1 The transnationalization of anti-corruption law

An introduction and overview

Régis Bismuth, Jan Dunin-Wasowicz, and Philip M. Nichols

Before October of 1996, international organizations and actors rarely discussed corruption. Within the World Bank Group, the topic was considered dangerously political and thus outside the range of appropriate issues for the Group. In 1996, however, then-President James Wolfensohn delivered an opening speech to the Group's annual meeting in which he acknowledged that corruption significantly interfered with the objectives of the Group, and in which he described corruption as a 'cancer' that inflicted numerous harms on the people of the world.[1]

Wolfensohn's speech highlighted a turning point in the study of and concern about corruption. Just a year before Wolfensohn's speech, the nongovernmental organization Transparency International, founded in part by persons who had left the World Bank Group in frustration with the way that corruption impeded their work, released the first Corruption Perceptions Index, which gave the world its first standard quantitative measure of corruption. Just a few months before Wolfensohn's speech, the Organization of American States concluded negotiation of and opened for signature the Inter-American Convention Against Corruption, the first international instrument specifically focused on corruption.

Since 1995, the study of corruption and practice of anti-corruption have changed in ways that can only be described using superlatives. The study of corruption has grown exponentially. Where once only a small handful of scholarly articles might address corruption in any given year, there are now entire journals dedicated to the subject and its study is commonplace. Practice has exceeded scholarly study; entire industries are built around providing advice and training, around risk assessment and avoidance, and around prosecution and defense. Once barely discussed, corruption is now at the forefront of conversations.

This book examines one aspect of the changes that have occurred in those decades. Legal systems have always attempted to control corruption, but have largely done so from a domestic perspective. In the last few decades, that changed. Corruption is recognized as a transnational phenomenon, and its control has

1 James Wolfensohn, 'Address to the Board of Governors at the Annual Meetings of the World Bank and the International Monetary Fund' in *Voice for the World's Poor* (World Bank 2005) 50.

been transnationalized. The contributions to this book explore discrete aspects of that transnationalization (4). Before discussing those contributions, however, it is useful to review what is meant by 'corruption' (1), 'transnational' (2), and the 'global anti-corruption regime' (3).

1 Corruption

This is not a book about corruption, but instead about laws and rules created to control corruption. Nonetheless, it is important to understand the object of these rules. As a phenomenon, corruption defies easy definition. Its effects, however, are much easier to describe.

1.1 Defining corruption

The authors in this book, and the anti-corruption community in general, use the word 'corruption' to mean several phenomena. Each of these has relevance to efforts to control corruption and to the subject matter of this book.

The definition of corruption as a social phenomenon has engendered substantial debate among political scientists and sociologists. Arnold Heidenheimer and Michael Johnston suggest that the myriad attempts to define corruption can be parsed into three broad categories: market-based, public interest-centered, and public office-centered types of definitions.[2] Market-based definitions tend to discuss corruption as a product of markets for influence or as a consequence of market failures. As Mark Philp notes, however, these sorts of analyses 'are certainly one way of understanding corruption, they may also provide a fruitful model for the explanation of the incidence of corruption, but they are not a way of defining it.'[3] Public interest-based definitions, on the other hand, view corruption through the lens of its deleterious effects on the public interest and good governance. This type of analysis similarly illuminated effect but provides little in terms of definition.[4]

Ulrich von Alemann warns that 'perhaps it is wrong to search for one true and correct universal definition. Maybe such a definition is like the Holy Grail, i.e. something unattainable that can only be a kind of guiding star.'[5] Von Alemann suggests that rather than seeking a crisp definition of corruption, scholars should

2 Arnold J Heidenheimer, *Political Corruption: Readings in Comparative Analysis* (Holt, Rinehart & Winston 1970) 4.

3 Mark Philp, 'Conceptualizing Political Corruption' in Arnold J Heidenheimer and Michael Johnston (eds), *Political Corruption: Concepts and Contexts* (3rd edn, Transaction 2002) 50.

4 For an example of the use of a public interest-based definition, see Maryvonne Gnaux, 'Social Sciences and the Evolving Concept of Corruption' (2004) 42 Crime, Law and Social Change 13, 18–22.

5 Ulrich von Alemann, 'The Unknown Depths of Political Theory: The Case for a Multidimensional Concept of Corruption' (2004) 42 Crime, Law and Social Change 25, 26.

instead attempt to understand it.[6] This approach, however, risks becoming tautological: according to this definition the phenomenon that a researcher attempts to understand is by definition whatever the scholar understands. This approach also renders comparisons and the sharing of knowledge difficult.

Practitioners and scholars therefore require a definition, and seem to have settled on the third of Heidenheimer and Johnston's definitions, a public office-based definition. Joseph Senturia used an early version of this definition in an encyclopedia entry on corruption,[7] but Joseph Nye brought it into broader discourse.[8] No single iteration of this definition exists, but in its broad form, capable of encompassing private sector as well as public sector corruption, a credible articulation would define corruption as:

> The abuse or misuse of trust or authority for self-serving reasons rather than the reasons for which trust or authority was conferred.

The International Chamber of Commerce, the International Monetary Fund, the Organisation for Economic Cooperation and Development, Transparency International, and the World Bank Group each use variations of this definition.[9] Most of the authors in this book explicitly or implicitly use the same definition of corruption, as does almost all of the research on which they rely.

The United Nations, on the other hand, not only does not use this definition but also eschews any attempts to define corruption. Like von Alemann, the parties that negotiated issues of corruption within the United Nations worried that attempting to define corruption was less important than acting on corruption, and avoided definition 'so as to allow greater flexibility for future implementations and interpretations.'[10] Scholars and practitioners require a definition, but von Alemann and the United Nations offer an important reminder: when considering

6 Ibid. Von Alemann, like Heidenheimer and Johnston, parses theories of corruption into categories, although von Alemann suggests seven categories rather than three: at 26–27.

7 Joseph J Senturia, 'Corruption, Political' (1931) IV Encyclopaedia of the Social Sciences 448.

8 Joseph S Nye, 'Corruption and Political Development: A Cost-Benefit Analysis' (1967) 61 American Political Science Review 417, 419.

9 International Chamber of Commerce, *Memorandum to the OECD Working Group on Bribery in International Business Transactions: Recommendations by the International Chamber of Commerce (ICC) on Further Provisions to be Adopted to Prevent and Prohibit Private-to-Private Corruption* (ICC 2006) 2; International Monetary Fund, 'The Role of the Fund in Governance Issues—Review of the Guidance Note—Preliminary Considerations—Background Notes' (2017) IMF Policy Papers, 9; 'What is Corruption?' (Transparency International) <www.transparency.org/en/what-is-corruption#> accessed 1 June 2020; 'Glossary of Statistical Terms' (OECD 2013) <stats.oecd.org/glossary/detail.asp?ID=4773> accessed 1 June 2020; World Bank, *Helping Countries Combat Corruption: The Role of the World Bank* (World Bank Group 1997) 8.

10 Antonio Argandoña, 'The United Nations Convention against Corruption and Its Impact on International Companies' (2007) 74 J Bus Ethics 481, 488.

the social phenomenon, pedantic insistence on strict enforcement of a definition is unlikely to result in insights into the nature of that phenomenon.

That reminder stands in stark contrast to the second way in which the authors of this book use the word 'corruption.' The objects of study in this book are laws, rules, and regulations. Definitions used to define social phenomena encompass the nature of a phenomenon rather than drawing sharp lines. Legal definitions, on the other hand, must draw clear lines. Basic fairness requires that people subject to that law know which behaviors fall within prohibitions and which do not. Fair processes require that the state prove that a person charged with violating a rule did violate that rule.

The criminal law of the Falkland Islands amply illustrates a precise definition:

(1) A person ('P') commits an offence in either of the following cases.
(2) Case 1 is where —
  (a) P offers, promises or gives a financial or other advantage to another person; and
  (b) P intends the advantage —
    (i) to induce a person to perform improperly a relevant function or activity; or
    (ii) to reward a person for the improper performance of such a function or activity.
(3) Case 2 is where —
  (a) P offers, promises or gives a financial or other advantage to another person; and
  (b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.
(4) In Case 1 it does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned.
(5) In Cases 1 and 2 it is irrelevant whether the advantage is offered, promised or given by P directly or through a third party.[11]

The criminal law repeats this exercise for the offense of accepting a bribe, and for bribing foreign officials.[12]

Because this is a book about the control of corruption through law and other rules, the authors in this book therefore use the word 'corruption' in two different ways. The word denotes a general social phenomenon without sharp boundaries. The word also is used as a blanket phrase encompassing several very sharply defined actions.

11 Crimes Ordinance 2014, §490. This legislation is to a large extent modeled on the UK Bribery Act.
12 Crimes Ordinance 2014, §491, §495.

The word 'corruption' is also used in a third way that sometimes causes confusion. As a phenomenon, corruption can take many forms, such as nepotism, embezzlement, cronyism, or extortion. Most often, however, the word 'corruption' actually refers only to one particular form: bribery. Susan Rose-Ackerman, a pioneer in the study of corruption, is unabashed: 'I shall always keep bribery in the analytical foreground.'[13] Michael Johnston, on the other hand, laments the confusion and imprecision engendered by the conflation of 'corruption' and 'bribery.'[14] Whether one sides with Rose-Ackerman or with Johnston, one cannot fight common usage. The word corruption now means only bribery. The anti-corruption regime discussed in this book, therefore, although sounding expansive, is actually designed almost entirely to control bribery and not other forms of corruption.

1.2 The effects of corruption

Corruption inflicts innumerable harms. In a foreword to the United Nations Convention Against Corruption, then-Secretary General Kofi Annan observed that:

> Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.[15]

Annan's condemnation of corruption echoes that of Wolfensohn a decade earlier.[16]

Corruption inflicts profound damage on people and the planet they inhabit.[17] The World Economic Forum estimates that the costs of corruption equals five percent of the world's gross domestic product.[18] The International Monetary Fund estimates that endemic corruption costs countries four percent of national

13 Susan Rose-Ackerman, *Corruption: A Study in Political Economy* (Academic Press 1978) 4.

14 Michael Johnston, *Syndromes of Corruption: Wealth, Power, and Democracy* (CUP 2005) 20–21.

15 Kofi Annan, *Foreword to United Nations Convention against Corruption* (UN Sales No V.04-56160, UN Office on Drugs & Crime 2004).

16 Wolfensohn states that 'corruption diverts resources from the poor to the rich, increases the cost of running businesses, distorts public expenditures, and deters foreign investors … it erodes the constituency for aid programs and humanitarian relief … it is a major barrier to sound and equitable development.' See Wolfensohn (n 1) 50.

17 See generally Susan Rose-Ackerman and Bonnie J Palika, *Corruption and Government: Causes, Consequences and Reform* (2nd edn, CUP 2016).

18 Security Council, press release, UN doc no SC/13493 (10 September 2018) <www.un.org/press/en/2018/sc13493.doc.htm> accessed 1 June 2020.

gross domestic product in tax revenues.[19] It also estimates that the most corrupt emerging economies waste twice as much money as do the least corrupt.[20] A study of 105 countries found that bribery costs the private sectors in developing countries 3.7 times the amount that those countries receive in development aid.[21]

Corruption also inflicts profound human costs. Corruption contributes to shorter lifespans, higher rates of infant mortality, lower levels of health, and lower levels of literacy and education.[22] Corruption causes the misallocation of resources and results in substandard or unwanted infrastructure.[23] Corruption degrades the physical environment and undermines efforts to protect it.[24] Corruption diminishes quality of life.

Corruption disrupts the relationship between people and governance. In a corrupt system, officials act in their own interest rather than in the interests of their constituencies.[25] Corrupt bureaucracies tend to be of lower quality than clean bureaucracies,[26] and corrupt bureaucrats conceal information and create

19 Vitor Gaspar, Paolo Mauro, and Paulo Medas, 'Tackling Corruption in Government' (*IMFBlog*, 4 April 2019) <http://blogs.imf.org/2019/04/04/tackling-corruption-in-government/> accessed 1 June 2020.

20 Ibid.

21 Sadika Hameed and Jeremiah Magpile, *The Costs of Corruption: Strategies for Ending a Tax on Private-Sector-Led Growth* (Rowman & Littlefield 2014) 3.

22 See Sanjeev Gupta, Hamid Davoodi, and Erwin Tiongson, 'Corruption and the Provision of Health Care and Education Services' (2000) International Monetary Fund Working Paper 116; Maureen Lewis, 'Governance and Corruption in Public Health Care Systems' (2006) Center for Global Development Working Paper 78.

23 See Jonathan Lehne, Jacob N Shapiro, and Oliver Vanden Eynde, 'Building Connections: Political Corruption and Road Construction in India' (2018) 131 J Dev Econ 62; Shuhong Wang, Danqing Zhao, and Hanxue Chen, 'Government Corruption, Resource Misallocation, and Ecological Efficiency' (2020) 85 Energy Econ 104573; Bingyong Zheng and Junji Xiao, 'Corruption and Investment: Theory and Evidence from China' (2020) 175 J Econ Behav & Org 40; Elisa Gamberoni, Christine Gartner, Claire Giordano, and Paloma Lopez-Garcia, 'Is Corruption Efficiency-Enhancing? A Case Study of Nine Central and Eastern European Countries' (2016) ECB Working Paper 1950.

24 See Chun-Ping Chang and Yu Hao, 'Environmental Performance, Corruption and Economic Growth: Global Evidence Using a New Data Set' (2017) 49 Applied Econ 498; Lorenzo Pellegrini and Reyer Gerlagh, 'Corruption, Democracy, and Environmental Policy: An Empirical Contribution to the Debate' (2006) 15 J Env & Dev 332.

25 Robert Klitgaard, *Controlling Corruption* (UCLA Press 1988) 1–12.

26 Bola Dauda, 'Corruption, Nepotism, and Anti-Bureaucratic Behaviors' in Nimi Wariboko and Toyin Falola (eds), *The Palgrave Handbook of African Social Ethics* (Palgrave Macmillan 2020) 317; Thomas Herzfeld and Christoph Weiss, 'Corruption and Legal (In)Effectiveness: An Empirical Investigation' (2003) 19 Eur J Pol Econ 621, 629.

obstacles to service.[27] Corruption engenders substantial mistrust of and disengagement from institutions of governance.[28]

Corruption negatively affects markets and the conduct of business. Corruption perverts the operation of markets: rather than production and consumption decisions being made on the basis of cost, quality, and need, those decisions are based on the quality of bribes. Indeed, much of the impetus for passage of the United States' Foreign Corrupt Practices Act was the legislature's desire to safeguard the integrity of the global market.[29] Several chapters in this book choose to focus on the effect of the global corruption regime on producers, but readers should not interpret that as suggesting that only producers are affected. Distortions to markets affect consumers as much as producers.

Corruption, particularly bribery, does impose costs on individual business firms. Business firms that pay bribes spend more time and incur greater costs when dealing with government than business firms that do not pay bribes.[30] Business firms that pay bribes incur higher costs when raising capital.[31] Firms that pay bribes are less productive, and experience slower rates of growth.[32] They

27 See Robert Wade, 'The Market for Public Office: Why the Indian State is Not Better at Development' (1985) 13 World Dev 467, 474–80; Robert Wade, 'The System of Administrative and Political Corruption: Canal Irrigation in South India' (1982) 18 J Dev Stud 287, 314–315.

28 See Eric M Uslaner, 'Trust and Corruption' in Johann Graf Lambsdorff, Markus Taube, and Matthias Schramm (eds), *The New Institutional Economics of Corruption* (Routledge 2005) 76, 82–87.

29 The United States Congress emphasized their intention to preserve market integrity through passage of the Act. At the opening of committee hearings, a Chair warned that '[t]he practice of bribing foreign officials has corrupted … the free market system, under which the most efficient producers with the best products are supposed to prevail.' Foreign and Corporate Bribes: Hearings on S 3133 Before the S Comm on Banking, Hous & Urban Affairs, 94th Cong (1976) 1 (statement of Sen William Proxmire, Chair). The Senate Report that accompanied the Senate version of the Act described bribery as 'fundamentally destructive of th[e] basic tenet' of business and warned that bribery threatened 'the very stability of overseas business.' S Rep No 95-114 (1977). 4. The House Report stated that bribery 'short circuits the marketplace … by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products.' HR Rep No 95-640 (1976) 4.

30 See Francisco Ciocchini, Erik Durbin, and David TC Ng, 'Does Corruption Increase Emerging Market Bond Spreads?' (2003) 55 J Econ & Bus 503, 512–513; Charles MC Lee and David Ng, 'Corruption and International Valuation: Does Virtue Pay?' (2005) 18 J Investing 23, 31–33.

31 See Alejandro Gaviria, 'Assessing the Effects of Corruption and Crime on Firm Performance: Evidence from Latin America' (2002) 3 Emerging Mts Rev 245, 267; Daniel Kaufman and Shang-Jin Wei, 'Does 'Grease Money' Speed Up the Wheels of Commerce?' (1999) World Bank Policy Research Working Paper No. 2254.

32 Raymond Fisman and Jakob Svensson, 'Are Corruption and Taxation Really Harmful to Growth? Firm-Level Evidence' (2007) 83 J Dev Econ 63, 64; Johann Graf Lambsdorff, 'How Corruption Affects Productivity' (2003) 56 Kyklos: Intl Rev for Soc Sci 457, 468.

also encounter more difficulties when trying to form partnerships and other relationships.[33]

All of these harms can be measured and discussed in a clinical way. As Tamar Hostovsky Brandes reminds the reader, however, there are other less quantifiable aspects to corruption that merit attention.[34] Corruption inflicts indignities both small and large. In the last few years, millions of people around the world have protested against corruption. Protesters have endured bitter Eastern European winters and suffocating Middle Eastern summers. They have braved snipers, beatings by security forces, and imprisonment. People have even self-immolated to protest corruption. People despise corruption, and the anger it engenders cannot be ignored.

2 Transnationalization of law

The phrase 'transnational law' has the same imprecise boundaries as the word 'corruption.'[35] As with the phenomenon of corruption, the concept may be more important than a precise definition. Conceptually, transnational law fills a lacuna in doctrinal theories of law. The term 'domestic law' addresses laws generated unilaterally by sovereign states and generally applicable to parties and actions over which they have jurisdiction. The term 'international law' addresses laws generated jointly (bilaterally, plurilaterally, or multilaterally) by sovereign states or the international organizations they have created. There should be, however, a jurisprudential lexicon or theories for activities that transcend political borders and cannot be understood, captured, or effectively regulated solely within the confines of traditional legal categories.

Business scholars, in particular, have observed the gap in traditional legal thinking, perhaps because business activities increasingly occur without reference to political borders. Stephen Kobrin notes, for example, that whereas multinational business firms operate as a unitary whole and 'emphasize control exercised by the center over the enterprise as a whole,' legal thinking continues to conceive of 'a transnational firm as "stringing together corporations created by the laws of different states."'[36] Kobrin explains how the reality of business does not conform to a world in which relationships exist only within the confines of a polity or between nations:

33 See Philip M Nichols, 'The Business Case for Complying With Bribery Laws' (2012) 49 Am Bus LJ 325, 334–352.

34 Tamar Hostovsky Brandes, 'The Relevance of Moral Arguments against Foreign Bribery: Israel as a Case Study', ch 5.

35 The phrase 'transnational law' was used as early as 1956, in Philip C Jessup, *Transnational Law* (Yale UP 1956).

36 Stephen J Kobrin, 'Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms, and Human Rights' (2009) 19 Bus Ethics Q 349, 356.

> Borders are 'transcended' rather than crossed, relations become increasingly 'supraterritorial' as distance, borders and geographic space itself lose economic and political significance. Markets no longer need to be defined in terms of geographic proximity and, in some instances, the location of transactions and organizations has become indeterminate.[37]

Kobrin and other business scholars do not suggest that domestic or international law has become obsolete, nor do they argue for the replacement of domestic or international law by some other paradigm.[38] Instead, they lament the failure of legal theory to accurately describe the world that they occupy. The concept of transnational law aims to remedy that failure.

In an ever-globalizing world, many sectors have come to recognize the usefulness of the transnational paradigm. Capital is both extremely liquid and relatively impervious to political borders; many who study financial regulation now embrace the concept of transnational rules.[39] Environmental protection, human rights, the internet, labour, migration, narcotics control, terrorism, and more all lend themselves to transnational regulation.[40] As David Zaring points out, many human activities now seem to fall within the ambit of the transnational.[41]

As a concept, transnational law is no more fully theorized than other jurisprudential theories,[42] and deliberately the choice has been made not to circumscribe our project to a single theory of transnational law. It should be

37 Stephen J Kobrin, 'Globalization, Transnational Corporations and the Future of Global Governance' in Andreas Georg Scherer and Guido Palazzo (eds), *Handbook of Research on Global Corporate Citizenship* (Edward Elgar 2008) 250.

38 See Kobrin, 'Private Political Authority' (n 36) 361 (acknowledging the power and relevance of sovereign states).

39 E.g., Abraham Newman and Elliot Posner, 'Transnational Feedback, Soft Law, and Preferences in Global Financial Regulation' (2016) 23 Rev Intl Pol Econ 123; David Zaring, 'Finding Legal Principle in Global Financial Regulation' (2011) 52 Va J Intl L 683.

40 See Tilmann Altwicker, 'Explaining the Emergence of Transnational Counter-Terrorism Legislation in International Law-Making' (2018) 24 Finnish YB Intl L 3; Tilmann Altwicker, 'Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts' (2018) 29 EJIL 581 (2018); Adelle Blackett and Laurence R Helfer, 'Introduction to the Symposium on Transnational Futures of International Labor Law' (2019) 113 AJIL Unbound 385; Laura Mai, '(Transnational) Law for the Anthropocene: Revisiting Jessup's Move From "What?" to "How?"' (2020) 11 Transnatl Legal Theory 105; Neha Mishra, 'Building Bridges: International Trade Law, Internet Governance, and the Regulation of Data Flows' (2019) 52 Vand J Transnatl L 463; Bruce Zagaris and Alex Psilakis, 'International Narcotics Control and Transnational Organized Crime' (2019) 35 Intl Enforcement L Rep 41.

41 David Zaring, 'Rulemaking and Adjudication in International Law' (2008) 46 Colum J Transnatl L 563, 565–566.

42 See Craig M Scott, 'Transnational Law as Proto-concept: Three Conceptions' (2009) 10 German LJ 859, 868–875 (parsing theories of legal realism into three categories—traditionalism, decisionism, and pluralism—but arguing that pluralism has the strongest explanatory power).

noted, nonetheless, that most theorists agree that transnationalization consists of something different than an expansion of domestic jurisdiction:

> [T]he term transnational does not merely signify the extension of … normativity across borders … Instead, the term transnational identifies an intricate connection of spatial and conceptual dimensions: in addressing … the demarcation of emerging and evolving spaces and … the construction of these spaces as artifacts for human activity, communication and rationality.[43]

Gregory Schaffer offers a cohesive model of the creation of transnational networks of rules.[44] He suggests a plurality of sources from which rules emerge, including 'bureaucratic networks of public officials, hybrid public-private networks, and networks of purely private parties.'[45] These sources interact in dynamic and recursive ways.[46] In this dynamic process, 'the transnational and local are held in tension, the actors engaged in transnational legal processes seek to influence local lawmaking and practice, and the national legal norms, adaptations, and resistance provide models for and feed back into transnational law.'[47] The product of this dynamic process changes constantly, and manifests itself differently across the breadth of its application.

Describing this process reveals many open questions. What roles and how much influence do the many actors play and have? Does the absence of democratic ratification render transnational law undemocratic? Do hegemons have undue influence over the process, or does it decentralized nature give voice to less powerful actors? It is those sorts of questions that chapters of this book address.

3 The global anti-corruption regime

As with so many other terms used in this book, the phrase 'global anti-corruption regime' lacks precise boundaries. The term exists for the convenience of those who study or practice in the realm of corruption control, who use it to designate an uncoordinated network of rules, laws, processes, and norms that operate to control corruption. That network clearly constitutes transnational law and is a natural object of study.

43 Peer Zumbansen, 'Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-Pluralist Order' (2012) 1 Global Constitutionalism 16, 22.

44 Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) 37 L & Soc Inquiry 229.

45 Ibid 236.

46 Ibid 238. See Terence Halliday and Bruce Carruthers, 'The Recursivity of Law: Global Norm-Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes' (2007) 112 Am J Sociol 1135 (describing dynamism and recursivity in the creation of transnational rules).

47 Shaffer (n 44) 238.

Many strands work together to create the network that constitutes the global anti-corruption regime. The regime constantly changes and grows,[48] but its basic components can be described.

3.1 Domestic activities

The domestic law of every country in the world criminalizes the bribery of its own officials, and most criminalize other forms of corruption as well. The law of the Falkland Islands, the southernmost polity in the world, has already been mentioned.[49] Greenland, the northernmost polity, also criminalizes corruption.[50] Russia, the easternmost country in the world, has enacted a plethora of laws and rules to control corruption, as has the westernmost, the United States.[51] Every country or state-equivalent in between those four corners prohibits the corruption of its own officials.

A growing body of domestic legal systems also prohibits the bribery of foreign officials. Once, only the laws of the United States and Sweden prohibited transnational bribery.[52] Now, the laws of virtually all of the major trading or investing countries have similar provisions.[53] These laws vary in scope and jurisdictional reach; the most common iteration criminalizes the payment of bribes to foreign government officials for purposes that have to do with business.

Laws, however, are not the only domestic contribution to the global anti-corruption regime. Many polities also contribute processes, administrative regulations, and training and norm creation. One of the most controversial processes, the conclusion of criminal investigations by deferred prosecution agreements or non-prosecution agreements, is the subject of a chapter in this book.[54] Administrative rules, on the other hand, tend to generate less debate. Both the federal government of the United States and the central government of China, for example, debar actors who act corruptly from further business with those

48 Gwendolyn Gordon observes that legal scholars tend to mistake culture as static when in reality it constantly changes. Gwendolyn Gordon, 'Culture in Corporate Law' (2016) 39 Seattle UL Rev 353, 363.

49 Text to note 11.

50 Criminal Code 1954, § 17.

51 See V Shorokhov, 'Anti-Corruption Policy in the Russian Federation' (2017) 3 Eur J Natural History 22; Mark S Gaioni, 'Federal Anticorruption Law in the State and Local Context: Defining the Scope of 18 USC Sec. 666' (2012) 46 Colum JL & Soc Probs 207.

52 15 USC § 78dd-1 (1978); Brottsbalken, SFS § 103 (1997).

53 See Nichols (n 33) 362–363 (reviewing laws of major trading and investing countries).

54 See Simon St-Georges and Denis Saint-Martin, 'The Global Diffusion of DPAs: The Not So Functional Remaking of the Rules against Business Corruption', ch 20. See also Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement' (2015) 49 UC Davis L Rev 497 (describing and discussing the controversial use of these agreements).

governments.[55] These are not small contributions to the global anti-corruption regime. In 2018, the United States government alone debarred 1,334 entities from procurement activities.[56]

States also robustly educate and generate norms. Hong Kong's Independent Commission Against Corruption stands out as a leader.[57] The Independent Commission is empowered to investigate and prosecute allegations of corruption, but that is only one of the three prongs in its anti-corruption portfolio. The Commission also assists with regular audits of every agency in the Hong Kong government, as required by Hong Kong law, to not only account for spending and other decisions but also find weaknesses in the decision-making and reporting processes that might lend themselves to corruption.[58] The third prong of the Commission's charge is education. The Commission conducts educational seminars in secondary schools, and has produced an extensive catalogue of educational videos and publications that are available for public consumption.[59]

3.2 Private dispute settlement

Arbitral bodies have developed a set of rules distinct from local laws and regulations. These rules may have more influence on transnational business than domestic law.[60] Arbitration usually operates less expensively and more quickly than judicial bodies. In polities with unstable, weak, or inexperienced institutions, arbitration offers a more reliable and trustworthy alternative to judicial bodies.[61]

Business firms that engage in corruption cut off their access to arbitration. The seminal case, ICC 1110, decided in 1963, involved an agent's request for payment of commissions on oil contracts in Argentina. The agent clearly had been involved in corrupt activities. Judge Gunnar Lagergren observed that:

55 Federal Acquisitions Regulations System—Causes for Debarment, 48 CFR § 9.406-2; Tong Xin-chao, 'Chinese Procurement Law: Current Legal Frameworks and a Transition to the World Trade Organization's Government Procurement Agreement' (2003) 17 Temple Intl & Comp LJ 139, 163–164.

56 *Annual Report of the Interagency Suspension and Debarment Committee to Congress* (30 October 2019) 7.

57 See Jon ST Quah, 'Anti-Corruption Agencies in Four Asian Countries: A Comparative Analysis' in Bidya Bowornwathana and Clay Wescott (eds), *Comparative Governance Reform in Asia: Democracy, Corruption, and Government Trust* (Emerald 2008) 85 (describing and comparing anti-corruption agencies).

58 ICAC, 'Internal Audit Functions' <www.icac.nsw.gov.au/prevention/foundations-for-corruption-prevention/internal-audit-functions> accessed 1 June 2020.

59 ICAC, 'Anti-Corruption Resources' <www.icac.org.hk/en/resource/publications-and-videos/ps/index.html> accessed 1 June 2020.

60 See Christopher R Drahozal and Richard W Naimark, *Towards a Science of International Arbitration: Collected Empirical Research* (Kluwer 2005) 59 (noting that 95% of transnational business contracts include an arbitration clause).

61 See Ilias Bantekas, *Introduction to International Arbitration* (CUP 2015) 16–20.

> Whether one is taking the point of view of good governance or that of commercial ethics it is impossible to close one's eyes to the probable destination of amounts of this magnitude, and to the destructive effect thereof on the business pattern with consequent impairment of industrial progress. Such corruption is an international evil; it is contrary to good morals and to international public policy common to the community of nations. [Firms engaged in corruption] have forfeited any right to ask for assistance of the machinery of justice.[62]

In the context of transnationalization, Judge Lagergren's ruling exhibits both rulemaking and the expression of norms that transcend locality.

More recently, relying on the principle that agreements to arbitrate are separable from otherwise unenforceable contracts,[63] arbitral bodies have granted limited access to arbitration even when bribery is alleged, but will not enforce contracts tainted by corruption.

> [B]ribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.[64]

In other words, arbitral panels will hear a case that involves corruption, but will not enforce the underlying contract.[65]

Arbitral bodies actively contribute to the global anti-corruption regime in other ways. Tribunals may, for example, investigate the possibility of corruption on their own initiative; if they fail to investigate and the occurrence of bribery is found in later proceedings, a tribunal's decision may legally be set aside by a national court.[66]

3.3 International instruments

Although transnational law encompasses sources other than those that govern relations between states, the instruments that govern those relationships have contributed substantially to the global anti-corruption regime. Most of those

62 ICC Case No 1110, Award (1963) [20], reprinted in (1994) 10 Arbitration Intl 282, 294.

63 Bantekas (n 61) 27–29.

64 *World Duty Free Company Ltd v. Republic of Kenya*, ICSID (World Bank) Case No ARB/00/7, Award (4 October 2006) [157].

65 See Matt Reeder, 'Estop That! Defeating a Corrupt State's Corruption Defense to ICSID BIT Arbitration' (2016) 27 Am Rev Intl Arb 311, 313–314.

66 Bernardo Cremades and David Cairns, 'Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering, and Fraud' in Kristine Karsten and Andrew Berkeley (eds), *Arbitration, Money Laundering, Corruption and Fraud* (Kluwer 2003) 67.

instruments require signatories to criminalize bribery, particularly the bribery of foreign officials.

The Organization of American States, led by Venezuela, promulgated the first of these conventions. Venezuela was then at a flection point in its democratic and economic progressions, both of which had been set back by bank failures caused by corruption.[67] The Inter-American Convention on Corruption requires all members of the organization to criminalize transnational bribery, and also requires members to cooperate with one another in the investigation, apprehension, and prosecution of persons and entities that pay bribes.[68]

The Organisation for Economic Cooperation and Development, universally known as the OECD, soon followed. Members of the OECD presented even more ripe conditions for an international instrument than did the Americas. Several Western European members were beset by wrenching corruption scandals, perhaps most painfully in Germany, where the corruption scandal engulfed the respected architect of German reunification.[69] The political and commercial reintegration of Central and Eastern Europe with Western Europe following the end of the Cold War also focused Western European attention on corruption. As Mark Pieth notes, 'Suddenly corruption abroad no longer happened on a remote continent, far away from home.'[70] In East Asia, Japan endured a series of corruption scandals so severe that Japan amended its constitution and changed the structure of its government.[71] A positivist international law account of these instruments might give scant attention to these background conditions; the plurality of sources considered in transnational law accounts makes them relevant. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was adopted one year after the Inter-American Convention; it too requires members to criminalize transnational bribery and to cooperate with one another in investigation and enforcement.[72]

Other international organizations followed with similar instruments. The African Union, the Council of Europe, and the European Union have each

67 See Bruce Zagaris and Shaila Lakhani Ohri, 'The Emergence of an International Enforcement Regime on Transnational Corruption in the Americas' (1999) 30 L & Poly Intl Bus 53, 65 (describing Venezuela's leadership).

68 Inter-American Convention against Corruption, 29 March 1996, 35 ILM 724. See 'Developments in the Law—International Criminal Law' (2001) 114 Harv L Rev 1943, 2032 (describing requirements).

69 See Kyle James, 'The Scandal that Rocked the Government of Helmut Kohl' (*DeutchesWelt* 2010) <www.dw.com/en/the-scandal-that-rocked-the-government-of-helmut-kohl/a-5137950>.

70 Mark Pieth, 'International Efforts to Combat Corruption' in *The Foreign Corrupt Practices Act: How to Comply Under the New Amendments and the OECD Convention* (Am Bar Assn 1999) E-1.

71 See Fakutsa Masumi, 'Political Reform's Path of No Return' (1994) 41 Japan Q 254, 255 (describing the scandals and their aftermath).

72 (Adopted 17 December 1997, entered into force 15 February 1999) 37 ILM 1.

agreed to similar requirements.[73] More recently, the United Nations General Assembly adopted a Convention Against Corruption, which requires signatories to criminalize transnational bribery.[74] Just to give a glimpse of its universal acceptance, it must be noted that the UN Convention Against Corruption has to date 187 State Parties, even more than the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (170), the UN Convention on the Elimination of All Forms of Racial Discrimination (182), the Convention on the Prevention and Punishment of the Crime of Genocide (152).

The contributions of international organizations go well beyond the promulgation of conventions. The OECD is particularly active in anti-corruption activities. The OECD Working Group on Bribery, for example, monitors each member's compliance with the Convention and publishes lengthy, very detailed reports.[75] The OECD publishes myriad working papers, maintains a publicly accessible knowledge portal, and funds numerous anti-corruption programs in non-member countries, many of which attempt to create or strengthen local laws and legal systems.[76] The United Nations has also engaged in activities beyond the promulgation of its Convention. The Sustainable Development Goals established by the United Nations include Goal 16: 'Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.' Target 16.5 within this goal is to 'substantially reduce corruption and bribery in all their forms' as measured by indicator 16.5.1, the 'proportion of persons who had at least one contact with a public official and who paid a bribe to a public official, or were asked for a bribe by those public officials, during the previous 12 months,' and indicator 16.5.2, the 'proportion of businesses that had at least one contact with a public official and that paid a bribe to a public official, or were asked for a bribe by those public officials during the previous 12 months.'[77] The interplay between these quantified measures, the requirements of its international instruments, and the norms expressed by the United Nations exemplifies the plurality of sources embraced by transnational law theory.

73 African Union, Convention on Preventing and Combating Corruption (adopted 11 July 2003) 43 ILM 5; Council of Europe, Criminal Law Convention on Corruption, ETS No 173, 27 January 1999, 38 ILM 505.

74 United Nations Convention against Corruption (opened for signature 9 December 2003, entered into force 14 December 2005) 2349 UNTS 41, arts 15–20.

75 OECD, 'Country Monitoring of the OECD Anti-Bribery Convention' <www.oecd.org/corruption/countrymonitoringoftheoecdanti-briberyconvention.htm> accessed 1 June 2020.

76 See OECD, 'Anti-Corruption and Integrity Hub' <www.oecd.org/corruption-integrity/> accessed 1 June 2020.

77 United Nations, Department of Economic and Social Affairs, 'SDG Indicators' <http://unstats.un.org/sdgs/metadata/?Text=&Goal=16&Target=16.5> accessed 1 June 2020.

3.4 Civil society and international financial institutions

Members of civil society make significant contributions to the global anti-corruption regime. A few months before the OECD promulgated its convention, for example, the International Chamber of Commerce adopted a rule forbidding the payment or acceptance of bribes or kickbacks by members, requiring members to control payments by their agents, and requiring members to adopt accounting procedures that would preclude the hiding of illicit payments.[78] The Chamber maintains a Commission on Anti-Corruption, which regularly publishes model codes of corporate conduct and other guidelines for business behavior.[79]

Transparency International plays an even more prominent role than the International Chamber of Commerce. In addition to publishing its very influential Corruption Perceptions Index, Transparency International conducts and publishes 'National Integrity Assessments,' which include evaluations of political structures, laws, and legal enforcement.[80] Transparency International makes recommendations on changes to these systems, and also publishes hundreds of documents that include model codes and laws, as well as suggested transnational standards. Transparency International also articulates norms and indicators that transcend political borders.[81]

The International Chamber of Commerce and Transparency International are only two of hundreds, perhaps thousands, of civil organizations that contribute to the global anti-corruption regime. To describe all of them, or even just to list them, would overwhelm this chapter. The activities of the World Bank Group, however, must be noted.

The World Bank Group has promulgated rules that forbid corruption in any project involving the Group. These are not toothless rules; the World Bank Group enforces them through hearings and debarment. The Integrity Vice Presidency division of the World Bank actively investigates and holds hearings on such claims.[82] If bribery is found to have occurred, then the responsible person or firm is placed on an embargo list and may not become involved in any project involving the World Bank Group.[83] The International Monetary Fund and each of the Regional Development Banks have similar processes, and maintain similar

78 Rules of Conduct to Combat Extortion and Bribery, arts 1, 2 & 4.

79 See, e.g., Commission on Anti-Corruption, *Combating Extortion and Bribery: ICC Rules of Conduct and Recommendations* (ICC 2005).

80 Transparency International, 'National Integrity Systems Assessment' <www.transparency.org/en/national-integrity-system-assessments> accessed 1 June 2020.

81 See, e.g., Transparency International, 'Ethics and Integrity' <www.transparency.org/en/the-organisation/ethics-integrity> accessed 1 June 2020.

82 Pascale Hélène Dubois, 'Domestic and International Administrative Tools to Combat Fraud & Corruption: A Comparison of US Suspension and Debarment with the World Bank's Sanctions System' (2012) U Chi Legal F 195, 218–226.

83 Sope Williams, 'The Debarment of Corrupt Contractors from World Bank-Financed Contracts' (2007) 36 Pub Contract LJ 277, 278.

lists; reciprocal agreements among these institutions result in cross-debarment.[84] As of June 2020, more than twelve hundred entities were debarred.

The World Bank Group contributes far more than its own administrative rules and processes. The World Bank Group actively promotes good governance programs, and frequently works with countries to change their laws, their legal institutions, and their enforcement processes. The World Bank constitutes a microcosm of transnational law creation. It is fitting that this chapter begins with an iconic speech by a former President, and that this section ends with reference to the significant contributions of the Group.

4 This book

This book does not use the global anti-corruption regime as a tool to create another jurisprudential theory of transnational law. Instead, the chapters in this book address discrete questions or issues raised by the transnationalization of anti-corruption law. The book is divided into five parts, each of which asks questions about both the content of the global anti-corruption regime and the transnational nature of that regime.

4.1 Part I: International, regional, and domestic sources of anti-corruption law – eclecticism or convergence?

The first part of this book addresses fundamental questions about transnational legal regimes, regarding the sources of and influences on the rules that make up the regime. Some models of transnational law suggest, for example, that rules are transplanted from one jurisdiction to another while other models suggest a diffusion of rules across networks.[85] Some models suggest that hegemons influence the content and structure of transnational regimes, while others suggest that the nature of transnational regimes gives greater voice to a plurality of sources.[86]

This part begins with a chapter by Elitza Katzarova and Jessica Ansart, which investigates the extent to which the United States' Foreign Corruption Practices Act influenced international instruments and the role played by the United States as a political actor.[87] The chapter finds that the Foreign Corrupt Practices Act served as a model for the instruments promulgated by the Organisation of American States and the Organisation for Economic Cooperation and Development, which, in turn, influenced other instruments. The chapter also

84 Dubois (n 82) 232.

85 See David Marsh and JC Sherman, 'Policy Diffusion and Policy Transfer' (2009) 30 Poly Study 269, 270–274 (discussing differences in the models).

86 See, e.g., Boaventura de Sousa Santos and César A Rodríguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (CUP 2005) (edited volume that addresses questions of hegemony and plurality in transnational regimes).

87 Elitza Katzarova and Jessica Ansart, 'The Americanization of International Anti-corruption: The Influence of the FCPA on the OAS and OECD Conventions', ch 2.

argues that not only did the United States as a political actor strongly influence international instruments, but also that its activities with respect to corruption are part of a broader effort to influence transnational criminal regimes and enforcement. The chapter concludes that US influence is so extensive that US enforcement techniques must be understood in order to understand enforcement of the global anticorruption regime.

The second chapter in the part, by Sean Griffith and Thomas Lee, expands on that argument by asking why countries succumbed to the United States' influence by enacting laws to prohibit transnational bribery.[88] They suggest that following the promulgation of international instruments, the United States expanded the jurisdictional reach of its own laws so as to encompass foreign firms that conducted business in the United States. These firms were subject to restrictions that did not apply to compatriot firms that did not conduct business in the United States. In order to even the competitive field, therefore, these firms applied pressure to their home governments to enact domestic rules similar to those of the United States. Griffith and Lee's contribution constitutes a carefully argued analysis of the creation of one strand of the global anti-corruption regime.

The third chapter in this part examines the role of another powerful actor, the Organisation for Economic Cooperation and Development.[89] Rachel Brewster and Andres Ortiz scrutinize recent corruption scandals in South America and subsequent reactions, through the lenses of a theory of government decision-making and theories of reform. Brewster and Ortiz particularly observe the role of the OECD as a political entrepreneur. They find that South American countries with membership in the OECD reacted differently and instituted different reforms than nonmember countries. Theories of transnational law creation emphasize the role that knowledge plays as well as the influence of politics;[90] this chapter provides a close examination of both in the ongoing creation of the global anti-corruption regime.

The fourth chapter, by Tamar Hostovsky Brandes, also contemplates sources that contribute to the global anti-corruption regime.[91] Brandes examines the adoption and implementation of anti-corruption laws in Israel, and finds that although the economic aspects of these laws were recognized, the moral aspects played a powerful role in their adoption and in their subsequent implementation. Brandes's analysis somewhat rebukes those who argue that the creation of

88 Sean J Griffith and Thomas H Lee, 'Toward an Interest Group Theory of Foreign Anti-Corruption Laws', ch 3.

89 Rachel Brewster and Andres Ortiz, 'Never Waste A Crisis: Anticorruption Reforms in South America', ch 4.

90 E.g., Peter M Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46 Intl Org 1 (emphasizing the importance of knowledge as technical uncertainty grows, and suggesting that 'epistemic communities'—groups of technical experts—have substantial political influence in the political aspects of regime creation).

91 Tamar Hostovsky Brandes, 'The Relevance of Moral Arguments against Foreign Bribery: Israel as a Case Study', ch 5.

the global anti-corruption regime only became possible when advocates abandoned moral arguments and transformed the discussion into one of economics and business rationality.[92] Brandes's analysis of the critical influence that moral notions have on Israel's enforcement of anti-corruption rules, and her argument for explicitly addressing moral questions when implementing laws, amply demonstrate the plurality of not only sources but also drivers that contribute to the global anti-corruption regime.

The fifth chapter takes the reader from Israel to France. Jonathan Bourguignon examines a recently enacted anti-corruption law, particularly the extraterritorial reach of that law.[93] The reach of Loi Sapin II of 2016[94] might exceed that of the United States' Foreign Corrupt Practices Act and the United Kingdom's Bribery Act. In this case, Bourguignon finds that France acts as the social entrepreneur. By enacting a law with such extensive reach, Bourguignon argues, France applies pressure on other states to avoid jurisdictional conflicts by coordinating and distributing prosecution. Bourguignon provides insights into Loi Sapin II, but by showing how the choices that France makes in crafting its domestic law influence the practices of other countries, also demonstrates the dynamism of the creation of the global anti-corruption regime.

The final chapter in this part takes the reader to yet another part of the world and involves yet another set of influential actors. Qingxiu Bu examines the relationships among China and several countries in Africa.[95] Bu warns that the Chinese practice of guanxi, highly institutionalized networks of social relationships and obligations, might interact with embedded corruption in parts of Africa in a way that increases corruption.[96] Bu emphasizes, however, that guanxi differs little from the social and professional networks nurtured by Western business firms. Bu suggests that the lack of sophisticated understandings of the real nature of guanxi in Western courts, and a lack of understanding of African systems by Chinese enforcement bodies, will result in uneven application of anti-corruption laws that disadvantage business firms from each side. Interestingly, Bu argues that the resolution of these conflicts lies not in the West nor in China but instead within Africa. Bu therefore not only demonstrates the dynamism of the global

92 See Beverley Earle, 'The United States' Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument' (1996) 14 Dick J Intl L 207, 209 (discussing this argument).

93 Jonathan Bourguignon, 'France's New Approach Towards Extraterritoriality in Anti-Corruption Law: Paving The Way for a Protective Principle in Economic Matters?', ch 6.

94 Loi no 2016–1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, Journal Officiel de la République Française No 0287 of 10 December 2016, Text No 2.

95 Qingxiu Bu, 'Chinese Multinational Corporations' Obligations in the Global Anti-Corruption: Levelling the Playing Field in Africa', ch 7.

96 In general, the relationship between guanxi and corruption generates substantial interest. See Jack Barbalet, 'Guanxi as Social Exchange: Emotions, Power and Corruption' (2018) 52 Sociology 934; Danielle E Warren, Thomas W Dunfee, and Naihe Li, 'Social Exchange in China: The Double-Edged Sword of Guanxi' (2004) 55 J Bus Ethics 353.

anti-corruption regime, but also makes a convincing argument for a wide plurality of sources for that regime.

4.2 Part II: Traditional methods reconsidered

Transnational law is dynamic and recursive, interacting with and reexamining itself in a process of constant change. This part of the book engages in that process. Each of the five chapters examines a given process, discusses its weaknesses, and suggests changes to the global anti-corruption regime.

The first chapter in this part, by Thomas Kruessmann, observes that despite frequent reference to the role that they could play, civil actions account for very little of the global anti-corruption regime.[97] Kruessmann argues that the paucity of civil law actions stems from a lack of imagination on the part of those who contribute to the creation of the regime. The traditional means of imposing liability – through breach of contract or infliction of a tort – are too uncertain and expensive when used to litigate issues of corruption. Kruessmann suggests looking elsewhere, and offers collective redress, as in consumer liability actions, and personal accountability, as imposed on corporate executives by supervisory boards, as examples of reimagined and more effective civil actions.

The second chapter in this part examines the effectiveness of voluntary standards and guidelines.[98] These privately developed tools are often called 'soft law' and constitute an important component of transnational regimes.[99] Vera Cherepanova begins by describing the emergence of myriad standards, and then usefully creates a four-part typology of existing standards.[100] Cherepanova examines the effectiveness of standards in controlling corruption and concludes that in the absence of accountability they have little effect. Cherepanova does not, however, argue that standards should be discarded; instead, she suggests that scholars and practitioners continue to study them so as to improve their effectiveness.

The third chapter in this part also examines standards and guidelines.[101] Eduard Ivanov reports on an empirical study he conducted, comparing the 'ocean' of standards and guidelines within the global anti-corruption regime to the relatively straightforward guidelines promulgated to curtail international money laundering and the financing of terrorists. Ivanov suggests that the

97 Thomas Kruessmann, 'The Failure of Transnational Anti-Corruption Law: Civil Law Strategies Reconsidered', ch 8.

98 Vera Cherepanova, 'The Proliferation of International Anti-Corruption Initiatives, Standards, and Guidelines: Classification, Benefits and Shortcomings, Future Prospects', ch 9.

99 See Christine M Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 ICLQ 850, 852.

100 See ibid 850–851 (criticizing the failure of scholars to realize the many forms taken by standards).

101 Eduard Ivanov, 'In the Ocean of Anti-Corruption Compliance Standards and Guidelines: Time for Codification?', ch 10.

multiplicity of resources, models, and guidance may work to the detriment of the goals of the anti-corruption regime, by leaving individual organizations confused and uncertain. He suggests standardization and codification of standards and guidelines.

Jimena Reyes, in the fourth chapter in this part, suggests a reconceptualization of the international anti-corruption instruments in Latin America.[102] Reyes notes that corruption has severely undermined the democratic revolutions throughout Latin America. She finds notions of grand corruption and theories of state capture to be too limited, in that they do not reflect the means through which corruption has undermined these states, and suggests new definitions. She also expresses frustration at the lack of connectivity between human rights regimes and anti-corruption regimes.[103] Reyes suggests that explicitly linking corruption to human rights would allow victims of corruption and of state capture to hold states and corrupt actors accountable in ways that are not available within the current global anti-corruption regime.

The final chapter in this part applies a similar analysis to international criminal law.[104] Vishal Sharma notes the many harms inflicted on society by large-scale corruption. In light of these harms, Sharma criticizes the failure of international criminal law to consider large-scale corruption as an international crime. He also notes that corruption undermines the prosecution of other crimes. Sharma suggests that corruption be considered an international crime prosecutable under the Statute of Rome, and proposes changes to the Statute of Rome to inoculate it against corruption. Sharma's chapter, along with the chapter contributed by Reyes, suggests a relatively unexplored process in the creation of transnational law. Sharma and Reyes suggest dynamic interaction not just within the context of a single transnational regime, but also between regimes. Their proposals demonstrate that this kind of interaction could enhance each of the interacting regimes.

102 Jimena Reyes, 'State Capture Through Corruption: How Can Human Rights Help?', ch 11.

103 Although only tangential to Reyes's arguments, the debate over whether corruption itself is a human rights violation or only contributes to and enables human rights violations may be of interest to some readers. Anne Peters provides a thorough introduction to this debate in 'Corruption and Human Rights' (2015) Basel Institute on Governance Working Paper No 20. The United Nations Office of the High Commissioner on Human Rights, on the other hand, provides an example of sidestepping the debate, opining that 'corruption itself is best seen as a structural obstacle to the enjoyment of human rights' but at the same time 'promot[ing] a human rights-based approach to anti-corruption.' Office of the United Nations High Commissioner for Human, 'Corruption and Human Rights' <www.ohchr.org/EN/Issues/CorruptionAndHR/Pages/CorruptionAndHRIndex.aspx> accessed 1 June 2020.

104 Vishal Sharma, 'Impact of Corruption on the Implementation of International Law: An International Criminal Law Perspective', ch 12.

4.3 Part III: The new frontiers of compliance

As discussed in this chapter, practitioners not only use transnational anti-corruption rules but also substantially contribute to the creation and content of those rules. Practitioners are naturally less interested in jurisprudential theory than in actual effectiveness. In this part of the book, contributors address practical problems with compliance, and propose meaningful solutions to those problems.

The first chapter in this part addresses the difficult issue of whistleblowers.[105] Corruption usually occurs out of sight; inside information may be the only means of discovering corrupt behavior. Leah Ambler and Claire Leger point out, however, that even though more countries actively investigate and prosecute corruption, only two percent of all investigations are initiated by information from a whistleblower. Several factors contribute to this surprisingly low percentage, but Ambler and Leger determine that fear and a failure to offer meaningful protection affect behavior the most. They attribute the failure in protection to a lack of requirements in international instruments, and to a subsequent lack of clarity in guidance provided to business firms. Business firms do not provide well-structured or consistent protection to potential whistleblowers, and potential whistleblowers do not receive a consistent or reassuring message regarding the consequences of whistleblowing. Ambler and Leger suggest that the global anti-corruption regime as a whole adopt techniques modeled on the OECD and the Group of 20.

In the second chapter,[106] Jeffrey Boles describes a business reality similar to that observed by Stephen Kobrin in his criticism of the narrow perspective of doctrinal law.[107] In this world of networks and value chains, created with little reference to political borders, any given business firm is associated with a number of other firms. The global anti-corruption regime often imposes liability for corrupt conduct engaged in by those firms. Boles argues that private contracts offer the most security for a business firm that seeks to shield itself from that risk. Boles draws from the experiences of business firms and their advisors to suggest the most effective way to harness the protection of private contracts.

The third chapter also focuses on empirical issues.[108] Knowledge generation and distribution is an important aspect of the creation and dynamism of transnational regimes. Indeed, in the third chapter of this book Rachel Brewster and Andres Ortiz demonstrate the importance of the role of the Organisation for Economic Cooperation and Development as a knowledge creator and

105 Leah Ambler and Claire Leger, 'Whistleblower Protection: The Next Frontier in the Transnationalization of Anti-Corruption Law', ch 13.

106 Jeffrey R Boles, 'The Contract as Anti-Corruption Platform for the Global Corporate Sector', ch 14.

107 Kobrin, 'Globalization, Transnational Corporations' (n 37) 250.

108 Robert E Clark, 'Linear and Non-Linear Modeling Techniques in Transnational Corruption Risk Assessment', ch 15.

disseminator.[109] Transparency International has also become one of the most widely known and used creators and distributors of knowledge. In this chapter, Robert Clark evaluates the validity and usefulness of Transparency International's influential Corruption Perceptions Index, as well as the World Bank's 'Control of Corruption' measures in its World Governance Indicators. Clark argues that the fact that these indexes treat a country as a whole rather than mapping the extent and nature of corruption within its borders greatly reduces the utility of the indexes. More granular information would assist business firms in assessing risk and designing appropriate anti-corruption programs, and would aid anti-corruption efforts. Clark suggests techniques that could improve the granularity of these types of measures.

In the final chapter in this section, Nuria González examines anti-corruption training.[110] González explicitly embraces the goal of creating an *acquis* on corruption control, and considers training to have a role in creating that corpus of hard and soft law. Her arguments strongly resonate with earlier explorations of norm generation in transnational law, which emphasized the powerful roles of nonstate actors and education.[111] Using comparative methods and analyzing programs used in numerous countries, González finds commonalities that suggest a nascent *acquis*, which she predicts will continue to become stronger and clearer.

4.4 Part IV: Anti-corruption considerations in international dispute resolution

Private dispute settlement plays a prominent role in the global anti-corruption regime. Gunnar Lagergren's decision took an early, and very firm, position against corruption, and has influenced countless subsequent disputes. This part of the book examines current issues in private dispute settlement related to corruption.

In the first chapter in this part, Lucinda Low addresses the role of 'red flags' in arbitral proceedings.[112] 'Red flags' are incidents or facts that put observers on notice that corruption might exist. The United States Department of Justice publishes a list of red flags, and warns that it will not excuse parties that ignore those warning signs.[113] The United Kingdom's Serious Fraud Office also emphasizes the necessity to heed red flags.[114] Low wrestles with the evidentiary value of red flags. She concludes that red flags indicate risk and thus merit investigation, but

109 Rachel Brewster and Andres Ortiz, 'Never Waste A Crisis: Anticorruption Reforms in South America', ch 4.

110 Nuria González, 'Transnationalization of Anti-Corruption Trainings', ch 16.

111 See, e.g., Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 Intl Org 887.

112 Lucinda A Low, 'Methodologies for Proving Corruption in Arbitration: Uses and Limitations of Red Flags', ch 17.

113 *A Resource Guide to the Foreign Corrupt Practices Act* (2012) 22.

114 *Guidance About Procedures Which Relevant Commercial Organisations Can Put Into Place to Prevent Persons Associated With Them From Bribing* (2011) 38–39.

that indicators of risk do not sufficiently prove that a party in fact engaged in corrupt activities. Low acknowledges that in some cases, the sheer volume of red flags suggests corruption, but stands firm that 'connecting the dots' does not rise even to the level of circumstantial evidence.

The second chapter in this part examines the role of another prominent set of private actors: the Sanctions Board of the World Bank Group, and ICSID, the International Center for the Settlement of Investment Disputes.[115] Both bodies have long experience in hearing and resolving disputes over transactions that involved corruption, and have accumulated extensive jurisprudential corpuses. Anna Lorem Ramos and Charlene Valdez Warner thoroughly explicate those bodies of rulings with respect to three issues: burden of proof, standard of proof and evidence, and red flags. They find a reassuring level of rigor and fairness in the workings of these tribunals. The sophistication of the rules developed by these supranational bodies markedly demonstrates that private dispute settlement must be considered an integral part of the global anti-corruption regime.

The final chapter in this part addresses issues that echo broader questions about the sources of transnational rules and the dynamic interactions among different sources.[116] In this chapter, Yueming Yan investigates the effect that anti-corruption provisions in international investment agreements and in international treaties and conventions have on arbitral proceedings and decisions. Yan finds that few existing international investment agreements actually contain anti-corruption provisions, although such provisions are included in some more recently concluded agreements. Yan also finds that arbitral bodies rarely make specific references to anti-corruption conventions. Yan acknowledges that arbitral bodies strongly embrace anti-corruption norms, and thus the lack of interaction between these possible sources of transnational law might not be significant. Yan argues, however, that interaction between these sources of law would provide greater clarity for business firms operating under the rules of each.

4.5 Part V: Challenges in the transnational enforcement of anti-corruption laws

The final part of this book explores issues in the enforcement of the global anti-corruption regime. Three of the four chapters scrutinize domestic courts. Domestic courts are, in fact, the *loci* of much of the enforcement of transnational rules, and thus, argue scholars such as Hannah Buxbaum, 'participate in implementing effective regulatory strategies for global markets.'[117] After an exhaustive study

115 Anna Lorem Ramos and Charlene Valdez Warner, 'The World Bank Group in International Dispute Resolution of Fraud and Corruption: Examining the Practice and Jurisprudence of the Sanctions Board and ICSID Arbitral Tribunals', ch 18.

116 Yueming Yan, 'References to International Anti-Corruption Conventions in International Investment Arbitration and International Investment Agreements', ch 23.

117 Hannah L Buxbaum, 'Transnational Regulatory Litigation' (2006) 46 Va J Intl L 251, 316.

of the roles played by domestic courts, Christopher Whytock finds that their participation goes beyond implementation: 'for better or worse, domestic courts are pervasively involved in the regulation of transnational activity,' involvement that includes norm dissemination and rule creation.[118]

The first chapter in this part supports Buxbaum and Whytock's conclusions.[119] Simon St-Georges and Denis Saint-Martin study the diffusion of deferred prosecution agreements and non-prosecution agreements throughout OECD jurisdictions. They find functionalist explanations for this diffusion unconvincing; the agreements offer little utility and thus are unlikely to have been adopted to accomplish goals. St-Georges and Saint-Martin then apply theoretical explanations from political science and from sociology, and find that each have some explanatory power. They conclude that it is too early to discount any theory for the diffusion of these agreements, but also observe that the diffusion of the use of deferred prosecution agreements and non-prosecution agreements presents a fruitful opportunity to test theories of the creation of transnational regimes.

In the second chapter in this part, Stéphane Bonifassi and Caroline Goussé analyze domestic attempts to prevent domestic courts from participating in the creation and enforcement of transnational law.[120] Blocking statutes forbid local entities from responding to subpoenas or other inquiries, from participating in judicial proceedings, and from sanctioning other local entities with respect to the enforcement of laws in another jurisdiction. Blocking statutes are often aimed at the extraterritorial application of domestic law, including the United States' Foreign Corrupt Practices Act. Bonifassi and Goussé examine the effects on the global anti-corruption regime of blocking statutes in China, France, and Switzerland. They find that these laws have little effect, in part because business firms are bound by and subject to so many different strands of the regime that the blocking of one strand is inconsequential, and in part because the business firms benefit from participation in the transnational regime. Bonifassi and Goussé also note that the use of blocking statutes by these countries is somewhat disingenuous; the United States would not need to prosecute foreign business firms for corrupt activities if those firms' home countries were more effective in enforcement of their own laws.

The penultimate chapter in this part and in this book seriously examines what may seem a utopian dream: the creation of an international body to coordinate anti-corruption laws, rules, and policies.[121] Although this may seem an idle dream, it is worth noting that only a few years before its creation, few people thought

118 Christopher A Whytock, 'Domestic Courts and Global Governance' (2009) 84 Tul L Rev 67, 69.

119 Simon St-Georges and Denis Saint-Martin, 'The Global Diffusion of DPAs: The Not So Functional Remaking of the Rules Against Business Corruption', ch 20.

120 Stéphane Bonifassi and Caroline Goussé, 'The Impact of Blocking Statutes on Enforcement of Anti-Corruption Laws', ch 21.

121 Camila Florencia Tort, 'The Search for Synergies: The Utopian Ideal of Cooperation between International Anti-Corruption Mechanisms', ch 22.

that the creation of the World Trade Organization was even remotely possible.[122] Camila Florencia Tort acknowledges the argument that the creation of an international corruption body would substantially reduce transaction costs for all actors, particularly member countries, by coordinating policies and especially by coordinating prosecution and enforcement. Nonetheless, after working through the structural obstacles to the creation of such a body, Tort concludes that it is unlikely and might not work as effectively as proponents suggest. The creation of such a body will remain, at least for the foreseeable future, a dream.

The final chapter in this book departs from domestic courts but continues to explore enforcement. In this chapter, Alexandra Malina Manea and Jamieson Smith undertake an ambitious review of sanctions imposed by multilateral development banks upon finding that an entity has engaged in corruption in a project that involves that bank, with a focus on the use of financial sanctions.[123] They find a lack of consensus and divergent approaches to the use of financial sanctions. They then survey various domestic laws to find appropriate measures to use as models for the coordination of sanctions. They suggest that multilateral development banks take advantage of contractual remedies that include aspects of common law liquidated damages and the civil law *clause pénale*. Their suggestion vividly demonstrates the dynamism of transnational anti-corruption law; in this case, nonstate actors would borrow norms and procedures from domestic courts to improve the adjudication of transgressions in nonstate forums. Manea and Smith observe that multilateral development banks are involved in transactions worth billions of euros, and have developed very sophisticated mechanisms to protect the integrity of these transactions, but are confident that these mechanisms will continue to improve.

5 Conclusion

This book does not attempt to create yet another meta theory of transnational law. Instead, this book closely examines a legal regime already recognized as transnational. By doing so, the chapters in this book provide insights into the transnationalization of law in general. Chapters in this book explore the sources of transnational law, the dynamic interactions of those sources, the application of transnational rules in various forums, and recursive evolution of a transnational regime. The global anti-corruption regime is a fruitful object of study.

122 See Philip M Nichols, 'Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority' (1996) 28 NYU J Intl L & Pol 711, 711–712 (discussing the creation of the World Trade Organization).

123 Alexandra Manea and Jamieson Smith, 'In Search of a Tailored Approach to Anti-Corruption Sanctions in the International Development Context: Financial Remedies by the Multilateral Development Banks', ch 23.

This book also considers the control of corruption. Corruption diminishes human wellbeing and degrades the planet. Controlling corruption should be among the highest priorities. A deeper understanding of the regime that attempts to control corruption should help to make that regime more effective. A more effective regime, in turn, could help to improve the lives of people around the world. That, alone, merits giving attention to the global anti-corruption regime.