

**CHAPTER 1**

**CORRUPTION IN CONTEXT: SOCIAL, ECONOMIC AND  
POLITICAL DIMENSIONS**

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## 1. **WHY CORRUPTION MATTERS: THE ADVERSE EFFECTS OF CORRUPTION**

### 1.1 **A Case Illustration of the Impact of Corruption**

The TV report noted below investigates the cancellation of World Bank funding (\$1.2 billion loan) for a major bridge proposal (worth nearly \$3 billion) in Bangladesh. The bridge is critical to both the economic growth of the country and the safety of hundreds of thousands of poor Bangladesh citizens who cross the Padma River daily in crowded, unsafe boats.<sup>1</sup> The World Bank cancelled funding for the bridge project because very senior politicians and officials in the Bangladesh government allegedly solicited bribes from bidding companies. SNC-Lavalin allegedly agreed to pay those bribes in order to get the engineering contract (worth \$50 million) to supervise the bridge construction. SNC-Lavalin is one of the five

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<sup>1</sup> "SNC and a Bridge for Bangladesh" CBC, the National, Investigative Report (15 minutes), aired May 15, 2013, online: <<http://www.cbc.ca/player/News/TV+Shows/The+National/ID/2385492220/>>.

largest international engineering firms in the world. It is based in Canada and operates in over 100 other countries.

### **Background on the Padma Bridge Corruption Scandal**

When allegations of bribery concerning the awarding of the engineering contract to SNC-Lavalin arose, the World Bank (WB) instituted an investigation by an external evaluation panel in the Fall of 2012. According to the report of the WB Panel, there was evidence that in late March of 2011 two members of the Bangladesh Bridge Project Evaluation Committee (BPEC) unlawfully informed senior SNC-Lavalin officers in Bangladesh that SNC-Lavalin was currently second behind another firm, Halcrow, in the bidding process, but that no final recommendation had been made. In addition to BPEC's recommendation, the awarding of the engineering contract would also have to be approved by Minister Syed Abul Hossain of the Bangladesh government. SNC-Lavalin officers allegedly took several steps to improve the company's ranking on BPEC's list. Mohammad Ismail, Director of an SNC-Lavalin subsidiary in Bangladesh was the main representative in the bidding process, along with SNC-Lavalin local consultant Md Mostafa. Ismail and Mostafa dealt directly with Zulfiqar Bhuiyan, the Secretary of the Bridge Authority and also a member of BPEC, and Minister Hossain. Bhuiyan indicated that he and the Minister expected to have a face-to-face meeting with a top SNC-Lavalin executive to "seal the project." Ramesh Shah was Vice-President of SNC-Lavalin International Inc. (SLII) and reported to Kevin Wallace who was Senior Vice-President of SLII and the senior SNC-Lavalin executive assigned to the Padma Bridge project. SLII was a relatively small subsidiary or division of the SNC-Lavalin Group of companies. Its head office was located in Oakville, Ontario.

In May 2011, Ramesh Shah and Kevin Wallace flew to Bangladesh for a face-to-face meeting with Buiyan and Minister Hossain. The meeting was facilitated by an influential government Minister, Abul Hasan Chowdhury, whom the prosecution alleges was also an agent of SNC-Lavalin. After the meeting, Ramesh Shah wrote in his notebook, "PADMA PCC...4% Min...1% Secretary." "PCC" was SNC-Lavalin's internal notation for "project consultancy or commercial costs" which apparently was used in SLII's accounts to refer to bribery payments. "Min" presumably referred to Minister Hossain and "Secretary" presumably referred to Secretary Buiyan. Two weeks later, SNC-Lavalin International Inc. was awarded the contract.

As noted, the World Bank "suspended" its funding for Padma Bridge in 2012 pending an external evaluation of alleged corruption by a WB Investigative Panel. After completing its initial evaluation, the WB panel recommended corruption charges be laid against several persons, including Minister Hossain. Bangladesh's Anti-Corruption Commission (ACC) laid conspiracy to bribe charges against seven persons, but they adamantly refused to include Minister Hossain. The World Bank threatened to cancel the Padma Bridge loan agreement due to this refusal to conduct a "full and fair" corruption inquiry of all suspects. In January 2013, before a formal cancellation occurred, Bangladesh "withdrew" its formal request to the World Bank for funding of the bridge.

The bridge was scheduled for completion in 2014. According to Bangladesh news sources, work on the bridge began in 2015 using domestic financing and apparently a \$2 billion investment from China. The government of Bangladesh initially claimed the bridge would be complete by 2018. In January of 2016, the Executive Committee of National Economic Council (ECNEC) approved a third revision to the Padma Bridge project raising the total project cost to more than Tk 80 billion (roughly US \$1.02 billion) over budget. The Bangladesh Bridge Authority claimed that the increased budget is due to delayed implementation and associated factors including rising costs for construction materials, consultancy services, and land, as well as recruiting more people to speed up the process.<sup>2</sup> Independent sources have suggested that the climbing costs were also at least in part due to further bribery and corruption, and that in order to fund the project the Bangladeshi government had to divert resources from essential services like health care.<sup>3</sup> Meanwhile, a hundred or more citizens continue to die yearly crossing the river on overcrowded and unsafe boats.<sup>4</sup>

The World Bank alerted the RCMP to evidence of possible corruption it had uncovered. After investigating, the RCMP initially laid bribery charges against two top SLII executives, Mohammed Ismail and Ramesh Shah. They are both Canadian citizens. Then, in September 2013, the RCMP laid bribery charges against three more persons: Wallace and Bhuiyan, both Canadian citizens, and former Minister Abul Hassan Chowdhury, who is a Bangladeshi national. A preferred indictment was filed on October 28, 2013, alleging one count of bribery by all five men committed between December 1, 2009 and September 1, 2011, contrary to s. 3(1)(b) of the *Corruption of Foreign Public Officials Act*. Chowdhury brought an action to stay the proceedings against him on the grounds that there was no jurisdiction to prosecute him, a Bangladeshi citizen who had never been in Canada, and whose alleged unlawful conduct occurred in Bangladesh. Canada has no extradition treaty with Bangladesh and had not attempted to have Bangladesh surrender Chowdhury for prosecution in Canada. Chowdhury was successful in his court challenge and the charges against him were stayed: *Chowdhury v The Queen*.<sup>5</sup> Charges against Mohammed Ismail were subsequently dropped, and the remaining three continued to await trial on the bribery charge.

In an important pre-trial issue in *World Bank Group v Wallace*, the Supreme Court of Canada unanimously ruled that the World Bank does not have to disclose its investigative reports

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<sup>2</sup> "Tk 8,286cr Rise in Padma Bridge Cost Okayed", *The Independent* (6 January 2016), online: <<http://www.theindependentbd.com/printversion/details/29269>>.

<sup>3</sup> Daniel Binette, "When Should Corruption Be Tolerated? The Case of the Padma Bridge", *The Global Anticorruption Blog* (6 November 2016), online: <<https://globalanticorruptionblog.com/2015/11/06/when-should-corruption-be-tolerated-the-case-of-the-padma-bridge/>>.

<sup>4</sup> See e.g., "Bangladesh Ferry Disaster Death Toll Reaches 70", *Daily Mail Online* (23 February 2015) and *US Today* (23 February 2015).

<sup>5</sup> *Chowdhury v The Queen*, 2014 ONSC 2635.

and similar matters to the four accused.<sup>6</sup> Any other result would have hampered the investigation and would have been a significant blow to future cooperation from agencies such as the World Bank.

Based on the evidence of alleged corruption collected by the World Bank, SNC-Lavalin Group Inc. and the World Bank signed a Negotiated Resolution Agreement in which SNC-Lavalin International Inc. (SLII) and over 100 SNC-Lavalin Group Inc. affiliates have been debarred from bidding on World Bank funded projects for 10 years. The remainder of SNC-Lavalin Group Inc. will also be debarred if SNC-Lavalin does not comply with the terms of the settlement in regard to improving their internal compliance program. It is hard to determine what portion of total SNC-Lavalin work is likely to be affected by the World Bank debarment, although by some estimates it is thought to be less than two percent.

Meanwhile the Bangladesh ACC continued to investigate the charge of conspiracy to bribe by seven persons: three Bangladesh officials (including the Prime Minister's nephew, Ferdous, Zaber and Bhuiyan), three SNC officials (Wallace, Shah and Mohammed Ismail), and SNC's local agent Mostafa. Remarkably, the ACC, in its final report in September 2014, concluded that there was not sufficient evidence to proceed with a charge of conspiracy to bribe against any of these men. The ACC also reported that Ministers Hossain and Chowdhury had no involvement in the alleged bribery scheme [See Chapter 6 at Section 3.2 for further discussion of the Bangladesh ACC]. The ACC report was then filed with the Bangladesh court and on October 30, 2014, the Court acquitted all seven persons of conspiracy to bribe.

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<sup>6</sup> *World Bank Group v Wallace*, 2016 SCC 15. The World Bank received emails from tipsters suggesting that there had been corruption in regard to the bridge supervision contract. The World Bank did its investigation and found evidence of corruption. After debarring SNC-Lavalin Group Inc. from bidding on World Bank-sponsored projects for 10 years, the World Bank shared the tipsters' emails, its own investigative reports and other documents with the RCMP. The RCMP used that information to obtain a warrant to intercept private communication (a wiretap warrant) and a search warrant to obtain certain documents from SNC-Lavalin offices. After the conspiracy to corrupt charge was laid, the accused person brought an application before an Ontario Superior Court trial judge to quash the wiretap authorization and thereby exclude from trial the evidence collected by wiretap. As part of the wiretap challenge, the accused sought an order requiring production to them of certain World Bank investigative documents. The trial judge concluded that certain World Bank documents were "likely relevant" to the accused's right to a fair trial and therefore ordered those documents be produced for *review before the court*. The SCC quashed the production order on two grounds. First, the World Bank was granted immunity from such disclosure under the Articles of Agreement setting up the World Bank, Articles which Canada and some 185 countries have agreed to. Second, even if the World Bank did not have immunity, the documents sought did not pass the "likely relevant" test, and therefore a court could not lawfully order their disclosure.

### Criticism of the World Bank

It should be noted that some commentators are highly critical of the World Bank's lending practices. For example, Paul Sarlo<sup>7</sup> argues that the World Bank facilitates large scale corruption by making huge development loans to notoriously corrupt governments without imposing a regime of due diligence to ensure the loan is used for the intended project.<sup>8</sup> This lack of due diligence opens the door to theft of 20-40% of loans by corrupt leaders or through the companies they hire to complete the project. Ultimately it is the citizens of the corrupt borrowing country who pay, since they are responsible for full repayment of the loan with interest even if part of the loan is stolen.

### A Shocking Conclusion

On January 6, 2017 the trial judge, Justice Nordheimer, threw out all the wiretap evidence in the case on the basis, amongst others, that the information provided in the Information to Obtain (ITO) was nothing more than "speculation, gossip and rumour".<sup>9</sup> If that was true, what does that say about the experience and competence of the senior RCMP officers who sought the wiretap, and of any prosecutor who may have assisted in obtaining it?<sup>10</sup> If the trial judge's overall characterization of the ITO was incorrect, why didn't the Public Prosecution Service of Canada (PPSC) appeal that decision? Barely one month later, on February 10, 2017, the Crown elected to call no witnesses at the trial on the grounds that "we

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<sup>7</sup> Paul Sarlo, "The Global Financial Crisis and the Transnational Anti-Corruption Regime: A Call for Regulation of the World Bank's Lending Practices" (2014) 45 Geo J Intl L 1293.

<sup>8</sup> For example, the World Bank lent Indonesia \$30 billion during the thirty-year rule of notoriously corrupt General Suharto. The International Monetary Fund has been subject to similar criticism related to irresponsible lending. For example, a portion of an IMF loan to Russia was used by Boris Yeltsin for his re-election campaign in 1996: Clare Fletcher and Daniela Herrmann, *The Internationalisation of Corruption* (Burlington, VT: Ashgate, 2012) at 68.

<sup>9</sup> "The fact that a particular investigation may be difficult, does not lower the standard that must be met in order to obtain a Part VI authorization. Reduced to its essentials, the information provided in the ITO was nothing more than speculation, gossip, and rumour. Nothing that could fairly be referred to as direct factual evidence, to support the rumour and speculation, was provided or investigated. The information provided by the tipsters was hearsay (or worse) added to other hearsay." (*R v Wallace*, 2017 ONSC 132 at para 71).

<sup>10</sup> For more details concerning allegations of SNC-Lavalin's involvement in corruption of Bangladeshi public officials, World Bank's investigation and subsequent withdrawal from funding the project, and RCMP investigation into this matter, see World Bank, "World Bank Statement on Padma Bridge" (29 June 2012), online: <[http://www.worldbank.org/en/news/press-release/2012/06/29/world-bank-statement-padma-bridge\\_and\\_World\\_Bank](http://www.worldbank.org/en/news/press-release/2012/06/29/world-bank-statement-padma-bridge_and_World_Bank)> and *World Bank Group v Wallace*, [2016] 1 SCR 207, 2016 SCC 15.

had no reasonable prospect of conviction based on the evidence”.<sup>11</sup> If the wiretap evidence was as legally suspect as Justice Nordheimer found, why didn’t the PPSC pursue the other available evidence before the trial began that would have supported the continuation of the prosecution, including the possibility of a plea agreement or a non-prosecution agreement with one of the original conspirators in exchange for their cooperation and testimony? It is in the public interest to ask whether the RCMP officers and prosecutors were up to the task of investigating and prosecuting this foreign bribery case? An inquiry and subsequent public explanation of why this important *CFPOA* case fell apart will be helpful for future investigations and prosecutions and may help reduce the damage done to Canada’s reputation.

Corruption is “public enemy no. 1” in the developing world, according to World Bank President Jim Yong Kim, and “every dollar that a corrupt official or corrupt business person puts in his or her pockets is a dollar stolen from a pregnant woman who needs healthcare, or from a girl or boy who deserves an education, or from communities that need water, roads and schools.” Recently, it has been estimated that as much as \$1 trillion annually is siphoned off from developing countries by corruption, tax evasion and other large financial crimes. The World Bank has estimated that as much as \$40 billion in foreign aid to the world’s poorest countries has been lost to corruption in recent years. And 3.6 million people die from inadequate health care and living conditions each year in part because corruption has stolen away development aid. UN Development Programme Administrator Helen Clark stated that “corruption can stand in the way of people getting basic services,” while UK Prime Minister David Cameron said “don’t let anyone keep corruption out of how we tackle poverty.” In 2008, the US Assistant Attorney General warned that “corruption is not a gentleman’s agreement where no one gets hurt. People do get hurt. And the people who are hurt the most are often residents of the poorest countries on earth.”

The remainder of Section 1 will look at the nature, causes and consequences of corruption that have motivated such strong condemnation of corruption by world leaders.

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<sup>11</sup> Jacques Gallant, “Judge acquits SNC-Lavalin execs, says RCMP relied on ‘gossip’”, *Toronto Star* (10 February 2017), online: <<https://www.thestar.com/news/gta/2017/02/10/judge-acquits-snc-lavalin-execs-says-rcmp-relied-on-gossip.html>>, and Janet McFarland, “Former SNC executives, businessman acquitted in corruption case”, *The Globe and Mail* (10 February 2017), online: <<http://www.theglobeandmail.com/report-onbusiness/former-snc-lavalin-executives-businessman-acquitted-in-corruption-case/article33979762/>>.

## 1.2 Four Concerns about Corruption

The Organization for Economic and Cooperative Development (OECD) prepared a Background Brief in 2013 entitled “The Rationale for Fighting Corruption” as part of the organization’s CleanGovBiz: Integrity in Practice Initiative.<sup>12</sup> The initiative seeks to involve civil society and the private sector in anti-corruption strategies. The brief provides an overview of the reasons why everyone should be concerned about corruption. The text of this brief is set out below:

BEGINNING OF EXCERPT

### **The Rationale for Fighting Corruption**

The costs of corruption for economic, political and social development are becoming increasingly evident. But many of the most convincing arguments in support of the fight against corruption are little known to the public and remain unused in political debates. This brief provides evidence that reveals the true cost and to explain why governments and business must prioritise the fight against corruption.

### **What is Corruption?**

Corruption is the abuse of public or private office for personal gain. It includes acts of bribery, embezzlement, nepotism or state capture. It is often associated with and reinforced by other illegal practices, such as bid rigging, fraud or money laundering. [Transparency International describes corruption as “the abuse of entrusted power for private gain.”]

### **What does Corruption Look Like?**

It could be a multinational company that pays a bribe to win the public contract to build the local highway, despite proposing a sub-standard offer. It could be the politician redirecting public investments to his hometown rather than to the region most in need. It could be the public official embezzling funds for school renovations to build his private villa. It could be the manager recruiting an ill-suited friend for a high-level position. Or, it could be the local official demanding bribes from ordinary citizens to get access to a new water pipe. At the end of the day, those hurt most by corruption are the world’s weakest and most vulnerable.

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<sup>12</sup> “The Rationale for Fighting Corruption” (OECD, 2013), online: <<http://www.oecd.org/cleangovbiz/49693613.pdf>>.

## Why Fight Corruption?

Corruption is one of the main obstacles to sustainable economic, political and social development, for developing, emerging and developed economies alike.

Overall, corruption reduces efficiency and increases inequality. Estimates show that the cost of corruption equals more than 5% of global GDP (US\$ 2.6 trillion, World Economic Forum) with over US\$ 1 trillion paid in bribes each year (World Bank). It is not only a question of ethics; we simply cannot afford such waste.

### 1. Corruption increases the cost of doing business

First, bribes and drawn-out negotiations to bargain them add additional costs to a transaction. Second, corruption brings with it the risk of prosecution, important penalties, blacklisting and reputational damage. Third, engaging in bribery creates business uncertainty, as such behaviour does not necessarily guarantee business to a company; there can always be another competing company willing to offer a higher bribe to tilt the business in its favour.

On the macro level, corruption distorts market mechanisms, like fair competition and deters domestic and foreign investments, thus stifling growth and future business opportunities for all stakeholders. IMF research has shown that investment in corrupt countries is almost 5% less than in countries that are relatively corruption-free. The World Economic Forum estimates that corruption increases the cost of doing business by up to 10% on average. Siemens, the German engineering giant, had to pay penalties of US\$ 1.6 billion in 2008 to settle charges that it routinely engaged in bribery around the world. A significant negative impact of corruption on a country's capital productivity has been proven.

### 2. Corruption leads to waste or the inefficient use of public resources

As a result of corruption, investments are not allocated to sectors and programmes which present the best value for money or where needs are highest, but to those which offer the best prospects for personal enrichment of corrupt politicians. Thus resources go into big infrastructure projects or military procurement where kickbacks are high, to the detriment of sectors like education and health care. Moreover, public tenders are assigned to the highest bribe payer, neglecting better qualified companies not willing to bribe, which undermines the quality of the projects carried out. In some instances public funds are simply diverted from their intended use, embezzled and exploited for private enrichment. Corruption also slows down bureaucratic processes, as inefficient bureaucracies offer more leverage for corrupt public officials: the longer the queue for a service, the higher the incentive for citizens to bribe to get what they

want. Finally, nepotism - in both private and public organisations - brings incompetent people into power, weakening performance and governance.

Several studies provide evidence of the negative correlation between corruption and the quality of government investments, services and regulations. For example, child mortality rates in countries with high levels of corruption are about one third higher than in countries with low corruption, infant mortality rates are almost twice as high and student dropout rates are five times as high (Gupta et al. 2011). Numbers on the monetary loss due to corruption vary, but are alarming. The African Union (2002) estimates that 25% of the GDP of African states, amounting to US\$148 billion, is lost to corruption every year. The US health care programmes Medicare and Medicaid estimate that 5% to 10% of their annual budget is wasted as a result of corruption.

### **3. Corruption excludes poor people from public services and perpetuates poverty**

The poor generally lack privileged access to decision makers, which is necessary in corrupt societies to obtain certain goods and services. Resources and benefits are thus exchanged among the rich and well connected, excluding the less privileged. Moreover, the poor bear the largest burden [proportionate to their income] of higher tariffs in public services imposed by the costs of corruption... They might also be completely excluded from basic services like health care or education, if they cannot afford to pay bribes which are requested illegally. The embezzlement or diversion of public funds further reduces the government's resources available for development and poverty reduction spending.

The significant impact of corruption on income inequality and the negative effect of corruption on income growth for the poorest 20% of a country have been proven empirically (Gupta et al. 2002). The World Bank (Baker 2005) estimates that each year US\$ 20 to US\$ 40 billion, corresponding to 20% to 40% of official development assistance, is stolen through high-level corruption from public budgets in developing countries and hidden overseas. Transparency International (Global Corruption Report 2006) found that about 35% of births in rural areas in Azerbaijan take place at home, because poor people cannot afford to pay the high charges for care in facilities where care was supposed to be free.

### **4. Corruption corrodes public trust, undermines the rule of law and ultimately delegitimizes the state**

Rules and regulations are circumvented by bribes, public budget control is undermined by illicit money flows and political critics and the media are silenced through bribes levering out democratic systems of checks and balances. Corruption in political processes like elections or party financing undermines the rule of the people

and thus the very foundation of democracy. If basic public services are not delivered to citizens due to corruption, the state eventually loses its credibility and legitimacy.

As a result, disappointed citizens might turn away from the state, retreat from political processes, migrate – or – stand up against what they perceive to be the corrupt political and economic elites. The global uprisings from the Arab world to India, Brazil and occupy Wall Street are proving that business as usual can no longer be an option for a number of countries. [footnotes omitted]

END OF EXCERPT

### 1.3 Four Other Related Concerns about Corruption

In addition to the four concerns described above, several other concerns are worthy of specific note, namely corruption's impact on (i) human rights, (ii) gender equality, (iii) global security and (iv) climate change and environmental degradation.

#### 1.3.1 Human Rights and Corruption

In *Corruption: Economic Analysis and International Law*, Arnone and Borlini elaborate on the impact of corruption on the rule of law and human rights:

Massive corrupt dynamics, indeed, weaken the basic foundations both of the representative mechanisms underlying the separation of powers and of human rights. ... Since corruption generates discrimination and inequality, this relationship [between human rights and government corruption] ... bears on civil and political rights. For instance, it strengthens the misappropriation of property in violation of legal rights ... it likely leads to the rise of monopolies which either wipe out or gravely vitiate freedom to trade. Corruption strikes at economic and social rights as well: the commissioning by a public entity of useless or overpriced goods or services, and the choice of poorly performing undertakings through perverted public procurement mechanisms are mere examples of how corruption can endanger the second generation of human rights.

The relationship between fundamental HR and corruption could not be expressed more vividly than in the words of the UN High Commissioner for Human Rights, Navy Pillay: "Let us be clear. Corruption kills. The money stolen is enough to feed the world's hungry every night, many of them children; corruption denies them their right to food, and in some cases, their right to life" ... The departure point and organizational principle of the 2004 [UN Development Program's] analyst study is that "Corruption affects the poor disproportionately, due to their powerlessness to change the status

quo and inability to pay bribes, creating inequalities that violate their human rights.”<sup>13</sup>

In their article “The International Legal Framework Against Corruption: Achievements and Challenges,” Jan Wouters et al. note the increasing tendency to frame corruption as a human rights issue.<sup>14</sup> To help understand the link between corruption and human rights, the International Council on Human Rights Policy divides corruption-based human rights violations into direct, indirect and remote violations. For example, bribing a judge directly violates the right to a fair trial, while embezzling public funds needed for social programs indirectly violates economic and social rights. Many commentators hope this focus on human rights will create new human rights-based remedies and assist in anti-corruption efforts.

The coupling of corruption and human rights remains an increasingly popular trend. In April 2015 in Doha, at the 13<sup>th</sup> United Nations Congress on Crime Prevention and International Justice, Dean and Executive Secretary of the International Anti-Corruption Academy, Martin Kreutner, stated, “All the universal goals run the risk of being severely undermined by corruption. ... Corruption is the antithesis vis-à-vis human rights, the venom vis-à-vis the rule of law, the poison for prosperity and development and the reverse of equity and equality.”<sup>15</sup> While recognizing the important connection between corruption and human rights, recently some authors have further analyzed the potential dangers and limitations of confining discussions of corruption to the language of human rights.<sup>16</sup>

Recent publications have also taken a closer look at the connection between corruption and human rights in particular geographic areas.<sup>17</sup> In particular, Anne Peters in her Working

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<sup>13</sup> Marco Arnone & Leonardo S Borlini, *Corruption: Economic Analysis and International Law* (Edward Elgar, 2014) at 170–171.

<sup>14</sup> Jan Wouters, Cedric Ryngaert & Ann Sophie Cloots, “The International Legal Framework Against Corruption: Achievements and Challenges” (June 2013) 14:1 *Melbourne J Intl L* 205 at 271–273.

<sup>15</sup> United Nations Office on Drugs and Crime, Press Release, “Sustainable Development, Human Rights, Freedoms Hinge on Anti-Corruption Strategies, Speakers Say as Crime Congress Concludes High-Level Segment” (14 April 2015), online:

<<http://www.unodc.org/unodc/en/press/releases/2015/April/sustainable-development-human-rights--freedoms-hinge-on-anti-corruption-strategies--speakers-say-as-crime-congress-concludes-high-level-segment.html>>.

<sup>16</sup> Cecily Rose, “The Limitations of a Human Rights Approach to Corruption” (2016) 65:2 *ICLQ* 450.

<sup>17</sup> See for example Kolawole Olaniyan, *Corruption and Human Rights Law in Africa* (Hart, 2014); Midori Matsushima and Hiroyuki Yamada, “Impacts of Bribery in Healthcare in Vietnam” (2016) 52:10 *J of Development Studies* 1479; and C Raj Kumar, “Corruption in India: A Violation of Human Rights Promoting Transparency and the Right to Good Governance” (2015) 49:2 *UC Davis L Rev* 741. For more on the connection between human rights and corruption, and the implications for anti-corruption efforts and remedies, see Lucy Koechlin & Magdalena Sepulveda Carmona, “Corruption and Human Rights: Exploring the Connection” in Robert I Rotberg, ed, *Corruption, Global Security, and World Order* (Cambridge, Massachusetts: Brookings Institution Press, World Peace Foundation & American Academy of Arts and Sciences, 2009) at 310–340 and International Council on Human

Paper 20 “Corruption and Human Rights” examines the various ways corruption can be conceptualized as a human rights violation and the advantages and disadvantages of doing so. She also examines whether it is a good idea to conceptualize corruption as a human rights violation and concludes, with some limitations, that it is. In regard to this latter point, she states:<sup>18</sup>

BEGINNING OF EXCERPT

An entirely different set of questions concerns the proceedings in which such a human rights violation might be claimed and whether the change in perspective – away from a primarily criminal law approach to anti-corruption toward human rights – is practical in terms of legal policy and valuable in terms of legal ethics.

**Opportunity for moral and practical strengthening of the anti-corruption agenda**

Proponents of endowing the anti-corruption instruments with a human rights approach believe that this will upgrade these instruments in political and moral terms and thus ensure improved implementation of anti-corruption measures. The classical argument is “empowerment”. The human rights approach can elucidate the rights of persons affected by corruption, such as the rights to safe drinking water and free primary education, and show them how, for instance, the misappropriation of public funds in those areas interferes with their enjoyment of the goods to which they are entitled. In that way, affected persons would be empowered to denounce corruption to which they otherwise would be helplessly exposed.

The UN Human Rights Council believes that the greatest advantages consist, firstly, in shifting the existing criminal law focus of the anti-corruption instrument away from individual perpetrators toward the systemic responsibility of the State and, secondly, in an improvement of the status of victims.

A weakness of the purely criminal law approach to anti-corruption is becoming apparent especially in China, where the broad and indeterminate criminal offences can easily be abused to eliminate or at least discredit political opponents. The human rights perspective shifts the focus away from repression toward prevention and thus also away from the abusive initiation of criminal proceedings.

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Rights Policy, *Corruption and Human Rights: Making the Connection* (Versoix, Switzerland: ICHRP, 2009).

<sup>18</sup> Anne Peters, “Corruption and Human Rights” (2015) Basel Institute on Governance Working Paper No 20, online:

<[https://www.baselgovernance.org/sites/collective.localhost/files/publications/corruption\\_and\\_human\\_rights.pdf](https://www.baselgovernance.org/sites/collective.localhost/files/publications/corruption_and_human_rights.pdf)>.

Finally, the shift from criminal law to human rights changes the intensity and burden of proof. While a public servant accused of bribery or criminal breach of trust enjoys the presumption of innocence, the human rights approach requires States to exonerate themselves before the treaty bodies when accused of deficient anti-corruption measures. For instance, a State must demonstrate that while it is willing to allot sufficient means to an authority, it is unable to do so due to a lack of resources. The follow-up question would be whether statistical evidence or the mere observation of the luxurious lifestyle of high-ranking politicians would be sufficient to corroborate the misappropriation of public funds that is presumed by the practice of the CESC and also by the UN Convention against Corruption. Article 20 UNCAC calls upon States parties to “consider” establishing “illicit enrichment” as a criminal offence. Under such a criminal law provision, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income could be punished. Such an implicit presumption of guilt is problematic in terms of the rule of law.

### **Practical recommendations**

The practical strategy implied by this change in perspective would be mutual mainstreaming. Human rights mainstreaming of anti-corruption efforts would mean that the realization of human rights would be one of the anti-corruption goals from the outset. In legal practice, this would imply an interpretation of all criminal offences relating to corruption in a way that takes into account human rights. On a complementary basis, anti-corruption mainstreaming of all human rights procedures should be implemented.

The implementation of this recommendation would include the following: In the work of the human rights treaty bodies, the guidelines for all country reports and for all country-specific concluding observations of the committees as well as the mandates of the human rights special rapporteurs should include corruption as a checkpoint that must be addressed. Not only human rights NGOs, but also specialized anti-corruption NGOs should be allowed to participate in the Universal Periodic Review as well as in treaty-specific monitoring. One might also conceive of a “General Comment on Corruption and Human Rights” that would apply to all treaties. Finally, an anti-corruption mandate could be included in the international standards for the national human rights institutions.

The practical benefit of the change in perspective is diminished, however, in that the international mechanisms are themselves weak when it comes to enforcing human rights. The options for individual complaints at the international level are limited – but some openings do exist, for example individual communications to various Human Rights Treaty Bodies. Of course, it should not be forgotten that the domestic institutions are the primary enforcers of international human rights. If a domestic

court were to condemn organs of the State for a violation of human rights through corruption, this would be a comparatively strong sanction. In many States, however, this is not to be expected, due to corruption in the justice system. This means that “empowerment” through human rights remains more symbolic than practical.

### **Risk of moral weakening**

The strength of taking a human rights approach to anti-corruption instruments is simultaneously its weakness, however. This is because of the ambivalent attitude of the Global South toward “Western” human rights. Their critique of the idea of human rights overlaps with fundamental objections to the international anti-corruption agenda.

This fundamental critique is clothed in the language of cultural relativism, ideology, or economics. According to the critique, the anti-corruption strategy is merely the imposition of a particular “Western” model of the State in numerous respects: A liberal State governed by the rule of law is required as a regulatory framework for a free market. This demand is based on a neoliberal agenda that wants to push back an interventionist, heavily bureaucratized model of the State.

The critique accuses the “rule of law” of serving primarily the economic interests of property owners and of capital.

Secondly, according to this critique, the conception of corruption as an evil is based on the picture of a State that performs public duties by way of public officials who are hired on the basis of merit and who act according to legal rules that formally apply to all. But this disqualifies communities based on family and clan relationships, which are sustained by exchanging gifts and providing group members with official posts. The values of reciprocity and loyalty underlying these communities are not acknowledged, but rather are replaced with Western meritocratic thinking and formal equal treatment. The allegation of legal and cultural imperialism and of the dictate of Western capital is further nourished by the human rights approach to anti-corruption strategies. According to that view, both sets of international instruments are merely two variants of imperialism.

However, economic and anthropological research relativizes this fundamental critique of anti-corruption strategies and thus the danger that they might be weakened by imbuing them with a human rights approach. The allegation that both anti-corruption and human rights are hegemonic or US-dominated strategies and/or strategies driven by global capital sounds more like an attempt to justify the behaviour of elites whose power and sinecures are threatened by anti-corruption and by the demand for respect of human rights. Individuals affected in many different regions of the world and cultures have demonstrated on Tahrir Square or the Maidan, in Caracas

or Mexico City, for freedom and fair prices of bread and against the corruption of the elites.

## **Conclusion and outlook**

### **Shift in the prerogative of interpretation**

In terms of communication theory, the change in perspective proposed here is a kind of “framing”, i.e., a new framework for interpretation associated with a new prerogative of interpretation. It is important in this regard that this prerogative of interpretation shifts in institutional terms as well: away from the World Bank and toward the UN Human Rights Council. Potentially, this new discursive power also entails a new power to act.

In legal terms, the connection between anti-corruption law and human rights protection proposed here can be construed as a systemic integration of two subareas of international law. Or, the human rights approach to anti-corruption instruments can be seen as their constitutionalization. Some international lawyers complain that the latter smacks of “human rightism”, or of a “hubris” of international human rights protection. But this alleged hubris can also be seen in more positive terms as the legitimate reinstatement of the human being as the normative reference point for all law, including international law.

### **Devaluation of the Global South?**

We have seen that the determination of a concrete violation of human rights by a concrete corrupt act is easier in the domain of petty corruption. In the domain of grand corruption, such as bribery of government ministers by foreign investors or the diversion of funds from the public budget, the connection between corrupt conduct and human rights violations of concrete victims is much harder to make. Now Western democracies suffer less from petty corruption than from grand corruption, including what is provocatively termed “legal corruption” in the form of non-transparent election financing and the resulting vested interests of politics, or in the form of a toleration of the smooth transition of public officials to lucrative jobs in the private sector, in which the insider knowledge gained in office can be put to use in the new company (“revolving door” phenomenon).

Because the reconceptualization in terms of human rights focuses primarily on petty corruption, it casts a spotlight on the Global South. But it would be exaggerated to say that this spotlight constitutes a devaluation of non-Western societies and thus represents a paternalistic, civilizing mission of the West against the rest of the world. The change in perspective does not downplay or excuse grand corruption, including

“legal” corruption in the Western world. It is merely less able to capture it, because grand corruption has a different, less individualized structure of wrongfulness.

### **The State, public office, and universalizability**

Until well into the 19th century, patronage and the purchase of public offices were largely considered legal and legitimate components of governance even in Europe. The awareness that these forms of exercising and influencing political power and administration were illegitimate and to be combated could only emerge with the development of the modern State – a State in which an impartial bureaucracy is called upon to apply the law equally and in which all public officials are required to act in the public interest, not in the interest of their family or ethnic group.

In a patrimonial State in which the political and administrative positions are primarily intended to generate income (“rent seeking”), the idea of corruption has no place. In that sense – as already indicated at the outset – the modern State governed by the rule of law and the concept of corruption are inextricably linked. This also explains why anti-corruption is difficult in regions of the world where this understanding of the State and the associated institutional safeguards are weak.

But – to use an example – is it really the same from the perspective of a motorist whether the sum of money he or she has to pay at a road block in order to pursue his or her course represents a bribe to a corrupt traffic police officer – as in many African States – or a motorway toll – as in France for example?

In both cases, the motorist’s freedom of movement is limited by him being forced to pay. The difference is that the motorway toll is based on a law that serves the public interest, namely maintenance of the motorway network, and at the same time applies equally to everyone (with reasonable differences based on type of vehicle, number of persons, or other relevant criteria). In contrast, the bribe is not based on a fee schedule defined in a political or at least orderly administrative procedure – but it may under certain circumstances help feed the police officer’s family. The difference between a bribe and a State fee is thus based solely on the legitimacy and legality of the institutions and procedures in which they are defined, collected, and used.

Augustine’s insight that States not governed by law and justice are nothing but large bands of thieves has lost none of its validity after more than 1,000 years. Only if this insight proves to be universally applicable can a global anti-corruption strategy be successful. And the “individualized” conception of corruption – namely the insight that corruption interferes with the rights of each individual citizen – can make a greater contribution to this universalization than the invocation of an anonymous general interest and an abstract conception of public office. [footnotes omitted]

END OF EXCERPT

### 1.3.2 Gender Equality and Corruption

Corruption affects women differently than men and carries implications for gender equality. According to the UNDP report *Corruption, Accountability and Gender: Understanding the Connections*, corruption “exacerbates gender-based asymmetries in empowerment, access to resources and enjoyment of rights.”<sup>19</sup> Reasons for corruption’s disproportionate effects include the fact that women make up most of the global poor, who suffer most from corruption, and the fact that women have lower levels of literacy and education, which can adversely affect their knowledge of their rights. The report summarizes the effects of corruption on women as follows:

The data suggests that ‘petty’ or ‘retail’ corruption (when basic public services are sold instead of provided by right) affects poor women in particular and that the currency of corruption is frequently sexualized – women and girls are often asked to pay bribes in the form of sexual favours. Women’s disempowerment and their dependence on public service delivery mechanisms for access to essential services (e.g., health, water and education) increases their vulnerability to the consequences of corruption-related service delivery deficits. In addition, women’s limited access to public officials and low income levels diminishes their ability to pay bribes, further restricting their access to basic services. Therefore, corruption disproportionately affects poor women because their low levels of economic and political empowerment constrain their ability to change the status quo or to hold states accountable to deliver services that are their right.<sup>20</sup>

The report provides more specific examples of the ways women and girls experience corruption in various countries and settings. For example, in many countries, women and girls bear water-gathering responsibilities—corruption prevents the construction of more convenient water infrastructure. In the arena of education, women and girls might face sexual extortion in order to be graded fairly or pay for school, as illustrated in Botswana.<sup>21</sup> The report also describes the disproportionate impact of corruption on women entrepreneurs, who often lack the resources to make bribe payments for licenses and permits to start a business. Other corruption-related issues for women include increased vulnerability to sexual violence in the context of police and judicial corruption and blocked access to maternity hospitals when staff members demand bribes.

### 1.3.3 Global Security and Corruption

In her book *Thieves of State*, Sarah Chayes argues that corruption fuels threats to international security. She ties endemic corruption by elites to national and international revolution and

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<sup>19</sup> Naomi Hossain, Celestine Nyamu Musembi & Jessica Hughes, *Corruption, Accountability and Gender: Understanding the Connections* (UNDP & UNIFEM, 2010) at 7.

<sup>20</sup> *Ibid* at 5.

<sup>21</sup> *Ibid* at 12.

violence in the Arab world, Nigeria, Ukraine and various historical settings.<sup>22</sup> Chayes draws attention to Al-Qaeda's assertions that the main rationale behind the 9/11 attacks was George W. Bush's cozy relationship with kleptocratic Arab heads of state. To demonstrate a pattern of association between corruption and destructive, terroristic acts, she compares the example of contemporary jihadists to Dutch Protestants who ransacked property of the corrupt Catholic Church during the Reformation. Similar to these early Protestants, the jihadists "articulate their struggle, at least in part, as a reaction to the kleptocratic practices of local rulers."<sup>23</sup> Chayes also cites other threats to global security fueled by corruption, such as uprisings leading to government collapse in countries like Syria, the ease of trafficking in conflict minerals and other illegal goods in corrupt countries like Zimbabwe, and unreliable military regimes.<sup>24</sup>

Although Chayes' first-hand experience leads to the conclusion that terrorism is, in part, a reaction to corrupt regimes in certain countries, other empirical research undermines the idea that corruption is a motivating factor for terrorism in general. Research by Teets and Chenoweth suggests that "[c]orruption does not motivate terrorism because of grievances against corrupt states, but rather it facilitates terrorism...corruption lowers the barriers to terrorist attacks, probably because obtaining illicit materials to conduct attacks is more difficult in less corrupt or transparent countries."<sup>25</sup> Matthew Simpson's research, described in an article titled "Terrorism and Corruption: Alternatives for Goal Attainment Within Political Opportunity Structures," also "cast[s] doubt on the notion that terrorist violence is the expression of grievances developed in response to perceived corruption within the political process."<sup>26</sup> Rather, Simpson's research indicates that organizations turn to terrorism when other extralegal avenues, like corruption, are blocked; "[i]n instances where the particular path of corruption could not be employed to gain political influence, these organizations used alternative strategies – terrorism being high on the list – to fill the gap."<sup>27</sup> However, Simpson recognizes that more research is required to determine when the relationship between corruption control and terrorism might vary due to other factors like inequality and development.

In *Corruption: Global Security and World Order*, Rotberg and Greenhill further explore the connection between corruption, trafficking and global security:

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<sup>22</sup> Sarah Chayes, *Thieves of State: Why Corruption Threatens Global Security* (WW Norton & Company, Inc., 2015).

<sup>23</sup> *Ibid* at 181.

<sup>24</sup> *Ibid* at 181–186.

<sup>25</sup> Jessica C Teets & Erica Chenoweth, "To Bribe or to Bomb: Do Corruption and Terrorism Go Together?" in Robert I Rotberg, ed, *Corruption, Global Security, and World Order* (Brookings Institution Press, World Peace Foundation & American Academy of Arts and Sciences, 2009) at 180.

<sup>26</sup> Matthew Simpson, "Terrorism and Corruption: Alternatives for Goal Attainment within Political Opportunity Structures" (Summer 2014) 44:2 100 *Intl J of Sociology* 87 at 100.

<sup>27</sup> *Ibid* at 100.

The durable ties between corrupt regimes and transnational crime and transnational trafficking pose major global security problems because of the ability of criminal organizations to subvert stability and growth in poor countries, by their skill at sapping such impoverished places of revenue and legitimate modernization, by their undermining the fabric of weak and fragile societies, and by their negative reinforcement of the least favorable kinds of leadership in developing countries. ... these unholy partnerships ... by facilitating the spread of small arms and light weapons make civil wars possible and lethal.<sup>28</sup>

Adding to the issue of global security, Matthew Bunn describes the link between corruption and nuclear proliferation, pointing out that “[c]orruption has been a critical enabling element of the nuclear weapons programs in Pakistan, Iraq, Libya, and Iran.”<sup>29</sup> Bunn explains that countries aspiring to a nuclear program are limited in their choice of means to obtain materials, and if these means are insufficient, “illicit contributions from foreign sources motivated by cash will be central to a nuclear program’s success.”<sup>30</sup>

For an exploration of the need for anti-corruption measures and good governance to promote sustainable peace in post-conflict nations, see Bertram Spector, *Negotiating Peace and Confronting Corruption: Challenges for Post-Conflict Societies* (US Institute of Peace Press, 2011). Spector argues that negotiated cease-fires and other short-term measures are not enough to establish long-lasting peace; rather, good governance is needed to end the corruption that fuels conflict in the first place.

### 1.3.4 Climate Change, Environmental Degradation and Corruption

Corruption in the area of climate change holds the potential to cause wide-ranging effects. Corrupt avoidance of climate change standards can sap projects of their effectiveness in mitigating climate change, leading to adverse consequences for future generations. The resultant failure or reduced success of mechanisms designed to mitigate the impacts of climate change will also disproportionately affect vulnerable, poor populations, who are expected to bear the brunt of the effects of climate change.

Enforcement of heightened climate change standards will require good governance at both international and national levels. As stated by Transparency International (TI) in *Global Corruption Report: Climate Change*, “[a] robust system of climate governance – meaning the processes and relationships at the international, national, corporate and local levels to address the causes and effects of climate change – will be essential for ensuring that the enormous political, social and financial investments by both the public sector and the private

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<sup>28</sup> Robert I Rotberg, “How Corruption Compromises World Peace and Stability” in Rotberg (2009) at 9.

<sup>29</sup> Matthew Bunn, “Corruption and Nuclear Proliferation” in Rotberg (2009) at 156.

<sup>30</sup> *Ibid* at 124.

sector made in climate change mitigation and adaptation are properly and equitably managed, so that responses to climate change are successful.”<sup>31</sup>

TI explains why climate change initiatives are uniquely vulnerable to corruption. Responses to climate change will involve massive amounts of money (investment in mitigation efforts is expected to reach almost US\$700 billion by 2020), which will “flow through new and untested financial markets and mechanisms,” creating fertile ground for corruption.<sup>32</sup> Many climate issues are complex, new and uncertain, yet require speedy solutions, which also increases the risk of corruption, for example by leaving “regulatory grey zones and loopholes.”<sup>33</sup>

In TI’s book, Patrick Alley points out that rife corruption in the forestry sector has already subverted efforts to use reforestation and forest management to slow climate change.<sup>34</sup> According to the World Bank, timber worth an estimated US\$10-23 billion is illegally logged or produced from suspicious sources every year. This illegal harvesting of timber is facilitated by “deeply engrained corruption schemes” in the industry.<sup>35</sup> The forestry sector is particularly prone to corruption because most tropical forests are on public land and therefore susceptible to control by a small group of politicians or public servants. Timber operations are also generally located in remote areas, far from scrutiny. Further, because no countries ban the importation of illegally sourced timber aside from the US, illegal timber is easy to launder on the international market.

Corruption threatens climate change action in many other ways. For example, undue influence and policy capture are current and future risks to effective climate change policy, as demonstrated by powerful energy sector lobby groups in the US. According to TI, carbon markets are also vulnerable to undue influence, which might have contributed to over-allocation of carbon permits and huge windfall profits for European power producers in 2005-2007. Carbon markets also suffer from a lack of measuring, reporting and verification of emissions. Other problems include the current lack of transparency and accountability in climate policy both internationally and nationally. For example, Shahanaz Mueller points out that, in Austria, the lack of transparency in implementation of aspirational policies has led to disappointing performance and slow progress.<sup>36</sup> Corruption in the construction sector also poses a huge risk to future adaptation projects; “[a]daptation without oversight presents

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<sup>31</sup> Gareth Sweeney et al, eds., *Global Corruption Report: Climate Change* (Transparency International, 2011) at xxv.

<sup>32</sup> *Ibid* at xxvi.

<sup>33</sup> *Ibid*.

<sup>34</sup> Patrick Alley, “Corruption: A Root Cause of Deforestation and Forest Degradation” in Sweeney et al, (2011) at 299.

<sup>35</sup> Sweeney et al (2011) at xxxii.

<sup>36</sup> Shahanaz Mueller, “Climate Policies in Austria: Poor Accountability Breeds Slow Progress” in Sweeney et al, (2011) at 71.

a two-fold risk of diverted funds *and* substandard work ... which may put populations at even more risk of climate extremes.”<sup>37</sup>

TI points out that the corruption spawned by climate change is not limited to familiar forms of corruption, such as misappropriation of funds and bribery, but rather “transcends the established typologies of corruption.”<sup>38</sup> TI argues that its definition of corruption, the abuse of entrusted power for private gain, must be expanded in the context of climate change to include “the power that future generations have vested in all of us, in our stewardship role for the planet,” and abuses of power such as “distortion of scientific facts, the breach of principles of fair representation and false claims about the green credentials of consumer products.”<sup>39</sup>

#### 1.4 Empirical Evidence on the Relationship between Corruption, Reduced Economic Growth and Poverty

In a report entitled *Corruption and Poverty: A Review of Recent Literature*, Chetwynd et al. summarize the different theories and research connecting corruption with poverty.<sup>40</sup> While Chetwynd’s summary is now dated (2003), I believe it still accurately reflects the basic relationship between corruption and poverty. Their research reveals an indirect relationship between poverty and corruption explained by two main theories. Persons who attach themselves to the “economic model” argue that corruption negatively impacts indicia of economic growth, which exacerbates poverty. Chetwynd et al. refer to the second theory as the “governance model.” Proponents of this theory argue that there is evidence that corruption negatively affects governance and poor governance negatively affects levels of poverty.

In the excerpt below, Chetwynd et al. use the terms “rent seeking” and “rent taking.” “Rent-seeking” is a term used by economists to refer to instances where an individual or entity seeks to increase his/her portion of existing wealth by demanding a form of rent that generally is of no benefit to the larger society. The distinction between rent seeking and corruption is explained by Coolidge and Rose-Ackerman in “High-Level Rent Seeking and Corruption in African Regimes: Theory and Cases”:

“Rent seeking” is often used interchangeably with “corruption,” and there is a large area of overlap. While corruption involves the misuse of public power for private gain, rent seeking derives from the economic concept of “rent” -- earnings in excess of all relevant costs (including a market rate of

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<sup>37</sup> Sweeny et al (2011) at xxxi.

<sup>38</sup> *Ibid* at xxv.

<sup>39</sup> *Ibid* at xxv–xxvi.

<sup>40</sup> E Chetwynd, F Chetwynd & B Spector, *Corruption and Poverty: A Review of Recent Literature* (Management Systems International, 2003) at 2–3, online: <<http://www.u4.no/recommended-reading/corruption-and-poverty-a-review-of-recent-literature/>>.

return on invested assets). Rent is equivalent to what most non-economists think of as monopoly profits. Rent seeking is then the effort to acquire access to or control over opportunities for earning rents. These efforts are not necessarily illegal, or even immoral. They include much lobbying and some forms of advertising. Some can be efficient, such as an auction of scarce and valuable assets. However, economists and public sector management specialists are concerned with what Jagdish Bhagwati termed “directly unproductive” rent seeking activities, because they waste resources and can contribute to economic inefficiency.<sup>41</sup>

For example, a customs official who demands that a bribe be paid before allowing imports into the country may become preoccupied with seeking to maximize his/her ability to extract these bribes (a form of rent) from the public. This is both an instance of corruption and rent seeking as the customs official seeks to maximize his/her own wealth at the expense of work productivity and the public interest.

Excerpts from Chetwynd et al.’s report, *Corruption and Poverty*, are set out below:<sup>42</sup>

#### BEGINNING OF EXCERPT

##### **Introduction**

Popular belief suggests that corruption and poverty are closely related in developing countries. Corruption in the public sector is often viewed as exacerbating conditions of poverty in countries already struggling with the strains of economic growth and democratic transition. Alternatively, countries experiencing chronic poverty are seen as natural breeding grounds for systemic corruption due to social and income inequalities and perverse economic incentives. This report summarizes recent research on the relationship between poverty and corruption to clarify the ways in which these phenomena interact. This understanding can inform USAID planning and programming in democracy and governance, as well as in poverty reduction strategies.

The development literature is rich with theoretical insights on this relationship, many of them founded on practical experience and careful observation. The World Bank’s *World Development Report for 2000/01: Attacking Poverty* summarized current thinking on the corruption-poverty linkage as follows:

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<sup>41</sup> Jacqueline Coolidge & Susan Rose-Ackerman, “High-Level Rent Seeking and Corruption in African Regimes: Theory and Cases” (1999) World Bank Working Paper No 10, online: <<http://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-1780>>.

<sup>42</sup> Chetwynd et al (2003), at 5–16.

The burden of petty corruption falls disproportionately on poor people ... For those without money and connections, petty corruption in public health or police services can have debilitating consequences. Corruption affects the lives of poor people through many other channels as well. It biases government spending away from socially valuable goods, such as education. It diverts public resources from infrastructure investments that could benefit poor people, such as health clinics, and tends to increase public spending on capital-intensive investments that offer more opportunities for kickbacks, such as defense contracts. It lowers the quality of infrastructure, since kickbacks are more lucrative on equipment purchases. Corruption also undermines public service delivery (World Bank, 2001: 201).

Many of these relationships have been examined using empirical research methods.<sup>43</sup> Much of this literature is recent -- from the mid-1990s -- when major international donor institutions began to focus attention on corruption issues and researchers initiated cross-country measurement of the corruption phenomenon. This report integrates this literature to present the major themes that are hypothesized and tested.

This report is divided into three sections. The first section describes briefly how poverty and corruption are defined and measured in the literature. The second section presents the prominent themes that emerged from our review of the literature on corruption and poverty. Within this section, theoretical propositions are discussed, empirical research studies that support or refute them are described, and implications are drawn. The third section summarizes the major themes uncovered in our review.

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## **2 Examining the Relationship Between Corruption and Poverty**

This review found that few studies examine or establish a direct relationship between corruption and poverty.<sup>44</sup> Corruption, by itself, does not produce poverty. Rather, corruption has direct consequences on economic and governance factors, intermediaries that in turn produce poverty. Thus, the relationship examined by researchers is an indirect one.

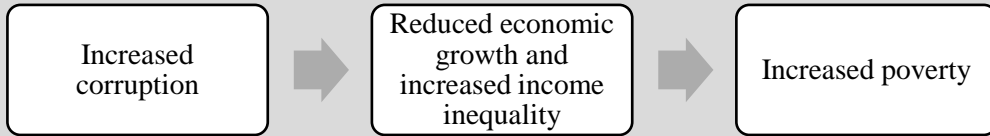
Two models emerge from the research literature. The "economic model" postulates that corruption affects poverty by first impacting economic growth factors, which, in

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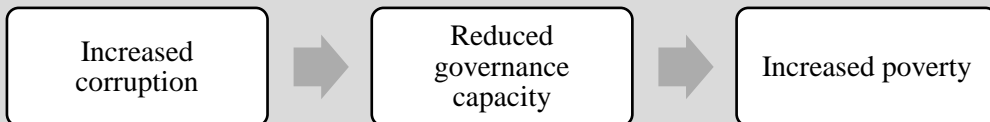
<sup>43</sup> [1] Many studies address the issue indirectly; few address it directly. See Annex 1, Bibliographic Table.

<sup>44</sup> [4] One group of researchers, Gupta et al (1998), found a statistically significant positive association directly between corruption and poverty. Tests for directionality showed that it appears to be corruption that increases poverty.

turn, impact poverty levels. In other words, increased corruption reduces economic investment, distorts markets, hinders competition, creates inefficiencies by increasing the costs of doing business, and increases income inequalities. By undermining these key economic factors, poverty is exacerbated.



The “governance model” asserts that corruption affects poverty by first influencing governance factors, which, in turn, impact poverty levels. So, for example, corruption erodes the institutional capacity of government to deliver quality public services, diverts public investment away from major public needs into capital projects (where bribes can be sought), lowers compliance with safety and health regulations, and increases budgetary pressures on government. Through these serious challenges to governance practices and outcomes, poverty is affected.



The following review of the literature is organized in relation to these models.

## 2.1 Economic Model

The literature shows an inverse correlation between aggregate economic growth and corruption; in general, countries with higher corruption experience less economic growth. Many of the studies reviewed for this paper address the channels through which corruption affects economic growth, for instance, through impacting investment and entrepreneurship, distorting markets, and undermining productivity. Furthermore, there is empirical evidence that corruption aggravates income inequality and is associated with slower economic growth. Finally, studies present evidence that as the rate of economic growth increases, the number of people above the poverty line tends to rise as well.

### Corruption Impedes Economic Growth

The relationship between corruption and economic growth is complex. Economic theory supports the notion that corruption hinders economic growth in the following ways:

- *Corruption discourages foreign and domestic investment:* rent taking increases costs and creates uncertainty, reducing incentives to both foreign and domestic investors.
- *Corruption taxes entrepreneurship:* entrepreneurs and innovators require licenses and permits and paying bribes for these goods cuts into profit margins.
- *Corruption lowers the quality of public infrastructure:* public resources are diverted to private uses, standards are waived; funds for operations and maintenance are diverted in favor of more rent seeking activity.
- *Corruption decreases tax revenue:* firms and activities are driven into the informal or gray sector by excessive rent taking and taxes are reduced in exchange for payoffs to tax officials.
- *Corruption diverts talent into rent seeking:* officials who otherwise would be engaged in productive activity become pre-occupied with rent taking, in which increasing returns encourage more rent taking.
- *Corruption distorts the composition of public expenditure:* rent seekers will pursue those projects for which rent seeking is easiest and best disguised, diverting funding from other sectors such as education and health.<sup>45</sup>

These theoretical propositions are supported by a number of empirical studies. They demonstrate that high levels of corruption are associated with low levels of investment and low levels of aggregate economic growth. For example, the results of several World Bank corruption surveys illustrate this inverse relationship between corruption and economic growth.

- *Corruption discourages domestic investment.* In Bulgaria, about one in four businesses in the entrepreneur sample had planned to expand (mostly through acquiring new equipment) but failed to do so, and corruption was an important factor in their change of plans. The Latvia study surveyed enterprises that had dropped planned investments. It found that the high cost of complying with regulations and the uncertainty surrounding them, including uncertainty regarding unofficial payments, were important factors for 28% of businesses foregoing new investments.
- *Corruption hurts entrepreneurship especially among small businesses.* Several studies reported that small businesses tend to pay the most bribes as a percentage of total revenue (especially in Bosnia, Ghana, and Slovakia). In

Poland, businesses have to deal with a large number of economic activities that are licensed, making them more prone to extortion.

- *Corruption decreases revenue from taxes and fees.* In Bangladesh, more than 30% of urban household respondents reduced electric and/or water bills by bribing the meter reader. In several studies, respondents were so frustrated that they indicated a willingness to pay more taxes if corruption could be controlled (Cambodia, Indonesia, Romania).<sup>46</sup>

In a cross-national analysis of corruption and growth for the IMF, Tanzi and Davodi (1997) tested four hypotheses designed to explain four channels through which corruption reduces growth. Using regression analysis, results established that higher levels of corruption were associated with: (1) increasing public sector investment (but decreased productivity); (2) reduced government revenues (reducing resources for productive expenditures); (3) lower expenditures on operations and maintenance (where other studies show that high government consumption is robustly associated with lower economic growth, e.g., see Barro 1996); and (4) reduced quality of public infrastructure (as shown by indicators for road conditions, power and water losses, telecom faults and proportion of railway diesels in use). All of these findings are consistent with the observation that corruption is inversely correlated with growth in GNP.

A seminal study by Mauro (2002) used a composite of two corruption indices and multiple regression analyses with a sample of 106 countries to show that high levels of corruption are associated with lower levels of investment as a share of Gross Domestic Product (GDP) and with lower GDP growth per capita. Extrapolation of these results by the researcher suggested that if a country were to improve its corruption index from a score of six to eight on a ten-point scale, it would increase the investment rate more than 4% and annual per capita GDP growth would increase by nearly one-half percent.

Recent work by Lambsdorff (forthcoming) casts additional light on how corruption affects investment, specifically, the relationship of investment to GDP. The study categorized investment into domestic savings and net capital inflows. Regression results provided evidence that corruption negatively impacts on capital accumulation by deterring capital imports. To explore causation, Lambsdorff decomposed the

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<sup>45</sup> [5] For a summary discussion of these points, see Mauro 1999. For further discussion of the theoretical reasoning, see Heidenheimer and Johnston (2002), specifically Chapter 19, Corruption and Development: A Review of the Issues, pp. 329-338 (Pranab Bardhan); Chapter 20, The Effects of Corruption on Growth and Public Expenditure, pp. 339-352 (Paolo Mauro); Chapter 21, When is Corruption Harmful? pp. 353-371 (Susan Rose-Ackerman).

<sup>46</sup> [6] For clarity, abbreviated references to the diagnostic studies are by country name rather than by name of author. References to the diagnostic studies are grouped at the end of the bibliography.

corruption index into several sub-indicators that look at corruption through the lens of bureaucratic quality, civil liberty, government stability, and law and order. Only the law and order sub-indicator turned out to be important for attracting capital flows.

Another World Bank study (2000a) suggests that higher levels of corruption reduce growth through decreased investment and output. This comprehensive study looked at 22 transition countries and examined two forms of corruption – state capture and administrative corruption – and their impact on selected economic and social indicators. Data for the study were derived from the Business Environment and Enterprise Performance Survey (BEEPS).

[Note: The empirical data cited by Chetwynd et al. above is from the 1990s and early 2000s. Subsequent empirical research has cast doubt on the claim that high levels of corruption adversely affect economic growth in terms of GDP. In fact, corruption might increase economic growth in the short run under certain circumstances (for example, by allowing corporations to avoid meeting expensive environmental requirements). However, Toke S. Aidt argues that corruption still impedes sustainable economic growth in the long run in his article “Corruption and Sustainable Development,” discussed below at page 27-28 of this book.]

### **Corruption Exacerbates Income Inequality**

Several studies have demonstrated a relationship between corruption and income inequality. The theoretical foundations for this relationship are derived from rent theory and draw on the ideas of Rose-Ackerman (1978) and Krueger (1974), among others. Propositions include:

- Corruption may create permanent distortions from which some groups or individuals can benefit more than others.
- The distributional consequences of corruption are likely to be more severe the more persistent the corruption.
- The impact of corruption on income distribution is in part a function of government involvement in allocating and financing scarce goods and services (Gupta, Davoodi, and Alonso-Terme, 1998).

A World Bank study (2000c) of poverty following the transition to a market economy in Eastern Europe and Central Asia (ECA) produced important findings concerning income distribution and corruption. The study analyzes data on firms’ perceptions of corruption and notes that more firms in ECA report that corruption is a problem than

in most other geographic regions.<sup>47</sup> The authors analyzed whether there “is any apparent link, within ECA, between corruption and measures of income inequality” (World Bank, 2000c: 169). When Gini coefficients for income per capita (measures of income inequality) were graphed against the Transparency International (TI) Corruption Perceptions Index (CPI), lower levels of corruption were seen to be statistically associated with lower levels of income inequality (simple correlation was +0.72). Similar results were obtained using different measures of corruption. The authors add that closer examination of the links between corruption and inequality show that the costs of corruption fall particularly heavily on smaller firms.<sup>48</sup>

This report also examined the relationship between a particular type of corruption, state capture, and income inequality. State capture describes the situation where businesses have undue influence over the decisions of public officials. The report notes that differences in income inequality in the ECA countries are greatest in those countries where the transition has been least successful and where state capture is at its highest. In these countries, state capture has allowed large economic interests to distort the legal framework and the policy-making process in a way that defeats the development of a market economy.<sup>49</sup> The report explores the relationship between state capture and income inequality through regressions of the Gini coefficient on measures of state capture and other variables and finds that a higher degree of state capture is correlated with higher inequality. The relationship holds even when controlling for political freedoms, location, and years under state planning (World Bank, 2000c: 172).

Gupta et al. (1998) conducted cross-national regression analysis of up to 56 countries to examine the ways that corruption could negatively impact income distribution and poverty. The study looked at the following relationships:

- *Growth* : Income inequality has been shown to be harmful to growth, so if corruption increases income inequality, it will also reduce growth and thereby exacerbate poverty.
- *Bias in tax systems* : Evasion, poor administration, and exemptions favoring the well-connected can reduce the tax base and progressivity of the tax system, increasing income inequality.

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<sup>47</sup> [8] Data is taken from the World Bank’s Business Environment and Enterprise Performance Survey (BEEPS), and shows that 70% of firms in the CIS [Commonwealth of Independent States] report that corruption is a problem, compared to 50% in Central and Eastern Europe, 40% in Latin America and 15% in OECD. World Bank 2000c at 168-69.

<sup>48</sup> [9] World Bank 2000c at 170, citing EBRD Transition Report (1999).

<sup>49</sup> [10] See generally World Bank 2000c at Chapter 4, A Look at Income Inequality, pp 139-170. The transition economies have been particularly vulnerable to state capture because of the socialist legacy of fused economic and political power.

- *Poor targeting of social programs*: Extending benefits to well-to-do income groups or siphoning from poverty alleviation programs will diminish their impact on poverty and inequality (and will tend to act as a regressive tax on the poor, enhancing income inequality).

The Gupta et al. study examined these propositions through an inequality model using a Gini coefficient to measure inequality. ... The statistically significant results include:

- Higher corruption is associated with higher income inequality such that a worsening of a country's corruption index by 2.5 points on a scale of 10 corresponds to an increase in the Gini coefficient (worsening inequality) of about 4 points. Tests showed the same results for an average decrease in secondary schooling by 2.3 years, as an example of the significance of corruption.
- Even controlling for stage of economic development, corruption appears to be harmful to income inequality. Moreover, a test of directionality suggests that it is corruption that increases inequality and not the reverse.<sup>50</sup>
- Corruption tends to increase the inequality of factor ownership [i.e. the ownership of the means of production].
- Corruption increases income inequality by reducing progressivity of the tax system, that is, the impact of corruption on income inequality was shown to be higher after taxes.

In another study of 35 countries (mostly OECD countries), Karstedt hypothesized that corruption supports, stabilizes and deepens inequality. Her measures of corruption (Transparency International's CPI and Bribery Propensity Index) were tested against measures of income distribution (as well as measures of power distance between elites and other ranks, and general trust). Results showed that *societies with high income inequality have high levels of corruption, while those with high levels of secondary education and a high proportion of women in government positions have decreasing levels of corruption*. The relation between measures of corruption and the Gini index of income inequality was nonlinear, indicating that after countries attain a specific level of income equality, corruption tends to decrease exponentially.

How does corruption exacerbate income inequality? Evidence from diagnostic surveys of corruption in several countries suggests that corruption aggravates income

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<sup>50</sup> [11] In a review of empirical studies, Lambsdorff (1999) cites other studies that agree with Gupta on this relationship. Lambsdorff questions whether inequality may also contribute to corruption. We have not found direct empirical support for reverse causality, though there is some indirect support in Kaufmann and Kraay, 2002, discussed below.

inequality because lower income households pay a higher proportion of their income in bribes.

In conclusion, the literature establishes clearly that corruption impedes economic growth and augments income inequalities. How does reduced economic growth, in turn, increase poverty?

### **Reduced Economic Growth Rates Increase Poverty**

There is evidence that the absence of economic growth (or negative growth) increases poverty. Quibria's study (2002) suggests that the burden of rapid economic retrenchment, such as seen recently in Thailand and Indonesia, hurts the poor most heavily. Similarly, in the transition countries of the former Soviet Union (FSU), the changeover to a market system was associated with a sharp initial drop in output and significantly higher levels of poverty. The expansion of poverty was initiated by the collapse of GDP, which fell by 50 percent in the FSU countries and 15 percent in Central and Eastern Europe. Poverty was found to be highly correlated with administrative corruption and corruption was empirically associated with lower economic growth rates (World Bank, 2000a).

Using a poverty model, the Gupta et al. (1998) study conducted a cross-national analysis of up to 56 countries to examine the relationship between growth and poverty. ... The authors found that higher growth is associated with poverty alleviation.

Dollar and Kraay (2002) of the World Bank Development Research Group studied a sample of 80 countries over four decades and showed that income of the lowest 20% of the population rises one for one with increases in per capita GDP. Moreover, using tests for directionality, they concluded that a 1% increase in GDP actually causes a 1% increase in the incomes of the poor.<sup>51</sup>

In his comprehensive study of the so-called Asian Tigers, Quibria (2002) gives a good example of rapid economic growth (during the 1980s and 1990s) leading to a

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<sup>51</sup> [12] Dollar and Kraay (2002). The question of the direction of causality is debated in several of the sources reviewed for this report. There is some empirical evidence of causality running from corruption to poverty. Dollar and Kraay (2002); Gupta, (1998). Although intuitively it would seem that there might also be reverse causality (i.e., running from poverty to corruption), we have not found empirical studies supporting this point. There is some evidence, however, of reverse causality running from per capita incomes to governance. See Kaufmann and Kraay (2002), discussed below.

substantial decrease in those living below a poverty line of \$1.25 per day.<sup>52</sup> Further, in those countries with a more equitable distribution of income at the outset, the decrease in poverty tended to be more robust. However, even in this special case of multiple country rapid growth in a particular region, income distribution remained more or less constant over the period of growth. Similarly, Ravallion and Chen (in Easterly, 2001: 13-14) examined 65 developing countries between 1981 and 1999. They found that the number of people below the poverty line of \$1 per day was reduced in countries with positive economic growth. However, they concluded that “measures of inequality show no tendency to get either better or worse with economic growth.”<sup>53</sup>

In conclusion, these studies show conclusively that income rises with economic growth and vice versa. It should be noted that economic growth does not necessarily lead to more equal income distribution; an increase in income may benefit the better-off rather than bringing the poor out of poverty. Income distribution seems to be an important moderating factor in the relationship between economic growth and poverty reduction.

## 2.1 Governance Model

The governance model postulates that increased corruption reduces governance capacity, which, in turn, increases poverty conditions. Kaufmann et al. (1999) define governance as,

“the traditions and institutions by which authority in a country is exercised. This includes (1) the process by which governments are selected, monitored and replaced, (2) the capacity of the government to effectively formulate and implement sound policies, and (3) the respect of citizens and the state for the institutions that govern economic and social interactions among them.”

Corruption disrupts governance practices, destabilizes governance institutions, reduces the provision of services by government, reduces respect for the rule of law, and reduces public trust in government and its institutions. Impaired governance, in turn, reduces social capital and public trust in governance institutions; this reduces

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<sup>52</sup> [13] Quibria (2002). Quibria suggests that a factor in this growth was the containment of corruption to the centralized type which he considers less costly to growth than more generalized or chaotic corruption.

<sup>53</sup> [14] Easterly (2001) at 13-14. In severe economic retraction, the poor suffer appreciably greater loss in income than the population's average. Easterly quotes from Martin Ravillion and Shaohua Chen, *Distribution and Poverty in Developing and Transition Economies* (World Bank Economic Review No.11 May 1997).

the public funds available to support effective economic growth programs and reduces the capability of government to help its citizens and the poor, in particular.

### **Corruption Degrades Governance**

Johnston (2000) suggests that serious corruption threatens democracy and governance by weakening political institutions and mass participation, and by delaying and distorting the economic development needed to sustain democracy. In a study of 83 countries, Johnston compares Transparency International's CPI with an index of political competitiveness and finds that well-institutionalized and decisive political competition is correlated with lower levels of corruption. These results were confirmed, even when controlling for GDP and examining the relationship over time.

Diagnostic surveys of corruption in Bosnia-Herzegovina, Ghana, Honduras, Indonesia and Latvia report that government institutions with the highest levels of corruption tend to provide lower quality services. The converse is also true: in Romania, the survey shows that state sector entities with better systems of public administration tend to have lower levels of corruption.

The literature shows that corruption impacts the quality of government services and infrastructure and that through these channels it has an impact on the poor. This is particularly the case in the health and education sectors. Enhanced education and healthcare services and population longevity are usually associated with higher economic growth. But under conditions of extensive corruption, when public services, such as health and basic education expenditures that especially benefit the poor, are given lower priority in favor of capital intensive programs that offer more opportunities for high-level rent taking, lower income groups lose services on which they depend. As government revenues decline through leakage brought on by corruption, public funds for poverty programs and programs to stimulate growth also become more scarce.

Gupta, Davoodi and Tiongson (2000) used regression analysis across a large sample of countries to assess an aggregate measure of education outcome and health status in a model that includes several corruption indices, per capita income, public spending on health care and education, and average years of education completed. The results supported the proposition that better health care and education outcomes are positively correlated with lower corruption. In particular, corruption is consistently correlated with higher school dropout rates and corruption is

significantly correlated with higher levels of infant mortality and lower-birth weights of babies.<sup>54</sup>

Mauro looked at the relationship between corruption and the composition of government spending. He found evidence that corrupt governments may display predatory behaviour in deciding how to distribute government expenditures. Specifically, his data showed corruption negatively related to education and health expenditures. ...

Gupta et al. (1998) also found that corruption can lead to reduced social spending on health and education. Countries with higher corruption tend to have lower levels of social spending, regardless of level of development. Corruption lowers tax revenues, increases government operating costs, increases government spending for wages and reduces spending on operations and maintenance, and often biases government toward spending on higher education and tertiary health care (rather than basic education and primary health care).

### **Impaired Governance Increases Poverty**

Pioneering research on the relationship among corruption, governance and poverty has been conducted at the World Bank by the team of Kaufmann, Kraay and Zoido-Lobaton. Their studies suggest an association between good governance (with control of corruption as an important component) and poverty alleviation.

Kaufmann et al. (1999) studied the effect of governance on per capita income in 173 countries, treating "control of corruption" as one of the components of good governance. ... Analysis showed a strong positive causal relationship running from improved governance to better development outcomes as measured by per capita income.<sup>55</sup> A one standard deviation improvement in governance raised per capita

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<sup>54</sup> [15] There was a problem of multicollinearity between corruption and public spending which for all practical purposes invalidated the other education indicators. Gupta, Davoodi and Tiongson (2000) at 17.

<sup>55</sup> [16] Kaufmann, Kraay and Zoido-Lobaton (1999) at 15. Although the relationship held for most of the aggregate indicators, the test of the relationship between the aggregate indicator for corruption and increase in per capita income did not hold up. Specification tests reported the p-value associated with the null hypothesis that the instruments affect income only through their effects on governance. For five out of the six aggregate indicators, the null hypothesis was not rejected, which was evidence in favor of the identifying assumptions. Corruption was the aggregate indicator for which the null hypothesis was rejected. This suggested that the aggregate indicator was not an adequate independent measure of corruption. "This is not to say that graft is unimportant for economic outcomes. Rather, in this set of countries, we have found it difficult to find exogenous variations in the causes of graft which make it possible to identify the effects of graft on per capita incomes." P.16 n. 15.

incomes 2.5 to 4 times. Analysis of updated indicators for 2000-2001 did not change these conclusions.<sup>56</sup>

Kaufmann and Kraay (2002) used updated governance indicators to gain a more nuanced understanding of the role of good governance in the relationship between corruption and growth in per capita incomes.<sup>57</sup> Using governance data for 2000/01, the authors establish empirically that for Latin American and Caribbean countries (i) better governance tends to yield higher per capita incomes, but (ii) higher per capita incomes tend to produce reduced governance capacity. The authors attribute this second finding to state capture. In short, the authors suggest that corruption (in the form of state capture) may interfere with the expected relationship between economic growth (higher per capita incomes) and better governance. The authors note that an empirical in-depth examination of the phenomenon of state capture in the Latin American and The Caribbean (LAC) region is part of the upcoming research agenda.<sup>58</sup>

The effect of governance on corruption and poverty is illuminated by another World Bank study (2000a). The deterioration in governance discussed in this study was accompanied by an increase in both corruption and poverty. Thus, as seen earlier, increases in corruption tend to deteriorate governance practices, but the reverse holds true as well – reduction in governance capacity increases the opportunities for corruption.

#### **Reduced Public Trust in Government Increases Vulnerability of the Poor**

Corruption that reduces governance capacity also may inflict critical collateral damage: reduced public trust in government institutions. As trust -- an important element of social capital -- declines, research has shown that vulnerability of the poor

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<sup>56</sup> [17] Kaufmann, Kraay and Zoido-Lobaton (2002). In an April, 2002, presentation at the US Department of State, Dr. Kaufmann summarized this work on governance and the demonstrated link to better development outcomes such as higher per capita income, lower infant mortality and higher literacy. He expects that donors will pay much more attention to governance, and that the link between good governance and poverty alleviation is now a mainstream concept. Kaufmann (2002), slide 44. New data will be released shortly and will be available at <http://info.worldbank.org/beeps.kkz/>.

<sup>57</sup> [18] Kaufmann and Kraay (2002). In a forthcoming study that draws on a survey of public officials in Bolivia, Kaufmann, Mehrez and Gurgur conclude (using a theoretical model for econometric analysis) that external voice and transparency have a larger effect on corruption (and quality of service) than conventional public sector management variables (such as civil servant wages, internal enforcement of rules, etc.).

<sup>58</sup> [19] This study would be similar to the Business Environment and Enterprise Performance Survey (BEEPS), developed jointly by the World Bank and the EBRD, which generated comparative measurements on corruption and state capture in the transition economies of the CIS and CEE. See <http://info.worldbank.org/governance/beeps/>.

increases as their economic productivity is affected. The concept of social capital refers to social structures that enable people to work collectively for the good of the group.<sup>59</sup> One of the most important and widely discussed elements of social capital is trust, both interpersonal trust and trust in institutions of government.<sup>60</sup> ...

One of the effects of widespread corruption in government services is that it appears to contribute to disaffection and distrust, and this appears to impact particularly heavily on the poor.<sup>61</sup> This is not surprising, because low income people are the ones who are most likely to be dependent on government services for assistance with basic needs, such as education and healthcare, and least likely to be able to pay bribes to cut through complex and unresponsive bureaucracies. Lack of trust has economic consequences: when people perceive that the social system is untrustworthy and inequitable, this can affect incentives to engage in productive activities.<sup>62</sup>

Knack and Keefer (1997) tested the relationship between social capital and economic performance in 29 market economies using indicators from the World Values Surveys (WVS) on interpersonal trust. They added the WVS trust measure to investment and growth regressions and found that trust correlated highly with economic growth. Each 12 percentage point rise in trust was associated with an increase in annual income growth of about 1 percentage point. They also found that the impact of trust on growth is significantly higher for poorer countries, suggesting that interpersonal trust is more essential where legal systems and financial markets are less well developed.

In a later study, Zak and Knack (1998) found that trust is higher in nations with stronger formal institutions for enforcing contracts and reducing corruption, and in nations with less polarized populations (as measured by income or land inequality, ethnic heterogeneity, and a subjective measure of the intensity of economic discrimination). They also showed that formal institutions and polarization appear to influence growth rates in part through their impacts on trust. For example, income inequality, land inequality, discrimination and corruption are associated with significantly lower growth rates, but the association of these variables with growth dramatically weakens when trust is controlled for.

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<sup>59</sup> [20] For a discussion of various definitions of social capital and their evolution, see Feldman and Assaf (1999).

<sup>60</sup> [21] See Rose-Ackerman (2001). Rose-Ackerman discusses the complex nature of the relationship between trust, the functioning of the state and the functioning of the market. The study stresses the mutual interaction between trust and democracy and the impact of corruption.

<sup>61</sup> [22] Rose-Ackerman (2001) at 26, noting that this is especially the case in the FSU.

<sup>62</sup> [23] Buscaglia (2000), discussing corruption and its long term impact on efficiency and equity, especially corruption in the judiciary.

Knack (1999) also looked at the effect of social capital on income inequality. His study regressed various indicators of social capital and trust against income data by quintile and found that higher scores on property rights measures were associated with declines in income inequality. Using the WVS trust indicator, he also found that inequality declined in higher trust societies. ... Knack concludes that “social capital reduces poverty rates and improves—or at a minimum does not exacerbate—income inequality.”

### 3 Conclusion

Overall, the literature reviewed in this paper demonstrates that corruption does exacerbate and promote poverty, but this pattern is complex and moderated by economic and governance factors. Table 1 summarizes the major findings of this report.

Table 1. Major Propositions Linking Corruption and Poverty

- Economic growth is associated with poverty reduction
- The burden of rapid retrenchment falls most heavily on the poor.
- Corruption is associated with low economic growth
- Corruption reduces domestic investment and foreign direct investment
- Corruption reduces public sector productivity
- Corruption distorts the composition of government expenditure, away from services directly beneficial to the poor and the growth process, e.g., education, health, and operation and maintenance
- Better health and education indicators are positively associated with lower corruption
- Corruption reduces government revenues
- Corruption lowers the quality of public infrastructure
- Corruption lowers spending on social sectors
- Corruption increases income inequality
- Corruption increases inequality of factor ownership
- Inequality slows growth
- Corruption decreases progressivity of the tax system
- Corruption acts as a regressive tax
- Low income households pay more in bribes as percent of income
- Better governance, including lower graft level, effects economic growth dramatically
- Better governance is associated with lower corruption and lower poverty levels.
- High state capture makes it difficult to reduce inequality
- Extensive, organized, well institutionalized and decisive political competition is associated with lower corruption
- Trust is a component of social capital. Higher social capital is associated with lower poverty. Corruption undermines trust (in government and other institutions) and thereby undermines social capital.

[footnotes omitted]

END OF EXCERPT

The 2015 OECD report, *Consequences of Corruption at the Sector Level and Implications for Economic Growth and Development*, explores the correlation between corruption and economic growth by focusing on four sectors that are key in promoting economic growth and

development but also vulnerable to corruption: extractive industries, utilities and infrastructure, health, and education.<sup>63</sup> The report investigates how corruption “distorts sector performance” and the consequences for economic growth and development.<sup>64</sup> For example, in extractive industries, the report finds that corruption can siphon funds away from populations and render dependence on natural resources counterproductive for the economy. The analysis concludes that corruption in these four sectors directly affects the cost of public and private sector projects, while indirectly damaging public institutions, eroding public trust in government and increasing inequality.

In his article “Corruption and Sustainable Development,” Aidt takes a new approach to analyzing the relationship between growth and corruption.<sup>65</sup> He points out that “[m]ost of the empirical research on the consequences of corruption at the economy-wide level uses real GDP per capita,” which has led to ambiguous and contradictory results regarding causal directions.<sup>66</sup> Aidt argues that research focused on GDP is “barking up the wrong tree.”<sup>67</sup> Since “development is concerned with sustainable improvements in human welfare,” Aidt instead focuses his research on the relationship between corruption and *sustainable* development.<sup>68</sup> He defines sustainable development as “present economic paths that do not compromise the well-being of future generations.”<sup>69</sup> Aidt’s research indicates that “corruption is a major obstacle to sustainable development.”<sup>70</sup> The following excerpt summarizes Aidt’s findings on the relationship between corruption and sustainable development:<sup>71</sup>

Corruption has the potential to undermine sustainable development in many ways. ... sustainable development requires suitable investment in the economy’s capital assets. A vast empirical literature strongly suggests that corruption is one reason why many societies do not make sufficient investments in their productive base. Take, for example, education, that is, investment in the stock of human capital. Since education is associated with positive externalities, the social value of these investments exceeds the private return, and public funding is justified from a social point of view, in particular for primary education. But do the funds committed always reach the schools? Expenditure tracking surveys undertaken by the World Bank

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<sup>63</sup> OECD, *Consequences of Corruption at the Sector Level and Implications for Economic Growth and Development* (OECD, 2015), online: <<http://www.oecd.org/publications/consequences-of-corruption-at-the-sector-level-and-implications-for-economic-growth-and-development-9789264230781-en.htm>>.

<sup>64</sup> *Ibid* at 9.

<sup>65</sup> Toke S Aidt, “Corruption and Sustainable Development” in Susan Rose-Ackerman & Tina Soreide, eds, *International Handbook on the Economics of Corruption*, vol 2 (Edward Elgar, 2011) at 3–50.

<sup>66</sup> *Ibid* at 6.

<sup>67</sup> *Ibid* at 3.

<sup>68</sup> *Ibid*.

<sup>69</sup> *Ibid* at 6.

<sup>70</sup> *Ibid* at 37.

<sup>71</sup> *Ibid* at 9–11.

in Africa suggest that the answer is no: corrupt officials manage to divert the flow of funds to other purposes, most likely to private consumption or political patronage...the macroeconomic evidence presented by Mauro (1998), Tanzi (1998) and many others shows how corruption distorts the portfolio of public spending by shifting resources away from education and towards public [sic] consumption. In short, there are good reasons to believe that corruption undermines the accumulation of human capital and may thus be a cause of unsustainable development.

Another example is investment in manufactured capital. A large theoretical literature highlights different reasons why corruption reduces the incentive to invest. The basic point is that corruption, through the sale of investment licenses or simply through creation of red tape and rent-seeking, serves as a tax on investment. The macroeconomic evidence strongly confirms that investment does not thrive in a corrupt environment. ... Tanzi and Davoodi (1998), for example, show that corruption tends to increase public investment, but that it is associated with low operation and maintenance expenditures and with poor quality of infrastructure, that is, with investments of lower quality. Moreover, Wei (2000) demonstrates that corruption acts like a tax on international investments....Along similar lines, Rose-Ackerman (1999, ch. 3), argues that corrupt politicians favor investment projects with inefficiently high capital intensity ('white elephants') because the stream of bribe income generated by such projects is front-loaded. As a consequence of this bias, too little investment is subsequently made in maintaining the capital.

...

The final example relates to the management of natural capital. Leite and Weidmann (2002) and many others provide macroeconomic evidence on the close association between extraction of natural resources, resource rents, and corruption. Anecdotal evidence linking the exploitation of natural resources to corruption is also abundant, ranging from kickbacks associated with logging concessions in Malaysia and Indonesia to oil concessions in Nigeria. ... The consequence of these distortions is environmental degradation. This is directly related to a vast literature on the so-called 'resource curse'. Economic logic suggests that abundance of natural resources should be beneficial for economic development. ... Yet, as first demonstrated by Sachs and Warner (1997), despite this apparent advantage, resource-rich countries tend to grow at a slower rate than other countries. One often-cited reason for this curse is that resource abundance fosters a 'rentier' economy with rampant corruption and poorly developed institutions. ... Such an environment not only encourages overuse of the natural resource base; it also crowds out investment in manufactured and human capital (Gylfason, 2001; Papyrakis and Gerlagh, 2006), misallocates talent away from innovative activities to rent-seeking (Acemoglu and Verdier, 1998) and encourages growth-harming increases in government

consumption (Atkinson and Hamilton, 2003) ... the general message from this literature is that resource rents induce corruption where institutions are weak, and that corruption and weak institutions encourage overuse of natural capital. The implied net result is a significant fall in genuine investment.

These examples show that corruption can be a threat to sustainable development through the effect it has on investment in an economy's productive base. However, they also demonstrate another basic point. The effect of corruption on economic growth, defined in terms of GDP per capita, is likely to be smaller than the corresponding effect of corruption on genuine investment and sustainability, at least over the medium term. [footnotes omitted]

For a detailed analysis of the effects of corruption on markets, national economies, the public sector, institutions and other aspects of economies and governance, see Marco Arnone and Leonardo S. Borlini, *Corruption: Economic Analysis and International Law* (Cheltenham, UK; Northampton, US: Edward Elgar Publishing, 2014).

## 1.5 Poverty and Corruption: A Growing Concern



Figure 1.1 Scenes from the Kibera in Nairobi. Photo by Karl Mueller. CC BY 2.0 Generic license.

The excerpts below are from Roy Cullen's readable and informative book *The Poverty of Corrupt Nations*.<sup>72</sup> Mr. Cullen, a former member of the Parliament of Canada, is also a founding member of the Global Organization of Parliamentarians Against Corruption (<http://gopacnetwork.org/>). In his book, he finds a strong correlation between low GDP per capita and corruption (based on TI's Corruption Perceptions Index). The following excerpts illustrate some connections between corruption and poverty:<sup>73</sup>

## BEGINNING OF EXCERPT

Nations where corruption is rampant also tend to have a large proportion of the population living in poverty – such as the people in this shanty town – while the countries' leaders may be diverting millions from national wealth to Swiss bank accounts for their personal benefit.

[Note: The picture of the shanty town is not reproduced because permission could not be obtained. An alternative picture has been substituted. See Figure 1.1.]

...

What I will attempt to demonstrate in this book is that while bribery and corruption may have cultural connotations and roots, they are morally and economically indefensible. This book places its focus on the relationship between corruption and poverty. It has two major themes.

First, there is the need for world leaders to address the growing disparities between the rich and poor nations. How big is this gap and what are the trends? As David Landes highlights in *The Wealth and Poverty of Nations*, "The difference in income per head between the richest industrial nation, say Switzerland, and the poorest non-industrial country, Mozambique, is about 400 to 1. Two hundred and fifty years ago, this gap between richest and poorest was perhaps 5 to 1...It is estimated that in today's world, 20,000 people perish every day from extreme poverty (some argue that the figure is 50,000 daily deaths from poverty-related causes).

[Note: The enormous gulf globally between the rich and the poor continues to grow. For a compelling account of this income inequality and of the dangers it creates, see: Joseph Stiglitz, *The Great Divide: Unequal Societies and What We Can do About Them* (W.W Norton, 2015).]

<sup>72</sup> Roy Cullen, *The Poverty of Corrupt Nations* (Blue Butterfly Books, 2008).

<sup>73</sup> *Ibid* at 1–6, 27–29, 59–61, 71–72.

Second, there is a need to deal with bribery and corruption, a growing activity that is getting completely out of hand, and one of the key factors that is slowing growth and reducing economic opportunities in the developing world.

I then argue that conventional approaches to battling poverty and corruption have not worked and need to be examined. We need to begin thinking and acting creatively to develop a new paradigm. Executing corrupt officials (25 officials have met this fate in China in the past four years) is not the answer for progressive nations with a respect for human rights and the rule of law.

The two themes mentioned above are closely interconnected. The poverty of the world's poor nations is significantly exacerbated through bribery and corruption. Later on I will describe the high degree of correlation between poverty and corruption. Not only do the problems of income distribution amongst the political elites, the working poor, and the poverty-stricken become more exaggerated, but it saps hope. Corruption also leads to political instability, donor fatigue, and the disappearance of much needed investment capital in the affected countries.

...

We know that disparities between the rich and poor nations are not a function of poverty alone. In fact, corruption is not an unknown phenomenon in the so-called developed world.... There are many underlying reasons for the wealth and income disparities. Some of these factors are not controllable, whereas corruption, with political will, can be controlled.

...

Quite clearly, corruption is a disease that affects every functioning aspect of governments. To better understand the correlation between corruption and good governance, researcher Tony Hahn created an Index of Public Governance (IPG). Hahn uses three levels of measurement to compute the index, drawing on data from the Freedom House's 2004 indices of political rights and civil liberties, Transparency International's 2004 Corruptions Perceptions Index, and the Economic Freedom of the World's 2004 annual report [these indices are further discussed in Section 4 of this chapter]. Each set of data represents a democratic and capitalist perspective of government based on the fundamentals that good governance ensures the ability of citizens to vote, encourages free enterprise, improves quality of life, and allows citizens to exercise their civil liberties.

Hahn's Index ranks 114 countries, revealing New Zealand at the top of the list with the highest model of good governance with a ranking of 9.45 out of 10. Following closely behind are Finland, Switzerland, Iceland, and Denmark. Also included in the top 10 are the United Kingdom, with a ranking of 9.2, and Australia and Canada, each

of which have a perfect *score* in the areas of political rights and civil liberties. Surprisingly the United States missed the top 10 by one, ranking eleventh with a score of only 8.2 on economic freedom.

Most importantly, however, are the results for Africa. The first of the African countries to make the list is Botswana, which ranks 29th with a score of 7.52, with Mauritius and South Africa following closely behind. What is interesting about this, as Hahn points out, is that unemployment in Botswana is over 20 per cent and a third of the population is living with HIV/AIDS. Comparing the Index rankings with indicators of development such as life expectancy and literacy, Botswana is gravely behind South Africa and Mauritius, with a life expectancy at 33.38 years—less than half the expected age of Mauritians. Another African nation worth noting is war-torn Sierra Leone, which ranks 74th on the Index of Public Governance, ahead of both Russia (91st place) and China (99th place). Yet in comparison to indicators of development, China and Russia also greatly surpass Sierra Leone.

Hahn points to history and culture to explain why a country can have a positive ranking in the Index of Public Governance and a low incidence of development. He argues that if countries that have the foundations of good governance continue with their efforts, development will follow. This means if countries like Sierra Leone stick to the path of comparatively good governance, while countries like Russia do not, then the indicator of development should rise for Sierra Leone in comparison with Russia.

In fact, Hahn's hypothesis on the relationship between corruption and poverty appears to be supported in a correlation analysis between Hahn's IPG and GDP per capita.

...

However, good governance is not the only indicator of corruption—poverty plays a role as well. *Governance, Corruption, and Economic Performance* recently published by the IMF, includes studies on the impact of corruption on economic performance. Amongst the findings are the following:

- social indicators (e.g. child mortality rate, school drop-out rates) are worse where corruption is high;
- countries with higher corruption tend to have lower per capita income, a higher incidence of poverty and greater income inequality;
- tax revenue is lower in more corrupt countries;
- transition economies that have made more progress on structural reform tend to be less corrupt; and
- decentralization of taxation and spending improves governance.

...

### **Corruption and Society**

In a December 2005 document, "Controlling Corruption: A Handbook for Arab Politicians," a number of negative impacts of corruption on society were identified...

- Substitutes personal gain for public good;
- Prevents or makes it more difficult for governments to implement laws and policies;
- Changes the image of politicians and encourages people to go into politics for the wrong reasons;
- Undermines public trust in politicians and in political institutions and processes;
- Erodes international confidence in the government;
- Encourages cynicism and discourages political participation;
- Can contribute to political instability, provoke coups d'état, and lead to civil wars;
- Perverts the conduct and results of elections, where they exist;
- Keeps the poor politically marginalized;
- Consolidates political power and reduces political competition;
- Delays and distorts political development and sustains political activity based on patronage, clientele and money;
- Limits political access to the advantage of the rich;
- Reduces the transparency of political decision-making.

...

For politicians in Mexico, when it comes to dealing with the drug lords, the choices are very clear—take the money and run and turn a blind eye; or have you and your family face the consequences of violence turned against you. It becomes even more difficult for a politician attempting to fight the drug lords when the police themselves are corrupt, and when judges are also bribed. It takes a brave politician to buck this trend.

Corruption is not only related to regular crime, however; the downing of a Russian passenger airliner in August 2004 by terrorists highlights how corruption and terrorism can be linked. It is alleged that the terrorist who blew up one of the planes was initially denied boarding the aircraft because of some irregularities with her

documentation. However, a bribe approximating US \$50 was paid—allowing her to board the aircraft and eventually blow it up, causing the death of 46 people.

In conclusion, corruption has enormous implications for developing countries. It undermines democratic processes, carries with it a huge economic cost, and corruption can lead to political unrest. But corruption also impacts countries with more developed economies and it is this to aspect that we now turn our attention.

...

Developed countries are not immune from corruption—it is more a question of order of magnitude, and the level of damage that corruption can cause in the respective jurisdictions. Many or all the negative consequences associated with corruption for developing countries apply to the more developed economies. There are, however, some additional and unique considerations for the industrialized world. There is an economic cost of bribery that is reflected in a higher cost of doing business in corrupt countries. This limits levels of foreign direct investment by developed countries in developing and emerging economies. Corruption in developing countries has undoubtedly changed world migration patterns as people flee their home countries out of disgust and/or the desire to improve the quality of their lives. They may flee their country of birth if they are being persecuted for exposing corrupt practices, or when bribery has caused greater health, safety, and environmental risks. [footnotes omitted]

END OF EXCERPT

## 2. THE MANY FACES OF CORRUPTION

### 2.1 No Universal Definition of Corruption

Corruption is not a singular concept; it comes in many forms and occurs in both hidden and open places. It is truly a global phenomenon; no country is corruption free. Although global in its nature, there is no global consensus on a universal definition of corruption. The definition and public perception of what behaviour constitutes corruption will vary to some extent depending on the social, political and economic structure of each society. For example, the line between lawful gift-giving and unlawful bribery can be difficult to pinpoint. Some countries have more prevalent social, political and economic customs of gift-giving. In many Asian countries, for example, gift-giving is, or until recently has been, part of a complex

socio-economic custom. In China, that custom is called *guanxi*.<sup>74</sup> The line between gifts and bribes can also change over time within a country. Indeed, over the past 50-75 years, this has taken place rapidly in many countries with the unrelenting march of the market economy into so-called “developing countries.”<sup>75</sup> Graycar and Jancsics in “Gift Giving and Corruption” provide a very useful four-part typology to distinguish between gifts and bribes in the public administration context.<sup>76</sup>

Although cultural difference may affect the nature, extent and kinds of “corruption” in different states, this absence of universal agreement does not mean there is no consensus at all on the meaning of corruption. The UN *Convention Against Corruption* does not define the word corruption. Instead, it adopts the pragmatic approach of describing a number of specific behaviours that parties to the Convention must criminalize as corrupt, and other specific behaviours that state parties should at least *consider* criminalizing. Thus, in a legal sense, corruption is the type of behaviour that a state has defined as corrupt. Chapter 2 of this book is devoted to an examination of the forms of conduct that have been defined as crimes of bribery or corruption.

“Corruption” is best seen as a broad, generic concept. Transparency International’s definition of corruption best captures this generic flavour: “corruption is the abuse of entrusted power for private gain.” The essence of corruption is the combination of three elements: abuse, entrusted power and private gain. The abuse of entrusted power must be more than accidental or negligent; it must be intentional or knowing. TI’s definition includes

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<sup>74</sup> A Smart, “Gifts, Bribes and Guanxi: A Reconsideration of Bourdieu’s Social Capital” (1993) 8:3 *Cultural Anthropology* 388.

<sup>75</sup> For example, P Verhezen, in “Gifts and Alliances in Java” (2002) 9:1 *J European Ethics Network* 56, argues that the traditional Javanese norms of harmony and respect have been replaced by economic values encouraging individualistic consumption and accumulation rather than sharing of communal wealth. He states that “the [traditional Javanese] logic of the gift and its inherent three-fold structure of obligation [harmony, hierarchy, respect and reciprocity] are [now] used for personal gain, not maintaining a social order. ... The rhetoric and ceremonial forms of a traditional culture are used to camouflage what are in fact business or commercial, and in extreme cases even extortionary relationships.” This example is cited by Douglas W Thompson, “A Merry Chase Around the Gift/Bribe Boundary,” a 2008 LLM Thesis, Faculty of Law, University of Victoria, at 54-56. Thompson (in Chapter 2) also describes a somewhat similar shift in ancient Athens, whereby some traditionally proper gifting became unethical and illegal as Athens society changed.

<sup>76</sup> Adam Graycar & David Jancsics, “Gift Giving and Corruption” (2017) 40 *Intl J of Public Admin* 1013-1023. Their four-part typology is divided into social gift, social bribe, bureaucratic gift and bureaucratic bribe. They apply (at page 1020) a series of questions to help distinguish the four different types of exchanges:

The variables that we would consider for each of these are: what is the primary function of the exchange; what is it that is being transacted; what is expected in return; does the organizational affiliation of the participants matter; are they exchanging their own resources, or somebody else’s (the organization’s); is there transparency in the transaction; who are the winners and who are the losers; what is the primary means of regulation of the transaction.

abuse of power by public officials (sometimes called public corruption) as well as abuse of entrusted power by private citizens in business (also called private corruption).<sup>77</sup> Private corruption is often dealt with through offences like theft, embezzlement, or the offering and accepting of secret commissions. When describing corruption, adjectives are often used to indicate the context or form of the corruption in question, such as:

- grand corruption and petty corruption
- public or private corruption
- domestic or local corruption versus foreign corruption
- systemic versus occasional corruption
- supply-side corruption (i.e. offering or giving bribes) versus demand-side corruption (i.e. requesting or receiving bribes), which are also sometimes called active corruption (for the briber) and passive corruption (for the bribed official)
- administrative corruption versus state capture<sup>78</sup>
- political corruption as a species of public corruption, including some forms of financial contributions to political parties and election campaigns, patronage, cronyism and various forms of vote buying
- books and records offences which are accounting offences designed to hide the giving or accepting of bribes

Graycar and Prenzler, in their very readable primer on corruption, *Understanding and Preventing Corruption*, further suggest that corruption should be examined in the context of four components: types, activities, sectors, and places (TASP).<sup>79</sup> They describe the nature and meaning of each of these components. For example, types of corruption include bribery,

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<sup>77</sup> In “The Law and Economics of Bribery and Extortion” (2010) 6:1 Ann Rev L & Soc Sci 217, Susan Rose-Ackerman notes that many jurisdictions do not criminalize private-to-private bribery unless accompanied by some other offence like extortion. In spite of this lack of criminalization, Rose-Ackerman is clear that private-to-private bribery has the potential for broader negative impacts, such as the development of monopolies harmful to consumers and suppliers, diluted product quality and limited entry for new businesses.

<sup>78</sup> Arnone and Borlini (2014) at 2, explain that administrative corruption “concerns all public employees’ or public officials’ actions for private gain that distort the application and enforcement of existing laws or rules; generally, these actions grant exemptions or tax allowances to specific agents. Alternatively, they are aimed at giving priority access to public services to an elite of agents.” State capture, according to Arnone and Borlini, encompasses “all illegal actions aimed at influencing the decision-making process of policy making in the different spheres of the life of a country.” Instead of being held accountable through public scrutiny and opinion, authorities in a situation of state capture exploit “illegal and secret channels that aim at favoring the interests of specific groups at the expense of everybody else. These channels are clearly accessible only to a limited group of ‘insiders’ at the expense of those who are ‘outsiders’ and do not participate in bribery.” State capture is also briefly discussed in Chapter 11, Section 1.1.

<sup>79</sup> Adam Graycar & Tim Prenzler, *Understanding and Preventing Corruption* (Palgrave Macmillan, 2013), ch 1.

abuse of discretion, trading in influence and patronage. Corruption can take place through a variety of activities, including the making of public appointments, the procurement of public goods, the delivery of public services and the regulation and auditing of administrative tasks and obligations. Corruption can occur in any sector of society including construction, extractive industries, municipal governance, immigration, education, health care, sports (especially at the international level), and law enforcement. And finally, corruption can take place internationally, nationally, regionally, and locally, in workplaces, governments, and corporate offices.

Another analytic tool for describing corruption is the 4 W's—*who*, *what*, *where* and *why*. The “*who*” describes the various actors (e.g., political leaders, government employees, corporate agents, and executives) involved in corruption events, and the “*what*” describes the size (petty or grand), the frequency (rare or common) and the type of corruption offences being committed (e.g., bribery of a government official to obtain a government procurement contract or influence peddling in appointments to administrative boards and tribunals). The “*where*” describes both the place (national or international) and the sector (public works, law enforcement, etc.). Finally, the “*why*” deals with the purposes or motives for engaging in corruption (including financial need, the need for acceptance and friendship, competition, and the desire to succeed, promotion of perceived efficiency, greed, etc.).

In a more global sense, the 2014 OECD *Foreign Bribery Report* provides a glimpse into the prevalence and characteristics of the corruption of foreign public officials.<sup>80</sup> The Report examines enforcement actions (207 bribery schemes) against 263 individuals and 164 entities for the offence of bribery of foreign public officials in international business transactions. The vast majority of the enforcement actions took place in the US (62%) and Germany (12.5%), with a sprinkling of enforcement actions in Korea (5%), the UK (2.8%), Canada (1.9%) and other countries. The sanctioned offences occurred all over the world. According to the report, the majority of bribes (or at least the majority of bribes targeted by law enforcement officials) came from large companies with more than 250 employees. Senior management were involved in over 50% of cases. 80% of bribes were directed towards officials of state-owned enterprises, followed by heads of state (6.97%), ministers (4%) and defence officials (3%). The values of the bribes were only available in 224 cases, but totaled \$3.1 billion in those cases. At least 71% of bribes involved an intermediary such as an agent, corporate vehicle, lawyer or family member. Interestingly, almost half of the cases involved the bribery of officials in countries with high or very high human development scores, casting doubt on the idea that most bribery of public officials occurs in developing countries. In terms of sectors, 57% of cases involved bribes to secure public procurement contracts.

The above description reveals some of the many faces of corruption. Recognition of corruption's many forms and an accurate description of those various forms is essential to finding appropriate responses and mechanisms in fighting corruption. The most effective anti-corruption mechanisms are varied and multi-faceted. They vary with the type of

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<sup>80</sup> OECD, *Foreign Bribery Report* (OECD, 2014), online: <<http://dx.doi.org/10.1787/9789264226616-en>>.

corruption being targeted and the social, political and economic context in which that corruption occurs. There are no “one size fits all” solutions to corruption. Remedies must be tailor-made and evaluated on an ongoing basis.

## 2.2 Imposing Western Definitions of Corruption Globally

Some commentators claim that the developed Western countries have imposed their conception of corruption on the rest of the world via international anti-corruption instruments.<sup>81</sup> These instruments are heavily focused on the Western economic priorities of fostering international trade and leveling the playing field for competing businesses. As a result, the international conventions focus on economic corruption of foreign officials rather than more subtle yet venomous forms of political corruption, such as corrupt party and campaign financing, cronyism or vote-buying (see Chapter 13 of this book).

The history of UNCAC and the OECD Convention (outlined in more detail in Section 6 below) explains why those conventions focus primarily on the grand corruption of political leaders in foreign states when securing lucrative contracts as opposed to political corruption. The concern over grand corruption in foreign countries is relatively recent. The history of that concern is recounted in Section 6 of this chapter. In short, the Watergate investigation led to the revelation of large, illegal presidential campaign contributions by prominent corporations through offshore subsidiaries. Further, the investigation revealed a systemic practice of corporate bribery of foreign public officials. Public outrage led to the enactment of the 1977 US *Foreign Corrupt Practices Act*, which made it an offence for US corporations to bribe foreign officials in order to obtain contracts abroad. Surprisingly, bribery of foreign officials was not an offence in any other country. Bribes paid in a foreign country to a foreign official were viewed as a matter for that foreign country. Indeed, bribes to foreign officials were tax deductible as an expense of doing business. Not surprisingly, American companies complained loudly that the *FCPA* put them at a serious competitive disadvantage in obtaining foreign government contracts, since other industrial countries were continuing to bribe foreign officials. Rather than reverse course and decriminalize bribery of foreign public officials, the American government undertook an intense international campaign to bring the major economic countries of the world into line with the American position. The US succeeded with the coming into force of the OECD Anti-Bribery Convention in 1999, followed by the broader UNCAC in 2005.

As this history demonstrates, the international conventions on corruption were born from American concerns about loss of international business and the absence of fair competition.

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<sup>81</sup> See, for example, T Polzer, “Corruption: Deconstructing the World Bank Discourse” (2001) Development Studies Institute, London School of Economics and Political Science Working Paper I. Polzer notes that the word “corruption” has no equivalent in many languages. See also A Gupta, “Blurred Boundaries: The Discourse of Corruption, the Culture of Politics, and the Imagined State” (1990) 22:2 *Am Ethnologist* 375; E Harrison, “Unpacking the Anti-Corruption Agenda: Dilemmas for Anthropologists” (2006) 34:1 *Oxford Development Studies* 16.

As discussed in Section 6 of this chapter, during UNCAC's negotiation, Austria, France, and the Netherlands advocated for regulations to increase the transparency of elections and campaign financing, but the US opposed this inclusion. Instead, Article 6 of the Convention merely requires state parties to *consider* implementing measures to increase transparency in elections and campaign financing.

Few commentators argue that grand corruption of foreign public officials should not be criminalized. However, there is merit to the observation that the international conventions focus too exclusively on Western concerns regarding economic trade. One could argue that Western countries display a double standard by roundly denouncing foreign economic bribery while failing to promote global standards regarding political corruption.

### 2.3 The Prevalence of Corruption

Section 4 of this chapter discusses the different methods for measuring the prevalence of corruption nationally and globally. But one doesn't need sophisticated measuring devices to know that corruption is rampant world-wide. One need only peruse the news over the past year or two to see the variety of people, places and activities involved in corruption. This section sets out briefly some of these corruption scandals. For example, nine US Navy officers were recently charged with accepting cash, hotel expenses and the services of prostitutes in exchange for providing classified US Navy information to a defence contractor in Singapore.<sup>82</sup> In May 2015, 31 executives at a Chinese mobile carrier were punished for creating a "small coffer" by inflating conference expenses and secretly keeping client gifts. The "small coffer" funds were then used for lavish entertainments.<sup>83</sup> In May 2015, BHP Billiton, a mining giant, agreed to pay \$25 million to settle charges laid by the US Securities Exchange Commission after BHP paid for government officials from various countries to attend the 2008 Olympics in Beijing. The officials were connected to pending contract negotiations or regulatory issues involving BHP.<sup>84</sup> Malawi's "cashgate" has been unfolding since 2013, when investigations into the siphoning of millions of dollars by civil servants began. In a recent development, two top Malawian army officers were arrested for their involvement in the siphoning of \$40 million under the guise of ordering new military uniforms that never materialized.<sup>85</sup> In June 2015, a Beijing traffic police officer stood trial for

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<sup>82</sup> Richard L Cassin, "Navy Officer Is Ninth Defendant to Plead Guilty in 'Fat Leonard' Bribe Scandal", *The FCPA Blog* (16 April 2015), online: <<http://www.fcpablog.com/blog/2015/4/16/navy-officer-is-ninth-defendant-to-plead-guilty-in-fat-leona.html>>.

<sup>83</sup> Hui Zhi, "'Small Coffers' at China Telecom Paid for Feasts and Prostitutes", *The FCPA Blog* (22 May 2015), online: <<http://www.fcpablog.com/blog/2015/5/22/small-coffers-at-china-telecom-paid-for-feasts-and-prostitut.html>>.

<sup>84</sup> Richard L Cassin, "BHP Billiton Pays \$25 Million to Settle Olympics FCPA Offences", *The FCPA Blog* (20 May 2015), online: <<http://www.fcpablog.com/blog/2015/5/20/bhp-billiton-pays-25-million-to-settle-olympics-fcpa-offense.html>>.

<sup>85</sup> "Two Top Army Officers Arrested in Malawi's Corruption Probe", *The New York Times* (13 May 2015).

accepting \$3.9 million in bribes in exchange for privileged license plates.<sup>86</sup> In the same month, a New Jersey cardiologists' practice agreed to pay \$3.6 million to settle allegations that it had falsely billed federal health care programs for medically unnecessary tests.<sup>87</sup>

In March 2016, the South African Supreme Court ruled that President Jacob Zuma had breached the constitution by failing to pay back the \$23 million of taxpayers' money he had used to upgrade his private residence. He had used the money to fund additions to his home in Nkandla including a cattle enclosure, an amphitheatre, a swimming pool, a visitor centre and a chicken run. Since then, further allegations of corruption against Zuma have surfaced.<sup>88</sup>

In November 2016, JPMorgan Chase agreed to pay \$246 million in fines in a settlement with US officials, for hiring unqualified children of China's ruling elite in exchange for gaining lucrative business.<sup>89</sup> In December 2014, Alstom, a Paris-based company, was ordered to pay \$772 million in criminal penalties to settle charges under the US *Foreign Corrupt Practices Act*. The charges related to \$75 million in bribes paid by Alstom to public officials in Indonesia, Saudi Arabia, Egypt, and the Bahamas in order to win contracts.<sup>90</sup>

In May 2015, four of the world's largest banks (JPMorgan Chase, Citigroup, Barclays, and the Royal Bank of Scotland) pled guilty to systematic rigging of the currency markets for profit between 2007 and 2013. While paying a total of more than \$5 billion in fines, the impact and size of that fine can be put in perspective by noting that JPMorgan Chase earned \$4.1 billion from its currency business in the first quarter of 2015.<sup>91</sup>

In June 2015, Chinese state media reported that Zhou Yongkang, former security czar and former member of the Politburo Standing Committee, was sentenced to life imprisonment

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<sup>86</sup> Hui Zhi, "Beijing: Traffic Cop Made \$2.9 Million Selling Lucky License Plates", *The FCPA Blog* (4 June 2015), online: <<http://www.fcablog.com/blog/2015/6/4/beijing-traffic-cop-made-39-million-selling-lucky-license-pl.html>>.

<sup>87</sup> Richard L Cassin, "New Jersey Cardiologists Pay \$3.6 for False Claims Settlement, Whistleblower Awarded \$650,000", *The FCPA Blog* (4 June 2015), online: <<http://www.fcablog.com/blog/2015/6/4/new-jersey-cardiologists-pay-36-for-false-claims-settlement.html>>.

<sup>88</sup> "Jacob Zuma Corruption Report Blocked in South Africa", *BBC News* (14 October 2016), online: <<http://www.bbc.com/news/world-africa-37655939>>.

<sup>89</sup> Matt Egan, "JP Morgan Fined for Hiring Kids of China's Elite to Win Business", *CNN Money* (17 November 2016), online: <<http://money.cnn.com/2016/11/17/investing/jpmorgan-china-hiring-bribery-settlement/index.html>>.

<sup>90</sup> Richard L Cassin, "Alstom Pays \$772 Million for FCPA Settlement, SFO Brings New Charges" *The FCPA Blog* (22 December 2014), online: <<http://www.fcablog.com/blog/2014/12/22/alstom-pays-772-million-for-fcpa-settlement-sfo-brings-new-c.html>>.

<sup>91</sup> Michael Corkery & Ben Protess, "Rigging of Foreign Exchange Market Makes Felons of Top Banks", *The New York Times* (20 May 2015), online: <<http://www.nytimes.com/2015/05/21/business/dealbook/5-big-banks-to-pay-billions-and-plead-guilty-in-currency-and-interest-rate-cases.html>>.

in a one-day closed trial. Mr. Zhou admitted to accepting a bribe of \$26 million and a similar bribe for his son and daughter. Those bribes only form part of the estimated \$16 billion that Mr. Zhou is said to have pilfered. Mr. Zhou was the most senior Chinese official to be convicted of corruption in an ongoing campaign to reduce corruption by making examples of President Xi Jinping's political rivals, such as Bo Xilai in 2013.<sup>92</sup>

In Brazil, a major corruption scandal has been unfolding since 2014 involving Brazil's state-owned oil company, Petrobras. Brazilian prosecutors allege that bribery and kickback schemes at Petrobras involved about \$2 billion in bribes and illicit funds. The country's biggest construction companies and many individuals have been charged with corruption-related offences over the past year. For example, Petrobras' former engineering director, Renato Duque, was arrested in November 2014 for allegedly taking \$1 million in bribes and \$174,000 worth of art in exchange for favouring one company in a bid for an undersea gas pipeline contract. In June 2015, five senior executives of construction companies were arrested in relation to alleged kickbacks and overbilling schemes between contractors and officials at Petrobras. Petrobras is also pursuing civil lawsuits against engineering and construction firms to recover funds tied to corruption. The former CEO of Petrobras, along with five other executives, resigned in February 2015, and two million people protested across Brazil in response to the scandal in March 2015. More protests against corruption at Petrobras took place in August 2015, with many protestors calling for President Dilma Rousseff to step down. In late August 2015, the speaker of the lower house of congress, Eduardo Cunha, was charged with corruption for allegedly accepting \$5 million in bribes in connection with the construction of two Petrobras drilling ships. In September 2015, the former presidential chief-of-staff was charged with corruption due to his alleged involvement in kickback schemes at Petrobras. Prosecutors also allege that bribe money connected to the Petrobras scandal has made its way to the ruling party's campaign coffers.<sup>93</sup> As of March 2016, the government of Brazil charged 179 people with criminal offences in relation to the scandal and had secured 93 convictions.<sup>94</sup> In May of 2016, President Rouseff was suspended from her position as President in order to face an impeachment trial. In August 2016, by a 61 to 20 vote of the Senate, Rousseff was convicted of manipulating the federal budget in order to conceal the country's financial problems, impeached, and removed from office.<sup>95</sup>

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<sup>92</sup> Nathan Vanderklippe, "Former Chinese Security Czar Jailed for Life", *The Globe and Mail* (12 June 2015). See also Gerry Ferguson, "China's Deliberate Non-Enforcement of Foreign Corruption: A Practice That Needs to End" (2017) 50:3 *Intl Lawyer* 503.

<sup>93</sup> "Brazil's Former Presidential Chief of Staff Charged with Corruption", *The Guardian* (4 September 2015), online: <<http://www.theguardian.com/world/2015/sep/04/brazils-former-presidential-chief-of-staff-charged-with-corruption>>.

<sup>94</sup> Joe Leahy, "What Is the Petrobras Scandal that Is Engulfing Brazil?", *Financial Times* (13 March 2016), online: <<https://www.ft.com/content/6e8b0e28-f728-11e5-803c-d27c7117d132>>.

<sup>95</sup> Simon Romero, "Dilma Rousseff is Ousted as Brazil's President in Impeachment Vote", *The New York Times* (31 August 2016), online: <<http://www.nytimes.com/2016/09/01/world/americas/brazil-dilma-rousseff-impeached-removed-president.html>>.

Since Brazil's new president, Michel Temer, and his conservative government have come into power, another scandal came to light. Brazilian police launched an investigation into fraudulent investments made by large pension funds of state-run companies whose board members were appointed by politicians. The pension funds implicated in the investigation controlled 280 billion reais (approximately US\$87 billion) in assets in 2015, and the fraud scheme was valued at approximately 8 billion reais (approximately US\$2.5 billion). Many of the politicians under investigation are those who were already under investigation in connection with the Petrobras scandal.<sup>96</sup> Eight of the ten cases upon which the investigation is based involved allegedly fraudulent or reckless investments made by the companies' equity investment divisions.<sup>97</sup> Forty senior financiers and executives were ordered to temporarily step down from their positions, abstain from capital market activity, and forfeit their passports.<sup>98</sup> The most noteworthy of such executives is the chief executive of JBS, the world's largest beef exporter.<sup>99</sup>

And nearly the whole world knows about the corruption charges laid against senior FIFA officials by the US.<sup>100</sup> FIFA officials were indicted based on allegations that they took part in accepting bribes and kickbacks over the course of 24 years. The officials were alleged to have accepted bribes in relation to past bidding processes for hosting rights and in the awarding of broadcasting and marketing rights for various tournaments. The US trial date was tentatively set to begin in February, 2017. Former FIFA President Sepp Blatter, resigned just four days after his re-election in June 2015 because of the allegations of corruption. Blatter, who is not facing charges in the US, said that he will defend FIFA in the US trial.<sup>101</sup> In March 2016, FIFA filed a victim statement and request for restitution. In the restitution claim, FIFA argues that its organization as a whole was not corrupt, but rather only its leaders were. As such, it claims that some of the \$290 million seized or frozen by US prosecutors should be used to compensate the victims of the corruption: FIFA and its member associations.<sup>102</sup> In October of 2016, former Costa Rican soccer federation president and member-elect to FIFA's

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<sup>96</sup> Anthony Boadle, "Brazil's New Government Buffeted by Pension Fund Scandal", *Reuters* (6 September 2016), online: <<http://www.reuters.com/article/us-brazil-corruption-idUSKCN11C2JK>>.

<sup>97</sup> Julia Leite and Gerson Freitas Jr, "Brazil's Biggest Pension Funds Targeted in New Fraud Probe", *Bloomberg* (5 September 2016), online: <<https://www.bloomberg.com/news/articles/2016-09-05/police-target-brazil-s-four-biggest-pension-funds-in-fraud-probe>>.

<sup>98</sup> Cesar Raizer, "JBS CEO Ordered to Step Aside in Brazil Pension Fund Probe", *Reuters* (7 September 2016), online: <<http://www.reuters.com/article/us-brazil-corruption-pensions-idUSKCN11B14G>>.

<sup>99</sup> Boadle, (6 September 2016).

<sup>100</sup> For a more detailed account and analysis of the FIFA corruption scandal, see Bruce W Bean, "An Interim Essay on FIFA's World Cup of Corruption: The Desperate Need for International Corporate Governance Standard at FIFA" (2016) 22:2 *ILSA J Intl & Comp L* 367.

<sup>101</sup> Carl Markam, "Sepp Blatter Will Defend FIFA in Corruption Trial as 39 Executives and Officials Face Charges by American Prosecutors", *Mail Online* (15 April 2016), online: <<http://www.dailymail.co.uk/sport/football/article-3542736/Sepp-Blatter-defend-FIFA-corruption-trial-39-executives-officials-face-charges-American-prosecutors.html>>.

<sup>102</sup> Alex Johnson, "FIFA Demands Millions in Restitution from U.S. – For its Own Misdeeds", *NBC News* (16 March 2016), online: <<http://www.nbcnews.com/storyline/fifa-corruption-scandal/fifa-demands-millions-restitution-u-s-its-own-misdeeds-n540456>>.

executive committee, Eduardo Li, plead guilty in a federal court in Brooklyn to charges in connection with the FIFA scandal. He admitted to accepting hundreds of thousands of dollars in bribes for awards of contracts for media, marketing, and sponsorship rights. He also admitted to accepting bribes in connection to friendly matches and admitted to embezzling \$90,000 sent by FIFA to the Costa Rican soccer federation for the 2014 Under 17 FIFA Women's World Cup tournament. So far, Li was among 17 people and 2 entities who plead guilty to charges in connection with the FIFA investigation.<sup>103</sup>

In Switzerland, authorities are probing the possibility of corruption in the bidding process for the upcoming World Cups in Qatar (2022) and Russia (2018). According to Domenico Scala, the chairman of FIFA's compliance and audit committee, Qatar and Russia could be denied the opportunity to host the World cup if evidence of bribery in the bidding process comes to light. In June, 2015, Switzerland announced they were investigating 53 "suspicious activity reports" in respect to the possible laundering of bribes in connection to the hosting of the Russia and Qatar World Cups. Sepp Blatter, who is a Swiss citizen, is involved in this investigation. By September 2015, Swiss Attorney General, Michael Lauber, stated that 121 suspicious banking transactions were being investigated. Since then, a spokesman for the Attorney General's office has stated that the number of incidents under investigation had surpassed 200. Swiss officials have estimated that the case will not proceed to trial until at least the end of 2020.<sup>104</sup> Former UEFA President Michel Platini was initially expected to succeed Blatter as President of FIFA, but that was prevented as he is under investigation by Swiss authorities in regard to a \$200,000 payment he received from Sepp Blatter in 2011.<sup>105</sup> Gianni Infantino, former General Secretary of UEFA, took over for Blatter as President of FIFA since his election in February 2016.<sup>106</sup>

And elsewhere, the Panama Papers prompted widespread shock and concern about tax evasion, laundering of proceeds of corruption, and other secretive financial dealings facilitated by offshore accounts and shell companies. In 2014, Bastian Obermayer, a journalist with the German newspaper *Suddeutsche Zeitung*, received an anonymous telephone call. Shortly thereafter, Bastian Obermayer and his colleague Frederik Obermaier received the 11.5 million documents that are now known as the Panama Papers.<sup>107</sup> The leaked documents came from the Panamanian law firm Mossack Fonseca, which specializes in secretive

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<sup>103</sup> Nate Raymond, "Ex-Costa Rican Soccer Chief Li Pleads Guilty in U.S. Bribery Case", *Reuters* (7 October 2016), online: <<http://www.reuters.com/article/soccer-fifa-court-idUSL2N1CD1O3>>.

<sup>104</sup> Vivek Chaudhary, "FIFA Investigation Could Take Five Years – Swiss Attorney General", *ESPN FC* (2 December 2015), online: <<http://www.espnfc.us/blog/fifa/243/post/2736523/fifa-investigation-could-take-five-years-swiss-ag>>.

<sup>105</sup> Bruce W Bean, "An Interim Essay on FIFA's World Cup of Corruption: The Desperate Need for International Corporate Governance Standard at FIFA" (2016) 22:2 *ILSA J Intl & Comp L* 367 at 385.

<sup>106</sup> *Ibid* at 392.

<sup>107</sup> Paul Farhi, "'Hello. This is John Doe': The mysterious message that launched the Panama Papers", *The Washington Post* (6 April 2016), online: <[https://www.washingtonpost.com/lifestyle/style/hello-this-is-john-doe-the-mysterious-message-that-launched-the-panama-papers/2016/04/06/59305838-fc0c-11e5-886f-a037dba38301\\_story.html](https://www.washingtonpost.com/lifestyle/style/hello-this-is-john-doe-the-mysterious-message-that-launched-the-panama-papers/2016/04/06/59305838-fc0c-11e5-886f-a037dba38301_story.html)>

offshore banking for the wealthy.<sup>108</sup> The International Consortium of Investigative Journalists (ICIJ) managed a team of 370 journalists from roughly 100 media organizations across 70 countries, which finally published the first coverage of the Panama Papers in April of 2016.<sup>109</sup> Of course, not all offshore accounts are used for illegal activities, but because of their secrecy they are often used for money laundering, hiding the proceeds of bribery, and tax evasion.<sup>110</sup> Evidence in the Panama Papers of legal, but perhaps immoral, tax avoidance has prompted backlash against some of the world's most powerful and wealthy individuals and companies. Internationally, the revelations in the Panama Papers instigated proposals for tax reform and calls for sanctions against countries that operate as tax havens.

The Panama Papers contain information about a multitude of politicians such as Ukrainian President Petro Poroshenko and King Salman of Saudi Arabia. Russian President Vladimir Putin's associates and family members of Chinese President Xi Jinping are also mentioned.<sup>111</sup> On April 5, 2016, Sigmundur David Gunnlaugsson stepped down from his position as Prime Minister of Iceland in response to protests following the release of the Panama Papers. The documents showed that Gunnlaugsson's wife owned an offshore company that held millions of dollars in debt from collapsed Icelandic banks.<sup>112</sup> Shortly after he took over as President of FIFA, Gianni Infantino became the subject of an investigation by the Swiss Federal Police because the Panama Papers included a contract signed years earlier by Infantino when he was at UEFA. The contract suggests that Infantino may have sold broadcast rights below market price only to have them sold later at a far higher price.<sup>113</sup> While serving as Prime Minister of the United Kingdom, David Cameron came under scrutiny because the Panama Papers revealed that his late father owned an offshore investment fund called Blairmore Holdings. While he initially denied having profited from the investments, on April 7, 2016, Cameron admitted that he had sold shares in the company for more than £30,000 shortly before becoming Prime Minister. Although there is no suggestion that the fund facilitated any illegal activity, Cameron's lack of transparency was criticized.<sup>114</sup> The Papers further revealed that three of Pakistani Prime Minister Nawaz Sharif's children owned offshore assets not included on his family's wealth statement.<sup>115</sup> On November 3, 2016, the highest court of Pakistan appointed a commission to investigate Sharif's finances after months of disagreement between Pakistan government and opposition

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<sup>108</sup> Kirk Semple, Azam Ahmed & Eric Lipton, "Leaks Casts Light on Law Firm Built on Secrecy", *The Globe and Mail* (8 April 2016).

<sup>109</sup> Farhi (2016).

<sup>110</sup> Frank Jordans & Raf Casert, "EU Threatens to Sanction Tax Havens", *The Globe and Mail* (8 April 2016).

<sup>111</sup> Farhi (2016).

<sup>112</sup> Ragnhildur Sigurdardottir, "Iceland Appoints New Prime Minister", *The Globe and Mail* (7 April 2016).

<sup>113</sup> Brian Homewood, "Infantino Subject of UEFA Office Raid", *The Globe and Mail* (7 April 2016).

<sup>114</sup> "David Cameron Had Stake in Father's Offshore Fund", *BBC News* (7 April 2016), online: <<http://www.bbc.com/news/uk-politics-35992167>>.

<sup>115</sup> "Panama Papers: Pakistan PM Nawaz Sharif to face investigators", *BBC News* (20 April 2017), online: <<http://www.bbc.com/news/world-asia-36092356>>.

party as to the terms of reference for the commission.<sup>116</sup> The Panama Papers also revealed that entrepreneurs and corrupt public officials in several African countries such as Nigeria, Algeria, and Sierra Leone used shell companies to hide profits from the sale of natural resources and to hide bribes paid in order to gain access to the resources.<sup>117</sup>

In other financial news, the US corruption case against Och-Ziff Capital Management, a major hedge fund company, was settled in September 2016. The corruption perpetrated by the hedge fund involved payments of bribes totaling over \$100 million to officials in Congo, Libya, Chad, Niger, and Guinea to gain influence and obtain mining assets. In the terms of the settlement, Och-Ziff, which manages \$39 billion, agreed to pay \$412 million in criminal and civil penalties. This payment was one of the largest that has been approved under the United States' *Foreign Corrupt Practices Act*.<sup>118</sup> And, in January 2017, the SEC filed a civil complaint against two former executives of Och-Ziff in respect to the abovementioned bribery schemes.<sup>119</sup>

Significant controversy has also surrounded the 1MDB affair. 1MDB is a Malaysian state investment firm launched in 2009, the same year that Najib Razak became Prime Minister of Malaysia. The fund was supposed to be used to increase economic development in the country. By 2014, the company was over US\$11 billion in debt. In 2015, information surfaced about a suspicious \$700 million payment into Najib's bank accounts made in 2013. This information led to investigations into 1MDB in at least six countries. Najib claimed that the transfer was a legal donation from a Saudi benefactor.<sup>120</sup>

On July 20, 2016, the United States Department of Justice filed lawsuits alleging that between 2009 and 2015 over \$3.5 billion had been taken from the fund by officials of 1MDB and their associates.<sup>121</sup> The lawsuits outline three separate phases of the theft. The first \$1 billion was allegedly obtained fraudulently through a fictitious joint venture between 1MDB and PetroSaudi. The following two phases focus on \$2.7 billion in funds that Goldman Sachs

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<sup>116</sup> Will Fitzgibbon, "Pakistan's PM Responds to Supreme Court Hearing on Panama Papers", *ICIJ* (3 November 2016), online: <<https://panamapapers.icij.org/20161103-pakistan-supreme-court.html>>.

<sup>117</sup> Scott Shane, "Panama Papers Reveal Wide Use of Shell Companies by African Officials", *The New York Times* (25 July 2016), online: <<http://www.nytimes.com/2016/07/25/world/americas/panama-papers-reveal-wide-use-of-shell-companies-by-african-officials.html>>.

<sup>118</sup> Geoffrey York, "Bribe to Congolese Officials Revealed in U.S. Corruption Case", *The Globe and Mail* (30 September 2016), online: <<http://www.theglobeandmail.com/news/world/bribe-to-congolese-officials-revealed-in-us-corruption-case/article32195819/>>.

<sup>119</sup> Richard L Cassin, "SEC Charges Two 'Masterminds' behind Och-Ziff Africa Bribe Scheme", *The FCPA Blog* (26 January 2017), online: <<http://www.fcpablog.com/blog/2017/1/26/sec-charges-two-masterminds-behind-och-ziff-africa-bribe-sch.html>>.

<sup>120</sup> "Thick and Fast: America Applies to Seize Assets Linked to a Malaysian State Investment Firm", *The Economist* (23 July 2016), online: <<http://www.economist.com/news/finance-and-economics/21702481-america-applies-seize-assets-linked-malaysian-state-investment-firm-thick>>.

<sup>121</sup> *Ibid.*

raised and diverted into a Swiss offshore company and a Singapore bank account.<sup>122</sup> The proceedings commenced by the US Justice Department sought to seize over \$1 billion in assets including luxury properties, art by Van Gogh and Monet, and a jet. The money from 1MDB was also reportedly used to finance production of the film “Wolf of Wall Street.” The production company that made the movie was cofounded by Najib Razak’s stepson, Riza Aziz. Among the several individuals mentioned in the lawsuit is a high-ranking Malaysian official who is called “Malaysian Official 1” and identified as a relative of Riza Aziz.<sup>123</sup> This individual is presumed to be Prime Minister Najib Razak.<sup>124</sup> The US proceedings that started in July of 2016 only concern seizure of assets. Criminal charges against the individuals involved may follow.<sup>125</sup> As of December 2016, US authorities were investigating Goldman Sachs’ role in the scandal. Goldman has maintained that it believed the funds were used to buy legitimate assets for 1MDB.<sup>126</sup>

Authorities in Switzerland and Singapore undertook separate investigations into the 1MDB scandal. On July 21, 2016, Singapore authorities reported having frozen or seized approximately \$175 million in its investigations into transactions linked to 1MDB. They also announced forthcoming proceedings against three large Singapore banks for their inadequate attempts to prevent money-laundering.<sup>127</sup> In Switzerland, authorities launched an investigation into whether or not Swiss banks were used to misappropriate funds diverted from 1MDB. In October of 2016, Switzerland’s Office of the Attorney General announced that a Ponzi scheme may have concealed the alleged fraud.<sup>128</sup>

Although not strictly a case of corruption, the recent scandal involving Volkswagen’s fraudulent avoidance of state emission standards is noteworthy. In September 2015, the US Environmental Protection Agency learned that Volkswagen sold innocent Americans cars equipped with special software that would automatically cheat emissions tests.<sup>129</sup> In June 2016, Volkswagen agreed to spend approximately \$14.7 billion in order to resolve federal and state civil allegations. However, the US Department of Justice stated that the settlement would not eliminate the possibility of Volkswagen being held criminally liable for its

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<sup>122</sup> Randeep Ramesh, “1MDB: The Inside Story of World’s Biggest Financial Scandal”, *The Guardian* (28 July 2016), online: <<https://www.theguardian.com/world/2016/jul/28/1mdb-inside-story-worlds-biggest-financial-scandal-malaysia>>.

<sup>123</sup> *The Economist* (23 July 2016).

<sup>124</sup> Ramesh (28 July 2016).

<sup>125</sup> *The Economist* (23 July 2016).

<sup>126</sup> Nathaniel Popper & Matthew Goldstein, “1MDB Case Hangs over Goldman Sachs as Investigators Dig for Answers”, *The New York Times* (22 December 2016), online: <<http://www.nytimes.com/2016/12/22/business/dealbook/1mdb-goldman-sachs.html>>.

<sup>127</sup> *The Economist* (23 July 2016).

<sup>128</sup> Joshua Franklin & Saeed Azhar, “Swiss Prosecutors Probe Suspected \$800 Million Misappropriation from Malaysia’s 1MDB”, *Reuters* (5 October 2016), online: <<http://in.reuters.com/article/malaysia-scandal-swiss-idINKCN1250R5>>.

<sup>129</sup> Russell Hotten, “Volkswagen: The Scandal Explained”, *BBC News* (10 December 2015), online: <<http://www.bbc.com/news/business-34324772>>.

actions.<sup>130</sup> Indeed, on January 11, 2017, Volkswagen AG agreed to plead guilty to three felony counts and agreed to pay a \$2.8 billion criminal penalty. In addition, a grand jury indicted six VW executives and employees for their roles in the emission standards fraud.<sup>131</sup>

### 3. DRIVERS OF CORRUPTION

Sorting out the causes of corruption is a complicated task. In their book *Corruption: Economic Analysis and International Law*, Arnone and Borlini note that “[a]ny attempt to isolate and distinguish causes [of corruption] from effects suffers from the limitations imposed by the presence of multi-directional causal chains.”<sup>132</sup> For example, although bad governance has been shown to contribute to corruption, corruption can also contribute to bad governance.

Some factors that enable or drive corruption can, however, be articulated. A good starting point is Arnone and Borlini’s observation that discretion and conflict of interest are the breeding grounds for corruption. Bad governance can strengthen the presence of these “preconditions.” If lack of accountability is added to the mix, particularly where officials have “monopoly power over discretionary decisions,” opportunities for corruption will be rife.<sup>133</sup> Complex and opaque systems of rules tend to foster this lack of accountability, along with insufficient stigma and enforcement surrounding corruption offences.

In a study for the World Bank entitled *Drivers of Corruption*, Soreide enumerates other, more specific drivers of corruption.<sup>134</sup> She begins by describing factors which increase opportunities for “grabbing” by public officials. When officials have the power to control the supply of scarce goods or services, opportunities to create shortages and demand high payments will increase. This is particularly problematic if citizens cannot choose between officials. Soreide maintains that facilitation of financial secrecy and secret ownership also drives corruption, along with information imbalances between principals and agents. For example, principals might not be informed regarding corruption in foreign markets, leaving openings for agents to exploit this ignorance by promoting bribery and pocketing a portion of the proceeds. Soreide also points out that revenues from natural resource exports and

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<sup>130</sup> Richard L Cassin, “VW’s \$14.7 Billion Compliance Failure: Deal Announced to Settle U.S. Civil Emission Claims”, *The FCPA Blog* (28 June 2016), online: <<http://www.fcpablog.com/blog/2016/6/28/vws-147-billion-compliance-failure-deal-announced-to-settle.html>>.

<sup>131</sup> Richard L Cassin, “Volkswagen Pleads Guilty in U.S. Criminal Case, Six VW Employees Indicted”, *The FCPA Blog* (11 January 2017), online: <<http://www.fcpablog.com/blog/2017/1/11/volkswagen-pleads-guilty-in-us-criminal-case-six-vw-employee.html>>.

<sup>132</sup> Arnone & Borlini (2014) at 4.

<sup>133</sup> *Ibid* at 21.

<sup>134</sup> Tina Soreide, *Drivers of Corruption* (World Bank, 2014) at 9–38.

development aid are vulnerable to grabbing. In the context of aid development, both donor and recipient countries contribute to misuse of aid funds:<sup>135</sup>

The more urgent the development needs, the more the aid-offering entity pays, and the weaker the recipient government's incentives to perform better, because better performance will eventually cut the level of aid received. The desire to offer financial and other forms of support is particularly strong in emergency situations and in the most-fragile states...Such sets of circumstances are vulnerable to theft and corruption because oversight systems are weak and funds pour in from many sources, continuing as long as the needs are dire.

...

Many authors have pointed at incentive problems of donor agencies, and there are a number of examples where representatives of donor agencies have been involved in illegal transactions or activities that violate their organization's rules and the recipient country's legislation. Although donor agencies are aware of the potentially troubling impact of such cases on the legitimacy of their operations, they, like other bureaucracies, have encountered difficulties eradicating the challenges completely and handling revealed cases of fraud and corruption effectively. ... Jansen [2014] explains a donor-government's disincentive to react partly as a trade-off between the cost of exercising control and the ease of referring to recipient responsibilities. Among the factors is the low propensity among donor representatives to procure independent reviews and audits of aid-financed projects and programs. Sometimes these are driven by the need to seize opportunities for new projects...this tendency is intensified by heavy workloads and "pipeline problems"; that is, when funds have to be allocated within the timeframe of a financial year regardless of the status of preparatory work or controls. [footnotes omitted]

Soreide moves on to consider the factors that encourage people to exploit opportunities for corruption. Included are lack of sanction for individuals or organizations, widespread tolerance, condonement by management, lack of protection for whistleblowers and the failure of political systems and their accountability safeguards.

In his article "Eight Questions about Corruption" (discussed in Section 5), Svensson points out that the countries with the highest levels of corruption according to corruption ranking results are those with low income and developing, and closed and transition economies.<sup>136</sup>

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<sup>135</sup> *Ibid* at 19.

<sup>136</sup> Jakob Svensson "Eight Questions About Corruption" (2005) 19 J Econ Perspectives 19, online: <<http://kie.vse.cz/wp-content/uploads/Svensson-2005.pdf>>.

In his book *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa*, Hatchard discusses the root causes of widespread corruption in Africa:<sup>137</sup>

Many writers have sought to explain the bad governance/corruption phenomenon in Africa. Blundo has argued that the colonial legacy was instrumental in creating a climate of corruption: here the new elite simply copied the example from their former colonial masters,<sup>138</sup> although Atyithey argues against this thesis going as far as to accuse Africans of ‘carping’ about colonial exploitation.<sup>139</sup> Others have linked bad governance with the development of opportunities for corruption. For example, Collier attributes this to four factors: overregulation of private activity; expanded public sector employment; expanded public procurement; and weakened scrutiny.<sup>140</sup> To these may be added issues such as increased access to development aid, privatization programmes, and the ability to launder the proceeds of corruption through the international financial system quickly and efficiently.<sup>141</sup>

Allen has argued that the constitutional models adopted by the Anglophone and Francophone African states at independence concentrated undue political power in the hands of the Executive and that this resulted in weak accountability mechanisms.<sup>142</sup> This power was then enhanced and further entrenched by the establishment of a one-party system in many states and often largely retained despite a return to multi-party democracy and the making of new constitutions.<sup>143</sup> This argument is taken up by Radithokwa who blames the spread of corruption almost solely on a crisis of leadership, accusing African leaders of a lack of self-discipline<sup>144</sup> and a resultant ‘crisis

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<sup>137</sup> John Hatchard, *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* (Edward Elgar, 2014) at 16–17.

<sup>138</sup> [27] Giorgio Blundo and Jean-Pierre Olivier de Sardan *Everyday Corruption and the State: Citizens and Public Officials in Africa*, ZedPress, London, 2006.

<sup>139</sup> [28] George Ayittey *Africa Betrayed* 1994, Macmillan, London, p. 13.

<sup>140</sup> [29] Paul Collier ‘How to Reduce Corruption’ (2000) 12(2) *African Development Review*, 191 at 194.

<sup>141</sup> [30] See also an interesting analysis by Wonbin Cho ‘What are the origins of corruption in Africa? Culture or Institution?’ Paper presented at the 2009 International Studies Association convention.

<sup>142</sup> [31] Chris Allen ‘Understanding African Politics’ (1995) 22 *Review of African Political Economy*, 301–20.

<sup>143</sup> [32] See further the discussion in Chapter 5, p. 107.

<sup>144</sup> [33] L Radithokwa ‘Corruption in Africa: A function of the Crisis of Leadership’, in K Frimpong and G Jacques (eds) *Corruption, Democracy and Good Governance in Africa* Gaborone, Lightbooks, 1999, 49–55.

in leadership'<sup>145</sup> leading to dysfunctional or failed institutions which facilitates the abuse of governmental power.<sup>146</sup>

Hatchard also explains some motives behind the corrupt acts of public officials. First on the list is financial gain, followed by the belief that corruption will not be prosecuted. Next, Hatchard describes the “[p]ressure to carry out or condone the activity” when lower-level officials are threatened or bribed into assisting the corrupt acts of higher level officials.<sup>147</sup> The presence of traditional gift-giving practices can also motivate corrupt practices, along with the standard business practice of “[b]ona fide payments to public officials, such as gifts or hospitality, provided by a company in order to promote its image.”<sup>148</sup> The desire to circumvent inefficient bureaucracy, through facilitation payments, for example, also motivates corruption.

## 4. PERCEPTIONS AND MEASUREMENTS OF CORRUPTION

As pointed out by Graycar and Prenzler, measuring corruption can guide remedial measures and provide “an indicator of how well a society is performing in terms of a government’s contract with its citizens.”<sup>149</sup> However, measuring corruption is challenging due to the lack of a uniform definition and the covert nature of corruption. A variety of methods deal with these problems in different ways. Measurements might address the level of risk of corruption, or the extent of actual corruption using various indicators, or the cost of corruption. Measurement might require creative techniques; for example, to reveal the amount of aid funding that had been skimmed in road-building projects in Indonesia, Benjamin Olken dug up chunks of road and measured the difference between funding and amounts of materials actually used. Because of the inevitable uncertainty involved in any one measurement method, Graycar and Prenzler recommend that measurements “triangulate as many indicators as possible.”<sup>150</sup>

### 4.1 Commonly-Cited Indexes of Corruption

#### (i) Transparency International’s Indexes

Transparency International is the world’s largest anti-corruption NGO. TI has been very influential in raising the profile of the problem of corruption, in part through its research

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<sup>145</sup> [34] Kempe R Hope and Bornwell C Chikulo (eds) *Corruption and Development in Africa: Lessons from Country Case-Studies* Basingstoke, Macmillan, 2000.

<sup>146</sup> [35] See Migai Akech ‘Abuse of Power and Corruption in Kenya’ (2011) 18 (1) *Ind J Global Leg Stud*, 341 at 342.

<sup>147</sup> Hatchard (2014) at 18.

<sup>148</sup> *Ibid* at 19.

<sup>149</sup> Graycar & Prenzler (2013) at 34.

<sup>150</sup> *Ibid* at 44.

and surveys regarding the prevalence of corruption-related activities worldwide. The three main indexes and surveys published by TI are the Corruption Perceptions Index (the “CPI”), the Global Corruption Barometer (the “GCB”) and the Bribe Payers Index (the “BPI”).

**(a) The Corruption Perceptions Index<sup>151</sup>**

The CPI is the most commonly cited corruption index worldwide. As its title indicates, the CPI measures perceptions rather than actual rates of corruption. The index is an aggregate of a variety of different data sources. It reports on levels of public sector corruption, as perceived by businesspersons and country experts who deal with the country in question. Despite some limitations, it is generally acknowledged as a reliable, though not precise, indicator of public sector corruption levels. The CPI is published annually and its release gets significant media attention. The 2017 edition includes information on 180 countries and territories. Denmark and New Zealand, closely followed by Finland and Norway, topped the list with the lowest levels of perceived corruption, while Somalia, South Sudan, Syria and Afghanistan had the highest perceived corruption levels.

**Discussion Question:**

(1) Where did the USA, UK and Canada place?

[see 2017 CPI under the heading ‘Results’ to answer this question]

**(b) The Global Corruption Barometer<sup>152</sup>**

The GCB measures both lived experiences with corruption and perceptions on corruption amongst the general public. According to TI, it is the world’s largest survey on public opinion on corruption. The 2013 edition included responses from citizens in 107 countries. It asked respondents questions regarding both their experiences with corruption in major public services and their perceptions on items such as the effectiveness of government efforts to control corruption and corruption trends and rates. The GCB is published every few years. The survey indicates that more than one in four people worldwide (25%) report having paid a bribe to a major public institution. This increases to more than three out of every four people (75%) in countries such as Sierra Leone and Liberia. In comparison, only one percent of people in countries such as Japan, Denmark and Finland report having done so.

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<sup>151</sup> Transparency International, *Corruption Perceptions Index 2017*, online: <[http://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2017](http://www.transparency.org/news/feature/corruption_perceptions_index_2017)>.

<sup>152</sup> Transparency International, *Global Corruption Barometer 2013*, online: <<http://www.transparency.org/gcb2013>>.

Over the course of 2015-2017, Transparency International has been releasing the 2015/2016 edition of the Global Corruption Barometer, which is now being presented in the context of five regional surveys covering Sub-Saharan Africa, the Middle East and North Africa, Asia Pacific, and Americas.<sup>153</sup> The first four regional surveys have already been made available.<sup>154</sup> They show, in particular, that in Europe and Central Asia bribery rates vary considerably between the countries of the region. For instance, while 0% of households in the United Kingdom reported paying a bribe when accessing basic services, this figure was as high as 42% in Moldova and 50% in Tajikistan.<sup>155</sup>

### Discussion Questions:

- (1) What percentage of people in the USA, UK and Canada reported paying a bribe to the 8 public institutions surveyed (including political parties, the police and the judiciary)?
  - (2) Does the public perception of bribery (Table 2) appear to be higher or lower than the public report of bribery (Table 1) in the USA, UK, Canada and New Zealand?
  - (3) Compare and contrast the public perception in the USA, UK, Canada and Denmark of the degree of corruption in each of the 12 public institutions surveyed.
- [see 2013 GCB, Appendix C under the heading 'Report' to answer these questions]

### (c) The Bribe Payers Index<sup>156</sup>

The BPI is based on a TI survey of business executives in thirty of the countries around the world that are most heavily involved in receiving imports and foreign investment. The index is not published on a regular schedule. The 2011 survey focuses on the supply side of bribery and measures perceptions on how often foreign companies from the largest economies engage in bribery while conducting business abroad versus at home. This edition focused on firms in 28 countries and of the countries surveyed, Chinese and Russian companies were perceived as the most

<sup>153</sup> Transparency International, *Global Corruption Barometer 2015/2016*, online: <[http://www.transparency.org/research/gcb/gcb\\_2015\\_16/0/](http://www.transparency.org/research/gcb/gcb_2015_16/0/)>.

<sup>154</sup> Transparency International, *People and Corruption: Africa Survey 2015* (December 2015), online: <[https://www.transparency.org/research/gcb/gcb\\_2015\\_16](https://www.transparency.org/research/gcb/gcb_2015_16)>; Transparency International, *People and Corruption: Middle East and North Africa Survey 2016* (May 2016), online: <[http://www.transparency.org/whatwedo/publication/people\\_and\\_corruption\\_mena\\_survey\\_2016](http://www.transparency.org/whatwedo/publication/people_and_corruption_mena_survey_2016)>; Transparency International, *People and Corruption: Europe and Central Asia 2016* (November 2016), online: <<http://www.transparency.org/whatwedo/publication/7493>>.

<sup>155</sup> Transparency International, *People and Corruption: Europe and Central Asia 2016* (November 2016), at 16-18.

<sup>156</sup> Transparency International, *Bribe Payers Index 2011*, online: <<http://www.transparency.org/bpi2011>>.

likely to engage in bribery while doing business abroad while firms from the Netherlands and Switzerland were perceived as the least likely to do so. The results are also categorized by sector. The public works construction sector was perceived as the industry sector most likely to involve bribes.

**Discussion Questions:**

(1) What is the perception of business persons as to the frequency of companies from the USA, UK and Canada engaging in foreign bribery?

(2) Does it appear that companies in the USA, UK, Canada and Singapore engage in more or less bribery at home (based on CPI score) than abroad (based on BPI)?

[see 2011 BPI under the heading 'Results' to answer these questions]

**(ii) The World Bank's Worldwide Governance Indicators Project<sup>157</sup>**

The Worldwide Governance Indicators project (WGI) reports on six indicators of good governance, one of which is control of corruption. The WGI is an aggregate of data from a large number of surveys conducted between 1996 and 2015, and includes data on more than 200 countries and territories. The WGI may be used to compare data over time or between countries. The Control of Corruption Indicator measures perceptions of the extent to which public power is exercised for private gain.

In August 2013, the Hertie School of Governance released a report titled "Global Comparative Trend Analysis Report."<sup>158</sup> The report, using data from the World Bank's control of corruption indicator, compares control of corruption scores among eight world regions in the period between 1996 and 2011. The regions of North America, Western Europe and Oceania were consistently ranked as the leading regions in controlling corruption. Few countries showed significant change in their control of corruption scores over the fifteen-year period.

**Discussion Questions:**

(1) Do you think countries with the best scores in the CPI also score best in terms of "control of corruption" in the World Bank's WGI?

<sup>157</sup> World Bank, Governance Indicators Project, online: <http://info.worldbank.org/governance/wgi/>.

<sup>158</sup> Roberto Martinez, Barranco Kututschka & Bianca Vaz Mondo, "Global Comparative Trend Analysis Report", ed by Alina Mungiu-Pippidi (Hertie School of Governance, 2013), online: <http://anticorrrp.eu/publications/global-comparative-trend-analysis-report/>.

(2) For example, compare the USA, UK, Canada, South Africa and Indonesia on the two different ratings projects (first look up the 2015 or 2017 CPI score for the above countries and then look at the 2015 WGI control of corruption score for each country).

[see WGI under 'Interactive data access' to answer these questions]

### (iii) Freedom House Publications

Freedom House is a US-based watchdog organization committed to promoting democracy and political and civil liberties globally. It publishes a number of research reports and publications relating to indicators of good democratic governance. Two major publications which deal specifically with corruption are *Nations in Transit* and *Countries at the Crossroads*.

#### (a) *Nations in Transit*

*Nations in Transit* is an annually published report that studies the reforms taking place within 29 of the former communist countries of Europe and Eurasia. The report covers seven categories relating to democratic change, one of which is corruption. Its corruption index reflects “public perceptions of corruption, the business interests of top policymakers, laws on financial disclosure and conflict of interest, and the efficacy of anti-corruption initiatives.”<sup>159</sup>

#### (b) *Countries at the Crossroads*

*Countries at the Crossroads*, published between 2004 and 2012, was an annual publication examining government performance in 70 countries at a crossroads in determining their political future. Its anticorruption and transparency section included four measurements:

- a) environment to protect against corruption (bureaucratic regulations and red tape, state activity in economy, revenue collection, separation of public and private interests, and financial disclosure);
- b) anticorruption framework and enforcement (anticorruption framework and processes, anticorruption bodies, prosecution);
- c) citizen protections against corruption (media coverage; whistleblower protection; redress for victims, and corruption in education); and

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<sup>159</sup> Freedom House, *Nations in Transit 2016: Europe and Eurasia Brace for Impact* (2016), online: <[https://freedomhouse.org/sites/default/files/FH\\_NIT2016\\_Final\\_FWeb.pdf](https://freedomhouse.org/sites/default/files/FH_NIT2016_Final_FWeb.pdf)> and *Nations in Transit 2017: The False Promise of Populism* (2017), online: <[https://freedomhouse.org/sites/default/files/NIT2017\\_booklet\\_FINAL\\_0.pdf](https://freedomhouse.org/sites/default/files/NIT2017_booklet_FINAL_0.pdf)>.

- d) governmental transparency (general transparency, legal right to information, budget-making process, expenditure accounting, government procurement, and distribution of foreign assistance).<sup>160</sup>

**(iv) TRACE Matrix**

TRACE International is a non-profit business association, founded in 2001 by in-house anti-bribery compliance experts, that provides its members with anti-bribery compliance support. TRACE Incorporated offers risk-based due diligence, anti-bribery training and advisory services to both members and non-members.<sup>161</sup> In collaboration with the RAND Corporation, TRACE International developed the TRACE Matrix, a global business bribery risk index for compliance professionals, which scores 199 countries in four domains – business interactions with the government, anti-bribery laws and enforcement, government and civil service transparency, and capacity for civil society oversight.<sup>162</sup> Published since 2014, a new edition is released every two years.

**(v) The World Justice Project Rule of Law Index<sup>163</sup>**

The World Justice Project (WJP) is a US-based independent and multidisciplinary organization that seeks to advance the rule of law globally. Its overall Rule of Law Index assesses performance of governments on the basis of 44 indicators organized in eight categories, including absence of corruption in the executive branch, the judiciary, the military and police, and the legislature.<sup>164</sup> The 2016 edition of the WJP Rule of Law Index, which covers 113 countries and territories, places Denmark, Singapore, Norway, Finland and Sweden on top of the list in the “absence of corruption” category.<sup>165</sup>

**4.2 Some Limitations Associated with Corruption Indexes Based on Perceptions**

Although the indexes included above are useful in understanding the prevalence of corruption around the globe, most do not include objective measures of corruption. There is little empirical data measuring corruption. The empirical research that does exist is not well-developed and is generally small in scope. This is because quantifying actual rates of corruption on a large scale is difficult. Objective measures, such as the number of bribery prosecutions, are not reliable indicators; a large number of prosecutions may simply reflect

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<sup>160</sup> Freedom House, *Countries at the Crossroads 2012 – Methodology*, online:

<<https://freedomhouse.org/report/countries-crossroads-2012/methodology>>.

<sup>161</sup> TRACE, “About TRACE”, online: <<https://www.traceinternational.org/about-trace>>.

<sup>162</sup> TRACE, “TRACE Matrix”, online: <<https://www.traceinternational.org/trace-matrix>>.

<sup>163</sup> World Justice Project, “Who We Are”, online: <<http://worldjusticeproject.org/who-we-are>>.

<sup>164</sup> World Justice Project, “Factors”, online: <<http://worldjusticeproject.org/factors>>.

<sup>165</sup> World Justice Project, *Rule of Law Index 2016*, online:

<[http://worldjusticeproject.org/sites/default/files/media/wjp\\_rule\\_of\\_law\\_index\\_2016.pdf](http://worldjusticeproject.org/sites/default/files/media/wjp_rule_of_law_index_2016.pdf)>.

a well-resourced and effective policing system and judiciary rather than a comparatively high prevalence of bribery. Because of the limitations of objective measurements, TI views perceptions of public sector corruption as the most reliable method of comparing levels of corruption across countries.

Despite the convenience and widespread use of perception measurements, indexes such as TI's CPI have also received significant criticisms. There is no guarantee that perceptions of corruption accurately reflect actual rates, and some commentators suggest that perceptions of corruption are not well-correlated with reality. The CPI in particular has been criticized for being western-centric, as it focuses on the perceptions of western business people rather than local lived experiences with corruption (although TI's Global Corruption Barometer does measure the latter).

Comparing perceptions across countries can also be difficult, as people from different regions may have different understandings about what constitutes corruption. For example, some election financing and lobbying activities in Western countries are designed to influence public officials in subtle, implicit ways—and in that sense, are corrupt—yet these practices are not legally defined as corruption.<sup>166</sup>

Perception measurements raise the issue of how corruption is defined. Definitions of corruption are not universally agreed upon and different definitions may produce differing results. Some definitions include many types of corruption while others focus primarily on bribery. The common focus on corruption in public institutions has also been criticized as being western-centric. Corruption is often portrayed as a trans-cultural disease. However, it is important to consider the different cultural contexts in which it exists.

The authors of the major indexes generally caution that results are not definitive indicators of actual corruption and should not be used to allocate development aid or develop country-specific corruption responses. However, with an understanding of their limitations, these index measurements can provide important information about corruption trends around the globe.

For a detailed, multidisciplinary and cross-sectoral examination of corruption research and practice, see Graycar and Smith's *Handbook of Global Research and Practice in Corruption* (Cheltenham, UK: Edward Elgar Publishing, 2011). Chapter 3 (Heinrich and Hodess, "Measuring Corruption") provides an overview of recent developments and trends in measuring corruption. Chapter 4 (Recanatini, "Assessing Corruption at the Country Level") analyzes an alternative approach to measuring corruption, promoted by practitioners at the World Bank, that assesses a country's governance structures and institutions from various perspectives, which are briefly discussed in Section 4.1(ii) above.

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<sup>166</sup> See Garry C Gray, "Insider Accounts of Institutional Corruption: Examining the Social Organization of Unethical Behaviour" (2013) 53 *Brit J Crim* 533.

For further information, see also Andersson and Heywood, "The Politics of Perception: Use and Abuse of Transparency International's Approach to Measuring Corruption" (2009) 57 *Political Studies* 746; United Nations Development Programme and Global Integrity, *A User's Guide to Measuring Corruption* (Oslo: UNDP Oslo Governance Centre, 2008) online: <[http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/a-users-guide-to-measuring-corruption/users\\_guide\\_measuring\\_corruption.pdf](http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/a-users-guide-to-measuring-corruption/users_guide_measuring_corruption.pdf)>.

For a collection of data from the burgeoning field of anti-corruption, see TI's GATEway project, online at: <<http://gateway.transparency.org/>>.

## 5. MORE ISSUES ON MEASURING AND UNDERSTANDING CORRUPTION

In his article "Eight Questions about Corruption," Jakob Svensson reviews literature and data on eight topics involved in understanding corruption.<sup>167</sup> For non-economists and non-statisticians, the data and analysis in Svensson's article are sometimes dense. What follows is a brief summary of Svensson's review. Although based on available data as of 2005, more recent data does not significantly alter the main observations in the article.

### 5.1 What is Corruption?

Svensson notes that the most common definition of public corruption is the misuse of public office for private gain. He also notes that no "definition of corruption is completely clear-cut."<sup>168</sup> The data in his article focuses on public corruption.

### 5.2 Which Countries Are Most Corrupt?

Svensson notes that measuring corruption across countries is challenging because of the secretive nature of corruption and the variety of forms it takes. Svensson then discusses different corruption measurement scales, including:

1. the corruption indicator in the International Country Risk Guide, which measures the likelihood of bribe requests,<sup>169</sup>
2. TI's Corruption Perception Index,<sup>170</sup>

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<sup>167</sup> Svensson (2005).

<sup>168</sup> *Ibid* at 21.

<sup>169</sup> See Political Risk Services for data, online: <<http://epub.prsgroup.com/products/international-country-risk-guide-icrg>>.

<sup>170</sup> Online: <<http://www.transparency.org/cpi2014>>.

3. Kaufmann, Kraay and Mastruzzi's Control of Corruption index (2003),<sup>171</sup>
4. the EBRD-World Bank Business Environment and Enterprise Performance Survey,<sup>172</sup> and
5. the International Crime Victim Surveys, run by UNODC.<sup>173</sup>

Svensson then lists the countries in the bottom ten percent according to each measurement tool.<sup>174</sup>

### 5.3 What are the Common Characteristics of Countries with High Corruption?

Based on the corruption ranking results, Svensson states:<sup>175</sup>

All of the countries with the highest levels of corruption are developing or transition countries. Strikingly, many are governed, or have recently been governed, by socialist governments. With few exceptions, the most corrupt countries have low income levels. Of the countries assigned an openness score by Sachs and Warner (1995), all of the most corrupt economies are considered closed economies, except Indonesia. [footnotes omitted]

Svensson's analysis also shows that richer countries generally have lower corruption. However, corruption levels vary widely across countries even controlling for income. For example, he notes that Argentina, Russia and Venezuela are ranked as relatively corrupt given their level of income. On the other hand, rankings of countries in sub-Saharan Africa often match the expected levels of corruption given their GDP. Svensson notes that levels of income are a stronger predictor of levels of corruption when combined with levels of schooling, forms of governance and freedom of the press.

Rose-Ackerman and Bonnie Palifka also argue that states emerging from conflict are especially susceptible to corruption, making reconstruction challenging.<sup>176</sup> Ackerman and Palifka observe that these postconflict states have many of the factors that create incentive to

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<sup>171</sup> See the World Bank website for data, online:

<[http://info.worldbank.org/governance/wgi/index.aspx - home](http://info.worldbank.org/governance/wgi/index.aspx-home)>.

<sup>172</sup> Online: <<http://ebrd-beeps.com/>>.

<sup>173</sup> Online: <[http://www.unicri.it/services/library\\_documentation/publications/icvs/](http://www.unicri.it/services/library_documentation/publications/icvs/)>.

<sup>174</sup> See Table 1 in Svensson (2005), at 25.

<sup>175</sup> Svensson (2005), at 24.

<sup>176</sup> Susan Rose-Ackerman & Bonnie J Palifka, *Corruption and Government: Cases, Consequences and Reform*, 2d ed (Cambridge University Press, 2016) at 316.

engage in corruption: widespread destruction, weak controls, lack of trust in law enforcement, poverty, and a poorly functioning judiciary.<sup>177</sup>

#### 5.4 What is the Magnitude of Corruption?

Svensson (2005) points out that subjective rankings of countries as more or less corrupt do not quantify the magnitude of corruption. He outlines some past attempts to measure magnitude at the micro level. For example, to determine the magnitude of corruption involved in public education grants in Uganda, Reinikka and Svensson (2004) compared the value of disbursements to each school district with survey data on actual receipts of money and equipment by schools.<sup>178</sup> Price comparisons can also be used to infer the magnitude of corruption. For example, Hsieh and Moretti (2006) analyzed the difference between the official selling price and estimated market price of Iraqi oil to infer the presence of underpricing and kickbacks for the regime.<sup>179</sup>

#### 5.5 Do Higher Wages for Bureaucrats Reduce Corruption?

Svensson (2005) then reviews empirical research on the impact of certain corruption control measures on actual corruption levels. First, Svensson looks at the relationship between higher wages for public servants and corruption. After summarizing several studies, Svensson concludes:

Thus, wage incentives can reduce bribery, but only under certain conditions. This strategy requires a well-functioning enforcement apparatus; the bribe being offered (or demanded) must not be a function of the official's wage; and the cost of paying higher wages must not be too high. In many poor developing countries where corruption is institutionalized, these requirements appear unlikely to hold.<sup>180</sup>

#### 5.6 Can Competition Reduce Corruption?

Svensson (2005) also analyzes data related to the relationship between competition and corruption:

Another common approach to control corruption is to increase competition among firms. One argument is that as firms' profits are driven down by

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<sup>177</sup> *Ibid.* As part of this analysis, Rose-Ackerman and Bonnie Palifka use four case studies: Guatemala, Angola, Mozambique and Burundi. For more, see Chapter 10 of Rose-Ackerman & Palifka (2016).

<sup>178</sup> Reinikka, Ritva and Jakob Svensson, "Local Capture: Evidence from a Central Government Transfer Program in Uganda." (2004) 119:2 Quarterly Journal of Economics. 679.

<sup>179</sup> Hsieh, Chang-Tai and Moretti, Enrico. "Did Iraq Cheat the United Nations? Underpricing, Bribes, and the Oil For Food Program." (2006) 121:4 Quarterly Journal of Economic. 1211.

<sup>180</sup> Svensson (2005) at 33.

competitive pressure, there are no excess profits from which to pay bribes (Ades and Di Tella, 1999). In reality, however, the connections between competition, profits and corruption are complex and not always analytically clear.<sup>181</sup>

For further discussion of this point, see Taylor's article.<sup>182</sup>

According to Svensson, some evidence shows that deregulation does not reduce corruption by increasing competition, but rather by reducing the discretion and power of public officials. Svensson concludes:

A variety of evidence suggests that increased competition, due to deregulation and simplification of rules and laws, is negatively correlated with corruption. But it can be a difficult task to strike the right balance between enacting and designing beneficial rules and laws to constrain private misconduct while also limiting the possibilities that such laws open the door for public corruption (Djankov, Glaeser, La Porta, Lopez-de-Silanes and Shleifer, 2003).<sup>183</sup>

## 5.7 Why Have There Been So Few (Recent) Successful Attempts to Fight Corruption?

Svensson notes that many anti-corruption programs provide resources to existing enforcement institutions. However, these institutions are often corrupt themselves. Svensson states that, "[t]o date, little evidence exists that devoting additional resources to the existing legal and financial government monitoring institutions will reduce corruption."<sup>184</sup> Although Hong Kong and Singapore are considered exceptions, both countries also implemented other wide-ranging reforms in their anti-corruption efforts.

Svensson then lists some alternative approaches to combating corruption, such as turning to private or citizen enforcement, providing citizens with access to information and delegating work to private firms. The issue of designing more effective anti-corruption institutions and practices is further addressed in Section 10 of this chapter.

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<sup>181</sup> *Ibid.*

<sup>182</sup> Alison Taylor argues that a competitive corporate atmosphere encourages corrupt conduct. According to Taylor, the promotion of a "narrative of intense rivalry and urgency" is "an integral part of a corrupt [corporate] culture". Taylor explains that "employees need to be socialized into paying bribes and encouraged to believe that corruption is an inevitable and necessary response to the hard commercial realities." See Alison Taylor, "Does Competition Cause Corruption?", *The FCPA Blog* (22 June 2015), online: <<http://www.fcpablog.com/blog/2015/6/22/alison-taylor-does-competition-cause-corruption.html>>.

<sup>183</sup> Svensson (2005) at 34.

<sup>184</sup> *Ibid* at 35.

## 5.8 Does Corruption Adversely Affect Growth?

Finally, Svensson analyzes findings on the link between corruption and economic growth, pointing out that, “in most theories that link corruption to slower economic growth, the corrupt action by itself does not impose the largest social cost. Instead, the primary social loss of corruption comes from propping up of inefficient firms and the allocation of talent, technology and capital away from their socially most productive uses (Murphy, Shleifer and Vishny, 1991, 1993).”<sup>185</sup> Svensson also describes the potentially adverse effects of corruption on firm growth and the allocation of entrepreneurial skills, as well as impacts on social welfare and, by extension, human capital. For more on the relationship between corruption and economic growth, see Section 1.4 of this chapter.

### Svensson’s Conclusion

Svensson notes that the answers to his eight questions are not clear-cut and he reminds readers of how little we know about many issues concerning corruption. In Svensson’s opinion, there are three areas of particular importance requiring more study:

First and most urgently, scant evidence exists on how to combat corruption. Because traditional approaches to improve governance have produced rather disappointing results, experimentation and evaluation of new tools to enhance accountability should be at the forefront of research on corruption.

Second, the differential effect of corruption is an important area for research. For example, China has been able to grow fast while being ranked among the most corrupt countries. Is corruption less harmful in China? Or would China have grown even faster if corruption was lower? These types of questions have received some attention, but more work along what context and type of corruption matters is likely to be fruitful.

Finally, the link between the macro literature on how institutions provide a more-or-less fertile breeding ground for corruption and the micro literature on how much corruption actually occurs in specific contexts is weak. As more forms of corruption and techniques to quantify them at the micro level are developed, it should be possible to reduce this mismatch between macro and micro evidence on corruption.<sup>186</sup>

For a concise article on the relationship between governance and corruption, and the difficulties of measuring both, see Daniel Kaufmann, “Back to Basics: 10 Myths About Governance and Corruption” (2005) 42:3 *Finance and Development*. See also Clare Fletcher

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<sup>185</sup> *Ibid* at 37.

<sup>186</sup> *Ibid* at 40.

and Daniela Herrmann, *The Internationalization of Corruption: Scale, Impact and Countermeasures* (Farnham: Gower, 2012), especially Part One.

## 6. HISTORICAL DEVELOPMENT OF INTERNATIONAL CORRUPTION LAWS

### 6.1 Early History from Antiquity to the OECD Convention in 1997

In Martin's 1999 article "The Development of International Bribery Law", the author details the development of anti-bribery laws in the west up to the 1997 signing of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Anti-Bribery Convention").<sup>187</sup> The OECD Convention was ratified by Canada in December, 1998 and came into force in February, 1999. The OECD Anti-Bribery Convention paved the way for further international actions to combat corruption, including the more expansive United Nations Convention Against Corruption (UNCAC), which entered into force in 2005.

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#### BEGINNING OF EXCERPT

Corruption was not a problem at the beginning of history. Rather than use bribes, people made "offerings" to their gods and leaders in the hope of receiving favors. In a sense, such reciprocities provided a social glue that allowed cultures and civilizations to develop. But with civilization came religious and civil institutions that needed rules of fairness and good governance to ensure the loyalty and trust of the populace. Kings and pharaohs had to demonstrate that the rule of law was above the influence of greasy palms. Thus began the distinction between gifts and bribes.

After presenting the Ten Commandments to Moses on Mount Sinai, God instructed the Israelites not to take *shohadh*, which is loosely translated from Hebrew as "offering."

You shall not take *shohadh*, which makes the clear-eyed blind and the words of the just crooked. (Exodus 23:1-3, 6-8)

<sup>187</sup> A. Timothy Martin, "The Development of International Bribery Law" (1999) 14 *Natural Resources & Environment* 95, online: <<http://timmartin.ca/wp-content/uploads/2016/02/Devpt-of-Int-Bribery-Law-Martin1999.pdf>>.

Given that the Old Testament was breaking new ground, it was only natural that this distinction started a bit ambiguously. However, even after several millennia of lawyers trying to define bribery, a certain amount of haze shrouds the issue.

There are records of bribes and bribery laws from ancient times. Archaeologists have recently found an Assyrian archive which is 3400 years old that listed the names of “employees accepting bribes.” An Egyptian pharaoh, Horemheb (1342-1314 BC), issued the first recorded law of a secular penalty for bribetaking. The Edict of Horemheb proclaimed that any judge who took a reward from one litigant and failed to hear the adversary was guilty of a “crime against justice” and subject to capital punishment. His threat apparently did not stop the practice of bribing the judiciary from spreading beyond Egypt.

The Greek historian Pausanius relates that before beginning each Olympic Games, all the umpires, athletes, their relatives and trainers swore over boars’ flesh that they would uphold Olympic rules intended to prevent corrupt activity. Similar to present times, not everyone played by the rules. Pausanius recorded in his *Description of Greece* (5.21.5) that Calippus of Athens bought off fellow competitors with bribes, as did many other contestants. This practice continued unabated until the Roman Emperor Theodosius eventually abolished the Olympic Games in 394 AD because of rampant corruption and brutality.

As for the Romans’ view of bribery, Shakespeare may have captured it best when Brutus said to Cassius in *Julius Caesar*:

Remember March; the ides of March remember.  
 Did not great Julius bleed for justice sake!  
 What villain touch’d his body that did stab  
 And not for justice? What, shall one of us,  
 That struck the foremost man of all this world  
 But for supporting robbers – shall we now  
 Contaminate our fingers with base bribes  
 And sell the mighty space of our large honours  
 For so much trash as may be grasped thus?  
 I had rather be a dog and bay the moon  
 Than such a Roman.

Act 4, Scene 3, lines 19-30

People’s view of corruption has evolved and become more negative as the institutions of government have developed. Instead of being ambivalent about the giving of gifts to officials in a position of public trust, modern society has enacted and prosecuted laws that make such payments illegal. Over time, a bribe has come to mean “an inducement improperly influencing the performance of a public function meant to be

gratuitously exercised.” (For an illuminating history of bribes, please refer to J. T. Noonan, *BRIBES* (1984).) [See also Douglas Thompson’s LLM thesis.<sup>188</sup>] Even though it is usually opposed on moral grounds, bribery has become a legal concept analyzed and prosecuted by lawyers. Thus in understanding how the world has grappled with corruption, one must consider the history of bribery laws.

### **For King and Country (And a little bit for me, too)**

Francis Bacon was one of the most brilliant lawyers, judges, and philosophers in English history. He was also one of its most corrupt Lord Chancellors. Bacon was first Solicitor General, then Attorney General, and finally, in 1618, Lord Chancellor. Even though he was an extremely capable jurist who honestly and fairly dispensed justice, he was too detached and philosophical to take notice of the bribes flowing to his servants who used his good office to benefit themselves. Caught up in the byzantine politics of the court of King James I, Bacon was accused of accepting bribes to affect cases in the Court of Chancery. His enemies in Parliament impeached him with twenty-three charges of bribery and corruption. Bacon first replied with a qualified admission of guilt. The House immediately rejected his submission, whereupon Bacon caved in: “I do plainly and ingenuously confess that I am guilty of corruption, and do renounce all defence.”

Sir John Trevor was probably the most corrupt Speaker in the history of Parliament. The East India Company was rumored to have bribed him to exert influence over laws affecting it. He also apparently accepted a large payment from the City of London Corporation. Indeed, a House Committee investigation discovered a written record of the City’s instructions and an endorsement of the payment to Trevor. The Members of Parliament drew up a resolution in 1694 which convicted the Speaker of a “high crime and misdemeanour.” Ironically, it was the responsibility of Sir John, as the Commons Speaker, to put the motion to the House, which he did in a shameless way. The motion was overwhelmingly acclaimed and Sir John slunk out of the House of Parliament. He did not return but rather sent a sicknote to the House who responded by expelling the Speaker. (These and other stories can be found in Matthew Parris, *GREAT PARLIAMENTARY SCANDALS* (1995).)

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<sup>188</sup> [In his University of Victoria LLM thesis, *A Merry Chase Around the Gift/Bribe Boundary* (2008), written under the co-supervision of Professor Ferguson, Douglas Thompson explains how the English word “bribe,” which originally had the altruistic meaning of a morsel of bread given as alms to beggars, became associated with the distasteful practice of selling indulgences in medieval England. That practice, carried out by pardoners licensed by the Church, was soon seen as a type of theft or extortion inflicted on those who felt compelled to buy indulgences to reduce the time spent in Purgatory by their deceased loved ones. With the abolition of the selling of indulgences at the time of the Reformation (1538), the word bribe took on its modern meaning.]

The English common law first dealt with foreign bribery in the trial of Warren Hastings who went to India at eighteen as a clerk of the East India Company and quickly rose through the ranks until he was appointed the British Governor of Bengal in 1772. During his tenure as Governor, he amassed a great fortune that could not be accounted for by his salary alone. Edmund Burke, a member of the House of Commons, accused the Company of great abuses in India and gradually those accusations focused on Hastings, who allegedly received large bribes while Governor. As a result of his investigations, Burke and his fellow Parliamentarians drafted Articles of Impeachment against Hastings that asserted various abuses of authority constituting “high crimes and misdemeanours” including “Corruption, Peculation and Extortion.” After winning the support of the House of Commons, the impeachment trial of Hastings commenced in the House of Lords in 1787. See Peter J. Marshall, *THE IMPEACHMENT OF WARREN HASTINGS* (1965).

The leading case of the time (1725) concerned Thomas Earl of Macclesfield, a Lord Chancellor who was accused of selling jobs in Chancery. In that case, the House of Lords held that the sale of an office which related “to the administrations of justice” was not an offense at common law. This was reflected in the definition of bribery provided by Blackstone in his *COMMENTARIES ON THE LAWS OF ENGLAND* of 1765. A bribe was a crime committed by “a judge or other person concerned in the administration of justice.” The definition was thus restricted to acts involving a judicial decree or its execution. By 1769 the law had expanded to make the offering of money for a government office a crime. In this environment, Hastings launched his defence which consisted of showing that he had not offered any money himself as bribes and that any presents he had received were not for himself but for the Company. To be on the safe side, he also launched personal attacks on Burke throughout the trial. Hastings' strategy was successful and resulted in the Lords deciding on April 23, 1795, after seven years of deliberation that he was not guilty. It would take another 180 years before anyone would again try to prosecute an act of foreign bribery. However, the next attempt would be in America rather than England.

### **New Law in the New World**

America has a long tradition of being concerned about corruption. Public offices have been bought, judges were monetarily influenced, and the nation's infrastructure was sometimes built on the back of bribes. But America is a country where government is expected to be for the benefit of the people. Public officials and their decisions were not to be bought and sold by a few wealthy individuals or corporations. Bribes were seen as immoral and against the founding principles of the United States of America. Something had to be done about corruption and lawmakers were more than willing to fill the breach. A multitude of approaches was thus pursued to address the problem.

The U.S. Founding Fathers clearly had corruption on their minds when they drafted the Constitution. Their first concern was Executive Branch corruption but they expanded the concept to include the Judiciary. The mechanism they built into the Constitution to remedy this problem was impeachment. The Constitutional Convention of 1787 first specified that the grounds for impeachment would be "Treason, Bribery, or Corruption." They later dropped "Corruption" as superfluous but added "other high crimes and misdemeanours" using the language from the Hastings trial in Parliament. This amendment supposedly provided Congress sufficient flexibility in the future to prosecute corrupt judges and Presidents. Unfortunately, the Constitution did not provide that Congressional members were subject to impeachment based upon the argument of James Madison that it was harder to corrupt a multitude than an individual. How wrong he proved to be! Bribing Congressmen became a national pastime. Eventually, Congress passed An Act to Prevent Frauds upon the Treasury of the United States in 1853 which made it illegal to bribe a member of Congress. It was not used much (possibly because of its misleading title). Indeed, during the first 150 years of the American Republic, no high ranking government leader was convicted for bribery. The Teapot Dome Scandal in the 1920s changed this complacency.

Albert Fall, Secretary of the Interior, arranged for the awarding of leases to two oil companies in 1922 in the Navy's oil reserves at Teapot Dome, Wyoming, and Elk Hill, California. After receiving many complaints, the Public Lands Committee of the Senate investigated and thereafter declared that the procurement of the leases had been "essentially corrupt." Apparently, Edward Doheny of Pan-American Petroleum made Secretary Fall a cash loan of \$100,000 delivered in "a little black bag" on which neither principal nor interest was collected, and the alibi of Harry Sinclair of Mammoth Oil Company was that he bought an interest in Fall's ranch. The Supreme Court unanimously cancelled the leases as "corruptly secured" and the oil companies were forced to pay back over \$47 million. All three were tried for conspiracy to defraud the United States but were acquitted. However, former Secretary Fall was convicted of bribery even though he argued that if the oilmen were innocent of giving a bribe, he could not be guilty of taking one. Fall was eventually sentenced to a fine equal to the bribe and served one year in jail. See Burl Noggle, *TEAPOT DOME: OIL AND POLITICS IN THE 1920's* (1962).

American legislators continued putting in place a plethora of laws that comprehensively extended the criminal law of bribery to almost every class and occupation imaginable. There was the Anti-Racketeering Act of 1934 and the Hobbs Act of 1946. This preoccupation with bribery continued unabated until the Nixon administration in 1970 produced the most comprehensive federal statute ever designed against bribery – the Racketeering Influenced and Corrupt Organization Act (or RICO). This statute was enacted in response to the growth of organized crime but

its greatest effect was to make bribery a federal offense and to give broad powers to district attorneys to prosecute anyone engaged in a “pattern” of bribes.

There was also a long history of laws meant to stop the abuses of campaign financing. President Teddy Roosevelt first pushed for the enactment of the Tillman Act of 1907 after the president of Standard Oil claimed that he had given the Republican Party \$125,000 in cash which had never been returned. The law prohibited corporate directors from using stockholders’ money for political purposes and was meant to be “an effective method of stopping the evils aimed at in corrupt practice acts.” This phrase had been popular for some time. The English Parliament had enacted a Corrupt Practices Act in 1883. The U.S. Congress enacted the Federal Corrupt Practices Act of 1910, which required the reporting of all contributions to national elections. This statute was amended several times, but its enforcement was infrequent, resulting in ambivalence about campaign contributions. The situation did not change until 1972 when the Federal Corrupt Practices Act was repealed and the Federal Election Campaign Act was enacted, resulting in taxpayers being permitted to deduct contributions to presidential campaigns. The government in effect had legalized payments to campaigning politicians rather than encourage potential bribes.

Throughout this period, all of the industrialized countries and most of the developing world had their own laws which made the bribery of public officials illegal. England had the Public Bodies Corrupt Act of 1889 and the Prevention of Corruption Acts of 1906 and 1916. Countries such as Canada, Denmark, France, Germany, Italy, the Netherlands, Spain, and Switzerland had prohibited the bribery of public officials under their respective Criminal Codes for many years. Some, such as France, as early as 1810. But similar to the United States, all these laws addressed the bribery of domestic officials, i.e., judges, politicians, and government officials within the country’s boundaries. No one ever contemplated looking beyond their own borders. All that changed as a result of some unrelated but extraordinary events investigated by several committees of the U.S. Senate.

### **A Leap into Foreign Waters**

In 1972 the Democratic National Committee headquarters located at the Watergate complex in Washington, D. C., was burglarized. The Senate formed a select committee the next year to investigate the burglary and found that many U.S. corporations had made illegal contributions to Richard Nixon’s Committee to Re-Elect the President. The result was that fifteen prominent corporations pleaded guilty to making illegal campaign contributions and were fined. One of the corporations, Gulf Oil, provided an amazing report to the Senate committee that detailed an elaborate overseas network to siphon political bribes back to the States and to other countries. Gulf had

apparently distributed more than \$5 million to influential politicians from overseas bank accounts over the years. See *THE GREAT OIL SPILL* (1976).

On February 3, 1975, Eli Black, the Chairman of United Brands Corporation, jumped to his death from a New York skyscraper. The Securities and Exchange Commission (SEC) investigated and discovered that his corporation, the largest American banana producer, had paid \$2.5 million to senior politicians in the Honduras. The SEC successfully sued the company for securities fraud since the payments were not reported in the financial accounts of United Brands. During the same period, a military coup ousted the President of the Honduras. As a result of the United Brands' investigation and concerns around the Gulf Oil report, the SEC sent a questionnaire to U.S. companies and asked them to reveal any "questionable payments" made by them abroad. Based upon this survey, the SEC published a report showing that over 400 U.S. companies, including 117 of the Fortune 500, had made "questionable payments" totalling more than 300 million dollars.

In June 1975, Senator Frank Church and his Subcommittee on Multinational Corporations were investigating a recent price rise of Arab oil and had called upon Northrop Corporation, a major supplier of aircraft to Saudi Arabia, to provide evidence. Northrop admitted paying bribes through a Saudi agent, Adnan Khashoggi, using the "Lockheed model." After hearing this statement and seeing the questionnaire from the SEC, the auditors of Lockheed Aircraft Corporation decided that they would only certify the company's accounts if Lockheed's corporate officers signed statements that all payments to consultants were in accordance with contracts and properly recorded. As it turned out, Lockheed had been engaged in a massive program of overseas bribes to government officials who bought their planes. Its officers refused to sign the statements. It quickly became public knowledge that Lockheed was going into its stockholders' meeting with unaudited financial statements. This caught the attention of Senator William Proxmire, Chairman of the Senate Banking Committee, who immediately convened an investigation into Lockheed. The day before the Senate Committee began its hearing, the company's treasurer shot himself dead. Undeterred, the Senate Banking Committee opened its investigation on August 25, 1975. The Committee found that Lockheed had paid hundreds of millions of dollars through consultants to government officials in Saudi Arabia, Japan, Italy, and the Netherlands. When asked if he had paid a one million dollar bribe to Prince Bernhard of the Netherlands, the president of Lockheed, A. Carl Kotchian, replied:

I think, sir, that as my understanding of a bribe is a quid pro quo for a specific item in return. I would characterize this more as a gift. But I don't want to quibble with you, sir.

It appeared that even a sophisticated jet-setting business executive was unable to distinguish a gift from a bribe.

Upon further examination, the Banking Committee found that as many as nine different American laws were criminally violated by a bribe paid abroad, including the Internal Revenue Code, the Foreign Assistance Act, the Bank Secrecy Act, the Travel Act, and RICO. However, these statutes had only been peripherally violated. To the great chagrin of the Committee, no specific law explicitly prohibited an American from paying a bribe overseas. Something had to be done to prevent the abuses perpetrated by Lockheed, Gulf Oil, and others so inclined. Senator Proxmire's Committee thus recommended that a new law be enacted to prevent overseas bribery based on their reasoning that (1) foreign governments friendly to the United States had come under "intense pressure from their own people," (2) the "image of American Democracy" had been "tarnished," (3) confidence in the financial integrity of American corporations had been impaired, and (4) the efficient functioning of capital markets had been hampered.

After very little debate in either the House or Senate, both Houses unanimously approved the Committee's bill on December 7, 1977, and President Carter subsequently signed it into law on December 19, 1977. The Foreign Corrupt Practices Act (FCPA) was thus born. This law was the first of its kind in the world. A new era of global bribery prevention had begun. The United States, like no other country before it, had decided to make the payment of bribes to foreign officials illegal and imposed rigorous record keeping requirements on U.S. companies and their overseas subsidiaries to ensure that bribes could not be hidden. However, when the dust settled and the United States surveyed the global landscape, it found itself standing alone.

### **All For One and One For All**

American companies immediately recognized that they were at a disadvantage to their foreign competitors. They would thereafter constantly claim that they lost overseas contracts because they could not pay the bribes that foreign companies allegedly did. (This view has been reinforced in some recent studies. *See* U.S. Department of Commerce, UNCLASSIFIED SUMMARY OF FOREIGN COMPETITIVE PRACTICES REPORT (Oct. 12, 1995); James R. Hines, Jr., FORBIDDEN PAYMENT: FOREIGN BRIBERY AND AMERICAN BUSINESS AFTER 1977 (Nat'l Bureau of Econ. Res. Working Paper No. 5266, 1995). The American government believed that its companies were competing on an unlevel playing field and therefore began seeking multilateral cooperation on global bribery.

The United States has advocated changes in the bribery laws of other countries in two primary areas. The first is to criminalize the bribery of foreign officials. This reflects the debate held in the U.S. Senate when it approved the FCPA in 1977. At that time,

Congress chose the stringent approach of criminalization over the option of only requiring public disclosure of foreign payments on the grounds that it was too lenient. The second area is the elimination of the tax deductibility of bribes. The U.S. government was concerned that other governments such as France and Germany allowed their corporations to deduct such payments against their income tax and thus tacitly approved the practice.

The first attempt to change international bribery law on a multilateral basis was at the United Nations (U.N.) and was wholly unsuccessful. The U. N. Economic and Social Council completed a draft agreement known as the International Agreement on Illicit Payments in 1979. This draft document outlawed all bribes to public officials, including the “grease” payments exempted under the FCPA. The Council of the General Assembly took no action to convene a conference to conclude and formalize it, despite strong efforts to do so by the United States.

Having failed at the United Nations, the U.S. moved to another forum, the Organization for Economic Cooperation and Development (OECD). The American government lobbied the OECD in 1981 to implement an illicit payments agreement. However, several countries expressed the view that differences among their legal systems would make such an agreement difficult to implement. Another attempt was made at the insistence of Congress when they amended the FCPA in 1988. Nothing resulted from either of these efforts. *See* U.S. Department of State, *ILLICIT PAYMENTS: PAST AND PRESENT U.S. INITIATIVES*.

The multilateral approach of the U.S. government was shelved at that point. There were a variety of unilateral attempts to extend the territoriality of the FCPA even farther beyond U.S. borders. Senator Russ Feingold introduced Bill 576 in 1995 which would have prohibited certain U.S. trade assistance agencies from aiding U.S. subsidiaries of foreign corporations, unless the director of the agency certified to Congress that the corporation maintained a company-wide policy prohibiting the bribery of public officials. Senator Hank Brown drafted a more far-reaching bill, the Foreign Business Corruption Act of 1996, to pressure foreign companies and countries. It provided for private rights of action with awards up to three times damages, allowed retaliatory actions against corrupt foreign governments on the basis of unfair trade barriers, and gave any U.S. person the right to bring action in a U.S. court against a foreign concern which violated a law of a foreign country that was substantially similar to U.S. legislation.

Neither of these bills advanced. One of the primary reasons was that the Clinton administration had decided in late 1993 to renew a multilateral effort. Since the Cold War had ended, the U.S. focused its attention on global economics and the problem of foreign bribes was given high priority in this new war. The American government carefully considered the supply and demand sides of the corruption equation in

forging its strategy. It primarily focused on the supply side (or active part of bribery) and the multilateral organization that received most of its attention was the OECD.

### **The OECD Convention**

In May 1994, a majority of the OECD countries agreed upon a suite of recommendations entitled OECD RECOMMENDATIONS ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS. However, it was not binding and was well below the objectives set by the United States. No specific measures were recommended; rather, it offered a broad list of “meaningful steps.” Subsequently, after intensive lobbying by the United States and after overcoming the resistance of some European countries (especially France), the OECD Council on April 11, 1996, approved a recommendation to eliminate the tax deductibility of bribes among its member states. At the next OECD meeting in May 1997, the American government pushed for a resolution committing governments to outlaw foreign bribery in their domestic legislation by the end of 1998 and to establish a monitoring system to ensure that it was being enforced. In opposition, France and Germany, with the support of Japan and Spain, maintained that “you need an international convention for criminalizing corruption, because the legal framework in each country is different. The U.S. and its supporters viewed this as a stalling tactic since such treaties take many years to negotiate and ratify.

After much negotiation, a compromise was struck. The ministers endorsed the REVISED RECOMMENDATION ON COMBATTING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS. They recommended that member countries would submit criminalization proposals to their legislative bodies by April 1, 1998, and seek their enactment by the end of 1998. The ministers also decided to open negotiations promptly on a convention to be completed by the end of 1997, with a view to its entry into force as soon as possible within 1998, and urged the prompt implementation of the 1996 recommendation on the tax deductibility of such bribes.

After six months of intensive discussions, all twenty-nine member countries of the OECD and five non-member countries agreed to sign the CONVENTION ON COMBATTING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (the OECD Convention) in Paris on December 17, 1997, *reprinted at* 37 I.L.M. 1 (1998). This Convention provided the framework under which all the signatory governments undertook to prohibit and act against the bribery of foreign public officials on an equivalent basis without requiring uniformity or changes in the fundamental principles of each government's legal system. The OECD Convention entered into force on the 60<sup>th</sup> day following the date upon which 5 of the 10 countries with the largest shares of OECD exports, representing at least 60% of the combined total exports of those 10 countries, deposited their instruments of acceptance, approval, or ratification. Such ratification had to occur by December 31, 1998, to be binding upon all signatory countries. Canada's deposit of its instrument on December

17, 1998, met the pass mark and resulted in the OECD Convention's entering into force on February 15, 1999. At the time of writing, fourteen countries had deposited their instruments of ratification and the remaining signatory countries have publicly stated that they will complete their ratification process during 1999 [as of 2016, 41 countries have adopted the Convention].

The Convention has a clearly defined scope. It provides that each government "shall establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business." The Convention makes it an offence for nationals of signatory countries to give a bribe to a foreign public official. In other words, it is directed against offences committed by the bribe-giver and not the public official receiving the bribe.

Signatory countries have undertaken to make the bribery of a foreign public official punishable by effective, proportionate, and dissuasive criminal penalties. A foreign public official includes persons elected or appointed to hold legislative, administrative, or judicial office of a foreign country. It also covers Public Agencies, Public Enterprises, and Public International Organizations. Despite intense lobbying by the U.S., it is not an offence to make payments to political parties or officials of those parties.

The Convention provides that the bribe and its proceeds are subject to seizure and confiscation. Where more than one government has jurisdiction, they are required to consult with a view to determining the most appropriate jurisdiction for prosecution. Bribery of a foreign public official is considered an extraditable offence amongst the signatory governments. All parties to the Convention have undertaken to cooperate in carrying out a program of systematic follow-up to monitor and promote the full implementation of the Convention. The OECD has recently set up a Centre for Anti-Corruption Compliance to provide information and training on anti-corruption laws. This Centre provides one of the most comprehensive websites available on foreign corruption: [updated link: <http://www.oecd.org/daf/anti-bribery/>]. [See also the UNODC anti-corruption website TRACK at <http://www.track.unodc.org/>.] The commentaries on the Convention state that it is not an offense if the advantage was permitted or required by the written law or regulation of the foreign public official's country. Also, making small "facilitation" payments is not an offense since they are not payments made "to obtain or retain business or other improper advantage."

Without question, the OECD Convention is the most significant international treaty on foreign bribery up to this time [1999]. However, it is but one piece of the American

strategy. At the urging of the U.S., the G-7 countries supported the recommendations of the OECD when they met in Lyon, France, in July 1996. The United Nations General Assembly also approved a resolution on “Action Against Corruption” in January 1997 and the Council of the European Union adopted a Framework Convention Against Corruption in May 1997. The U.S. has also worked closely with non-governmental organizations such as the International Chamber of Commerce (ICC) and Transparency International (TI).

In March 1996, the ICC approved and published its Rules of Conduct on bribery in international business transactions. These rules prohibit extortion and bribery for any purpose, not just to obtain or retain business, making them more stringent than the previous ICC Code published in 1977. The rules now cover extortion and bribery in judicial proceedings, tax matters, and environmental and other regulatory cases, as well as in legislative proceedings. (The ICC’s website on extortion and bribery is [updated link: [http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2004/ICC-Rules-of-Conduct-and-Recommendations-to-Fight-Extortion-and-Bribery-\(2005-Edition\)/](http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2004/ICC-Rules-of-Conduct-and-Recommendations-to-Fight-Extortion-and-Bribery-(2005-Edition)/)]).

Transparency International was founded in May 1993 with its headquarters in Germany. It is a not-for-profit, non-governmental organization that attempts to counter corruption in international business transactions. It does this through international and national coalitions which encourage governments to establish and implement effective law, policies, and anti-corruption programs. Each year, TI publishes a corruption [perception] index which lists [global perceptions on] the most and least corrupt countries in the world. It has also established a program called “Islands of Integrity” which attempts to arrange, in welldefined markets, a pact among competitors to stop corruption simultaneously, by entering into an Anti-Bribery Pact. (For further details on TI, see its homepage at [updated link: <http://www.transparency.org>]).

The United States has not forgotten the demand side (or passive part) of bribery. It pursued the corruption agenda at both the Organization of American States (OAS) and the Asia-Pacific Economic (APEC) Forum. Its greatest success to date has been at the OAS. In a meeting held in Caracas, Venezuela, in March 1996, the OAS adopted an Inter-American Convention Against Corruption. Once again, the United States led the implementation of this convention, with strong support from several South American countries, including Venezuela. Colombia opposed the treaty’s extradition provisions and Uruguay objected to the bank secrecy provisions. However, it was eventually signed by twenty-five OAS members and has been ratified by sixteen member states at this time [as of 2015, 33 OAS members have signed on].

The OAS Convention provides that each country shall prohibit and punish the offering or granting, directly or indirectly, by its nationals, residents, or businesses, to

a government official of another state, of any article of monetary value or other benefit in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official's public functions. Such offenses shall be an extraditable offense in any extradition treaty existing between or among the countries. Countries shall also provide each other the broadest possible measure of assistance in the identification, tracing, freezing, seizure, and forfeiture of property or proceeds obtained, derived from, or used in the commission of any offence established in accordance with the convention. (The OAS website on corruption can be found at [updated link: <http://www.oas.org/juridico/english/fightcur.html>]).

The U.S. government lobbied the APEC Forums that met in Manila in 1996 and Vancouver in 1997 to approve recommendations similar to those adopted by the OECD. Several Asian members of the APEC Forum publicly stated their misgivings about the U.S. proposal, citing cultural differences amongst the member economies. Nothing happened with this proposal, and it was quietly dropped.

The Clinton administration also pushed the corruption agenda in the multilateral organizations that govern world trade and dispense development funds, in particular, the World Trade Organization (WTO), the World Bank, and the International Monetary Fund (IMF). At the WTO's Singapore conference in December 1996, the United States, with support from Canada, the European Union, Japan, and nine other countries, proposed new public procurement rules that would criminalize bribes and require more transparency in the awarding of government contracts. As expected, resistance to the proposal arose from a variety of developing countries. A group led by Malaysia and including Indonesia, Thailand, Brunei, the Philippines, Bahrain, Zimbabwe, Cuba, Egypt, and Uganda argued that due regard be given to the national policies of each country.

...

In 1996, the World Bank initiated a policy that required it to investigate complaints of corruption and if it found sufficient grounds, allowed it to blacklist companies and governments that participated in bribery. Under this policy, evidence of corruption could result in the cancellation of World Bank financing in a country and in the prevention of a bribing company from participating in contracts financed by the World Bank. The World Bank has made a clear public statement of its position in a report published in September 1997 entitled *Helping Countries Combat Corruption: The Role of the World Bank*. The report states that bribes are one of the primary elements of corruption used to obtain government contracts and services and that poorly regulated financial systems permeated with fraud "can undermine savings and deter foreign investment. They also make a country vulnerable to financial crises and macroeconomic instability."

The World Bank has begun to act against countries where it has found corruption in its projects. The bank stopped funding development projects in Nigeria and Zaire, and it has launched strict reforms to improve the monitoring of its money. The World Bank also suspended a \$76 million loan to Kenya for energy development because it could not ensure that contracts would be awarded fairly and openly. Developing countries have to take these actions seriously since the World Bank finances about 40,000 contracts worth \$25 billion each year. (Further details on the World Bank's anticorruption program can be found at [updated link:

<http://www.worldbank.org/en/topic/governance/brief/anti-corruption>].)

[In the last five years, the World Bank funded on average \$40 billion worth of projects a year; the World Bank has also significantly increased the number of debarments in that same period – from 2009-2013 there have been 492 debarments.<sup>189</sup>]

On a similar basis, the IMF has denounced corruption in developing countries. As part of its monetary policy, it has urged countries wanting to borrow from the IMF to institute anticorruption reforms. The IMF has also acted closely with the World Bank against corrupt regimes. In August 1997, the IMF suspended a \$220 million loan to Kenya because of a scandal in the gold and diamond export trade. The next month, the IMF put a \$120 million loan to Cambodia on hold “because of problems in governance which concern corruption and logging.” As the IMF takes a leading role in resolving the financial crises of several Southeast Asian countries, it is imposing conditions on its loans that directly address corruption and bribery. South Korea has been forced to open its markets, curtail state-owned firms and crony capitalism, and make its financial systems more transparent. Thailand and Malaysia had to accept the same recipe and Indonesia was required to close sixteen loss-making banks, including one owned by former President Suharto's son. (The IMF's position on dealing with corruption is provided at [updated link: <http://www.imf.org/external/np/exr/facts/gov.htm>].)

[Basically, the IMF maintains that good governance is the key to economic success and that it promotes good governance by engaging in surveillance of its member countries' economic policies].

Despite such pressures, laws dealing with bribery in developing countries themselves haven't changed much. Bribery laws in third world countries are often confusing and

<sup>189</sup> See Freshfields' report on World Bank sanctions, online:

<[https://consultations.worldbank.org/Data/hub/files/consultation-template/consultation-review-world-bank-group-sanctions-systemopenconsultationtemplate/materials/freshfields\\_bruckhaus\\_deringer\\_llp\\_world\\_bank\\_consultation\\_submission.pdf](https://consultations.worldbank.org/Data/hub/files/consultation-template/consultation-review-world-bank-group-sanctions-systemopenconsultationtemplate/materials/freshfields_bruckhaus_deringer_llp_world_bank_consultation_submission.pdf)>. See also

<[http://www.freshfields.com/en/news/Freshfields\\_submits\\_recommendations\\_as\\_part\\_of\\_World\\_Bank\\_sanctions\\_system\\_consultation/](http://www.freshfields.com/en/news/Freshfields_submits_recommendations_as_part_of_World_Bank_sanctions_system_consultation/)>.

sometimes even contradictory. They tend not to reflect local customs and practice and are often ignored. When they are applied, it is often done arbitrarily and inconsistently. The punishment under such host country laws is usually severe and consists of imprisonment or fines and occasionally death. The punishment tends to apply to individuals only and not to corporations. For an investing company, the individuals most at risk are the company's employees and representatives who work or reside in the host country.

Investing companies often face a dilemma with these laws. Whereas they try to conform to the requirements of the bribery laws of their country of residence, this may not necessarily translate into conformance with host country laws. One example is the defences or exceptions under the FCPA. Facilitating payments or reasonable business expenditures may not strictly be allowed in the host country's law even though much greater sins are publicly practiced. These laws will undoubtedly change if a WTO convention on bribery is enacted, but in a way which is presently unknown.

### **Don't Blame Uncle Sam!**

One gets the impression that the American government has single-handedly changed corruption laws around the world, for which they can be commended (or criticized, depending on one's perspective). However, it is not the complete story. The United States has indeed been the primary catalyst in this tremendous change, but looking beyond its initiative there are a multitude of reasons that have converged to create wide and growing support for the prevention of bribery in foreign countries.

The United States has mounted a massive global campaign in every conceivable multilateral organization in the world. (The primary U.S. Government website on foreign corruption is found at [updated link: <http://www.imf.org/external/np/exr/facts/gov.htm>]). A lot of this campaign is motivated by self-interest, but there is also a genuine desire to make the world a better place to do business. The U.S. government has relentlessly pursued the simple goal of having other countries' multinationals play by the same rules applicable to U.S. companies. Its strategy is clearly laid out in the 1996 Annual Report to Congress of the Trade Promotion Coordinating Committee. One of the Report's more novel ideas was the establishment of a hotline at the U.S. Department of Commerce for reporting bribery allegations. (This recommendation has not been implemented to the gratitude of scurrilous bribers around the world!)

There is a dawning realization that bribes eliminate competition, create inefficiencies, and ultimately cost countries and their consumers money. One only has to look at a list of the most corrupt countries and see that it is very similar to the list of the least developed countries in the world. It has been demonstrated that countries with high corruption have less investment and lower growth rates in their economy. *See generally*

Paulo Mauro, *WHY WORRY ABOUT CORRUPTION?* (1997). The result has been growing support in international trade and development organizations for policies aimed directly at eliminating corruption.

END OF EXCERPT

In their book *Handbook of Global Research and Practice in Corruption*, Graycar and Smith note some reasons why corruption has increasingly been seen as a significant global concern:

International trade has been a feature of human behavior for millennia. But in recent centuries new transport mechanisms and new technologies have made for economic interdependence. Compounded by digital technologies which move money around the world at the speed of light, and global business moguls who seek advantage opportunistically and capriciously, corruption takes on a new dimension. Political instability has also taken on a cross-national dimension, and it is often fuelled by, and in turn fuels corruption.<sup>190</sup>

## 6.2 International Corruption Instruments Culminating in UNCAC (2005)

Webb in “The United Nations Convention Against Corruption” describes the major international anti-corruption instruments developed between 1997 and the enactment of UNCAC.<sup>191</sup> The brief summaries below of the major international instruments developed between 1996 and 2005 are derived from Webb’s article.

### 6.2.1 The Organization of American States Inter-American Convention Against Corruption (1996)

The Organization of American States Inter-American Convention Against Corruption (OAS Convention) was signed by 22 countries in 1996, including the US. Canada signed the convention in 1999 and 33 countries have now signed on. The OAS Convention was the first binding international instrument on corruption. Venezuela led the group of Latin-American countries that lobbied for its creation. The United States was also a strong supporter of the Convention. The OAS Convention has a broader scope than the OECD Anti-Bribery Convention. Besides criminalizing the bribery of foreign officials, the OAS Convention requires that signatory states also criminalize the acceptance or solicitation of bribes. It

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<sup>190</sup> Adam Graycar & Russell Smith, *Handbook of Global Research and Practice in Corruption* (Edward Elgar, 2011) at 3.

<sup>191</sup> Philippa Webb, “The United Nations Convention Against Corruption” (2005) 8 J Intl Econ L 191, online: <<http://jiel.oxfordjournals.org/content/8/1/191.short>>.

therefore addresses both active bribery (the giving of a bribe) as well as passive bribery (the receiving of a bribe). Since the OAS Convention prohibits any bribe paid in relation to “any act or omission in the performance of that official’s public function” (Article VIII, OAS Convention), it is broader than the equivalent OECD Anti-Bribery Convention provision, which only criminalizes bribery when it relates to a business transaction or contract. In addition, the OAS Convention encourages signatory states to criminalize other acts of corruption not strictly covered under anti-bribery laws, such as the misuse of confidential information by public officials.

As Webb notes, the OAS Convention’s greatest weakness is its lack of a strong enforcement mechanism. In 2001 the Conference of State Parties established a peer review system to monitor implementation of the Convention. Under this system a Committee of Experts selects a state for review and then prepares a preliminary report on that country’s implementation of the Convention. This report is then made available for review by the subject state. The final report is then submitted to the Conference of States Parties and published. The Committee of Experts can only make recommendations for improvements and cannot recommend sanctions for states who fail to meet their international obligations under the Convention.

### **6.2.2 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997)**

As discussed in the excerpt from Martin’s article, “The Development of International Bribery Law,” the OECD Anti-Bribery Convention was a key development in the international fight against corruption. The Convention has now been ratified by 35 OECD member states and 7 non-member countries (Argentina, Brazil, Bulgaria, Colombia, Costa Rica, Lithuania, Russia and South Africa).<sup>192</sup> While the OECD Convention initially seemed to come with a more rigorous review process than the OAS Convention, Webb writes that the monitoring mechanism had “mixed results.”<sup>193</sup> Implementation of the OECD Anti-Bribery Convention is monitored by the OECD Working Group on Bribery, which uses a multi-phase peer-review system to evaluate and report on state parties’ implementation of the Convention. The review system has worked slowly at times and has not always been well-funded. In many countries the introduction of new anti-corruption legislation has not had a significant impact domestically. Webb concludes that “[d]espite its focused scope, widespread ratification, and well developed monitory system, it [the OECD Anti-Bribery Convention] is yet to produce significant changes on the ground.”<sup>194</sup> Some other commentators have a more positive view of the impacts of the OECD Anti-Bribery Convention. In my view, the OECD Convention’s review system has prompted more government attention (and funding) for anti-corruption activities and, at least for Canada and the UK, has prompted some legislative

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<sup>192</sup> OECD, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, online: <<http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm>>.

<sup>193</sup> Webb (2005) at 197.

<sup>194</sup> *Ibid* at 198.

and practice improvements. For example, in Canada, new federal money was directed towards enforcement of the *Corruption of Foreign Public Officials Act (CFPOA)* and amendments were made to the Act due to criticisms and suggestions from the OECD review mechanism. Pressure for the new UK *Bribery Act, 2010* arose from many sources including the OECD review mechanism.

A detailed review of the activities of the OECD Working Group on Bribery can be found in their 2013 and 2014 Annual Reports.<sup>195</sup>

For further background on the development of the OECD Anti-Bribery Convention and a review of its application in member countries' domestic legislation, see Davids and Schubert, "The global architecture of foreign bribery control: Applying the OECD Bribery Convention" in Graycar and Smith, (2011).

### **6.2.3 Council of Europe Criminal Law and Civil Law Conventions on Corruption (1999)**

#### **(i) The Council of Europe Criminal Law Convention on Corruption**

This multilateral instrument was adopted by the Council of Europe in 1999. The Council of Europe (COE) is a political organization composed of 45 European nations, including many from Central and Eastern Europe. The COE Criminal Law Convention on Corruption (COE Criminal Law Convention) may also be adopted by non-European states. Indeed, both Mexico and the United States are both signatories to the Convention. The Convention applies to private sector as well as public sector bribery. The Convention requires that member states prohibit active and passive bribery, but does not require that signatory states criminalize other forms of corruption. The COE Criminal law Convention also provides support mechanisms for parties fighting corruption, such as the requirement that signatory countries protect informants. In addition, although the facilitation of the tracing and seizing of assets is addressed, the Convention does not deal with the return of stolen assets exported out of the country of origin.

#### **(ii) The Council of Europe Civil Law Convention on Corruption**

The COE Civil Law Convention on Corruption (COE Civil Law Convention) is the first international instrument to address civil law legal remedies for those affected by corruption. Like the COE Criminal Law Convention, the COE Civil Law Convention may also be adopted by non-COE member states. As of May, 2013, 33 states had ratified the Convention. The COE Civil Law Convention focuses on the act of bribery and requires that signatory states provide domestic legal avenues for victims of corruption to recover damages against those who participated in acts of corruption as well as those who failed to take reasonable care to prevent corruption. The Convention addresses the protection of whistleblowers and

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<sup>195</sup> OECD Working Group on Bribery, *Annual Report on Activities Undertaken in 2013* (OECD, 2014), online: <<http://www.oecd.org/tax/crime/oecdworkinggrouponbribery-annualreport.htm>>.

allows courts to declare a contract invalid if its validity was “undermined by an act of corruption” (Article 8 COE Civil Law Convention). Although civil law mechanisms may allow victims of corruption to participate in the enforcement of anti-corruption laws on their own initiative, Webb notes that there are several disadvantages with addressing corruption through civil law means. Civil enforcement of anti-corruption laws could lead to a reduced ability of government agencies to control the overall anti-corruption strategy. As well, many victims of corruption may not have the means to take a civil claim to court.

### **(iii) Group of States against Corruption**

The Group of States against Corruption (GRECO) is a monitoring organization that was established in 1999 by the Council of Europe. It monitors compliance with the Council of Europe’s anti-corruption standards. All states that are party to either the Criminal or Civil Law Conventions on Corruption are subject to GRECO’s compliance monitoring. Currently, GRECO includes 48 European States, as well as the US.

A team of experts nominated by GRECO members evaluates state parties’ implementation of the Council of Europe’s anti-corruption conventions. Each evaluation round assesses member states on a different corruption subtopic. First, member states are evaluated and recommendations are issued on how the state could improve its compliance. Next, a compliance report that evaluates how well the country complied with the recommendations of the earlier evaluation report is completed. All evaluation and compliance reports are made public and are available on GRECO’s website.<sup>196</sup>

## **6.2.4 Convention of the European Union on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States (1997)**

The Convention of the European Union on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States (EU Convention) builds on the 1995 Convention on the Protection of the European Communities Financial Interests and the 1996 and 1997 Protocols. The EU Convention is focused on addressing bribery of officials. It is limited to acts that are harmful to the EU’s economic interests and only addresses corruption occurring within EU member nations. Following the EU Convention, the EU addressed private sector corruption in the 1998 EU *Joint Action Act*. The 2003 Communication on a Comprehensive EU Policy against Corruption encouraged member states to act on their multilateral anti-corruption obligations; however, it was drafted in non-binding language.

For a recent, detailed analysis of European countries which have progressed and those that have regressed in the past 15 years, see Mungiu-Pippidi, *The Good, the Bad and the Ugly*:

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<sup>196</sup> Group of States against Corruption, online: <[http://www.coe.int/t/dghl/monitoring/greco/default\\_en.asp](http://www.coe.int/t/dghl/monitoring/greco/default_en.asp)>.

*Controlling Corruption in the European Union*, Working Paper 35, European Research Centre for Anti-Corruption and State-Building (Oslo: NORAD, 2013), online: <[http://www.againstcorruption.eu/?post\\_type=reports](http://www.againstcorruption.eu/?post_type=reports)>.

### 6.2.5 African Union Convention on Preventing and Combating Corruption (2003)

The African Union Convention on Preventing and Combating Corruption (AU Convention) is a broadly conceived, regional anti-corruption agreement. It was adopted in 2003 potentially covering 53 states. It required 15 states to ratify before coming into force and this was achieved in 2006. As of May 2013, 31 states ratified the Convention.<sup>197</sup> While the Convention is very comprehensive and is generally phrased in mandatory language, its enforcement mechanism relies on self-reporting. State parties are required to report on their implementation of the Convention to an Advisory Board elected by the Executive Council. However there is no obligation on the part of the Advisory Board to check the veracity of the country reports. Webb states that the lack of follow-up mechanisms to monitor enforcement may allow state parties to avoid fully implementing the Convention. However, Carr takes a more optimistic view of the AU Convention. She states that the “AU Convention is progressing in the right direction and with more harmonisation on the way through international and inter-regional agreements on various strengthening measures, such as codes of conduct for public officials and protection of informants, the war [against corruption] should ease in intensity.”<sup>198</sup>

For an in-depth review of the AU Convention and a comparison between it and other international and domestic instruments, see Thomas R. Snider and Won Kidane, “Combating Corruption Through International Law in Africa: A Comparative Analysis” (2007) 40 *Corn ILJ* 691.

For further information on corruption and anti-corruption strategies in Africa see:

- John Hatchard, *Combatting Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* (Cheltenham, UK; Northampton US: Edward Elgar, 2014).
- The African Development Bank Group, <http://www.afdb.org>
- The African Parliamentarians Network Against Corruption (APNAC), [www.apnacafrica.org](http://www.apnacafrica.org) and
- The African Union Advisory Board on Corruption, <http://www.auanticorruption.org/>

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<sup>197</sup> African Union, “African Union Convention on Preventing and Combating Corruption”, online: <<https://www.au.int/en/treaties/african-union-convention-preventing-and-combating-corruption>>.

<sup>198</sup> Indira Carr, “Corruption in Africa: Is the African Union Convention on Combating Corruption the Answer?” (2007) *J Bus L* 111 at 136.

### 6.2.6 United Nations Convention Against Corruption (2003)

The United Nations Convention Against Corruption (UNCAC) was adopted by the General Assembly in December, 2003 and came into force in 2005 (with 140 state signatories). As of February 2017, 183 states are parties to UNCAC.<sup>199</sup> The term “State Parties” refers to states that have ratified or acceded to the Convention, thereby expressing their consent to be bound by the Convention; the term “signatories” refers to those states that signed the Convention before it entered into force in December 2005, thereby indicating their intent to ratify the Convention.

Webb notes that the negotiating process leading to UNCAC grew out of negotiation of the United Nations Convention Against Transnational Organized Crime (UNTOC, 2000). As part of its strategy to curb organized crime, UNTOC also requires that signatory states criminalize active and passive bribery relating to public officials. For a good description of the negotiations behind, and the content of, UNTOC, see Dimitri Vlassis, “UNTOC and its Protocols” in *The Changing Face of International Criminal Law: Select Papers* (International Centre for Criminal Law Reform and Criminal Justice Policy: Vancouver, 2002) at 75-103.

By December 2000, however, the United Nations General Assembly decided that a more comprehensive international agreement on anti-corruption was needed. Over seven sessions, in 2002 and 2003, the Ad Hoc Committee for the Negotiation of the Convention against Corruption negotiated the text of the Convention. The draft version of UNCAC was adopted by the General Assembly in October 2003 and was officially signed at Merida, Mexico in December 2003.

The UNCAC is broader in scope than the OECD Anti-Bribery Convention and many of the earlier, regional anti-bribery agreements. As Webb notes, the Convention addresses the following three main anti-corruption strategies:

- *Prevention*: The provisions of Chapter II of UNCAC contain preventative measures which target both the public and private sectors. These non-mandatory provisions propose the establishment of anti-corruption organizations and lay out measures for preventing corruption in the judiciary and public procurement. Member states are encouraged to involve nongovernmental organizations (NGOs) in uncovering and stopping corruption. (See UNCAC Articles 11, 9 and 6).
- *Criminalization*: Chapter III of UNCAC requires member states to criminalize a wide array of corruption activities, including bribery, embezzlement of public funds, trading in influence, concealing corruption and money laundering related to corruption. Though these measures are mandatory, the UNCAC adds qualifying clauses allowing member states some flexibility in adopting criminal legislation “in

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<sup>199</sup> United Nations Office on Drugs and Crime, “United Nations Convention against Corruption”, online:

<<http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>>.

accordance with fundamental principles of domestic law” or “to the greatest extent possible within [the state’s] domestic legal system” (See UNCAC Articles 23 and 31). Resistant government officials could potentially use these clauses to justify inaction.

- *International Cooperation*: Chapter IV mandates that member states cooperate in preventing, investigating and prosecuting corruption. Signatories of UNCAC agree to give mutual legal assistance through gathering and transferring evidence for court trials and extraditing accused offenders. Furthermore, member states must also support each other in tracing, freezing, seizing, and confiscating proceeds of corruption.<sup>200</sup>

The negotiation process was not without controversy. According to Webb, the topics that generated the most disagreement among negotiating parties were the provisions addressing asset recovery, private sector corruption, political corruption, and implementation of the Convention.

*Asset Recovery*: A key aspect of UNCAC is the fact that it addresses the recovery of state assets exported from state coffers by corrupt officials. In this regard Webb states:<sup>201</sup>

Asset recovery therefore became a sort of ‘litmus test’ for the success of the negotiating process as a whole. Although there were intense debates on how to reconcile the needs of the countries seeking the return of the assets with the legal and procedural safeguards of the countries whose assistance is needed, the representatives always emphasized its importance throughout the negotiations. The high priority of the issue was bolstered by the Security Council resolution deciding that all UN member states should take steps to freeze funds removed from Iraq by the Saddam Hussein or his senior officials and immediately transfer them to the Development Fund for Iraq, and take steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property that had been illegally removed. The African representative, in particular, believed that the words and spirit of this resolution should be incorporated into the UNCAC.

In the end, provisions on asset recovery formed an entire chapter of the UNCAC. The provisions have been hailed as ‘ground-breaking’. But this overstates their true impact. [footnotes omitted]

Then Webb adds:

The effectiveness of the asset recovery provisions depend to a large extent on the measures for mutual legal assistance. ... Overall, even though the chapter on asset recovery is not as revolutionary as some people say, it is a

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<sup>200</sup> Webb (2005) at 205–206.

<sup>201</sup> *Ibid* at 208–209.

significant step forward in dealing with a complex problem in international affairs. Most importantly, the Convention ties the asset recovery provisions to a wide range of corrupt acts, not just bribery.<sup>202</sup>

Asset Recovery is dealt with in detail in Chapter 5.

*Private Sector:* Considering the economic strength of many multinational corporations, private sector corruption was also considered during the UNCAC negotiating process. The European Union was strongly in favour of including the criminalization of private sector bribery during the UNCAC negotiations. The United States was opposed as it viewed this initiative as an undesirable constraint on private sector business dealing. The final version of UNCAC only includes non-binding articles relating to the criminalization of private sector bribery and embezzlement. UNCAC does, however, require that state parties take steps to prevent private sector corruption. As well, the Convention requires state parties to ensure that individuals and other legal entities that suffered damages as a result of corruption have the right to bring civil cases against those who are responsible. Due in part to the American business community's fears of a plethora of lawsuits being brought against American companies by overseas litigants, each state has the ability to determine under what circumstances these types of claims will be permitted.

In regard to private-to-public sphere corruption, UNCAC is more comprehensive than the OECD Anti-Bribery Convention in several respects. UNCAC criminalizes the bribery of domestic officials as well as foreign officials. Also UNCAC mandates that state parties prohibit bribes from being tax deductible; in comparison, this step is only a recommendation in the OECD Anti-Bribery Convention.

*Financing of Political Parties:* At one point in the negotiating process Austria, France, and the Netherlands proposed an article (Article 10) that mandated signatory countries adopt regulations aimed at addressing corruption and increasing transparency in elections and campaign financing. The United States voiced strong opposition to the mandatory language of the article. This was a reversal from the American stance on the same issue during the OECD Anti-Bribery Convention negotiations 20 years earlier. Eventually a compromise was struck and the mandatory directions in Article 10 were replaced with Article 6, which only asks that states "consider" taking steps to enhance transparency in elections and campaign financing. As Webb writes, "[t]he Ad Hoc Committee ultimately had to recognize that campaign contributions are a crucial part of the election systems in many countries and it had to tread carefully in order to avoid the Convention coming into conflict with a core aspect of democratic politics."<sup>203</sup> Despite strong public concern on this issue, the UNCAC negotiating committee failed to reach agreement on a binding article addressing corruption in campaign financing.

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<sup>202</sup> *Ibid* at 210.

<sup>203</sup> *Ibid* at 218.

*Implementation, Enforcement, and Monitoring:* Despite stronger proposals by several delegations, the final version of UNCAC was criticized for not establishing stronger monitoring mechanisms to ensure that signatory states comply with the Convention. UNCAC established a “Conference of State Parties,” meant to enable the exchange of information and cooperation among signatory states, but no formal review mechanism was agreed upon. In 2009, the Conference of State Parties agreed on a peer review process to evaluate state parties’ self-assessments of compliance with the Convention. The review process comprised of two five-year cycles with a quarter of the member states reviewed each year: the first cycle (2010-2015) reviews compliance with Chapters III (Criminalization) and IV (International Cooperation) and the second cycle (2015-2020) will cover Chapters II (Preventative Measures) and V (Asset Recovery).

UNCAC has influenced global cooperation in fighting corruption. In “The United Nations Convention Against Corruption,” Jousten highlights UNCAC’s impact in three areas:

- as a global convention it has considerably expanded the geographical scope of cooperation,
- it provides common definitions of certain key offences, and requires (or, in some cases, at least encourages) States Parties to criminalize these acts, and
- it has standardized, and contributed to, the development of procedural forms of co-operation.<sup>204</sup>

The UNODC developed materials for a university-level course on UNCAC. The course materials are available on the UNODC’s webportal TRACK (Tools and Resources for Anti-Corruption Knowledge, under the section “Education”: [www.track.unodc.org](http://www.track.unodc.org)). The “Education” section of TRACK also contains a Menu of Resources which identifies 20 anti-corruption topics and provides a list of relevant academic articles, books, reports etc., on each topic. In addition, this book is also available on UNODC’s TRACK webportal: <http://www.track.unodc.org/Education/Pages/ACAD.aspx>.

For a discussion of the compliance challenges and impacts of UNCAC, see Ophelie Brunelle-Quaraishi, “Assessing the Relevancy and Efficacy of the United Nations Convention Against Corruption: A Comparative Analysis” (2011) 2:1 Notre Dame Intl & Comp LJ 101. See also Jan Wouters, Cedric Ryngaert and Ann Sofie Cloots, “The International Legal Framework Against Corruption: Achievements and Challenges” (June 2013) 14:1 Melb J Intl L 205.

### 6.3 The Meaning and Effect of International Conventions

In international law, a convention (or treaty) is a statement of principles, rules and procedures on a specific topic which is adopted by international bodies such as the United

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<sup>204</sup> Matti Jousten, “The United Nations Convention Against Corruption” in Graycar & Smith, eds, (2011).

Nations. The adoption of a convention by the UN does not automatically bind all UN members to comply with the convention. At the time a convention is adopted, a number of countries will sign (become signatories) to the convention. By becoming signatories, those countries indicate their general agreement with the principles and purposes of the convention. However, countries are only bound by a convention or treaty by ratifying it. Ratification signals that a country has laws and practices in place that are in compliance with the convention and that the country is ready to be bound by the treaty under international law.

In countries such as England, Canada and Australia, ratification is a power exercised by the Executive (i.e., the elected government and, more specifically, the cabinet). Parliamentary approval is not required, although all treaties and conventions are tabled in Parliament before ratification by Canada. In the US, ratification takes place through the combined actions of the Executive and a two-thirds vote of the Senate.

Once ratified, the particular state becomes a “party” or “state party” to the convention.

Some conventions have protocols. A protocol is an addition or a supplement to an existing convention. State parties are not automatically required to adopt protocols and for that reason protocols are often referred to as “optional protocols.” In the case of the OECD Anti-Bribery Convention, there have been three subsequent instruments, called “Recommendations,” which are also optional.

If states disagree on the interpretation of a convention or treaty provision, the dispute can be referred to an international tribunal or arbiter for resolution. Conventions and treaties frequently have specific provisions allowing countries to withdraw from (or denounce) the convention (e.g., Article 70 of UNCAC and Article 17 of the OECD Anti-Bribery Convention).

On the topic of enforcement of conventions and treaties, *Canada’s Approach to Treaty Making*, a publication from Canada’s Library of Parliament, states:<sup>205</sup>

Compliance with and the enforceability of international treaties is a broad topic that cannot be dealt with in any comprehensive manner in a few paragraphs. Ultimately, there are multiple forms of international treaties, multiple levels of enforceability, and multiple mechanisms for enforcement. Various bodies are available to assist with the enforcement of international treaties and conventions at the international and regional levels. For example, trade treaties may be subject to enforcement under the NAFTA or through the World Trade Organization, which have various levels of tribunals to ensure compliance with their standards. Other trade treaties are subject to enforcement by arbitral tribunals that can impose financial

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<sup>205</sup> Laura Barnett, “Canada’s Approach to Treaty Making Process” (revised November 2012) Library of Parliament, Legal and Legislative Affairs Division Background Paper No 2008-45-E at 5, online: <<http://www.parl.gc.ca/content/lop/researchpublications/2008-45-e.htm>>.

penalties on parties to the agreement. By contrast, human rights treaties are often subject to some form of oversight through the United Nations treaty bodies. The Concluding Observations issued with respect to country compliance under these UN treaty bodies are not legally binding, but they do carry significant moral suasion. Breaches of humanitarian law, such as war crimes and crimes against humanity, are dealt with by the International Criminal Court, which has the power to sentence individuals to imprisonment. The International Court of Justice is also charged with settling legal disputes submitted to it by states in accordance with international law generally, and with giving advisory opinions on legal questions referred to it by UN organs and specialized agencies. [Footnotes omitted]

On a practical level, enforcement of UNCAC and the OECD Convention is dependent on the implementation monitoring process which the State Parties have agreed to in each Convention.<sup>206</sup> In accordance with Article 12 of the OECD Convention, a detailed monitoring program of each state party is done under a framework developed and conducted by its Working Group on Bribery (see 2009 Recommendation of the Council for Further Combatting Bribery of Foreign Public Officials, Recommendations XIV and XV). The Working Group's Evaluation and Monitoring Reports for each country can be viewed on their website.<sup>207</sup> Once the enforcement recommendations set out in the Country Evaluation Report are made public that country is under political and moral pressure to comply with the recommendations.

Article 63 of UNCAC leaves the issue of monitoring State Parties compliance to the Conference of State Parties who are directed to agree upon activities, procedures and methods of work to achieve the Convention's objectives, including (in Article 63(4)(e)) periodic review of the "implementation of the Convention by its State Parties." UNCAC adopted a review mechanism during the 3<sup>rd</sup> Conference of State Parties in Doha in 2009

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<sup>206</sup> Monitoring and compliance are challenging tasks in relation to international conventions. Clare Fletcher and Daniela Hermann describe the difficulty of enforcement in *The Internationalisation of Corruption* (Burlington, VT: Ashgate, 2012) at 73: "[t]heoretically, when a treaty comes into existence, ratifying states are legally bound to comply with it. ... As we have seen, however, in the contemporary international system there is no single political authority above the state. In practical terms, therefore, states cannot be forced to comply." Fletcher and Hermann also point out that monitoring without infringing on state sovereignty is problematic, while compliance with UNCAC and the OECD Convention is further jeopardized by the challenges of pursuing complex and expensive corruption cases within states. Further, as seen in the BAE case (described in more detail at Part 10 of this chapter and Chapter 6, Part 1 of this book), compliance with UNCAC and the OECD Convention also depends on political will in each ratifying state. For Rose-Ackerman and Bonne Palifka's analysis of feasible options available to international bodies in fighting corruption see Chapter 14 of Rose-Ackerman & Palifka (2016).

<sup>207</sup> OECD Convention Working Group on Bribery, "Country Reports on the Implementation of the OECD Anti-Bribery Convention" online: <<http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm>>.

(Resolution 3/1). Under the review mechanism, each state party is reviewed by two peer states under the co-ordination of the UNODC Secretariat. The terms of reference, guidelines and blueprint for UNCAC reviews can be found in the 2011 UNODC publication *Mechanisms for the Review of Implementation of the United Nations Convention against Corruption: Basic Documents*. In short, peer reviews of all states are to begin over a four-year time frame beginning in 2010, with a country's year of review being determined by lottery. [Canada is in year 3, the UK in year 2, the US in year 1]. The two peer review countries are made up of one review country from the same region as the country being reviewed and another review country from a different region. The first step of the review is the completion and submission of a detailed self-assessment report by the country under review, followed by electronic communication; then (normally) a site visit and the writing of the review report (the executive summary is made public, but not the report itself). For more information on the progress of the UNCAC review mechanism, see the April 7, 2016 Progress Report of the Implementation of the Mandates of the Implementation Review Group.<sup>208</sup> Each evaluation cycle of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption lasts four years. The Progress Report from the most recent session of the Implementation Review Group, which occurred in April of 2016, provides information on the first review cycle. At this seventh session, country pairings for the second cycle of reviews were drawn.<sup>209</sup> Thirty countries are expected to be reviewed during the first year of the second cycle.

## 6.4 Development and Revision of National Laws Against Corruption

### 6.4.1 US and UK Anti-Corruption Laws

Following the multilateral agreements reached in the international forum, many countries have enacted or revised domestic laws to comply with their international convention obligations. As already noted, the United States' *Foreign Corrupt Practices Act* (1977) was an

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<sup>208</sup> Implementation Review Group, "Progress Report on the Implementation of the Mandates of the Implementation Review Group" (7 April 2016), online: <<http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/20-24June2016/V1602026e.pdf>>. The Implementation Review Group's Canadian Progress Report can be found at: <<http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1400913e.pdf>>. The United Kingdom's Progress Report can be found at: <<http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1382015e.pdf>>. The United States' Progress Report can be found at: <<http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1251970e.pdf>>. China is being reviewed by Viet Nam and Bahamas, but its report has not yet been published.

<sup>209</sup> "Country Pairings for the Second Cycle of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption" (14 July 2106), online: <[http://www.unodc.org/documents/treaties/UNCAC/Review-Mechanism/CountryPairingSchedule/2016\\_07\\_14\\_Country\\_pairings\\_SecondCycle.pdf](http://www.unodc.org/documents/treaties/UNCAC/Review-Mechanism/CountryPairingSchedule/2016_07_14_Country_pairings_SecondCycle.pdf)>.

influential example of a rigorous anti-corruption law long before the international instruments were established. The United Kingdom's *Bribery Act* (2010) is the latest illustration of a strong and broad domestic anti-corruption law. Both the US and UK laws have broad extra-territorial provisions, and therefore foreign companies and persons conducting global businesses with a link to either country must comply with these two "domestic" laws. Both US and UK corruption laws will be examined throughout this book as illustrations of how other countries could comply with UNCAC and other anti-corruption conventions.

Compliance by state parties with international anti-corruption obligations remains inconsistent. The 2015 Transparency International (TI) report "Exporting Corruption? Country Enforcement of the OECD Anti-Bribery Convention Progress Report 2015" indicates that of the 39 state parties to the OECD Convention, only four (Germany, Switzerland, the UK, and the US) are actively enforcing the OECD Convention, while six countries (including Canada) have moderate enforcement, nine others have limited enforcement, and twenty have little or no enforcement.<sup>210</sup> TI views the "Active Enforcement" ranking as a necessary step to effectively deterring companies and individuals from bribing foreign public officials.

#### 6.4.2 Canada's Domestic Legislation

Canadian corruption and bribery laws will be examined in detail in subsequent chapters of this book. In short, the 1998 *Corruption of Foreign Public Officials Act* (CFPOA) was enacted in order to fulfill Canada's obligations under the OECD Anti-Bribery Convention. The CFPOA makes it a criminal offence in Canada for Canadian corporations or individuals to bribe or offer a bribe to a foreign official in order to win business or gain an improper advantage. In 2013, the federal government amended the CFPOA in several ways to increase its scope and effectiveness. Canada currently meets its anti-corruption international obligations under UNCAC by a combination of provisions in its *Criminal Code* and CFPOA.

Enforcement of the CFPOA was nearly non-existent prior to 2008-2009 since there were no police resources specifically allocated to CFPOA enforcement. Canada was criticized by many commentators and eventually by the OECD Working Group on Bribery for its non-enforcement of CFPOA provisions. As a consequence of this criticism, the federal government funded the creation of two new RCMP foreign corruption units. Since that time there have been a few major convictions for foreign bribery, two other cases awaiting trial, and apparently 10 to 15 other cases under investigation. TI currently ranks Canada's

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<sup>210</sup> Fritz Heimann & Gillian Dell, "Exporting Corruption? Country Enforcement of the OECD Anti-Bribery Convention Progress Report 2015" (Transparency International, 2015), online: <[http://www.transparency.org/whatwedo/publication/exporting\\_corruption\\_progress\\_report\\_2015\\_assessing\\_enforcement\\_of\\_the\\_oecd](http://www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2015_assessing_enforcement_of_the_oecd)>.

enforcement of the OECD Convention as “Moderate,” one level below the “Active Enforcement” level, which is considered the appropriate level.<sup>211</sup>

## 7. DIVERGENT POLITICAL AND ECONOMIC VIEWS ON CORRUPTION

### 7.1 Libertarians, Cultural Ethnographers and Liberal Democrats

In her article “Corruption: Greed, Culture and the State,” Rose-Ackerman argues that while lawyers view corruption mainly as a problem of law enforcement, some commentators in other disciplines contest the very concept of corruption.<sup>212</sup> To analyze this perspective, Rose-Ackerman reviews how both free-market libertarians and cultural ethnographers have drawn on a distrust of the modern state to legitimize, excuse, and explain corruption. She further argues that these views are overly simplistic and are at times, internally inconsistent. Instead, she advocates for an approach to anti-corruption theory that acknowledges the importance of the modern state and seeks to build transparency and accountability in government institutions.

#### Libertarians and Corruption

Rose-Ackerman describes the libertarian view of corruption “as a symptom of an intrusive, meddling state that systematically reins in the free market and undermines entrepreneurial activity and competition... [Libertarians] argue that market actors who pay bribes to avoid complying with the rules, to lower tax bills, or to get favours, limit the harm that the state can do, and consequently enhance the benevolent operation of the free market as a locus of individual freedom.”<sup>213</sup> She suggests that libertarians prefer very little state regulation and view bribery as a technique that can be used to facilitate the efficient functioning of free markets. As an example, Rose-Ackerman submits that a libertarian would not be concerned about the illegality of using a bribe to get around a costly regulation, and instead would approve of this transaction. In support of this libertarian position, Rose-Ackerman cites Becker<sup>214</sup> and the authors of “Economic Freedom and Corruption” who write, “The fewer

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<sup>211</sup> *Ibid.*

<sup>212</sup> Susan Rose-Ackerman, “Corruption: Greed, Culture and the State” (2010) 120 Yale LJ 125, online: <<http://www.yalelawjournal.org/forum/corruption-greed-culture-and-the-state>>.

<sup>213</sup> *Ibid* at 126.

<sup>214</sup> Gary S Becker, “To Root Out Corruption, Boot out Big Government”, *Business Week* (31 January 1994) at 18.

resources (includes assets and regulatory power) a government controls, the fewer the opportunities for corruption."<sup>215</sup>

Furthermore, Rose-Ackerman describes the extreme libertarian views of Brennan and Buchanan, who perceive state taxation and regulation as equivalent to theft.<sup>216</sup> Brennan and Buchanan's view, Rose-Ackerman argues, would allow government officials to act in self-interest and extract private benefits, initiating the government's devolution into a kleptocratic monster. Rose-Ackerman critiques this libertarian view and maintains that democracies, while not always completely efficient or perfect, are the best available way to reflect the will of the people. Indeed, as long as the rules of the constitution are followed, and human rights are respected, Rose-Ackerman argues that using government inefficiency, or bad laws, as a way to justify bribery "trivializes and undermines democratic institutions."<sup>217</sup>

### **Ethnography and Corruption**

Rose-Ackerman also asserts that cultural anthropologists and ethnographers excuse the corrupt giving of gifts and favours, but do so by employing different justifications than libertarians. From the perspective of a cultural anthropologist, Rose-Ackerman argues traditions that emphasize payments, gifts or favours to friends and family are privileged over formal rules and laws. Indeed, she states "scholars in this tradition often refuse to label transactions as corrupt if they are based on affective ties, or they claim that, even if formally illegal, the practices are socially acceptable, economically beneficial, and compensate for the imperfections of government and of electoral institutions."<sup>218</sup>

The author suggests that cultural anthropologists blame corruption on a mismatch between traditional practices and the development of impartial bureaucratic and democratic systems. Thus, if a society is transitioning from personal transactions to a formal set of rules and laws, cultural feelings of duty may clash with professional obligations and lead to corrupt acts. Additionally, Rose-Ackerman asserts that in some cultures, many ethnographers find the current, dominant conception of corruption is simply a part of everyday life in a citizen's social interactions with the state. In these instances, such as paying a fee to avoid taxes or bribing a judge for the "loss" of a key legal document, the social norms justify the behaviour, even though they mix economic motives and social practices. As examples of these

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<sup>215</sup> Rose-Ackerman (2010) at 127, citing Alejandro A Chafuen & Eugenio Guzman, "Economic Freedom and Corruption" in Gerald P O'Driscoll, Jr, Kim R Holmes & Melanie Kirkpatrick, eds, *2000 Index of Economic Freedom* (2000) 51 at 59.

<sup>216</sup> Geoffrey Brennan & James M Buchanan, *The Power to Tax: Analytical Foundations of a Fiscal Constitution* (Indianapolis: Liberty Fund, 1980).

<sup>217</sup> Rose-Ackerman (2010) at 128.

<sup>218</sup> *Ibid* at 128.

anthropologic assertions, Rose-Ackerman relies on the work of de Sardan,<sup>219</sup> Hasty<sup>220</sup> and Smith<sup>221</sup> who developed these themes in the African context. Specifically, Rose-Ackerman cites Smith's studies of Nigerian culture, where locals considered modern conceptions of corruption, which involved helping friends and family, proper moral behaviour. Furthermore, Rose-Ackerman submits that in Africa corruption is recognized and criticized by many people, even though "they themselves participate in networks that socially reproduce corruption."<sup>222</sup> Rose-Ackerman also acknowledges a similar cultural norm of ambiguity regarding bribes to friends and family in China, termed *guanxi*, or as it translates "social connections."

Rose-Ackerman while sympathetic to the position of those who find their social obligations conflict with their professional ones, reasons that "while deeply embedded and self-reinforcing, ... norms must change ... if a society is ever to build a legitimate democracy."<sup>223</sup> She further argues that the current condemnation of corruption by citizens leaves openings for potential reform.

In summary, Rose-Ackerman believes libertarians and ethnographers share very similar normative positions. She states, "both stress the way payoffs to public officials permit nonstate institutions to flourish in spite of a set of formal rules that constrain private behaviour. However, each gives a different set of institutions priority – the market for one and social ties for the other."<sup>224</sup> In addition, Rose-Ackerman argues both groups perceive corruption as a response to a dysfunctional reality.

### Grand Corruption

The main type of corruption Rose-Ackerman is concerned with is what she terms "grand corruption." In instances of grand corruption, those at the top of the state hierarchy, such as political leaders, participate in corrupt acts in return for funds. The problem with this, Rose-Ackerman argues, is that grand corruption will lead to distortions in the quality and quantity of government decisions, divert funds to public officials' private accounts and create unfair electoral advantages. Grand corruption is sometimes initiated by multinational firms, whom Rose-Ackerman contends, invoke cultural norms as their justification for giving bribes to public officials. For example, Rose-Ackerman cites the 2006 international arbitration dispute where a firm paid a two-million-dollar bribe to the President of Kenya and tried to argue that the payment was made to satisfy the local custom of *harambee*. The Kenya government,

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<sup>219</sup> JP Olivier de Sardan, "A Moral Economy of Corruption in Africa?" (1999) 37:1 *J Modern Afr Stud* 25.

<sup>220</sup> Jennifer Hasty, "The Pleasures of Corruption: Desire and Discipline in Ghanaian Political Culture" (2005) 20:1 *Cultural Anthropology* 271 at 273.

<sup>221</sup> Daniel Jordan Smith, "Kinship and Corruption in Contemporary Nigeria" (2001) 66:3 *Ethnos* 344.

<sup>222</sup> Rose-Ackerman (2010) at 130.

<sup>223</sup> *Ibid* at 130.

<sup>224</sup> *Ibid* at 131.

under new leadership argued there was no valid contract because of the bribe and the arbitration tribunal agreed with them.<sup>225</sup>

Rose-Ackerman analyzes multiple justifications she believes others use to excuse grand corruption.<sup>226</sup> First, multinational firms argue that presenting bribes is simply an attempt to be culturally sensitive. The author points out this excuse is invalid because the unfavourable terms of the contract, obtained because of the bribe, negatively affected the citizens of the nation. Thus, if the firm was being culturally sensitive they would consider the cultural needs of more than just the one public official whom they bribed. Second, Rose-Ackerman critiques the argument used by high ranking officials that a bribe is simply a tribute to their prestigious status, in line with cultural traditions--an argument which conflicts with established tradition where bribes go from higher-status to lower-status individuals. If high ranking officials were really following traditions, Rose-Ackerman claims, they would be insulted by these bribes and reject them. Third, Rose-Ackerman states culturalists argue that grand corruption is imported from wealthy, capitalist countries where businesses have profit-maximization as their goal. In other words, the bribes and corruption only occur because of this western influence. In her assessment this argument is too simple because both parties, including the political leaders, must agree to make a corrupt deal and some are willing to use the excuse of culture to justify self-gain. Thus, Rose-Ackerman asserts "one needs to be cautious in accepting at face value assertions that seemingly corrupt transactions reflect entrenched cultural practices acceptable to most people."<sup>227</sup>

### Democratic Legitimacy and the Control of Corruption

The author asserts that a democratic state may exercise coercive power in making decisions, which may have a greater cost on some individuals over others, as long as the state publicly justifies its exercise of power. Furthermore, Rose-Ackerman recognizes that a democracy does not mean unanimous consent or a lack of policymaking delegation. Broadly speaking, Rose-Ackerman believes a properly functioning democracy is a legitimate way to organize society. However, Rose-Ackerman argues if elected officials or bureaucrats engage in self-interested behaviour, such as corruption, this undermines the state's claim to legitimacy. She acknowledges that in situations where public power is bound up with paternalistic obligations, it may be difficult to separate corrupt dealings with local practices. Nevertheless, Rose-Ackerman argues if corruption is allowed to take place in government, state agents will likely rewrite rules to increase their self-gain and will create a feedback loop that weakens the legitimacy of the government. Furthermore, Rose-Ackerman argues that "tensions

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<sup>225</sup> *Ibid* at 132, citing *World Duty Free Co v Republic of Kenya*, ICSID Case No. ARB/00/7, at 190-191 (4 October 2006).

<sup>226</sup> For more on grand corruption and an economic analysis on how to reduce the incentives and increase the cost of corruption, see Chapters 3, 4 and 5 of Rose-Ackerman & Palifka, (2016).

<sup>227</sup> *Ibid* at 134.

between the democratic welfare state and the private market and between that state and a country's traditional cultural practices are all but inevitable."<sup>228</sup>

Therefore, Rose-Ackerman suggests that anti-corruption policy can take three paths: first, to accept the presence of cultural norms and channel them into less destructive paths; second, to bypass cultural norms by substituting institutions that require other skills and values; or third, to transform these cultural norms. She also cautions that aggressive approaches to anti-corruption may destroy the goodwill and loyalty of citizens. Rose-Ackerman acknowledges there is no easy solution to the critiques of anti-corruption efforts, but provides eight potential areas of reform.

1. Simple Transparency is Necessary

There must be the publication of and easy access to all laws, statutes, regulations, legal guidelines and practice manuals. Moreover, there should be an independent external audit body, which oversees government spending.

2. External Oversight of Government Activity is Essential

Removing press restrictions and sponsoring training in investigative journalism is one solution to provide external monitoring of government action. This area of reform is tied to the first suggestion, as civilians must have access to information before they can review it and issue complaints.

3. Transparent and Competitive Processes for Large-Scale Procurement Should Exist

This measure is specifically aimed at countering grand corruption, but she recognizes there will be an occasional need for sole-source procurement. In these instances, she advises the government be transparent with their negotiations and attempt to obtain a high quality result at a good price.

4. The State Should Enforce Bribery Laws Against Major Offenders both Inside and Outside of Government

This may entail, making special efforts to apprehend organized crime involved in corruption.

5. Creation of a Complaint Mechanism Process to Report Bribes

There should be a way for individuals and businesses to report bribes and have their claims dealt with in a timely manner.

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<sup>228</sup> *Ibid* at 136.

6. Reforms Should Be Made to Improve Government Function and Reduce Corruption

Rules and regulations should be studied to identify where reforms or repeals may be necessary to reduce corruption.

7. The Working Conditions of Civil Servants and the Judiciary Should be Improved

Improving the pay, working conditions and recruitment process of civil servants, coupled with increased internal monitoring, should help reduce the likelihood of corruption.

8. Electoral Law May Need Reform

In areas where politicians are found to be corrupt, electoral law and its enforcement may need to be reformed.<sup>229</sup>

In conclusion, Rose-Ackerman acknowledges that while international treaties and civil society initiatives aimed at curbing global corruption are a step in the right direction, their effects do not have the same “bite as hard law” and are only a complement to much needed domestic reform. In addition, she urges moving away from simplistic claims such as corruption is necessary because of a dysfunctional government, and instead, argues for realistic domestic reforms, such as increasing the effectiveness of public services and ensuring conflicts are resolved fairly, in order to reduce corruption.<sup>230</sup>

## 7.2 The Three Authority Systems: Traditional, Patrimonial and Rational-Legal

In his article “Corruption in the Broad Sweep of History,” Marcus Felson uses Max Weber’s three categories of historical authority systems to conceptualize corruption and place it within its political and economic context.

BEGINNING OF EXCERPT

Corruption is a product of the interplay between (a) primary human imperatives and (b) an economic and social system trying to control and channel those imperatives. Primary human imperatives include both looking after one’s personal interests and meeting social commitments to friends and relatives. A strong tension is inherent

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<sup>229</sup> Rose-Ackerman & Palifka (2016).

<sup>230</sup> For further exploration of the relationship between culture and corruption, see Chapter 7 of Rose-Ackerman & Palifka (2016).

between these primary human imperatives and the larger economic and social system. That tension is strongest with the modern form of economic organization. Hence corruption, despite its ancient presence, becomes especially relevant in a modern world. Although corruption becomes especially an issue as developing nations move towards a modern world, we should not assume that the tension will go away once they are developed.

Those aware of Max Weber (1947 [1904]) will immediately recognize the origins of the current argument in his description and analysis of the broad sweep of economic and social history. Weber was perhaps the greatest historical theorist of economic and social life. On the one hand, he gathered vast detail as he studied and described each society. On the other hand, Weber summarized those details within a very general analytical framework. Each society has a prevalent authority system that governs its behavior, and that authority system is central for understanding it. Weber synthesized information about the broad sweep of economic and social history with three authority systems: (a) traditional, (b) patrimonial, and (c) rational-legal. This chapter explains his general categories, then shows why they help us to understand and conceptualize corruption.

Within a traditional system, individuals are constrained by the rules and mores of society, but those constraints do not stand between primary human imperatives and productivity. Thus a traditional hunting and gathering society follows the teachings of the past and the social ties of kinship, whether or not these lead to greater efficiency. Traditional systems often apply in agrarian societies with small village life, and are not oriented towards a modern society. However, traditional systems may persist into the modern era. A prime example of a traditional system is the interplay of the Hindu religion and the economy in India. Each economic role is largely defined by caste and hence by tradition, within minimal economic flexibility and little regard to efficiency. Within a traditional system, many economic behaviours that we might regard as corrupt from an outside viewpoint are actually part of the rules. Thus assigning jobs by caste and village is intrinsic to the way of life, and should not be viewed as corrupt behavior as a matter of personal deviance, except when those collective obligations are circumvented.

The patrimonial system is very distinct from the traditional system because of its reliance on personal rule. In this system the ruler does not distinguish between personal and public life, treating state resources and decisions as his personal affair. The agents of the ruler act in his name and on his behalf. It is still possible for those agents to be corrupt only in the sense that they cheat the ruler of his due. If the ruler's agents mistreat the citizens, they are acting within the rules of the system—so long as they send the proceeds back to the ruler and do not take more than their allotted share. This is quite evident in the history of tax farmers whose job was to demand tribute and payments from the provinces. They would be perceived as corrupt to us today,

but they were not corrupt in terms of their system, unless they hid the proceeds from the ruler in their own selfish interest. Examples of patrimony range from Roman emperors to President Ferdinand Marcos in the Philippines and Colonel Khadafi in Libya—reflecting extension of authority beyond a local area. This leads us to as whether such power has been established by force or by normative authority or some combination. But regardless of the answer to that question, extracting resources from the population is intrinsic to the system, not a violation of it.

The rational-legal system of economic and social organization has an entirely different set of expectations from the traditional and patrimonial systems. The rational-legal system is closely related to Weber's textbook concept of 'formal organization' and bureaucracy—a word he uses in positive terms. Under this system, all persons follow rules and fit into formal roles that are separate from the personal, family, and friendship interests of their incumbents. The rulers and role incumbents are substitutable, so that a formal organization persists over time, pursuing goals beyond the individual. This impersonality includes hiring based on competence and certification, and promotion based on ability and productivity. The role incumbents must follow rules, and must be oriented towards goal achievement beyond themselves. They are also supposed to treat each client equally, according to the rules, ignoring personal ties and predilections. Thus modern life conflicts fundamentally with primary human imperatives. Bureaucracy in Weber's terms is like a machine, since it separates personal interests (including family and friend commitments) from interests, facilitating the latter. Yet this form of economic and social organization only emerged in the past 200 years or less in Europe, and in most of the world did not begin to spread until after 1950. In many parts of the world, the rational-legal form is only beginning to emerge. The distinction between persons and positions is difficult to accept fully in any era, which helps explain why it was so late to arrive.

Of course, Weber's concept of rational formal organization is an ideal type. It describes the official position of many modern societies; but that does not mean that everybody follows those rules all of the time. Indeed, a rational-legal system creates a fundamental tension in society, because it is only natural for each person to take care of oneself and one's family and friends, even in violation of general rules and roles. Thus the rational-legal system is almost directly in conflict with primary human imperatives—which do not go away simply because society no longer welcomes them as much as before. Indeed, corruption has much greater potential in the rational legal system than in the traditional or patrimonial systems of economic and social organization. The levels of corruption possible in a rational-legal system far exceed anything possible in the traditional system, which provides more local controls and hardly expects people to abandon their personal ties while engaging in productive work. The corruption in a modern system also exceeds the corruption of the patrimonial system, within which one must cheat the ruler in order to be corrupt, but

the ruler and his agents extracting from everybody else is part and parcel of that economic and social system.

The corruption potential of a rational-legal system is dramatically greater mainly because that system conflicts with basic human tendencies. If human beings are both selfish and social, then the modern form conflicts with each. It conflicts with the selfish tendencies because each individual has something to gain from evading less pleasant role assignments or taking resources beyond entitlement. It conflicts with social tendencies because each individual feels commitment to friends, family and those with less social distance and wants to help them more than strangers. Hence treating everybody alike under the rules is unnatural for real people.

Given its conflict with human selfishness and human sociability, the rational-legal system should have died an early death. Yet it survives and spreads for a simple reason: this strange and hardly human form of social and economic organization is extremely productive in material terms. It makes more cars. It processes more customers and clients. It shortens lines and puts a chicken in every pot. And so the least human of social and economic systems is also the most productive. Thus our selfish and social interests are torn between the immediate gains from violating the rules and the more general gains from following them. The best individual solution is to break the rules yourself but get everybody else to follow them, yielding a productive society as a whole that you can then exploit. However, if too many people do that then the productivity of the whole system declines and the rational-legal system becomes a figment of the imagination.

Imaginary rational-legal systems are all too common. In a way the real lesson of the 2000 Presidential election and the case of *Gore vs Bush* in Florida is the corruption and mismanagement of state and local governments in the United States. In Weber's terms, each occupational role is assigned to a specialist, with overlapping roles minimized. Those familiar with corruption issues will immediately recognize this as a flaw, for the lack of overlap makes it easier for one person to corrupt the system and avoid discovery. In contrast, overlapping makes it possible for someone else to check, or more generally for the people to check one another.

Weber relied too much on the power of the normative system to keep each incumbent performing properly. Here we turn to another great theorist, James Madison (1787), whose famous Federalist Paper Number 10 explained the need for a system of checks and balances. Although Madison was considering legislative matters, his general principle was that individuals are corruptible (in the broad sense), but that their selfish and personal interests can be used to counter one another.

The theory of checks and balances may be the essential general theory of corruption control. In both government and business, checks and balances are employed to

protect responsible decisions and actions. Rival political parties, parliamentary question periods, a free press, regulatory agencies, free competition in the marketplace, overlapping roles, auditors and accountants—each of these is a special example of the general rule that checks and balances are needed to prevent personal and social interests from impairing efficiency and productivity. Thus Madison sought to reconcile primary human imperatives with the requirement that everyone has a fair shake.

Modern corruption has to do with positions, and modern organization creates lots of positions demanding that people suppress their selfish interests. In the era of traditional and patrimonial authority, corruption was limited and modern corruption did not exist (although a more primitive and limited form of corruption did apply, even then). When organization is poorly designed and managed, we can expect corruption as a result; but we can also expect various organizational goals to be poorly achieved. In fighting corruption, we must always remember what we are asking of people: to set aside personal interest and personal ties and to follow rules for the greater *impersonal* good. But we must also understand that we can never completely win the war against corruption, nor can we give it up. We can never win it because primary human imperatives always outweigh impersonal goals. We can never give up the struggle because our modern prosperity depends on containing these personal and social goals while on the job. But if we don't contain it, it grows and takes over. Like housekeeping, no vacuum sweeper works permanently but the failure to vacuum lets a home get dirtier and dirtier.

Yet corruption cannot be controlled by assuming that people can be trained in ethics alone, since it is impossible to talk people out of being people. But it is possible to train people to supervise one another and hence to provide a system of checks and balances. Such a system works best when criminalization and punishment work only at the extreme, when the system operates on a normal basis without getting to that point. Control depends on designing more secure systems, efficient supervision, and effective checks and balances. As technology takes new forms, it brings new opportunities for corruption and hence demands new checking and balancing. With the march of technology, more and more value is intangible—contained in electronic data that are not easily watched with the naked eye. But systems can be designed to keep track of electronic data, too, thus interfering with the opportunities for corruption. As society becomes more complex in technology, corrupt practices can more easily escape notice, at least for a while. But in time we learn to use technology to reduce the complexity of supervision and thence to create methods for managing, checking, and balancing so that formal organization keeps personal and social needs under a reasonable degree of containment. An organization must find simplicity and accountability to avoid corruption. That means overcoming organizational and technical complexity with new forms of simple checks and balances. When that is achieved, modern society can achieve simple monitoring while requiring complex

conspiring, and corruption will diminish. Developing nations face the same principles but at an earlier stage, with formal organization replacing family and patrimonial systems in places not yet ready for that to happen. But, of course, no place is fully ready to give up its personal and social tendencies, and so the work of reducing corruption is never complete.<sup>231</sup>

END OF EXCERPT

Felson's contention that the rational-legal system holds the greatest potential for corruption is reflected in empirical data. In their article "Democracy and Corruption: a Complex Relationship," Shrabani Saha et al. use sophisticated econometric models to show the rise in corruption in countries that have transitioned from autocratic regimes to electoral democracies (the ultimate rational-legal system).<sup>232</sup> The authors conclude that electoral democracy and political rights alone are insufficient to reduce corruption; in fact, electoral democracy alone aggravates widespread corruption because there are less checks and balances against corruption in an electoral democracy than in an autocratic regime. Effective democratic institutions, such as an independent judiciary, free press, strong rule of law in the economic system and distribution of social benefits and respect for civil rights, are crucial to reducing corruption. These institutions deter corruption by increasing the probability that corrupt acts will be detected and punished.

For a counterpoint to "economistic" understandings of corruption, see Barry Hindess, "Good government and corruption" in Peter Larmour and Nick Wolanin, eds, *Corruption and Anti-Corruption* (Canberra: Asia Pacific Press, 2001). Hindess argues that a narrow focus on economic corruption obscures other, more general forms of corruption in government. By ignoring these other forms of corruption, we fail to see the damaging effects of party politics, police corruption and other insidious problems of political life in western democracies.

For an analysis of how unethical, yet technically, legal *quid pro quos* are institutionalized in professional environments, and how this institutionalized corruption affects the independence of politics and professions, see Garry C Gray, "Insider Accounts of Institutional Corruption: Examining the Social Organization of Unethical Behaviour" (2013) 53 *Brit J Criminol* 533.

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<sup>231</sup> Marcus Felson, "Corruption in the Broad Sweep of History" in Graycar and Smith, (2011) at 12.

<sup>232</sup> Shrabani Saha et al, "Democracy and Corruption: A Complex Relationship" (2014) 61:3 *Crime L & Soc Change* 287.

## 8. A SOCIOLOGICAL PERSPECTIVE ON INSTITUTIONAL CORRUPTION

by Garry Gray

*Section 8 was written by Professor Garry Gray, Assistant Professor of Sociology, University of Victoria*

As conventional wisdom would have it, corruption and illegality go hand in hand. Tacitus' famed words, *Corruptissima re publica plurimae leges*, often translated as 'the more corrupt the state, the more numerous the laws,' evokes multiple meanings, but one rendering elucidates on the expansiveness of corruption beyond the law.<sup>233</sup> Bribery and other direct quid pro quo conflict of interest exchanges involving public officials and fiduciaries are well recognized as indictable offences in many countries, but corruption also operates on an invisible level, embedded within the social norms and institutional practices of professional environments. This form of corruption can be referred to as institutional corruption. Conceptually it requires that we go beyond the focus on illegal behaviour to also include unethical and professional activities that violate public trust. Institutional corruption therefore requires a shift in focus towards examining "influences that implicitly or purposively serve to distort the independence of a professional in a position of public trust."<sup>234</sup>

In summarizing an account from a confidential interview that I conducted with a consultant for a multilateral development institution who was also a tenured professor, we can observe distinctions between traditional corruption and institutional corruption.<sup>235</sup> Over more than a decade, Anthony had taken on consulting assignments that required him to evaluate projects being considered for grant funding from a multi-lateral donor.<sup>236</sup> On more than one occasion while abroad on assignment, he had been offered bribes in return for writing favorable reports. He said these bribes could involve very large sums of money. In one case the bribe was perhaps five percent of the grant total, amounting to more than double the annual salary that he was earning as a tenured professor. Anthony acknowledged that these overtly illegal and at times threatening experiences fit the traditional conceptualization of corruption.

Following this discussion I asked Anthony if he had experienced other kinds of conflicts, namely situations that caused him to wrestle with what to do in his work for the multilateral

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<sup>233</sup> George Long, *The Annals of Tacitus with a Commentary by the Rev. Percival Frost, M.A.* (Whittaker & Co, 1872).

<sup>234</sup> Garry C Gray, "Insider Accounts of Institutional Corruption: Examining the Social Organization of Unethical Behaviour" (2013) 53 *Brit J Crim* 533.

<sup>235</sup> This interview was conducted as part of a larger project on behavioural ethics among professionals in positions of public trust and funded by the Edmond J Safra Center for Ethics at Harvard University.

<sup>236</sup> The name Anthony is a pseudonym.

donor. Anthony recounted a situation where his research findings and recommendations in a commissioned report did not fit with the ideological perspective held by his manager at the multilateral development institution. After some careful consideration he felt he could not compromise, because of the impact the alternative could potentially have for the country in question. Anthony recalled having a lengthy conversation over the phone with that manager and being asked to change the report. He refused, and acknowledged in that phone call that his contract was coming up for renewal and that he knew this disagreement could affect it. He saw this possible consequence as an expected, even logical outcome given the norms of consulting. There was nothing illegal about the situation, but the ‘corrupting’ effect of the earlier bribery examples and the threat of reduced hours is the same: both were influences intended to alter the outcomes of Anthony’s reports.

Looking back on that exchange, Anthony is convinced that he would have been offered more consulting hours in the subsequent year had he submitted a report that fit with his manager’s desired outcome. He also questioned what he would have done had he not held a tenured professorship, and if consulting had been his primary mode of employment. He was convinced that his professorship had structurally enabled him to stand behind his report. In this case, he was able to resist institutional corruption, but acknowledges that he still felt pressured to ‘go along, to get along’.

The concept of public trust is an important element of institutional corruption theory. If Anthony was not a university professor, but instead was a full-time consultant who depended on the availability of future consulting opportunities, should we be less trusting of Anthony’s ability to remain independent? Would the possibility of missing out on future consulting opportunities lead to subtle forms of dependency within Anthony’s social and professional networks? If so, then what other subtle improper influences may exist in professional environments that could compromise the *independence* of professionals in positions of public trust?

### **From Bribery to Political Corruption**

While the United States, since the enactment of the *FCPA* in 1977, has been a driving force behind global attempts to regulate quid-pro-quo corruption and in particular, bribery, (c.f., the OECD Anti-Bribery Convention in 1999 and the UNCAC in 2005), it has been reluctant to impose similar regulations on political corruption. During the UNCAC negotiations, the United States resisted proposals from Austria, France, and the Netherlands to impose mandatory regulations that would address issues of corruption in campaign finance. While campaign finance reform, and the issue of money in politics, is a contentious policy issue in

the United States<sup>237</sup> it also provides a good example of the value of an institutional corruption approach.<sup>238</sup>

### Political Corruption: The Case of Jack Abramoff

Prior to being convicted of fraud and being sent to prison, Jack Abramoff was one of the most influential lobbyists in the United States.<sup>239</sup> Upon release from prison, Abramoff now spends his time exposing the role that institutional corruption plays in political decision-making and campaign financing. During one public interview, Abramoff told the interviewer the following: “We know a bribe is when you show up with a stack of cash and say, ‘Here’s \$10,000 in cash, and can you do this for me?’ But if I show up with 10 \$1,000 campaign contributions and say the same thing, that’s not a bribe in Washington. Outside of Washington, everybody gets this... but inside Washington, that’s the way it’s done... We have institutionalized corruption in Washington. It’s perfectly accepted, and it’s acceptable to virtually everybody, and that’s where things need to change.”<sup>240</sup>

The role of money in politics, in particular through campaign finances, is attracting increased international attention. For instance, in response to major corruption scandals in Brazil, the Supreme Court of Brazil declared on September 17, 2015, that corporate donations to election campaigns are unconstitutional.<sup>241</sup> And, in the United States, several US politicians seeking the party nomination for leader of the Democratic Party, including Hillary Clinton, Bernie Sanders, and Lawrence Lessig, campaigned for the November 2016 election with campaign finance reform as a major component of their election platform. There is a growing narrative developing in the United States that politicians are becoming less dependent upon the people they represent and more dependent on those who support their campaign finance initiatives.

However, rather than leading to direct quid-pro-quo corruption, the growing dependency on funders of campaigns in the United States is contributing to more subtle forms of institutionalized corruption through relational forms of dependency corruption. By creating situations where politicians become dependent on funders, it is suggested that integrity and independence are compromised. In turn, this leads to situations where self-censoring behaviour (such as deciding which policies or amendments to pursue, or alternatively, vote against) can begin to feel normal and perhaps even justified among politicians in positions

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<sup>237</sup> Jennifer Heerwig & Katherine Shaw, “Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure” (2014) 102 *Geo LJ* 1443; Garry C Gray & Michael D Jones, “A Qualitative Narrative Policy Framework: Examining the Policy Narratives of US Campaign Finance Regulatory Reform”, *American Sociological Association Meetings* (Chicago: August 24, 2015).

<sup>238</sup> Lawrence Lessig, *Republic Lost: How Money Corrupts Congress—and a Plan to Stop It* (Twelve, 2011).

<sup>239</sup> *United States of America v Jack Abramoff*, 2006, online: <[http://www.npr.org/documents/2006/jan/abramoff\\_charges.pdf](http://www.npr.org/documents/2006/jan/abramoff_charges.pdf)>.

<sup>240</sup> PBS Interview (4 April 2012), online: <<http://www.pbs.org/wnet/tavis/miley/interviews/former-lobbyist-jack-abramoff/>>.

<sup>241</sup> Paul Kiernan, “Brazil Supreme Court Bans Corporate Donations to Politicians and Parties”, *The Wall Street Journal* (18 September 2015), online: <<http://www.wsj.com/articles/brazil-supreme-court-bans-corporate-donations-to-politicians-and-parties-1442616836>>.

of public trust. As Lawrence Lessig notes, “knowing that there are members of Congress dependent on campaign cash, private interests exploit that dependency, by seeking special benefits from the governments (‘rents’) and returning the favor ever so indirectly with campaign contributions. And knowing that they are so dependent upon private support, members of Congress will work to keep their fingers in as much of private life as possible... [And] because this is ‘just the way things are done’, no one needs to feel guilty, or evil in this system.”<sup>242</sup>

Given that the corruption described here is institutional in nature and often rationalized as a normal part of politics, a sociological account of institutional corruption is timely. For instance, an analysis of the insider accounts of institutional corruption provided by Jack Abramoff after he was released from prison reveals the mechanics of how the independence of American politicians can be exploited by lobbyists. In particular, through various techniques such as campaign finance contributions, legal loopholes, and the manipulation of social networks that result in improper influences that while often legal, may lead to corrupting outcomes.

Take for instance, the revolving door metaphor, where professionals holding jobs in congressional offices move into lobbying jobs and vice versa. Abramoff shows how this can contribute to institutionalized forms of corruption given the subtle and often hidden financial incentives that exist for public representatives.<sup>243</sup> According to Abramoff, industry lobbyists are well aware of the importance of social relationships and social networks in a revolving door system. While there are cooling-off regulations in some countries that attempt to limit government employees from immediately going through the revolving door to a lobbying job, there still remains various corrupt ways that these regulations can be skirted. According to Abramoff, lobbyists are still able to informally capture individual members of the United States Congress, as well as their staff, even without offering a formal contract of employment. Improper influences can be quite insidious Abramoff states:

As I started hiring staff, particularly chiefs of staff [to members of Congress], I would say ‘hey look when do you want to leave the hill?’ ‘Well, I don’t want to leave for two years.’ ‘Ok, in two years I’ll hire you.’ I hired them right then. The minute they knew they were coming to work for me their whole job changed. They are human beings. If you have a job and you know you are going somewhere else you are at least going to be thinking about the next job. You don’t want that business to go away... When I tell people this... they don’t understand that their staff becomes... my staffer. For two years that staffer is not only my staffer... but is better than my staffer. Because my staffer can’t find the things that person is going to find and look out for our interests more than we could... one of the real pernicious and

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<sup>242</sup> Lessig (2011) at 237-8.

<sup>243</sup> Jordi Blanes, Mirko Draca & Christian Fons-Rosen, “Revolving Door Lobbyists” (2010) London School of Economics and Political Science Centre for Economic Performance Discussion Paper No 993.

corrupt parts of the system, and again completely legal, and unknown entirely.<sup>244</sup>

According to Abramoff, he cultivated these kinds of improper influences in close to 100 of the 435 United States congressional offices. He also noted that staffers were “perfect targets for revolving-door techniques.”<sup>245</sup> The impact of the revolving door is that it contributes to dependencies between lobbyists and government officials (dependence corruption) whereby “public officials might be more likely to insert legal content known as riders that are favourable to lobbying clients into bills that are to be voted on by members of Congress.”<sup>246</sup> As Abramoff notes:

a lobbyist trying to enact his client’s wishes needs to get his amendment onto a bill likely to pass both the House and the Senate, to then be signed by the president. No bill is more likely to pass than a reform bill... so smart lobbyists always keep an eye out for reform bills. It’s ironic, if not horrific, that this is the case. The very bills designed to limit corruption and improve our system of government sometimes serve as vehicles for special interests.<sup>247</sup>

According to Abramoff, the technique of inserting corrupt riders into a reform bill is a common practice, one that is intertwined with problems of political corruption embedded in the revolving door between government and industry. While reform efforts attempt to prevent political corruption, in particular, gifts that represent an illegal and overt attempt to buy influence, they do not always capture or prevent the more subtle forms of institutional corruption. Abramoff’s insider accounts reveal that political contributions to campaigns “are a significant form of indirect gifting that can accomplish the same things [as quid-pro-quo corruption] but without the legal ramifications.”<sup>248</sup> As Abramoff commented in an interview:

You can’t take a congressman to lunch for \$25 and buy him a hamburger or a steak or something like that. But you can take him to a fundraising lunch and not only buy him that steak but give him \$25,000 extra and call it a fundraiser. And you have all the same access and all the same interaction with that congressman.<sup>249</sup>

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<sup>244</sup> Gray (2013) at 543.

<sup>245</sup> *Ibid* at 543.

<sup>246</sup> *Ibid* at 544.

<sup>247</sup> *Ibid* at 544.

<sup>248</sup> *Ibid* at 542.

<sup>249</sup> *Ibid* at 542.

The above insider accounts of structured and systematic corruption provided by Jack Abramoff illustrate the value of an institutional corruption approach to traditional studies of political corruption.<sup>250</sup>

## Conclusion

Corruption, especially corruption that is specialized and intricately woven beyond the public eye, is often legal despite its potential for harm. Far too often, the general public has no choice but to trust that professionals will both recognize and resist corrupting influences when they arise in their professional environments. However, rather than simply trust that each individual professional will “do the right thing” and maintain integrity in the face of improper and potentially corrupting influences, institutional corruption theory offers an alternative. Examine institutional practices, structures, and relationships that bear on the trustworthiness and independence of public officials and professionals, and corrupting systems can be exposed, understood, and eventually mitigated.

## 9. CORPORATE SOCIAL RESPONSIBILITY AND CORRUPTION

In his article “Enhancing the Effectiveness of the Foreign Corrupt Practices Act Through Corporate Social Responsibility,” Dan Heiss states “over the last decade, combating corruption has taken a place alongside human rights, labour rights, and environmental protection as one of the major issues in corporate social responsibility (CSR).”<sup>251</sup> He further argues, “...to be truly effective in reducing the level of bribery in international business, the FCPA must work to encourage corporations to be socially responsible. Thus, to reduce corruption, corporations should be encouraged to think about not just what they should *not* do, but also what they *can* do. That is, corporations need to consider what they can do to work with other businesses, home and host country governments, local communities, and civil society organizations to reduce the levels of corruption in any particular country. To assist in this process, ... the enforcement of the FCPA should be structured to support the various actors and major initiatives in the CSR field that combat corruption.”

### 9.1 What is Corporate Social Responsibility?

Corporate social responsibility (CSR) is a broad and evolving concept.<sup>252</sup> Its content is shaped by shifting societal expectations which are dependent in part on the industrial context in which it operates and the people who are impacted by its behaviour. The John F. Kennedy

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<sup>250</sup> For a full account of both the Jack Abramoff case and other techniques of institutional corruption, see Gray (2013).

<sup>251</sup> Dan Heiss, “Enhancing the Effectiveness of the Foreign Corrupt Practices Act Through Corporate Social Responsibility” (2012) 73 Ohio St LJ 1121 at 1122.

<sup>252</sup> Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (LexisNexis Canada Inc, 2009) at 5.

School of Government at Harvard University explains that CSR is a concept that arises from the growing expectation that businesses should embrace social accountability.<sup>253</sup> In the same vein, the Conference Board of Canada suggests that the foundation of CSR is the notion that corporations have responsibilities to stakeholders other than their shareholders.<sup>254</sup>

Industry Canada, a government department, defines CSR as “the way a company achieves a balance or integration of economic, environmental and social imperatives while at the same time addressing shareholder and stakeholder expectations.”<sup>255</sup> The UK Government describes CSR as “the voluntary actions that businesses can take over and above legal requirements to manage and enhance economic, environmental and societal impacts.”<sup>256</sup> Though definitions of CSR vary, international sources reflect consensus on the following characteristics:

- CSR involves obligations apart from the formal requirements of law, and is instead a reflection of normative standards;
- CSR involves companies demonstrating varying degrees of commitment to concepts such as corporate citizenship, sustainable development, and environmental sustainability; and,
- governments, citizens, and investors now generally expect companies to adopt some form of internal CSR business strategy.<sup>257</sup>

While CSR is dynamic and still developing, it is clear that the global corporate community has adopted CSR as an important item on the business agenda.<sup>258</sup>

## 9.2 How Did CSR Develop?

Carroll, in his article “Corporate Social Responsibility: Evolution of a Definitional Construct,” suggests that our contemporary notion of CSR is the product of an American school of thought dating to the mid-twentieth century, perhaps originating with Howard R. Bowen’s seminal book *Social Responsibilities of the Businessman* (1953).<sup>259</sup> Bowen asked the fundamental question, “What responsibilities to society may businessmen [and business

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<sup>253</sup> Kennedy School of Government, “Our Approach to CSR” (2008), *Corporate Social Responsibility Initiative*, online: <[http://www.hks.harvard.edu/m-rcbg/CSRI/init\\_approach.html](http://www.hks.harvard.edu/m-rcbg/CSRI/init_approach.html)>.

<sup>254</sup> The Conference Board of Canada, “The Conference Board of Canada”, *CSR-directory.net*, online: <<http://csr-news.net/directory/the-conference-board-of-canada>>.

<sup>255</sup> Industry Canada, “Governance for Sustainability” (September 2011), *Corporate Social Responsibility*, online: <[https://www.ic.gc.ca/eic/site/csr-rse.nsf/eng/h\\_rs00577.html](https://www.ic.gc.ca/eic/site/csr-rse.nsf/eng/h_rs00577.html)>.

<sup>256</sup> United Kingdom, Department for Business Innovation & Skills, *Good for Business & Society: Government Response to Call for Views on Corporate Responsibility* (April 2014) at 3.

<sup>257</sup> Kerr, Janda & Pitts (2009) at 6–8.

<sup>258</sup> *Ibid* at 33–34.

<sup>259</sup> Archie B Carroll, “Corporate Social Responsibility: Evolution of a Definitional Construct” (1999) 38 *Bus & Soc* 269.

women] reasonably be expected to assume?"<sup>260</sup> He suggested that businesspersons have a responsibility to act in accordance with society's values and best interests. Carroll notes that the Committee for Economic Development (CED), which published *Social Responsibilities of Business Corporations* in 1971, asserted that society expected businesses to assume greater moral responsibility and "contribute to the quality of American life."<sup>261</sup> In 1979, Carroll outlined three dimensions of CSR: corporate responsibilities, social issues of business, and corporate actions.<sup>262</sup> Otherwise put, corporate responsibilities lead corporations to respond to certain social issues, as determined by societal and corporate values and priorities.<sup>263</sup> While Carroll's concept of CSR has evolved in subsequent decades, it remains foundational for contemporary CSR theory.<sup>264</sup> Today, CSR is one of many related concepts that influence the role of businesses in society. These include corporate social performance (CSP), corporate citizenship, inclusive business, social entrepreneurship, and sustainable development. In a recent UNESCAP Report, the authors stated the following in regard to the development of the concept of corporate social responsibility:

[T]he focus on developing new or refined concepts of CSR gradually gave way to alternative approaches such as corporate citizenship (Pinkston and Carroll, 1994), business ethics (Shapiro, 1995) and stakeholder theory (Freeman, 1984), although the core concerns of CSR were reflected in those new approaches. The CSR concept served as the basis, building block or point-of-departure for other related initiatives, many of which adopted CSR principles (Carroll, 2008).

Since entering into the twenty-first century, more focus has been given to implementation of CSR initiatives and empirical study of CSR impacts. However, some development of the CSR concept has been continuously observed. Schwartz and Carroll (2003) reduced Carroll's four categories of corporate responsibilities (i.e. economic, legal, ethical and philanthropic) to a three-domain approach, namely economic, legal and ethical. The International Labour Organization (ILO) (2007) redefined CSR as a way that enterprises consider the impact of their operations on society and CSR principles are integrated in enterprises' internal processes and interactions with stakeholders on a voluntary basis. More recently, the European Commission (2011) simplified the CSR definition as the responsibility of enterprises for their impacts on society, which indicates that enterprises should have a process in place to integrate CSR agenda into their operations and core strategies in close corporation with stakeholders. The World

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<sup>260</sup> *Ibid* at 270 citing Howard R Bowen, *Social Responsibilities of the Businessman* (Harper & Row, 1953).

<sup>261</sup> *Ibid* at 274–75.

<sup>262</sup> Masato Abe & Wanida Ruanglikhitkul, "Developments in the Concept of Corporate Social Responsibility" in *From Corporate Social Responsibility to Corporate Sustainability: Moving the Agenda Forward in Asia and the Pacific, Studies in Trade and Investment No 77* (UNESCAP, 2013) at 11.

<sup>263</sup> *Ibid*.

<sup>264</sup> *Ibid*.

Business Council for Sustainable Development (WBCSD) (2012) also emphasized a balance of return on financial, natural and social capitals, particularly suggesting the integration of CSR reporting into annual report.<sup>265</sup>

For further reading on the evolution of CSR, see Archie B. Carrol, "Corporate Social Responsibility: Evolution of a Definitional Construct" (1999) 38 *Bus & Soc'y* 268. See also *From Corporate Social Responsibility to Corporate Sustainability: Moving the Agenda Forward in Asia and the Pacific*, Studies in Trade and Investment No 77 (UNESCAP: 2013).

There are also critics and skeptics of the notion of corporate social responsibility: for example, in Dustin Gumpinger's article "Corporate Social Responsibility, Social Justice, and the Politics of Difference: Towards a Participatory Model of the Corporation," the author states:<sup>266</sup>

The problem is that the notion of corporate social responsibility, under the current corporate law framework, is an oxymoron. The corporation's legal mandate is to pursue its own best interests and thus to maximize the wealth of its shareholders. Hence, corporate social responsibility is illegal and impossible to the extent that it undermines a company's bottom line. Acting out of social concern can only be justified insofar as it tends to bolster the corporation's interests. It is not surprising then that critics have characterized corporate social responsibility as an "ideological movement" designed to legitimize the power of transnational corporations.

In order to foster a world in which corporate decision-makers act genuinely in the interest of individuals and groups other than shareholders, the institutional nature of the corporate form must be reconceptualised. But if corporate social responsibility is an ineffective tool for evaluating corporate decisions, actions and outcomes, where should we turn? I shall argue that, as a dominant social institution, the corporation ought to be held to the same theoretical standards as other social institutions: namely, to the standard of social justice. [Footnotes omitted]

Gumpinger concludes with the following thoughts:

Historically, corporations were public purpose institutions; today, they remain legal institutions in that they rely on legislation to create and enable them. Under this legal framework, corporations have come to govern virtually every aspect of our daily lives, despite the fact that they lack the democratic accountability of governments. This fusion of power and

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<sup>265</sup> *Ibid* at 11–12.

<sup>266</sup> Dustin Gumpinger, "Corporate Social Responsibility, Social Justice, and the Politics of Difference: Towards a Participatory Model of the Corporation" (2011) 16:1 *Appeal* 101 at 102.

unaccountability has given rise to claims that the corporate form is inherently unjust and should be changed.

...

The corporation's propensity to cause and reinforce dominations and oppression highlight the need to build democratic decision-making structures into the corporate form. To achieve this goal, corporate law theory needs to abandon its desire for political unity, which tends to exclude the perspectives of the oppressed and the disadvantaged. Rather, a theory of the firm ought to be based on a heterogeneous notion of the public which gives voice to those who are systematically excluded from corporate decision-making. Hence, corporate law ought to provide the means through which the distinct voices and perspectives of those who are oppressed and disadvantaged by the corporation may be recognized and represented. If the corporation proves unable to serve this goal in addition to its primary goal of accumulating and generating wealth then it may be time to conceptualize an institution that can.<sup>267</sup>

### 9.3 Some Current CSR Policies and Initiatives

In order to develop an understanding of current expectations for CSR policies, it is helpful to consult commonly referenced international instruments. Though CSR is reflected in a vast array of global policies and initiatives, the following standards are referred to across the globe to aid businesses forming internal CSR strategies:

- International Organization for Standardization ("ISO") 26000: Provides guidance on how businesses and organizations can operate in a socially responsible way and helps to clarify the concept of social responsibility. See [www.iso.org/iso/home/standards/iso26000](http://www.iso.org/iso/home/standards/iso26000). Other ISO standards, such as ISO 9000 on corporate quality management and ISO 14001 on environmental management are also relevant in the CSR context.
- Global Reporting Initiative G4 Guidelines ("GRI G4"): Promotes corporate transparency by providing guidance on how to disclose information and what types of information should be disclosed. Anti-corruption is addressed as an aspect of the "society" reporting category. See <https://www.globalreporting.org/resource/library/GRI4-Part1-Reporting-Principles-and-Standard-Disclosures.pdf>.

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<sup>267</sup> *Ibid* at 120.

- Transparency International’s Business Principles for Countering Bribery (TI Principles): Provides a framework for companies to develop comprehensive anti-bribery programs. See [http://www.transparency.org/whatwedo/pub/business\\_principles\\_for\\_countering\\_bribery](http://www.transparency.org/whatwedo/pub/business_principles_for_countering_bribery).
- The World Economic Forum Partnering Against Corruption Principles for Countering Bribery (PACI Principles) is derived from the TI Principles. See [http://www3.weforum.org/docs/WEF\\_PACI\\_Principles\\_2009.pdf](http://www3.weforum.org/docs/WEF_PACI_Principles_2009.pdf).
  - The TI and PACI Principles are discussed and critiqued in Adeyeye’s book *Corporate Social Responsibility of Multinational Corporations in Developing Countries: Perspectives on Anti-Corruption*.<sup>268</sup>
- The UN Global Compact: Is the largest global corporate citizenship initiative. It proposes ten principles of responsible and sustainable corporate conduct. See <https://www.unglobalcompact.org/what-is-gc/mission/principles>.

By way of illustration, the UN Global Compact asks companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment, and anti-corruption. These core values are expressed in the form of ten principles set out below:

<p><b>Human Rights</b></p> <ul style="list-style-type: none"><li>• Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and</li><li>• Principle 2: make sure that they are not complicit in human rights abuses.</li></ul> <p><b>Labour</b></p> <ul style="list-style-type: none"><li>• Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;</li><li>• Principle 4: the elimination of all forms of forced and compulsory labour;</li><li>• Principle 5: the effective abolition of child labour; and</li><li>• Principle 6: the elimination of discrimination in respect of employment and occupation.</li></ul> <p><b>Environment</b></p> <ul style="list-style-type: none"><li>• Principle 7: Businesses should support a precautionary approach to environmental challenges;</li></ul>
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<sup>268</sup> Adefolake Adeyeye, *Corporate Social Responsibility of Multinational Corporations in Developing Countries: Perspectives on Anti-Corruption* (Cambridge University Press, 2012) at 49–54.

- Principle 8: undertake initiatives to promote greater environmental responsibility; and
- Principle 9: encourage the development and diffusion of environmentally friendly technologies.

#### **Anti-Corruption**

- Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.<sup>269</sup>

In regard to the 10<sup>th</sup> Principle, the UN Global Compact website, amongst other things, provides the following commentary:

#### BEGINNING OF EXCERPT

#### **Why should companies care?**

There are many reasons why the elimination of corruption has become a priority within the business community. Confidence and trust in business among investors, customers, employees and the public have been eroded by recent waves of business ethics scandals around the globe. Companies are learning the hard way that they can be held responsible for not paying enough attention to the actions of their employees, associated companies, business partners and agents.

The rapid development of rules of corporate governance around the world is also prompting companies to focus on anti-corruption measures as part of their mechanisms to express corporate sustainability and to protect their reputations and the interests of their stakeholders. Their anti-corruption systems are increasingly being extended to a range of ethics and integrity issues, and a growing number of investment managers are looking to these systems as evidence that the companies undertake good and well-managed business practice.

Businesses face high ethical and business risks and potential costs when they fail to effectively combat corruption in all its forms. All companies, large and small, are vulnerable to corruption, and the potential for damage is considerable. Business can face:

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<sup>269</sup> “The Ten Principles of the UN Global Compact” (UN Global Compact), online: <<https://www.unglobalcompact.org/what-is-gc/mission/principles>>.

- legal risks: not only are most forms of corruption illegal where they occur but it is also increasingly becoming illegal in a company's home country to engage in corrupt practices in another country;
- Reputational risks: companies whose policies and practices fail to meet high ethical standards, or that take a relaxed attitude toward compliance with laws, are exposed to serious reputational risks. Often it is enough to be accused of malpractice for a company's reputation to be damaged even if a court subsequently determines the contrary;
- Financial costs: there is clear evidence that many countries lose close to \$1 trillion due to fraud, corruption and shady business transactions and in certain cases, corruption can cost a country up to 17% of its GDP, according to the UN Development Programme in 2014. This undermines business performance and diverts public resources from legitimate sustainable development;
- Erosion of internal trust and confidence as unethical behaviour damages staff loyalty to the company as well as the overall ethical culture of the company.

#### What can companies do?

The UN Global Compact suggests that participants consider the following three elements when fighting corruption and implementing the 10th principle:

- **Internal:** As a first and basic step, introduce anti-corruption policies and programmes within their organizations and their business operations;
- **External:** Report on the work against corruption in the annual Communication on Progress; and share experiences and best practices through the submission of examples and case stories;
- **Collective Action:** Join forces with industry peers and with other stakeholders to scale up anti-corruption efforts, level the playing field and create fair competition for all. Companies can use the [Anti-Corruption Collective Action Hub](#) to create a company profile, propose projects, find partners and on-going projects as well as resources on anti-corruption collective action;
- **Sign the "Anti-corruption Call to Action"**, which is a call from Business to Governments to address corruption and foster effective governance for a sustainable and inclusive global economy.<sup>270</sup>

END OF EXCERPT

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<sup>270</sup> "Principle Ten: Anti-Corruption," online: <<https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-10>>.

## 9.4 The Need for Increased Trust in Business

Kimmel in a *FCPA Blog* post reports on the *Edelman 2017 Trust Barometer* as follows:

### BEGINNING OF EXCERPT

Earlier today Edelman released the findings of its 17th annual Trust Barometer, a poll of 33,000 respondents in 28 countries. This year's results were strikingly different from their 2016 findings. In fact, trust to “do what is right” declined in all four major institutions: NGOs, Business, Media and Government.

I had the good fortune of an invitation to a pre-release webinar hosted by Edelman on January 13, enabling me to report early on the 2017 Trust Barometer findings.

As Trust Across America continues its mission to help build trust in business, the following are some of the key takeaways from the presentation:

- Only 37 percent of respondents trust the CEO as a credible spokesperson.
- CEO credibility dropped in all 28 markets, reflecting a global crisis of leadership.
- 82 percent of respondents believe “Big Pharma” needs greater regulation.
- 53 percent of respondents do not believe that financial institutions have been reined in “enough.”
- The main opportunities for businesses to prove they are “doing no harm” include focus on bribery, executive compensation, tax havens, overcharging for products, and reducing costs by decreasing product quality.
- The ways business can best show they are “doing more” is through their treatment of employees, producing high quality products, listening to customers, paying their fair share of taxes, and employing ethical business practices.
- CEOs must engage in talking “with” not “at” people. They should be more spontaneous, blunt, include personal experience in dialogue, and participate in their company's social media.
- And finally, Edelman's survey results reflect a fundamental shift from the old “For the people” to the new “With the people.”

What actions must big business take?

It is incumbent on Boards of Directors, CEOs and their C-Suites to:

- Acknowledge that they individually have a problem, and collectively are responsible for the growing crisis of trust in business.
- Recognize that trust is indeed a hard asset and a measurable currency, not an intangible to be taken for granted.
- Find the courage and take action to elevate trust across and among all stakeholder groups.

Through its \*FACTS® Framework, Trust Across America's research focus picks up where Edelman's findings leave off. For the past eight years we have been measuring the trust "worthiness" or integrity of the largest 1,500 U.S. public companies.

We find that industry is *not* destiny and a handful of corporate leaders are already reaping the rewards of high trust. Edelman's 2017 findings do, however, support our call for a different "way" of doing business, and perhaps that "way" will find increasing support from big business in 2017.<sup>271</sup>

END OF EXCERPT

## 9.5 Concluding Note

Chapter 8 of this book considers the role of the corporate lawyer in anti-corruption initiatives. Legal counsel should be prepared to provide corporate clients with guidance on developing internal policies that will ensure fulfillment of legal and ethical obligations from both an anti-corruption and CSR perspective. Chapter 8 provides guidance to corporate lawyers who want to ensure that their clients' anti-corruption policy and programs are conforming to national and international expectations for corporate behaviour.

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<sup>271</sup> Barbara Brooks Kimmel, "Edelman 2017 Trust Barometer: Most Think CEOs Aren't Credible", *The FCPA Blog* (16 January 2017), online: <<http://www.fcpablog.com/blog/2017/1/16/edelman-2017-trust-barometer-most-think-ceos-arent-credible.html>>.

## 10. SUCCESSES AND FAILURES IN INTERNATIONAL CONTROL OF CORRUPTION: GOOD GOVERNANCE

### 10.1 Ten Lessons to Be Learned in Designing Anti-Corruption Initiatives

In the 2011 report *Contextual Choices in Fighting Corruption: Lessons Learned*,<sup>272</sup> prepared by the Hertie School of Governance for the Norwegian Agency for Development Cooperation (NORAD), Alina Mungiu-Pippidi et al. review the successes and failures of the international community's anti-corruption initiatives and strategies in the previous fifteen years.<sup>273</sup> From this review, the authors extract the lessons learned to help guide future anti-corruption initiatives. It should be noted that the authors' conclusions are not necessarily agreed upon by all anti-corruption scholars and practitioners.

The excerpts below are from the Executive Summary and provide an overview of the report's findings:

BEGINNING OF EXCERPT

[xix:]

Fifteen years have passed since World Bank President James Wolfensohn called for a global fight against the 'cancer' of corruption, a call that was answered by much of the development community. Since then, awareness of the systemic nature of corruption has dramatically increased, mostly due to the advocacy efforts of NGOs such as Transparency International and the visibility of corruption rankings such as TI's CPI and the World Bank's Governance Indicators (WGI). The demand also increased for a comprehensive and integrated global legal framework to fight corruption, which was eventually met with the adoption of the UNCAC. This report is a general reflection on the impact of this global effort and is not intended as an evaluation. Its main objectives are to understand and assess the cognitive framework of the global anti-corruption effort; its relevance for the development agenda; and to offer some explanations and solutions fifteen years later.

<sup>272</sup> Alina Mungiu-Pippidi et al, "Contextual Choices in Fighting Corruption: Lessons Learned" (2011) European Research Centre for Anti-Corruption and State-Building Working Paper No 30, online: <[http://www.againstcorruption.eu/wp-content/uploads/2012/09/WP-30-Contextual-Choices-new\\_merged2.pdf](http://www.againstcorruption.eu/wp-content/uploads/2012/09/WP-30-Contextual-Choices-new_merged2.pdf)>.

<sup>273</sup> Alina Mungiu-Pippidi expands on her analysis of guiding principles for government anti-corruption initiatives in her book, *The Quest for Good Governance: How Societies Develop Control of Corruption* (Cambridge University Press, 2015).

Once it became apparent that development resources could potentially disappear in environments characterized by weak governance and corruption, anti-corruption developed into a specific approach to development assistance (good governance as means). Promoting good governance, however, also become an objective in itself (good governance as end), as donors realized that the economy of aid could not be separated from the broader country governance. Unfortunately, not much significant progress has been registered globally since the World Bank began monitoring the world governance indicators, despite an unprecedented investment in good governance policies and an unprecedented rise in awareness (Kaufmann, 2009). Progress seems to be made in atypical polities, such as the United Arab Emirates, Hong Kong or Cape Verde, or remains controversial (Georgia). Countries that have evolved within the previous decade have, in fact, regressed in the fifteen years of global anti-corruption. When reviewing countries continent by continent, it is almost impossible to find a steady progression to the 'green' area which represents the top quarter of ratings, although the lower part of the scale shows better results. What we do find, however, is involution: South Africa, Argentina, Malaysia or Ukraine. Good governance is not only hard to achieve, but difficult to sustain.

[xiii-xiv:]

Why, despite unprecedented investment in anti-corruption in the last fifteen years and since the implementation of global monitoring instruments and global legislation, have so few countries managed to register progress? This new report commissioned by the Norwegian Agency for Development Cooperation (NORAD) to the Hertie School of Governance argues that conceptual flaws, imprecise measurement instruments and inadequate strategies are to blame. But it also argues that the quest for public integrity is a political one, between predatory elites in a society and its losers and fought primarily on domestic playgrounds. As such, the donor community can play only a limited part and it needs to play this part strategically in order to create results. Based on new statistical evidence, the report recommends cash-on-delivery/selectivity approaches for anti-corruption assistance [cash-on-delivery is a term used in the aid community to mean an aid scheme whereby funding is only delivered once progress on an agreed upon goal is achieved by the aid recipient]. Effective and sustainable policies for good governance need to diminish the political and material resources of corruption and build normative constraints in the form of domestic collective action. Most of the current anti-corruption strategies, on the contrary, focus on increasing legal constraints, which often fail because most interventions are localized in societies that lack the rule of law.

As governance is defined as the set of formal and informal institutions shaping "who gets what" in a given polity, the understanding of governance regimes is an indispensable step towards creating a more strategic approach to anti-corruption. Three distinct types of governance regimes are described in the report: open access or

ethical universalism regimes, which exist in most of the developed world; closed access regimes, divided between neo-patrimonial (where power is monopolized by the ruler and their clique) and competitive particularistic (where several groups compete for the spoils, but spoiling the state remains the rule of the game). Free elections by themselves do not solve the problem of corruption: more democracies than autocracies feature presently among systemically corrupt countries. The widely used perception indicators, which are presumed to measure corruption, actually measure governance in general, not only illegal corruption, which is only a small part of the overall picture (hence their insensitivity to change). Governance regimes are stable: the few countries that succeeded in changing over the last few decades are presented in section 7 on page 72 [these countries include Tanzania, Albania, Indonesia, Paraguay and Georgia].

Most corruption academic literature conceptualizes anti-corruption at the individual level, as do most current theories about anti-corruption. This presumes that corruption is a deviation from an otherwise established norm of ethical universalism, where every citizen is treated equally by the state and all public resources are distributed impartially. In fact, outside the developed world, the norm is not ethical universalism, since the process of modernization leading to an impersonal state autonomous from private interest was never completed in most countries. Most anti-corruption instruments that donors favour are norm-infringing instruments from the developed context, when they should be norm-building instruments for developing contexts. There is a gross inadequacy of institutional imports from developed countries which enjoy rule of law to developing contexts, shown in section 6 (Table 13 on page 56) of the report, where statistical evidence found no impact by anti-corruption agencies, Ombudsmen-like institutions and the ratification of the United Nations Convention against Corruption (UNCAC). What is presented in most anti-corruption literature as a principal-agent problem is in fact a collective action problem, since societies reach a sub-optimal equilibrium of poor governance with an insufficient domestic agency pushing for change.

The report argues that the question “what causes corruption” is therefore absurd. Particularism exists by default, since most human societies have limited resources to share, and people tend to share them in a particular way, most notably with their closest kin and not with everyone else. Modern states are based on universal citizenship, which entails fair treatment of every citizen by the government. But there are very few states that have thus far succeeded in moving from the natural state to this ideal of modernity. The question should change from “what causes corruption” to “what makes particularism evolve into universalism”. What determines a change in the equilibrium?

The classic answer offered by modernization theory is development. As societies grow richer, people become more autonomous, with normative constraints to discretionary

power and corrupt allocation as the result. Even countries with a poor quality of governance grow, with examples ranging from Italy to Mexico. However, in many cases development is systematically hindered by government favouritism towards private actors and non-rational (particular) allocation, resulting in a vicious circle of captive states and poor societies. Disregarding factors that cannot be influenced by policy, the report found quite a few significant determinants of the degree of control of corruption where human agency can play an important role (see Table 12 on page 49), including the strong impact of the internet infrastructure, reduction in red tape, economic openness, civil society activity, freedom of information acts and media freedom. These are all areas where development donors can play a large role, even when disregarding individual rights and independence of the judiciary, which are more political and thus more difficult to influence. Although some of these proxies do not seem to address corruption directly, any contribution to their improvement is a clear and substantial anti-corruption aid that can be measured.

[xiv-xviii: The report concludes with a list of the ten lessons that can be learned from the fifteen years since the World Bank called for a global fight against corruption. These include:]

1. Although globalization has turned corruption into a global phenomenon, subsequently addressed by a global governance approach (anti-bribery conventions, UNCAC, the emergence of a global civil society), **the battlefield where this war is lost or won remains national**. Case studies of historical and contemporary achievers show that although external constraints played a large role in inducing disequilibrium in particularistic countries and triggering change, a transformation has to be reflected in a new equilibrium of power at the society level for it to be both profound and sustainable.

2. **Transitions from corrupt regimes to regimes where ethical universalism is the norm are political and not technical-legal processes**. There is no global success case of anti-corruption as promoted by the international anti-corruption community. Successful countries followed paths of their own. Fighting corruption in societies where particularism is the norm is similar to inducing a regime change: this requires a broad basis of participation to succeed and it is highly unrealistic to expect this to happen in such a short interval of time and with non-political instruments. **The main actors should be broad national coalitions, and the main role of the international community is to support them in becoming both broad and powerful**. All good governance programs should be designed to promote this political approach: audits, controls and reviews should be entrusted to 'losers' and draw on natural competition to fight favouritism and privilege granting. No country can change without domestic collective action which is both representative and sustainable over time. The media, political oppositions and civil society should not be seen as non-permanent guests taking part in consultations on legal drafts but as main permanent actors in the process

of anti-corruption and holding decisive seats in all institutions promoting ethical universalism. **Which windows of opportunities to use, what actors have more interest in changing the rules of the game and how to sequence the change depends on the diagnosis of each society and cannot be solved by a one-size-fits all solution.** Chapter 2 of UNCAC, Preventive measures, can accommodate a variety of such programs. But also a number of what are seen as democracy promotion efforts (building a free media, civil society, community voice, empowerment) should in fact be considered as anti-corruption programs.

**3. Lesson number three is that on this political front, the international community has often played an ambiguous and inconsistent role and has thus sabotaged its own efforts.** The failure of the anti-corruption conditionality is partly grounded in the lack of understanding of particularism as a regime of governance and in consequently selecting various implausible principals as main actors to change the regime. Just as importantly, it is also partly caused by the overriding of good governance promotion by other strategic policy priorities. To minimize this in the future, good governance programs and **particularly UNCAC implementation should be tied to assistance on a cash-by-delivery mechanism only**, as the European Union has already suggested for its revamped North African European Neighbourhood Policy support. Diplomacy should also act in concert with aid, promoting representative anti-corruption actors in societies and avoiding the ‘professionalization’ of anti-corruption by limitation to a circle of ‘experts’.

**4. Lesson number four is that there are no silver bullets or maverick institutions in fighting corruption.** We found no impact of anticorruption agencies (explained by their inadequacy in an environment without an independent judiciary and where particularism is the rule of the game, not the exception) and of Ombudsman (explained by the control of such agencies by the government or group in power). Particularly in African countries, where particularism is the norm and predatory elites are in charge, it is inadequate to transplant new institutions and try to ring-fence them against particularism (Simons 2008). We found, however, some limited impact of freedom of information acts (FOIA). The impact of FOIA and the second generation transparency tools (transparency of budgets, legislative drafts, statements of assets) which is substantiated by qualitative evaluation studies is explained by the fact that their implementation depends to a great extent on non-governmental actors.

**5. Lesson number five is about the lack of significant impact (in statistical tests) by the UNCAC after five years**, which should not come as a surprise in this context. After all, five years after the 1948 adoption of the Universal Declaration of Human Rights, only a handful of countries in the world were considered as fully respecting such rights. By 2010, according to Freedom House, their number had grown to 87, representing 45 percent of the world’s 194 polities and 43 percent of the global population. 57 percent of the global population still lives in countries where human

rights are only imperfectly observed, if at all. The advance in this interval is attributed to liberalizing autocrats, international pressures for norm adoption and implementation, but primarily to freedom fighters and the rise in demand for freedom in each of these countries. The story of UNCAC is similar. **The norm was set: many countries formally adopted ethical universalism as a norm, which simplifies the job of anti-corruption fighters. But without massive domestic demand for new rules of the game and public participation in a sustainable mechanism which would prevent the eternal reproduction of privilege and shift allocation to ethical universalism, we are unlikely to see significant progress. Strategies must be conceived accordingly: UNCAC is a collection of institutional tools, not all similarly effective or useful, of which some have the potential to become effective weapons. This is true, however, only if local actors take them up and fight the long fight with them. What the international community can do, in any event, is to push UNCAC implementation and review as a mechanism to stir collective action. UNCAC will have an impact only if the entire society contributes to a check on the government. Such a permanent check could play a far more important role than the international review of UNCAC. For example, if the country of Ruritania were to ratify UNCAC, donors should push for a national stakeholders' commission to check on implementation, including media, local communities, and anti-corruption NGOs. The review should take place on an annual basis and those in charge of implementation should report to this body and make the report public. Accountability to the entire society regarding the implementation of UNCAC is a minimal requirement in building the general accountability of governments. In this context, the ownership principle in anti-corruption must simply be interpreted as ownership by the society, not by the government. Funds for anti-corruption should also be disbursed only in consultation with such an inclusive stakeholder body and after its assessment of trend and impact.**

**6. Lesson number six is about the importance of civil society, for which the report finds statistical and qualitative evidence.** However, the kind of civil society needed to serve as a watchdog at the community as well as national level is frequently missing in many countries. In the last ten years and due to donors funding, the world was more populated with professional 'expert' civil society than with watchdog and whistle-blowing civil society. Any country ruled by particularism is bound to have many 'losers' who are shortcut by networks of privilege. Without their collective action, there is no sustainable change in the rules of the game, and their empowerment becomes therefore the chief priority. We do see success models in South Korea and a few Eastern European countries.

**7. Lesson seven is about developing indicators and measures to allow better monitoring of trends and impact of policies.** The aggregate measures of corruption, particularly the WGI Control of Corruption, which allows measuring confidence error on top of perceptions of corruption, have played a great role by setting the stage for a

global competition for integrity among countries. But once it comes to the process of change itself and the impact of certain policies, they become less helpful. **Section 3 of this report suggests the use of a new generation of indicators which allow us to understand what the real norm (practice) is and how it changes over time.** The full reports on Brazil and Romania posted online present such indicators.

**8. Lesson eight is about the fit of repressive policies to various development contexts. It is very risky to fight corruption by repressive means whenever particularism is the main allocation norm because some people will be above the law and the selection of those to be prosecuted cannot be anything but biased.** The risk is that the whole judicial aspect of AC will simply become a hunt for opponents or those poorly connected who cannot bail themselves out. The case of corruption determined by scarcity in very poor countries, for example when the government is in payment arrears or severely underfunds certain sectors, deserves a completely different treatment. A repressive approach has never solved scarcity problems. Either the state should abandon the task if it is unable to fund it, or funds should be found to pay policemen, doctors, and the rest. Resorting to a more ancient system of collecting fees for services, or transferring ownership of the service to anyone who can fund it, might prove palliative. This problem cannot be fought by anticorruption measures, and should not be even considered as corruption. Unless, such policies are implemented, an investment on the part of the country and donors of raising legal constraints will fail (and this is frequently the only AC policy promoted). Investment in strong legal constraints only works in developed institutional environments.

**9. Lesson number nine is that policies of drying resources for corruption are essential, along with increasing normative constraints.** The long term advocated – and partly discredited – economic liberal policies of the World Bank have an important good governance component which has proved significant both in our statistics models (and of others) and in the case studies. The discredit does not come from their failure to produce growth but from the difficulty of transposing them into practice: privatizations often produce private rents, as governments embark in such policies and then try to control competition and preserve them. But the success stories are mostly the successes of liberal economic policies, particularly of red tape reduction, tax simplification and privatization.

**10. The final lesson is about formalization, which plays an important role in explaining corruption.** Societies become transparent, and thus modern, following a process of bargaining where individuals agree to pay taxes in exchange for certain public goods. This agreement does not exist in particularistic societies, as everyone knows that access is not equal, and this hinders their development. **Societies hide from predatory rulers to defend themselves, and this is why it is important that government and society work together for more transparency.** Successful policies of formalization are based on bargaining, not repression, except in the area of criminal

economy (smuggling, drugs, traffic, money laundering). Formalization, understood as a process of persuasion and incentivizing of property and business registration, is an essential step in reducing informality. [footnotes omitted]

END OF EXCERPT

Heeks and Mathisen, in “Understanding Success and Failure of Anti-Corruption Initiatives,” argue that anti-corruption initiatives often fail because of “design-reality gaps,” which they describe as “a mismatch between the expectations built into their design as compared to on-the-ground realities in the context of their implementation. Successful initiatives find ways to minimize or close these gaps. Effective design and implementation processes enable gap closure and improve the likelihood of success.”<sup>274</sup>

## 11. ANOTHER CASE STUDY: BAE ENGAGES IN LARGE-SCALE CORRUPTION IN SAUDI ARABIA

In “**Black Money**,” *Frontline* (PBS, 2009) available online: <http://video.pbs.org/video/1114436938/> (55 min), Lowell Bergman investigates an \$80 billion arms deal between BAE Systems, a British corporation, and Saudi Arabia. Details of the contract were not released publicly. At the same time, members of the Saudi royal family and Saudi government officials received huge personal payments and gifts from BAE. When British prosecutors began investigations, Saudi Arabia threatened to pull support for Britain’s fight against terrorism. The British prosecutors backed off. The video introduces some of the major anti-corruption legal developments in international as well as British and American law. It highlights the scale with which multinational corporations have been involved in the shadowy world of international bribery.

Update: In 2010, BAE pled guilty in the US to charges of failing to keep accurate accounting records and conspiring to make false statements to the US government. Although the charges related to various cases of corruption, BAE did not, however, admit to actual bribery in the plea bargain. BAE was required to pay \$400 million to the US Treasury. The company avoided further sanctions, such as debarment from public procurement in the US, because it did not plead guilty to actual corruption offences. In the same plea deal, BAE was also required to pay £30 million to the UK and Tanzania. The UK’s Serious Fraud Office was investigating allegations of corruption by BAE in seven or eight other countries, but dropped the other cases after settling the Tanzania case.

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<sup>274</sup> Richard Heeks & Harald Mathisen, “Understanding Success and Failure of Anti-Corruption Initiatives” (2012) 58:5 Crime L & Soc Change 533.

In 2011, BAE was required to pay a further \$79 million as a civil penalty to the US Department of State for alleged violations of the *Arms Export Control Act* and the *International Traffic in Arms Regulations*. The Department of State imposed a statutory debarment from the US public procurement process but concurrently rescinded the debarment, implying that BAE is “too big to debar.”<sup>275</sup>

See Chapter 7, Section 4.6 for further discussion of the BAE case.

**Discussion Questions:**

(1) A former Siemens employee asserts that the company’s international reputation was not harmed by the public acknowledgement of its bribery offences because bribery is such a common-place business practice worldwide (the Siemens case is briefly discussed at Section 1.2 of this chapter). He argues that Siemens will be perceived merely as unlucky, not corrupt, and its business prospects will be unaffected by the conviction. Do you think this is true?

(2) Should the USA be allowed to prosecute foreign companies like Siemens or BAE just because these companies are traded on American stock exchanges? Should a prosecuting country have to consider another country’s political, economic or strategic military interests before pursuing corruption charges? What if a prosecuting country uses the threat of corruption charges as a bargaining chip in forcing their foreign policy agenda?

(3) Did BAE’s bribery of Saudi officials really hurt anyone? It secured a contract that brought thousands of jobs to the UK and cemented a strategic alliance between the UK and Saudi Arabia. What about BAE’s bribery of South African officials to secure a \$2 billion contract for weapons that South Africans could ill afford? Did that hurt anyone?

(4) Is it right for western democracies like the USA, the UK, Canada, Switzerland, Denmark, etc., to stand in judgment of “bribery” of Saudi officials when gift giving and nepotism are a cultural part of Saudi business practices? Why or why not?

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<sup>275</sup> Nick Wagoner, “Was BAE Too Big to Debar?”, *The FCPA Blog* (19 April 2011), online: <<http://www.fcpablog.com/blog/2011/4/19/was-bae-too-big-to-debar.html>>.