HARVARD INTERNATIONAL LAW JOURNAL

STUDENT COMMENTARY: DECEMBER 2011

Online Volume 53

The Failure to Negotiate Effective International Measures Against Transnational Bribery

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I. INTRODUCTION

Despite years of negotiations aimed at addressing transnational corruption, the international community has failed to establish an effective international legal regime to curb the problem. After providing an outline of the problem and a brief history of attempts to address it, this Commentary considers some possible explanations for the international community's continuing inability to negotiate an effective agreement to crack down on firms that bribe foreign officials. The Commentary concludes by speculating that an institutionalized enforcement mechanism might provide impetus for an agreement.

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II. THE PROBLEM

A. The Problems of Corruption

Corruption, "the misuse of public power for private profit,"[1] can include practices as diverse as nepotism, patronage, misappropriation of resources, abuse of insider information, extortion, and money laundering.[2] International attention, however, has focused largely on bribery.[3] Of particular importance is bribery involving high government officials and procurement, privatization, or other large-scale public decisions, also known as "Grand Corruption."[4]

Although once accepted by some as useful "grease in the wheels,"[5] corruption is now almost universally seen as both harmful and immoral. Corruption has been

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[1] Press Release, Transparency Int'l, Final Statement of the Uganda International Conference on Empowering Civil Society in the Fight Against Corruption (Apr. 24, 1996), *available at* http://www.transparency.org/news_room/latest_news/press_releases/1996/1996_04_25_agm. *See also* Philip M. Nichols, *Corruption as an Assurance Problem*, 19 AM. U. INT'L L. REV. 1307, 1308 (2004) (citing, *inter alia*, J.S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417, 419 (1967) (for the definition "the misuse of public *office* for private gain" (emphasis added)). Note that this definition applies only to public (or "political") corruption; there is also the possibility of corruption in other spheres. *See, e.g.,* Victoria Baranetsky, *Lessig's Focus on Corruption May Have Uncomfortable Implications for Harvard*, HARV. L. RECORD, Nov. 19, 2009, http://www.hlrecord.org/news/lessig-s-focus-on-corruption-may-have-uncomfortable-implications-for-harvard-1.937178 (discussing Professor Lawrence Lessig's institutional corruption project).

[2] *See* Antonio Argandoña, *Corruption and Companies: The Use of Facilitating Payments*, 60 J. BUS. ETHICS 251, 252 (2005).

[3] *See* R. Michael Gadbaw, *International Anticorruption Initiatives: Today's Fad or Tomorrow's New World?*, 91 PROC. ANNUAL MEETING, AM. SOC. INT'L L. 111, 112 (1997) ("Criminalization of foreign bribery . . . should be the first objective of anticorruption initiatives.").

[4] Bruce W. Bean, *Hyperbole, Hypocrisy, and Hubris in the Anti-Corruption Dialogue*, 41 GEO. J. INT'L L. 781, 787 (2010). See *also* WORLD BANK INDEPENDENT EVALUATION GROUP, PUBLIC SECTOR REFORM: WHAT WORKS AND WHY? 58–59 (2009) (describing grand corruption and state capture).

[5] Pierre-Guillaume Méon & Laurent Weill, *Is Corruption an Efficient Grease?*, 32 WORLD DEV. 244, 244 (2009).

condemned by major world religions[6] and international institutions,[7] and bribery of government officials is illegal in almost every country.[8]

Corruption hurts economic growth and development,[9] creating market inefficiencies by allocating resources based on bribery rather than merit.[10] The corruption of regulatory systems not only transfers resources from honest people to unscrupulous ones,[11] but can also put health and safety at risk. [12] Widespread bribery undermines "public perceptions of how—and how well—a proper market economy works,"[13] inhibiting liberal reforms and the rule of law.

B. The Problems of Transnational Corruption

Economic globalization has exacerbated the age-old problems of bribery and corruption. There are many opportunities for corruption and bribery in the course of international transactions. For instance, in March of 2011, IBM agreed to settle allegations that it paid US$54 million in bribes while pursuing contracts in South Korea.[14] The German engineering conglomerate Siemens is thought to have spent US$805 million on foreign bribes between 2001 and 2007.[15]

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[6] *See* Nichols, *supra* note 1, at 1308 (drawing on the Code of Hammurabi, the Qur'an, and scholarship on Buddhism and Ancient India). *See also Exodus* 23:8.

[7] *See* Bean, *supra* note 4, at 783–84 (surveying statements by the World Bank, the International Monetary Fund, the United Nations Development Program, and the European Bank for Reconstruction and Development).

[8] Scott P. Boylan, *Organized Crime and Corruption in Russia: Implications for U.S. and International Law*, 19 FORDHAM INT'L L.J. 1999, 2021 (1996), *cited in* Steven R. Salbu, *Transnational Bribery: The Big Question*, 21 NW. J. INT'L L. & BUS. 435, 438 (2001).

[9] Patrick X. Delaney, *Transnational Corruption: Regulation Across Borders*, 47 VA. J. INT'L L. 413, 419 (2007).

[10] Antonio Argandoña, *The United Nations Convention Against Corruption and Its Impact on International Companies*, 74 J. BUS. ETHICS 481, 481 (2007). Impeding the functioning of official institutions such as courts leads individuals to rely on parallel informal institutions. The need to operate additional institutions creates significant costs. *See* Nichols, *supra* note 1, at 1311–16.

[11] SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY 8 (1978).

[12] Salbu, *supra* note 8, at 448 (corruption "can easily lead to loss of human life, as when purchased inspection approvals allow bridges to collapse.").

[13] Patrick Glynn et al., *The Globalization of Corruption*, *in* CORRUPTION AND THE GLOBAL ECONOMY 7, 10 (Kimberly Ann Elliott ed., 1997).

[14] Tom Schoenberg & Joshua Gallu, *IBM Is Said to Pay $10 Million to Settle SEC Foreign-Bribery Allegations*, BLOOMBERG NEWS, Mar. 18, 2011,
http://www.bloomberg.com/news/print/2011-03-18/ibm-is-said-to-pay-10-million-to-settle-sec-foreign-bribery-allegations.html.

[15] *Siemens: A Giant Awakens*, ECONOMIST, Sept. 9, 2010,
http://www.economist.com/node/16990709 [hereinafter ECONOMIST, *Siemens*].

The cross-border aspects of transnational corruption create a number of additional problems. The international nature of these practices hinders detection and enforcement. The ready availability of Swiss bank accounts,[16] shell corporations, and off-shore money laundering facilitates bribery. Officials often sequester their ill-gotten gains in third countries, depriving their own country of those resources.[17] This is particularly problematic in the context of resource-rich dictatorships, where rich leaders can capture significant gains from foreign payments at the expense of their people.[18] A 2002 U.N. study found that "[t]he exporting of funds derived from corruption" has severe impacts on the source state.[19] According to the 2001 Nyanga Declaration:

> [A]n estimated US$ 20–40 billion has over the decades been illegally and corruptly appropriated from some of the world's poorest countries, most of them in Africa, by politicians, soldiers, businesspersons and other leaders, and kept abroad in form of cash, stocks and bonds, real estate and other assets.[20]

Corruption creates a significant barrier to entry for foreign trade and investment. A 1997 study concluded that Mexico's level of corruption imposed the equivalent of an additional twenty percent tax on foreign direct investment, as compared to

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[16] *But see* Matthew Saltmarsh, *Imminent End of Secrecy to Shake Up Swiss Banking*, N.Y. TIMES, May 13, 2010 http://www.nytimes.com/2010/05/14/business/global/14ubs.html.

[17] Ad Hoc Committee for the Negotiation of a Convention Against Corruption, *Global Study on the Transfer of Funds of Illicit Origin, Especially Funds Derived From Acts of Corruption*, 3–4, U.N. Doc. A/AC.261/12 (Nov. 28, 2002).

[18] *See* Martine Boersma, Catching the 'Big Fish'?: A Critical Analysis of the Current International and Regional Anti-Corruption Treaties 3 (14 November 2008) (unpublished manuscript) (available at http://ssrn.com/abstract=1301602).

[19] Ad Hoc Committee for the Negotiation of a Convention Against Corruption, *supra* note 17, at 3.

[20] Press Release, Transparency Int'l, Nyanga Declaration on the Recovery and Repatriation of Africa's Wealth Illegally Appropriated and Banked or Invested Abroad (March 4, 2001) *available at* http://www.ipocafrica.org/index.php?option=com_docman&task=doc_download&gid=343, *quoted in* Ad Hoc Committee for the Negotiation of a Convention against Corruption, *supra* note 17, at 3.

Singapore.[21] Corruption among border officials can create problems for imports and exports.[22]

Globalization has also amplified the potential harms of corruption. Given the increasing interdependence of financial markets around the world, bribery in one place can have ripple effects elsewhere.[23] Corrupt practices can also spread from country to country, as businesspeople become acclimatized to bribery in different contexts.[24]

C. Conceptualizing Anticorruption Negotiations

Transnational bribery is caused—and regulated—by factors at multiple levels, from the corporation, to national governments, to the international community. For the purposes of this Commentary, I think of the processes involved in transnational bribery as playing out as a three-level game:[25]

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[21] Shang-Jin Wei, *How Taxing Is Corruption on International Investors?* 1 (William Davidson Institute, Working Paper No. 63, 1997), *available at* http://deepblue.lib.umich.edu/bitstream/2027.42/39453/3/wp63.pdf. *But see* Ali Al-Sadig, *The Effects of Corruption on FDI Inflows*, 29 CATO J. 267, 268 (2009) (noting that although a "one-point increase in the corruption level [of a host country] leads to a reduction in per capita FDI inflows by about 11 percent," these effects disappear when using panel data and controlling for the quality of the country's institutions and other characteristics).

[22] *But see* Kimberly Ann Elliott, *Corruption as an International Policy Problem: Overview and Recommendations*, *in* CORRUPTION AND THE GLOBAL ECONOMY 175, 198–200 (Kimberly Ann Elliott ed., 1997) (noting that corruption could actually facilitate trade where officials waive tariff payments in exchange for bribes).

[23] *See* Glynn et al., *supra* note 13, at 12 ("When the corrupt Bank of Credit and Commerce International went belly-up in 1991, for example, the entire social security fund of Gabon was wiped out.").

[24] Argandoña, *supra* note 10, at 482.

[25] For a discussion of "[t]wo-level games [as] a metaphor for domestic-international interactions," see Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 433–35 (1988).

International / Diplomatic	National / Legal	Corporate / Operational
States negotiate international instruments, choosing the levels of bindingness, specificity, and rigor of enforcement mechanisms.	Governments develop anti-bribery legislation, selecting a level of statutory ambiguity and coverage and determining the intensity of prosecution.	Companies and corporate officers decide how much to bribe foreign officials; officials decide how many bribes to solicit and accept.

At the operational level, corruption is the ultimate form of principal-agent conflict: by definition, corruption involves public officials who are misusing public authority.[26] From the perspective of firms, however, corruption can also appear to be a prisoner's dilemma game.[27] In a clean procurement system, no company would have to pay a bribe, and the successful bidder would keep all the profits of the deal.[28] However, as long as some companies have the option of bribing, there is a powerful incentive for each competitor to bribe so as to avoid the risk of losing the deal.

At the national level, states choose policies that influence their companies' ability to offer bribes abroad.[29] In addition to the political factors affecting these decisions, the logic of economic competiveness inclines most governments to tread lightly on laws against bribery by nationals abroad. Although capital-exporting countries would prefer a world with no procurement bribery, each country is hesitant to seriously enforce prohibitions on domestic companies engaging in bribery abroad, for fear of putting its companies at a competitive disadvantage.[30]

At the international level, states recognize the shared problem of transnational bribery, and negotiate resolutions,[31] recommendations,[32] and treaties[33] calling for its

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[26] Transparency Int'l, *supra* note 1.

[27] Susan Rose-Ackerman, *The Political Economy of Corruption*, *in* CORRUPTION AND THE GLOBAL ECONOMY 31, 53 (Kimberly Ann Elliott ed., 1997).

[28] *See The Short Arm of the Law*, ECONOMIST, Mar. 8, 2002, http://www.economist.com/node/1032032 [hereinafter ECONOMIST, *The Short Arm of the Law*] (noting that bribery increases costs on companies).

[29] *See* Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L L. 665, 688 (2004).

[30] *Id.* at 674.

[31] *See, e.g.*, United Nations Declaration Against Corruption and Bribery in International Commercial Transactions, G.A. Res. 51/191, U.N. GAOR, 51st Sess., Supp. No. 49 (Vol. 1), U.N. Doc. A/RES/51/191 (Feb. 21, 1997).

criminalization. Although many states seem very interested in stamping out corruption, they are also concerned about preserving flexibility for themselves at the national/legal level. Accordingly, as discussed in the next section, international agreements against transnational bribery have generally been weak.

III. INTERNATIONAL RESPONSES TO TRANSNATIONAL CORRUPTION

Over the last forty years, states have begun to take action both individually and in groups to address concerns about transnational corruption. This section traces the development of international anti-bribery norms from the U.S. Foreign Corrupt Practices Act of 1977 to the Organization of American States (OAS) and Organisation for Economic Co-operation and Development (OECD) treaties of 1996 and 1997 respectively and finally to the United Nations Convention Against Corruption. Although these measures have been successful in terms of attracting adherents, they have failed to induce significant changes in states' anticorruption behavior at the national/legal level or to meaningfully curb the use of bribes by companies.

A. The Foreign Corrupt Practices Act

In the aftermath of the Watergate scandal, Securities and Exchange Commission (SEC) investigations of illegal contributions to Richard Nixon's presidential reelection campaign revealed that American corporations maintained slush funds used to pay bribes both in the United States and abroad.[34] Concerned by the potential of these practices to undermine the legitimacy of American companies abroad,[35] Congress passed the Foreign Corrupt Practices Act (FCPA) in 1977.[36]

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[32] *See, e.g.*, WORKING GRP. ON BRIBERY IN INT'L BUS. TRANSACTIONS, OECD, RECOMMENDATION OF THE COUNCIL FOR FURTHER COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (2009), *available at* http://www.oecd.org/dataoecd/11/40/44176910.pdf.

[33] *See, e.g.*, Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724 [hereinafter OAS Convention]; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1, *available at* http://www.oecd.org/dataoecd/4/18/38028044.pdf [hereinafter OECD Convention].

[34] Barbara Crutchfield George et al., *On the Threshold of the Adoption of Global Antibribery Legislation: Critical Analysis of Current Domestic and International Efforts Toward the Reduction of Business Corruption*, 32 VAND. J. INT'L L. 1, 5 (1999).

[35] *See* Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. INT'L L. 345, 351 (2000); Tarullo, *supra* note 29, at 673.

[36] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977).

The Act has two major functions.[37] First, it criminalizes the payment of bribes to government officials anywhere in the world by U.S. residents, citizens, and companies.[38] Second, it mandates financial reporting rules designed to detect and hinder illicit payments.[39]

The FCPA can be seen as a unilateral move by the U.S. Government to try to address the problems of transnational corruption.[40] The United States hoped that other countries would follow suit,[41] passing similar laws and moving to an equilibrium position with less corruption where everyone would be better off.

However, other states failed to follow suit. No other country adopted FCPA-like restrictions on their companies' ability to engage in corruption abroad.[42] Foreign companies continued offering bribes, while U.S. companies were prohibited from doing so, creating a significant competitive disadvantage for U.S. companies.[43] Upset, Congress directed the President in 1988 to seek an international agreement to create a fair playing field by extending FCPA provisions to other jurisdictions.[44]

B. OAS, OECD, and U.N. Conventions

Deliberations in U.N. bodies were stalled through the 1980s, in part due to conflicts between developing countries' desire to emphasize misconduct by transnational companies, rather than the solicitation of bribes as such.[45] Unable to reach a binding agreement through the U.N. system, the United States turned to other fora.

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[37] *See* Kari Lynn Diersen, *Foreign Corrupt Practices Act,* 36 AM. CRIM. L. REV. 753, 755–56 (1999).

[38] 15 U.S.C. §§ 78dd-1, et seq (West 2011).

[39] 15 U.S.C. § 78m(b)(2) (West 2011).

[40] *Cf.* Kenneth A. Oye, *Explaining Cooperation Under Anarchy: Hypotheses and Strategies*, 38 WORLD POL. 1, 10–11 (1985) (discussing unilateral strategies to limit gains from exploitation).

[41] Similarly, the United States was among the earliest to ratify the OECD Convention, reasoning that acting first would "help convince other nations to implement the Convention." *The International Anti-Bribery and Fair Competition Act of 1998: Hearing Before the H. Subcomm. on Finance and Hazardous Materials*, 105th Cong. 2 (1998) (statement of Michael G. Oxley, Chairman, H. Subcomm. on Finance and Hazardous Materials).

[42] Kenneth W. Abbott & Duncan Snidal, Filling in the Fold Theorem: The Role of Gradualism and Legalization in International Cooperation to Combat Corruption 20 (Aug. 30, 2002) (unpublished conference paper), *available at* http://www.international.ucla.edu/cms/files/Duncan_Snidal.pdf.

[43] *See* Tarullo, *supra* note 29, at 671 (interpreting the adoption of the FCPA through a modified prisoner's dilemma model).

[44] George et al., *supra* note 34, at 20; Glynn et al., *supra* note 13, at 19.

[45] *See* Posadas, *supra* note 35, at 368–69. *See also* Mark Pieth, *International Cooperation to Combat Corruption*, *in* CORRUPTION AND THE GLOBAL ECONOMY 119, 122 (Kimberly Ann Elliott ed.,

The Organization of American States (OAS) offered a promising venue for America's anti-bribery schemes. Negotiating within the framework of the OAS allowed the United States to exclude many opponents of anti-bribery rules and draw on its heightened influence in the region.[46] Following a series of conferences, the members of the OAS adopted the Inter-American Convention Against Corruption on March 29, 1996.[47] The Convention is aimed at fighting governmental corruption generally,[48] and most of its provisions have to do with measures designed to stamp out domestic bribery within the jurisdiction of each state party. Article VIII, however, focuses explicitly on transnational bribery, requiring states to "prohibit and punish" such bribery through domestic law.[49]

The Organization for Economic Cooperation and Development (OECD), a "Rich Men's Club"[50] of wealthy, generally U.S.-friendly countries, was another fruitful forum for anti-bribery negotiations.[51] On November 21, 1997, thirty-four states signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[52] The Convention's key provision is a general requirement that states parties criminalize the bribery of foreign officials under their laws.[53]

The United States used the conclusion of the OAS and OECD Conventions to raise awareness and build consensus around the need to address transnational bribery.[54] After a series of conferences and resolutions,[55] the U.N. Convention Against

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1997) (noting that "developing countries [maintained] that the concept of 'illicit payments' should be understood in a broad sense, including payments also made to the apartheid regime in South Africa.").

[46] *See* Carolyn M. Shaw, *Limits to Hegemonic Influence in the Organization of American States*, 45 LATIN AM. POL. SOC'Y 59, 59–60 (2003) ("[T]he United States is by far the most powerful member state of the OAS and has considerable influence over the organization's actions.").

[47] OAS Convention, *supra* note 33.

[48] *Id.* art II(1). *See also* Posadas, *supra* note 35, at 384.

[49] OAS Convention, *supra* note 33, art. VIII.

[50] PAUL H. COHEN & ARTHUR MARRIOTT, INTERNATIONAL CORRUPTION xxviii (2010).

[51] It is worth noting that the forum shopping went both ways: countries opposed to effective OECD regulations on transnational bribery tried to keep negotiations in the United Nations, perhaps in hopes that they would fail. Elliott, *supra* note 22, at 216.

[52] OECD Convention, *supra* note 33; Posadas, *supra* note 35, at 380.

[53] OECD Convention, *supra* note 33, art. 1. *See also* COHEN & MARRIOTT, *supra* note 50, at 52–55.

[54] Philippa Webb, *The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?*, 8 J. INT'L ECON. L. 191, 192 (2005). For a discussion of sequencing, see generally James K. Sebenius, *Sequencing to Build Coalitions: With Whom Should I Talk First?*, *in* WISE CHOICES: DECISIONS, GAMES, AND NEGOTIATIONS 324 (Richard J. Zeckhauser et al. eds., 1996).

[55] Argandoña, *supra* note 10, at 482–85.

Corruption[56] was adopted on October 31, 2003.[57] The Convention has since been ratified by 155 states.[58] Like the OAS Convention, the U.N. Convention addresses many aspects of the prevention and punishment of corruption. Article 16 requires states parties to make the offering of bribes to foreign officials a criminal offense.[59]

C. The Failure of Existing Agreements

Despite the successful conclusion of each of these agreements, progress at the national/legal level to halt bribery of foreign officials has been slow. Even after the OAS and OECD conventions entered into force, U.S. officials remained concerned about the competitive disadvantage caused by other countries' relatively lax treatment of corruption abroad.[60]

Many countries have added foreign bribery to their criminal statues in a vague or loophole-ridden way that allows offenders to escape punishment:

> The crime of bribery is often poorly defined, with varying degrees of imprecision as to what qualifies as a foreign public entity or a commercial enterprise, for example. Liability and jurisdiction are often delineated in an equally amorphous manner, and the lack of certainty in interpreting these anti-corruption provisions further confounds the implementation process for example, the absence of nationality jurisdiction provision in some countries allows nationals to use non-

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[56] United Nations Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41, *available at* http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf [hereinafter U.N. Convention].

[57] UNITED NATIONS TREATY COLLECTION: STATUS OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-14&chapter=18&lang=en (last visited Dec. 8, 2011).

[58] *Id.*

[59] U.N. Convention, *supra* note 56, art. 16.

[60] *See* Sara Nathan, *U.S.: Tie Loans to Corruption, Weigh Bribery in Aid Decisions*, USA TODAY, Feb. 17, 1999 ("U.S. businesses lost contracts worth $30 billion from mid-1997 to mid-1998 because of corruption, [Undersecretary of State Stuart] Eizenstat says. Countries such as Australia, Belgium and France still allow companies to deduct bribes from their taxes."); *The Global Crackdown on Corporate Bribery: Ungreasing the Wheels*, ECONOMIST, Nov. 19, 2009 ("American lawyers worry that local prosecutors will remain tougher than their counterparts in other rich countries . . . ").

> nationals to bribe foreign public entities while out of their home country.[61]

Lax sentencing rules, inadequate investment in enforcement, and failure to initiate prosecutions have further undermined anticorruption efforts.[62] There have been few prosecutions outside of the United States for bribery of foreign officials.[63] At least until 2003 "new domestic laws based on the OECD Convention have not resulted in a single conviction."[64] By 2009, approximately half of the parties to the Convention had made "little or no" efforts at enforcement.[65]

A major reason for this inadequate response is the weakness of the treaty obligations contained in the conventions on corruption. Despite its ambition of penalizing transnational bribery, the OECD Convention does not specify precise language or implementation measures.[66] Instead, the Convention leaves states parties a great deal of discretion to define statutes of limitations, sentencing provisions, the scope of prosecutorial discretion, and elements of the crime of bribery in accordance with their own domestic law.[67] The OAS Convention is similarly vague, and is further weakened by the fact that each state party is required to criminalize bribery of foreign officials only "[s]ubject to its Constitution and the fundamental principles of its legal system."[68] Although the United Nations Convention has a mandatory provision requiring criminalization of the bribery of foreign officials,[69] it does so only in general terms,[70] and related provisions are merely hortatory.[71] The Convention's enforcement provisions are quite weak, leaving a great deal of discretion to the Conference of States Parties to set up implementing procedures.[72] This lack of rigor means that states can claim adherence while taking only token measures to combat the bribery of

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[61] COHEN & MARRIOTT, *supra* note 50, at 62 (internal citations omitted).

[62] *Id.* at 62–63.

[63] Tarullo, *supra* note 29, at 683 (noting that by 2004, only Canada had initiated such a prosecution).

[64] Webb, *supra* note 54, at 198.

[65] Gillian Dell, *A Mixed Picture: Assessing the Enforcement of the OECD Anti-Bribery Convention*, *in* GLOBAL CORRUPTION REPORT 2009: CORRUPTION AND THE PRIVATE SECTOR 426, 427 (2010).

[66] COHEN & MARRIOTT, *supra* note 50, at 53.

[67] *Id.* at 54–55.

[68] OAS Convention, *supra* note 33, art. VII.

[69] U.N. Convention, *supra* note 56, art. 16(1).

[70] *See* Webb, *supra* note 54, at 221 (The U.N. Convention "follows the formula of the weakest regional conventions by giving state parties a large degree of leeway to decide if and how far to incorporate the Convention into national law.").

[71] *See, e.g.*, *id.*, art. 16(2), art. 18. *See also* U.N. OFFICE ON DRUGS AND CRIME, LEGISLATIVE GUIDE FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION 95–107 (2006).

[72] Webb, *supra* note 54, at 221.

foreign officials. As long as states can get away with it, they have every incentive not to crack down.

IV. BARRIERS TO AGREEMENT

Given the well-recognized harms of corruption, why have states not been able to agree upon more stringent rules? Approaching the problem on the basis of the three-level framework discussed above, it seems clear that most states will select something close to the least-aggressive policies on the national/legal level that are permitted by the international treaty regime. But why have states not agreed upon a stronger regime?

A. Principal-Agent Problems

A simple explanation for the delays in negotiating effective anti-bribery measures involves principal-agent problems.[73] Representatives of intransigent states often have personal interests that diverge from those of their country. These interests can be personal (and corrupt in the classical sense), role-oriented, or political.

Most obviously, political leaders who are corrupt benefit personally from maintaining an international order in which they can continue to solicit bribes effectively. Of the few states that have not yet signed on to the U.N. Convention, many are among the most corrupt.[74] During the negotiation of the Convention, German members of Parliament opposed possible provisions that would cut off their ability to collect consultant fees for lobbying, consulting, and writing editorials.[75]

A second source of tension between representatives and the societies that they represent is political in nature. Politicians and bureaucrats may be dependent on constituencies that would prefer to avoid aggressive anti-bribery rules. For instance,

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[73] *See generally* ROBERT H. MNOOKIN ET AL., BEYOND WINNING 69–91 (2000).

[74] *Compare UNCAC Signature and Ratification Status as of March 31, 2011*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, http://www.unodc.org/images/treaties/UNCAC/Status-Map/2011-03-01_-_UNCAC_Ratification_Map_Larger.jpg (last visited Dec. 8, 2011) *with Corruption Perceptions Index 2009*, TRANSPARENCY INT'L, http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table (last visited Dec. 8, 2011). On the other hand, note that several of the most notoriously corrupt countries, including Uzbekistan, Libya, Turkmenistan, and Sudan are signatories or states parties to the Convention. This may be evidence of the ineffectiveness of the Convention.

[75] *Profile: Germany Dissents as Diplomats Work on Final Version of UN Global Anti-Corruption Agreement* (NPR: All Things Considered radio broadcast July 21, 2003).

European politicians were hesitant to follow the United States in adopting FCPA-like measures in part because of pressure from domestic industry groups.[76]

A third source of owner-agent problems has to do with the identities and institutional loyalties of those charged with negotiating anti-bribery measures. Foreign affairs ministries have a general interest in maintaining positive relationships abroad.[77] Effective anti-bribery measures are likely to disrupt some of those relationships, at least in the short run. The revelations following post-Watergate congressional investigations caused numerous problems for the U.S. State department.[78] Accordingly, it is possible that diplomats may be inclined to adopt softer agreements than are in their countries' interests.[79]

One way to address the principal-agent problems associated with anticorruption negotiations is to create countervailing pressure for strong regulations. The personal interests of politicians can be manipulated by appealing to foreign constituencies to increase the salience of corruption issues.[80] Gradual progress in curtailing corruption can also help reduce agents' objections. Once a country starts cleaning up corruption

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[76] *See* Tarullo, *supra* note 29, at 674 n.26 ("[O]ne European official told me with disarming candor that his country's companies needed a competitive edge over their more efficient U.S. competitors."). Note that if the European country experienced more benefits than costs from permitting continued foreign bribery, the interests of the principal (the country) and the agent (the official) would be aligned.

[77] *See, e.g.*, *Gingrich Slams Powell's State Department*, NEWSMAX WIRES, Apr. 23, 2003. *See also* Johan Galtung & Mari Holmboe Ruge, *Patterns of Diplomacy*, 2 J. PEACE RESEARCH 101, 111–13 (1965) (discussing individual diplomats' increasing identification with the international *corps diplomatique* as opposed to their home country). *But see* Melinda Brouwer, *Former Official: State Department Culture an Impediment to Arms Control*, U.S. DIPLOMACY: THE WORLD AFFAIRS BLOG NETWORK (June 4, 2008), http://diplomacy.foreignpolicyblogs.com/2008/06/04/former-official-state-department-culture-an-impediment-to-arms-control/ (quoting former Deputy Assistant Secretary for Nuclear Nonproliferation describing "cultural biases against multilateral diplomacy and transnational activities").

[78] Posadas, *supra* note 35, at 358 n.44 ("The State Department stated before the Subcommittee on International Economic Policy that since the U.S. Congress started revealing the questionable conduct of U.S. companies abroad, 'the head of a friendly government' had been removed from office, 'other friendly leaders' were under political attack, and the property of an American company had been expropriated in one country even though the bribing scandal had occurred in a different one.").

[79] It is also possible that personal ideological commitments (to the rule of law or to international cooperation generally) might lead diplomats to prefer *stronger* agreements than their governments might choose. *See* Chris Cobb, *Treaty Negotiator Bounced for being "Too Tough, Aggressive,"* OTTAWA CITIZEN, Feb. 7, 2011, http://www2.canada.com/ottawacitizen/news/story.html?id=cf92f1e6-68b3-4c3a-a9e2-834002b7bc2f&p=3 (discussing ouster of Canadian cluster munitions diplomat).

[80] *See* Tarullo, *supra* note 29, at 678–79 (discussing U.S. public diplomacy anticorruption efforts).

problems, its leaders are less likely to be personally compromised in future negotiations. For instance, the German government seems to have become more supportive of international anticorruption measures as its own politics have become less corrupt.[81]

B. Ideological Obstacles

A further barrier to agreement has to do with parties' commitments to ideological principles that may be impacted by anticorruption agreements. For instance, the United States' commitment to free market solutions for private sector problems inhibited agreement on provisions governing business corruption.[82] American intransigence on campaign finance issues raised similar problems for proposed articles governing corruption and political parties.[83]

Commitments to conceptions of sovereignty and national jurisdiction played an important role in limiting the scope of the OECD convention.[84] In the early 1990s, the United Kingdom, France, and Germany objected to mandatory FCPA-type extraterritorial penalization of bribery as improper encroachment on national sovereignty.[85] It is unclear to what extent these are bona fide concerns rather than fig leaves covering more material interests in the competitiveness of export industries.[86] That the European positions switched so rapidly over the following decade[87] could

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[81] *Compare* Alexander Keselica, *Germany's Stronger Anti-Corruption Enforcement*, 11 KROLL GLOBAL FRAUD REPORT 7 (2010), *available at* http://www.kroll.com/about/library/fraud/Apr2010/germany. aspx *with* DAGMAR SCHRÖDER ET AL., TRANSPARENCY INT'L, COUNTRY REPORTS ON POLITICAL CORRUPTION AND PARTY FINANCING: GERMANY (2004) (noting improvements in transparency rules governing political financing). *But see* Hans Leyendecker, *Germany: Corruption Notebook*, GLOBAL INTEGRITY REPORT 2004, http://back.globalintegrity.org/reports/2004/2004/country65a8.html?cc=de&act=notebook (arguing that "[c]orruption in Germany is spreading like cancer"). Of course, it is difficult to show a causal relationship between reduction in domestic political corruption and better policies towards international corruption: it is very likely that both developments share independence causes.

[82] *See* Irwin Arieff, *UN Anti-Corruption Pact Raises Last Minute Alarms*, REUTERS, June 29, 2003; *See also* Webb, *supra* note 54, at 214–15.

[83] *See* Webb, *supra* note 54, at 216–18.

[84] Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight Against Corruption*, 31 J. LEGAL STUD. 141, 158–160, 172 (2002) [hereinafter Abbott & Snidal, *Values and Interests*].

[85] Glynn et al., *supra* note 13, at 20.

[86] *Cf.* Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RES. 325, 348–49 (1996) (discussing tying positions to justifications in competitive bargaining).

[87] *See* Posadas, *supra* note 35, at 397 (noting that EU members that "have strengthened their anticorruption commitments").

suggest that these arguments were mostly posturing. It is also possible that sovereignty-oriented objections were withdrawn more in response to changing norms surrounding corruption,[88] or even evolving views on state sovereignty.[89]

In any case, any effective agreement on corruption will have to navigate through or around states' declared commitments to national sovereignty and related principles. One way of doing this is to alter those commitments over time. The legalization process, moving from soft law to hard law, is one way of shifting parties' value commitments.[90] In constructivist terms, parties' interests can change in response to the rise of anti-bribery ideas.[91]

However, the main option that anticorruption negotiators have turned to in the past involves accommodating, rather than seeking to modify, states' sovereignty concerns. This approach, leaving decisions about implementation to national governments, is discussed in the next section.

C. The Need for Flexibility in Implementation

Differences in national criminal justice systems have meant that rather than imposing a uniform implementation of the crime of transnational bribery, international treaties have left the details of implementation up to individual states.[92] Unlike the most favored nation principle,[93] or restrictions on the use of ozone-destroying substances,[94]

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[88] *See generally* Abbott & Snidal, *Values and Interests*, *supra* note 84 (discussing the role of Transparency International and other factors in changing the values surrounding anticorruption efforts).

[89] Although the concept of a "Responsibility to Protect" was not fully articulated by the International Commission on Intervention and State Sovereignty until December 2001, the growing idea of compromising Westphalian sovereignty in order to solve global problems was clearly in the air in the 1990s. *See* Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT'L L. 99, 111–14 (2007).

[90] *Cf.* DAVID A. LAX & JAMES K. SEBENIUS, 3-D NEGOTIATION: POWERFUL TOOLS TO CHANGE THE GAME IN YOUR MOST IMPORTANT DEALS 29–30 (2006) ("Checking the Sequence and Process Choices").

[91] *Cf.* Stephen M. Walt, *International Relations: One World, Many Theories*, FOREIGN POLICY, Spring 1998, at 29, 40–41.

[92] *See supra* Part III.C.

[93] *See, e.g.*, General Agreement on Tariffs and Trade, art 1(1), *opened for signature* Oct. 30, 1947, 55 U.N.T.S. 194. *But see* Henrik Horn & Petros C. Mavroidis, *Economic and Legal Aspects of the Most-Favored-Nation Clause*, 17 EUR. J. POL. ECON. 233 (2001) (describing instances in which application of the clause required interpretation by dispute resolution bodies).

[94] Montreal Protocol on Substances that Deplete the Ozone Layer, art. 2A(1), Sept. 30, 1987, 26 I.L.M. 1541, *amendments at* 30 I.L.M. 537, *available at* http://ozone.unep.org/Publications/MP_Handbook/Section_1.1_The_Montreal_Protocol/Article_2A.shtml.

both of which have fairly stable legal meanings everywhere, what it means to criminalize foreign corruption can vary substantially from country to country.

The kinds of measures that can be deployed are often constrained by domestic legal and political factors that limit the zone of possible treaty agreements. For instance, the United States delayed signing the OAS Convention out of concern that the Article IX provision penalizing unexplained growth in the assets of public officials might run afoul of the constitutional principle that defendants are innocent until proven guilty.[95] States are also hesitant to accept requirements that might be beyond their capacity to meet. Many representatives of developing countries worry that mandatory anticorruption rules at international financial institutions could be used to deny them capital.[96] Even in the European Union, variation in domestic legal systems has caused problems for anti-bribery efforts.[97]

Making treaty provisions less demanding makes it easier for states to implement them in their own way. When treaty provisions become are more general, a greater variety of possible implementations become permissible.[98] It is because of variation in domestic legal systems that the OECD Convention requires criminalization of foreign bribery without providing specific guidance,[99] and the Inter-American Convention only requires such criminalization "[s]ubject to [each state party's] Constitution and the fundamental principles of its legal system."[100] The U.N. Convention Against Corruption does not include such language, which led the United States to file a reservation ostensibly limiting its obligations to enforce the Convention's requirements as they apply to state and local officials.[101]

Unfortunately, giving governments the flexibility to criminalize bribery as they see fit also gives them the opportunity to do so in an ineffective way.[102] Many countries have left "holes in the anti-bribery laws that are big enough for a half-blind elephant to

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[95] *See* Elliott, *supra* note 22, at 218.

[96] Kimberly Ann Elliott, *Introduction*, *in* CORRUPTION AND THE GLOBAL ECONOMY 1, 3 (Kimberly Ann Elliott, ed. 1997).

[97] Posadas, *supra* note 35, at 395.

[98] Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175, 189 (1993).

[99] OECD Convention, *supra* note 33, art. 1.

[100] OAS Convention, *supra* note 33, art. VII.

[101] UNITED STATES OF AMERICA, *United Nations Convention Against Corruption: Reservations and Declarations*, UNITED NATIONS TREATY COLLECTION (Feb. 12, 2011 7:43:44 AM), http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-14&chapter=18&lang=en. *See also* Julian Ku, *U.S. Senate Ratifies Three Possibly Meaningless Treaties*, OPINIO JURIS (Oct. 10, 2005, 4:35:00 PM), http://lawofnations.blogspot.com/2005/10/us-senate-ratifies-three-possibly.html.

[102] *See supra* Part III.C.

blunder through."[103] These statutes are not weak by accident: legislators have a powerful incentive to let their own country's companies get away with bribery.

States' tendency to go easy on bribery at the national implementation stage affects how they negotiate on the international/diplomatic level. Assuming that other parties will shirk as much as possible, few governments are willing to commit themselves to strong measures that could cost their firms in the future.[104]

One way that this problem could be addressed is through the adoption of explicitly standards-based treaty provisions.[105] The language of the U.N. Convention can be read as invoking some standard-like ideas: states are required to "adopt such legislative and other measures as may be necessary" to criminalize foreign bribery.[106] However, absent a clear framework for adjudication, these standards have not been fully operationalized. Kenneth Oye argues that clearly defining categories of cooperative and defective behavior facilitates reciprocity;[107] absent such definition, cooperation becomes more difficult. A standard that, for instance, required states to put into place measures to ensure that allegation of bribery resulted in *effective* investigation, prosecution, and punishment would allow states to implement those measures in a manner consistent with domestic legal systems, but could still be applied to assess the compliance of individual states.[108] Absent an authoritative institutional mechanism for adjudication, however, enforcement relies on the interaction of individual states, giving rise to problems discussed in the next section.

D. Collective Action Problems

Countries' fears of losing business to foreign competitors whose governments are soft on bribery leads to a collective action problem that inhibits effective agreements. Daniel K. Tarullo, U.S. Assistant Secretary of State for Economic and Business Affairs, during the negotiation of the OECD Convention, characterized this situation as a prisoner's dilemma problem.[109] Although reciprocal tit-for-tat strategies are often

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[103] ECONOMIST, *The Short Arm of the Law*, *supra* note 28.

[104] *See* Abbott & Snidal, *Values and Interests*, *supra* note 84 at 167 ("[E]ach government believed that its own prosecutors would vigorously enforce agreed-upon rules but feared that other governments would overlook violations through prosecutorial discretion or similar doctrines, giving their national firms a competitive advantage.").

[105] For a discussion and analysis of the distinction between rules and standards, see generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L. J. 557 (1993).

[106] U.N. Convention, *supra* note 56.

[107] Oye, *supra* note 40, at 16–17.

[108] The OECD Working Group on Bribery peer monitoring system involves this kind of assessment, but it lacks the power to enforce its recommendations. *See generally*, WORKING GROUP ON BRIBERY, OECD, ANNUAL REPORT 2009 (2009).

[109] Tarullo, *supra* note 29, at 672.

effective in resolving iterated games of this kind,[110] two characteristics of the anti-bribery problem undermine the possibility for strategies of reciprocity. First, difficulties in detecting defection from anti-bribery agreements undermine the possibility of future retaliation. Second, constraints on each state's policy choices prevent such retaliation.

1. Uncertainty About Defection

Corruption is slippery: hard to define, and harder to monitor. Accordingly, it is hard to determine whether a state's response to bribery is effective and whether that state is defecting from its anti-bribery obligations. Because the threat of retaliation is less effective when detection of defection is more difficult,[111] the lack of information around bribery complicates reciprocal arrangements in this area.

In the first place, what does or does not constitute bribery can itself vary based on legal systems, business practices, and the cultural context. [112] The Korean example of *ttkopp*, courtesy payments made to public officials at holidays,[113] speaks to the vagueness of bribery. What might seem corrupt to an American is actually viewed as an innocuous tradition. Accordingly, the failure of a government to crack down on *ttkopp* should not be perceived as defection from an anti-bribery treaty. The ambiguity surrounding bribery may be less of a problem in the context of grand corruption, where the size of payments can be a clear sign of their illicit nature.[114] Nonetheless, the fuzziness of corruption makes it harder to tell whether a given state is doing its part to fight bribery of foreign officials.

Another source of uncertainty involves domestic legal systems. When a defendant is let off the hook on a technicality, it can be hard to tell at a distance whether lenity results from legitimate procedural justice concerns or from a *sub rosa* desire to permit

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[110] *See generally* Robert Axelrod & William D. Hamilton, *The Evolution of Cooperation*, 211 SCIENCE 1390 (1981).

[111] DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATIVE AND COMPETITIVE GAIN 161–62 (1987) (discussing "readily observable defections"); Oye, *supra* note 40, at 15.

[112] *See* RAYMOND COHEN, NEGOTIATING ACROSS CULTURES: INTERNATIONAL COMMUNICATION IN AN INTERDEPENDENT WORLD 10–14 (1997) (discussing culture generally).

[113] *See* Jennifer Dawn Taylor, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 LA. L. REV. 861, 879 (2001) (citing Joongi Kim & Jong Bum Kim, *Cultural Differences in the Crusade Against International Bribery: Rice-Cake Expenses in Korea and the Foreign Corrupt Practices Act*, 6 PAC. RIM L. & POL'Y J. 549, 557 (1997)).

[114] *See* ECONOMIST, *Siemens*, *supra* note 15; Schoenberg & Gallu, *supra* note 14 (describing multi-million dollar bribes).

domestic businesses' engagement in foreign corruption.[115] The problem is exacerbated when governments claim to be acting out of constitutional necessity. As the Netherlands noted in its objection to the U.S. reservation limiting its obligations under the OECD Convention to those consistent with the Constitution, such a limitation has the effect of substantially reducing confidence that the United States will live up to its commitments.[116] Similarly, uncertainty about domestic political situations in other countries raises concerns about involuntary defection.[117]

2. The Difficulty of Retaliation

Even where it is possible to determine that non-compliance is taking place, states have limited flexibility to adjust their anticorruption policies in response.[118] Moreover, effective retaliation is complicated by the large number of parties in the system. Both of these factors make it harder to implement reciprocity-based strategies for addressing international corruption.

The normatively charged nature of anticorruption policy makes retaliatory defection difficult. After the U.S. Congress passed the FCPA in 1977, American politicians could not seriously back down from the law for fear of being seen as endorsing corruption.[119] In Thomas Schelling's terms, adopting effective anticorruption measures can be seen as a binding commitment. [120] Once states "agreed to new limits on transnational bribery, the 'stickiness' of values would make it very difficult for them to undo those rules . . . and thus to retaliate against governments that shirked."[121]

Retaliation is also impaired by the multilateral context of the transnational corruption problem. The more players there are in a game, the more coordination difficulties

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[115] *See, e.g.,* Press Release, OECD, OECD Urges Argentina to Improve Capacity to Enforce the Anti-Bribery Convention (July 7, 2008), *available at* http://www.oecd.org/document/62/0,3746,en_2649_37447_40938494_1_1_1_37447,00.html (noting delays in Argentine prosecution of foreign bribery due to procedural laws).

[116] NETHERLANDS, *United Nations Convention Against Corruption: Objections*, UNITED NATIONS TREATY COLLECTION (Feb. 12, 2011 7:43:44 AM), http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-14&chapter=18&lang=en.

[117] *See* Putnam, *supra* note 25, at 452–53.

[118] *Cf.* Oye, *supra* note 40, at 16.

[119] Abbott & Snidal, *Values and Interests*, *supra* note 84, at 162 ("However compelling the business arguments about unfair competition from European and Asian rivals that remained free to bribe, congressmen found it impossible to vote for even compromise measures that appeared to endorse corruption."). But note that the U.S. government could soft pedal simply by lightening enforcement of the Act, which provides no private right of action.

[120] *Cf.* THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 22–28 (1981).

[121] Abbott & Snidal, *Values and Interests*, *supra* note 84, at 167.

arise in trying to sanction defectors.[122] Suppose that Argentina failed to build up the institutional capacity necessary to effectively investigate and prosecute foreign bribery by Argentine firms,[123] giving those firms a competitive advantage over firms in countries with rigorous anti-bribery enforcement. What could Europe and America do? In other treaty regimes, retaliation can take the form of denying defectors the benefits of the treaty. However, in the corruption context, it is not politically palatable to apply treaty obligations selectively. America could not respond to Argentine noncompliance by permitting U.S. companies to bribe Argentine officials.[124]

As a result of uncertainty surrounding defection and difficulty in responding effectively, defectors are likely to go unpunished. Accordingly, states may hesitate to commit themselves to strong anti-bribery measures in the present that may undermine their competitiveness in the future. One possibility for addressing this problem is to provide more institutionalized mechanisms for enforcement, rather than relying on decentralized efforts to induce compliance. Institutional enforcement regimes make retaliation more effective.[125]

V. CONCLUSION

International discussions surrounding transnational bribery offer a case study of a situation where value is left on the table because of the failure to negotiate around barriers that should be surmountable. Because curtailing corruption on the ground, at the corporate or operational level, is an aspiration that all parties share, it seems that a strong international agreement ensuring effective national legal anti-bribery measures would be win-win. Failure to achieve that arrangement is not the product of differing preferences but rather the result of a configuration of payoffs that complicates the realization of shared interests.

The barriers to agreement discussed above have impeded negotiations so far, leading to milquetoast conventions that fail to stop corruption. Many of these barriers could be addressed through the implementation of institutional mechanisms to provide assurances regarding state compliance. Part of the anti-bribery compliance problem is

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[122] Oye, *supra* note 40, at 19–20.

[123] This is not far from the truth. *See* WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, OECD, ARGENTINA: PHASE 2: REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS (2008), *available at* http://www.oecd.org/dataoecd/35/28/40975295.pdf.

[124] A draft of the OECD Convention that prohibited bribing only the public officials of other states party was met with outrage: bribing is never acceptable. Abbott & Snidal, *Values and Interests*, *supra* note 84, at 167–68.

[125] Oye, *supra* note 40, at 20–21.

informational: it is too hard to evaluate whether a state is truly cooperating in its efforts to criminalize bribery. A second part concerns the incentives on states: the availability of effective punishments for defection.

One possible avenue for such an institutional system would involve bringing anti-bribery efforts more fully under the umbrella of the World Trade Organization (WTO). Existing WTO rules include a hortatory commitment to "domestic transparency," but do not allow recourse to formal dispute settlement understanding enforcement.[126] The WTO also administers the Plurilateral Agreement on Government Procurement.[127] However, current WTO disciplines are oriented toward capital-importing countries, obliging them to conduct procurement processes fairly. To combat corruption, capital-*exporting* countries must also take measures to criminalize bribery on the part of their companies. Permitting Argentine exporters or contractors to bribe procurement officers abroad would effectively be a subsidy for Argentine exports and has similar anticompetitive results. Institutionalized adjudication of the hypothetical failures of the Argentine government to properly criminalize foreign bribery might allow for both a clearer, more widely accepted determination of whether malfeasance had occurred and also facilitate orderly reprisals to induce future compliance.

Admittedly, such a scheme would face a host of barriers to negotiation; perhaps more daunting than the barriers to more traditional negotiated approach. Nonetheless, there is hope that as norms continue to develop and institutional frameworks mature, future anti-bribery negotiators will be able to avoid these barriers and reach agreements to the benefit of all.

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[126] Padideh Ala'i, *The WTO and the Anti-Corruption Movement*, 6 LOY. U. CHI. INT'L L. REV. 259, 264–66 (2008) (citing General Agreement on Tariffs and Trade, *supra* note 93; Marrakesh Agreement Establishing the World Trade Organization, Annex 3**,** ¶B, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994)).

[127] Elliott, *supra* note 22, at 222. *See also The Plurilateral Agreement on Government Procurement (GPA)*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm (last visited Dec. 8, 2011).