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Drafting Implementing Regulations for International Anti-Corruption Conventions

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How can executive agencies in developing countries implement international conventions against corruption? This paper looks at the legal issues presented by the Council of Europe, United Nations and OECD conventions against corruption; as well as the choices which executive agencies (such as the tax police, customs and border guard) in developing countries have in helping to implement these conventions. This paper reviews the potential obligations which these Conventions impose on executive agencies and the legal principles which should be enshired in executive regulation which translates these conventions into practice. This paper provides a simple legal/administrative test for corruption as well as tests for complicity, respondeat superiour, and tests which help establish jurisdiction between departments and between countries (in international corruption cases). The paper also discusses mechanisms for financing anti-corruption work, the conduct of tests or probes of civil servant bribe-taking behaviour, and the optimal fine to apply to businesses engaging in corruption as determined under a civil law standard.

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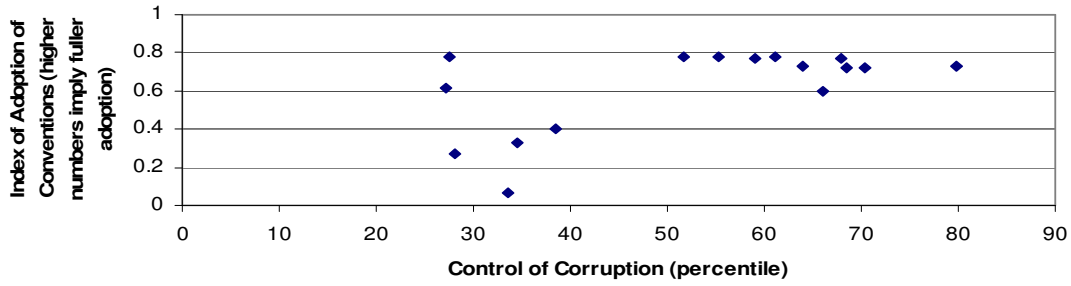
Introduction

For over 10 years, organisations such as the Organisation for Economic Co-operation and Development (OECD), the Council of Europe (CoE), and the United Nations (UN), have been helping developing countries adopt legal measures to fight corruption.[1] However, such work has had questionable impacts on reducing corruption. Figure 1 plots a variable which measures the extent to which several Central and Eastern European countries have adopted anti-corruption conventions against the extent to which "public power is exercised for private gain, including both petty and grand forms of corruption."[2] This figure shows no correlation across countries between the extent to which a country adopts anti-corruption conventions and the ability of its administrators to fight against corruption. Indeed, if a general trend is discernible among these data, public administrations of countries who have adopted anti-corruption conventions tend to be more controlled by corruption.[3] These data suggest that these anti-corruption conventions have relatively little impact on corruption.[4]

Figure 1: Adoption of Anti-Corruption Conventions and Control of Corruption



Source: Kaufmann et al. (2005) and Steves and Alan Rousso (2003)

[1] In fact, recommendations issued by these organisations extend back almost 20 years. Such "legal measures" have consisted of negotiated agreements for chaning national legislation (as adopted by the national parliament) as well as advisory missions aimed at advising executive agencies about the quality of regulation (such as administrative degrees, orders, acts and decisions) and advice to criminal, civil and administrative courts related to technical issues such as case management. While acknowleging the wide range of other actors supporting legal reform affecting developing countries' fight against corruption (such as ministeries of justice in many European Union countries, the US Department of Justice, and the American Bar Association's Central and Eastern Europe Law Initiative) and the number of other multilateral and bilateral treaties, recommendations and *opinio juris* concerning the fight against corruption, I focus on these three organisations due to their importance.

[2] The conventions covered include the Stability Pact Anti-Corruption Initiative (SPAI), the OECD Anti-Bribery Convention, the Council of Europe's (COE) Criminal and Civil Law Conventions on Corruption, the COE's Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, and the COE's Group of States against Corruption (GRECO). The control of corruption indicator scores countries relative to each other instead of an absolute scale.

[3] Naturally, two opposing explanations may account for such a relationship in these data. On the one hand, the adoption of anti-corruption conventions may simply be ineffective (and possibly even contribute to corruuption by encouraging the country to delay real reforms which tackle corruption). On the other hand, corruption ridden countries may be the most eager to adopt anti-corruption conventions. However, given the over 10 years of work related to these conventions, if they were effective, the effects would be seen by now.

[4] Steves and Rousso (2003) support this conclusion with regression analysis. In their study, they find that the adoption of anti-corruption conventions is not statistically significantly correlated with levels of corruption in a country as measured by surveys of businessmen working in the country being asked about (while controlling for factors which may influence the analysis).

The UN, OECD and CoE conventions against corruption have been under-effective because these conventions, while being ratified by national parliaments, are not being implemented in executive agencies most prone to corruption – particularly the traffic police, the police, customs, and tax inspection (Emmert, 2003). Agency-level implementation in many developing countries has not occurred for (at least) two reasons. First, the development and application of many of the legal principles which help insure civil servant accountability (and which prosecutors or instructing judges rely upon in trial) remains at a lower than in developed OECD countries.[5] Resort to civil law, administrative law, criminal law, and contract law is difficult and costly. Unlike in OECD countries, in cases where the law is silent, no jurisprudential tradition helps inform judges to take the decisions which contribute to an effective "stock" of regulation.[6] Second, the provisions in these conventions often do not take into account the political or economic costs involved in implementing the provisions of the anti-corruption laws which these countries ratify. Many of the points, related to the criminalisation of bribery, the cleaning of party finance and international asset seizure are expensive to implement and not in the interests of parliamentarians or executive agencies to implement.[7]

Drawing on a range basic legal concepts, this paper provides concrete judicial tests which can be used by executive agencies in order to implement the provisions of the main international conventions against corruption. The paper starts by the core legal logic behind imposing sanctions against corruption -- providing a test for corruption which helps administrators to differentiate between corruption and legitimate gifts). The legal logic of corruption as a breach of contract helps clarify the liability of superiors and colleagues (conspirators), as well as helps establish appropriate jurisdiction for corruption offenses. By looking at the economics underlying anti-corruption regulation, optimal methods of internal investigation, finance and the application of remedies can help overcome the poor incentives civil servants have to implement these conventions.[8] This paper seeks to provide practical guidance (inspired by the academic and practitioner literature on the subject) for the advisors of executive agencies working in Central and Eastern Europe who are looking to help implement international conventions in executive agencies, particularly in those agencies which are most prone to corruption (such as customs and traffic police).[9]

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[5] A number of measures of judicial quality suggest that judicial systems in developing countries are less developed than those in OECD member countries (see Dakolias 2005 for a discussion of the different measures). Ofosu-Amaah *et al.* (1999) discuss the legal framework related to fighting corruption in detail.

[6] As argued in Michael (2004), public sectors in developing countries particular need to develop such a "stock" of effective regulations in fighting corruption because no accepted theory or textbook exists on fighting corruption.

[7] Michael (2007) attempts to assess the extent to which recommendations to parlimanetarians are "incentive compatible" (in their political interests to implement). A number of articles discuss the calculation of costs and benefits in implementing anti-corruption programmes; providing an economic explanation for the lack of implementation of anti-corruption activities.

[8] This paper takes an unabashedly Nw Institutional Economics view of legislation and regulation, viewing the optimality of regulation as a function of its social costs and benefits. While I acknowledge such a view of law has its opponents, the lack of implementation of anti-corruption laws (and the overwhelming evidence suggesting that few incentives existing in developing countries to implement these law) suggests that a economic-based view of law may serve as a useful tool – when used with other legal philosophies, to help promote implementation. See Medema (1997) for more on the pros and cons of New Institutional Economics in legal analysis.

[9] While most of the issues addressed in this paper are relevant for all developing countries, this paper specifically focuses on Central and Eastern Europe due to the large amount of technical assistance the UN, CoE and OECD provide to this region in support of these conventions (for reasons whose discussion lies outside of the bounds of this paper). Despite the Continental system of law used in this region, I have purposely decided to use Anglo-Saxon legal principles and terminology to explain many of the arguments to a English-language readership. Such

While an academic should be comfortable with the method of argumentation employed in this paper (and hold a sufficiently critical attitude toward the material covered), the director in a customs agency or expert in the legal department of an anti-corruption agency should keep several caveats in mind. First, this paper seeks to illustrate a regulatory approach (a method of reasoning) instead of provide definitive legal judgments. Because each country has a differing legal tradition (which will change over time), the arguments in this paper must be incomplete and can not consider the various legal principles which impact on a particular argument.[10] Second, the material covered in this paper concerns mostly developing countries (and particularly in Central and Eastern Europe). In developed OECD countries, sufficient legal tests of corruption have been developed and the quality of legal/regulatory enforcement (and international co-operation) is such that these laws do not need to be self-financing or incentive-compatible (as will be defined in this paper).

The (Mis)Implementation of Anti-Corruption Treaties

While a number of international conventions, recommendations and treaties exist related to fighting corruption, three treaties have been particularly influential among policymakers – namely the United Nations (UN) Convention Against Corruption, the OECD Convention on the Bribery of Foreign Officials in International Business Transactions and the two Council of Europe (CoE) treaties establishing civil and criminal liability in corruption cases.[11] Figure 2 provides a summary of each of these conventions and the areas on which the convention focuses.

In theory, the implementation of these anti-corruption conventions follows the four-stage procedure outlined in Figure 3.[12] First, country representatives and ambassadors to the OECD, UN and the Council of Europe negotiate the provisions of the overall convention.[13] Second, national parliaments consider the convention and make modifications in light of the

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a choice has been partly dictated by the application of economic reasoning (which is much less amenable to the Continental legal tradition (which much less readily accepts the importation of economic ideas due to its different conception of the foundation of rights, the nature of society and the role of the judicial system). Yet, this paper represents another (of a wide range of research) which contributes Anglox-Saxon ideas to the Continental system in areas where no apparent conflict between the two traditions would invalidate the ideas presented in this paper. See Helmholtz (1990) for more on the increasing convergence between these two legal traditions and Emmert (1990) for a discussion of the Central and Eastern European legal tradition (which has in some ways mixed these two legal traditions). For an interesting application of common law practices in a continential law tradition, see Frase (1990).

[10] To this end, I avoid citing particular legislation or supporting regulation in order to avoid the appearance that I am making specific legal claims.

[11] For these treaties, see the United Nations Office on Drugs and Crime (2006). Surprisingly, not much academic work has been done analysing these treaties, except for Abbott and Snidal (2002) or Posadas (2000) as some examples. Schroth (2002) discusses the impact of the main international anti-corruption conventions. However, he only considers their effects on the US and provides an analysis of judicial interpretations of the provisions of the conventions which have been adopted into US law. The extremely complicated nature of US law probably forced the author to exclude a detailed discussion of cases involving US civil servants and or a discussion of the ways which the various US departments have worked to promote the implementation of these Conventions. Unfortunately, while the US legal tradition is the least applicable to these countries, it's legal traditions are the most researched (given the

[12] Figure 3 represents an idealised and highly simplified version of the adoption process aimed at the reader which any prior knowledge in the area. See Levinson (1999) for more on the adoption of laws aimed at supporting the ratification of international anti-corruption conventions.

[13] For a discussion of the politics involved in the negotiation of the OECD, see Posadas (2000).

country's legal traditions as well as the political constraints.[14] Third, once parliament ratifies a law or statute which implements the main provisions outlined in the convention, each ministry nominated in the law (or which is affected by the law) develops a set of regulations which define more specifically the method by which the implementing agency will enforce the law.[15] Fourth, these regulations come under constant review, both internally (as agency officials take practical decisions which impact upon the way public officials use public power) as well as by administrative courts.

Figure 2: The Main Anti-Corruption Conventions

Convention	Description	Selected Areas of activity
UN Convention Against Corruption	Signatories establish criminal liability for corruption within their own countries. Covers wide membership of the UN.	criminalisation of bribery, embezzlement, asset recovery
CoE Civil Convention Against Corruption	Allows private persons to sue government or other persons for damages arising from corruption.	individual and group indemnification for corruption
CoE Criminal Convention Against Corruption	Criminalises participation in corruption for civil servants and non-government counterparts.	criminalisation of corruption
OECD Convention*	Establishes criminal liability for bribes paid by businessmen from OECD countries to government officials from any country.	Criminal responsibility for corruption abroad, extradition, information sharing.

Note: This table only covers the main concrete provisions of each convention. Each convention establishes a number of vague principles related to accountability and transparency which have not (and probably can not) be implemented in practice.
* The OECD hosts mutual monitoring meetings, whose results sometimes affect national legislation in the CEE region. The Czech Republic, Poland and Hungary undergo monitoring by the Working Group on the Anti-Bribery Convention while Ukraine, Moldova and several other Eastern European countries used to undergo monitoring within the framework of the (now defunct) Anti-Corruption Network for Transition Economies.

[14] For an excellent and detailed discussion of the trade-off between legal and political concerns in the ratification of the OECD Convention, see Abbott and Snidal (2002).
[15] These regulations may consist of high-level directives, decisions, degrees or a range of administrative acts and decisions. A detailed discussion of the how executive agencies draft and implement regulations falls outside the scope of this paper.

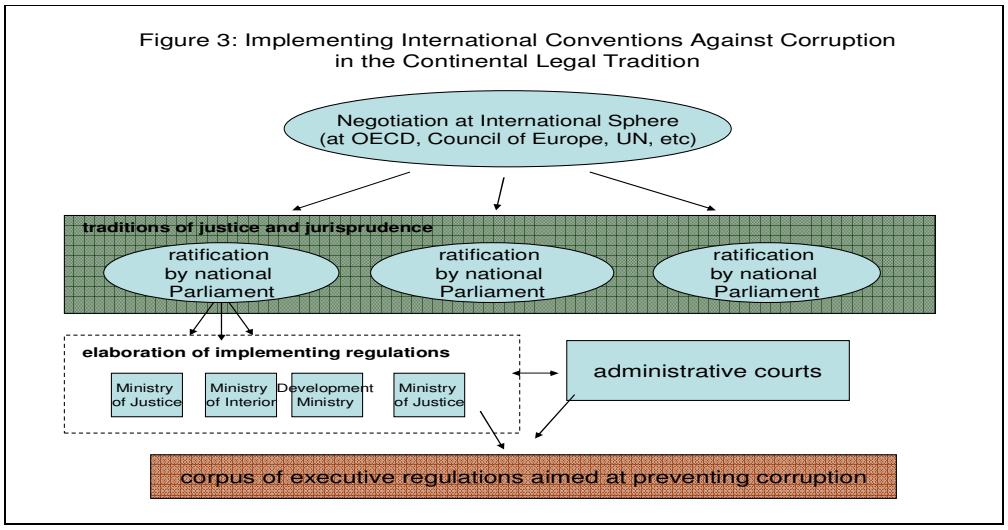


Figure 3 highlights the systemic nature of anti-corruption which is often pointed out by anti-corruption practitioners. For example, Langseth *et al.* (1997) note that anti-corruption programmes form a system and each organisation serves as a "pillar of integrity." Doig and McIvor (2003), using less mythological references, refer to "holistic reform" involving the legislature, executive, judicial system, business and non-governmental agencies. Clearly, Figure 3 shows the mechanisms by which such a system develops – namely as an **evolving corpus or system of anti-corruption law which aims at fighting corruption**.[16] Such a corpus represents a body of administrative law – namely the set of parliamentary decisions, decrees by senior officials of executive agencies, decisions, directives, other administrative acts and rulings by administrative courts as well as informal customs and institutions which aim to reduce the use of public power for private gain.[17] Ultimately, the executive agencies which interact with the public will implement administrative acts which put into practice the broad principles defined in the international instruments such as the two Council of Europe conventions, the OECD convention and the UN convention.[18]

A number of legal issues emerge as this corpus of implementing regulations develops in Central and Eastern Europe.[19] Figure 4 describes several of the issues raised by these international conventions which the executive agencies will need to address. The figure also discusses the activities which the conventions (and international work in general) forsees in order to address the particular problem. **The general trend of the international conventions discussed has been to increase penalities for corruption and increase resource and time**

[16] Naturally, such an evolutionary perspective on law represents only one view of law. See Dershowitz (2002) for a highly readable exposition of this approach to law in the Common Law tradition or Smith (1988) for a similar "institutionalist" approach to public law.

[17] For example, most countries in Central and Eastern Europe will have an anti-corruption law, a strategy which is approved by Parliament, an act signed by the Council of Ministers, a freedom of information act, a civil servant law, a public procurement law, and other laws aimed at fighting corruption. See Ofosu-Amaah *et al.* (1999) for more.

[18] Such a view opposes the "legislative fetishism" practiced by many policymakers in Central and Eastern Europe and their Western advisors. See Channel (2005) for more and Galinou (2005) for problems the legal transplants. The problem of "legal transplants" (the adoption of laws from other countries) has well-known problems (Damaska, 1997). The adoption of these conventions does not represent a "transplant" per se (because the law in theory represents the negotiated outcome of a law which best suits all countries and does not derive from any one particular country). However, the strong influence of particular laws (particularly the US Foreign Corrupt Practices Act) make the adoption of these conventions quasi-transplants.

[19] Galligan and Smilov (1999) provide a discussion of administrative law in Central and Eastern Europe.

burdens on signatory governments (without making provision for more finance or skills required to assume the responsibilities forseen in these conventions). The conventions offer almost no guidance to implementing authorities about the supporting regulation required within executive agencies in order to help implement these conventions.

Figure 4: Issues Involved in the International Conventions Relevant for Executive Implementation

Issue	Description of Problem	Problem Result in Executive Agency	Activities to address issue
Definition of corruption	The definition of corruption is still a contested issue with Transparency International in particular pushing for a wide definition which is legally difficult to enforce.	Lack of a definition has created many legal definitions in CEE region. Relies on laws instead of public sector ethos.	Work on public sector ethics and work on multiple legal prohibitions on activities related with corruption.[20]
Criminalisation of corruption	Corruption offenses become crimes as defined by Parliament, with a fixed set of definable offenses and remedies.	Hazy aspects of corruption, particularly related to trade in influence, difficult to define specifically.	Executive agencies turn over corruption cases to prosecutor instead of dealing with them directly (or often ignores them).
Identification of bribery or risks of bribery	No accepted method of identifying corruption	Executive agencies take "passive" approach to corruption (waiting until complaint is made).	Implementing "tougher laws" and increasing restricting rights and activities of civil servants.
Burden of proof, treatment of evidence	Corruption needs tangible proof. Proof hard to obtain as its an activity conducted in secret. Criminalisation makes evidentiary burden "beyond a reasonable doubt"	Evidence difficult and expensive to collect; few willing witnesses; departments develop few anti-corruption competencies.	Whistle-blower protection, provisions for anti-corruption education and co-ordination between departments.
Indemnification for corruption	Victims of corruption have almost no recourse to recover funds and/or seek damages for corruption-related harms (though CoE Convention provides in theory).	No mechanism in place to either hear cases or to pay-out indemnities.	CoE Civil Convention offers strongest remedies. OECD and UN convention discuss. Legal precedents of suing individual government agencies increasing.
Jurisdiction	Vertical jurisdiction: which level of agency deals with corruption Horizontal jurisdiction: which government institutions deals with corruption Forum: which countries deals with cross-border cases.	A corruption case can cross a number of jurisdictions (and programmes aimed at reducing incentives for corruption certainly involve many departments). Jurisdiction a political and administrative issue without clear criteria for assigning jurisdiction.	few to date, except establishment of anti-corruption co-ordinating committees.

[20] The definition of corruption and the adoption of legislation aimed at fighting corruption are closely tied. The recent view of corruption as a cross-sector phenomenon involving the public and private sectors (a view which has been marketed heavily by the World Bank and Transparency International) has militated for the adoption of a single law aimed specifically at defining corruption and adopting measures to fight it. The classic view that corruption stems from civil service weaknesses (poor organisation, low salaries, insufficient materials, low training) militates for a regulations which span legislation involving a wide number of civil service and political issues. The UK, for example, has preferred to deal with corruption by leaving restrictions in a wide range of legislation which affects civil servant behaviour.

Figure 4 continued: Issues Involved in the International Conventions Relevant for Executive Implementation

Treatment of contributory factors (awareness raising, salaries)	Most legal traditions allow for state complicity when civil servant commits error – however little complicity for corruption.	Many agencies implicit accept complicity, looking at awareness raising and other activities to help reduce corruption.	Ad hoc implementation of measures which indirectly touch on corruption. CoE Civil Convention touches this issue.
Right to privacy and dignity (probes for corruption, transmission of evidence between government departments, psychological testing of staff)	Many corruption controls are costly and demoralizing. Such controls potentially violate civil servants' or service users human rights.	Executive agencies proceeding on ad hoc basis, introducing controls which seem appropriate. General trends is "more control is better" without concrete evidence to support particular methods.	No agreement on activities to undertake. In some countries, civil servants can be video-taped and "entrapped" (tempted to accept bribes). Contracts can often allow for enforcement (though many rights can not be signed away).
Finance	Anti-corruption work needs to be self financing in poorer countries in order to be sustainable.	Many agencies considering keeping part of corruption proceeds (which is prohibited in many countries). International donor funding main source of current finance for many countries.	Fighting corruption generally seen as government obligation outside of need to be self-financing.

Defining Corruption: A Simple Contract Test

The definition of corruption has been widely debated. In the 1990s, the standard definition of corruption was "the (mis)use of public power for private gain."[21] More recent definitions – particularly promulgated by the international non-governmental organisation Transparency International -- have encapsulated "the misuse of entrusted power" either in the public or private sector. Such a definition has gained a large amount of credibility in policy circles given Transparency International's large PR activity and close relationship with a number of international organizations and national governments.[22]

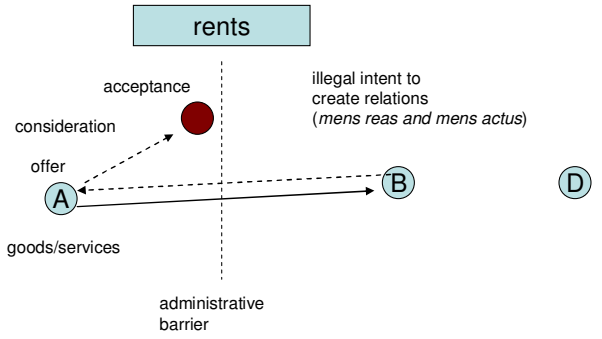
Such a definition of corruption should be avoided for three reasons. First, such a wide definition of corruption subsumes every possible form of deceit, deception, or conflict between persons – thus providing no definition at all. Second, the nature of the principal-agent relationship is completely different in the public as opposed to private sector. A civil servant is delegated authority by the entire society, through a political process – making infractions crimes against the *body politik*. A private individual enters into a formal or informal contract in a company or NGO, whereby the agent serves one or more principals – making infractions torts against private persons. Third, a definition of corruption should serve a specific legal function. Adequate legal definitions exist for the misuse of entrusted power in the private sector – as defined under fraud, theft, and other tort and/or criminal offenses. Until the mid-2000s, the field of anti-corruption treated matters relating to the use of public power

[21] See Johnston (1996) for more on the definition of corruption.
[22] See Larmour (2005) for a description of TI's policy agenda.

for private gain and the field of corporate governance treated matters relating to the misuse of entrusted resources in a private setting.[23]

In order to clarify the defintion of corruption, Figure 5 shows the elements involved in a corrupt transaction involving the use of public power for private gain. A corrupt transaction requires three elements: a) a regulatory distortion which restricts the activities of private economic actors, b) a good or service which is subject to these regulations, and c) a pool of rents created by this distortion (which serves to finance bribe payments or other forms of compensation). A restriction on importing cigarettes provides an obvious example; this regulatory restriction creates profits in a black market which can be used to bribe border guards or customs officials.[24]

Figure 5: Elements involved in a corrupt transaction



Clearly, a bribe or the use of public power for private gain relies on an informal, illegal contract between an economic agent and a government official.[25] A contract consists of four elements: an offer, acceptance, consideration and intent to form relations. One side makes an offer (either the business person offers to pay for a favor or the government official offers to do a favor in exchange for a bribe). The offer must be accepted by the other party. The "consideration" can be cash or a favour (paid either directly and now or indirectly and

[23] Transparency International's attempt to expand the definition of corruption is legally unnecessarily as well as philosophically untenable. Namely, courts have increased increased the applicability of anti-corruption laws to cases where civil servants are only indirectly involved. For example, Dugan and Lechtman (1997) note that US courts have ruled that the FCPA applies in cases where gifts or facilitating payments are made to representative of a company which is wholely or partially owned by a foreign government or in cases where part of a payment may be passed on to a foreign official (including politicians). Indeed, the person need only act "instrumentally" on behalf of the foreign government (and need not directly be bound by civil service regulations or have a government job in the traditional sense).

[24] While the argument is too complicated to make here, in theory bribes or other forms of corruption can only occur in the presence of economic distortions which create rents. In brief, in a perfectly functioning market, no resources would be available to pay civil servants unless a distortion (like the one shown in Figure 5) were present. Moreover, it can be shown that any regulation – including a speed limit – results in the same conditions presented in Figure 5. In this case, an individual would be willing to pay more to drive faster and the counterpart is not the purchaser of cigarettes, but society in general. As such, the state will also bear some complicity in providing civil servants with incentives to engage in corruption (by creating rent-generating regulatory distortions and possibly indirectly or unintentially enabling civil servants to collect bribes).

[25] Such an approach represents a novel interpretation of a contract because contracts made illegally are considered null and void in a court, even if they are considered valid by contracting parties (and enforced using extra-judicial means). See Haller (1990) for a more detailed discussion of the nature of illegal enterprise.

later). Unlike in a legal contract though, the contract seeks to create illegal relations (as corruption is prohibited now by law). Such a relation provides the briber with goods and services which he or she is not entitled (either by law or by the civil servant who withholds entitlement when seeking a bribe).[26] Corruption is difficult to identify and prosecute because illegal relations are often paired with legal relations (namely the individual may cross a border more quickly and in exchange for a packet of cigarettes).

A contract-based test for corruption helps to differentiate corruption from gift-giving (as well as identify cases of corruption which extends across multiple people or long amounts of time).[27] Clearly, illegal relations involve a quantity, quality, speed, friendliness and informativeness of a service to which the service user is not entitled. Moreover, consideration must be paid for specifically a good or service which has been illegally offered and accepted. Encapsulating these principles is a two part test for corruption. If the answer to both questions is affirmative, then the transaction involves corruption and if the answer to both questions is negative, then the transaction involves a legitimate gift.

Two Questions of the Corruption Contract Test:

1. Has an extra payment been made for the quantity, quality, speed, friendliness and informativeness of a service to which the service user has an administratively defined right?

2. Was the *ex-post* delivery of the public good or service made on the *ex-ante* expectation of an extra-payment?

The case in which one of these questions is negative poses a legal challenge. Namely, if the individual did not pay (but intended to pay) or paid for a service which he or she did not receive, the question of civil or criminal responsibility arises. In this case, the standard test for a civil or criminal offense can be applied as to whether either party possessed *mens rea* (intention) and *actus reus* (act). The test of civil/criminal intention and act will serve for a particular case. However, over time, administrators and judges must collect, over time, substantive legal principles (discovered in the light of each particular case) which establish other tests of corruption.[28]

[26] In many cases, payment is made for particular dimensions or margins of goods or services which these civil servants provide. In the New Institutional Economics traditions as applied to law (the approach taken in this paper), goods and services can be divided into a number of valuable margins such as the speed, friendliness, quality or information provided in a particular transaction. See Furubotn and Richter (2005) for more on defining and valuing these rights.

[27] As legislation against corruption is increasing adopted and enforced, parties to corrupt transactions seek ways of making bribery more difficult to detect. For example, in a recent case involving the Macedonian customs service, bribes to facilitate border crossing were paid to a local restaurant waiters (who may change a truck driver 50 euro for a coffee). The waiter would hold these funds and render them to a customs officer later (sometimes months later) in exchange for a commission. The truck driver passes more quickly, the customs inspector receives a bribe, the intermediary receives a commission and the case of corruption becomes more difficult to detect. The treatment of corruption in Figure 5 (and the legal test which follows) derives in part from Henning (2001).

[28] In a common law tradition, such a collection of legal principles comprises the *ratios decidendis* (or the substantive part of a ruling) of a number of cases. These *ratio* are often short phrases which encapsulate the principle the judge uses in deciding a particular question. While such rulings do not form law in a administrative law tradition, judges, administrators and parliamentarians may make reference to them when interpreting laws

If a transaction fails this test (and is deemed corrupt), liability is needs to be placed on each party. While several authors argue that all parties are equally liable for corruption offenses, the principle of equal liability contradicts general legal practice of assigning liability in civil and criminal cases based on each parties' responsibility for and contribution to the legal infraction. A test of liability – and particularly criminal liability – would assign liability based on the principles of *mens rea* (intention) and *actus reus* (act).[29] Namely, if the economic agent is coerced by the government official, than the government official is clearly at fault (having both criminal intent and action) For such coercion, the briber need only show that he or she would have faced high costs without paying the bribe and that in that particular situation, the need to pay was probably clear and pressing.[30] Failing this test suggests that the business person was responsible; and liability falls to the businessperson. Yet, this question alone probably does not suggest *mens reus* (intention) on either side because the civil servant could be affected by the civil service environment (such as lack of equipment) and the businessman could have acted opportunistically instead of with a pre-meditated intent to bribe. However, if one or both sides possessed a habit or developed methods of soliciting/paying bribes, then corruption was clearly pre-meditated and thus a criminal offence. If a businessman both had an urgent need to pay a bribe and a regular system of paying, then the fault clearly lies with the public administration and the individual should not face criminal liability.[31]

Two Questions for a Criminal Liability Test for Corruption:

3. Did a clear and present need exist for the economic agent to provide consideration, in whose absence, the agent would face considerable personal costs?

4. Did either party possess a habit, infrastructure, or regularly defined ways of soliciting or offering corrupt consideration?

The use of a simple 4 questions presented above which test of the presence of corruption and liability for corruption help solve many of the problems with anti-corruption legal work in Central Europe. First, complete criminalisation is impractical, if not impossible given weak judicial systems, low public sector wages, and a culture of corruption.[32] Second, these tests helps civil servants (who could become targets of the law) understand the

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and regulations. To the extent that decisions are not appealed or do not contradict existing regulations, these principles become law.

[29] As will be argued below, while the CoE and OECD Conventions seek to criminalise corruption, in highly corruption ridden societies, the establishment of an administrative jurisdiction with civil penalities may help promote the rapid and cheap investigation of corruption offenses.

[30] Failing this test does not necessarily place personal liability on the civil servant. In most administrative law traditions, the civil servant possesses a dual nature, as a individual and as a employee of the state. As discussed below, if the civil servant also had a pressing need to accept a bribe, liability could fall on the state instead of the civil servant personally. In this case, either the liability passes directlly to the state, or the civil servant could seek indemnification of the state's contribution to his or her crime.

[31] Criminal law generally allows necessity, duress and consent as general defences to crimes.

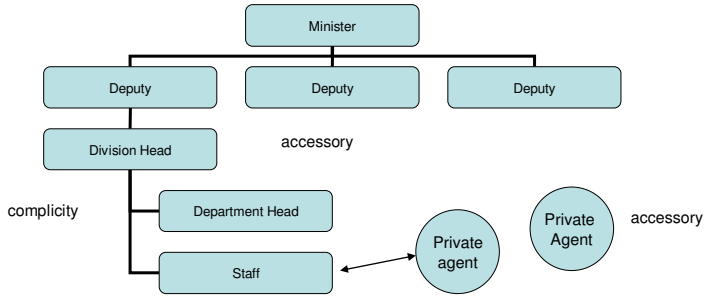
[32] A number of studies suggest that judiciaries will be unable to successful prosecute corruption offenses in the region (Anderson and Gray, 2006).

principles behind the law rather than simply memorizing laws.[33] Third, the test helps develop a jurisprudential tradition in these countries related to corruption.

Respondeat Superiour and Complicity

Corruption often involves only two parties because incentives are to keep the transaction secret. However, when more than two parties are involved in corruption, then additional legal dimensions arise (which are only indirectly treated by the international conventions mentioned above). In many circumstances, bribes are often centralized in the agency (with agents handing over part or all of the revenue collected to their superiours).[34] The private sector equivalent consists of middle-men or groups of individuals who either pay bribes or know about bribery. As such, *scienter* (guilty knowledge) extends in both the public and private sector. Figure 6 portrays a scenario in which corruption chains exist in the government involving accessories to a crime (those who actively collect a share of the bribes) and complicity in a criminal offense (those who know about corrupt colleagues). In the private sector, middle-men can also aid and abet the crime of corruption.[35]

Figure 6: Legal Responsibility Within and Outside the Government: Treatment of Clientalism and Organised Administrative Corruption



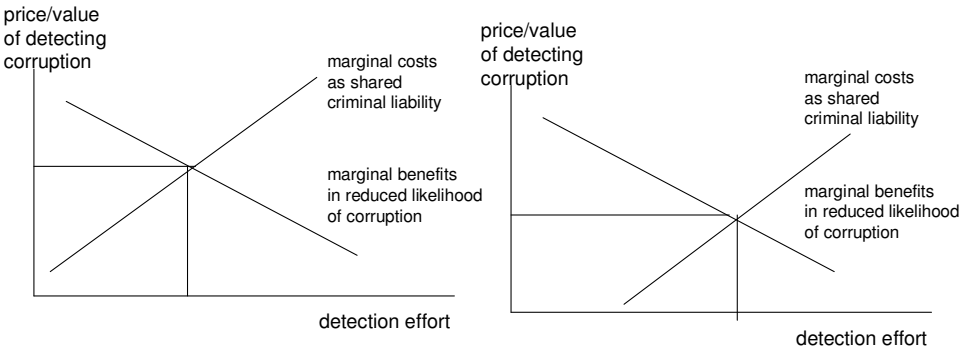
In some cases, the superiour be liable for corruption offenses of sub-ordinates if he or she failed to exercise sufficient oversight. Yet, even if the superiour exercises reasonable oversight over employees, he or she may still be prosecuted under indirect *respondeat superior*.[36] To establish indirect *respondeat superiour* (such that the superiour is guilty of the corruption offenses of sub-ordinates), four conditions must apply; namely the person was working on work-related matters, at the place of work and during working hours, in service to his or her principal, and action could be anticipated by the principal.[37] The strengthening of *respondeat superiour* would have contradictory effects on level of detected corruption. On the one hand, increased senior responsibility provides senior officials with more incentives to detect and prevent corruption. On the other hand, criminal sanctions imposed against the

[33] A number of studies, including Anderson and Gray (2005) find that anti-corruption training is extremely weak in the region.
[34] See Sajo (1998) for a description.
[35] The figure presents a simplified description as the law (at least in a common law tradition) defines
[36] The reasonableness of oversight depends on the circumstances and will probably be determined over time in a particular agency through decisions about various offences over time (as discussed above).
[37] In this example, the civil servant bears personal rather than professional responsibility. Clearly, if superiours know (or are likely to know) about corruption activity of their sub-ordinates, an element of government indemnity also exists. The next section will discuss the indemnisation of the civil servant as an individual and as a representative of the state.

senior official make him or her less likely to investigate vigorously (as he or she would also face penalities).

These two contradicting factors can be analysed using economics. Figure 7 shows the amount of detection effort and the value of such effort.[38] Panel (a) shows increasing marginal costs as the principal shares criminal liability to the agent. Marginal benefits decrease as the probability of finding cases of corruption falls (and thus preventing potential cases before they become serious). As shown in panel (b) – which shows a shifted marginal cost curve such as that which might be faced in Eastern Europe – the overall level of detection increases as superiors face *less* liability of the corruption offenses of their sub-ordinates!

Figure 7: Optimal Public Sector Principals' Effort in Detection Corruption Offences



Complicity in corruption offenses lies at the heart of third-party responsibility (and thus third-party legal liability). Both failure to exercise oversight and failure to engage in a sufficient amount of detection effort can make a superior an accomplice to a corruption crime. Other civil servants who share bribes or businessmen who change middle-man fees may also be complicit in corruption through aiding and abetting a criminal offence. The failure to denounce corruption may also be considered as complicity – though the CoE and UN anti-corruption conventions take an unclear position on the exact extent to which failure to whistle-blow involves complicity by third-parties. However, no society (particular in the former Soviet Union) wants a culture of denouncers. Thus, again, a test should be in place to determine whether an individual should denounce a corruption offence in order to escape joint liability.[39] If the person was likely to know about corruption, but the impact of such corruption on others is not great, then either a *non-lieu* would be given or the offence treated as a civil (or administrative in the case of the civil servant) offence.[40] In cases where the

[38] This analysis, like much of the analysis in this paper is redolent of Bensen and Baden (1985). Of course, Becker (1968) remains the classic reference for this kind of analysis.

[39] The continential system generally places greater responsibility on individuals to assist the government defend society's interests whereas in a common law system, individuals do not have the same duty of fidelity toward the state (which in turn exercises its duty of care toward its citizens).

[40] A discussion about the types of evidence which would establish civil responsibility for complicity in corruption are beyond the scope of this paper. However, evidence regarding the person's relation with the suspect, the person's location and movements are all potentially substantive pieces of evidence which the instructing judge (prosecutor/administrative agent) would take into account in deciding whether to forward the case.

individual knew about corruption which would significantly affect others, then possible criminal liability would ensue.[41]

Two Questions for a Corruption Complicity Test

5. Is it likely the individual knew about corrupt transaction(s) under consideration?

6. Did the individual know about corruption which significantly adversely harmed individuals not party to the corrupt transaction.

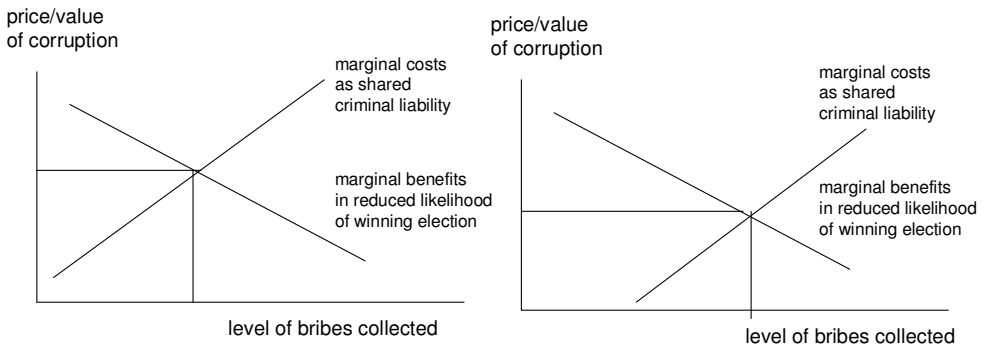
Political corruption (or the collection of bribes for the finance of a political post) is particularly related to such types of corruption. In the election law, **a provision can stipulate that any winning candidate whose campaign was financed by corruption must resign from office -- even if the candidate did not know the funds had been obtained from corruption**.[42] The discussion about complicity above makes the legal argument for introducing this form of liability for politicians. Naturally, the level of proof required will be found empirically – namely by an acceptable rate of candidate turn-over (as competition in electoral markets will ensure the vigorous application of this law).[43] The economics of corruption for politicians is depicted in Figure 8. Marginal costs increase as more bribes are collected by his or her associates (as the politician runs higher risks of being discovered and investigated). The politician obtains lower marginal benefits (as the proceeds of corruption make a high impact on voters already favorably disposed to the candidate and a lower impact on extra voters who are less favorably inclined). As shown, an equilibrium level of corruption will exist, though provisions which make corruption more costly for the candidate will reduce the extent to which he or she participates in corruption.

[41] As in cases of theft or other offences, a particular level of harm often determines whether an offence is statutorily defined as a crime and a civil offence. The most obvious measure of harm in cases involving bribery consists of the financial value of the bribe involved. In the early stages of using this test, judges and administrators may interpret the phrase "significantly adversely" and, over time, embody their deliberations in the anti-corruption law as a threshold level.

[42] Such a provision can either also or instead be included in the country's anti-corruption law (if such a law exists in a particular country). The approach taken to date in practice has been to allow political markets to eliminate corrupt politicans (and to subject the civil servants who participate in corruption to face criminal liability for corruption). Basing the prosecution of politicians for corruption offences in electoral or even civil law (fraud and mis-use of funds) can be a practical way to enforce the anti-corruption law.

[43] Political corruption, and the use of corruption laws for political motives, has a long and well-researched history. See della Porta and Vannucci (1999) for an approachable introduction to the issues.

Figure 8: Optimal Level of Bribe Seeking for a Political Post



The Three Golden Rules of Anti-Corruption Regulation in Developing Countries

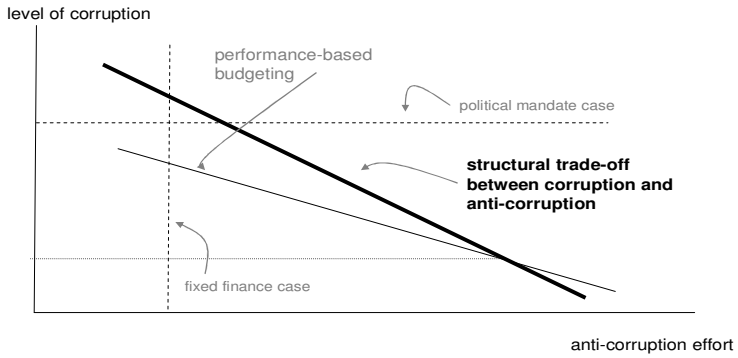
In anti-corruption, as well as in most areas of public service delivery, a number of golden rules help agencies fulfill their mandate – in this case to fight corruption. The first golden rule of anti-corruption regulation is that finance from anti-corruption must be used to finance anti-corruption. The intuition behind this is shown in Figure 9, which plots the amount of anti-corruption undertaken corresponding with various levels of corruption. In the case of a fixed budget to a department (such as the Internal Affairs department of a ministry of customs), the anti-corruption level effort is fixed by the department's line-item budget for anti-corruption work. Such funding, depicted as a vertical line, establishes a fixed level of anti-corruption work, irregardless of the level of corruption. In the case where funding is given based on political events (a general cry against corruption) or based on administratively perceived need for anti-corruption funding, funding is tied to a particular level of corruption which may not correspond the amount of actual anti-corruption work undertaken by the department. Such funding often only occurs at high levels of corruption (as governments tend not to fund anti-corruption where no apparent need exists). Figure 9 also shows the (downward sloping heavy set line) structural relationship between the level of anti-corruption work and the level of corruption (showing the extent to which cops on streets, public auditors slouched over desks, and others help dissuade people from engaging in corruption or help prosecute them). The figure also shows the case when a department receives anti-corruption funding in proportion to its effectiveness at fighting corruption (as the light downward sloping line). Figure 9 shows the case where more funding is given than the received as proceeds from corruption.[44] The intersection of each financing rule with the structural trade-off determines the equilibrium level of corruption and anti-corruption. Such a rule will result in the highest amount of long-run, sustainable anti-corruption effort.[45] In this case, over time, funding is expected to converge to the level corresponding with the structural trade-off.[46]

[44] Such a proportional funding rule may emerge for law enforcement agencies who are allocated funding to do core anti-corruption work based on their effectiveness.

[45] While a discussion of comparative statics involving Figure 9 extends beyond the bounds of this paper, the reader can see that the slope of the financial rule between corruption and anti-corruption must be greater than the slope of the structural trade-off between these two variables (in order to guarantee continued investment in anti-corruption).

[46] In practice, most governments follow the opposite logic; restricting funding as anti-corruption work becomes more successful (on the grounds the problem is less pressing relative to other problems). The result of such funding patterns is to provide the anti-corruption unit with incentives to avoid fighting corruption (and in theory

Figure 9: The Case for Performance-Based Anti-Corruption Budgets



The second golden rule of anti-corruption regulation (in developing countries) is that anti-corruption results depend on the extent to which the anti-corruption fighter's incentives are tied to his or her performance. Figure 10, an adoption of the Hart (1995 model) shows the level of revenue collection (or detection of bribes) on the *y*-axis for various distributions of proceeds from enforcement activities between the Treasury and the civil servant (on the *x*-axis).[47] On the left end of the *x*-axis, the Treasury (or a party who is not the civil servant) has rights over all the proceeds; providing the civil servant will have few incentives to work hard. On the right end of the *x*-axis, the civil servant obtains all the proceeds, he or she will be have incentives to be over-diligent – accusing innocent people where enough circumstantial evidence may exist (or even engaging in criminal behaviour to increase his or her salary!)[48] As shown in the Figure, some optimal "pass through" of the proceeds from fighting corruption can be defined such that the investigating officer in the ministry of customs, tax, border guard or other agency has the optimal incentives to fight corruption.

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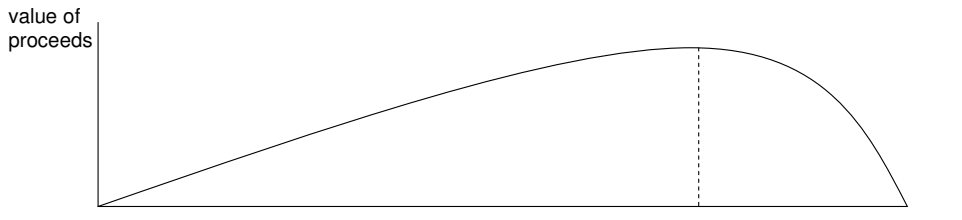
to contribute to corruption!). In theory, the optimal level of finance will never (in theory) exceed the point where the downward sloping finance curve intersects with the downward sloping structural trade-off curve.

[47] Such proceeds may involve catching civil servants "red handed", taking money which would be used in bribery. In other cases, these proceeds may involve an award tied to the level of social harm prevented by preventing specific cases of corruption (as will be discussed below). However, such proceeds may extent to a share of extra revenue which revenue generating departments collect when civil servants are not corrupt. For example, a customs or tax collection service may collecct $5 million more when a particular civil servant is no longer granting dispensations in exchange for bribes.

[48] The pass through of proceeds to civil servants may take a number of forms. Civil servants may either be legally entitled to a share of the proceeds or their salary (and promotion prospections) may be tied to their effort at fighting corruption.

Figure 10: Pass through of Anti-Corruption Incentives



In practice, government departments engage in a number of activities which help tie civil servants' remuneration to his or her performance in an anti-corruption context. Some countries have experimented with a "bounty" system, whereby the civil servant's department keeps a percentage of seizures.[49] In cases where such collections violate law (in most countries government departments are not allowed to engage in revenue sharing), a system of administrative fines are imposed with can closely replicate such a revenue sharing arrangement.[50] Once a department's revenues are partly determined by civil servant performance, civil servant pay can be adjusted through accelerating promotions and the paying of perquisites, and the payment of *qui tam* rewards.[51]

The third and possible most important golden rule of anti-corruption regulation (in a developing country context) is that an incentive-based approach to fighting corruption will produce superiour results to an approach based on regulations because **regulations distort both the public and private sectors.**[52] In many cases, co-ordination or co-operation failures between civil servants create situations where executive regulation can improve productivity in anti-corruption work. However, as shown in Figure 11, in many cases, these regulations fail to stop the behaviour they target while simultaneously introducing a wide range of real costs (such as monitoring and enforcement costs) and economic costs (tied to the opportunity cost

[49] A number of government departments derive revenue from anti-corruption efforts. Naturally, internal security offices recuperate bribes (if such recuperation is possible). The gain to the government in cases where corruption offences have been averted also represents revenue gain (though the realisation of this gain is less obvious as the gain derives from a averted harm instead of a direct payment into the government's coffers).

[50] Revenue sharing schemes are prohibited in most administrative law traditions on the grounds such arrangements would create adverse incentives to over-collect. Such a system would also avoid the systems of transparency and accountability which govern public sector budgeting, expenditure and reporting. Increasingly, particular types of fines are being designated for special purposes instead of simply being remitted into the general government budget.

[51] In some civil services in the OECD, higher grade specialist positions are increasingly be created which are paid like senior managerial posts, but without the concomitant managerial responsibilities. While such a system is sometimes open to abuse, close oversight by the civil service office helps prevent fraud in the system. In some Central and Eastern European countries, civil servants are still given perquisites (access to cheap housing, use of government resouces) which can increase a civil servant's real salary by up to 40% in places such as Russia (Nunberg, 1998). *Qui tam* rewards (or rewards paid for providing evidence on a civil servant which leads to his or her convinction of corruption or other offences against the state) are covered in the next section – as are the remedies which can help mitigate the problems with paying civil servants to do their job.

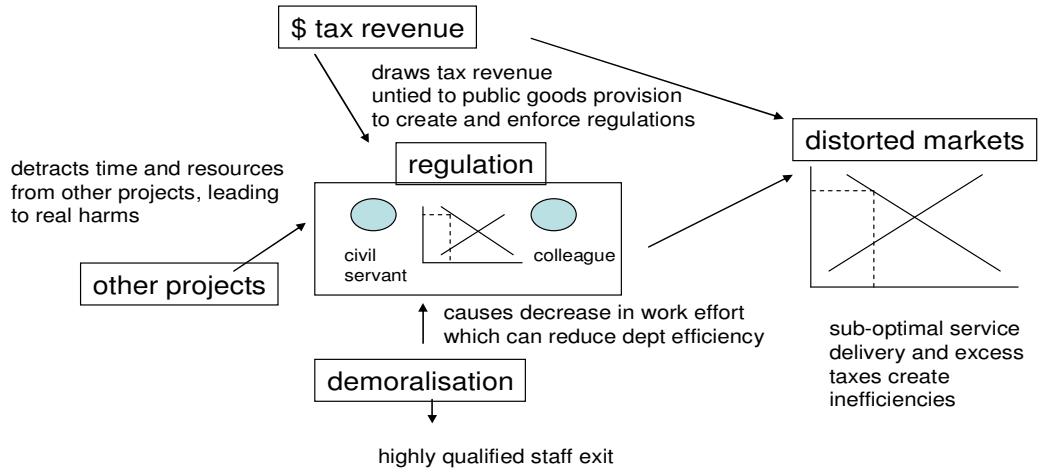
[52] The trend in fighting corruption has been to implement codes of conduct, conflict of interest rules, asset declaration, party finance reform and hundreds of executive level regulations tied from the amount of money civil servants are allowed to carry to the number of receipts they must produce for work-related expenses. Regulating is almost an instrictive and visceral reaction to a problem in the public sector (see Anechiarico and Jacobs, 1998 for one book treatment of the problems involved with anti-corruption regulation).

of doing something else). A regulation, which will create a divergence between actions the civil servant would normally take and the action he or she is required to take, will detract the civil servant's attention from other, potentially more productive, tasks.[53] Anti-corruption regulations cost money -- money to talk about, to write down and to implement.[54] These regulations can often distort markets, not only because they restrict civil servants' freedom of movement but also because they impose an extra tax burden on society.[55] These considerations lead to a restatement of the third, and possibly most important, golden rule of anti-corruption regulation:

***Prime inter pares* rule of Anti-Corruption Regulation**

A departmental regulation aimed at reducing corruption must balance the corruption reducing effects that rule will have with the distortionary effects on the public management environment and private markets[56]

Figure 11: The Distortionary Effects of Anti-Corruption Regulations



[53] Figure 11 does not argue against all regulation; as regulations prohibiting civil servants from collecting bribes clearly detracts the civil servant's away from such activites and increases overall productivity. However, regulations which force the civil servant to engage in filling out paperwork or change work location every 6 months clearly imposes costs which may be larger than the gains from reducing corruption.

[54] While such stories abound, a recent code of conduct exercise in a particular Estonian ministry cost of 20 staff days and $30,000 in fees to an external consultant. In theory, the department should have conducted a cost-benefits analysis before engaging in this work (as not a single civil servant could tell me what the code of conduct contained).

[55] Regulations often emerge from a crisis in the executive agency instead of a well-reasoned consideration of costs and benefits. The result of such regulations is to impose costs on all bureaucratic members while only marginally reducing the liklihood of particular acts of corruption. For example, an accounting procedure imposing the loss of $40,000 dollars in staff and accountants' time to prevent $5,000 in stolen or mis-accounted funds would be a poor regulation.

[56] As this is a paper on legal aspects of anti-corruption regulation, the rule must address issues related to justice. Broadly speaking (because each country's conception of justice will necessarily vary), the regulation must protect the interests of the majority which preserving the rights of the minority (Kolm, 2002). In some sense, the role of the agency manager is to push for efficient anti-corruption regulations while the role of (administrative) judicial oversight is to ensure that these regulations conform with and help promote the view of justice which has evolved with the country's jurisprudential tradition.

Who to Sue, where to Sue? Jurisdiction for Anti-Corruption Offenses

Jurisdiction over particular corruption offences should be given to the organisation which can most effectively investigate and prosecute the offence.[57] For civil servants, the civil servant's department, the administrative court and the criminal courts all can have a role to play in a corruption case. For the private persons caught engaging in corruption or wishing to file a complaint against the extortion of a bribe, they may have recourse to civil or criminal proceedings. Generally at present, in cases of suspected corruption (or cases where a complaint is made), initiation begins in the civil servant's department. The department may conduct an investigation if prima facie evidence for the offence is not forthcoming. In most instances, the department is unable to obtain sufficient proof and the matter is dropped. In cases where department management wishes to proceed with the investigation or prosecution of a corruption offence, they may work with (and/or receive guidance from) an administrative court or specialized body dealing with administrative issues. For serious cases (where criminal liability is unavoidable), investigators may be called who also frequently drop the case for lack of evidence. For complaints received outside, they are handled directly in the administrative court or tribunal.[58]

The normative choice of jurisdiction should depend on the relative costs and benefits of investigating and prosecuting corruption.[59] Figure 12 shows the marginal benefit of using administrative and civil courts (and downward sloping lines reflect the diminishing marginal returns to each type of institution). Civil courts are assumed to be more costly (though more effective for larger cases of corruption) as reflected by a rightward shifted marginal benefits curve. Parties directly involved in corruption (as well as society in general) are assumed to incur marginal higher harms (and thus costs) with higher levels of corruption – reflected by the upwarding sloping cost curves in Figure 12. In the Figure, private costs are everywhere less than social costs (reflecting third-parties who must bear the higher prices, lower competition, restricted access to public services and other harms attendant with corruption).[60] In the Figure, the case should be split up. If only aggregated bribe payers filed suits against civil servants, then an division of administrative to civil courts would be set at (a,c). However, if other people who are harmed are allowed to bring action against these civil servants, the level of corruption falls, and administrative courts take a much heavier share of the legal workload (at a*,c*).[61] Administrative courts should take jurisdiction over part of the offence and civil courts over another part.

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[57] Such a view of jurisdiction is still controversial among public management experts who argue that jurisdiction is a political issue as much as a technical issue (relating to government efficiency). See Hood (1999) for an interesting view in the UK context.

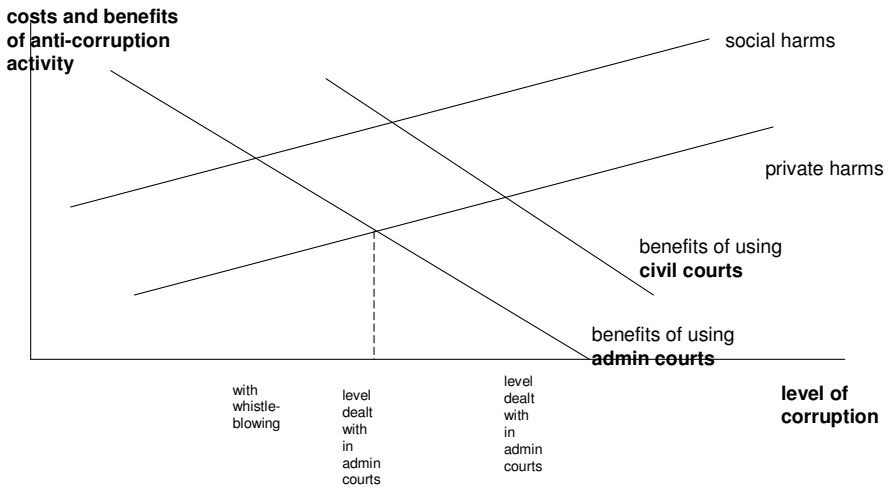
[58] The obvious question revolves around whether a corrupt civil servant's boss would press charges against a corrupt subordinate? Figure 8 already suggested that under circumstances, the boss will have incentives to turn the corrupt civil servant over to the administrative courts (or criminal courts). An audit will be discussed below which addresses in more detail how to reduce incentives currently in place which protect corrupt officials.

[59] While the positive determination of jurisdiction depends on political negoation and the resulting law, the detailed jurisdiction for corruption offenses is not yet established in many Central European countries.

[60] For example, when a trader pays a bribe to avoid a licence, he or she also acts non-competitively vis-a-vis other traders; causing them to lose sales to now cheaper trader. For more on the calculation of these social costs, see Michael (2007).

[61] The reader with a background in law may have difficulty accepting the (overly) economistic logic employed in this section. However, a wide number of legal scholars are using economic analysis in their legal reasoning (Posner, 2003). Authors such as Ogus (2004) note that traditional law enforcement has had difficulty, leading to new approaches such as those presented in this paper.

Figure 12: Choice of Jurisdiction and Definition of Plaintiff



In most legal traditions covered by the Council of Europe and OECD Conventions, victims of corruption can only claim damages for the direct harm caused by corruption (for example psychological harm and punitive damages generally can not be claimed). Yet, harms to various parties occur beyond the money lost in a bribe payment. The government losses tax, customs and other revenue, which the bribe payer losses time and often incurs extra expense as a result of corruption. Moreover, remedies available under these conventions complete ignore harms to third-parties (such as individuals who must wait in a queue longer because of privileged passage by bribe payers). In a scheme where only bribes paid can be recovered, the value of anti-corruption is zero (anti-corruption work simply restitutes bribes to their rightful owners in cases of extortion) or negative (when court costs are high and funds are not recoverable). Even in an efficient system whereby private costs are recovered quickly, the value of anti-corruption work would be low relative to the value of anti-corruption which encompasses a broader range of harms. In Figure 12, the value of such a system *Vs* clearly lies about the value of a system allowing only for the recuperation of private costs *Vp*. Yet, legally justifying a legal system which allows plaintiffs to recover from defendants sums which incorporate the additional harm they impose on direct parties to corruption and indirect third-parties remains problematic.[62]

Two concepts can help justify the imposition of fines which help internal the external harms caused by corruption.[63] *Duty of care and qui tam* are two legal provisions which provide economic incentives to actors to engage in the socially efficient level of legal activity. While duty of care is a tort concept (particularly enshrined in Anglo-Saxon law), most continental legal traditions place a much higher level of responsibility on government to exercise duty of care than the Anglo-Saxon tradition places on the American and British government. In the view, the government has a duty of care to provide fair competition, free

[62] In cases where defendants are unable to pay the fine, the government would indemnify victims (as it does with other harms).

[63] Such third-parties are referred to as social bads exhibiting negative externalities. Judicial remedies aimed at making perpetrators of corruption offences pay fines equal to the socail harm they cause can be justified in the same way that Coasian taxes on pollutors are justified.

passage across a border (subject to the national law), safe streets and other services. Though an individual may not be directly involved in corruption, if the government allows corruption which damages this third-party, the government has acted negligently toward its duty of care and is thus liable for damages caused.[64] The government's liability in this case is to indemnify victims for an amount equal to the social costs minus the private costs as indicated in Figure 12. To the extent that victims of corruption can file administrative complaints (in the department for example where the corrupt civil servant work) for violations of the government's duty of care (which results in economic harms to victims/plaintiffs), then the government will engage in the optimal level of anti-corruption activity.[65]

Qui tam provisions, which allow any individual to sue the government on behalf the interests of the government, are also expected to help internalize the externalities caused by corruption (and which victims of corruption are unwilling or unable to sue for in compensation). In cases involving corruption, *qui tam* provisions serve as a bounty for corrupt officials and businessmen.[66] The reward for individuals to report cases of corruption would by related to the social return identified in Figure 12 for three reasons.[67] First, individuals reporting corruption would want a return which equaled the value they generate to society (as long as this reward is higher than their own costs). Second, government would want to pay out no more than the social value generated by whistle-blowing (and thus the value it receives in tax revenue).[68] Third, injured third-parties would be willing to pay part of the harm they incur in order to reduce or prevent that harm.[69]

The logic is illustrated more fully in Figure 13, which illustrates on a line the costs and benefits involved in a simple bribery case in which a third-party denounces a corrupt official in exchange for a reward. Panel (a) shows the bribe level (on a line such that positions to the right represent higher bribe amounts) and the corresponding amount of social harm. For

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[64] Such a logic will seem unusual for a reader steeped in a common law tradition. For example, a number of French plaintiffs have successfully sued the French government in cases of assault and battery involving other private individuals and the grounds that the government was responsible for private the law enforcement required to forsee and prevent the assault. In general, criminal liability in a common law tradition does not extent to omission (except when the defendent is under a positive duty to act). A careful distinction should be made between negligence (failing to prevent corruption) and complicity (creating an environment which enables civil servants to collect bribes).

[65] As argued in the previous section, tying the payment of harms committed by members of an executive agency to its budget increases the incentives to fight corruption. As shown in the last section, government will increase anti-corruption work to the extent such work will increase the department's budget (and its civil servants' compensation). Clearly, if executive agencies can derive revenue from their anti-corruption work, then can also be liable to pay indemnities from their own budgets. Legally, the payment of such penalities poses no problems; if departments have the legal right to collect fines, they also have the legal obligation to pay them.

[66] The actual effect of these bounties will depend on the extent to which corrupt officials and businessmen can "price in" the bounty and the increased probability of being caught during the bribe negotiations. If they can pass through these costs, then qui tam provisions may only serve to further redistribute income instead of lead to a reduction in the incidence of bribery. For a game theoretic discussion of the design of such a system, see Cooter and Garoupa (2001).

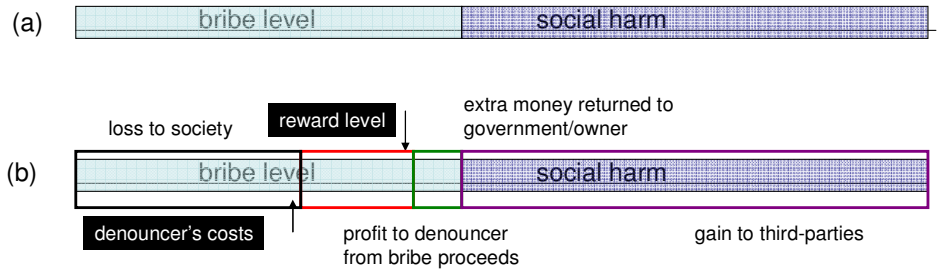
[67] In theory, without transactions costs, the reward to the denouncer should exactly equal social benefits from denouncing corruption because the denouncer can convince these third-parties that they are better off if they pay the denouncer. In the real world, the actual payment to the denouncer is likely to be less than these social benefits.

[68] In theory, the government will receive in tax revenue the value of the social goods and services it provides. If it provides less, voters will (in theory and in the long-run) vote to reduce the tax level. If government produces more value than it earns in taxes, government should provide more goods and services, thus militating for an increase in the tax rate.

[69] The landmark citation for the intuition shown in Figure 13 is Coase (1960). See Claeys (2006) for an interesting application of similar legal concepts.

example, a person bribing a customs officer may pay $100 which causes $600 in harm to other businesspeople (who lose sales). Panel (b) shows a reward level which is higher than the whistle-blower's costs (such a reward must always be higher, otherwise no incentive exists to denounce corruption). For example, of the $100 bribe, the denouncer may receive $80 and cost the denouncer $40 in time and effort to find and report this incidence of bribery. At the level of rewards and costs portrayed in panel (b), the loss to society of corruption is represented only by the denouncer's costs (as the other harms are recoupable). The denouncer's profit is represented by the difference between the reward level and the denouncer's costs. The extra money returned to directly harmed parties is returned -- representing a gain to these victims. Parties who are indirectly harmed benefit from the discontinuation of corruption.

Figure 13: The Optimal Theoretical Qui Tam Award in Corruption Cases

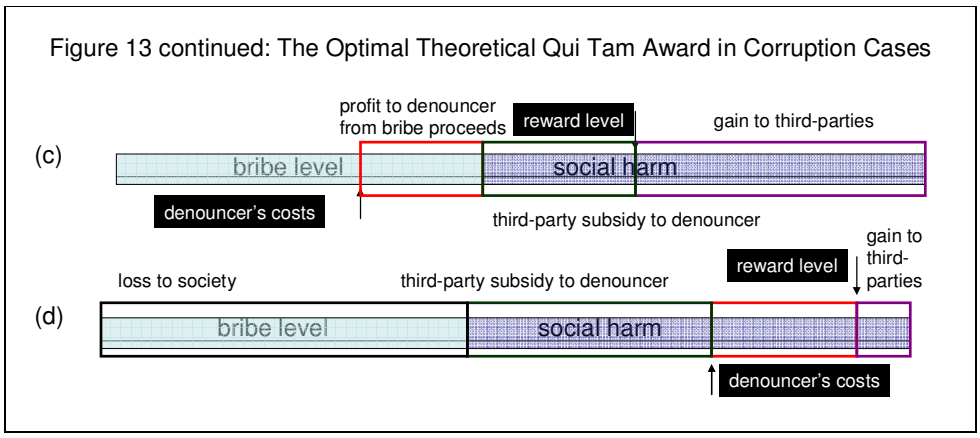


In cases where the reward exceeds the amount of money involved in the bribe transaction, some parties who are indirectly harmed will find it beneficial to pay the denouncer.[70] In panel (c), the denouncer's costs are less than the bribe paid, though the reward is much higher; thus the denouncer may incur $80 in costs and receive a reward of $200 (which is less than the $600 in overall harm to all producers). As a result, part of the denouncer's bounty will be paid by individuals directly harmed by the bribe and partly by individuals indirectly harmed. However, because the reward is less than the overall gain accruing to third-parties, some of these third-parties will benefit.[71] In panel (d), the denouncer's costs are higher than the amount involved in the bribe transaction; for example the denouncer may incur $200 in costs and receive $400 in rewards, though only $300 in bribes was paid. In this case, as long as the reward is less than the overall harm to society, third-parties will benefit by contributing to the denouncer's bounty. In this case, third-parties (or society as a whole) compensates the denouncer and the gain to third-parties is much less than when smaller rewards are paid.[72]

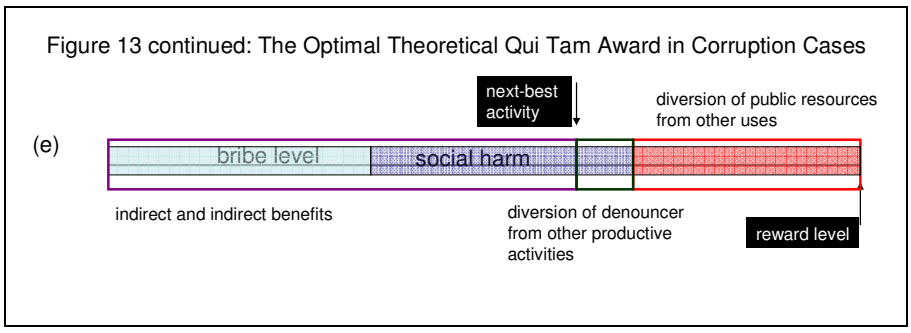
[70] In theory, individual who are indirectly harmed will make Pareto improving payments to the denouncer. Usually in practice however, these third-parties are completely dissassociated with the corruption case (and they often to directly understand the harms which they experience). Thus, compensation to the denouncer based on overall social gain comes from the government budget). In theory, third-parties who are most harmed by bribery would be those parties must willing to pay compensation to the denouncer. However, even in theory, predicting which third-parties will benefit most from the discontinuation of corruption (and asking for contributions from these specific individuals) can only be done with difficulty.

[71] In theory, in the presence of low transactions costs, third-parties who are harmed by corruption can form a coalition or class-action in order to divide the gains relatively equally among themselves.

[72] As an interesting aside, in the case where no detection or prevention is attempted, the bribe represents a simple redistribution of resources between briber and bribee (thus no economic loss occurs, except for the harms to



In case the reward is set too high, the reward can distort incentives, causing *qui tam* provision to do more economic harm than good. Panel (e) shows the case where the reward paid to the denouncer is higher than the direct or indirect harms of bribery. In this case, the government must resources from other activities in order to compensate the denouncer…resulting potentially in lower social returns to other activities. Because the denouncer will have an opportunity cost (such as working in a company) the reward could distort the individual's incentives, resulting in this individual moving away from other productive activity.[73]



As shown previously, an effective anti-corruption programme provides the same kinds of incentives to civil servants to denounce corruption (and to increase work effort aimed at investigating corruption). However, paying civil servants to do their duty potentially creates negative incentives within the public sector because of the two negative effects describes in panel (e), namely distorting the civil servant's time and government resources. As discussed above though, it is possible to design a compensation package which provides blunted financial incentives (in the form of promotion or perquisites) without diminishing incentives to comply with work obligations. Thus, **the optimal high-powered incentive scheme aimed at encouraging civil servants to actively fight corruption blunts the incentives paid to civil servants to the point where the temptation to divert one's time and government resources into the investigation and prosecution of corruption offences which have low**

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third-parties). In the case where a bounty-hunter attempts to collect a reward, his or her costs represent a efficiency-decreasing transaction cost.

[73] The reader will that the same logic presented in Figure 11 applies in the case in which the reward paid exceeds the social loss caused by a corruption transaction. In both cases, individuals are provided with incentives to maximise a private or individual return which causes decreases in overall welfare.

expected return are minimized.[74] The previous discussion suggests a simple test to determine the level of payments made to whistle-blowers.[75]

Two Questions for Determining the Level of *Qui Tam* Rewards

1. What was the financial value of the harm done to parties to a corruption offence who hold no legal liability and the financial value of harms imposed on third-parties?

2. What payment can be made to engage the investigation of corruption cases while simultaneously minimizing the distortion to investigators' incentives?

Problems of Criminalisation, Defenses, and the Application of Administrative/Judicial Remedies

The legal trajectory of the international legal work on corruption (as embodied in the UN, CoE and OECD Conventions) points to the increased criminalisation of bribery and corruption (and I have repeated referred to criminal offences of corruption). The criminalisation of corruption offences in developed OECD countries with effective judicial systems has been common practice.[76] However, in countries where judicial systems are weak, the criminalisation of corruption offences (as imposed by these international conventions) poses serious problems for successfully prosecuting corruption offences.[77] First, criminal cases require extensive (and expensive) investigation by the judiciary and prosecutor's office. Yet, resources in these government services are extremely limited and corruption in the judicial system is likely to reduce the liklihood of successful prosecutions of corruption in other sectors.[78] Second, (as previously discussed) as superiors are legally and administrative responsible for the corrupt activities of their sub-ordinates, they have been unwilling to strenuously investigate complaints about corruption – in order to avoid prosecution themselves! Third, the level of proof required for a successful criminal conviction reduces the range of cases which may be pursued. Administrative sanctions against corruption based on "balance of probabilities" standard for successful conviction can – in certain circumstances – provide greater deterrence against corruption than the ostensibly strong criminal standard

[74] The optimal payment, which will be less than the equilibrium payment which equals the private plus social costs imposed by a particular corrupt transaction, will clearly depend on the civil servant's income elasticiity of labour supply and the extent to which the civil servant internalises the externality through a public service motivation or altruism (see Crewson, 1995 for empirical estimates of such a public service motivation). Such a payment will necessarily reduce the resources available to compensate victims of corruption crimes and other corruption offences.

[75] Such a rule currently emboddies the spirit of the CoE Convention (which does not allow for punitive damages). Thus, a conception of justice which ties compensation to harms complies with the spirit of international legal work on bribery.

[76] Philosophically, the wide range of social harms caused by corruption suggest that corruption is a crime against society (thus consistuting a crime) instead of simply an offence against an individual (consisting a civil law infraction or a tort). In advanced countries, the state is unlikely to be negligent towards its duty to uphold the rule of law. The effectiveness of criminalisation remains an open question – as countries such as Japan, Italy and other countries shows that criminalisation is not a necessary and sufficient condition for reducing corruption.

[77] Posner (2004) provides a useful vade mecum for understanding criminal law traditions in developing countries. Salbu (2000) provides an overview of the legislation and institutional change aimed at fighting corruption.

[78] The weaknesses in the judicial systems of both countries is covered in the literature previously cited.

which requires proof "beyond a reasonable doubt."[79] Fourth, by increasing the penalities for bribery, criminalisation can increase the equilibrium bribe payment. Obviously, bribees need to "price in" the additional costs they face if they should be detected. Less obviously, once a bribe has been offered, the civil servant bribee can blackmail the briber up to the point where the bribe paid equals the money value of criminal sanctions against the briber.

Moreover, a number of defenses which are more widely available in developing countries, make criminal liability difficult to categorically establish and attenuate civil servant responsibility in cases involving corruption.[80] First, civil servants may rely on the implied wishes of their superiours (as discussed in the section on respondeat superior). In a public administration rife with corruption, civil servants can argue that speed payments facilitate the functioning of government – thereby serving the interests of the department. *Respondeat superiour* serves to dissolve liability and transfer liability to others, reducing the likelihood of successfully prosecuting any one particular individual. Civil servants can argue – with some validity – that prior failures to investigate and prosecute corruption comprise implicit consent for corruption. Second, in countries affected by high levels of corruption, civil servants can argue that the government is complicit in bribery – as the government places civil servants in positions of temptation with low wages and little effective oversight. Most courts find for either diminished responsibility or acquit defendents who are placed in positions of temptation.[81] Third, except in the most egrigous forms of bribe-reeking, some form of coersion is often present in corrupt transactions. Such forms of coercion can include fear for one's life and safety if one does not participate actively when one's colleagues participate actively, threats made by criminals seeking favours, to more abstract definitions of coercion stemming from relative poverty.

The difficulty of prosecuting corruption under a criminal burden of proof as well as the large number of mitigating circumstances (which defendents can be as reasonable defences) militates for a multiple levels of exclusive (non-overlapping) responsibility. Figure 14 showd three levels of responsibility which exist (albeit in a highly disarticlated form which does not appear in the anti-corruption law) for corruption offences. Managerial responsibility aims at tackling incentives leading to corruption and small corruption offences. Managerial jurisdiction results in cheap investigations which require little formality. Administrative responsibility applies a civil law burden of proof (allowing executives services to deal with high risk areas of corruption where obtaining proof is difficult or expensive). Administrative cases can be processed quickly and the relatively light penalities make bribing administrative judges generally unprofitable. Criminal responsibility applies all the standard procedures as envisioned in the criminal code (and to the extent applicable the anti-corruption law).[82]

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[79] Such deterrance is likely if a lower burden of proof facilitates the prosecution of corruption (particularly when proof is difficult to obtain). In most EU countries, the accuser of a corruption offense has the burden of proof. In the UK, the burden of proof is reversed – namely the civil servant has the duty to show he or she did not participate in corruption. While the reversal of the burden of proof for allegations of administrative corruption are not appropriate to many developing countries, the UK experience shows that reducing the required standard of proof may serve to deter corruption.

[80] For a broader discussion of the issues, see Shavell and Polinsky (2001).

[81] As an obvious example, a court would take a much more lenient view of a starving individual who took money left in the open on a public table top than it would of a rich person who took money from a locked safe. Even though both cases involve theft, in one case

[82] Naturally, the civil servant and the government department could still face civil liability.

Figure 14: The Harms and Standard of Evidence Required for Corruption Remedies

	Evidence requirement	**Types of remedies**	**Advantages**
Managerial	suspecion of corruption	Written warning, reassignment, pass to admin or criminal levels	failure to prosecute opens to administrave and criminal liability.
Administrative	balance of probabilities	warning, reassignment, fine, firing.	failure to detect large numbers gives admin court liability. contributory factors/ accessory to a crime
Criminal	beyond a reasonable doubt	fine, censure, prison.[83]	if criminal prosecution does not succeed (because of corruption in judiciary), then rely on two other levels to obtain partial prosecution.

These defenses show that a legal test should differentiate between personal liability and state liability for corruption offences.[84] In most cases, because the state is responsible for investigating and prosecuting corruption offences, the state bears no liability for cases where civil servants act *ultra vires* in order collect bribes. However, if executive agencies are granted the right to collect money to use in fighting corruption and the obligation to indemnify victims of corruption (as discussed above), then clearly executive agencies must bear legal liability for corruption offences.[85] In order in provide incentives for the state to prevent corruption, the burden of proof can be reversed for state liability as shown in Figure 15a.

Figure 15a: Dual Liability for Corruption Offenses

	Description	**Burden of Proof**	**Type of Responsibility**	**Justification**
Personal Liability	The bribee breaks the law and thus incurs personal liability	On accuser, beyond a reasonable doubt	Managerial, administrative or criminal	The civil servant breaks his service (employment) contract; incurring personal rather than derived responsibility.
State Liability	Department policies facilitated the collection of bribes and provided the civil servant with incentives	On state (reversed burden of proof).	Administrative	The state engages in contributory negligence or at least failing in its duty of care toward government service users.

[83] Prision time is difficult to justify from an economic point of view given the purely economic nature of corruption offences, the resources required to maintain the individual in prison and the questionable deterrance and punitive value of imprisionment (see Wickelgren, 2003 for some of the literature and issues).

[84] Clearly, in many circumstances, liability would fall to both the individual and the state for a single offence (French administrative law recognises such shared liability under the *cumul de fautes* principle). Particularly French law recognises civil servant fautes which are only possible with money and powers provided by the state. Moreover, in cases where several civil servants are found to have commited a similar infraction, they may claim compensation from the state for penalties assessed on them personally (Roucault, 2006).

[85] In a continental tradition, legal disputes between government entities are resolved by administrative courts. The imposition of rights and obligations on particular executive agencies represents a new area for continential law. Clearly, contracts made between executive agencies presupposed that executive agencies can create and negotiate over rights and obligations between themselves (and between them and non-government entities). However, the imposition of liabilities on one department for policies which are imposed on all executive agencies (such as the civil servant renumeration scheme) represents a relatively unchartered area of European public law.

The reversal of the burden of proof can help with increase prosecutions of corruption offences and provide incentives to government policymakers to actively prevent corruption for a number of reasons. First, the state clearly has an positive obligation to discourage corruption – thus the burden of proof naturally falls on the state.[86] Second, the state is more able to bear responsibility for corruption than the individual. Damages in a large corruption case are likely to be more than an relative poor civil servant in a developing country can bear.[87] Third, the cost of providing documents and other proof (which could convince a reasonable person) that no bribes were paid in a specific situation would be extremely high for an individual but relatively low for the government.

Corruption offences often involve the violation of several regulations and impose liability on several persons or entities. For example, speed bribery involves the violation of a number of regulations. *Managerial-level violations* include failure to maintain discipline, dealing in secret with service users, failure to report a criminal activity to management (the offer of a bribe). Corruption also may constitute reckless behaviour which puts the department at risk (as managers in the department potentially share liability for corruption offences). *Administrative level infractions* include the breach of administrative procedure, placing others at risk of commiting a crime (other civil servants who are around and other service users who may observe the case), misuse of public assets, abuse of power, violating the code of conduct, and possibly perpetrating fraud and deception (if the civil servant claims that the service user does not have rights which he or she actually has) as well as theft (if coercion was involved in the collection of the bribe). *Criminal violations* include a corruption offence, possibly theft of both state assets (if these assets where granted to service users) or theft of service user assets (if the bribe was obtained by coersion). Failing to declare such income may also constitute a criminal offence. The civil servant also could hold criminal liability for complicity in organised crime (if organised crime groups pay the bribe).[88]

As many corruption offenses involve a number of infractions of department, administrative and criminal codes, each infraction may fall within a different jurisdiction. To the extent that infractions fall in different jurisdictions, remedies can be "cut up" (or divided) and the defendent may face trial in several jurisdictions.[89] A three-tiered system of liability helps allocate responsibilty to each tier – ensuring a greater level of detection and prosecution.[90] Even though criminal liability for corruption may be difficult to prove, the

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[86] In many cases of corruption in developing countries, the state has reasonable forseeability of

[87] Moreover, a criminal trial – which an effective method of ensuring integrity – is psychologically oppressive for an individual to bear; a burden better borne by individuals who serve as agents to a institutional principal (like the state).

[88] As discussed at some length previously, the civil servant may also bear civil liability if third persons are harmed. Corruption involving public procurements are most likely to fall in several jurisdictions as harms can be attributed to users of inferiour goods and services, competiting firms (who spend money to participate in a rigged tender), the contracting government department, and the procurement agency (whose regulations are violated). Provisions in the commercial code (as previous discussed) are violated as are provisions in company law in many countries.

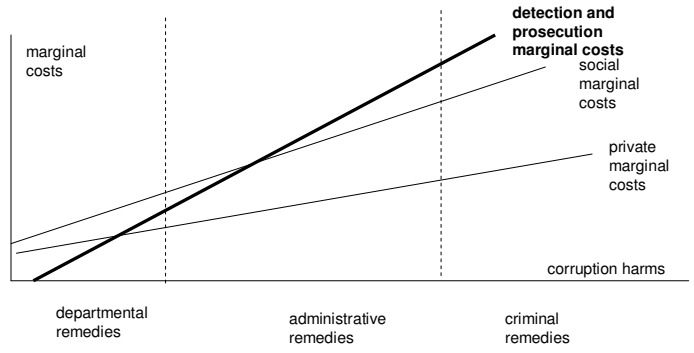
[89] Courts have long upheld the view that corrupt transactions involve multiple violations of commercial, civil or criminal code. For example, Schroth (2002), citiing 15 U.S.C. 78u(d)(3), notes that "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" and increases again if, in addition to this, the violation "directly or indirectly results in substantial losses or created a significant risk of substantial losses to other persons." As with court decisions in other countries, this succinct quote shows that penalties depend on the harm caused by the corruption offence.

[90] Kaufmann (1994) discusses the case of decreasing returns to enforcement efforts aimed at reducing corruption.

other forms of liability previously discussed may help prosecute at some level (less than optimal but greater than zero) corruption offences.

Responsibility for the prosecution of various types of offences related to corruption offences should be allocated to the organisation with the greatest incentives and lowest cost of prosecution. Figure 16 shows the optimal jurisdiction for a variety of offences discussed above (though in the Figure only an administrative and a criminal offence are portrayed). The heavy line shows the increasing cost of detecting and prosecuting corruption offences (a cost given by the natural underlying technologies and procedures of fighting corruption). Compared with these costs are the increase costs to individuals and society for corruption offences. As shown, the social cost (the cost to third-parties and society in general) is relatively high compared with the private cost (the cost to the agency and the state more generally).[91] In the particular example shown in the Figure, in this particular offence, the particular offence against the state can be prosecuted within the state (at the departmental level) and the infractions hurting society is handled most cheaply and effectively by the administrative courts.

Figure 16: The Optimal Division of Corruption Remedies Between Jurisdictions



Despite the multiple levels of accountability designed in such a system, the system remains a passive system. Namely, executive agencies wait until a complaint is filed or suspecions of corruption emerge. As such, an active system of corruption detection is required which audits based on risks of corruption. Such a "risk-based" approach to fighting corruption has been increasing used in countries as a way of detecting corruption (given that no parties have an incentive to complain or denounce corruption).

Legal Issues Involved in an Active System of Corruption Detection

At present, most executive agencies employ a "passive" system of risk detection – waiting for complaints to be made about corruption.[92] Working within the constraints of such a passive system, executive agencies have been unable to detect many cases of corruption. In

[91] These costs conform with the cost structure shown in Figure 7, as a civil servant will increase his or her anti-corruption effort as the cost of being involved in a corruption case rises.

[92] Such an approach is codified in law as investigators can not begin an investigation without "reasonable cause." While the criteria of reasonable cause is uncontroversial, such cause to date has been interpreted as a complaint lodged against a civil servant, a media revelation, the production of evidence in another case which lead to suspicion of corruption).

order to increase the rate of detection of corruption, many countries have instituted onerous schemes of inspecting police, customs and border guard officials. Such inspections involve psychological tests (inspecting the "propensity" for engaging in corruption), inspections of personal effects (including their pockets to ensure they are not carrying excess amounts of cash which can not be easy explained). Inspection increasing involves videotaping civil servants (in the hopes they will forget they are being taped)![93] Asset declaration represents a recent attempt to impose an inspection regime on civil servants (such that the possession of assets whose value far exceeds the civil servant's salary would raise a red flag).

Such procedures are (and should be) being phased out for three reasons. First, they are neither cost efficient nor effective. Just as extensive searches carried out by customs of goods crossing a border or extensive searches of financial transactions by tax police are being phased out, so must an inspection system which attempts to conduct blanket searches.[94] Second, they potentially intrude on the civil servant's right to privacy. In many OECD country judicial systems, government authorities can search or conduct in-depth investigation only with "reasonable cause."[95] In almost all cases, the only evidence which senior level government administrators can rely upon is based on hear-say which would not credibly constitute evidence in an administrative, civil or criminal proceeding.[96] Third, they encourage civil servants to seek other ways of engaging in corruption which are not detectable by existing types of monitoring. Under 100% surveillance of a particular service, civil servants

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[93] Even if secret monitoring was deemed legal in a particular circumstance, while video taping could be conducted in secret, filmage would need to be entered into evidence during a prosecution, revealing the video taping to the rest of the civil servants.

[94] As will be discussed below, much investigation services prefer to use a risk-based approach, sampling at random goods or financial transactions. Sampling frequences are determined by the risk of each population segment. See Albanese (2001) for more. As a simple hypothetical mathematical exercise, assume that 5% of a 200 man customs agency take $50 in bribes per day (which corresponds with empirical estimates in a number of low income countries). The cost of searching each person (after the start up costs of the programme have been paid) include roughly five people working all day to conduct searches of all 200 officers. If they are paid $20 a day, then $100 a day are paid in "enforcement costs." However, the $2 in time lost from the 200 men searched per day equals $400. This simple example shows how gains deriving froom reductions in corruption can be reduced by the increased costs imposed on the administration.

[95] Two issues arise with a "reasonable cause" standard. The first (and obvious) issue pertains to the extent to which government authorities can use data about groups of individuals to substantiate reasonable cause leading to the investigation of a particular individual. The compromise being applied (particularly in the United States) is a type of profiling, whereby individuals from more risky risky groups are randomly selected for further search – though even this system is not without its detractors (see Lever, 2005 for more). The second (and less obvious) issue concerns the rights employees – particularly employees of the state – should possess while at work. On the one hand, civil servants should (and clearly do) surrender rights over their own privacy in the interest of the public good. On the other hand, high levels of search and over-sight – without reasonable cause -- clearly represent invasions of privacy (as embodied in many national constitutions in Central and Eastern Europe) and causes civil servants to seek alternative employment without such high levels of surveillance. Clearly, if the particular rights of privacy being abrogated are even legislatively allowed to the surrendered, the legality of oversight depends on the voluntary surrender of these rights by the civil servant. The use of coercion by the government in encouraging civil servants to accept extensive oversight represents an abridgement of these civil servants civil rights. See Bennett (1992) for a deeper discussion of the issues.

[96] Hear-say evidence is discounted (or considered inadmissible as evidence) by most judicial systems as being unreliable. The two main forms of evidence which would be used to establish reasonable cause for a large number of civil servants would be survey results and accusations made by third-parties not involved in a particular corruption offence. Survey results are clearly based on hear-say as a wide range of corruption perceptions surveys show collect data from individuals who have not used the services recently of a service which they are evaluating. Accusations made by third-parties are either based on opinions formed after talking with someone who paid a bribe or based on direct observation. As most corruption offences are carried out secretly, observations are relatively rare. The establishment of reasonable cause would clearly depend on each country's jurisprudential tradition related to "reasonableness."

will solicit bribes outside the view of the video camera and use third-parties in order to escape detection. In the case of random investigation though, the probability of succeeding in the crime reduces the civil servants' incentive to develop new method of collecting bribes or engaging in corrupt activities.[97]

Post-event random audits and auditing probes or tests are two "active" approachs to detecting corruption (in contrast to the "passive" methods previously discussed). In a post-event random audit, the civil servant's activities would be reviewed by an independent reviewer or auditor. Given the resources required to employ the reviewer, the person engages in performance audit – looking at "services events" where the civil servant both performed well and poorly.[98] Such audits occur ex-post (or after the event) in order to prevent the civil servant from changing his or her behaviour in light of the audit. In a test or probe of the department's institutional integrity, more controversially, an official appointed by the head of department (or a more senior official) attempts to pay a bribe in exchange for a favor. The official may also stage a corrupt act to test whether the target observing the staged act reports the incident (*as per* his or her duty). Such tests are used to estimate the level and extent of bribe payments instead of used to convict particular individuals, and individual data are not revealed to the executive agency.

Such probes or tests – when used with other techniques -- should be conducted for three reasons. First, they provide incontrovertible evidence related to the incidence of bribery and other types of corruption in an executive administration. Surveys of perceptions about corruption have problems with have been well enumerated and many executive agencies have objected to the ratings they have been given (Sampford *et al.*, 2006). An independently conducted test of the incidence of bribery in an executive will certainly be deemed more reliable than an incidence established by polls of businessmen or households.[99] Second, a system of probes which seek to collect estimates of corruption instead of prosecute individuals infringes less on civil servants rights than many of the other types of surveillance (as daily searches for pocket money and continuous video surveillance comprise intrusive methods of detecting corruption). Such tests focus on the civil service system instead of particular individuals, thereby providing a reliable measure of the extent to which government policy contributes to corruption.[100] Third, such a system is cheap, easy to implement and effective – allowing the agency to reduce surveillance which interferes with civil servant

[97] A simple numerical example suffices to illustrate the argument. Suppose a civil servant collects $1,000 in bribes a month and type of surveillance is introduced which has 100% success rate. The civil servant will change methods into an inferiour method possibly resulting in $400 with no risk of further detection (the method will be inferiour, otherwise the civil servant would have used the alternative method in the first place). The government increases the use of costly and efficiency-reducing surveillance to cover alternative types of bribe collection. The government could introduce a surveillance technology with a 50% success rate, this in case the civil servant will earn an expected $500. While the less effective surveillance technology allows more bribes to be paid, it also allows the chance that briber takers will be detected.

[98] As performance audit represents a well-researched area of public sector management, I refer the reader to Pollitt (1999) for a review of the issues and techniques. Such performance audits should be done to the extent the person increases the social value of civil servant production by more than his or her salary.

[99] For example, if a survey of perceptions estimated that 20% of customs officials take bribes and only 5% are recorded as taking bribes in a probe, then the probe data would be authoritative – suggesting that the executive agency focuses on PR activities highlighting its anti-corruption work (as perceptions are negatively biased) .

[100] Clearly in cases where such tests find a high incidence of bribe solicition suggests government policy facilitates bribes (or acts negligently toward bribery). Such data could usefully by civil servants prosecuted for corruption offences in support of defences discussed previously. While the use of these data would reduce conviction rates, they would increase administrative power to discriminate between corruption offences encourages by the public sector management environment and corruption for which the individual civil servant is solely liable.

work. Because civil servants are not protected from corruption offences committed during the probe or test, this form of detection has fewer negative impacts on morale than the other forms of detection previously mentioned.

In the administrative law of some countries, such tests or probes might be interpreted as entrapment. Entrapment occurs when an individual is "induced or persuaded by law enforcement officers or their agents to commit a crime that he had no previous intent to commit."[101] Entrapment is generally prohibited because entrapment involves government participation either directly in a crime or indirectly through inciting a crime. Managers in executive agencies who engage in entrapment may face stiff penalties (as defined in the administrative code) as well as possible liability for participating in the crime which the public official was attempted to entrapment the other party. These remedies have resulted in the categorical refusal of many government agency managers from considering managerial audits involving the types of probes discussed previously.

However, public sector managers should rethink (after taking legal advice) the use of tests of institutional integrity for four reasons. First, entrapment does not occur when the government merely provides the opportunity for the person to commit a crime which he or she was ready and willing to engage in. Any legal test which provides an opportunity to engage in corruption (but uses no form of coercion to incite a crime) fails incitement. Second, the theory of entrapment relies on law enforcement agencies targeting private citizens (whose rights are protected as defined in law). In cases where a civil servant is involved, such a probe becomes subject to administrative law and the employment contract between the civil servant and the state. While the obligation of law enforcement does not create the positive obligation of the state to ensure that private citizens are not engaged in corruption, the state has the duty to ensure that its civil servants do not participate in corruption. Moreover, the department manager -- who potentially holds liability in corruption cases – has a responsibility to ensure it avoids liability for corruption and upholds its duty of care toward the rule of law. Such tests, therefore, represent an important defense against potential corruption allegations based on implicit consent, contributory negligence and other arguments which place liability on the government. Such probes represent managerial monitoring which is no more intrusive than oversight aimed at ensuring the civil servant is not shirking or has not stolen government property.[102]

Because the law is often a matter of interpretation, the executive agency manager can take several precautions to ensure he or she does not face liability for entrapment when using a test of institutional integrity (or at a minimum help ensure that the implementation of these probes is not overturned by administrative courts or the constitutional court. All of these

[101] I purposely take this definition from an online law dictionary to provide the reader with a resource to find more information. See http://www.lectlaw.com/def/e024.htm.

[102] In practice, the law in many developing countries is likely to still be unclear about the use of these probes or tests (namely the law does not specificially forbid probes of the type mentioned in this paper). In this case, the head of the executive agency can order such probing to be conducted on a trial basis. If no complaint is filled, then the order remains legal. If a complaint filed with the administrative court, the order may be rescinded but the managerial would not bear liability (as long as he or acted in good faith and in the government's best interests). As data collected would not comprise evidence in trials against civil servants (and could even be declared statuatorally as inadmissible), tresspaass or other forms of harm would be difficult to prove. Should the executive manager wish to use the results of these tests more aggressive, he or she may use them to build risk profiles of various civil servants in his or her department. Given the already extensive use of psychological and other testing, the collection and use of these data should be not more problematic than the use of these other test scores. The value of such information would clearly exceed its cost and be more reliable than the results of psychological tests.

activities seek to ensure coercion is not used, civil servants are partners instead of targets of these probes, and probes are implemented and data used in a just manner.[103] **All these activities do not require extra legislative reform.**[104]

Figure 18: Administrative activities aimed at indemnifying government from liability for entrapment

- Signed forms of consent at start of employment. The civil servant can be informed that he or she will be under irregular tests for bribe seeking. Individuals refusing to sign the form can be given low-corruption-risk jobs.[105]
- Probe as character testimony. The manager can use the results of such probes as evidence of good character. Using individual results during investigations for corruption (or even other offences where the person's character is material to the outcome) could provide incentives to keep the system.
- Defense against *respondeat superior*. The manager can increasingly accept departmental liability (not personal liability) for corruption offences; recognizing that the additional obligation would entrain additional rights to conduct such probes (as a defense against complicity and contributory negligence).
- Design the probe such that the test for entrapment fails (such that the idea is from defendant, government provides opportunity instead of motivation, and can clearly establish *ex-ante* intent).[106]
- Minimise harms of data use. Using probes only to collect data about corruption trends reduces or eliminates the harm experienced by individual civil servants, reducing incentives to find the decision to conduct probes as *ultra vires*.[107]
- Make judgments which support the vague provisions of the national anti-corruption law. Many anti-corruption laws have phrases to the effect that a civil servant will take whatever measures they deem necessarily to prevent corruption and detect corruption when it occurs. Thus, decisions which set the precedent for such probes can be taken which directly identify the decision or decree as implementing the national anti-corruption law.

[103] As stated previously, national legislation can provide the manager with incentives to implement these types of probes – by creating a clearly defined test for administrative complicity and the establishment of rights to funding for anti-corruption work (as well as the obligation to pay damages in cases of departmental complicity with corruption offences).

[104] As discussed previously, regulations create distortions to both public and private sector activity. Therefore, regulations should seek, where possible, to implement programmes using (or reinterpreting) existing law instead of relying on costly legislative and/or regulatory change.

[105] As long as tests are discriminatorily used, the public sector manager need not worry about liability for discimination or violation of civil rights as precidents clearly exist in the form of drug testing or tests used to establish merit.

[106] Remember that a crime or civil offence requires *mens rea* (intention) and *actus reus* (action). Liability for entrapment revolves around whether *mens rea* would exist indepedently of the individual conducting the probe. Clearly a probe of customs bribery which involved an individual crossing a border (making no solicition for preferential treatment in exchange for a bribe) would not be entrapment; nor would the individual incite a crime if the person's documentation was incomplete. See Allen *et al.* (1999) for a fuller exposition about entrapment.

[107] To help assure civil servants that the government will not renege on its promise not to use these data for prosecutions, the manager may remind staff that the burden of proof lies with the government to prove that entrapment did NOT occur…ensuring a reasonable level of protection for audited civil servants. At first glance, the government appears to be abetting a crime by failing to prosecute cases in which civil servants have solicted bribes (as prosecutors are legally bound to prosecute all people for infractions of the law). Namely, even though the agency may not bear criminal liability for participation in corruption, the agency may hold liability for failing to prosecute a crime. Many criminal law traditions, though, allow the government to forgo prosecution and/or the collection of data (such as the individual identity of each civil servant engaged in solicitation) in cases where these activites prove contrary to the government's over-riding interests. Government administrators can rely much less on this defense and should seek expert legal counsel for ways to proceed.

Issues in International Asset Recovery and International Law

As noted previous, particularly the UN Convention Against Corruption seeks for the recovery of assets which have been financed from corruption which are located in foreign countries.[108] On the one hand, in most legal traditions, the law clearly requires that illegally obtained funds be restituted to their rightful owner. On the other hand, in an international context, such claw-back bumps up against international sovereignty and possibly economic efficiency.[109] Namely, can banks in London trust a decision made by a Czech court and will return of Czech funds discourage investment in the City?[110]

The asset recovery provision as embodied in the UN Convention is likely to stumble on a number of problems.[111] First, many assets involved in corruption are laundered, introducing a number of intermediary parties. Each of these intermediary parties obtains (often legally) a part of the proceeds of the originally corrupt transactions – and the "washed" funds themselves may be possessed legally by the person engaged in corruption. Thus recovering these funds would deprive a number of innocent parties of money which they obtained legally. The part of the original proceeds which are "washed" are difficult to restitute because proving they belong to the original owner would be difficult.[112] Second, several countries have bank secrecy laws, making recovery of assets less likely. As asset recovery becomes more effective in OECD countries, funds will increasingly shift to these tax havens. Third, recovery of assets from foreign countries is likely to be an expensive process. For example, if a car is bought with funds embezzled from a participating state, the car must be seized, sold and then funds wired to the counterpart country.

The more important problem facing the UN Convention relates to the acceptance and execution of decisions taken by foreign courts. Developing countries (and in particular Central and Eastern European countries) have several options -- as depicted in Figure 19 – in the way they handle foreign rulings on corruption related to the restitution of funds from corruption. At one end of the spectrum, courts may give *foreign jurisdiction* – enforcing the

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[108] The UN Convention while a useful first start at fighting corruption global, suffers from a number of serious problems. In this paper, I address mainly its provisions for asset seizure (as the real innovation of this Convention). See Michael (2004) for an analysis and critique of the Convention and Webb (2005) for a broader overview.

[109] Stessens (2005) covers many of these issues in a money laundering context. Irregardless of the legality of claw-back, potential claims on funds decreases the security of property rights over these funds; decreasing the predictability of investment. For example, if B steals funds from A and subsequently pays C, then C (as the "holder in due course") has no remedies when these funds are reclaimed by A. The extent to which corruption represents a "real defense" in practice in the national law of UN signatory countries remains to be seen. From bank C's point of view, the dishonour of this credit represents a business risk (and increases B's certainly he can access these funds – assuming he is not in prison).

[110] While not addressed in this paper, the UN Convention (and OECD Convention) raise the issue of investigatory jurisdiction. Dugan and Lechtman (1997) cite evidence showing – quite terrifyingly – that the US Central Intelligence Agency has been involved with the collection of intelligence about non-US citizens bribing non-US foreign officials.

[111] See Kilchling (2001) for more on asset recovery. Given the costs o f investigation and seizure, only relatively large bribes should be (and are) attempted to be reclaimed.

[112] In practice, this problem might be relatively easy to overcome. Intermediaries can either take insurance protecting them from depossession or in the interests of equity, the government can provide insurance -- particulary as government officials wiil also bear some liability for the original corruption offence which gave rise to the repossession of the funds and as the provision of such insurance would help insulate the government against civil lawsuits.

decision of foreign courts or requests from foreign governments.[113] The court receives a request for the confiscation of the convicted individual's assets and instructs the bank holding the proceeds of corruption to debit the account holder who has been convicted in a foreign jurisdiction. These funds are wired to a pre-nominated account held by the requesting government. *Translated judgment* requires the court in the country where the funds are held to arrive at a similar judgment – in the legal tradition and using the judicial procedures – as the requesting country's court. Such a procedure in some ways requires double jeopardy – trying the same individual twice for the same crime, albeit in a different jurisdiction.[114]

Figure 19: Foreign Translation of Judgments in International Corruption Cases

	Description	**Conditions for jurisdiction**	**Pros**	**Cons**
Foreign Jurisdiction	National courts respect foreign country's court or administrative decisions	Requesting state's judicial system is similar to counterpart countries system. High counterpart judicial quality.	1. Reduces the transactions costs of dealing with corruption. 2. Deals quickly and effectively with corruption.	1. Deals with crime that isn't that country's problem. 2. Possible miscarriages of justice.
Translated Judgment	foreign courts or administrative body must reach similar conclusion as foreign power, "translating" the decision.	Interacting states have different court systems; one or both countries have low judicial quality.	1. Ties claims by foreign courts to domestic judicial system 2. Can help protect individual rights.[115]	1. Expense 2. Possible unavailability of evidence (in case judge wishes clarification).
Joint judgment	Foreign country's representative participates in foreign trial, seeing evidence and ensuring the quality of the judgment.	Low transactions cost for joint judgment – represents globalisation of corruption prosecutions.	Internalises the cross-border aspect of the case; helps make the trial like a domestic trial.	Can lead to serious disputes between countries if participating country finds aspects of trial undesirable.
No foreign jurisdiction	Foreign governments refuse to consider claims by foreign powers	country relies heavy on illegal funds for internal investment, receiving government concerns about sovereignty	Reduces workload and expense of dealing with claims by foreign countries	Country will probably not receive legal and other types of assistance in return.

In a *joint judgment*, officials from the country where the bank is located attend the trial and offer evidence (if required). As participants in the trial, they can informally advice the judge and counsel to ensure procedures are followed which are deemed legal in both countries. Finally, in a *no jurisdiction* system, the court generally (as a matter of policy)

[113] The exact working procedure used my vary, depending on the country. Most Eastern European countries (particular former Soviet countries) have a tradition of channeling relations with foreign countries through either the Ministry of Foreign Affairs or through a foreign relations department in the ministry of justice. Increasingly (thanks to the internet), Ministries of Justice are dealing with each other directly (though the extradition of funds still remains a political as well as technocratic decision).

[114] In practice, such a procedure may be conducted administratively. The judge in the country where the funds are located may examine the proceedings from the foreign trial . He or she may then decide, based on his or her country's legal tradition and rules of evidence, whether the verdict can be applied in the foreign jurisdiction and whether the funds held by that country's bank can be tied beyond a reasonable doubt especially to corruption.

[115] Privacy and the security of property have always been viewed as effective measures against state infrigement of civil liberties and individuals have often placed assets abroad when their government's policies have agressively abridged civil liberties.

refuses foreign country requests for the restitution of funds. By refusing as a matter of policy (instead of on a case by case basis), judicial co-operation becomes a political issue instead of a technocratic issue. **Clearly the extent of translation should correspond with the reliability of the requesting government's judicial and court system and the cost of executing foreign judgments.**

When assets are recovered and remitted to the requesting country, funds can be remitted to a number of possible parties. As discussed previously, damages from judgments should recover the funds obtained from corruption, compensate parties harmed by corruption and serve to provide incentives to civil servants to continue fighting corruption. Figure 20 shows the possible beneficiaries of international asset recovery as well as the advantages and disadvantages to allocating the proceeds obtained to each party. **Naturally, the allocation of these funds will maximize efficiency as well as equity – serving the interests of justice (to the extent possible) and providing incentives to continue fighting corruption.**[116]

Figure 20: Restitution of Funds Tied to Corruption

Beneficiary	Description	Pros	Cons
Law Enforcement Agency	The agency which detected the infraction obtains part or all of the damages.	1. Ties pay to performance 2. Funds additional anti-corruption work. 3. Relies of justice to future potential corruption victims.	1. Creates incentives to trap innocent persons. 2. Pays bureaucrats instead of victims 3. Potentially undemocratic
Law suit (direct harm)	Individuals directly harmed (coerced to pay bribes, lose business) are compensated.	1. Ties claims to *private* harms 2. Encourages victims activism against corruption	1. Victims often to do step forward 2. Costly
Class action suit (indirect harm)	Individuals and organizations indirectly harmed by corruption (longer waiting times, lack of access to public services, etc.) are compensated.	1. Dissuades corruption because of potentially large claims. 2. Ties claim to *social* harm (which is the relevant harm from a public economics stand-point).	1. Expensive 2. Co-ordination problems 3. Makes society more litigious
Treasury	Proceeds from corruption put in general government budget.	Proceeds from a public harm used to generate public goods.	Generally budgets are weak or potentially prone to corruption!

[116] A further discussion of the allocation of the restituted proceeds from corruption would make this paper even longer. The proceeds should be allocated to each party based on their marginal welfare. Namely, victims of corruption will derive some benefit from compensation. However, such a benefit must be traded off against the benefit future potential victims of corruption enjoy through more anti-corruption work. The benefit of all these parties must furthermore be traded-off against the benefit individuals may experience by the funding of other social goods and services. If damages are awarded which cover all harms (and if the convict have enough money to pay all the damages awarded), then funds can be easily allocated such that social social welfare is maximised. If the convict does not have enough money, then funds should be allocated justly (as decided by the concept of justice used by a particular court).

Enforcing the OECD Convention and International Law

The OECD Convention criminalizes the payment of bribes by businessmen from OECD member countries to foreign officials anywhere in the world.[117] At the heart of the OECD Convention is the issue of jurisdiction (and the application of the laws of that jurisdiction) because the businessman from an OECD member country who bribes a foreign official in a non-OECD country commits corruption offenses in two countries.[118] A related question concerns the level (and partition of damages) which provides optimal incentives – maximisng incentives for governments to prosecute corruption offences while simultaneous minimizing incentives for companies to engage in corruption.

Under what jurisdiction should the offence be tried?[119] In some cases, the jurisdictional issue can be resolved relatively simply; a German paying a bribe in Zimbabwe should be tried in Germany. In some cases, jurisdiction is less clear; a Mexican national attempting to bribe an American through intermediary parties while remaining physically in Mexico.[120] In other cases, the jurisdictional issue is extremely complex. For example, a case may involve the bribing of officials in Moldova by Turkish citizens using false certificates of origin for American-made cars which are destined to be sold in the Ukraine.[121] Who should have jurisdiction, Moldova (where the offence occurred), Turkey (which is a signatory to the OECD Convention) or Ukraine (where the majority of the harm occurs).[122]

[117] For an authoritative treatment of the issues surrounding the OECD Convention, see Pieth *et al.* (2007).
[118] Schroth (2002) includes a detailed discussion of juridiction and forum selection, both for violations of the US Foreign Corrupt Practices Act and under the OECD Convention. Rather than repeat the arguments, I attempt to use implications of Schroth's analysis for prescriptive analysis. Dugan and Lechtman (1997) provide several examples where the US has shown a large amount of judicial activism in prosecuting corruption cases involving non-US citizens, as US courts have ruled that "renting or buying real property in the United States may amount to sufficient minimum contacts to establish jurisdiction over the foreign person" (381). Elliott (1997) provides an overview of many of the issues related to the fight against corruption across international borders.
[119] The jurisdictional issue arises both from a legal and a practical point of view. According to the OECD Convention article 4 "Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles." See the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. OECD/DAFFE/IME/BR(97)16~IN(A1L8 Dec. 1997). 37 ILM 1(1998).
[120] Both countries are signatory to the OECD Convention. The problem arises from the differences in judicial quality between the countries which may decrease the relevance of jurisdictional decision based on the application of the principles of territoriality, nationality, effects, and universality. Interestingly, the theory of jurisdiction as taught in international law rarely touches about forum selection based on judicial quality (though in practice the choice of forum often depends on the perceived reliability of the courts in a particular country)!
[121] At the time of writing, Moldova and Ukraine had a free trade zone, so American cars which are redesigned as produced in Moldova would receive preferential customs duties. The USA and Turkey are parties to the OECD Convention whereas Ukraine and Moldova are not parties to the convention.
[122] Figure 21 includes trial in an American court because the US judiciary has been particularly active (relative to other countries) in hearing cases which have extra-territorial effects (see Small, 1987 for more).

Figure 21: Forum Selection for International Corruption Cases

	Justification	Pros	Cons
Send to Turkish court	OECD Convention broken in Turkey.	Upholds trial by peers and makes legal system bear cost of own citizens	Potential weakness in court system by international standards; expensive to send; possibly different standards related to admissibility of evidence and different criminal code.
Sue in Moldovan court	Territoriality-based justification (Moldova was site of crime). Evidence against civil servants also probably relevant in trial against Turkish businessmen.	Ties offense and trail of offense to place where crime committed	Potential weakness in court system by international standards
Ukraine court	Effects-doctrine	Upholds jurisdiction based on effects	Potential weakness in court system
American court	Effects-doctrine; highest likelihood of fair trial; establishment of precedents for use in other cases.	Precedent of US courts litigating on foreign cases	Only peripherally tied to case

The solution to the jurisdictional issue involves a three-stage process. In the first stage, the country with the highest judicial quality should sit the case, subject to the agreement of all the states involved (the USA in the example given in Figure 21). In the second stage, the actual jurisdiction (which country's laws should be used during the trial) should determined by the judge in the court chosen for the case (the US judge would consider Moldova, Ukrainian, Turkish and US jurisdiction).[123] Once jurisdiction has been established, the trial proceeds and a verdict is reached. In the third-stage, the host country charges the country of jurisdiction for costs of the trial.[124]

Second, what should be the liability for company officials and representatives in the bribing of foreign officials in international business transactions? Clearly criminal responsibility is too strict (given the relatively few convictions to date under the OECD Convention). In cases where a company's representative can be shown to have engaged in a corruption offense such that the company holds no liability (namely the company's implied and explicit wishes and outside of work conditions), the individual would face personal criminal liability. However, in cases where the company representative may have been acting in the company's interests and on the company's orders, the company must bear partial or complete liability for the corruption offense.

In many legal traditions, liability passes through the company to the directors or senior management who act on the company's behalf. Such a tradition prevents legal action against corruption when using a criminal standard of proof.[125] Instead, a weaker provision should be

[123] Courts are becoming increasingly comfortable trying cases according to the laws of foreign countries, particularly as many countries recognise choice of jurisdictions clauses in commercial contracts. The application of foreign jurisdiction has been hampered by the lack of legal expertise in foreign law in most countries.

[124] By charging the state in whose jurisdiction the trial should have been held (if that state had a reliable court system), this tax serves to encourage these states to focus resources on developing their own judicial systems (in order to avoid the costs of more expensive trials in foreign countries). If the defendent's proceeds from corruption are located in a bank in the host country, the host county may deduct legal fees from before restituting the remainder (as described in the discusson of the UN Convention previously).

[125] See Beale and Safwat (2004) for an expanded discussion about corporate criminal liability for corruption offenses.

added to the Convention that for legal persons (corporations, NGOs and state agencies who are not acting under *jure imperii*), the burden of proof should be reversed in corruption cases involving corporations.[126] Namely, when corporation are accused of engaging in corruption, they have the burden to show that they had been involved in corruption.[127] As described previously in the decision of a government department's burden of proof, such a burden can be justified by the relatively higher duty of care incumbent on companies (in contrast with individuals), the lower cost of establishing innocence (given the large amount of reporting corporations conduct) and the burden of guilt (corporations are better able to cope with the trial and pay damages than individuals).[128] Thus, two tests would be required -- establishing *respondeat superior* (corporate liability for the corruption of its representative) and failure to disprove the allegation. Clearly, a civil standard of proof should be required, making prosecution less onerous than under the Convention.[129]

Two Tests for Corporate Liability under the OECD Convention

1. Could company management have forseen that an authorized company representative could be placed in a situation where that representative would have an incentive to use personal or company funds in a corrupt transaction with a foreign government official in helping to increase the company's revenues?

2. Is the company able to produce records and other documents which add plausible deniability to charges of corruption by its representatives?

Under a civil law remedies for corporate corruption, the maximum penalty incurred by companies under this provision would be a flat-rate fine, payable in the company's country of

[126] Submission of a complaint about a company's bribing of government officials by third parties would not diminish the liability of the civil servant and the sanctions imposed on him or her (which is discussed in previous sections of this paper). The use of this procedure would often occur when the person lodging the complaint does not have evidence pertaining to a parrticular corrupt transaction between a specific civil servant and the company. To the extent that charges lead to convictions under the lighter standard of proof, a trail of civil servants with whom the company interacted would probably exist in the company files, allowing corruption investigation service to form judgements about the riskiness of these civil servants.

[127] The reversal of the burden of proof is not a new concept (in the UK, civil servants have the onus of proof in cases of alleged corruption). The provision, as an amendment to the OECD Convention or the Council of Europe Civil Convention against Corruption, can be ratified in national parliaments as an amendment either to the anti-corruption law or to the companies law. From an enforcement point of view, amendment of the Company Act would be preferrable as the company regulatory body has greater enforcement and supervision power than the Ministry of Justice or Ministry of Interior.

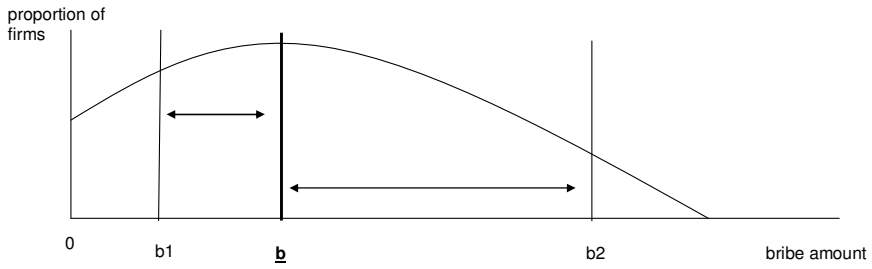
[128] Companies, unlike individials, as required by law and the practicalities of business, produce a large amount of documentation during the course of business. Thus the cost of proving that a company official did not engage in corruption is much less than the cost for a private person. Moreover, the large amount regulation imposed of corporations demonstrates that companies are held to a more stringent concept of the duty of care than that applied to individuals. In some countries, the regulatory burden has become excessive; and a regulatory regime which relies on civil suits against corporations (instead of government enforcement of costly reporting and auditing requirements) can fight corruption more effective and increase economic performance/efficiency.

[129] Under such a burden, a regulator would need to be convinced that the company more likely paid a bribe than did not (to paraphrase Lord Denning). Thus (at the risk of being repetitive), under this provision, if the company had a 51% probability of paying the bribe, the company would pay damages. Naturally, the penalty would be much less than that incurred under the Convention where the company must be shown beyond a reasonable doubt to have paid the bribe.

registration (or headquarters) for violations.[130] Such a "negligence fine" (as the fine punishes for failing to prove innocence instead of definitively punishes for corruption) is likely to reduce the profitable level of bribe payment and increase the optimal level of internal monitoring and prevention. Much experience suggests that the imposition of fines can lead to socially desired corporate behaviours much more readily than criminalisation.[131]

The optimal fine level depends on the average bribe being paid by all companies in a particular jurisdiction. Figure 22a shows the proportion of firms who pay bribes and the amounts they pay; distributed according to some statistical distribution.[132] In this Figure, $\underline{b}$ represents the average bribe amount, paid by the largest proportion of firms. Naturally, $\underline{b}$ also represents the optimal negligence tax, as a statistical estimate of the bribes any one firm is probably paying and the tax level which recoups the overall level of bribes paid to civil servants. A firm with a bribe level of *b1* pays a higher amount in negligence taxes than it pays in bribes, making bribe paying an even more expensive activity.[133] A firm paying *b2* in bribes will pay less in the negligence tax than in bribes, though the tax and bribe value will certainly reduce overall profits.

Figure 22a: The Optimal Negligence Tax and its Relation to Bribe Paying



The effect the negligence tax will have on companies will depend on how companies respond to the tax.[134] Companies can either reduce the amount of bribes they pay or increase

[130] Schroter (2002) notes a number of cases in which companies have paid fines as plea bargains in corruption cases (involving International Harvester Co. and Goodyear International Corp.). A fixed fine would reduce the cost of such plea bargaining (as a fine represents a standardised plea bargain). The interested reader can consult Wells (2005) as a concise treatment of the issues revolving around corporate responsibility for corruption.

[131] According to Schroth (2002), the US legal tradition has increasingly tried to encourage companies to comply with the Foreign Corrupt Practices Act using economic incentives. He cites the American Institute of Certified Public Accountants Statement on Auditing Standards (No. 1, sec.320.28) and the US Securities and Exchange Commission Act releases (No. 34-13185 and 34-15772) in support of this argument. Hatzis (2002) describes the logic behind efficient penalties.

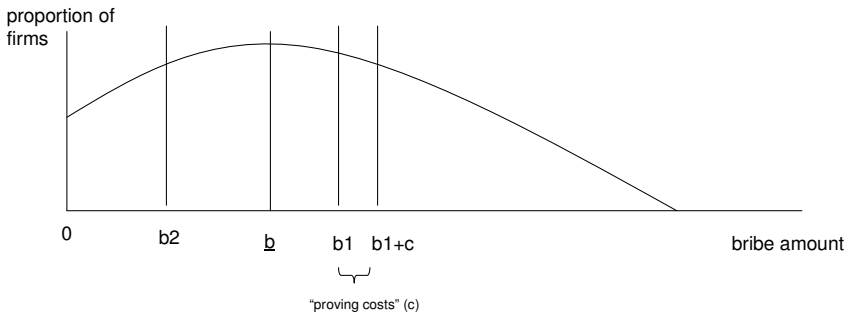
[132] The distribution depicted in Figures 22 roughly represents a beta distribution, such that many of the firms center around a bribe payment of zero. The Figure could have depicted a normal distribution truncated at zero, as negative bribe payments (or extra expenses undertaken by companies to avoid paying bribes) are both difficult to conceive in the real world.

[133] Such a fine takes into account that impossibility of estimating a particular person's bribe payments. While individual bribes are difficult to measure, overall levels of bribery – and confidental individual estimates – can be obtained through surveys. Thus the fining of innocent parties (which do not pay bribes), the failure to impose fines on bribe payers and under-fining as well as over-fining represent regulatory errors. As with all regulation, the magnitude of these errors is set as a level which is acceptable to the parliamentarians and staff of executive agencies designing the regulation.

[134] A formal model of the problem would make this paper unreadable to many of the policymakers this paper targets. As a partial formalisation for economist readers, $c = a + \alpha\underline{b} + \beta b$ such that compliance costs are partly

spending on compliance, monitoring and activities which either help show that company officials have not been engaged in corruption or help to hide corruption. As shown in Figure 22b, a company with a bribe level of *b1* may pay *c* of extra supervision – or hiding -- costs (which will affect the probability of the company paying an additional b in negligence taxes). These costs reduce the likelihood the company is caught paying bribes (though the company still pays bribes). In this case, *c* is less than *b*; suggesting that the company should undertake extra supervision. The company can also reduce its bribe level which also reduces the likelihood of paying a bribe tax. In the example shown in Figure 22b, the bribe rate may fall to *b2* – because civil servants accept the argument that companies categorically refuse to bribe due to the tax. If (*b1-b2*) is greater than *b*, (namely if the reduction in bribe payments is greater than the fine the money must pay if found not in compliance), then the company saves money.

Figure 22b: Trading-Off Bribery, Fines and Compliance Costs



In practice, a company will trade off "proving costs" (or the increased costs of reducing bribery and/or covering it up) with the expected cost of paying a negligence tax. Clearly, many companies in Figure 22b will not pay bribes, but be unable to prove (to a civil law standard) their innocence. Such Type II error (or the regulatory error of fining parties who are innocent of corruption though guilty of failing to keep enough documentation to prove their innocence) should decrease as a company increases is monitoring effort (and costs).[135] However, increased monitoring costs are also expected to help companies cover up instances of bribery by developing more complicated accounting vehicles, extending the number of agents in a transaction, and so forth. These expenses help increase the negligence tax's Type I error (or the probability that companies which are guilty of corruption will be found innocent).

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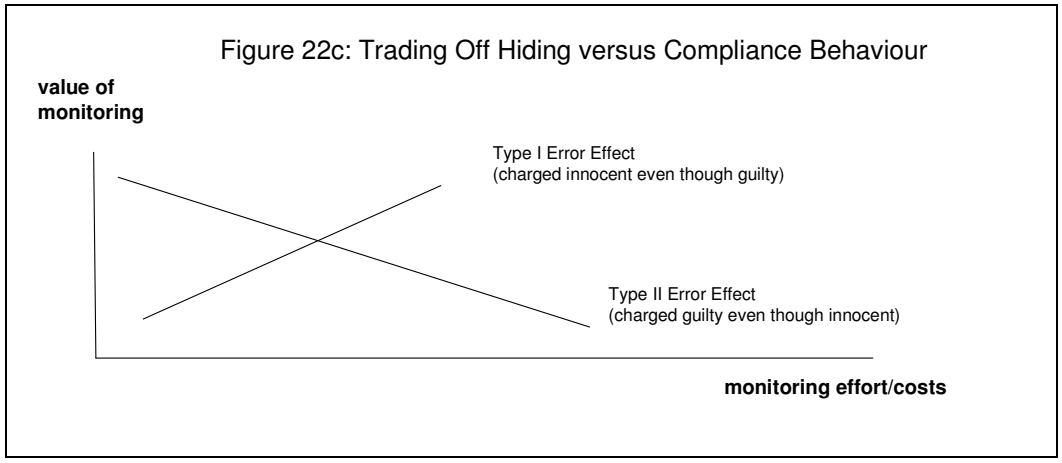
fixes, increase at a rate a with negligence taxes. *b* or the effect of bribes actually paid will be positive or negative, depending on whether compliance costs it is more profitable for compliance to complement or substitute for bribery. The level of bribes increases by some rate δ with the probability of incurring the fine θ and the fine b such that $b = \delta\theta b + \gamma c$; where g may positive or negative depending on whether bribes and compliance costs are complements or substitutes. Naturally, the firms profits are $\pi = p(b)*Q(b) - (b + c)$, such that the price of goods (p) and the quantity sold (Q) are functions of bribes paid – and revenues may fall or rise depending on the effects bribes have on sales. The complementarity of compliance costs and bribery depends on the effect bribe payments have on revenues. Figure 24 presents qualitatively the complementarity of compliance costs and bribery as a function of the profitability of bribery.

[135] Using terminology imported from statistics, regulatory errors are sometimes refered to as Type I and Type II errors. Type I error refers to cases where innocent individuals or companies are wrongly convicted under the regulation whereas Type II error describes the extext to which guilty parties are found innocent under a regulation. .

An optimal level of investment in such proving costs (or monitoring effort) will emerge which both maximizes the chances that innocent and guilty companies are acquitted. Figure 22c plots the effects of Type I and Type II errors on the value of increasing activities aimed at detecting (and possibly hiding) corruption. As shown by the upward sloping line, the value of investing in compliance and proving for guilty firms increases because of the increased likelihood the regulator will make Type I errors (namely find guilty firms innocent).[136] The downward sloping line represents the economic drag these expenses cause on innocent companies (as they are truly innocent, these expenses represent a dead-weight loss on them and society). However, if such a fine where included in the OECD Convention, these expenses would be necessary to help ensure the firm is not found guilty of bribery offenses under the lighter civil standard of proof. For both innocent and guilty companies, the effect of such a regime on companies will decrease overall profits (and thus economic growth). If π represents the firm's profits, b represents bribes paid, t represents the negligence tax, and c represents the additional costs of compliance (with p and Q representing the normal price and quantity of goods sold as revenue and C represents other costs of business such as wages and capital expenditures), then clearly the firms profits will be $\pi = p*Q - C - (b+tc)$.[137]



The extent to which a negligence tax (and thus the payment of extra compliance costs) reduces bribery depends on the relative profitability of bribery. Figure 23 shows the marginal benefits of paying a bribe compared with the marginal benefits of investing in monitoring which helps ensure the firm does not pay a bribery tax – given the fixed poll of resources available to the firm (which is plotted on the x-axis).[138] In this simple example, any shift in the

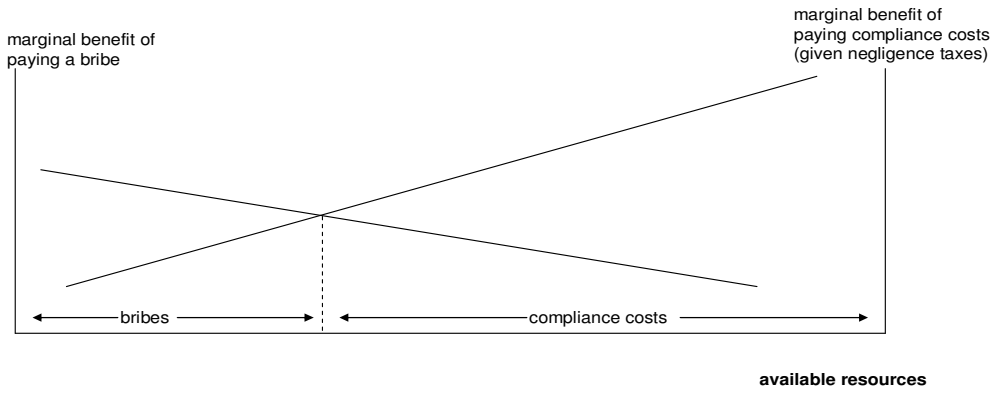
[136] Because both guilty and innocent firms will increase their expense on record keeping, supervision and accounting, the level of such expenses can not act as a sorting mechanism (which would help regulators detect guilty companies). In the language of game theory, a pooling strategy is the Nash equilibrium in this Bayesian two-stage game -- where firms select which type (guilt or innocent) they will be and then send a signal to regulators in the form of expenditure on monitoring. Figure 22c represents such a pooling equilibrium as an equilibrium level of investment in these proving costs which are the same between guilty and innocent firms.

[137] Figure 22c provides the basic illustration of the relationship between monitoring value and monitoring effort. Clearly factors which increase the level of Type I error (such as a skilled inspector leaving the agency) would lead to more lower-valued monitoring (covering up) effort. An increase in Type II error (due to an anti-corruption crusade) would result in more monitoring and covering-up costs – which makes bribery more difficult in general.

[138] As discussed in the third section of this paper, the amount of resources available for the payment of bribes and taxes is limited to the rents or profits generated by the firm. As intimated above, a tax which reduces the amount of rents available to pay bribes represents a second-best solution to corruption (with the first-best solution consisting of removing the economic distortion or regulation leading to the creation of these rents in

marginal benefit of investing in compliance will *necessarily* result in a reduction in the amount of bribes paid because resources are finite. This argument presupposes that the firm can not reduce its capital expenditure or staff salaries in order to find finds to maintain the current level of bribery. If civil servants refuse to accept a lower level of bribe payments, then the firm must free up resources from other areas of activity, resulting in a substitution effect between bribes and compliance costs. In Figure 23, such a substitution effect would be illustrated by an outward shift in the marginal benefits of paying a bribe (the downward sloping line in the figure). Conversely, if civil servants are more tolerant of reductions in bribe levels (or if the negligence taxes previously discussed reduce the funds available to pay bribes), the effect would be to shift out the upward sloping curve.

Figure 23: The Allocation of Bribes and Compliance Costs



The effects of the negligence tax (as intimated by Figure 23) depends on the profitability of bribery, the ability of the company to pay bribes, and the extent to which civil servants are willing to change their demand for bribes as the negligence tax on bribe suppliers increases. Figure 24 summarises the possible effects of such a negligence tax – showing the conditions under which such a tax imposes an extra burden on companies, crowds out bribe, reduces the payment of bribes and had no effect on bribery. As shown in the Figure, the effect of the tax depends on the ability of firms to pay bribes and the elasticity of bribe seeking (which describes the proportional change in bribe seeking for changes in the negligence tax). The Figure also shows the likely effects on economic activity. Such a negligence tax is likely to be most effective when civil servants are not too rapacious and few extra company resources are available to pay bribes. Conversely, when other government policy makes a large amount of economic rents available to companies and when civil servants aggressively bid for those resources, such a negligence tax is likely to be ineffective.

cases where such regulations do not serve a strong social objective, such as restricting the flow of illegal weapons).

Figure 24: Possible Effects of a Negligence Tax

	Description	**Ability to pay bribes (Profits/ Rents/ Market Power)**	**Bribe seeking elasticity**	**Effects on economy**
Extra burden on companies	Negligence tax forced companies to pay on top of bribes paid.	High	Low	Further distorts economic activity
Crowds out/substitutes for bribes	Negligence tax encourages firms to get tough on paying bribes. Acts to convince civil servants that no money left for bribes.	Low	Medium	Ambiguous, depends on incidence of tax.
Reduces bribe burden	Tax encourages companies to self-monitor. Acts as credible deterrent for bribe seeking civil servants.	Low	High	increases economic activity
No effect	Companies do not change behaviour, treating the tax as an insurable risk.[139]	High	High	Hurts economic activity (or redistributes funds to insurance markets).

While such a negligence tax seems (in most cases) to harm economic activity, the social benefits could well exceed the social costs. The money from these taxes could be used to fund anti-corruption work conducted by various government agencies (and to pay fines from administrative suits filed against the department for corruption offenses).[140] Clearly, as previously discussed, the closer the negligence tax can be tied to the government's anti-corruption work (instead of being deposited in the national Treasury), the more corruption-reducing impact such a tax is likely to have. As shown in Figure 25, the tax provides weak incentives for companies to self-enforce (as shown by the bottom upward sloping line). Funds can also be used to finance the work of internal security departments and the anti-corruption agency (or its equivalent in the country concerned). The proceeds can also be used to finance the *qui tam* rewards which were previous discussed (providing high-powered incentives for enforcing the anti-corruption law). The sum of all these effects is shown in Figure 25 as the highest line in the graph. As an aside, such a scheme could also compensate victims of corruption because the government department could collect fines on the behalf of these victims – as portrayed in Figure 13.[141]

[139] Financial institutions are increasingly developing insurance products based on regulatory outcomes (such as director's liability insurance which pays even in the case the director bears full legal liability). If firms can insure against this risk (which is partly a function of the company's behaviour and partly attributable to external factors), then the compliance costs *c* represented in Figure 22 would depict an insurance premium. As this paper focuses on developing countries (whose insurance offerings are much less developed than in the developed economies), such insurance is unlikely to affect the analysis presented in this paper in the short-run.

[140] Taxes can be assessed on OECD multinational enterprises operating in developing countries either by the foreign government directly or by the government of the OECD member country where the enterprise is headquartered. In the former case, a subsidiary of the enterprise must be registered as a company/corporation in the developing country (and subject to its regulatory regime). In the latter case, the funds can either be used by the OECD government to fund addition investigation activities or sent as foreign aid to the law enforcement agency of the country where the developing country where the violation occured leading to the incidence of the tax.

[141] Consider the case where a representative of Cheatem Plc pays bribes to a customs officer of the Elbonian Federation (as a fictitious example). Elbonian victims could sue the customs department and the department in turn sues Cheatem. Such an arrangement may be more efficient than if the victims attempt a class-action suit (on

Figure 25: Effects of an Amendment to the OECD Convention

Note: This graph does not show the two harms concomitant with increased anti-corruption work. First, the "negligence fine" would distort private markets as well as public sector activity. Second, the work might focus on efficiency increasing speed payments which help facilitate commerce, thereby lowering welfare.

Putting it All Together: Drafting Agency Anti-Corruption Regulations and Changing National Legislation

All of the issues presented in this paper can be brought together in an executive agency's regulations which implement the national anti-corruption law (and thus the CoE, UN and OECD international conventions against corruption). National legislation should be general (abstract) enough such that each executive agency can implement the principles embodied in such legislation without being constrained by specific requirements which are not relevant for the executing agency. However, national legislation should be specific enough to provide guidance to executive agencies which are not specialists in anti-corruption.[142]

Making national anti-corruption legislation more specific involves costs and benefits for the executive agencies responsible for implementing such legislation. Figure 26 shows the increasing marginal value of making national anti-corruption legislation more specific as a guiding effect. To some extent, laws are standardized contracts which are applicable across all executive departments; embodying the learning and political agreements which each agency is spared from having to negotiate separately. The Figure also shows the decreasing marginal value of such clarity as a constraining effect – as specific national legislation constrains executive agencies' options for selecting theories of anti-corruption (and the corresponding methods of implementation) which seem appropriate to that agency's management. As shown in the figure, the point at which the marginal costs equal the marginal benefits for increased specificity and relevance for national anti-corruption legislation indicates an optimum (S* in

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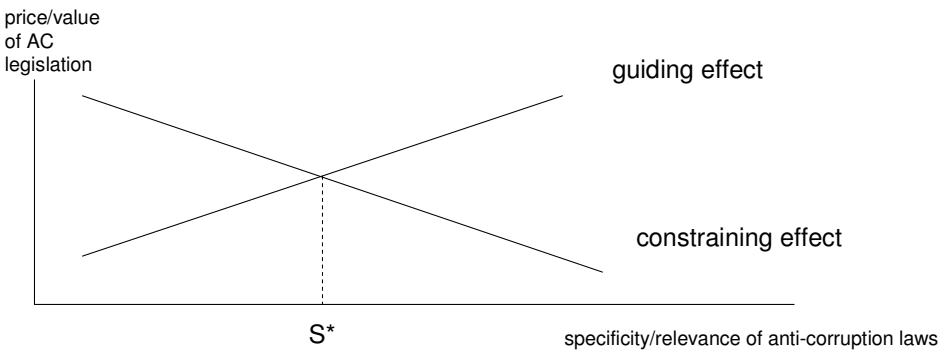
the grounds that the government can undertake the legal action more cheaply and quickly than a private legal partnership).

[142] Michael (2004) presents a methodology for measuring the specificity and relevance of articles contained in the international anti-corruption conventions (and in national legislation) as a way of quantifying the abstractness of these legal instruments. The assessment showed that all the conventions, and particularly the UN Convention, was excessively abstract – failing to provide sufficient guidance to signatory states on implementing the broad principles contained in these conventions.

the graph).[143] As discussed in the first section of this paper, over time a jurisprudential tradition develops (as many executive choose similar anti-corruption activities and philosophies). The adoption of these similar activities represents an upward shift in the constraining effect of national legislation (resulting in a higher value of national legislation in fighting corruption). Yet, the adoption of approaches (particularly ineffective approaches have been adopted in countries based on donor organisation advice) results in increased relevance which decreases the value of anti-corruption legislation.[144]

Figure 26: Optimal Specificity and Relevance of Anti-Corruption Implementing Legislation



In many cases, national legislation should over time be amended to facilitate the implementation of the anti-corruption conventions discussed in this paper. Figure 27 summarises the various activities described in this paper and provides the outline for executive level regulation aimed at fighting corruption. The figure also discusses changes which may eventually occur to national legislation (which was discussed in the first part of this paper) as existing practice translates over time into legislation. Figure 27 shows four panels which discuss liability for anti-corruption offences, methods of finance and indemnification for corruption related harms, jurisdiction for various corruption-related offences and other activities in support of the implementation of international anti-corruption conventions.

[143] While the level of specificity and relevance depicted in Figure 26 represents an optimum, such a level may not represent an equilibrium level – as the level of specificty and relevance emboddied in national legislation is based on parliamentary politics and not technocratic considerations. See Michael (2007) for more.

[144] Such an effect may explain the very general nature of the UN and OECD conventions which seek to prevent the imposition of guiding principles which may be ineffective for a particular signatory state.

Figure 27a: Legislation and Regulation Establishing Corruption Liability

Provision	Provisions in National Law	Provisions in Departmental Regulation	Support for international conventions
Corruption contract test	* Defines contract test broadly * Broad enough to allow departmental amendments	* Describes with detailed examples * Provides exemptions as necessary	Helps clarify definition of corruption in all conventions
criminal liability test	* covers test for assigning liability to government official and assigning to businessperson * defines situations where case handed for criminal investigation and prosecution.	* describes specific things that happen in order to assign liability * presents departmental procedures used to hand over case for criminal investigation.	* Concretises the criminalisation broadly and abstractly urged in conventions * helps break deadlock of passive v. active and giver-rece
test for managerial complicity	* Establishes *respondeat superiour* * Presents theory of liability and defenses. * Presents broad guidelines for managers to choose activities in order to avoid liability	* covers types of management * Specific actions in context which establish liability * Covers specific types of activities to avoid or reduce liability	Helps align criminal responsibility with liability (by extending number of potential guilty civil servants prosecutable).
test for departmental complicity/ contributory negligence	* Establishes clear separation of government and personal liability * Establishes criteria for each type of liability * Presents approach to avoid liability * Presents broadly the government's duty of care * Sets civil burden of proof and fines as remedies	* covers specific conditions whereby department is complicit or negligent * sets fine levels based on harm * sets criteria for harms * establishes procedures for determining complicity and indemnifying harmed parties.	Addresses important short-comings in international conventions. Helps tie indemnity to liability (criminal conventions stubbornly focus on individual criminals and ignore systemic nature of corruption).
Politician liability for corruption offences of colleagues, party-machine	* Legalises dismissal from position in ministry (or executive agency) when affiliated parties engaged in corruption to help politician win election.	* Acts principle enshrined in national law. * Defines procedures for succession if head removed for political corruption	* Helps tackle political corruption (which the international conventions are relatively lax on).
Establishment of state liability for corruption offences	* Establishes department liability, civil law burden of proof and remedy as fine * outlines theory of liability	* sets specific offences where department liable * proposes activities which absolve department of liability.	Helps tie indemnity to liability (criminal conventions stubbornly focus on individual criminals and ignore systemic nature of corruption).

Figure 27b: Legislation and Regulation Establishing Financing and Financial Incentives

financing mechanisms	* Establishes right to keep proceeds from fighting corruption * Establishes right to tie (in diminished form) pay to performance in fighting corruption	* defines financial arrangements for keeping revenues * defines specific civil servant actions to merit promotion or pay-raises	Provides vital and missing element to international conventions (no money, no enforcement).
Establish negligence fine for companies possibly violating OECD Con.	* Establishes civil burden of proof and outlines principles for optimal fine (as average level of bribery) and right to use to fund AC work	* Describes evidence requirements and procedures for being complaint. * Describes procedure for setting fine * Describes management of funds and activities to be fined by fine.	Helps with enforcement of OECD Convention. Creates layer of liability which is easier to obtain prosecutions.
establish departmental mechanisms for paying harms	* Establishes definitions of direct harms and indirect harms	* describes methods of bringing complaint, deciding complaint and assessment damages.	Practical implementation of the "prevention" measures which conventions refer to in abstract.
establish departmental mechanisms for paying *qui tam* rewards	* Establishes rewards for private persons based on harms incurred * reiterates benefits paid to effective government officials for denouncing or discovering corruption	* Describes types of offences covered by qui tam rewards, procedures for bringing a complaint, and relation rewards for civil servants.	* Provides civil remedy support for criminalisation * Provides incentives for UN and CoE Criminal Conventions to be self-enforcing.

Figure 27c: Establishing National and International Jurisdiction

inter-organisational jurisdiction	*establish three levels of competence *assigns investigation and prosecution responsibilities depending on costs and benefits	* discusses specific conditions under which management and administrative levels retain jurisdiction * discusses detailed procedures	Helps create levels of responsibility which help serve the objectives of the conventions (and criminalisation)
jurisdiction for violations of OECD Convention	* Modifies vague prescriptions embodied in OECD Convention * establishes jurisdiction for OECD violations based on judicial quality, legal principle and establishes legal basis for international transfers of funds covering trial costs.	* describes departments methods of finding foreign businessmen paying bribes * discusses methods of dealing with civil cases (department complaint against businessman)	* Jurisdictional issue one key reason why OECD Convention not applied in practice * provides method of funding legal cases covered by the Convention.
asset recovery jurisdiction	* Establish jurisdiction based on requesting government's judicial and court system and the cost of executing foreign judgments. * Establishes principles for distributing restituted assets based on harm or other theory of justice (between treasury, dept, direct victims and indirect victims)	* Establishes procedure for asking for repatriation of assets and compensation for harms * Establishes method of determining harms	* Implements the UN Convention (which is vague on the matter of how governments recover assets in practice).

Figure 27d: Setting Supportive Foundations

Non-distortion rule	None	Executive regulation discourages regulation whose costs exceeds benefits	Reduces regulatory burden imposed by conventions
Establish system of detection based on risk assessment	* Establishes legal basis for using random sampling and probes * Presents limits of probes (as avoiding liability for entrapment)	* Establish sampling frequencies from various populations * inform service users of search regime	* Lowers cost of detecting the corruption prosecuted by the conventions * Increases probability of detection (thus number of prosecutions).

Most of these provisions should be legal in most Central and Eastern European countries for three reasons. First, the anti-corruption laws in place are vague – presenting principles instead of concrete mechanisms for implementation. The vagueness of national legislation, in this case, to some extent, allows executive agencies to implement the regulation suggested in this paper.[145] Second, in cases where the national anti-corruption law (and other administrative law which directs anti-corruption work) is silent about the legality of the suggestions made in this paper, the executive official can rely on already established traditions in criminal, civil, and administrative law in defense of regulations which implement the regulatory provisions covered in this article.[146] The activities suggested draw on already established law and regulation in other contexts and use them for anti-corruption work. Third, the administrative and managerial provisions outlined in this article are proportional to the offence and entail no significant restriction in the rights of government service users or civil servants beyond that already embodied in national legislation.[147]

Conclusions

The purpose of this paper has been primarily pedagogical – showing policymakers how they might apply legal reasoning and economic analysis to regulatory issues raised by the international conventions against corruption. In the abstract (without reference to a particular country's legal system), this paper derived a test for corruption, complicity, contributory negligence, and appropriate jurisdiction for the investigations and prosecution of national and international corruption cases. The paper also presented ways in which regulations implementing the anti-corruption conventions could be financed and how damages could be allocated between parties. In the last section, the intuitions developed throughout the paper were used to suggest a number of articles which may be included in executive agency regulation aimed at implementing the OECD, UN and CoE anti-corruption conventions (as embodied in national legislation).

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[145] In most countries, executive agencies hold a fair amount of discretion in applying the national law. In France, recent judgments allow the executive to engage in activity which extends beyond the law (so long as the provisions in the regulation help the agency implement the law).

[146] In many cases, the activities suggested in this paper form existing practice in public finance, company, commercial, employment, administrative and other law. For example, in the US, a number of prosecutions for corruption have been filed as infrignments of the Hobbes Act (which criminalises the obstruction of commerce by robberv or extortion). In many cases, the legal principles emboddied in existing legislation protect, rather than expose to liability or risk, executive officials seeking to act against corruption.

[147] In almost all cases, the suggestions made in this paper are practices being undertaken in other parts of government. For example, the collection of revenue by cutoms or police for work on anti-corruption may seem problematic when viewed as a profit. However, these services regularly rely on fines imposed on citizens; and in many cases these fines are allocated for use by the agency collecting the fine. In case parlimentary authorisation is required for fines collected to remain as part of the agency's budget, the public finance law can be easily amended to make provision of the funds to remain in the agency's budget.

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