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The World Is Broken: The Social Construction of a Global Corruption Problem

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Abstract

This thesis examines the social construction of a global corruption problem by introducing a methodological framework from the field of sociology and adapting it to International Relations (IR). It provides an alternative explanation for the adoption of anti-corruption instruments in the period 1994-1997 and the international institutionalization of anti-corruption reforms. It challenges conventional views that point to the rise of non-state actors, such as Transparency International, and the end of the Cold War. By tracing the trajectory of the corruption problem, it shows that the dynamics of the 1990s can only be fully understood within the legacy of the 1970s and, in particular, the failed talks at the United Nations. The institutionalization of the global corruption problem in the 1990s was a product largely of historical contingency and state intentionality. While it appeared that a new issue has taken international organizations by storm, it was largely key state agents that were creating this change by building coalitions and maneuvering between venues.

The thesis employs methods of discourse and practice analysis from sociological research for the empirical study of claims. The analysis makes use of archival data to open up the pre-negotiation talks on illicit/corrupt payments at the OECD and the UN and study the process of claims-making, as well as document discursive strategies such as controversy management and feasibility. By taking a step back from the study of norms to look at the social construction of problems, the thesis introduces new methodological tools into constructivist IR. It also provides for the integration of state agency in constructivist approaches by showing how state actors engage in ontological warfare over the definition and institutionalization of new problems. Studying the social construction of problems through the process of claims-making elucidates the power relations that inform the established definitions and the spectrum of legitimate solutions; it helps us better understand the makings of international reality.

Abbreviations

ACRN	Anti-Corruption Research Network
BAE	British Aerospace
BIAC	Business and Industry Advisory Committee
CCL	corporate criminal liability
CIME	Committee on International Investment and Multinational Enterprises
CIPE	Center of International Private Enterprise
CoE	Council of Europe
CPI	Corruption Perception Index
DAFFE	Directorate for Financial, Fiscal and Enterprise Affairs
ECOSOC	United Nations Economic and Social Council
EU	European Union
FATF	Financial Action Task Force
FCPA	Foreign Corrupt Practices Act
FDI	Foreign Direct Investment
FIDIC	Business Integrity Management Clearing House of the International Federation of Consulting Engineers
GATT	General Agreement on Tariffs and Trade
GIACC	Global Infrastructure Anti-Corruption Centre
GFC	global financial crisis
G7	Group of 7
G-77	Group of 77
G20	Group of 20
ICC	International Chamber of Commerce
IFIs	International Financial Institutions
IME	Committee on International Investment and Multinational Enterprises
IMF	International Monetary Fund
ITT	International Telephone & Telegraph
NIE	New Institutional Economics
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
PACI	Partnering Against Corruption Initiative
PPP	public-private partnership
RBIBT	Recommendation on Bribery in International Business Transactions
SEC	Securities & Exchange Commission
SME	small and medium enterprises
TI	Transparency International
TI USA	Transparency International United States of America
TNC	Trans-National Corporation
TUAC	Trade Union Advisory Committee
UN	United Nations
UNCAC	United Nations Convention Against Corruption
UNICORN	Unions Anti-Corruption Network
UNCTAD	United Nations Conference on Trade and Development
UNODC	United Nations Office on Drugs and Crime
UNTERM	United Nations Terminated Missions
UNTOC	United Nations Convention against Transnational Organized Crime
UK	United Kingdom
US	United States
WGI	Worldwide Governance Indicators
WTO	World Trade Organization

Introduction

The World Is Broken: The Social Construction of a Global Corruption Problem

Global governance and international regimes constitute an attempt to fix what is seen to be broken. Arguably, the exponentially increasing demand for global solutions to complex problems encounters one insurmountable difficulty, which is that the world itself is also broken: it is broken into nation states. The attempt to tackle trans-boundary problems that exhibit ever-increasing sophistication has to, therefore, overcome the broken landscape of international affairs. The collective governance of global problems is seen as the triumph of norm-guided behavior over the self-interested conduct of nation states. Norm entrepreneurs, who are usually disinterested non-state actors, are seen to propel public debate and match optimal solutions to natural problems that are in dire need of urgent policy responses. This is how the world is fixed; by addressing problems and then handling the daunting task of implementing the chosen solutions.

One of the most notorious scourges of the global community at the beginning of the 21st century is corruption. A global survey conducted for the BBC ranked corruption as the second most serious global problem in 2010 and 2011.¹ In

¹ BBC World Service. "Global poll: Corruption is world's most talked about problem." Accessed May 29, 2014. http://www.bbc.co.uk/pressoffice/pressreleases/stories/2010/12_december/09/corruption.shtml

2014 a call to make corruption a crime against humanity and to include it in the jurisdiction of the International Criminal Court continued to gain momentum.² Corruption, and in particular bribery, are now seen to be on a par with genocide and war crimes. These examples are indicative of the gravity attributed to corruption but also of the continuous process of internationalization of the problem.

This thesis examines the social construction of the global corruption problem. It introduces a methodological framework from the field of sociology and adapts it to International Relations (IR). Constructivist scholars in IR have not studied the social construction of problems directly, but have been approaching the construction of international reality through the study of norms. Sociology has propelled much of the constructivist research agenda in IR, but the emphasis of the latter on normative and epistemic factors in understanding international politics has obscured the role of power in the production of social knowledge. A shift from the study of norms to the study of problems can reveal that below the malleable normative structures of international affairs lays a solid foundation of state interests and power. Studying social construction as an interactive process between state and non-state actors, this thesis shows that in the case of anti-corruption, state actors remain the most relevant constructors of global problems.

One of the goals of this thesis is to develop a deeper and more systematic understanding of the rise of corruption as a global problem. Why is it important to understand the rise of global social issues and why is it important to study them as

² US News. "Let Nations, Not the World, Prosecute Corruption" Accessed September 20, 2014. <http://www.usnews.com/opinion/articles/2014/04/30/dont-add-corruption-to-the-international-criminal-courts-mandate>

processes? Looking at problems as social constructs allows us to question commonsensical explanations and to understand the historically contingent aspects of their trajectory. As this thesis shows, there is no set natural history of social problems, but there are patterns of development, which constructivist researchers establish through the accumulation of case studies. By being attentive to the stages of development of a social problem, we can better understand the failure in issue-specific governance systems to bring forth change or ameliorate complex conditions. By unpacking the issues and studying the process of claims-making, we also gain insight into the power relations that lie below the established definitions and the gamut of legitimate solutions; we learn more about the making of international reality.

This thesis begins from the premise that international regimes, understood as issue-specific governance systems, emerge from problems. These global problems are not natural, but have to be constructed and, despite the recent focus on the role of non-state actors in international affairs, state agency remains essential to the process of social construction. The public preoccupation with political corruption across the globe does not provide for an automatic response from international organizations and financial institutions; national preoccupations with corruption do not translate into international or global anti-corruption measures. How do we explain then the simultaneous adoption of anti-corruption measures and conventions in the period 1994-1997 by the OECD, OAS, the EU, the CoE as well as the World Bank, the WTO and later the United Nations? Even if we assume that

international organizations have a radar to capture public discontent over issues across the globe and produce international legalization to mitigate public disgruntlement, this radar would have to be called 'states'.

The global anti-corruption eruption in the last twenty years (1994-2014) has presented researchers with the challenge of systematizing and conceptualizing the imposing corpus of global and national anti-corruption initiatives. The **first chapter** contributes to this task by introducing the main signposts in the discursive and policy landscape of the global anti-corruption expansion and delimiting the main actors according to the existing literature. The chapter starts to problematize corruption by engaging with the main conceptual tools and the major explanations for the rise of corruption as a global issue.

In order to provide a systematic account of how corruption became a global problem, this thesis builds on the work of Spector and Kitsuse (1973; 2009) on the social construction of problems. The **second chapter** lays the conceptual and theoretical foundations of the social construction of corruption as a global problem by adapting the sociological approach of Spector and Kitsuse (2009) to the field of International Relations. The framework is presented with its conceptual tools, such as the natural history or career of a social problem, the process of collective definition and the empirical study of claims. In adapting the approach to IR, this chapter shows that the process of claims-making is similar to the conceptualization of Abbott and Snidal (2000) of demanders and resisters in the production of international legislation, but the sociological approach sheds new light on the global

politics of contestation and can further our understanding of the creation of governance structures. When the construction of social problems becomes the product of a process of collective definition, the resisters stop being presented as opposition to the 'problem' and become contestant claims-makers in its construction. This shift is significant because it elucidates the production of global governance structures and the intricate debates on the definitions of problems which are tackled in the empirical chapters.

The **third chapter** charts the way in which the question of corrupt/illicit payments moved beyond national borders. It presents the socio-historical context of the launch of claims-making activities by identifying the first institutional recognition of claims. The content of global claims at the OECD and the UN is examined and the reasons for the failure to reach consensus on the definition of the problem are analyzed by taking stock of the counter-claims of the Group of 77. The stalemate of the talks at the United Nations led the government of the United States to find a unilateral solution to the question of corrupt payments. By establishing the agency of states in the process of social construction at such an early stage (1975) and analyzing the content of claims and counter-claims at the OECD and the UN, this chapter argues that the successful institutionalization of corruption in the 1990s can be fully understood primarily as the legacy of the 1970s.

By stressing the historical contingency of the process through which corruption emerged as a legitimate global concern, this study highlights the contingent aspect of social problems and displays them to be products of historical

processes and agents' intentionality. The **fourth chapter** shows how the deadlock of the 1970s shaped the talks in the early 1990s after the question of illicit/corrupt practices was brought again to the OECD agenda. Within the group of industrialized states, controversial claims over the definition and the scope of the practices that should be deemed 'corrupt' emerged and the attempt to usher an international agreement was juxtaposed to an understanding of corruption as a national problem; a problem best met within the borders of the nation state. Through the progressive study of feasibility and controversy management an agreement was reached on a Council Recommendation in 1994, which provided an entry point for the question of corruption, now defined as bribery, to be discussed in regional organizations such as OAS, the EU, and the CoE.

The fifth chapter maps out how, in the 1994-1997 period, the backbone of the international anti-corruption regime was laid out by OECD member states, who moved the discussions on anti-corruption measures between different venues such as the OAS, the CoE, the EU, the United Nations and the G7/8. This diffusion of venues was not done in order to promote anti-corruption measures more broadly, but to a significant extent, in order to shape the contents of an agreement at the OECD. The outcome of the anti-corruption endeavor was to a large degree the product of systematic state-powered coalition building and instrumental employment of venues and publicity. The contribution of non-state actors was largely shaped by previous efforts of state actors, in particular, the United States, and the ongoing intergovernmental dynamics.

The title of this thesis entails that the world is broken into nation states. The world is broken also by conditions that necessitate collective definitions and collective responses. The study of the social construction of a global corruption problem adds another element to the image of a broken world. The origin of the word 'corruption' comes from the Latin 'cor' (altogether) and 'rumpere' (break).³ On that note, this thesis does not mean to simply add another moderately critical account to the already burgeoning critically-inclined scholarship on the global anti-corruption resurgence. By presenting the social construction of the problem, this thesis also tries to add to a constructive debate on corruption in which the historical contingencies in our discursive and policy treatment of corruption are made more explicit, and possibly, more amenable to change.

³ Oxford Dictionaries, s.v. "corrupt," accessed October 22, 2014, <http://www.oxforddictionaries.com/definition/english/corrupt>

Incipit vita nova.

Dante Alighieri

I Chapter

Understanding the Global Anti-Corruption Eruption

Introduction

The expansion of global anti-corruption initiatives has been so impressive in the past twenty years (1994-2014) that enumerating and systematizing its manifestations across the globe has become a daunting task. The purpose of this chapter is, firstly, to present a map of the ‘anti-corruption eruption’ that has swept the globe. Secondly, to frame the anti-corruption initiatives conceptually and tackle the reasons for their rapid emergence and expansion according to the existing literature; thirdly, to delineate the main actors involved in the process. To this purpose, the first part of the chapter presents an outline of the major global anti-corruption initiatives and introduces the main actors in five different groups. The second part of the chapter starts to analyze the question as to why there has been a global anti-corruption eruption and who are the major actors responsible for this development. This section starts to problematize corruption as a global issue by introducing the six factors that have contributed to the rise of corruption as a global policy problem: the end of the Cold War, the good governance agenda of the World Bank, the coalition building of Transparency International, the quantification of corruption through the publication of international perception-based indices, the instrumental use of the issue

of corruption as a smoke-screen for policies of liberalization and finally, the role of the United States in rising corrupt payments on the global agenda.

The third part of the chapter then proceeds to examine four major ways of conceptualizing global anti-corruption work: anti-corruption as an issue for global governance (Rosenau and Wang 2001; Eigen 2013; Kirton, Savona and Fratianni 2013), as an international regime or regimes (Bukovanvsky 2002; Rosenvinge 2009; Davis 2009; Wolf and Schmidt-Pfister 2010), as a ‘movement’ (Yao 1997; Sampson 2005; Hough 2013) and as an industry (Sampson 2010). Two of the four concepts and their compatibility are given further consideration – that is the existence of an international anti-corruption regime and its relation to the theoretical framework of global governance. Regimes in the context of global governance literature can be seen as specific ‘governance systems’; providing governance in specific issue area (Ba and Hoffmann 2006; Stokke 2012). This thesis begins from the premise that international regimes emerge from problems. These global problems are not natural, but have to be constructed and despite the recent focus on the role of non-state actors in international affairs, state agency remains essential to the process of social construction.

1. The Global Anti-Corruption Eruption

In a short period of time in the mid-1990s, the question of corruption emerged in a number of venues and was addressed with a wide range of instruments. It seemed like a new issue had exploded onto the international scene after the end of the Cold War. The famous reference of Naim (1995) to a ‘corruption eruption’ was met with an equally imposing

anti-corruption eruption that took over the major international organizations and financial institutions and involved the business community and civil society actors.

1.1. Global Legal Framework and Intergovernmental Accords

A number of international legal treaties have been adopted since the mid-1990s that tackle the subject of corruption. The only legal anti-corruption instrument that is truly global in scope is the United Nations Convention Against Corruption (UNCAC) adopted in 2003. There are a number of international conventions with regional scope, most of which precede the UNCAC. These are the Inter-American Convention Against Corruption (1996), the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union (1997), the Council of Europe Criminal and Civil Law Conventions (1999) and the African Union Convention on Preventing and Combating Corruption (2003). Even though the OECD Convention is not a global instrument, it cannot properly be placed in the regional profile. This is primarily because the membership base of the OECD is not regional, but also because the Convention for Combating Bribery of Foreign Public Officials in International Business Transactions (1997) involves a strong transnational element with its focus on transnational bribery. This transnational element was incorporated into almost all of the above listed Conventions. Therefore, the OECD Convention can be set apart as a formal legal arrangement with a strong transnational character.

A complementary, albeit ‘national’, side of the global governance of corruption that further developed as a consequence of the OECD Convention, is the application of domestic acts with extraterritorial reach such as the United Kingdom Bribery Act from 2010 and the United States Foreign Corrupt Practices Act (FCPA) from 1977.⁴ While other national legal acts targeting the curbing of corruption exist, these two pieces of legislation enjoy an extensive extraterritorial application. The extraterritorial reach of the Bribery Act and the FCPA is partly due to their legal provisions but also to the special position that both the United Kingdom (UK) and the United States (US) hold in the global economy. The jurisdictional reach of the Bribery Act, for example, is extended to all companies that have a ‘presence’ in the UK, which may be an office, operations or subsidiary (Bribery Act 2010).⁵ The UK jurisdiction applies even to acts committed in a third country that do not bear connection to the operations of the liable company in the UK (Dunst, Diamant and Kung 2011). In this respect Article 12 of the Bribery Act comes close to the provisions of the FCPA which came into effect after the amendments of 1998.⁶ The extended US jurisdiction was possible because the OECD Convention, adopted the previous year, allowed for amendments to the FCPA, so that all companies listed on a US stock exchange would be liable even for corrupt acts committed in a third country (Ashe 2004). The prosecution of companies under these two powerful extraterritorial acts and under other anti-corruption national laws with similar reach are an important part of the global governance of corruption because of the broad extraterritoriality they enjoy. Since the application of the Bribery Act has been

⁴ FCPA of 1977, Pub. L. No. 95-213, § 102, 91 Stat. 1494-1496.

⁵ The Bribery Act from 2010 modernizes the complex and outdated Prevention of Corruption Acts from 1889-1916. It criminalizes the demand as well as the supply part of the corrupt transaction and it addresses the bribery of private persons which both give it a pioneering quality.

⁶ International Anti-Bribery and Fair Competition Act of 1998, Pub L No 105–366, 112. Stat 3302 (1998).

significantly postponed, for the time being only the FCPA provides robust proof that on behalf of the US, this national legislation is vigorously employed in the fight against corrupt practices internationally and the Siemens and BAE cases constitute point in case (Lord 2014).⁷

A trans-governmental element in the global governance of corruption has developed as a consequence of the need for enforcement of the international conventions and the extraterritorial national laws. Delaney (2005) explains the trans-governmental twist in the anti-corruption effort as a network that has developed from the necessity for cooperation between national agencies, entrusted with the power to implement national anti-corruption laws and to comply with international obligations.

1.2. The Business Side of Anti-Corruption: Taking the Lead

Both private and public sector initiatives have developed to counteract corruption internationally and have led to attempts to combine business and governmental approaches to anti-corruption work in a comprehensive framework. Global business actors have adopted anti-corruption practices as part of general strategies for corporate responsibility, or specific attempts to address national and international legislation on the subject. The International Chamber of Commerce (ICC), the leading business organization worldwide, was the first international non-government organization that addressed the

⁷ Both cases were brought to the Court of Columbia (U.S. v. Siemens Aktiengesellschaft and U.S. v. BAE Systems PLC). In the case of the BAE, the British Government chose to close the case and evoked issues of national security as justification for the decision but yet it had to concede to an investigation under the FCPA in which it pleaded guilty (US Department of Justice 2014).

issue of corruption internationally with the ICC's Rules on Extortion and Bribery in International Business Transactions in 1977.

Business actors continue to be actively involved in curbing corruption. The scope of the OECD Convention, for example, focuses on the 'supply side' of bribery. While addressed at states, the Convention concentrates on the role of global business as the provider of bribes and does not scrutinize the 'demand', or recipient side of the corrupt transaction. Abiding to formal legal restrictions, however, is not the only way in which business actors contribute to the global anti-corruption campaign. Voluntary action, as in the case of the ICC Rules on Extortion and Bribery, remain at the forefront of business attempts to curb corruption internationally.

Anti-corruption policies have become an integral ingredient of Corporate Social Responsibility. An example of how this was achieved at a global scale is provided by the Global Compact. The Compact is the most significant 'voluntary corporate responsibility initiative in the world' and it involves close to 9000 corporate actors from 130 countries. In light of the UNCAC, in June 2004, a 10th Principle was added to the Global Compact which states that 'Businesses should work against corruption in all its forms, including extortion and bribery' (UN Global Compact 2014). Stressing the importance of voluntary action, the Compact aims at complementing international regulation and mainstreaming the ten principles of corporate responsibility and sustainability worldwide.

While the endorsement of self-regulating mechanisms could be an effective preventive mechanism against corruption for big companies, small and medium enterprises (SME) may find it more challenging to build internal integrity systems that ensure compliance. The Business Anti-Corruption Portal (Portal), an Internet tool, is

tailored for SMEs that are less often placed in the media limelight, but face as many challenges, especially when investing abroad, as big companies do. The Portal provides tools, free training and information tailored to SMEs and stresses the importance of the involvement of the private sector in the global fight against corruption (Business Anti-Corruption Portal 2014). Another notable business portal with a global scope is the Resource Center for Business ‘Business Fighting Corruption’ of the World Bank Institute (World Bank 2014). While these initiatives remain business-oriented they reach towards wider civil society and therefore provide a good platform for interaction between international NGOs and global business actors.

The Business and Industry Advisory Committee (BIAC)⁸, which represents business interests to the OECD, also takes an active stance against corruption and bribery and structures the plethora of formal and informal initiatives on the subject in the BIAC Anti-Bribery Resource Guide (BIAC 2014). Membership associations, such as TRACE International and CIPE (Center of International Private Enterprise) specialize in consulting multinational corporations on compliance with international anti-corruption regulation (CIPE 2014). The Partnering Against Corruption Initiative (PACI) of the World Economic Forum is another ‘global anti-corruption initiative, developed by companies for companies’ (World Economic Forum 2014). Notable initiatives by industry include the Extractive Industries Transparency Initiative, the Global Infrastructure Anti-Corruption Centre (GIACC), the Business Integrity Management Clearing House of the International Federation of Consulting Engineers (FIDIC). The Global Unions Anti-Corruption Network (UNICORN) is an international trade union

⁸ BIAC members are Chambers of Commerce and Federations and Confederations of Enterprises from all OECD member states.

network, sponsored among others by TUAC (the Trade Union Advisory Committee to the OECD) which specializes in trade union anti-corruption work at the international level (UNODC 2014).

1.3. 'Joining Forces against Corruption: G20 Business and Government.'

The G20 Anti-Corruption Action Plan, first adopted in 2010, constitutes a recent international attempt at a comprehensive reform and harmonization of the global governance of corruption. The Action Plan also provides an example of the existing synergies between government and business actors, and reveals the dense web of communication and collaboration between a number of international organizations on the subject of anti-corruption.

The current resurgence of interest in the international fight against corruption can be partially attributed to fears that the global financial crisis (GFC) would undermine standards in business transactions. It was in relation to the GFC that the G20 Anti-Corruption Action Plan was adopted in Seoul during the Summit in November 2010. Strengthening the existing 'international anti-corruption regime' appears at the front of the reform effort with the two pillars of the regime being the UNCAC Convention and the OECD Convention which features even more heavily in the recommendations of the Action Plan (Action Plan G20 Annex III 2010).

The driving force behind efforts such as the G20 Action Plan is a fear that, especially in Western Europe, the fight against corruption in the interaction between business and the public sector could become subordinated to the pursuit of profit, thus

jeopardizing the implementation of the OECD Convention as the most effective insurance against this development (Wolf and Schmidt-Pfister 2010). At the same time the challenges posed by the GFC may provide impetus for the future development of the anti-corruption regime and become a robust ‘example of politics in an era of fragmented statehood’ in a field as politically sensitive and multi-dimensional as corruption (16).

The OECD and G20 are building a strong cooperative effort aimed at the successful implementation of the Action Plan on Anti-Corruption. The cooperation goes beyond foreign bribery to include general international cooperation and public-private partnership (PPP) anti-corruption initiatives to the more concrete tasks of whistle blowers’ protection and asset recovery. Together with the UN Office on Drugs and Crime in Vienna, which is the agency responsible for tackling the implementation of the UN Convention Against Corruption, the OECD and G20 organize common events for strengthening coordination, such as the conference ‘Joining forces against corruption: G20 business and government’ that took place in April 27-28, 2010 (OECD 2014).

The effort to strengthen what in the G20 Anti-Corruption Action Plan is called the ‘international anti-corruption regime’ only emerged in 2010, after unsuccessful attempts to address the same issue in 2009. Currently momentum appears to have been built for strengthening and improving the consistency of the anti-corruption effort through the annual review of the action plan which aims to develop a dense network of interlocutors beyond the G20 membership to tackle foreign bribery in particular (Action Plan G20 Annex III 2010).

1.4. The IMF, the World Bank and the WTO: Good Governance and Transparency

The World Bank, the IMF and the WTO have addressed corruption in the broader framework of good governance and transparency since the mid-nineties. The oldest provision on anti-corruption measures, Article X, was passed to the WTO from GATT in 1994 and has remained virtually unchanged since 1947 (Ala'i 2008). The WTO has therefore been addressing the issue of transparency and (indirectly) corruption since its creation in 1995.

The IMF has tackled corruption directly in the overall framework of good governance promotion since 1997. Corruption, defined as 'the abuse of public authority or trust for private benefit', undermines the legitimacy of government and 'market integrity' and is therefore a focal point of the IMF efforts to address poor governance globally. "The Partnership for Sustainable Global Growth" (1996) and "Good Governance: The IMF's Role" (1997) are the two essential publications which laid the foundations for the IMF's anti-corruption policies (IMF 2014).

Although other regional and development banks have also developed anti-corruption policies in the last twenty years, the World Bank retains a central position on the anti-corruption frontier. The World Bank's anti-corruption strategy was first made public in September 1997 and it evolved into a comprehensive program by 2007, when the Governance and Anticorruption strategy of the World Bank Working Group was approved. The successful implementation of the strategy would see 'the emergence of a shared vision in which countries recognize the links between governance, corruption, growth and poverty reduction'(GAC 2007, 2). Another anti-corruption instrument with

global magnitude is the World Bank's Listing of Ineligible Firms and Individuals, which sanctions companies for a limited amount of time and can be used as a global reference for firms that breach anti-corruption regulation (World Bank 2014).

1.5. Civil Society Watchdogs: Transparency International, Global Witness and Global Integrity⁹

Transparency International (TI) is undoubtedly the most significant civil society organization, operating at the global level in the field of anti-corruption. Its work is so visible that very often it has become synonymous with the global campaign against corruption itself. The founder of TI, Peter Eigen, left the World Bank at the beginning of the 1990s in order to begin a journey of coalition-building that would lead to the foundation of the Berlin-based international NGO and subsequently aid significantly the rise of corruption to the global agenda (Rosenau and Wang 2001). TI is credited with providing the missing ingredient in the global attempt to curb corruption – that is, establishing the role of civil society and breaking down the intergovernmental veto on corruption as an issue amenable to global regulation (Galtung and Pope 1999).

Founded in 1993, TI has become a dense network of over a hundred national chapters. It has pioneered some of the most innovative tools aimed at raising awareness

⁹ The analysis of the role of global civil society in fighting corruption is bound to encounter some conceptual fuzziness. International business actors and other civil society organizations all manage the collection of processes that can be termed as global civil society, or as Keane (2003) defines it: the 'dynamic ensemble of more or less tightly interlinked social processes' (10). There are divergent opinions as to who are the actors who drive these global processes, but the current separation of business and civil society actors is based on a typology of non-state actors developed by Costoya (2007) in which civil society and business actors are assumed as separate (4). This distinction helps emphasize the role that organized business interests played in supporting the emergence of international anti-corruption legislation in the mid-90s.

about the detrimental effects of corruption and since 1995 it publishes the annual Corruption Perception Index (CPI), which receives extensive media coverage (TI 2014). It also coordinates the Anti-Corruption Research Network, an Internet hub for anti-corruption research. Galtung and Pope (1999) argue that TI has acquired a leading role in the global anti-corruption debate within a few years of its establishment. The strength of TI is that while it deals with corporate responsibility and works in cooperation with global business and governments, it can also serve as an opposition, as an independent watchdog that holds other actors accountable and represents the interests of unorganized civil society.

Another global anti-corruption watchdog is Global Integrity. Employing a methodology that developed from field research over the years to capture the opinion of local experts and citizens, Global Integrity started publishing the Global Integrity Index in mid-2000 (Global Integrity 2014). Global Witness is another international NGO which addresses in particular the so called 'Dutch disease' or resource curse – the problem that countries rich in resources face more problems of corruption and development because of rent-seeking governments and elites (Global Witness 2014).

2. Explaining the Emergence of a Global Corruption Problem

This thesis investigates the question of how corruption was constructed as a global problem, and the following sections present the main arguments for the process of social construction. The factors and agents, discussed in the literature can be essentially broken down into six groups. The first, and most commonsensical, explanation is that corruption became a global problem with the end of the Cold War and the subsequent increase in

capital movement due to the opening of new markets. This explanation presents the emergence of global problems as an automatic response to changed conditions. Other studies part with this structural explanation, introducing the agents responsible for the rise of corruption to the global agenda. Two of these agents are the World Bank and TI. The ‘measurement revolution’ initiated by these two organizations through the publication of corruption indices is also credited for the de-politicisation of corruption and its rise to the global policy agenda. Critical studies then present this de-politicisation of corruption and the anti-corruption work of the World Bank in particular as a neo-liberal window-dressing, an analytical position which argues that corruption’s rise to the global agenda was meant to provide a smoke-screen for policies of liberalization and privatization. Lastly, the role of the United States in pushing corruption within the policy priorities of a number of international organization, in particular the OECD presents another route through which corruption became a global problem. These six explanations for the rise of corruption as a global problem are given attention in the following sub-sections.

2.1. The End of the Cold War and the Global Corruption Eruption

The first explanation as to why a global corruption problem emerged on the global agenda is that there has been an objective increase in levels of corruption throughout the world. The ‘corruption eruption’ was a name initially given by Naim (1995) to signify a number of successive corruption scandals that broke out in the mid-nineties throughout Europe, the United States, Latin America and other parts of the world. The phrase came to represent the argument that there has been a significant increase in the occurrences of corruption throughout the globe. The original article by Naim argued, however, that the

corruption eruption from the mid-nineties was not due to an objective increase in corruption, because no reliable data existed to support this argument. It would be difficult to conclude whether in the 1990s there has been any significant increase in actual rather than perceived levels of corruption worldwide, but such an increase can be inferred indirectly from the rise in capital flows to emerging markets, which according to TI representative Frank Vogl has triggered a boom in grand corruption across the globe (Rosenau and Wang 2001).

According to Naim (1995) the real change occurred not in the objective number of corrupt cases, but at the level of public perception that no longer rendered corrupt practices dismissible. The perception of a 'corruption eruption' was due to the spread of democratic ideals around the globe, which abolished the once tacit acceptance of illicit practices. A 'legitimation crisis', which has taken power away from the leaders and brought it to the public in a progressive global trend towards more open and democratic governance, was the essential ingredient to the public concern with corruption (Glynn, Kobrin and Naim 1997). The end of the Cold War according to this argument was catalytic in speeding up and intensifying these revolutionary structural processes. With the Soviet Union removed as a security threat and the increased economic interdependence spreading towards new markets, the problem of corruption could potentially be exacerbated, but the above structural changes have also provided the solution in terms of a historical opportunity for more transparent and democratic governance worldwide. This argument of interdependence due to the process of globalization and the end of the Cold War as a challenge and opportunity to democratization, despite being much more nuanced and explanatorily rich, provides the

conventional view of how corruption rose to global prominence in the mid-nineties. The relationship between the Cold War and the corruption eruption is more complicated, however, and can be understood in two major ways. One is that the end of the Cold War and the spread of democracy led to higher expectations towards accountability and ethics in politics, which in turn, alerted public opinion to resurfacing instances of corrupt behavior, as Naim argues. The second is to understand corruption as a legacy of the Cold War, during which illicit payments were used by both government and business to buy influence necessary to secure the loyalty of foreign governments and provide access to resources (Neild 2002).

The conventional story goes that in the mid-nineties, due to the increased level of capital movement and the entrance into the world economy of new national markets, corruption rose to the attention of international policy makers and became an issue for global governance. This thesis argues that the end of the Cold War and events in the nineties provided a window of opportunity rather than the source of corruption as a global agenda item since processes of establishing the problem of corruption internationally were already in place since the seventies. Structural explanations, such as the end of the Cold War, obscure agency and entail a degree of automaticity and determinism, which is detrimental to elucidating the concrete mechanisms through which national troubles become global problems. Structural explanations that do not delve into how certain issues acquire the status of global policy problems, therefore, contribute to the ‘naturalization’ of problems and preclude critical examination that has theoretical and practical advantages; theoretical because it brings to light the agents and processes through which issues become policy problems; practical because it can map future

directions in the re-definition of problems through the establishment of phases and patterns in the trajectory of otherwise disparate global problems.

The following sub-sections highlight the role of agency in global affairs and start the de-naturalization of corruption as a global issue, by presenting the major actors that have contributed to the emergence of corruption as a global problem in the existing literature – international organizations such as the World Bank, global NGOs such as TI and state actors. These explanations attribute the rise of corruption as a global policy problem to the influence of these actors and the processes of de-politicization and quantification of corruption that they started.

2.2. The Good Governance Agenda of the World Bank: Corruption and Development

The World Bank was one of the first international actors to start addressing corruption within the broader framework of good governance. The first formal referral to the problem of corruption appeared in 1997 in the World Development Report, but Weaver (2010) explains that the attempt to tangentially tackle the issue of corruption within the broader framework of institutional development dated back to the 1970s. During this decade staff within the African branch of the World Bank started promoting the idea that in order to accomplish the goals of development, the international financial institution had to address problems of political character. Weaver traces the process through which this small group of what would later become ‘governance advocates’ managed to convince upper management of the importance of public institutions for the purposes of development, at first with limited success. With a mandate of then President McNamara, a task force, managed by Arturo Israel was created in 1979 and in 1983 a brief referral to

‘good government’ was included in the annual World Development Report. Weaver explains that it was only later, in 1989, that the more neutral term of ‘good governance’ was adopted in order to depoliticize the issue and make it part of a technocratic discourse (55).

Within the framework of the World Bank agenda on good governance, corruption only later gained a central position as an impediment to development. This is an essential factor for generating an explanation as to why the World Bank as one of the contributors to the anti-corruption campaign engaged in the question in the first place. Corruption as a World Bank development prerogative can be understood only within the broader framework of debates about the role of the state or what Israel (1990) calls the ‘quality of the state’ or the ‘quality of politics’ in development. In this context, corruption becomes just one symptom of the illegitimate interaction of public and private interests that is peculiar to ‘bad government’. The lack of corruption, however, cannot be equated with quality of government as Rothstein (2011) observes. Rothstein employs ‘quality of government’, understood foremost as the impartial application of public authority, as a more precise concept than the term ‘good governance’ which has become overstretched. Stressing the role of government in these conceptualizations brings them closer to a political, rather than an economic, reading of the exercise of public authority.

Weaver (2010) captures this opposition between politics and economics within debates in the World Bank by stressing that the change of terminology from ‘government’ to ‘governance’ was ultimately one of change from political to economic development prerogatives. Questioning whether the pendulum between the dichotomies of politics and economics as well as public and private has slung too far, Israel (1990)

comments on the World Development Report from 1988 that ‘balancing the arguments of both the public interest and private interest views and concentrating on the benefits and costs of government intervention’ is essential to changing the views on how development works (5). Israel’s argument that the prescription to dismantle the state has probably gone too far was relevant for the search of improved ‘quality of politics’ that would inform partly what was to become the good governance agenda of the World Bank. In the mid-90s, in particular, much of the thinking between World Bank policies shifted from the premises of the so-called “Washington Consensus” to New Institutional Economics (NIE) and the importance of sound regulative institutions for economic development (Cameron 2004). The impact of the broader institutional framework on economic performance argued by Israel’s team since the late 1970s was solidified by the influence of NIE at the World Bank in the 1990s and also starting in the 1990s corruption took central stage in the good governance debate.

Currently, corruption has an almost omnipotent explanatory power in the development debate and questions of development are seen to have established corruption as a problem of global concern. Within the framework of the Bank’s good governance agenda corruption emerges as an impediment to development and growth, but also as a symptom of ‘bad government’. From the point of view of the World Bank, as one of the most visible actors in the anti-corruption field, corruption emerged as a global problem because it was an impediment to development for the Bank’s borrowers and, therefore, a substantive hindrance for the effectiveness of the financial institution. The attempt to address issues of corruption within the broader framework of ‘good government’ spanned for a few decades until it finally received central stage status in the

mid-90s with the change of the Bank's leadership in 1995 and the influence of NIE on policy thinking, but also with developments at major intergovernmental organizations such as the OECD and other regional venues.

2.3. Global Coalition Building: The Impact of Transparency International

The founding of TI in 1993 was intertwined with the African Section of the World Bank through the NGO's founder Peter Eigen, who worked as manager in World Bank programs in Africa and Latin America. After a pivotal meeting in Swaziland in 1990 and extensive discussions with his colleagues, Eigen designed a comprehensive plan for action against corruption (Galtung and Pope 1999). The reception in the World Bank was hesitant since anti-corruption work involved going beyond the Bank's mandate, which was to deal with economic issues only (Eigen 1996). Eigen set out to find a solution outside the World Bank, leading him to leave the financial institution; after a series of meetings around the world he founded the Advisory Council of TI (Galtung and Pope 1999). Since then, TI has expanded into a global NGO with over a hundred national chapters.

As discussed previously, Rosenau and Wang (2001) provide an analysis of how corruption rose as an issue for global governance by concentrating on the role of TI. NGOs and transnational advocacy groups, however, are only one of a number of actors, including intergovernmental organizations and national governments, who have contributed to the emergence of corruption as a global problem. As Rosenau and Wang note, TI is not the main actor or source of change but is acting as an important 'intervening variable'. TI is credited for building a non-confrontational coalition model

between government, business and civil society actors (Galtung and Pope 1999). Raising media and public awareness through the annual Corruption Perception Index and other publications makes TI a catalyst in the process of constructing corruption as a global problem, but that process remained largely intergovernmental. As later chapters show, TI became part of the attempt of state actors to create an international policy response that began 20 years prior to the foundation of the civil society organization.

2.4. The Measurement Revolution: The Advent of Global Corruption Indices

The design and publication of the Corruption Perception Index (CPI) and the Worldwide Governance Indicators (WGI) changed the idea that international corruption was unquantifiable and this development is credited for raising the issue to the global policy agenda (TI 2014).¹⁰ The measurement revolution that these subjective indices started contributed significantly to the visibility of corruption worldwide, whether it was by convincing policy makers that quantifiable ultimately means manageable or by promoting an exponential growth in academic papers on the subject. The CPI, in particular, has served its purpose as a powerful public relations tool for raising awareness of corruption by making headlines across the globe with its annual publications. Both the WGI and the CPI have promoted a boom of academic papers, which have contributed to a rising consensus on how corruption relates to other development issues such as FDI and growth. According to Galtung (2006), the positive view of corruption has become part of the past with the help of studies using corruption indices. A foreign investor in a

¹⁰ There are business-oriented data sets (such as Business International and the World Competitiveness Report) which predate the CPI (Ades and di Tella 1997). The two indices of TI(CPI) and the World Bank(Control of Corruption as part of the WGI) were developed by Lambsdorff and Kaufmann respectively and cover the period from 1995 and 1996 respectively (TI 2014; World Bank 2014).

country burdened with inefficient bureaucracy and incomprehensible procedures can find an efficient and inexpensive shortcut in the form of bribing a public official, the general argument went (Leff 1964; Huntington 1968). The high cost of corruption and its negative effect on growth, FDI, and development has only recently been broadly accepted and the debate whether corruption is ‘grease’ or ‘sand’ in the wheels of development and trade has taken on a life of its own (Ades and di Tella 1997; Kaufman and Wei 1999; Meon and Weill 2010).

The academic studies and debates prompted by the corruption indices promoted the view that corruption can be studied internationally as an objective fact, although indirectly through the quantification of expert and lay perception (Treisman 2000; Connors, Shacklock, Galtung and Sampford 2006). At the same time the ‘measurement revolution’ has attracted criticism that what is being measured are perceived levels of corruption or quantified perception. Some authors go as far as to argue that the limited ‘Western-style’ definition used in the indices is a form of ‘neo-colonialism through measurement’ (De Maria 2008, 184). As much as the indices of the World Bank and TI were turning points in the study of corruption world-wide, their connection to the ‘objective fact’ of corrupt exchanges remains ambivalent. Firstly, since what is being measured is perception, some amount of bias and stereotyping can occur, such as the ‘poor is bad effect’ which considers countries with lower economic performance to be inherently more corrupt (Søreide 2006). The tendency to gather data from business surveys and therefore capture mainly the opinions of Western businessmen is another point of criticism towards the CPI (Lambsdorff 2006). As Andersson and Heywood (2009) argue, taking into consideration business transactions and understanding the

corrupt exchange predominantly as bribery precludes a more nuanced and deeper quantitative understanding of the forms and impact of corruption. Furthermore, proxies, such as overall economic performance and the stability of the political system, affect the estimation of corruption levels. Secondly, on their own turn corruption indices affect investment decisions and can turn into a self-fulfilling prophecy (Warren and Laufer 2009).

Philip (2006) observes that corruption indices do not include ‘hard data’ about actual occurrences of corruption in ‘soft’ perception-based data, but it is usually the latter that is used in academic studies.¹¹ Lambsdorff (2006) addresses the problem that the perception indices do not relate directly to real phenomena, but yet these subjective indices remain the most comprehensive way of estimating the levels of corruption worldwide. The bias in the sample of respondents is tackled by including data that consists of both residents (who may also be employees of multinational companies) and expatriates, according to the designer of the CPI.¹² This attempt to balance the sample of respondents, however, does not provide a solution to generalized bias that can be common to both residents and expatriates. The question remains to what extent the perception is based on empirical evidence or on personal preconceptions and reproduction of media and social biases (Miller 2006). Most of this criticism is targeted

¹¹ This is due to comparability issues and discrepancies in the legal procedures of countries from which the data is collected (Philip 2006).

¹² The CPI is a composite index that in 2013 included 13 data sources: the African Development Bank Governance Ratings 2012, the Bertelsmann Foundation Sustainable Governance Indicators 2014, the Bertelsmann Foundation Transformation Index 2014, the Economist Intelligence Unit Country Risk Ratings, the Freedom House Nations in Transit 2013, the Global Insight Country Risk Ratings, the IMD World Competitiveness Yearbook 2013, the Political and Economic Risk Consultancy Asian Intelligence 2013, the Political Risk Services International Country Risk Guide, the Transparency International Bribe Payers Survey 2011, the World Bank - Country Policy and Institutional Assessment 2012, the World Economic Forum Executive Opinion Survey (EOS) 2013, and the World Justice Project Rule of Law Index 2013 (TI 2014).

towards the CPI as a perception-based index, but as Heywood and Rose (2014) show, non-perceptual measurement of corruption remains a distinct possibility, yet one less likely to generate comparable results and as a consequence make newspaper headlines. Despite these problems with studying international corruption quantitatively, the publication of corruption perception indices has contributed significantly to the global visibility of corruption in the media and has helped solidify consensus on the negative impact that corruption has on development objectives.

2.5. Anti-corruption Policies as Neoliberal Window-dressing: The Critics of the Anti-Corruption Crusade

A growing amount of literature places the explanation of the origin of anti-corruption policies and discourse within the context of neoliberal reforms and usually adopts a critical stance towards the politics of anti-corruption (Brown and Cloke 2004; Krastev 2004; Whyte 2007; Bracking 2009; Roden 2010). Brown and Cloke (2011) offer a comprehensive analysis of critical studies and, despite the nuances, a common trend appears to be that anti-corruption work is or at least has become a program, providing legitimacy to a neoliberal ‘economistic’ and anti-state paradigm. The conventional understanding of corruption presents the role of politics as a source of rents and promotes deregulation as the only way to reduce opportunities for rent-seeking (Bracking 2007). The neoliberal charge inherent to the anti-corruption movement is criticized as being biased and a-historical; it is also business-centered and privileges the interests of market actors. Civil society actors, such as TI, have also contributed to a program of

‘normalization’ by trying to bring diverging political and economic institutions in line with neoliberal criteria (Hindess 2005). The anti-corruption crusade (Brown and Cloke 2004; Roden 2010) can therefore be seen to employ a ‘hollowed out’ discourse (Bukovansky 2006) as a window-dressing technique for policies of sometimes aggressive liberalization.

The actual implementation of World Bank anti-corruption policies has also been placed under scrutiny (Harrison 2004; Carroll 2009; Brown and Cloke 2011). The Bank has been seen to support, through its governance program, an ‘American-led liberal capitalist globalism’ which has been ascending steadily after the Second World War (Harrison 2004, 9). Anti-corruption policies, seen from this critical perspective, provide a smoke-screen for neoliberal policies of deregulation, privatization and the withdrawal of the state from the economy. Especially through the work of the World Bank a new type of ‘governance-state’ has emerged which has to limit its steering activities to a minimum and allow free market reforms to work properly (Harrison 2004). Sociologists and anthropologists have equally criticized the occupation of the anti-corruption discourse by economics, the establishment of quantified perception through the TI Corruption Perception Index and the World Bank Governance Indicators as a standard measurement for corruption, which has allowed the transformation of anti-corruption debates into a ‘one-size fits all’ scientific enterprise (Krastev 2004).

The critical strand of the anti-corruption literature provides a lot of valuable insights into the politics of anti-corruption, but could fall into the trap of making a straw-man out of neo-liberalism. Even the so called ‘Washington Consensus’, which is seen as the most acute and representative form of a neoliberal agenda, is not such a coherent

body of thought as is usually assumed (Williamson 2008).¹³ The ‘Washington Consensus’ initially developed as a response to questions about the development of Latin America and Williamson, who was the first to engage conceptually with what was to become the new embodiment of neoliberalism explains that:

The term “Washington Consensus” was coined in 1989. The first written usage was in my background paper for a conference that the Institute for International Economics convened in order to examine the extent to which the old ideas of development economics that had governed Latin American economic policy since the 1950s were being swept aside by the set of ideas that had long been accepted as appropriate within the OECD. In order to try and ensure that the background papers for that conference dealt with a common set of issues, I made a list of ten policies that I thought more or less everyone in Washington would agree were needed more or less everywhere in Latin America, and labeled this the “Washington Consensus.” Little did it occur to me that fifteen years later I would be asked to write about the history of a term that had become the center of fierce ideological controversy. (Williamson 2008,14)

At the same time, the World Bank good governance agenda is supposed to be part of a Post-Washington Consensus era since the very goal of good governance policies was to address the limited view on development as dependent on economic factors (Jayasuriya 2002).¹⁴ Krastev (2004) argues that the World Bank and the IMF have in practice redesigned the elements of the ‘Washington Consensus’ as anti-corruption strategies in order to silence opposition to reforms. This argument pertains to the improper instrumentalization of policies to serve other objectives, but also to the rationale behind anti-corruption strategies. Understood as neo-liberal window-dressing, anti-corruption policies rose to prominence as a way to promote the interests of major developed states in the rest of the world.

¹³ Williamson (2002) states that the term he coined has come to signify ‘a set of neoliberal policies that have been imposed on hapless countries by the Washington-based international financial institutions and have led them to crisis and misery. There are people who cannot utter the term without foaming at the mouth.’(11).

¹⁴ Rodrik (2006) calls the inclusion of anti-corruption and other more politically and socially oriented objectives ‘augmented’ Washington consensus, while Naim (2000) stresses the incoherence of the ‘Washington confusion’.

2.6. The Role of the United States

Another argument for the rise of the problem of corruption to global prominence is the attempt of the United States to level the playing field in relation to the FCPA. The argument that the breakthrough of corruption as a global agenda item was due to US interests in leveling the playing field however, only offers a procedural explanation; it does not address the more substantive question as to why the United States would put itself in a disadvantaged position by adopting the Act in the first place. The FCPA was essentially the first anti-corruption tool with potentially global reach. The 'procedural' explanation of why corruption rose as an issue for global governance points to the US attempt to overcome the competitive disadvantage that the adoption of the anti-bribery law was creating for American companies since 1977. The reasons why the US adopted the FCPA in the first place can be seen as threefold: 1) in order to manage publicity; 2) in order to keep corporate (defense) actors under check and; 3) in order to preserve the integrity of the free market system (Pieth 2007).

From the Watergate to Lockheed scandals, the 1970s were seen by the American public as a venal age. Under the investigation of the Church Committee, an expanding number of illicit deals were resurfacing both within and outside the borders of the United States. To manage the public outrage over the findings was one reason why the United States adopted the FCPA. The Church Committee uncovered a chain of corporate scandals and established corporate bribery as constituting a common practice (Cragg and Woolf 2002). Pieth (2007) argues that a second more covert agenda that the US government was pursuing at the time was trying to prevent private defense interests from

interfering with US security objectives during the Cold War. The danger of US defense companies bribing their way into crucial arms markets, especially in the Middle East, was the second reason for the adoption of a law that would proscribe the practice of foreign bribery and it is given further attention in the first empirical chapter. The Watergate affair had long-lasting effects on the American public and on American domestic and foreign policy. As Pieth observes, based on case law and other evidence, the US legislator post-Watergate was trying to protect the ‘free market system against the erosion of public confidence’ (8). The question was not one simply of bribery but of much more subtle and often legal instances of private interests exerting disproportionate influence over the direction of public affairs. In particular, Watergate led to the ‘public integrity war’ at the center of which was the debate about the role of government in the agendas of new progressives and movement conservatives (North and Doss 1997).

The focal point of the ‘integrity war’ was the interaction between government and corporate actors. The defenders of ‘big government’ tried to portray corruption scandals as the consequence of the power of ‘special interests’ over the democratic process. According to these new progressives, the Industrial revolution changed American politics irretrievably by placing powerful corporate actors in the political landscape of the country and allowing them to exhibit strong influence over the political system. The movement conservatives tried to portray the corruption scandals since Watergate, as a natural consequence of the ‘moral bankruptcy of big government’ (xii). The new progressives’ preoccupation with the ability of private actors to exert disproportionate influence (both legally and illegally) over the outcomes of the national political process influenced the ‘good government’ reform model in American politics. This model was

also central to the initial development of the good governance agenda within the framework of the World Bank. In particular, the ‘good government’ model shaped the conviction that in order to reinstate ‘public trust in government...citizens must demand that special interests and public officials comply with strict codes of conduct and fully disclose their attempt to influence public officials’ (9).¹⁵ Protecting the legitimacy and integrity of the free market meant also to prove that the system could work within a political context according to clear and ethical rules that did not compromise the public’s confidence in the integrity of private companies and public officials alike. At stake was the very legitimacy of the free market, since the perceived venality of public power under the pressure and financial resources of big business fell under the scrutiny of the American public. The first empirical chapter elaborates on the historical and ideational climate of the 1970s and further traces the causal link between the FCPA and the establishment of corruption as an international agenda item.

3. Conceptualizing the Global Anti-Corruption Eruption: From International Regimes to Global Movements and Industries

Scholars have tried to make sense of the rapidly expanding global anti-corruption work through the prism of different conceptual tools. The anti-corruption eruption has been conceptualized in the existing literature in four major categories: 1) anti-corruption as an issue of global governance (Rosenau and Wang 2001; Eigen 2013; Kirton, Savona and Fratianni 2013); 2) as an international regime or regimes (Bukovanvsky 2002; Roseninge

¹⁵ Foremost, ‘good government’ was important in a political system, which was not ready for the attack of ‘industrial giants’ ready to buy loyalty from public officials (15).

2009; Wolf and Schmidt-Pfister 2010); 3) as a ‘movement’ referring either to the work of TI or as a loose term addressing both regional and global efforts to tackle corruption (Yao 1997; Sampson 2005; Hough 2013) and; 4) as an industry in anthropological studies (Sampson 2010).

These four conceptualizations are neither clear cut nor mutually exclusive but they all come with different insights about the global anti-corruption resurgence. The ‘industry’ debate portrays anti-corruption work as ‘anti-corruptionism’ (Sampson 2010) and is critical of the effectiveness of implementing anti-corruption projects (Haller and Shore 2005). The practitioners of anti-corruptionism refer to it as a ‘movement’ but some of them are simply drawn to the ‘market-place’ of anti-corruption programs, the success of which is difficult to establish. The industry debate offers another notable insight: anti-corruption is not ‘innocent’ (Sampson 2005). The recent consensus on the high cost of corruption and the necessity to tackle it has mobilized support from groups with diverging agendas: from anti-globalization activists to liberalization reformers and potentially offers a new platform for consensus on global governance. At the same time, this branch of the literature warns that global anti-corruption has been transformed into an industry that cohabitates with the phenomenon of corruption it was intended to fight.

Studies on the global governance of corruption have stressed the role of non-state actors in the anti-corruption eruption. Rosenau and Wang (2001) set two criteria in order for an issue to qualify as the subject of global governance – the existence of emerging norms and the higher visibility and sensitivity on behalf of the public. The role of TI as a norm entrepreneur is the explanation they put forward for the rise of corruption on the global agenda. A global anti-corruption norm (McCoy and Heckel

2001) has emerged and, the importance of TI lies in framing corruption as an issue of development and accountability and translating it from a highly sensitive political problem into legal and economic terms.

Some academic literature poses the existence as well as the taxonomic characteristics of an international anti-corruption regime or regimes at the centre of scholarly investigation (Rosenvinge 2009; Davis 2009; Wolf and Schmidt-Pfister 2010). This work tends to mix a definition of international regimes coming from the field of International Relations with a legal conceptualization of regimes in which a single treaty can represent an international legal regime; a given issue area can therefore be covered by a number of intersecting legal regimes. A plural conceptualization of international regimes in the legal tradition offers a number of advantages because it helps distinguish between different components in the legal and normative order governing the specific issue area. Wolf and Schmidt-Pfister (2010) adopt a plural conceptualization of international anti-corruption regimes but also bound the investigation regionally by addressing the existence of such regimes in Europe. The plural concept helps distinguish between different approaches both diachronically and spatially and adds precision, but it betrays the purpose of the concept of ‘international regimes’ as it has developed in IR and this concept of regimes is what the Wolf and Schmidt-Pfister edition aspires to since it ‘roughly’ adopts a definition of regimes based on Krasner (13). The utility of the regime concept comes from its ability to capture interrelatedness and intentionality, which show that the disparate international conventions as well as formal and informal rules and norms against corruption form a more or less cohesive whole. The concept of international regimes and in particular its compatibility with the literature on global

governance is discussed in more detail in the following sub-section as they constitute part of the conceptual building blocks of this thesis.

3.1. International Regimes and Global Governance: ‘The State Is Dead, Long Live the State’.

In the development of IR as a discipline, research agendas have continuously been abandoned in favor of new ones, which offer a new perspective and focus on different elements of international politics. Older research agendas with their respective conceptual tools remain in use and even though they are compatible with the new conceptual tools, their explicit link is rarely specified. As IR matures as a discipline such potentially compatible concepts are bound to multiply and it would benefit the discipline if their differences as well as their compatibility are made explicit. One example of two such concepts, which pertain to two different, yet connected, research agendas are international regimes and global governance. In anti-corruption studies both ‘anti-corruption regime’ and ‘global governance of corruption’ are used (Rosenau and Wang 2001; Bukovanvsky 2002; Rosenvinge 2009; Davis 2009; Wolf and Schmidt-Pfister 2010; Eigen 2013; Kirton, Savona and Fratianni 2013). The two concepts are sometimes used interchangeably and this is due partly to the broadly perceived compatibility between international regimes and global governance but it remains problematic if the connection is not made explicit.

On the one hand, the difference between the two concepts is strictly historical. The work on international regimes, from the 1980s and 1990s, paved the road for the ideational and normative turn in the field of IR. Regime theorists developed sensibility

towards the ‘normative superstructures’ underlying international cooperation and did not conceive of regime formation simply as useful vehicles for solving collective action problems and reducing transaction costs (Puchala and Hopkins 1982). To a certain extent, both global governance and international regimes aimed to dethrone states from their dominant position in IR analysis, but because of temporal differences did so to a different degree. Regime theory still kept the state as the central actor in international affairs, while global governance, which developed to some extent as an offspring of regime theory, aimed to specifically bring non-state actors to the analysis of global politics. Therefore, even though both the scholarship on international regimes and the scholarship on global governance belong to the same pedigree of research that argues for the importance of ideational factors and non-state actors, the precedence of international regimes allowed for a more formal understanding of the way in which states manage international affairs. It is indeed under the influence of a global governance research agenda that the role of non-state actors in the development of the anti-corruption movement has been stressed to such an extent that it appears as the triumph of global civil society organizations over states. The literature on governance also stresses steering rather than hierarchy, which we usually find with state-centered international politics.

The concept of governance was already implicitly and sometimes explicitly present within the theory of international regimes and as global governance became an independent research agenda, the concept of international regimes continued within this framework. Regimes in the context of the global governance literature can be seen as specific ‘governance systems’ providing governance in a specific issue area (Stokke 1997; Ba and Hoffmann 2006). Regimes are more limited issue areas in the broader

landscape of global governance and they differ slightly from the latter because of their statist ontology and a consequent preference for the study of international rather than global politics. This distinction makes international regimes more readily compatible with the basic premises of realism, but the concepts remain highly congruent (Stokke 1997). An international anti-corruption regime, therefore, would constitute a specific issue area within the broader framework of global governance.

3.2. Defining an International Anti-Corruption Regime

The value added by the concept of international regimes is that 'it goes beyond individual treaties to envisage a 'functional whole' composed of a potentially heterogeneous set of formal and informal agreements, practices and institutions' (Hasenclever, Mayer and Rittberger 1997, 191). The amount of cohesion, or the adherence to a criterion of compliance with an international regime, varies according to the definition of the concept and the criteria on which the existence of the regime is stabilized. The classic definition of Krasner (1982), according to which regimes are 'principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue area' (1), poses a number of challenges.¹⁶ Therefore, a more formalistic definition put forward by Keohane (1993) offers an alternative route, which is employed in the current study. Even though Keohane agreed with Krasner's definition for the purposes of the volume of International Organization edited by the latter in 1982, he argued that regimes can be

¹⁶ The most significant of these challenges is that it is not feasible to distinguish between 'norms' and 'principles' on the one hand and 'rules' and 'decision-making procedure' on the other (Keohane 1993). Furthermore, the breadth of the definition places under the umbrella name of 'regimes' an unlimited number of international institutions both formal and informal, which leads to the concept of regimes being reduced to defining everything and nothing at the same time.

studied as ‘governmental arrangements which are intended to regulate and control transnational and interstate relations’ (Neumann and Weaver 1997, 96). This formal approach underestimates the inter-subjective component of regimes (even in the minimalist definition as convergence of actor’s expectations) and does not provide the analytical tools to distinguish between regime and non-regime situations since ‘rules written down on a piece of paper’ cannot be consequential, if a certain amount of inter-subjective agreement on the validity of these rules and hence ‘convergence of expectations’ does not exist (Duvall and Wendt 1989; Hasenclever, Mayer and Rittberger 1997). These considerations led to the revision of the formal definition which aimed to reconcile the ‘behavioural’ and ‘formal’ strands of the literature and posed the question of discerning the existence of an international regime as the task of finding ‘the existence of explicit rules that are referred to in an affirmative manner by governments, even if they are not necessarily scrupulously observed’ (Keohane 1993, 28).¹⁷

These rules also entail the development of a particular vocabulary for the discursive management of the given issue area since the ‘medium for the construction of intersubjective meanings’ is language (Carlsnaes, Risse-Kappen and Simmons 2002, 103). Understanding the emergence of regimes that govern a specific issue area, also entails studying the process through which a given condition is brought to the attention of policymakers, and the discursive analysis of how definitions are constructed and how the

¹⁷ The purpose of regime theory in IR is to show that international conventions, norms, practices and decision making procedures form a single regime in a given issue area. Even the more formalistic approach put forward by Keohane (1993), which allows for some confusion with the legal interpretation of regimes as a single treaty or convention, at the same time preserves the principle that a regime is an amalgam of formal and informal practices, legal acts or ‘governmental arrangements’ which organize a certain issue area without necessarily being strictly followed. This helps stress the interaction of formal legal arrangements and norms and the intersubjective understanding that brought and consolidated the issue on the international agenda. In the case of Keohane’s definition, the inter-subjective element is introduced through the reference to rules, which while affirmatively evoked by governments, are not always ‘scrupulously observed’ (28).

proper vocabulary to govern the issue is established. The most fundamental part of international regimes as a form of international order can rest outside formal arrangements and be embedded in the network which constitutes the meaning of 'normal' (as in norm-guided) behavior in the particular issue area (Keeley 1990, 97). An international regime can thus be seen as an arena in which the contents of 'normal' and 'abnormal' behavior crystallize. A functioning international regime would 'also provide a public language for defense and attack, justification and condemnation'(102).

The rules, referred to by Keohane, guide the behavior of actors at the international level or at least generate a sense of obligation towards appropriate behavior. This sense of obligation can also be referred to as an anti-corruption norm (McCoy and Heckel 2001). McCoy and Heckel argues that the institutionalization of the global norm took place in the 1990s with the adoption of a number of international legal instruments. As discussed previously, the legal backbone of the anti-corruption regime consists of regional conventions adopted by the OAS, CoE, the EU and the African Union as well as one global instrument, that is, the UNCAC and the OECD Convention. These 'rules written on a piece of paper' testify for the intergovernmental agreement that there is a problem with corrupt practices that has to be addressed collectively. Agreeing on the existence of a harmful condition and arriving at a definition of what is problematic about it is essential, since in the framework of social constructivism, the problem is not an objective fact out there, but a product of social construction. As Blyth (2002) observed 'controlling the definition ... is inherently political' because it helps the reinterpretation of reality (105). This inter-subjective component of the regime refers to the way in which corruption rose onto the global agenda and how state and non-state actors collectively defined a putative

condition as a global problem; a definitional process which constituted a necessary step for the emergence of formal agreements.

3.3. The Construction of a Global Corruption Problem and the Emergence of an International Anti-Corruption Regime: Phases of Development

Wolf and Schmidt-Pfister (2010) divide the history of anti-corruption regimes into five phases. The first phase of non-regime lasts until the 1970s and is characterized by the complete absence of the issue of corruption from the global agenda. The second phase, which spans from the mid-70s to the mid-90s, features unilateral US measures and the third one starting from the mid-90s (referred to as the ‘global corruption eruption’) spans until 2005. Since the late 1990s increased compliance efforts have marked a fourth – the implementation phase. Simultaneously, as early as the mid-2000 evidence suggests that insufficient performance and compliance has led to a legitimacy crisis, which characterizes the current fifth phase of regime development (15-16).

The overlap in the phases of this chronology can be problematic because the fifth phase provides an evaluation of the effectiveness of the regime, while the fourth one remains chronological. This chronological evolution, therefore, can be simplified into three main non-overlapping phases of the development of corruption as a global problem. The first phase starts in (1971-1976) from virtually no formal or informal recognition of the legitimacy of the issue as anything else, but a national concern and spans for approximately 20 years. From the mid-70s to the mid-90s, the discussion of the issue gained international momentum, but intergovernmental accord led to limited

institutionalization. The second phase started in 1994 and marked the institutionalization of the issue and the development of an official plan. Within a decade (1995-2005) a plethora of formal international legal arrangements, a boom of codes of conduct and vast media coverage brought the problem of corruption to the top of the international public, media and policy agenda.

The third phase started in 2005 and is ongoing. It can be described as a new phase of normalization. Corruption has been transformed into a legitimate issue of concern for global governance. Spector and Kitsuse (2009) have established that the phase of institutionalization of a social problem is always followed by a legitimacy crisis. They argue that the development of social problems follows a pattern in which the implementation phase leads to a loss of credibility and legitimacy, because the expected results are not seen. As a consequence, during the last phase competing definitions of the issue start to emerge. The attempt to strengthen the regime during the legitimacy crisis stage go in two major directions; attempts to consolidate efforts in order to ensure better compliance with the existing course of action and/or calls to re-formulate the definition of the issue and the objectives of the plan of action. In the anti-corruption case, both trends are evident. The G20 Anti-Corruption Action Plan, for example, aims at the consolidation of the regime and the implementation of the already existing instruments. At the same time, the G20 Plan relates the implementation effort to the exigencies of the post-crisis economic recovery without questioning the usefulness of their rationale (Action Plan G20 Annex III 2010). Daniel Kaufmann, former director at the World Bank Institute, sees the financial crisis as one of the symptoms of what he calls 'legal corruption' (Kaufmann 2010; Vicente and Kaufmann 2005). Kaufmann (2010) calls for a re-formulation of the

problem and redefines corruption as a form of collusion between government officials and business actors which has remained outside the grip of the law. This collusion may start with legal forms of influence peddling and lead to a subtle form of state capture in developing and developed countries alike. Kaufmann's argument presents a point in case of how the last phase of regime development generates claims over the expansive redefinition of the problem.

Attempts to internationalize anti-corruption efforts and define corruption as a global problem started in the 1970s and culminated with institutionalization in the 1990s, when a number of organizations such as the OECD, the UN, the CoE, OAS, the World Bank and others adopted anti-corruption instruments. Partly because of academic developments in the 1990s that gave priority to non-state actors like global civil society and global business and their role in world affairs, the account of the rise of corruption as a global problem remained focused on the impact of non-state actors such as TI. This one-sidedness obscured the impact of state-actors who were discussing corruption in formal institutional settings 20 years prior to the foundation of TI. In order to explore the intergovernmental side of the anti-corruption coin, this thesis conceptualizes of the anti-corruption effort as an international anti-corruption regime. The literature on global governance superseded academic discussions of international regimes but the two remain compatible and an account of the emergence of corruption as a global problem can be understood within the framework of an international anti-corruption regime with a strong intergovernmental component.

Conclusion

This chapter presented the main aspects of the global anti-corruption eruption from the mid-1990s to the mid-2000s. It further offered an overview of the main ways to think about the rapid anti-corruption expansion, as well as the main agents that brought forward this change. The existing literature is already laden with implicit or explicit hypotheses about the rise of corruption as a global problem and the second part of the chapter outlined the main routes through which corruption arose as an international agenda item by presenting structural arguments and explanations providing for the role of agency. A number of studies have placed the emergence of corruption as a global concern at the center of investigation (McCoy and Heckel 2001; Bukovansky 2002; Krastev 2004; Jakobi 2013). These studies offer valuable insights into the emergence of corruption as an issue for global governance and allow to varying degrees for the role of state actors in the process. By presenting the concepts and the main actors, involved in anti-corruption work, this chapter laid the ground for the contextualization of the empirical chapters and the elaboration of the conceptual tools that are used in this thesis and which inform the content of the next chapter.

This introduction to the intellectual puzzle sets the ground for the elaboration of the mechanism through which corruption was constructed as a global problem in the empirical chapters and for supporting the argument that the construction of corruption as a global problem was a predominantly intergovernmental endeavor in which power and interests had a strong impact on the shared construction of meaning. This approach to the construction of global problems can help us better understand the way in which specific governance issue areas emerge and develop.

Chapter 2

The Social Construction of Global Problems: Ontology, Theory and Methodology

In less than a decade (1994-2004) a number of binding and non-binding anti-corruption instruments cascaded and corruption was brought forth from obscurity as a serious problem and a legitimate topic for discussion at international organizations and financial institutions. This thesis enquires into the mechanism through which this change became possible. Conventional explanations of the puzzle attribute agency to global civil society organizations (CSOs) and argue that the reason for the emergence of anti-corruption initiatives is nested in the post-Cold War exigencies. While the academic insights on the emergence of anti-corruption as a fast-expanding sphere of governance have been given attention in the previous chapter, some of the explanations in the literature on global governance provide either an automated view of the process, which conceives of corruption as a natural problem, or exaggerate the agency of non-state actors. In both cases, the agency of states is obscured. In order to provide a systematic account of how corruption became a global problem, this thesis builds on the work of Spector and Kitsuse (1973; 2009) on the social construction of problems. This chapter lays the conceptual and theoretical foundations of the social construction of corruption as a global problem by adapting the sociological approach of Spector and Kitsuse (2009) to the field of International Relations.

1. Research Question

This thesis begins from the premise that international regimes, understood as issue-specific governance systems, emerge from problems. These global problems are not natural, but socially constructed and, despite the recent focus on the role of non-state actors in international affairs, state agency remains essential to this process. The central puzzle of this thesis is the social construction of corruption as a global problem: How was corruption socially constructed as a global problem?

To account for the social construction of a problem means to provide for historical contingencies and to understand problems as evolving products of collective definition that are in a dynamic relation to the condition they refer to. This thesis studies the process of definition through claims-making and other discursive strategies and practices that are presented in this chapter and are applied in the empirical studies. In order to clarify what is meant by problematization and construction of a global problem, the following sections will proceed in three steps. First, the concept of social construction in the field of International Relations as well as in the philosophy and the sociology of science is discussed. In order to specify what are the procedures in the construction of a global problem, different types of social constructs are examined and the problem of moral and factual relativism is briefly tackled. Taking the criticism of some philosophers of science seriously (Hacking 1999; Boghossian 2006), the value of problem construction as opposed to fact construction is argued. Second, the conceptual framework of the construction of social problems is presented with its essential elements, such as the

natural history or career of a social problem and the empirical study of claims.¹⁸ This theory of social problems from Sociology is adapted to IR. Thirdly, other theoretical and conceptual issues are tackled before the presentation of the cases and the data sources.

1.1. What is Social Construction and the Social Construction of What?

The central argument of this thesis is that corruption in particular, and global problems in general, are not ‘natural’ but constitute processes of collective definition and have to be socially constructed as problems to become focal points in issue-specific governance structures. ‘Social construction’ is one of the central concepts of social constructionism or as it has entered the field of International Relations (IR) – constructivism (Onuf 1989).¹⁹ Constructivism in IR comes in stronger and weaker varieties, but there are some broadly accepted characteristics that pertain to the process and the agency of social construction and distinguish it from other approaches. Firstly, international politics is constructed from ideational as well as material components, with the interpretation of ideas and beliefs which inform agents of construction being contingent on time and place. Secondly, despite being immaterial in nature, the ideational components of international reality can be employed instrumentally for the furthering of objectives (Ruggie 1998).²⁰ Because constructivists in the social sciences are interested in the construction of facts or social

¹⁸ After Blumer (1971), the ‘career’ of a problem became a common conceptualization of the development of a social problem.

¹⁹ Even though constructionism and constructivism are used interchangeably in this thesis, the term social constructionism is usually used in sociology and the sociology of science, while in the field of International Relations the term constructivism has become more widely accepted.

²⁰ Finnemore and Sikkink (2001) argue that inter-subjective beliefs are irreducible to individuals and Adler (1997) points that interests and identities of agents are themselves constructed through inter-subjective beliefs. Ruggie proposes a similar alternative to methodological individualism, based on Searle’s concept of collective intentionality as an antidote to the neo-utilitarian tendency of attaching ideas and beliefs to particular individuals.

facts, the process of construction entails that the human or collective intentionality of agents, which has led to the construction of a particular social fact or problem, is embedded in a social context within which specific beliefs, ideas, and interests gain currency at a given time. Social construction, therefore, stresses the historical contingency of social facts and problems.

The treatment of social facts in the social sciences has to a significant extent softened the contestation that constructivism as an ontological and epistemological approach has received from scientific realists in other academic fields. The question, what it means for X to be socially constructed, has salient repercussions in the philosophy of science and has been a source of contestation in the sociology of science. The answer to what social construction is and how it works cannot be adequately addressed without first answering the question about what is the X that is being constructed. Facts or social facts in general are one of a number of 'things' being claimed as the products of social construction. Social constructs are potentially innumerable. In 'The Social Construction of What?' Hacking (1999) presents an extensive list of items that are claimed as social constructs: from 'quarks' to 'postmodernism'. The number of social constructs is continuously growing in sociology and politics and includes the construction of social agency (Meyer and Jepperson 2000), leadership (Grint 2005), literacy (Cook-Gumperz 2006) and deviance (Goode and Ben-Yehuda 2009). European Studies and IR have produced their own list of social constructs: from Wendt's seminal publication (1992) on the social construction of power politics and anarchy through the construction of international politics (Wendt 1995; Hopf 2002), of pluralistic security communities (Barnett and Adler 1998), of ethnic identity (Fearon and Laitin 2000), to the 'moral'

construction of power politics (Williams 2004) and the construction of the international economy (Abdelal, Blyth and Parsons 2010).

This enumeration shows that different types of things are claimed as social constructs. The social construction of facts (Latour and Woolgar 1979) or reality (Berger and Luckman 1966) provides the broader ontological framework for the construction of individual social facts and social phenomena. Hacking distinguishes between three types of social constructs that are sometimes implicitly mixed. The first type is made up of objects, the second comprises ideas, concepts and beliefs about objects and the third type is made up of facts, truth and reality. Although there are different ways of grouping the above types, this basic distinction helps the conceptualization of social constructs at three consecutive levels of abstraction: the level of objects which is of little interest to the scholar of IR, the level of concepts and beliefs and the third level of truth and reality.²¹

The major criticism against the social construction of facts and reality is that they lead to relativism, which some philosophers have called a ‘fear of knowledge’ (Boghossian 2006). Sociologists of science have challenged the absolute objectivity of the scientific enterprise in the natural sciences inserting elements of sociality and subjectivity in the study of how scientists produce knowledge. In the field of politics and international affairs, however, the dynamics have been reversed because scientific principles coming from the natural sciences have ‘naturalized’ and reified social phenomena. While sociologists of science have tried to socialize the natural sciences, studying the process of social construction in the field of politics has the function to ‘de-naturalize’ problems and

²¹ One basic distinction between the constructivist and positivist scholar would be the level at which facts are placed. The seemingly innocuous placement of facts at the level of reality and truth rather than at the level of concepts and beliefs is very revealing of a positivist inclination and likely to be opposed by a constructivist scholar.

reclaim the sociality of the discipline. The criticism of constructivism, however, can help refine the *object* of social construction. The following section, therefore, examines the problem of relativism in the social construction of facts and argues that social facts and problems stand on a different side of the non-essentialist spectrum since the objects of construction are social facts and problems that by definition are involved in a mechanism of cultural and social production.

1.2. Social Construction and the Question of Relativism

The main criticism towards constructivism is that it leads to relativism. While it is only universal constructionism that denies the existence of human-independent facts, the following section briefly engages with criticism on moral and factual relativism (Boghossian 2006) as the question of relativism has its place in every constructivist research agenda.

a. Moral relativism

Moral relativism is one argument against a constructivist research agenda, which is particularly relevant to the study of corruption. Moral relativism, which argues that culturally there are different attitudes and moral stances towards corruption, has been the predominant way of understanding the role of constructivism in studies of anti-corruption (Collier 2002; Granovetter 2007; Brytting, Minogue and Morino 2012). Rather than justifying corruption morally, constructivist analysis has placed the abstract problem of corruption in the more practical universe of a culturally embedded society and related the concept of corruption to other referential moral obligations, such as loyalty towards the family and networks of friends. Corruption has also been placed in the broader framework

of bureaucratization and modernization that have been advanced unevenly across the globe (Giannakopoulos, Tänzler, and Maras 2012; Brytting, Minogue and Morino 2012). In their examination of the social construction of corruption in Europe Giannakopoulos, Tänzler, and Maras (2012) fragment the study into cases that cover eleven European states and elucidate different aspects of the corruption problem, understood in the light of different clusters of modernity.

A constructivist perspective, therefore, enriches rather than jeopardizes the acquisition of knowledge by pointing to the ideational and normative frames behind moral statements. The consequence is not the absolute relativization of the facts to the point where 'anything goes' (as in moral nihilism), but rather a relativization that remains simply 'relative' (as in moral relationism).²² For instance, corruption, understood as the use of public office for private benefit, is wrong in relation to a breach of contract between the public and the public official that is not supposed to act in her private capacity, but serve the public interest. Corrupt exchanges, such as bribery, have recently been deemed economically inefficient and are now wrong in relation to growth objectives and loss of investor confidence. The fact that it was only in the 1990s that corruption was deemed to have negative effects on economic development is a case in point that this relational map is evolving and malleable.

²² For example, Boghossian uses the statement 'It was wrong for Ken to steal the money' in order to highlight varieties of moral relativism. A constructivist account of the social practice of robbery will point to the ideational factors informing the value judgment behind 'It was wrong for X to steal the money' (48-52). The moral or ideological backup of the statement becomes apparent. The knowledge statement is related to its source and the preconditions and assumptions that inform it become evident. In order to illustrate that point a simple modification to the example provided by Boghossian can be done: 'It was wrong for X to steal the money according to the principle of private property'. The competing statement that 'It was not wrong for X to steal the money' that is inherent in moral relativism will also come with the relative principled belief that informs it. In the long tradition of the 'noble thief', for example, the violation of the right to property has been offset by the principle of justice and the morally wrong act of thievery has been turned into an act of restoration of justice (Hobsbawm 2000). Both statements are still valid and competing but by naming the frames of reference behind them, the moral relativist enriches knowledge rather than rejecting its attainment.

This is one side of the potential contribution of constructivism to the enrichment rather than the obtrusion of knowledge. In the center of the 'science wars' was the tendency of sociologists of science working in a constructionist perspective to relativize the objectivity of scientific knowledge in the natural sciences. In the social sciences the tendency is reversed - the influence of the natural sciences as a standard for scientific inquiry has obscured the social nature of politics in general and international politics in particular. In pointing towards the ideational backbone of social problems, constructivism potentially offers ultimate rather than proximal explanations and contributes to the deepening and pluralism of knowledge about social reality rather than the negation of the possibility for knowledge as Boghossian argues.²³

b. Factual relativism

Epistemic rather than moral relativism is at the center of contestation in debates within the philosophy and sociology of science. Global or universal constructionism is the only form of relativism which denies the existence of objective facts and discussing briefly its extreme position helps highlight some perceived problems with the constructivist perspective and introduces the concept of problematization as a conceptual vehicle, which provides a middle ground between absolute relativism and perceiving problems (and in particular social problems) as natural. The epistemic relativist would claim, for example, that before the point in time when a certain part of the sky was cut out and abstracted from the night sky by human agents, 'constellations' did not exist (Boghossian 2006). In social terms, what the epistemic relativist is saying is that for human beings constellations

²³ Boghossian (2006) agrees with the 'value added' of a constructivist account based on moral pluralism, relationism and non-absolutism but he rejects the universalization of these types of claims beyond the moral domain and its transformation into global relativism which equally applies to natural, social and moral 'facts'.

did not exist and without human beings, the concept of constellation – a representation of a particular patch of the night sky would not exist either. Part of the issue with fact constructivism and fact ‘fabrication’ as Goodman (1978) calls it, is that it unsettles the relationship between our idea of a constellation, the concept of constellation, and that material thing ‘behind’ it which has existed without human agents, but not separated from the rest of the sky and without a name. In this sense, constellations did not exist before human agents *problematized* them. The example above refers to the study and conceptualization of the natural world but is more applicable to the social world. To say that corruption was constructed as a global problem does not refer to the fact of ‘corrupt’ exchanges, but to its problematization. Therefore, the social construction of corruption does not imply corruption did not exist until agents ‘made it up’. On the contrary, such practices existed, but they were not yet labeled as corruption and seen as a problem of global scope. The concept of ‘problematization’ (in the sense of ‘bringing an issue forward’) can provide a useful vehicle of reconciliation when less radical forms of constructivism are employed. The etymological root of the word problem comes from the Greek verb *προβάλλω*, which means to highlight or to bring forward.²⁴ Presenting the process of social construction as a problematization of a certain condition, therefore, does not undermine the facts behind the socially constructed problem, but stresses that at a certain point of time these facts were brought forward; they became problematic.²⁵

²⁴ Oxford Dictionaries, s.v. “problem,” accessed October 22, 2014, <http://www.oxforddictionaries.com/definition/english/problem>

²⁵ Problematization has a long pedigree of scholarly interest with one of the most prominent examples coming from the securitization theory of the Copenhagen School. The framing of problems has been central to the literature on epistemic communities as well, but has been surprisingly understudied by students of global governance (Hülse 2007).

1.3 Global Problems, Instrumentality and Relativism

This thesis starts from the premise that global problems are not natural and self-evident and that in order to become the focal point of specific governance structures, global issues first need to be ‘problematized’. The commonsensical understanding of a problem is usually connected to the notion of emergency. Crises, such as the Global Financial Crisis (GFC) of 2008, demand swift measures, yet the problem at their core remains contested. If moral hazard is constructed as the central problem of the GFC and this interpretation prevails, the nature of the policy response would depend on the agreed understanding of what is problematic with the given condition. The scope and the operationalization of the response come from the definition of the problem. Problems, such as anthropogenically induced global warming, become deeply contested examples of the interaction between science and political power (Pettenger 2007). Since not enough attention has been paid to the research of global problems, a typology of the mechanism in which global problems emerge as such could only be established from the gradual accumulation of cases. Within this framework, the case of corruption could provide insight into how, out of the universe of potential global problems, some rise to prominence so quickly and generate wide-ranging support, while others do not.

A constructivist research agenda on the social construction of global problems provides the broader ideational framework out of which a 'fact' or a collection of facts is interpreted and emerges as a problem. When agency is accounted for, the emergence of the problem loses both its naturalness and its automaticity. Finnemore and Sikkink (1998) argue that international actors ‘call attention to issues or even create issues’ (893). If the etymological root of the word “problem” is to be taken seriously, the process of

problematization would 'bring forward' a condition now defined as a problem.²⁶ The process is not automatic, because even if state, non-state actors or international policy makers 'spot' a problem out there they still have to engage in ontological persuasion at the beginning of negotiations (Hülse 2007).²⁷

Hülse calls for the study of global problems and adopts a radical constructivist approach to prove that actors that are in the business of managing global problems also create them. He argues for the agency of organizations such as the Financial Action Task Force (FATF) in constructing global problems and comes close to the argument in the politics of anti-corruption that the World Bank is instrumentally promoting the issue of corruption to further their mandate and accomplish a 'creeping politicisation' (Marquette 2004). The argument that global actors, who have an inherent interest expanding their mandate transform previously national prerogatives into global concerns does not answer the question why a particular problem emerges at a given time. FATF, for example, is an intergovernmental body at the OECD headquarters and was created with a mandate from the G7 to carry out work on money-laundering; that is FATF may have an interest in creating global problems in general, but it was given a specific mandate to work on money-laundering by nation states. Hülse, therefore, inadvertently brackets the problem by taking money-laundering for a natural problem and accounting only for its instrumental use. This account in which money-laundering is taken for granted but its

²⁶ The notion that the emergence of problems is always triggered by some objectively measured increase or worsening of the condition has been challenged by constructivist scholars. Epstein (2005), for example, argues the explanatory weakness of material based factors in the emergence of an international whaling regime by showing the causal irrelevance of the levels of endangerment of whales to the formation of the regime.

²⁷ Hülse places ontological persuasion as a prerequisite for 'normative persuasion'. During the process of ontological persuasion other actors with competing interpretations have to be convinced of the existence of the problem, its definitional parameters, as well as the causal connections between the claimed problem and other objectives on the agenda.

instrumental use is ‘problematized’ may lead to relativism (as if the problem is chosen at random). Since one of the basic premises of constructivism is that agents of social construction can be instrumental (Ruggie 1998), it is in de-naturalizing problems that the task of social construction lies and this entails asking questions such as: why this particular issue, who claimed it was a problem and why, how did they define it? In order to provide a systematic account of a research agenda with a methodology that can answer these types of questions, the work of Spector and Kitsuse (1973; 1975; 2009) on the construction of social problems is discussed in the following section. Their methods for the empirical study of claims and the development (or career) of a social problem are applied in the empirical chapters.

2. The Social Construction of Global Problems: Towards a Conceptual Framework

A variety of approaches have placed the study of social problems as the center of scholarly enquiry, such as the literature on framing and agenda-setting, but the sociological approach of Spector and Kitsuse (2009) offers the most comprehensive framework through which to examine the entire career of a global issue. It provides the advantage of tracing a collective definition process with a focus on how a putative condition is re-negotiated rather than concentrating on external factors, such as policy windows and focus events (Kingdon 2010). By concentrating on the process of collective definition from the first emergence of claims to the phases of post-institutionalization, Spector and Kitsuse’s approach maps tendencies in the development of social problems. While both framing and agenda-setting offer conceptual lenses of the social construction

of problems, the Spector and Kitsuse approach offers some distinct benefits because of its comprehensive framework and emphasis on collective definition.

2.1. Sociological Perspectives on Social Problems

In a series of articles dating back to the 1970s Spector and Kitsuse (1973; 1975) made a pioneering attempt to systematize the existing literature on the study of social problems. They argued (2009) that the field has hitherto been ‘dominated by textbooks that offer compilations of facts documenting the existence of the author(s) arbitrary selected assortment of what they conceive to be “social ills”’(ix). They offered a redefinition of social problems not as objective self-evident conditions, but as processes in which the power of claims-making groups is the most crucial factor in the establishment of a putative condition as a problem. What Spector and Kitsuse contributed to the conventional study of social problems is that they shifted the sociological attention from the objective condition to the *process* through which claims-makers argue for and define a problem. The process of claims-making can be easily documented, as it is usually discursive and the ‘claims-making activity itself can be empirically observed and documented without regard to the presence or ‘reality’ of the “social condition”, which is conventionally asserted to be the basis of the claims’ (xi).

The ‘subjective turn’ to social problems was not invented with the establishment of social constructionism, but had a long evolution in the field of sociology, starting with the Theory of Social Disorganization. Mooney, Knox and Schacht (2011) single out the Conflict and the Symbolic Interactionist perspectives as providing more sophisticated

analytical tools for the study of social problems.²⁸ Symbolic interactionism is seen to have influenced the writings of Blumer (1971), the Labeling approach and Social Constructionism. In the social constructionist approach of Spector and Kitsuse, social problems are transformed from self-evident objective realities into *activities* through which particular social *groups* identify certain conditions as harmful and in need of corrective action. The significance of this analytical transformation is that social problems become processes of social interaction. The existence and the analytical importance of an actual social condition that triggers the claims-making process by the social participants has been a debated issue (Holstein and Miller 1993). The contestation was partly informed by the battles between scientific realism and social constructionism discussed earlier, but the contribution of Spector and Kitsuse was that their subjective approach led to the systematization of the literature on social problems and to the delimitation of perspectives which had until then been based on unspecified ontological and epistemological assumptions.

The value judgments of the sociologist in assessing social conditions was first attacked by the value-conflict school, which argued that social organization is always imperfect and sociologists should not base their analysis on the expectation that a return to some non-existent social equilibrium is possible (Spector and Kitsuse 2009). The value conflict school turned social problems into a subjectively defined condition that is selected from a number of social participants as harmful and deserving corrective action. This definitional process is also called a ‘negotiation’ because it is inherently political and

²⁸ Mooney, Knox and Schacht (2011) single out three broader perspectives that have been the most influential on the study of social problems: 1. Structural-functionalist; 2. Conflict; 3. Symbolic Interactionist perspectives. Other theories and approaches to the study of social problems can be taxonomically ordered around these three perspectives.

because social conditions become problems by being defined and negotiated by agents. As Spector and Kitsuse argue agents also make their case through ‘quasi theories’ and causal inferences in order to explain, provide order, and restore confidence that the situation can be successfully handled. The discovery of a ‘cure’ and the invention of causal inferences to support the quasi-theory become essential parts of the negotiation process. While this epistemological position is far from being broadly accepted, the argument that the value conflict school promotes is that the sociologist should be, above all, interested in the process through which prescriptions and explanations are voiced and how some of them prevail rather than others. This change of analytical focus transforms the role of the social scientist from a diagnostician of social problems to the much more suitable for the sociologist, in particular, investigator of the process through which social problems are negotiated, defined and institutionalized.

Part of the definitional process is a conflict of definitions, sponsored by two or more different camps trying to negotiate the institutionalization of the problem. The negotiating agents call for attention to some aspects of the problematic situation and attempt the exclusion of other aspects that are neglected as irrelevant or at least are argued to be peripheral to the conceptualization of the problem. The core of the constructivist argument put forward by Spector and Kitsuse (2009) is that as individual agents and organizations promote a problem in the sphere of public recognition they become an intrinsic part of the problem construction and this includes the social scientists investigating the problem. This approach argues that the sociologist who promotes awareness of a social problem or even simply studies it is in a similar position to a ‘lobbyist’. Spector and Kitsuse, therefore, argue that claims-making activities should be at

the center of investigation since any attempt to ‘study the problem itself’ is an act of promotion of a particular interpretation of the problematic situation in which the sociologist simply promotes her version of reality over others. The process of social interaction which constructs the problem is a more suitable approach to the study of society: ‘how individuals and groups become engaged in collective activities that recognize putative conditions as problems, and attempt to establish institutional arrangements’. The claims-making activities of groups who promote a certain version of reality and reject others is placed at the center of sociological investigation shedding light on ‘how methods of social control and treatment are institutionally established’ (72).

This view of social constructivism could be particularly robust when adapted to the field of International relations, as it allows for the role of power in establishing ideas and promoting versions of international reality, by essentially decoupling content and method. The construction of global problems as a perspective on global organization offers a new interpretation of this conundrum by arguing that ideational factors contribute to the establishment and institutionalization of power at the international level and that this power can be ‘ideational’ too. The ability of some agents to establish their version of reality is inseparable from relative power. The struggle of ideas at the global level can be seen as a power struggle in which the stronger prevails not necessarily because of the validity of their argument and the established ideas contribute to the social construction of one version of reality over another.

2.2. Towards a Natural History of Social Problems

Although work on the natural history, or career of social problems has been done within the framework of the value-conflict school since the thirties and forties, one of the early

models belongs to Blumer (1971) and it systematizes the career of a social problem in five generic stages:

1. The emergence of a social problem
2. The legitimation of the problem
3. The mobilization of action with regard to the problem
4. The formation of an official plan of action
5. The transformation of the official plan in its empirical implementation (301)

These five stages capture the transformation of what he calls ‘the process of collective definition’ (288). Blumer argues that rather than positioning social problems in objective conditions, the sociologist should study problems as a process of collective definition because it is this socially negotiated mechanism that determines the career of the social problem. Despite the utilitarian aspirations of sociologists who through scientific analysis break the problem in objective constituents, such as frequency of occurrence, agents involved, and causal relation between the putative objective condition and other elements of social reality, the detection and monitoring of social problems has paradoxically been quite unsuccessful. Blumer argues that sociologists usually follow public opinion in their analysis of social problems and fail to answer why some putative problems fail to come to public attention while others do. Thus, the sociologically significant question under which conditions societies come to recognize such putative conditions as problematic and what is the mechanism through which the recognition and institutionalization comes about remains unanswered. The negligence of this process is not only of theoretical but also of practical concern since: ‘The societal definition and not the objective makeup of a given social condition, determines whether the condition exists as a social problem’ (300). The social definition determines what is done at the policy level about the putative social condition and thus, the mechanism through which society recognizes, defines and

subsequently institutionalizes the governance of social problems appears as an intrinsic part of their practical resolution.

It is noteworthy that the transition from one stage to the next is highly volatile; at each stage the career of the social problem can be interrupted as not all problematic situations that come to public and media attention are taken seriously by the administration and the government and not all situations that are discussed in official institutions manage to make it to legislation. Furthermore, the confrontation of positions and interests complicates the smooth development of any social problem no matter how urgent its resolution appears: 'A social problem is always a focal point for the operation of divergent and conflicting interests, intentions and objectives' (301). The role of contingency is another of Blumer's contributions towards the study of social problems (Spector and Kitsuse 2009). Quite often favorable or unfavorable events and social environments make or break the career of a social problem.

The five stages proposed by Blumer have been modified by Spector and Kistuse. The first stage is what Blumer calls the **emergence** of the social problem. The *awareness* of society is an important element at this stage, which characterizes the selective process through which the public and the media recognize social conditions as deserving attention. The second phase after this bid for attention has been successful is **legitimation**. The popular recognition of the problematic situation is a necessary but insufficient condition for a certain 'degree of respectability' to be attached to the social problem so it becomes a matter of debate in the public sphere. The problem, despite some recognition in the first stage, could be considered as an integral part of the way things are done and can be judged as unworthy of consideration for reformative action. If the problem is not

judged legitimate at this stage, it becomes one of the many harmful conditions in society that are being excluded or ignored. As Blumer argues, the selectivity of this process cannot be explained only with some intrinsic urgency of the problem but is quite often the product of influential interests that raise the problem on the public agenda.

Mobilization is the third stage in this process and it is a controversial clash of competing interests and interpretations during which the advocates for reform clash with the vested interests that want to bury the problem and exclude it from public policy. The media at this stage also becomes a hotbed for strategic moves, evaluation and falsification of claims and actively participates in the redefinition together with other interested actors who attempt to bend the definition according to their interests and power. This stage is characterized by intensification and, as Blumer notes, the mobilization stage is when the problem is radically redefined in order to accommodate conflicting interests or it perishes. The fourth stage is the one where an **official plan** is formed and it pertains to the practical aspect of handling the redefined social problem. The problem has entered the sphere of officialdom of the legislative process. At this stage the bargaining and compromises lead to another redefinition of the problem: ‘This is a defining and redefining process in a concentrated form – the forming, the re-working and the recasting of a collective picture’ (304). This official definition may be presenting the social problem in a completely different light than the popular sentiment. The last stage of **implementation** is not an automatic process but again a transformative one during which the understanding of the problem is once again recast under the weight of practice with potential losers trying to undermine the implementation of the plan and the public administration trying to sometimes adjust it subversively to their own, or somebody else’s political agenda. Thus,

according to Blumer, rather than constituting the end of the definitional process, the implementation phase prompts a new phase in the collective redefinition of the problem.

It is important to note that when Blumer refers to the ‘collective definition of the problem’ this is quite different from the one or many overlapping definitions discussed in the relevant social science literature, in the media or the public institutions. Rather than a concise statement that defines the social problem, the collective definition is a process, a kaleidoscope of overlapping claims and definitions that accompany the understanding of the putative condition both theoretically and practically. For instance, the now widely accepted definition of political corruption from Senturia (1931): ‘misuse of public power for private profit’ (449) is also used as operational definition by TI and the World Bank. This short definition of political corruption from an encyclopedia entry from 85 years ago has become successful in briefly representing the contemporary concept of corruption, but is not exhaustive of a ‘collective definition’ of corruption. The collective definition is a *process*; it is the trajectory through which a given society comes to recognize, legitimize and govern social problems. It is connected to the ‘natural history’ or ‘career’ of the social problem, accommodating not simply scientific facts about the putative social condition but also conflicting interpretations, diverging strategies, inequality of power and vested interests as well as practical predicaments in the implementation of the official plan of action. All of these elements shape and redefine the understanding of the social problem and consequently determine its successful governance. Blumer still considers, the study of the ‘objective make-up’ a valuable research agenda, but since the process of collective definition is ultimately *politicized* in his perspective, ‘the knowledge of the objective makeup of the social problem is of significance only to the extent that the knowledge

enters into the process of collective definition' and this is the process of 'being seen and defined' by society that ultimately determines the rise and demise of social problems in the public arena (305).

Spector and Kistuse, delve significantly in the symbolic interactionist school's earlier attempts at theorization of social problems, but dismiss altogether the search for objective definitions of social problems. They carry the research agenda one step further by presenting social problems as a process of claims-making. They base their four-stage model of the natural history of social problems on Blumer and Fuller and Myer, but essentially merge all the 5 phases of Blumer into two, concentrating on the implementation stage, which they argue, was inadequately represented in previous models of the career of social problems. They introduce the 3rd and 4th stages as 'a second generation' social problems which study what happens *after* legislation has been enacted and plans of action have been put into place (142). Spector and Kitsuse argue that the 3rd and 4th stages reveal that government legislation as well as civil society plans of action usually fail to ameliorate the harmful social conditions they aim to address. A brief overview of the reformulation offered by Spector and Kistuse on the first two compact stages is followed by an elaboration of the two new phases introduced in the natural history of social problems.

Stage 1: Debate and publicity prompted by claims-making groups

Stage 2: Recognition of legitimacy leading to official plan for reform

Stage 3: Critical stage of dissatisfaction with official plan

Stage 4: Rejection of official plan, attempt to create alternative solution

The first stage of Spector and Kitsuse's natural history of social problems concentrates on the activities of groups that argue for the existence of a harmful social

condition by which they may or may not be directly affected. This stage is essentially the attempt to transform, in the famous formulation of Mills (1959), private problems into public concerns. This is the stage at which statistically significant occurrences of otherwise private troubles, such as unemployment or divorce, make a bid for public attention. Because a lot of claims are discarded, the success of claims is dependent on the power of the pressing groups and their use of claims-making mechanisms. For Spector and Kitsuse, claims-making is a 'form of interaction' in which 'definitions of conditions as social problems are constructed by members of society who attempt to call attention to situations they find repugnant and who try to mobilize institutions to do something about them' (78).

Therefore, groups with higher membership, economic resources, and more sophisticated organization are more likely to have their claims processed as legitimate. The power of a group to make claims is understood as the ability of a group to realize demands it makes on other groups, agencies, and institutions. Therefore, *the actual results* that a claims-making group manages to produce are the measurement of its power.

While the first stage can continue for an indefinite period of time, the beginning of the second stage is marked by the recognition of the claims-making group by an official agency.²⁹ The success of the group may be achieved through mounting pressure or the agency could recognize that it can gain dividends from assuming control over the problem.³⁰ Spector and Kitsuse remark that often 'commissions reform by public

²⁹ The power of claims-making concerns the effectiveness of a group and should be distinguished from what Spector and Kitsuse call the 'claims to power' which include strategies such as threats of blockages, strikes, withdrawal of support, or the leaking of sensitive information (144). The group may not manage to realize the threats or, even if it does, the campaign may be altogether unsuccessful.

³⁰ Spector and Kitsuse adopt a grass-roots approach in which groups try to get governmental recognition and push a putative condition as a 'formal part of an institutional agenda' (154). The authors, however, recognize that this is simply one route for agenda-setting in society and quite often the initiative comes from

relations, in which the commissions to study the problem are taken to be the substance of reform itself” (150). In the long process of producing a final report, the putative problem may find its premature end or go to the next level of institutionalization. When staff and resources are attributed to the governing of a problem this does not mark the end of its career, but rather signifies a new stage of development. The institutionalization of the problem marks the moment when ‘satisfying complaints’, rather than mitigating the condition itself, may become a primary goal. Spector and Kitsuse mark the end of the second stage: ‘when complaints about some condition have become domesticated and routinized by some agency that develops a vested interest in doing something about the complaints, though not necessarily in dealing with the conditions to which the complaints refer’ (151).

Stage three further complicates the relationship between the problem and the proposed solution due to the inability of the plan of action to mitigate the condition. This lack of effectiveness could be planned since reforms by public relations mean to diffuse social tension and to take control over the solution of the problem. In the third stage of social problem development, ‘assertions about the inadequacy, inefficacy or injustice of the procedures may themselves become the conditions around which new activities’ become organized, often by different groups than the ones that achieved initial recognition (151-2). When the bureaucratic handling of the problem generates new predicaments and claims start to emerge about the procedures rather than the problem itself, these are ‘second generation’ claims.. According to Spector and Kitsuse, after the

governmental institutions that want to raise a condition to the status of a social problem. The difference between ‘initiator’ and ‘responder’ can be hard to discern, but the initiative in the construction of social problems can come from both grass-root movements and governmental institutions. The major indicator of the successful career of a social problem in both cases, however, remains the raising of an issue as part of an official agenda and the enactment of legislation.

routinization of claims is achieved at the previous stage, stage three concludes with a legitimacy crisis. At the fourth stage, interested groups contend that it is no longer viable 'to work within the system'(153). Since the legitimacy of institutions is compromised, either the organizations try to reform or new methods to ameliorate the condition are established at the community level.

The research agenda of Spector and Kitsuse has been very influential but their early work has been contested on the grounds of 'ontological gerrymandering' (Woolgar and Pawluch 1985). This meant constructionist scholars push the boundary between what remains problematized and what remains fixed in the analytical process quite indiscriminately. The debate which came out of this critique led to the consolidation of strict and contextual constructionism. (Best 2009). The epistemological differences between the two are elucidated in relation to the validity of objective conditions. While strict constructionism remains neutral towards the validity of claims, contextual constructionism tries not only to position claims within their socio-historical context, but also place the analyst in a position to evaluate their validity (Best 1993; 2009). In this sense, Best offers a middle ground in the objectivist-subjectivist debate by incorporating elements of both. Contextualizing the process of claims-making, however, does not necessarily entail that the analysts should expose 'erroneous' claims.

Best (1993) finds the development of strict constructionism inappropriate because in the quest for epistemological consistency and theoretical purity, Spector and Kitsuse are trying to fence off their research from the messy business of empirical analysis. A theory of social problem *discourse* which studies only rhetoric and language is more feasible, but it collides with the argument that constructionism is empirically grounded.

Best is critical of this view because it renounces the sociological purpose of understanding and changing reality for the better and relegates sociological studies down to the level of language games. The extremes of contextual and strict constructivism, however, are not the only options in the study of social problems from a constructionist perspective, rather they are the two extreme points of a continuum. It is possible to contextualize discourse and to provide analysis for a variety of claims and counter-claims without making judgment on their validity. The study of social problems does offer practical clues to understanding the empirical realities ‘behind’ problems, but these clues remain implicit. By investigating who are the claims-makers and what are the interests that are fueling their activities, as well as, what kind of evidence are they providing for their claims, the constructionist researcher can present a variety of clues as to the possible validity of claims, but not the final judgment as to proving one group of claims erroneous and another group of claims valid.

2.3 The Empirical Study of Claims

What kind of empirical questions does a social constructionist agenda on social problems pursue? Some examples at the primary stages of claims-making would be: Who are the claims-makers?; What is the context of their interest in the claims?; What type of evidence do they provide? Spector and Kitsuse (2009) provide a dynamic conceptualization of social problems – one that shifts the understanding of problems from a ‘condition’ to an ‘activity’. Claims-making is an interactive process in which demands are made from one group or organization on another: A ‘claim is a demand that one party makes upon another’(83). Spector and Kitsuse (2009) explain that before making a claim,

claimants first construct an etiology of the putative problem which conditions the way the claim is expressed. While they argue that the 'imputation of values and interests' (74) proposed by the value-conflict school is unproductive, the answer to the question as to why some conditions become the source of claims is inseparable from the subjective categories of values and interests. The motivation of the groups and individuals involved at the different stages of the social problem's development is more difficult to infer than a contextualized understanding of the kind of conditions they were facing and referring to as a social problem. In the research process a resurfacing of counter-claims would occur that has a critical and reformative potential. Spector and Kitsuse proclaim a non-committal stance to the validity of claims, but their contextual rather their factual validity can only provide a fuller account of the claims-making process since it gives voice to different claims and is a better position to analytically establish why some kind of claims prevail over others. The socio-historical context of the claim becomes, therefore, the first empirical step for the researcher of social problems.

The question about values and interests is central to the study of international relations and seems to be one of the divisive issues between rational choice theorists and constructivists scholars. Abbott and Snidal (2002) propose a reconciliation of the two positions and an understanding of the connection between values and interests as an interplay, rather than opposition. The approach of Spector and Kitsuse (2009) suggests that the researcher remain interested in the interplay or opposition of values and interests to the extent that participants in the process of social definition impute such categories on one another. Spector and Kitsuse, exclude the study of motives and argue for the *study of functions* and the imputation of motives by the participants involved. 'Real motives' will

always remain elusive and the study of motives will often amount to little more than the projection of motives by the analyst according to her own system of values. The study of functions and the imputation of motives, however, can be easily inferred from the data without pointing to an ultimate motive.

The empirical study of claims starts from isolating the first occurrence of claims-making and studying the background that provoked a particular group to start the process. The sequence of events that initiated the claims is, therefore, part of the claims-making process and after providing this background the researcher should follow the thread of continuity in the redefinition of social problems as they become part of the agenda of different organizations. As a first step the researcher should: 'identify the beginning point of a particular group's interest and participation in the preliminary and preparatory stages of claims-making' and recognize that many cases of claims-making will be unsuccessful (128). Spector and Kitsuse (2009) place the legitimation of the claims by a public institution as the first indicator that claims are being successful. The main research task in the first phase of the empirical analysis of claims, therefore is to individualize the initial claims-makers. If the claims are rendered legitimate, an Ad Hoc Committee to study the issue is usually formed. The selection of the Committee sheds light on what kind of experts are deemed authoritative and what kind of definition is about to emerge, since sociologists, economists or legal experts would have a different take on the same objective condition. Whether a problem is of economic, humanitarian or legal nature is not a self-evident aspect inherent to the objective condition itself and the prism through which a problem is viewed becomes a strategic and essentially a political tool. Appeals to legal rhetoric, for example, can be used as a universalistic rationalization for self-interest:

‘International talk is often moral and legal because the obligatory vocabulary of moral and legal dispute between individuals is also useful for purely amoral strategic interactions when cooperation and coordination are involved’ (Posner and Goldsmith 2002, 115).

The collection of new documentation by the ad hoc Committee and their recommendations are further examined. The way an understanding of a condition is continuously shifted from the first occurrences of claims-making through the internal proceedings of the organizations that deem the claims legitimate is of high relevance to the social construction of problems:

The data document the development of claims and issues as they are defined, redefined, and passed from one set of participants to another; this thread of continuity leads to and through a variety of institutions and casts of characters. ... The unit of analysis of these data is the historical thread of continuity that resides in the interaction of participants in the unfolding and development of ‘the problem’ (Spector and Kitsuse 2009, 125-6).

The processing of claims leads to a continuous redefinition of the problem and the inclusion of contributions from new participants in the definitional process. Excavating competing claims from the definitional process and contextualizing the emergence of claims-making provides potential clues as to what kind of claims and under which conditions prevail over others and shows that other interpretations of putative conditions are possible but are neglected or overruled by more successful claims. Shifting claims from ‘localized’ to ‘globalized’, changes the definition of the putative condition and is reflected in the negotiation of a final solution. Spector and Kitsuse provide relevant empirical cases for how the expansion of the geographical and definitional scope of a problem may lead to a deadlock. Opening up the research to controversial questions and proposing solutions that are too radical and potentially disconcerting in the public eye is

another route to an impasse. Nevertheless, the claims are still successful if they have received formal recognition and have become part of the agenda of international organizations. Claims-making activities might go through a number of cycles of recognition and failure before the institutionalization of the problem.

Recognition by an official public institution is, therefore, the usual method of seeding successful claims, even though public institutions themselves may be the generators of claims. While claims may be implicit, their existence depends on the recognition of the legitimacy of the claim by the respondent. The appropriate forum or organization in front of which the claims should be lodged is therefore, essential to the advancement of claims-making. The claims-making process at the international level is different from the national, but still the recognition that specific claims constitute a legitimate item on an institutional agenda is part of the study of social problems. The official recognition of a respondent is an essential tool in the isolation of specific claims. The response in most organizations is routinized and the strategies for a successful recognition become part of the organization of claims. The organization and processing of claims-making activities become, therefore, an empirical question to be answered since there is 'no simple mechanical, causal relationship between a condition, and the activation of responses and complaints'(84). The careers of social problems, however, do follow similar patterns that can help the understanding of the impact of agents on the social construction of global issues as well as help discern the future trends in the development of a social problem past its legitimacy crisis and the emergence of second-generation claims.

2.4. The Social Construction of Problems: Towards a Globalized Perspective

The process of claims-making in the framework of the global governance literature is similar to the conceptualization of Abbott and Snidal (2000) who distinguish between ‘demandeurs’ and resisters in the production of international legislation. Demandeurs are ‘states (and other actors) that have worked to obtain commitments from others, often in the face of strong resistance’ (431). In international law, legal regimes often become ‘functions of demandeur preferences’ (Gopalan 2008). The main difference between the claims-making process of Spector and Kitsuse and the demandeur approach of Abbott and Snidal is that in the conceptual framework of the former both demandeurs and resisters will be considered claims-makers. When the construction of social problems becomes the product of a process of collective definition, the resisters stop being presented as simply being in opposition to the ‘problem’ and become contestant claims-makers in the construction of the problem. This shift is significant because it sheds new light on the production of global governance structures. If we take as an example the politics of contestation by developing countries on global environmental arrangements, the conventional perspective is that their opposition to solving the problem of environmental degradation has finally been overcome (Najam 2005). From a constructivist perspective, however, the same politics of contestation by the global South becomes part of claims-making activities that are analyzed at the same level as the pro-active politics of the demandeurs. A conventional understanding of social problems existing simply as ‘objective conditions’, would assume that the ‘resisters’ are against the ‘problem’, but according to the constructionist reading of the same dynamic this might not be the case. The ‘resisters’ or the ‘counter claims-makers’ may have a different understanding of the

putative condition and their rejection of the demands could be justified by this differing interpretation. The claims-making activities of the ‘demandeurs’ may not be given priority and their bid for attention may not be taken seriously and remain without legitimacy. At the global arena, state and private claims-makers make their bids for legitimacy in front of official organizations and in front of each other.

The participants in the process of claims-making will differ in a national and international environment:

National claims-makers:

1. Pressure Groups: Political Activists and Lobbyists
2. Moral Entrepreneurs
3. Academic experts: Academic and Social Researchers
4. The Traditional and Social Media: Newspaper Columnists, Media Commentators

Global claims-makers:

- 1) States
- 2) International Organizations
- 3) Global Civil Society/ Global Business
- 4) Epistemic Communities
- 5) Global Traditional and Social Media

In addition to looking for a different set of agents, the claims-making of global problems will differ in terms of content because claims will be not only asserting that a problem exists, but also that this problem is best addressed through coordinated action at the global level. Transboundary problems such as environmental pollution appear to be quite obviously global or at least transnational rather than national problems, yet their amelioration through global coordinated action is not automatic. Conventional approaches assume that the resistance to change, usually presented through the opposition between demandeurs and resisters, is at the core of the problem and the fault for the deadlock

usually lies with the resisters or with states who do not want to compromise their national sovereignty. The social constructionist approach presents this dynamic in terms of claims and counterclaims. Counterclaims do not necessarily oppose the ‘problem’, but may rather contest the scope of the condition, its parameters and definition and the proposed course of action. Counterclaims may also be directed towards the ‘global status’ of the problem, and may insist that the problem is one best handled within the boundaries of national jurisdiction.

Spector and Kitsuse (2009) define social problems as ‘the activities of individuals or groups making assertions of grievances and claims with respect to some putative condition’(75). This condition is in need of amelioration according to the etiology presented in the claims of these groups. Global problems are **the claims-making activities of state and non-state actors who make assertions that some putative condition is a problem which can be ameliorated only through coordinated action at a global level.** The claims as to why a problem is global rather than national are therefore an essential part of the claims-making process.

Global problems are by definition trans-sovereign since sovereign states are not able to deal with them on their own (Love 2010). The amelioration of global problems is often the prerogative of global governance structures and global governance can indeed be defined as ‘collective actions to establish international institutions and norms to cope with the causes and consequences of adverse supranational, transnational, or national problems’ (Väyrynen 1999, 25). Demand for global governance is intensified through globalization and global governance is to an extent a collective response to global problems. While the relation of the social construction of global problems to the literature

on global governance has been mapped in the previous chapter, it is essential to stress what makes the ‘globality’ of a social problem. Claims-making activities that demand a global response are a necessary prerequisite for the social construction of ‘global problems’. While the term global can be applied to a variety of problems that are encountered by nation states as long as there are no demands for the creation of institutional structures with transnational, trans-sovereign or at least international element, we cannot speak of a global problem the way it is intended in this thesis. For example, unemployment is often referred to as a ‘global problem’ because a lot of nation states have undesirably high unemployment rates. However, while the International Labor Organization estimates the global number of unemployed for 2013 to be over 200 million, this is still not a global problem as intended in this thesis (ILO 2014). Unemployment has indeed reached the status of a global fright in a period of just a few years. A BBC World Service Survey showed that it has joined corruption and poverty as the most talked about global problems. A six-fold increase of public concern with unemployment has been marked from 2009 to 2011 (GlobeScan 2011). The IMF has made appeals for international coordination of policies on aggregate demand to boost job creation indirectly, but has not recommended coordination of labour market policies (Gali and Blanchard 2010; Blanchard, Jaumotte and Loungani 2013). The worldwide public concern with unemployment and the construction of a global unemployment problem are not yet matched by successful claims-making activities that will boost unemployment as a global agenda item.

A global problem will start its career after claims are being made that the unemployment situation can be ameliorated only through coordinated international and

global action and not through more effective policies of national governments.³¹ Therefore, the construction of a global unemployment problem would entail that claims-making activities are taking place that the unemployment numbers can be tackled only through collective action at a global level and these claims are legitimated in the framework of different international forums. The subsequent attempt to govern the problem of unemployment globally or at least through coordinated international action will mark the beginning of a stage of institutionalization.

3. Constructivism and Realism: Towards a New Synthesis

The introduction of a perspective from sociology into IR has to take into account the existence of state agency in international affairs. Barkin (2003; 2011) has criticized the implicit liberalism of constructivist scholars in IR who have not provided for a satisfactory inclusion of state power into studies of social construction. Even though constructivism is usually seen as an alternative to other dominant approaches, unlike liberalism and realism, it is not a substantive theory of IR. The agents of social construction at the global level are often identified as non-state actors, but the neglect of state agency, becomes a neglect of the role of power in international affairs. This thesis examines the agency of state actors and in particular powerful states in the construction of global problems and draws on insights from realism. Realist Constructivism is one form of interaction between classical realism and constructivism that allows for the investigation of state agency in global processes through an ontological lens that detects the role of ideational and normative factors in actors' behavior.

³¹ Even the IMF calls for reform are limited to coordination not of labor market policies, but of fiscal and monetary policies to influence aggregate demand (Blanchard and Gali 2010).

Constructivism is an ontology or methodology, in other words it tells scholars how to study international relations but not how they work (Barkin 2011).³² Usually constructivism is seen as potentially compatible with one of the Neo-Institutionalisms, which appear congruent with the constructivist interest in ideational and normative aspects of social reality. A new edition of ‘constructivist’ institutionalism (Hay 2008) has become a contender in the new-institutionalist family. The origins of constructivist institutionalism can be traced back to historical institutionalism (HI), if we assume that HI occupies the middle ground between rational choice and sociological institutionalism (Hay 2008).³³ Constructivist institutionalism has, however, become ontologically distinct from its predecessors and challenges particularly their inadequate explanation of institutional disequilibrium (60). While the usefulness of the newest institutionalism is put under attack (Bell 2011), the multiplication of constructivist variants of established theories is becoming a trend in IR scholarship.³⁴ This development is consistent with the broader constructivist agenda, since constructivism can be seen as ‘an oppositional movement within IR theory’ (Brown and Ainley 2009), one that challenges the inherent materialism of mainstream approaches in the discipline.

The proliferation of ‘new syntheses’ could allow constructivist scholars to engage closely with dominant theoretical approaches and ‘reform them’ from within. Realist constructivism proposes one such synthesis between constructivism and classical realism (Barkin 2011). Realism and constructivism sometimes appear to stand in complete

³² Barkin (2011) credits Jervis for first observing this interplay between constructivism and substantive theories of IR, which he uses in his synthesis between realism and constructivism.

³³ Hay (2008) clarifies that he proposes the reference to ‘constructivist’ rather than ‘ideational’ or ‘discursive’ because in this way the ontological assumptions of the approach are manifested in a clearer manner (57).

³⁴ In particular Bell (2011) argues that a new constructivist institutionalism is redundant since the problem of explaining institutional change can be better addressed by a modified historical institutionalism, which incorporates constructivist insights.

opposition to each other and indeed a large part of constructivist criticism has been aimed at the structural realism of Waltz. The Wendtian argument (1992; 1995; 1999), however, has been directed towards assumptions in neorealism, not classical realism. In order to be able to address the neorealist theory from an equal ground, Wendt claimed constructivism to be a ‘structural theory’ of international politics. Wendtian constructivism rests on three main assumptions: the centrality of states in the international system, the existence of inter-subjective and not material international structures and state interests and identities being socially constructed rather than exogenous.³⁵ With this move, Wendt adapted constructivism to the claims of structural realism and introduced the concepts of intersubjectivity and social construction of identities and interests in opposition to the tendency of neo-realism to overstress material structures and import exogenous identities into the analysis of international affairs.

A synthesis between constructivism and a theory of IR, in the form of adapting some of the insights from realism to constructivism may provide a robust form of interaction. Barkin (2011) has elaborated the specific points of interaction between constructivism and realism on which the synthesis in this thesis rests. Since the publication of his first article on this new synthesis Barkin (2003) has drawn attention to realist constructivism (Jackson and Nexon 2004; Mattern 2004; Sterling-Folker 2004). Barkin (2011) bases the synthesis between realism and constructivism on the two fundamental concepts of ‘social construction’ and ‘power politics’. He argues that in

³⁵ The exact formulation of the basis of constructivism as a structural theory contending with structural realism reads: ‘Constructivism is a structural theory of the international system that makes the following core claims: (1) states are the principal units of analysis for international political theory; (2) the key structures in the states system are intersubjective rather than material; and (3) state identities and interests are in important part constructed by these social structures, rather than given exogenously to the system by human nature [as (neo)realists maintain] or domestic politics [as neoliberals favour]’ (Wendt 1999, 385)

order to expand the explanatory power of constructivism, theoretical insights from realism have to be adapted.³⁶ Part of the task, however is to decouple classical realism from its merger with excessive materialism and a narrowly understood rationalism. For ‘power politics’ is ‘relative’, ‘relational’ and ‘social’ (18). The ability to employ brute force, in case persuasion fails, is lurking behind but the power struggle is often contained in persuasion: ‘In politics, power is about getting other actors to do what you want them to do’ and ‘political power is ultimately about persuasion, about convincing others rather than forcing’(19). To adapt this argument to the construction of global problems: Power is convincing others that your private troubles are global problems.

The two major points in developing realist constructivism are: to distance constructivism from the inherent liberalism that is characteristic of most constructivist scholarship at least in the United States (Barkin 2003; 2011); and secondly, to stress not only the role of power in international relations but also the way power shapes normative transformations at the global level. In the framework of constructivism, Realism generates hypotheses that bring back state actors, but also show that even state-centered international relations is a battlefield of ideas. Power in inter-state relations is understood not solely as brute material force or violent coercion, since, as Dahl (1957) famously argued, it is the ability to make others do what otherwise they would not have done that is at the core of power relations. The greatest success of power, therefore, is to coerce without threatening. In other words, power as persuasion is part of the realist/constructivist discourse. Persuasion can be seen as the opposite of power, understood as material force, and therefore, persuasion is often seen as the weapon of the

³⁶ Barkin sees the explanatory power of constructivism as rather limited: ‘Constructivism can help us understand how a particular politics is constructed, but it is much more limited in its ability to help us understand how politics in general is constructed’ (11).

weak. Quite often the agents of persuasion at the global level are appointed as civil society actors, epistemic communities and other non-state actors who do not possess the same material capabilities as states. In the creation of global problems around which policy responses are built, however, state actors can be the central players who embark on persuasion campaigns. Their material power is not irrelevant, but at the same time cannot completely account for the outcome and the methods they use.

One of the fundamental sides of the realist/constructivist debate is the role that international institutions hold in this new synthesis. This point is essential because it is one of the most problematic areas in distancing liberal and realist constructivism. That international institutions have a fundamental role in transcending state power is one of the basic assumptions of liberalism. International institutions or even organizations were given little consideration in classical realism, but in order to synthesize realist insights with constructivist ontology some space has to be provided for the role of institutions in global affairs. This thesis argues that this can be achieved through the concept of international regimes. While both regime theory and global governance have developed as part of a liberal research agenda, the concept of international regimes is compatible with both the realist state-centrism and the constructivist stress on inter-subjectivity.

4. Methodological Issues, Case Selection and Data Sources

This thesis starts from the argument that problems in the field of international politics are not natural and that they need to be constructed as issues around which international policy responses are built. Problematization is the mechanism through which an issue is

constructed as a problem for an international regime, understood as an issue-specific governance structure. The observable effect of the successful construction of a global problem is the emergence of a global governance structure or an international regime to address the issue and in particular, since this thesis adopts a formal definition of regimes, the adoption of international treaties, declarations and other agreements.

The thesis employs discourse and practice analysis methods in accordance with the strategies of Spector and Kitsuse (2009) for the empirical study of claims. These discursive strategies include the study of the definition of conditions, expression of claims and imputation of motives and values by the claims-makers as well as practices and strategies of managing controversy and publicity. Spector and Kitsuse put forward library and archival research and analysis of documents as well as unstructured elite interviews as the right methods to obtain the data for their definitional approach. The presentation of the data has to be highly detailed and include excerpts of memos, faxes, letters, minutes of meetings, commentaries and dossiers in the media. The examples that Spector and Kitsuse provide to illustrate the study of the social construction of problems highlight the main methodological aspects of the empirical study of claims.

While claims are discursive strategies, this thesis argues that some discourses matter more than others and that it is not visibility that is the most important feature of the discursive construction of a problem. In order to contextualize claims, the analysis reaches beyond the strictly discursive plain since to adopt a discursive approach alone means to implicitly argue that global problems are 'talked into existence'. This argument would devalue the construction of global problems since potentially and practically many issues are talked about in global terms. The role of the media and global civil society are

essential to agenda setting understood as high social visibility, but at the same time the role of the media and civil society is not the most influential creator of problems at the global level. The construction of global problems depends predominantly on the political will of powerful state agents. This means that the mechanism through which corruption was constructed as a global problem was predominantly intergovernmental and that powerful states were the primary agents of construction. They were moved by ideational and normative as well as economic, security and material considerations, but it was state agency that moved corruption beyond national borders and external factors such as the end of the Cold War were used instrumentally and provided a window of opportunity rather than the impetus for the construction of the global problem.

In the empirical chapters within-case analysis of the discursive strategies of social construction of the problem of corruption in two international organizations – the OECD and the UN - is investigated. In the process of data collection, the two discussions proved to be more entangled than expected. In particular, the OECD discussion in 1977 of a possible treaty addressing issues of corruption for the first time was made conditional upon the successful advancement of the same issue within the framework of the United Nations. Similarly in the late 1990s, it was after the adoption of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, that the discussions within the UN changed and allowed for the adoption of the most comprehensive global instrument against corruption. The interconnection between the two cases enhances the argument that problematization of global issues is an essential step in the adoption of international treaties within the framework of international regimes. The successful legitimation of a global problem within one institutional framework may lead

to a quick spillover to other international forums. Finnemore and Sikkink (1998) credit norms for this policy cascade, but as the empirical chapters show, the spill-over effect was due to the agency of states.

The empirical within-case analysis of discursive strategies of problematization is based on primary data from three main sources – Congressional and State Department archival data, an extensive investigation of the OECD Archives and available UN resources obtained both directly from the United Nations Online Archive and the United Nations Office on Drugs and Crime and indirectly from the OECD archival listing of UN materials. The data analyzed is sensitive and different declassification procedures apply within the different institutional frameworks. Congressional and State Department archival materials, in particular from the 1970s, are available to researchers due to the exhaustion of the 20 year period of disclosure. At the level of the OECD, the Council Resolution on the Classification and Declassification of Information (CES/CRC(97)16) provides access to all archival materials (including classified) after a period of maximum 6 years. The access to primary documents dating before 1997 is possible under the same conditions but necessitates a special request. The review and reproduction of all types of data proved unproblematic during my research period at the OECD Headquarters; OECD data provides the most abundant resource for the analysis with more than 20 000 documents. The access to preparatory documents or minutes of meetings also proved unproblematic. Lastly, the compendium of primary archival sources is complemented with the examination of journalistic sources reproduced in the OECD press reviews in

order to gain an understanding of the media and public perception of the talks and the wider societal context.³⁷

5. Thinking of Corruption in Global Terms: Some Conceptual Clarifications

This thesis studies the emergence of problems as evolving products of collective definition that are in a dynamic relation to the putative condition that they refer to. In the anti-corruption case different understandings of corruption saturate the academic and policy debates. From an expansive definition that understands corruption as the permeation of the political sphere by the logic of the market (Girling 1997) to a more operational understanding of corruption as a monetized exchange, setting precise definitional boundaries is a difficult task. The most referenced and broadly accepted conceptualization is the operational definition used by TI: ‘the abuse of entrusted power for private gain’. The TI definition does not specify the subject of the ‘entrusted power’ and therefore does not limit the instances of corruption to holders of public office.³⁸ This operational definition is shared by the World Bank with a slight alteration – ‘the abuse of public office for private gain’ (World Bank 2014). The misuse of public power for private gain is mistakenly attributed to Nye as a derivative of a much more elaborate conceptualization, but it can actually be traced back to Senturia (1931). Senturia put forward the ‘misuse of public power for private profit’ as the definition of political

³⁷ George and Bennett (2005) put forward a compendium of the same type of data sources and emphasize that classified sources require acquaintance with the wider social context through the reading of journalistic data from the period corresponding to the archival material (97).

³⁸ In the methodological elaboration of the CPI index, Lambsdorff, the creator of the CPI, slightly alters the definition as to the ‘misuse of public power for private benefit’ (Lambsdorff 2007, 16).

corruption (448). In the current form and with some modifications in the wording, this definition applies to both administrative and political corruption.

Political corruption and administrative corruption are also ‘grand’ and ‘petty’. The primary difference between the two is that the former implicates political decision makers while the latter is concerned with lower-level bureaucrats. Furthermore, systemic corruption vertically cuts through petty and grand corruption and ‘implicates an entire bureaucratic hierarchy, electoral system or overall governmental structure from top to bottom’ (Rose-Ackerman 2007, xvii). A distinction in different types of corruption exists between the small and big ‘c’ and is useful for distinguishing between scandals which remain a symptom of corruption and the broader phenomenon of corruption itself (Harris 2003). The interplay between grand corruption and the so called ‘small c’ corruption are discussed in the empirical chapters.

This thesis preliminary understands corruption in the conventional (Senturia) definition, as the misuse of public power for private gain, which also informs the operational definitions of TI and the World Bank. Despite minor alterations in the wording, the contemporary understanding of corruption revolves closely around the institution of the public office. In both grand and petty corruption, it is public officials at different levels of government, who fail to observe the public interest and become a focal point of concern. Heidenheimer and Johnston (2011) argue that in relation to the referential frame for the misuse, four definitional variants exist; a ‘public-office-centered’, a ‘public-interest-centered’, a ‘market-centered’ and a ‘public-opinion centered’(3-12). Von Aleman (2004) proposes a further five dimensional expansion of the concept which includes corruption as ‘social decline’, ‘deviant behavior’, a ‘system of

measurable perceptions’, ‘a logic of exchange’ and corruption as ‘shadow politics’ (24). Even though the five-fold definition aims to contextualize corruption and embed it in a broader social debate, the elastic nature of such expansive definitions is problematic. In order to avoid a conceptual overstretch, the thesis adopts the operational definition of corruption as the misuse of public power for private gain but remains attentive to the more expansive forms of the concept employed by the media, since they become intertwined with the more precise definitions of corruption in the formal agreements that are discussed in the empirical chapters.

One of the consequences of conceptualizing corruption as a ‘transaction’ and in particular as bribery was that corruption becomes measurable. Selecting a piece of the puzzle such as illicit monetized payments between private and public agents makes corruption quantifiable and was done for the purposes of economic analysis (Rose-Ackerman 2007). Quantification of the perception of corruption in the CPI index is not limited to bribery of public officials, however, but includes public procurement kickbacks and embezzlement of public resources (TI 2014). The concept of corruption, both theoretically and empirically intermingles with other concepts such as clientelism, patronage, rent-seeking, and bribery.³⁹ Debates about the forms and types of corruption are complex and, for the purpose of this thesis, redundant since the scope of investigation is on the construction of corruption as a global problem rather than the operationalization of the concept of corruption for quantitative analysis. Two useful sources on the definition

³⁹ Piattoni (2001) sees the inter-linkage of corruption with clientelism and patronage, not so much as an empirically grounded phenomenon but also as a feeble grouping of interrelated concepts which constitute a “‘corruption’” (in a common language sense) of the democratic ideal’ (7). The difference between corruption and clientelism can be seen in the existence of monetary or ‘monetarizable goods’ in the case of corruption and the fact that clientelism occurs in ‘fully mobilized polities’ where the state administration has spilled into what was formally a prerogative of the private sphere (Piattoni 2001, 6-7).

of corruption that this thesis examines in detail are provided not by the academic literature but by the UN and the OECD. The two organizations do not re-define corruption since they accept the conventional social science definition adopted here. In establishing the range of corrupt offences covered by the UNCAC and the OECD Convention, however they respectively establish two different scopes on corruption, with the UN providing the widest most comprehensive treatment of corruption globally and the OECD establishing the more limited offence of corporate bribery of foreign public officials. The commentary on the Tenth Principle of the UN Global Compact provides a broad definition of corruption, which oscillates between ‘influence’ and ‘institutionalized bribery’. In both instances non-monetized forms of corruption remain part of the definition. Furthermore, the scope of offences that the UNCAC criminalizes is broad and reaches beyond bribery and embezzlement to include money-laundering and corrupt transactions, limited to the private sector. In this sense, the UNCAC constitutes not simply the only global instrument against corruption but also provides the most comprehensive scope for the definition of corrupt transactions and activities related to them (UNODC 2014). As is shown in the empirical chapters, this expansive definition was part of the very process through which the question of corrupt payment was discursively negotiated in the UN since 1975.

Transnational corporate corruption, in particular bribery involving public officials, was the focal point around which a global corruption problem was constructed and because of which the more comprehensive UN approach became possible. Corporate bribery pertains to both the administrative and the political type of corruption but it is usually grand corruption that draws more concern with ‘facilitation payments’ to

administrative officials being admissible in the OECD Convention.⁴⁰ Corporate transnational bribery remains a distinctive type of corrupt transactions which was central to the construction of corruption as a global issue and there are two major reasons for that: 1) the transnational nature of such activities made them an issue that required new forms of cooperation and the creation of channels for sharing information that did not exist prior to the adoption of the OECD Convention in 1997 and; 2) before the entry into force of the Convention corporate bribery of foreign public officials was legal in the country of origin. Persuading actors why corporate bribery was a problem that needed to be criminalized from the supply side of the bribe provided an essential channel for the more general issue of corruption to emerge as an item on the global agenda.

Conclusion

This chapter introduced the conceptual building blocks of this thesis by presenting the main elements of a research agenda on the social construction of problems. It did so in three steps: first, by presenting the essentials of the concept of social construction and second, by channeling it towards the more specific agenda of Spector and Kitsuse (1973; 2009) on the social construction of problems. Thirdly, adapting this sociological approach to the field of IR entails the consideration of a different type of agent – that is state actors. This thesis argues that the social construction of a global corruption problem remained a

⁴⁰ The exclusion of facilitation payments is made in Art. 1.9 of the Convention.

largely intergovernmental process, driven by powerful states. Finally, with this examination of state power in the social construction of international reality, this thesis joins the approaches that aim for integrating realist insights into constructivism.

Following the conceptual framework of Spector and Kitsuse, the first empirical chapter starts with tracing the first occurrences of global claims-making in the 1970s by identifying the first institutional legitimation of claims. The chapter proceeds to follow the pre-negotiation talks at the OECD and the UN and to uncover the reasons for the failure to open treaty negotiations at both organizations through the analysis of claims and counter-claims and the redefinition of the scope of the problem. Lastly, the first empirical chapter examines the consequences of the 1970s and in particular the decision of the United States government to unilaterally address the problem of corrupt payments through the adoption of the FCPA. The frustrated attempts to repeal the Act in the following decade paved the road to the re-launching of global claims-making activities in 1989, which is the subject of the second empirical chapter.

Chapter III

The Social Construction of Corruption as a Global Problem: First Occurrences of Global Claims-making in the 1970s

Introduction

This chapter presents the process of claims-making which moved the subject of corruption beyond national borders. It does this by identifying the first occurrence and institutional recognition of global claims and presenting the socio-historical context in which they were launched. In the third section of the chapter, the content of global claims at the OECD and the UN is examined and the reasons for the failure to reach consensus on the definition of the problem are analyzed through the weighing of counter-claims. The failure of the pre-negotiation talks, led the United States government to find a unilateral solution to the question of corrupt payments in the form of the FCPA which is examined in the last section of the chapter. The failed talks of the 1970s and the adoption of the FCPA in 1977 were the legacy against which global claims were re-launched in 1989, which we will examine in the next chapter. By establishing the agency of states in the process of social construction at such an early stage (1975) and examining in detail the content of claims and counter-claims at the OECD and the UN, this chapter argues that the successful campaign to construct corruption as a global policy problem in the 1990s can only be understood as the legacy of the 1970s and that states were the pioneers in the process of collective definition. In this way, this chapter lays the groundwork for the argument that

state power is essential to have an outcome in the creation of global problems and that powerful states can be pro-active participants in the construction of global problems.

The first step in the study of claims is to 'identify the beginning point of a particular group's interest and participation in the preliminary and preparatory stages of claims-making' and recognize that many cases of claims-making will be unsuccessful (Spector and Kitsuse 2009, 128). The legitimation of claims by a public institution is the first indicator that claims are being successful in establishing the grounds for the construction of a social problem. The search for the first occurrence of claims-making about corruption being a problem in need of globally organized corrective action shows that the first legitimation of claims took place in 1975 in the United Nations, the OECD, the World Bank, the International Monetary Fund and the International Chamber of Commerce, but before that in the US Congress. The United States submitted a proposal to the OECD for the inclusion of 'illicit payments' in the Guidelines for Multinational Enterprises (OECD IME(75)18).⁴¹ The formal claim was made on the 17th of September 1975, just before the opening of the regular session of the United Nations General Assembly in the third week of September where a similar claim about 'corrupt payments' was reiterated. In the beginning of September 1975 informal talks including a number of Finance Ministers from developed nations, were carried out by Treasury Secretary Simon in the IMF and the World Bank (U.S. Senate 1975).⁴²

⁴¹ Due to the large amount of documents cited from the OECD Archives, in-text citations use the reference code, because this constitutes the most effective method to locate the documents in both the bibliography and the OECD archives.

⁴² The first formal appeal for global attention was allegedly made by Secretary of State Henry Kissinger on the 1st of September, 1975 during the Seventh Special Session of the United Nations General Assembly. The speech "Global Consensus and Economic Development", delivered by D. Moynihan due to the absence of Kissinger, however, does not include any direct reference to the question of corrupt practices (U.S. Senate 1975).

The institutional Legitimation of Claims

The first formalized claims that there was a problem with corruption or ‘corrupt practices’ of worldwide magnitude and demanding a consistent global approach in order to be eradicated were made by the United States Delegations to the United Nations and the OECD in 1975. The US claims-making activities in the OECD were related to the ongoing negotiations of the Guidelines for Multinational Enterprises, which were successfully completed the following year. The US contribution was proposed under the heading, “Political Involvement”. The Draft Guidelines on Political Involvement of Multinational Enterprises recommended that companies and multinational enterprises evade interfering in the politics of a host country and eschew political contestation.(OECD IME(75)19,4). A United Kingdom proposal explicitly referred to political influence through monetary payments and recommended that multinational enterprises:

Refrain from tendering any payments (other than for manifest public purposes) to a host government, or to its agencies, or to political parties, unless such payments are lawful and details [sic] of the amounts and the beneficiaries are published in accordance with a general requirement of the host government regarding such publications (OECD IME(75)16,1).

The US modified position simply clarified that: ‘Enterprises should neither make nor be solicited to make payments to government officials or (illicit) contributions to political parties and candidates’(OECD IME(75)18,1). ‘Illicit payments’, a euphemism reminiscent of the ‘irregular payments’ by American corporations investigated by SEC at the time, remained the preferred and to some extent dominant formulation for the discussion of such practices in the OECD; while in the United Nations reference was made to both illicit payments and corrupt practices. The explicit connection to corruption in the latter

formulation contributed to the confrontation at the United Nations, but also provided some precision, since there is a broad range of illicit payments that may not be related to corruption. Simultaneous to the proposal in the OECD, the United States made an official appeal to the United Nations during the 30th session of the UN General Assembly within the framework of the Commission on Transnational Corporations. In addition to the United States, two other countries submitted draft resolutions to the General Assembly concerning the treatment of international corrupt practices – the Libyan Arab Republic and Iran. Even early on in the discussions the work of the OECD Committee on International Investment and Multinational Enterprises was explicitly connected to the UN Commission on Trans-national Enterprises. The OECD Committee discussed an exchange of views with the UN Commission on a permanent basis⁴³, but was met with opposition by some Delegates, who while principally agreeing to the collaboration stressed that:

...a clear distinction should be made between exchanges of views and attempts to coordinate views; Delegates should also be aware of the fact that the discussions which will take place in the ECOSOC and its subsidiary bodies on a Code of Conduct would be different from those taking place within the OECD. It was explained that this was partly due to the fact that, to a certain extent, the specific concern of developing countries about the activities of multinational enterprises differs from that of the OECD countries in this field. (IME/M(75)2,8)

As we will see shortly, the attempt to keep the two processes separate failed and the development of a legally-binding OECD Convention on illicit practices was made

⁴³ The attempt to cross-pollinate at the level of ideas, but keep the two talks separate was further elaborated in the following manner: 'The question was raised of whether the Committee, or those Members of the Committee who are at the same time Members of the Commission on Transnational Enterprises, would wish to use the session of the Committee as a forum for exchange of views in particular on ECOSOC's activities relating to multinational enterprises. In response to the Chairman's question several Delegates expressed the view that it would be useful and desirable to have such an exchange of views on a permanent basis, in the framework of the Committee. Other delegations, while agreeing in principle to the proposed exchanges of views, stated that a clear distinction should be made between exchanges of views and attempts to coordinate views.' (IME/M(75)2,8).

conditional on the developments at the UN Commission on the same subject. The differences and interconnectedness of the claims and counter-claims in the United Nations and the OECD are analyzed in detail in sections three and four. Locating the first institutional response to the claims is the first step in individualizing a claims-making activity, a starting point from which the analysis folds back to look at the context of an agents' interest in pursuing claims-making activities in the first place. The next section examines the social and historical context that led the United States to pursue the agenda of constructing corruption or corrupt practices into a problem of international concern.

2

Socio-historical Context of the Claims

The United States claimed in 1975 that there was a problem with corrupt practices, stressing the global impact of a particular type of corruption, that is, payments by corporations to public officials in foreign countries. The trans-national character of this activity made it particularly susceptible to global consideration. The illicit payments made by a foreign corporation in a host country were considered illegitimate or illicit in most national jurisdictions, but they were not illegal in the home country where the corporation was primary based. In the post-Watergate congressional hearings the investigations of the Church Committee in 1975 revealed the involvement of a number of US corporations in illicit payments to foreign governments. The Church Committee was investigating the repercussions of the Watergate affair and in particular governmental operations with respect to intelligence activities, but it revealed that questionable payments to US politicians were matched abroad with payments made to foreign political leaders. In the

subsequent investigation of what seemed to be a an illegitimate involvement of US corporations in the domestic affairs of a number of foreign countries, separate hearings on “The Activities of American Multinational Corporations Abroad” were held with Gulf Oil, Lockheed and other implicated companies that had also made questionable payments. Gulf Oil had made such payments in Korea, Exxon, Mobile Oil and Lockheed in Italy, the Netherlands and Japan (U.S. House 1975).

In the wake of the post-Watergate investigations the United States government found itself into what can be described as a threefold legitimacy crisis.⁴⁴ The investigations deepened an already severe crisis of political legitimacy that the United States had to tackle domestically and which involved the attempt to dissipate public mistrust towards government and big business. Secondly, there was the question of legal legitimacy in relation to American-based multinational corporations. The post-Watergate climate was one of the ‘most high profile periods for attacks on MNC’ and ‘every Congressman and Senator wanted his or her own investigation committee’ (Broehl 1996, 159). Internationally as well, the increasing economic power of the multinational corporation and its ability to evade the grip of national jurisdictions led to discussions about the legal status of these juridical entities; the UN and the OECD Codes of Conduct being two examples of such international debates. Thirdly, there was an economic legitimacy crisis with the developing countries due to the unsatisfactory progress in growth rates and income redistribution. A growing disappointment after over two decades

⁴⁴ This threefold distinction between political, legal and economic aspects of legitimacy is based on Bakker. Bakker (2000) describes legitimacy as an inherently political concept interpreted in the classic definition of Lipset as ‘the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society’ (quoted in Bakker, 22). The three qualifications of legitimacy rather than comprising three different definitions, stress three dimensions of the same concept. The central political concept can also be based on legality and adherence to the law as the most important basis for legitimacy and/or economic performance or at least an economic order that is considered just and adequate.

of development policies that was quite concisely captured in an OECD report from 1972 as ‘development weariness’ (DD-300, 5). In addition to the geopolitical impact that this development fatigue could have had in the context of the Cold War, it was threatening the very basis of the relationship between Western investors and Third World countries.

This domestic legitimacy crisis with foreign policy repercussions constituted the backdrop against which the US legislative and executive branches felt constrained to adopt a tough stance against cases of foreign bribery. In accounting for the socio-historical context of claims-making, the stress is not on motivation, but on function. The actual motivation of the American legislative and executive powers to promote claims-making activities in international organizations is difficult, if not impossible, to discern. The study of functions and the content of claims, however, is much easier to document and understand. In order to examine the stated reasons for pursuing a claims-making agenda, hearings at the US Congress in 1975 are a revealing source of information. The two questions that are of concern according to the established agenda of social constructionism is what kind of considerations and functions does claims-making serve and how is the decision of what is a proper international or global forum to lodge the complaints made. The two empirical questions about the social construction of a global problem are what makes a problem global and how the proper institutional setting for the claims-making activities is chosen.

2.1. Establishing the Global Dimension: Magnitude, Definition and Geographical Scope

In the post-Watergate years, investigations and hearings at the United States Senate Select Committee to Study Governmental Operations and the Subcommittee on Multinational Corporations revealed that US corporations had made illicit payments to foreign governments. Given the particular post-Watergate environment, the publicity surrounding these investigations created strong support for a unilateral measure that would forbid US companies to perpetuate these illicit practices abroad, leading eventually to the FCPA which is discussed in section five. In the current sub-section the first claims that corrupt practices are a global problem are presented and it is shown that these claims operated in an environment of uncertainty as to the magnitude of the problem and with fluid definitional boundaries. In light of the expected unilateral legislative measure that the US Congress was pushing for, the search for an international solution became a priority for the US executive and for American corporations.

The primary source of information on the US position in starting a global claims-making process is the Congressional Hearings and Discussions on Senate Resolution 265 “The Resolution to Protect the United States Ability to Trade Abroad” (U.S. Senate 1975). Senator Ribicoff, as a member of the Finance Committee, in the opening of the congressional hearings pointed to the unfavorable domestic and worldwide publicity for US illicit practices that were not, however, the sole prerogative of American companies:

During the past few months, we have all learned of the disturbing extent to which American firms have been involved in these wholly unjustifiable activities. The publicity that has accompanied these disclosures has made it seem to many that this kind of corporate misconduct is primary an American practice. It has been argued that if we stop our companies from engaging in these sordid activities we will be ending the problem. But the

fact is foreign corporations have been involved too, probably even to a greater extent than our own companies.

To prevent American companies from continuing their past abuses we will need stronger laws that will force complete and accurate disclosure. But that is not enough. To (the) end the problem we will need an international solution, and that is the goal of this resolution' (Ribicoff 1975, 2)

This statement presents the problem of corrupt or questionable payments as having a publicity aspect, which necessitates the prompt reaction of the US legislator. At the same time, the problem of illicit payments is claimed to be of global relevance since, despite the unjust focus on American corporations, other corporations are also implicated in such practices. Thus, the twin solutions of national legislation and international negotiations on a collective solution become the center of claims as to the proper course of future action. Senator Church, as Chairman of the Subcommittee of Multinational Corporations, also made a statement that the investigations led him to conclude that a solution to the problem of political contributions that resurfaced during the hearings had to be sought nationally and internationally, but he also pointed to such practices being a 'way of life' and therefore, not necessarily perceived by the participants as a problem in need of timely solution:

It has been a very sorry, sordid tale that the subcommittee heard - a tale of kickbacks and shakedowns, of bribery and corruption in the very highest military and governmental circles abroad and the condoning of secret slush funds, false bookkeeping, Swiss bank accounts and "fake" subsidiaries by the top of the executives of America's leading firms.

Corporate representatives tell us that corruption is an integral part of doing business abroad; that paying bribes is a common and accepted practice or a way of life, as many of them put it.' (Church 1975, 7)

Senator Church was the central figure in the hearings first as Chairman of the so called "Church Committee" or the United States Senate Select Committee to Study

Governmental Operations with Respect to Intelligence Activities and then as Chairman to the Subcommittee on Multinational Corporations. His knowledge and expertise on the subject was central to forming a better understanding of the scope of the problem and its repercussions and subsequently influencing a decision as to why the problem should be tackled and at what level. Senator Church considered the problem of corrupt payments a political and economic, rather than a moral, one and he put emphasis mostly on the repercussion of such payments on American foreign policy. Despite the fact that the Hearings in the Subcommittee provided numerous examples of the way in which US foreign policy was hampered by the revelations, Senator Church singled the influence of corporate bribery on a new arms race in the Middle East as the most important foreign policy aspect of corrupt practices:

Perhaps the most immediate concern is the role of the corporate agents' fees and through them, bribes to Government officials, in fueling a new arms race in the Middle East and other parts of the world. Documents and public testimony before the Multinational Subcommittee show that military procurement decisions which were supposed to be made on the basis of fundamental national security considerations, instead, all too often are based on the size of payoffs made to key people in the military and civilian defense establishments. As these bribes are usually a fixed percent of the cost of a particular weapon being sold, the more weapons sold, the bigger the kickback for the purchaser. The incentive is, therefore, great to buy the most expensive weapons and in greater quantities than are really needed. One country's unnecessarily bloated defense budget then immediately becomes the rationale for its neighbors or potential adversaries to acquire more weapons just to keep up. And so it goes in a vicious and never-ending cycle.⁴⁵ (Church 1975, 8)

⁴⁵ Senator Church further elaborated on the lack of supervision from the US authorities over such practices in particular in the Middle East and what he considered to be the 'real cause' of indiscriminately promoting military purchases in the region: 'Unfortunately, the U.S. Government, and particularly the Department of State and Defense which often oversee our participation in overseas arms sales, has failed to establish clear guidelines for industry on the use of agent's fees. Instead, it has given some companies the impression that it is willing to tolerate the use and misuse of agent's fees so long as growing arms exports continue to contribute to a more favorable balance of payments for the United States. For lack of any comprehensive policy to deal with the real root of the problem, the high price of OPEC oil, this administration is depending heavily on the export of sophisticated and expensive weapons to soak up some of the oil money and return it to the U.S.'s economy. Thus, ironically, as the U.S. commitment and direct involvement in maintaining

According to the statement the payments constitute a problem because legitimate defense requirements should be the basis for making arms purchases rather than private financial interests. In addition, sensitive matters such as arms policy, should remain foremost a transaction between governments and the existence of such illicit payments by private corporations should be eradicated. Leaving defense budgets to be influenced by the incentive of private profit may lead to an escalating arms race with grave repercussions for armed conflicts. The effect of corporate bribery on political regimes in other countries as well as the foreign policy objectives of the United States was not limited, however, to a spiraling arms race, but involved the use of corrupt payments by American corporations in ideological warfare :

There is also little doubt that widespread corruption serves to undermine those moderate democratic and pro-free-enterprise governments which the United States has traditionally sought to foster and support. Several oil companies testified before the subcommittee that they had made huge political contributions in Italy and Korea, for example. They claimed to be supporting the democratic forces who are friendly to foreign capital in those countries, but in fact, they were subverting the basic democratic processes of those two countries by making illegal contributions and were, at the same time, providing the radical left with its strongest election issue. (Church 1975, 9)

The tendency of electorates in other countries to start perceiving their governments as ‘handmaidens of foreign and domestic financial interests’ was jeopardizing the American foreign policy objective of stabilizing democratic and foreign capital friendly political regimes (9). Foreign policy repercussions of corrupt practices were the main issue for the Subcommittee on Multinational Corporations, but Senator Church argued that these practices committed abroad were also problematic domestically:

peace in the Middle East is growing, so is its willingness to provide all sides in that conflict with the instruments of another war.’ (Church 1975, 8).

But corrupt practices also have an impact here at home. As was revealed by the Watergate investigations, the same techniques used by the corporations to make surreptitious payments abroad were also used to make illegal political contributions in the United States. The slush funds and secret bank accounts from which money was drawn to pay foreign politicians also provided the means of disguising corporate contributions to American politicians. (Church 1975, 9)

The illicit interaction between private and foreign as well as national public actors, revealed through the investigations, constituted a national as well as an international problem. Illicit payments also constituted a short-sighted understanding of American business interests and, as Senator Church asserted, the business community was already aware of the fact that corruption was not a viable long-term strategy. American leadership in tackling the issue internationally and nationally was necessary for the American business community as well. An analogical international solution had to be sought in addition to a national one since the problem was not only American and as Resolution 265 affirmed the competitiveness of American business should not be compromised with a unilateral solution (Church 1975). Senate Resolution 265 urged the American executive to start talks for a treaty on corruption in the framework of GATT or other trade agreement. A multilateral approach to corrupt payments was deemed appropriate in order to preserve the competitive positions of American companies in international trade.

It was more than logical to conclude that the problem with illicit political contributions was not a patented American one and hearings at the Subcommittee of Multinational Corporations bore testimony by American enterprises that such practices were widely shared in the global business community but the evidence was scarce. Senator Church admitted that American companies during the hearings: ‘spoke in generalities. They said that they believed that these practices which they themselves admitted were commonplace, they believed that foreign firms did engage in them. But

they were not able to furnish us specific information' (Church 1975, 10). The Senator himself was positive that this was not solely an American practice, but he referred to the difficulty of discovering definitive proof. The evidence he provided was of anecdotal nature – he referred to two stories he read in the press about Belgian and French bribery cases.⁴⁶ A conventional understanding of problems as objective conditions, that are statistically studied and demand an almost automatic response from society and the responsible public authorities, inadequately explains the emergence of social and global problems. Even in cases when the magnitude of the problem appears as the driving force behind building a collective response to a putative condition, it may be the perceived magnitude of a problem (or the publicity it generates) that leads to action and prescriptive rather than empirical argumentation for said action. The difficulty of building a statistical database on global corrupt practices is notorious and the fact that at such an early stage of claims-making, the 'data' is anecdotal is more than understandable. The Congressional hearings persuasively show the lack of precise data, but also the struggle to understand the magnitude of the problem quantitatively. This dynamic is evident in the testimony of the Assistant Secretary of Commerce for Domestic and International Business:

... I've spent the last 15 years of my life in the field of international trade, and in the last 18 months prior to coming to government, I have participated in the financing of over \$300 million of equipment going abroad, and I have never been involved in a transaction of that nature. I do not think that 98 percent of the companies in this country have. I think we are talking about a small percentage. (Reed 1975, 34)

Senator BYRD. You mentioned that 98 percent of the corporations do

⁴⁶ The relevance of the type of evidence provided at this preliminary stage of global claims-making activities does not question the validity of the claims that such illicit interactions were happening or that they were not an American-only practice. According to Spector and Kitsuse (2009), the evidence on which claims are based assists in understanding the process of collective definition and reveals that social problems are far from being self-evident statistically measured givens that demand an almost automatic response from policy makers.

not engage in such practices as are enumerated in the resolution. That is an encouraging statement, I think. Does that apply to 98 percent of the multinationals as well as 98 percent of the corporations?

Mr. REED. The figure 98 percent is my own estimate. It is not something that is statistically proven.

Senator BYRD. Yes; but when you applied the 98 percent, do you apply it to all corporations doing business overseas, or do you apply it to the multinationals only? (U.S. Senate 1975, 37)⁴⁷

The geographical scope became another question in relation to the ‘globality’ of the problem investigated during the hearings. Senator Church concluded that from the information he had gathered during the hearings the rendering of bribes was also from the recipient’s part a ‘worldwide problem’ and American companies admitted to making such payments not only in developing, but also in developed countries (11). On the other hand, the supply part of such corrupt payments, that was deemed to be the developed countries, was more significant because it required the search for a global solution. Senator Church was not aware of ongoing investigations in other countries with the exception of Germany, but he confirmed that Iran and Saudi Arabia had reacted to the findings of the Subcommittee on Multinational Corporations by passing edicts on the practice of rendering commissions in military equipment purchases.⁴⁸ The expected scenario was that

⁴⁷ A similar struggle for quantitative representation of the global magnitude of the problem is evident in the following discourse: ‘Senator BYRD. In how many countries would you say it is a practice of the Government-or Government official to seek and accept bribes or kickbacks or other unethical contributions? Mr. REED. Are you asking me the specific number of countries? Senator BYRD. Yes. Mr. REED. I do not know. Senator BYRD. Do you have any idea? Mr. REED. I would defer to Mr.Katz, maybe he has an answer Mr.KATZ. No,sir,we do not have an answer to that question.’ (U.S. Senate 1975, 37).

⁴⁸ Discussions on the geographical scope of such corrupt practices became a matter of speculation. but conclusive evidence was absent: ‘Senator HANSEN. Internationally, how widespread is the admission by companies in other nations to admit what American corporations here have admitted? Do British, Japanese, French, German firms admit it? Senator CHURCH. I do not know that either the English or the Japanese Governments have undertaken an investigation of this matter. Actually, it has been through the investigation of my Subcommittee on Multinational Corporations that this has first come to light. But that has had some interesting repercussions. Since we began to make these disclosures, both Iran and Saudi Arabia have made laws or edicts against the use of commissions in connection with the purchase of military weapons, so foreign governments are beginning to react to these disclosures.’ (Church 1975, 9).

after other countries undertake their own investigations even if only a small number were willing to make the findings public, this small core of states could reach agreement for an international solution. Senator Church supported a mixed solution for these potential partner countries with the enactment of national laws and corollary international agreement. The proposal of the Church Committee for national legislation on corrupt payments was to a large extent driving the need for an international approach:

Now we have these universal practices all over the world. And American business is being blamed. Talking for myself, personally, I do not intend to sit by and see American business put in a disadvantageous position. And they certainly are in a disadvantaged position because this Congress will, I am sure, follow up the Church committee's proposals and have every type of restriction against American corporations (Ribicoff 1975, 19).⁴⁹

The function of an international solution was, to a significant extent, to preempt national legislation banning illicit payments abroad or at least minimizing the damage that the ban on such payments would have incurred on the competitiveness of American corporations. This is the main reason why representatives of American trade organizations also endorsed the Senate Resolution with the modifications put forward by representatives of the executive. US companies and representatives of the executive were more eager to export the policy debate on corrupt practices abroad, while in the US Congress there was a strong determination to first ban such practices by US companies with a national law that would go in the line of full disclosure or criminalization. For organized business interests the search for a global solution was much more preferable to a unilateral domestic measure which would put American business at a competitive disadvantage.

⁴⁹ Senator Ribicoff concludes on the justification for including the issue under the Trade Act in the following manner: 'And when we wrote that 1974 Trade Act, I think there was unanimous feeling around this table, Democrats and Republicans. We expected once and for all that the American negotiators look out for the interests of American business and not be so hypersensitive to what other people do.' (Ribicoff 1975, 19).

Representatives of American trade organizations, therefore, urged that the problem of corrupt payments be addressed at the international level and the plans for unilateral policy measures be abandoned:

use every resource of the U.S. Government to deal with this problem, and that might include bilateral discussions or any other intergovernmental technique to accomplish the objectives of the resolution. I suggest that the regulatory proposals of the Department of State, which I have entered into the record, are unilateral in character; they are totally unnecessary at the present time; and they would be contrary to the objective of the resolution (U.S. Senate 1975, 41).

The two main considerations were, firstly, not to rush into a unilateral form of legislation before a global approach has been tested and, secondly, to place a demarcation line between similar practices which would render some legitimate and others not. The second concern was expressed about both domestic and global business transactions and especially in connection to military contracts. Business representatives urged that: 'many relationships carried on by U.S. companies even with the Middle East countries or with Indonesia or with some of the other countries that have received so much attention in the press, are legitimate relationships and are not subject to criticism' (41).⁵⁰ Where does the line of demarcation between illicit and legitimate types of influence in business transactions was subject to claims-making. Agent fees were one such example as their legitimacy was claimed justified on the grounds that:

The use of sales agents in some foreign countries by U.S. companies has developed over the years on the basis that locals must deal with locals because of an inherent mistrust of foreigners./ The term "influence" is used here rather loosely. To be more specific, it can range from normal friendships or family ties between local agent and procuring officer to the payment of substantial sums of money to individuals in high government positions with somewhat lesser amounts paid to lower echelon

⁵⁰ The statement belongs to Charles Stewart, who was President of Machinery and Allied Products Institute at the time of the hearings.

government officials. (1975, 49)

The attempt to isolate what constitutes ‘corrupt payments’ from other fees that are necessary to make investments abroad, especially in the Middle East, constitute a claim that pertains to the scope of the problem. Representatives of business and trade interests have tried to delimit a narrower definition of what are considered ‘corrupt payments’ and clarify legitimate agent fees, monetary and non-monetary forms of influence and other services that remain outside the ‘problem’. The two primary objectives of organized business interests in the mid-70s were: 1) exporting the discussion of the problem to international forums while preventing the enactment of a unilateral national legislative act; 2) demarcating a narrower definition of what constitutes a corrupt practice. These two objectives shaped much of the strategy of the US executive in addressing corrupt practices internationally. As will become evident with the adoption of the FCPA (Section 5), different actors had different interests. The choice of international organization in which to launch the claims was another example of the plurality of positions in which the intent of the Congress to direct talks to the GATT was challenged by representatives of the US executive and organized business interests.

2.2. Deciding on an Institutional Forum for the Launch of Global Claims

Senate Resolution 265 directed the American executive (President Special Representative for Trade Negotiations, representatives of the Department of State, Commerce, Treasury, and Justice) to initiate negotiations for a treaty on corruption in the framework of GATT or other trade agreement in accordance with the 1974 Trade Act. The main exchange of claims and counter-claims on the content of the problem and the

appropriate international forum in which to attempt a collectively negotiated solution occurred during the hearings of the President's Special Representative for Trade Negotiations. It was in the contrasting positions between the representatives of the legislative and executive branches of government that the claims-making process became ready for international export. The Senate Resolution 265 specified the GATT as the proper institutional forum for the internationalization of the problem of corrupt payments and insisted on its definition as a trade issue. The Special Representative for Trade Negotiations concurred with the general objective of the Resolution, but not with the definition of the problem as a trade issue and with the chosen institutional setting for launching the claims globally.

As we understand it Senate Resolution 265 is intended to focus world attention on what is now being increasingly revealed as a very serious problem; defined in the resolution as "practices of bribery, indirect payments, kickbacks, unethical political contributions, and other such similar disreputable activities which have been found to be widespread internationally and are a significant influence on the conduct of trade and commerce". (Dent 1975,15)

While accepting the Senate's bid for worldwide attention, the understanding of such payments as a problem of trade became a controversial point and it determined the choice of institutional setting in which claims were to be made. The President's Special Representative Dent, insisted that the trade negotiations in Geneva were not the appropriate forum and that a multi-faceted issue such as corruption should be examined in the OECD, and/or the United Nations. The Special Representative rejected the GATT as the proper institution at which to address the claims and argued that the payments were unethical as they referred to a government-private relationship rather than being a private problem.

The President's Special Representative reassured the Congress that other institutional fora were already approached and the question of public disclosure of corrupt payments was examined in the IMF and the World Bank with Ministers of Finance from Canada, Japan, Britain, France, and Germany. Furthermore, the Secretary General of the OECD had responded favorably to looking for international corrective action within the organization. Special countermeasures were undertaken in the sphere of defense by the Secretary of Defense who in cooperation with the State Department and the Pentagon, was working on a special solution for the disclosed cases of fees paid to middlemen in arms sales. The Defense Security Assistance Agency also demanded that the host government of the purchase provide formal approval of the transaction. Regional approaches in the framework of the Organization of American States in cooperation with MIT, Stanford Regional Institute and Harvard University were also underway. Despite claiming that the problem was predominantly political and governmental in nature, Special Representative Dent stressed that private actors were actively working for a solution in the direction of self-regulation. The Guidelines for International Investment of the International Chamber of Commerce as well as the US Chamber were already starting to develop codes of acceptable conduct for multinational corporations. The Charter on International Investments of the Pacific Economic Council and the Caterpillar Tractor's Code of Worldwide Business Conduct provided other examples of business-sponsored initiatives on solving the problem of illicit payments (Dent 1975).

Offering an argument that is in line with the discourse adopted by the Social Pathology school in the field of sociology, Dent reaffirms the multi-faceted nature of the problem and compares it to a disease:

...this complex and important problem has been and is under intensive study at the highest levels in the executive branch of this Government, by the United States with the cooperation of other governments in a number of important international forums, and by thoughtful private sector leaders the world over. The fact that the disease has not been eradicated should not detract from the dedicated diagnostic and corrective research and development that is well advanced.

This fact, along with recognition that the problem affects all facets of business and business-government relationships. Leads me frankly to wonder whether the multilateral trade negotiations now underway in Geneva are, or should be considered, the only competent international forum in which to negotiate admittedly much-needed solutions to the problem-or even, in fact, whether it may prove to be the most effective one. (Dent 1975, 17)

Turning a social problem into a pathology implies that not only is the problem ‘natural’, but that the only course of action is to eradicate the disease. With this rhetorical strategy Representative Dent took a firm position against the disclosed corrupt practices and established the dedication of the executive to address, at least discursively, the issue of illicit payments. At the same time, what was problematic with the disclosed payments, the Special Representative claimed, was of moral and political nature. Legislating global morality was hardly the business of the United States, according to his argument. Therefore, it was questionable what would be the tradeoff for an ethical code of conduct within the framework of GATT. The trade negotiations were already complicated by economic recession and if these ethical issues were added to an already ambitious round of negotiations it was doubtful that successful conclusion of both the negotiations and the particular problem laid ahead. The President’s Special Representative insisted that corruption was predominantly a moral and political issue, but this did not doom it to failure in other international negotiations since ‘no government is likely to concede nonconformity with commonly held principles of morality and decency’. While agreeing,

in principle that corrupt practices can constitute a trade obstacle, Dent expressed his practical doubts that one could negotiate ‘the ethics of trade practices in the MTN.’ (17)

While the above reformulations can also be understood within the literature on framing⁵¹, within the framework of the social construction of global problems, this preliminary reframing of putative conditions serves an additional purpose because it helps justify the choice of the institutional context within which global claims will be launched. The insistence that corrupt payments constituted an ethical problem was meant to steer talks away from GATT as the preferred forum for launching the claims. This is why the executive representative referred to ‘unethical payments’ and insisted that the issue should be brought to a wider web of global and international forums, but most appropriately to the OECD. The insistence of the President’s Special Representative that GATT was not the most appropriate forum for working towards a global solution, however, was met with very strong opposition in Congress. The Special Representative suggested amendments to the Resolution that would accommodate the change of preferred venue and these changes were supported by the business community, but met forceful opposition in Congress. Senator Ribicoff insisted that American corporations:

...have been pilloried and placed upon the front pages of every paper in the world and it has been given to believe that only American companies engaged in these practices. And those of us who know the affairs of the world, know that every government and companies all over the world do this. And we felt the time has come to move fast in the international forum where we have clout, and that is GATT, to put the American

⁵¹ This debate can also be understood within the literature of framing and the constructivist literature on international norms, since framing a problem in a certain manner is the main task of a norm entrepreneur in the primary stage of norm cycles (Finnemore and Sikkink 1998, 897). Frames are cognitive and persuasive vehicles that focus attention on aspects of the same issue because respondents react differently to different characterizations of the same problem (Mintz and Redd 2003).

companies on the same basis as companies from all over the globe.
(Ribicoff 1975, 22)⁵²

The Senator vehemently opposed the change of international organization proposed by the executive arguing that: ‘Every nation that is in OECD is in the GATT, but GATT is where the crunch is. GATT is where the power is. Everything else is a debating society’ (Ribicoff 1975, 30). The inclusion of transnational corrupt payments under the 1974 Trade Act made the issue suitable for discussion at international trade negotiations. Therefore, it is possible that this particular interpretation of the putative condition was enacted in order to promote the problem at an international forum where the United States ‘has clout’, as the Congressional hearings repeatedly put it. The position of the representatives of the executive promoted a different interpretation and another strategy for the internationalization of the issue – these unethical payments would be better managed at the OECD and after a consensus is reached within the group of developed nations, this agreement could be ‘transferable’ to other international and global institutional forums (Dent 1975, 23).⁵³ It could be argued that the physical act of corrupt payments constitutes ‘money changing hands’ under particular circumstances and this physical act does not change whether it is qualified as an ethical or trade issue. Whether these payments are considered a problem of trade or ethics, however, has to do with what

⁵² The worldwide unfavorable publicity for US corporations was further stressed by the Senator: ‘American corporations have been pilloried on the front pages and the television of not only the United States but throughout the entire world. And the world and the American people have been given to believe that American corporations are the only malefactors of this practice. And, yet, anybody who knows what is going on worldwide knows this is a worldwide phenomenon; that business houses and business corporations in every nation of the world are paying under the table and are guilty of bribes but none of them paint them this way.’ (Ribicoff 1975, 19)

⁵³ The strategic value of starting the discussions at the OECD was explained as being the following: ‘What we are attempting to do is obtain some unanimity of thought within a smaller group, particularly the payers, the people who are making the payments. The OECD, we think, provides a proper vehicle at the moment to attempt to get some unanimity of thought in regard to how this universal code of conduct would be accepted and could then be introduced into GATT or any other appropriate body.’ (Reed 1975, 35).

is problematic in the first place – do corrupt payments have to be tackled internationally because they have a harmful effect on trade, or ethics, or both? The long-term benefits of tackling these illicit payments could be both economic and ethical, but the urgency of tackling the issue does not come from either the harmful effect on world trade that these payments have or from their detrimental ethical effect. The immediate function of tackling the corrupt payments after the Church Committee investigations to a significant extent was aimed at dispersing the public discontent from the domestic as well as worldwide publicity of the disclosures of corrupt payments:

...the only country at the present time worldwide that is being buffeted around in public opinion and the propaganda, even from countries that take the bribes and insist upon the bribes, is the United States of America or the Nation that is perverting people all over the world and the American company is painted as the business and ethical outlaw, when we know that all countries in the world are part and parcel of this operation, and the job, as I see it, is to use American clout-and American clout is at GATT more than any place else (Ribicoff 1975, 33).

While the US Senate Resolution directed the negotiation talks towards GATT, representatives of the executive and business interests managed to establish that a broader approach, involving in particular the OECD and the UN would be more effective.

This section mapped the preparatory stage of claims-making activities, establishing the socio-historical context and identifying the actors from the legislative and executive branches of government, as well as representatives of business interests, and traced the claims and counter-claims dynamic at this preliminary phase of claims-making. To a significant extent, the immediate function of claims-making at this stage was to tackle unfavorable publicity, domestically as well as globally and ameliorate the consequences public discontent might have for compromising American leadership.

While the US Congress expressed intent to act unilaterally, such projects were suspended, waiting for the results of a multilateral approach.

3

Global Claims-making Activities

3.1 Pre-Negotiation Talks at the United Nations (1975-1980)

The first time the question of corruption was claimed as a potential global problem was in 1975 by state representatives during the 30th session of the UN General Assembly. Anti-corruption was incorporated in discussions about the repercussions of the activities of transnational corporations on development within the framework of the Commission on Transnational Corporations, which held its first session 17-28 March 1975. Three countries submitted draft resolutions concerning the treatment of international corrupt practices to the General Assembly – the Libyan Arab Republic, Iran and the United States. The proposals of the United States and the one of pre-Revolution Iran did not differ substantially, except for the emphasis on the role and responsibility of government in addressing the occurrences of corruption. The Libyan version of a draft resolution made use of a more forceful language, providing for tougher measures, but also including a significant modification: ‘The Assembly would further have asked home States to refrain from employing transnational corporations as an instrument for intervening in the internal affairs of host countries for political purposes.’(Chapter XIII: UN Yearbook 1975, 487) With this addition the Libyan claim raised the highly controversial question of

government-sponsored illicit payments to foreign governments done through front corporations which is discussed in further detail.

While the final version of the UN Resolution is available the draft versions are presented in a summarized version in, “Chapter XIII. Questions concerning transnational corporations” from the UN 1975 Yearbook, with the positions the three countries which submitted draft Resolutions to the 30th Session of the General Assembly presented verbatim. The position of Iran:

By the Iranian proposal, the Assembly would have, inter alia: called upon Governments to take all necessary measures to prevent corruptive practices; called upon home countries to adopt strict measures against acts of bribery committed by their nationals or corporations abroad; asked the Secretary-General to prepare a study of ways and means to prevent corruptive practices, including the adoption of a code of conduct; asked that the Commission on Transnational Corporations include the issue in its programme of work; and called upon relevant governmental and non-governmental organizations to assist in the formulation and implementation of anti-corruptive measures against transnational and other corporations. (487)

The Libyan version of the Draft Resolution was withdrawn as the other two, but it most directly addressed the problem of corruption as political influence and the entanglement of interests of foreign public and private actors. It is, therefore, presented in some detail, because these controversial claims, despite not being directly adopted in the position of the G-77, presented an extreme case of the position of the developing countries on the question of corrupt practices:

By the Libyan proposal, the Assembly would have, inter alia: condemned illegal and immoral acts practised by transnational corporations against the safety and security of peoples and States; condemned States which supported, collaborated with or covered up such acts; recognized the right of States to nullify contracts entered into as a result of illegal or immoral practices, and to take action they deemed appropriate in accordance with national laws; called upon all Member States to investigate the illegal and immoral acts of transnational corporations, to exchange information regarding them, and to impose strong sanctions,

including boycotts, against the corporations involved. The Assembly would further have asked home States to refrain from employing transnational corporations as an instrument for intervening in the internal affairs of host countries for political purposes, to take legal action against transnational corporations committing illegal and immoral acts and to provide a list of the names of persons or organizations receiving bribes. (487)⁵⁴

‘Illegal and immoral acts’, the exact content and form of which were to be studied in an ad-hoc group, constituted an expansive definition of what was problematic with the interaction of foreign private and domestic public actors. It also reveals a deep-seated distrust in the objectives of foreign investment and skepticism as to what extent corporations are independent economic actors, pursuing purely economic interests, without being influenced by the country of origin. The most notable twist in the problem’s definition is the claim that bribery and other illicit practices and forms of influence are state-sponsored and foreign states are part of the corrupt equation. The United States proposal also included a reference to state-sponsored corporate bribery by referring to possible ‘encouragement by government officials’ for corrupt practices committed by private agents:

By the United States proposal, the Assembly would have, inter alia: condemned the offering or solicitation of bribes and other corrupt practices by enterprises, or their encouragement by government officials or individuals; asked the Commission to include the issue in its programme of work; and asked relevant governmental and non-governmental organizations to co-operate with efforts to resolve the problem. (487)

⁵⁴ In terms of administrative procedures to start addressing the issue, the Libyan proposal did not differ significantly for the other two resolutions: ‘The Assembly would also have asked the Secretary-General to establish a group of eminent legal experts to prepare a study of the illegal and immoral practices of transnational corporations and the consequences of those practices upon international relations, and asked the Commission on Transnational Corporations to include the question in its programme of work, with particular attention to those aspects that were related to the developing countries and the impact of the question on international relations as a whole’ (487).

All three draft Resolutions were withdrawn in favor of a fourth one that included the Libyan Arab Republic and Iran, but within the context of a much bigger group of developing countries, also part of the G-77 and included seven OPEC members⁵⁵. Resolution 3514 (XXX) was adopted on 15 December 1975, with the title, ‘Measures against Corrupt Practices of Transnational and Other Corporations, their Intermediaries and others Involved’. The Resolution, which was drafted by the group of 27 developing nations, although devoid of the forceful language of the Libyan draft Resolution, left the question open as to the involvement of foreign governments in the illicit payments forwarded through corporate actors to public officials of other countries.

The question of government involvement in corporate illicit payments appeared in the claims by the three countries that forwarded and then withdrew the draft Resolutions. The question of Western influence through the employment of private actors as instruments of foreign policy was claimed as relevant to the problem of corruption, as developing nations interpreted it. Furthermore, Resolution 3514 reinforced the connection between corrupt practices of transnational corporations and the discussions about the Code of Conduct, which aimed at regulating the activities of transnational corporations in the territory of the host country. Resolution 3514 recalled the Declaration on the Establishment of a New International Economic Order (Declaration ENIEO) and the Action Plan that provided for the discussion of the code of conduct. The Declaration was an initiative of developing nations who sought to establish more equitable conditions for development; but in so doing were jeopardizing the interests of Western investors with

⁵⁵ The Draft Resolution was forwarded by Algeria, Argentina, Benin, Bolivia, Colombia, Costa Rica, Cuba, Democratic Yemen, Ecuador, Egypt, Gabon, Guyana, Iran, Iraq, the Libyan Arab Republic, Madagascar, Nigeria, Pakistan, Peru, Romania, Somalia, the Syrian Arab Republic, Togo, the United Republic of Tanzania, the Upper Volta, Venezuela and Yugoslavia.

demands for stronger control over foreign investment and the reaffirmation of national sovereignty through more effective control over natural resources and demands for more equitable prices for extracted raw materials (Resolution 3201 (S-VI) Declaration on the Establishment of a New International Economic Order). The Ad Hoc Intergovernmental Working Group on Corrupt Practices, established on August 5, 1976 by ECOSOC, also was dominated by developing nations. Members included Algeria, Colombia, Iran, Mexico, Nigeria, Pakistan, Sierra Leone, Uganda, the United States, Venezuela, and Zaire. The chairman of the Group, Rafael Rivas, was from Colombia. The group was meant to ‘conduct an examination of the problem of corrupt practices in international commercial transactions by transnational and other corporations, their intermediaries and other parties involved’ (Appendix III: UN Yearbook 1976, 1084). This broader mandate allowed for the study of corrupt practices in a national context (e.g. national enterprises and national governmental officials). It also did not identify corrupt practices as a payment and allowed for the consideration of other parties, such as foreign governments, as part of the illicit interaction.

Some of the developed countries were opposed to the UN Code of Conduct as an offspring of the Declaration ENIEO since it was seen to compromise free market policies through the imposition of excessive regulation. Despite their similar mandate, the draft Codes of Conduct at the OECD and the United Nations were in competition, if not in conflict, with each other since one was representing the approach of industrialized nations of the North and the other was to some extent dominated by the South (Sagafi-nejad and Dunning 2008). The problem of corrupt practices in the UN, therefore, became inherently intertwined with discussions about the influence of Western governments and

multinational corporations over the social and economic progress of developing nations. This led to the ultimate paralysis of the negotiations in 1980, when the G-77 finalized its decision that the progress of the drafted International Agreement on Illicit Payments (IAIP) was conditional on the adoption of the Code of Conduct for Transnational Corporations. Although this constituted a decisive blow to the negotiation process, the talks had already stalled in 1976 with the G-77 insistence that Western governments should terminate their support – legal or illegal - of the apartheid regime in South Africa (IME/M(77)1). Although the decision of the G-77 looks like a strategic move to hamper the agreement on illicit payments, work on the Code of Conduct started in relation to Chile bringing the case with the ITT Corporation to ECOSOC in 1972 (Horn 1980).⁵⁶ Therefore, making progress on illicit payments conditional on the Code was symptomatic of a different interpretation of what is wrong with a putative condition; the G-77 claimed it was corporate conduct and demanded more restrictions on multinational corporations, while the US interpreted bribery as the culprit.

The claims made by developing nations included FDI as a form of foreign influence over national political processes, with the Apartheid regime in South Africa providing the most controversial example that ultimately led to the stagnation of the pre-negotiation talks. Developing nations claimed that foreign private enterprises tried to influence the political processes of newly sovereign nations for the benefit of their home governments or for their own purposes. In the case of South Africa, although new FDI stagnated in the 1970s due to public pressure against apartheid, it was only in the mid-1980s that foreign corporations started exiting the South African market en masse (Gelb

⁵⁶ The alleged corporate misconduct of ITT was examined by the Church Subcommittee as well (Section 5.1).

and Black 2004).⁵⁷ TNC involvement in South Africa was claimed to be supporting the Apartheid regime and that by pursuing investment interests, in particular in military, police and security affairs, the foreign corporations were solidifying the regime directly and were detrimental to international efforts to terminate it. The operations of TNCs were also supporting the regime indirectly by confirming to the rules of Apartheid since 80 percent of the South African workforce was black (Sagafi-nejad and Dunning 2008). The case of the Apartheid regime constituted an unusual claim for the political influence of TNCs since it pertained to TNC support of an illegitimate, but at the time domestically legal, political system. The question of TNC involvement in South Africa was rather one of economic power – the power of foreign economic actors to influence even indirectly the political processes of a country in a way that is detrimental to the legitimate public interest. This interpretation of what constitutes a corrupt practice widened significantly the definitional scope of the problem and was opposed by developed nations because it questioned the ability of otherwise legitimate practices such as FDI to impose undue influence on foreign political processes.

The claims of the developing nations could not be understood only as a bargaining strategy in which unrelated issues are made conditional on one another. The diverging positions of the developed and developing countries can be more fully understood as ontological claims and counter-claims about the construction of a global problem and as a struggle of definitions over putative conditions and their causal relation to other agenda items. Whether it is the support for Apartheid, the inability of yet unstable institutional systems to exert effective control over the dealings of transnational corporations on their

⁵⁷ Further work at the United Nations Centre on Transnational Corporations contributed to the withdrawal of TNCs from South Africa in the 1980s (Sagafi-nejad and Dunning 2008).

territory, or the use of bribery to secure military contracts, one of the major claims of the developing nations was about influence bought through money - legal or illegal. The fact that bribery of foreign public officials was legal at the time in the country of origin was not seen as central since under question appeared to be, as Pieth (2007) observed, the very legitimacy of the free market system. For the developed nations, the unencumbered operation of the free market and the free access of corporate actors to foreign markets can be just and desirable (take away the occurrences of illicit payments), but for the developing nations the primary source of concern seemed to be the very question as to what kind of effect the powerful governmental and corporate moneyed interests had over their yet inadequate national public institutions.

3.2 Pre-Negotiation Talks at the OECD (1975-1980)

Parallel to discussions at the United Nations, some OECD member states also raised concerns about the increasing flow of FDI from non-OECD members and in particular oil producing countries. The flux of capital from these countries was bound to ‘add new aspects to foreign control in key industries’ (IME(75)2,3). This ‘reversal’ of foreign investment from its usual route from developed to developing countries became a matter of controversy:

The problem was not a monetary one, but concerned the channeling and utilisation of this transfer of assets to oil-producing countries. The word “investment” in this particular context could not be interpreted in the sense in which it had normally been interpreted in the past. Normal investments by foreign countries were usually welcome because they permitted the creation of new production capacities and access to foreign technology and managerial [sic] skills. But the investments now under discussion were of a different nature, and involved the purchase of the assets of a firm, not for economic reasons but for political reasons, in order to control it and its management. Because of his country’s shortage

of skilled labour, the Federal Government had always encouraged German businessmen to go abroad and to take with them their knowledge and skills and money. But the motives of the oil-producing countries were not the same, their object was to gain influence on the production structures of other countries. (IME(75)4,55)

Even though the problem of political influence in a foreign country through FDI, reflected the claims of the G-77 in the United Nations, in the OECD the issue, under the general rubric of political influence, was not connected explicitly to corrupt activities. The exertion of influence over OECD member states through investment by oil producing countries was juxtaposed to the benefit of managing current account surpluses globally.⁵⁸ Policy coordination of foreign investment in OECD member states became a matter of discussion because if members imposed differing modes of screening or prevention a number of problems could have resulted (IME(75)2).⁵⁹ The machinery to tackle investment flows in OECD member states as well as the strategies for impeding investment in some sectors, and promoting it in others were the main policy responses discussed. Concerns of political influence from oil-producing nations were center-stage and were revealing of a rather uncharted territory in the global economy – the inflow of investment from developing to developed nations.

In the 1970s, outward FDI from developing nations was the exception rather than the rule, starting from 1 percent of total global investment in the 1970s and reaching 6 percent in the 1990s (Velde and Nair 2006). The unprecedented investment flows from oil

⁵⁸ The choice between preventing investment or negotiating, mostly bilaterally, better conditions for oil purchases was deemed difficult. The risk that the latter option may lead to increasing bilateralization of global trade, was particularly undesirable at a moment when the liberalization of cross-border capital movements was intensifying and international cooperation in investment was instrumental to the liberalization of capital flows.

⁵⁹ These problems included the :‘Impairment of the freedom of investment among OECD countries, because the screening or control of investment becomes the rule; uneven vulnerability to foreign take over activity if some countries erect more effective controls than others; growing bilateralisation of trade with, and transfer of technology to, oil-producing countries, as a counterpart to the bilateralisation of capital investments; undue competition among OECD countries to attract investment, e.g. through tax concessions’ (IME(75)2,4).

producers in the mid-1970s anticipated later debates about sovereign wealth funds and raised concerns in the OECD with some member states questioning the nature of these investment flows as FDI, since they were not performed by private enterprises, but by foreign governments. This concern mirrored the claims expressed in the United Nations by the Group of 77 about the influence of foreign investment over the political processes of developing countries and the ability of the government to govern the national economy, but was not explicitly connected to corruption as it was in the UN Commission on Transnational Corporations. The question of illicit payments in the OECD remained of a more limited scope, although still under the rubric of political influence.

The question of political influence of multinational enterprises was introduced by the United Kingdom delegation to the Drafting Group on September 12, 1975 and aimed to set basic guidelines for private enterprises' political non-involvement in the countries where international investment is carried, 'save to the extent necessary'(IME(75)2,1). The Draft aims as much to establish standards of political non-involvement as to safeguard some involvement of multinational enterprises as legitimate. The necessity to stay clear of political controversy is also pointed in the United Kingdom Draft, but most importantly the avoidance of 'any payments (other than for manifest public purposes) to a host government, or to its agencies, or to political parties'. The distinct feature of such payments is based on the criterion of lawfulness or legality as well as on a requirement for full disclosure: 'unless such payments are lawful and details [sic] of the amounts and the beneficiaries are published in accordance with a general requirement of the host government' (IME(75)16,1). The note on the Draft Guideline on Political Involvement, submitted by the United States on 17 September 1975 expanded the criterion of legality by

defining the contributions or payments as ‘illicit’ rather than unlawful or illegal. This shift of definition allowed for arguments that make the issue of political involvement of multinational enterprises and illicit payments, in particular, the prerogative of the ‘home government’ and therefore promoted a different set of solutions that would be in accordance with the solutions discussed in the US Congress in relation to corrupt payments performed by American corporations. The discussions during the Fourth Meeting of the Committee for International Investment and Multinational Enterprises dismantled such claims as the majority of delegates agreed that while referencing the question of political involvement in the Guidelines might be of some use, the recommendation for behavior could not go beyond ‘recommending multinational enterprises to act in conformity with the legislation and practice of the host country’ (IME/M(75)4,3).

The responsibility of the multinational enterprises to act in accordance with the host country’s established practices was further strengthened through the revisions of the Draft Guidelines. Multinational corporations were urged to operate:

within the framework of the laws and regulations of the host country, observe the best standards set by relevant local customs and practices with regard to:

- (i) rendering gifts or other benefits to public servants;
- (ii) contributions to political parties and other political organisations;
- (iii) involvement in local political activities

(IME(75)19 (1st Revision) Annex I, 5)

After US insistence the reference to ‘gifts’ was changed for ‘bribes’ and an overall much stronger formulation of the recommendation was achieved. Enterprises were urged to:

(6) not render – and they should not be solicited or expected to render – any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office; (7) not make contributions to

candidates for public office or to political parties or other political organisations except as permitted by law; (8) abstain from any improper involvement in local political activities.

(IME(75)2 Annex I, 2)

The change from ‘gift’ to ‘bribe’ can be seen as an instance of reframing, but in relation to the social construction of problems the shift is important in revealing what the alleged problematic action is. While ‘gifts’ rendered in the cultural context of another country, according to the best practices of the host society, seem rather inauspicious as a problem, the rendering of direct or indirect benefits and ‘bribes’ demands more attention. The former claim provides a supposed excuse for such practices within the socio-cultural context of the country in which investment is carried out, while the latter condones such practices as universally unacceptable. Ultimately, the first claim negates that there is a problem with such practices while the second promotes the need to counteract them. While the former claim does not provide a basis for the ‘globality’ of the problem since it makes the course of action conditional on the customs and practices of a territorially bound state, the latter universalizes the illegitimate nature of monetary payments or indirect types of influence independent of the national socio-historical context. The latter text prevailed during the next meeting of the Committee on International Investment and Multinational Enterprises (CIME) on December 18, 1975 (IME/M(76)1) and was included in the final text of the adopted Guidelines.

The controversy of defining the putative condition as ‘gift’ or ‘bribe’ between OECD member states was overshadowed by the far bigger controversy about corrupt practices and political influence at the United Nations. Thus, despite the inclusion of the recommendation in the Guidelines for Multinational Enterprises adopted on the 21 June,

1976, further work on illicit payments was hampered. The successful adoption of the Guidelines on MNC and the references to transnational bribery that it made were of limited success since the code was voluntary. The goal of the United States was to further develop the work on illicit payments in the direction of a legally-binding treaty. By the end of 1976 such talks were already under way and the US argued that certain issues referenced in the code were in need of further work, such as, for example, the ‘proposed convention to deal with the problem of illicit payments’ (IME(76)26/01,2). For lack of a dedicated ad hoc committee to deal with the subject of illicit payments, CIME was entrusted with the task, but its work became entangled with the negotiations of a binding legal instrument in the Ad Hoc Intergovernmental Working Group on Corrupt Practices at the United Nations. Despite the initial determination to keep the work of the OECD and the UN separate, because of the differing interests of the developing and the developed nations on the subject of transnational corporations, such separation became unfeasible during the pre-negotiation talks (OECD IME/M(75)2).

Voluminous exchanges of documentation between the two organizations occurred during 1976 and the discussion of bribery and political involvement at the OECD stagnated in 1977 because of the discussions at the United Nations (IME/M(77)1). The pre-negotiation talks at the UN were qualified by Jack Blum, a US attorney, who endeavored to draft the anti-corruption convention at the time, as the ‘disaster of 1976’. The reason, according to Blum, was that: ‘Ideological differences, commercial rivalries, and national interests overrode what little momentum the anti-corruption initiative had’ (Blum 2009, 2). Mark Pieth, a Swiss Professor of Criminal Law, who was Chairman of the

OECD Working Group on Bribery in International Business Transactions from 1990 to 2013, had a slightly different insight into the debacle of the 1970s:

The drafts modeled after the FCPA were, however, caught in the crossfire between North and South, with developing countries maintaining that the concept of “illicit payments” should be understood in a broad sense, including payments also made to the apartheid regime in South Africa. (Pieth 1997, 122)

Claims-making about the redefinition of the scope of the problem was at the center of the heated debates, as discussed previously. The position of the developing nations was that the problem of corrupt payments was broader than the limited understanding of bribery, promoted in accordance with the FCPA drafts that were simultaneously being discussed at the US Congress. This redefinition of scope incorporated instances of political influence through other means than commercial bribery and referred to illicit interactions between private and public actors, but also to political influence through FDI. This redefinition of the scope of the problem included but was not limited to bribery:

With decolonization, former colonial states, but also newcomers amongst exporting nations, tried to maintain or establish their power-basis with the emerging elites in the southern hemisphere by buying allegiances. Whereas the motivation to bribe will have been primary economic, to a large extent corruption was also used as a political means in the struggle of the Cold War to secure influence across the world. (Pieth 2007, 5)

This shadow of influence also has to be understood in the context of suspicion towards multinational enterprises and their likelihood to ‘abuse (of) concentrations of economic power and to conflict with national policy objectives (IME(76)1 Annex, 5).

The socio-economic context of the 1970s is relevant here, not only because of the Cold War, but also because consensus had not yet been reached about the desirability of FDI. The G-77 was apprehensive of the dealings of foreign TNC on their territory,

especially in light of colonial heritage. Furthermore, during the Cold War, the G-77 had more leverage to claim a different global economic order, a request that was partly presented in the Declaration ENIEO. The OECD Guidelines were seen to represent a ‘western approach’ and at least to some extent to ‘render irrelevant’ the UN approach (Sagafi-nejad and Dunning 2008, 111). The South-North controversy during the pre-negotiation talks was, however, also a clash of definitions and a clash of different perspectives on the same putative condition and, therefore, on what constitutes the global problem of corrupt practices.

4

Claims and Counter-claims in the 1970s and the Redefinition of Scope

A re-definition of scope was the primary issue at stake during discussions at the OECD and the United Nations in the mid to late 1970s, with *political influence* and *bribes* reflecting different degrees of expansion of the definition. Understanding corrupt practices as payments or as influence entails different approaches for addressing the putative condition that led to the claims in the first place. Conflicting claims reflect different interpretations of a putative condition. The putative condition in the broadest sense is an interaction between public officials and private business actors and the transnational dimension of this interaction is evident in the interaction of foreign businesses with domestic public officials. This interaction between public and private actors is not exhausted with the influence of foreign business interests over the public interest of the host country, but includes also the exertion of political influence of foreign countries through business relations.

This redefinition of scope continuously shifts the problematic character of the putative condition from the broader definition of political influence of business actors and foreign political interests through business actors to the more specific problem of corrupt payments (or bribery) performed between foreign corporations and domestic public actors. How the constructed problem relates to an expansive or narrow understanding of the putative condition (which can be described neutrally as an interaction between public and private actors) does not constitute the central matter of investigation. The broader or narrower definitions of the problematic situation are both legitimate interpretations. The more fundamental matter of inquiry in the social construction of problems is why and what kind of interpretations prevail and subsequently what are the type of claims capable of instituting an official response to a problem in a global setting.

If the putative condition is broadly and neutrally presented as the interaction of foreign private and domestic public actors, then what is problematic about this interaction is a matter of competing definitions. While the developing nations questioned the legitimacy of Western investment, as well as the payment of illicit contributions, the developed nations were interested in establishing the legitimate nature of one form of transaction (investment) and the exclusion of the another (bribery). International corruption, understood either as political influence or as an illicit payment, demands two very different approaches for addressing the issue; while both claims are legitimate definitions of the same putative condition, it is noteworthy that the narrower definition of the problematic situation could be much easier to handle and be addressed through the creation of an internationally negotiated machinery that would tackle the problem of

corrupt payments understood as bribery. This issue raises the question discussed by Spector and Kitsuse (2009) that it is easier to construct problems that are manageable – problems that are more easily handled. While concrete solutions can be offered to the problem of corrupt payments, it is much more difficult to address the problem of influence, both domestically and globally. Especially in a time of increasing public-private partnerships, the question of what kind of influence is legitimate and what kind is problematic becomes increasingly difficult to discern. A case in point is the widely publicized case of Lockheed Corporation in the 1970s. While Lockheed Martin was reformed to tackle the question of bribery, the company's interaction with the Pentagon is still being questioned. Lockheed Corporation has remained tightly involved not only in the technological, but also in the policy aspects of national security and this is questioned in a New York Times article from November 28, 2004: 'It is impossible to tell where the government ends and Lockheed begins'⁶⁰. While the last case of bribery was discovered in 1994 in relation to a 1989 sale of C-130 Hercules transport planes to Egypt, the influence that Lockheed exerts abroad and on American policy making is still a source for concern.⁶¹ An understanding of corruption as political influence rather than as a payment would have put under question the current interaction between Lockheed and the American, as well as foreign, governments.

⁶⁰ The comment is made by Danielle Brian of the Project on Government Oversight, a nonprofit group in Washington that monitors government contracts.

⁶¹ The author of the article, Tom Weiner, remarks that corporate bribery is no longer necessary in a world where business and government are so comfortably entangled together: 'There really is no need to do business that way any more - not in a world where so much of Lockheed's wealth flows directly from the Treasury, where competition for foreign markets is both controlled and subsidized by the White House and Congress, and where Lockheed's influence runs so deep. Men who have worked, lobbied and lawyered for Lockheed hold the posts of secretary of the Navy, secretary of transportation, director of the national nuclear weapons complex and director of the national spy satellite agency' ('Lockheed and the future of warfare', 3).

Excavating the process of claims-making reveals competing definitions of the same putative condition and sheds light on the process of social interaction that leads to a collective definition of a problem. Globally, state actors engage in processes of collective definition in which their material power matters. However, state actors engage also ideationally and battle over one version of international reality instead of another. The question of corrupt practices reveals the complexity of this process by showing that claims and counter-claims constitute different versions of what is a legitimate form of international and transnational interaction between public and private actors.

5

Global Claims Come Home: The Adoption of the FCPA

The failure of talks in the United Nations and the OECD in 1975-1979 to generate a viable global solution to the ‘problem of corrupt payments’ was due to some extent to varying claims of scope and in particular the developing nations’ arguments that broader range of activities were to be included in the category of ‘corrupt practices’. The claims of the G-77 that foreign corporations become political agents in their countries that enforce or de-stabilize the position of ruling governments, as well as channel the national interest of their country of origin became highly controversial. Viewed from this perspective the question of corruption became one of ‘influence’ rather than ‘payment’.

The UN Codes of Conduct can be understood as part of the program for New International Economic Order, launched with initiative from the G-77 in 1974 (Reynolds 1982; Fikentscher 1993). Hence, the issue of illicit payments became caught up in a far larger effort to renegotiate the terms and workings of the global economy. This does not

entail, however that the problem of corrupt payments was hijacked by other priorities – rather in the attempt to define the putative condition, different and controversial opinions appeared. The more limited understanding of corrupt payments as bribery was juxtaposed to a more complex definition that contained a broader variety of practices, including, in some occasions, FDI with strong political impact. Within the context of the United Nations the diverging opinions on what constituted legitimate and what was an illicit practice caused a clash of opinions between the global South and North. The matter was further complicated by the unilateral adoption of the FCPA by the United States. Western partners also turned towards the unilateral act and the US lost its base of support within the UN negotiations. The answer to the question as to why the negotiation process failed in the 1970s is that, at least to some extent, the failure to generate a viable global solution to the problem of ‘corrupt practices’ was due to a battle over what constituted the putative condition that gave rise to these divergent claims.

Parallel to the UN and OECD pre-negotiation talks, debates were ongoing in the US Congress. The Ford administration insisted on a multilateral solution and favored a disclosure approach (Cragg and Woof 2001). It took a change of administration and Jimmy Carter, who favored a criminalization approach, signed the FCPA into law on December 20, 1977 (Koehler 2012). The new President still envisioned the successful conclusion of the UN negotiations as the international counterpart of the American ban on foreign bribery, but the unilateral adoption of the FCPA, further complicated the pre-negotiation talks and isolated the United States in the United Nations (IME/M(77)1). This chapter discusses briefly the adoption of the FCPA, since its amendment in 1988 led to the resurgence of discussions at the international level and a strategic re-launch of global

claims.

5.1. The FCPA in the Context of US Domestic Attempts to Tackle Corruption

The FCPA was the first, albeit national, law that addressed the question of transnational bribery. The adoption of the law in 1977, however, can be better understood within a domestic anti-corruption program, since the FCPA was a direct consequence of the Watergate investigations (Posadas 2000; Cragg and Woof 2002; Biegelman and Biegelman 2010; Kohler 2014). The connection was immediate because the Watergate Special Prosecutor Force, investigating the 1972 campaign of then President Richard Nixon, discovered that the slush funds used at home for illegal party contributions, were also used to bribe foreign officials abroad (Sporkin 2003).⁶² This was the beginning of a series of revelations concerning corporate behavior abroad, starting from the involvement of ITT in Chile and ending with the highly publicized Lockheed bribery case. The general concerns of the American legislator had to do with the connections between government and business, whether domestically or internationally and did not differ so greatly from the UN talks about the role of corporations in politics and the influence of foreign national interests on domestic political processes through corporate channels. The accent in the talks in the US Congress, however, was on foreign policy and the way in which corporate activities endanger foreign policy priorities.

The Lockheed Corporation case, investigated by the Church Subcommittee in

⁶² Judge Stanley Sporkin, who was employed by SEC at the time (1961-1981) and became Director of the Division of Enforcement (1974-1981) explained in an interview for SEC, that the same slush funds, used for illegal contributions in the United States were used abroad for other questionable payments: 'And before we knew it we had developed a horrendous situation where we found out of those slush funds that were being used to give money to political parties, we went into them and we found that those monies were also being used for other various activities, such as bribing officials in foreign countries to get business.' (Sporkin 2003, 16).

1975-76, became emblematic of debates about the role of corporate actors in political affairs abroad and in the United States. Senator Church in a public speech at Harvard University on October 26, 1976 argued that corporations have been transformed into political actors:

The lesson of the Lockheed case, then, is that an American multinational corporation can become a political actor abroad whose immediate interests may be antithetical to the foreign policy objectives of the United States. Nor is Lockheed an isolated case. In the course of our three-year investigation, we found the ITT Corporation attempting to subvert the electoral processes of Chile; the Gulf Oil Corporation making \$4 million in illegal political contributions to General Park's party in Korea; and in Italy, a concerted plan by the major oil companies for multi-million dollar payments to Italian political parties in direct return for legislative favors. We can no longer pretend that what these corporations do abroad is strictly their own business of little interest or concern to the government of the United States.

The ITT incident was the cornerstone of the Church Subcommittee investigations as it surfaced in public debates in 1972 and became the reason for the creation of the Subcommittee on Multinational Corporations by the Senate Committee on Foreign Relations. The investigations of the Subcommittee concluded that the ITT corporation had not acted illegally, but had acted illicitly and had breached ethical corporate behaviour (Cragg and Woof 2001). This is how the paradox of the legality of such foreign corrupt payments on the territory of the United States began to take shape. The actions of corporations, although blatantly illegitimate in the context of national legislation, were carried out in an international legal loophole and were deemed technically legal in the United States. Attempts to prosecute questionable corporate payments under existing laws and legal statutes were deemed insufficient and the Foreign Corrupt Practices Act became the US Congress' attempt to address the inadequacy of the existing national legal framework. The problem of political involvement of US corporations abroad and the

growing power of corporations to outmanoeuvre national sovereignty was further complicated by alleged government involvement in the questionable payments carried out by corporations abroad:

I do not ignore that some of these corporations, as in the case of ITT in Chile, acted with the encouragement of government agencies, like the CIA. But more often, as in the cases of Japan, Korea and Italy, the subcommittee has been told by the responsible U.S. government officials that they had no knowledge of the political payments, bribes or questionable commission fees disclosed by the subcommittee. It could be that these are disingenuous denials designed to conceal the background role of our own government in such gross misconduct. But I think it is more likely that the disclaimers reflect the traditional attitude of our diplomats that commercial activities abroad of American-owned corporations are simply none of their business. Such an attitude betrays a failure to understand that multinational corporations often are crucial actors in the international political sphere, whose activities may determine and define U.S. national interests to a degree comparable to the actions of our own government (Church 1976, 1).

The problem of corrupt payments can therefore be placed at the center of what Senator Church in the same speech referred to as a 'web of entanglement' that cannot be exhausted with the influence of corporate actors over political processes, but rather points to an intricacy between political and business considerations:

What I have tried to describe to you is the way in which the Lockheed case illustrates a web of entanglement: a major U.S. defense contractor seeks its financial salvation in sales abroad; it penetrates and corrupts the internal politics of major allies of the United States; our own government admits that this fraudulent and corrosive behavior has taken place outside its knowledge and control; and, when a congressional committee proposes to expose the sordid facts and legislate to prevent their repetition, we are told that to do so would endanger the security of the United States. (Church 1976, 2).

Despite attempts from Secretary of State Henry Kissinger to suppress the Lockheed case on the basis of security interests, Senator Church continued the investigations (Biegelman and Biegelman 2010). The disclosure program, instituted by the Securities and Exchange Commission (SEC) in 1975, had hundreds of companies participate on a

voluntary basis and revealed a world-wide bribery web, a global conundrum that Kissinger in 1975 referred to as ‘the Watergate of private industry’ (quoted in Biegelman and Biegelman 2010, 17). The Lockheed bribery case was simply the most publicized of the investigations, since it led to resignations of political leaders abroad, and therefore became the emblematic precursor to the FCPA. The choice of a voluntary disclosure program had already predetermined the temperance with which corporations were held accountable for the questionable payments and for their lack of accurate accounts of such payments. However, as was revealed at the time, none of these actions were (except marginally) trespassing any American laws (Cragg and Woof 2001; Koehler 2012). Legislative response was deemed necessary, firstly because of the SEC obligation to ensure correct disclosure to stockholders and secondly, because of the ramifications of such corrupt payments for American foreign policy (Cragg and Woof 2002).

The American executive was hesitant to pursue criminalization and the Ford administration focused on disclosure measures, which would have provided a much more lax approach to handling corporate corrupt payments. The US Congress was determined to enact tougher measures, however, and an earlier form of the FCPA (Bill S.3133) was introduced by Senator Proxmire (Koehler 2012). The bill was in direct opposition to the proposal backed by the Ford administration, the ‘Foreign Payments Disclosure Act’, which did not foresee the explicit prohibition of bribery (SEC 2014). The leverage of the US Congress post-Watergate was particularly high because of the compromised reputation of the executive, severely damaged during the Nixon administration (Fisher 2014). The criminalization approach, promoted by Proxmire was

the most substantial option of legislative action against the questionable corporate payments and in the particular post-Watergate climate, it overrode the strong ‘domestic concerns’ of the business sector.⁶³

The Lockheed case and the other bribery cases post-Watergate had a damaging effect on US credibility both domestically and abroad. Unfavorable foreign publicity, starting with Watergate was indeed exacerbated by the political and ideological exigencies of the Cold War:

Corporate bribery also creates severe foreign policy problems for the United States. The revelation of improper payments invariably tends to embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations (U.S. House 1977, 5).

The problem with the disclosed corrupt payments had an ideological and a foreign policy dimension, but the reason why the criminalization approach became the preferred mode of addressing the questionable payments had more to do with the climate of ‘post-Watergate morality’ that had a powerful impact on US politics in the 1970s (Koehler 2012).

5.2. The FCPA as a Product of ‘Post-Watergate Morality’

The FCPA is significant in the construction of a global corruption problem for two main reasons. Firstly, the unilateral adoption of a law with extra-territorial implications further complicated the pre-negotiation talks at the OECD and the United Nations in 1977 and contributed to the failure of a viable multilateral solution. Secondly, the FCPA became the basis for renewed attempts to reopen negotiation talks in the OECD after the Act was

⁶³ ‘Domestic concern’ was defined as all US companies and their foreign subsidiaries (U.S. House 1977).

amended for the first time in 1988 in Title V of the Omnibus Trade Act. While the attempts to promote the problem of corrupt payment on the international agenda presented transnational corporate bribery as fundamentally a global problem, the adoption of the FCPA pitched corporate corrupt payments as essentially a national problem. The criminalization of corporate questionable payments to foreign governmental officials was not a 'national' problem because it could not have been better addressed through a global approach, but because the FCPA was predominantly a consequence of the dynamic between the executive and legislative branches of power in the peculiar post-Watergate climate and the function of the Act was to a large extent to remedy sentiments of suspicion towards the representatives of US business and US government.

The FCPA was a complex interplay between a number of actors, most notably the Church Subcommittee, the Ford (and Carter) Administration, the SEC, and the chairman of the Senate Committee on Banking Housing and Urban Affairs (Koehler 2012). The latter in the face of Senator William Proxmire was responsible for drafting what was later to become the FCPA of 1977. In the attempt to criminalize bribery and not simply demand transparency and disclosure of information, Proxmire was guided by clear objectives. He wanted the anti-bribery campaign to take the form of a criminal law because that 'would help US multinational companies resist corrupt demands', but he also argued that corrupt practices carried out abroad would corrode the US political landscape and become the rule domestically as well (quoted in Cragg and Woof 2002,9).

Criminalization of transnational corrupt practices at first appeared an unlikely course of action because the proposals of Church, the SEC and the Ford administration

excluded criminalization in favor of disclosure and measures aiming at self-regulation (SEC 2014). The proposal of the Ford Administration was based on the investigations of the Task Force on Questionable Payments Abroad, established by the President on March 31, 1976. President Ford considered the ‘erosion of confidence’ and in particular the public distrust in the free enterprise system as major motives for legislative action (Ford 1976). The proposed Foreign Payments Disclosure Act, however, was particularly sensitive to the element of extraterritoriality inherent in the criminalization approach and was hesitant to promote the application of US criminal statutes on foreign territories (Ford 1979). The disclosed information about corrupt payments would have been provided to foreign governments on certain occasions and the relevant foreign authorities were to decide if the information should be made public and/or national jurisdiction on the subject was applicable. The prosecution of transnational bribery was, according to this draft Act, to remain a predominantly national prerogative with limited forms of unilateral or multilateral international cooperation for the exchange of information. The provisions of the Act were minimal in comparison to the maximal approach promoted by Proxmire (SEC 2014). Facilitation payments were to be excluded from disclosure and the Secretary of State or the Attorney General could ban the publication of disclosed payments on the basis of foreign policy considerations (Ford 1979).

The proposal of the Ford Administration left a large margin for political discretion. The continuation of ‘business as usual’ was what the Proxmire proposal for criminalization was trying to counteract. The criminalization approach also entailed a larger responsibility for the bribing corporation. The approach would have, therefore, showed decisive intention to root out American corporate bribery domestically and

abroad, and would have also inflicted significant costs on bribing transgressors. During a hearing before the Senate Committee On Banking, Housing and Urban Affairs, Proxmire referred to the impunity and lack of criminal and monetary accountability that corporations, involved in the corrupt payments have enjoyed following the disclosures (SEC 2014). Promoting a criminalization approach was to some extent a method of instituting more stringent measures against bribing US companies. The approach championed by Proxmire claimed to aim at restoring faith in the US business community and in the ethical standards corporations abide to in their interaction with foreign, but also US governmental officials:

The recent revelations of foreign bribes paid by many of our largest corporations threaten to undermine public confidence in our free enterprise system. We cannot condone bribery abroad and expect the public to believe that the same kind of illegal payoffs do not occur at home. Corporate corruption knows no boundaries. If we permit bribery to become a regular policy of U.S. corporations abroad, it will only be a matter of time before these same corrupt practices inflict our domestic economic system.

There are those who condemn foreign bribery but who argue that it should be dealt with only through an international treaty such as the one the State Department has announced it is considering. This approach is really a prescription for doing nothing...An international treaty to outlaw bribery is equivalent to a treaty to outlaw war. While high sounding in purpose, it is devoid of any practical effect. (Proxmire 1976, 1)

Proxmire reversed the arguments earlier used to promote corrupt practices as an intrinsically global problem that has to be addressed through a viable multilateral solution. The Senator claimed that, even if desirable, the negotiation of an international treaty would be too lengthy a process and would ultimately not provide a practical solution to the problem. Proxmire's arguments had a political underbelly since his criminalization approach was in direct opposition to the proposal by the Ford Administration. The proposal also reflected the expressed concern of Congress that the State and Defense

Departments, in particular, were not only insufficiently involved in solving the problem of foreign corrupt payments, but were actually actively perpetuating it (Kohler 2012). Congressional hearings suggested that the US Government was not unaware of the questionable payments even prior to the disclosure procedures and led to suspicion of state-promoted corporate bribery that made Senator Helms conclude that he is unconvinced that the US 'Government has leveled with the American people about the Government's own involvement with respect to these activities' (quoted in Koehler, 968). As Koehler observes, Senator Church also characterized the Government's inactivity and overall attitude towards the foreign corrupt payments as one of 'indifference or perhaps benign neglect' (969). This suspected indolence of the US Government that was working towards an international solution, but was allegedly circumventing real reform, became the fuel behind the unilateral criminalization approach.

The US Congress, and in particular the Senate's suspicion towards the Government's approach and possible involvement in the questionable payments were the driving forces behind the FCPA. The initial draft of the bill proposed by Proxmire was the only one providing for the criminalization of transnational corrupt payments performed by US-based companies and their subsidiaries and the Senator later re-worked the bill to accommodate the proposal by the SEC. The SEC initially showed reluctance to support the criminalization approach. In an address by the SEC Chairman Roderick Hills on March 15, 1976 the implications of the disclosures for the US society were presented in the following way:

Confidence in our business community and its capacity to compete fairly has been badly shaken, perhaps destroyed at least temporarily. We must -- for this reason alone -- as a government and a society, condemn bribery anywhere. If bribery will get a contract for a manager in a foreign country, and if he is permitted to try it: Who will be convinced that the company that bribes abroad

will compete fairly at home.

Disclosure alone cannot restore confidence in our institutions. Indeed, disclosure carried to an irrelevant degree would only obscure its true value, but the discipline of disclosure will be a power catharsis for much of our present cynicism. We are face to face today with the disagreeable fact that too many of our people in government and out do not believe in our free-enterprise, capitalistic system; because they do not believe it's competitive, they do not believe it's free, and the word "capitalist" sounds like another one of those fellows who won't tell the truth. (Hills 1976, 12-13)

The SEC Chairman was expressing a similar sentiment to the one held by Proxmire; that the unencumbered proliferation of corrupt payments abroad would compromise the credibility of domestic business-government relations. At the same time, the 'discipline of disclosure' was judged sufficient to purge the American public from the growing distrust towards the dealings of business and government actors. The SEC, however, later came around on the criminalization approach supported by the Senate as the most effective measure against corrupt practices that would restore the confidence of the American electorate in the political system governing the country (SEC 2014).

In his resignation speech former Vice President Agnew used the term 'post-Watergate morality' to refer to his understanding that 'the things he had done had been ... normal and generally tolerated ... until Watergate came along' (quoted in Koehler 2012, 943). The decreased tolerance of the American public towards questionable dealings was a central item of this post-Watergate moral sentiment and the members of Congress of this new political era took on the role of guardians of the integrity of the free market system that the US was championing around the globe. The illicit payments, discovered during the post-Watergate investigations became, therefore, part of the ideological battle of supremacy during the Cold War and were seen as compromising the very legitimacy of the free enterprise system (Pieth 2007; Koehler 2014). The questions previously raised by

the Church Subcommittee investigations, as to the corrupt payments being a foreign policy problem, became nuanced when suspicion arose during Congressional hearings that the Government was at the very least aware of these illicit transactions, if not actively condoning them. The disclosure approach would have publicized such corrupt payments without criminalizing them in the United States. The unilateral criminalization approach, proposed by Senator Proxmire and later supported by SEC, was seen as a radical measure that could only be fully understood as an offspring of the ‘post-Watergate morality’ (Koehler 2012). The unilateral criminalization of foreign corrupt payments was opposed by the Ford administration as detrimental to US negotiations aimed at designing an international solution to the problem of corrupt payments (Cragg and Woof 2001). The criminalization approach championed in the FCPA both contributed to the failure of international negotiations after 1977 and became the basis for reopening negotiation attempts in 1988 after the first amendment of the act.

5.3. Unilateral Criminalization over Disclosure Measures: The Adoption of the FCPA

Following the enquiries from a number of Senate Committees, the SEC, and the Task Force on Questionable Payments Abroad, established by President Ford, the US Congress passed the FCPA in December 1977. The US Congress was driven not only by concerns for US foreign policy, being damaged by the corruption scandals of the previous years, but also by much broader ethical considerations, the primary one of which was the integrity of the free market system (U.S. House 1977). This combination of domestic challenges to democratic governance and the foreign policy exigencies in the Cold War

era coupled to promote the enactment of the FCPA in 1977 in the particular climate of ‘post-Watergate morality’. After being passed by Senate, but not by the House of Representatives in 1976, the bill was reintroduced by Proxmire in January 1977. Prior to his election as President, the Democrat candidate Jimmy Carter, supported the criminalization approach, but as SEC records show, after coming into office showed only hesitant support for Proxmire’s bill. SEC believed it had remedied the problem by strengthening corporate governance and addressing the falsification of corporate records. Proxmire’s bill, however, retained ‘a great deal of superficial appeal’ as Commerce Secretary Richardson put it (SEC 2014). The Proxmire sponsored bill passed the 95th Congress and the report presented in front of the House of Representatives stated that the necessity for the act was primarily driven by the unethical nature of the bribe practices disclosed and the rift with the political values of American public life. The report concluded that such corruptive practices erode ‘public confidence in the integrity of the free market system’ (quoted in Cragg and Woof 2002, 17).

Adopting unilaterally the FCPA placed American business at a relative disadvantage with respect to foreign competitors. As discussed, the unilateral criminalization approach was not the only option available for policy makers at the time. The ‘international’ or multilateral alternative preferred by the Ford administration remained another option that was pursued at the time by the US executive in the framework of a number of international organizations. From a business point of view, the proposal of the Ford administration to first secure a multilateral framework appeared far more acceptable than the one championed by Senator Proxmire since it relied on the strategy of multilateral international cooperation which would have levelled the playing

field. The multilateral arrangement was more favorable to business interests because it would have resolved the tension between conformity with the national legislation and the competitive pressure of global markets. Furthermore, the US proposal at the UN was based on the disclosure approach championed by the Ford Administration. The adoption of the FCPA, therefore, had a negative impact on the international negotiations as the ECOSOC Ad Hoc Intergovernmental Working Group on Corrupt Practices was firmly against home country criminalization of corrupt practices because of the predicaments of enforcement and extraterritorial application that this approach demanded (IME/M(77)1).

Once the FCPA was adopted, the interest of the United States to protect its companies from the adverse effect on their global competitiveness, caused by the unique domestic anti-corruption act, appeared as a logical development. In the decade, following the adoption of the FCPA, the US Congress was consistently lobbied by American companies that insisted that they operated at a relative disadvantage in a global market place, where bribes remained tax deductible for most of their European competitors. In fact, as Gutterman (2013) observes, corporate lobbying against the FCPA from 1977 to 1988 was so persistent that the question becomes why was it not successful in repealing the act? Despite the Reagan Administration's stated intention after 1981 to de-criminalize foreign bribery, the FCPA remained intact. The reason for its perseverance in the face of powerful corporate lobbying and the executive's determination to protect the interest of American business was that repealing the act would have been 'easier done than said' (Gutterman 2013). In the enduring tradition of Watergate, public justification for the repeal would have been politically unfeasible, because: 'you simply couldn't get representatives or senators to vote to repeal it ... no congressman will want to run for re-

election and have his opponent say that he had voted in favor of committing bribery' (Heimann quoted in Gutterman, 112). The debate about revisions spread over three congresses and the first amendment to the FCPA was enacted as part of the Omnibus Trade and Competitiveness Act in 1988.. Thus, in 1988 in accordance with the provisions of the amendment, the US Congress pushed the executive branch to initiate negotiations specifically in the framework of the OECD, which culminated in an international convention ten years later.

Conclusion

This chapter examined the failed pre-negotiation talks of the 1970s in a number of international forums that formed the backdrop against which the re-launch of global claims was made in 1989. The re-definition of the problem's scope was the primary hindrance at reaching consensus during discussions at the OECD and the United Nations in the mid to late 1970s. Claims and counter-claims between developing and developed nations (primarily the US) made the definition of corruption waver between political influence and bribery. Delegations to the UN from the Global South saw the interaction between public and private actors not only as the influence of foreign business interests over the public interest of their country, but also as the exertion of political influence of foreign countries through business relations. This expansion of the understanding of what was the putative condition, endangered the very legitimacy of FDI in former colonial nations and became largely controversial. With talks at the OECD dependent on progress

in the UN, both pre-negotiation talks stalled. Faced with the uncertainty of the adoption of a global treaty, the US enacted the FCPA unilaterally and this decision shaped the content of the talks after the re-launch of global claims in 1989.

The foreign corrupt payments revealed during the post-Watergate investigations provided a serious predicament for the United States in the 1970s. The approach adopted by the US Congress was criminalization, which entailed a 'limited scope' and 'individual actor paradigm' (Puckett 2010). While the global publicity of the revealed corrupt payments compromised trust in American companies and the legitimacy of the global free market system, the FCPA was to a large extent adopted as a domestic anti-corruption measure. In the particular climate of 'post-Watergate morality', the foreign/illicit payments problem became a serious predicament for the United States. The subsequent internationalization of the FCPA can be seen as the global equivalent of turning private (national) troubles into public (global) problems. The problem was 'American', not because only American corporations were carrying out such questionable payments domestically and abroad, but because due to a constellation of circumstances the US was the most interested actor in launching a global claims-making campaign on transnational corrupt payments. Other countries involved in the disclosure measures, despite the unfavorable national publicity, did not pursue the issue of corporate payments further, and when they did, it was treated as an essentially domestic (or national) problem. The disclosure of corrupt payments had repercussions in Japan, the Netherlands, and a number of countries in the Middle East, but no country investigated the alleged illicit payments by their own corporations or at least did not make the investigations public (Church 1975).

The internationalization of the FCPA came forth as an American priority in 1988

with the decision to press the issue at the OECD. The FCPA, therefore, conditioned the second re-launch of global claims in the late eighties and early nineties, but it also gave a powerful ally to the US government – the active engagement of American based multinational companies that became champions of global anti-corruption efforts.

Chapter IV

Global Claims-Making in the 1990s

Introduction: The Road to Global Claims-making in the 1990s

This chapter traces the re-launch of global claims-making in 1989 and shows how the impasse of the 1970s shaped the negotiations in the 1990s. The previous chapter demonstrated how the attempt to construct a multilateral approach to transnational corruption in the 1970s shipwrecked in a storm of diverging interpretative claims. Consensus on what constituted a ‘corrupt practice’ proved unattainable, with developing countries insisting on a definition of corruption broader than bribery. These debates over the definition of the scope of the practices that should be deemed ‘corrupt’ did not remain encapsulated in the United Nations, but spread, or had an influence, over other organizations such as the OAS and the OECD. Furthermore, a global approach to tackle corrupt practices was juxtaposed on a predominant understanding of corruption as a national problem – a problem best met within the national legislative framework of each country with some limited form of bilateral or multilateral information exchange. Global measures, such as those found in the following resolutions, guidelines and rules of conduct, included: OAS Resolution 154 (167/75) from July 10, 1975; UN Resolution 3514 from December 15, 1975; OECD Guidelines for Multinational Enterprises from

June 21, 1976; ICC Rules of Conduct to Combat Extortion and Bribery from December 2, 1977.

These initiatives were promoted by the United States (Schmults Memorandum 1976). The ICC Rules of Conduct were published as a self-regulation measure at the same time that the FCPA was signed into law in December 1977. The FCPA, together with the 1978 Ethics in Government Act and the amended Federal Election Campaign Act, became part of a comprehensive regulatory campaign against corruption in American politics (Neild 2002). The FCPA aimed at restoring confidence in American business through a radical measure – a criminalization approach led by Congress that was in direct opposition to the disclosure approach heralded by the US executive in a number of international and global forums. As the US Trade Representative later argued, the US Congress ‘reacted quickly and emotionally to daily newspaper headlines and public outcry’ in adopting this draconian measure (Brock 1981). The FCPA formed the basis of the second strategic re-launch of global claims-making and to a significant extent shaped the content of the problem of corruption, as it became institutionalized in international organizations starting from the mid-1990s.

This chapter establishes the re-emergence of claims after the 1988 Amendment to the FCPA, when the US chose the OECD specifically as the most appropriate international forum in which to achieve consensus on corrupt practices. Section 1 shows that reaching an agreement on the content of the problem and the methods to address it was difficult even among the developed nations that comprised the membership base of the OECD. Section 2 examines the re-emergence of claims at the UN. Another OECD member, the Netherlands, showed a strong preference for a universal treaty during the

preliminary discussions at the OECD and re-introduced the issue of corrupt payments in the United Nations by organizing an Interregional Seminar on Corruption in Government as a preparatory meeting for the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders. The chapter opens up the pre-negotiation talks at the OECD and the UN and examines the differences between claims made at the two organizations. It shows that in the early 1990s the OECD remained the primary venue for discussions and this had an effect on the process of claims-making. As in the 1970s, the agency of states remained paramount to the process of collective definition and it was largely because of the initiative and the influence of the United States that corrupt payments was re-introduced as a global problem in the 1990s.

1

Global Claims-making in the 1990s: Pre-Negotiation Talks at the OECD (1989-1994)

1.1 The 1988 Amendment to the FCPA and the Re-launch of Global Claims

American corporations lobbied against the adoption of the FCPA prior to its adoption and to repeal it after 1977 (Gutterman 2013). Business found itself on the defensive, particularly after the revelations of hundreds of illicit high profile business cases and the 1970s became a decade of intensive business mobilization (Hacker and Pierson 2010). Despite the strategies of stepping up lobbying and developing personal contacts with politicians, the prevalence of an anti-corruption sentiment post-Watergate made this difficult. As Gutterman (2013) puts it, ‘the pressure publicly to justify norm-transgressing practices’ made the act of foreign bribery as well as the repeal of the Act “easier done

than said””(109). In the immediate adoption of the FCPA, enforcement efforts were credible, but with the advent of the Reagan administration and the frustrated effort to repeal or amend the act, enforcement patterns changed (Cragg and Woof 2002). The FCPA was amended within the framework of the 1988 Omnibus Trade Act, which guided the executive to initiate the negotiation of an international treaty, this time specifically within the framework of the OECD.

Foreign corrupt practices raised specific problems for a range of actors in the United States, starting from the fact that the FCPA placed unique constraints on US business. The re-launch of global claims was intrinsically connected to the criminalization approach established by the FCPA. Whereas previous negotiations were not restricted to establishing a definitive ban on transnational corrupt practices, but heralded primarily a disclosure approach, which would entail the ‘right to know’ of governments and sometimes citizens but not necessarily legal prosecution. The re-launch of global claims at the OECD in 1989, therefore, served a different function than the failed talks of the 1970s, since it was aimed at the specific task of internationalizing the FCPA. The function of the US global claims were, nonetheless, stated as essentially identical to the ones of the previous decades:

The impetus to move on this issue came from the Congress which called on the executive branch in the Omnibus Trade bill of 1988 to work through the OECD to arrive at a common anti-bribery position. Now, some have asserted that the treaty does not go as far as it was hoped, but nevertheless it sets us on a course to pursue similar actions and efforts and other international arena and to broaden anti-corruption efforts in cooperation with our competitors. (Senator Sarbanes 1998)

The strategy to reach consensus at the OECD and build on it in other international forums was first proposed by representatives of the US executive in 1975 and was adopted again

in 1989. The attempt to forge consensus with other economically powerful partners and then export this consensus on corrupt practices as a global problem to other international organizations and global institutions was successful in the 1990s. It determined, to a large extent, the definition of the problem and the mapping of the legitimate range of concerns and responses. In the process, the ‘limited scope’ and ‘individual actor paradigm’, promoted by the FCPA, came to tacitly define global attitudes towards corruption as bribery (Puckett 2010). The tackling of the problem, predominantly understood as one of ‘foreign corporate payments,’ had to contribute to the global legitimization of the free market system and of multinational enterprises. Furthermore, how to reconcile fighting corruption with the objectives of liberalization, privatization and de-regulation became issues of primary concern. The discussions about corrupt practices in the OECD in the 1990s were contextually different from the UN pre-negotiation talks in the 1970s, but were not less problematic. The US had to persuade their competitors and partners from the Global North that corrupt payments, particularly in the form of bribery, constituted a problem, which had to be addressed multilaterally. The pre-negotiation talks at the OECD, which started in 1989, were central to forging a consensus on what constitutes and how to address the global problem of illicit or corrupt payments.

1.2. Pre-Negotiation Talks at the OECD: The Positions of Member States.

The re-launch of formal claims to address corruption or corrupt/illicit practices as a global problem demanding international action were made by the United States Delegation at the OECD during a Special Session of the Executive Committee, held on 28 February and 1 March 1989. The US proposed a feasibility study, or an ‘inventory of relevant legislation’

on illicit payments to be completed through a questionnaire, distributed to member states (C(89)49,1). The US Delegation insisted that further work be carried out by an ad hoc committee, with a small group of legal experts from member states (to be agreed by the OECD Council). The US proposal emphasized the need for an ad hoc group because the issue did not allegedly fit neatly into the standing committees (such as the International Investment and Multinational Enterprises) and also would have interfered with the work and financial resources of other committees since it needed special (mostly legal) expertise.⁶⁴ As Spector and Kitsuse (2009) observe, the tactic of establishing an ad hoc group allows for the institutional independence of discussions of the problem and is therefore more conducive to reaching a successful outcome..

The US proposal provided a succinct background report on the FCPA and the consequences of the 1988 Omnibus Trade and Competiveness Act. It also briefly touched on concerns about jurisdictional reach and the contested definition of the problem. The proposal urged swift action and the adoption of a binding treaty that would administer civil and criminal penalties on transgressors from the OECD member states.⁶⁵ The document clarified, however, that such practices were not the sole prerogative of OECD nations:

⁶⁴ The proposal stated that illicit payments constitute a 'broad but discrete subject'. This is why it demanded special attention. The US also suggested that legal expertise is of primary utility in this case: 'We would anticipate that the necessary experts – primary legal experts – would come largely from capitals and would have different sorts of expertise from the officials who attend meetings of the standing committees.' (C(89)49,2).

⁶⁵ The US proposal envisioned a binding international treaty that would harmonize international legal provisions in accordance with the US law: 'The goal of an international agreement would be to ensure that individuals and enterprises in OECD member states are subject to comparable national legal standards governing bribery in conducting international commercial transactions. The central element of such agreement would be a binding obligation by members to enact appropriate civil, administrative and criminal penalties to punish their nationals and corporations who commit bribery in connection with such transactions.' (C(89)49,2).

Bribery is a problem for many countries, not just those of the OECD. But as the U.S. Congress recognized, the OECD has a long history of setting an example for others. In our view, this organization is well suited to examine this problem. OECD members have a common interest in showing they are committed to ethical business practices abroad by their nationals. Moreover, the OECD has the experience and the facilities to serve as a forum for the negotiation of an agreement on illicit payments.

(C(89)49, 2)

The US appeal for action was not limited to developed nations and sought to universalize the significance of a future OECD agreement on illicit payments. In fact, US claims concentrated on developing nations as the beneficiaries of such reforms. Economic development in the Third World and economic efficiency for industrialized nations smoothly coalesced in US claims. The universalization of the claims served three primary purposes. First, it was a continuation of the strategy of building consensus among developed nations and exporting it to other organizations with wider membership base. Second, it helped make the claims less controversial because it presented corruption as a problem of efficiency for both developed and developing nations; for the developed nations it was imposing undue costs and for the developing nations it was causing political instability and was hindering development. Third, the United States needed to universalize the claims and to reach a degree of consensus and a global legitimization of the issue because of the transnational nature of corrupt transactions. Without the cooperation of developing nations for information exchange, even a convention targeting only OECD members would not have been implementable.

As we saw in the previous chapter, the US wanted to take a firm stance against corruption internationally in the 1970s, but failed to convince developing nations in the UN that they had a stake in fighting corrupt payments understood as bribery. Bringing developing nations on board with a broad mandate to address corrupt practices

internationally was still needed in the 1990s. Furthermore, presenting the question as a development prerogative was deflecting controversial claims. Playing the development card in an organization with membership from only developed states became a basic strategy in the pre-negotiation talks:

The issue of illicit payments also is relevant to the OECD's overall concern for the developing world. This organization has long recognized the importance of maintaining a corruption-free environment for international commerce. The use of bribery in international commerce not only poses ethical problems, it also hinders the development of international commerce by adding undue transaction costs and restricting the operation of free and open markets. The United States believes that an international agreement would serve the purpose of eliminating so far as possible bribery and other payments that are both illegal and costly to enterprises, and that are disruptive to political stability and sound economic development in developing countries. (C(89)152, 17)

The Council approved the US proposal (already backed by the Secretary-General) and a group of experts was formed and consulted for the first time on a draft questioner to be distributed to MS on 15 June 1989. The completed questioner was to be re-submitted to the Secretariat by 31 October 1989. It initially defined illicit payments as 'payments or other benefits offered or paid with a view to facilitate commercial transactions'. It probed national and transnational bribery legislation as well as issues pertaining to extra-territorial jurisdiction and the tax deductibility of illicit payments.⁶⁶ After the completion of the study in June 1990, the Secretary-General produced a Note about illicit (corrupt) payments in international commercial transactions. This report set the framework for discussion in the following years and also put the problem into comparative and historical

⁶⁶ Some of the questions examined the possibility of more drastic measures in case there was evidence that transnational bribery has occurred: 'What is the impact of an illicit payment on the validity of the transaction it is intended to facilitate? Is it possible under your legal system to enforce a contract that is tainted with corruption or is this contract declared null and void? Under your legal system what would be the effect in your country of foreign law decisions concerning illicit payments?' (C(89)49,22). These questions were examining the possibility of cancelling a contract that has in any way been implicated with corrupt practices as an extreme measure.

perspective. The study of what were the main factors that caused the failure of the previous talks in the UN and the OECD guaranteed institutional continuity and also pinpointed the most controversial issues that could interfere with the progress in the current talks. The main obstacles were judged to be of a legal and political nature. Referring to previous international attempts at abolishing such practices and in particular the attempt to draft a convention to criminalize corrupt payments, the report stated that in terms of legal obstacles:

No other general international convention had made criminals of corporations, and this novelty created some of the problems that arose in the course of the negotiations[...] / Difficulties of a legal nature were mostly in connection with the issue of territorial jurisdiction. As illicit payments involve activities in several states, effective control would involve concurrent action in these states. As is shown above this was not in accordance with most countries criminal statutes against bribery, which generally seek to protect mainly the integrity of their own national officials. Jurisdiction over acts committed abroad is asserted only exceptionally. (C(90)87, 5).

Criminal liability of juridical persons and extra-territorial application of national laws were designated as the two issues of primary concern in the past and would prove to be problematic in future OECD talks on the subject as well. The Secretary's Note examined the principal unresolved legal aspects of addressing corrupt payments at the United Nations, which were: the issue of extraterritoriality and the publication of payments. Whereas pending issues of political nature were judged to be: references to 'illegal minority regimes in Southern Africa'⁶⁷ and the entanglement of the issue of corrupt payments with the negotiation of a binding Code of Conduct for Multinational enterprises.

⁶⁷ Expanding the definition of corrupt payments as to include other practices than what can technically be defined as bribery is reflected in the issue of tax payments to the Apartheid regime: 'The article concerning the prohibition from making royalty or tax (p)ayments to the "illegal minority regimes" in Southern Africa was firmly supported by the Group of 77 and especially by Uganda, Venezuela and Argentina. OECD countries constantly opposed this article.' (Annex 2, 41).

Political problems also appeared. An article concerning the prohibition of making royalty or tax payments to the “illegal minority regimes in Southern Africa”, firmly supported by the group of 77, was opposed by OECD countries. Also, throughout the negotiations, the Group of 77, insisted that corrupt practices involving transnational corporations should only be regulated within the context of the “Code of Conduct of transnational corporations”. This led to a deadlock. (33).

Examining the reasons for the deadlock the report pointed out that one striking element of the opposition between developing and developed nations was that: ‘In fact, few developing countries demonstrated interest in the issue, which they perceived as of special concern to some industrialized countries’ (C(90)87 Annex 2, 41). The puzzle as to why the developing nations did not show particular concern for the problem narrowly defined as bribery can be approached in a number of ways. Elites of developing nations could have shown lack of interest in addressing the problem of transnational bribery in which they were in fact implicated and their disinterest constituted a disingenuous attempt to continue said corrupt practices uninhibited. As the discussions at the UN had previously revealed, however, developing nations did not show particular concern for bribery *per se*, but lodged claims that there was a more fundamental problem with the influence that Western investment interests and state-sponsored corporate bribery had over their political processes. They demanded that the question of corrupt payments to be examined within the broader context of setting different terms of global trade, a strategy that was opposed by developed nations and in particular the United States.

The OECD members were meant to put a common front at the UN, but the significance of the question of transnational bribery did not have unequivocal support within the group. Nevertheless, in 1979 a decision was reached to sign an OECD agreement in case the UN talks faltered:

Upon the request of the United States, consultations were held among OECD countries in Paris from 31st May to 2nd June 1978 with a view to harmonising these countries positions in the UN Committee.⁶⁸ In spite of the efforts made mainly by the US delegation, no consensus was reached on a common declaration setting forth the basic elements of a treaty on illicit payments and proposing to convene a conference of plenipotentiaries in 1979 to conclude that treaty. In the 1980 Venice [*sic*] Summit Communiqué, however, the attending governments committed themselves to the ongoing UN effort and pledged, in the event that initiatives faltered, to conclude an agreement among themselves with the same objective. (C(90)87 Annex 2,37)

The G7 Summit took place from the 22-23 June 1980 in Venice, Italy and considered the question of illicit payments as part of its trade agenda and the final communiqué made the political commitment that the G7 members would pursue the question further:

As a further step in strengthening the international trading system, we commit our governments to work in the United Nations toward an agreement to prohibit illicit payments to foreign government officials in international business transactions. If that effort falters, we will seek to conclude an agreement among our countries, but open to all, with the same objective. (Venice G7 Summit Communiqué VI:3)

This political commitment, however, did not prove to be stable. The United States appeared as the only state actor with a strong interest in addressing the question of illicit payments. The choice to tackle the problem unilaterally with the adoption of the FCPA and without consultation with other negotiating partners further complicated the matter and alienated its hesitant partners in the developed world. The adoption of the FCPA was viewed unfavorably by other OECD members, despite the fact that it put their MNCs at a competitive advantage over American MNCs because it showed that the US government was unilaterally making decisions about addressing the corrupt payments problem; decisions that it was later intending to impose on other countries. As Pieth (1999)

⁶⁸ In the period from 1976 to 1979 a draft agreement was produced by the developed nations the elements of which were presented so as to help the harmonizing of positions.

explained, the other partners were suspicious of a hegemonic trade agenda so despite the impasse at the United Nations, OECD members did not pursue the issue any further:

The draft agreement was not finalized because of divergences between participants. In addition to the draft agreement, the Economic and Social Council formulated two draft resolutions on the subject and decided to transmit them to the General Assembly. The General Assembly agreed in 1979 to take no decision on them at that time. No further action has been taken since. (C(90)87 Annex 2,37)

The talks in the 1990s re-opened in the shadow of the impasse from the 1970s, but also as an outstanding issue to be resolved by OECD members. By stressing that the issue of corrupt practices was awaiting settlement for over a decade, in 1990 the Reports of the Secretary General re-opened the debate as an unresolved issue in need of settlement. The Recommendations to the Council suggested a wide mandate and two possible courses of action. The first was in accordance with the US proposal to pursue an international solution through the negotiation of a treaty and the second was a softer approach of fortifying the already existing national legislation and supplementing this national approach with a set of voluntary guidelines, such as a revised version of the Guidelines on Multinational Enterprises.⁶⁹ Furthermore, the US proposal for the creation of an ad hoc group to tackle the issue was countered by the option of CIME taking on the mandate as it did in 1975. The Secretary-General Note concluded that:

The problem of prohibited practices, otherwise called corrupt practices, including payments, bribery, extortion and other similar practices, is a universal phenomenon with deep roots and a long history. It poses serious political, economic, social, legal, and moral challenges. With the development of international exchanges, instances of corruption have resurfaced in a dramatic manner, causing serious embarrassment and attracting widespread concern. (C(90)87 Annex 2, 36)

⁶⁹ Paragraphs 7 and 8 of the OECD Guidelines on Multinational Enterprises, referring to illicit payments were added because of the 'concern raised by the United States regarding the distorting effects of illicit payments on international trade and investment' (6).

At this preliminary stage of discussion three primary concerns developed as justification for a course of action at the international level. The first was a concern for developing nations, which had failed to understand their stake in agreeing to accept the so defined problem of corrupt payments. The second was a preoccupation with economic efficiency and the financial losses that in particular bribery was incurring on the global economy. The third was about publicity and the ‘embarrassment’ factor pertaining not to the actual harm corrupt payments were causing themselves, but to how revelations of their existence was causing international concern.

During the early stages of discussions, however, OECD member states remained unconvinced of the seriousness the US delegation was attaching to the issue of bribery. As Mark Pieth, who was to become the Chairman of the OECD Group on Bribery in International Business Transactions stated: ‘the reactions of other OECD members were at best reserved’ (1997, 119). After the Council in March 1989 the US representative forcefully reestablished the US interest in the subject during the Council Session on the 21 May 1990 referring to his government’s plan to ‘approach capitals to reiterate its interest in the matter (C/M(90)13(Prov)).⁷⁰ The US representative claimed that ‘increased awareness’ or ‘consciousness’ of the problem of corruption in the developing world is a signal that OECD members should do whatever is in their power to curb bribery in international business transactions:

⁷⁰ During the Executive Committee in Special Session on the 21 May 1990 the ‘permanent Representative of the United States reminded the Council that in March 1989 his country had raised the issue [of illicit payments] in various OECD bodies and in particular the ECSS’ (Minutes 733 Council Session). The submission of the completed feasibility study was expected for the Council Session on the 22nd of June – ‘As soon as the Secretariat’s report had been distributed, the United States intended to approach capitals to reiterate its interest in the matter’(C/M(90)13(Prov.).

The United States believed that OECD governments had a common interest in seeing that business entities based in OECD countries avoided illicit payments, for reasons that were well known: trade problems and persistent problems in foreign relations emerged when such payments came to light. Mr. Lamb thought that there was increasing consciousness of the problem of corruption in economic development in the third world, and that whatever could be done to eliminate illicit payments could help countries address at least part of the problem of corruption of which all were perhaps more aware today and more willing to address openly. (C/M(90)13(Prov.),6)

The US Representative, Denis Lamb, was tactfully presenting the problem of corrupt payments as damaging for developing countries, evading in this way potentially controversial discussions about the involvement of OECD members in such practices. At the same time the absence of developing nations at an international forum such as the OECD appeared to be a fortunate condition for addressing the issue properly as it could have obliterated many of the hindrances encountered at the United Nations:

The United States recognized that dealing with illicit payments on an international basis was not easy, as had been amply demonstrated by the lack of progress in the United Nations. Nevertheless western governments had made progress in recent years in attacking controversial problems such as money laundering, and they would urge the OECD to set a comparable example in addressing illicit payments. (7)

The US considered the OECD to be the most appropriate forum for tackling this 'generally acknowledged problem' and, recognising the resistance of some delegations, agreed to a broad mandate but insisted on the establishment of an ad hoc group. The Canadian delegation provided vague agreement, without commitment to the outcome and was specifically against the issue as an extra-territorial offence. Canada also preferred future work to be carried out within CIME rather than an ad hoc group. The representative of Switzerland was skeptical of the feasibility of a legally binding agreement and the UK delegation saw no merit in further work on the subject altogether. The UK argumentation was that national laws were adequate and domestic legislation could remedy the

insufficiencies. Insurmountable issues with extra-territorial application of laws and double jeopardy were coupled with the demand for additional resources that could be put towards more urgent matters. According to the UK delegation even if action on the international scale was agreed on, the rules could not be effectively applied domestically. The UK position was backed by Germany with some unspecified reservations.

Spain, the Netherlands and Turkey were in favor of a UN treaty. The Netherlands in particular showed a strong preference for a universal treaty and raised the issue at the United Nations at the end of 1989.⁷¹ Spain, Australia, Greece, Denmark, New Zealand, Belgium, Italy, Sweden, the Netherlands and Japan also favored CIME as the future forum for the work on illicit payments. Only the Austrian and Finnish delegations showed explicit support for an ad hoc group, but Austria had a problem with the extra-territorial application of national laws. Iceland, while generally supportive, demanded further clarification on the definition of ‘illicit payments’ ‘or what exactly – among a multitude of business practices constituted an illicit payment’ (12). The delegations of Greece, Belgium, Sweden, and Norway were more supportive of the US proposal, while Australia, Luxemburg, and Ireland demonstrated skepticism over the proposed endeavor. The Greek delegation in particular claimed that illicit payments and illicit receipts were part of the game in international economic relations, but such practices undermined international competition. The Irish position was skeptical but: ‘That was not to say that the Irish authorities did not recognize that there was a very serious problem’ (11). The problem, however, remained national and the extra-territoriality inherent to the US international solution was considered inappropriate:

⁷¹ Attention to this process is given in the following UN section.

The problem of extra-territoriality was one which was not confined to this particular issue: the difficulties which had occurred in a number of other aspects of international law were well known, when countries tried to solve a problem which essentially was one which should first be dealt with at home by reaching out into the legal systems of other countries. The question of illicit payments, Mr. O'Sullivan thought, was a field that would prove to be immensely complex and difficult to tackle. (C/M(90)13(Prov.),11)

While the governments of the French and Italian delegations had not yet finalized their positions, the Italian Delegation was principally opposed to extra-territoriality and requested information about the reaction of the US Congress to the OECD discussions so far as well as more information on the overall US strategy. The US delegation's response was that members of Congress were very invested in the issue and reasonably satisfied by OECD developments. However, a conclusive decision had not been made about the feasibility of an international agreement or what kind of action the organization and its members intended to take. In light of the expressed opinions, the Chairman of the OECD Council was hesitant about the prospects of success and 'whether something could be done and if so, whether it would be better to envisage a binding or a non-binding instrument.'(13).

The task of persuading its partners at the OECD that illicit payments, defined as bribery in international business transactions, was a matter of global concern was difficult for the US. The US government had maneuvered itself into competitive disadvantage and despite the lax implementation of the FCPA, American businesses were facing more uncertainty with the expansion towards new markets after the fall of the iron curtain in 1989, a problem of competitiveness that the Omnibus Act was trying to remedy. The US President had made a commitment to submit a progress report on the work done on illicit payments by August 1991, but the reservations that other OECD members had as to how

important was this issue made progress incremental (DAFFE/IME/M/(91)1). The political clout of the US remained the most important factor for progress, but also the ability to ‘lock’ the issue in a working group guaranteed institutional continuity that ensured the problem would not be written off the agenda. Managing controversy became an essential task of the Working Group and aided the US Delegation to ultimately forge consensus on corrupt payments.

1.3 Pre-Negotiation Talks at the OECD: The Ad Hoc Working Group and Controversy Management

The role of the Working group under the auspices of CIME was essential in foreseeing and managing controversies arising in the OECD Council. The Ad Hoc Group constituted not of independent experts, but of delegates from national capitals and was therefore similar to the constitution of the Council. Its delegates were from Ministries of Justice and Finance, Ministries of the Economy, central banks, foreign investment departments, etc. The United States had the most delegates (4) – from the Securities and Exchange Commission, the Department of Justice, the Department of State and the Permanent Delegation to the OECD (DAFFE/IME/PI(91)3). At least initially the delegated experts did not strictly represent relative size of the states or financial contribution, but to some extent reflected the level of investment and interest in the issue of illicit payments. The German and the UK Delegations, which were both outspokenly opposed to addressing the issue, had just one Delegate each from the Ministry of the Economy (Germany) and the Department of Trade and Industry (UK).

The national principle in the selection of predominantly legal experts with a broad competence rather than independent consultants from the field of anti-corruption

influenced the content and direction of the studies and the discussions. As Spector and Kitsuse (2009) note, the selection of the members of a working group is not a self-evident choice, but a political one. The selection of sociologists, economists, or legal experts already tints the problem in the shade of the expertise that the delegates are expected to provide. The discussions in the Ad Hoc Group on Illicit Payments, therefore, had a decisively legal character and concentrated on the problem of legal feasibility, leaving the decisions as to the substance of the problem and if future action was at all desirable to member states. This strategy helped the management of controversies arising from the discussion of the ethical, economic and political consequences of corrupt practices. At the same time, the question of legal feasibility became an intrinsic part of the process of definition and the measures taken against the issue. Further work in the framework of the OECD was judged dependent on the attainability of consensus and the practicability of the proposed solutions. This trend had an influence on the scope and definition of the offence with the boundaries of what constituted 'illicit payment' remaining fluid and fuzzy during the discussions. These developments are in line with argument that practicability and feasibility constitute an intrinsic part of the decision whether there is a 'problem' that demands a collective response (Spector and Kitsuse 2009). At the international level matters of feasibility are further complicated by competing claims that policy measures are better left to the discretion of individual nation states and should not become the center of concerted global action. The national principle in the choice of experts for the ad hoc group could further strengthen the propensity to consider the problem as a national prerogative rather than a matter for international measures.

Contact was initiated with consultants for a feasibility study ‘on the various options for international co-operation in the area of the prevention of illicit payments.’ (DAFFE/IME/PI(91)2,4). The ad hoc group convened in June 1991 to discuss a Feasibility Study on Available International Means for Dealing with Illicit Payments in International Commercial Transactions (DAFFE/IME/PI(91)1). It had to issue a report by the end of the year, which, after revision, would be sent to the Council as a CIME report (DAFFE/IME/PI(91)4,5). The ‘Note Prepared by the Secretariat’ invited the Ad Hoc Group to examine options in the form a multilateral convention, bilateral agreements, guidelines that were not obligatory, or the reinforcement of existing national laws. The Ad Hoc Group divided these options into 5 categories:

- 1) Multilateral Agreement
 - 2) Bilateral Agreements
 - 3) OECD Council Decision
 - 4) Strengthening of National Laws
 - 5) Voluntary Guidelines and Codes of Conduct
- DAFFE/IME/PI(91)2

First, the choice of a multinational convention, especially with an emphasis on criminalization, was pitched as the most effective measure for the prevention of illicit payments. The problem of reaching the ‘highest level of consensus’ associated with this measure, however made this option difficult to achieve, the lack of a wide-reaching consensus at the UN in the 1970s was provided as a case in point. Second, the bilateral arrangements had to ‘include agreements between OECD Member States and countries where public corruption appeared prevalent; agreements among OECD Member States on taxation issues and mutual judicial assistance; and agreements to implement, enforce, or fill gaps in other international instruments.’ (2). The third option in the form of a Council Decision could have been adopted in combination with other measures and/ or with the establishment of an international monitoring body or formal consultation process. The

fourth option of revising national laws could have been done with a model law that would encourage reform of national laws, or with a recommendation to ‘take appropriate measures’ and was a highly feasible option because it demanded a ‘lower level of consensus’ (3). Since the OECD and ICC had already issued guidelines on corrupt payments, reinforcing and endorsing those voluntary guidelines remained the last option.

Despite the fact that the definitional boundaries of the offense remained ambiguous and unspecified throughout the talks, the Ad Hoc Group claimed that consensus existed on the principle that bribery should not be taking place between enterprises and members of foreign governments. Singling the US as the only state that had enacted legislation against such transactions, the Group reaffirmed that the choice of the term ‘illicit payments’ also came from US legislative debates. However, consensus as to whether corrupt payments were to be addressed internationally remained a challenge. Discussing the failure at the UN and the insufficient impact of the ICC Guidelines the Report affirmed that:

The lack of success in finding an effective international solution to the illicit payments problem appears to reflect a lack of consensus on a fundamental point: is it appropriate and feasible to proscribe corrupt arrangements between private enterprises and the public officials of other sovereign states? The United States has long urged that the answer to this question should be affirmative, so long as a recognized basis exists for exercising prescriptive jurisdiction. Other nations, however, have repeatedly urged that efforts to police another state’s governmental processes would constitute an impermissible assertion of “extraterritorial” jurisdiction or, at least, officious and self-righteous intermeddling (4).

This lack of consensus reflected a fundamental disagreement on whether the issue could and should be tackled through the transnational measures proposed by the United States. The question of feasibility became intertwined with the question of ‘globality’ because other OECD member states disagreed with the claim that illicit payments, defined as

bribes, should be tackled outside of the borders of nation states and saw the problem as a national one. How the anti-corruption initiative would be received beyond the OECD area was another area of contestation. While previous efforts to tackle bribery were met with the opposition of non-OECD Members, the ad hoc Group claimed that the tide had turned for developing nations, which had come to appreciate the deleterious effect that corruption had on their social and economical systems and were less likely to oppose an OECD initiative, like they did in the 1970s:

The recent decisions of the OECD Council to study the illicit payments issue evidences renewed interest by Member States in exploring available international options for dealing with the problem... For their part, developing countries appear to have begun to appreciate the pernicious effects of corruption on the fabric of their political and social systems. Consequently, they may, as a group feel less aggrieved by a joint effort of the OECD Member States to prevent illicit payments in international commercial transactions. (5)⁷²

The Ad Hoc Group's Report is indicative of the importance of feasibility in the construction of social problems. This feasibility works on two levels. The first one is administrative and it pertains to the effectiveness that the proposed measure would have in terms of compliance and presumed efficacy in ameliorating the condition.⁷³ The second is political as it pertains to the feasibility of reaching a final agreement. The interplay between what is feasible in terms of consensus and what is effective in terms of addressing a putative condition becomes part of the makeup of the contents of the problem and the proposed solutions:

⁷² This position was already taking into consideration the recent UN Economic and Social Council Official Records Decision 111/104 which recommended 'that all nations take appropriate means in combating corruption of public officials' as well as the proceedings of the International Seminar on Corruption in Government, which took place in The Hague (11-15 Dec. 1989, 3-19).

⁷³ As noted, the content and definition of the actual problem remained unspecified with the US definition of bribery being continuously challenged from other member states at the UN, the OECD and OAS. The preliminary documents, therefore made reference to 'illicit payments' ('broadly defined') when looking for criminal penalties under national laws as part of the feasibility studies.

In considering the options presented in this Discussion Paper, it is important to evaluate not only their intrinsic merits but also the extent of consensus likely to support them. In the past, there has been no consensus favoring strong international action to prevent illicit payments. An overriding issue is the extent to which such a consensus has now – or can be – developed. (DAFFE/IME/PI(91)2/REV1, 5-6)⁷⁴

The feasibility of reaching an agreement on the need for international action became an intrinsic part of the development of the putative condition into a global problem. Consensus on the severity of the condition, what it was and what was the proper mode to handle it was at the center of such debates. Different states or group of states had a diverging understanding of ‘what is wrong’ and what the best mode of handling the alleged problem was. The understanding of problems as natural conditions has created a success bias, which naturalizes the final definition of a putative condition, forsaking the divergent interpretations of the problem prior to institutionalization. The lack of consensus on illicit payments in the United Nations reflected a divergence in understanding what was problematic with the putative condition (which could most broadly be defined as illicit interaction between public and private actors). This lack of consensus worked at different levels:

Three draft UN Conventions failed to reach fruition because of a lack of consensus (1) between the developed and developing countries, and (2) among the developed countries themselves. The lack of consensus between developed and developing countries is unlikely to reoccur (at least in the same form) in negotiating a multilateral convention among OECD Member States. The lack of consensus that emerged among the developed countries, however, is potentially more significant. Indeed, based on a review of the ECOSOC deliberations, one commentator has concluded that “the bulk of the important struggle over the proposed convention has been between the United States on the one hand and the other OECD nations on the other.” (9)⁷⁵

⁷⁴ Option 1 introduced the criterion of ‘multilaterality’ which pertained to an agreement among more than two sovereign states and was a ‘favored instrument for requiring uniform behavior of public and private actors in the international arena.’ (4).

⁷⁵ The reference was made to a study published by Seymour in 1980 (Seymour, Bruce Illicit Payments in International Business: National Legislation). It is noteworthy, that the studies made by Seymour

Because of the institutional continuity, the impact of the failed talks was weighing heavily on the new ones. In addition to considering previous efforts on a new proposal, international organizations take into consideration the work of other international forums on the same subject and go to great lengths not to duplicate their efforts. The OECD talks in the 1970s were put on hold because the main forum for discussion had become the UN and any further work at the OECD was made conditional on forging consensus at the UN. This development suggests that, as the US strategy stated, consensus is indeed ‘transferable’, but also that the main institutional setting for the talks matters. The rationale behind the choice of venue in transnational litigation, also known as forum shopping (Bell 2003), was very much part of the choice of the OECD by the United States. The OECD provided favorable conditions because an agreement between its members to put a stop to transnational corrupt payments perpetuated by their corporations would have been easier than establishing consensus at the UN. As the Report of the Ad Hoc Group argued, the lack of consensus between the global South and North would not be repeated in the same form. This was apparent for negotiations at the OECD where developing nations were not present; it also implied that UN debates would not become the primary forum for discussion. However, even if the OECD was to remain the central forum for work on illicit payments, the lack of consensus between the developed nations would be a serious hindrance.

In the 1990s, the US was still isolated in its concern for bribery or illicit payments. This isolation raises the question as to why others were not so concerned with

(consisting mostly of the history of the pre-negotiation process in the United Nations) were the only broadly cited academic scholarship in the Group’s Report’s. This is consistent with the political context of the talks and the study of what is feasible rather than what is the best technical solution.

said practices. Was the US the beacon of moral fiber in international business? Or did it have a problem with such practices because of the constellation of events in relation to Watergate and because of the FCPA and the inability to repeal it? The latter explanation, which stresses the role of contingency and national interest rather than some intrinsic value of morality in international politics, is the answer provided by realism.⁷⁶ This explanation points to a difference with problems at the national level where normative issues might appear to hold a stronger persuasive power. The issue of bribery of foreign officials became a problem for the United States in its national legislative order and this is the sense in which the problem of corrupt practices was a 'private trouble' of the United States that the executive was trying to turn into a global concern. For other OECD states, said practices did not become problematic and therefore it was the task of the US to break its relative isolation and convince its OECD partners to take the issue seriously in a way that it did not manage to convince the global community of states in the UN 15 years prior.⁷⁷ The failed UN model of action provided one alternative for future work at the OECD:

The draft U.N. illicit payments agreement provides one model for a multilateral convention among OECD Member States addressing the illicit payments problem. The U.N. approach was to draft a comprehensive criminalization convention designed to incorporate all mechanisms available to deter illicit payments in international transactions and to punish anyone engaging in corrupt practices. Effectively, it would have incorporated the U.S. Foreign Corrupt Practices Act, together with a number of additional enforcement mechanisms into international law. (DAFFE/IME/PI(91)2,11)

⁷⁶ In addition to contingency, this process can also be understood as path dependency because once the US passed FCPA, its position with respect to internationalizing the problem became more likely.

⁷⁷ The OECD Report analytically discussed the major controversy points at the UN, in addition to the exercise of extraterritorial jurisdiction, which were to be repeated in one form or another at the OECD: 'A number of delegations also took issue with the provision requiring criminalization of corporate conduct or application of measures with comparable deterrent effects. Finally, significant issues arose over provisions that would have permitted nullification of contracts tainted with corruption and over the dispute settlement procedures.' (10).

After the adoption of the FCPA, it was even more difficult for the US, to convince its partners not only of the definition of illicit payments as bribery but also in the adoption of a criminalization approach that would ensure uniform application of rules and, due to the extraterritorial elements of the measure, would allow the US to police its application. On the one hand, this was because other OECD nations had an incentive to be free riders and not adopt themselves the legislation that was imposing restrictions on US business. On the other hand, however, the adoption of the FCPA in the midst of talks at the UN and the OECD in the late 1970s showed that the US government was going ahead unilaterally with a widely debated issue and trying to impose the same definitions and solutions on other states.

In fact, the problem that the US had in the 1990s had more to do with the FCPA itself rather than the corrupt practices *per se* that the act was addressing. Nothing short of a multilateral convention on transnational bribery that was based on criminalization would have been a satisfactory outcome for the US because a binding treaty would have ensured the choice of criminal measures by other OECD member states. From the US perspective, the work of the Ad Hoc Group was important in steering the discussion towards the direction of a multilateral option or in case this was unfeasible, to direct attention to preliminary steps that would secure a basic level of consensus that would later be used as a basis for a multilateral legally binding agreement.

The discussion of the ‘sub-options’ of a criminalization convention involved a choice of remedies: ‘the option to address the problem criminally, civilly or administratively’ with the US experience with SEC showing the value of administrative and civil measures; a more Limited Statute Convention; the establishment of an

international “Office of Fair Practices” to monitor, investigate complaints, exchange information with governments, and publicize obtained information when appropriate. The advantages and disadvantages of the multilateral option were evaluated in terms of benefits and costs, a common model for US documents on the subject of illicit payments. The benefits of a multilateral convention would have been to prevent illicit payments more effectively, to level the playing field and cut unnecessary costs of business. A multilateral convention was deemed to have the following advantages and disadvantages:

Pros

- ✓ binding
- ✓ ensuring uniform obligations
- ✓ providing an effective enforcement mechanism

Cons

- ✗ inflexible
- ✗ demanding high consensus
- ✗ difficulty with amendments

The costs of a multilateral convention would have been its inherent inflexibility and some intrinsic issues with the prospect of future amendments:

If the definition of “illicit payment” or a particular enforcement mechanism created unforeseen problems for one or more parties, they would have to persuade the other parties to agree to a change. As the recent amendment of the U.S. Foreign Corrupt Practices Act demonstrates, the definition and control of illicit payments can well require change in light of experience. (DAFFE/IME/PI(91)2/REV1 14)

Even more relevant were the ‘extrinsic problems’ and the trade off between effectiveness and feasibility. Agreement achieved at the expense of reservations would have been one likely outcome of a binding treaty that in any case would have been a multiannual project. The high degree of consensus that the adoption of a multilateral treaty required could have led to failure to pursue the issue further in any form as had happened in the United Nations:

As the experience of the draft U.N. convention shows, there may well be no consensus even among the OECD Member States on important elements of a criminalization convention. At worst, lack of consensus could result in failure to agree on any text to recommend for signature. Alternatively, lack of consensus might lead to agreement among only a subset of Member States which, for competitive reasons, might ultimately refuse to proceed on their own (DAFFE/IME/PI(91)2, 5)

Characteristically, the feasibility of reaching consensus on addressing the problem became part of the discussion as to whether it was desirable to tackle the issue at the global level. The development of a matrix presenting the controversies that may arise in pursuing an international agenda became the centerpiece of preliminary discussions.

In short, the most important consideration in determining whether to pursue a multilateral convention on illicit payments is the likelihood of success. For agreement to be reached, a broad political consensus must exist among Member States. The consensus must extend beyond agreement that illicit payments are reprehensible. It must reach (1) the appropriateness of exercising jurisdiction over what some regard as extraterritorial conduct, and (2) the proper remedies for dealing with such conduct. (DAFFE/IME/PI(91)2/REV1,15)

The Reports reveal the extent to which the proposed solutions became part of the discussions about whether to address the condition. Feasibility rather than an inquiry into the severity of the condition or its negative global impact became the center of discussions at the Working Group. The following matrix was developed and revised so as to foresee any source of controversy within the OECD member group.

ISSUE	CONTROVERSY	COMMENTS
Definition of offence as bribery	No	Illegality under national jurisdiction
Definition including other illicit payments	Yes	Questions as to adopt a definition beyond traditional bribery
Type of transaction – Sale to Governments	No	
Type of transaction – Sales in need of government approval	Yes	

Purpose of Payment	Yes	'Effort to proscribe "market conditioning" payments or other payments not tied to a particular transaction would be very controversial'
Public Agents as recipients	No	
Private Agents as recipients	Yes/No	Including payments to private agents would be controversial but probably will not be discussed as an option at all
Corporate Payers	Yes	Criminal liability for corporations (who are juridical persons) would be very controversial
Intermediaries	Yes	If payments through intermediaries are included that would lead to controversy

Adapted from DAFFE/IME/PI(92)3/ANN, DAFFE/IME/PI(91)2/REV1, DAFFE/IME/PI(91)7/ANN1

Controversies pertaining to the definition of corrupt practices that went beyond bribery were one source of difficulty. The US delegation insisted on a definition of corrupt payments as bribery, while the majority of OECD Members challenged this limitation of the definition. Furthermore, potentially controversial topics were questions about private agents as recipients and the use of intermediaries as well as indirect forms of government involvement in cases when official approval was needed for the commercial transaction. The question of corporate criminal liability was also deemed central.

ISSUE	CONTROVERSY	COMMENTS
Secondary Offences	Yes	It would be in conflict with the legislation of a number of MS to include conspiracy and other secondary offense for illicit payments (in the case of criminalization)
Actions at the National Level		
Criminalization of Illicit payments	Yes	
Tax deductibility	Yes/No	The degree to which the

		issue of tax deductibility of such payments would be controversial depends on the definition of the offence/ federal states further complications
Disclosure & keeping records	Yes	Some experts expressed the opinion that a disclosure approach would have similar shortcomings to criminalization/ 'Despite recent legislative changes, may remain controversial depending on definition of offense' (DAFFE/IME/PI(91)5/ANN2)
Conditioning public actions	Yes	Similar considerations to disclosure
Civil measures	Yes	Caused problems at the UN

Adapted from DAFFE/IME/PI(92)3/ANN, DAFFE/IME/PI(91)2/REV1, DAFFE/IME/PI(91)7/ANN1, (DAFFE/IME/PI(91)5/ANN2)

An opening through which the problem of illicit payments could have been addressed indirectly came from the subject of tax deductibility of bribes on which consensus appeared possible. There was also probability to reach consensus on some forms of information exchange and mutual judicial assistance:

ISSUE	CONTROVERSY	COMMENTS
Territorial Jurisdiction	Yes	Very controversial in UN draft. A solution might be to define the offence so that it demands adequate territorial nexus
International Measures		
Information Exchange	No/Yes	
Mutual (administrative, civil, criminal) assistance	No	
Extradition	Yes/No	Already existing instruments/ 'principle not controversial but some legal aspects may need to be resolved'
Monitoring MS	No	
Monitoring Corporations	Yes	Entails delegation of sovereignty
Dispute Resolution	Yes	Controversial at UN and ICC

Adapted from DAFFE/IME/PI(92)3/ANN, DAFFE/IME/PI(91)2/REV1, DAFFE/IME/PI(91)7/ANN1

The question of monitoring corporations was also deemed highly controversial as it would have been performed by Member States, who were to ensure compliance of their (and in some cases foreign) corporations. This might have led to enmeshing state agencies in the private sector and raised fears of too much government involvement in the economy. Including the question of a dispute resolution tribunal, securing compliance with the multilateral convention would have been a significant challenge.

The draft matrix prepared by the Ad Hoc Group is revealing of the already discussed element of feasibility that is intrinsic to the construction of social problems, according to Spector and Kitsuse (2009). The matrix was regularly updated and became central to evaluating the tradeoff between the administrative and political aspects of feasibility referred to earlier. Based on the matrix and the evaluation of the advantages and disadvantages the choice of convention appeared unfeasible to the working group. The assumed unfeasibility of reaching the degree of consensus necessary for the adoption of a binding multilateral instrument was judged more important than the fact that a multilateral treaty would have been arguably the most effective measure against corrupt practices. Other measures that demanded a lesser degree of international consensus were therefore necessary and proposed for consideration. Bilateral agreements⁷⁸ came as a secondary alternative to a multinational treaty:

Unlike multilateral conventions, which seek to create a multinational web of identical legal rules, bilateral agreements generally focus on matters of reciprocal interest between the two contracting states.⁷⁹ To assist its investigation of allegations that Lockheed Aircraft

⁷⁸These bilateral agreements referred to treaties and less formal agreements. A Bilateral treaty was considered to be a 'contract that two sovereign states intend to be binding' and it is governed by international law. While other agreements did not require ratification, executive agreements were binding under international law (16).

⁷⁹Prolific examples existed in the field of investment and double taxation, but it was unusual for such instruments to be used for criminalization of some forms of transnational behavior.

Corporation had made illicit payments, the United States negotiated a series of ad hoc bilateral assistance arrangements in the 1970s. A series of much broader bilateral treaties followed, providing the assistance in locating witnesses, obtaining witness testimony, production and authentication of business records, and service of judicial and administrative documents in criminal matters. (DAFFE/IME/PI(91)7/ANN1,4)

Four secondary options of bilateral agreements with ‘host’ countries (defined as countries where corruption was ‘prevalent’) were developed. These bilateral agreements would have resolved the question of extraterritoriality, but were deemed politically unfeasible because the host country would have to implicitly admit the existence of endemic corruption on its territory. Therefore, it was judged that excluding developing nations and enacting a ‘network of such bilateral undertakings among OECD Members (or a multilateral convention to that effect) might provide useful political cover for non-OECD countries to enter into such agreements’ (17). This formulation implied that such agreements between OECD members would otherwise be completely superfluous, despite the fact that after the Lockheed affair the bilateral agreements enacted were precisely between OECD member states. This redirection of focus from the developed to the developing world, once again was strategically keeping controversy under control by presenting the problem as one of development.

At the same time the question of tax deductibility of bribes was one of central importance to US interests because it was creating an even more acute disadvantage for American business. Option 2 was dedicated to this aspect of bribery and concerned Bilateral Tax Agreements dedicated to the treatment of the deductibility of illicit payments that could use the format of the model OECD treaty on double taxation. Option 3 was Mutual Assistance Agreements for the facilitation of current laws, but would have been helpful as a deterrent only in the US. Finally, Option 4 concerned a combination of

bilateral agreements with other measures such as a multilateral treaty, or a voluntary code. The benefits of such and other bilateral arrangements was that they were legally binding, yet could be easily adapted to specific needs (a MOU was even easier to negotiate and adopt, but was non-binding). The cons of bilateral agreements in ‘non-host countries’, however were significant because:

Absent a parallel series of agreements making the same or similar rules applicable to all principal international competitors, non-host countries would be unlikely to agree bilaterally to prohibit their own nationals from competing for international business in ways that remain open to others. Moreover, the same so-called “extraterritoriality” issues implicated in a multilateral convention on illicit payments are likely to make illicit payment bilaterals equally difficult to negotiate. Neither of these disadvantages, however, would affect bilateral agreements with host countries or agreements limited to taxation issues or mutual judicial assistance. (18)

The disadvantages of expanding the web of bilaterals, created with the initiative of the US after the Lockheed case, were deemed significant enough for this option to be deemed feasible but impractical. The third substantive option concerned an OECD Council Decision. This would have fallen under Art. 5(a) and 6 of the OECD Convention which entitles the Council to issue decisions by consensus that are binding, but do not demand ratification and allow for reservations. An OECD Decision could be very general in the form of recommendations, and had not been used to criminalize private actions, but more than 40 Decisions had been adopted because of their high flexibility. The advantages of a Council Decision and relevant sub-options would have been that they:

[p]rovide means of binding Member States to take action. For a generally phrased undertaking, an OECD Decision may be more appropriate than a treaty. Moreover, OECD Decisions are traditionally and readily combined with other options, such as non-binding recommendations and OECD institutional monitoring mechanisms. A combination along these lines can be an effective means of promoting incremental progress in appropriate areas.(DAFFE/IME/PI(91)7/ANN1 ,2)

The prospect of incremental action was advantageous because it would have allowed for a low degree of consensus in order to adopt a Recommendation with general language, leaving significant discretionary power for member states. The disadvantage was that Decisions had not been used previously for such substantial changes (the criminalization of private conduct) and to that extent do not have a significant advantage over a convention on the same subject, which would be also better tailored towards the inclusion of non-members. This option was therefore considered in combination with the fourth substantive option, which constituted in the strengthening of national laws where considerable variation existed among members with the FCPA being the only national law prohibiting illicit payments abroad. Non-binding ways to encourage states to strengthen their laws were particularly relevant in the form of: model laws⁸⁰ and Recommendation by OECD Council.⁸¹ Sub-options included an OECD sponsored model law that could be created by a working group and an OECD Recommendation without a model law. The advantages of taking this substantive route were that with a Council Decision it would have been easier to reach international consensus. This non-binding model allowed for flexibility and possibly more effectiveness since a multilateral treaty might lead to the lowest common denominator because of the inability to reach a broad enough consensus. The disadvantages were that legislation might not be enacted or would have remained ‘spotty’ as experience suggested (23).

⁸⁰ A model law was defined as: ‘a document, usually produced by a committee of experts under the aegis of a multi-jurisdictional organization, intended to inspire emulative enactment by virtue of its intrinsic merits or hoped-for benefits of harmonization.’(19-20). A model has force only if adopted by a MS, and some precedents existed in the UN in the fields of trade and international arbitration.

⁸¹ Under Articles 5(b) and 6 it was possible to strengthen national laws: the measure was judged to require less time, but the implementation would have been much slower and could have involved ‘unlimited “tinkering” by national legislatures’ (22). Like a Council decisions, the majority of the work had to be done by committees and the Secretariat.

The last and fifth substantial option concerned Codes of Conduct and Guidelines.⁸² This option was already explored with the 1976 OECD Guidelines, including a reference to illicit payments. The ICC Guidelines, issued following the Shawcross Commission report, “Rules of Conduct to Combat Extortion and Bribery”, also established a panel to monitor the application of said rules; but any study of infringement had to secure the agreement of the accused enterprise and the procedures were to remain undisclosed. UN Guidelines also constituted a precedent.⁸³ The OECD Guidelines and the Showcross Report both took less than 2 years to be concluded, but the UN Code of Conduct for Transnational Corporations took more than 15 years of talks since it lacked basic consensus. These concerns raised questions about the velocity of adoption and effectiveness. The advantages of such non-binding measures were that they might be faster to adopt and be a good ground for further work. The existing experience showed low efficacy of such measures, however, except for the fact that courts might decide to take use of the guidelines (precedents existed with non-binding instruments on money-laundering) and treat them as international norms. To the extent that such guidelines were already enacted and seemed to be of little consequence, this option was also considered feasible, but unlikely to be effective.

The talks on corrupt payments at the OECD in the period 1989-1994 were to a large extent dominated by the impasse of the 1970s. Managing controversy and deciding on the trade-off between effectiveness and feasibility became the dominant goals of the

⁸² They could be used in a national context to guide behavior as self-regulatory mechanisms, for example, stock exchanges, and may impose disciplinary action but do not criminalize behavior.

⁸³ Their addressees are private and natural persons and not states, and the guidelines are non-binding. They do not criminalize behavior, but may impose disciplinary action. When Guidelines are international, this creates a difficulty because international law addresses are states, therefore, soft laws are used to supplement such gaps in jurisdiction.

pre-negotiation talks in the 1990s and the options for future work were each examined against these criteria. Unlike the 1970s, however, the OECD remained the primary venue for discussions on policy solutions to corrupt practices with the UN retaining a subsidiary position.

2

Pre-Negotiation Talks at the UN (1989-1994)

After the United States Delegation raised the question of illicit payments at the OECD during the Special Session of the Executive Committee on February 28, 1989, another OECD member state found a less formal channel to re-launch the debates at the United Nations. The government of the Netherlands, which during the OECD Council meetings expressed a strong preference for a universal treaty, hosted an Interregional Seminar on Corruption in Government as a preparatory meeting for the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders. The Interregional Seminar took place from 11 to 15 December 1989 in The Hague and was attended by officials from 18 developing countries and 8 developed countries as observers, as well as representatives from academia, NGOs and other independent anti-corruption organizations. The Seminar participants drafted an anti-corruption manual that was presented at the 8th Congress.

The UN Congresses on Prevention of Crime, which took place every five years, constituted the only institutionalized arrangement that continuously discussed the topic of transnational corruption since the 1970s. The perspective on corruption was different, however, with sophisticated types of white-collar crime or what was seen as ever evolving

new forms of economic crime being at the center of graft and corruption as problems of international concern. In the period from 1980 to 1989 when talks about corrupt payments had completely stopped at the ECOSOC, the only UN related forum to discuss questions of corrupt activities remained the Congress on Prevention of Crime, but its take on the issue was in the tradition of ECOSOC and differed significantly from the OECD discussions. During the 6th Congress in Caracas (25 August – 5 September 1980) questions of corporate crime and the abuse of power of high level officials were at the forefront of discussions about corrupt practices. The abuse of economic power by transnational corporations and the impunity with which they and high government officials perpetuated corrupt practices was pointing to the problematic relationship between global business and political elites worldwide and was not concerned with bribery in particular. The inability of developing states to handle effectively transnational corporations and the ‘various aspects of offences relating to the abuse of power and the perpetrators of such offences at the global and regional levels’ with a stress on economic crime revealed a much broader understanding of corruption (Travaux Préparatoires UNCAC 2010, xv).

During the 7th Congress (Milan, 26 August - 6 September 1985), the controversial subjects of NIEO and corporate criminal liability also resurfaced and corruption was discussed as leading to distrust in government and cynicism because of a socially presumed ‘inevitability of a corrupt society and the inability to achieve a state of communal well-being and economic stability and prosperity’ (xv). At the same time the solutions to corruption as a form of ‘economic crime’ were seen to be in building institutional capacity within the developing nations that would provide for the prosecution

of ‘complex cases of economic crime’.⁸⁴ This demanded an equivalent treatment of economic and conventional crimes with an acknowledgment that the former reveal an amount of ever-evolving sophistication, which required a dynamic approach for their penalization and would end their committal with impunity.

It was in the context of this ‘developing nations perspective’ that the interregional seminar followed in discussing forms of corrupt practices and the possibility for an international convention to address transnational corruption. During the 8th Congress, corruption was discussed under agenda item 3 and a paper prepared by the Secretariat claimed that, ‘corruption had become more transnational, plaguing all societies, and that its consequences were much more deleterious in developing countries’ (xiii). Political commitment was therefore needed in the form of strengthening of national laws and international cooperation for their effective application. The stress was, however, on the responsibility of the host country to persecute such crimes, which involved a higher degree of national government authority over transnational corporations. The position that corruption and bribery were just tools in the toolbox of a number of more sophisticated economic crimes was a major difference with discussions at the OECD where bribery was pitched as the problem. There was a fundamental difference between a national approach to addressing economic crimes and an approach where a country is responsible for bribery

⁸⁴ The question of corruption appeared as part of the area of economic crime in which corporate and organized crime appeared intricate: ‘Recognizing that those types of crime had been relatively neglected by criminologists and that the definitions used were often vague and ambiguous, the Congress indicated that the expression “crime as business” referred to heterogeneous groups of crimes characterized by specific features, such as the underlying objective of economic gain and the involvement of some form of commerce, industry or trade; the use or misuse of legitimate techniques of business and industry; and the high social status and/or political power of the persons involved in the commission of the crimes concerned. Crimes of corporations, on the one hand, and so-called “organized” or syndicated crime, on the other, were found to have many similarities and interrelations and, typically, both might involve the corruption of law enforcement and political authority.’(xiii)

performed by its enterprises. It reflected different levels of interference with the functioning of the free market and transnational corporations in particular. Attempts by developing states to strengthen their grip over foreign investors operating on their territory and a high level of discretion in the prosecution and definition of economic crimes and corruption would have been highly undesirable for the developed countries.

During the 8th Congress a resolution demanded that the Crime Prevention Branch forward a draft code of conduct for public officials to the next Congress and a report on the position of NGOs and governments on the distributed anti-corruption manual ‘and requested the Committee on Crime Prevention and Control to keep the issue of corruption under constant review and to submit the results of the efforts undertaken in pursuance of the resolution to the Ninth Congress’ (xviii). Resolution 45/107 reiterated the mandate of the Crime Prevention and Criminal Justice Branch on corruption and requested the production of materials on special training of national prosecutors and judges. In parallel, corruption was included in the agenda of the Commission on Human Rights with a stress on high-level government officials:

Following the Eighth Congress, the Commission on Human Rights adopted resolution 1992/50, entitled “Fraudulent enrichment of top State officials prejudicial to the public interest, the factors responsible for it, and the agents involved in all countries in such fraudulent enrichment”, in which it stressed the necessity for determined action to combat the fraudulent or illicit enrichment of top State officials and the transfer abroad of the assets thus diverted, as well as to prevent those practices which undermined the democratic system in countries throughout the world and constituted an obstacle to their development. (xviii)

Before the 9th Congress in 1995, which took place in Egypt, the UN International Drug Control Program launched a preparatory Ministerial Forum Against Corruption (November 1994). The previous Congress in Havana discussed measures against

corruption and stressed the importance of international cooperation in addressing it globally as well as the role the UN should play in the process. The Congress, however, was taking place every 5 years and did not provide a consistent framework for discussion of the issue of corruption *per se*. It provided, however, for the reintroduction of the issue of foreign illicit payments on the agenda of the United Nations and in particular in the Commission on Transnational Corporations, which requested the Secretary General to issue a report on corruption in international business transactions in 1991. The Report recalled previous efforts on the subject and noted that national approaches to tackling corruption could benefit from international cooperation on the subject. The following year, the TNC Code of Conduct, which was connected to the question of illicit payments in the 1970s, failed and therefore opened the door to a new take on the subject. It was only after the Recommendation of the OECD in 1994, however, that the UN intensified talks on the subject of illicit payments (Posadas 2000). With the exception of the above references, the question of corruption remained of limited importance in the UN until some degree of consensus was reached at the OECD. In this sense, the discussions of the 1990s mirrored those of the 1970s, but the issue of corrupt payments remained contained as the prerogative of the OECD.⁸⁵ This had significant influence over the process of reaching consensus and the definition of the offence.

The differences between the OECD and the UN take on the question of illicit payments are reflected in an exchange of views that took place on the 25th of April 1991

⁸⁵ This exchange of positions between the OECD and the UN as the central forum for discussion in the 1970s and 1990s raises relevant questions as to how to contain the discussions of a potential global policy issue as the prerogative of a certain organization. The Netherlands did not manage to reintroduce the illicit payments issue in the United Nations in the same forceful and persuasive way that the US did in the OECD. In the 1970s, it was the inability to manage controversy at the United Nations that raised the stakes of the issue of corrupt payments and made further OECD talks conditional on finding a successful resolution to the controversy at the UN.

(C/M(91)9/PROV/ANN). The United States at that point was still isolated in its interest to address transnational bribery and therefore the bulk of the discussion on the subject took place between the US Permanent Representative to the OECD, Alan Larson, and the Secretary-General of UNCTAD, Kenneth Dadzie. During his presentation of the 8th Session of the UN Conference on Trade and Development, Dadzie made a reference to ‘good management’ that the US Representative took as a vantage point to raise the issue of corrupt activities:

With regard to Mr. Dadzie’s interesting comments on the question of good governance and in particular on the specific point he had made concerning the efforts of developing countries were making to structure their economies in a way as to minimize the opportunities and incentives for corrupt activities, Mr. Larson asked whether it would be seen as desirable to have greater discipline on the activities of representatives of industrial countries through some sort of international agreement or national activities which would discipline illicit payments by their citizens. (22) ⁸⁶

The US Permanent representative continued to refer to ‘good governance’, a concept that had recently gained an, albeit limited, currency after the 1989 World Bank Report on Sub-Saharan Africa (World Bank 1989). The UN Representative consistently referred to ‘good management’ and this difference was significant because it was symptomatic of diverging explanations as to what was the culprit for unsatisfactory development and how this overarching problem was to be addressed as well as what was the role of corruption in the

⁸⁶ The position of the UNCTAD Representative was that corruption was part of a web of problems – an intricate part of a development *problematique*, rather than a problem that is on its own: ‘The debate continues as to how to integrate considerations of economic efficiency with sound management at the domestic level and with broader national and international development objectives. The increasingly complex interplay between trade, foreign direct investment, the globalization of economic activity as well as of corporate operations, technology transfer and services has added a further dimension to the development *problematique*’(4).

process. The UN representative affirmed that the concept of “good management”⁸⁷ was already included in the agenda of UNCTAD VIII, but remained highly contested.⁸⁸ At the current stage of discussion at the UN, it was primarily understood as ‘establishing a predictable business framework’ for foreign investors. A number of other objectives included:

A. 'Establishing a predictable framework' for the private sector, which included transparent processes of decision-making and accountability for both private and public actors, domestic and foreign. The same demands had to apply to enterprises coming from developed countries.

B. Managing Conflict as another aspect of predictability.

C. Dealing with Market Deficiencies – the objective of 'good management' justified government intervention in the economy with a limited scope. A relevant example was provided by cases of rent extraction. In such cases market deficiencies created an economic climate with no competitive pressure where few companies reap all the profits. High prices also were deemed to justify governmental intervention as well as 'infant industry protection'. The free market mechanism was further deemed insufficient to solve the problems of development: 'market solutions to problems of poverty and inequitable distribution income often result in conditions incompatible with societal values' (14). Altogether, market mechanisms were deemed to not provide for public goods and deal effectively with externalities.

D. 'Governmental participation in economic activity': in this sense the concept of 'good management' pertained to the relative scope of the private and public sectors. Government intervention (and a lot of it) was still deemed necessary to set the conditions required for a free market system. Sustainable development was also provided as another example of the insufficiency of the market mechanism.

Adapted from (C/M(91)9/PROV/ANN)

⁸⁷ 'Good management' constituted an intersection point between market forces and public policy at which government intervention was supposed to compensate for market inefficiencies. To this extent, good management was not seen as the withdrawal of the government from the economy except for the provision of basic services, but as a vantage point for more intervention – a position that would have been inconsistent with the objectives of neoliberal economics.

⁸⁸ If the policies of good management were to be applied to everybody, still the complex interplay between mutually reinforcing domestic and international policies was to be acknowledged, because the rules of global trade and investment were equally culpable for insufficient development as domestic inadequacies.

Without making an explicit reference to New Institutional Economics (NIE), the UN representative concurred in this exchange of views with the basic NIE insight that domestic institutions, defined as the ‘rules of the game’, matter in managing economic uncertainty (North 1990). But at the same time, Dadzie pointed to the rules of the global economy as the main detriment to successful economic development.⁸⁹ In the early 1990s, under the influence of NIE, the theoretical groundwork was laid that showed the culprit for unsatisfactory economic growth to be in domestic policies, but the UN representative challenged this perspective and claimed that the global economic environment was hostile to development and some of the aspects of the problem were ‘the collapse in financial flows, the burden of the debt overhang, historically high interest rates, depressed real commodity prices, and formidable barriers in developed countries markets.’ (C/M(91)9/PROV/ANN,7).

These aspects of the global rules of the game did not negate the importance of domestic policies, but revealed a more varied and complex picture. The developing governance literature stressed the role of institutions (defined after North as ‘the rules of the game’) and the role of political authority *within* the nation state (Kaufmann 2010). The underlying argument was that the culprit of slow development was to be found in domestic politics and that was challenged by developing nations in the preliminary discussions of the parameters of what they called ‘good management’. The question of corrupt payments was thrown in the vortex of discussions about good governance but, understood initially from the perspective of developing nations, the concept of good

⁸⁹ The performance of some East Asian economies, as well as India and China, according to the UN Representative appeared to further support the argument that it was domestic rather than global policies which mattered in development strategy: ‘This bifurcation of experience has been regarded as evidence that the principle determinant of success or failure is not the external environment, which is in principle common to all countries – but rather the domestic policies adopted.’ (12).

governance/ management was meant as a policy tool, which could create a predictable framework for foreign investment and was therefore a matter of primary interest for Western investors. The difference in positions on what constituted ‘good governance’ became a matter of debate during the OECD session. The Representative of the Netherlands remarked that he was astounded by the degree of convergence between UNCTAD and the OECD on economic policies, but that there was one notable exception:

There has been however one exception: Mr. Dadzie had mentioned that the question of good management and good governance had aroused considerable controversy whereas Mr. Labohm was under the impression that a consensus was emerging world-wide on the desirability of good management and good governance (21).

The US joined on that note stating that the delegation: ‘had been struck by the emerging consensus on development policy, particularly with respect to the role of private enterprises, human resources and democratic institutions, and thought that it was very important that this be reflected in the proceedings’ (21). The views on good management/governance, however, were not synchronized and as noted earlier the US Representative introduced the future OECD program to tackle the supply side of bribery in the discussion of good governance. The UK representative also welcomed the ‘emphasis on good governance’ and commented that the ‘UNCTAD was not, after all, missing out on the change of atmosphere – with emphasis on partnership and flexibility rather than confrontation and regulation – which had taken place over the last few years’(22).

The softening of the position of the developing countries was, however, intrinsically related to the changing global environment in which they had collectively lost bargaining power as their importance had diminished with the end of the Cold War. As the Representative of the UN stated: ‘While welcoming the ending of the Cold War

many developing countries have also been concerned that their vital interests would lose their salience on the international agenda' (6).⁹⁰ At the same time, the position of the developing nations was that the global rules of the game and in particular the rules governing Western enterprises remained the most detrimental element in the development agenda that the developed nations did not seem disposed to revisit.⁹¹ The rules of the global economic game appeared to be made in organizations to which the developing nations either did not have access or had limited influence:

These phenomena have accentuated the vulnerability of those economies, particularly in the developing world, that are open enough to come under considerable influence from abroad but are not sufficiently large for their own policies to make a significant impact on others. Thus, the volume and terms of trade of developing countries has come to depend significantly on the overall stance of macro-economic policies in major OECD countries...(C/M(91)9/PROV/ANN,8)

The Secretary-General of UNCTAD responded to the question regarding good management, which had been raised by the Representative of the Netherlands, explaining further as to why the question of good governance had recently become controversial at the UNCTAD:

The controversy to which Mr. Dadzie had referred was a controversy within the UNCTAD rather than any controversy external to UNCTAD. Within UNCTAD, the way an issue was presented was seen as being just as important as the issue itself. As it had happened, the issue had been advanced in the first place as a problem of corruption in developing countries, and this approach had generated negative vibrations and cast a cloud over subsequent discussions: every time a

⁹⁰ Enquiries about groupings in the UN probed into the changing alliances of developing nations and resolved that the UNCTAD as an organ of the General Assembly remained the most essential forum 'to deal ...with trade and development from the particular point of view of developing countries'(7). Together with the simultaneously established Group of 77 (which now has 131 members), the UNCTAD was seen to have a distinctive developing nations' perspective on global issues.

⁹¹ The UN Representative argued that FDI constituted 'the prime mover of the internationalisation of economic activity, and a growing proportion of international trade now takes place within firms or among related firms.'(8). At the same time, from his perspective, the complex interaction between policies by national governments, the free market and the role of free enterprises on the political system remained unresolved. Therefore, examining these basic relationships was just as relevant.

suggestion was made, it was seen by one side or the other as an accusation. Finally, following some months of acrimonious discussion, agreement had been reached on the concept of good management. There were still some suspicions that the Secretariat might treat good management as simply an issue of corruption (by and involving only developing countries) but Mr. Dadzie thought he had demonstrated in his presentation that the view was somewhat more balanced than that (33).

The question of ‘good management’, as the UNCTAD Representative called it, emphasized the economic side of ‘good governance’ that the US and UK Representatives referred to in accordance with the recently developed World Bank terminology. The World Bank also came to define governance with broader, more neutral language, namely as ‘the manner in which power is exercised in the management of a country’s economic and social resources for development’ (World Bank Group 1992,1).⁹² Stressing the economic rather than political aspects of public authority, the definition of good governance as ‘sound development management’ was developed for the purpose of feasibility (Santiso 2001,5). Subsequently, corruption became not the sole or even centerpiece of good governance. A case in point is that the Worldwide Governance Indicators, published since 2002 (currently covering the period from 1996-2013), use Control of Corruption as one of six governance indicators (World Bank 2014). As the Secretary-General stated, during these preliminary talks at the UNCTAD, corruption in developing countries was put forward as the centerpiece of a good management/governance agenda. This led to controversies and rancorous disputes and the insistence on ‘management’ rather than ‘governance’ had a lot to do with the economic side of public authority. It is this understanding of governance as national level

⁹² As noted previously the concept of ‘governance’ started to gain international currency with the 1989 World Bank Report on Sub-Saharan Africa, in which the situation in the region was referred to as a ‘governance’ crisis (World Bank 1989, 60).

management in order to establish a predictable framework for investment that the UN Representative was referring to in response to Alan Larson's question about corruption:

Mr. Dadzie explained that corruption was one element in what the Secretariat of UNCTAD regarded as a complex of dimensions which together constituted the establishment of a predictable framework for business activity. The first of these dimensions had to do with the provision of public services and a viable infrastructure...legal and regulatory framework defining with reasonable clarity what was allowable and what was not allowable – there must be laws, for instance, governing property, etc. – but there must also be a transparent process through which the set of laws, rules and regulations governing economic activity is established, applied and modified as may be necessary. It was in this context that it was felt that the application of the relevant rules and regulations should be effectively removed from an ad hoc or arbitrary intervention by the politically powerful and must not be subject to excessive discretionary power which offered temptations to economic agents and their interlocutors in administrative structures to engage in corrupt practices. Whether there was need for an international agreement was another matter. There was no doubt that all countries must achieve a more uniform understanding of practices which are allowable and which are not (C/M(91)9/PROV/ANN, 3).⁹³

This decoupling of the political and economic authority of national governments constituted a compromise that could have led to some level of consensus on the desirability of 'good management'. It was a compromise that stripped anti-corruption policies from their ubiquitous political facet but also reconciled an anti-corruption agenda with the objective of fostering a deregulated global market. The degree of disagreement on questions of state intervention in the economy and the global terms of trade was, however, unlikely to lead to agreement on the contents of corruption or the methods to tackle it at the UNCTAD at that time. The essential step at reaching global consensus on

⁹³ Without appearing fundamentally opposed to an international agreement on corrupt payments the UN representative outlined broadly the general aspect of the problem and the spectrum of possible measures: 'There was a criminal dimension. There was a dimension which had to do with the behavior of governments and enterprises. Obviously all these dimensions needed to be brought into proper relationship with each other. Mr. Dadzie would venture to say that a little more study was required of what was involved. Different instruments might be required in the field of crime – possibly some sort of international agreement. In other areas, codes of behavior, either binding or non-binding, might be appropriate.' (24).

the content of corrupt activities and the design of the program that would address them proved to be reaching agreement at the OECD as pre-negotiation talks advanced.

Conclusion

In the 1990s, as in the 1970s, one international organization became the locus of discussion of the problem of corrupt payments. The repercussions of the choice of venue, the UN or the OECD, were significant because of the difference in the membership base of the two organizations. The potential global problem was discussed in a different light at the two institutional settings and the central locus of discussion was important for reaching consensus on whether the issue demanded global attention. It is not possible to neatly group the position of developed and developing nations as there was significant variety of opinions within each group, yet there appeared to be some level of convergence between a ‘developing’ and a ‘developed’ nations’ perspective on questions of good governance and corruption.

In the aftermath of the failed UN pre-negotiation process, feasibility became the most essential element for future work at the OECD. The study of feasibility meant that in addition to what the problem consisted of, the question whether anything could be done about internationally became just as important (Spector and Kitsuse 2008). The protracted work on corrupt payments at the OECD and the UN reveals international organizations as incubators in which global social issues can remain encapsulated for a number of years or

even decades while state actors remain central to any progress. On the one hand, the study of the social construction of the problem of corruption shows how through the rather mundane internal dealings of working groups and Council meetings, meaning and definitions are shuffled and transformed. On the other hand, the essential impetus for the successful completion of the work of expert committees is political and comes from influential state actors.

The pre-negotiation talks at the OECD were not less difficult for the US than the UN talks, and the US Delegation found itself isolated in its concern for corrupt payments at the OECD. The US had a problem specifically with bribery because of the FCPA and leveling the playing field with its major competitors from the developed world became a major goal. This did not entail that the US was the only country that was implicated in corrupt dealings, but that under particular domestic and international contingencies in the 1970s, this implication became a problem for the United States in a way that it did not for any other state. The corrupt payments problem was jeopardizing its domestic stability in the post-Watergate era and complicating its position in ideological warfare during the Cold War. Tackling this problem with illicit payments set in course a mechanism of internationalization that was successfully completed in the 1990s. The success of the US despite its relative isolation in both the UN and the OECD to forge consensus on corrupt payments is examined in the next chapter and shows how the ability to turn your national (private) troubles into global (public) concerns is an essential part of state power.

Chapter V

The OECD Convention and Beyond: State-powered Coalition Building in a Broken World

Introduction

Pre-negotiation talks constitute the most essential step in the social construction of global problems, but researchers have largely ignored them. In a constructivist research agenda, however, the decision to open negotiations reveals a high degree of consensus on the recognition of a putative condition as a problem in need of corrective action at the global level. While bargaining during the negotiation stage is the biggest showcase for power imbalances, power also matters before opening negotiations since not every actor can raise an issue at an international organization and actually see it through.

The work of ad hoc groups and other committees provides essential continuity for pre-negotiation debates, but is not in itself sufficient for reaching a successful outcome. As Spector and Kitsuse (2009) note, the vast majority of social concerns drown in the swirl of ad hoc groups and committees. Through the rather mundane and detailed internal dealings of working groups and Council meetings, meaning and definitions are shuffled and transformed and feasibility becomes the central element of the process of collective definition. Rather than defining the problem and the measures to address it in some ideal vacuum of technical expertise, the definition of the offence, its relation to the most effective instruments and to the putative condition itself remain contested and dynamic. The study of feasibility, therefore, has an impact on what is defined as the problem, and in

judging if anything can be done about the fuzzily defined condition and with what tools. The expertise of national delegates convening at the OECD Ad Hoc Group was instrumental in delimitating the most feasible option for future action but at no time did their technical competences supplant the agency of Member States. The supremacy of nation states over this process of internationalization of the problem of corruption was institutionally enshrined in the role of the OECD Council in the organization's decision-making processes, but also became part of the very discussions of feasibility within the Ad Hoc Group and CIME. Previous chapters traced the undercurrent of intergovernmental talks on corrupt practices since the 1970s and this chapter shows how starting in the 1990s other actors became incorporated into these on-going talks.

In the period 1994-1997 the foundation of the international anti-corruption regime was laid out. As section 2 shows, the success of the anti-corruption endeavor was to a large extent determined by a systematic approach of state-sponsored coalition building. The advancement of talks at the OECD and the adoption of the Recommendation on Bribery in International Business Transactions (RBIBT) led OECD member states to introduce the topic of corrupt practices in the OAS, the CoE, the EU, the United Nations and the G7/8. Non-state actors contributed to the process of coalition-building, but much of what they achieved was shaped by previous efforts of state actors, in particular, the United States and ongoing intergovernmental pre-negotiations. The instrumental use of publicity and the change of venues contributed to the success of the OECD initiative to outlaw corrupt payments and led to the spread of talks in a number of regional organizations. The formal agreements reached at organizations such as OAS, the CoE, the EU, the OECD, and the World Bank then provided the legal and discursive underpinnings

for the re-introduction of the subject at the United Nations. Building on chapter 4, the first part of this chapter zooms closer in on the way in which the decision for the RBIBT was reached and discursively shaped. The second part then goes on to zoom out and show the bigger picture of how, in relation to progress at the OECD, the subject of corruption was introduced in regional organizations.

In this way this chapter works towards striking a balance between showing how the social construction of problems is negotiated within organizations and how the interconnection and overlaps between organizations also shape the processes of collective definition and the formulation of an official plan of action.

1

Talks at the OECD Advance: Towards a Fragile Consensus 1991-1994

This section shows how the study of political and administrative feasibility led to the narrowing down of options and establishing a plan for future work, which proved to be fundamental for incremental progress and led to the adoption of the RBIBT in 1994. After establishing the list of four primary options, the Ad Hoc Group had to receive CIME's approval for choosing a combination of an OECD Decision and Recommendation (options 3 and 4).⁹⁴ The choice of these options did not *per se* exclude option 1

⁹⁴ The query to CIME looked for support to the understanding of corrupt practices as a problem of competitiveness, which made such practices contrary to the OECD objectives of establishing equal conditions for competitiveness in global economic exchange, but also specifically enquired: 'Would the CIME agree that give the difficulties identified with respect to pursuing the negotiation of a multilateral convention any further work should focus, at least initially, on developing options 3 and 4, i.e., a combination of the OECD Recommendation and Decision, as specified in paragraph 7 above. Going ahead

(International Convention) when consensus was forged on the issue, but pursuing the Convention route was deemed unfeasible at the moment. (DAFFE/IME(91)26,3).⁹⁵ The Ad Hoc Group had to ‘provide the Council with the elements necessary to allow it to assess the feasibility of the different options without prejudicing the outcome of its deliberations on this issue’ and at the same time help the Council decide as to whether pursuing future work on the question of illicit payments was necessary and/or desirable (DAFFE/IME/PI(91)4,2-3).⁹⁶ Member states, therefore, retained a firm grip on the decision-making process and even the preliminary recommendations of the Ad Hoc Group were not issued independently, but in collaboration with the Delegations. A list of “elements and issues” (provided by the Secretariat in a Room Document) formed the basis for revisions that incorporated the opinion of the MS delegations. The refined inventory of elements on which agreement was reached was later to provide the contents of the RBIBT, the Recommendation on tax deductibility and the Convention itself. The substantive elements of the Group’s work were ‘to give an appreciation of which elements, irrespective of the type of instrument in which they may be incorporated, must be treated and in what way’. The criterion of ‘controversy’ was once again the centerpiece of the study of feasibility: ‘Are there any elements, which are considered so controversial that their inclusion in any type of instrument would meet little, or no international consensus? If so, which ones and why? ... What is the nature of the controversy? Is there scope for its mitigation or resolution?’ (DAFFE/IME/PI(91)5). Based on the matrix of

with these options would not necessarily imply that option 1 may not later be pursued if a consensus develops sufficient to warrant its re-examination.’ (DAFFE/IME(91)26,3).

⁹⁵ During a meeting on the 13-14 June, 1991, the Ad Hoc Group members elected as Chairman Pieth, who had been instrumental in the successful outcome of the discussions on money-laundering (DAFFE/IME/PI(91)3).

⁹⁶ The list of the members of the Ad Hoc Group revealed an increased interest in the issue of corrupt practices with a more extensive national representation from Ministries of Finance and the Economy, Departments of States, National Banks from almost all OECD member states (DAFFE/IME/PI(91)3).

potential controversies the Ad Hoc Group had to suggest the exclusion of controversial elements out of the program for future discussion.⁹⁷ Once again the tradeoff between effectiveness and feasibility was taken as the primary consideration:

In the opinion of the Group, which uncontroversial elements must be included in order to have an effective instrument and why? Again using as an example the matrix of elements provided in the study, these might include the definition of the offense to cover bribery and sales to governments, the identification of the actors to extend to public official recipients. There are also international remedies which might be acceptable under all options, such as the exchange of information, mutual legal assistance, and the monitoring of Member states' commitments. (DAFFE/IME/PI(91)2/REV1,10)

The continuous management of the controversial elements showcases that expert recommendations were not made in a political lacuna in which technical solutions were matched to clearly defined natural problems, but that these expert recommendations were imbued in the context of what appeared to be politically feasible.

The interplay between optimal solutions and what was to be realistically expected led to estimates as to what kind of definitions of offences were to be paired with what type of instruments in order to achieve the ultimate match between effectiveness and feasibility: 'If these were the only elements on which agreement could be reached, does the Group feel that they are sufficient for developing an effective instrument? If not, what element would be lacking? Does their inclusion depend on being able to reduce potential controversy?' (DAFFE/IME/PI(91)5,3)⁹⁸ In this study of feasibility vs. effectiveness the

⁹⁷ Basing the recommendations on the provided matrix, the Report stated that a number of such highly controversial elements had been individuated: 'The matrix of elements provided in the feasibility study (see Annex 2 to this Note) would suggest that such elements may include a definition of illicit payments which would cover payments other than traditional bribes, including sales requiring government approval, the reaching of payments through intermediaries, and the issue of jurisdiction absent a sufficient territorial nexus.' (DAFFE/IME/PI(91)5).

⁹⁸ This search for optimal solutions in the context of what is deemed to be in the realm of the politically feasible was concerned with questions such as: 'Is there an inverse [relationship] proportionality between the controversial elements and the type of instrument? For example, does the controversy diminish as one gets further away from the more legally constraining type of instrument?'(3).

Group had to concentrate on, ‘(a) of the degree of consensus that is likely to be achieved on the different options as presented in the consultant’s feasibility study; and (b) of the legal/political effectiveness of those options for dealing with illicit payments (3). Based on this trade-off the Group had to exclude certain future routes and promote others, all the while not prejudicing the Decision of the Council. This interplay between technical expertise and political authority was at the core of discussions on the subject and showcased the manner in which political feasibility is intrinsically connected to technical fixes from the very beginning of the evolution of the global issue. Furthermore, the methodology of the matrix became contested and the meaning of ‘feasibility’ became a question in itself:

What should be the criteria for determining feasibility? Would it be the amount of international consensus a particular option is likely to enjoy, or would it be the extent to which Member states would be legally bound to their commitments, or how much political credibility the instrument can achieve? Are there other criteria? What is the trade-off between the various criteria? / Using these criteria, what would the Group define as the most feasible option within the OECD? How likely would it be to achieve international consensus and why? How effective would it be in dealing with the problem of illicit payments?’

(DAFFE/IME/PI(91)2/REV1,4)

The ingredients of a technical evaluation, therefore, already included a significant amount of reflection on issues of practical feasibility such as estimations of political will and chances of successful consensus building. Since the most important aspect of the Group’s consultation was deemed to be legal expertise (in accordance with the US claim) it was legal feasibility, rather than ethical and economic considerations, that took central stage in deciding on a plan for action.⁹⁹ In managing controversy, from a legal standpoint, the

⁹⁹ The work of economists or other social scientists, for example, sociologists would have provided a different type of expertise, but might have also given rise to more controversy because more claims might have centered around the relationship of the putative condition to the definition of the problem as they did in the UN.

consideration of what was politically feasible was more readily included in the ‘technical analysis’. The diagnostics of the problem did not take place in a vacuum of technical (legal) expertise in which optimal solutions were later matched to the realities of political constrictions and the distinction between technical and political processes was not clear-cut since the legal analysis already included political considerations. Nonetheless, the Report retained a claim of separation between technical expertise and political decision-making:

Having examined the feasibility study on the available international means for preventing illicit payments, the Group should be in a position to make a technical evaluation of which of the available instruments seems the most worthwhile pursuing. This technical evaluation, which will be taken into consideration by the CIME in developing its report to the Council, will help the Council to make the political decision whether or not to pursue work concerning illicit payments. (DAFFE/IME/PI(91)5, 5)

Following these preliminary interactions between the Ad Hoc Group and the Council, as well as the expressed remarks of MS Delegations, further work on the feasibility study remained slow and capsulated within the Ad Hoc Group for almost a year. On June 9, 1992 the Secretariat submitted a Note for consideration to the Group in which the option of multilateral negotiations was deemed unfeasible at this stage and a combination of a Recommendation and Decision was judged to best reflect the attitude of the Council (DAFFE/IME/PI(92)3).¹⁰⁰ This option for future work required: ‘a) political commitments on substantive matters (an OECD Recommendation, which might include a “model law”) b) legally binding undertakings on procedural matters (an OECD Decision)’(2). An overview of OECD Recommendations and Decisions showed that the latter even though obligatory may be ineffective, while the former constituted ‘vehicles for political

¹⁰⁰ Multilateral negotiations for a binding instrument were deemed too complicated at this stage so a combination of an OECD Recommendation and Decision, which also reflected the Council Decision was considered as feasible.

agreement' (3). This is another example of how the technical report of the ad hoc Group already reflected the MS disposition to binding instruments as a Recommendation with more general prescriptions (which did not even include a model law) was strongly preferred by the vast majority of Council members (DAFFE/IME/PI(92)3/REV1).

Political disagreement and controversies are usually seen as obstacles to solving otherwise practical problems, but this more nuanced picture of pre-negotiation talks reveals that political and collective definition processes become an integral part of the way in which problems are studied and constructed. The Ad Hoc Group's technical expertise included an attempt to foresee controversial areas and take them off the negotiation table so that emerging discord would not lead to a deadlock. Through this process, the members of the Ad Hoc Group, who were also representatives of member states from state departments and ministries, remained attentive to the preferences of the Council and reflected the expected attitudes of MS. The direction of future work was, therefore, determined by route of a non-binding Recommendation, which may have included reference to illicit payments in the Council Act. CIME further proposed the following options as the basis of a Recommendation:

- i) International trade and investment should not give rise to corruption of public officials
- ii) Member countries' enterprises should have in this regard equal competitive conditions,
- iii) Legal action should rest on internationally acceptable jurisdictional grounds
 - a) preventing or deterring such practices by each Member country's national and/or
 - b) co-operating with "victim" countries in meeting their primary responsibility for countering corruption of their officials. (DAFFE/IME/PI(92)3,3)

Point i) of the first draft suggested that it was international exchange that gave rise to corruption of public officials and that the responsibility for protecting the integrity of the national public service lay primarily within the jurisdiction of the 'host' state (point iiiib).

After accommodating the comments of MS, in particular the US Delegation, the content was changed to:

- i) international trade and investment should be free of corruption of officials involved,
- ii) Member countries' enterprises should have in this regard equal competitive conditions,
- iii) Legal action should rest on internationally acceptable jurisdictional grounds
(DAFFE/IME/PI(92)3/REV1,4)

These changes took out the controversial argument that international trade and investment gave rise to corrupt practices and that it was the prerogative of countries in which such practices were carried out by foreign investors to prevent and punish said practices. Despite these changes, other MS remained unconvinced of the US FCPA approach and when the content of the Recommendation was presented with two possible major directions the second one was preferred:

- i) that Member States create in their own legislation a basis for taking action against their nationals who bribe foreign officials, which would give them a jurisdiction concurrent with that of the country in which bribery has taken place ("host country") and
- ii) that Member States take such measures as may be necessary to promote effective co-operation with those host countries which wish to investigate and prosecute such conduct. (DAFFE/IME/PI(92)3/REV3,3)

The position of the majority of the Council was once again pushing corrupt payments as the prerogative of national legislation and challenging the extent to which the issues should be seen as global. The central elements of this national approach to tackling corruption had to be broad enough to allow countries the discretionary power to use them according to their specific needs: 'The language of these elements would be general and non technical, to provide guidance easily adaptable to different legislative approaches' (4). The only specific recommendation could have been the inclusion of a model law, which could have easily been based entirely on the FCPA, but would still have left a lot of

space for political and legislative maneuvering for individual OECD members. The prospects for international or transnational cooperation remained rather limited.

The Recommendation would have had provisions for inter-governmental co-operation such as exchange of information, but a network of bilateral or multilateral agreements building on the network of bilaterals between the US and other OECD Member States already established in the 1970s was what the majority of Delegations were disposed to concede to. This mutual assistance perspective was, however, firmly routing the responsibility for treating corrupt practices as predominantly a national prerogative. This was claimed to be the case because difficulties with ‘global coverage and jurisdiction’ made civil and administrative rather than criminal measures more suitable for addressing the differences between member states (5). As noted earlier, challenging the extent to which the issue should be treated beyond the borders of the nation state became a primary concern, but questions of definitional scope remained just as relevant.

The ‘principal controversial elements’ were established as ‘the definitions of the act and the actors and the reach of national jurisdiction’(11). First, throughout the discussions the precise definition of the problem remained contested and ambiguous:

The term “illicit payment” has been used as a generic term for all payments that are made with the intention to influence a decision improperly’ – payments for the purchase of public decisions’ – broad interpretation that covers ‘financial and non-financial payments, may include the payment of a direct monetary bribe, or payment in the form of political contributions, payments in violation of exchange control regulations, gifts and favours, etc. (DAFFE/IME/PI(92)3/REV1,5)

Even the understanding of the problem as a ‘payment’ was not definitive. In later revisions it was specifically added that the term ‘payments’ is somehow misleading because the definition is: ‘interpreted broadly enough to cover financial and non-financial

payments, may include the payment of a direct monetary bribe, or others' (DAFFE/IME/PI(92)3/REV2,4).¹⁰¹ The advantage of this definition was to cover benefits which did not possess any intrinsic value in themselves: 'social or other advantage of no necessary significant value to someone other than the recipient' or 'anything of value granted to the recipient, to which the latter would not be otherwise entitled (an "undue" advantage)' (DAFFE/IME/PI(92)3/REV1,6). While this interpretation of the offence would have been much closer to an understanding of corruption as influence rather than monetary exchange, the definition was later to be stirred in the direction of bribery. Defining the offence as 'bribery' had little to do with the 'problem itself' or its relation to the putative condition and what was problematic about it and more to do with feasibility:

While there is a certain consensus on the definition of "bribery", which is generally considered as criminal offence in OECD countries, the Ad hoc group's previous discussions indicated that the concept of other "illicit payments" is not easily definable and that there may not be a consensus to reach beyond classical "bribery", at least for criminal law purposes (DAFFE/IME/PI(92)3/REV2,12).¹⁰²

At the same time, it was the United States Delegation that was firmly behind the definition of illicit payments as 'bribery' and that position was intrinsically connected to the FCPA statute, which tackled the offense of bribery in particular. It was characteristic that in the UN, the definition and scope of 'corrupt practices' was at the forefront of

¹⁰¹ Preliminary definitions cast a broader web on the types of practices that are deemed corrupt and the definition of the offence entailed that: 'one party gives, offers, attempts to give or offer, or promises, to another party who may be a foreign public official, any reward, advantage or benefit of any kind, in order to improperly influence the making (or the omission of (REV1) of a decision/ in the context of an international commercial transaction' (DAFFE/IME/PI(92)3/REV2,5).

¹⁰² Political contributions constituted one such example: 'It is not clear, however, what justification there would be for excluding from the definition of "briber" a payment made for an illicit purpose which is in the form of a political contribution to the official's election campaign or political party. As far as political contributions are concerned, a possible solution to the problem of definition would be to remain silent on the question of political contribution as a form of bribery. Members may, however, wish to specifically require the disclosure of foreign political contributions made by Member countries enterprises whether or not they are intended to obtain advantage.' (DAFFE/IME/PI(92)3/REV2,12).

controversies and that this limitation of corruption to bribery remained highly contested at the OECD as well. Controversies over definition and scope constitute the most fundamental aspect of the social construction of problems because they indicate contested interpretations of what the problem is and how it relates to other issues in the social universe. A natural understanding of social problems would typically present the end product of the process of collective definition as the problem itself. From a constructivist perspective, however, the end product is a negotiated definition in which some actors have more power over the final result than others.

Second, after the definition of corrupt payments, the identity of the proponent of the bribe became a source of significant controversy because it entailed corporate criminal liability (CCL).¹⁰³ Most countries did not have any provisions for CCL at the time, or had only administrative and civil measures and some limited CCL (acting through natural persons such as board members and employees). Since the questions of private recipients and intermediaries also became controversial, establishing feasibility and managing controversy on the topic of actors involved in the corrupt transaction constituted a central part of the talks.

Third, the question of jurisdictional reach, or ‘extraterritoriality’ became another example of how controversy was managed. The feasibility study had a legal and political component: in terms of legality the question was what was the basis for taking legal

¹⁰³The definition of the offender covered natural and legal persons and the recipient could be a public/governmental official or a private party. The definition of public official was broad enough to include all persons with public decision-making or implementing roles. Relevant was also the inclusion of a private person with the ability to influence public policy whether this person works in a firm or NGO. The definition of who makes an offer included ‘any corporation, partnership, association, joint stock company, business, trust, unincorporated organization or sole proprietorship which has its principal place of business (or centre of activity related to the commercial transaction in question) in the member country’ (DAFFE/IME/PI(92)3/REV3, 5). It is noteworthy, that there did not occur at any point a discussion of the offeror being a public or governmental agent in their official capacity while a private recipient remained an albeit contested option.

action for a payment made in a foreign territory, since the foreign state was responsible for the integrity of its own officials.¹⁰⁴ The ramification of addressing the supply side of corrupt payments was the exercise of extraterritorial jurisdiction, which was highly contested and this is why it demanded a high degree of consensus. The future CIME report had to address the concerns of delegations and in later revisions, ‘extraterritoriality’ was substituted by ‘concurrent jurisdiction’. In concurrent jurisdiction states share the responsibility of prosecution but some delegations, saw this yet again as an ‘inappropriate interference in the sovereignty or interests of another state’ (DAFFE/IME/PI(92)3/REV3, 12). The question of extraterritoriality was nominally absent from the last draft, despite the fact that the substance of extraterritorial jurisdiction was still inherent to the proposed solutions. This rephrasing/reframing made no significant difference to the position of Member States, who were opposing the extraterritorial element of the transnational anti-corruption measures. The political feasibility of action based on concurrent jurisdiction was also judged to be dependent on the level of international consensus on the desirability of fighting illicit practices and what constituted an illicit practice: ‘The establishment of concurrent jurisdiction is politically feasible for matters to which Member countries attach substantial importance and on which there is a broad international consensus’. The establishment of international consensus was judged to be more likely than it was at the

¹⁰⁴ The illegality of the payment in the country of origin was deemed a necessary condition for prosecution, but the illegality within the national boundaries of the host country was not a necessary condition for prosecution as was in the case of the US FCPA. In the first revision the Report clarified that ‘Some members of the Group considered it a necessary element of the offence, which the prosecution would have to prove, that the payment was in violation of the laws of the recipient’s country. Another approach found in the United States Law, is not to include illegality in the Official’s country as an element of the offence which needs to be proven, but to provide an affirmative defense in the case such payment is lawful under the written laws and regulations of the country of the foreign official in question.’(5). The US example promoted a version in which the presumed legality of the act at the territory of the foreign state at which it was committed was not a requirement for the prosecution. It was the responsibility of the state of origin (where the corporation had its principle center of activity) to pursue the offender independently of the legal status of the act in the country in which it was committed.

United Nations more than 10 years ago, but political feasibility still faced considerable hindrances because:

Some Delegations believe that it is inappropriate for Member countries to assume responsibility for sanctioning conduct which should be primarily the concern and responsibility of the government of the official. Moreover, despite the official anti-corruption policies of all countries, an OECD initiative could be resented by non-OECD countries.

(DAFFE/IME/PI(92)3/REV2, 12)

This is why non-member attitudes towards counter-measures to corrupt payments became relevant to the OECD initiative. The participation and inclusion of non-members was judged important and entailed ‘a commitment to promote anti-corruption policies within and beyond the OECD area, including through a policy dialogue with non OECD countries’(11). This expansion beyond the OECD served the dual purpose of providing legitimacy and the necessary broader support for an OECD instrument and turning the OECD initiative into a catalyst for global anti-corruption action. Furthermore, as early as 1992-1993 policy dialogue with the World Bank was considered and the Guidelines on the Legal Framework for the Treatment of Foreign Investment were referenced, in which a bid to states to control ‘corrupt business practices’ was made (DAFFE/IME/PI(92)3/REV1).¹⁰⁵ The World Bank Group Guidelines were following in the line of work of the UN Center on Transnational Corporations (UNCTC) that worked on the question of illicit payments in the 1970s and early 1980s, but the World Bank had a different take on business-state relations. Instead of looking at the behavior of corporations and calling for international regulation of corporate behavior as had the UNCTC, the World Bank

¹⁰⁵ Particular reference was made to section 8 of Guideline 3 which stated that: ‘each State will take appropriate measures for the prevention and the control of corrupt business practices and the promotion of accountability and transparency in its dealings with foreign investors, and will co-operate with other States in developing international procedures and mechanisms to ensure the same.’
(DAFFE/IME/PI(92)3/REV1,11)

addressed governments and their ability to promote FDI (World Bank Group 1992).¹⁰⁶ After the OECD Council gave CIME a mandate on February 25, 1993 to draft the text of a Recommendation, the initiative to promote anti-corruption policies more broadly was claimed as intrinsic to the Recommendation (DAFFE/IME(93)21). This was the beginning of the expansion of the OECD work on illicit payments into a broader network of other intergovernmental organizations, non-state actors and international financial institutions which is discussed in the second part of this chapter.

1.1 Drafting the OECD Recommendation (1993-1994)

The work program for 1994 included the preparation of an OECD Recommendation against ‘illicit payments in international trade and investment’, which would provide for modes of getting non-members on board. A Report had to be filed with the Council by February 1994 and the OECD Council agreed on the Recommendation option in the same month (DAFFE/IME(93)17).¹⁰⁷ The catalyst for progress within the OECD was the change of leadership in Washington in 1993, which gave new impetus to the American initiative because President Clinton made the anti-bribery agenda a foreign policy priority in the context of the revision of trade policies in the post-Cold War global economy (Larson 1997; Glynn, Kobrin, Naim 1997). Furthermore, Warren Christopher who became Secretary of State under Clinton in 1993 had been personally involved in drafting

¹⁰⁶ While curbing the economic and political influence of TNCs which were feared to infringe on national sovereignty constituted issues of concern for the UNCTC, such apprehensions were dissipated in the post-Cold War era. The World Bank avoided addressing the behavior of corporations in order not to duplicate the work of the UNCTC, but the Center was superseded in 1993 and the program was moved to UNCTAD where the focus shifted towards FDI promotion as well (UNCTAD 2002).

¹⁰⁷ Further work was judged necessary on the assimilation approach, promoted by the German Delegation and on the issue of tax deductibility of bribes (DAFFE/IME(93)17). While the German proposal was abandoned, work on the tax deductibility of bribes led to the adoption of a second Recommendation.

and discussing the FCPA in 1977 under Carter (Pieth 2013). Together with the Assistant Secretary of State for Economic and Business Affairs, Daniel Tarullo, who was also a lawyer with good knowledge of the FCPA, Warren Christopher turned the OECD anti-corruption agenda into a major priority (Abott and Snidal 2002; Glynn, Kobrin, Naim 1997).

With increased political dedication and resources the United States was very influential in the drafting of the Recommendation. Other member states such as the Netherlands, Italy and Germany also submitted drafts and commentaries, which, however, were not reflected in the final Recommendation. The Netherlands made suggestions for the draft recommendation in line with prior UN efforts, but was more supportive of the OECD initiative than in 1989. The Dutch Delegation still showed a strong preference for a universal approach to corruption that it claimed was not limited to developing countries:

Nonetheless, corruption in international trade and investment remains a serious problem. This not only poses moral and political questions, it also distorts international competitive conditions. Far from being restricted to developing countries, bribery is a world-wide phenomenon occurring also in business transactions between OECD member countries. An OECD initiative, which could act as a catalyst for global action, is therefore appropriate.

The OECD Recommendation is aimed at promoting international cooperation to combat bribery in international trade and investment. It contains suggestions for policy at both the national and the international level, in such a way that each country may adopt measures which, in its view, are most appropriate to achieve the desired result, i.e. to dissuade both enterprises and public officials from resorting to bribery when negotiating international business transactions.' (DAFFE/IME/PI(93)1,2)

While the Dutch Delegation conceded on the definition of the offence as bribery, the Italian Delegation made a proposal that concentrated precisely on the definition of corrupt payments and in particular the distinction between bribery and other illicit transactions (DAFFE/IME/PI(93)2). The preliminary comments of the US Delegation insisted on

international cooperation and used the formulation of 'illicit payments' while substituting it with bribery in later drafts (DAFFE/IME/PI(93)3). The German Delegation submitted a proposal on Assimilation, in which a criminal act with foreign elements is assimilated and hypothetically treated as a domestic act to be included in the Recommendation as an alternative to the extra-territoriality, promoted in the US method. According to the Germans, the concept of assimilation was suitable because it would have allowed for a comprehensive international agreement against corruption without changes to national legislation on the subject (DAFFE/IME/PI(93)2).

While some of the comments and draft proposals by the Delegations concerned the modes of addressing the problem, uncertainty over what was the exact content of the offensive behavior persisted. Delegations were discussing methods to tackle the question of illicit payments without having managed to settle the parameters of what was included in the definition of such activities. Referring to the controversies over the definition of illicit payments, the Report to the Council agreed on the elements of the behavior, the advantage, the transaction and the identity of who offered the bribe, recipient and intermediary, but not on the actual content of these aspects of the definition. In later drafts, the concept of 'illicit payments', however, was altogether replaced by 'payment of bribes' and 'bribery', discursively displacing in this way the contestation that illicit payments contained a broader spectrum of activities than traditional bribery (DAFFE/IME/PI(93)9). The position of the United States that illicit payments were exhausted by bribery, which was challenged by the majority of OECD Members and previously at the United Nations, prevailed.

The reasons why the United States was insisting on this specific definition of what constituted ‘illicit payment’ were both practical and historical: practical, because a more limited definition of any problem, including corruption, would be more feasible for negotiation and implementation. An expansion of the scope of what constitutes an illicit payment might have proven even more difficult to reach consensus on. In fact, the United States referred to bribery and corrupt practices as ‘illicit payments’ in order to manage controversy in the international organizations where talks were held. Hiding the concepts of bribery and corruption under the more ubiquitous heading of ‘illicit payments’ constituted a strategy to avoid controversy up to the moment when some level of consensus on the necessity to act has been reached. The underlying reason for this definition was that historically, it was bribery of foreign public officials that crystallized as a problem for the US after the congressional hearings and the adoption of the FCPA. Therefore, the term ‘illicit payments’ as a cover for bribery was not meant to raise the questions of scope and definition that it did at the OECD and the UN. While these controversies about what constituted an ‘illicit payment’ could be seen as a bargaining game in which other state actors try to dilute the US demands and make the problem unfeasible, in the social construction of problems these controversies reveal competing definitions of the same putative condition, in this case broadly defined as an illicit interaction between public and private actors from different countries.

Empirical studies into the aspects and the extent of the behavior in question were understandably difficult because of the political sensitivity of the issue of corruption. The work on tax treatment of illicit payments was the only data that provided some limited glimpse into the empirical dimension of the problem and some albeit insufficient

quantitative understanding of the extent of transnational bribery in particular. The tax treatment of illicit payments figured as an element of the Recommendation (DAFFE/IME/PI(93)6). The results of the questionnaire to which 16 members responded showed a varied treatment of bribery across the OECD area.¹⁰⁸ Most respondents had at least some provision for the deductibility of payments that could be considered illicit.¹⁰⁹ In addition to the US, six other members had some provisions of non-tax deductibility of certain general payments.¹¹⁰ Except for the United States, however, these provisions were not aimed at illicit payments abroad, although Austria and Canada had some extended jurisdiction in tax matters and non-deductibility of illicit payments. Under specific conditions, deductibility was possible under the domestic legislation of all respondents, including the United States, where facilitation payments for a 'routine government action' still enjoyed tax deductibility (6). In some cases (US and France) prior government approval was necessary for the deductibility of such payments. In France under a confidential procedure, the Minister of Finance deemed payments with an undisclosed recipient abroad deductible, but this procedure had just been abolished. After 1993, such approval was no longer granted, but companies could still enjoy tax deductibility of certain payments as long as they met the legal requirements.

Only four members provided specific information about the number of illicit payments detected or reported in their tax system. In Belgium 109 such payments were revealed between 1988 and 1992. In France 200 annual requests were made. While New

¹⁰⁸ The questionnaire was filled by Austria, Belgium, Canada, Finland, France, Germany, Italy, Japan, the Netherlands, New Zealand, Portugal, Spain, Switzerland, Turkey, the United Kingdom, the United States and included information about Denmark, Greece and Luxemburg from a previous study (C(90)87).

¹⁰⁹ The 'non-deductibility' of illicit payments meant that they were not considered as legitimate business expense and their deductibility meant that governments were implicitly subsidizing illicit payments by making them tax free as business expenditure.

¹¹⁰ Namely, in Austria, Belgium, Canada, France, Luxemburg, New Zealand, Norway and the United Kingdom such prohibition was underway (DAFFE/IME/PI(93)6).

Zealand had only one reported case, Norway reported 5 such cases and a number of other domestic payments camouflaged as commissions and currently under investigation. In conclusion, since most countries imposed certain restrictions on the tax deductibility of illicit payments, harmonization was deemed feasible, albeit difficult (DAFFE/IME/PI(93)6). The work on the prohibition of tax deductibility of illicit payments provided an opening through which to push the anti-bribery agenda further as it led to a second Recommendation that was adopted by the Council on April 17, 1996 (C(96)27/FINAL). This incremental approach of building agreement on different facets of the issue was indicative of the role of the OECD as a facilitator.

The facilitating role of the OECD was also instrumental in providing a forum for a broader range of actors. The anti-corruption work of the organization was presented not as an end in itself but as a first step in a broader anti-corruption agenda. OECD members had to consider undertaking: 'a commitment to promote anti-corruption policies within and beyond the OECD area, including a policy dialogue with non-OECD countries, which would permit the identification of the most suitable modalities for enhancing international efforts' (DAFFE/IME/PI(93)5,4). The policy dialogue with non-members aimed to:

[i]ncrease the awareness in non-Member countries of the importance of concerted actions to combat corrupt practices and illicit payments. Member countries could associate themselves with recent efforts by independent organizations such as Transparency International, as well as work already underway in the Development Assistance Committee, in order to jointly encourage and influence policy discussions of these issues in non-Member countries. (4-5)

Transparency International (TI) was founded in May 1993, only three months prior to the report and was already seen as a valuable partner in the talks (DAFFE/IME/PI(93)5). In 1993 President Clinton sent US officials to ask for TI's support and managed to secure it (Pope 2011). As Jeremy Pope, co-founder of TI stated: 'We agreed - not on the basis of

providing corporate America with a level playing field for export competition, but in the interest of the victims of corrupt practices, most notably the poor in the developing world' (158). With the initiative of the US executive TI became a valuable ally in the pre-negotiation talks at a number of organizations, of which more will be said in the second section of this chapter.

At the same time that the subsequent drafts of the OECD Recommendation limited the problem of illicit payments to bribery, they universalized the relevance of the OECD initiative and to some extent discursively framed future debates on the subject: 'an OECD initiative to combat bribery could act as a catalyst for global action and could help companies to refuse to engage in such practices in host countries by setting standards of behaviour to which they can refer' (DAFFE/IME/PI(93)9,2). Furthermore, the Recommendation required the acceptance by non-members of the legitimacy of an anti-corruption agenda, because the cooperation of so called 'host countries' was necessary for successful implementation. Therefore, the Recommendation was seen as an element that would boost future cooperation with non-members as well:

An important question in considering the effective application of the OECD Recommendation was how to associate non-OECD Member countries in the efforts to combat bribery. The Recommendation appeals to non-Member countries to join with OECD Members in their endeavours to combat the payment of bribes. It further asks Member countries to actively promote anti-corruption policies within and beyond the OECD area and to encourage non-Member countries to join in the OECD effort. (5)

Policy dialogue as promoted by the Recommendation had its first measure in the form of an international symposium in 1994 (later moved to 1995) which was meant to explore a program for action that would include non-OECD members (DAFFE/IME/PI(93)11). The symposium was tailored to 'increase awareness' of corruption with a broader audience of state and non-state actors and formulate a proposal for future course of action (3). The

Working Group on Illicit Payments was further encouraged to make ‘the results of their efforts to combat bribery more easily accessible to wider audiences’ through the publication of their annual reviews and information exchange with non-Members (6). The symposium and the efforts of the OECD to engage a wider audience in the anti-corruption effort, as early as 1993, are indicative of the coalition of governmental and non-governmental actors that was built with US leadership and are discussed in the second part of this chapter.

1.2 The Impact of the United States on Drafting the Final Text of the OECD Recommendation

The Draft Recommendation stated that impetus for action had come from the fact that: ‘bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions’(DAFFE/IME/PI(93)11,7). Furthermore, the fact that only one member state had criminalized the bribing of foreign public officials while all OECD members had enacted legislative measures that made the bribing of their public officials a criminal offence was providing some legal basis for action, notwithstanding the fact that this situation was causing distortion of international competition. Therefore, in order to dissuade companies to resort to bribery in international business, OECD members had to take both national and international measures that would act as a stepping stone for other organizations.¹¹¹ The impact of the US Delegation was not limited to the establishment of bribery as the offence, but was also influential on the hierarchy of

¹¹¹ In the Draft Report to CIME ‘illicit payments’ were already substituted with ‘bribery’ and a more forceful language was employed. The Report highlighted, however, that consensus has not been reached in a number of areas despite the fact that the feasibility of cooperation among OECD members has been developed since July 1990 (DAFFE/IME/PI (93)11).

proposed measures. The earlier drafts of the Recommendation did not promote criminal action as the top priority in addressing bribery and left considerable space for national maneuvering within the boundaries of the recommended behavior. In the field of domestic action, members were invited to:

[a]dopt such measures as they consider appropriate to meet this goal, with respect to offerors of bribes to foreign public officials, in conformity with their jurisdictional principles. These measures may include:

- i) revising their civil, commercial, administrative laws and regulations to ensure that bribery, including bribery through intermediaries, is illegal or inadmissible when performed in whole or in substantial part under their territorial jurisdiction, or by natural and juridical persons under their jurisdiction;
- ii) revising their tax legislation so that bribes are not considered legitimate business expenses for purposes of tax deductability [sic];
- iii) revising their company and business accounting requirements and practices to secure adequate recording of payments which might conceal. (9)

Criminalization of bribery remained a distinct possibility, but did not initially make it as one of the recommended measures and international cooperation was limited to actions in the line of bilateral agreements aimed at providing information upon request. This hierarchy of priorities was not consistent with the US intention to use the Recommendation for the criminalization of corrupt transactions and then as a stepping-stone to an anti-bribery Convention. On December 6, 1993, the US submitted an alternative draft Recommendation which was adopted almost verbatim as the final text of the recommendation (DAFFE/IME/PI(93)10). Firstly, the US draft added a definition of the offence and secondly, it completely reshuffled the proposed measures for domestic action:

- I I. RECOMMENDS that Member countries maintain effective measures to deter and punish offerors of bribes to foreign public officials. These measures shall include:
- i) Criminal laws
 - ii) Civil or administrative laws
 - iii) Tax laws
 - iv) Company and business accounting

- v) Banking, financial and other relevant laws (to trace payments – international co-operation) (3)

The US draft also appealed to the global relevance of the OECD initiative, highlighting the importance of relations with non-Members and strengthening the links between the OECD initiative and the other organizations:

V II. APPEALS to non-Member countries to join with OECD Members in combating bribery and to take full account of the terms of this Recommendation
V III. REQUESTS the Secretariat to consult with other international organizations and international financial institutions on effective means to combat bribery as an aid to promote the policy of good governance;
I X. INVITES Member countries to promote anti-corruption policies within and beyond the OECD area and, in their dealings with non-Member countries, to encourage them to join in the effort to combat bribery in accordance with this Recommendation. (4)

The new draft Recommendation reflected very closely the American text and did not include any of the commentaries of other Delegations such as the Netherlands, Italy and Germany. The influence of the US Delegation on the formulation of the actual text of the Recommendation was very significant, yet, the notion of ‘bribery’ employed in this draft was far broader than a payment, reflecting the position of the majority of members who insisted on a definition of corrupt payments beyond traditional bribery.¹¹² Similar controversies emerged over the hierarchical list of measures promoted by the US Delegation with criminal laws being the top choice of civil, administrative and other measures that were transferred verbatim in the new draft.¹¹³

Some Delegations prefer to delete i) and add “criminal” at the beginning of ii) {i) criminal laws, or their application, [in order that the bribery of

¹¹² The definition of bribery was set in the draft as: ‘[such bribery can involve an intentional offer, promise, or giving of any undue pecuniary or other advantages to or for the benefit of a foreign public official (including members of a law-making body, candidates for a law-making body or public office and officials of political parties) whether or not solicited by the official, in violation of the official’s legal duties, whether directly or indirectly through an intermediary, in order to obtain or retain business]’(4). The bracketed text indicated that consensus had not yet been reached on the particular definition.

¹¹³ The controversies over the definition were settled temporary with a ‘working definition of bribery for practical purposes’, but the controversy over the list of measures was not so easily dissuaded (DAFFE/IME/PI(93)11,7).

foreign public officials would be considered punishable] ii) civil, commercial, administrative laws and regulations so that bribery would be illegal}(DAFFE/IME/PI (93)11/REV1,6).

In compromising about including criminal measures in the inventory of measures to be taken, some Delegations insisted that the list of recommended actions was not meant to be exhausted by the Member States and that individual members had discretionary space to decide which measures were applicable:

While all Member countries agree to review all the areas listed under “domestic action”, there are different opinions as to whether action will be necessary in every case. – It is agreed that domestic tax laws and regulations are to be reviewed by all Members, but there are different views on whether tax deductibility of bribes should be mentioned explicitly in the Recommendation, and on whether action to change tax laws and regulations should be expected in every case. While Member countries agree that action in the area of criminal laws would be the most effective ways [sic] to deal with the problem of bribery in international business transactions, they also agree that it raises complex issues for implementation. Aside from outright criminalization, other possible means of action include criminalization if the act is criminal offence also in the target country, assimilation of the offence in the domestic legislation on request of the target country and extradition.(DAFFE/IME/PI (93)11/REV1,3-4)

These battles between the US Delegation and other OECD members are significant because they show differing claims on the question not only of bribery, but also of the proper inventory to handle it. While the first text specified the prohibition of transnational bribery in the style of the FCPA, the second version concentrated on domestic prohibition of bribery and could have been interpreted far more liberally by individual member states. OECD members tried to oblige US demands but at the same time retain the ability to maneuver independently and retain discretion in their application of the new rules. The US Delegation was not only determined to limit the offence to traditional bribery, but was also insisting on promoting criminalization along the lines of the FCPA and the latter formed the basis for future discord. Following the amendments of the FCPA in 1998, after

the criminalization approach to transnational bribery was enshrined in a binding OECD Convention, the US law became applicable to foreign corporations and companies such as Siemens (Germany), BAE (UK), ENI (Italy), Technip (France) were imposed record fines (SEC Enforcement Actions 2014). SEC enforcement records reveal that 8 out of the top 10 companies fined under the FCPA (until February 27, 2014) were foreign. The acceptance of the criminalization approach from the OECD partners was essential not only as a legal basis for action, but also as a form of consensus on the question of transnational bribery that allowed foreign companies to be persecuted under the FCPA. This consensus on the subject of transnational bribery was relevant in relation to non-Members as well and the US was looking into expanding the consensus globally. Reflected verbatim in the US draft was included a request 'to consult with international organizations and international financial institutions on effective means to combat bribery as an aid to promote the policy of good governance' (DAFFE/IME/PI(93)10,7). In this way the US draft (which became the final draft of the Recommendation) specifically connected the question of bribery to the agenda of good governance that was already gaining momentum at the World Bank.

The OECD Recommendation (RBIBT) adopted by the Council on May 27, 1994 demonstrated the political will of member states to tackle corrupt practices in international business transactions. It was an important signal for other international organizations and non-state actors that some level of intergovernmental consensus has been reached on the existence of a serious issue in need of collective remedy at the global level. While such general political commitments were also evident with the Resolutions of the 1970s, the choice of instrument this time entailed that OECD member states would

have to take concrete measures in their respective national jurisdictions. The effectiveness of the instrument is the first way in which to understand the RBIBT as a breakthrough. Not all ‘soft law’ instruments are made equal and the peer-review and monitoring system of the OECD recommendations is a case in point. The Financial Action Task Force (FATF) Recommendations developed and implemented global standards on money-laundering through ‘soft law’ measures (Pieth 1999). The second political aspect of the importance of the RBIBT is that it became a stepping-stone for further work at the OECD but also the centerpiece of a systematic approach of state-sponsored coalition building in and between organizations.

2

Building Momentum on the Recommendation, the OECD Convention and Beyond

In the 1994-1997 period the foundations of the global anti-corruption architecture were laid out. The RBIBT constituted a landmark in this process because its adoption led to the introduction or re-introduction of the problem of corrupt practices (now predominantly understood as bribery) in the CoE, the EU, OAS, G7 and the UN. The following sections trace how this was carried out by OECD member states and how the agreements in different venues developed and started influencing each other. While non-state actors played a role in this process their efforts were shaped and reinforced by previous endeavors of state actors, in particular, the United States and ongoing intergovernmental pre-negotiations. The change of venues coupled with the instrumental use of publicity

contributed to the success of the OECD initiative to outlaw corrupt payments and led to the adoption of anti-corruption instruments in other regional and global forums. The formal agreements reached in other venues then provided the legal and discursive underpinnings for the re-introduction of the subject at the United Nations.

2.1. Involving the CoE, the EU and OAS: Profiting from the Membership Base

The RBIBT which led to the resurgence of the negotiations at the OECD was immediately followed by the 19th Conference of European Ministers of Justice in Valletta in June 1994, which issued recommendations that prepared the ground for the Programme of Action against Corruption adopted by the Committee of Ministers of the Council of Europe in November 1996 (Civil Law Convention on Corruption 1999). The 19th Conference was carried out under the theme of "Administrative, civil and penal aspects, including the role of the judiciary, of the fight against corruption" and it examined the consequences of the RBIBT and the future work on predominantly civil and administrative (but also possibly criminal) measures against transnational corruption and bribery (CM(94)117). The Secretary-General of the CoE stressed the 'European dimension of the problem facing old and new democracies alike' and argued that the 'response to the problem must be European as well' and it entailed collective measures of European states (3). The Ministers of Justice discussed the issues raised at the OECD and the choice of remedies set out in the RBIBT. Resolution 1 was indicative of the overlap with the agenda of the OECD Working Group and also established a Group on Corruption within the CoE which would map future action for European states (including the drafting of a Convention) that would be enacted in coordination with the OECD and the UN (19-21).

The considerable overlap between the membership base of the OECD and the CoE made the latter a useful forum for the coordination of anti-corruption policies of European states. In 1994 nineteen members of the OECD were also members of the CoE and after the accession of the Czech Republic (1995), Hungary (1996) and Poland (1996) to the OECD, the overlap increased to 22 common member states. Furthermore, the fact that most CoE members were also EU member states caused not only the spread of discussions from one organization to another, but also the explicit coordination of the negotiations leading to the Common Position of October 6, 1997 and the Second Joint Position of 13 November, 1997 concerning the co-ordination of work on corrupt practices underway in the three organizations so as to avoid conflict or duplication (Szarek-Manson 2010).¹¹⁴ The need to coordinate positions and policies in order to achieve a common legal basis on issues between EU members led to the inclusion of anti-corruption measures in the Convention on the Protection of the European Communities' Financial Interests, adopted on the 26 July, 1995 with a Protocol from September 27, 1996 (Pieth 2013). The EU Convention against Corruption Involving Public Officials was adopted on the 26 May, 1997 and its main goal was to ensure that members adopted criminal provisions which would cover cases of bribery not only of their national public officials, but also of holders of public office in other EU member states (Business Anti-Corruption Portal 2014). In this way, the EU created an albeit limited system of criminalization of corruption of foreign public officials within its own membership base even before the adoption of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in December of the same year.

¹¹⁴ When work advanced at the United Nations, co-ordination was necessary in 4 organizations and this was reflected in the Co-ordinated Position for the UN, adopted by the Council of the EU on the 28th of February 2001 (Szarek-Mason 2010).

Having made progress with European partners at the OECD with the RBIBT, the US Government approached the member states of OAS and the US Office of Government Ethics and the US Information Agency launched the First International Conference on Ethics in Government in Washington DC in November 1994. The Summit of the Americas in Miami that took place in the next month made addressing corruption a priority for the organization.¹¹⁵ The anti-corruption project was introduced into the general theme of probity and civic ethics raised by Chile in the same year (Manfroni and Werksman 2003). The US government was interested in introducing the subject of transnational bribery and Venezuela was interested in establishing extradition and mutual assistance procedures in order to mitigate the consequences of the 1994 banking crisis (Feinberg 1997). The Chilean Ambassador to OAS, Edmundo Carreño presided over the Working Group on Probity and Ethics (Manfroni and Werksman 2003). The Working Group, comprised of national experts mandated by almost all member governments, met at the Washington headquarters of OAS a number of times in order to amend and prepare the draft text of the Convention (Carreño 2000). During the Summit of the Americas in Miami, the US persuaded its partners to establish cooperation with the Working Group on Bribery at the OECD (Elliott 1997). As a consequence of this liaison, the OAS Group adopted a definition of the offence that almost verbatim reproduced the OECD preliminary definition (DAFFE/IME/PI(93)1). The Convention was successfully adopted on March 29, 1996 and Article VIII in practice internationalized the FCPA for the first

¹¹⁵ Even though the anti-corruption agenda was the top priority for the US at the Summit, President Clinton was evasive of naming the practices 'corrupt' (Elliott 1997). It was the Vice President of Ecuador, Alberto Dahik who was chairman of the Advisory body of TI that promoted the explicit use of 'corruption' as an agenda item. Paradoxically, Dahik himself had to leave his country in 1995 on corruption charges; an incident that made TI realize that politicians should not be included in TI's higher management (Galtung and Pope 1999).

time (Elliott 1997; Feinberg 1997).

The leadership of the US executive through a technique of issue-specific coalition building was instrumental for the successful adoption of the Convention (Feinberg 1997). Feinberg traces how the US government engaged other state actors prior to the topic being raised for the first time in OAS. An Interagency Working Group (IWG) was created in 1993 to deal with corruption in the framework of Inter-American relations, and was later renamed as the Democracy IWG, once corrupt practices were incorporated under the general objective of strengthening democratic institutions. Michael Skol, who became Head of the IWG, had excellent knowledge of Venezuelan domestic politics through his work as the US Ambassador to Caracas and expected that a broader anti-corruption agenda would be well received by the new Venezuelan government because the corruption scandals that the country recently experienced had led to the impeachment of the former president. Feinberg singles out winning Venezuela as an ally and receiving its support for the internationalization of the FCPA (in exchange for the inclusion of measures on extradition) as one of the definitive contributions to the successful anti-corruption campaign in OAS. As part of the US consensus building strategy, a series of meetings were organized in Washington through the embassies of a small core of member states (Venezuela, Chile, Honduras and Ecuador) that carried out a considerable amount of work prior to the official announcement of corrupt practices as an agenda item in the Miami Summit. The OAS Working Group on Probitry and Ethics worked in close cooperation with the Washington WG. The drafts produced by the two groups ‘paralleled’ each other and the US government managed to imprint its influence on the final draft of the Convention (119).

Feinberg credits the US leadership in coalition building for diffusing the North-South tension on global anti-corruption work. Furthermore, the liaison between OAS and the OECD Working Group (that was first proposed by the US) showed that the inter-American consensus would have positive repercussions for furthering the work of the OECD. The OAS Convention not only constituted the first international legally binding instrument on corruption, but was also indicative of agreement between developing and developed nations on the desirability of an anti-corruption regime. The primarily US interest, however, continued to be in the OECD, as internationalizing the FCPA among the members of OAS would not have been as consequential as convincing the major European investors to impose restrictions on their companies. The OAS progress, therefore, provided evidence that agreement on a global anti-corruption campaign was possible and that the issue-specific coalition building sponsored by the US was effective.

An essential aspect of the coalition building was that intergovernmental cooperation was enriched by meetings between the Democracy IWG and a number of NGOs such as the US section of the ICC and TI. Feinberg who was a special assistant to President Clinton and senior director of Inter-American Affairs at the National Security Council, sought out TI's support in early 1994 (Vogl 2012). Vogl, co-founder of TI, agreed to utilize TI's connections in Latin America in order to convince another government to officially raise the question of corruption on the agenda because: 'the United States could not diplomatically raise the issue itself as this would be resented' (185).¹¹⁶ The US success in building this broader coalition even before the topic was raised in OAS was fundamental for the quick negotiation and successful adoption of the

¹¹⁶ This is how the support of the President of Costa Rica, Oscar Arias, and the Vice President of Ecuador, Alberto Dahik, was secured (Vogl 2012).

OAS Convention. Involving NGOs and business actors has become a successful US strategy for issue-specific coalition building (Feinberg 1997).

2.2. Involving TI and ICC: Building a Coalition from within the OECD

Proposals to include TI in the work of the OECD on corrupt payments were made immediately after the international NGO was founded in 1993 (DAFFE/IME/PI(93)5). As noted previously, President Clinton managed to secure TI's support for the OECD initiative (Elliott 1997; Pope 2011). The international NGO was also very invested in facilitating a global solution to corrupt practices in international business transactions in particular. The US Chapter of the NGO carried out most of the correspondence with the OECD and it is emblematic that its slogan at the time was, 'The coalition to curb corruption in international business transactions' (TI USA 1998). The main interlocutor with the OECD who submitted and presented reports at the Meeting of the OECD Working Group on Bribery in International Business Transactions was the Chairman of TI-USA Fritz Heimann. He was advocating a synergetic anti-corruption approach between governments and companies and was urging governments to adopt the Recommendation on the tax deductibility of bribes, which was the next stepping-stone in the signing of a binding treaty in 1997 (Heimann 1996). The TI-USA Chairman also contributed in his dual capacity as a representative of the ICC (and as a Counselor to the General Counsel of the General Electric Company). The triple capacity of the main interlocutor with the OECD is revealing of the way in which the experience with the FCPA shaped the interests of American corporations and organized business in becoming anti-corruption activists. In the mid-1990s a series of high-profile prosecutions by the

Department of Justice, such as General Electric in 1994 and Lockheed in 1995, reminded US business to get on board with the government agenda of internationalizing the FCPA (Pieth 2007). The Chairman of the OECD WG on Bribery pointed to the ‘effective lobbying of the US business sector’ as a major contributing factor for the success of the OECD anti-corruption agenda (13).

While American companies were firmly behind their government’s agenda to promote an international anti-corruption agenda, their major competitors from other OECD member states were opposed to the endeavor and TI got involved in turning the opinion of essential members of the business community in the UK, France and Germany with some success (Vogl 2012). A series of meetings was carried out by TI with the German business representatives at the Aspen Institute in Berlin during the decisive years prior to the adoption of the OECD Convention (Eigen 2013). TI managed to influence the position of the German business community on the prospect of countering international corruption and this had an impact on the German government signing the OECD Convention; the treaty that Eigen considers to be the watershed moment in the international anti-corruption program.

While TI is celebrated for its coalition building, it was also part of an intergovernmental coalition strategy with US leadership. Furthermore, a broad network of interlocutors of non-governmental and business actors as well as intergovernmental organizations and global financial institutions was established from within the OECD. In March 1995 as a follow up of the Symposium on Corruption and Good Governance, an anti-corruption network was created between the OECD as organizer and the OAS, CoE, the IMF, the World Bank, the United Nations and others (Symposium 1996). The

Symposium gained considerable media attention in the Financial Times, the International Herald Tribune, the BBC, etc. (Coburn 1995; Glynn, Kobrin and Naim 1997). The reference of the former Costa Rican President, Oscar Sanchez, to the ‘cancer of corruption’ was particularly well-received in global media outlets and the Financial Times in particular (Adonis and Jack 1995). Reminiscent of the words of Senator Church in 1975 that: ‘A cancer is eating away at the vitals of Western society and that cancer is corruption’, the ‘cancer is corruption’ slogan would later come to signify the policy change in the World Bank (quoted in Vogl 2012, 164). But more importantly, by the time President Wolfehson made his emblematic ‘cancer of corruption’ speech in October 1996, the anti-corruption agenda already had the intergovernmental seal of approval with the OAS Convention and the work underway in the OECD, CoE and the EU.

The role of the OECD as a facilitator was particularly useful in creating broad coalitions amongst a range of actors. Special Meetings with the private sector and NGOs (including TI and ICC) in the OECD were organized and they included representatives of the World Bank. Such formal meetings were carried out in 1996, for example, to inform the private sector about the Recommendation on tax deductibility of bribes and to receive feedback from business representatives on the proposed route to criminalization (DAFFEE/IME/BR/A(96)6/REV1). In 1996 the ICC revised its Rules of Conduct adopting much of the language of the RBIBT and specifically urging governments to implement the measures proposed in the OECD Recommendation. In addition to a reference to the RBIBT, the revised text urged the World Bank and the EBRD to contribute to the anti-corruption agenda (ICC Rules of Conduct 1996).

2.3. The Instrumental Use of Venues and Publicity: The Adoption of the OECD Anti-Bribery Convention of 1997

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was a product of direct US influence according to both the US State Department and the academic literature (Cragg and Woof 2002; Abbott and Snidal 2002; Krastev 2004). Breakthrough in the negotiations came with the Recommendation on Bribery in International Business Transactions (RBIBT) in 1994 (Glynn, Kobrin, Naim 1997; Abbott and Snidal 2002; Pieth 2013). In addition to US leadership and the factors inherent to the internal workings of the OECD such as controversy management and the progressive study of feasibility, a significant contributing factor for the success of the OECD talks was that an increasing number of European partners were facing domestic crises concerning what Harris (2003) calls the small ‘c’; that is corruption scandals that are symptomatic of the broader phenomenon of corruption itself, but do not exhaust it. A number of state actors within and outside of Europe started facing similar crises of political legitimacy as the US did in the 1970s. Italy, France, Germany, Spain and the UK all experienced a series of corruption-related political scandals and instability (Della Porta and Meny, 1997).

While Vogl (2012) observes that the corruption-related political scandals of the 1970s were no less turbulent, it was the US strategy to connect these national, highly reported, occurrences of the small ‘c’ to the issue of transnational bribery through the ‘calculated use of public diplomacy’ that made the difference in the 1990s (Glynn, Kobrin and Naim 1997, 20). In the same way that Watergate and the Lockheed case provided the context for the adoption of the FCPA in 1977, a number of corruption accusations in

OECD member states, such as the United Kingdom, France (Fay 1995) and Spain, influenced the climate of the OECD negotiation process in the mid-90s (Della Porta and Meny, 1997). All of these cases of alleged corruption within nation states led the Financial Times to categorize 1995 as the ‘Year of Corruption’ while a joint survey of FT, The Economist and New York Times showed that there has been a fourfold increase in reporting on corruption between 1984 and 1995 (Tanzi 1998). The ‘sensitization’ of the European public to the subject of corruption was successfully employed by US officials, who ‘observed the high level of European public interest in all aspects of corruption, including the OECD discussions’ (Abbott and Snidal 2002, 164). As Abbott and Snidal observe, political scandals culminating in the mid-nineties made the European public highly attentive to issues of corruption and State Department officials managed to link the preoccupation with domestic corruption to the question of transnational bribery. These developments made some of the US partners more susceptible to support an OECD sponsored anti-corruption instrument. This is why the success of the ‘vague’ RBIBT has been attributed to the US attempt to bring ‘domestic political pressure, motivated by value considerations’ to the negotiation table (164).

The Council Recommendation of 1994 was significant because it secured the political commitment of the European partners in the OECD and ensured that they would take concrete steps to address corrupt practices. The RBIBT was different than the more general political statements against corrupt practices of the 1970s because of the specific provisions for review and follow-up procedures that were included under title VIII (C(94)75/FINAL). The monitoring provisions prompted a peer review process, which turned ‘into one of the most dynamic instruments of international law’ (Pieth 2013, 10-

11). Title IX specifically provided for a review within 3 years which led to the revision of the Recommendation on the 23rd of May, 1997 and the further strengthening of the political commitment of states, this time specifically in the line of criminalization (C(97)123/FINAL). Furthermore, on April 11, 1996 another issue which had come out of the feasibility study of the Ad Hoc Group, the tax deductibility of bribes, was adopted in the Recommendation on tax deductibility (C(96)27/FINAL). In fact, the two Council Recommendations remained the major testimony of the political commitment of states to tackle bribery even after the adoption of the binding treaty (Pieth 2013). The RBIBT testified to the political will of states to take coordinated measures to counter corruption, defined as bribery, and set in motion a process of peer-review and monitoring that secured steady progress.

After the RBIBT the battle was not to agree on the existence of a problem which the US managed to narrow down to bribery but to push for criminal measures. European partners, in particular Germany and France (at first joined by the UK), were resisting the US attempt to promote criminalization by internationalizing the FCPA (DAFFE/IME/BR/RD(95)1.¹¹⁷ The US State Department wanted a binding treaty, but as it was not feasible was content with the recommendation on tax deductibility and the revision of the RBIBT in the direction of criminalization (Abbott and Snidal 2002). Germany and France, however, proposed a binding treaty, with the former choosing the UN as the venue for negotiation and the latter preferring the WTO (Pieth 2013). Pieth argued that at that stage (prior to the adoption of the OECD Convention) an attempt to negotiate a binding instrument at the UN would have failed. This seemingly counter-

¹¹⁷ The 're-discovery' of the 1906 Prevention of Corruption Act and the repercussions of the 'cash for questions' controversy had a definitive impact on the UK position and the new government (formed in May 1997) wanted to take a strong stance against corruption (Alldrige 2012; Bean 2012).

intuitive joint move by the German and French Delegations was done in order to counter the US project to move towards criminalization and constituted an attempt to deflect talks for a binding instrument from the OECD to organizations that were chosen because of the likelihood of stalemate. The pre-negotiation talks at the UN were still referred to as the ‘disaster of 1976’ (Blum 2009, 2) and the US executive had historically avoided raising the issue of illicit payments at GATT and the WTO, which would have been equally undesirable for the negotiation of a binding instrument.¹¹⁸ The US did raise the issue of transparency in procurement at the WTO, but after the adoption of the OECD Convention (International Trade Commission 1997).

Work underway in regional organizations such as OAS, the EU and the CoE became part of the persuasion strategies of both camps. The US was using the OAS Convention to invalidate the argument that criminalizing the supply side of bribes constituted interference in the domestic affairs of another state (or the sovereignty of the so called ‘host’ countries). In fact, after the adoption of the OAS Convention, Tarullo argued that the member states of OAS ‘suggest that governments of developed countries... by failing to act against foreign bribery by their own multinationals, [are] complicit in the bribery’ (quoted in Ashe 2004, 2912). Getting an agreement between developed and developing nations in the OAS was a powerful bargaining tool which aimed to show that unlike the 1970s, the developing nations could be brought onboard a global anti-corruption campaign. While the US Delegation used the agreement at OAS as a persuasion technique, the European partners used the agreements reached at the CoE and the EU to set the tone of the OECD agreement and France and Germany presented a

¹¹⁸ As discussed in Chapter 3, Senate Resolution 265 of 1975 specified GATT as the institutional forum for negotiations, but representatives of the US executive did not concur with this strategy as they judged it would have been highly unlikely to reach consensus at GATT.

draft Convention based on the texts negotiated at the EU and the CoE (Pieth 2013).

The EU Convention against Corruption Involving Public Officials (26 May, 1997) was adopted before the negotiations for a binding Treaty at the OECD began in October of the same year and its main goal was to ensure that members adopted criminal provisions which would cover cases of bribery not only of their national public officials, but also of holders of public office in other EU member states (European Union 1998). If this approach was to be applied to the OECD Convention, as Germany and France wanted, it would have entailed criminalization only among members of the OECD; in other words Germany, for example, would have made it illegal for a German company to bribe an official in Canada, but not in Bangladesh or Venezuela. This, albeit significant, concession would not have been satisfactory for the US Delegation, because it would not have provided global coverage and would have internationalized the FCPA only incompletely.¹¹⁹ Therefore, the US refused this *inter partes* approach by arguing that only a global impact of proscribing corrupt payments would be legitimate and desirable (Abbott and Snidal 2002).

Targeting the OECD as the primary forum to address the corrupt payments issue in 1989 was a strategic move to internationalize the FCPA among the main US investment competitors at the time. The US preference can also be explained with the historic and financial influence that it has at the OECD; historic because the organization was created in 1948 to implement the Marshall Plan for post-war Europe and financial because the US was still the biggest contributor, providing 22% of the organization's

¹¹⁹ As noted previously, the goal of the US Delegation was to reach an agreement for the criminalization of bribery in countries outside the OECD area, even if only through the revision of the RBIBT because this would have internationalized even incompletely the FCPA. Pieth (2013) explains that the Delegations of France and Germany made a concession to criminalize bribes *inter partes* (only between members of the organization) in the Convention that they drafted based on the texts agreed on in the CoE and EU.

budget. As Carolyn Ervin, Director of the Financial and Enterprise Affairs (DAF) at the OECD, put it in a fax to Pieth referring to a visit of the organization's Secretary-General to the United States: 'He [Donald Johnston] intends that bribery be one of his major points for persuading Washington of how useful is the OECD'.¹²⁰ The US Delegation to the OECD had the political clout to retain the issue of corrupt payments on the agenda of the organization for the period 1989-1994 when little concern for the transnational aspect of such practices existed among other member states. The study of feasibility and controversy management were essential for they brought forth the aspects of the definition and suitable measures on which future work and consensus were built. At the same time what turned around the pre-negotiation talks was the instrumental use of venues and publicity, which established a connection between corruption as a national problem and the transnational element of corrupt practices which became enshrined in the OECD Convention.

The most important external element that contributed to the success of the OECD talks was the instrumental use of publicity or the use of public diplomacy (Glynn, Kobrin, Naim 1997; Abbott and Snidal 2002). As discussed previously, all the major European OECD members (Germany, France, UK, Italy and Spain) underwent a series of corruption-related political scandals in the early to mid-90s. Just because there were national controversies over corruption cases across Europe, however, did not mean that an international approach would be automatically sought after. In fact, connecting these domestic corruption issues to transnational bribery through the instrumental use of publicity was a way of turning national troubles into global problems to paraphrase the famous formulation by Mills (1959). US officials managed to interlock public concerns

¹²⁰ Carolyn Ervin, fax to M.Pieth, September 23, 1996. (OECD Archives).

over democratic accountability and national corruption with transnational bribery through the European press, which was attentive to information that national politicians appeared supportive of bribery in an international context (Abbott and Snidal 2002). As Glynn, Kobrin and Naim (1997) also confirm through extensive interviews: ‘American officials took their case to the international media, which proved remarkably receptive’ (21). The OECD Press Reviews from the period 1994-1997 show an overwhelming interest in the OECD talks with thousands of publications referring to the organization’s anti-corruption effort and relating it to national corruption scandals. At the same time, media interest peaked around the adoption of the revised recommendation in May 1997 and the months covering the negotiation of the treaty (October-December 1997). The Journal of Commerce, the Washington Post, the International Herald Tribune, The New York Times, The France Press Agency, Le Monde, The Yomuri Shimbun all published series of articles reflecting on the position of France and Germany as obstructive and quoting US officials who criticized the strategies of the two European countries to block the US proposal to outlaw bribery (Blustein 1997). While the tax deductibility of bribes was discussed at CIME with the Fiscal Affairs Committee, the US Trade Representative, Michael Kantor, threatened that the US would impose trade sanctions on the reluctant European partners and that (most likely unsubstantiated) threat received broad media coverage (Glynn, Kobrin, Naim 1997).

This mounting pressure through the media in which the positions of countries were publically exposed was the culmination of the strategy of public diplomacy that ultimately provided the external impetus to adopt the Revised Recommendation in May 1997 and the OECD Convention in December of the same year. From within the OECD

and CIME, in particular, work on controversy management continued and a list of ‘Agreed Common Elements’ was provided on which consensus for the revised recommendation and/or the proposed binding instrument would later be built (Pieth 2013). While these elements provided the backbone for agreement, the key to the successful resolution of the OECD talks was lying in another change of institutional setting: the G7 (as a TI Press Release (1998) put it ‘G7 Summit holds the key to Global Anti-Bribery Treaty’). A series of meetings were organized prior to the 23rd G7 Summit in Denver. The meeting of the G7 Ministers and Central Bank Governors on April 27, 1997 in Washington produced a Statement of support for the anti-corruption work of the International Financial Institutions (IFIs) and the OECD and urged the strengthening and broadening of such efforts and in particular the implementation of the ban on tax deductibility of bribes by OECD states and the criminalization of corrupt payments (Washington G7 Meeting). Following the Communiqué of G7 Finance Ministers was a series of preparatory meetings between Washington, D.C. and Airlie Center, VA on the 22-24 of May 1997 that proved to be decisive for reaching a compromise between OECD member states (The White House 2014).

The US executive was prepared to move forward without France and Germany and requested the support of the UK, but Tarullo, who was Clinton’s personal representative to the Summit, attempted to secure the Franco-German agreement as the following telegram from the OECD Archives reveals:

He [US Representative to OECD, Alan Larson] thought that the Germans might be prepared to move towards accepting the US conditions. Since the ECSS, the US had lobbied them at high level (letters from Attorney General Reno and Commerce Secretary Daley to their counterparts). In circulating the revised draft G7 statement, they had made clear US readiness to take this to the

Summit. Tarullo would be pressing hard at Airlie House. Kohl would not wish to be embarrassed at Denver.

(RefN:1160 1997)¹²¹

Reaching, what Pieth (2007) calls the ‘compromise of May 1997’, ensured that in case the negotiations of a binding instrument failed by April 1, 1998, members would nonetheless enact criminalization measures in accordance with the Revised Recommendation (16). The fate of the OECD Convention was also decided when the G7 members agreed to proceed with ratification (Pieth 2013). The exact way in which the compromise of May 1997, which essentially secured the criminalization of bribery, was reached remains unspecified, but the change of venues and the instrumental use of publicity and the ‘embarrassment factor’ remained an effective part of the persuasion arsenal of the US President’s personal representative. Abott and Snidal (2002) note that: ‘Tarullo carried with him (or told people he did) a list of the 10 largest bribe-paying companies in the world’ and when partners became hesitant he would threaten to make the list public with a tap on his pocket (164). Through public diplomacy and the threat of publicity, the US executive would essentially re-create the consequences of the public revulsion that took over Europe and the US in the 1970s, but as Abbott and Snidal point out the public distaste for corrupt practices in Europe was not mobilized in the 1970s, the way it was in the 1990s.

The piecemeal approach of controversy management and feasibility provided the elements of agreement and drafts by the US, French, German and Italian Delegations were provided and revised in ‘Friends of the Chairman’ format (Pieth 2013). While Metcalfe (2000) provides an elaborate account of the negotiation process itself, the key to

¹²¹ Washington Embassy, telegram to Foreign and Commonwealth Office (UK), May 21, 1997. (OECD Archives).

signing the Convention on December 17, 1997 lies in the Revised Recommendation and the compromise that was enshrined in Section 3 which ensured that criminalization measures would be enacted by April 1998, even if the negotiation of a binding instrument failed. Criminalization as the ‘strongest form of condemnation’ (Abbott and Snidal 2002, 167) also testified of the formal seriousness that OECD member states now attributed to the problem of corrupt payments.

The specific aspect of corruption, defined as transnational bribery, enshrined in the OECD Convention and the Council Recommendations appeared as a threshold through which corruption arrived publicly on the intergovernmental and global agenda. This is also formally revealed in the explicit statement of influence or the discursive impact of the RBIBT and the OECD Convention on agreements reached in international organizations such as the Council of Europe, the EU, OAS and the UN (in particular Article 16 of UNCAC).¹²² With the OECD, the OAS, the EU and CoE being on board with the anti-corruption agenda the UN followed suit with the Global Program Against Corruption in March 1999 and further elaboration on a potential global instrument commenced the following year with the UN General Assembly Resolution 55/61. The final version of the UN Convention Against Corruption was ready by the end of 2003 and entered into force on December 14, 2005.

¹²² As it was noted earlier, the RBIBT of 1994 which led to the resurgence of the negotiations at the OECD was paralleled by the recommendations of the 19th Conference of European Ministers of Justice in Valletta in 1994 that prepared the ground for the ‘Programme of Action against Corruption’ adopted by the Committee of Ministers of the Council of Europe in November 1996. Resolution 1, adopted by the European Ministers of Justice at their 21st Conference in Prague in 1997 followed the adoption of the revised OECD Recommendation and urged for the implementation of the Programme. In the EU, the Common Position 97/661/JHA from October 6, 1997 defined by the Council on negotiations in the Council of Europe and the OECD relating to corruption, also established a formal link between the adoption of the RBIBT, the OECD Anti-Bribery Convention and the subsequent Criminal and Civil Law Conventions on Corruption adopted in 1999.

2.4. Towards a Global Convention: Developments at the UN

Following the adoption of the two OECD Recommendations, in December 1996 the US Department of State sponsored the adoption of the UN Declaration Against Corruption and Bribery in International Commercial Transactions (Department of State 1997). The Declaration 51/191 closely followed the language of the RBIBT urging states to criminalize corruption and bribery of foreign public officials and to proscribe the tax deductibility of bribes. A year earlier on December 20, 1995 Resolution 50/106 was adopted, which in Article 6 urged ECOSOC to decide on a time frame for the UN Draft Agreement on Illicit Payments developed under the auspices of the Committee under the same name (A/RES/51/191).¹²³ The Draft Agreement on Illicit Payments was superseded by the UN Declaration Against Corruption and Bribery in International Commercial Transactions (UNTERM 2014). Boswell (1997) argued that the Declaration of 1996 was indicative of the expanding political will to approach the question of corruption and bribery in particular. In 1999, however, when the UN Secretary General was launching the Global Compact at the World Economic Forum, he was still reluctant to talk about anti-corruption provisions (Vogl 2012). Despite, the Declaration from December 1996, anti-corruption legislation was slower to emerge at the UN. Vogl (2012) credits the fact that other regional organizations came to develop anti-corruption instruments as well as the mounting pressure from the Clinton Administration to investigate bribery and kickbacks in the Oil-for-Food program as providing impetus for anti-corruption work at the UN in the late 1990s.

¹²³ This line of work was carried out in accordance with the UN Crime Prevention Congresses and was discussed in Chapter 4.

Following the Global Program Against Corruption in March 1999 and after the inclusion of provisions on corruption in the United Nations Convention against Transnational Organized Crime (UNTOC) in December 2000, the decision to work towards an international legal instrument against corruption was taken by the General Assembly (A/RES/55/61). As the declassification period of the UN documents is 20 years, records and minutes from the pre-negotiation talks and the negotiation of the UNCAC Treaty are not yet made available. The former chairman of the Ad Hoc Committee for the negotiation of a Convention against Corruption, Dr. M.Touq, has elaborated that while criminalization was seen as the sensible way forward by all states, UN members were ‘bitterly divided over the definition of corruption’ (Touq 2013). The Group of 77 and China wanted to include illegal transfer of funds which at first was problematic, but then led to the inclusion of the provisions on asset recovery (Vlassis 2004). The final text of the Convention had significantly broadened the type of practices covered such as trading in influence and private sector corruption (UNODC 2014). By the time the UNCAC was negotiated, however, it was seen as the cumulative work on top of a number of intersecting legal regimes that had already been put into place in regional organizations, as Touq also put it. Although ‘UNCAC expands past definitions of corruption’ (Eicher 2012, 120), the question of corrupt payments in the UN in the 1990s had lost its radical potential in comparison to the talks in the 1970s. The debate on corrupt payments was no longer challenging the rules of the international economic system and was no longer demanding curbing the power of multinational corporations; the anti-corruption program had become normalized.

Conclusion

The first part of this chapter traced the study of political and administrative feasibility that led to the narrowing down of options and choosing the most feasible and effective channel to move the issue forward. It also examined the way in which the process of collective definition was carried out within the OECD and established the impact that the US Delegation had on the definition of corruption as bribery as well as the final text of the RBIBT. This aspect of the process of collective definition within an organization could make the question of social construction look like a normative one; in other words, issues should be discussed and debated between equals but in the end the most powerful actor wins. The way in which the US executive managed to steer and shape much of the anti-corruption debate and in particular internationalize the FCPA naturally raises the question of hegemony (Pieth 1999). If hegemony is understood thinly, as leadership, this would have repercussions for the construction of global problems since the international anti-corruption case shows that a powerful state with a strong interest in an issue provides a crucial ingredient in the globalization of a problem. A powerful state also stays that way because of its ability to imprint its definitions on problems and solutions so as to tilt the playing field in its interest.

After the period 1994-1997, corruption as a global problem entered a stage of institutionalization. This was achieved after the introduction of the subject in a number of regional organizations such as OAS, the CoE and the EU. The formal agreements

produced by these organizations and the OECD provided the underpinnings for work at the United Nations. This process showed how a problem can migrate between different venues and how an issue can move from regional to global organizations. As this chapter showed, the success of the anti-corruption endeavor was to a large extent determined by a systematic approach of coalition building with US leadership. Non-state actors, such as TI and the ICC contributed to the process, but much of what they achieved was shaped by previous efforts of state actors and ongoing intergovernmental talks. If a counter-factual is to be imagined in which the US executive was not invested in anti-corruption work and not pro-actively seeking to promote it, how likely would be TI to succeed in persuading other governments to get on board with a global anti-corruption agenda, including international legalization? In this alternative world the campaign of TI might also have been much more radical; one of active criticism of governments and business and their questionable dealings.

Conclusion: A World Unbroken

This thesis examined the social construction of a global corruption problem. The study of the construction of a social problem may imply accounting for historical contingencies and understanding problems as inter-subjective processes, rather than outcomes; as evolving products of collective definition that are in a dynamic relation to the putative condition that they refer to. Claims and counter-claims are the source of this dynamic process of re-definition and in order to study the way in which problems are shaped through claims-making, the analysis opened up the pre-negotiation talks at the OECD and the UN. It further established the interconnections between organizations working on the same issue and the strategic changes of venues. By examining this intricate machinery of actors and processes, it showed that what propelled the engine into action was state agency.

The primary relevance of this thesis is for the literature on the politics of anti-corruption since this study enquired also into the reasons for a swift change; in three years (1994-1997) a number of anti-corruption instruments were adopted and in less than a decade (1994-2004), the anti-corruption program had become fully institutionalized. The public or media preoccupation with corruption was not, therefore, of direct relevance for this thesis and of how it conceptualized of a 'global problem'. As Chapter 5 showed, the

public outrage and the media saturation with corruption scandals were used instrumentally; they did not dictate the change of organizational agenda in a direct way. The social construction of corruption up to the period of institutionalization in the mid-1990s was a complicated, historically contingent process, during which there was an exchange between the UN and the OECD as the major forum for talks on corrupt/illicit payments. During the 1970s, while there was a division between the global South and North, the major claims and counter-claims occurred between the United States and some of the members of the G-77. The Cold War did not predetermine the contestation in a conventional way; rather the G-77 used their leverage in the conflict between the two super-powers to demand the re-organization of the global economic system. This ambition was enshrined in the UN Declaration on a new international economic order and dictated much of the thinking behind the Code of Conduct on Transnational Corporations because of which the agreement on illicit payments was blocked. The positions of Chile and the US constitute a case in point of the claims and counterclaims. As it was discussed in Chapter 3, the work on the Code of Conduct started with Chile bringing to ECOSOC the case of the ITT Corporation one year before the 1973 coup. The US executive also brought the corrupt payments issue to the negotiation table because of a long string of revelations that started with the same multinational. Conditioning progress on illicit payments on the Code of Conduct was indicative of different interpretations of what is wrong with the same putative condition; the G-77 claimed it was corporate conduct and demanded more restrictions on multinational corporations, while the US interpreted bribery as the culprit. Sanctioning corporations in order to prevent a worse backlash against them on its own turn informed the FCPA approach.

The conditioning of future work in the OECD on progress with the Code in the United Nations is relevant for the diffusion of issues from one organization to another and the practice of making one international forum the primary venue. The positions were reversed in the early 1990s when the OECD became the primary locus of discussions and the work of the UN on a Draft Agreement on Illicit Payments was superseded by the UN Declaration Against Corruption and Bribery in International Commercial Transactions in 1996. The 1996 Declaration showed a significant overlap with the aims and the language of the two OECD Recommendations suggesting that establishing the primary venue for intergovernmental talks has a decisive influence not only on the content of discussions in the given organization but also on other organizations. This shows that collective definitions are not developed only between states within international organizations but also between organizations. Intergovernmental organizations also shape discursively the gamut of the possible, establish boundaries to legitimate solutions and the acceptable ways to think about problems. The exigencies of reaching consensus and the trade-off between effectiveness and political feasibility, inherent to intergovernmental talks that were examined in this thesis, suggest that problems that are too intricate and solutions that are more radical will rarely make it into the building blocks of international reality.

At the same time, the dynamics from 1994-1997, show that it is not so much a recognition of a worsening condition that leads to the diffusion of talks from one venue to another, but the role of state agents. The US executive built a coalition around the issue of transnational bribery and strategically changed venues; other OECD partners spread the talks to the EU and CoE also with the intention of influencing the content of the agreement at the OECD. While it appeared that an issue had exploded in a number of

formal international venues and was driven by exogenous pressures, it was the intentionality of state agents that was creating this change.

In addition to offering an IR perspective for the more comprehensive understanding of the politics of anti-corruption, this study has some repercussions for constructivism in IR. By joining emerging constructivist approaches that allow for the inclusion of power, and in particular state power, in the analysis, this thesis argued that a step back from norms is necessary in order to look at the social construction of problems. The study of the pursuit of normatively desirable goals in international affairs has obscured the role that interest and power have on the emergence of global problems on the international policy agenda; it has further neglected the study of how power, particularly state power, shapes norms. States remain the major creators of global problems as they negotiate definitions and measures and maneuver through different organizations that are likely to facilitate the attainment of their goals. International reality is what states negotiate it to be.

Approaching the social construction of problems as a research agenda has a number of practical limitations and advantages. First, the practical constraints of a study that allows us to understand global problems as processes are that it is demanding in terms of the collection of materials across the study of different venues. In most organizations, there is a twenty years embargo of classified documents, which entails a significant time lag. In addition to the confidentiality of the talks, minutes of meetings that are important in re-constructing the content of claims might not be readily available. While interviews with participants would enrich the study, they may also be difficult to carry out if there are significant delays in time. The optimal solution, given these constraints, could be to

limit the number of venues that are studied in detail. As the anti-corruption case suggests, one venue might become the primary locus of debate at a given time. A satisfactory balance between discourse and practice analysis within and between venues is feasible.

Secondly, the breadth of the project in tracing the trajectory of a global issue in its definitional permutations from one venue to another offers us the big picture; an understanding of the process of social construction over time. This would help us better understand the career of the social problem and foresee relevant challenges and contestations to the status quo. In the case of the anti-corruption problem, the recent work of the UN on illicit flows is but one example of developments to follow in the post-institutionalization phase, which was also referred to as the ‘Legitimacy crisis’ phase. The High Level Panel on Illicit Flows, citing recent data that bribery and government theft account for only three percent of illicit flows from Africa, challenges the notion that corruption and bribery are the main culprits of unsatisfactory development by putting the limelight again on multinational corporations.¹²⁴ The relevance of this and other developments that aim to transform the understanding between the established definition of a problem and the putative conditions that it refers to, can only be understood within the historically contingent account of the development of a problem as a process of collective definition. We can imagine an alternative world, in which the claims of the developing countries have been granted as legitimate, but that would not have been the brave new world of today.

Lastly, the decisive role that the US had in the emergence and institutionalization of corruption as a global problem leads to the question of hegemony. This study only

¹²⁴ UNECA. “High Level Panel on Financial Flows.” Accessed September 22, 2014. <http://www.uneca.org/iff>

tangentially tackled this question, because it took the position of the US as a powerful state. Theoretically, that state could have been Germany, but it has to be a state, or a coalition of states, with enough interest and enough resources to break through the difficulties of ontological inducement. The emergence and institutionalization of a new global problem means that an ontological warfare had somewhere been led; that agents had to induce change, because this is what problems are, they are the nodes around a given condition that has been ignored and tolerated up to a certain point. The research agenda on social construction should not treat that condition as a natural part in the global landscape, or should rather ask: who are the landscape designers; who shaped this part of global governance the way we see it today? If through a gradual accumulation of cases, it turns out that most issues in international organizations that become institutionalized are raised by the United States, then this would give a new definition to us living in an American-led world.

Based on the findings in this thesis, it would not be too far-fetched to say that corruption, the way that we know it today, is an American-made global problem. This is not to say that the development is not positive, but the aim of scholarship in IR is not to assess; it is to understand the way in which international reality is built. Global problems constitute nodes in the fabric of global governance; nodes around which expectations and definitions converge, as international regimes show. The way we define and tackle global problems is an essential part of the way in which we understand international politics. Naturalizing problems or allowing normative biases to cloud our vision, does not allow us to see the way in which contingency and power have limited our understanding of the possible; our ability to imagine a different world.

Finally, the question of the US as a hegemonic actor can be countered by asking if the US executive was not the real norm entrepreneur? Did the US want to regulate global morality, as some OECD members remarked? The approach adopted in this thesis does not provide for the study of motivation but the study of functions. And the study of functions is simple: the US had a problem and adopted the FCPA, then the FCPA became the problem. Did the US build a coalition around transnational bribery in order to give to the world a small piece of 'post-Watergate morality'? This could be, but as a realist would say: morality has a special status in international relations; it provides excellent justification for action, but rarely the motivation for it.

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