Conference:

Corruption and Cross-Border Financial Flows: The Political-Economy of International Standard Setting

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Almost a year ago I became a member of a panel set up at the initiative of the UN General Assembly and ECOSOC —the Economic and Social Council. It is called FACTI— Financial Accountability and Transparency Initiative. It focuses especially on the way the Sustainable Development Goals can be undermined by financial flows that leave many countries with little to show their own people for investments from abroad and for public infrastructure procurement at home.[1] We have the assistance of a small secretariat, and we have been meeting via zoom both as a panel and with a wide range of interested individuals and stakeholders. The panel is an international group chaired by former presidents of Niger and Lithuania. We have only the power of the bully pulpit, but we hope to have an impact, given both the urgency of achieving the SDGs and weaknesses of the international integrity system.

The panel is dealing with several aspects of the international financial system, including both tax evasion and tax avoidance, but I will focus here on corruption because that is where my own expertise lies.[2] Both corrupt payments that enter a country and the corrupt proceeds that are then laundered back out are objects of concern. Unlike the vexed debate over tax avoidance, there is general agreement that "grand" corruption is both illegal and harmful to fair and equitable economic growth. Pure fraud can involve a single actor or group that steals from the public treasury or a private firm. But corruption is a two-sided phenomenon with a payer on one side and a recipient on the other. This means that successful deterrence can concentrate on either side of the illicit deal—a seeming advantage, except that there may be no unhappy victim to report the offense. Illegal payoffs are difficult for domestic governments to confront because the perpetrators keep them secret, and they implicate powerful public and private actors. The international community can both support international efforts and encourage domestic anti-corruption activities that build on honest law-enforcement and institutional reform.

Consider the four major forms of grand corruption: major investments in natural resources, public infrastructure procurement, defense equipment procurement, and the sale of public assets to private firms. They all involve large, one-of-a-kind, expenditures that usually extend over many years. The number of qualified suppliers is likely to be limited, meaning that the government cannot simply "go shopping" and rely on mar-

1 *Yale University, The work of the panel, its membership, and its consultations are described on its website: https://www.factipanel.org/.

2 For an introduction to my work see: Susan Rose-Ackerman and Bonnie J. Palifka, Corruption and Government: Causes, Consequences and Reform, 2d ed. (Cambridge University Press: Cambridge UK, 2016).

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ket competition to produce high-quality supplies at low prices. Each supplier or natural resource firm will explain why it can provide the best value for money in the least amount of time. Because the choice criteria will seldom be perfectly clear even to the decision-maker, there is plenty of room for corrupt payoffs to influence the outcome, even if the firm selected is an otherwise competent supplier. There are several common, interrelated possibilities.[3]

- Corruption can increase the **monetary profit** on a particular deal that can be shared between politicians and investors. The quality of the project may be high, but the contracting process includes a bargaining space for public officials and private firms to negotiate over how to share the excess. Some of that excess may also go as personal payoffs to lower-level officials on both sides to assure their complicity.
- Corruption can reduce the public benefit of the project beyond mere financial padding. A firm can free up more funds for private gain by selecting **low-quality inputs** that will not become noticeable until, say, an earthquake or a hurricane occurs, or the passage of time reveals structural faults, as in the recent bridge collapse in Genoa.[4] Alternatively, the government may collude with the contractor to **over-design** a project in ways that provide little public benefit, but make it harder to provide reasonable cost estimates that can be compared with other projects worldwide. Think of the massive one-of-a-kind cathedral built in Yamoussoukro, Ivory Coast.[5] A study of government contracting in Nigeria showed how businesspeople collaborated with each other to propose projects to the government that left room for private benefits on both sides.[6]
- Corruption can give a firm a **dominant advantage in the competition** for contracts. If a firm has reputation both for bribery and for delivering high quality infrastructure projects, that combination my give the firm an unassailable advantage over its competitors. A study by Nicolás Campos, Eduardo Engel and two co-authors suggests that this was the case for Odebrecht, the Brazilian firm that admitted to widespread involvement in corrupt payoffs in Latin America and Africa. It innovated and streamlined the payment of bribes through its Department of Structured Operation, based in the Dominican Republic. No one needed to carry around suitcases filled with cash, and the transactions were handled electronically and very quickly and politely. This meant that bribes did not unduly inflate the cost of the contract. Odebrecht made modest excess profits on individual deals, but it mainly gained from a dramatic increase in its share of the infrastructure market. Once awarded a contract, it also benefited from subsequent renegotiations in its favor.[7] The expectation of corrupt dealings may also have induced government officials to propose projects that made very little economic or social sense and to over-design others as well to inflate the totals out of which bribes were paid. Unfortunately, there are no systematic measures of that kind of behavior by public officials.
- **Resource concessions** for oil and minerals need to comply with certain technical standards to be feasible. Poor countries may have little background in these fields and lack good advice on international investment law. Thus, firms, which are global repeat players, may disproportionately benefit without having to pay high bribes (a cost for the firms). In fact, high bribe payments may be the result of a regime that is able to bring in enough expertise to convince the firm that it needs to bargain hard. Unfortunately, that can mean generous payoffs to the corrupt rulers and their associates but little benefit to ordinary people.
- In governments, democratic or otherwise, **where rulers have a short time horizon and are budget-constrained, they may sign long-term leases** on public assets, such as airports, railways, or bridges to generate substantial funds up-front, where the leaseholders then benefit from the revenue inflow over time. However, to generate the most funds for government coffers, public officials agree to generous franchise terms that allow the concessionaire to set high rates—that is, high bridge and highway tolls, railroad ticket prices, and landing fees. For example, the city of Chicago signed a long-term lease for its parking meters that obligated the city to clear streets with leased meters more quickly than other streets.[8] The short-term perspective of the city government, eager for an influx of funds, produced a long-term one-sided bargain. The problem as in many corrupt deals is that the government officials engaged in bargaining need not have the long-term interest of the polity in mind; they are only looking through a short-term window for political and personal gain.

Given this taxonomy of grand corruption, how can the international community help to limit its harmful effects on development? Nation-states' own law-enforcement systems, including their prosecutors and judges, must be part of the response. However, the international financial community needs to be involved because much of the domestic impact arises because it is easy to transfer funds across borders, despite existing rules and constraints. A good share of the gains from grand corruption are laundered through the global financial system. Corruption is a predicate offense for money-laundering at the Financial Action Task Force and in many national laws, but it is a relative newcomer and often takes second place to organized crime and the drug trade, and, more recently, terrorism, and environmental crime.[9] It can be subsumed in a long list of

3 See id. at 93-109.

4 The bridge's basic design plus deferred maintenance by the private company that managed the bridge were contributing factors, Guglielmo Mattioli, "What Caused the Genoa Bridge Collapse and the End of an Italian National Myth, *The Guardian*, February 26, 2019, https://www.theguardian.com/cities/2019/feb/26/what-caused-the-genoa-morandi-bridge-collapse-and-the-end-of-an-italian-national-myth. Corruption in the design and procurement contracts has not been documented, but some suspect that corruption may have contributed to the use of low-quality cement; see, Jeffrey Heimgartner, "The Rise and Fall of the Doomed Morandi Bridge," August 25, 2020, engineering.com, https://www.engineering.com/BIM/ArticleID/20576/The-Rise-Fall-and-Rebuild-of-the-Doomed-Morandi-Bridge.aspx.

5 Monica Mark, "Yamoussouko's Notre Dame de la Paix, Ivory Coast, World's Largest Basilica," *The Guardian*, May 15, 2015, https://www.theguardian.com/cities/2015/may/15/yamoussoukro-notre-dame-de-la-paix-ivory-coast-worlds-largest-basilica-history-of-cities-in-50-buildings-day-37.

6 Nnaoke Ufere, Sheri Perelli, Richard Boland, and Bo Carlsson, Merchants of Corruption: How Entrepreneurs Manufacture and Supply Bribes," *World Development* 40: 2440-2453 (2012).

7 Nicolas Campos, Eduardo Engel, Ronald D. Fischer, and Alexander Galetovic, "Renegotiations and Corruption in Infrastructure: The Odebrecht Case" (September 2, 2019, last revised December 3, 2020). Available at SSRN: https://ssrn.com/abstract=3447631 or http://dx.doi.org/10.2139/ssrn.3447631.

8 Illinois Public Interest Research Group, "Privatization and the Public Interest," October 7, 2009, https://illinoispirg.org/reports/ilp/privatization-and-public-interest.

9 FATF, *Laundering the Proceeds of Corruption*, Paris, July 2011, https://www.fatf-gafi.org/media/fatf/documents/reports/Laundering%20the%20Proceeds%20of%20Corruption.pdf; Congressional Re-

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predicate offences. Nevertheless, a 2011 FATF report makes a strong case for the international efforts to seek to capture the proceeds of corruption.

> [Those who benefit from corruption] may control the machinery of the state, allowing them to co-opt those individuals and institutions that are supposed to prevent and detect such crimes; they can use the proceeds of corruption to finance political parties or organizations and, in turn, reinforce their control over overt government mechanisms; their political power gives them the ability to recruit skilled associates within their own country to engage in transactions to make the proceeds indistinguishable from legitimate money and provide a diplomatic cover; and they often have a veneer of respectability that deflects suspicion.[10]

Unfortunately, in a kleptocratic regime, domestic law enforcement is not able to act. Under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, countries that have ratified the Convention can bring suits against business firms or those that do business in their countries if they can prove the payment of bribes to get business in host countries throughout the world.[11] The money-laundering system can be used both by the bribers to transfer the funds and by the recipients to move the funds to convenient off-shore locations and eventually to financial centers. The institutions of the host country where the bribe apparently influenced public choices may not be involved directly. The fluidity, speed, and anonymity of international financial transactions highlights the importance of international action.

Unfortunately, international action by nation states is not easy to organize, especially in the financial arena, where massive private organizations—banks, trusts, stock markets, investment vehicles, hedge funds, etc., play a central role and seek to dictate terms to nation state regulators. That is where the FACTI Panel can play a role in pushing the UN and other international bodies, such as the OECD. I do not know what we will finally recommend. The final report will only be issued in February. I hope, however, that we can reject the easy way by issuing a bland report; our work will have more impact if it takes a stand on ways to reform the international architecture of cross-border transactions.

Let me move now to some of proposals that the FACTI panel will discuss and stress how even a small panel, whose members serve as individuals, must face the diverse goals and interests of its members. Also, as a panel associated with the UN, we want a report that many UN members can accept, even though the FACTI panel report is not subject to a vote of the UN member states. Here are the major fault-lines that I see even within our cooperative and accommodating group.

First, rich versus poor countries. Even though some of us are from wealthy countries (the US, German, Norway, and Austria), our focus on the Sustainable Development Goals means that none of us seeks a report that advocates for the narrow economic interests of wealthy polities.

Second, we have admonished each other to **be both bold and practical**, where practical implies understanding the way that power is distributed in the world. We need to recognize the economic and political power of wealthy countries that, along with China, are necessary allies to support change. If we propose the creation of new institutions, they will have to be financed from somewhere, and the UN faces severe budget pressure.

Third: small versus medium and large countries, measured by population or GDP. Small countries necessarily look to the UN and to regional associations to give them a voice and a place at the table. This is all to the good, but it need not equalize all national voices, so that a small Pacific island, for example, has the same influence as the Indian subcontinent. Later, I will point out places where the distribution of countries by size raises important questions about the meaning of "equal' treatment.

Fourth: resource rich versus resource poor countries and regions of countries. The problem of grand corruption arises with salience in the former case. However, if even the meagre domestic wealth of a resource-poor country is siphoned off-shore, the result will be a particular tragedy for its citizens.

Fifth, organized crime, terrorism, and guerilla war are distributed broadly and unsystematically across the globe. The users of expensive illegal drugs are concentrated in wealthy and middle-income countries. Thus, some countries do not put much emphasis on these issues and other emphasize their salience.

Consider, then, some specific reforms that the FACTI panel has discussed and how they map onto these fault lines. They are:

- An international registry of beneficial ownership,
- Improvements in anti-money laundering regulations as they apply to wealthy Politically Exposed Persons (PEPs),
- Reforms in the procurement processes for public infrastructure projects involving international bidders and in the award of concessions for resource extraction,
- Restitution of the proceeds of corruption,
- Constraining the cross-border flows of funds used by organized crime and terrorists,
- Capacity building inside less-developed countries with weak institutions, and clear international rules for them to follow,
- The regulation and oversight of "enablers", that is, professionals who assist in the negotiation and implementation of international deals, and
- Reforms to increase the impact of the UN Convention against Corruption.

Beneficial Ownership: One idea is an on-line registry of the beneficial owners of all kinds of financial and business entities with a value above a certain level. Perhaps purely local firms could be exempt so long as they do not transact or hold funds internationally. The keys are transparency to outsiders, not just law enforcement, and clear information requirements so owners know what is required and so the public can understand the data (perhaps with some help from experts). Any registry would need a set of uniform definitions, something that does not now exist. It would be difficult to keep such records up to date with wide capacity differences around the world and fast-changing economic conditions, such as the COVID-19 pandemic. The burden should be on firms to update the data annually, but if the material is public, private watchdog groups could provide oversight. Of course, many firms disappear each year or merge and change their names. If there is an international registry, what would be the role of individual country financial market regulators? Could the UN establish an expert panel to produce a blueprint for such a project?

One problem is the lack of uniform accounting standards worldwide. This would have to be overcome with an agreement on a set of acceptable standards, even if they

search Service, *Money Laundering*: *An Overview of 18 U.S. C.* §1956 and Related Federal Criminal Law, 2017 CRS RL33315, https://www.everycrsreport.com/files/20171130_RL33315_a7fb09655852a4a57b91fc3fa500ad82a3158c34.pdf.

10 FATF Report, p. 34.

11 The text of the Convention is at: http://www.oecd.org/corruption/oecdantibriberyconvention.htm.

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are not everywhere the same. The key is that whatever the details, observers can see who the ultimate owners are. The International Auditing and Assurance Standards Board (https://www.iaasb.org/) sets standards. However, its board members are from developed countries, so buy-in from the developed world is a precondition for global standards. Perhaps the UN could contract with the IAASB or some comparable body to produce standards tailored to the size and complexity of the businesses concerned (not the level of development of the country).

A further problem is the wide variation in the information that must be provided to regulators before a firm can be legally established. We know that many wealthy jurisdictions, including some US states and some small EU member states, specialize in lax incorporation laws. Thus, a key goal of a beneficial ownership registry is to push these jurisdictions to impose more requirements or simply to provide more oversight.

The US Congress has finally responded to criticism of the way some states are enabling illicit financial flows. Embedded in the 2021 National Defense Authorization Act, Congress enacted the Corporate Transparency Act in early 2021 over President Trump's veto. The Act requires most private firms to report their beneficial owners, a major victory for supporters of transparency that federalizes what has been a state responsibility. However, the data will not be available to the public, and there are numerous exemptions.[12] The impact of the statute will depend importantly on how it is implemented by the federal government through regulations and enforcement. It will also depend upon the way US disclosure requirements interact with those in other jurisdictions.

Many small countries have easy incorporation laws that are aggressively marketed abroad. Nevertheless, small countries seek an exemption from efforts to globalize data on beneficial ownership, arguing that they have weak capacity. This can create conflict within the panel because other members are from countries where funds are siphoned off into offshore havens. Furthermore, some very poor countries, measured by GDP per capita, include a wealthy elite who invest both inside and outside the country. They should be not be exempt from disclosure simply because their home countries are unable to track their investments.

Thus, the idea of a beneficial ownership registry is a positive idea, but one which faces several hurdles.[13] It needs to accommodate the fears of small countries, without overlooking the way some small countries, even if vulnerable to economic and social shocks, facilitate corrupt financial transfers that impose deep costs on the citizens of other low-income countries.

Tracking Wealthy Individuals: Some illicit financial flows are not linked to taxable business and financial firms, but rather to the wealth of private individuals who sequester their wealth offshore. Some may have created shell companies to manage their funds, but other wealth transfers would not necessarily be revealed by a beneficial ownership registry. Wealth transfers by the elite may have legitimate justifications, such as, reducing the risk of having one's wealth concentrated in a high-risk polity. However, they can also be a way to lower taxes and to use offshore banking to launder the proceeds of corruption or of illegal business activity, such as the drug trade and other proceeds of organized crime. Thus, the FACTI panel could recommend reforms related to anti-money laundering (AML) that limit access to financial havens and eventually to money-center institutions. AML activity needs to distinguish between cases where the firm or individual uses corruption to earn illegal profits from an otherwise legitimate business activity (e.g., a firm that obtains government infrastructure contracts via payoffs) versus a firm or a mafia that corrupts a government department to facilitate illegal businesses.

Consider the former type of corruption that can raise the prices of projects and support "white elephants" with little social value. If international AML rules can limit the ability of bribe recipients to send their funds offshore, that difficulty may deter some corruption from occurring or, at least, reduce its scale. We do not know much about the concrete effect of AML rules, but the critics worry that they deter legitimate international investments as well as corrupt deals.[14] The problem, called "de-risking", arises when a financial institution refuses to supply credit for any investment in a particular jurisdiction because of the overall risk of money laundering.[15] Thus, some opposition to stronger and better enforced AML rules may come from rapidly growing middle-income countries that worry about reduced inward foreign direct investment. It should be possible to respond to this concern with rules that level the playing field for honest investors, but these investors would need to be involved in the discussion over the rules. Also, the small versus large country divide may arise here as well with small countries complaining that the constraints are too onerous for them. However, relief could depend upon a good faith showing that outflows are well monitored. Here the panel will run into the tension in some countries between those in power and other citizens. Powerful autocratic rulers are not likely to want international oversight of their financial activities—labeling such actions as violations of sovereignty. Even panel members from more democratic polities might side with those who assert strong versions of national sovereignty to counter international standards and policies that apply to their nationals.

Public Procurement and Concessionary Contracts: High-level, corrupt public officials and corrupt, bribe-paying firms can arrange to transfer funds without involving the local banking system (witness the Odebrecht corporation's special corruption office in the Dominican Republic that centralized the corrupt transfers). A first question is the path followed by the funds. It is apparently quite easy to "layer" funds, that is, to create a complex pattern of transfers that disguises their origin.[16] To some extent better information about ownership, as suggested earlier, will help, but the panel might consider an additional constraint, one that goes beyond the US limitations on investment in the US by politically exposed persons (PEPs).[17] Rather, the international financial markets in the US, Europe and Asia initially could refuse to accept funds that arrive from a "financial paradise"—whether the entity is an island nation, a crown dependency, a small EU

12 The text of the act, HR 6395, is at: https://www.govinfo.gov/content/pkg/BILLS-116hr6395enr/pdf/BILLS-116hr6395enr.pdf. The material on anti-money laundering and beneficial ownership is in titles LXI-LXV, pp. 1160-1246. The Corporate Transparency Act is title LXIV.

13 The background paper prepared for the FACTI panel was particularly comprehensive. Andres Knobel, "Background Paper on Transparency of Asset and Beneficial Ownership Information", June 24, 2020, available on the FACTI website at: https://uploads-ssl.webflow.com/5e0bd9edab846816e263d633/5f150c1c6354699b05e3e6f7_FACTI%20BP4%20Asset%20and%20benficial%20ownership%20registries.pdf.

14 Peter Reuter, "illicit Financial Flows," *Milken Institute Review*, March 7, 2017, https://www.milkenreview.org/articles/illicit-financial-flows (noting the lack of information on the effectiveness of AML rules).

15 World Bank, "Are Global Banks Cutting Off Customers in Developing and Emerging Economies?" May 1, 2018, https://www.worldbank.org/en/news/feature/2018/05/02/are-global-banks-cutting-off-customers-in-developing-and-emerging-economies

16 See Knobel, supra note 13.

17 The Global Magnitsky Act, dealing with this issue, is described by the US Department of State at: https://www.state.gov/global-magnitsky-act/

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member, or a US state. The burden of proof then would be on the owner of the account to provide a trail tracing the funds back to their source to demonstrate their legitimacy. It is now very easy for financial institutions and markets in the developed world not to ask too many questions. The idea is both to deter bribery by limiting the use of funds obtained corruptly from domestic or foreign firms and to limit tax avoidance or evasion that is not transparent to citizens. The Financial Action Task Force (FATF) faces pressures not to put too many countries on its blacklist (now labeled a "call for action"),[18] but the policy could simply skip that step and just ask if the entity has a large volume of funds flowing in and out. The idea is to put the burden of proof on the investor. Once again, there can be a problem of restricting the economic options open to some small polities. That may be a price worth paying that could be mitigated through debt forgiveness or other forms of aid.

Restitution of the Proceeds of Corruption: The panel members from countries where corruption is endemic have been very concerned with the losses to their countries from large-scale corrupt deals. Presently, the strongest legal actions occur under the OECD Anti-Corruption Convention, a generalization of the US Foreign Corrupt Practices Act (FCPA). The Convention allows the 43 signatory countries to bring legal cases against firms that have paid bribes to get business abroad.[19] The US remains the major enforcer, although a few other countries now initiate cases. The US has the longest experience in the field, dating from the passage of the FCPA in 1977. Most importantly, US criminal law has a very broad jurisdictional reach so that the US can prosecute firms listed on the US stock exchanges or doing business in the US even if their formal headquarters are elsewhere. Most successful cases end in financial settlements that flow into the US treasury.[20] Recently, however, the US has collaborated with government where the corruption occurred, such as Brazil and Malaysia, or where some of the money was transferred, such as Switzerland.[21]

A weakness of the OECD Convention and the FCPA is that neither one covers those who receive the bribes. These recipients must be tried in their home countries, an unlikely possibility if they are still in power and difficult to accomplish even if they are not. Sometimes anti-money laundering laws can be use against bribery recipients if corruption is a predicate offense. Some are advocating for an international anti-corruption court for just that purpose, but this seems to me an implausible idea. Those focused on the impunity of corrupt actors, especially if they violate human rights, support the idea as well as domestic opponents of kleptocratic regimes.[22] However, the countries that would have to ratify such a treaty if it were to serve its purpose are just those countries whose political class is unlikely to have an interest in participating. The court's prosecutors would need to have the investigative powers of domestic prosecutors, powers that would deter kleptocratic regimes from participating. This an example of the tension between practicality and wishful thinking. Rather than take on the proposal for a court, the FACTI panel has concentrated on international measures to make it harder for the corrupt to use their financial benefits outside their own countries, and on supporting the OECD Convention.

The emphasis on suits brought by wealthy countries against corrupt firms and their managers and owners raises the issue of the restitution of corrupt gains is a particularly clear form. If corruption is believed to harm a country's development prospects, shouldn't its citizens be recompensed for that loss? There are two basic problems here. First, how can one calculate the developmental cost of a particular case of corruption? The size of the bribe is often a very poor measure of the social cost of corruption. A bribe may be low because the multi-national firm is so powerful that it can reap a profit windfall with only a modest payoff. Ideally, it would be best to estimate what would have happened in an honest transaction or if a developmentally destructive project had never been attempted. At the very least, prosecutors should ask if the loss could have been a multiple of the bribes paid, which are, recall, a cost which the firm seeks to minimize. The size of the bribe would be relevant to punishing the bribe payer, but it is not a measure of the harm caused by the briber--unless the bribe is a good proxy for the firm's savings on quality and time that bribery permits.[23]

Second, if one can come up with a rough estimate, how should the funds be distributed, especially if those currently in power may have been implicated in the relevant case or suspected of other contemporary offenses? This has been the major sticking point in the debate over restitution, rather than the level of fines. Here, we see a clear tension between claims of sovereign right and the insistence that restitution payments should end up benefiting ordinary people, especially those at the bottom of the income ladder. The principle of restitution is justified in two very different ways that are not always compatible. One is a claim of sovereign right and does not require any further justification or explanation about how the funds will be spent. They were stolen from the country, and the country deserves to recover them. The second is a claim of distributive justice. The corrupt funds left the country as the result of an illegal deal between a public official and an international firm, undermining development goals. Thus, it is essential that they be used to further the Sustainable Development Goals, and the restitution payments need to make sure that that happens. That may require considerable outside oversight, given the weakness of the country's institutional framework. The beneficiary state may object under the first, sovereignty, claim. A possible compromise is a funding package that goes along with programs of domestic institution building that are acceptable to those currently in power.

18 FATF is an inter-governmental body established by the G7 in 1989 to make recommendations to combat money laundering. It currently has 39 members, and its mandate has expanded to include terrorist financing and weapons of mass destruction. Part of its agenda concerns links between money laundering and corruption. For background see: https://www.fatf-gafi.org/home/ . In 2020 only Iran and North Korea were on the "call for action" list.

19 The Convention is at: http://www.oecd.org/corruption/oecdantibriberyconvention.htm. The US FCPA is at: https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act.

20 See OECD, *Implementing the OECD Anti-Bribery Convention: Phase 4 Report: United States*, November 2020, https://www.oecd.org/corruption/anti-bribery/United-States-Phase-4-Report-ENG.pdf.

21 US Department of Justice, "Odebrecht and Braskem Plead Guilty and Agree to Pay at Least 35 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History," December 21, 2016, https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve. Alexandra Stevenson and Matthew Goldstein, "Goldman Sachs and Malaysia Reach $3.9 Billion Settlement in 1MDB Scandal," New York Times, July 12, 2020, https://www.nytimes.com/2020/07/24/business/goldman-sachs-malaysia-1mdb.html.

22 One strong advocate is Judge Wolf. Mark L. Wolf, "The World Needs an International Anti-Corruption Court," Daedalus 147 (3): 144-156 (2018), https://www.mitpressjournals.org/doi/abs/10.1162/daed_a_00507.

23 On using the criminal law to deter bribery see Susan Rose-Ackerman and Bonnie J. Palifka, Corruption and Government: Causes, Consequences, and Reform (Cambridge UK: Cambridge University Press, 2016) pp. 205-222.

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Organized Crime and Terrorism: The drug trade and other illicit businesses, such as trafficking in weapons and people, pose difficult issues. The participants are willing to use violence, and they may have their own ways of transferring funds, such as the informal *hawala* system or cryptocurrencies (such as bitcoins).[24] I do not think that the report will delve too deeply into the issue of organized crime, but it does drain resources from legitimate businesses, facilitated by international methods of sending funds out of developing countries. However, I hope that we will critique contemporary efforts to regularize the use of cryptocurrencies. The more that legitimate, established financial institutions invest in bitcoins or help their customers do so, the greater the risk that it will become an unexamined route for illicit flows to leave low-income countries and show up as laundered funds in money centers. Even if they have some legitimate purposes, the downsides seem to me to be clear and serious. Here, I am not sure that there will be must dispute within the panel. The opposition will come from portions of the business and financial worlds that see cryptocurrencies as somehow "modern" even if their main claimed advantage is lack of transparency that the panel is trying to encourage.[25]

Capacity Building and Clear Rules: Capacity building assistance can help accomplish institutional reform in low-income countries with weak institutions. The goals are preventing corruption, increasing tax collections, and supporting law enforcement. Less developed countries (LDCs) stress the value of clear rules so that both countries and responsible business leaders could take credit for complying with the rules. For those who do not think that they are in the position to make the rules , the most important things are clarity, stability and feasibility. Of course, there is some tension between clear international standards that apply to business activities and the idea that each country must find its own way forward. However, here is another case where an expert committee of the UN, the WB, and IMF could, first, support research to identify what actually makes a difference, and then propose some uniform standards. Some LDCs argue that they cannot comply with complex, technocratic standards. Some past proposals have been needlessly complex, as each actor tries to add his or her favorite regulation. The risk is that rather than helping LDCs respond to global risks of money laundering and illicit financial flows, they simply force these countries toward autarky or toward an alliance with criminal sources of funds. There will, of course, be tradeoffs between feasibility and effectiveness, but if the most effective rules are not, in practice feasible, then they are pointless. That tradeoff becomes part of the argument for concentrating much of the enforcement responsibility in wealthy states or international financial institutions.

"Enablers" is a negative term used to describe expert individuals who are important players international business dealings. The term captures their dual role as impartial experts and facilitaters of the interests of firms, on the one side, and public sector ministries, on the other. Often they do not simply profer advice but also engage in contract negotiations, and they have even been known to play the role of bagmen for corrupt deals. Thus, it is important to ask about the professional norms under which they operate. Do they simply further the narrow economic interests of those who contract or hire them, or do they have effective codes of conduct that ought to permit them to pushback against abusive demands? Do their professional associations have codes of conduct that can help level the playing field for low-income countries with few resources and access only to limited professional assistance? Do the professional associations, civil-society groups, or aid organizations, such as the World Bank, the IMF and UNDP, provide pro bono help in some cases and how well does that work? These associations maintain quality, but they may also limit entry. It would be desirable to know about the ethical codes of the international bodies in areas, such as: the International Bar Association, the International Auditing and Assurance Standards Board (IAASB), the International Union of Architects, Institution of Civil Engineers (ICE), as well as associations of notaries, management consultant, defense specialist, and other procurement professionals.[26] Clearly, countries with low incomes and few such professionals of their own are at a disadvantage in dealing with multi-national firms and global financial institutions with very deep pockets. Outside investors may simply overwhelm local political and economic forces and then provide modest bribes to local powerbrokers to buy their silence. Thus, the first question to ask is whether self-regulation includes an obligation not to overwhelm those on the other side of the bargaining table with limited expertise and financial capacity. Second, if self-regulation seems inadequate, are there ways for other bodies, such as the UN and the World Bank, to impose some reasonable limits or responsibilities on these groups, at least as a condition for their own support for development projects?

UNCAC: One issue is whether the UN Convention Against Corruption can be given a more robust role. The convention originally has no enforcement so that the existing peer review process is a step forward. However, countries under examination can refuse to issue the peer review report to the public; a possibility that does a disservice to the role of citizens and civil society groups in monitoring government. Of course, the country needs to have a voice, and if it objects, its officials could issue a statement explaining the report's weaknesses. From looking at the composition of some of the UN peer review panels, I can understand why a particular country might object to a particular member of its committee, but the UN could have a system for allowing a limited number of country vetoes. Do countries take steps to respond to the peer reviews; do the responses mostly consist in legal changes in anti-corruption laws, or are there cases of serious efforts at structural change? Also how are the peer reviewers selected? Do they need a background in anti-corruption and/orin public administratin reform?

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I have learned a good deal from participating in the FACTI panel both about the substance of the underlying issues, but also about the way people argue about reform. Seeing how many different points of view can be on the table, even in a group with a commitment to achieving the Sustainable Development Goals, I have better appreciation of the ability of diverse international bodies to reach agreements and on the key role played by secretariats. I have also become more tolerant of the bland and vague language that

24 Julia Kagan, "Hawala," *Investopedia*, April 29, 2020, https://www.investopedia.com/terms/h/hawala.asp; Nathaniel Popper, "Bitcoin Has Lost Its Steam. But Criminals Still Love It," New York Times, January 28, 2020, https://www.nytimes.com/2020/01/28/technology/bitcoin-black-market.html.

25 The US Treasury's Financial Crimes Enforcement Network proposed a rule to increase the transparency of the cryptocurrency market. See the press release here with a link to the proposed rule: https://home.treasury.gov/news/press-releases/sm1216. The proposal has met with opposition from businesses that deal in and use cryptocurrencies. Blockchain Association, Comment on the Financial Crimes Enforcement Network's Notice of Proposed Rulemaking on "*Requirements for Certain Transactions Involving Convertible Virtual Currencies or Digital Assets*", https://theblockchainassociation.org/wp-content/uploads/2021/01/BA-Response-to-FinCEN-2020-0020.pdf. Although proposed hurriedly at the end of the Trump administration, it is an attempt to limit some of the risks of such assets.

26 For example, see the websites for the groups listed in the text at: https://www.ibanet.org/Default.aspx, http://iaasb.com/, https://www.theice.com, https://www.uia-architectes.org/webApi/en/.

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often substitutes for agreement. I hope that we can do better than that, however. Even if the panel has no formal power, it may act as a spur to the UN, to the OECD, and to other regional and international bodies to take on the developmental consequences of international financial flows even in the face of underlying conflicts over values and interests.

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