

# Does the Globalization of Anti-corruption Law Help Developing Countries?

Kevin E. Davis\*  
Beller Family Professor of Business Law  
New York University School of Law  
[ked2@nyu.edu](mailto:ked2@nyu.edu)

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## Abstract

What role do foreign institutions play in combating political corruption in developing countries? This chapter begins by describing the recently developed transnational anti-corruption regime, which encompasses legal instruments ranging from the dedicated multilateral agreements sponsored by the OECD and the United Nations, to the anti-corruption policies of international financial institutions, to components of the international anti-money laundering regime, international norms governing government procurement, and private law norms concerning enforcement of corruptly procured contracts. It also surveys the evidence concerning a variety of claims about the potential advantages and disadvantages of having foreign institutions play a role in preventing, sanctioning, or providing redress for corruption on the part of local public officials. One of the main conclusions is that more attention ought to be paid to whether foreign institutions displace and undermine, or alternatively complement and enhance, local anti-corruption institutions. The analysis not only sheds light on the transnational anti-corruption regime, but also has implications for other efforts to rely on foreign legal institutions to address the problems of developing countries.

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## 1. INTRODUCTION

What role do foreign institutions play in combating political corruption in developing countries? This chapter attempts to shed light on this question by examining the impact on developing countries of the elaborate transnational anti-corruption regime that has emerged in recent years. The centerpieces of that regime are dedicated treaties such as the Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ('OECD Convention') and the United Nations Convention against Corruption ('UN Convention'). However, the regime also encompasses a range of other legal instruments, including the anti-corruption policies of international financial institutions, components of the international anti-money laundering regime, international norms governing government procurement, and private law norms concerning enforcement of corruptly procured contracts.

The idea that foreign legal institutions can step in and be of assistance when their domestic counterparts are found wanting, which some might call a form of legal globalization (others might call it 'institutional piggy-backing'), is a familiar one in modern legal thought. For instance, the international investment regime is typically justified by reference to the idea that investor-state arbitration can usefully compensate for the shortcomings of national courts in capital-importing countries. International commercial arbitration is often justified on similar grounds. Along the same lines, Dammann and Hansmann (2008) have proposed that countries with strong courts should allow those courts to assert jurisdiction over disputes to which they have no tangible connection in order to enable litigants in developing countries (and elsewhere) to break the monopolies enjoyed by dysfunctional local courts. Coffee (1999) makes the case for allowing issuers from countries with weak securities regulators to rely on foreign securities laws. Finally, proponents of extra-territorial application of labour and environmental laws argue that this is the best means of securing protection for the inhabitants of countries with inadequate labour and environmental regimes.

The idea of calling on foreign legal institutions to buttress domestic institutions is particularly appealing when what is at stake is the very integrity of the state. Political corruption, which I will define broadly – if somewhat vaguely – as the misuse of public power for private gain, compromises the integrity of the state and is widely viewed as a significant obstacle to development (see generally, Rose-Ackerman, 1999). At the same time, the advent of globalization has made political corruption a transnational phenomenon. We live in a world of structural adjustment programs, multinational corporations, international supply chains, international wire transfers and daily inter-continental flights; it is a world in which officials' incentives and opportunities to engage in corruption are shaped as much by the politics of international financial institutions as by local politics, bribes can be paid by foreign as well as local actors, and the proceeds of corruption can be moved overseas on a moment's notice. Under the circumstances it seems reasonable to believe that if there is any field in which the activities of foreign legal institutions can benefit developing countries it is in the field of anti-corruption law (for specific recommendations, see Rose-Ackerman, 1999; 177-197). In other words, globalization of the causes of corruption may demand globalization of the institutional responses.

At the same time, it is important to recognize that there are powerful objections to the idea of relying on foreign legal institutions to perform roles that might, at least in principle, be played by domestic ones. Framed in general terms, those objections fall into three main categories.

The first category of objections focus on the motivations that are likely to drive the behavior of foreign institutions and the possibility that they may be less than pure. The concern is that foreign institutions and the actors who inhabit them will generally tend to be indifferent or even hostile to the welfare of distant populations and so will not be reliable guardians of those populations' interests. The strongest versions of these arguments draw on colonial experiences in which international law and the legal institutions of colonizers were expressly designed to facilitate exploitation of colonial populations for the benefit of colonizers.

Objections in the second category focus on the potential outcomes of relying on foreign legal institutions. They represent elaborations on the theme that even if they are offered with the best of intentions, the legal solutions provided by foreign institutions may be incompatible with local interests. To begin with, foreign institutions may reflect foreign values that are incompatible with local values. Alternatively, foreign institutions may rely on the presence of complementary institutions that are missing in the new context.

A third rather disparate set of objections are united by concerns about the longer-term development of societies that rely heavily on foreign legal institutions – and, in particular, their long-run institutional development. The concern is that foreign institutions will serve as substitutes for displaced domestic institutions that may, even if only over time, offer equal or even superior performance. When scratched these objections often turn out to be little more than the idea that local institutions are inherently superior to foreign ones. But sometimes they rest on more secure theoretical foundations. Consider, for example, Hirschmann's (1970) well-known analysis of the potential trade-offs entailed in permitting the clients of an organization to 'exit' its sphere of influence as opposed to relying on their 'voice' to motivate organizational change. In this context the relevant argument would be that permitting the members of a society to exit local legal institutions and rely on foreign ones may reduce their incentive to use 'voice' to lobby for improvements in local institutions. A second basis for concern about displacing local institutions relies on another insight from economics, namely, the value of learning-by-doing. The argument here is that if given enough opportunities to address challenging problems, over time local institutions will acquire increasing expertise and legitimacy, to the point where, eventually, their performance may outmatch that of foreign institutions.

This chapter begins with an overview of the transnational regime that governs the extent to which foreign institutions participate in preventing, sanctioning, or providing redress for corruption in developing countries. The next two sections set out the

potential advantages and disadvantages respectively of permitting foreign institutions to operate in this fashion. The subsequent section surveys the evidence supporting those theoretical claims. The conclusion emphasizes the need for concerted efforts to collect data bearing on the validity of one potential disadvantage, namely, the possibility that the activities of foreign institutions might undermine the development of local institutions.

## **2. OVERVIEW OF THE TRANSNATIONAL ANTI-CORRUPTION REGIME**

How international and transnational law came to be concerned with corruption is now well-documented (see, for example, Abbott and Snidal, 2002; Schroth, 2002)<sup>1</sup>. It began in the United States, where investigations into ‘dirty tricks’ by the administration of President Richard Nixon uncovered evidence that American multinational corporations were routinely making illicit payments to foreign public officials out of secret slush funds. In response, the US Congress passed the Foreign Corrupt Practices Act (FCPA). The most prominent feature of the FCPA was a prohibition – backed by stiff criminal and civil penalties – on payments to foreign public officials in order to assist in ‘obtaining or retaining business’. Curiously, the FCPA also explicitly excludes ‘facilitation payments’ – defined as payments made to facilitate or expedite performance of a ‘routine governmental action’ – from the scope of its prohibition on bribery (15 U.S.C. § 78dd-1). Just as important but somewhat less prominent were the FCPA’s recordkeeping obligations, which require public companies to keep accurate books and records, and requirements to maintain internal controls designed to ensure the integrity of those books and records (15 U.S.C. § 78m(b)(2)).

The FCPA is, of course, a creature of domestic law. Anti-corruption norms inspired by the FCPA became part of international law as a result of a campaign that involved a

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<sup>1</sup> For practical reasons the focus here is on legal instruments that are specifically targeted at corruption. A more comprehensive analysis would include other legal instruments such as bilateral investment treaties or austerity programs imposed by international financial institutions that exert significant influence over the scope and nature of state action in developing countries and thereby, at least arguably, influence the nature and prevalence of corruption.

number of constituencies (Abbott and Snidal, 2002). To begin with, the US government and firms subject to the FCPA shared an interest in seeing other countries adopt legislation similar to the FCPA in order to level the playing field, in other words, to ensure that the FCPA's constraints would not place US firms at a competitive disadvantage. Another important actor was Transparency International, a non-governmental organization established in 1993 and dedicated to combating corruption. Transparency International, both through its international organization and various national chapters, lobbied for the adoption of anti-corruption laws at both the domestic level and in international organizations. In the 1990s the World Bank under the leadership of James Wolfensohn also joined the fight against corruption and adopted an anti-corruption policy in 1997. These actors were joined by a range of human rights activists and development experts from both developed and developing countries who were concerned about the corrosive effects of corruption in many parts of the world. In fact, the global anti-corruption campaign displays many of the characteristics of a mass movement, very much like the movements that campaigned for abolition of the slave trade around the beginning of the 19<sup>th</sup> century and which continue to campaign for initiatives such as fair trade, Third World debt relief, and respect for various sorts of human rights.

The anti-corruption movement began to bear fruit in the late 1990s. The first and most notable success was the conclusion in 1997 of the OECD Convention. There were also advances at the regional level, in the form of anti-corruption conventions produced by the African Union, the Council of Europe and the Organization of American States. Meanwhile, international financial institutions such as the World Bank, the regional development banks and the International Monetary Fund all adopted anti-corruption policies. Developing countries also came under considerable pressure from international financial institutions and other actors to adopt international norms concerning government procurement, including those set out in instruments such as the UNCITRAL Model Law on Procurement of Goods, Construction and Services and the World Trade Organization's Agreement on Government Procurement (McCrudden and Gross, 2006). It is also significant that in 2003 the Financial Action Task Force decided

to include ‘corruption and bribery’ among the predicate offences to money laundering, thereby instantly creating pressure for countries to bring their elaborate anti-money laundering regimes to bear against corruption (Financial Action Task Force, 2003)<sup>2</sup>. Activity at the global level culminated in 2003 with the adoption of the UN Convention.

The OECD Convention and most of the other anti-corruption conventions referred to above focus on encouraging states to adopt domestic legislation like the US FCPA prohibiting bribery of foreign public officials; prohibiting laundering of the proceeds of transnational bribery; ensuring that bribes are not tax deductible; and, co-operating with foreign governments in investigating and prosecuting bribery through both extradition and mutual legal assistance. The regional conventions also recommend various measures to be taken against domestic bribery, including preventive measures such as transparency in public administration, codes of conduct for civil servants, and requirements that public procurement processes be open, competitive and accountable. The UN Convention covers much of the same ground but goes somewhat further by encouraging states to criminalize the solicitation or acceptance of bribes by foreign public officials (as opposed to focusing exclusively on the bribe-payers)<sup>3</sup>. The UN Convention also contains provisions requiring parties to co-operate in the recovery of assets that qualify as either proceeds or instruments of corruption, and in collecting compensatory damages for harm caused by corruption (Arts 54 – 59).

The anti-corruption policies of the international financial institutions focus on ensuring that the proceeds of their grants or loans are not used for corrupt purposes. Those policies include procedures for cancelling agreements with firms or governments found to have engaged in improper activity and disqualifying guilty firms from receiving further funds. In addition though, the international financial institutions have pressed

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<sup>2</sup> Individual members of FATF began to express concern about laundering of the proceeds of corruption somewhat earlier. See for example, Financial Action Task Force, 1999: ‘Written submissions from some of the members also mentioned an increase in the number of cases in which laundering was related to official corruption or the funding of international terrorism’ (para. 43).

<sup>3</sup> UN Convention: Art. 16(2). The UN Convention also goes beyond the other conventions by extending to corruption of private actors, a topic that is beyond the focus of this chapter. See UN Convention: Arts 12, 21 and 22.

for the adoption of international norms concerning government procurement that are designed to prevent all forms of corruption. For instance, the Agreement on Government Procurement generally requires open, competitive bidding; acceptance of the lowest qualified tender; the establishment of procedures for bringing challenges to the procurement process before an independent tribunal; and abandonment of discrimination in favour of local suppliers.

All of this activity in the areas of public international law and domestic criminal law has begun to have an influence on private law. In one remarkable decision, after an extensive review of the international law on point, a distinguished arbitral panel declared that condemnation of bribery is a provision of international public policy that is automatically incorporated into the law that governs private contracts<sup>4</sup>.

For present purposes the most striking feature of the regime that has been constructed through these various initiatives is the significant role it allows foreign legal institutions to play in both preventing and responding to corruption – especially bribery – involving local public officials. In particular, the foreign institutions may:

- Press the government to adopt measures designed to minimize opportunities for corruption;
- Impose criminal liability for paying bribes to foreign public officials;
- Impose civil liability, including potential cancellation of contracts, for paying bribes to foreign public officials;
- Impose administrative penalties for paying bribes to foreign public officials;
- Impose criminal or civil liability for laundering proceeds of bribery;
- Impose criminal liability for soliciting or accepting a bribe;
- Impose record-keeping and reporting obligations on potential payers of bribes as well as financial intermediaries and other actors who deal with them;

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<sup>4</sup> *World Duty Free v. Kenya*)



- Extradite suspected bribe-payers;
- Provide mutual legal assistance in the course of investigations of corruption; and,
- Assist other actors in recovering assets used in or derived from corruption, or which are required to compensate victims of corruption.

This regime clearly invites countries affected by corruption, especially when it takes the form of transnational bribery, to look to foreign legal institutions for assistance. The question now becomes, should developing countries accept the invitation?

### **3. POTENTIAL ADVANTAGES OF INVOLVING FOREIGN LEGAL INSTITUTIONS**

The theoretical arguments in favour of allowing foreign institutions to play a role in combating corruption in developing countries are straightforward and reasonably compelling. They all stem from the proposition that foreign legal institutions may bring to the table valuable resources that local institutions are unable to match.

To begin with there is the obvious point that relying on foreign institutions allows local actors to save money. Investigating and prosecuting white collar crime can be expensive in terms of both money and human capital, especially when defendants can use their ill-gotten gains to hire the best lawyers and accountants money can buy to help cover their tracks and defend their activities. Foreign actors do not typically insist on payment for these services and so no poor country can afford to ignore the economic value of this kind of assistance.

It is also important to understand that foreign institutions may provide not only additional resources, but resources that local institutions cannot obtain at any price. The most obvious example of such a resource is the ability to deploy coercive force in the foreign territory. Foreign courts, law enforcement agencies and other branches of the state typically have a monopoly on the use of force within their territory and so may be indispensable in efforts to arrest individuals or seize assets located overseas.

Another consideration is that foreign legal institutions may have access to superior information. Information about corporate misconduct tends to flow from firms' employees, regulators, competitors or financiers. With the advent of globalization, those sources can just as easily be located outside the jurisdiction of the bribe-recipient as inside. Courts and law enforcement agencies in a bribe-recipient's jurisdiction are less likely to have access to foreign sources than the courts and law enforcement agencies in the jurisdictions where the employees, and so on, are located. A related point is that foreign institutions may have superior expertise, either across the board or in relation to specific aspects of the investigation or prosecution of specific forms of misconduct. For instance, foreign prosecutors may possess special expertise in forensic accounting; or, they may have special insight into the tactics that will induce local whistleblowers to come forward.

Last, but certainly not least, is the possibility that foreign institutions may have greater integrity. If corruption has infected local legal institutions then foreign institutions may offer the only viable responses. Of course a cynic might ask why anyone should expect foreign legal institutions to be less corrupt than local ones. As a theoretical matter there are several possible answers. One response is that some foreign actors may be inherently less corruptible – whether because they have been selected more carefully or because they are subject to more effective schemes of monitoring, rewards and punishments. A second response to the cynic is that even if they are no less corruptible than local institutions, foreign institutions are less likely to have been corrupted in a way that impairs their ability to deal with the local problem. It seems plausible that local actors will find it relatively difficult to establish illicit relationships with foreign legal institutions that allow to them to subvert the course of justice.

#### **4. POTENTIAL DISADVANTAGES OF INVOLVING FOREIGN LEGAL INSTITUTIONS**

Although there are many plausible advantages that come with relying, at least to some extent, on foreign legal institutions to address the problem posed by corruption, there are also some plausible disadvantages. The disadvantages fall quite neatly into the

categories used above to organize the general arguments against getting foreign legal institutions involved in preventing, deterring or providing redress for domestic problems: Indifference, Incompatibility and Institutional Displacement. It is convenient to begin by spelling out the arguments in theoretical terms and to hold off for a few more pages before turning to the evidence.

### *Indifference*

At first glance the argument that draws upon concerns about Indifference seems like a simple application of the idea that foreign actors will generally act in accord with their self-interest. The argument would be that even if they derive some benefit from paying lip service to the fight against corruption, self-interested foreign institutions will not dedicate their resources to combating corruption in developing countries because they, and the societies to which they belong, receive no material benefit from doing so<sup>5</sup>. However, this argument rests on two contestable premises. The first premise is that foreign institutions are motivated by selfish material interests. But what if foreign actors are motivated by values rather than interests? The question of what motivates state behaviour is the subject of a raging debate in international relations and the right answer is unlikely to be clearcut. Moreover, in many cases the individual state is not the relevant actor. In practice the individuals or organizations that form sub-components of a state's legal system often have substantial amounts of autonomy and in many cases there is no reason to presume that their actions will be motivated or guided by their home state's material interests. In other cases, the relevant actors are international organizations or non-governmental organizations, which also often operate autonomously from states.

The second contestable premise is that combating corruption of public officials in developing countries is incompatible with foreign states' self-interest. This claim ignores the fact that sometimes foreign states have a direct economic interest in combating corruption; for instance, if only because of the difficulty of enforcing

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<sup>5</sup> For a considerably more sophisticated version of this argument, see Reisman, 1979.

corrupt transactions, bribery is often an expensive and unreliable way of obtaining the services of foreign public officials (Davis, 2002). The claim that foreign states have no interest in combating corruption in developing countries may also ignore the reality of the incentives created by international interdependence. Perhaps enlightened states perceive an interest in helping to eradicate political corruption in societies with which they share goods, capital, people, ideas and culture<sup>6</sup>. Or perhaps they see profit in helping other societies to diagnose their corruption problems so as to boost demand for anti-corruption consulting services and technology (Rajagopal, 1999: 505).

The simplistic version of the Indifference argument also overlooks another complication, namely, the distinction between indifference on the part of individual states and collective indifference. Even states that have some sort of motivation to dedicate resources to combating corruption in the developing world have an incentive to free-ride on the efforts of others. In other words, even if states collectively have an interest – whether based on moral or material considerations – in contributing to anti-corruption efforts, individual states may not have any interest in stepping up to the plate.

Taking these considerations into account suggests that the most plausible version of the Indifference argument is that foreign actors will manifest *selective indifference* in the fight against corruption in the developing world. So, for instance, states may focus on combating bribery as a means of obtaining legitimate government contracts in jurisdictions whose economic development they consider uniquely important, while turning a blind eye to bribes paid to obtain otherwise-unobtainable goods such as illegal logging concessions in jurisdictions which are of less strategic importance or in which other states have equally strong interests (Davis, 2002).

### ***Incompatibility***

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<sup>6</sup> Edmund Burke presented an early example of this argument in his efforts to impeach Warren Hastings for corruption while serving as Governor-General of Bengal. See Ala'i, 2000; Pavarala, 2004.

A second set of arguments against relying on foreign institutions' anti-corruption efforts is that those efforts may be incompatible with local needs or desires. Or to put it another way, the response to the claim that foreigners bring invaluable resources to the table in the fight against corruption is that those resources either may not be valued by local actors, or may not be deployed in ways which, on balance, benefit the local population.

One form of incompatibility stems from a clash of values: foreign actors may wish to impose harsh penalties on activity that local actors either would not condemn or would not condemn very severely. When values conflict in this fashion respect for self-rule and cultural diversity arguably weigh against foreign intervention. This is the argument that Edmund Burke once dismissively referred to as 'geographical morality'<sup>7</sup>. Steven Salbu (1999), for example, suggests that campaigns against transnational bribery risk degenerating into a form of moral imperialism. He acknowledges the fact that by all accounts bribery is universally condemned but argues that the meaning of bribery in any given context can be subjective – one man's culturally-appropriate gift may be another man's morally reprehensible bribe – and the views of locals and foreigners may diverge systematically.

Foreigners' anti-corruption efforts may also be incompatible with the material interests, as opposed to the moral values, of local actors. This problem stems from the fact that many aspects of the transnational anti-corruption regime, including those which punish firms for paying bribes to foreign public officials, tend to discourage firms from doing business in countries with corrupt officials. Cutting off those countries' access to trade and investment obviously threatens to undermine their development prospects (Sparling, 2009).

Of course anti-corruption advocates hope that the economic incentive created by the threat of economic isolation, together with the ideological pressure generated by

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<sup>7</sup>The reference is to an argument offered by Warren Hastings in his defense against Burke's efforts to impeach Hastings before the House of Lords for engaging in acts of corruption while he was Governor of Bengal. For accounts of this affair, see Ala'i, 2000; Pavarala, 2004.

international organizations, will encourage corrupt states to take steps to reduce corruption. Skeptics worry that the cures might be worse than the disease. Some scholars claim that the international anti-corruption campaign threatens to work fundamental and potentially pernicious changes in relationships between state and societies in developing countries (Kennedy, 1999; Rajagopal, 1999). For example, one commonly prescribed ‘cure’ for corruption is to reduce the number of opportunities public officials have to abuse their power. This can be done by reducing the scope of officials’ authority, which may in turn require reducing the extent of state control over the economy (Klitgaard, 1988). The concern is that this kind of anti-corruption strategy may indirectly weaken and delegitimize the kind of developmental state that (some would argue) is so desperately needed in poor countries in favour of a night-watchman state that eschews excessive ‘intervention’ in the economy.

Ironically, there is also concern that anti-corruption strategies will unduly enhance state power. If we leave aside the idea of reducing the extent of state intervention in the economy, the most intuitive anti-corruption strategy is to enhance surveillance and increase penalties. The problem is that in addition to curbing corruption, this may serve to bolster the authority of otherwise undesirable leaders or factions and permit violations of civil liberties (Rose-Ackerman, 1999: 207 – 209). And even if paying more attention to corruption does not involve repression, any increase in the amount of effort a society devotes to analyzing and controlling corruption may reduce public bodies’ ability to pursue other public purposes (Anechiarico and Jacobs, 1996). Crackdowns and zero-tolerance approaches can even be counter-productive if, for example, they discourage actors involved in corruption from coming forward with information that can be used to prosecute other actors (Davis, 2009). Alternatively, foreign-supported crackdowns that focus on one form of corruption to the exclusion of others may simply lead to increased levels of the forms subject to less scrutiny. Finally, the effects of drawing attention to corruption can be particularly perverse if nothing can be done to eliminate it, in which case the main effect will be merely to undermine the legitimacy of the state in question.

The apparent contradictions among these arguments – foreign institutions may either weaken or strengthen the state – are consistent with the more basic proposition that any particular set of anti-corruption resources may be valuable in the context of one society but not in another. One straightforward reason why the impact of the transnational anti-corruption regime may vary is because the activities it targets pose less of a threat to some societies than to others, perhaps because the effectiveness of domestic institutional substitutes varies across societies. Alternatively, the consequences of adopting a given legal institution may depend on the presence of some complementary feature of the society, that is to say, a feature that enhances the value of the institution in question. In the absence of that complementary feature, the institution may have little value, and may even be harmful. For example, in some jurisdictions allowing local actors to use foreign courts to pursue allegations of corruption may be useful because there are institutional mechanisms in place to ensure that the allegations are well-founded. The impact would be different though in a society in which local politicians are free from any meaningful constraints on their ability to use legal proceedings to pursue political vendettas. In that setting it is not obvious that the international community ought to be helping to expand local politicians' arsenal.

### *Institutional Displacement*

The arguments in favour of permitting foreign institutions to address corruption in developing countries include claims that foreign institutions are simply more competent than local institutions in the sense that they possess superior integrity or expertise. The idea of allocating responsibility based on relative institutional competence presumes that institutional competence is an exogenous variable in the analysis. In other words, it presumes that institutional competence is not influenced by the allocation of responsibility. The objection is that institutional quality may actually be endogenous.

This objection rests on the premise that foreign institutions can serve as substitutes for domestic institutions. That is to say, the greater the extent to which foreign institutions become involved in combating corruption the fewer the benefits to be derived from the

efforts of domestic institutions. For example, if American forensic accountants can be relied on to investigate cases of transnational bribery involving public officials from Country X there will be little benefit to Country X in building up local forensic accounting capacity.

So how might the use of foreign institutions as substitutes for domestic institutions diminish the competence of latter? Hirschman's claim that permitting people to exit an institution generally reduces their incentives to exercise voice seems directly applicable here. Suppose that victims of corruption could rely on foreign police forces, prosecutors, lawyers, and courts to investigate, prosecute and adjudicate complaints of bribery and to levy criminal or civil sanctions. In that case, why would those victims invest any effort in complaining about or pressing for the improvement of local courts, and so on? This may not be a problem if the foreign institutions are a perfect substitute for local institutions. But suppose that the foreign institutions only serve the needs of a subset of the local population, perhaps only people – such as foreign investors – who are victimized by transnational bribery as opposed to corruption with no international aspect. Suppose that the local prosecutors and courts would serve both constituencies. Suppose that the voices of victims of local corruption are too weak to prompt change and the guardians of local institutions are indifferent to the prospect of losing jurisdiction over cases involving transnational bribery. In these circumstances it is quite plausible that permitting foreign institutions to respond to corruption will tend to retard the development of local institutions.

A separate argument can be made that foreign institutions may prevent local institutions from learning-by-doing. This argument leads to the same conclusion as the argument about the deleterious effects of enabling exit from local institutions but proceeds from a different starting point. The premise of the learning-by-doing argument is that local institutions improve by experience rather than as a result of pressure from vocal constituents. The intuition is that professionals such as judges, lawyers, police officers and accountants, as well as the organizations to which they belong, may need to cut their



teeth on at least a few cases before they can be expected to perform at the same levels as more experienced foreign institutions. On this view, the facts that at some point in time local legal institutions lack expertise or integrity may be consequences rather than causes of their disuse. To the extent that victims of corruption can rely on foreign lawyers, prosecutors, courts and police forces to respond to their claims, local institutions will face diminished opportunities to acquire the requisite experience. This is sub-optimal whenever the long-term benefits of enhancing the quality of local institutions would outweigh the costs borne by victims who are poorly served while local institutions are in the process of acquiring expertise. Again, the conclusion is that limiting the role that foreign legal institutions play in combating corruption may, over time, better serve the interests of local actors.

Of course, in some cases it will be reasonable to conclude that foreign institutions serve as complements to local institutions, not substitutes. In other words, the greater the extent to which foreign institutions are involved in combating political corruption, the greater the benefits a country will derive from domestic institutions' anti-corruption efforts. In these situations the flip sides of the arguments set out above suggest that the involvement of foreign institutions will increase the quality of local institutions. For example, the facts that foreign institutions are willing to investigate financial flows passing through their jurisdictions and to assist in recovery of misappropriated funds will tend to increase the benefits to a developing country of initiating proceedings against corrupt actors and, by extension, of building local institutions capable of initiating such proceedings. The competence of those local institutions may very well increase as they attract the critical attention of local constituencies and accumulate experience.

## **5. EVIDENCE**

It is all well and good to list theoretical claims about the advantages and disadvantages of a particular legal regime, but when the regime in question has been in place for a number of years it seems reasonable to ask whether there is any supporting evidence. It is not possible at this point to undertake a comprehensive analysis of the impact of the transnational anti-corruption regime on developing countries. Even if space would

permit it, the available data would not. Canvassing the available evidence will, however, help us to develop tentative views about some of the theories outlined above and to identify areas in which further data collection and analysis is warranted.

### *Evidence of Advantages*

The good news about the transnational anti-corruption regime begins with the fact that it is being used. The clearest indications are that a number of large multi-national firms have been successfully prosecuted by US and European authorities for paying bribes to public officials in developing countries. In the most high-profile proceedings, Siemens AG and three of its affiliates paid fines or penalties totaling over \$1.7 billion to authorities in the United States and Germany, and the World Bank, to settle allegations that for over a decade it had paid substantial bribes to officials in countries including Argentina, Bangladesh, Iraq and Venezuela (US Department of Justice, 2008; World Bank, 2009*d*). Moreover, since 2001 the US Department of Justice has made visible commitments to strengthen its enforcement of the FCPA (US Department of Justice, 2009: 31). In addition, there have been some encouraging successes in proceedings that have sought to use foreign courts to recover assets from corrupt public officials such as Sani Abacha (Basel Institute on Governance, 2007) and Frederick Chiluba<sup>8</sup>.

There is also evidence that at least one prominent component of the transnational anti-corruption regime, the OECD Convention, is having a deterrent effect. Cuervo-Cazurra (2008) presents a statistical study which finds that for countries which had implemented the OECD Convention, investment flows became more sensitive to corruption in the sense that more corrupt countries were more likely to experience diminished investment flows. These findings are broadly consistent with the findings of the OECD Working Group on Bribery, which the OECD Convention charges with performing regular reviews of the parties' compliance (OECD Convention: Art. 12 and associated commentary). In 2006 the Working Group on Bribery reported on the 21 Phase 2 evaluations that had been conducted by the end of 2005 (OECD, 2006). The

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<sup>8</sup> *Attorney General of Zambia v. Meer Care & Desai*

report enumerated many deficiencies in parties' implementing legislation – deficiencies which, taken as a whole, call into question their commitment to the objectives of the Convention (more on this below). On the other hand, the Working Group reported that awareness of anti-corruption legislation among representatives of large multi-national companies operating in those countries was 'acceptable' and that many of the companies had adopted codes of conduct or codes of ethics that addressed corruption (OECD, 2006: 128).

If it is true that having foreign legal institutions combat corruption is advantageous to developing countries then the evidence might take the form not only of improved deterrence, but also improvements in the effectiveness of local institutions as they obtain access to greater resources and are exposed to the influence of institutions with relatively high levels of integrity. Only a handful of countries that even arguably qualify as developing countries are parties to the OECD Convention and, aside from the data that has been compiled on the effects of the Convention on its parties, there does not appear to be any particularly systematic examination of the extent to which the transnational anti-corruption regime has influenced the effectiveness of local legal institutions<sup>9</sup>. However, there are clearly instances where the transnational anti-corruption regime has served to enhance the effectiveness of anti-corruption institutions in developing countries. For example, in Kenya, pressure from foreign donors and lenders clearly drove the adoption of new anti-corruption legislation. At one point the Attorney General indicated that anti-corruption legislation had to be vetted by the International Monetary Fund before being submitted to either Cabinet or Parliament (Kibwana et al., 2001). Carr (2009) reports that donors have played a similar role in Tanzania. Meanwhile, the accession process has allowed the European Union along with other foreign actors to play a significant role in encouraging legal

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<sup>9</sup> The 38 parties to the OECD Convention include seven countries that are not members of the OECD, namely, Argentina, Brazil, Bulgaria, Chile, Estonia, Slovenia and South Africa. It is also worth noting that the OECD members include a few relatively poor countries such as Mexico (OECD, 2009).

actors in South Eastern Europe and the Baltic states to invest in combating corruption (Smilov, 2009: 96 – 99; Dahl, 2009)<sup>10</sup>.

### *Evidence of Indifference*

Although there is some evidence that the transnational anti-corruption regime has been successfully put into operation, there is also a fair amount of evidence that local actors who look to foreign institutions for assistance in combating corruption are often met with indifference. This is especially true if they look beyond the United States, which generally appears to be an exceptionally diligent participant in international anti-corruption efforts.

The indifference of foreign institutions can be manifested in a number of ways. To begin with, foreign countries may be reluctant to take the steps necessary to ensure that they comply with both the letter and the spirit of the obligations they have assumed under international instruments such as the OECD Convention. According to the OECD's Working Group on Bribery recurring problems include: failure to enact laws that make it likely that legal persons such as corporations will be held liable for bribery; the low level of monetary sanctions imposed on legal persons for bribery of foreign public officials; perceptions that factors such as national economic interests influence the investigation or prosecution of foreign bribery; ineffectiveness of efforts to use fraudulent accounting offences to uncover efforts to conceal bribery; and lack of reporting by providers of official development assistance and export credit agencies (OECD, 2006).

Another manifestation of indifference is failure to enforce anti-corruption laws after they have been enacted. Transparency International (Heimann and Dell, 2009) reports that only 4 of the 38 parties to the OECD Convention (Germany, Norway, Switzerland and the United States) have actively enforced their anti-corruption laws, while 21 have seen little or no enforcement. This finding is broadly consistent with the conclusions

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<sup>10</sup> Going further back in time, Gillespie and Okruhlik report that a clean-up campaign in Saudi Arabia was prompted by the same revelations of corruption that prompted the enactment of the FCPA (1991: 89).

of the OECD's Working Group on Bribery, though not entirely consistent with Cuervo-Cazurra's (2008) finding that the OECD Convention has reduced investment flows to relatively corrupt countries.

Interestingly, Cuervo-Cazurra's study does provide circumstantial evidence that for some period of time even the United States engaged in self-interested non-enforcement. He finds that although the FCPA has been in force since 1977, flows of foreign direct investment from the US were sensitive to levels of corruption in the host country after the adoption of the OECD Convention, but not before Smarzynska and Wei (2000) and Wei (2000) report similar findings for a period shortly prior to the adoption of the OECD Convention. Hines (1995) finds the opposite for the period 1977-1982. The implication is that the FCPA only became an effective deterrent to investment in corrupt countries after the OECD Convention was adopted. This is consistent with the hypothesis that the United States engaged in limited enforcement of the FCPA prior to the adoption of similar legislation by other OECD countries in order to avoid placing US firms at a competitive disadvantage. But other explanations for these findings are possible. For instance, it may be the case that the US's unilateral efforts were sincere but limited in effectiveness by the absence of co-operation from law enforcement agencies in other OECD countries. Moreover, Cuervo-Cazurra's empirical claims are not fully consistent with other evidence. For instance, both Smarzynska and Wei (2000) and Hines (1995) find, using different methodologies, that after the enactment of the FCPA but before the adoption of the OECD Convention, US investors in countries with higher levels of corruption were more reluctant than other investors to take on local partners.

Robust and reliable data on cases in which allegations of corruption have *not* been pursued is not available, and even examples of specific instances of non-enforcement are hard to come by. The most prominent example is the BAE affair, in which the government of the United Kingdom closed an investigation into allegations that a British company, BAE Systems Plc, paid bribes to members of the Saudi royal family and government officials in connection with a massive sale of airplanes from the

United Kingdom to Saudi Arabia. BAE was the prime contractor (Rose-Ackerman and Billa, 2008). The UK government cited ‘the need to safeguard national and international security’ as the main reason for closing the inquiry. There is also speculation that the government was afraid that any penalties imposed on BAE would force the company into insolvency, which would have been politically unacceptable (Alexander, 2009), but the UK’s Serious Fraud Office subsequently announced it would seek permission to prosecute BAE for corruption associated with its activities in Africa and Eastern Europe (Serious Fraud Office, 2009b). In any event, it is clear that the UK took its own interests – though not necessarily its economic interests – into account in determining whether to permit its courts and prosecutorial agencies to be used to pursue corruption of the Saudi government.

It is difficult to say to what extent the instances of non-enforcement that have been uncovered reflect total as opposed to selective indifference on the part of foreign legal institutions. For instance, it is unclear whether the UK government would have turned a blind eye to bribery if the allegations had involved a country that was less strategically important than Saudi Arabia<sup>11</sup>. Occasionally, interviews with key actors are able to uncover evidence of selectivity. For instance, Harrison (2001: 673) reports that donors operating in Uganda, Tanzania and Mozambique were inclined to turn a blind eye to known instances of corruption in order to preserve their ability to use the countries as showcases for their development projects. Wrong (2009) makes similar allegations about donors operating in Kenya. In general though, it is difficult to say what motivates non-enforcement or under-enforcement of anti-corruption norms.

Of course, even if countries enact and enforce anti-corruption laws targeting overseas bribery that does not amount to conclusive evidence that they are committed to fighting corruption in developing countries. To begin with, the major components of the transnational anti-corruption regime focus on only a subset of the activities that could

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<sup>11</sup> The UK’s Serious Fraud Office announced the first prosecution of a British firm for transnational bribery on 10 July 2009. The prosecution arose from the company’s voluntary disclosure to the SFO of evidence that it had sought to influence decision-makers in public contracts in Jamaica and Ghana between 1993 and 2001 (Serious Fraud Office, 2009).

be labeled corrupt – mainly, bribery of and embezzlement by high-level public officials who deal with foreign companies. This leaves a whole world of corruption untouched (Gathii, 2009). To some extent the lack of attention to other forms of corruption reflects practical considerations such as lack of access to the relevant actors. But practical considerations do not explain why the OECD Convention explicitly excludes ‘facilitation payments’ paid by multinational actors from its prohibition on bribery<sup>12</sup>. The implication is that foreign actors are not concerned with ‘minor’ matters such as school teachers who request bribes to allow students to take exams, or police officers who extract bribes from motorists for spurious violations, or public officials who facilitate irregular allocations of public land. Meanwhile, reports from countries such as Bulgaria, Mongolia, Kenya and Slovakia suggest that members of the general public regard these forms of corruption as being at least as harmful as grand corruption (Klopp, 2000; Lajcakova, 2003; Nichols et al., 2004).

It is also true that not every instance in which foreign actors activate the transnational anti-corruption regime can be taken as a manifestation of desire to protect the interests of local actors. This is most evident in cases where private actors launch allegations of political corruption in foreign courts in order to serve their private economic interests. Take for example the proceedings that were launched in Hong Kong to recover assets misappropriated by the ruling family of the Republic of the Congo<sup>13</sup>. They were initiated by a vulture fund trying to enhance the value of Congolese sovereign debt it bought at a discount, presumably on the theory that the assets uncovered would likely be located outside of Congo and thus relatively amenable to attachment and execution. If successful this kind of litigation might have a deterrent effect on leaders of other countries, but the direct benefits to the population of the Congo will be limited. The primary motivation of the vulture fund is to line its own pockets. To see the potential

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<sup>12</sup> Similarly, there is no practical reason why international financial institutions advising client governments on austerity policies ostensibly aimed at macro-economic stabilization should not take into account the potential impact on levels of corruption; Klitgaard (1988: 197; 1989) suggests that austerity policies have, by reducing levels of public sector wages, contributed to increased levels of corruption.

<sup>13</sup> See *Long Beach Ltd. v. Global Witness Ltd.* [2007] EWHC 1980 (QB).

conflict between the interests of the creditors and local interests, imagine if litigation of this sort were directed by local actors and with a view to local interests. In that case any assets recovered would probably be repatriated to the Congo as rapidly as possible where efforts could be made to shield them from foreign creditors.

### *Evidence of Incompatibility*

Turning now from motivations to consequences, is there any evidence that the transnational anti-corruption regime has worked against the aspirations or interests of developing countries?

To begin with, charges of moral imperialism seem to have little foundation. Though there may be disagreement about the boundaries of the concept of corruption, there does not seem to be much disagreement about the moral status of the kinds of high-level bribery and embezzlement that are the focus of the transnational anti-corruption regime (Rose-Ackerman, 1999). These forms of corruption appear to be universally criminalized and condemned. It is not clear, however, that they are condemned with equal force in all societies. For instance, in a survey of students in Bulgaria and Mongolia, Nichols et al. (2004) found that condemnation of bribe-taking by traffic officers was 'soft'. They report that the students 'seemed resigned to this small-scale corruption as a fact of everyday life and even joked about it and the small salaries earned by civil servants' (ibid: 237). The presence of these kinds of disagreements does little to undermine the legitimacy of the transnational anti-corruption regime though because that regime has devoted relatively little attention to practices other than bribery and embezzlement. Moreover, the central feature of that regime, the OECD's prohibition on transnational bribery, does not apply to actions that are lawful in the jurisdiction of the official who has been bribed (OECD, 1997: Comment 8 to Art. 1).

The evidence suggests that there is more disagreement about the morality of practices such as payments to political parties, conflicts of interest, and nepotism. Nichols et al. (2004) found significant differences across countries on whether to condemn a public official for 'helping to get his relatives in getting a job/getting into schools'. Moreover,



relatively few respondents in either country defined corruption to include ‘participation in commercial ventures’ or ‘assisting relatives in meeting influential people’. Again though, these activities are generally not the focus of the transnational anti-corruption regime. The one exception may be in the area of government procurement, where some developing states have argued that the kinds of transparency and non-discrimination demanded by international norms are incompatible with their desire to use government procurement to achieve important social policies. In particular, Malaysia has complained that the norms contained in the Agreement on Government Procurement are incompatible with the value it attaches to the practice of using preferences in government procurement to mitigate ethnic inequalities (McCrudden and Gross, 2006).

Leaving aside the concerns about moral imperialism, is there any evidence that the anti-corruption strategies that have been rolled out in connection with the emergence of the transnational anti-corruption regime are having more tangible benign or malign effects on developing countries? As a general matter, evidence that patterns of corrupt activity vary significantly across countries tends to undermine the basis for expecting any sort of one-size-fits-all legal response to be equally effective across countries (Rose-Ackerman, 1999; Johnston, 2005). But there appears to be little direct evidence on the actual effects of the transnational anti-corruption regime on developing countries. Most notably, no one appears to have undertaken a comprehensive empirical analysis of whether the transnational anti-corruption regime, or any component thereof, has caused corruption in developing countries to decrease. Admittedly however,, given the difficulties inherent in measuring the incidence of corruption in a way that enables comparison across space or time, such a study may not even be feasible.

There are, however, a few instances in which a *worsening* of corruption has been tied to externally-driven anti-corruption strategies. The principal complaints have involved the idea of reducing state intervention in the economy as a means of reducing opportunities to engage in corruption. The process of shrinking the state through privatization has led to some of the most egregious examples of corruption in recent

history (see, for example, Rose-Ackerman, 1999: 35 – 38; Johnston, 2005: 125 – 129). And once the state has been shrunk it is not clear from the evidence that it is likely to be any less corrupt. As Krastev (2004) points out, the Nordic countries have some of the most interventionist states in the world but are also regarded as the least corrupt. There is also at least one case in which international scrutiny of one set of corrupt practices is reported to have induced officials to switch to equally pernicious corrupt practices that attracted less international attention. Klopp (2000) claims that during the 1990's the Kenyan government resorted to irregular allocation of public lands as a form of patronage in order to avoid international scrutiny of other forms of corruption such as irregular appointments to para-statal organizations.

There is more evidence bearing on the claim that the anti-corruption regime will have the short-term effect of discouraging firms from doing business in or with corrupt states. As far as investment flows are concerned, and at least for the period from 1996 to 2002, this hypothesis is squarely supported by Cuervo-Cazurra's (2008) statistical study. The idea that there has been a deterrent effect is also consistent with the OECD Working Group's qualitative evidence suggesting that large multinational firms are highly aware of anti-bribery legislation and have incorporated its tenets into their in-house compliance programs. On the other hand, the OECD's research does leave open the possibility of small and medium-sized firms replacing larger firms in niches that involve doing business in relatively corrupt environments.

Finally, there is the concern that it may be dangerous to provide foreign-backing for anti-corruption initiatives in situations where complementary institutions such as constraints on politically-motivated prosecutions are missing. There is little direct evidence that foreign anti-corruption institutions have been abused, but there is certainly evidence of domestic anti-corruption institutions being used in a partisan fashion. For instance, Larmour (2009) describes how the leader of a military coup in Fiji in December 2006 tried to use an anti-corruption campaign to disable political opponents and shore up his legitimacy without always presenting clear evidence of corruption on the part of the targeted individuals. Similarly, Krastev (2004) reports

that in post-communist Eastern Europe allegations of corruption slung at one another by political opponents have led both politicians and the public to obsess about corruption to the exclusion of other important policy considerations, and to reduce public trust in political institutions (see also Smilov, 2009). De Weaver (2005) argues that a Chinese anti-corruption campaign launched in or around 2003 was motivated in part by a desire ‘to remove people loyal to former party chairman Jiang Zemin’. Finally, going further back in time, in a study focused on the Middle East and North Africa, Gillespie and Okruhlik (1991) identified many examples of ineffective anti-corruption campaigns that were either public relations exercises or designed primarily to target political opponents<sup>14</sup>.

At the same time, the Fijian example suggests that legal institutions are capable of avoiding co-optation by self-interested politicians. For instance, the Fijian High Court initially questioned whether the coup leader’s newly created anti-corruption commission could initiate criminal proceedings without the participation of the Director of Public Prosecutions<sup>15</sup>. Meanwhile the Commonwealth Lawyer’s Association reportedly discouraged at least one foreign lawyer from participating in the Commission’s activities, suggesting that resistance to politicization of the anti-corruption regime may also come from the broader international legal community (Fiji Times Online, 2007).

### ***Evidence of Institutional Displacement***

Evidence on whether the transnational anti-corruption regime has displaced local institutions is sparse, mainly because there appears to be no systematic effort to collect it. Ideally we would have comprehensive data on the institutional integrity and competence of local institutions involved in combating corruption. It would also be nice to have data on various factors that might have influenced the quality of those institutions over time, including how frequently they participate in transnational

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<sup>14</sup> To be fair however, they also found many other examples of campaigns that seemed to be motivated by genuine desire to alleviate corruption.

<sup>15</sup> Compare *Fiji Independent Commission Against Corruption v Devo* [2008] FJHC 132 with *Fiji Independent Commission Against Corruption v Kumar* [2009] FJHC 76.

proceedings and the extent to which they play a leadership role. Even data on how local actors perceive the transnational anti-corruption regime – perhaps a survey of law enforcement officials in developing countries asking how helpful they find foreign institutions – would be enlightening.

To end on a positive note though, there are certainly cases in which foreign institutions appear to have served as complements rather than substitutes for the anti-corruption efforts of actors from developing countries. The prime examples are the proceedings that states have brought – not always with success – against former leaders such as Ferdinand Marcos<sup>16</sup>, Jean-Claude Duvalier<sup>17</sup> and Frederick Chiluba<sup>18</sup> to recover embezzled assets<sup>19</sup>. The time is ripe for a comprehensive assessment of not only the prevalence and effectiveness of such proceedings, but also their long-term impact on the development of local institutions.

## 6. CONCLUSION

The primary purpose of this chapter is to explore the advantages and disadvantages of the transnational anti-corruption regime for developing countries. The potential advantages and disadvantages appear to be similar to those associated with other international or transnational regimes that affect developing countries. At this stage it does not seem prudent to go further and attempt to draw any conclusions about whether the anti-corruption efforts of foreign legal institutions have, in general, positive or negative effects on developing countries. In the first place, it is unclear whether any general claims would be helpful because there are strong reasons to believe that the answers to this question will be highly context-dependent. Second, there is insufficient data to assess many of the relevant hypotheses. In fact, in my view the principal lesson to be drawn from this exercise is that too little attention is being paid to some of the ramifications of relying on foreign legal institutions to solve the problems of the

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<sup>16</sup> *Republic of the Philippines v. Marcos*, 862 F.2d 1355 C.A.9 (Cal., 1988).

<sup>17</sup> *Republic of Haiti v. Duvalier* [1990] 1 QB. 202; [1989] 1 All ER 456.

<sup>18</sup> *Attorney General of Zambia v. Meer Care & Desai* [2007] EWHC 952

<sup>19</sup> For regularly updated data on such cases, see <http://www.assetrecovery.org>.

developing world, and especially the ramifications for the development of local institutions.