

ESSAY

**ENFORCING INTERNATIONAL CORRUPT
PRACTICES LAW**

*Paul D. Carrington**

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INTRODUCTION

This Essay strives to advance the current international movement to deter the transnational corrupt practices that have long burdened the

* Professor of Law, Duke University. The theme of this Essay was presented to a session of the Inter-University Council Program on Public and Private Justice in Dubrovnik, Croatia on May 24, 2009 and to a panel of the Law & Society Association Meeting in Denver, Colorado on May 28, 2009. The possible relevance of the American experience to the current international concern was first presented at a 2007 conference at the Duke Law School. The corresponding paper was published as *Law and Transnational Corruption: The Need for Lincoln's Law Abroad*, 70 LAW & CONTEMP. PROBS. 109 (2007). It was presented again at a Conference on the Civil Law Consequences of Corruption at the Centre for European Law and Politics at the University of Bremen in Germany on March 15, 2008. That preview of this Essay was republished in THE CIVIL LAW CONSEQUENCES OF CORRUPTION 37 (Olaf Meyer ed., 2009). The earlier presentations did not advance the proposal presented here. But this Essay has benefited from helpful reactions and conversations at each of the four presentations to very different conferees, but especially to those attending the Bremen conference. Todd Miller helped as an editor and research assistant. Jennifer Behrens of the Goodson Library at Duke has also been a great source of help.

global economy and weakened governments, especially in “developing” nations. Laws made in the last decade to address this longstanding global problem have not been effectively enforced. Described here are the moderately successful efforts in the United States since 1862 to reward private citizens serving as enforcers of laws prohibiting corrupt practices. It is suggested that this American experience might be adapted by international organizations to enhance enforcement of the new public international laws.

I. THE TRANSNATIONAL CORRUPTION PROBLEM

The weakness of many governments caused in part by their vulnerability to corruption is a misfortune having serious transnational consequences. Given the rise of terrorism and piracy in weakly governed lands, and the declining physical condition of the planet we share, one need not be an ardent humanitarian to be concerned about the spreading deterioration of governments in many former imperial colonies. The promotion by the World Trade Organization and its antecedents of free trade in the global marketplace has conferred many benefits, but few of these have been received by the peoples of “developing countries.”¹

A root problem for many failing or weak states is that they are dis-served by officials seeking personal kickbacks on anything that can be bought from or sold by their government, including mineral leases, medical supplies, textbooks, building construction, roads, railways, tourism concessions, new airports, agricultural equipment, or even imaginary enterprises and activities.² And the corrupt ruling elites who receive these bribes often protect themselves by investing their proceeds overseas, not at home, thus contributing yet further to the attrition of the economy of the peoples they purport to serve.³

The problem of corruption may be especially grave in nations endowed with natural resources highly valued by people in wealthier nations.⁴ Americans in 2010 know from current experience that firms extracting minerals are sometimes careless about the natural environ-

1. See generally ROBERT E. HUDEC, *DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM* (1987); *DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM* (Chantal Thomas & Joel P. Trachtman eds., 2009).

2. Robert I. Rotberg, *The Challenge of Weak, Failing, and Collapsed States*, in *LEASHING THE DOGS OF WAR: CONFLICT MANAGEMENT IN A DIVIDED WORLD* 83, 87 (Chester A. Crocker et al. eds., 2007).

3. *Id.* at 86.

4. See generally LESLIE HOLMES, *ROTTEN STATES?: CORRUPTION, POST-COMMUNISM AND NEOLIBERALISM* (2006); *INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION* (Susan Rose-Ackerman ed., 2006).

mental consequences of their extractions,⁵ perhaps especially when mining or drilling in nations distant from their own, but the concern of ruling elites about those consequences is in many nations likely to be quite limited and reconciled by the personal rewards they receive as controllers of governments unable to deter either the corruption or environmental recklessness practiced by foreign firms. The World Bank calculated that bribes totaling a trillion dollars were paid in 2002.⁶ A large share of that amount was undoubtedly paid to officials of weak governments by firms that extract and export natural resources for sale in the developed world. And much of the foreign aid to such nations provided by the World Bank or the International Monetary Fund seems quite likely to end up in some officials' secret bank accounts. It is reasonable to suppose that the corruption of higher officials sets a low moral standard disabling effective government at the prosaic levels of law enforcement in "developing" nations.⁷ Unless and until means can be devised to deter bribery in failing and failed nations, globalization can be of scant benefit to "the bottom billion"⁸ identified by Professor Collier, who are destined to be governed weakly, if at all. Their ungoverned states will continue to export poverty and serve as havens for all sorts of gangsters, pirates, and terrorists.

II. THE AMERICAN FOREIGN CORRUPT PRACTICES ACT

A. The Limits of Its Public Enforcement

This problem of *transnational* corruption was first recognized as a matter for international concern in the United States during the Cold War.⁹ American firms had long been free to bribe foreign officials in violation of the foreign country's laws to induce those officials to invest public funds in American goods or services or to supply access to local resources. It was fair to assume that such payments were sometimes

5. For an account of recent events in the Gulf of Mexico, see Liz Judge, *Another Oil Explosion in the Gulf: Enough is Enough*, UNEARTHED (Sept. 2, 2010, 2:32 PM), <http://unearthed.earthjustice.org/blog/2010-september/another-oil-explosion-gulf-enough-enough>; see generally EARLE A. RIPLEY ET AL., ENVIRONMENTAL EFFECTS OF MINING (1996).

6. Susan Rose-Ackerman, *Governance and Corruption*, in GLOBAL CRISES, GLOBAL SOLUTIONS 301, 301 (Bjørn Lomborg ed., 2004).

7. A contemporary reflection on the relationship of law enforcement to basic human conditions is Gary Haugen & Victor Boutros, *And Justice for All: Enforcing Human Rights for the World's Poor*, FOREIGN AFF., May–June 2010, at 51, 52.

8. The phrase belongs to Paul Collier. See, e.g., THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT (2007).

9. DONALD R. CRUVER, COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT: A GUIDE FOR U.S. FIRMS DOING BUSINESS IN THE INTERNATIONAL MARKETPLACE vii, 1–12 (2d ed. 1999).

indispensable conditions of foreign trade by the American firms because contracts were often given to the highest bidder, i.e. the firm offering the biggest bribe.¹⁰ In the United States, bribes paid to foreign officials were long regarded as expenses deductible against income for income tax purposes, regardless of their illegality under foreign law,¹¹ and thus were in a special sense subsidized by the government.

The Watergate scandal and the misuse of corporate money to fund President Nixon's 1972 presidential campaign led to an investigation by the Securities and Exchange Commission (SEC) of reported expenses that might have been payments made to gain an illicit advantage with foreign government officials. The investigation coincidentally revealed widespread use of false accounting methods to conceal bribes paid to foreign officials.¹² The SEC initiated the practice of investigating such reporting and seeking injunctions to compel companies to make full disclosures in the financial statements they distributed to investors.¹³ The SEC also initiated a voluntary disclosure program that led to the revelation that more than 450 companies had concealed at least \$400 million (at least \$4 billion in 2010 dollars) in bribes paid to foreign officials in one year.¹⁴ Among the scandals revealed was the payment of \$1 million (at least \$10 million by 2010 standards) by the Lockheed Aircraft Corporation to Prince Bernhard of the Netherlands to secure the sale of a military aircraft.¹⁵

The domestic political reaction to these scandals led to enactment of the Foreign Corrupt Practices Act (FCPA) that modified the Securities Exchange Act to require transparent accounting for payments to foreign officials by all firms listing their securities on American exchanges.¹⁶ Thus, all firms, American or foreign, in which Americans were likely to invest were made subject to punishment for concealing illegal payments,

10. For reflections on the problem, see W. MICHAEL REISMAN, *FOLDED LIES: BRIBERY, CRUSADES AND REFORMS* 151–173 (1979).

11. The U.S. Internal Revenue Code was amended in 1958 to eliminate the deductibility of bribes paid to foreign officials. Pub. L. No. 85–866, 72 Stat. 1606, 1608. That provision is now codified as 26 U.S.C. § 162(c)(1).

12. See U.S. SEC. & EXCH. COMM'N [SEC], 94TH CONG., *REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES SUBMITTED TO THE SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS* 13 (1976).

13. *E.g.*, SEC v. Joseph Schlitz Brewing Co., 452 F. Supp. 824, 829–30 (E.D. Wis. 1978).

14. See Mark Pieth, *Introduction*, in *THE OECD CONVENTION ON BRIBERY: A COMMENTARY* 7 n.11 (Mark Pieth et al. eds., 1997).

15. *Obituary: Prince Bernhard of the Netherlands*, BBC NEWS (Dec. 2, 2004, 8:17 GMT), <http://news.bbc.co.uk/2/hi/europe/749465.stm>. Also bribed by Lockheed were officers of the Japanese government. See GERALD L. CURTIS, *THE JAPANESE WAY OF POLITICS* 163 (1988).

16. 15 U.S.C. § 78m (2006).

or offers of payment, to officers of foreign governments as well as those paid in the United States. It was presumed that shareholders would disapprove and prohibit payments such as that made to Prince Bernhard.

Because the SEC had authority only over firms required to file public accounting statements that might be read by American investors, and had no authority over competing American firms that were privately owned, a criminal law to be enforced by the Department of Justice was also enacted.¹⁷ The new law was adopted by a unanimous vote in both Houses of Congress and signed by President Carter in 1977.¹⁸ The criminal law prohibits “corruptly in furtherance of an offer, [any] payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value” directly or indirectly to a foreign official for the purpose of influencing an official decision of financial consequence to the donor.¹⁹ These prohibitions were thus imposed on all American domestic concerns whether or not they were registered on a stock exchange, so long as any part of the transaction occurred in the United States (or in its territorial waters), in interstate commerce, or by use of the United States mail.²⁰ The regulated firms are generally accountable for the corrupt conduct of their employees.²¹ But the prohibitions of this 1977 law did not apply to foreign nationals acting on behalf of foreign subsidiaries of American firms if their misconduct occurred outside the United States.²²

The International Chamber of Commerce (ICC) gave a salute to the 1977 American law when, a year later, it promulgated its Rules of Conduct to Combat Extortion and Bribery.²³ The leadership of the Chamber recognized that bribes paid as a cost of competing in international transactions do nothing for the collective profits of its members or for the quality of the goods or services they purchase or provide. Unsurprisingly, these ICC rules of business ethics were declared to be “ineffective

17. For a chronicle of the legislative history, see CRUVER, *supra* note 9, at 1–12.

18. The Foreign Corrupt Practices Act, 15 U.S.C. § 78dd–1 (2006) (first enacted on Dec. 19, 1977, 91 Stat. 1495).

19. 15 U.S.C. § 78dd–2 (2006). See generally STUART H. DEMING, THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 7–20 (2005).

20. 15 U.S.C. § 78dd–1(a), 78dd–2(a) (2006).

21. To some it seems unjust that innocent shareholders should bear a resulting loss caused by the criminal misconduct of their employees. See, e.g., John C. Coffee, Jr., “*No Soul to Damn, No Body to Kick*”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386, 387 n.4 (1981).

22. DEMING, *supra* note 19, at 8.

23. The Rules were amended in 1996 and again in 2005. On their current content, see INT’L CHAMBER OF COM. [ICC], DOC. NO. 194/51, MAJOR CHANGES BROUGHT BY THE 2005 REVISION OF THE ICC RULES OF CONDUCT AND RECOMMENDATIONS TO COMBAT EXTORTION AND BRIBERY (2005), available at <http://www.iccwbo.org/uploadedFiles/ICC/policy/anticorruption/Statements/revISED ICC Rules.pdf>.

as a practical matter,²⁴ but they were a first international acknowledgment of the radiating adverse global consequences of corrupt governments disserving weak states.

The FCPA was written only as public law to be enforced by the SEC and the Department of Justice. No provision was made for enforcement in civil actions brought by private plaintiffs.²⁵ Until recently, the number of enforcement prosecutions was never large.²⁶ The Department of Justice was mindful of the adverse consequences of effective enforcement; it recognized that American investors were rewarded and American workers found jobs as a result of deals with foreign governments whose officers often expected to share the bribers' wealth even if it might impose a cost on the people they were purporting to serve and on the efficiency of the global marketplace.

But the FCPA had an additional legal consequence. A violation resulting in harm to competing firms exposes the offender to civil liability under the 1970 Racketeer Influenced and Corrupt Organization Act (RICO).²⁷ And unlawful commercial bribery is also a violation of the tort law of most states if it causes foreseeable harm to a business competitor or others.²⁸ As Judge Richard Posner opined: "Commercial bribery is a deliberate tort, and one way to deter it is to make it worthless to the tortfeasor by stripping away all his gain."²⁹ Indeed, it is the sort of deliberate tort that may expose the wrongdoer to liability for punitive damages, imposed in the courts of almost any state in the common law tradition.³⁰ As with criminal prosecutions, private claims in American courts for damages allegedly resulting from violations of the Foreign Corrupt Prac-

24. CRUVER, *supra* note 9, at 81.

25. See *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1027–30 (6th Cir. 1990).

26. DEMING, *supra* note 19, at 6. For an example of weak enforcement, see Mark Levin, *Lighting Up the Foreign Corrupt Practices Act: A Case Study of U.S. Tobacco Industry Political Influence Buying in Japan*, 34 N.C. J. INT'L L. & COM. REG. 471 (2009), discussing Brown & Williamson Tobacco Company's affairs in Japan.

27. 18 U.S.C. §§ 1961–1968 (2006). Cf. *W.S. Kirkpatrick & Co. v. Evtl. Techtronics Corp., Int'l*, 493 U.S. 400 (1990) (holding that the Act of State doctrine does not bar private claims). See also *Kensington Int'l Ltd. v. Société Nationale des Pétroles du Congo*, No. 05 Civ. 5101(LAP), 2006 WL 846351 (S.D.N.Y. Mar. 31, 2006) (denying defendants' motion to dismiss for failure to state a Racketeer Influenced and Corrupt Organization Act (RICO) claim).

28. See, e.g., *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 958 (2003).

29. *Williams Elec. Games, Inc. v. Garrity*, 366 F.3d 569, 576 (7th Cir. 2004). But cf. Kevin E. Davis, *Civil Remedies for Corruption in Government Contracting: Zero Tolerance Versus Proportional Liability* (Inst. for Int'l Law & Justice, Working Paper No. 2009/4, 2009), available at http://lsr.nellco.org/nyu_plltwp/130 (advocating a proportional liability approach, rather than a zero-tolerance approach, to deal with bribery).

30. For a full account of this tradition, see LINDA L. SCHLUETER, *PUNITIVE DAMAGES* (5th ed. 2005). See also Stephen Daniels & Joanne Martin, *Historical Fiction: Punitive Damages, Change, and the Politics of Ideas* (Am. Bar Found., Working Paper No. 9618, 1996).

tices Act have been few. Yet the prospect of civil liability imposed by private firms who lose business to a corrupting competitor,³¹ or perhaps even by a defrauded government, may have enhanced the deterrent effect of criminal law.

A recent example of such a civil action brought by a foreign government in an American court is that brought in 2009 by the Republic of Iraq in federal court in New York against ninety three defendants alleged to have participated in frauds associated with the United Nations oil-for-food program. It is reported that Iraq seeks \$10 billion as compensation for what it describes as “the largest financial fraud in human history.”³² The claim seems plausible. Its attorneys may be serving for fees contingent on success. Representing a civil plaintiff, they will have access to discovery. Iraq bears little risk of being required to reimburse the defendants should its lawyers fail to prove its case. And the defendants’ assets may be found in the United States and seized if necessary to collect a money judgment favoring Iraq.

Public enforcement of the United States Foreign Corrupt Practices Act has improved in the 21st century. Enlargement of the role of the SEC was initiated by the Private Securities Litigation Act of 1995.³³ That law imposed a duty on auditors to detect and disclose corrupt practices.³⁴ The auditor is no longer permitted to rely on personal confidence in the integrity of the audited firm, but must investigate the integrity of the firm’s reporting of payments made.³⁵ In addition, the SEC has commenced the practice of requiring firms listed on American exchanges to disgorge profits proven to be derived from corrupt deals.³⁶

31. See, e.g., *Korea Supply*, 63 P.3d 937; *Williams Elec. Games*, 366 F.3d 569.

32. *Iraq’s Legacy Lawsuit*, THE FCPA BLOG (May 6, 2009, 8:38 PM), <http://www.fcpliblog.com/blog/2009/5/7/iraqs-lawsuit-legacy.html>.

33. Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C. (2006)).

34. See *id.* § 301 (adding Section 10A Audit Requirements to the Act of 1934, 15 U.S.C. § 78a).

35. See generally DEMING, *supra* note 19, at 373–78 (discussing the duties of auditors).

36. See SEC, *SEC Files Settled Foreign Corrupt Practices Act Charges Against Siemens AG for Engaging in Worldwide Bribery with Total Disgorgement and Criminal Fines of Over \$1.6 Billion*, Litigation Release No. 20829 (Dec. 15, 2008), available at <http://www.sec.gov/litigation/litreleases/2008/lr20829.htm> (announcing that Siemens agreed to pay \$350 million in disgorgement); SEC, *SEC Charges KBR, Inc. with Foreign Bribery; Charges Halliburton Co. and KBR, Inc. with Related Accounting Violations—Companies to Pay Disgorgement of \$177 Million; KBR Subsidiary to Pay Criminal Fines of \$402 Million; Total Payments to be \$579 Million*, Litigation Release No. 20897A (Feb. 11, 2009), available at <http://www.sec.gov/litigation/litreleases/2009/lr20897a.htm> (announcing that Halliburton and KBR agreed to pay \$177 million in disgorgement). See also David C. Weiss, Note, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT’L L. 471, 482–88 (2009) (discussing the SEC’s increased efforts to disgorge). For a brief summary

The Department of Justice then also substantially enlarged its efforts to enforce corrupt practices law.³⁷ Those efforts seem to have abundantly reimbursed the national treasury. It is reported that American businesses creating joint ventures with Chinese companies or acquiring Chinese outfits are especially exposed to the risk of prosecution because of the probability that their ventures are corrupt.³⁸ And now, for the first time, the Department of Justice has begun to prosecute individual officers of firms who participate in the bribes and, along with the SEC, to require their employers to disgorge profits from deals acquired by their crimes. Among those successfully prosecuted is a member of Congress who is alleged to have negotiated a corrupt deal with Nigeria on behalf of an American firm.³⁹

Two of the cases advanced by the SEC and the Department of Justice warrant special note. One is the case against the Halliburton Company that disgorged \$559 million in 2009 as punishment for its corrupt practices in Nigeria.⁴⁰ Albert Jack Stanley, who managed the Halliburton subsidiary under the supervision of Richard Cheney, then the Halliburton CEO,⁴¹ faced an extended sentence for his firm's bribery of public officers in Nigeria and bargained for a reduced sentence by be-

of the accounting standards imposed by the SEC, see DEMING, *supra* note 19, at 21–27, 373–84.

37. See Carrie Johnson, *U.S. Targets Bribery Overseas; Globalization, Reforms Give Rise to Spike in Prosecutions*, WASH. POST, Dec. 5, 2007, at D1. They may be more willing to enforce criminal laws prohibiting money laundering, wire and mail fraud, and conspiracy laws in the context of bribery allegations. See Press Release, U.S. Dep't of Justice, *Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme* (Jan. 19, 2010), available at <http://www.justice.gov/opa/pr/2010/January/10-crm-048.html>; Ashby Jones, *Another Individual Falls in DOJ's FCPA Ramp-Up*, WALL ST. J. BLOG (Feb. 11, 2010, 2:24 PM), <http://blogs.wsj.com/law/2010/02/11/another-individual-falls-in-doj-fcpa-ramp-up/>; George J. Terwilliger, *Corrupt Payments Abroad: FCPA and Other Risks*, NAT'L L.J., June 2, 2008, at 12.

38. Sheri Qualters, *Risk of Bribe Probes Grows for Business*, NAT'L L.J., Jan. 9, 2008, available at <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1199786732205>.

39. David Stout, *Ex-Louisiana Congressman Sentenced to 13 Years*, N.Y. TIMES, Nov. 14, 2009, at A14 (Congressman Jefferson was convicted and sentenced to thirteen years in prison. The prosecutor had sought a sentence of twenty-seven years.). See also Marcia Coyle, *Jefferson Case Shows SEC, DOJ Targeting Individuals: Foreign Corrupt Act Case Reflects a Trend*, NAT'L L.J., June 11, 2007, at 6.

40. The company paid \$382 million to the Department of Justice and \$177 million to the SEC. Press Release, Halliburton Company, *Halliburton Announces Settlement of Department of Justice and Securities and Exchange Commission Foreign Corrupt Practices Act Investigations* (Feb. 11, 2009), available at http://www.halliburton.com/public/news/pubsdata/press_release/2009/corpnws_021109.html.

41. Stanley was designated by Cheney to be president of the Halliburton subsidiary Kellogg, Brown & Root (KBR) in 1998. The bribes to Nigerian officials had commenced in 1995 and continued until 2004, when Stanley was fired. See Russell Gold, *Halliburton Ex-Official Pleads Guilty in Bribe Case*, WALL ST. J., Sept. 4, 2008, at A1.

coming a witness against his firm.⁴² Halliburton, long centered in Houston, moved its corporate headquarters to Dubai in 2008, apparently in the hope of reducing its exposure to federal law enforcement.⁴³ Its continuing relationships in Iraq are not presently the subject of criminal proceedings, but they are appropriate subjects of continuing investigations.⁴⁴

Also to be noted is the prosecution of the German firm, Siemens, whose registration with the SEC exposed it to federal prosecutions for bribes paid to the Nigerian government, resulting in a \$1.6 billion fine paid by Siemens to the United States for corrupt practices in numerous nations.⁴⁵ That prosecution came on the heels of a German prosecution.⁴⁶ And the Department of Justice in January 2009, for the first time initiated a proceeding to recover funds received as a bribe paid by Siemens to the son of the Prime Minister of Bangladesh and held in a bank account in Singapore. This appears to be the Department's first effort to retrieve a bribe paid to a foreign official.⁴⁷ The event seems perhaps to have alerted the Liberian government to the possible use of American aid in tracking its officials who have benefited from corruption in that nation.⁴⁸

But still there are constraints on enforcement of such laws by public officials. Because of their adverse domestic economic consequences, such federal prosecutions can be politically very difficult for the prosecutors in the United States Department of Justice. For example, James Giffen, an American citizen, was indicted in 2003 for bribing President Nursultan

42. Laolu Akande, *Halliburton's Ex-Chief Ready to Testify in Nigeria*, GUARDIAN (NIGERIA), Apr. 14, 2009. Sentencing of Stanley has repeatedly been postponed. *Sentencing Report for Q2 '10*, FCPA BLOG (July 1, 2010, 7:28 AM), <http://www.fcpablog.com/blog/2010/7/1/enforcement-report-for-q2-10.html>.

43. See Charlie Cray, *Halliburton Takes the Money and Runs Away*, HUFFINGTON POST (Mar. 13, 2007, 11:45 AM), http://www.huffingtonpost.com/charlie-cray/halliburton-takes-the-mon_b_43304.html.

44. See Jim Donahue, *Iraq for Sale: The War Profiteers*, HALLIBURTONWATCH (Oct. 10, 2006), <http://www.halliburtonwatch.org/news/iraqforsale.html>; Pratap Chaterjee, *Is Halliburton Forgiven and Forgotten? Or How to Stay Out of Sight While Profiting From the War in Iraq*, CORPWATCH (June 3, 2009), <http://www.corpwatch.org/article.php?id=15372>.

45. Press Release, Sec. & Exch. Comm'n, SEC Charges Seimens AG for Engaging in Worldwide Bribery (Dec. 15, 2008), available at <http://www.sec.gov/news/press/2008/2008-294.htm>.

46. See Siri Schubert & T. Christian Miller, *Where Bribery Was Just a Line Item*, N.Y. TIMES, Dec. 21, 2008, at B1.

47. *Chasing Dirty Money*, THE FCPA BLOG (Jan. 11, 2009, 6:28 PM), <http://www.fcpablog.com/blog/2009/1/11/chasing-dirty-money.html>. See also Press Release, Dep't of Justice, Department of Justice Seeks to Recover Approximately \$3 Million in Illegal Proceeds from Foreign Bribe Payments (Jan. 9, 2009), available at <http://www.justice.gov/opa/pr/2009/January/09-crm-020.html>.

48. *Liberia's Graft-Busting Leader*, THE FCPA BLOG (June 9, 2009, 8:48 PM), <http://www.fcpablog.com/blog/2009/6/10/liberias-graft-busting-leader.html>.

Nazarbaev of Kazakhstan on behalf of Mobil, Texaco, Phillips/Conoco, and BP. His alleged offense gained public attention in 2000.⁴⁹ After four years of investigation, Giffen was charged with thirteen counts of violating the FCPA and thirty-six counts of criminal money laundering.⁵⁰ President Nazarbaev, who has been a friend of American foreign policy in the Middle East, was critical of the prosecution, perhaps sensing that he could even lose his office as a result of it.⁵¹ Prospective government witnesses were even said to have received death threats.⁵² In his defense, Giffen alleged that he had been regularly debriefed by United States government officials, and claimed that “by the time of the transactions at the heart of the indictment, [he] understood himself to be working not only for the government of Kazakhstan, but also for . . . United States government agencies.”⁵³ The Justice Department moved to preclude the defendant from advancing the defense that he was acting on public authority, or to use information classified as secret by the government agencies said to be involved. The trial court denied the motion to preclude the defense, but did not rule on the motion regarding government secrets. On appeal by the prosecution, the court of appeals, after nearly a year of deliberation, dismissed the appeal on the ground that the trial court order to be reviewed lacked the finality essential to appellate jurisdiction.⁵⁴ The trial has been repeatedly postponed. It will perhaps be held some day,⁵⁵ but maybe

49. For a full account, see STEVE LEVINE, *THE OIL AND THE GLORY: THE PURSUIT OF EMPIRE AND FORTUNE ON THE CASPIAN SEA* (2007). See also ROBERT BAER, *SEE NO EVIL: THE TRUE STORY OF A GROUND SOLDIER IN THE CIA'S WAR ON TERRORISM* 241–42 (2002).

50. Press Release, U.S. Attorney's Office, American Businessman Charged with \$78 Million in Unlawful Payments to Kazakh Officials in 6 Oil Transactions; Former Mobil Corp. Executive Indicted for Tax Evasion in Kickback Scheme (Apr. 2, 2003), available at www.justice.gov/usao/nys/pressreleases/April03/giffenwilliams.pdf.

51. Marlena Telvick, *United States vs. James H. Giffen*, INT'L FREEDOM NETWORK (May 20, 2004), <http://ifn.org.uk/article.php?sid=2>. The indictment also alleged that Swiss authorities had begun “investigating accounts ‘nominally owned by offshore companies but beneficially owned, directly or indirectly, by Balgimbayev and Nazarbayev . . . into which Mr. Giffen had made tens of millions of dollars in unlawful payments’ in 1999.” *Id.*

52. Peter Crisell, *Kazakhstan: A Khanate Revived*, NEWNATIONS.COM, <http://www.newnations.com/specialreports/kazakhstan.html> (last visited Aug. 30, 2010).

53. *United States v. Giffen*, 473 F.3d 30, 34 (2d Cir. 2006).

54. *Id.* at 37.

55. Steve Levine, *James Giffen's First Line of Defense Appears to Fall*, THE OIL AND THE GLORY (May 2, 2009), http://www.businessweek.com/blogs/russia_oil_politics/archives/2009/05/james_giffens_f.html/. Meanwhile, another American, Mark Seidenfeld has been accused of corrupt practices in Kazakhstan on behalf of a different client. His investigation was dropped in 2007, but then reopened. A sympathetic assessment of the latter case is *Following Acquittal, New False Charges Are Pending Against Mark Seidenfeld*, HELPMARK SEIDENFELD AND BOYCOTT DUCAT (Aug. 29, 2007, 3:06 PM), <http://savemark.wordpress.com/2007/08/29/following-acquittal-new-false-charges-are-pending-against-mark-seidenfeld/>.

Kazakhstan is too important to the United States for the Department of Justice to continue the case.⁵⁶

The Giffen case, although extraordinary,⁵⁷ illustrates a fundamental difficulty with the public enforcement of any law forbidding bribery of foreign officials. The responsible public officers so engaged are required to punish their fellow citizens, with whom they may have diverse connections and shared interests, and to whom they owe their official status, in order to protect a distant government with whom they have no connection.

III. THE INTERNATIONALIZATION OF LAWS DETECTING CORRUPTION

In the last decade of the 20th century, other nations, in conformity with the encouragement of the International Chamber of Commerce, began to align themselves with the 1977 American policy of imposing criminal punishment on their citizens who bribe officers of foreign governments.⁵⁸ The international campaign had its origins in the Asian financial crisis of the 1990s. That event elevated interest in international regulation of trade to provide greater stability in developing economies. The United States was especially interested in persuading other nations to join in deterring transnational bribery in order to level the playing field for American firms constrained by its FCPA from offering the best bribes to the foreign officials seeking them. As a result of its urging and the concerns heightened by the crisis, the Organization for Economic Cooperation and Development (OECD) in 1997 promulgated a new international Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.⁵⁹

This OECD Convention obligates signatory nations to enact criminal laws with a “functional equivalence” to those it prescribes, and to

56. *James Giffen and America's Secrets*, THE FCPA BLOG (July 15, 2009, 8:12 PM), <http://www.fcablog.com/blog/2009/7/15/james-giffen-and-americas-secrets.html>.

57. For example, in a similar case, Frederic Bourke was convicted in October 2009 of allowing his agent in Azerbaijan to bribe officials and was denied a new trial. *United States v. Kozeny*, 664 F. Supp. 2d 369, 369 (S.D.N.Y. 2009).

58. See J. NDUMBE ANYU, THE FOREIGN CORRUPT PRACTICES ACT: A CATALYST FOR GLOBAL CORRUPTION REFORM (2007); DEMING, *supra* note 19, at 93–130.

59. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 1.1, Nov. 21, 1997, S. Treaty Doc. No. 105-43, 37 I.L.M. 1. See also DEMING, *supra* note 19, at 85–100. For a brief account, see Lucinda A. Low & William M. McGlone, *Avoiding Problems Under the Foreign Corrupt Practices Act, U.S. Antiboycott Laws, OFAC Sanctions, Export Controls, and the Economic Espionage Act*, in NEGOTIATING AND STRUCTURING INTERNATIONAL COMMERCIAL TRANSACTIONS 200–03 (Mark R. Sandstrom & David N. Goldsweig eds., 2003).

cooperate with the enforcement efforts of other signatory nations.⁶⁰ In support of the latter obligation, a system of private peer review was established that subjects signatory nations to periodic reviews by teams of specialists from at least two other states.⁶¹ One substantive difference between the OECD Convention and the FCPA is that the Convention does not forbid campaign contributions to foreign candidates for public office, as the FCPA does.⁶² And the Convention is silent on any obligation of signatory nations to enact accounting and record-keeping standards corresponding to those enforced in the United States by its Securities Exchange Commission.⁶³

The 1997 OECD Convention marked the beginning of an international movement based on the premise that we all have a stake in the integrity of the global marketplace that deserves the protection of law.⁶⁴ Much energy and rhetoric is now being expended around the globe in campaigns to protest and deter transnational corrupt practices. The campaign may be heard in such venues as the International Monetary Fund, the World Bank, the United Nations, the International Chamber of Commerce, the International Bar Association, and non-governmental institutions such as Transparency International and Global Witness that are devoted to resisting transnational corruption of governments and courts. German observers have also expressed support because of concerns that German firms engaged in corruption abroad may have brought the practices home, i.e., that “globalization has become a motor for corruption in Germany.”⁶⁵

In response to the OECD Convention, the American FCPA was amended again in 1998 as the International Anti-Bribery and Fair Competition Act⁶⁶ in order to bring American law into accord with the

60. See OECD, COMMENTARIES ON THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS ¶ 2 (1997), available at <http://www.oecd.org/dataoecd/4/18/38028044.pdf>.

61. Peer review is said to be “at the heart of the ‘trade’ of the OECD.” Fabrizio Paganì, *Peer Review: A Tool For Co-Operation and Change, An Analysis of an OECD Working Method*, OECD SG/LEG(2002)1 (Sept. 11, 2002), available at <http://www.oecd.org/dataoecd/33/16/1955285.pdf>.

62. 15 U.S.C. § 78dd-1 (2006).

63. The OECD Convention is silent on accounting practices. See Weiss, *supra* note 36, at 478–80; *cf. supra* note 34.

64. See Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 59, Preamble. See generally DEMING, *supra* note 19, at 93–130.

65. So we are told by a German prosecutor. Carter Dougherty, *Germany Battling Rising Tide of Corporate Corruption*, N.Y. TIMES, Feb. 15, 2007, at C1.

66. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified as amended at 15 U.S.C. § 78dd, et seq. (2006)). On the state of the law at that time, see Symposium, *Review of the Foreign Corrupt Practices Act on Its Twentieth Anniversary: Its Application, Defense and International Aftermath*, 18 NW. J. INT’L L. & BUS.

Convention.⁶⁷ One substantive change made for this purpose was legitimize “grease” payments, i.e. small rewards or tips paid to lower-ranking officers “to expedite or to secure the performance of a routine governmental action.”⁶⁸ In some weak states, such “grease” payments may indeed be important to the operation of impoverished governments.⁶⁹ Another reform was an extension of the law to criminalize bribes paid to officials of “public international organizations.”⁷⁰ And foreign nationals working for American firms were brought within the group subject to criminal liability for illicit payments or offers of payment. But those working for foreign subsidiaries were still not included, leaving open a means of evasion of federal law that surely remains in use.

While the United States was thus strengthening its efforts to address the global problem, thirty-six nations had ratified the OECD Convention within a decade.⁷¹ These included the governments of most of the major players in international commerce, except China. Also, in 1997, the Organization of American States promulgated the Inter-American Convention Against Corruption,⁷² which is even more explicit in requiring ratifying states to enact specified criminal laws. In 2002, the Council of Europe’s Criminal Law Convention on Corruption entered into force, with forty-six signatories.⁷³ In 2003, the African Union opened for signature its similar convention.⁷⁴ In 2006, the European Union adopted a resolution calling for the return of assets of illicit origin to nations victimized by corrupt practices.⁷⁵

263 (1998); Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229 (1997).

67. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 59.

68. 15 U.S.C. § 78dd-2(b) (2006). *See, e.g., How to Grease a Palm; Bribery*, ECONOMIST, Dec. 23, 2006, at 115 (noting that tactful strategies are used to ensure that bribes go undetected).

69. *See generally* J.S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417 (1967) (suggesting that the rewards of corrupt practices may sometimes serve the public interest by motivating some officials).

70. 15 U.S.C. § 78dd-2 (2006).

71. *See Public Procurement: Spotting the Bribe*, OECD OBSERVER Mar. 2007, at 11, 12.

72. DEMING, *supra* note 19, at 101–04.

73. *Id.* at 105.

74. African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5 (2004).

75. *See* Second Comm. of the Gen. Assembly, Draft Resolution, *Preventing and Combating Corrupt Practices and Transfer of Assets of Illicit Origin and Returning Such Assets, In Particular to the Countries of Origin, Consistent with the United Nations Convention Against Corruption*, U.N. Doc. A/C.2/61/L.53 (Dec. 1, 2006) (*submitted by* Aboubacar Sadikh Barry). *See also* EU Explanation of Position—Preventing and Combating Corrupt Practices and Transfer of Assets of Illicit Origin, Consistent with the UN Convention on Corruption (Dec. 6, 2006), available at http://www.europa-eu-un.org/articles/en/article_6571_en.htm.

Also in 2003, the United Nations opened its Convention Against Corruption⁷⁶ negotiated in Vienna by the UN Office on Drugs and Crime. It has been ratified by over one hundred nations and is also now in force.⁷⁷ Its general tone is reflected in Article 19:

Each State Party *shall consider* adopting such legislative and other measures *as may be necessary* to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.

A similarly tentative tone is expressed in the UN Convention's suggestions that each State Party take action to proscribe deliberate concealment of bribes⁷⁸ or obstruction of justice,⁷⁹ and provide for civil liability "as may be necessary."⁸⁰ It was said that this UN Convention, while diffident, would be a "focal point" of the United States' campaign against corruption.⁸¹

IV. PROBLEMS WITH PUBLIC ENFORCEMENT OF THE NEW INTERNATIONAL CONVENTIONS

One may admire the sincere efforts of all those who have secured the promulgation and ratification of these international conventions and still question whether they are effective in deterring corruption of public officials, or perhaps merely express "a hollow commitment."⁸² A thorough empirical study revealing an effect on the realities of weak governments

76. U.N. Convention Against Corruption, G.A. Res. 58/4, U.N. Doc. A/RES/58/4 (Oct. 31, 2003); DEMING, *supra* note 19, at 114–23.

77. Press Release, U.N. Info. Serv., United Nations Convention Against Corruption Receives 100th Ratification (Oct. 2, 2007), available at <http://www.unis.unvienna.org/unis/pressrels/2007/unispc548.html>.

78. U.N. Convention Against Corruption, *supra* note 76, art. 24.

79. *Id.* art. 25.

80. *Id.* art. 26.

81. Press Release, U.S. Dep't of State Bureau for Int'l Narcotics & Crime Control, U.S. Contributes \$500,000 to Support Implementation of the U.N. Convention Against Corruption (Dec. 13, 2004), available at <http://2001-2009.state.gov/p/inl/rls/other/39714.htm>.

82. FRITZ HEIMANN & GILLIAN DELL, TRANSPARENCY INT'L, PROGRESS REPORT 2009: ENFORCEMENT OF THE OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 9 (2009), available at http://www.transparency.org/news_room/in_focus/2009/oecd_pr_2009.

has not been conducted, but the available data points to a conclusion that “enforcement must be re-energized.”⁸³

The impediments to enforcement by public officers are obvious and notably illustrated in the Kazakhstan case in the United States. Are public prosecutors in the nations signing a convention likely to be vigorous in prosecuting their fellow nationals or local firms that employ many of their fellow nationals? For paying a bribe to a foreign official in order to secure a contract or other benefit that will indirectly serve the interests of their fellow nationals and their own national economies? How much effort can national prosecutors reasonably be expected to expend investigating possible violations of such international criminal laws? Vigorous prosecutors risk being seen by fellow citizens as ungrateful and unpatriotic. And how much money will parliaments and legislatures facing competing demands on public resources vote to appropriate to fund such investigations and prosecutions? Can the system of peer review established by the OECD secure adequate answers to these questions? And when impoverished nations invest the needed resources and moral commitment to accuse and convict their officials and the foreign nationals who bribed them, can they expect that OECD nations in which the convicted foreigners have come to reside will assist in imposing punishments on their own countrymen? Corruption is easily denied, and exposure generally requires serious investigative effort requiring energy and public resources. There are inevitably present in all such matters competing needs for attention and the usual risk that the resources, if applied elsewhere, might better serve the public good.⁸⁴

The weakness of the global resolve to punish foreign corrupt practices through criminal laws enforced by public servants has been on display in numerous places. For example, despite the disincentives, prosecutors in Lesotho, at the urging of the World Bank, sought in 2000 to punish Canadian, French, and Italian nationals and their firms for corrupt practices related to the Lesotho Highlands Water Project.⁸⁵ As a result of the prosecutors’ efforts, the World Bank debarred one firm from

83. FRITZ HEIMANN & GILLIAN DELL, TRANSPARENCY INT’L, PROGRESS REPORT 2008: ENFORCEMENT OF THE OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 8 (2008), available at http://www.transparency.org/news_room/in_focus/2008/4th_oecd_progress_report.

84. See, e.g., *In Denial: Corruption in Romania*, ECONOMIST, July 5, 2008, at 62 (reporting the impediments to and costs of enforcement in Romania).

85. See Nicol Degli Innocenti, *Lesotho Highlands Bribes Trial Starts*, INT’L RIVERS (June 5, 2000), <http://www.internationalrivers.org/en/africa/lesotho-water-project/lesotho-highlands-bribes-trial-starts>. For a general account of the project see Korinna Horta, *The Mountain Kingdom’s White Oil: The Lesotho Highlands Water Project*, 25 ECOLOGIST 227 (1995).

further participation in projects funded by it.⁸⁶ And convictions in Lesotho resulted in penalties imposed on some subsidiary corporations, but the convicted foreigners apparently remain at large. The European Anti-Fraud Office (OLAF) did supply some data on the parent corporate defendants, but other help to Lesotho was not forthcoming.⁸⁷ Such events are obviously discouraging to prosecutors in developing nations who need to consider competing needs for their scarce professional resources.

In 2004, the United Kingdom, having recently enacted its criminal law as required by the OECD Convention, initiated an inquiry into bribes allegedly paid by BAE Systems, the British weapons firm, to secure contracts with the government of Saudi Arabia. In November 2006, it was reported that Saudi Arabia, perhaps inspired by the Kazakhstan experience in the United States, threatened to break diplomatic relations with the United Kingdom if the investigation was not dropped.⁸⁸ The next month, the investigation was dropped after the British government determined that “‘the wider public interest’ ‘outweighed the need to maintain the rule of law.’”⁸⁹ The action was defended by those calling attention to the need to secure the help of Saudi Arabia in dealing with Palestinian affairs and to secure thousands of jobs of workers hired to perform the corrupt contract,⁹⁰ considerations said to overbalance the rule of law. Mr. Blair’s successors were told by the High Court of Justice in 2008 to reconsider his decision to discontinue the investigation,⁹¹ but on appeal the House of Lords affirmed the Prime Minister’s action in calling off the prosecution.⁹² A “summit” conference was held in London

86. See *World Bank Debars Acres International Limited (Acres)*, INT’L RIVERS (June 23, 2004), <http://www.internationalrivers.org/en/africa/lesotho-water-project/world-bank-debars-acres-international-limited-acres>.

87. Fiona Darroch, *Lesotho Highlands Water Project: Corporate Pressure on the Prosecution and Judiciary*, in TRANSPARENCY INT’L, GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS 87, 90 (Diana Rodriguez & Linda Ehrichs eds., 2007).

88. David Leppard, *Blair Hit By Saudi ‘Bribery’ Threat*, SUNDAY TIMES (LONDON), Nov. 19, 2006, at 1.

89. David Leigh & Rob Evans, *‘National Interest’ Halts Arms Corruption Inquiry*, GUARDIAN, Dec. 15, 2006, <http://www.guardian.co.uk/uk/2006/dec/15/saudi-arabia-armstrade>.

90. See *Barefaced*, ECONOMIST, Dec. 23, 2006, at 18; but see Alan Cowell, *British Contractor Paid Saudi, Reports Say*, N.Y. TIMES, June 6, 2007, at A3 (giving a later account of the incident); Heather Timmons & Eric Pfanner, *Blair Defends Ending of Graft Inquiry; Investigation of Saudi Arms Deal a National Security Risk, He Says*, INT’L HERALD TRIBUNE, Dec. 16, 2006, at 3; Kevin LaCroix, *Corrupt Practices, National Security and the Rule of Law*, THE D&O DIARY (Apr. 11, 2008), <http://www.dandodiary.com/2008/04/articles/foreign-corrupt-practices-act/corrupt-practices-national-security-and-the-rule-of-law/>.

91. The case against the action was brought by an NGO, the Campaign Against Arms Trade. The court thanked the organization for bringing the action. See *High Court Re-Opens Saudi Arms Corruption Investigation*, EKKLESIA, Apr. 24, 2008, <http://ekkleisia.co.uk/node/7051>.

92. Christopher Hope, *SFO Was Right to Call Off BAE-Saudi Corruption Probe, Law Lords Rule*, TELEGRAPH.CO.UK, July 30, 2008, <http://www.telegraph.co.uk/news/worldnews/>

in 2009 to explore the options and train business leaders to confront the issues.⁹³ That conference was apparently a part of a trend of presenting other such “summit” conferences.⁹⁴ In October 2009, the case was reopened by the Serious Fraud Office. In February 2010, the Office was able to secure an admission from BAE that it had concealed payments made to middlemen, resulting in a fine of roughly \$50 million. But what made this possible was BAE’s confession of guilt under the United States Foreign Corrupt Practices Act and payment of a \$400 million fine to the United States.⁹⁵ The Serious Fraud Office has yet to demonstrate the will to punish the corruption of foreign officials by British firms seeking to gain an advantage for the Office’s fellow countrymen.

Anti-corruption laws do have a better chance of being locally enforced when a new regime takes over the corrupted government in that it might reveal the dealings of its predecessors. This happened in Nigeria in 2007⁹⁶ and led to the investigation of Siemens by the German government enforcing its new foreign corrupt practices law enacted pursuant to the international initiatives. It appeared that in 2006, Siemens’ Nigerian subsidiary had acquired a contract to build a power sector by paying perhaps \$21 million to Nigerian officials to close the deal.⁹⁷ Exposed in 2007, the firm not only lost a contract but also its parent firm became the object of criminal investigations in Germany and the United States, where its stock is traded and it is subject to the corresponding laws governing accounting in publicly traded firms. The German parent firm cooperated in the investigation and won a measure of restraint on the part of the prosecutors.⁹⁸ It appears that it had budgeted \$40 to \$50 million a year in bribes paid to Nigerian officials from 2002 to 2006.⁹⁹

middleeast/saudi Arabia/2473629/SFO-was-right-to-call-off-BAE-Saudi-corruption-probe-law-lords-rule.html.

93. See Ethical Corp., *The UK Anti-Corruption Summit 2009*, <http://www.ethicalcorp.com/ukethics> (last visited Sept. 20, 2010).

94. E.g., Ethical Corp., *The 3rd Annual Global Anti-Corruption Summit USA*, <http://www.ethicalcorp.com/globalethics> (last visited Aug. 30, 2010); Ethical Corp., *The Future of Anti-Corruption Law & Enforcement in Europe*, <http://www.ethicalcorp.com/eulegal> (last visited Sept. 20, 2010).

95. See Christopher Drew & Nicola Clark, *BAE Settles Allegations of Bribery*, N.Y. TIMES, Feb. 6, 2010, at B1.

96. President Umaru Yar’Adua assumed office in May 2007, promising to rid the nation of the squalor of corruption. A contract with Siemens Nigeria for a supply of circuit breakers was cancelled in December. *Nigeria Suspends Siemens Dealings*, BBC NEWS (Dec. 6, 2007, 10:40 GMT), <http://news.bbc.co.uk/2/hi/business/7130315.stm> (last visited Sept. 20, 2010).

97. See *Siemens faces Nigerian bribery inquiry*, BIZTECH AFRICA (June 18, 2010, 6:00 AM), <http://www.biztechafrika.com/section/business/article/siemens-faces-neigerann-bribery-inquiry/47/>.

98. Schubert & Miller, *supra* note 46.

99. *Id.*

As noted, the parent firm has now paid fines of \$1.6 billion to the governments of Germany and the United States for its corrupt practices in many nations. Siemens has declared its intent never to do it again. But will future officers of Siemens keep that promise in mind? If so, can it compete successfully with firms less constrained by their governments? Is it reasonable to expect that Siemens' experience will suffice to deter other firms from other nations with less vigorous and less well-endowed prosecutors? A blacklisting of Siemens has been lifted and in 2008 it acquired new contracts with Nigeria to construct its power sector.¹⁰⁰

It is reported that France, like Germany, has become actively engaged in anti-corruption law enforcement.¹⁰¹ That may be the reality throughout the European Union. Nevertheless, a skeptic may well doubt that the criminal laws pose a very serious threat to most of those firms around the world whose profits, indeed perhaps their economic viability, seem to depend on their willingness, or at least the willingness of their subsidiaries and their local officers, to participate in the corruption of foreign officials to secure markets for their goods or services. Of course, such criminal laws express a moral judgment, and businessmen are not immune to moral suasion. But as Adam Smith noted as a predicate to his celebration of the marketplace, moral constraints lose force as they are applied over greater distances.¹⁰² The moral force of such international law is therefore chronically weak. And corrupt practices are by definition secret crimes that can be prevented or deterred only by vigorous investigation and forceful legal sanctions that may not be forthcoming.

In recognition of the problem of weak public enforcement of criminal laws, the Council of Europe in 1999 adopted the Civil Law Convention on Corruption. Its aim, as stated by the Council, is to take "into account the need to fight corruption and in particular provide for effective remedies for those whose rights and interests are affected by corruption."¹⁰³ Signatories are obliged to authorize civil actions for compensation of firms damaged by corrupt practices.¹⁰⁴ This Convention entered into force in 2003. It provides for actions for compensation to

100. *Nigeria: Halliburton, Like Siemens*, ALLAFRICA.COM (Apr. 21, 2009), <http://allafrica.com/stories/200904210245.html>. See also *Siemens—Unworthy Causes*, TRADING-MARKETS.COM (May 6, 2009, 7:09 AM), <http://www.tradingmarkets.com/site/news/Stock%20News/2310866/>.

101. ROBERT A. GOLDSPIK ET AL., MORGAN LEWIS, ANTI-CORRUPTION LAWS IN EUROPE: A REVIEW OF 2008 (2009), http://www.morganlewis.com/pubs/LIT_Webcast_Anti-CorruptionLawsInEurope_21jan09.pdf.

102. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 136 (D.D. Raphael & A.L. Macfie eds., Oxford Univ. Press 1976) (1759).

103. Civil Law Convention on Corruption art. 3, Nov. 4, 1999, Europ. T.S. No. 174, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm>.

104. Eur. Consult. Ass., *Explanatory Report to the Civil Law Convention on Corruption* ¶ 1(a)(6) (1999), available at <http://conventions.coe.int/Treaty/EN/Reports/Html/174.htm>.

the defrauded government, such as that of Iraq in the oil-for-food scandal,¹⁰⁵ for all damages suffered as a result of corruption.¹⁰⁶ It also provides for the protection of whistle blowers,¹⁰⁷ the acquisition of evidence,¹⁰⁸ and provisional remedies.¹⁰⁹ In addition, it requires transparency in company accounts¹¹⁰ and strives to promote international co-operation and monitoring.

With this Convention, the Council of Europe acknowledged the need for a civil enforcement mechanism imposing real adverse economic consequences on firms that bribe foreign governments. Civil liability is surely important to deter firms from bribing one another's corporate officers in the private sector. The integrity of many other governments calls for a similar and plausible threat of civil liability. But while the Civil Law Convention is a significant step forward, reports of civil actions against offenders are few.

Primary attention seems to be given to the possible but seldom practiced invalidation of contracts tainted by corruption as the civil sanction to be imposed pursuant to the Convention. Such a civil contract action would presumably be brought by uncorrupted officers of the corrupted government to secure compensation for the economic loss suffered by their governments as a result of the corrupt practice. To date, no effort appears to have been made to bring the Council of Europe into line with the law of the United States recognizing bribery of foreign officials by American firms as a tort¹¹¹ subject to punitive damages¹¹² in proceedings brought by competitors who lost government contracts as a result of a defendant's payment of a bribe,¹¹³ or by victimized governments such as Iraq.¹¹⁴

Thus, while the Civil Law Convention takes steps in the direction of civil enforcement, they seem insufficient to enlist private enforcement to deter European firms motivated by the marketplace to engage in corrupt practices, except possibly for the most blatant misdeeds.¹¹⁵ Notwithstanding the possibilities that remain open, the enactments of the United

105. See *supra* text accompanying note 32.

106. *Civil Law Convention on Corruption*, *supra* note 103, art. 3.

107. *Id.* art. 9.

108. *Id.* art. 11.

109. *Id.* art. 12.

110. *Id.* art. 10.

111. See generally THE CIVIL LAW CONSEQUENCES OF CORRUPTION (Olaf Meyer ed., 2009).

112. 18 U.S.C. § 1964(c) (2001).

113. See, e.g., *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937 (Cal. 2003).

114. See *supra* note 33.

115. The United Kingdom might be an exception. See Kary Klismet, Quo Vadis, "Qui Tam"? *The Future of Private False Claims Suits Against States After Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 87 IOWA L. REV. 283, 287-88 (2001).

States and other nations since 1998 conforming to all these conventions might be regarded as a benign gesture but one of apparently quite limited consequence. If an act of transnational corruption should attract substantial public notice, the signatory nations have empowered themselves to stand on the side of integrity in government by conducting a criminal prosecution, or, in Europe, maybe even entertaining a civil contract action against their nationals who offend. The United States is no longer alone in taking that moral stand. And perhaps the enactments will serve to enlarge the force of moral suasion against corrupt practices. But the threat of adverse consequences for those engaged in transnational bribery, even in the United States, is still generally remote and evadable by most firms.

In response to this situation, the OECD Council in 2009 posted a new recommendation that member states raise taxes on their firms detected to be engaged in international corrupt practices.¹¹⁶ They also directed states to increase public awareness of the criminal law, improve auditing practices, and limit public subsidies and licenses to those firms more closely observed in their compliance, and who cooperate fully with the OECD's peer review system of investigation and accountability.¹¹⁷ And it urged member states "to further examine . . . [the possible use] of civil, commercial, and administrative laws and regulations, to combat foreign bribery."¹¹⁸ This last recommendation confirms the need for international consideration of the American experience with private enforcement of public laws. Japan, anticipating the Council's recommendations, initiated a study of the options that is underway in 2010.¹¹⁹

116. OECD, Working Group on Bribery in Int'l Bus. Transactions, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, § III(iii) (Nov. 26, 2009), www.oecd.org/dataoecd/11/40/44176910.pdf. This is as opposed to allowing a tax deduction for the cost of bribes paid, as was long the practice in the United States. *Id.* § VIII(i).

117. *See generally id.*

118. *Id.* § III(viii).

119. STUDY PANEL FOR PREVENTING A RECURRENCE OF ODA-RELATED CORRUPTION, TOWARDS PREVENTING A RECURRENCE OF CORRUPTION RELATED TO OFFICIAL DEVELOPMENT ASSISTANCE (ODA) (2009), <http://www.mofa.go.jp/policy/oda/reform/anti-corrupt/prevention.pdf>. *See also* Veronica L. Taylor, *Rule-of-Law Assistance Discourse and Practice: Japanese Inflections*, in *LAW IN THE PURSUIT OF DEVELOPMENT: PRINCIPLES INTO PRACTICE?*, 161, 161–79 (Amanda Perry-Kessaris ed., 2010) (providing an account of the Official Development Assistance program).

V. THE AMERICAN EXPERIENCE WITH PRIVATE ENFORCEMENT OF ITS DOMESTIC CORRUPT PRACTICES LAWS

The contemporary international problem with corruption is redolent of American legal history beginning in the 18th century. The new nation's citizens were then quite familiar with the problem of governmental corruption. Benjamin Franklin in 1767 observed that "[t]here is no kind of dishonesty into which otherwise good people more easily and frequently fall than that of defrauding the government."¹²⁰ They sensed that the line of moral conduct for those in public service is not always clearly drawn. This is so today because to most citizens their government is a distant anonymity having no moral claim upon themselves. The faint line between a campaign contribution and a bribe is a premier modern American example of this lack of clarity.¹²¹ Family interests, longstanding friendships, cultural or sub-cultural connections, and political alliances supply other sources of tolerated improprieties.¹²²

Mindful of corrupt practices observed in the Continental Congress that waged the colonies' war for independence,¹²³ Franklin's contemporaries in the earliest years of the nation recognized the impediments to effective public enforcement of laws forbidding corrupt practices. Drawing on longstanding English practice, they allowed private citizens who had the requisite fortitude to initiate lawsuits and pursue claims in the name of the United States against any person or firm defrauding their government.¹²⁴

120. Benjamin Franklin, "F.B.": *On Smuggling*, LONDON CHRONICLE, Nov. 21–24, 1767, available at <http://franklinpapers.org/franklin/framedVolumes.jsp> (follow "Vol. 14: 1767" hyperlink; then follow "F.B.": *On Smuggling*" hyperlink). See generally HISTORICAL REVIEW OF THE CONSTITUTION AND GOVERNMENT OF PENNSYLVANIA (1759).

121. See ANDREW STARK, CONFLICT OF INTEREST IN AMERICAN PUBLIC LIFE 152–77 (2000); cf. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (holding that it is a denial of due process of law for a state supreme court justice to hear a case involving a party who contributed three million dollars to his political campaign to secure his judicial office). But see *Citizens United v. Fed. Election Comm'n.*, 130 Sup. Ct. 876 (2010) (reflecting the view of the Court that campaign contributions are free speech, not bribery).

122. For an especially powerful example, see Alan Smart & Carolyn L. Hsu, *Corruption or Social Capital? Tact and the Performance of Guanxi in Market Socialist China*, in CORRUPTION AND THE SECRET OF LAW: A LEGAL ANTHROPOLOGICAL PERSPECTIVE 167, 167 (Monique Nuijten & Gerhard Anders eds., 2007).

123. For example, Samuel Chase (a future Supreme Court Justice), was dismissed from the Continental Congress for his illicit use of inside information to turn a profit for himself. See JAMES HAW ET AL., STORMY PATRIOT: THE LIFE OF SAMUEL CHASE 105–08 (1980).

124. For accounts of the early legislation and its colonial antecedents, see Linda J. Stengle, *Rewarding Integrity: The Struggle to Protect Decentralized Fraud Enforcement Through the Public Disclosure Bar of the False Claims Act*, 33 DEL. J. CORP. L. 471, 476–81 (2008); Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81 (1972). See also JAMES B. HELMER, JR., FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION 29–61 (3d ed., 2002).

In the 19th century, the English forsook this practice of private enforcement of public law. But it became an important tool of government in the United States as it remained an unsettled and contentious place not so unlike many of the 21st century's "emerging nations." During its Civil War in the 1860s, the nation's Secretary of War, responsible for oversight of the military striving to suppress the slave states' secession was dismissed by President Lincoln for paying his friends twice the market price for cavalry horses that turned out to be afflicted with "every disease horseflesh is heir to."¹²⁵ Such scandals led to the enactment in 1862 of the False Claims Act, then known as "Lincoln's Law."¹²⁶ That law required the offender guilty of defrauding the government to pay double damages, half of which would be paid to the "relator," i.e. the citizen who commenced and maintained a claim on behalf of the United States to secure compensation from those engaged in corrupt practices for harm resulting from the taking of bribes by its officers. Thereafter, numerous relators came forward in the name of the United States to pursue claims against private contractors who were proven to have sold the army rifles without triggers, gunpowder diluted with sand, or uniforms that could not endure a single rainfall.¹²⁷

Under the False Claims Amendments Act of 1986, "Lincoln's Law" was reinforced and made to impose treble damages liability on those engaged in corrupt practices causing harm to the federal government.¹²⁸ The 1986 law continues to assure the relator of a substantial reward if the defendant is shown to have defrauded the government. Indeed, it has been amended again in 2009 to make it still more attractive for a relator to "blow a whistle."¹²⁹ Brief consideration of that law as a possible model for international law is therefore timely.

For several reasons, such private enforcement by citizens in civil actions is perceived to be more effective in deterring corrupt practices than criminal law enforcement. First, as noted, proceedings under the federal False Claims Act are not criminal proceedings and so proof "beyond a

125. HENRY SCAMMELL, *GIANTKILLERS: THE TEAM AND THE LAW THAT HELP WHISTLE-LOWERS RECOVER AMERICA'S STOLEN BILLIONS* 38 (2004).

126. Federal False Claims Act of March 2, 1863, 12 Stat. 696–699 (codified as amended at 31 U.S.C. §§ 3729–3733 (2009)).

127. The problem of "war profiteers" persists. Bryan Terry, Note, *Private Attorneys General v. "War Profiteers": Applying the False Claims Act to Private Security Contractors in Iraq*, 30 SEATTLE U. L. REV. 809 (2007).

128. Pub. L. No. 99–562, 100 Stat. 3153 (codified as amended at 31 U.S.C. § 3739(a) (2009)).

129. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111–21, 123 Stat. 1617 (to be codified as amended at 31 U.S.C. §§ 3729–3733). For a brief description of the law's effects, see Jesse Lee, *Protecting Homeowners, Protecting the Economy*, THE WHITE HOUSE BLOG (May 20, 2009, 6:49 PM), <http://www.whitehouse.gov/blog/Protecting-Homeowners-Protecting-the-Economy>.

reasonable doubt” is not required; a “preponderance of proof” will, if credited, suffice to support a judgment against the defendant who appears to have paid a bribe to an official. Second, the private citizen-relator has, like the public prosecutor, the rights conferred on civil litigants by American rules of civil procedure to compel disclosure of possible evidence¹³⁰ and to compel non-party witnesses to supply their evidence as well.¹³¹ Also, much of the government’s files are exposed to private investigation as a result of the Freedom of Information Act enacted in 1966.¹³² Furthermore, a relator, unlike a civil plaintiff in England or most other nations, is ordinarily not liable for the legal expenses of the defense even if he and/or the government is unsuccessful in proving the case.¹³³ This is because a relator having a credible claim may secure private legal counsel without payment, because lawyers are available to present such claims for compensation that is contingent on their success.¹³⁴

When a false claims case is filed by a relator in the name of the United States, the Department of Justice is discreetly informed and invited to take control of the proceeding, but even if it does, the case continues as a civil action and the private relator remains a party to be compensated if it is successful.¹³⁵ If the Department of Justice does not intervene, the private relator is entitled to maintain the action in the name of the United States and for its benefit. Such a relator, if successful, is then entitled to receive at least twenty-five percent of the trebled damages, plus reimbursement for costs, including attorneys’ fees.¹³⁶ This can be a very substantial reward for the citizen who comes forward as the relator. More than a few American relators have in recent years been

130. See FED. R. CIV. P. 26–37. This right was conferred on all civil litigants by the rules promulgated pursuant to the Rules Enabling Act of 1934, Pub. L. 73–415, 48 Stat. 1064 (codified at 28 U.S.C. § 2072 (2006)). For a compact account of the right to discovery, see MARK A. DOMBROFF, *DISCOVERY* (1986).

131. See FED. R. CIV. P. 45.

132. 5 U.S.C. § 552 (2000).

133. For an account of the origins of this distinctive “American rule,” see John Leubsdorf, *Toward A History of the American Rule on Attorney Fee Recovery*, 47 *LAW & CONTEMP. PROBS.* 9 (1984).

134. See generally F.B. MACKINNON, *CONTINGENT FEE FOR LEGAL SERVICES: A STUDY OF PROFESSIONAL ECONOMICS AND RESPONSIBILITIES* (1964). The origins of this unusual tradition are explained in MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776–1876*, at 278 (1976). Greece is one country that may also allow contingent fees. ELENI SKORDAKI & DANIELLE WALKER, *REGULATING AND CHARGING FOR LEGAL SERVICES: AN INTERNATIONAL COMPARISON* 56 (1994).

135. 31 U.S.C. § 3730(c)(1) (2000).

136. 31 U.S.C. § 3730(d)(2) (2000).

able to retire in wealth after revealing frauds on the government, often those committed by their former employers.¹³⁷

One constraint is that the relator's claim must be based at least in part on his personal knowledge. A provision enacted in 1942 requires a relator to be an "original source" of at least some of the information on which the claim rests.¹³⁸ But pursuant to the recent amendment of the Act, a relator is not denied compensation when a case commenced by him or her is won by the government on proof other than evidence that he or she brought to the court.¹³⁹ The relator is also provided with rights protecting him or her from retaliation by an employer.¹⁴⁰ However, the present law does not empower the relator to sue a corrupt officer who received a bribe.

Examples of successful private actions initiated pursuant to this law abound. In September 2009, the United States settled a claim against the Pfizer corporation for its fraudulent practices in selling medicines to government health care programs for \$2.3 billion. The primary whistleblower, a former officer of Pfizer, was rewarded with a fee of \$51.5 million.¹⁴¹ In a similar case in April, a relator received \$48.7 million of the \$325 million paid by Northrup Grumman to the United States to settle a corruption claim arising from a sale of a spy satellite program. The whistleblower had been an engineer for Northrup.¹⁴² The same week, Quest Diagnostics agreed to pay \$302 million for selling the government faulty diagnostic kits.¹⁴³ In January, Eli Lilly had paid \$1.42 billion for false advertising of an antipsychotic drug sold to patients spending public funds; nine of its former salesmen were awarded perhaps as much as \$100 million for blowing the whistle and filing the claim in the name of the United States.¹⁴⁴

137. Examples abound. See, e.g., *Eli Lilly and Company Agrees to Pay \$1.415 Billion to Resolve Allegations of Off-label Promotions of Zyprexa*, DEP'T OF JUSTICE, (Jan. 15, 2009), <http://www.justice.gov/opa/pr/2009/January/09-civ-038.html>; *Masto Announces \$400 Million Nationwide Settlement with Merck*, NEV. OFFICE OF THE ATT'Y GEN. (Feb. 7, 2008), <http://www.drugfraudsettlement.com/news/Nevada-Media-Release.pdf>; *AMERIGROUP Announces Settlement in Largest Ever False Claims Case*, GOLDBERG KOHN (July 22, 2008), <http://www.goldbergekohn.com/news-firm-1096.html>.

138. 31 U.S.C. § 3730(e)(4)(A) (2000).

139. This amendment reverses the holding in *Rockwell International Corp. v. United States*, 549 U.S. 457 (2007).

140. 31 U.S.C. § 3730(h) (2000).

141. Bill Berkrot, *Pfizer Whistleblower's Ordeal Reaps Big Rewards*, REUTERS, Sept. 2, 2009, available at <http://www.reuters.com/article/idUSN021592920090902>.

142. Peter Pae, *DEFENSE; Northrop, Government End Disputes*, L.A. TIMES, Apr. 3, 2009, at B1.

143. *Quest to Pay \$302 Million in Marketing Case*, N.Y. TIMES, Apr. 16, 2009, at B9.

144. *Eli Lilly Agrees to Settle Zyprexa Marketing Cases*, WALL ST. J., Jan. 16, 2009, at B4. The whistleblowers' share is reported by Joe Palazzolo, *Lilly Whistleblower Reprises Role*

Over 10,000 false-claim cases have been filed in American federal courts since the 1986 revision of the law.¹⁴⁵ Although historically the bulk of the false claims actions were directed at those who provide goods or services to the military, other industries have become frequent targets for claims. Now, as illustrated by the 2009 examples noted above, many of the current false-claims cases are brought against health-care providers accused of overpricing goods or services paid for by the United States Department of Health and Human Services.¹⁴⁶

In 2006, Congress enacted a provision to reward states that enact similar laws if applicable to health care providers.¹⁴⁷ As many as thirty states have done so, as have the cities of New York and Chicago.¹⁴⁸

A non-profit organization, Taxpayers Against Fraud, provides tips, information, and support to a variety of relators.¹⁴⁹ It has complained that the Department of Justice does not invest sufficient resources in the enforcement of corruption law, even failing to spend funds that have been appropriated specifically for that purpose. Public notice of the 2009 cases might supply that need. But even despite this failing, the false claims law serves as a useful incentive to private enforcement of the law, and the result is that corrupt practices are subject to strong deterrence in the United States. Not enough, to be sure, to prevent corrupt practices altogether, for, as Ben Franklin affirmed, the temptations are very great, perhaps especially to officers of vast commercial enterprises who are expected to concentrate on short-term profits.

in AstraZeneca Case, MAIN JUSTICE: POLITICS, POLICY AND LAW (Apr. 27, 2010, 6:42 PM), <http://www.mainjustice.com/2010/04/27/whistleblower-reprises-role-in-astrazeneca-case/>.

145. SCAMMELL, *supra* note 125, at 304–05.

146. Marcia Coyle, *High Court Vets False Claims Act*, NAT'L L.J., Nov. 27, 2006, at 1. The Department of Justice has now taken a heightened interest in frauds committed by medical doctors and health care executives. BNA, *Health Care–Fraud*, 76 U.S. L. WK. 2344, 2344 (2007).

147. § 6031 of the Deficit Reduction Act of 2005, Pub. L. No. 190–171, 120 Stat. 4 (2006), amended the Social Security Act, 42 U.S.C. § 1396h, to insert § 1909, providing that the federal contribution to Medicare programs are to be increased to ten percent for states enacting appropriate false claims laws applicable to health care providers and added 42 U.S.C. § 1396(a)(68)(C), requiring states to include provisions notifying health care employees of their right to become whistleblowers.

148. See *State False Claims Acts*, TAXPAYERS AGAINST FRAUD EDUCATION FUND: THE FALSE CLAIMS ACT LEGAL CENTER, <http://www.taf.org/statefca.htm> (last visited Sept. 20, 2010).

149. See generally TAXPAYERS AGAINST FRAUD EDUCATION FUND: THE FALSE CLAIMS ACT LEGAL CENTER, <http://www.taf.org> (last visited Sept. 20, 2010).

VI. THE POSSIBILITY OF PRIVATE ENFORCEMENT OF INTERNATIONAL CORRUPT PRACTICES LAW IN NATIONAL COURTS

Might the international institutions seeking to deter transnational corruption usefully advance the idea of enabling similar private enforcement of transnational corrupt practices laws in the courts of all nations, or at least those of the “developed nations” of the OECD? The nations of that organization could agree to enact versions of the American laws offering handsome rewards to those who, as “relators,” expose transnational corrupt practices of their local firms, in the hope that the deterrent effect of such law would be spread among firms in all the “developed” nations. Thus, citizens of a victimized state, or anyone with personal knowledge of the corruption, might be authorized in the name of the defrauded government to invoke the jurisdiction of any signatory state to assert corruption claims against any firms or individuals who are within that state’s jurisdictional reach. Such empowerment of private enforcement might significantly enhance the deterrent effect of the laws enacted pursuant to the present Conventions.

The culture shock resulting from such an international agreement could be less than a reader might suppose. American false claims laws are not entirely unique. The United Kingdom, Korea, and the Netherlands, and perhaps some other nations, have laws to reward and protect whistleblowers who alert prosecutors to frauds on their governments.¹⁵⁰ India is the scene of much active enforcement of laws resembling the American law.¹⁵¹ The idea of private claimants representing the English monarchy has an ancient history¹⁵² and European high courts enforcing constitutions are no strangers to political roles.¹⁵³

150. GÜNTER HEINE ET AL., PRIVATE COMMERCIAL BRIBERY: A COMPARISON OF NATIONAL AND SUPRANATIONAL LEGAL STRUCTURES 81 (U.K.), 266 (Kor.), 311 (Neth.), and 648–49 (for a comparative analysis) (2003). It is also reported that Japan has the beginnings of a movement to enact legislation protecting whistleblowers. *Id.* at 230.

151. There are a substantial number of lawyers in India specializing in Qui Tam False Claims Act cases. See Qui Tam False Claims Act Lawyers in India, <http://hg.org/law-firms/Qui-Tam-False-Claims-Act/India.html> (last visited Sept. 8, 2010). The Cabinet in 2010 approved a bill imposing fines and penalties on those punishing whistleblowers. *Cabinet approves bill to protect whistleblowers*, EXPRESSINDIA (Aug. 9, 2010, 8:50 PM), <http://www.expressindia.com/latest-news/Cabinet-approves-bill-to-protect-whistleblowers/657959/>. This legislation appears to be a response to the murder of a whistleblower. See Richard Renner, *Whistleblower murdered in India*, WHISTLEBLOWERS PROTECTION BLOG (Jan. 15, 2010), <http://www.whistleblowersblog.org/2010/01/articles/legislation/international-1/whistleblower-murdered-in-india/>.

152. See SMITH, *supra* note 102 (observing the ease and comfort with which humans observe the misfortunes of distant others).

153. See KAREN J. ALTER, THE EUROPEAN COURT’S POLITICAL POWER 263–86 (2009).

A. Possible Enforcement of International Law in US. Courts

As the Iraq case illustrates,¹⁵⁴ a foreign government may invoke the jurisdiction of an American court to invoke, in a civil action, international corrupt practices law against firms that bribed the foreign government's officials. Thus, the United States could alone simply amend its foreign corrupt practices law to enable a citizen of another nation, such as Kazakhstan, to take on the role of a relator to bring suit in an American court in the name of his government against those oil companies who have allegedly bribed his president in violation of international corrupt practices law. Such a private plaintiff might be empowered to recover for the government of Kazakhstan treble damages from oil companies that paid such a bribe, and the relator might receive a substantial share as a reward for useful public service.

As noted, the plaintiff suing on behalf of his government could, in an American court, be represented by a lawyer serving for a fee contingent on success.¹⁵⁵ An advantage of treating the matter as one fit for resolution in a civil proceeding in an American forum is that the relator or his or her foreign government (if it took over the case in order seriously to pursue it) would not be required to prove the bribery or the resulting damages "beyond a reasonable doubt." A "preponderance of proof" would, if credited, suffice to support a civil judgment against the defendant. Furthermore, a foreign nation or its citizen-relator pursuing a corruption claim in the American court could make full use of the right to conduct discovery. Any evidence available in the United States or in the possession of an American citizen could be presented at trial. Foreign government claimants would also share the right to compel disclosure of possible evidence by the accused firm¹⁵⁶ and to compel non-party witnesses within reach of an American court to supply their evidence as well.¹⁵⁷ Discovery of evidence from witnesses and their files in other nations is available in the United States and assisted by many foreign governments, or at least by those committed to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.¹⁵⁸ A defendant refusing to provide documents or other evidence upon demand might be subjected to an adverse judgment on the merits of the dispute because an American court might reasonably infer that the evidence the defendant refuses to produce on request would prove the allegation of

154. *Iraq's Legacy Lawsuit*, *supra* note 32.

155. *See supra* notes 136–140.

156. FED. R. CIV. P. 26–37.

157. FED. R. CIV. P. 45.

158. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 (entered into force for the U.S. Oct. 7, 1972).

the adversary.¹⁵⁹ And if either the relator or his government is unsuccessful in proving the case, they would ordinarily bear no liability for the legal expenses of the defense.

In one respect, this idea of invoking the jurisdiction of American courts is less radical than an international reader might suppose. In the 18th century, the first Congress of the United States conferred jurisdiction on its federal courts to hear claims by foreign citizens alleging violations of international law.¹⁶⁰ While the history of that provision is dim, it seems likely that its authors were attentive to the problems of protecting foreign diplomats and assisting foreign plaintiffs seeking to recover their ships or cargo from pirates.¹⁶¹ Whatever the 18th century concern, the statute is, in the 21st century, used by diverse foreign plaintiffs invoking human rights recognized internationally.¹⁶²

A foreign government inclined to join Iraq¹⁶³ in invoking the jurisdiction of American courts to enforce international law prohibiting the bribery of its officials might also welcome the opportunity to take over similar privately initiated cases brought in American courts by its own citizens serving as relators. For the reasons stated, it might in all respects be less expensive and more effective for a foreign government or its citizens to proceed in a civil case against a firm guilty of corrupt practices in an American court than to conduct civil actions in their own forum. Recall the pertinent observation of a judicial member of the House of Lords who some years ago observed that “[a]s a moth is drawn to the light, so is a litigant drawn to the United States.”¹⁶⁴ And there is the special attraction of such private enforcement that no public official is required to take personal responsibility for what may be an impolitic action but which might enrich their nation’s treasury.

There is no strong reason for the United States to withhold its judicial services from foreign relators or foreign governments in need of an effective forum in which to present suits to enforce corrupt practices laws.¹⁶⁵ The private lawyers retained to conduct such cases in an Ameri-

159. *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705–09 (1982).

160. Judiciary Act of 1789, 1 Stat. 73 (1789) (codified as amended at 28 U.S.C. § 1350 (2006)) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

161. “Uppermost in the legislative mind appears to have been offenses against ambassadors; . . . violations of safe conduct were probably understood to be actionable . . . and individual actions arising out of prize captures and piracy may well have also been contemplated . . .” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004).

162. *E.g.*, *Abdullah v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009); *cf.* *Sosa*, 542 U.S. 692.

163. *See Iraq’s Legacy Lawsuit*, *supra* note 32.

164. *Smith Kline & French Lab. Ltd. v. Bloch*, [1983] 1 W.L.R. 730, 733 (Eng.).

165. *See* Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. (forthcoming 2010).

can court are exposed to substantial income tax liability by the United States, so that it is not unlikely that the United States would show a net profit on the sale of judicial services to foreigners bringing such cases to its courts on behalf of their governments.¹⁶⁶ And even if the United States alone were to amend its law to provide for such private enforcement of the foreign corrupt practices act by foreign citizens striving to protect their own governments, the reform would not be without some deterrent effect.

But, as with the original Foreign Corrupt Practices Act, the deterrent effect of such an employment of American jurisdiction to enable foreign citizens to enforce international corrupt practices law would be most felt by firms that are subject to that jurisdiction. There would thus be a cause for concern for the uneven impact on business competitors.

A second problem with simply extending the present American law and legal process to relators representing foreign governments is that the present law assures the victimized government of the opportunity to relieve the relator and take over the conduct of the litigation. It would be unlikely, to say the least, that public lawyers employed by the government of Kazakhstan, for example, would vigorously pursue claims arising from bribes allegedly paid to the president of their republic. They might well, if permitted, seek to exercise control to defeat the claim without regard to its merit.

And a third problem with invoking the international law in the courts of the United States is that even if jurisdiction over the foreign defendant were assured, a resulting civil judgment might be enforceable only against assets of the defendant that could be found in the United States. While one might hope that foreign courts would lend a hand in enforcing the judgments rendered pursuant to such legislation and against firms that are within the “long-arm” constitutional reach of American courts, experience suggests that this is unlikely unless a change could be made in the governing transnational law to commit foreign courts to enforce judgments rendered in the United States. Recent experience with efforts at The Hague to reach agreement about the enforcement of foreign judgments lends scant encouragement to such a hope.¹⁶⁷ A serious threat

166. This would obviously not be true for American jurors summoned to sit on such cases, especially given the potential complexity of the evidence that might be presented. On that account, legislation authorizing foreign citizens to sue might perhaps employ the diction “suit in equity” to bar application of the Seventh Amendment right to trial by jury. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 685–86 (8th ed. 2010).

167. See Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 *AM. J. COMP. L.* 543, 549 (2006); Stephen B. Burbank, *Federalism and Private International Law: Implementing the Hague Choice of Court Convention in the United States*, 2 *J. PRIVATE INTL. L.* 287, 288–89 (2006); Jason Webb Yackee, *A Matter of Good Form: The (Downsized) Hague Judgments Convention*

to the enforcement of an American judgment in a transnational false claims case is a longstanding international tradition that the courts of one nation do not enforce the public revenue or punitive laws of another.¹⁶⁸

A fourth consideration is that it might be impolitic for the United States alone to venture forth to provide private enforcement of a global antibribery and fair competition act that could have no more than limited effect. Some Europeans, Asians, and Africans may already resent the pretentiousness of American courts sitting as “world courts” as they are sometimes prone to do.¹⁶⁹ For these four reasons, the United States is not here encouraged to go forward alone.

B. *Private Enforcement in Courts of Other Nations*

More effectively, international law might establish a model law extending to other national courts the empowerment of private citizen-relators to sue in the name of their governments those guilty of corrupt practices, invoking jurisdiction wherever the offender or its assets might be found. Such a law might be established by an amendment to the OECD Convention on Civil Consequences requiring similar amendments to national laws.¹⁷⁰

Such an international law might also explicitly empower a party who has paid a bribe under duress to recover the sum paid to its corrupt official. This might have the benign effect of making public officials less eager to receive bribes. A relevant example of frustration in the private enforcement of the present international law deterring corruption is the 2006 decision of an arbitration panel denying compensation to Nasir Ali for a clear breach of contract by the government of Kenya.¹⁷¹ Nasir Ali had bribed the President of Kenya to acquire a place of business at the Nairobi airport for his duty-free shop. But under a successor President, the Republic revoked the contract and leased the space to a rival foreign owner. The arbitrators declined to enforce the corrupt contract of Nasir

and Conditions of Formal Validity for the Enforcement of Forum Selection Agreements, 53 DUKE L.J. 1179, 1179–80 (2004).

168. *E.g.*, *Planche v. Fletcher*, (1779) 99 Eng. Rep. 164, 165 (K.B. 1779); *Her Majesty the Queen v. Gilbertson*, 597 F.2d 1161, 1163 (9th Cir. 1979). *But cf.* *Pasquantino v. United States*, 544 U.S. 349, 352–53 (2005) (holding that a plot to defraud a foreign government of tax revenue did violate the Federal Wire Fraud Statute).

169. Ralf Michaels, *US-Gerichte als Weltgerichte—Avantgarde der Globalisierung* [US Courts as World Courts: The Avant-Garde of Globalization], 31 ZEITSCHRIFT DER DEUTSCH-AMERIKANISCHEN JURISTEN-VEREINIGUNG [DAJV-NEWSLETTER] 46 (2006) (F.R.G.).

170. *See supra* note 160 and accompanying text.

171. *World Duty Free Co. v. Republic of Kenya*, ICSID Arb. 00/7 (Oct. 4, 1996), *available at* <http://ita.law.uvic.ca/documents/WDFv.KenyaAward.pdf>. For commentary on the responsibility of investment arbitrators to afford civil remedies for bribery, see Abiola O. Makinwa, *Civil Remedies for International Corruption: The Role of International Arbitration*, in *THE CIVIL LAW CONSEQUENCES OF CORRUPTION*, *supra* note 111, at 257–80.

Ali and merely expressed frustration that the President who received the bribe was permitted to keep it. Nothing indicated that the successor business had not also paid a similar bribe to the president's successor in order to secure the repudiation of the contract with Nasir Ali.

If the OECD or the Civil Law Convention were modified to include an endorsement of such laws generously rewarding citizen-plaintiffs for representing their governments in matters of transnational corruption, there would remain the problem that most national courts who would be asked to hear such claims are less hospitable to plaintiffs bringing such civil tort cases. And perhaps many would be especially unreceptive to foreign claimants invoking international or foreign tort law against a domestic defendant.

It is certain that the numerous features of American law facilitating private enforcement would in most national courts be unavailable. Few nations' courts adhere to "the American rule" that a plaintiff who advances a tort claim but loses is not liable for the defendant's expenses, including attorneys' fees.¹⁷² While there are variations on laws governing attorneys' fees, plaintiffs in most national legal systems would not be likely to be permitted to retain counsel for a fee contingent upon his or her success in the case.¹⁷³ And while European courts often conduct penetrating factual inquiries, private plaintiffs are rarely empowered to conduct private investigations of the sort permitted by the discovery rules in use in American courts.¹⁷⁴ It is also doubtful that a plaintiff in most nations' courts would have access to government records of the sort opened to plaintiffs by "Freedom of Information" or state "sunshine" legislation in the United States. Furthermore, few judges are empowered to issue injunctions enforceable by fines or imprisonment for those who fail to produce needed information or documents. Such limits on private access to evidence increase the risk to the relator of a costly defeat of the claim.

172. See generally Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651 (1982) (explaining the legal-theoretical bases for "the American rule" and pointing out its rarity in the legal systems of the world).

173. Conditional fees are allowed in the United Kingdom and in the European Commission of Human Rights, but these are modest in amount and limited to personal injury or insolvency cases. See Michael Zander, *Where Are We Now on Conditional Fees?—Or Why This Emperor is Wearing Few, If Any, Clothes*, 65 MOD. L. REV. 919 (2002); Winand Emons & Nuno Garoupa, *US-Style Contingent Fees and UK-Style Conditional Fees: Agency Problems and the Supply of Legal Services*, 27 MANAGERIAL & DECISION ECON. 379 (2006).

174. See Hein Kötz, *Civil Justice Systems in Europe and the United States*, 13 DUKE J. COMP. & INT'L L. 61, 74–76 (2003).

VII. REWARDING PRIVATE ENFORCEMENT IN INTERNATIONAL ARBITRATION

Given the difficulties of adapting many national courts to the role of enforcing the rights of a foreign state at the behest of one or more of its citizens, attention ought be given to the possibility of an international tribunal commanding the respect and acceptance of all the governments willing to subscribe to the principle that citizens are entitled to protect their governments from bribes paid by foreign firms. Such an international tribunal might also hear claims by firms presenting evidence that they could and would have provided goods and services of equal quality at lower prices than those a state agreed to pay in response to a defendant's corrupt practices.¹⁷⁵

Special dispute-resolving schemes have been incorporated in numerous multilateral agreements,¹⁷⁶ including some bearing on environmental controversies.¹⁷⁷ Such a forum could be established and empowered with the usable features of the American practice empowering private law enforcement by relators and whistleblowers. There is an existing model for an international forum in which corruption claims might be heard and decided.

The model is the International Center for the Settlement of Investment Disputes (ICSID), an autonomous international institution established by the World Bank under the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States.¹⁷⁸ ICSID provides an arbitral forum whose jurisdiction is conferred by the contracts made between member governments and the foreign firms with whom they deal. The Nairobi airport case mentioned above was decided by an ICSID panel.

175. Such a forum might also be a suitable venue to hear tort claims arising from environmental harms caused by careless mineral extractions. *See supra* note 5.

176. *See* Karen J. Alter, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, 71 *LAW & CONTEMP. PROBS.* 37 (2008).

177. *See generally* CESARE P.R. ROMANO, *THE PEACEFUL SETTLEMENT OF INTERNATIONAL ENVIRONMENTAL DISPUTES: A PRAGMATIC APPROACH* (2000) (analyzing the conditions under which international adjudication can effectively tackle the challenge of environmental disputes).

178. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (1966). For the origins of the Convention, see JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 78–125 (2010); KENNETH J. VANDELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* 19–74 (2010); Andreas F. Lowenfeld, *The ICSID Convention: Origins and Transformation*, 38 *GA. J. INT'L & COMP. L.* 47 (2009). For speculation on the future of the institution, see *INTERNATIONAL INVESTMENT LAW IN THE 21ST CENTURY* (C. Binder et al. eds., 2009); *THE FUTURE OF INVESTMENT ARBITRATION* (C. Rogers & R. Alford eds., 2009).

There are 144 member states that have ratified the ICSID Convention and are thus subject to the Center's jurisdiction. Presently, there are over 120 cases pending on its docket; all involve disputes between firms engaged in international trade and the member governments with whom they have made contracts.¹⁷⁹ While, as with other tribunals, one may be concerned about the independence of the judges,¹⁸⁰ the Center's monetary awards are enforceable under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹⁸¹ that has been ratified by all but a very few nations.¹⁸² Thus, its decisions are much more widely enforceable than mere civil judgments rendered by national courts.

Given the absence of alternatives and the widely recognized utility of arbitral tribunals in resolving civil disputes arising in international trade, the ICSID model is not only the best available, but one worthy of a measure of public confidence.¹⁸³ Cautions have been expressed such as that uttered by Cesare P. R. Romano that while arbitration "has some merits, it is by and large a vestige of an old world where adjudication was ultimately regarded as a sort of 'continuation of diplomacy by judicial means,' to paraphrase a famous quote from Carl von Clausewitz."¹⁸⁴ But ICSID is more than that as a forum in which pre-existing law is respected and enforced.

179. INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, <http://icsid.worldbank.org/ICSID/FrontServlet> (for list of member states, follow "Member States" hyperlink; for pending cases, follow "Cases" hyperlink, then follow "List of Cases" hyperlink, then follow "Pending Cases" hyperlink) (last visited Sept. 20, 2010).

180. See Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005).

181. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention] (codified as amended at 9 U.S.C. §§ 201-08 (2000)) (entered into force for the U.S. Dec. 29, 1970).

182. No nation engaged in substantial trade has failed to ratify the New York Convention. See *Status of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (listing the status of each state party to the New York Convention). On enforcement, see generally UNITED NATIONS, ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS (1999), <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf> (discussing the effectiveness of enforcement, application of the Convention by the judiciary, and potential improvements to the implementation process).

183. See, e.g., Eric A. Posner, *Diplomacy, Arbitration, and International Courts*, in THE ROLE OF INTERNATIONAL COURTS 51 (Carl Baudenbacher & Erhard Busek eds., 2008) (explaining the advantages of international adjudication relative to arbitration and diplomacy); Robert H. Smith & Tyler B. Robinson, *E-Disclosure in International Arbitration*, 24 ARB. INTL 105 (2008) (commenting on the availability of discovery in traditional international commercial arbitration).

184. Cesare P.R. Romano, *International Dispute Settlement*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 1036, 1038 (Daniel Bodansky et al. eds., 2007).

It must be conceded that ICSID is not universally revered. The Republic of Ecuador, although presently engaged in an ICSID arbitration proceeding with Occidental Petroleum arising from the government's response to alleged environmental harms resulting from its extractions in Oriente Province, has now withdrawn its consent to future proceedings of this sort.¹⁸⁵ But if Ecuador seeks future investments in similar enterprises by transnational firms, it will likely find it necessary to submit to a jurisdiction such as that of ICSID, or a different but similar center established by the World Bank.¹⁸⁶ And a defendant nation such as Ecuador might escape liability by demonstrating that the plaintiff investor was guilty of bribing its officials.¹⁸⁷

If the World Bank were to more aggressively pursue its policy deterring corruption in response to the OECD's initiative, it might establish an international arbitral tribunal empowered by contract to resolve corruption claims brought by suitably qualified citizens or non-governmental organizations against firms or offices engaged in corrupt practices. Nations becoming members of a center such as ICSID could be required to include submission to the center's jurisdiction as a condition of any contract of size made with a foreign national or a transnational firm or its subsidiary for their purchase of goods or services, their sale of business opportunities, or their consent to extractions of minerals. A similar condition of submission to the Center's jurisdiction could be imposed on those holding high public offices in a signatory state. Such a reform might be made in pursuit of the Bank's broader policy of advancing the rule of law.¹⁸⁸

As an additional condition of the submission of corruption claims to such an arbitral tribunal, a member state would need to establish reasonable accounting standards to be observed by its public officials and

185. On December 23, 2007, Ecuador withdrew its consent to jurisdiction over matters "relative to the extraction of natural resources such as oil, gas, or other minerals." Letter from Maria Fernanda Espinosa Garcés, Ecuadorian Ambassador to the U.S., to Ana Palacio, Sec'y Gen., ICSID (Nov. 23, 2007), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=regular&AnnounceNo=9.pdf>.

186. It is not unimaginable that such a forum could be empowered to resolve tort claims for environmental harms caused by firms engaged in transnational mineral extractions. On the shortcomings of traditional legal solutions in the context of environmental law, see ELISA MORGERA, CORPORATE ACCOUNTABILITY IN INTERNATIONAL ENVIRONMENTAL LAW 25–62 (2009). For a brief account of other presently existing transnational forums and the problem of occasionally overlapping jurisdictions, see Andrea K. Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals Is Not Working*, 59 HASTINGS L.J. 241 (2007).

187. Cf. *Inceyna Vallisoletana SI v. Republic of El Salvador*, ICSID Case No. ARB/03/26 (Aug. 2, 2006).

188. Julio Faundez, *Rule of Law or Washington Consensus: The Evolution of the World Bank's Approach to Legal and Judicial Reform*, in LAW IN THE PURSUIT OF DEVELOPMENT, supra note 119, at 180–201.

by those international firms with whom they might deal. And, as a constraint on the misuse of the investigative power conferred on the party alleging a corruption claim and his or her counsel, it would be appropriate to require him or her at the outset to identify a personal source of information suggesting the likelihood of a corrupt practice worthy of further investigation.

To facilitate effective private law enforcement of international anti-corruption laws in such a center, the civil procedure employed would need to differ from that conventionally employed in the arbitration of contract disputes, or by the present ICSID arbitral panels. The American rules of procedure empowering private investigation surely need not be explicitly incorporated, but they serve to illustrate what would be needed to empower private counsel to investigate and reveal corruption.¹⁸⁹

Thus, it would be necessary to include provisions empowering the parties' private counsel to expose pertinent records of the government and its contracting parties, to examine witnesses under compulsion to give evidence, and to empower the arbitral panel to render an enforceable monetary award against a firm or person within the represented state's jurisdiction who failed to cooperate reasonably with the investigation conducted by counsel for any of the parties.¹⁹⁰ Official files and records of represented states would be subject to arbitral scrutiny.¹⁹¹

An obvious problem in establishing such a center is the identification of suitable members of the arbitration panels.¹⁹² Finding suitably disinterested decisionmakers is not easy and perfection cannot be achieved. But the peer review system employed by OECD to encourage

189. See Tom Barnett, *A U.S. Perspective: Convergence of Standards for Information Exchange in International Arbitration and American Civil Discovery*, in *ELECTRONIC DISCLOSURE IN INTERNATIONAL ARBITRATION* 119 (David J. Howell ed., 2008); but see Michael E. Schneider, *A Civil Law Perspective: "Forget E-Discovery!"* in *ELECTRONIC DISCLOSURE IN INTERNATIONAL ARBITRATION*, *id.* at 13 (expressing misgivings about the consequences of electronic information storage and recovery by investigating parties).

190. U.N. COMM'N ON LEGAL EMPOWERMENT OF THE POOR & U.N. DEV. PROGRAMME, *MAKING THE LAW WORK FOR EVERYONE* 64 (2008) concludes that:

In general, the success of alternative dispute resolution depends on certain standards and practices, such as the right of poor people to appoint judges of their choice for the dispute resolution. But it is equally imperative that the alternative dispute resolution mechanisms are recognized as legitimate and linked to formal enforcement, and that they do not operate totally outside the realm of the legal system.

191. On current discourse regarding procedural rules in international commercial arbitration, see Carrie Menkel-Meadow, *Are Cross-Cultural Ethics Standards Possible or Desirable in International Arbitration?*, in *MELANGES EN L'HONNEUR DE PIERRE TERCIER* 883 (Peter Gauch et al. eds., 2008).

192. See Audley Sheppard, *Arbitrator Independence in ICSID Arbitration*, in *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY*, *supra* note 178, at 131–56.

enforcement of laws enacted pursuant to its Convention suggests a place to begin the search.¹⁹³ Perhaps a variation on that system might assure a heightened sense of public duty and accountability on the part of the arbitrators asked to decide corruption cases.

The problem of the enforceability of judgments would be substantially diminished when the decision to reward the relator is rendered as an arbitral award. The present Convention on Foreign Awards does vest discretion in any enforcing court to refuse enforcement of arbitral awards offending its notions of local public policy.¹⁹⁴ It is clear that this provision is intended to be read narrowly, and at least in the United States it is.¹⁹⁵ But an award might be denied enforcement by a court persuaded that the arbitral panel was itself corrupt or unqualified.

CONCLUSION

The World Bank, at least with the support of the International Chamber of Commerce or the United Nations, could create a legal forum in the ICSID model that could enable and reward effective private enforcement of international anticorruption law. The complexities of the tasks are at least partially revealed above. But the needs clearly exist and the time has come for serious consideration of the limited possibilities. Others have noted the difficulty as well as the need for transnational institutions that might gain the requisite measure of trust from the humanity whom they presume to govern.¹⁹⁶ If such a legal forum were created, it would need some of the features that cause plaintiffs “like moths to the light” to be attracted to American courts. These might include a right of audience for contingent fee lawyers representing private citizens or non-governmental organizations empowered to compel witness testimony and disclosures and to examine public and private files. Such a means of private enforcement in an international forum would not cure the infectious disease of corruption, but it would almost surely reduce the suffering.

193. See *supra* text accompanying note 61.

194. New York Convention, *supra* note 181, art. V(2)(b).

195. See *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (Ratka)*, 508 F.2d 969 (2d Cir. 1974); *Europcar Italia, S.P.A. v. Maiellano Tours, Inc.*, 156 F.3d 310 (2d Cir. 1998).

196. See ROBERT A. DAHL, ON POLITICAL EQUALITY 87–92 (2006).