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Mapping and Evaluating the Regime Complex for Bribery

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Abstract

The international legal framework regulating bribery comprises a multitude of international obligations, domestic laws, financial sanctions, NGOs, codes of conduct, indicator regimes, regulatory and governance frameworks and asset recovery programs. This paper considers that these constituents constitute a 'regime complex'. It comprehensively outlines the elements of this regime complex and concludes that while in some respects the regime complex functions well, other aspects warrant reconsideration in order to improve overall efficacy.

Key Word: "bribery", "regime complex", "corruption"

I Introduction

In 1996 the incumbent President of the World Bank memorably denounced “the cancer of corruption”¹ plaguing the development and economic growth of developing nations. James D. Wolfensohn’s words to the Bank’s shareholders at the 1996 Annual Meetings marked an active stance taken by the Bank against bribery and corruption, issues that it had for the most part previously eschewed. In the following years, more than 600 World Bank anti-corruption initiatives were set into motion.² This landmark speech both captured international attention and signalled the beginning of an era from which the attitudes of the World Bank and the International Monetary Fund towards bribery and corruption became much more combative.

However, these issues had already been attracting the concerns of domestic policy-makers for some time. The significant turning point for a shift in general attitudes towards corruption eventuated approximately 20 years earlier during the Watergate era. This period spanned the Republican administrations of Presidents Nixon and Ford during which Stanley Sporkin, the incumbent Director of Enforcement of the US Securities and Exchange Commission, unearthed a multitude of illicit foreign payments.³ More than 400 corporations admitted to making dubious or illegal payments to foreign officials and politicians in the context of international transactions. 23 per cent of the Fortune 500 corporations admitted to paying bribes to secure business abroad.⁴ These revelations culminated in the passage of the US Foreign Corrupt Practices Act (FCPA) in 1977.⁵

Enactment of the FCPA slowly sparked negotiation of a multitude of agreements levelled at preventing and punishing bribery. Following the passage of the FCPA, United States firms were at a significant disadvantage compared to their unconstrained foreign counterparts. Accordingly, the United States pushed for other countries to adopt similar legislation.⁶ Initial discussions during Organisation for Economic Co-operation and Development (OECD) and World Trade Organisation

¹ James D. Wolfensohn, President of the World Bank “Annual Meetings Address by James D. Wolfensohn” (Annual Meetings of the Board of Governors of the World Bank Group and International Monetary Fund, Washington D.C., 1 October 1996).

² The World Bank “Ten Things You Did Not Know About the World Bank and Anti-Corruption” The World Bank News & Broadcast <<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190202~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html>>.

³ Elizabeth K. Spahn “Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention against Corruption” (2013) 23 *Ind. Int’l & Comp. L. Rev* 1 at 3.

⁴ Spahn, above n 3, at 3.

⁵ Foreign Corrupt Practices Act 15 USC § 78dd-1, et seq.

⁶ Rachel Brewster “The Domestic and International Enforcement of the OECD Anti-Bribery Convention” (2014) 15 *Chi. J. Int’l L.* 84 at 99.

negotiations with European governments were unsuccessful. Those governments viewed the legislation as aspirational and commercially naïve, while simultaneously recognising the commercial advantage borne by their own national corporations due to the strict regulation of United States firms.⁷

However, after a series of European corruption scandals throughout the 1990s, the idea of wider commitment to a multilateral treaty gained traction.⁸ This culminated in the entry into force of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention).⁹ The OECD Anti-Bribery Convention is the premier multilateral anti-bribery treaty.¹⁰ However, it represents only one element of the expansive framework designed to prevent and combat bribery. Notably, it only criminalises supply side bribery. The Convention proscribes bribing or offering to bribe a foreign official.¹¹ However, the Convention does not sanction the corrupt official responsible for soliciting or accepting the bribe.

The legal framework for bribery has proved to be an inexhaustible source of academic discussion, owing to the multitude of laws, regulations and best practice guidelines pertaining to the issue. Aside from the major OECD Anti-Bribery Convention, there are several other significant multilateral regional agreements governing bribery, in addition to various domestic legislative regimes aimed at both the supply and demand sides of the transaction. These are supplemented by the financial sanctions regimes of international institutions such as the World Bank and the Multilateral Development Banks (MDBs) and the activities of NGOs ranging in size from major global watchdogs such as Transparency International to smaller country-specific initiatives.

This paper considers the international legal framework governing bribery from a unique perspective. A number of works have descriptively assessed certain elements of the framework. Wouters, Ryngaert and Cloots authored perhaps the most comprehensive existing piece on this topic.¹² However, there is no current literature that provides a complete breakdown of all constituent parts of the regime complex, nor is there any work analysing the framework from a regime complex perspective. Consequently, this paper makes three original contributions to the existing scholarship

⁷ Spahn, above n 3, at 99.

⁸ At 100.

⁹ Organisation for Economic Co-Operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 37 ILM 1 (opened for signature 17 December 1997, entered into force 15 February 1999).

¹⁰ Brewster, above n 6, at 99.

¹¹ OECD Anti-Bribery Convention, above n 9, art 1.

¹² Jan Wouters, Cedric Ryngaert and Sofie Cloots “The International Legal Framework Against Corruption: Achievements and Challenges” (2013) 14 Melb. J. Int’l L. 205.

on the international anti-bribery framework. First, it proposes that there is a regime complex for bribery. Second, it comprehensively describes and visually maps the constituent elements of the regime complex for bribery. Third, it analyses the efficacy and functionality of the framework from a regime complex standpoint.

The primary focus of this paper is the anti-bribery framework. Bribery is a specific manifestation of the concept of corruption more generally therefore literature and norms concerning corruption are directly relevant. Moreover, the relevant instruments often cover both corruption and specific bribery offences. Historically, the focus has been on bribery of public officials and prevention of the inherent harm resulting from the diversion of public monies away from the public benefit. This paper also discusses 'private bribery,' which entails the payment of bribes to a private firm or an individual holding private office, in order to secure a benefit. The recent focus on abuse of private sector office is cogent in light of the increased outsourcing of public-oriented works to private entities, which significantly blurs the line between the functions of the public and private sectors.

This paper comprises six main parts, including this introduction. Part II outlines the different ways of conceptualising regime complexes and proposes that there is a regime complex for bribery. Part III further defines the specific concept of bribery and the related, broader concept of corruption and discusses the key aspects of the elemental regimes, institutions and supplementary facets of the legal framework that comprise the regime complex for bribery. Part IV visually depicts the regime complex. Part V contains an analysis of the efficacy and functionality of the regime complex as a whole. Part VI sets out the conclusions.

II Regime Complexes, Generally and the Specific Regime Complex for Bribery

Regime complexes are a useful means of analysing complex international legal frameworks. This part of the paper concerns the notion of regime complexes and has three subparts. First, it outlines the different ways of conceptualising the regime complex. Second, it briefly describes the evolution of the international legal framework for bribery. Third, it proposes that the international legal framework for bribery is a regime complex.

A Conceptualising the Regime Complex

The regime complex is a way of conceptualising the international legal treatment of a particular issue area. Academics have published both descriptive pieces on the features of the regime complex and pieces that apply these concepts to a variety of specific issue areas including climate change,¹³ food security¹⁴ and maritime piracy.¹⁵ The regime complex analysis can be applicable to a number of diverse legal areas. There is an existing body of scholarship describing and evaluating certain facets of the anti-bribery framework. However, no work has yet considered the application of the regime complex principles to the issue area of bribery.

Raustiala and Victor's description of the two key features of a regime complex provides a useful starting point. First, there must be an array (usually three or more) of overlapping institutions governing a particular issue area. Second, the institutions lack an overall architecture or hierarchy.¹⁶ Keohane and Victor have subsequently expanded upon this definition in the climate change context, envisaging a continuum upon which regulatory regimes sit. At one extreme, there are fully integrated, comprehensive, hierarchical institutions. At the other, there are tenuously linked institutions entailing a high degree of inter-institutional fragmentation and lack of an identifiable core.¹⁷ Regime complexes sit somewhere in the middle of the continuum, with defined linkages between the specific regimes but lacking an overarching structure. Keohane and Victor also propose six normative criteria that are indicative of the functionality of a regime complex. These criteria are coherence, accountability,

¹³ Robert O. Keohane and David G. Victor "The Regime Complex for Climate Change" (2011) 9 *Perspectives on Politics* 7.

¹⁴ Matias E. Margulis "The Regime Complex for Food Security: Implications for the Global Hunger Challenge" (2013) *Global Governance* 53.

¹⁵ Michael J. Struett, Mark T. Nance and Diane Armstrong "Navigating the Maritime Piracy Regime Complex" (2013) 19 *Global Governance* 93.

¹⁶ Kal Raustiala and David G. Victor "The Regime Complex for Plant Genetic Resources" (2004) 55 *International Organization* 277 at 279.

¹⁷ Keohane and Victor, above n 13, at 8.

determinacy, sustainability, epistemic quality and fairness.¹⁸ The application of these criteria to the regime complex for bribery is discussed in Part V.

Orsini, Moran and Young expand on these classifications, identifying the existence of different elemental regimes as a hallmark of a regime complex.¹⁹ They propose three elements that indicate a regime complex exists. First, there will be a network of at least three constituent regimes relating to a common subject matter. Second, the elemental regimes will exhibit overlapping membership. Third, the crossover of the constituent regimes will generate substantive, normative or operative interactions, which are *potentially* problematic, leaving aside the possibility of effective management thereof.²⁰ The different objectives of its constituent parts may hinder the overall cooperation and coherence of the regime complex.

Margulis also emphasises an overlap in rules as indicative of a regime complex, recognising the possibility of conflicts arising out of regime complexes, which can significantly hinder its coherence.²¹ The effective management of dissonant norms or maintenance of synergy in substantive interactions within a regime complex is telling of its efficacy. This idea is investigated further below. In the maritime piracy context, Struett, Nance and Armstrong recognise that the existence of a regime complex may hinder or improve co-operation in relation to a particular issue area.²² Similar to Margulis, these authors also accept that the existence of conflicting norms or dissonance in substantive interactions is common in regime complexes. Norms shape the behavioural patterns of different actors. A clash therein presents a possible source of transnational conflict and may also significantly hamper governance of the issue.²³ However, notwithstanding the possible hindrance on co-operation, these authors suggest that centralised integration is not necessarily the key to managing problematic substantive interactions. The solution is instead the effective diffusion and dissemination of information across the elemental institutions in an integrated way.²⁴

B Emergence of a Regime Complex for Bribery

Regime complexes emerge and develop over time. Margulis attributes the shift from regime to regime complex to institutional proliferation causing overlapping authority between different regimes, where divergence exists either between institutional norms

¹⁸ Keohane and Victor, above n 13, at 17.

¹⁹ Amandine Orsini, Jean-Frédéric Morin and Oran Young “Regime Complexes: A Buzz, A Boom, or a Bust for Global Governance?” (2013) 19 *Global Governance* 27 at 29.

²⁰ At 29.

²¹ Margulis, above n 14, at 61.

²² Struett, Nance and Armstrong, above n 15, at 94.

²³ At 95.

²⁴ At 94.

or substantive interactions.²⁵ Certain authors pinpoint the impetus for significant change in the legal treatment of bribery to the enactment of the FCPA.²⁶ However, it was not until the late 1990s and early 2000s that a regime complex for bribery fully crystallised. During this period, there were a raft of major international developments. Anti-bribery instruments such as the OECD Anti-Bribery Convention entered into force, the World Bank enacted its sanctions regime and major NGO watchdog group Transparency International formed.

However, continued conscious state action means that the regime complex for bribery continues to evolve. Further regional agreements such as the ECOWAS Protocol on the Fight Against Corruption²⁷ are pending entry into force. As discussed in Part III of this paper, some constituents of the regime complex are just beginning to develop. For example, recent citizen-driven initiatives have been instrumental in reforming corrupt public sectors. In addition, there has been renewed emphasis on the need to strengthen human rights protections to counter bribery. Freedom of expression and the free flow of information are increasingly seen as critical to ensure accountability.

C The Anti-Bribery Framework as a Regime Complex

It is almost impossible to formulate an exhaustive definition of a regime complex that regulatory regimes either will or will not satisfy. However, the scholarship discussed above provides insurmountably useful guidance on the recognition of a regime complex. This paper proposes that a regime complex for bribery exists. In light of the conceptions discussed above, this paper considers that the anti-bribery framework tends to cumulatively demonstrate the indicators of a regime complex.

There are a multitude of institutions and elemental regimes governing the issue area of bribery. A full outline of the different facets of the anti-bribery framework is set out in Part III. In a broad sense, there is an element of hierarchy present in the relationship between international treaties and the implementation of domestic laws. However, there is no single core institution and no overall architecture to structure the relationships between the different elements of the regime complex.

In addition to international law obligations and sanctions under domestic legislation, multiple other elemental regimes are of significant relevance. These include, inter alia, international financial sanctions regimes, bribery and corruption indicators

²⁵ Margulis, above n 14, at 57.

²⁶ Spahn, above n 3, at 3.

²⁷ Economic Community of West African States Protocol on the Fight Against Corruption (opened for signature 21 December 2001, not yet entered into force), text available at <https://eos.cartercenter.org/uploads/document_file/path/406/ECOWAS_Protocol_on_Corruption.pdf>

promulgated and assessed by different NGOs, broader good governance frameworks and financial regulatory frameworks. Orsini, Moran and Young envisage the different elemental regimes as exhibiting overlapping membership.²⁸ This is unquestionably a feature of a regime complex. However, the use of the ‘membership’ terminology may be awkward in relation to the NGO constituents such as Transparency International, which act as independent assessors. This paper prefers the broader terminology of ‘overlapping membership, jurisdiction or scope of interest’ between the different elemental regimes. This is consistent with Orsini, Moran and Young’s proposal that non-state actors play a crucial role in achieving synergy between the constituent regimes.²⁹ In effect, the role of NGOs such as Transparency International could be conceptualised in two ways. First, they might be viewed as behavioural regulators existing independently to manage the regime complex. Conversely, they can be seen as a separate elemental regime operating within the regime complex as a whole.

The existence of norm-based conflicts or dissonance in substantive operations is also a common indicator of a regime complex. The authors cited above all agree that dissonant rules and inharmonious substantive interactions can be problematic, particularly in creating transnational conflicts between actors and generally promoting distrust.³⁰ In terms of the regime complex for bribery, the actual norms of the different elemental regimes are relatively coherent. However, despite the coherent body of rules, conflicting behavioural trends of different actors have become ingrained due to a disparity in the substantive enforcement of the sanctions applicable to the supply and demand sides of a corrupt transaction. In effect, effective enforcement of demand side sanctions is lacking, which is discussed further in Part V.

Perhaps the most apt illustration of problematic substantive interactions is the operation of the international financial sanctions regimes in light of the level of enforcement of demand side anti-bribery legislation. If a firm engages in bribery or another corrupt practice in the context of a project financed by one of the development banks it will be sanctioned under the relevant sanctions procedures.³¹ In most cases, the firm is debarred from eligibility to compete for any development bank-financed projects until the firm establishes positive steps taken to mitigate its agents’ propensity to pay bribes. The sanctions procedures have both deterrent and punitive objectives.

²⁸ Orsini, Moran and Young, above n 19, at 29.

²⁹ At 36.

³⁰ Margulis, above n 14, at 62; Orsini, Moran and Young, above n 19, at 31; Keohane and Victor, above n 13, at 8.

³¹ Anne-Marie Leroy and Frank Fariello *The World Bank Group Sanctions Process and its Recent Reforms* (The World Bank, Washington D.C., 2012) at 1.

However, the sanctioning competencies do not extend to the corrupt official involved on the demand side.³² The frequently ambivalent attitude of states towards prosecution of officials who have received bribe payments under domestic legislation might undermine the deterrent effect of the sanctions procedures.³³ Public officials will continue to solicit and accept bribe payments in performance of their duties. The lack of effective enforcement of demand side sanctions will therefore significantly reduce the deterrent effects of the sanctions procedures. Only corporations willing to pay bribes will win lucrative contracts for overseas work, which has the dual effect of incentivising bribery and causing upright, more efficient firms to lose out to their bribe-paying competitors.

³² The World Bank “The World Bank Group’s Sanctions Regime: Information Note” <http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/The_World_Bank_Group_Sanctions_Regime.pdf>, at 19.

³³ Tina Søreide, Linda Gröning and Rasmus Wandall “An Efficient Anticorruption Sanctions Regime? The Case of the World Bank” (2015) 16 *Chi. J. Int’l L.* 523 at 546.

III Elementar Regimes, Institutions and Supplementary Facets of the Regime Complex for Bribery

This part outlines the major elements of the constituent regimes, institutions and supplementary facets of the regime complex for bribery. First, it briefly defines the concept of bribery and the closely related concept of corruption. Second, it outlines the major international anti-bribery agreements. Third, it sets out the international financial sanctions for engaging in bribery. Fourth, it explains the fundamental importance of domestic anti-bribery legislation. Fifth, it identifies the other relevant domestic legislative frameworks that indirectly regulate bribery. Sixth, it considers the role of NGOs in combating bribery and corruption. Seventh, it details the development of initiatives concerned with recovery of actual bribe payments. Finally, this part considers the increasing importance of good governance frameworks, economic deregulation agendas and financial regulatory frameworks. The relevant elements of the constituent regimes are grouped broadly together. It is impossible to regard the different regimes as silos, as there are instances of significant overlap between each. This confluence is noted in this part and elucidated further in Part V.

A Bribery and Corruption

The concepts of bribery and corruption are closely linked. Bribery is perhaps the most popularly recognised manifestation of corruption and the two are used synonymously at times. There are some instruments that deal solely with bribery. However, most address corruption more broadly, integrating specific bribery-related offences. Generally, bribery is the touchstone offence for public corruption.³⁴

Bribery is the actual practice of conferring or offering to confer an undue advantage upon an official, to secure an advantage in return, usually in the form of a commercial lead. Traditional bribery offences have focused on receipt of bribes by public officials. However, there is now a growing emphasis on criminalising bribery of private sector agents.

The uniformly accepted definition of corruption is “the abuse of public [or private] office for private gain”.³⁵ Corruption is a broader concept, referring more generally to the abuse of office for private gain. For example, it might refer to fraudulent embezzlement of public funds by an official. Entrenched corruption in the context of

³⁴ Ophelie Brunelle-Quraishi “Assessing the Relevancy and Efficacy of the United Nations Convention Against Corruption: A Comparative Analysis” (2011) 2 *Notre Dame J. Int’l & Comp. L.* 101 at 110.

³⁵ The World Bank, the IMF and Transparency International have endorsed this definition.

large-scale infrastructure projects in developing countries has proven to be a serious problem.³⁶

The accepted definition of corruption is cogent in light of the United Nations Convention Against Corruption³⁷ (UNCAC). The UNCAC requires state parties to establish an offence of:³⁸

“The abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions for the purpose of obtaining and undue advantage for himself or herself or for another person or entity.” [Emphasis added].

An official can therefore be guilty of corruption even if the gain is not a financial one.³⁹ This definition of corruption is also consistent with the bribery definition outlined in the OECD Anti-Bribery Convention.⁴⁰ In the context of the FCPA (implementing the offences outlined in the OECD Anti-Bribery Convention), bribe has been interpreted to cover, inter alia, charitable contributions or the employment of a family member of an official. In effect, the conduct of the public official or private sector agent (depending on the relevant circumstances) is impugned where the decision is made (or the bribe offered) for “reasons other than those identified as relevant by the legal or administrative framework that the public official is responsible for administering”.⁴¹

B International Instruments

This section outlines the major international instruments concerned with bribery. It details the fundamental aspects of each, including the geographical scope, the preventative measures, the fundamental offences contained therein and, where relevant, its oversight mechanisms. The global instruments are addressed first. The regional instruments are then categorised by region and are set out within these regional categories from the most major to the most minor.

³⁶ Courtney Hostetler “Going from Bad to Good: Combating Corporate Corruption on World Bank-Funded Infrastructure Projects” (2011) 14 Yale Hum. Rts. & Dev. L.J. 231 at 232.

³⁷ United Nations Convention Against Corruption 2349 UNTS 41 (opened for signature 9 December 2003, entered into force 14 December 2005).

³⁸ Article 19.

³⁹ *Corruption: Costs and Mitigating Strategies* (International Monetary Fund, Washington D.C., 2016) at 4.

⁴⁰ OECD Anti-Bribery Convention, above n 9, art 1.

⁴¹ *Corruption: Costs and Mitigating Strategies*, above n 39, at 4.

1 Global instruments

(a) United Nations Convention Against Corruption (UNCAC)⁴²

The UNCAC was adopted as a result of debate during negotiation of the United Nations Convention Against Transnational Organised Crime (UNCATOC).⁴³ The foreword to the Convention notes the insidious nature of corruption and its corrosive effects on economic development and within society as a whole. It complements the UNCATOC, which in itself is insufficiently specialised to deal with the complexities of corruption.⁴⁴

140 states have signed the UNCAC, which entered into force in December 2005, rendering it the most geographically far-reaching anti-corruption instrument.⁴⁵ The text of the Convention comprises four main areas; prevention, criminalisation, international cooperation and asset recovery. The UNCAC outlines standards and offences for both the public and private sectors.⁴⁶ Article 7 requires the strengthening of systems to ensure civil servants and non-elected officials are selected on objective grounds. Specific training of individuals occupying positions that are more susceptible to corruption is also required.⁴⁷ State parties must establish effective procurement practices, ensuring that the relevant procedures are transparent, based on free competition and entail merit-based selections.⁴⁸

The UNCAC outlines two levels of offences, those that states *must* criminalise and others they *may* criminalise. Criminalisation of bribery of public officials is mandatory. States must adopt measures applicable to both the supply and demand side of the transaction, to criminalise bribery of their own nationals⁴⁹ as well as foreign officials.⁵⁰ States must also criminalise embezzlement and misappropriation of public property.⁵¹ The Convention envisages that states will consider criminalisation of related offences such as trading in influence, abuse of functions, illicit enrichment, money laundering and obstruction of justice.⁵² The offence of illicit enrichment places the onus on the public official to reasonably explain significant increases in their assets.⁵³ Furthermore, art 21 provides that states shall consider criminalisation of

⁴² UNCAC, above n 37.

⁴³ Brunelle-Quraishi, above n 34, at 105.

⁴⁴ At 105.

⁴⁵ The UNCAC was preceded by the United Nations Declaration against Corruption and Bribery in International Commercial Transactions adopted by the General Assembly in resolution 51/191.

⁴⁶ UNCAC, above n 42, art 12.

⁴⁷ Article 7.

⁴⁸ Article 9.

⁴⁹ UNCAC, above n 37, art 15.

⁵⁰ Article 16.

⁵¹ Article 17.

⁵² The related criminal offences are set out in articles 18-25 of the UNCAC.

⁵³ Article 20.

bribery of private sector agents.⁵⁴ The UNCAC is unique in its inclusion of asset recovery provisions. Previous anti-corruption instruments have dealt to an extent with asset freezing, but not comprehensively with the issue of stolen asset recovery.⁵⁵

(b) OECD Anti-Bribery Convention

The OECD Anti-Bribery Convention is the first major international treaty levelled solely at supply side bribery.⁵⁶ The Convention, which has 41 state parties, entered into force in February 1999, preceded by the Revised Recommendation of the OECD Council on Combating Bribery in International Business Transactions issued in May 1997. Article 1⁵⁷ is the critical provision. It obliges states to establish a criminal offence for conferring or offering to confer any undue advantage on a foreign public official in order that the official act or refrain from acting in a certain way in the performance of their official duties, so as to ensure that the briber obtains or retains an improper advantage. The Convention applies only to international transactions.⁵⁸ The proviso is that no offence is committed where the advantage was permitted or required by law in the public official's state of residence. Furthermore, there is no sanction for the official involved.⁵⁹

The OECD Working Group on Bribery (WGB) is the responsible oversight body. The WGB conducts a four-phase review of each state's progress following accession to the Convention.⁶⁰ The Convention itself is silent as to the level of enforcement required of each state. Uniform obligations would be difficult and unfair to institute in practice due to the differences in available resources and policy priorities of each individual state. In some respects, the WGB reports on individual enforcement are ambiguous, urging states to recall their on-going obligations to prevent, detect and combat bribery. However, the reports do contain instances of useful advice. For example, they suggest an institutional approach may add complexities to the process and muddy already unclear parameters of individual roles.⁶¹

⁵⁴ UNCAC, above n 37, art 21.

⁵⁵ Quraishi, above n 34, at 122.

⁵⁶ OECD Anti-Bribery Convention, above n 9.

⁵⁷ Article 1.

⁵⁸ Article 1.

⁵⁹ See Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted by the Negotiating Conference on 21 November 1997.

⁶⁰ Brewster, above n 6, at 101.

⁶¹ OECD Working Group on Bribery "Phase 3 Report on Implementing the OECD Anti-Bribery Convention in South Africa" (13 March 2014) OECD <<https://www.oecd.org/daf/anti-bribery/SouthAfricaPhase3ReportEN.pdf>>.

(a) African Union Convention on Preventing and Combating Corruption (AUCPCC)⁶²

The AUCPCC is a regional agreement between certain African states, which entered into force in August 2006. The AUCPCC covers both public and private sector corruption. Article 3 governs the payment and acceptance of bribes to and by public officials and any person directing or working for a private sector entity.⁶³ The acquisition and use of corruption-related funds to finance political parties is also proscribed.⁶⁴ The Convention expressly applies to the supply and demand sides of bribery of private sector agents.⁶⁵

The AUCPCC recognises the need to engage civil society to fight corruption. Specifically, there are aspirational obligations to popularise knowledge of the Convention with the participation of both the media and civil society at large.⁶⁶ The recognition of the importance of ensuring the media's access to and dissemination of information in corruption cases, subject to prejudice of fair trial rights, is paramount.⁶⁷ The lack of recognition of free expression rights in anti-bribery instruments is a notable and frequent omission.

Article 22 establishes the Advisory Board on Corruption within the African Union as the relevant oversight mechanism. The body is tasked with, inter alia, promoting anti-corruption measures, documenting the scope of the problem of corruption on the African continent, advising governments on how to deal with corruption-related issues and fostering relationships with groups more broadly concerned with the issue such as the African Commission on Human and Peoples' Rights, NGOs and African civil society.

(b) Southern African Development Community Protocol Against Corruption (SADC Protocol)⁶⁸

The Southern African Development Community (SADC) is not a supranational organisation. The principle of complementarity underlies the protocols promulgated

⁶² African Union Convention on Preventing and Combating Corruption 43 I.L.M. 5 (opened for signature 11 July 2003, entered into force 5 August 2006).

⁶³ Article 3.

⁶⁴ Article 10.

⁶⁵ Article 4.

⁶⁶ Article 12.

⁶⁷ Article 12(4).

⁶⁸ Southern African Development Community Protocol Against Corruption (opened for signature 14 August 2001, entered into force 6 August 2003), text available at <http://www.sadc.int/files/7913/5292/8361/Protocol_Against_Corruption2001.pdf>.

by the SADC.⁶⁹ States are sovereign actors and remain responsible for administering anti-corruption initiatives within their own jurisdictions. The SADC Protocol, in force since 2003, aims to harmonise states' anti-corruption efforts and envisages commitment to co-operation between the individual member states.⁷⁰

Bribery is the touchstone offence for corrupt conduct.⁷¹ The SADC Protocol engages both the public and the private sectors. For example, art 3(1)(e)⁷² proscribes supply and demand side bribery in relation to any person directing or working for a private sector entity. Article 6 explicitly deals with the supply end of the transaction in respect of acts of corruption involving officials of foreign states. Each state party is further expected to punish its own nationals for bribing or offering to bribe foreign public officials.⁷³

However, the Protocol currently lacks an effective oversight body. Article 11 establishes an institution comprised of state party representatives to oversee implementation of the Protocol.⁷⁴ Article 11(2)⁷⁵ envisages biannual reporting requirements for each member state to the committee. This institution is yet to take shape.⁷⁶

(c) ECOWAS Protocol on the Fight Against Corruption⁷⁷

The treaty establishing the Economic Community of West African States is a sub-regional agreement between 15 West African nations. The ECOWAS objectives include co-operation between and promotion of the interests of West African states.⁷⁸ The ECOWAS Protocol on the Fight Against Corruption was adopted at the end of 2001, but has not yet entered into force due to a lack of ratification. Comparable to other anti-corruption instruments, the Protocol requires the enactment of preventative measures, transparent procurement procedures and whistle-blower protection laws.⁷⁹ Similar to the AUCPCC, the Protocol explicitly recognises the need to protect freedom of expression and dissemination of information rights. Only a limited

⁶⁹ D.D.N. Nsereko and Z. Kebonang "The SADC Protocol Against Corruption: Example of the Region's Response to an International Scourge (2005) 1 U. Botswana L.J. 85 at 86.

⁷⁰ Wouters, Ryngaert and Cloots, above n 12, at 231.

⁷¹ SADC Protocol, above n 68, art 3.

⁷² Article 3(1)(e).

⁷³ Article 6.

⁷⁴ Article 11(1).

⁷⁵ Article 11(2).

⁷⁶ Wouters, Ryngaert and Cloots, above n 12, at 231.

⁷⁷ Economic Community of West African States Protocol on the Fight Against Corruption (opened for signature 21 December 2001, not yet entered into force), text available at <https://eos.cartercenter.org/uploads/document_file/path/406/ECOWAS_Protocol_on_Corruption.pdf>

⁷⁸ O. Anuke Ovwah "Harmonisation of Laws Within the Economic Community of West African States (ECOWAS)." (1994) 6 Afr. J. Int'l & Comp. L. 76 at 76.

⁷⁹ Wouters, Ryngaert and Cloots, above n 12, at 231.

number of instruments explicitly reference the protection of these fundamental rights as being necessary in order to combat bribery and corruption.⁸⁰

3 *European instruments*

(a) European Union

Several European Union instruments deal with bribery and corruption. The Convention on the Protection of the European Communities' Financial Interests⁸¹ (and its two preceding protocols)⁸² concerns the use of fraudulent statements and documents in the misappropriation of European Union funds. It specifically targets the kleptocratic looting of public monies. The Convention Against Corruption Involving Officials⁸³ focuses specifically on the wider corruption offences. The EU realised that fragmentation between the relevant instruments may be inimical to preventing and combating corruption. Therefore, the European Commission shifted its focus away from the implementation of further instruments, instead working closely with GRECO⁸⁴ to diagnose corruption challenges and focus on synergising substantive enforcement of the existing framework.⁸⁵ Moreover, the Council of the European Union has implemented a framework to combat private sector corruption.⁸⁶

(b) Council of Europe

The Council of Europe (CoE), which has 47 member states, is the European continent's central human rights organisation. The primary concerns of the CoE include fundamental human rights, democracy and the rule of law.⁸⁷ Among its imperatives, the CoE seeks to facilitate state efforts to combat corruption and terrorism as well as advocating for freedom of expression and protection of the media.⁸⁸ The Committee of Ministers of the CoE has adopted the Twenty Guiding

⁸⁰ Wouters, Ryngaert and Cloots, above n 12, at 231.

⁸¹ Council Act of 26 July 1995 Drawing up the Convention on the Protection of the European Communities' Financial Interests [1995] OJ C 316/48.

⁸² See, the Council of the European Union: Protocol to the Convention on the protection of the European Communities' financial interests and the Second Protocol to the Convention on the protection of the European Communities' financial interests.

⁸³ Convention Drawn Up on the Basis of Article K.3(2)(c) of the Treaty on the Functioning of the European Union on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union [1997] OJ C 195/2.

⁸⁴ The Group of States against Corruption (GRECO) was established by Resolution (99) 5 of the Committee of Ministers of the Council of Europe to improve and monitor members' anti-corruption efforts and observance of the Twenty Guiding Principles for the Fight against Corruption.

⁸⁵ Wouters, Ryngaert and Cloots, above n 12, at 224.

⁸⁶ See, the Council of the European Union Framework decision on combating corruption in the private sector adopted 22 July 2003.

⁸⁷ Council of Europe "Who we are" (2016) < <http://www.coe.int/web/about-us/who-we-are>>.

⁸⁸ Council of Europe "Human rights, Democracy, Rule of Law" < <http://www.coe.int/en/web/about-us/values>>.

Principles for the Fight Against Corruption.⁸⁹ The guiding principles go further than some of the more generic obligations under international instruments. Specific suggested measures include limiting the immunity of corrupt officials and to ensure that the media has the right to receive and impart information on matters of corruption. There is also a Model Code of Conduct for Public Officials.⁹⁰

The CoE has also adopted both the Criminal Law Convention on Corruption⁹¹ and the Civil Law Convention on Corruption.⁹² The Criminal Law Convention focuses on the criminal law issues of bribery, such as implementing synchronised bribery and corruption offences. The Civil Law Convention aims to provide effective civil remedies for harm caused by corrupt practices.⁹³

4 *Arab League*

The Arab League is an organisation consisting of independent Arab states, spanning Northern to Eastern Africa, the Middle East and Indian Ocean island nations.⁹⁴ The Arab League implemented the first pan-Arab anti-corruption instrument entitled the Arab Convention to Fight Corruption.⁹⁵ Signed on 21 December 2010, the Convention has been ratified by 21 of the 22 Arab states, with the exception of Somalia. Only 15 of the same Arab States are party to the UNCAC.⁹⁶

The Convention sets out a comprehensive list of criminal offences that states should implement.⁹⁷ The Convention explicitly criminalises bribery of persons in public office, including public joint-stock companies, associations and institutions legally considered public benefit bodies, officials of international public enterprises and private sector officials.⁹⁸ In addition, the Convention requires the implementation of general corruption-related offences including, inter alia, trading in influence, illicit (or unjust) enrichment, laundering of the proceeds of crime and the embezzlement of

⁸⁹ These are set out in Resolution 97 (24) of the Committee of Ministers of the Council of Europe on the Twenty Guiding Principles for the Fight against Corruption (6 November 1997).

⁹⁰ The Model Code of Conduct for Public Officials was adopted by the Committee of Ministers of the Council of Europe on 11 May 2000.

⁹¹ Criminal Law Convention on Corruption ETS No 173 (opened for signature 27 January 1999, entered into force 1 July 2002).

⁹² Civil Law Convention on Corruption ETS No 174 (opened for signature 4 November 1999, entered into force 1 November 2003).

⁹³ Wouters, Ryngaert and Cloots, above n 12, at 226.

⁹⁴ Arab League "Presentation of the Arab League" Arab League Online < <http://www.arableagueonline.org/>>.

⁹⁵ League of Arab States Arab Convention to Fight Corruption (adopted 21 December 2010), text available at <<http://star.worldbank.org/star/sites/star/files/Arab-Convention-Against-Corruption.pdf>>.

⁹⁶ Transparency International "A Glance at the Arab Convention to Fight Corruption" (21 August 2012) Transparency International < <http://blog.transparency.org/2012/08/21/a-glance-at-the-arab-convention-to-fight-corruption/>>.

⁹⁷ Arab Convention to Fight Corruption, above n 95, art 4.

⁹⁸ Article 4.

public funds. Notably, the Convention also refers to the need to engage wider civil society.⁹⁹

5 Americas

The Organisation of American States (OAS) Inter-American Convention against Corruption (IACAC) was the first multilateral instrument aimed at combating corruption of public officials.¹⁰⁰ The IACAC has been ratified by 33 of the 34 states.¹⁰¹ Its geographical scope covers both of the American continents, with its member states spanning North, Central and South America as well as the Caribbean. The IACAC specifies compulsory and non-compulsory obligations.¹⁰² Article VI¹⁰³ deals with domestic bribery and corruption. Article VI is compulsory and spells out the acts of domestic corruption that fall within the scope of the IACAC.¹⁰⁴ In respect of domestic corruption, both payment and acceptance of the bribe constitute separate criminal offences attaching to the supply and demand sides of the transaction. The fraudulent use of property derived from any of the impugned acts is also an offence.¹⁰⁵ Provision is further made for secondary liability.¹⁰⁶ The IACAC does not cover bribery and corruption of private sector agents. This is unsurprising as the IACAC is the oldest instrument and the shift in focus to private sector behaviour is a recent occurrence.

Similar to the UNCAC, the IACAC also mandates an illicit enrichment offence. The benefit of such an offence is that it removes the evidential burden of proving a correlation between suspicious gain and misuse of authority, which is often difficult given the covert nature of bribery.¹⁰⁷ The effect of an illicit enrichment sanction is to find corruption without proof of a quid pro quo or intention to make illicit gains.¹⁰⁸

Article VIII covers transnational bribery and is also compulsory.¹⁰⁹ It provides that states will prohibit and punish the offering or granting of bribe payments by its nationals to government officials of other states. Some experts suggest that there may

⁹⁹ The Preamble of the Arab Convention to Fight Corruption considers that individuals and civil society play a vital role in combating corruption.

¹⁰⁰ OAS Inter-American Convention against Corruption 35 ILM 724 (opened for signature 29 March 1996, entered into force 6 March 1997).

¹⁰¹ Giorleny D. Altamirano “The Impact of the Inter-American Convention Against Corruption” (2006) 38 U. Miami Inter-Am. L. Rev. 487 at 499.

¹⁰² Article XI suggests offences that states should consider establishing.

¹⁰³ IACAC, above n 100, art VI.

¹⁰⁴ Article VI.

¹⁰⁵ Article VI.

¹⁰⁶ Article VI.

¹⁰⁷ Altamirano, above n 101, at 814.

¹⁰⁸ At 814.

¹⁰⁹ IACAC, above n 100, art VIII.

be a small but apparent distinction between the treatment of domestic bribery, which warrants criminalisation and, transnational bribery, which attracts “prohibition and punishment”.¹¹⁰ The IACAC has its own oversight body, the Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC). The MESICIC is an inter-governmental body supporting state parties in their implementation of the IACAC.¹¹¹

6 *Asia-Pacific*

There is currently no equivalent regional agreement in place in the Asia-Pacific region. However, other prominent anti-corruption standards are in place. Therefore, the expenditure necessary to negotiate and adopt a regional agreement may not necessarily be warranted. It is questionable whether there is much more to be gained from another regional agreement that re-incorporates the same ideologies. The Trans-Pacific Partnership Agreement already contains stringent anti-corruption standards.¹¹² Furthermore the Asia-Pacific Economic Cooperation (APEC) has an Anti-Corruption Experts’ Working Group and has implemented Transparency Standards.¹¹³

C *International Financial Sanctions Regimes*

1 *The World Bank Group*

The World Bank (the Bank) provides developing countries with a variety of financial products including low-interest loans, interest-free credits and grants for the purposes of investment in education, infrastructure and other developmental sectors.¹¹⁴ Inherent in the implementation of large-scale development projects is the procurement of services from international contractors. International tender and bidding processes have historically been fraught with the risk of corruption. Due process by which contracts are awarded to service providers is particularly susceptible to being undermined by corruption in countries with less transparent bureaucracies and weaker administrations. The Bank therefore has a sanctions regime for individuals and firms involved in corruption and supply side bribery in the context of Bank-financed projects, which either prevents or limits their future eligibility for project involvement.¹¹⁵ The sanctions do not apply to demand side bribery.¹¹⁶ Public officials

¹¹⁰ Altamirano, above n 101, at 508.

¹¹¹ Department of Legal Cooperation “What is the MESICIC?” (2011) Organization of American States <http://www.oas.org/juridico/english/mesicic_intro_en.htm>.

¹¹² These are set out in art 26 of the Trans-Pacific Partnership Agreement.

¹¹³ Asia Pacific Economic Cooperation “APEC Transparency Standards” (2016) APEC <<http://www.apec.org/Groups/Committee-on-Trade-and-Investment/APEC-Transparency-Standards.aspx>>.

¹¹⁴ Anne-Marie Leroy and Frank Fariello, above n 31, at 1.

¹¹⁵ At 1.

are exempt from the Bank's sanctioning competencies due to its long-standing policy not to sanction governments or government officials.¹¹⁷ There is an inherent tension between the fiduciary duty the Bank owes to its shareholders and its obligation to offer favourable monetary services to countries in need.¹¹⁸ The Bank's mandate means it cannot refuse financial support to untrustworthy governments.¹¹⁹

The Bank's sanctions procedures¹²⁰ outline a number of different sanctions. These apply to the respondent firm, and may also be applied to closely affiliated entities. However, application to parent and sister entities is subject to a culpability threshold or, must be necessary to avoid circumvention of the sanction on the respondent.¹²¹ The Bank may debar a firm definitely or indefinitely. Debarment renders a firm ineligible to be awarded a Bank-financed project and prevents participation in related activities. Formerly, definite debarment was the baseline sanction. A definite debarment period results in automatic release when the term of debarment expires. Indefinite debarment is reserved for situations where there is no realistic prospect of rehabilitation of the sanctioned party.¹²² Since reform of its sanctions procedures, the sanctions board now adopts debarment with *conditional* release as its baseline sanction.¹²³ The Board uses its discretion, contingent on the firm's compliance with its conditions of release, to lift the sanction. Formerly, sanctioned firms were eligible for participation in projects immediately upon expiry of the debarment period, notwithstanding the fact its governance may not have improved and it is still highly likely to engage in sanctionable practices.¹²⁴

There is also the option of conditional non-debarment, which effectively imposes a probation period. The sanctioned party must meet certain conditions within an established time frame or the party will be debarred. This might be appropriate where the party has already undertaken voluntary corrective measures or may apply to a parent company that has failed to actively supervise the operations of its subsidiary.¹²⁵ If the behaviour is minor or a firm is only peripherally involved rather than

¹¹⁶ Laurence Boisson de Chazournes and Edouard Fromageau "Balancing the Scales: the World Bank Sanctions Process and Access to Remedies" (2012) 23 EJIL 963 at 980.

¹¹⁷ The World Bank "The World Bank Group's Sanctions Regime: Information Note" <http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/The_World_Bank_Group_Sanctions_Regime.pdf>, at 19.

¹¹⁸ The World Bank "IBRD Articles of Agreement" (27 June 2012) <<http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf>>, art I(i).

¹¹⁹ Søreide, Gröning and Wandall, above n 33, at 529.

¹²⁰ The World Bank "World Bank Sanctions Procedures" (1 January 2011) <<http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WBGSanctionsProceduresJan2011.pdf>>.

¹²¹ Leroy and Fariello, above n 31, at 18.

¹²² At 4.

¹²³ At 15.

¹²⁴ At 14.

¹²⁵ At 5.

substantially complicit in the corruption, the Board may issue a letter of reprimand.¹²⁶ Finally, the Board may require the sanctioned party to take restitutionary steps towards any other party.¹²⁷

2 *Multilateral development banks*

The regional development banks (MDBs) have similarly developed sanctions regimes. The regimes of the Asian Development Bank, Inter-American Development Bank, the European Bank for Reconstruction and Development and the African Development Bank have evolved concurrently with the implementation and reform of the World Bank's sanctions procedures.¹²⁸

Despite some differences between the respective sanctions regimes of each MDB, there is common treatment of parties sanctioned by any one of the banks, due to the mutual cross-debarment agreement between the World Bank and the MDBs. Each bank mutually agrees to enforce debarment decisions of the other, provided that it is not inconsistent with the individual bank's legal or institutional considerations.¹²⁹ The practical benefit is a saving of costs by eliminating the need for each bank to individually sanction the party to prevent its future involvement in prospective projects.

D *Indicators of Bribery and Corruption*

The various sets of indicators related to bribery and corruption comprise another constituent of the regime complex. These are used and promulgated by NGOs, international aid agencies and international financial institutions, among others.

“Indicators are statistical measures that are used to consolidate complex data into a single number or rank that is meaningful to policy makers and the public.”¹³⁰ Empirical indicators have proven useful because quantification furnishes openness for the purpose of public scrutiny.¹³¹ Indicators may be instrumental in instigating reform to achieve improved accountability and transparency within certain sectors and in pressuring bribe-paying corporations to improve their governance.¹³² Nevertheless, indicators are inherently problematic. They are constructed on certain theories of responsibility and conceptions of problems, which are representative of the ideologies

¹²⁶ Leroy and Fariello, above n 31, at 5.

¹²⁷ At 5.

¹²⁸ At 8.

¹²⁹ Chazournes and Fromageau, above n 116, at 989.

¹³⁰ Sally Engle Merry “Measuring the World: Indicators, Human Rights and Global Governance” (2011) 52 *Current Anthropology* 83 at 86.

¹³¹ At 85.

¹³² At 90.

of the frameworks responsible for their production.¹³³ Moreover, accurate measurement of the occurrence of bribery and corruption is almost impossible. The highly subjective nature of indicators of bribery and corruption is problematic as it involves converting subjective evidence into quantifiable scores, which may not be reflective of the actual rate of bribery occurring.¹³⁴

Transparency International is a primary and authoritative issuer of such indicators. For example, the Bribe Payers Index creates a world ranking system, based on measuring the occurrence of supply side bribery. It orders countries by the propensity of their firms to pay bribes, based on the evidence of senior business executives from both developed and developing countries.¹³⁵ The Corruption Perceptions Index focuses on demand side bribery. Countries are scored and ranked based on the perceived level of corruption within their respective public sectors.¹³⁶ The Global Corruption Barometer is a more holistic measure. It surveys citizens based on their personal experiences, such as being required to pay bribes for official services.¹³⁷ The latter indicator is more focused on domestic corruption but is nevertheless relevant as it is illustrative of the propensity of a certain country's public sector to accept bribes. If this is high at a national level, it may also be high at an international level. The Corruption Perceptions Index has been particularly influential.

Engle Merry notes that indicators are relevant to the work of other entities as well as the issuing institution. For example, the Millennium Challenge Corporation (MCC), a United States foreign aid agency,¹³⁸ allocates funding to countries based on performance measured by its established indicators. A key area of concern is the promotion of good governance by controlling corruption.¹³⁹ The MCC uses Transparency International's Corruption Perceptions Index as its indicator of corruption.¹⁴⁰

As discussed in Part I, bribery and corruption are fundamental concerns of the World Bank, as they threaten the confidence of its shareholders and undermine the efficient

¹³³ Engle Merry, above n 130, at 88.

¹³⁴ Wouters, Ryngaert and Cloots, above n 12, at 235.

¹³⁵ Transparency International "Bribe Payers Index" (2016) Transparency International <http://www.transparency.org/research/bpi/overview>.

¹³⁶ Transparency International "Corruption Perceptions Index" Transparency International (2016) <<http://www.transparency.org/research/cpi/overview>>.

¹³⁷ Transparency International "Global Corruption Barometer" Transparency International (2016) <<http://www.transparency.org/research/gcb/overview>>.

¹³⁸ Millennium Challenge Corporation "Who We Fund" (2016) Millennium Challenge Corporation <<https://www.mcc.gov/who-we-fund>>.

¹³⁹ Engle Merry, above n 130, at 90.

¹⁴⁰ At 90.

allocation of its funds in the promotion of development.¹⁴¹ Therefore empirical evidence and indicators of corruption are relevant to the Bank's activities and governance initiatives. Control of bribery and corruption is one of the six indicators that the Bank uses to determine a particular country's governance score, in relation to its Worldwide Governance Indicators Project (WGI).¹⁴² The World Bank envisages that the trends illustrated by WGI data will play a supplementary role to country-specific diagnostic data in determining essential anti-bribery governance reforms.¹⁴³ However, not all World Bank Group projects use evidence of the rate of bribery and corruption to indicate a given country's rank.

The Bank's Doing Business Project is designed to objectively measure and rank economic constraints and the ease of 'doing business' within a given economy. The annual report encompasses 11 indicators.¹⁴⁴ However, the 2016 report forewarns that the Doing Business Project's methodology considers only a limited number of regulatory constraints on conducting business within a country. Notably, the report explicitly excludes the prevalence of bribery and corruption within an economy.¹⁴⁵ This is relatively surprising, as an elevated propensity to solicit or require bribe payments could be of direct relevance to the ease of doing business within a particular economy, given that the competitive advantage is borne by firms with higher capital reserves and a willingness to pay bribes, therefore effectively constraining smaller but more efficient market actors.

E Domestic Anti-Bribery Legislation

State-specific anti-bribery legislative frameworks could be categorised as a separate elemental regime or as a subset of the multiplicity of international instruments regulating corruption and establishing bribery offences. The relevant legislation is the formal manifestation of the overarching international instruments. However, it may also be considered to comprise a separate elemental regime. Whereas international instruments are aimed at achieving coherence and set purportedly binding yet sometimes aspirational obligations for states, domestic legislation plays an insurmountable role in its own right in providing a legal basis for the conscious substantive actions states take in prosecuting bribery-related offences.

¹⁴¹ Søreide, Gröning and Wandall, above n 33, at 546.

¹⁴² The World Bank Group "The Worldwide Governance Indicators" (2015) <<http://info.worldbank.org/governance/wgi/index.aspx#home>>.

¹⁴³ The World Bank Group "FAQ" Worldwide Governance Indicators (2015) <<http://info.worldbank.org/governance/wgi/index.aspx#faq-15>>.

¹⁴⁴ The World Bank Group "About Doing Business" (2016) Doing Business <<http://www.doingbusiness.org/about-us>>.

¹⁴⁵ The World Bank *Doing Business 2016* (International Bank for Reconstruction and Development, Washington D.C., 2016) at v.

Unilateral enforcement efforts of the United States are an example of the way in which domestic legislation, while maintaining coherence with international obligations, also appears to operate as a constituent part of the regime complex. The United States Securities Exchange Commission adopts a wide jurisdictional approach to its anti-bribery obligations, prosecuting activities with only a tenuous link to American soil. For example, it has brought cases based on a breach of an undertaking made to the Department of Justice. 8 of the 10 biggest settlements under the Foreign Corrupt Practices Act have involved foreign firms.¹⁴⁶

F Other Domestic Legislative Frameworks

Leaving aside specific anti-bribery legislation, other legislative frameworks indirectly regulate bribery. The operation of these frameworks is briefly described below.

1 Human rights

In recent years, international instruments¹⁴⁷ and authoritative bodies concerned with combating corruption, including the Council of Europe, have tended to advocate for the protection of free expression rights and the safeguarding of information dissemination channels. The emerging focus on facilitating reporting of bribery and corruption is cogent given that 35 per cent of journalists killed worldwide since 1992 were reporting on crime and corruption at the time of their deaths.¹⁴⁸ There is some overlap here with the work of NGOs detailed below. Freedom House is an American NGO concerned with several issues including corruption. Its primary focus is on freedom of the press.¹⁴⁹

Therefore, the role of protective frameworks for human rights goes further than protection of expression for the purposes of education and accountability. It is also necessary to protect the right not to be deprived of life for the whistle-blowers and journalists reporting on such matters. The Committee to Protect Journalists notes that 9 out of 10 cases of journalist murders, which occur while reporting on these issues go unpunished, resulting in effective censorship.¹⁵⁰

2 Freedom of international movement

Firms and individuals at the supply end of a corrupt transaction are subject to numerous sanctions, for example, under the Foreign Corrupt Practices Act (and its

¹⁴⁶ Brewster, above n 6, at 107.

¹⁴⁷ See, inter alia, the AUCPCC, above n 62.

¹⁴⁸ Spahn, above n 3, at 3.

¹⁴⁹ Wouters, Ryngaert and Cloots, above n 12, at 237.

¹⁵⁰ Frank Smyth *CJP Journalist Security Guide: Covering the News in a Dangerous and Changing World* (Committee to Protect Journalists, New York City, 2012) at 30.

overseas equivalents) and under the World Bank's sanctions procedures. However, the implicated official on the demand side often evades punishment. Denying visas to persons involved in bribery and corruption may furnish an effective demand side sanction.¹⁵¹ US Proclamation 7750 provided a legal basis for immigration officials to deny visas to foreign citizens in the event of credible evidence that they had been involved in bribery and corruption. However, the law was not stringently applied¹⁵² as details of individual visa denials remained secret, rendering it ineffective.¹⁵³ Conversely, the Obama Administration's Magnitsky Act is a more promising piece of legislation.¹⁵⁴ It requires public naming of those involved in Sergei Magnitsky's death (a Russian lawyer responsible for uncovering a \$230 million tax fraud orchestrated by public officials) and bans their entry into the United States.¹⁵⁵ This is not anti-bribery legislation per se, but could set a precedent for more broadly applicable laws that do not suffer the same shortfalls as Proclamation 7750. Transparent visa denial procedures may be instituted where there is credible evidence of a person's involvement in bribery and corruption, such as demand side implication in an FCPA settled matter.¹⁵⁶

3 *Anti money-laundering*

Money-laundering statutes do not directly concern the prohibition of bribery and corrupt practices. However, they may be a useful alternative means for prosecuting those on the demand side of the transaction, where there is no jurisdiction to do so under a state's anti-bribery laws, which often focus on supply side bribery as required by the OECD Anti-Bribery Convention.¹⁵⁷ The United States Department of Justice has successfully prosecuted foreign officials under anti money-laundering statutes where courts have rejected its jurisdiction to prosecute those officials under anti-bribery legislation.¹⁵⁸

G *NGOs*

The compilation of an exhaustive list of every NGO with ancillary relevance to bribery and corruption is beyond the scope of this paper. This section instead outlines

¹⁵¹ Garen S. Marshall "Increasing Accountability for Demand-Side Bribery in International Business Transactions" (2013) 46. N.Y.U. J. Int'l L. & Pol. 1283 at 1314.

¹⁵² Ian Urbina "Taint of Corruption is no Barrier to U.S. Visa" *The New York Times* (online ed, New York City, 16 November 2009).

¹⁵³ Marshall, above n 151, at 1314.

¹⁵⁴ Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law and Accountability Act of 2012 126 Stat. 1496.

¹⁵⁵ Richard L. Cassin "The Biggest Anti-Corruption Story of 2012" (31 December 2012) The FCPA Blog < <http://www.fcpablog.com/blog/2012/12/31/the-biggest-anti-corruption-story-of-2012.html>>.

¹⁵⁶ Marshall, above n 151, at 1315.

¹⁵⁷ OECD Anti-Bribery Convention, above n 9, art 1.

¹⁵⁸ Marshall, above n 151, at 1294.

the different facets of the NGO constituent of the regime complex with reference to prominent examples.

1 Global NGOs

As discussed above, Transparency International is the premier global watchdog agency for corruption. It is responsible for issuing groups of indicators used by various other entities such as international aid agencies. The Berlin-based organisation has over 100 national chapters.¹⁵⁹ It has produced a multiplicity of guiding publications such as its Business Principles for Countering Bribery,¹⁶⁰ as well as working with major international banks to develop preventative standards to counter laundering of the proceeds of corruption.

There are also a number of other international anti-corruption NGOs that supplement the work of Transparency International. Transparify¹⁶¹ reports on the financial transparency of major think tanks based on the availability of information concerning the sources and proportion of funding they receive. The Global Organization of Parliamentarians Against Corruption¹⁶² (GOPAC) comprises a transnational not-for-profit network of parliamentarians committed to good governance and combating corruption. It aims to assist politicians in their advocacy and legislative capacities to render government procedures accountable and transparent, through the provision of workshops, handbooks and global task forces.

2 Regional NGOs

Furthermore, a number of NGOs are specifically dedicated to fighting corruption within a particular region or state. For example, Africa has, inter alia, the Anti Corruption Coalition (Uganda)¹⁶³ and Corruption Watch (South Africa)¹⁶⁴. Asia has,

¹⁵⁹ Transparency International “Our Organisation” (2016) Transparency International <<https://www.transparency.org/whoweare/organisation/>>.

¹⁶⁰ Transparency International “Business Principles for Countering Bribery” (2016) Transparency International <https://www.transparency.org/whatwedo/tools/business_principles_for_countering_bribery/1/>.

¹⁶¹ Transparify “About” (2016) Transparify <<http://www.transparify.org/about/>>.

¹⁶² GOPAC “Overview” (2016) GOPAC <<http://gopacnetwork.org/overview/>>.

¹⁶³ Anti Corruption Coalition Uganda “About Us” (2015) Anti Corruption Coalition Uganda <<http://accu.or.ug/about-us/>>.

¹⁶⁴ Corruption Watch South Africa “Who We Are” (2016) Corruption Watch South Africa <<http://www.corruptionwatch.org.za/about-us/who-we-are/about-corruption-watch/>>.

inter alia, the Indonesia Corruption Watch,¹⁶⁵ Integrity Watch Afghanistan¹⁶⁶ and the Centre for Public Interest Litigation (India).¹⁶⁷

3 *Grassroots anti-corruption initiatives*

Grassroots movements have played an instrumental role in combating corruption. For example, Sakker el Dekkene (a Lebanese organisation) used a guerrilla advertising campaign and online reporting platform to raise awareness of corruption and encourage whistle-blowing, which it used as empirical evidence of the rife occurrence of bribery in Lebanon, with the objective that this evidence be used to pressure institutions into self-reform.¹⁶⁸ These techniques significantly raised civil awareness of the problem and resulted in partial reform of the Lebanese finance ministry.¹⁶⁹

Shayfeen.com is a similar Egyptian grassroots movement. An online platform facilitates the reporting of instances of corrupt behaviour, which is then collated and passed on to the media. In some cases, the organisation compiles reports to demonstrate groupings of related claims.¹⁷⁰

4 *'Soft law' rules and best practice guidelines*

In addition to the 'hard law' offences states implement under international treaty obligations, there are a number of guiding, self-regulatory 'soft law' measures and recommended best practice guidelines to fight bribery and corruption. These are here as part of the NGO section as many of these codes of conduct are promulgated by non-governmental actors or groups. However, they warrant specific discussion as the various sets of soft law rules provide very useful guidance.

The existence of soft law obligations dates back to the 1970s. During this period the International Chamber of Commerce (ICC) adopted a set of flagship, self-regulatory rules designed to guide good commercial practices in fighting corruption. These rules underwent reform in 2011¹⁷¹ to reflect the UN Guiding Principles on Business and

¹⁶⁵ Indonesia Corruption Watch (2016) <<http://www.antikorupsi.org/>>.

¹⁶⁶ Integrity Watch Afghanistan "About Us" (2016) Integrity Watch Afghanistan <<https://iwaweb.org/#>>.

¹⁶⁷ Legally India "Centre for Public Interest Litigation" (2016) <<http://www.legallyindia.com/tag/centre-for-public-interest-litigation-cpil>>.

¹⁶⁸ Sakker "Virtuous Cycle" (2014) <https://www.sakker.com/about.php?page=visual>>.

¹⁶⁹ For more information see <<https://www.insightonconflict.org/conflicts/lebanon/peacebuilding-organisations/sakker-el-dekkene/>>.

¹⁷⁰ Sa'eda Kilani *Against Corruption: The Role of Arab Civil Society in Fighting Corruption* (eBook ed, 2014) at 43.

¹⁷¹ ICC Commission on Corporate Responsibility and Anti-Corruption *ICC Rules on Combating Corruption* (International Chamber of Commerce, Paris, 2011).

Human Rights (although these rules are concerned with human rights abuses rather than corruption specifically).¹⁷²

As discussed above, Transparency International has developed its Business Principles for Countering Bribery. International economic forums often launch codes of conduct or substantive guidelines against bribery and corruption. In 2004 the World Economic Forum launched the Partnering Against Corruption Initiative (PACI), which comprises a voluntary set of initiatives that companies can join. PACI has a dual self-evaluative and external monitoring system.¹⁷³

H Asset Recovery Initiatives

Stolen asset recovery procedures present a promising method of combating and punishing demand side bribery.¹⁷⁴ Furthermore, they allow reallocation of the stolen resources. The UNCAC highlights the necessity of effective asset recovery mechanisms. However, the efficacy of such procedures is to an extent contingent on cross-border co-operation between states.¹⁷⁵ Asset recovery initiatives necessarily require co-ordination on both a national and international scale, where corrupt funds have been transferred outside the jurisdiction.

Asset recovery mechanisms may take a variety of forms. Certain states establish institutions vested with powers to freeze and recover assets suspected to be connected to corruption offences. The Anti-Corruption Commission of the Cayman Islands, a major financial centre, is conferred the power of liaising with foreign anti-corruption authorities and obtaining court orders to freeze the assets of persons who are suspected of corruption offences.¹⁷⁶

A major international effort is the Stolen Asset Recovery Initiative (StAR), which is a joint venture between the World Bank and the United Nations Office on Drugs and Crime.¹⁷⁷ StAR's objective is to end the provision of safe havens for corrupt funds, by working with developing countries and financial hubs to prevent money-laundering of the proceeds of corruption and facilitate the repatriation of stolen

¹⁷² Wouters, Ryngaert and Cloots, above n 12, at 236.

¹⁷³ At 237.

¹⁷⁴ Spahn, above n 3, at 29.

¹⁷⁵ Lucinda A. Low, Sarah R. Lamoree and John London "The "Demand Side" of Transnational Bribery and Corruption: Why Leveling the Playing Field on the Supply Side Isn't Enough" (2015) 84 Fordham L. Rev. 563 at 587.

¹⁷⁶ Cayman Islands Government "About Us" Anti-Corruption Commission <<http://www.anticorruptioncommission.ky/portal/page/portal/acchome/what-we-do>>.

¹⁷⁷ Low, Lamoree and London, above n 175, at 587.

assets.¹⁷⁸ The initiative is not concerned with bringing asset recovery claims in itself. It aims to provide technical assistance, education and training in order to achieve the stated objective.¹⁷⁹

I Good Governance and Deregulation Policies

Economic deregulation policy agendas do not strictly operate as a constituent part of the regime complex in their own right. However, they play an important supplementary role. They operate at a national level but depend on international uniformity. There is a prevalent concern that elevated levels of regulatory constraints, including investment regulations, price controls and licensing requirements (coupled with monopoly power over granting licenses), facilitate corrupt behaviour and rent-seeking practices.¹⁸⁰ The existence of such bureaucratic restrictions informs the World Bank's 'control of corruption' governance indicator discussed above. The World Bank has previously iterated that targeted anti-corruption strategies are unlikely to succeed unless embedded within broader good governance frameworks.¹⁸¹

The relevance of good governance ideologies to bribery and corruption is wider in scope than economic governance alone. One suggested preventative tactic is fuller disclosure requirements. For example, a public official may be required to disclose former and existing privately held positions, in the interests of transparency.¹⁸²

J Banking and Financial Practice Regulations and Guidelines

Financial and banking practice regulation is another area of the regime complex that can be considered an elemental regime in its own right. This area overlaps with anti money-laundering legislation. However, the role of such legislation has been conceptualised as an alternative combative strategy, whereas proper banking practices can be a preventative strategy. Despite these interactions, financial regulations are not exclusively corruption-focused and thus sit as a separate facet of the framework. There is also overlap with the asset recovery regime, as proper banking practices will facilitate the efficacy of stolen asset repatriation. Moreover, the role of NGOs has been critical in this field. For example, Transparency International worked closely with the Wolfsberg Group (thirteen major global banks including Goldman Sachs, Deutsche Bank and Bank of Tokyo-Mitsubishi UFJ), to develop the Wolfsberg Anti-

¹⁷⁸ The World Bank and the United Nations Office on Drugs and Crime "The Stolen Asset Recovery Initiative" (2015) StAR <<http://star.worldbank.org/star/>>.

¹⁷⁹ Low, Lamoree and London, above n 175, at 587.

¹⁸⁰ Wouters, Ryngaert and Cloots, above n 12, at 232.

¹⁸¹ At 267.

¹⁸² At 267.

Money Laundering Principles for Private Banking.¹⁸³ Regulation of banking practice and disclosure requirements may operate conjunctively with asset recovery procedures as an economic deterrent from engaging in corrupt practices as it increases the likelihood of discovery and subsequent prosecution. There are also various other issuers of financial and banking regulations including the Financial Action Task Force and the Basel Committee on Banking Supervision.¹⁸⁴

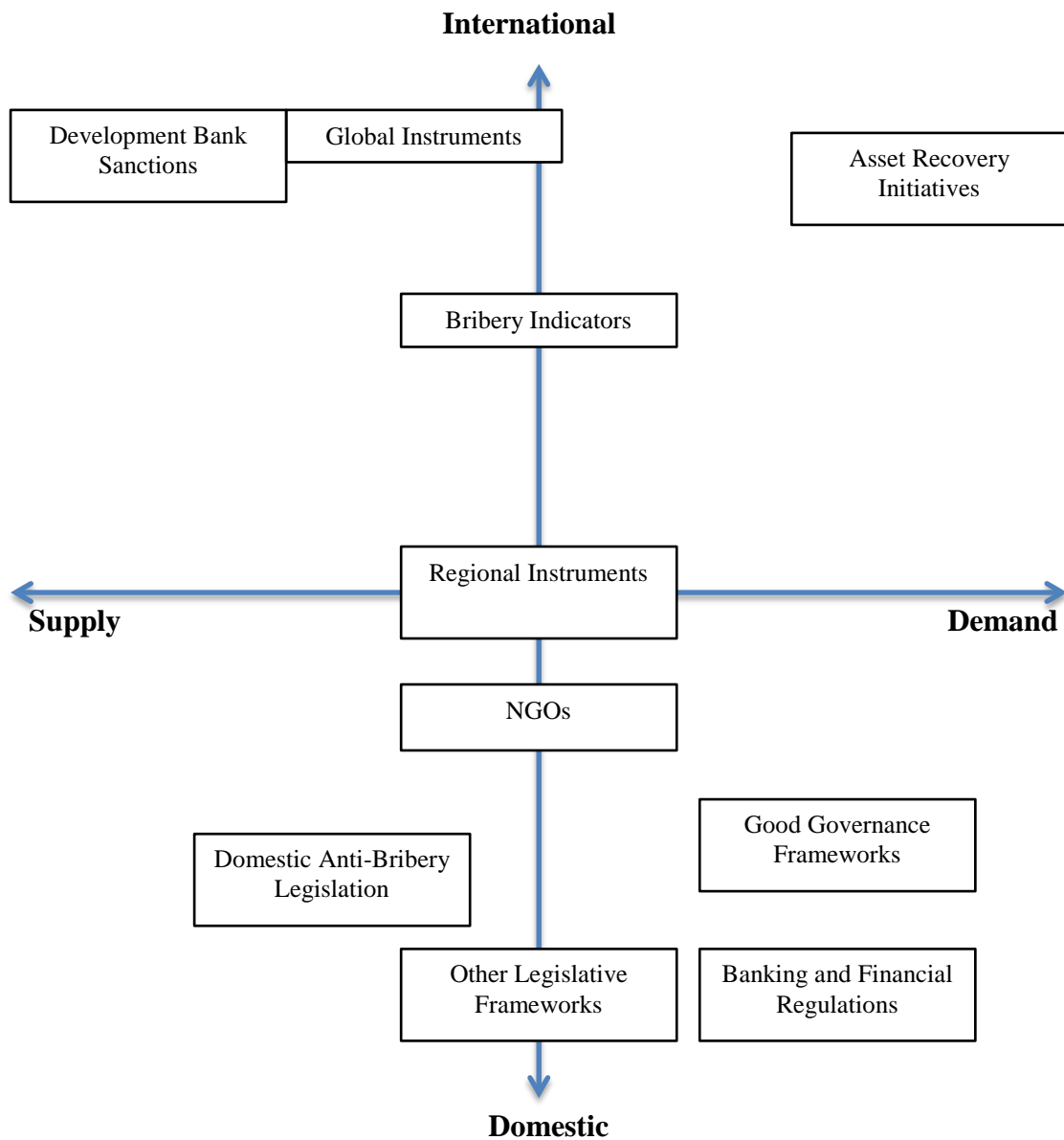
¹⁸³ The Wolfsberg Group “Global Banks: Global Standards” (2015) Wolfsberg News <<http://www.wolfsberg-principles.com/>>.

¹⁸⁴ Wouters, Ryngaert and Cloots, above n 12, at 262.

IV Mapping the Regime Complex for Bribery

This part maps out the regime complex for bribery. The figure below is a graphic representation of the constituent parts that comprise the regime complex for bribery. The constituent regimes are organised along an x-axis and a y-axis based on their individual characteristics. The x-axis placement depicts whether the elemental regime is concerned with the supply or demand side of a bribery transaction, or possibly both. The y-axis placement focuses on whether the regime has an international or domestic emphasis, although it may entail both. The following sections briefly explain the reasoning for each regime’s placement on the respective axes.

A The Regime Complex for Bribery



B X-Axis – Supply and Demand

The x-axis is concerned with whether the constituent regime applies to the supply or demand side of the sanction. Those placed centrally apply equally to both ends.

The financial sanctions regimes of the World Bank and the MDBs sit firmly at the supply end of the spectrum because they are solely concerned with firms that offer or supply bribes in the context of bank-financed development projects. Corrupt recipients are fully exempt from the sanctioning competencies.¹⁸⁵ Domestic anti-bribery legislation sits further toward the supply-end, despite often criminalising both ends of the transaction. Owing to the existence of the OECD Anti-Bribery Convention, which solely targets supply side bribery, domestic supply side sanctions are implemented and enforced more stringently.¹⁸⁶ Furthermore, the prominence of the OECD Anti-Bribery Convention skews the placement of global instruments towards the supply side, even though the UNCAC also addresses demand side bribery.

Regional instruments, NGOs, indicators regimes and other relevant legislative frameworks sit in the centre. Instruments in the first category explicitly proscribe both payment and solicitation of bribes. The latter three categories are concerned with the issues of bribery and corruption more generally and are therefore not solely targeted at one end nor the other.

Asset recovery programs, good governance ideologies and banking and financial regulatory frameworks are more demand side focused. For example, implementing banking and financial regulations and promoting better governance both deters bribery and makes it harder for the recipient to hide ill-gotten gains. Facilitating the repatriation of stolen funds sanctions the corrupt recipient of the bribe payment as they are rightfully deprived of these monies in addition to facing punitive sanctions under domestic laws. It is notable that all three of these areas are more recent, emerging elements of the regime complex rather than fully-fledged constituents. For example, StAR involves technical guidance and education rather than bringing substantive asset recovery claims. Furthermore, good governance frameworks and proper banking regulations are, in most countries, still in the developmental stage. Despite the figure's apparent balance, enforcement of demand side laws is a

¹⁸⁵ The World Bank “The World Bank Group’s Sanctions Regime: Information Note” <http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/The_World_Bank_Group_Sanctions_Regime.pdf>, at 19.

¹⁸⁶ See, inter alia, Brewster’s discussion of the extremely effective enforcement of the US Foreign Corrupt Practices Act, above n 6.

somewhat lacking area of the regime complex. Part V of this paper discusses the insufficiency of the demand side sanctions in further detail.

C Y-Axis – Scope of Application

The y-axis is concerned with whether the principal application of the constituent regime is domestic or international. The elemental regimes that operate in relation to certain regions sit in the centre of the spectrum.

The principal, global anti-bribery instruments are the UNCAC and the OECD Anti-Bribery Convention, which have supranational application. The development bank sanctions also apply internationally to any firm caught engaging in bribery in the context of Bank-financed activities. Many of the asset recovery initiatives and programs are still in the developmental stages. However, full efficacy of these mechanisms is contingent on international implementation so that cross-border authorities and institutions are able to track down and return these assets. Many bribery indicators are country-specific. However, they sit closer to the international extreme as international institutions such as NGOs, aid agencies and the World Bank principally use the aggregate data.

Regional instruments sit in the centre of the spectrum. These apply internationally but are generally only relevant to a specific area and lack the geographical significance of an instrument such as the UNCAC. NGOs also sit close to the centre of the y-axis. Major corruption watchdogs such as Transparency International have chapters in many countries. However, NGOs as a group sit closer to the domestic end of the spectrum for two reasons. First, many states have one or even a number of anti-bribery NGOs specific to that territory. Second, as discussed in Part IV, the work of country-specific NGOs such as Shayfeen.com in Egypt and Sakker el Dekkene in the Lebanon has been instrumental in engaging civil society and instigating reform.

Domestic anti-bribery legislation and good governance policies comprise the next group down. These are primarily state-level regimes. However, domestic anti-bribery legislation can be and has been used extra-territorially. Eight of the ten largest settlements under the Foreign Corrupt Practices Act have been made with foreign firms.¹⁸⁷ Moreover, whereas cognisable good governance norms are generally nation-specific, some uniformity is often achieved by way of regional agreement.¹⁸⁸ Below this are other domestic legislative frameworks, of which banking and financial

¹⁸⁷ Richard L. Cassin “Here’s our new Top Ten list, with VimpelCom landing sixth” (19 February 2016) The FCPA Blog <<http://www.fcpablog.com/blog/2016/2/19/heres-our-new-top-ten-list-with-vimpelcom-landing-sixth.html>>.

¹⁸⁸ See, for example, the APEC transparency standards, above n 113.

practice regulations could be deemed a subset. These laws are jurisdiction-specific and require national enactment and enforcement.

This paper considers that the regime complex is relatively balanced in terms of domestic and international anti-bribery measures. Moreover, some of the primarily domestic constituents do have a level of international application or utility and vice versa. Therefore, this paper is more interested in the disparity in the effective enforcement of supply and demand side sanctions.

V *Assessment of the Efficacy and Functionality of the Regime Complex for Bribery*

This part of the paper analyses the efficacy and normative functionality of the regime complex for bribery. First, it considers Keohane and Victor's six assessment criteria.¹⁸⁹ Second, it explores the lack of behavioural synergy between different actors. Third, it investigates possible improvements to the ways in which information and knowledge are disseminated between the constituent elements. Fourth, it analyses the visual map of the regime complex for bribery in Part IV and proposes that the lack of effective demand side sanctions could counteract the effectiveness of the supply side sanctions. Fifth, it reconsiders the functionality of the regime complex from a human rights perspective rather than a criminal one.

A *Keohane and Victor's Criteria for Assessment*

Keohane and Victor's criteria for assessment provide a useful starting point. However, these criteria are non-exhaustive, therefore the regime complex for bribery warrants a broader discussion than solely a strict analysis under these six factors.

1 *Coherence*

The constituent regimes of a regime complex may be mutually reinforcing or incompatible and harmful to one another.¹⁹⁰ The regime complex for bribery enjoys a relatively high level of coherence. The constituent elements of the regime complex for bribery present a relatively uniform body of norms. However, the disparity in effective enforcement between the supply and demand side sanctions is potentially problematic as it creates conflicting interactions between different groups of actors. Similarly, the sanctions procedures of the World Bank and MDBs competencies specifically apply to the firm at the supply end of the transaction. Moreover, active enforcers of the OECD Anti-Bribery Convention such as the US use domestic legislation very effectively to sanction supply side bribery.¹⁹¹ However, the full efficacy of the sanctions procedures presupposes active enforcement of domestic supply side anti-bribery laws, which is often not the case. This creates a clash between the rent-seeking practices of corrupt officials and the deterrence objectives of the sanctions procedures for corporations involved in Bank-funded projects. Therefore, despite a high level of formal coherence between the norms there is a low level of coherence in respect of the lack of consistent enforcement.¹⁹²

¹⁸⁹ Keohane and Victor, above n 13, at 16.

¹⁹⁰ At 16.

¹⁹¹ Brewster, above n 6, at 107.

¹⁹² Margulis, above n 14, at 61.

As part of the coherence criterion, Keohane and Victor also consider the nature and level of mutual reinforcement between the elemental regimes. There is mutual reinforcement *within* the constituent regimes. The international financial institutions regime is an example. The mutual debarment agreement,¹⁹³ between the international financial institutions to enforce each other's debarment sanctions is an example of preventative collaboration to manage risk. It is cost efficient and mitigates the risk that a firm debarred by one bank will be able to circumvent the sanctions procedures and participate in projects managed by another bank. This is an example of effective risk management as a preventative strategy. However, resources might be put to better use *across* the different elemental regimes for improved mutual reinforcement. In theory, this happens to an extent. For example, the World Bank sometimes refers bribery cases to national authorities for prosecution of the implicated recipient of the bribe. However, there is little empirical evidence concerning the number of referrals made or whether any result in a prosecution being brought.¹⁹⁴

2 *Accountability*

The elements of a regime complex should be accountable in the sense that one actor can hold another actor to certain standards in order to definitively determine whether it has fulfilled its responsibilities. Legitimacy through accountability is often lacking absent a single integrated regime.¹⁹⁵ Academics have identified this precise issue as a key weakness in the regime complex for bribery. In the context of international instruments such as the OECD Anti-Bribery Convention, formal implementation of the requisite legislation and offences is uniform across member countries, however substantive compliance by way of enforcement is extremely low, with only four active enforcers of the Convention.¹⁹⁶

Most international anti-bribery instruments are silent on the substantive level of enforcement required of domestic anti-bribery laws. This is a significant difference from the regime complex for climate change, where quantifiable targets are put into place. Under the regime complex for bribery, it is not strictly possible for one state to hold another to account for its low enforcement efforts. However, subject to the jurisdictional approach a state takes, it may constrain the actions of another state's national firms.¹⁹⁷ State-to-state accountability may not always be a prerequisite of an effective regime complex. It might be less important in a regime complex such as the

¹⁹³ Chazournes and Fromageau, above n 116, at 989.

¹⁹⁴ Low, Lamoree and London, above n 175, at 578.

¹⁹⁵ Keohane and Victor, above n 13, at 17.

¹⁹⁶ Brewster, above n 6, at 87.

¹⁹⁷ For example, the US adopts a wide jurisdictional approach takes action against foreign firms under its Foreign Corrupt Practices Act as a means of interstate enforcement.

one for bribery, where it is difficult and perhaps unhelpful to set quantifiable targets. The covert nature of bribery makes it hard to accurately measure its incidence rate and accordingly difficult to hold a state to a standard that reflects its individual incidence rate of bribery. Moreover, active enforcement of anti-bribery laws may be lower on the agenda of states with more pressing policy issues or more constrained financial resources, making it unfair to hold all states to the same standard.¹⁹⁸

3 *Determinacy*

The rules of a regime complex should have easily ascertainable normative content.¹⁹⁹ A determinate set of rules or doctrines is clear-cut. A law is determinate where its application to a particular set of facts would be clear to a high percentage of informed observers.²⁰⁰ At first glance, the norms of the regime complex for bribery appear to score relatively highly for determinacy. However, this paper considers that in reality, they fall short in several respects.

The fundamental norms of the regime complex for bribery are ascertainable and determinate in the sense that the international instruments and related domestic laws tend to implement all-encompassing bribery-related offences. The offences are deliberately drafted in broad terms. Article 1 of the OECD Anti-Bribery Convention provides an example. It is an offence to confer *any* undue advantage on a public official.²⁰¹ Therefore, the offence clearly includes non-pecuniary advantages such as obtaining a place in a particular school for the child of a foreign public official. Moreover, an offence is committed whether or not the official accepts the undue advantage, because offering any such advantage is similarly criminalised. The prescribed standard of conduct expected of private corporations is both high and clear. Therefore, the comprehensive drafting of some bribery-related offences results in a high level of determinacy.

However, some offences are less determinate. The UNCAC requires states to *consider* establishing an offence of illicit enrichment. Illicit enrichment constitutes a significant increase in the assets of a public official that cannot be reasonably explained in relation to lawful income.²⁰² In theory, this is an extremely effective anti-bribery offence because it promotes transparency of financial activity and circumvents the difficulties in evidence-gathering resulting from the covert nature of bribery. However, such an offence is not determinate because there is significant scope for

¹⁹⁸ Brewster, above n 6, at 102.

¹⁹⁹ Keohane and Victor, above n 13, at 17.

²⁰⁰ Donald A. Dripps “The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules” (2014) 74 Miss. L.J. 341 at 342.

²⁰¹ OECD Anti-Bribery Convention, above n 9, art 1.

²⁰² UNCAC, above n 37, art 20.

interpretation of the reasonableness threshold based on evidence of lawful income. In addition to interpretation issues, the extent of applicability of the rules to certain actors is uncertain. This is discussed in fuller detail below, in relation to the blurring of the distinction between public and private bribery.

Keohane and Victor also state that rules with highly ascertainable normative content facilitate and encourage the effective investment of state resources in the enforcement of the rules, which in turn acts as an incentive for other states to take similar action.²⁰³ Furthermore, they note that this will build confidence that actors are taking an active stance against the problem, notwithstanding their diverging interests.²⁰⁴ In the context of the regime complex for bribery, this is not always true. The norms of the regime complex for bribery can be contrasted with the norms of the regime complex for climate change to illustrate this point. For example, the Kyoto Protocol creates substantive obligations and targets, which in turn means that it is determinable whether a particular state has fulfilled its obligations.²⁰⁵ By contrast, the norms of the regime complex for bribery do not detail substantive obligations that states must attain such as a certain amount of resource expenditure on the issue. This also means that it is difficult to sanction any given state for non-compliance with its obligations.²⁰⁶ Therefore, this paper argues that the regime complex for bribery falls short of determinacy in light of the above analysis and consequently concludes that enforcement of the rules is not incentivised and the promotion of trust between respective states is lacking.

4 *Sustainability*

Sustainable regimes build in redundancy. In the climate change context, Keohane and Victor considered whether the policies of the regime were long-lived.²⁰⁷ The major element of this criterion appears to be consistency of incumbent and future rules. This is for the most part unproblematic for the regime complex for bribery. With the exception of the recent inclusion of private bribery, the core offences are unlikely to change substantially. The rules are likely to become more clear-cut as the necessary good governance frameworks and banking and financial regulations begin to gain fuller form. These developments will not conflict with the existing laws, but rather will furnish broader good governance frameworks to support the constituents of the regime complex.

²⁰³ Keohane and Victor, above n 13, at 17.

²⁰⁴ At 17.

²⁰⁵ At 10.

²⁰⁶ Brewster, above n 6, at 109.

²⁰⁷ Keohane and Victor, above n 13, at 17.

5 *Epistemic quality*

Keohane and Victor state that regime complexes vary in epistemic quality, noting that this is intrinsically linked to both effectiveness and legitimacy. Variations in epistemic quality might occur in respect of the correlation between the respective norms and empirical evidence or scientific knowledge.²⁰⁸ A cogent measure of epistemic quality may be the malleability of the rules in the event of availability of new information.

The covert nature of bribery and corruption and the steps taken by those involved to erase evidence makes it extremely difficult to accurately collate empirical data concerning, inter alia, the geographic concentration of bribery, the size of its economic impact and its prevalence within particular administrations or institutions. Where it does become available, empirical evidence will play a crucial role in the development of the policy agendas of the respective elemental regimes. For example, increased knowledge of the kinds of regulations and governance policies that induce or facilitate rent-seeking behaviour or financial practices within institutions that inadvertently facilitate the hiding of corrupt funds should inform the way in which the individual elemental regimes develop over time.

6 *Fairness*

The final, somewhat elusive, criterion is fairness. Keohane and Victor note that states that are willing to co-operate should not be denied benefits.²⁰⁹ There is no evidence that this is the case in the regime complex for bribery.

It is also noteworthy that Keohane and Victor state that international institutions are unlikely to rank well on these criteria, due to the existence of conflicts of interest and asymmetries of power. Therefore, these factors provide a useful mechanism for identifying possible issues areas within a regime complex. However, a fuller, more holistic assessment is necessary in order to properly assess functionality.

B Achieving Substantive Synergy within the Regime Complex for Bribery

This paper considers that in addition to a coherent set of rules, achieving synergy in the substantive interactions of different actors is fundamental to the efficacy of the regime complex. The following section considers two currently problematic aspects in light of this proposition. First, it considers the effect of the incumbent norms on the behaviour of private corporations as opposed to officials. Second, it explores possible

²⁰⁸ Keohane and Victor, above n 13, at 17.

²⁰⁹ At 17.

repercussions of the diminishing division between the public and the private sector and its consequences.

1 Development bank sanctions and domestic law enforcement

As outlined in Part II, a lack of effective enforcement of domestic laws against public officials may be inimical to the objectives of the sanctions procedures of the World Bank and the MDBs. The sanctions procedures are aimed at both deterring and combatting corruption in the context of Bank-financed activities on the supply side. However, the lack of consistent and effective sanctioning on the demand side does nothing to reduce, and may spur, rent-seeking practices on the part of officials. This jeopardises the trustworthiness and legitimacy of the World Bank's activities because a regime targeted solely at supply side bribery cannot secure the necessary donor confidence in its activities.²¹⁰ This is problematic because the Bank's successful functioning relies on continued donor confidence, which the sanctions procedures are designed to support.²¹¹ The resulting effect is that companies are then faced with a choice to either refuse to comply with bribe payment solicitation and risk losing out on major business opportunities or to run the risk and engage in corrupt activities.

Uniform enforcement of both supply and demand side anti-bribery measures is necessary for two reasons. First, it is required for consistent treatment of key parties to a fraudulent or corrupt transaction. Second, it is needed to effectively synergise the behaviour of these actors and to facilitate the overall efficacy of the regime complex for bribery. Several measures have been suggested to effectively counter this problem. Søreide, Gröning and Wandall propose a cross-collaboration process. In essence, the development banks could mutually agree to restrict loans unless a particular prosecution is brought through the criminal justice system. If financial circumstances became dire, external controls could be used to control monies to fulfill urgent government needs.²¹²

However, the first part of this solution tends to ignore the well-established policy of the World Bank (and the regional MDBs) not to obliquely sanction untrustworthy governments. The Bank cannot effectively debar a government or country from financial support due to an untrustworthy administration as it has an obligation to financially assist developing countries.²¹³ The motive behind this strategy is understandable. However, threatening a government with future loan ineligibility

²¹⁰ Søreide, Gröning and Wandall, above n 33, at 546.

²¹¹ At 547.

²¹² At 549.

²¹³ The World Bank "IBRD Articles of Agreement" (27 June 2012) <<http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf>>, art I(i).

unless a particular prosecution is brought is unlikely to be a workable strategy in practice. There may be a multitude of other factors that dictate whether a claim is brought, such as possible corruption within the justice system, a lack of sufficient resources or priority of other more pressing claims. Furthermore, even where funds are mismanaged within a project as a result of corruption, it does not follow that the citizens receive no benefit whatsoever. This solution would negatively affect the interests of those citizens who would have benefited from the completion of the project, notwithstanding the inefficient allocation of loan monies.

A preferable approach, with more enduring benefits, could be to build on the good governance policies and guidelines already developed by the World Bank and the MDBs. In practice, it may be difficult to place external controls on individual actors. However, the banks could play an instrumental role in setting up disclosure requirements and reporting mechanisms that ensure clarity in the specific ways in which the funds are being used and to prevent bribery by making it harder for officials to cover up their corrupt gains. This might initially be instituted as a set of soft law principles with technical support provided to countries to implement the requisite policies. After an initial grace period, then Bank loans might, subject to discretion, become contingent on the existence of sufficiently strengthened mechanisms to protect Bank funds from improper use.

However, this approach also has drawbacks. More transparent procedures undoubtedly mitigate the risk of bribery and corruption going unnoticed. However, no matter how transparent the procedures, there is still at least a chance that they will be abused. If it is left up to governments themselves to report back to the Bank, there is a higher chance of misuse. The Bank might establish an independent monitoring board tasked with ensuring the veracity of information reported and spending disclosed. However, gaining access to accurate information about whether the disclosure and reporting mechanisms are being used honestly may prove extremely difficult and is contingent on bona fide cooperation of the respective governments of the countries involved, which may be unlikely if it is in their interests to cover up incidences of bribery and corruption.

2 *Public and private bribery*

Public bribery is customarily distinct from private bribery as the identity of the recipient is a public official rather than a private sector agent.²¹⁴ Public bribery (and corruption) has conventionally been the focus of the relevant international

²¹⁴ Jeffrey R. Boles “The Two Faces of Bribery: International Corruption Pathways Meet Conflicting Legislative Regimes” (2013) 35 Mich. J. Int’l L. 673 at 688.

instruments. Important treaties²¹⁵ and their associated domestic laws often focus exclusively on public bribery. There is a historical perception that private bribery warrants a lesser level of intervention because it solely affects the business community and the public sector theoretically remains uninfluenced. Therefore, no harm to the interests of citizens results.²¹⁶ This conventional attitude is evidenced by the non-mandatory private corruption criminal offences that the UNCAC suggests states *may* consider implementing.²¹⁷ Marshall considers that the OECD Anti-Bribery Convention requires revision, and the relevant legislation needs to be amended to include private bribery as a criminal offence.²¹⁸

Privatisation of public sector assets and services (synonymous with outsourcing) has become increasingly common. This significantly fuses the roles and functions of public officials and private sector agents. The regime cannot therefore be fully effective if only public bribery is actively criminalised. This generates problematic behaviours that the regime complex for bribery must address. Private sector agents charged with public functions may be driven toward a higher propensity to solicit bribe payments than their public sector counterparts. There may also be uncertainties around whether certain actors' competencies are covered by the relevant definition of public sector official within a given jurisdiction.

Difficulties with the conventional focus on public bribery also arise outside of the privatisation context. A rigid focus on the abuse of public function or public office is too narrow.²¹⁹ Lavish lunches organised by a pharmaceutical company to influence doctors' decisions to prescribe certain medicines does not involve an abuse of a public office, nor, as the commentators argue, does it necessarily result in private gain per se (it may not even reach the level of conferring an undue advantage).²²⁰ Academics argue that private and public bribery are dual manifestations of the same offence and are therefore underscored by the same principles, involving breach of trust or breach of fiduciary duty violations. The bribe is intended to influence a disregard for said duty.²²¹ This issue evidently requires significant attention. In the privatisation context, bribery may be sufficiently addressed by extension of the existing laws. However, in light of the above example, it is questionable whether extension of the current offences will satisfactorily encompass private bribery outside of the privatisation sphere.

²¹⁵ See for example the OECD Anti-Bribery Convention, above n 9 and the IACAC, above n 100.

²¹⁶ Boles, above n 214, at 688.

²¹⁷ UNCAC, above n 37, art 21.

²¹⁸ Marshall, above n 151, at 1306.

²¹⁹ Wouters, Ryngaert and Cloots, above n 12, at 276.

²²⁰ At 276.

²²¹ Boles, above n 214, at 692.

The rationale for criminalising private bribery is that harm does actually result. The International Chamber of Commerce recognised this in its recommendations to the OECD to include private sector bribery in its Anti-Bribery Convention, noting that private bribery undermines the proper functioning of global competition, even where it does not undermine public trust in the administration.²²² Extension of traditional bribery offences is less suitable to instances of private bribery where the corrupt transaction does not involve a public actor or exercise of a public function. Moreover, there may actually be no direct private gain for the recipient involved. An employee of a company may be motivated to solicit a bribe by higher profits or some other benefit for the company.²²³ In the privatisation context, the resulting harms are similar to those flowing from public bribery.

This paper considers that the regime complex for bribery would benefit from increased state engagement with private bribery. This may involve commissioning the redrafting of public bribery offences to include bribery of a private sector agent with a view to influencing the exercise of a function that concerns the public interest. Furthermore, states *may* consider revisiting the issue of private bribery outside of the privatisation context. However, in doing so, states will necessarily have to consider commercial realities. It is in the nature of commerce that private actors maintain functioning business relationships with the aid of small perks. Not all gratuitous advantages can necessarily be conceived as private bribery affecting the functioning of competition. They may promote efficiency by strengthening relationships between actors, which must be considered before drastic offences are introduced.

C Integrated Diffusion of Information

Struett, Nance and Armstrong argue that the generation and subsequent diffusion of new knowledge and information is fundamental to the efficacy of the regime complex. It enables the involved parties to approach the issue in a uniform and integrated fashion, despite a certain level of fragmentation between the different elemental regimes.²²⁴ There are examples of diffusion of knowledge outside of the regime complex. For example, Transparency International's Corruption Perceptions Index is utilised as a decision-making tool by foreign aid agencies. Integration of the way in which the elemental regimes impart and receive information may improve the efficiency of the regime complex, as opposed to further integration of the actual elemental regimes themselves.

²²² International Chamber of Commerce Recommendations by the International Chamber of Commerce on Further Provisions to be Adopted to Prevent and Prohibit Private-to-Private Corruption – Memorandum to the Working Group on Bribery in International Business Transactions (13 September 2006).

²²³ Wouters, Ryngaert and Cloots, above n 12, at 276.

²²⁴ Struett, Nance and Armstrong, above n 15, at 94.

The lack of a single institutional core is a common feature of regime complexes.²²⁵ This paper considers that a core platform for the dissemination of information may be a possible addition to consider in order to improve the efficacy of the regime complex. Reliable data and statistics concerning corrupt practices and bribery are inherently valuable as they are extremely difficult to come by. At present, there is no institution or organisation responsible for disseminating aggregate data and knowledge between the different constituent elements of the regime or to the individual actors and entities that exist thereunder. An information distribution platform could facilitate education about the prevalence of bribery within certain geographical areas, industries or even certain corporations. It could also enhance existing technical training programs by providing empirical evidence of which combative methods and preventative strategies have been successful and which have not. Furthermore, NGOs could also use such evidence to develop existing good governance guidelines and policies to guide states' efforts in combating bribery and corruption.

However, inherent in such a proposal are several significant difficulties that would need to be overcome. First, the data and statistics would be of no use in combatting the problem unless they were reliable and verifiable. Furthermore, there is an issue as to whether objective or subjective measures of the incidence rate of bribery are of more use. Generally, objective data is considered a more reliable measure. However, the World Bank forewarns that it is very difficult to collate objective data on bribery in the first place and has consequently formed the view that perceptions-based measures are an invaluable tool of capturing on the ground realities of governance strategies and their respective outcomes.²²⁶ NGOs and international financial institutions such as the World Bank have therefore tended to incorporate use of subjective indicators such as the Corruption Perceptions Index. Although this may be a valuable source of information, it is still unreliable to an extent and there will likely be inaccuracies and omissions in the data, particularly in the case of states where the occurrence of bribery and corruption is less overt rather than an ingrained civil norm or feature of everyday life that citizens experience.

Another significant hurdle is the nature of responsibility and accountability for the collection and accuracy of the data. Transparency International (or a similar agency) may be a logical starting point. First, it is the incumbent premier anti-corruption watchdog. Second, it is geographically far-reaching, with chapters in over 100

²²⁵ Keohane and Victor, above n 13, at 8.

²²⁶ The World Bank "FAQ" (2015) Worldwide Governance Indicators <<http://info.worldbank.org/governance/wgi/index.aspx#faq>>.

countries. Resource permitting, it may be appropriate to establish a unique branch of the organisation tasked specifically with collaborating with different actors, compiling and collating information on bribery and disseminating this to different actors upon request. This would necessarily involve partnering agreements with different parties from different elements of the regime complex. For example, the World Bank and the MDBs could play an instrumental role in collecting the details of agents implicated in large-scale corruption. Obtaining this information would be of use to immigration officials, domestic governments and law enforcement bodies such as the US Securities and Exchange Commission. Local NGOs such as Shayfeen.com and Sakker el Dekkene might also pass aggregate information to the responsible body concerning the level of incidence of reported corruption experienced by citizens. This may not be as useful at a supranational level but is nevertheless important evidence as it is indicative of the extent to which bribery and corruption have become ingrained in civil society within particular states.

However, the suggested approach raises further questions in itself. A central institution tasked with collecting and disseminating information would necessarily rely on cooperation with either national branches or independent partners. Both its legitimacy and effectiveness would therefore be contingent on the accuracy of the information gathered from these sources. NGOs themselves are not unsusceptible to corruption and therefore the information-gathering processes themselves would necessarily require a high level of transparency. For example, the organisation's Board of Directors discredited Transparency International's Croatian chapter at the end of 2015, owing to a lack of confidence in the quality and impact level of the chapter's activities.²²⁷ A partner organisation tasked with gathering such metadata may always be subject to a risk of internal corruption, which may take the form of offers to bribe an agency official to skew the statistics in order to portray the governance of a state more favourably.

Finally, the establishment of such a platform may give rise to other legal issues. Subjective data might be at risk of tampering by malicious or vexatious reports being made about certain persons or entities. It would therefore require the implementation of effective mechanisms to prevent misuse of reporting procedures. The methodology of gathering subjective data may also create privacy issues. For example, NGOs may gather sensitive information concerning personal experiences with bribery and corruption. Therefore, in order to protect the individuals involved, there would need to be a level of institutional accountability for the privacy concerns of said

²²⁷ Transparency International "Transparency International statement on its former chapter in Croatia" (12 April 2016) Transparency International <http://www.transparency.org/news/pressrelease/transparency_international_statement_on_its_former_chapter_in_croatia>.

individuals. It also follows that such a platform would require watertight safeguards to protect the identities of those responsible for reporting incidences of bribery.

In effect, a central information platform that disseminates knowledge throughout the regime complex may be a desirable, complementary addition in the future. However, before this can be achieved there are significant practical and legal challenges to overcome before a trustworthy and effective institution can be established.

D Inadequacy of Demand Side Sanctions

At first glance, the figure in Part IV mapping the constituent elements of the regime complex appears relatively balanced in respect of the sanctions applicable to supply and demand side bribery. However, the discrepancy lies not in the existence of measures applicable to either side of the transaction but rather in the disparity in the efficacy of the sanctions on each side. The sanctions procedures of the World Bank and the MDBs coupled with domestic anti-bribery legislation constitute a stringent set of standards and punitive penalties for firms that are found to have engaged in bribery. The sanctions procedures are particularly effective due to the use of debarment with conditional release as the baseline sanction. This means the firm must comply with certain conditions imposed under the sanctions procedures, which entails a certain probative onus to demonstrate a shift towards better governance in its behaviours, which effectively mitigates the risk that its agents will subsequently engage in sanctionable practices.²²⁸ Although domestic legislation may criminalise both demand and supply side bribery, as a constituent it sits closer to the supply end, as the most major multilateral anti-bribery treaty²²⁹ only requires criminalisation of supply side bribery. Furthermore, the most actively enforced domestic anti-bribery statute is the US Foreign Corrupt Practices Act and its supply side anti-bribery provisions.²³⁰

Conversely, the facets of the regime complex primarily concerned with demand side bribery are good governance frameworks and economic policies, asset recovery initiatives and stringent banking and financial regulatory frameworks. Laudable objectives underscore each of these elemental regimes. However, to a certain extent they lack impact. As discussed in Part III, these are emerging regimes of the regime complex and comprise preventative strategies rather than mechanisms for prosecuting and sanctioning the demand side of the transaction. These constituents are undoubtedly of fundamental utility to the operation of the regime complex. However, it is questionable whether these measures are sufficient alone or whether the demand

²²⁸ Leroy and Fariello, above n 31, at 4.

²²⁹ OECD Anti-Bribery Convention, above n 9, art 1.

²³⁰ Brewster, above n 6, at 107.

side requires implementation of better punitive laws, sanctions and obligations. Experts often note the need to reform and reinforce existing accountability mechanisms for demand side bribery.²³¹

Over-active enforcement of supply side bribery laws combined with ineffective sanctions for demand side bribery might have the effect of unwittingly placing a sanction on the economic development of emerging markets.²³² Anti-bribery laws have the laudable objective of deterring and punishing corruption and therefore averting the resulting harms. However, evidence shows that these laws can have the collateral effect of deterring investment.²³³ One possible model is as follows. Capital-rich countries will refuse to enforce anti-bribery legislation so as not to impede investment in opportunity rich countries that do not actively sanction demand side bribery. These countries will fill the void left by active enforcers of the OECD Anti-Bribery Convention.²³⁴ Alternatively, it may be possible that these capital-rich countries will be pressured not to invest in these economies, by active enforcers.²³⁵ This will result in the effective economic sanctioning of developing markets stifling investment opportunities. In light of these risks, strengthening the framework for treatment of demand side bribery appears cogent in order to deter bribery but encourage investment in developing economies where the rates of punishment for bribery and corruption are currently low. This should ultimately be beneficial for the target economy and investors.

Multiple options have been proposed to strengthen available demand side sanctions, including the establishment of a novel international tribunal, special commissions and laws aimed at eradicating safe havens for bribe recipients (such as the visa denial procedures outlined in Part III) or prioritised enforcement of existing domestic laws.²³⁶ The establishment of an international tribunal may be desirable but would also be very costly. It remains unclear whether more effective enforcement of anti-bribery legislation in the home country of the recipient could be induced. The World Bank can refer suggested cases to governments; nevertheless there is little empirical evidence to suggest that these referrals result in action being taken against the implicated officials.²³⁷ Limiting the safe havens and international movement of persons under credible suspicion of bribery or engagement in corrupt activities can have hard-hitting impacts. Therefore, this paper argues that building on the ‘no safe

²³¹ Marshall, above n 151, at 1306.

²³² Andrew Brady Spalding “Unwitting Sanctions: Understanding Anti-Bribery Legislation As Economic Sanctions Against Emerging Markets” (2010) 62 Fla. L. Rev. 351 at 351.

²³³ At 351.

²³⁴ At 397.

²³⁵ At 398.

²³⁶ Low, Lamoree and London, above n 175, at 588.

²³⁷ At 578.

haven' principle embodied by the US Proclamation 7750 and revised in the Magnitsky Act presents a viable course of action. Reform of existing visa denial procedures would significantly limit the freedom of movement of these persons and act as an effective sanction.

Inherent in such a mechanism are several contingencies that may affect its success. It relies on effective collaboration between countries in sharing credible evidence that a person has engaged in bribery. The World Bank sanctions board and major NGOs such as Transparency International could potentially facilitate the availability of information to immigration officials. This strategy also requires commitment from a majority of states. However, political agendas may impact on respective levels of enforcement.²³⁸ Nevertheless, if commitment from a significant number of states can be achieved, it will significantly fetter the ability of bribe recipients to enjoy the benefits of their corrupt gains.

E Bribery, Corruption and Human Rights

The incumbent framework and regime complex for bribery primarily frames the issue as a criminal one and focuses on the establishment and enforcement of criminal offences for bribery and other corrupt behaviours. As noted in Part III, human rights laws and considerations are relevant to the regime complex. This constituent was discussed primarily in relation to freedom of expression protections allowing the uninhibited flow of information and providing legal protection for reporters and whistle-blowers. Some commentators suggest that rather than framing bribery and corruption as criminal issues, viewing these issues through a human rights lens is a preferable approach.²³⁹

A rights-focused approach involves refocusing policies on the connections between bribery and infringements of human rights in order to 'humanise' the anti-corruption agenda.²⁴⁰ Academics suggest that possible solutions might entail allowing victim of corruption to seek constitutional rights-based remedies or tort-inspired remedies where private actors are concerned.

However, academics also note that these approaches may have drawbacks.²⁴¹ First, it is currently unclear whether a private actor could be found to have violated international human rights law in a similar manner to a private violation of

²³⁸ Marshall, above n 151, at 1314.

²³⁹ Wouters, Ryngaert and Cloots, above n 12, at 270.

²⁴⁰ At 271.

²⁴¹ At 271.

international criminal law.²⁴² Furthermore, it may be difficult to elucidate a category of persons significantly affected to have standing to bring a claim. It is also questionable whether a person whose rights have been breached as a result of corruption would effectively be able to avail themselves of constitutional remedies within that country.

This paper considers that an entire shift from criminalisation to a rights-based approach is undesirable. However, it also considers that human rights law plays an important supplementary role to the criminal focuses of the anti-corruption framework. From a regime complex perspective, re-emphasis of the fundamental role played by the elemental human rights regime would strengthen the foundations of the regime complex. As discussed above, there is significant work to be done in relation to the protections afforded by international law for journalists and other actors reporting on bribery and corruption as well as for whistle-blowers.

²⁴² Wouters, Ryngaert and Cloots, above n 12, at 274.

VI Conclusion

The payment and receipt of bribes is a readily discernible and problematic manifestation of corruption. Bribery is an injurious practice that contravenes good governance, perniciously undermines trust in the administration and results in the diversion of public resources and funding away from the public interest, harming social and economic development. This paper concludes that the constituent regimes of the international anti-bribery framework comprise a regime complex.

In light of the multitude of regimes, institutions and norms that comprise the regime complex, perfect coherence and absolute efficiency are implausible ambitions. The regime complex for bribery performs well in some respects. However, there are nevertheless aspects that require reconsideration to improve overall efficacy. In particular, this paper concludes that the regime complex lacks effective demand side sanctions and enforcement and that the alignment of private and public bribery offences warrants further contemplation.

The deterrence and proscription of bribery is a complex area. The practice is inherently covert, causes varying deleterious effects and manifests differently within different establishments. Regime complexes are advantageous as the norms of their constituents are flexible and adaptable.²⁴³ A shift towards institutionalisation or integration risks diversion of resources²⁴⁴ and control away from constituents, which are individually more specialised to deal with specific problems. Furthermore, it may dilute the practical policy efforts that can be expended on a given area.²⁴⁵ This paper therefore concludes that the regime complex is better equipped to deal with the complex aspects and effects of bribery.

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²⁴³ Keohane and Victor, above n 13, at 8.

²⁴⁴ At 8.

²⁴⁵ At 9.

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