White Paper 3

fight against corruption

(in alphabetical order)

coordinator

Nicola BONUCCI

Partner, Paul Hastings, Global Trade and Investigations
& White-Collar Defense Practices, Former Director for Legal Affairs, OECD

rapporteur

Pascale DUBOIS

Adjunct Professor, Georgetown Law School
Former Vice President, Integrity, World Bank

first co-rapporteur

Elisabeth DANON

Legal Analyst at the Anti-Corruption Division of the OECD

second co-rapporteur

Stanislas JULIEN-STEFFENS

Trainee Lawyer, Graduate, School of Law, Sciences Po Paris,
and Paris-Panthéon-Assas University

steering committee

Laura ALONSO

Former Head of the Anti-corruption Office in Argentina,
Former CEO of the domestic chapter of Transparency International,
Buenos Aires, Argentina

Jan DUNIN-WASOWICZ

Counsel, Hugues Hubbard and Reed, Paris,
Co-chair of the Anti-Corruption Interest Group
at the American Society of International Law

Susan KARAMANIAN

Dean of Hamad Bin Khalifa University's College of Law, Doha, Qatar

Lucinda LOW

Partner, Steptoe & Johnson LLP, Washington DC, Chair,
Coalition for Integrity, former President of the American Society
of International Law

Babajide OGUNDIPE

Senior Partner, Sofunde, Osakwe, Ogundipe & Belgore,
Lagos, Nigeria

Mark PIETH

Emeritus Professor, Basel University, Former Chair Working Group
on Bribery, OECD

authors' information

Introduction

This White Paper is based on i) the committee members' expertise, ii) public information and literature and iii) a set of interviews with numerous stakeholders representing academia, civil society and private sector. The list of interviewees appears in the Appendix, and we are grateful to them for their rich and insightful contributions.

The paper does not pretend to be an exhaustive presentation of the numerous facets of corruption and the ways in which it can be, if not eradicated, at least mitigated. It is, however, an attempt to set some clear directions in an often fragmented and confused debate. In this context, the White Paper seeks to cover the fight against corruption in broader terms while looking at transnational bribery in more detail.

1.

state of the art: the path to the current global anti-corruption landscape

Analysing the current state of the global fight against corruption requires shedding light on the path that led to it. At the onset, it should be noted that while this topic has been at the top of the policy agenda for many years, the emergence of multilateral standards driving the fight against corruption is relatively recent. In the immediate post-World War II era, the nascent model of global governance made no mention of corruption. While corruption was sometimes referred to during the Cold War years it was mainly for political reasons. It is only with the fall of the Berlin Wall and the ensuing globalisation that corruption gradually evolved to a major cross-border concern. It has since occupied an ever-growing space on the map, leading to a proliferation of standards and initiatives of varying scope, nature, and geographical reach. The first section of this White Paper provides a broad chronological sequencing highlighting the key milestones and multi-governmental stakeholders that have contributed to shaping the current global anti-corruption landscape.

1) From the post-World War II era to the Cold War: the evolution of corruption from a purely domestic to a cross-border concern

The model of global governance that emerged in the aftermath of World War II did not include an anticorruption component. The respective mandates of international institutions such as the United Nations, the International Monetary Fund (IMF), and the World Bank, which focused essentially on economic and social reconstruction, peace-keeping, and the organization of a post-colonial world, did not factor in any corruption risks associated with these endeavours. Thus, largely ignored by international standards, the topic remained essentially a matter of national law.

In most, if not all countries, paying bribes to domestic public officials had been criminalized for decades, and legal, institutional, and judicial frameworks of uneven sophistication and efficiency were designed to enforce domestic anti-bribery laws.

However, these efforts were strictly bound within domestic confines. While international trade, driven by Western countries' companies, was gaining significant momentum, payments to foreign public officials were largely accepted as a necessary means to successfully conduct business abroad. Witness, for example, the tax-deductibility of such payments in many capital-exporting countries.

In 1977, the enactment by the United States of the Foreign Corrupt Practices Act (FCPA) broke the status quo and the law of silence by introducing the first national legislation criminalizing bribery of foreign public officials to obtain an advantage in the context of international business. The FCPA was enacted in the wake of the Watergate scandal, which revealed that several US companies had used foreign slush funds to make illegal political contributions. This discovery prompted a probe that revealed that US multinationals often paid bribes to obtain contracts from foreign government officials. At that time, however, this was not an offence neither in the United States nor in any other country in the world. The foreign policy concerns and public outcry that ensued led to the enactment of the FCPA.

The FCPA marked an important semantical juncture by introducing the concept of transnational, or "foreign" bribery, as opposed to the long-standing notion of domestic bribery. By bringing the realization, at the national level, of the risks posed by transnational corrupt practices, the FCPA also marked a seminal moment in the future development of an international framework regulating foreign bribery. It served both to shape the relevant provisions in international anti-corruption treaties that emerged decades later, as well as the development of national laws such as the 2010 United Kingdom Bribery Act and the 2016 French Sapin II Law.

2) From the end of the Cold War to the beginning of the 21st century: the emergence and proliferation of multilateral standards and initiatives against corruption

The early 1990s were a turning point in the fight against corruption. At the end of the Cold War, the model of liberal democracies prevailed, and international trade and investment developed at an unprecedented pace. The model of governance that took shape both domestically and internationally no longer saw corruption as a political problem but as a scourge hindering economic and social prosperity and undermining political stability.

The globalization of the fight against bribery in international business

One of the earliest international anti-corruption instruments to be adopted, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention or OECD Convention), adopted in 1997 after years of gestation, was ground-breaking in numerous respects. The OECD Convention sprang from the United States' and other capital-exporting nations' determination to curb distorted competition caused by bribery in foreign markets. Without common rules among exporting countries, companies within the purview of the FCPA were at a competitive disadvantage compared to those that could continue paying bribes without risking prosecution. Beyond the issue of fairness was the greater recognition of the need to establish a level playing field in international business at a time when cross-border activity was gaining unprecedented speed.

The OECD Anti-Bribery Convention establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions and provides for a host of related measures to make this effective, including requiring countries to hold their companies liable; to impose effective,

proportionate, and dissuasive sanctions; and to cooperate internationally in foreign bribery cases. A combination of factors, including the Convention's restricted membership, its narrow thematic scope, and rigorous built-in peer-review process, explain the success of the OECD Convention. Since its adoption, the number of Parties to the Convention has grown, and its standards were refined and further developed in 2009 and 2021, thereby fostering a level playing field for companies competing in the global markets.

The proliferation of multilateral standards and universalization of the fight against corruption

As the impact of corruption was gaining attention from policy-makers both nationally and internationally, multilateral anti-corruption instruments of various scopes and geographic reach started to flourish. The regional instruments include:

- → the Inter-American Convention Against Corruption in 1996;
- → the Criminal Law Convention on Corruption of the Council of Europe in 1998;
- → the Civil Law Convention on Corruption of the Council of Europe in 1999;
- → the African Union Convention on Preventing and Combating Corruption in 2003; and
- → the Arab Convention Against Corruption, which was adopted within the framework of the Arab League in 2010.

In 2003, the United Nations Convention against Corruption (UNCAC) became the first and only universal instrument against corruption. To date, the UNCAC has been signed by 140 countries or organizations and ratified by 189 countries. It is the broadest anti-corruption standard-setting instrument in terms of geographical reach and thematic scope, covering both the bribery of public officials and private to private bribery, asset recovery, and a host of preventive measures for the public and private sectors, as well as international cooperation provisions. While monitoring of the UNCAC differs greatly from the one supporting the implementation of the OECD Anti-Bribery, the universal nature of the UNCAC, which resides in its broader reach and substance, has contributed to the development of a global anti-corruption movement and to the awareness of the different public and private actors of the need to fight against corruption.

In parallel to standard setting, the growing role and influence of multilateral development banks

As multilateral standards emerged, multilateral development banks (MDBs) joined the fight against corruption. The World Bank was the first MDB to do so actively. Until 1996, the World Bank had largely ignored the issue of corruption, treating it as a political issue – and, therefore, outside its mandate. However, in his annual meeting speech in 1996, then-President James Wolfensohn put anti-corruption firmly on the map with his "cancer of corruption" speech. In the wake of that speech, the World Bank began to confront corruption through several different avenues, such as capacity building and diagnostic work.

In 1999, the World Bank implemented a quasi-judicial administrative process for sanctioning firms and individuals accused of having engaged in sanctionable practices, including corruption, in connection with the procurement or execution of Bank-financed contracts. The sanctions system developed and implemented by the World Bank has influenced the sanctions systems of a number of other multilateral development banks, as evidenced by their adoption of harmonized standards, the 2010 cross-debarment agreement between the World Bank, the Asian Development Bank Group, the African Development Bank, the European Bank for Reconstruction and Development, and the InterAmerican Development Bank Group, and the continued cooperation amongst MDBs.

3) The current anti-corruption landscape: top priority on the global agenda but a question mark regarding progress in practice

From the beginning of the 21st century to date, the fight against corruption has remained at the top of the global agenda, resulting in a diversification of anti-corruption initiatives alongside international treaties and conventions. The resulting volume of anti-corruption norms and initiatives begs the question of their impact on the level of corruption in practice.

The affirmation of anti-corruption as a top priority

As landmark international organisations have continued to play a central role in the fight against corruption through standard-setting and implementation, diverse forms of action have

developed, and other organizations and institutions have added their shoulder to the wheel. In the last twenty years, policymakers have time and again reaffirmed their resolution to eradicate corruption and bribery in all its forms. While an exhaustive list cannot be drawn, a few high-level initiatives are noteworthy:

i) In 2010, the Group of Twenty" or "G20", representing the meeting of the most powerful countries in the world, joined the global fight against anti-corruption by setting up an Anti-Corruption Working Group, whose mission is to develop and implement anti-corruption action plans around topical issues in the area. The action plans are then subject to an evaluation report.

ii) In the same perspective of intensifying the fight against corruption in the long term at the international level, the Sustainable Development Goals adopted by the United Nations General Assembly in September 2015, listed under Goal 16 - Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable, and inclusive institutions at all levels - the following two goals:

"16.4 By 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime.

16.5 Substantially reduce corruption and bribery in all their forms."

iii) In 2016 the UK government organised the first Head of States and Governments anti-corruption summit.

iv) In 2018, the IMF enhanced its engagement on governance and anti-corruption through the "*Review of 1997 Guidance Note on Governance - A Proposed Framework for Enhanced Fund Engagement*". The new framework, which is being implemented through, *inter alia*, the IMF's yearly reviews, is designed to promote more systematic, effective, candid, and even-handed engagement with member countries regarding governance vulnerabilities that are macroeconomically critical. Given the IMF's important role in the global financial economy, the fact that it also decided to address corruption is another sign of the global embrace of the fight against corruption.

v) In 2020, the G20 organised the first G20 Ministerial meeting devoted to the fight against corruption.

vi) In 2021, the United Nations organized the first-ever United Nations General Assembly Special Session (UNGASS) against Corruption in New York between June 2 and 4, 2021. The UNGASS led to the adoption by the United Nations General Assembly of a political declaration setting the course of international anti-corruption efforts for the next decade, further entrenching the fight against corruption on the global agenda.

vii) That same year, the OECD Council adopted the 2021 Anti-Bribery Recommendation, which complements the Anti-Bribery Convention with a view to further strengthening and supporting its implementation. In particular, the 2021 Anti-Bribery Recommendation includes sections on key topics that have emerged or significantly evolved in the anti-corruption area since the standards were reviewed last, including, *inter alia*, on strengthening enforcement of foreign bribery laws, addressing the demand side of foreign bribery, enhancing international cooperation, introducing principles on the use of non-trial resolutions in foreign bribery cases, incentivising anti-corruption compliance by companies, and providing comprehensive and effective protection for reporting persons.

In an ocean of multilateral norms against corruption, where do we stand in practice?

International anti-corruption law has changed profoundly in the last 30 years, driven by a growing volume of standard-setting instruments of various scope, geographical reach, legal force, and implementation mechanisms. The immediate outcome of this steady inflation is the coexistence of multiple instruments meant to prevent, detect, and sanction corruption of all shapes and forms, including foreign and domestic bribery, as well as to promote cross-border investigations and cooperation in enforcement. This situation raises one basic yet critical question: how far does this translate into effective and sustainable changes in day-to-day life?

Unsurprisingly, given the number of factors coming into play, the question has no clear-cut answer. On the one hand, progress achieved in the last 30 years cannot be denied. The most telling example is probably the OECD Anti-Bribery Convention, which has profoundly changed the way companies do business abroad and shifted the narrative in a way that bribing a foreign public official to obtain a competitive advantage is no longer considered "business as usual". Another key indicator of progress in the fight against corruption is increased transparency. Over the years, the combination of international norms and relentless

work of civil society organisations has led to increased transparency in government dealings, thereby contributing to holding the authors of corrupt behaviours to account.

Yet, corruption is still alive and well. While the reliability of data is indeed one of the greatest challenges (see Part 2) some figures are mindboggling. In 2007, the UN and the World Bank estimated the cross-border flow of the global proceeds of criminal activity, corruption, and tax evasion at between 1,000 and 1,600 billion dollars per year. Nearly a decade later, the IMF estimated in 2016 that bribes (a form of corruption) alone would cost the world between $1.5 trillion and $2 trillion each year, or nearly 2% of its GDP. At the European level, a study published by the European Parliament the same year found that corruption costs the European Union between €179bn and €990bn in GDP terms on an annual basis or up to 6.3% of European GDP.

A simple, albeit unsatisfactory, conclusion could be that to the extent progress has been made, much more remains to be done. While international standards have added significant power to the fight against corruption, a lot of ground remains to be conquered, starting first and foremost with the adequate and effective implementation of existing standards. Although it cannot be said with certainty why corruption remains high despite the volume of norms regulating it, one could argue that improperly or non-implemented rules can procure an artificial sense of security through the misguided notion that a problem is being addressed. This distorted view of reality in the eyes of stakeholders provides greater leeway for wrongdoers to indulge in corrupt behaviour. By the same token, an increased but curated level of transparency can divert the attention from dealings that remain in the dark and are therefore unchecked. Beyond these mechanical considerations, one should also keep in mind that corruption does not exist in a vacuum. It is only recently that researchers have started to explore links with the rule of law and weak institutions leading to state/family capture. Moreover, as new economic players emerge, trade partnerships transform, and the balance of powers on the global scene evolves, corruption follows suit and takes on new shapes and forms. In fact, years of practice in the fight against corruption have led to a much better understanding of the complexity of the issue.

With these considerations in mind, one cannot afford to be gullible or complacent regarding the progress achieved. Undeniably, fighting corruption remains an uphill battle. Nonetheless, erring on the side of cynicism and giving up the fight against corruption would be totally misguided.

2.

challenges

1) Improving the effectiveness of the existing legal framework

There is widespread recognition that the legal and institutional framework put in place in the last 25 years (see Part I) is now largely adequate; however, bribery and other forms of corruption continue to persist beyond any acceptable level. According to the latest Transparency International (TI) Global Corruption Barometer (2017) nearly one in four people paid a bribe to access a public service in the 12 months before the question was asked.

The main challenge both at the domestic and international levels remains implementation. The term "implementation" is used in its broadest sense and covers various situations (inadequate national implementation of international norms, lack of enforcement, uneven level playing field, etc.). Deficient implementation does not have a single cause, and several factors, which constitute as many challenges, can be highlighted. Some of them are presented below:

i) Lack of political will

As indicated above, countries know what they need to do but are unable or unwilling to do what needs to be done. While they have passed the laws and regulations and institutions, in some cases the application of those laws is still in the early days. In other cases, the laws have been in place for some time, but enforcement remains limited. More generally, there is little evidence of follow-up, in terms of impact assessment, to the adoption of these anti-corruption and anti-money laundering laws.

There is, in fact, a gap between the importance of the fight against corruption on the political agenda (domestic and international) and the actions on the ground. The speeches are there, but the actions are lacking. Even today, very few countries have adopted coherent and actionable anti-corruption strategies. The problem is compounded by the fact that surveys, statistics, or data do not always reflect the actual intensity of the fight against corruption. In some countries, the statistics show a low incidence of corruption, but this often means that there is very little commitment to investigating and fighting corruption, and as a result, few cases of corruption are revealed.

The lack of political will to fight corruption has different sources: sometimes it is due to authoritarian political regimes or weak

institutions. For other countries, it has to do with the desire not to penalize companies economically, especially for events that have occurred abroad. There is a difference between how public servants and officers should behave if they were enforcing existing anti-corruption laws and how they actually behave. In addition, as noted below, limited financial and human resources may be a problem. International institutions and monitoring bodies have difficulty dealing with these circumstances. The OECD Anti Bribery Convention provides in its article 5 that:

"Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."

However, a similar provision does not exist in other Conventions and, even in the OECD context, conformity with article 5 is not thoroughly and systematically examined.

ii) Insufficient human and financial resources

All the interviewees stressed the need for better human and financial resources.

To be effective in the fight against corruption, three elements appear necessary:

→ Independence and objectivity of prosecutors;

→ Strong and coherent anti-corruption legislation; and

→ Adequate financial and human resources.

In fact, practitioners strongly suspect that the lack of human and financial resources is often the result of a lack of political will. Investigations of bribery and corruption cases require proactiveness. They are difficult and costly, particularly in an international context.

However, the matter cannot be boiled down to a simple lack of resources, human or financial. Law enforcement officials must have specific skills and competencies that require continuous training. Specialized magistrates and investigators need to be attracted and retained.

While, in recent years, there has been a proliferation of anti-corruption institutions and agencies, it remains to be seen if this

is the best way to address the challenge; actually, in some cases, the superposition of agencies can result in overlapping of competencies and dilution of responsibilities.

The case of Ukraine is a good illustration of the situation. In recent years, the country saw the establishment of a number of anti-corruption bodies – the National Anti-Corruption Bureau of Ukraine, the National Agency on Corruption Prevention, the Specialized Anti-Corruption Prosecutor's Office, and the High Anti-Corruption Court of Ukraine. Overlapping mandates and conflicts among these institutions resulted in limited effectiveness.

iii) Insufficient coordination and cooperation among domestic agencies

Even if there has been some progress recently in some countries, the fight against corruption at the national level is still too fragmented and lacks coordination. This is a challenge that all countries, not only developing and emerging ones, are facing. There may be good reasons sometimes for not exchanging information amongst agencies (because of privacy and data protections), yet in many cases, not exchanging information is in fact the result of the vertical structure of governments.

In this context, a few governments have developed national anticorruption strategies, sometimes complemented by interagency structures such as the US "Kleptocracy Task Force."

At the European Union level, the main evolution is the creation of the European Public Prosecutor's Office (EPPO), which is the new independent public prosecution office of the European Union, responsible for investigating, prosecuting, and bringing to judgment crimes against the financial interests of the EU. Even though the adoption of EPPO took more than 20 years, it still does not cover all of Europe because five member countries of the European Union do not participate in EPPO.

iv) Insufficient coordination and cooperation amongst international institutions

While there has been a surge of international anti-bribery conventions in the last 25 years, there has been little effort of coordination and creating synergies between them.

It is regrettable that the UNCAC and its States Parties pay not much more than lip service to the various regional conventions that exist, as illustrated by the Declaration adopted by UNGASS in June 2021.

The insufficient coordination among international institutions is not limited to the fight against corruption but is particularly striking in an area in which there otherwise seems to be an international consensus, at least until now.

Monitoring is a good example of insufficient coordination. Thus, even if the secretariats of the various intergovernmental organizations that have a monitoring mechanism (Council of Europe, OAS, OECD, and UNODC) meet regularly and exchange information on a case-by-case basis, this is not systemic. Moreover, there is no formal mechanism for facilitating joint visits, attendance at each other's meetings, or presentation of the reports to the other monitoring bodies. The result is a lack of efficiency and a "monitoring fatigue" in the examined countries.

Things may be evolving in the right direction, although more could and should be done.

i) In recent years, the IMF has decided to make use of OECD reports in its article IV consultations with countries, but this is in relation only to G7 countries and some other volunteers.

ii) At its April 2022 ministerial meeting, the Financial Action Task Force (FATF) adopted a statement that includes the following:

"FATF plays an important role in global anti-corruption efforts, and commits to do more, within the scope of its mandate and in close cooperation with international bodies mandated to fight corruption, including the OECD Working Group on Bribery, the G20 Anti-corruption Working Group, and the Conference of State Parties to the United Nations Convention Against Corruption."

Beyond monitoring, the perception is that the level of collaboration on the ground between the various international institutions dealing with anticorruption is rarely up to the challenge. Only in a handful of cases has the international community decided to tackle corruption in a systemic and coherent manner.

The Ukraine Recovery Conference held in Lugano on 4-5 July 2022 stressed the importance of the fight against corruption. Ukraine could be a test case and a benchmark for the international community.

The effectiveness of the work of intergovernmental organizations is also impaired by the constant political pressure exercised on their secretariats when assessing and/or monitoring progress made by members of the organization. The recent demise of

the "Doing Business" indicators at the World Bank is a perfect illustration of the kind of pressure faced by the secretariats of international organizations any time rankings or evaluations of countries are involved.

To quote one of the interviewees:

"Within the FATF, there is a basic misunderstanding between some countries and the Secretariat about what it means to be a member-led body. Countries will defend their rights and have a fear that the Secretariat has its own agenda, but also the feeling that the Secretariat might be influenced by the most powerful nations. This is not true. These are independent professionals. The strong way to ensure that the FATF is not led by a specific member is to have a strong Secretariat. One way to increase the independence of the Secretariat would be for the Secretariat to produce its own papers that are separate from the FATF papers. This would allow the Secretariat to present its own views."

v) MLA system not adequate for complex financial crimes

Mutual legal assistance (MLA) is a key tool for cooperation against complex financial crimes like bribery and cooperation. It is enshrined in all the international anticorruption conventions and is regularly pledged in international statements and declarations.

However, there is a huge gap between theory and practice. According to an OECD survey conducted in 2015, 70% of anti-corruption law enforcement officials report that mutual legal assistance challenges have had a negative impact on their ability to carry out anti-corruption work. There is no reason to believe that the data would be significantly different should a similar survey be conducted today.

This has been partially overcome by developing other forms of cooperation, more or less formal, both bilaterally and multilaterally.

Thus:

i) Following the 2016 London Summit, several countries set up an International Anticorruption Coordination Center (IACCC) to bring together specialist law enforcement officers

from multiple agencies to tackle allegations of large-scale corruption cases.

ii) The meetings of the OECD Working Group on Bribery are the occasion for informal discussion and cooperation.

iii) Recently the Council of Europe working closely with the French Anti-Corruption Agency set up a "Network of corruption prevention authorities."

iv) The World Bank has made clear that it will refer the outcome and evidence of a World Bank investigation to domestic authorities on a case-by-case basis and has done so on several occasions (although the fact that it applies a civil rather than a criminal law standard of proof means that such referrals do not automatically result in national prosecutions).

However, all these forms of cooperation have their limits and cannot replace MLA. The International Law Association could set up an international committee to look at ways and means by which MLA (including mutual legal assistance treaties) could be improved to facilitate cooperation and exchange of information on complex financial crimes.

vi) Persistent need for an anti-corruption regulation at the national level

In spite of the general adequacy of the existing legal framework, in particular at an international level, there are still issues related to the transposition of the spirit (if not the text) of some of the treaties' key provisions.

A perfect example is represented by the existing disparities over the treaty requirements to hold legal persons responsible for corrupt practices. There is still a difficulty in triggering the liability of legal persons in numerous countries, despite the provisions contained in several international treaties and the specific guidance offered by the OECD in its two recommendations (2009 and 2021).

It is strongly suggested that the same guidance should be offered in the context of other international anticorruption treaties. In particular, UNCAC and the ILA could play a role in this regard.

The question of the liability of legal persons is only an example of the matters that deserve a more detailed discussion. While this White Paper is not exhaustive, other points that have been raised during the interviews are worth noting:

- First, there are differences among countries on the standards of proof required and, possibly, an insufficient awareness in the judiciary of the difficulty of establishing the facts "*beyond a reasonable doubt*," in particular for cross-border criminal cases.
- Second, there is insufficient attention being paid to the standards in civil matters involving issues of corruption, including the consequences of corruption in that context.
- Third, the standard of "*effective, proportionate and dissuasive*" sanctions set out in the international texts leaves too much latitude to the States that may be either too lenient or too stringent (some national legislations contemplate the winding up of the company).

2) Corruption is more than bribery

The last thirty years have been very much devoted to the fight against bribery. The word "corruption" considered in a broader sense, however, entails other forms of corruption/unethical behavior that have received much less attention both internationally and domestically, such as:

→ State/policy capture

→ Kleptocracy

→ Nepotism/cronyism

→ Conflicts of interest

→ Lobbying

As of today, there is still no internationally agreed definition of the word corruption, and corruption is always seen as a two-way transaction. However, it is not sufficiently emphasized that corruption operates through dynamic and resilient networks that are much larger than a single transaction. There is a need for a broader perception of all the conflicts of interest and other circumstances that comprise and feed into these networks of corruption.

Conflict of interest is not per se illegal but can be detrimental and needs to be properly regulated. As of today - both in the private and public sphere and in its various forms (apparent, potential, real) - it is still largely under-identified and not properly understood. As developed in the next section, consideration should therefore be given to developing a universal framework providing a common understanding and a regulatory setting for the various forms of conflict of interest.

State/policy capture to influence legal and financial frameworks that enable corruption, including illicit financial flows, to proceed with impunity is prevalent in many countries along the whole development level stream. Lobbying and election campaign financing provide for a direct avenue to tie the elected individuals to their sponsors, thereby providing opportunities for the funders to influence the decision-makers.

These non-bribery forms of conduct are more difficult to overcome to the extent that they have become institutionalized in numerous countries and need to be properly addressed to rebuild trust in government and public affairs.

3) Persistence of binary approaches

One of the main challenges is that anti-bribery and anti-corruption are often approached in a binary fashion. While such an approach has the merit of simplicity, it gives the impression that they are distinct issues and even that fighting one detracts from the other. In fact, the fight against corruption is a continuum and should be tackled in coherent and holistic way.

i) Petty corruption vs. Grand corruption

Corruption has been reduced in numerous countries, but the transnational flow of corrupt money is at its peak because of globalization.

There is a tendency to consider petty and grand corruption as opposites, even though there are no internationally agreed definition for either of them.

Petty corruption, also known as low-level corruption, concerns access to basic public services.

Grand corruption, conversely, is focused on misuses or abuse of high-level power entailing movements of large sums of money, with harmful and widespread consequences.

In terms of the international agenda, many policies focus on grand corruption, rather than endemic petty corruption, even though this type of corruption mostly affects poor and vulnerable populations. One of the challenges for developing countries is to fight petty corruption, more than grand corruption, to build a culture of the rule of law within its country and to end impunity for corrupt practices.

ii) Supply-side vs. Demand-side

Since the mid-1990s, emphasis has been put on active bribery, also known as the supply side. This is understandable because until then, active bribery at the transnational level was a common business practice and was legal in all countries except the United States. Active bribery is still an issue both at the domestic and international levels and should continue to be addressed.

However, the emphasis of the international community on the supply side may sometime mask an unwillingness to tackle passive bribery, *i.e.*, the demand side.

A 2018 study published by the OECD showed that out of 55 bribery schemes involving two parties to the Convention and ending in a sanction for the briber, public officials are known to have been sanctioned in only one-fifth of them. Obviously, more action is needed to tackle the demand side.

iii) Foreign bribery vs. Domestic bribery

As noted by one of the interviewees:

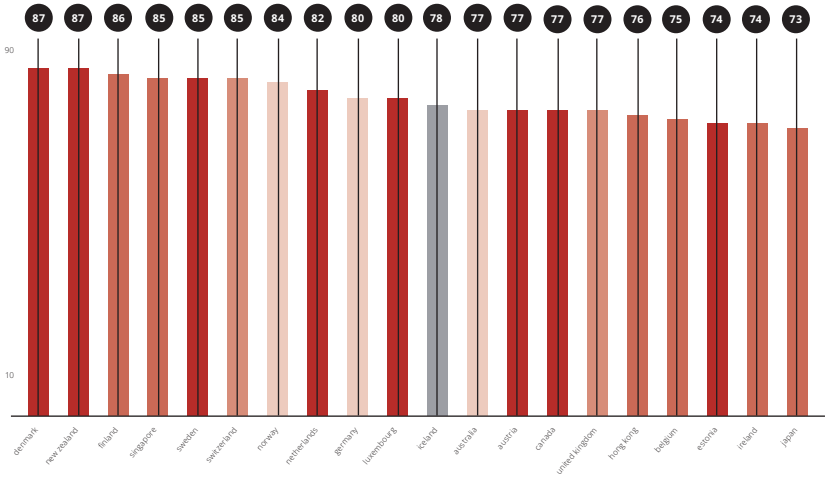
"the transnational fight against corruption is only one part of the global fight against corruption. The most important changes will occur at smaller scales, notably through the implementation by domestic actors of national and local anti-corruption measures."

It is quite difficult for the international community and for international law to address domestic bribery. International institutions are sometimes reluctant to be too proactive, preferring to avoid what they view as internal affairs of countries. However, it is a fact that most of the bribery takes place at the domestic and sub-national level. It is also a fact that if a country

suffers from serious domestic corruption issues, it is very likely to suffer the same issues in its cross-border transactions.

In that sense fighting domestic bribery is a way to fight trans-national bribery. The reverse proposition is, however, less evident, as illustrated by the graphs below based on two TI indicators (Source: TI France). The black numbers indicate the best countries according to the Corruption Perceptions Index (CPI). The colors indicate how the same countries stand in the TI Exporting Corruption Report. Green indicates countries with "active" enforcement, yellow "moderate," orange "limited," and red "little or no."

Top 20 countries on the CPI



It is striking that among the best 20 countries according to the CPI, 15 have limited, little or no enforcement against their nationals operating abroad. This decoupling suggests that the good results under CPI are much more the result of common social behavior than proactive policies.

iv) Rich countries vs. Poor countries

The fight against bribery, in particular its transnational form, was grounded on a basic assumption: the briber was from the North, the bribee from the South. The fight against corruption was linked to the general discourse on good governance pushed by, for example, the Clinton administration and by OECD countries in general. In a sense, it was seen as a component of the development agenda. At the same time, countries from the South insisted that no good governance could be reached if investors from the northern hemisphere continued to bribe.

While there is some truth to these assumptions, they are largely exaggerated. A report produced by the OECD in 2014 indicated that two-thirds of the foreign bribery cases investigated and prosecuted under the aegis of the Convention dealt with bribes paid in developed countries or emerging markets. There are several reasons that may explain this, including economic ones as well as political/institutional ones.

It is, therefore, time to shift from traditional mechanisms focusing on punishment, which targeted developing countries, in particular, to a global logic of prevention of corruption which also concerns developed countries.

The North-South lenses have also obfuscated another geographical divide that the invasion of Ukraine has moved to the forefront of the political agenda. The matter is not so much where the money comes from but where it goes once a bribe is paid, and this is undoubtedly to the West.

As one of the interviewees noted:

"The West is the safe haven for illicit funds. The money is in the West, and the West pushes the agenda. There is a dissonance here that needs to be resolved."

Or, to quote another interviewee:

"Illicit money flows are increasing because they are facilitated by the financial secrecy that has been developed in Western countries. The default position is to put the blame on developing countries that are designated as corrupt countries and downplay our responsibility. The Western countries have left the holes in our laws for this to work. The reason is that the Western countries appreciate the flow of money into their economies."

4) Global cases are yet to be resolved globally

Transnational bribery often entails multi-jurisdictional issues. These have been recognized early on, mostly through the angle of a potential conflict of jurisdictions.

Thus article 4.3 of the OECD Anti Bribery Convention provides that:

"When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution."

Today, we are seeing more and more coordinated resolutions and a call for coordination early on.

In the Recommendation adopted by the OECD in November 2021, parties to the OECD Anti Bribery Convention are invited to:

"consider coordination as early in the process as is feasible and where appropriate, and in such a way that respects the independence of the individual jurisdictions and recognises the benefits of co-operation in achieving effective law enforcement."

However, this only covers one part of the equation, and global resolution is still partial due to two blind spots.

i) Return of illicit assets (improvements but still a lot to be done)

Chapter V of UNCAC on asset recovery was one of the most contentious and difficult chapters to negotiate. In fact, it almost derailed the whole Convention. It is one of the greatest added values of UNCAC compared to other anti-corruption conventions, but more than 15 years after the entry into force of the Convention we are far from the expectations and hopes raised by the insertion of the topic in UNCAC.

While Chapter V sets out the principles, the question of the return of illicit assets requires national legislation and operational guidance as the matter is highly technical while - at the same time - very political. The ongoing situation in relation to Russian assets, although not necessarily linked to corruption, illustrates well the complexity of the situation.

In 2014, the World Bank's Stolen Asset Recovery Initiative (StAR) and the OECD published the report "*Few and Far - The Hard Facts on Stolen Asset Recovery*," which follows up on a previous report published in 2011 by StAR and the OECD, "*Tracking Anti-Corruption and Asset Recovery Commitments*." This report covered corruption-related asset recoveries by OECD countries between 2006 and June 2012 and showed that a huge gap remains between the results achieved and the billions of dollars that are estimated to be stolen from developing countries. Only US$147.2 million was returned by OECD members between 2010 and June 2012, and US$276.3 million between 2006 and 2009 -- a fraction of the $20-40 billion estimated to have been stolen each year.

The situation has, however, evolved in the right direction. In 2021, StAR published the study entitled, "*Mapping international recoveries and returns of stolen assets under UNCAC: an insight*

into the practice of cross-border repatriation of proceeds of corruption over the past 10 years."

Among the key findings of this study:

- Over the past ten years, efforts to trace and restrain stolen assets across borders have become significantly more widespread, with a marked increase in examples of completed returns of corruption proceeds between 2017 and 2021.
- The "club" of states that are pursuing cross-border asset recovery cases involving corruption proceeds is growing. While only 10 countries reported pursuing such cases during 2006-2012, in two StAR/OECD reports published in 2011 and 2014 (that collected information from OECD countries), 61 states reported involvement in at least one cross-border asset freeze, confiscation, or completed return of corruption proceeds between 2010 and 2021 in the new StAR survey.
- As many as 36 different destination countries reported having been engaged in international cooperation over restraining and returning proceeds of foreign corruption to their jurisdiction since 2010.
- It is a fact that in recent years numerous countries (like Switzerland and France) have adopted and/or updated their legislation concerning the return of assets, but the glass is still more empty than full. While national legislation is an essential component, there is a risk of fragmentation and even, possibly, of conflicting requirements, especially in the absence of any internationally agreed guidance beyond Chapter V.

ii) Victim compensation

Often assimilated and more often, than not, confused with the discussion on asset recovery, a new theme has surged in recent years in the anti-corruption community: the compensation of victims. One of the reasons for it appearing only recently is that for many years, corruption was presented as "a victimless crime" or at least that victims had not realized that they were victims. The discourse has now changed. Victims of corruption are still rarely represented in court proceedings or consulted about corruption investigations and are almost never compensated.

There is difficulty in defining and identifying victims of corruption, in particular with respect to certain types of projects or transactions. In India, a number of studies suggests that the bribes paid to obtain a driver's license and the ones related to road public procurement are the main reasons for the fact that - with

just 1 percent of the world's vehicles - India accounts for 11 percent of the global death in road accidents, the highest in the world, according to a report by the World Bank.

Indeed, victims must prove direct harm to have legal standing, but this is often difficult if not impossible to prove. In addition, corruption may cause more generalized harm that is difficult to link to any specific victim. Last, but not least, countries, government bodies, or state enterprises often present themselves as victims even though they themselves may be the corrupt party.

Only a handful of countries has elaborated a policy on the compensation of victims abroad. On 1st June 2017, the UK's Serious Fraud Office, Crown Prosecution Service and National Crime Agency published Compensation Principles. These principles commit the agencies to considering compensation in all relevant cases; using whatever legal means to achieve it; working cross-government to identify victims, assess the case and obtain evidence for compensation, and identifying a means by which compensation can be repaid in a transparent, accountable and fair way that avoids the risk of further corruption; proactively engaging where possible with law enforcement in affected states; publishing information on concluded cases.

The UNCAC Coalition, a global network of over 350 civil society organizations (CSOs) in over 100 countries, committed to promoting the ratification, implementation, and monitoring of the UNCAC, has set up a "Victims of Corruption working group" that is intended "*to facilitate discussions, the exchange of information and joint advocacy among civil society experts around victims' remedies and compensation for damages caused by corruption.*"

iii) Poor quality of data

More than twenty-five years after the first international initiatives designed to fight corruption, the business case is still to be made. This is largely due to the fact when trying to assess the impact of corruption and bribery, we are still relying on scattered, unreliable, and deficient data.

Apart from microdata and empirical evidence, we have seen numerous aggregate data and figures mentioned and referred to by main political leaders, and international institutions, including their heads. Unfortunately, these data do not always clarify the analysis; to the contrary, they may cloud the picture.

Research published in 2021 by the U4 Anti-Corruption Centre, a reputable academic institution, analyzed ten of the most widely cited claims, tracing each to its source and evaluating its credibility and reliability. Their main conclusions reported below are quite blunt:

"We analysed ten global corruption statistics, attempting to trace each back to its origin and to assess its credibility and reliability. These statistics concern the amount of bribes paid worldwide, the amount of public funds stolen/embezzled, the costs of corruption to the global economy, and the percentage of development aid lost to corruption, among other things. • Of the ten statistics we assessed, none could be classified as credible, and only two came close to credibility. Six of the ten statistics are problematic, and the other four appear to be entirely unfounded."

The authors of the research pursued by noting that:

"the widespread citation of unreliable statistics undermines efforts to understand the nature of the corruption problem. Organizations calling for evidence-based anticorruption strategies should be more careful about the quality of the evidence that they present".

It is to be noted, however, that the international community has recognized this weakness. The Praia Group on Governance Statistics (the Praia Group), established in March 2015 at the forty-sixth session of the United Nations Statistical Commission (UNSC), result from the international recognition that governance statistics are a critical area of statistics that lacks the maturity of other statistics and are underinvested in most parts of the world. The Praia Group was indeed created to "*contribute to establishing international standards and methods for the compilation of statistics on the major dimensions of governance*." To this end, the Group developed in 2020 a Handbook on Governance Statistics for National Statistical Offices, which also covers "*absence of corruption*."

The Handbook has identified as a top priority the "*institutionalization of the monitoring of corruption at the national level*," it has also taken note that "*reliable and relevant indicators to monitor grand corruption need to be identified. Despite its critical importance, methodology to measure this form of corruption is crucially lacking*."

3.

issues, questions
and possible way forward

Our interviews and analysis have produced some recommendations and proposals by various stakeholders for further consideration in relation to the issues presented in the second part of this White Paper. Some represent the strong consensus of the Steering Committee, while for others, the next appropriate step in our view is further discussion that is focused on gathering a deeper consensus, prioritization and consideration of effective implementation. There may be others that should be on the agenda as well and we do not submit this as a comprehensive list. Given the crowded landscape of initiatives, in our view prioritization based on the ability of an initiative either to make existing initiatives more effective, to close loopholes, or to be effective is in order; there is no need for initiatives just for initiatives' sake.

1) Increased international cooperation

i) Enforcement cooperation for both the supply and demand sides

International cooperation is indispensable to successfully resolving foreign bribery cases. Cooperation and coordination among supply-side countries have increased significantly in the last ten years, as evidenced by the rising number of multi-jurisdictional resolutions. In such cases, countries that have competing jurisdiction over the supply side of the bribery scheme collaborate and cooperate to investigate more efficiently and reach a common resolution against the alleged bribe payer. Traditional forms of international cooperation, including mutual legal assistance, have also progressed significantly, driven by the fact that many parties to the OECD Anti-Bribery Convention have started enforcing their foreign bribery laws in the past ten tears. The growing attention paid to the risk of not prosecuting a person previously sanctioned for the same criminal conduct in a foreign jurisdiction also prompts enforcing countries to cooperate and coordinate resolutions.

Meanwhile, cooperation between supply-side and demand-side countries has progressed at an incomparably slower speed and is therefore lagging. According to some of the experts, ways should be explored to involve demand-side countries at the onset and throughout the resolution process to promote fairness and adequate compensation.

ii) Increasing cooperation with the private sector in the repression of bribery

The private sector has a critical role to play in fighting corruption. Broadly speaking, this role can be broken down between involvement in the prevention and detection of bribery on the one hand and involvement in the repression of bribery on the other. Involvement in prevention and detection takes various forms, including collective action, as examined further under point 5 below. Involvement in the repression of bribery takes the form of a company's cooperation with law enforcement proceedings, in particular through voluntary disclosure and contribution to the ensuing investigation and case resolution.

The need to increase cooperation with the private sector has been gradually accepted over the years, and, as a result, non-trial resolutions (commonly known as "settlements") have become the prevailing method to enforce foreign bribery laws (and, more generally, corporate offences). Resolving foreign bribery cases through a non-trial resolution mechanism provides several benefits for an alleged offender, including avoiding being suspended from public contracting. Other benefits include shorter proceedings, which both limit any legal fees and mitigate the company's reputational damage. Increasingly, countries use non-trial resolutions to create incentives for companies to self-report corrupt behaviour and cooperate with law enforcement authorities. Such mechanisms are a game changer in the enforcement of a cross-border crime that is complex to detect and particularly challenging to prove in court due to its intrinsically hidden nature.

Compared to the early days, there is a stronger recognition within the 'anti-corruption community' that business can be a driver of change when fighting corruption. It would be useful for more countries to increase cooperation with the private sector by developing incentives for good corporate behaviour. Evidently, incentives must be carefully balanced to avoid being overly lenient. In this regard, as more and more countries started seeking the assistance of alleged wrongdoers in investigations and enforcement, in 2021, the OECD Anti-Bribery Convention called for countries to incentivize good corporate behaviour,

while providing safeguards to ensure that companies do not "get off the hook" too easily.

iii) Harmonisation of enforcement mechanisms to address different speeds of enforcement

According to several experts interviewed for this White Paper, harmonisation of enforcement mechanisms is critical to overcoming procedural hurdles and achieving a common speed of enforcement. Several interviews explored a proposed solution that would involve harmonising enforcement mechanisms around a form of non-trial resolution akin to a deferred prosecution agreement.

The OECD Working Group on Bribery's report on *Resolving Foreign Bribery with Non-Trial Resolutions* provides evidence that non-trial resolutions have been a driver of enforcement and explains why. The report also explains how these mechanisms facilitate multi-jurisdictional resolutions of foreign bribery cases. These findings substantiate the notion that harmonisation of enforcement mechanisms around a non-trial resolution model would contribute to ironing out the vast disparities in enforcement speed, both in countries party to the OECD Anti-Bribery Convention and beyond. This may require new legislation in the relevant countries as well as new enforcement policies.

iv) Improve MLA effectiveness

For all the reasons identified above, and while recognizing that informal corporations has expanded in the last few years and will continue to do so, the Steering Committee is of the view that the ILA could set up an international committee to look at ways and means by which MLA (including mutual legal assistance treaties) could be improved to facilitate cooperation and exchange of information on complex financial crimes.

v) Promote common understanding of key treaty provisions and harmonization between treaties

The Steering Committee recognizes that anticorruption treaties in force present a numerous common feature and very comparable - if not identical - language. Uniformity is not always desirable however. Notably, in several key areas, like liability of legal persons, implementation by parties to the various convention appears to still rely heavily on domestic legal and cultural traditions rather than on international norms.

It is strongly suggested that common/joint guidance should be offered in the context of international anticorruption treaties. The ILA could play a role in this regard both as a convener and as an advisor.

2) Increased transparency

Under the pressure of civil society, transparency of public dealings has increased significantly in the past ten years. Maybe, more importantly, the notion that transparency is indispensable to hold corrupt officials to account has become more accepted. Yet, transparency remains an uphill battle, and important grounds remain to be conquered, to wit: transparency of sovereign funds' borrowing and lending.

i) Transparency of sovereign funds' borrowing and lending

Recent high-profile scandals involving massive corruption schemes in the sovereign wealth funds of Mozambique, Malaysia, and Libya have shed light on the urgent need to increase transparency in government lending and sovereign funds management. One solution proposed is to increase transparency in sovereign debt dealing across emerging markets. In 2019, the Institute of International Finance (IIF), the global association of the financial industry, adopted the Voluntary Principles for Debt Transparency. These Principles, which recognize the need to improve transparency in respect of medium- to long-term financing provided by the private sector to sovereign debtors, were further endorsed by the G20.

While this is a useful start, experts interviewed for the White Paper advocate for the codification of these principles to increase their effectiveness. The consolidation of efforts engaged by multiple stakeholders could be the next step toward such codification. In 2021, the IIF acknowledged a "*need for improved sovereign debt transparency*," adding that "*the multiple ongoing efforts to improve sovereign debt transparency are complementary and should be rapidly advanced and integrated*." Key stakeholders have recognized this growing need in the wake of the pandemic, considering that despite significant relief measures brought on by the COVID-19 crisis, about 60 percent of low-income countries are at high risk or already in debt distress.

Measures to increase transparency could include compelling financial institutions to disclose a loan within 30 days of contract signature and making this information accessible in a global registry - including key information about the loan. Criteria could

also be implemented regarding the lender, establishing that the contract should be authorized only if a transparent and accountable government debt contracting process is in place. Amongst other measures, scrutiny by civil society organizations and government oversight bodies, including access to information about borrowing plans before contracts are signed, could be implemented. To complement transparency measures, efforts should be taken to ensure that private investors, especially international banks, are held accountable for their role in illegal and irresponsible debts in emerging markets.

As the process advances, developing and emerging countries should claim an active role in the rulemaking and commitment to increase transparency. This could include pushing for changes in the legal framework for borrowing and lending, noting that most international loans are made under US or UK law, and committing to accountable debt contracting processes, where national parliaments would approve all borrowing plans.

ii) Disclosure from private sector companies

A second key area where transparency should be increased is payments made by companies in the context of domestic and international business. One expert recommended that governments develop and enforce strict regulations compelling corporations to publicly disclose such payments. These rules should focus, as a matter of priority, on companies operating in high-risk industries, including manufacturing, mining, oil and gas, and pharmaceuticals. Disclosures should be made in corporations' annual reports and should include, at a minimum, the amounts paid for each project in each country of operation, as well as the local agents and other individuals or entities who received the payments and/or channeled them to the ultimate recipient. Enforcement of these rules should be done at the national level by market regulators.

This approach not only serves as a deterrent to bribery but can also protect companies from extortion. As further examined below, this effort should be accompanied by the development of a coalition of governments, corporations, and NGOs to promote public "Registers of Beneficial Ownership" for corporations, their subsidiaries, as well as for trusts.

iii) Asset declarations

Despite considerable progress in the last years, efforts should be made to make asset declaration a top priority on the global anti-corruption agenda. To date, over 160 countries around the

world have introduced financial disclosure systems. However, according to StAR, few asset and interest declaration systems are effective. More specifically, "*cumbersome filing procedures, crucial gaps in the disclosure forms, and lack of transparency and enforcement are limiting the role of asset and interest declaration systems. Such weaknesses also may make it merely another "check-the-box" exercise to implement national anticorruption strategies. Lack of control of submission and ineffective verification of declarations undermine their importance as an anti-corruption tool.*"

According to the experts we interviewed, facilitating access to data with transparency platforms (on which declarations of assets, conflict of interests, and/or income of public leaders would be posted) would be key to enhancing public sector transparency and accountability, promoting integrity and preventing corruption.

iv) Enhanced transparency in the funding of political parties

Sources and amounts paid directly to political parties, individual candidates, or organizations that in turn support the candidates and political parties should be fully transparent. According to one expert, this rule should also apply to non-government organizations operating in high-risk countries, as they can be misused as a conduit for money laundering.

v) Public procurement and other public private interactions

Public procurement transparency has increased in recent years, but practical remedies are still lacking. Initiatives like the High Level Reporting Mechanism (HLRM) jointly developed by the OECD and the Basel Institute on Governance have been put in place in some countries. The HLRM is a mechanism designed to address effectively bribery solicitations and related practices that involve public officials. Upon disclosure by the private sector of a dubious practice, the HLRM triggers a process of rapid analysis and pragmatic response by the respective government. The goal is to restore the status quo before a reported problem escalates further and to allow interactions between public and private stakeholder to proceed smoothly. This obviously requires the existence of an "island of honesty" within the government (see below).

3) Focusing on prevention

Greater emphasis should be placed on the prevention of corruption. Because prevention involves medium- to long-term policies, the benefits of which are thus not directly visible and easy to measure, prevention is not the public authorities' focus of attention. According to one expert, a way to place greater emphasis on prevention would be to institute a corruption check for every piece of legislation, as is currently applied in Albania, to measure the corruption risks that each new law creates. A similar practice that was discussed that could be put in place for contracts would be to check, at the end of the contract negotiation phase, whether elements of a contract create the risk of opening the door to corrupt practices.

4) Stop sheltering dirty money

In line with the fundamental problem identified in Part 2 of separating high-income from low- and middle-income countries in the traditional frameworks to fight corruption, multiple experts criticized the undisturbed sheltering by western countries of the proceeds of corrupt conduct. Several of them noted a certain hypocrisy when high-income countries point fingers at institutionalised corruption in lower-income countries while welcoming the proceeds of such corruption into their own financial system and thus indirectly benefiting from them.

i) Legal and actual elimination of tax havens

One expert recommends significantly increasing the support and joint action by development cooperation entities (both multilateral and national) to deal with transfer pricing and other forms of tax evasion by helping countries develop the capacity to deal with these issues. According to the same expert, supporting and enhancing the responsibilities of FATF to deal with current and shifting fiscal havens should also be considered. In the same vein, so-called "conduit countries" that transfer illicit money to smaller jurisdictions must also be dealt with.

ii) Regulation of "enablers"

Better regulation of so-called "enablers" is critical to ending Western countries' sheltering of corrupt money. Despite increasingly stringent "know your customer" (KYC) procedures, transferring money in smaller sums remains too easy to do for some banks and financial institutions. According to one expert, this

situation calls for further regulation and oversight. Additional measures should be identified to prevent banks and financial institutions from knowingly or unknowingly being part of money laundering operations.

The term "enablers" is also used in relation to "gatekeepers," meaning professionals whose role is to prevent corporate misconduct by ensuring that a company's operations comply with the laws and regulations that apply to it, yet who instead use their position and expertise to facilitate or conceal such misconduct. These professionals can include legal counsel, tax advisers, and external auditors. In the wake of the Panama Papers and other recent high-scale white-collar scandals, the role of gatekeepers has received increased attention from stakeholders.

Experts interviewed also shared views on the regulation of corporate counsels. Corporate counsels can facilitate or conceal bribery in various ways, including by consolidating a corrupt transaction or otherwise furthering the scheme by acting as an intermediary. They can also facilitate the laundering of the proceeds of bribes. For instance, in the 1MDB scandal, illicit money flowing from the Malaysian sovereign wealth fund and further laundered in the form of luxury real estate in the United States first landed in the trust account of a large New York law firm.

According to some experts, a framework should be created, making a business case for professionals to systematically adopt the right behavior. While the topic has gained significant attention in the last five years, dissident voices have warned that regulating corporate counsel to prevent them from becoming enablers would risk putting the attorney-client privilege, as well as the rights of the defense, in jeopardy. This is a complex area that needs to be addressed at the national level, either by professional groups or perhaps via legislation.

iii) Transparency of beneficial ownership

Increased transparency of beneficial ownership will help to deter and prevent the misuse of corporate vehicles to launder the proceeds of bribery. While numerous countries have made great strides on this front in the past years, much progress remains to be made. Beyond law enforcement authorities' access to beneficial ownership registries, experts advocate for free and unfettered public access to digital beneficial ownership registries. Rules regarding beneficial ownership should also be extended to the broadest range of corporate vehicles possible. According to one expert, there is "*no excuse for us not to know who we are doing business with.*" At the very least, public registers

should include beneficial owners of corporations and their subsidiaries, as well as trusts. Referencing the 2001 PATRIOT Act, which prohibits US financial institutions from establishing, maintaining, administering, or managing correspondent accounts for foreign shell banks, they argued that the same mechanism could be adopted for shell companies.

Another expert advocated for the introduction of a reporting threshold for international financial transactions, based on the thresholds currently implemented for carrying bank notes across borders. This process should be applied to incoming and outgoing sums to enable cross-referencing.

iv) Unexplained wealth orders

Unexplained wealth orders allow for the confiscation of property without proving criminality by reversing the burden of proof. Targeted at people linked with a serious crime or who hold public office in a foreign country, they allow law enforcement to apply for a court order requiring someone to explain their interest in the property and how they obtained it. If that person fails to comply, law enforcement may then apply to the court for a recovery order, alongside the added benefit of a presumption that the property should be confiscated.

Unexplained wealth orders remain a relatively rare mechanism in Western countries and have therefore not delivered as promised. They could be developed further, possibly in a coordinated manner, with a view to including them in the arsenal of mechanisms to stop sheltering dirty money.

5) Involving all stakeholders

i) Enrolling the private sector through industry-specific collective action

Collective action is "*a collaborative approach to address corruption challenges and raise standards of integrity and fair competition in business*." The term covers a broad range of initiatives, including integrity pacts among companies and initiatives involving the private and public sectors and/or civil society.

The notion that collective action can be a game changer in the prevention and detection of corruption has gained considerable traction in the past years. This results from the now widely recognised value of multi-stakeholder initiatives and the role of the private sector.

Collective action can take multiple shapes and forms. It can be industry-specific, as is the case for the successful Maritime Anti-Corruption Network (MACN), a global business network that includes over 165 companies globally. MACN and its members "*work towards the elimination of all forms of maritime corruption by raising awareness of the challenges faced; implementing the MACN Anti-Corruption Principles and co-developing and sharing best practices; collaborating with governments, non-governmental organizations, and civil society to identify and mitigate the root causes of corruption; and creating a culture of integrity within the maritime community.*" MACN has been recognized as a pioneer in industry-specific collective action and its model could be replicated and tailored to other high-risk industries such as energy and finance.

Governments have a key role to play in incentivizing sector-specific collective action. In fact, the 2021 OECD Anti-Bribery Recommendation calls for countries party to the Convention to "*consider fostering, facilitating, engaging, or participating in anti-bribery collective action initiatives with private and public sector representatives, as well as civil society organizations, aiming to address foreign bribery and bribe solicitation.*"

Another suggestion put forward by one of the experts is the establishment of sector-specific codes of conduct by international organizations such as the OECD, which in the event of non-compliance would lead to investors no longer receiving financing and/or the revocation of licenses.

ii) Raising awareness to better engage civil society and the population at large

Experts across the board concurred that engagement of civil society is a critical component of an efficient fight against corruption. Several of them shared examples of successful civil society engagement. One of them advocated for the introduction of a national *actio popularis* for corruption offenses.

Throughout the discussions on this topic, it emerged that engaging civil society in the fight against corruption requires empowering it through two key elements: knowledge and tools. These two elements are examined in further detail below.

Beyond civil society, educating populations at large about the challenges raised by corruption, its impact, and how to fight it is critical. This civic education work should be done in cooperation between civil society organizations and public authorities.

According to one expert, the first step should be to enhance civic engagement, including by raising awareness of the impact

of voting, policy-making processes, and mechanisms to hold governments accountable.

Several experts are proponents of better integrating anti-corruption into academia. Advocating for a cross-disciplinary approach, one expert considers that emphasis should be put on the development of Integrity Centers in universities, including the faculties of law, business, and public administration. Such centers would not only introduce integrity curriculum content in these faculties but also work with communities and external stakeholders, particularly through developing programs for companies' executives, public sector managers, and NGO leaders. These Integrity Centers could lead research efforts to assist legislators and government officials in better understanding complex issues such as financial secrecy systems. National and international cooperation between such centers could harmonize and accelerate improvements.

Additionally, young professionals must be better trained on anti-corruption issues. For this purpose, curricula should be reviewed to better account for and address the needs of the global agenda for the prevention, detection, and repression of corruption.

6) Building knowledge

i) Research on impact of corruption on its victims

The linkage between corruption and human rights is increasingly recognized. Yet citizens need to better understand the impact of corruption on their daily lives, starting with the increased cost of essentials, access, and quality of public service. Accordingly, indicators must be developed to better capture the true cost of corruption, including human lives, to give corruption a human face and incorporate the victims of corruption into the anti-corruption discourse.

ii) Harnessing digitalization

Harnessing digitalization and artificial intelligence can help to achieve several of the elements described above as solutions, including educating citizens, empowering them to act, and building knowledge. Examples of digitalization include platforms developed in low-income countries, designed to inform citizens about the effect of corruption, while allowing them to report bribes. Within companies, digitalization helps establish and

monitor the implementation of anti-corruption policies, including business relationships, whistleblowing procedures, and policies on gifts and hospitality. digitalization also allows retaining data collected through alerts and harnessing this data to further improve anti-corruption systems.

Digitalization is also key to the success of collective action. For example, the above-referenced MACN has been collecting data on corrupt demands in maritime trade for over a decade through MACN's Anonymous Incident Reporting platform. The system is designed to allow operators to report corrupt demands in ports globally. To date, nearly 50,000 incidents have been reported in over 1,000 ports across 149 countries.

Digitalization also offers a unique opportunity to better trace the flow of illicit funds, particularly if the digital path cannot be erased, thereby enabling a level of monetary oversight previously nonexistent for cash transactions.

Encouraging states to enact laws to eliminate anonymous digital transactions is an important first step and should be combined with partnerships between the tech industry, financial institutions, and governments to develop digital financial transactions governance standards.

iii) Open, accessible, and actionable data, including through social media

Data must be open, accessible, and utilized effectively. Arming the public with information that can be used to hold governments accountable is a critical part of mitigating corruption. An increasing amount of data is being made available by a growing number of actors across the globe, predominantly through online registries and open platforms. Many governments are on board with open data initiatives and make large data sets freely available to citizens. However, a gap exists between the availability of data and its use to fight corruption effectively. Disclosure of data alone is not enough; data must be available in machine-readable formats that allow for independent analysis by citizens and civil society who want to learn how to read, analyse and use the data.

Given the greater facility of reaching out to individuals through social media, multilateral and national institutions should find new approaches to share their data on the impact of corruption widely and convey the message that citizens have a role to play in addressing it. This may create new demands on legislators, governments, and corporations by their citizens and clients and engage citizens for the long term.

iv) Increased media coverage

Publicity and media coverage of the fight against corruption could be increased, especially through the work of investigative journalists such as the journalists belonging to, inter alia, the International Consortium of Investigative Journalists and the Organized Crime and Corruption Reporting Project. Enforcement actions for violations of anti-corruption measures help to raise the profile of anti-corruption efforts and push governments and civil society to become more aware of it and adopt measures to fight corruption.

In addition, freedom of the press is needed to ensure that journalists can expose corruption scandals without fear of reprisal.

One expert suggested that to bolster the credibility of the work of investigative journalists, legal experts, such as former prosecutors, could help by analyzing the work of investigative journalists to ensure its legal accuracy.

7) Building capacity

i) Education of civil servants

On par with efforts to better educate and inform stakeholders on the impacts of corruption and ways to fight it, educating civil servants remains essential. Efforts targeting those civil servants involved in the fight against corruption in the context of their professional activity could focus on capacity building, with a view to strengthening the tools and mechanisms at their disposal. As regards other civil servants, awareness-raising activities on the forms and impact of corruption could be enhanced. In general, the data and knowledge built through research, as examined above, should reach all public servants through educational material in order to drive change.

ii) Promote integrity within governments

One expert recommended the promotion of "islands of honesty" within the government, the idea being that when prosecutors or other officials gain enough independence to investigate

corrupt officials, this will begin to disrupt any corrupt equilibrium that may exist within the country.

8) Better combatting conflicts of interest

Several experts explained that failing to address conflicts of interest is a major impediment to fighting corruption. They referred in particular to the issue of the "revolving door," which refers to personnel moving between roles as legislators and regulators on the one hand, and members of the industries affected by the legislation and regulation on the other. Failing to adequately control revolving doors undermines the mechanisms developed to guarantee ethics and integrity in government.

One expert suggested an international treaty or new international codes of conduct that establish reasonable standards regarding conflicts of interest. While noting the difficulty of reaching a consensus on a treaty, the Steering Committee is of the view that serious consideration should be given to developing a universal framework providing a common understanding and a regulatory setting for the various forms of conflicts of interest.

9) Rethinking the role of international organisations

Several experts formulated proposals to rethink or further enhance the role of international organizations in fighting corruption. These ranged from high-level proposals, such as the publication of a yearly public implementation report of G20 commitments regarding agreed anti-corruption measures, to coercive measures like blacklisting of countries not willing to fight international corruption offenses, followed by international financial consequences. Other suggestions included exploring ways to extend the oversight of the World Bank to international public tenders.

i) Targeted conditionalities and indicators

Several experts insisted on the need to rethink conditionalities associated with the multilateral development banks' (MDBs) policy-based lending in order to prevent the implementation of a "one-size fits all" system and better tailor measures to the specificities of each country. According to one expert, the framework used by international financial institutions is both overly specific and incomplete. In particular, they disregard the

political context of the country where support is provided, even though it is a central element to account for in fighting corruption.

The framework developed by MDBs and international financial institutions to conduct analysis could also be designed with a view to better empower citizens. One expert used the example of the IMF framework for conducting public and external debt sustainability analyses (DSAs), which aims to better detect, prevent, and resolve potential crises. According to them, tools like the DSA should include human rights components and assess whether a specific contract or debt will advance the social goals of a country. This would allow civil society to assess the debt being contracted by their countries.

ii) More granular reviews to develop actionable tools

According to one expert, anti-corruption reviews at the multilateral, regional, and bilateral levels should examine not only stand-alone domestic anti-corruption laws but also analize how they are reflected in sectors and/or industry-specific laws and regulations and how these are applied in practice. These granular reviews would allow assessing how effectively corruption risk mitigation is incorporated in various sectors (*e.g.*, trade laws, health bills, customs procedures, public procurement), how rules are implemented in practice, even down to written procedures (or the lack of written procedures). This, in turn, would help guide day-to-day tasks of local public officials and private sector employees. -

annex 01

acknowledgement

The coordinator would like to recognize the key role played by the rapporteur, Pascale Dubois, and the two co-rapporteurs, Elisabeth Danon and Stanislas Julien-Steffens, as well as the special contribution of two steering committee members (Lucinda Low and Susan Karamanian) throughout this work.

annex 02

persons interviewed

We would like to warmly thank the following individuals who agreed to be interviewed in the context of the preparation of this White Paper for their valuable contribution to our reflections and discussions:

- Raymond BAKER, Founding President of Global Financial Integrity
- Lucie CHEVALLEREAU, Head of Ethics & Compliance | Reporting and Risks, ENGIE
- Sarah CHAYES, Journalist, Author of the prize-winning *Thieves of State: Why Corruption Threatens Global Security*
- Kevin DAVIS, Professor of Business Law at New York University School of Law
- Gretta FENNER, Managing Director, Basel Institute on Governance
- Laura KÖVESI, European Chief Prosecutor
- Drago KOS, Chair of the OECD Group on Bribery
- C. Raj KUMAR, Professor and Dean, Jindal Global Law School, India
- Huguette LABELLE, Former Chair of Transparency International and now the Head of its International Council
- David LEWIS, Managing Director and Global Head of Anti-Money Laundering (AML) Advisory; Former Executive Secretary, Financial Action Task Force
- Shervin MAJLESSI, Chief of Section, Corruption & Economic Crime Branch, UNODC
- Abiola MAKINWA, Senior Lecturer in Commercial Law, The Hague University of Applied Sciences
- Cecilia MÜLLER TORBRAND, Chief Executive Officer, The Maritime Anti-Corruption Network
- Denise NAMBURETE, Executive Director of N'weti Health Communication, based in Maputo, Mozambique
- Bonnie J. PALIFKA, Associate Research Professor, Tecnologico de Monterrey, Mexico
- Nikolay STAYKOV, Investigative Journalist and Co-Founder of the Anti-Corruption Fund
- Wieger WIELINGA, Managing Director Enforcement & EMEA of Omni Bridgeway

- Torplus YOMNAK, Founder and Chief Advisor of HAND Social Entreprise, Assistant Professor at Chulalongkorn University, Thailand

annex 03

key instruments and some bibliographical elements

→ International treaties and conventions

- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997)
- United Nations Convention against Corruption (2003)

→ Regional conventions

- African Union Convention on Preventing and Combating Corruption (2003)
- Arab Convention Against Corruption (2010)
- Council of Europe Criminal Law Convention on Corruption (1998)
- Council of Europe Civil Law Convention on Corruption (1999)
- Inter-American Convention Against Corruption (1996)

→ National legislation and principles

- French Sapin II Law (2016)
- United Kingdom Bribery Act (2010)
- UK's Serious Fraud Office, Crown Prosecution Service and National Crime Agency, General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases (2017)
- U.S. Foreign Corrupt Practices Act (1977)

→ Recommendations, declarations, and statements from international organisations

- Financial Action Task Force, Declaration of the Ministers of the Financial Action Task Force (2022)
- OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009)
- OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2021)
- United Nations General Assembly, Resolution adopted by the General Assembly on 2 June 2021, A/RES/S-32/1 (2021)

→ Reports, surveys, and publications

- Basel Institute on Governance, "Collective Action," (2022)
- Institute of International Finance, Voluntary Principles for Debt Transparency (2019)
- Institute of International Finance, IIF Letter to the G20 on Common Framework, Debt Transparency, ESG Considerations (2021)
- International Bar Association, OECD, Report of the Task Force on the Role of Lawyers and International Commercial Structures Report of the Task Force on the Role of Lawyers and International Commercial Structures (2019)
- International Monetary Fund, Review of 1997 Guidance Note on Governance - A Proposed Framework for Enhanced Fund Engagement (2018)
- Center for Global Development Blog, Masood Ahmed and Hannah Brown, Fix the Common Framework for Debt Before It Is Too Late (2021)
- Maritime Anti-Corruption Network, "MACN Overview and History" (2022)

- OECD Foreign Bribery Report, An Analysis of Crime of Bribery of Foreign Public Officials (2014)
- OECD, Consequences of Corruption at the Sector Level and Implications for Economic Growth and Development (2015)
- OECD, 2017 Enforcement of the Anti-Bribery Convention - Special focus: What happened to the public officials in sanctioned foreign bribery schemes? (2018)
- OECD Working Group on Bribery, Resolving Foreign Bribery Cases with Non-Trial Resolutions - Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention (2019)
- OECD, Foreign Bribery and the Role of Intermediaries, Managers and Gender (2020)
- Praia Group on Governance Statistics, Handbook on Governance Statistics (2020)
- Stolen Asset Recovery Initiative, OECD, Tracking Anti-Corruption and Asset Recovery Commitments (2011)
- Stolen Asset Recovery Initiative, OECD, Few and Far - The Hard Facts on Stolen Asset Recovery (2014)
- Stolen Asset Recovery Initiative, Mapping international recoveries and returns of stolen assets under UNCAC: an insight into the practice of cross-border repatriation of proceeds of corruption over the past 10 years (2021)
- Stolen Asset Recovery Initiative, “Asset Declarations” (2022)
- Transparency International, Global Corruption Barometer (2017)
- Transparency International, 2021 Corruption Perceptions Index (2022)
- U4 Anti-Corruption Centre, The credibility of corruption statistics - A critical review of ten global estimates (2021)
- UK Parliament, "Research Briefing: Unexplained Wealth Orders" (2022)
- U.S. Department of Justice, “United States Seeks to Recover More Than $1 Billion Obtained from Corruption Involving Malaysian Sovereign Wealth Fund” (2016)

IN THE SAME COLLECTION

Food / Agriculture

Anthropocene

Fight Against Corruption

Mass Crimes and Impunity

Law In Support of Democracy

Human Rights

Energy

Business and Human Rights

Outer Space

Civil Status

International Finance

Taxation

Global Governance / Multilateralism

International Investments

Migration

Digital Challenges for International Law

Ocean

Sdgs beyond 2030

Cultural Heritage

Intellectual Property

Dispute Resolution

Health

Labour

Cities in International Law

White Paper n° 3 - Fight against corruption
realisation: September, 2022
graphic design: clémence hivert - *bluclemence@gmail.com*

www.ilaparis2023.org/en

Public consultation from September 1 to December 31, 2022.

adi.ila2023.anticorruption@gmail.com