criminal conduct that transcends national borders and threatens U.S. interests in three broad, interrelated categories: threats to Americans and their communities, threats to American businesses and financial institutions, and threats to global security and stability."[80] U.S. GAO guidance has stated that the following actions constitute international crimes:

> corruption; terrorism; drug trafficking; illegal immigration and alien smuggling; trafficking in women and children; environmental crimes (including flora and fauna trafficking); sanctions violations; illicit technology transfers and smuggling of materials for weapons of mass destruction; arms trafficking; trafficking in precious gems; piracy; non-drug contraband smuggling; intellectual property rights violations; foreign economic espionage; foreign corrupt business practices; counterfeiting; financial fraud (including advance fee scams and credit card fraud); high-tech crime; and money laundering.[81]

Multiple international agreements address the issue of corruption and provide further evidence that corruption is an international legal crime and is treated as such. For example, the United Nations Convention Against Corruption ("UNCAC") provides in Article 36 that signatory countries must "ensure the existence of a body or bodies of personnel specialized in combating corruption through law enforcement."[82] Likewise, the Council of Europe's Criminal Law Convention states in Article 20 that "[e]ach party shall adopt such measures as may be necessary to ensure that persons or entities are specialised in the fight against corruption."[83] Further, the Council of Europe Committee of Ministers Resolution 97 (24), in the Twenty Guiding Principles For the Fight Against Corruption, in Principles 3 and 7, provides for "the establishment of a specialised, independent, well-trained and adequately resourced body to fight corruption."[84]

However, not all scholars agree that corruption should be classified as a crime against humanity. First, according to some scholars, it is unclear whether Article 7(i)(k) of the Rome Statute "is broad enough to allow

---

80. U.S. GOV'T ACCOUNTABILITY OFF., GAO-01-629, INTERNATIONAL CRIME CONTROL: SUSTAINED EXECUTIVE-LEVEL COORDINATION OF FEDERAL RESPONSE NEEDED 16 (2001).

81. *Id.*

82. United Nations Convention Against Corruption, art. 36, Oct. 31, 2003, G.A. Res. 58/4, 2349 U.N.T.S. 161.

83. Council of Europe Criminal Law Convention on Corruption, art. 20, Jan. 27, 1999, https://rm.coe.int/168007f3f5.

84. Council of Europe Committee of Ministers Resolution 97 (24), Twenty Guiding Principles for the Fight Against Corruption, 3, 7, Nov. 6, 1997, https://polis.osce.org/node/4681.

inclusion of grand corruption as a prosecutable crime against humanity."[85] If grand corruption does not fall within the Rome Statute, the statute will need to be amended, which requires that two-thirds of the Member States' votes.[86] Corrupt governments may not be willing to support amending the Rome Statute.[87] Further, even if Article 7 were amended, not all nations, but only those nations that voted for the change, would be subject to its enforcement.[88] Consequently, the nations most marred by corruption may also be the least likely to be bound by any amendment.[89]

Under the second approach, the Elements of Crimes could be amended to enable grand corruption to be defined as a crime against humanity, which is also likely to be contested in the Assembly of States parties and would require a two-thirds majority vote.[90] Another approach would be to petition the Office of the Prosecutor to "utilize prosecutorial discretion to interpret Article 7(k) to include grand corruption . . . ."[91] However, some scholars have suggested that this approach could face backlash in the ICC's judicial chambers.[92]

E. National Legislation Presents Stand-Alone Efforts to Reduce Corruption

National legislation has presented stand-alone efforts to reduce corruption. For example, the U.K. passed the 2010 Bribery Act, which

85. Steven Groves et al., *Why the U.S. Should Oppose the Creation of an International Anti-Corruption Court*, THE HERITAGE FOUND. (Oct. 1, 2014), https://www.heritage.org/global-politics/report/why-the-us-should-oppose-the-creation-international-anti-corruption-court.

86. *Id.*

87. *See id.*

88. *See id.*; *see also* Rome Statute of the International Criminal Court, art. 7, 121, 121(5), July 17, 1998 (corrected 2002), 2187 U.N.T.S. 38544 ("Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nations or on its territory.").

89. Groves et al., *supra* note 85.

90. *Id.*; *see also* Rome Statute of the International Criminal Court, art. 9(1)–(2)(c), July 17, 1998, 2187 U.N.T.S. 38544 (entered into force July 1, 2002) ("Elements of Crimes shall assist the Court in the interpretation and application of articles 6,7, and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties."); Rome Statute of the International Criminal Court, art. 9(1)–(2)(c), July 17, 1998, 2187 U.N.T.S. 38544 (entered into force July 1, 2002) ("Amendments to the Elements of Crimes may be proposed by: (a) Any State Party; (b) The judges acting by an absolute majority; (c) The Prosecutor. Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.").

91. Groves et al., *supra* note 85; *see also* Bloom, *supra* note 72, at 667–71.

92. Groves et al., *supra* note 85.

took effect in July 2011.[93] The U.K. Anti-Bribery Act "criminalizes both commercial bribery and bribery of foreign public officials for all companies doing business in the United Kingdom and for all U.K. citizens and companies doing business abroad."[94] The U.K. Serious Fraud Office has also recently strengthened its stance on corruption, stating that the self-reporting of corruption is not sufficient in itself to prevent prosecution of such acts.[95]

Similarly, Mexico ratified the extraterritorial Federal Procurement Anti-corruption Law, which imposes sanctions "against both foreign and Mexican persons for corrupt practices relating to public contracts with both the Mexican federal government and foreign governments as well, including bribery occurring through a third party."[96] Mexico's law is notable because it specifically criminalizes the act of offering a bribe, irrespective of whether such a bribe was actually paid.[97]

India has also passed anti-corruption laws, including the Prevention of Corruption Act (1988) and the Prevention of Money-Laundering Act (2002).[98] The 2011 Lokpal Bill (Prevention of Bribery of Foreign Public Officials and Officials of Public international Organization Bill), which remains stalled in India's Parliament, is another example of the country's efforts to reduce corruption.[99] India's anti-corruption laws criminalize "both active and passive bribery" of foreign public leaders.[100] Similarly, Indonesia ratified legislation to eradicate corruption in 2001 and has recently proposed new anti-corruption laws that would prosecute acts of bribery by foreign public officials and private sector corruption.[101]

As described in further detail below, Brazil has also increased its efforts to prosecute corruption. In addition to the existing legal framework described above, Brazil's current draft law, Responsibility of Legal Persons

---

93. *See* Gwendolyn L. Hassan, *The Increasing Risk of Multijurisdictional Bribery Prosecution: Why Having an FCPA Compliance Program Is No Longer Enough*, 42 INT'L L. NEWS 11, 12 (2013) (stating that the Bribery Act is the most notable stand-alone legislation to combat corruption).

94. *See id.* at 12 (highlighting that the Bribery Act is broad in scope and applies extraterritorially).

95. *See id.* (altering key provisions related to self-disclosure because it is not a guarantee of non-prosecution).

96. *Id.* (detailing that Mexico's law applies extraterritorially as well).

97. *Id.*

98. *Id.* (explaining that India had not taken any measures to address the bribery of foreign public officials until 2011).

99. *Id.*

100. *Id.*

101. *Id.*

for Acts of Corruption (Bill 6,826/2010), "would establish the direct liability of legal entities for acts for corruption committed by their directors, officers, employees, and agents"[102] and "would also provide for debarment from public contracting and fines of up to thirty percent of a company's income."[103] Under current law, persons engaging in corruption may be jailed for up to thirty years.[104]

F. Corruption in Latin America — The Case of Lavo Jato

The Odebrecht scandal, known as *Lavo Jato*, which has touched multiple Latin American nations, is perhaps one of the most high-profile recent portrayals of public corruption.[105] In 2017, Odebrecht, a Brazilian construction company, admitted that it had paid up to $800 million in bribes over the prior two decades to secure public contracts throughout Latin America valued at more than $3.3 billion.[106] Public officials in a number of Latin American nations, including Mexico, Colombia, and Panama, admitted accepting bribes.[107] Ecuador's Vice President Jorge Glas was convicted of accepting over $13 million in bribes from the company.[108] Further Peru's President Pablo Kuczynski was nearly impeached after he was accused of accepting bribes from Odebrecht.[109]

In the wake of the *Lavo Jato* scandal, significant changes took place. Former Brazilian President Michael Temer was arrested after allegations surfaced that he had accepted $2 million in bribes from Odebrecht and had engaged in money laundering after leaving office.[110] A number of other senior Brazilian officials and business executives, including former President Luiz Inácio Lul de Silva and Aécio Neves, were also arrested on significant charges for accepting bribes in exchange for awarding certain public contracts.[111] This systemic corruption was identified and

102. *Id.*

103. *Id.*

104. *See id.* (explaining that various existing provisions criminalize public officials offering and accepting bribes).

105. BEITTEL ET AL., *supra* note 30, at 9–10 (stating that Brazil's multinational construction firm Odebrecht was involved in a landmark plea agreement and admitted to paying millions in bribes to politicians and office holders throughout Latin America).

106. *Id.* at 9; *see also* BEITTEL, SPOTLIGHT ON PUBLIC CORRUPTION IN LATIN AMERICA, *supra* note 48.

107. BEITTEL, SPOTLIGHT ON PUBLIC CORRUPTION IN LATIN AMERICA, *supra* note 48.

108. *Id.*

109. *Id.*

110. BEITTEL ET AL., *supra* note 30, at 9–10 (noting that the President was protected from investigation during his tenure).

111. *Id.* at 10.

investigated through numerous cooperative investigations.[112] The investigations uncovered a number of other scandals that resulted in "the charging of more than 900 individuals" and allowed prosecutors to "secure[] more than 200 convictions for crimes including corruption, money laundering, and abuse of the financial system."[113] Due to a large case backlog, many of the persons implicated in these scandals have not been convicted.[114] Some of the anti-corruption proposals were ultimately incorporated into Brazil's draft laws that were subsequently presented before the nation's Congress in early 2019.[115]

A number of legal and institutional factors have propelled these reforms.[116] First, the Brazilian attorney general (*Ministério Público Federal*, MPF) has significant autonomy granted by the Brazilian constitution.[117] This independence has allowed the attorney general to pursue cases against high-profile leaders without fear of retaliation.[118] The attorney general may also work with the Brazilian legal scheme, as exemplified by a law entering into effect in 2013 that allows attorney to reduce penalty for cooperative defendants.[119] During the *Lavo Jato* investigation, Brazilian prosecutors granted at least 218 plea agreements as part of their investigations.[120] Brazil has further benefitted from its ability to use the resources provided by the United States and other nations.[121] Notably, during the *Lavo Jato* investigation, prosecutors "issued 269 formal requests for legal assistance to 45 countries."[122] Brazil has also received assistance from information cooperation and dialogue with the U.S. Department of Justice and analogous offices of other nations; such

112. *Id.* at 23.
113. *Id.* at 22–23.
114. *Id.* at 23.
115. *Id.* at 9–10.
116. *Id.* at 23.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* (citing Mutual Legal Assistance, U.S. Braz., Oct. 14, 1997, S. TREATY DOC. NO. 105-42 (1998) (providing for bilateral cooperation in investigations between the United States and Brazil because "[t]he bilateral treaty empowers both countries to request assistance from one another, including taking the testimony or statements of persons; providing documents, records, and items; locating or identifying persons or items; serving documents; transferring persons in custody for testimony or other purposes; executing requests for searches or seizures; assisting in proceedings relating to immobilization and forfeiture of assets, restitution, and collection of fines; and any other form of assistance not prohibited by law.").

cooperation has allowed for improved sharing of evidence and information.[123] This increased coordination between the United States and Brazil has allowed for coordinated prosecutions of large corporations that violated the U.S. Foreign Corrupt Practices Act ("FCPA")[124] and Brazilian anti-bribery laws.[125] These coordinated prosecutions have resulted in $1.9 billion and $4.4 million in payments to the United States and Brazil respectively.[126]

III. NATIONAL PROSECUTIONS, FAILED CASES

Reports by the Inter-American Development Bank ("IDB"), finding earlier attempts to reduce corruption to be "uneven" in scope and efficacy, have suggested that an "integrated approach" is needed to reduce pervasive corruption.[127] The IDB acknowledged the importance of measures of corruption developed by key ratings agencies, including Standard & Poor's, Fitch, and Moody's.[128] If such ratings are unfavorable, a recipient country is less likely to attract investment.[129]

The IDB report suggested that the most meaningful efforts at reducing corruption required action on behalf of private and public sector initiatives, as well as community efforts.[130] The report concluded that "successfully addressing corruption will require the concerted attention of both governments and businesses, as well as the use of the latest advanced technologies to capture, analyze, and share data to prevent, detect, and deter corrupt behavior."[131]

U.S. government agencies have found comparable results. For example, U.S. GAO has concluded that meaningful reduction in corruption must come from multipronged initiatives that include backing from both government officials, the private sector, and members of the public.[132] Other factors reducing corruption include promoting public "access to

123. BEITTEL ET AL., *supra* note 30, at 24.

124. 15 U.S.C. § 78dd-1 (1998).

125. BEITTEL ET AL., *supra* note 30, at 23–24.

126. *Id.* at 24 (noting such companies found in violation include Braskem, Embraer, Keppel Offshore and Marine, Odebrecht, Petrobras, Rolls Royce, and SMB Offshore).

127. *Id*. at 15–16.

128. *Id.* at 16.

129. *Id.*

130. *See Combating Corruption*, *supra* note 2 (finding that governments and businesses must collaborate and use advancing technologies to fight corruption).

131. *Id.*

132. U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-506, FOREIGN ASSISTANCE: U.S. ANTICORRUPTION PROGRAMS IN SUB-SAHARAN AFRICAN WILL REQUIRE TIME AND COMMITMENT (Apr. 2014), https://www.gao.gov/assets/250/242162.pdf.

government information."[133] Like the IDB, U.S. GAO concluded that a long-term approach must be considered, noting that "because corruption cannot be eradicated quickly and simply, anti-corruption efforts require long-term commitment to gain public confidence."[134]

A. National Anti-Corruption Efforts Have Largely Been Inadequate to Reduce Corruption.

Countries have responded with different legislative initiatives as well as the development of national courts in order to prosecute persons engaged in corruption related to national projects.

For example, in Bangladesh, institutionalized corruption was deemed to have reached "endemic proportions" in the years prior to 2007.[135] There, Bangladesh's anti-corruption efforts, among a variety of legislative initiatives, including versions of the nation's penal code dating to 1860, as well as the 1947 Prevention of Corruption Act ("PCA") and the 2004 Anti-Corruption Act.[136] The PCA created the Anti-Corruption Commission ("ACC"), which was charged with the sole responsibility for reducing corruption within the nation through investigations and prosecutions.[137] Bangladesh is also a member of several international anti-corruption treaties, including UNCAC. The ACC is directed by three commissioners and a chairman who is appointed by the current President of Bangladesh.[138] In order to reduce bias by the Commission, Commission members are not able to hold "any profitable office in the service of the Republic" upon leaving the post.[139] Nevertheless, despite these efforts, corruption and fraudulent conduct proliferated throughout the nation, particularly in the form of bribery and civil servant corruption.[140] Further, prosecutions in Bangladesh have largely failed to make a tangible impact on reducing national corruption.[141]

Prosecutions in Kenya have yielded similar results.[142] Like Bangladesh,

133. *Id.*

134. *Id.*

135. *See* U.N. ESCOR, U.N. Dev. Programme, Rep. of Anti-Corruption Assessment Mission: Dhaka Bangladesh, at 7 (March 2–15, 2008) (stating that corruption in Bangladesh has increased in the years leading up to January 11, 2007).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 15.

140. *See id.* at 16–17.

141. *Id.* at 19.

142. *See Frequently Asked Questions About the Kenya Anti-Corruption Commission*, KENYA ANTI-CORRUPTION COMMISSION 8–9, https://www.eacc.go.ke/wp-

Kenya has established several anti-corruption initiatives, including the Ethics and Anti-Corruption Commission ("EACC"), which replaced the Kenya Anti-Corruption Commission ("KACC") in 2011.[143] The EACC has primary responsibility for investigating and prosecuting corruption in Kenya.[144] The EACC is comprised of "a Chairperson and four other members appointed according to the provisions of the Constitution" and the Ethics and Anti-Corruption Commission Act of 2011.[145] In addition to investigation and prosecution, the EACC also engages in public outreach and educational efforts to combat corruption.[146] Despite these efforts, as in Bangladesh, Kenya continues to experience widespread corruption, particularly in its public procurement and government sectors, with bribery of government officials remaining widespread.[147]

Further, a regional approach to combatting corruption has not proven to successfully address fraudulent conduct across a regional bloc or group of countries working together to combat corruption. For instance, during the African Union Convention on Preventing and Combating Corruption in 2004, some African nations joined together to reduce corruption across the region.[148] Despite the argument that corruption may manifest itself differently due to regional variations in governance structure and economic metrics, regional efforts at quashing corruption have largely proven ineffective due to the often inapposite national interests of each individual nation.[149] Nations often have a vested interest in asset recovery and regional investment, which reduces the efficacy of regional anti-corruption commissions or courts.[150] Moreover, those nations that are most plagued

content/uploads/2018/08/KACC-FAQ-A5-Book.pdf (last visited Apr. 25, 2020).

143. *About Us*, ETHICS & ANTI-CORRUPTION COMMISSION, http://www.eacc.go.ke/about-us/ (last visited Apr. 25, 2020).

144. *Id.*

145. *Id.*

146. *See id.*

147. *See* Michel Arseneault, *Anti-corruption Officials Suspended, Casting Shadowing on Kenyan Transparency*, RFI (Apr. 24, 2015), http://www.english.rfi.fr/africa/20150424-anti-corruption-officials-suspended-casting-shadow-kenyan-transparency (finding that the recent political suspensions and investigations are a major setback in efforts to end political corruption and other anti-graft efforts).

148. *See* Melissa Khemani, *Corruption and the Violation of Human Rights: The Case for Bringing the African Union Convention on Preventing and Combating Corruption within the Jurisdiction of the African Court and Human and Peoples' Rights*, 16 AFR. Y.B. INT'L L. 213, 214 (2008) (noting the "crippling effects" of corruption prompted Member States to adopt the Convention on Preventing and Combating Corruption in 2003).

149. *See id.* at 214, 220.

150. *See id.* at 222.

by corruption at the level of their government and public officials may not possess the political stability to develop and assist in overseeing an effective anti-corruption panel within the region.[151]

B. MDB Sanctions Boards Are Limited in Prosecuting Corruption

National prosecutions of international corruption cases have failed to make a noticeable impact on widespread corruption.[152] Under the current framework, each MDB carries its own sanctioning process. Sanctions board decisions of each body are enforceable as for projects by other MDBs.[153] For instance, an entity that is debarred by the World Bank's Sanctions Board will often be unable, through reciprocity, to obtain a contract from another MDB.[154] The vendors and entities deemed non-responsible entities will be publicly listed and are ineligible to bid on or be awarded World Bank projects.[155] On an MDB project, fraudulent conduct may occur during project design, procurement, implementation, or during the project's later management.

Most prominently, the Integrity Vice Presidency ("INT") of the World Bank investigates and reviews possible allegations of corruption, and the World Bank's Sanctions Board issues sanctions.[156] Other MDBs abide by the Sanctions Board decision when selecting analogous bid procurements.[157] Reciprocity agreements — often known as cross-debarment — are standard practice among the World Bank and comparable MDBs.[158] Still, cross-debarment rarely occurs between a national government and MBD or other institution.[159] As a result, an entity that has been found corrupt and has been debarred by the World Bank or other MDB may be eligible to obtain procurement for a project from a national

151. *See id.*

152. *See* Alina Mungiu-Pippidi & Niklas Kossow, *Rethinking the Way We Do Anti-Corruption*, NATO REV. MAG., https://www.nato.int/docu/review/2016/also-in-2016/anticorruption-corruption-laws-regulation-control-anticorrp-budget-index/en/index.htm (last visited Feb. 26, 2020) (testing the effectiveness of various anti-corruption strategies using quantitative methods).

153. *See* INFORMATION NOTE, *supra* note 6, at 9.

154. *See id.* at 9–10.

155. *See id.* at 5.

156. *See id.* at 4 (defining the role of the "INT").

157. *See id.* at 9 (implementing "cross-debarments" between the sanctions board and MDBs).

158. *See also id.*

159. *See* Christopher R. Yukins, *Cross-Debarment: A Stakeholder Analysis*, 45 GEO. WASH. INT'L L. REV. 219, 221 (2013) (stating cross-debarment between governments and other institutions is not yet common).

agency elsewhere.[160]

The World Bank has introduced several additional concrete efforts to halt corruption, including the "introduction of a confidential hotline, tightening of procurement guidelines, intensive audits of projects, and support for improving procurement systems in client countries."[161] The World Bank also offers support to those countries requesting assistance in investigating potential acts of corruption.[162]

In addition to debarment, the World Bank and other MDBs have other avenues to recover assets lost to corruption — for example, the United Nations' and World Bank's Stolen Asset Recovery ("StAR") Initiative.[163] The StAR Initiative, part of the Bank's Governance and Anti-Corruption Strategy, is a fairly recent effort to reclaim assets that had been allocated for projects in developing nations.[164] Notably, the StAR initiative has been able to take effect due to the implementation of the UN Convention Against Corruption ("UNCAC"), which took effect in December 2005 and will be discussed in greater detail later in this Article.[165]

IV. EXISTING INTERNATIONAL TRIBUNALS ARE NOT SUFFICIENT TO PROSECUTE

A. Corruption: Limitations of the ICC

The limitations associated with standalone international courts, as was seen by the experience of the International Criminal Court ("ICC"), International Criminal Tribunal for Rwanda[166] ("ICTR"), and International Criminal Tribunal for the former Yugoslavia[167] ("ICTY"), suggest that a new judicial approach must be installed in order to successfully address corruption. Because the ICTR and ICTY were specially created to prosecute particularly heinous war crimes, this Article will only explore the limitations of the ICC.

Founded in 2002 by the Rome Statute, the ICC is a special court that

160. *See id.*

161. JEFF HUTHER & ANSWAR SHAR, THE WORLD BANK, ANTI-CORRUPTION POLICIES AND PROGRAMS: A FRAMEWORK FOR EVALUATION (2000).

162. *Id.*

163. THE WORLD BANK, STOLEN ASSET RECOVERY (STAR) INITIATIVE: CHALLENGES, OPPORTUNITIES, AND ACTION PLAN (2007).

164. *Id.*

165. *Id.*

166. *See Int'l Residual Mechanism for Criminal Tribunals for Rwanda*, UNITED NATIONS, http://unictr.irmct.org/ (last visited Apr. 25, 2020).

167. *See Int'l Crim Tribunals for the Former Yugoslavia*, UNITED NATIONS, http://www.icty.org/ (last visited Apr. 25, 2020).

investigates and prosecutes individuals charged "with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression."[168] While the ICC has launched investigations and prosecutions, leading to the public indictment of over forty persons for grave crimes, the ICC has been criticized as slow and inefficient.[169]

Scholars have also suggested that there are three major concerns associated with the ICC's current mandate. First, the ICC has been condemned for perpetuating imperialism through its focus on prosecuting Africans.[170] Second, the ICC has been criticized for its failure to adhere to the precedent of other tribunals.[171] Third, the ICC and other international tribunals have been criticized for their lack of information-sharing across tribunals.[172] Each of these criticisms will be discussed in turn.

The experience of the ICC suggests that, while effective in reducing corruption in some capacity, international courts are often slow and are not effective in reducing systemic corruption. Notably, the ICC has been criticized for perpetuating imperialism by subjugating and marginalizing Sub-Saharan African nations and has been slow and ineffective in carrying out prosecutions.[173] Some critics of the ICC have alleged that the ICC has placed a heightened focus upon prosecuting African nations that have

168. *About the ICC*, INT'L CRIM. CT., UNITED NATIONS, https://www.icc-cpi.int/about (last visited Apr. 25, 2020).

169. *See* Anthony Wang, *On the Failed Authority of the International Criminal Court*, INT'L POL'Y DIG. (June 15, 2018), https://intpolicydigest.org/2018/06/15/on-the-failed-authority-of-the-international-criminal-court/ (noting the ICC's "deep institutional bureaucracy" which slows its pace undermines public confidence in the ability to deter future wrongdoers). *See generally Home*, INT'L CRIMINAL COURT, https://www.icc-cpi.int/Pages/defendants-wip.aspx (last visited Feb. 26, 2020).

170. *See* Jessica Hatcher-Moore, *Is the World's Highest Court Fit For Purpose?*, THE GUARDIAN (Apr. 5, 2017), https://www.theguardian.com/global-development-professionals-network/2017/apr/05/international-criminal-court-fit-purpose.

171. *See* Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT'L DISP. SETTLEMENT 5, 20 (2011) (highlighting the importance of adhering to precedent in cases having the same legal issues).

172. OPEN SOC'Y JUSTICE INITIATIVE, BRIEFING PAPER: ESTABLISHING PERFORMANCE INDICATORS FOR THE ICC 8 (2015), https://www.justiceinitiative.org/uploads/b14d7fe9-0548-4b5e-9ebe-f97a6cf119ed/briefing-icc-perforamnce-indicators-20151208.pdf ("The ICC does not have an institutional tradition of sharing information across organs.").

173. *See, e.g.*, Ugamanim Bassey Obo & Dickson Ekpe*, Africa and the International Criminal Court: A Case of Imperialism By Another Name*, 3 INT'L J. DEV. & SUSTAINABILITY 2025, 2034 (2014), https://isdsnet.com/ijds-v3n10-6.pdf (contending that the prosecutorial inertia the ICC exerts when crimes are committed by dominant countries undermines justice for the larger pool of victims).

previously been harmed by Colonialism and other Western "assistance."[174]

Furthermore, the ICC has been criticized for its views toward stare decisis and precedent.[175] Although ICC decisions acknowledge the findings of other international courts, the ICC specifically provides that the decisions of the tribunals are not binding upon its decisions. Particularly, in *Prosecutor v. Lubanga Dujilo*, the tribunal stated that "decisions of other international courts and tribunals are not part of the directly applicable law . . . ."[176] Although the ICC has reviewed the opinions of other courts, the lack of an influential body of law reduces the efficacy and legitimacy of the Court.[177] In addition, the ICC and other international tribunals have been criticized for the lack of information-sharing processes across tribunals. This lack of transparency has reduced the efficiency and impartiality of these tribunals.

Despite the foregoing limitations, one approach that has been proposed to reduce corruption is expanding the ICC's mandate so that it can prosecute acts of corruption.[178] However, some critics have suggested that the ICC lacks the experience and resources to prosecute corruption.[179] The ICC currently lacks investigators and lawyers with this expertise.[180] Likewise, domestic legal prosecutors likely will not have the expertise to address corruption in other countries that may have differing customs and cultures. Further, acts of corruption vary widely from each other.[181]

Critics of expanding the ICC's jurisdiction have also argued that, because many of these investigations require undercover efforts and cooperating witnesses, the ICC, which has limited relationship with national law enforcement, would be unable to adequately conduct

174. Mwangi S. Kimenyi, *Can the International Criminal Court Play Fair in Africa?*, BROOKINGS INST. (Oct. 17, 2013), https://www.brookings.edu/blog/africa-in-focus/2013/10/17/can-the-international-criminal-court-play-fair-in-africa/ (suggesting that African countries were pressured to sign the EU treaty that intertwined colonialist interests with those of African countries).

175. Guillaume, *supra* note 171, at 12–13.

176. Prosecutor v. Dujilo, ICC-01/04-01/06, Judgment Pursuant to Art. 74 of the Stat., ¶ 603 (Mar. 14, 2012); Aldo Zammit Borda, *Precedent in International Criminal Courts and Tribunals*, 2 CAMBRIDGE J. INT. & COMP. L. 287, 294 (2013).

177. *See* Borda, *supra* note 176, at 294–95 (highlighting a need to turn to external decisions).

178. Alter & Sorensen, *supra* note 43 ("What international criminal law does best is prosecute those most responsible, at the apex of the pyramid, when individual nations are unwilling or unable to do so.").

179. *Id.* (finding the infrastructure insufficient for prosecuting mass atrocities).

180. *Id.* (noting that war crimes require a different set of skills from those of domestic approaches).

181. *Id.* (discussing a range of corruptions requiring specialized expertise).

investigations.[182] For this reason, critics have argued that the ICC would be unlikely to have the resources to investigate and prosecute corruption more effectively than the lawmakers that are working at the national level.[183] Such critics have further suggested that bilateral treaties, particularly those in the investor space, and other efforts to assist nations with additional resources to prosecute corruption within their borders would be more effective than another stand-alone international court.[184] As one example of an ancillary mechanism to fight corruption, certain scholars have proposed that international arbitration could play an increased role in fighting corruption.[185] The investor-state dispute mechanisms play a key role in ensuring that cross-border transactions are not befouled by corruption.[186] Bilateral investment treaties typically provide for international arbitration clauses to protect the investor and recipient state in the event of a dispute, and has imbued transparency into these agreements.[187] Applying similar efforts to agreements at risk for bribery may be a more effective and less burdensome mechanism to reduce corruption.[188] For these reasons, according to critics, the scope of ICC's responsibility should not be expanded to prosecute corruption.

V. A HYBRID, MIXED PROSECUTION APPROACH TO REDUCING CORRUPTION IS NEEDED TO BUILD UPON EXISTING NATIONAL AND INTERNATIONAL EFFORTS

Due to the apparent shortcomings associated with a limited national approach to anti-corruption, a more integrated cross-border approach must be created. There has already been a number of promising efforts at collaboration to reduce corruption.[189] Despite these promising early efforts,

182. *Id.*

183. *See id.* (reasoning that national level authorities are better equipped to handle witnesses).

184. *See id.*; *see also An Open Letter About Investor-State Dispute Settlement (April 2015*), MCGILL (Apr. 20, 2015), https://www.mcgill.ca/fortier-chair/isds-open-letter (describing value of bilateral investment agreements in promoting transparency and sovereignty). *But see* Leo O'Toole, *Investment Arbitration: A Poor Forum for the International Fight Against Corruption*, YALE J. INT'L L. (Dec. 1, 2016), https://www.yjil.yale.edu/investment-arbitration-a-poor-forum-for-the-international-fight-against-corruption/ (arguing international arbitration a weak mechanism to reduce corruption).

185. *See id.*

186. *Id*.

187. *Id*.

188. *Id*.

189. *See* Hassan, *supra* note 93 (explaining how some countries have amended their anti-corruption laws to expand the scope and extraterritorial application of the laws).

more still must be done.

The United States has signaled its support for increased international collaboration. Evidencing this support, Congress passed the International Anticorruption and Good Governance Act in October 2000, which aims to assist other countries "combat corruption throughout society and to improve transparency and accountability at all levels of government and throughout the private sector."[190] However, the United States did not offer new funding for anti-corruption efforts.[191] Most recently, the United States has signaled it will assist with auditing initiatives to promote transparency. As one example of these efforts, on March 1, 2019, GAO's Center for Audit Excellence announced that it had signed a Memorandum of Understanding with the World Bank in its latest attempt to "strengthen international accountability and promote good governance . . . [and] will include "potential to coordinate on needs assessments, advisory services, training, mentoring, internal controls, and performances audits, among other areas."[192]

As will be described further below, increased transparency and information sharing will be crucial in reducing corruption — evidence suggests corruption is significantly reduced where such acts are visible.[193] Increased information sharing will also reduce duplication of efforts.[194]

In tandem with improved information sharing, sanctions for corruption must be created. As experienced by the Export-Import Bank of the United States ("EXIM Bank"), prior to the creation of the Office of Inspector General ("OIG"), entities and persons will not be deterred from engaging in corrupt acts unless the penalties for such acts are steep.[195] Indeed, persons

---

190. U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-506, FOREIGN ASSISTANCE; U.S. ANTICORRUPTION PROGRAMS IN SUB-SAHARAN AFRICA WILL REQUIRE TIME AND COMMITMENT (Apr. 2014), https://www.gao.gov/assets/250/242162.pdf.

191. *Id.*

192. Press Release, U.S. Gov't Accountability Off., GAO's Ctr. for Audit Excellence & World Bank Begin New P'ship to Enhance Capacity of Accountability Orgs. (Mar. 1, 2019) (on file with the author).

193. *See* Robert I. Rotberg, *Accomplishing Anticorruption: Propositions and Methods*, 147 DAEDALUS J. AM. ACAD. ARTS & SCI. 12 (2018) (citing Georgia's information-sharing reforms that led to reduced corruption).

194. This approach would *not* include increasing access to information, it would include appropriate safeguards such that rogue governments would not misuse this information.

195. EXPORT-IMPORT BANK OF THE UNITED STATES, OFFICE OF INSPECTOR GENERAL, FY 2020 CONGRESSIONAL BUDGET JUSTIFICATION, 2 [hereinafter FY 2020 CONGRESSIONAL BUDGET JUSTIFICATION], https://www.exim.gov/sites/default/files/congressional-resources/budet-justification/FY_2020_EXIM_CBJ_-_Compliant.pdf (stating that pre-OIG enforcement attempts were unsuccessful because the penalties "did not carry significant risk," and "the lack of effective deterrence" served as an

who engage in corruption engage in a cost-benefit analysis and will not decide against such behavior until the risks outweigh the rewards.[196]

In light of the foregoing arguments, a unified anti-corruption sanctioning body must be created.

A. Where Prior Anti-Corruption Conventions Have Fallen Short: Weaknesses of the OECD Convention on Bribery

International conventions and treaties on corruption have presented early first attempts at an international effort to reduce corruption; however, such efforts have not adequately mitigated corruption or its effects. Such early attempts to coordinate anti-corruption laws suggest additional unification is possible.

Most prominently, in 1994 the OECD created the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions ("OECD Anti-Bribery Convention"), which "requires its parties to criminalize the bribery of foreign public officials in international business transactions."[197] The Convention was ratified in 1997 by twenty-nine member countries.[198]

The OECD, founded in 1961 with aims of promoting worldwide economic progress, currently has thirty-nine parties to the OECD Anti-Bribery Convention.[199] Thirty-four of these members are OECD member countries, while five Convention members, including South Africa, Russia, Bulgaria, Brazil, and Argentina, are not currently OECD members.[200] As part of the OECD's efforts to reduce corruption, nations including the United States have taken steps to implement anti-corruption efforts postulated during the OECD Anti-Bribery Convention.[201]

---

incentive for other parties to defraud EXIM Bank).

196. *See Combatting Corruption*, *supra* note 2 (explaining that increasing the costs of engaging in corrupt conduct by enhancing accountability and strengthening enforcement mechanisms is key to effective deterrence); *see also* FY 2020 CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 195, at 2 ("An active program of investigating and arresting foreign nationals responsible for fraudulent schemes has been implemented and has generated results.").

197. CRIMINAL DIV. OF U.S. DEP'T OF JUSTICE & ENF'T DIV. OF THE U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 7 (Nov. 14, 2012) [hereinafter A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT], https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

198. Hassan, *supra* note 93.

199. A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, *supra* note 197, at 7.

200. *Id.*

201. *See* DEP'T OF JUSTICE, STEPS TAKEN BY THE UNITED STATES TO IMPLEMENT

The OECD also has a Working Group on bribery, which considers potential avenues to reduce corruption.[202] The Working Group further assists with the implementation and oversight of such anti-bribery efforts.[203] All members of the Anti-Bribery Convention participate in the Bribery Working Group.[204] Colombia has also been invited to join the Working Group.[205]

The Working Group implements recommendations set forth in the Anti-Bribery Convention.[206] The Working Group engages in a quarterly peer review to monitor whether member states are adequately implementing the provisions of the Anti-Bribery Convention.[207] The Working Group also sets forth a peer-review monitoring system that assesses whether a country's domestic laws adequately implement the Convention, whether such laws are effective, and whether a country is adequately conducting enforcement actions when corruption is identified.[208]

However, the OECD Convention has significant limitations, including the fact that it has no jurisdiction over non-signatories or other nations that choose not to accept its jurisdiction.[209] Further, the OECD solely implements the domestic anti-corruption laws of a particular nation, but does not provide for a single body to oversee efforts to prosecute corruption affecting multiple nations concurrently.[210]

B. UNCAC Has Failed to Adequately Address Corruption.

Like the OECD, the U.N. Convention Against Corruption ("UNCAC") has been unable to adequately prosecute acts of corruption. UNCAC was passed by the U.N. General Assembly on October 31, 2003, and took effect on December 14, 2005.[211] Like the OECD Convention, UNCAC requires

---

AND ENFORCE THE OECD ANTI-BRIBERY CONVENTION (Feb. 25, 2013), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/03/19/2013-02-25-steps-taken-oecd-anti-bribery-convention.pdf (describing enforcement resources and actions by the United States).

202. A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, *supra* note 197, at 7.

203. *Id.*

204. *Id.*

205. Hassan, *supra* note 93.

206. A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, *supra* note 197, at 7.

207. *Id.*

208. *Id.*

209. *See* Anna Souza, *The OECD Anti-Bribery Convention: Changing the Current of Trade*, 97 J. DEV. ECON. 73, 73 (2012).

210. *See* Hassan, *supra* note 93, at 13–14.

211. *See* A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, *supra*

that signatories prosecute acts of corruption and sets forth a peer-review mechanism to review anti-corruption laws of the signatories.[212] UNCAC also "establishes guidelines for the creation of anti-corruption bodies, codes of conduct for public officials, transparent and objective systems of procurement, and enhanced accounting and auditing standards for the private sector."[213] UNCAC has broader support than the OECD Convention, with 163 countries as members.[214]

UNCAC draws upon earlier international efforts to prosecute corruption, such as the Inter-American Convention Against Corruption ("IACAC"), which was the first international convention on anti-corruption and was ratified in March 1996 by member states of the Organization of American States.[215] Like the OECD and UNCAC, member parties to the IACAC must criminalize bribery and other acts of corruption.[216] Compliance with the IACAC is monitored by the Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption ("MESICIC").[217] There are currently thirty-one countries subject to the MESICIC.[218]

Similarly, in 1999, the Council of Europe set forth its own anti-corruption efforts in the form of the Group of States Against Corruption ("GRECO").[219] GRECO oversees whether adopting nations have complied with European anti-corruption laws, including prohibitions on bribery.[220] GRECO member states are not required to be part of the Council of Europe.[221] The United States, along with forty-five European nations, are currently GRECO members.[222]

However, UNCAC, IACAC, and GRECO's efficacy is marred by many of the same limitations that the OECD Convention faces. Like the OECD Convention, anti-corruption efforts under these treaties cannot be enforced against non-signatories.[223] Further, efforts pursuant to these treaties merely

---

note 197; *see also* Hassan, *supra* note 93.

212. A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, *supra* note 197, at 8.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *See id.* at 7–8 (explaining that although all signatories to anti-corruption treaties

assist nations in implementing domestic laws of corruption but do not have a single body, tribunal, or other mechanism to oversee efforts where multiple nations are affected by corruption, or where an individual nation lacks resources to adequately prevent or prosecute pervasive corruption occurring within its borders.

C. Current Efforts Ignore Certain Negative Ramifications Associated with Prosecuting Corruption

Finally, many of the foregoing international efforts have failed to address certain negative ramifications associated with prosecuting corruption. For example, sanctioning an entity, thus barring it from participating in public works contracts, could lead to bankruptcy of that entity, which would in turn lead to unemployed workers.[224] If the public works contractor is a large firm, as was Odebrecht, its bankruptcy could lead to significant unemployment in the region.[225] Such bankruptcy could destabilize the immediate region and may prevent the public infrastructure project from being created altogether.[226]

D. The Export-Import Bank of the United States Provides a Mixed Prosecution Model to Halt Corruption

The EXIM Bank bears certain structural similarities to MDBs and engages in large-scale cross-border transactions in nations around the world. The EXIM Bank is the official export credit agency of the United States and engages in lending transactions that are considered too risky for the private sector to pursue.[227] Loans through the EXIM Bank are backed through the full faith and credit of the United States.[228] Despite the inherent risks associated with these transactions, the EXIM Bank maintains a consistently low default rate.[229] The Bank's low default rate may be

---

review and assist in monitoring the implementation of anti-corruption efforts in signatory countries, each signatory must enact their own domestic and foreign anti-corruption laws).

224. *See* BEITTEL ET AL., *supra* note 30, at 36 (stating that "a key constraint on firms being barred from public works contracts because of corruptions is the threat of bankruptcy . . . .").

225. *Id.*

226. *Id.*

227. *About Us*, EXPORT-IMPORT BANK OF THE UNITED STATES, https://www.exim.gov/about (last visited Apr. 25, 2020) ("When private sector lenders are unable or unwilling to provide financing, EXIM fills in the gap for American businesses by equipping them with the financing tools necessary to compete for global sales.").

228. *Id.*

229. *Id.*

attributed to the agency's Office of the Inspector General ("OIG"), which conducts audits, inspections, and investigations on behalf of the Bank.[230]

The EXIM Bank's approach differs significantly from that of development banks in a key way — instead of merely waiting until the corruption has progressed and then "debarring" or taking other retaliatory action against an entity, the EXIM Bank can take steps to stop the corruption immediately and may rely upon the assistance of the U.S. Department of Justice and other agencies to reclaim misappropriated assets.[231] The EXIM Bank has emphasized to Congress the OIG's significant ability to halt corruption, noting that before OIG's creation, EXIM's "limited investigative and prosecutive efforts in prior years contributed to a perception that defrauding EXIM Bank did not carry significant risk, particularly for foreign parties," and that "[t]he lack of effective deterrence encouraged others to attempt similar crimes."[232]

The OIG has been very effective: since 2009, its efforts have led to 104 indictments or "informations" and eighty convictions.[233] The OIG, assisted by the U.S. Department of Justice ("DOJ"), has recovered $340 million in misappropriated funds, despite having an operating budget of only $41 million during the same period.[234] The OIG and the DOJ have also arrested defendants on criminal charges in a number of foreign countries including United Arab Emirates, Argentina, and Mexico.[235]

The EXIM Bank has also increasingly relied upon technology and information sharing to reduce the likelihood of nonrepayment. Prior to approving a financial transaction, the agency looks at self-certifications, credit reports, and reports by third party vendors, such as Thomson Reuters World Check database, which "currently checks over 20 different watch lists and other databases, including list of entities excluded from doing

230. FY 2020 CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 195, at 2–4 ("Pursuant to current law, the OIG is required to supervise and report on the audit of the Bank's annual financial statements, audit compliance with the Federal Information Security Modernization Act (FISMA), report on the Bank's compliance with the Improper Payments laws, conduct a risk assessment of the Bank's purchase card programs, and comply with auditing, inspection, and investigations standards, including the Generally Accepted Government Auditing Standards (GAGAS), Quality Standards for Inspections and Evaluation, and the Attorney General's Guidelines for Investigations.").

231. *Id.* at 2 (reasoning that OIG's active scheme of investigating and arresting foreign nationals deters foreign nationals from defrauding EXIM Bank).

232. *Id.*

233. *Id.*

234. *Id.* at 2–3.

235. *Id.*

business with the federal government."[236]

E. U.S. Prosecution of Cross-Border Corruption Further Depicts How a Multifaceted Approach May Be Employed to Address Corruption.

The United States has other mechanisms in place to prosecute acts of corruption that violate U.S. law but occur outside the U.S. border. For potential violations of the U.S. Foreign Corrupt Practice Act ("FCPA"), DOJ's FCPA Unit works closely with the Federal Bureau of Investigation's ("FBI") International Corruption Unit to investigate and reclaim lost assets.[237] The Department of Homeland Security and the Internal Revenue Service's Criminal Investigation Unit also assist with FCPA investigations.[238] Where applicable, the Department of Treasury's Office of Foreign Assets Control provides additional assistance in FCPA cases.[239]

If cross-border diplomatic efforts are needed to address acts of corruption, the Department of State will usually engage in such efforts.[240] The Department of State also promotes U.S. interests in reducing corruption and promoting transparency through building foreign capacity for anti-corruption efforts and entering into international treaties aiming to reduce corruption.[241] The United States has provided annual support of up to $1 billion to promote anti-corruption efforts overseas.[242]

For these reasons, a new hybrid mechanism to prosecute corruption must be created to act in tandem with prior efforts. This new mechanism would not supplant efforts by the OECD Convention, UNCAC, IACAC, and GRECO, among other bodies, but instead would merely provide an additional avenue to investigate and prosecute corruption where these mechanisms fall short.

VI. RECOMMENDATIONS

While some other authors have postulated the creation of an international

236. U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-337, EXPORT-IMPORT BANK: EXIM SHOULD EXPLORE USING AVAILABLE DATA TO IDENTIFY APPLICANTS WITH DELINQUENT FEDERAL DEBT 17–18 (2019), https://www.gao.gov/assets/700/699291.pdf.

237. A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, *supra* note 197, at 5.

238. *Id.*

239. *Id.*

240. *Id.* at 6.

241. *Id.*

242. *Id.*

anti-corruption court akin to other large international courts (such as the ICTY), such a court would initially be too unwieldy, expensive, and inefficient to meaningfully reduce corruption.[243] Instead, a gradual increase in collaboration in investigating and prosecuting corruption is needed. Established in multiple phases, a hybrid international anti-corruption "court" that possesses the capacity to both investigate acts of corruption and bring claims against those persons or entities should be created. The proposed court would have unique jurisdiction — it would be able to review acts of corruption associated with MDB projects, national projects, governments, and other institutions. The court would also create binding and nonbinding precedent, which it may use in subsequent decisions. The use of precedent will assist in predictability and efficiency.[244] For this approach to be effective, national governments would need to recognize the legitimacy of the court and would need to engage in information sharing with the court officials and investigators. This new body would also have authority to impose stricter sanctions on those persons or entities found to have engaged in corruption and would rely upon the assistance of national and international police forces and agencies to enforce its penalties.

A multi-phased approach for addressing corruption in large-scale international development projects would be most effective in allowing the court to gain legitimacy and would enable the court to acquire resources (both in terms of fiscal resources and expertise). During this initial phase, a unified sanctions board to prosecute acts of corruption affecting large-scale projects and investments must be created. Initially, the proposed board would involve only select entities, including other MDBs and public agencies overseeing risky cross-border transactions. The unified sanctions board could gradually be expanded to initially include those nations seeking outside assistance in investigating and prosecuting corruption. However, the board's scope would gradually expand to be accessible to,

243. *Compare* approach presented here (advocating for a malleable structure based upon increased collaboration and information-sharing between countries, and gradual implementation to promote legitimacy), *with* proposal outlined by Mark L. Wolf, *The World Needs an International Anti-Corruption Court*, 147 DAEDALUS, J. AM. ACADEMY ARTS & SCIENCES 144, 145 (2018) (proposing creation of a formal international anti-corruption court). While the author here believes that the creation of a formal international anti-corruption court would not be disadvantageous, a phasic approach that incorporates increased information-sharing and increases penalties is likely to be more effective in reducing widespread corruption and less expensive. Pursuant to this approach, different bodies could use information sharing to reduce duplication of efforts. The decisions of such bodies could then be used by other bodies to promote economy (even to the extent that the decisions of one body are not binding on another body).

244. Borda, *supra* note 176, at 298 (explaining that using external judicial decisions has apparent efficiency benefits).

and assist with, anti-corruption efforts for other UN organizations and national entities, though membership and jurisdiction would be wholly voluntary.

The proposed unified sanctions board would possess its own investigative body. This investigative body would be able to provide assistance to countries that prefer to conduct their own investigations internally. Further, although members would be capable of investigating and prosecuting cases in front of the unified sanctions board, prosecution could also be held before a national court or other international tribunal.

As the second phase of this approach, a full international anti-corruption court could be created, with its jurisdiction gradually expanded as the court develops a body of case law that would serve as precedent. This anti-corruption court would be derived from the initial phase's unified sanctions board. The proposed anti-corruption court would be complementary to existing regimes, meaning that if individual nations are adept to investigate and prosecute corruption within their country, then they would continue to be able to prosecute internally through their nation's courts. However, the international anti-corruption court's investigators and judges would have specialized expertise in prosecution and asset recovery that national governments often lack.[245] Another advantage of submitting to the court's jurisdiction would be the ability to harmonize the current regulations, which would provide a more unified international approach against fraudulent conduct. Further, unlike the ICC, the court would adhere to existing precedent and could rely upon its own prior decisions or the decisions of national governments.[246]

There are many advantages to this proposal. The creation of a new, unified sanctions board and an anti-corruption court for the MDBs and UN agencies will help with alleviating some of the shortcomings found in the current system, whereby each MDB prosecutes corruption through its own

245. Wolf, *supra* note 243, at 145 (providing the example that the United States does not allow district attorneys to prosecute local officials due to lack of legal expertise).

246. *Compare* Kimble v. Marvel Entm't, LLC., 135 S. Ct. 2401 (2015) (reaffirming the principle of stare decisis because it promotes predictable and consistent development of legal principles, reliance on judicial decisions, and perceived integrity of the judicial process), *with* Guillaume, *supra* note 165, at 9 (stating that the Court's precedent is not binding, and it will not abide by stare decisis), *and* Borda, *supra* note 175, at 294 (reporting that international courts consistently find external judicial decisions are merely persuasive and not binding), *and* Prosecutor v. Dyilo, ICC-01/04-01/06, Judgment Pursuant to Art. 74 of the Statute, ¶ 603 (Mar. 14, 2012) (finding that opinions of international courts are excluded from the directly applicable law under article 21 of the Statute).

sanctioning entity.[247] The creation of a new, unified sanctions board will provide a more harmonized and consistent approach to the problem of corruption and will impose a stronger and clearer signal to entities and individuals contemplating fraudulent conduct. A unified sanctions board would also address more efficiently the transparency limitations in the current reciprocity approach.[248] For instance, it will help promote information sharing and ensure that debarred entities are unable to continue to procure bids.

Once fully established, the proposed "court" would also be effective in prosecuting acts of corruption that span across multiple nations, as was seen in the Odebrecht scandal.[249] The court must have the capacity to investigate and prosecute both large- and small-scale acts of corruption — as one example, two divisions within the court, a "small-scale corruption division" and a "large-scale corruption division" (divided by the potential amount of lost funds) may be created, so that each type of case is given appropriate consideration. Such a court would be particularly beneficial for developing nations, where key government officials have frequently been found to accept bribes in exchange for certain acts or awards.[250] Allowing the international anti-corruption court to prosecute acts of corruption means that these nations can rely upon an outside, third-party resource to provide anti-corruption expertise and authority when the nation acting alone may not. The international anti-corruption court would also be able to impose fines and sanctions upon entities in multiple nations in a single decision or opinion, thus increasing efficiency and saving time and resources. In imposing sanctions, the court would be required to consider the potential effects on the immediate populace (such as unemployment and displacement) associated with possible penalties.[251]

---

247. *See supra* Parts III, IV.

248. *See also* INFORMATION NOTE, *supra* note 6, at 9 (stating that the Bank Group's 'cross debarments' of other MDB's debarments are not subject to its sanctions process, and the Bank Group Management itself reviews the Bank Group's decisions to opt out of a specific debarment decision).

249. *See* BEITTEL ET AL., *supra* note 30, at 9 (demonstrating successful prosecution of corruption by multiple nations with international support after an initial settlement agreement between Brazil, Switzerland, and the United States).

250. *See id.* at 6, 10 (noting the "long-time practice of businesses and foreign corporations paying bribes to gain contracts in developing countries," as evidenced by arrests of former presidents Temer and Inacio Lula da Silva as well as other high-level government officials in Brazil in association with Odebrecht bribery investigations).

251. *Id.* at 36 (noting approaches to combatting anti-corruption should reflect country-specific circumstances especially since resisting corruption may result in bankruptcy of companies and have "destabilizing economic consequences" which leave many unemployed).

The proposed international anti-corruption mechanism will also be hallmarked by collaborative asset-recovery capacities, similar to those efforts that U.S. agencies and the EXIM Bank have installed.[252] The court could utilize national police forces (of both the affected nation and other nations) and intelligence to recover funds otherwise lost to corruption. This asset-recovery ability will allow the international anti-corruption court to, over time, fund its own operations by taking a portion of the reclaimed funds. Like the EXIM Bank's OIG, the international anti-corruption court, when fully utilized, will be able to return its operating budget by multiple times.[253] By allowing for information sharing and enforcement with signatory nations, the proposed court will also have the knowledge and police power to implement its decisions. Finally, as experienced by the EXIM Bank,[254] the penalties for engaging in corruption must be heightened — if actors believe that the penalties for engaging in corruption are particularly severe, then they will be deterred from engaging in future acts of corruption.

The proposed approach is described below:

> *1. Create a new, unified sanctions board for national governments, MDBs and UN agencies to bring allegations of corruption and bribery. The number of tiers and specific structure is not expressly described here, but the intention is for the board to become multi-tiered over time to prosecute corrupt acts of various magnitudes and types.*

A new, unified sanctions board and a system for MDBs and UN agencies to investigate and prosecute allegations of fraudulent conduct should be created. The number of tiers of the proposed unified sanctions board may be dictated based upon the relative need and the structure most beneficial to promote efficiency and ensure effective adjudication of allegations. However, the proposed structure would likely trend toward a more involved, multi-tiered mechanism, in which recourse for varied forms of

252. FY 2020 CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 195, at 2–3 (noting the EXIM OIG was created to combat the perception that one could defraud the EXIM Bank without any repercussion. Now, the EXIM OIG and the U.S. Department of Justice arrest violators "who have attempted to defraud the Bank or affiliated financial institutions." After the arrests, defendants will then repay any outstanding amounts on transactions to the EXIM Bank.).

253. *Id.* (stating that even by conservative estimates OIG has saved the federal government "several multiples of its budget").

254. *Id.* (stating that pre-OIG enforcement attempts were unsuccessful because the penalties "did not carry significant risk," and "the lack of effective deterrence" served as an incentive for other parties to defraud EXIM Bank).

corruption or bribery would be available through separate channels. Once it becomes operational, the proposed structure will likely have at least two tiers and involve both public and private sector actors, meaning that cases could be brought by public or private entities affected by corruption during large-scale projects or investments. Additionally, separate allegations for corruption or wrongdoing could be brought against public servants outside of the scope of large-scale projects if a signatory requests outside assistance in adjudicating such a case (due to bias of government prosecutors or a lack of resources, for example).

2. Incorporate information-sharing provisions that would facilitate the unified board's access to information and serve as a potential conduit for information sharing between national agencies.

Second, the unified board's structure should incorporate information-sharing provisions that would facilitate the tribunal's access to information, as well as serve as a potential conduit for information sharing between national agencies. As noted above, one criticism that has marred the ICC is the tribunal's lack of transparency and its failure to effectively incorporate precedent.[255] The proposed structure would more effectively integrate precedent through information sharing. Certain investigative materials created by national prosecutors could be made available to the unified board in order to prevent duplication of efforts and ensure that any decision by the board is accurate and based upon a thorough investigation. One way to address the weaknesses inherent in the existing system would be to make the new body be an implementing agency for the information-sharing parts of UNCAC.

3. Expand the unified board to address administrative actions against civil servants engaging in corrupt acts or accepting bribes as part of their official duties.

Third, the unified sanctions board structure should be gradually expanded to address, investigate, and prosecute administrative actions against civil servants who have been accused of committing fraudulent conduct. This will expand upon the scope and efficacy of the court's reach. Initially, the court will not prosecute criminal acts.

255. *See* OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 172, at 2 (proposing the ICC implement performance indicators in response to an increased demand from States for enhanced efficiency and transparency for States evaluation of the ICC's performance).

4. Expand the unified board to address criminal cases against civil servants who have engaged in criminal wrongdoing relating to large-scale projects. Allegations may be brought by MDBs, UN agencies, national governments, or other similar agencies that cannot effectively prosecute the wrongdoing without the assistance of an impartial body.

Fourth, the unified board's structure should be gradually expanded to address, investigate, and prosecute criminal cases against civil servants who have been accused for committing fraudulent conduct affecting large-scale projects, including projects for which government bids or solicitations are required. Starting with administrative actions and extending the court's authority to criminal cases will help the unified board to gradually transition into an anti-corruption court, as will be detailed in the following section.

5. *Create an international anti-corruption "court" to address fraud, corruption, and bribery in large scale projects awarded by national governments, MDBs, UN agencies, or similar agencies, as well as smaller allegations of corruption against civil servants in which a national body may be unable to impartially or effectively adjudicate.*

Fifth, an international anti-corruption "court" should be created. The proposed international anti-corruption court will be created out of the unified sanctions board and the system for prosecuting allegations for fraudulent conduct for MDBs and UN agencies as outlined in the initial phase. This court should have its own judges, which are elected through a democratic mechanism.

The proposed international anti-corruption court can be distinguished from the preceding unified sanctions board, as the court will have a significantly broader jurisdiction and will be accessible to national governments, governing bodies, MDBs, and UN agencies around the world.[256] However, the jurisdiction of the international anti-corruption court will remain complementary to existing regimes. Thus, if an individual nation believes that it has the ability to prosecute corruption internally and within its borders, that nation will have the ability to do so. This means that the international anti-corruption court's jurisdiction must be adopted by the governing nation and may reduce the court's efficacy. Nations will need to expressly sign onto the international anti-corruption court's jurisdiction.

256. *See* INFORMATION NOTE, *supra* note 6, at 15 (detailing the current unified sanctions board's jurisdiction).

Despite this shortcoming, there remain numerous advantages that nations will likely find to be strong motivation to become a member of the international anti-corruption court. The first advantage of joining the international anti-corruption court will be that the court shall possess its own investigators, who will be specially trained in complex international investigations and asset recovery. Instances of corruption often cross international borders, and an anti-corruption body within a single nation, acting alone, is often unable to effectively quash transnational corruption without the assistance of an overarching, supra-national body.[257] The court's investigators will also be trained to have particular expertise in asset recovery, including for those transactions whereby money or other assets have crossed national borders. For example, money-laundering cases often implicate a variety of different laws, cross international borders and require a team of sophisticated investigators to be able to analyze and resolve effectively.[258]

The second advantage of joining the international anti-corruption court is that the court will be able to rectify the disputes involving corruption and fraudulent conduct that implicate more than one nation. Although the opposing nations would need to submit to the international anti-corruption's jurisdiction, the court will help to impugn impartiality and fairness and will assist with maintaining positive relations among nations.

Finally, the third advantage associated with joining the international anti-corruption court is that the court will be more effective in identifying and enforcing allegations of corruption and will help to fill the gaps in anti-corruption enforcement where individual nations, MDBs, and UN bodies, working through treaties and reciprocity agreements, have been unable to do so.[259]

There is one aspect of the proposed approach that must be clarified — the author does not agree with the formalistic approach for the creation of a true "international anti-corruption court" created in the image of the ICC, ICTY, or ICTR.[260] Such rigid courts have many pitfalls, including the fact

257. *See* Webb, *supra* note 37, at 192–93 ("The flow of information, money, drugs, and arms across borders has also destroyed the illusion of corruption as a domestic political issue to be left to individual countries.").

258. *See id.* at 210–11.

259. Wolf, *supra* note 20, at 1 ("An International Anti-Corruption Court would have the potential to erode the widespread culture of impunity, [and] contribute to creating conditions conducive to the democratic election of honest officials in countries which have long histories of grand corruption.").

260. *See About the ICC*, UNITED NATIONS, https://www.icc-cpi.int/about (last visited Mar. 21, 2020) (asserting the ICC was established by the Rome Statute which serves as the court's guiding legal document); *see also International Criminal Tribunals for the Former Yugoslavia*, UNITED NATIONS, http://www.icty.org/en/about (last visited Apr.

that these entities are expensive and otherwise not cost-effective.[261] Such courts have also been criticized for being slow in their prosecution of persons engaged in international crimes. Here, the proposed approach would take into account the fact that corruption is a widespread problem perpetuated by smaller actors. Consequently, there must be a mechanism to prosecute both large-scale and small-scale actors. The international anti-corruption court shall develop mechanisms to prosecute both larger and smaller acts of corruption. Such an approach would be akin to the U.S. court system, which has both a small claims division, as well as divisions for more significant crimes.[262] Understanding that corruption arises on both a large and small scale, driven by both large and small actors, is key to effectively prosecuting corruption. Importantly, the anti-corruption court would also at least partially fund its operating expenses by reclaiming a portion of the funds otherwise lost to corruption.

VII. CONCLUSION

To conclude, there is a critical need to create an international anti-corruption enforcement body and gradually expand its jurisdiction. A streamlined, unified approach is vital to rectifying the shortcomings of the current system. This Article postulates that there is a value in gradually establishing an international mechanism for prosecuting corruption cases. Given the weaknesses of many nations' capacity and political will to deter fraudulent acts, moving toward a unified system may assist in reducing corruption in those nations where it is most likely to occur.

25, 2020) (stating the ICTY was established in accordance with Chapter VII of the UN Charter); *International Residual Mechanism for Criminal Tribunals for Rwanda*, UNITED NATIONS, http://unictr.irmct.org/en/tribunal (last visited last Apr. 25, 2020) (stating the International Criminal Tribunal for Rwanda was established by Resolution 955 of the UN Security Council).

261. *See International Criminal Court: 12 Years, $1 Billion, 2 Convictions*, FORBES (Mar. 12, 2014), https://www.forbes.com/sites/daviddavenport/2014/03/12/international-criminal-court-12-years-1-billion-2-convictions-2/#26b9565e2405 (observing that many question whether the ICC is too expensive and ineffective to justify given its conviction rate and total expenditures in obtaining them); *see also* Rupert Skilbeck, *Funding Justice: The Price of War Crimes Trials*, 15 AM. U. HUMAN RIGHTS BRIEF 1 (2008), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=&https redir=1&article=1028&context=hrbrief (claiming the ICTYR spent $1.2 billion (762 million euros) and the ICTR spent $1 billion (635 million euros) in ten years of operating, a cost of between $10–15 million (6.4–9.5 million euros) per accused).

262. *Introduction to the Federal Court System*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/usao/justice-101/federal-courts (last visited Apr. 25, 2020) (explaining the federal court system).