ERADICATING CORRUPTION: MISSION (IM)POSSIBLE? HOW ETHICAL CORPORATIONS CAN COMBAT CORRUPTION THROUGH FOREIGN DIRECT INVESTMENT

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ABSTRACT

Several efforts to end corruption have been too narrowly focused on petty corruption and lacking in enforcement mechanisms or long-term sustainability. This paper argues for a new approach to combat grand corruption: engaging in corporate foreign direct investment in corrupt countries in order to systemically deal with corruption. The goal is to break the cycle of corruption by helping honest companies operate in an honest way. The question that follows from this recommended approach is, how does one encourage corporations to invest in traditionally corrupt nations? After all, plenty of academic research concludes that corruption deters investment. This paper proposes several positive incentive strategies to encourage corporate investment by minimizing the risk or cost of doing so in hopes of making ethical foreign direct investment possible even in corrupt nations. Because this is a global problem, this paper will primarily focus on corruption at an international level.

I. INTRODUCTION ....................................... 580
II. POPULAR ATTEMPTS TO COMBAT GRAND CORRUPTION: WHY THEY ARE NOT ENOUGH ...................... 583
   A. Criminalizing Corruption ............................ 583
   B. Transparency International’s Efforts ................. 585
   C. Corporate Codes of Conduct ........................... 586
   D. Investigative Bodies ................................... 588
   E. International Anti-Corruption Court .................. 590
   F. The Case for Foreign Direct Investment ............... 591
III. POSITIVE INCENTIVES TO ENCOURAGE FOREIGN DIRECT INVESTMENT IN CORRUPT COUNTRIES .......... 593
    A. Overview ........................................... 593
    B. Direct Communication and Negotiation ............... 595

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I. INTRODUCTION

During the summer of 2015, U.S. President Barack Obama addressed Kenyans in Nairobi, challenging them to “break the cycle’ of government corruption.”1 “‘It’s an anchor that weighs you down and prevents you from achieving what you could,’ Mr. Obama said. ‘Ordinary people have to stand up and say “enough is enough.”’”2 Corruption is generally defined as “dishonest or fraudulent conduct by those in power, typically involving bribery”,3 which results in self-enrichment. Corrupt parties often exchange roles between the one who corrupts and the one who is corrupted. As President Obama alluded to in his speech in Kenya, there are two sides to corruption: the public sector demand side and the private sector supply side. Working together, the two sides can lead to great costs for individuals, governments, nations, and the global economy. It is estimated that corruption still costs more than five percent of global gross domestic product (GDP), which is about $2.6 trillion.4 Yet, there are also non-monetary costs involved, such as market and competition distortion, frustration of democratization and the rule of law, inefficient use of public resources, weakened trust in leadership, perpetuation of poverty, and inducement of violence, among others.

Corruption generally arises in two forms: petty corruption and grand corruption. Petty corruption “refers to everyday abuse of entrusted power by low- and mid-level public officials in their interactions with

2. Id.
ordinary citizens.” In contrast, grand corruption consists of “big bribes paid to government officials typically by big companies to make big deals go a way that they would not have gone in normal market conditions.”

In an ideal world both forms of corruption would be tackled simultaneously. However, practically-speaking, efforts must be prioritized and, thus far, there has been too much focus on petty corruption. Instead, it is more important to focus on the demand side, meaning the public sector in which grand corruption occurs. It follows that reform must concurrently take place on the public sector level in order to effectively combat grand corruption. Yet, “[t]here is a fundamental flaw in the popular expectation that government will have an interest in controlling corruption.” As some individuals surmise, government officials are the ones who benefit from corruption, meaning, “laws are watered down and leave loopholes; enforcement of anti-corruption measures by one branch is obstructed by others.”

Though corrupt governments may be incapable of self-reform, multinational corporations possess the power to enact change on an institutional level. Thus far, unfortunately, corporations have not wielded their power. Scholars and professionals still believe that implementing corporate codes of conduct to prevent and police corrupt employee and agent conduct is a major way corporations can and should contribute to the fight against corruption. While codes of conduct can


8. Id.

promote integrity and “help to build an atmosphere of ethics,” these codes alone cannot improve a country’s corruption track record because they are aimed primarily towards ending petty corruption. Rather than deal with corruption as a systemic problem, corporate codes endeavor to prevent companies’ employees from making facilitating payments, or “grease payments,” to low- and mid-level public officials on a transaction-by-transaction basis. In an environment full of grand corruption, how much good does it do to solely combat petty corruption? Corporations are capable of, and should be, doing more to fight grand corruption. This Note will propose how corporations should go about combating corruption while focusing on corruption at an institutional level.

Part II analyzes several popular attempts at combating grand corruption and why they are not, or will not, be enough to truly eliminate corruption. In turn, Part III proposes a new method to eradicate corruption: corporations should engage in foreign direct investment in corrupt countries. Although many studies and reports insist that corruption discourages foreign direct investment, few realize that investors can actually be the solution by systemically ending, or at least significantly lessening, corruption. It is probably no surprise that there is an inverse correlation between corruption and economic growth or GDP: the higher a country’s GDP, the lower its corruption. Still, corporations should invest in traditionally corrupt countries, despite the risk of doing so, because stimulating economic growth and thereby lifting countries out of poverty is the best way to reduce the need, or demand, for corruption. Corporate foreign direct investment can help break the cycle of corruption by helping honest companies successfully operate and invest in honest ways. Naturally, the challenge becomes how to convince corporations to invest in infamously corrupt regions without having to resort to corruption to carry out business duties. Therefore, Part III also offers several strategies and solutions framed around positive incentives to help encourage ethical corporations to make ethical investments in corrupt nations.


11. See Sullivan et al., supra note 9, at 2–3.

II. POPULAR ATTEMPTS TO COMBAT GRAND CORRUPTION: WHY THEY ARE NOT ENOUGH

Several important strategies were implemented during the past few decades to try to fight grand corruption, but few strategies systematically address grand corruption. This section will review some of the most popular strategies, including criminalization, the work of Transparency International, corporate codes of conduct, independent investigative bodies, and an international anti-corruption court, and analyze why such strategies are not enough to end grand corruption.

A. Criminalizing Corruption

Criminalizing corruption first began, on a global level, in 1997 with the introduction of the Inter-American Convention Against Corruption (IACAC), signed by the Organization of American States, to band groups of countries together and set a common anti-corruption goal. Article VII of IACAC conveys this sentiment by requiring the domestic criminalization of corruption as follows: “The States Parties that have not yet done so shall adopt the necessary legislative or other measures to establish as criminal offenses under their domestic law the acts of corruption described in Article VI(1) [the bribery of government officials] and to facilitate cooperation among themselves pursuant to this Convention.” Then, a few years later in 1999, the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Officials in International Business Transactions (the OECD Anti-Bribery Convention) went into effect to criminalize bribery of foreign public officials rather than national officials. The OECD Anti-Bribery Convention goes a step further than IACAC by recommending sanctions. Unfortunately, the recommendations in Article 3 of the OECD Anti-Bribery Convention are broad and left up to each party to implement, as illustrated by the following excerpt: “The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties.”

14. Id. art. VII.
16. Id. art. 3.
17. Id. art. 3.1.
Most recently, the United Nations Convention Against Corruption (UNCAC) became effective in 2005 and has been ratified by almost all of the countries in the world.\textsuperscript{18} Significantly, UNCAC helps tie together the two aforementioned conventions by requiring States Parties to criminalize bribery of both national and foreign public officials. Additionally, UNCAC criminalizes embezzlement of misappropriation by a public official, money laundering, and obstruction of justice.\textsuperscript{19} Thus, UNCAC goes beyond the basic forms of corruption criminalized in the IACAC and OECD Anti-Bribery Convention. Finally, UNCAC also includes several recommended acts for which each State Party shall “consider” criminalization, including: trading in influence, abuse of functions, illicit enrichment, bribery in the private sector, embezzlement of property in the private sector, and concealment.\textsuperscript{20}

As this series of international agreements demonstrates, most international players believe that criminalizing corruption is an adequate approach. Accordingly, many local laws also criminalize corruption, such as the Foreign Corrupt Practices Act (FCPA)\textsuperscript{21} and the U.K. Anti-Bribery Act.\textsuperscript{22} Despite these efforts, corruption is still prevalent globally, as evidenced by the amount of money paid in bribes annually, the list of low ranking countries on Transparency International’s Corruption Perception Index, and corruption scandals causing citizens to protest and high-ranking public officials to resign from office. Criminalization is primarily failing due to lack of enforcement.\textsuperscript{23} Without real consequences to breaking the laws, there is no deterrent factor present. The obstacle with enforcing criminalization of grand corruption is that gathering the evidence necessary to prosecute such cases and imprison corrupt officials is expensive and politically and procedurally taxing.

Politically, corrupt government officials often yield great power by controlling the country’s agenda and purse strings. Sometimes such government officials attempt to establish a vertically integrated corrupt

\begin{footnotesize}
\begin{enumerate}
\item[19.] Id. arts. 15-17, 23, 25.
\item[20.] Id. arts. 18-21, 22, 24.
\item[22.] Bribery Act, 2010, c. 23, § 7 (U.K.).
\end{enumerate}
\end{footnotesize}
enterprise. Why would the officials who benefit from corruption want to enforce laws and eliminate corruption, thereby paving the path towards self-prosecution? Moreover, obtaining legitimate and strong evidence in such a corrupt society is procedurally difficult. In order to build a case and track a complex money trail, prosecutors and investigators must have access to strong internal capacities. However, prosecuting government officials can come at a great risk to life, given that investigators and judges can face death threats simply for performing their professional duties. Therefore, prosecuting public officials is often a complicated, long, and slow process that requires “substantial determination and political will.” But without such enforcement, criminalization of various types of corruption by itself is futile. Furthermore, anti-corruption laws are too transactional in nature to solve endemic or systemic corruption.

B. Transparency International’s Efforts

Transparency International (TI) is the leading non-governmental organization (NGO) in the anti-corruption domain. Founded in 1993 to “stop corruption and promote transparency, accountability and integrity at all levels and across all sectors of society,” TI now has over one hundred national chapters worldwide. As stated on TI’s website, the organization works with governments and other NGOs to fight corruption and help citizens engage with their governments. Yet, TI’s primary output is the research it publishes and updates almost annually in the form of various reports, such as the Corruption Perception
Index and Bribe Payers Index. Naming and shaming the most corrupt nations increases transparency, but research without implementation, by itself, does not do much to stop corruption.

One initiative that TI has helped spearhead is the use of integrity pacts in public procurement. “Integrity pacts are essentially an agreement between the government agency offering a contract and the companies bidding for it that they will abstain from bribery, collusion and other corrupt practices for the extent of the contract.” Integrity pacts usually have built in sanctions and require the use of a monitoring system, which TI helps lead. Integrity pacts have been in existence since the 1990s and have applied to more than “300 separate situations,” but only in about “15 countries.” This low country count is unsurprising given that most corrupt officials would not take it upon themselves to introduce a measure to curb the very corruption from which they benefit.

Moreover, by banning the use of facilitating payments and low-level bribery, such integrity pacts focus more on petty corruption rather than grand corruption. Consequently, this creates a narrow focus on single transactions and fails to address the larger context of systemic corruption where petty corruption operates as one of many players. Fighting grand corruption requires a special, broader approach that targets the source of its utility and engagement. Grand corruption occurs at and beyond the highest levels of government. Grand corruption can survive and thrive even without petty corruption, but the reverse is not true.

C. Corporate Codes of Conduct

It is all but a requirement nowadays for multinational corporations serious about their anti-corruption efforts and reputations to establish

corporate codes of conduct. Corporate codes of conduct are great for self-policing, self-regulating, and helping corporations build consensus on the meaning of bribery and how to prevent it. Codes of conduct result in good publicity and transparency because such codes are often published online. This form of transparency allows senior management to display its investment in creating and maintaining a corporate culture of integrity. Corporate codes of conduct can also serve as a good defense tool that corporations can use to protect themselves from the demands of corruption. For instance, if a public official requests a bribe, a corporate employee sincerely does not wish to engage in corruption can point to the company’s code of conduct and say, “I am prohibited from engaging in that kind of behavior.” Therefore, the code of conduct can provide a clear response and “easy out” for ethical individuals.

Codes of conduct, however, are not without their limitations. Some codes of conduct may be weakened by a lack of enforcement. For example, the United Nations Global Compact—a pseudo-super code of conduct—purports to call “companies everywhere to voluntarily align their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption, and to take action in support of UN goals and issues.” However, this compact ultimately has no teeth because there is no enforcement mechanism to punish the companies that violate it. “The trouble is that each firm has an incentive to cheat on any agreement not to bribe. Of course when all firms do this, they collectively lose. It becomes a prisoner’s dilemma.”

The greatest limitation in codes of conduct is their inherent inability to target systemic corruption. Codes of conduct focus on transactions. Conversely, larger corruption involving kickbacks may stay hidden and is more difficult to track. Corruption is an institutional problem that cannot be solved on such a case-by-case basis. While codes of conduct can help instill values of ethics and integrity within a company’s employees, such codes cannot disperse similar values among government officials or help police grand corruption. Furthermore, codes of conduct may disadvantage corporations wishing to enter new markets. For example, a corporation wanting to invest in a market that is accustomed to corruption may either fail in doing business there if it

strictly adheres to its code of conduct, thereby allowing institutional corruption to continue to prevail, or else risk disregarding the code of conduct in favor of making the investment.\textsuperscript{37}

On its face, respecting the corporate code of conduct so much so that it drives away business opportunities may seem ill-advised for the corporation from a business growth perspective. A corporation can actually reframe the alleged “loss of business” message, however, to use to its advantage. For example, adhering to its code of conduct will help the ethical corporation save money that it likely would have spent on bribes and it will redirect ethical investments to a more ethical environment. If all corporations followed this logic, however, corrupt countries would have little hope in attracting and benefiting from ethical investors. As a result, the lack of investment would stunt a corrupt nation’s economic growth and fail to tackle corruption at an institutional level. Therefore, as further discussed in Part III, it is necessary to create positive investment incentives to prevent this train of thought from deterring ethical companies from investing in corrupt nations. Efforts should be aimed at making it possible for ethical companies to invest and succeed in even the most corrupt states. Codes of conduct are not enough to single-handedly put an end to corruption.

D. Investigative Bodies

Special investigative bodies generally have the mission to identify and prosecute grand corruption—the type of corruption other measures have not been able to effectively target. Several countries have special investigative bodies, including the Office of the Ombudsman of the Philippines and the Corruption Eradication Commission of Indonesia (KPK).\textsuperscript{38} Although these investigative bodies have had varying degrees of success, the core problem with each body is its lack of independence from the country and government within which it operates. For instance, the KPK was almost dissolved when “two of its commissioners were accused of corruption.”\textsuperscript{39} Although the evidence against the two commissioners turned out to be fabricated by senior

\textsuperscript{37} Ada-Iuliana Popescu, In Brief: Pros and Cons of Corporate Codes of Conduct, 10 J. PUB. ADMIN., FIN. & L., 125, 129 (2016).


\textsuperscript{39} Id. at 22.
officials in the Police and Attorney General’s Office, it still shows how a lack of independence caused the government to try to undermine the KPK’s mission. “This episode highlights a key reality that an anti-corruption agency faces: the more effective it becomes, the stronger will be the resistance of corrupt forces.”  

It appears higher forces took notice of this reality when the United Nations (UN) backed the creation of the International Commission against Impunity in Guatemala (CICIG) in 2007. Unlike its predecessors, however, CICIG has a commissioner appointed by the Secretary-General of the UN and is an independent body because its staff consists of individuals from twenty different countries. Moreover, CICIG has the power to launch its own criminal investigations and it can locally prosecute cases as a co-plaintiff with Guatemala’s attorney general’s office. CICIG has attained unprecedented success in uncovering and prosecuting the corruption of several high-ranking officials. For instance, recent investigative and prosecutorial actions taken by CICIG caused Guatemala’s President Perez to step down from office due to the discovery of a multimillion-dollar customs fraud scheme in which he was involved. Although Guatemalans support CICIG, its model is unsustainable. Not only does the CICIG’s mandate have to be renewed by the President of Guatemala every two years, but the body is expensive to fund with a budget of about twelve million dollars per year. CICIG cannot continue on forever. Instead, CICIG must transfer its knowledge and skills to Guatemalans to allow them to autonomously operate an effective and independent judicial system. Since this

40. Id. at 21.  
44. See id.  
has not yet occurred in the CICIG’s eight years of existence, and its mandate was recently renewed through September 2017, it is safe to assume that Guatemala’s judicial system is not ready for self-sustenance.

Therefore, the CICIG model is not scalable to simultaneously assemble independent investigative bodies in many corrupt countries around the world. While one might ask corporations in the private sector to help fund similar investigative bodies in hopes that such an investment may pay off for them in the long run, odds are that such a request would probably deter corporations from conducting business in those countries altogether. Conducting business in a corrupt country already comes with a corruption tax and a necessary budget for compliance, so why would corporations want to spend even more money by also helping to fund independent investigative bodies?

This seems like an area better suited for public sector funding because governments should fund governmental functions. Corrupt governments, however, are probably reluctant in this endeavor. Nevertheless, such governments do not realize that a CICIG model could actually raise more money than it costs. By preventing individuals from siphoning off government funds, CICIG generates more money for the government, thereby commencing a virtuous cycle.

E. International Anti-Corruption Court

Specialized corruption courts already exist in several countries, but now the Honorable Mark Wolf, a Senior U.S. District Judge in Massachusetts, is spearheading the movement to create an International Anti-Corruption Court (the IACC) modeled after the International Criminal Court (the ICC). Conversely, others believe grand corruption should be designated as a crime against humanity that the ICC could prosecute. Several obstacles exist with executing either approach, including the issues of how to fund a new court and how to establish grand corruption as a crime against humanity under the

48. U.N. DEPT. OF POL. AFF., supra note 42.
49. See generally Anna Hakobyan, Special Courts for Corruption Cases, U4 ANTI-CORRUPTION RESOURCE CTR. (Oct. 6, 2003), http://www.u4.no/publications/special-courts-for-corruption-cases/.
Rome Statute, to which some of the most powerful nations are not even parties. Nevertheless, even if those issues were miraculously resolved, the most impractical aspects of the proposals remain: each lacks an independent means of enforcement and the former would result in duplicative criminalization of corruption.

Like the ICC, an IACC would rely “entirely on the cooperation and support of national authorities to enforce its warrants and rulings.”52 Government support to execute warrants and perform arrests has been unsurprisingly low, thus impeding the ICC’s ability to efficiently fulfill its duties.53 The ICC has been criticized for its lack of progress and slow-moving pace during its past twelve years of existence.54 Lack of enforcement mechanisms remains the core problem. Moreover, as previously illustrated, improving enforcement is a reoccurring need among all efforts to curb corruption to date. Moreover, what good does it do to designate grand corruption as an international crime if almost every country has a version of local law that already criminalizes it? Again, “[t]he problem is enforcement, not a lack of laws or judicial options. If these existing laws and commitments are insufficient to address the issue, it is doubtful that another treaty will tip the balance even if it includes the possibility of punishment.”55 Corruption is difficult enough to prosecute in the country in which it occurs, so why would a far removed international judicial body have any greater success, especially given the additional diplomatic challenges it would present?

F. The Case for Foreign Direct Investment

As discussed thus far, current anti-corruption measures do not effectively combat grand corruption. Therefore, a new, bottom-up, systematic approach to combat grand corruption should be adopted: incentivizing corporate foreign direct investment in corrupt countries. Despite some empirical evidence suggesting that corruption actually

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53. See id.
55. Schaefer et al., supra note 52, at 11.
hinders foreign direct investment, the case for what is essentially the inverse approach—encouraging ethical foreign direct investment as a means of improving economic conditions in corrupt developing countries to eliminate the need for corruption—addresses the need for a change in attitude and practice towards corruption to occur from within a country, rather than to be imposed by international agreements requiring its criminalization. While several U.S. and world aid organizations have provided economic assistance to developing countries for decades, some scholars hypothesize that doing so has not produced significant changes in corruption and may have actually been counterproductive, stating:

Providing development aid directly to governments enhances the power of corrupt regimes through provision of resources, increases opportunities for grand corruption, undermines the government’s reliance on local taxpayers for funding—thereby weakening a key check on government authority—and undercuts the political and economic power of a nation’s indigenous business community.

Therefore, the best way to directly engage a country’s business community and circumvent giving money directly to governments is to enhance the role of the highly ethical part of the international private sector through foreign direct investment. In fact, a recent study found that “less corrupt countries have received more U.S. investment per capita.” Additionally, according to TI’s Corruption Perception Index, countries with higher GDPs are generally perceived as less corrupt. Hence, of the twenty-one most corrupt countries on TI’s 2013 Corruption Perception Index, nineteen “have an annual GDP of less than $100 billion” and thirteen have over a ten-percent employment rate. Conversely, only four of the least corrupt nations have GDPs less than $100 billion and only two have unemployment rates greater than ten

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57. Schaefer et al., supra note 52, at 14 (internal citation omitted).
58. Shao et al., supra note 12, at 163.
59. Patton, supra note 59.
Ultimately, corporations must realize that they can be a large part of the solution to grand corruption. As investors, corporations maintain the money and power to help stimulate the economies of corrupt countries and lift such countries out of poverty. In turn, this economic change would reduce the prevalence and need for individuals to engage in grand corruption. Indeed, this approach treats corruption as an institutional problem, which current anti-corruption efforts have been unable to address.

The dilemma that ensues from this realization, however, is how corporations can be encouraged to invest in historically corrupt countries. After all, corporations have been deterred from such investments for decades for this exact reason. “Moving business from a country with a low level of corruption to a country with medium or high levels of corruption is found to be equivalent to a 20% tax on foreign business.”62 Because corporations choosing to do business in a corrupt nation would be taking on additional risk of at least a twenty-percent tax, such corporations must be persuaded to commence this course of action with positive incentives that would help significantly reduce such costs and risks. Changing incentives can change behavior, as illustrated in Part III below.

III. POSITIVE INCENTIVES TO ENCOURAGE FOREIGN DIRECT INVESTMENT IN CORRUPT COUNTRIES

A. Overview

An alliance between the public and private sectors is imperative in the fight against corruption. As former United Nations Secretary-General Ban Ki-moon stated, “[t]o reject corruption, every sector of society must act together, including Government bodies, civil society, the media, young people and businesses.”63 Thus far, public- and private-sector anti-corruption initiatives have been largely segregated in their battles against grand corruption and petty corruption, respectively. Therefore, these two sectors must come together to target corruption systemically and leverage the strengths and powers of each sector. Doing so could lead to larger strides in improving the poor

61. Id.
economic conditions and corrupt governments of many nations.

First, local governments must reduce the demand for corruption by harnessing the powers of ethical multinational corporations as “agents of change” in stimulating economic growth through foreign direct investment. Admittedly, many reports and studies demonstrate that high corruption levels and lack of anti-corruption legislation deter investment from such countries. It is no surprise that corruption continues to thrive in those environments from which ethical corporations shy away, thereby allowing companies open to engaging in bribery to conduct business as usual and allow the cycle of corruption to repeat. The business model has to change to break this cycle. Ethical companies must be able to invest in even the most corrupt states in order to eradicate grand corruption.

Significantly, there is evidence that foreign direct investment can reduce corruption. An empirical study found that corruption levels are significantly lower today in countries that have experienced high foreign direct investment flows over the last thirty years. Countries where grand corruption, such as bribing public officials, has become normalized should welcome change for reasons other than concurrent economic benefits. Ethical foreign direct investment may also encourage a country’s own institutions to act more ethically in order to “gain legitimacy within the bigger, global business environment. As the host country grows, it would like to enhance its international reputation and attract more business.” The complicated part is figuring out how to encourage corporations that are accustomed to staying away from doing business in corrupt countries to invest in these countries instead as a long-term strategy for mutual success.

The balance of this section will discuss positive incentive opportunities to influence corporations to engage in foreign direct investment in historically corrupt regions. Specifically, this section will discuss direct communication between private and public sectors, fiscal breaks, making funding and aid contingent on corruption scores or ranks, collaborating with NGOs, lobbying for an FCPA corporate compliance defense carve out, and creating private rights of action.

65. See, e.g., Hess, supra note 56, at 1136 n.94 (collecting journal articles).
66. See generally Kwok & Tadesse, supra note 64.
67. The study obtained the data on FDI inflow and GDP from the World Development Database maintained by the World Bank. See id. at 775, 781.
68. Id. at 769.
B. Direct Communication and Negotiation

If you want something, simply ask for it. Corporations and the governments of corrupt countries stand nothing to lose and so much to gain by opening the channels of communication.

Ideally, private- and public-sector collaboration would be achieved by ethical multinational corporations approaching politicians of corrupt countries to express their interest in conducting business in the country contingent upon certain conditions that could reduce the risks posed to the corporation. If the corrupt country refuses to meet the corporation’s demands, the corporation can easily take its business elsewhere. Corporations would likely be hesitant in spending their own money to fund investigative anti-corruption bodies to monitor and prosecute grand corruption. Nevertheless, there is nothing stopping businesses from asking governments to take on this responsibility before committing to make foreign investments. Although corrupt governments are reluctant to police themselves, the prospect of a corporation investing money and ultimately benefitting the entire economy may be tempting. Furthermore, if a corporation’s interest and demand is made public, the corrupt government may not want to risk bad publicity or public scrutiny and may thus give in to the demand.

Similarly, a public-private channel of communication can occur between a corporation and its home country of incorporation. Instead of directly lobbying the corrupt government, a large corporation or group of corporations can collectively lobby their home government to increase diplomatic relations with the corrupt country in which they wish to do business and work with the corrupt country or pressure them to create investment opportunities and reduce risk. This is precisely what Vice President Biden did to former Guatemalan President Perez when he demanded that Perez renew CICIG’s mandate or else he would stop U.S. aid to Guatemala.69 As Perez recounts, “[Biden] told me it was practically a condition [for the aid].”70 It is unknown whether U.S. corporations had any influence on the U.S. government’s actions in this case. Nonetheless, this is an example of how powerful, ethical governments can leverage money or other instruments of value over corrupt nations in order to negotiate conditions that will allow corpora-

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70. Id.
tions to invest with a greater peace of mind. This can lead to a win-win situation.

C. Fiscal Incentives

It is no secret that money is a powerful motivator. Unfortunately, most corrupt governments cannot afford to implement traditional fiscal incentives to attract foreign investors, such as low corporate tax rates or breaks, tax holidays, special economic zones, and subsidies for infrastructure or job training. Therefore, a more indirect method of fiscal incentivizing that may be more feasible is the cutting of red tape—meaning reducing and simplifying the bureaucratic rules and obstacles to doing business. By making the administrative aspect of doing business less onerous, such as minimizing the amount of paperwork and time it takes to obtain permits and licenses, removing foreign ownership caps on firm holdings, or relaxing residency requirements, corporations will be able to operate more quickly and efficiently. For example, in 1964 Mexico created maquiladoras, which are factories that can import materials, assembly components, and production equipment duty-free, and export the manufactured product into the United States at lower tariffs. The process for obtaining legal recognition was complicated, however, until a reform in 1983 helped cut red tape, after which FDI drastically increased.\(^\text{74}\) \([\text{B}]\)etween 1983 and 1989 FDI in Mexico increased from $478 million to $3,635 million; the share of FDI in total fixed investment increased from 1.42 percent to 9.68 percent.\(^\text{74}\) Mexican investment law also allows for 100% foreign-owned corporations, including maquiladoras.\(^\text{75}\)

While cutting red tape can lead to great economic rewards at a lower cost when compared to traditional fiscal incentive strategies, it still runs the risk of encouraging and perpetuating the cycle of corrupt investment. This is similar to how the sale of real estate at reduced prices or below market values to multinational corporations in corrupt coun-

74. Id.
tries\textsuperscript{76} can attract both ethical and non-ethical investors. Therefore, additional measures are necessary to break the cycle by appealing to only ethical companies, as discussed hereafter.

D. Performance-Based Funding and Aid Allocation

Similar to strong-arming a country to relent to one’s demands, as Biden did in Guatemala, an incentivized aid-allocation system that is dependent on a country’s progress in eliminating corruption could be created to fund corrupt countries. Countries that fail to meet expectations would be punished to induce more compliant behavior. Specifically, if a country regresses, funds should either be cut off (which is rarely done) or withheld in future rounds of funding (which is a more likely possibility). The Millennium Challenge Corporation (MCC), an independent U.S. government foreign aid agency,\textsuperscript{77} already does this through performance-based aid allocation.\textsuperscript{78}

MCC is currently the only donor that ties eligibility for assistance directly to performance on a publicly-available indicator of anti-corruption commitment produced by a third party. To receive MCC compact funding, countries must perform above the median within their peer group on the World Bank Institute’s Control of Corruption index.\textsuperscript{79}

In doing so, “MCC is helping institutionalize the idea that foreign aid should be a two-way street. If donors are going to provide more assistance, recipient countries need to provide greater accountability and deliver results.”\textsuperscript{80} Accordingly, ethical corporations can choose to invest in countries that receive such performance-based funding because they can be more confident that corruption is being seriously addressed and reduced. However, this measure alone is not enough. Ethical companies must be provided with additional support.

The World Bank could implement a similar system by conditioning loans to countries based on each country’s performance in TI’s Control

\textsuperscript{76} See id.
\textsuperscript{77} About MCC, MILLENNIUM CHALLENGE CORP., https://www.mcc.gov/about (last visited Apr. 8, 2017).
\textsuperscript{79} Id.
\textsuperscript{80} Id.
of Corruption Index. In turn, the World Bank could embed government monitoring oversight funds into the project financing. ⁸¹ After all, eliminating corruption goes hand in hand with the World Bank’s mission of ending poverty. Because the World Bank deals with so many impoverished nations, it has the power to do even more to engage the private sector and encourage ethical foreign direct investment.

For instance, the World Bank could create another ranking or scoring system that could rate and certify contractors that use ethical practices in poor corrupt countries. Therefore, when a corporation or bank wishes to do business in such a nation, it has some guidance and assurance that the contractors it employs will not engage in corruption. Because this system is not foolproof, investors can reciprocate and also rate the contractors’ ethical performance upon a project’s completion to endorse the World Bank’s certification or cause its revocation. This will create a preferential hierarchy among contractors, thus helping ethical companies by making the least corrupt ones more desirable among ethically minded foreign investors. Similarly, the World Bank can choose to fund government contracts in corrupt countries only to companies it first identifies as non-corrupt. The World Bank can require a company to maintain and enforce a code of conduct against bribery, which it can monitor and assess through regular audits of the company’s compliance system. Failure to enforce a code of conduct would result in a breach of contract. Taking the aid that countries have come to rely and depend upon and adding strings to condition the availability of funds can be a powerful motivational tool for corrupt nations to engage in stricter enforcement of anti-corruption laws.

E. NGO Collaboration

The public and private sector partnership encouraging ethical foreign direct investment in corrupt countries should actively work with NGOs to remove obstacles to investment that involve corrupt systems. Although NGOs lack law enforcement capabilities, they can play a large role in validating the problem of corruption and increasing its transparency. For instance, NGOs can help ethical companies make successful, corruption-free investments by attaching themselves to an investment and blowing the whistle whenever the investor faces indigenous corruption. In doing so, NGOs can be more active and hands-on than they have been thus far and help stop bribery.

Aside from just studying and reporting the status of corruption as Transparency International does, NGOs in the technology sector can also help expand the access and use of technology. Especially in countries that lack a CICIG-like investigative body, social media, smartphones, and internet access have the ability to transform government transparency and accountability in the fight against corruption through several different avenues, including: providing faster and easier access to information, encouraging citizen monitoring and journalism, removing the human element involved in fraud and bribery, and increasing the ease of gathering prosecutorial evidence.

Anyone with access to a computer or smartphone has the ability to become an investigative journalist, whistleblower, or activist. In countries where the government limits freedom of the press, the aforementioned technology can allow citizens to bypass controls that might try to contain or conceal public exposure of corruption, such as use of funds in government spending or elections. Online disclosure of known instances of corruption and quick dispersion of financial and legal information can impress upon citizens the significance of grand corruption in their respective countries and motivate citizens to demand change from their government leaders. NGOs can begin this initiative, but eventually the hope is that citizens will become the ones to monitor and hold public officials accountable in the public eye.

While smartphone access is on the rise, internet access is still expensive in some undeveloped, corrupt nations. Companies like Facebook and Google are currently funding NGOs to reduce or remove data costs.\(^\text{82}\) Therefore, another opportunity for corporations to help eliminate grand corruption could be to back tech NGOs devoted to increasing internet access. As internet access improves and the costs of owning a computer, tablet, or smartphone fall, corrupt officials will have a harder time concealing their corrupt practices. Consequently, wealthy private corporations that want to invest in corrupt countries can choose to act as third-party facilitators in the fight against corruption by partnering, collaborating with, or helping fund NGOs to provide citizens with greater access to technology. NGOs, businesses, and the governments within a corrupt country should also continue to engage in conversations as the country develops. Together, such entities can stage workshops and seminars to discuss sustainable development initiatives and next steps in fighting corruption.

F. *FCPA Compliance Defense Carve Out Only For Investment in the Most Corrupt Countries*

The barriers to ethical investment in corrupt countries do not arise solely from corrupt governments. Rather, for some corporations, legal restrictions at their principle places of business deter or inhibit investment as well. One of the biggest obstacles facing U.S. corporations or foreign businesses operating in connection with a U.S. territory is the threat of prosecution under the Foreign Corrupt Practices Act. With several major companies facing severe million dollar penalties over the past decade,83 corporations with any U.S. nexus are apprehensive at the idea of investing in a corrupt country. This fear stems from the fact that the company could risk prosecution and debarment even if one corporate employee engages in bribery of a foreign official. Although corporate codes of conduct and internal capabilities to prevent and detect breach of the code are improving, a chain is only as strong as its weakest link. In this case, the weakest link has the potential to bring down an entire business.

Consequently, many argue that the FCPA should be reformed to create a compliance defense. A compliance defense “would allow a corporation to escape liability for one of its employee’s wrongful payments if the corporation could show that it had in place an effective compliance program, but that an employee was able to evade the program despite the corporation’s best efforts to prevent such a payment.”84 Although problematic, this defense could first be introduced and limited to use in the most corrupt countries before its utility is proven to warrant further expansion. Therefore, a U.S. corporation or a corporation with U.S. ties that was once anxious about investing in a historically corrupt country could rest assured that if one of its employees or agents pays a bribe, the corporation could invoke the compliance defense (as long as it could prove an effective compliance program existed) and achieve a better settlement agreement with the Department of Justice. Of course, there may be problems as to how the defense would play out in reality given the uncertainty of proving what constitutes an “effective compliance program” and how prosecutors and courts would respond to invocation of the defense. Nevertheless, corporations have the ability to help lobby for this reform to the FCPA.

84. Hess, supra note 56, at 1137.
Private rights of action date back to U.S. bilateral investment treaties (BITs) of the 1980s, during which a system of investor-state dispute resolution was created. The system entails reducing investors’ risks by giving them a private right of action, meaning “the right to submit an investment dispute with the host government directly to international arbitration” for monetary compensation. This “government-to-firm commitment” signals strong support for the private sector and comes at little to no cost for governments that are confident they will not engage in any prohibited behavior. Private rights of action have become routine in international investment agreements, even making it into chapter 11 of the North American Free Trade Agreement (NAFTA).

Most recently, Article 16.3 of the “Competition Policy” chapter of the Trans-Pacific Partnership Agreement (TPP) included a private right of action before the U.S. subsequently withdrew from the TPP. Unfortunately, this independent right to seek redress for injury caused by a violation of law was not reciprocated in Article 26 of the TPP entitled “Transparency and Anti-Corruption.” Would it not be equally fair and beneficial to establish a private right of action for businesses?

88. See id. at 15.
92. See TPP, supra note 90, at art. 26. Given that the TPP has been in negotiations for 7 years, I could not find any mention online or through news databases of how the private right of action was proposed and became part of the agreement.
injured as a result of corrupt government practices? It would, but most corrupt countries would probably not make such a great commitment.

Anti-corruption is not yet a universal concept like private rights of action for investment, which are viewed as “cheap” measures because states have come to agree that bad behavior like expropriation should be avoided and the seemingly similar agreement on anti-competitive practices. It is unlikely that corrupt governments would be confident in agreeing to no longer engage in corruption at the risk of high arbitral awards that they would not be able to pay. Yet corrupt governments might be more likely to at least consider and test the proposal given the right investment opportunity. Private rights of action contained within BITs or other agreements with corrupt countries would certainly appeal to ethical corporate investors because they would allow such corporations to minimize their risks of investment and grow their businesses while simultaneously holding enforceable rights against the corrupt regimes. On the other hand, such a dispute resolution mechanism also faces the possibility of backfiring. Corporations may end up spending too much time and money arbitrating corruption and bankrupting an already poor, undeveloped nation before the investment is able to lead to true economic growth that would reduce the need and desire for corruption.

Nevertheless, when it comes at least to the TPP, corporations thinking of investing in corrupt member nations may not be completely prohibited from using a private right of action in corruption cases. As Professor R. Michael Gadbaw indicates, bribing to steal a deal could be considered an anticompetitive practice, in which case one could theoretically use the TPP competition law, thereby indirectly obtaining the private right of action. This option could be very tempting to over half of the TPP member nations who would most likely wish to engage in corruption-free trade given their very high ranks on TI’s Corruption Perception Index, as follows: New Zealand (#1), Singapore (#7),

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93. Cf. Paul D. Carrington, Law and Transnational Corruption: The Need for Lincoln’s Law Abroad, 70 L. & CONTEMP. PROBS. 109, 132–35 (2007) (arguing Lincoln’s Law (a nickname for the False Claims Act, which gives private citizens standing to sue on behalf of the government, or “whistleblow”) for foreign plaintiffs such that “[f]oreign nationals could be permitted to sue in the name of their governments that have been corrupted by a defendant who is subject to the personal jurisdiction of the court in which the action is brought.”).

Canada (#9), Australia (#13), Japan (#20), U.S. (#18), and Chile (#24).  

IV. Conclusion

There are several untapped opportunities to incentivize corporations to accept the seemingly impossible mission of eradicating corruption. Corporations can negotiate directly with corrupt governments to leverage the prospect of doing business in the country in exchange for tougher enforcement of anti-corruption laws. Moreover, corrupt countries can offer to cut the red tape for corporations interested in investment opportunities. Aid foundations and the World Bank could also condition their funding to corrupt nations on the gradual elimination of corruption, judged on a preexisting or new corruption score index. NGOs can take more active roles by attaching themselves to corporate investments to ensure they remain free from corruption. Corporations can also partner with NGOs to help increase transparency by arming citizens with greater access to technology, or corporations can lobby the U.S. government for a compliance defense carve out in the FCPA to lessen the threat of prosecution for investments in corrupt states. Finally, nations can agree to create private rights of action through international agreements, following the TPP model.  

Ultimately, the link between GDP and corruption is undeniable. The private sector faces a unique opportunity to significantly change the course of corruption by redirecting some funds to nations that have been blacklisted by the foreign investment community. Although multinational corporations will surely face challenges, not all of which can be mitigated by the aforementioned positive incentives, they are in the best position to absorb short-term risks and losses in exchange for the potential of achieving long-term gains. After all, the current attempts to address corruption—criminalization, Transparency International’s movement, corporate codes of conduct, investigative bodies, or an international anti-corruption court—have failed or will fail to specifically target grand corruption, are severely lacking in enforcement mechanisms, or are impractical and unsustainable. The best way to circumvent a corrupt government is through greater foreign direct investment from ethical companies. By empowering the business

95. See 2016 Corruption Perceptions Index, supra note 30, at 4. The remainder of the TPP member nations have much lower scores, as follows: Malaysia (#55), Peru (#101), Mexico (#123), and Vietnam (#113), and Brunei (#41). Id. at 5.

2017] 603
community in a corrupt country, its citizens will be able to lift themselves out of poverty, thereby eliminating the need for and dependence upon grand corruption.

President Obama declared during his speech on corruption in Kenya in the summer of 2015, “‘[o]rdinary people have to stand up and say ‘enough is enough.’”\(^9\) Although the right attitude and approach is embedded in this directive in terms of calling for change from within a country and its citizens, the strategy neglects to address the demand side of corruption, nuances of grand corruption, and the overarching systemic nature of corruption. A corrupt government will not listen to its people and willingly give up the benefits it incurs to sustain its officials’ wealth, power, and status. Consequently, the power of change lies in the “who” or “what” that holds even more wealth, power, and status than corrupt governments operating in impoverished nations: multinational corporations.

\(^9\) Lee & Vogt, supra note 1.