



INSTITUTE FOR INTERNATIONAL LAW AND JUSTICE
NEW YORK UNIVERSITY SCHOOL OF LAW

International Law and Justice Working Papers

IILJ Working Paper 2014/1
Global Administrative Law Series

**TRANSNATIONAL ANTI-CORRUPTION LAW IN ACTION:
CASES FROM ARGENTINA AND BRAZIL**

Kevin E. Davis; Guillermo Jorge; Máira Rocha Machado
NYU School of Law; San Andrés University School of Law;
São Paulo Law School of Fundação Getulio Vargas

Faculty Director: Benedict Kingsbury
Program Director: Angelina Fisher
Faculty Advisory Committee:
Philip Alston, Jose Alvarez, Sujit Choudhry; Kevin Davis, Gráinne de Búrca, Franco Ferrari, David Golove, Ryan Goodman, Robert Howse, Martti Koskenniemi, Mattias Kumm, Samuel Rascoff, Linda Silberman, Richard Stewart, Alan Sykes, Joseph H.H. Weiler, and Katrina Wyman

Global Administrative Law Project Directors:
Benedict Kingsbury and Richard Stewart
Institute for International Law and Justice
New York University School of Law
139 MacDougal Street, 3rd Floor
New York, NY 10012
Website: www.iilj.org

All rights reserved.
No part of this paper may be reproduced in any form
without permission of the author.

ISSN: 1552-6275

©Kevin E. Davis; Guillermo Jorge; Máira Rocha Machado

*Working Papers are issued at the responsibility of their authors, and do not
reflect views of NYU, the IILJ, or associated personnel.*

New York University School of Law
New York, NY 10012
U.S.A.



Cite as:
IILJ Working Paper 2014/1
(Global Administrative Law Series)
Finalized 4/7/2014
(www.iilj.org)

**Transnational Anti-Corruption Law in Action:
Cases from Argentina and Brazil***

Kevin E. Davis
New York University School of Law

Guillermo Jorge
San Andrés University School of Law

Maíra Rocha Machado
São Paulo Law School of Fundação Getulio Vargas

April 7, 2014

Forthcoming in *Law and Social Inquiry*

Abstract

Debates over whether transnational and international legal institutions are fair, effective or legitimate responses to corruption of local public officials have an important empirical dimension. We use case studies to examine the claim that foreign legal institutions serve as fair, effective and legitimate complements to local anti-corruption institutions. We call this set of claims the “institutional complementarity theory”. The first case study centers on proceedings concerning bribes paid by subsidiaries of Siemens AG, a German company, to obtain and retain a contract to provide national identity cards—among other things—for the Argentine government. The second case study examines events stemming from overbilling in the construction of a courthouse in Brazil. Analysis of these cases suggests that the institutional complementarity theory has a great deal of traction. At the same time, our findings suggest that local institutions may have greater potential, and foreign institutions may have more limited potential, than the theory assumes.

* This research project benefited from helpful comments received from William Alford, Carlos Ayres, André Rodrigues Correa, Ary Oswaldo Mattos Filho, David Garland, Benedict Kingsbury, Máximo Langer, Antenor Madruga, Salem Nasser, Bruno Paschoal, Juliana Palma, Flávia Puschel, Bruno Salama, Mario Schapiro, Rochelle Ribeiro, Matthew Taylor and participants in workshops at Harvard Law School, San Andrés University, São Paulo Law School of Fundação Getulio Vargas, NYU School of Law and the University of Utah, as well as a presentation at the World Bank co-sponsored by the American Bar Association Section of International Law. María Florencia Bergez, Carolina Domingues, Audrey Feldman, Luisa Ferreira, Fernanda Geraldini, Yuri Luz, Ana Mara Machado, Rafael Tatamoto, and Lucía Wang provided greatly appreciated research assistance. The authors acknowledge with thanks support provided by New York University School of Law, San Andrés University School of Law and São Paulo Law School of Fundação Getulio Vargas, as well as the International Development Research Centre, Ottawa, Canada.

Introduction

Anti-corruption law is now remarkably transnational in scope. A potent set of legal mechanisms permits legal institutions in one country to regulate and provide redress for corrupt acts involving public officials from other countries. The most prominent of those mechanisms allow authorities to (i) prosecute firms and individuals who pay bribes to foreign public officials and (ii) help recover corruptly procured assets transferred overseas. These mechanisms are generally created by national law but are supported and inspired by a burgeoning set of international norms. The sources of the relevant international norms include: the Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention"); the United Nations Convention against Corruption ("UN Convention"); the anti-corruption policies of international financial institutions; certain components of the international anti-money laundering regime that has been developed by the Financial Action Task Force (FATF); international norms governing government procurement; and, private law principles concerning enforcement of corruptly procured contracts in international fora.

The emergence of transnational anti-corruption law has coincided with intense debates about the fairness, effectiveness and legitimacy of enforcement of legal norms by foreign or international institutions. One of the main general concerns is that the rights of defendants will be compromised if they are subject to surprising forms of liability or have to respond to proceedings in multiple jurisdictions or in inaccessible fora applying unfamiliar procedural rules. There are also concerns about interfering with law enforcement efforts of the states which arguably have the greatest interest in regulating

official corruption, namely, the states in which the officials are located. This kind of interference may be not only counter-productive, but also illegitimate, because foreign officials are not primarily accountable to members of the most affected societies.

Transnational anti-corruption law is largely immune to the charge that it risks imposing surprising forms of liability on defendants. There appears to be widespread agreement about substantive anti-corruption norms and a global consensus around the idea that it is important for legal institutions to try to uphold the integrity of public officials.

Concerns that enforcement of transnational anti-corruption law will unfairly burden defendants with multiple proceedings or illegitimately interfere with local anti-corruption initiatives are potentially more troubling. The most compelling response lies in a set of claims that we call the “institutional complementarity theory”. In an era marked by massive foreign direct investment and easy international wire transfers, the actors and the assets involved in corrupting a country’s public officials will often be located outside its borders and beyond the reach of local legal institutions. Moreover, because of the power that many public officials wield and the sums of money under their control, corrupt officials and their collaborators will tend to be relatively sophisticated, or at least have access to sophisticated legal and financial advice. Under these conditions there is good reason to fear that defendants will easily be able to deflect purely local enforcement actions or, worse yet, will not face any enforcement actions at all. At the same time, foreign and local agencies have common interests in combatting at least transnational forms of corruption and their combined efforts may be complementary. The institutional complementarity theory holds that rather than generating duplicative

proceedings and interfering with local enforcement efforts, transnational anti-corruption law allows foreign institutions to play a valuable role in avoiding impunity and buttressing overmatched local anti-corruption institutions (Rose-Ackerman 1999: 177-197; Rose-Ackerman 2013).

The institutional complementarity theory rests on important assumptions about the relative capabilities of local and foreign anti-corruption institutions, the costs of intervention by foreign institutions, and the extent to which foreign institutions are accountable to members of the affected society. These assumptions are empirical ones, but much of what we know about their validity is anecdotal (Davis, 2010). In an effort to address this lacuna we have conducted in-depth case studies of two sets of legal proceedings, one from Argentina and one from Brazil. Each case involves both local and foreign institutions responding to allegations of high-level political corruption. In one case foreign institutions were involved mainly in the prosecution of bribe-payers. In the other case foreign institutions were involved primarily in the recovery of assets that represented the proceeds of bribery.

More specifically, the first case centers on bribes paid by subsidiaries of Siemens AG, a German company, to obtain and retain a contract to provide national identity cards—among other things—for the government of Argentina. The contract was worth over US\$ 1 billion and in order to secure it Siemens Argentina made questionable payments totaling over US\$ 100 million between 1997 and January 2007. Several investigations of the contract were initiated by Argentine authorities but the resulting legal proceedings were largely ineffectual. Meanwhile though, the Munich Public Prosecutors' Office together with the US Department of Justice and the Securities

Exchange Commission launched their own investigations into the worldwide activities of Siemens AG, investigations that ultimately led to both criminal and civil proceedings in both countries. Siemens AG paid a combined total of more than US\$ 1.6 billion in fines, penalties and disgorgement of profits to the US and German authorities to resolve those proceedings. Siemens also admitted to having violated the FCPA as well as German law in connection with the Argentine ID card project as well as projects in Iraq, Bangladesh and Venezuela. Those admissions initially reinvigorated a previously dormant criminal investigation in Argentina. However, the Argentine push faded as the case lost international momentum.

Our second case is from Brazil. It stems from the construction of a courthouse for a Regional Labor Tribunal (“TRT”). From 1992 until work was suspended by court order in July 1998, the Federal government made payments toward the project totaling R\$ 226 million. A subsequent audit found that only R\$ 63 million was actually used in the construction of the building, leaving R\$ 169 million unaccounted for (roughly US\$ 82 million at January 30, 2013 exchange rates). Various proceedings were launched against the principals of several of the construction companies involved as well as two public officials. One of those officials was Nicolau dos Santos Neto, a former lay judge and President of the Regional Labor Tribunal, who became an icon of corruption scandals in the country. The other was Luis Estevão, a businessman who eventually became the first person in the history of the country to be expelled from the Senate. In 2012 Estevão again made headlines by agreeing to return R\$ 468 million (roughly US\$ 235 million) to the Brazilian treasury, the largest amount ever recovered in a Brazilian corruption case (AGU 2012). Both Neto and Estevão were found to have transferred some of the proceeds of

corrupt acts overseas. Those transfers led to the institution of legal proceedings in several distinct fora in Brazil, Switzerland and the United States.

Our decision to examine transnational anti-corruption law through its application in specific instances reflects a particular understanding of the concept of transnational law. Transnational law involves regulation of “actions or events that transcend national frontiers” (Jessup 1955: 2).¹ That regulation rarely involves a single society’s legal institutions. Rather, it often involves the combined efforts of local, foreign and supranational institutions. Transnational law is sometimes presented as a body of rules which have cohered into one or more “regimes” (Teubner and Korth 2010), or even a “legal order” (Shaffer 2011: 236). It can also be imagined, however, as a rather disorderly series of interactions between local, foreign and supranational legal institutions, prompted by specific actions or events, with each set of interactions both being shaped by and shaping the institutions involved.² This study is informed by our sense that this second model best characterizes transnational anti-corruption law.

Part 2 below provides an overview of the study, including the theoretical motivation and the design of the empirical analysis. Parts 3 and 4 set out the information we collected about each of our cases. Part 5 discusses the implications for the

¹ An alternative definition of transnational law focuses on the transnational construction and flow of norms. See Shaffer (2011: 234-236).

² This understanding of transnational law is related to the recursive process of lawmaking described by Halliday 2009 and Shaffer 2011, but places more emphasis on the role of law enforcement. It is also consistent with the conception of multi-level global governance in international law enforcement described in Burke-White 2005.

institutional complementarity theory. Part 6 concludes by identifying the directions for further research suggested by our findings.

Overview of the study

1.1 Theoretical backdrop

There are intense debates about the effectiveness and legitimacy of transnational and international mechanisms that allow authorities in one country to sanction conduct that occurs in other countries. Recent flashpoints have included the extraterritorial enforcement of U.S. antitrust and securities laws, French efforts to regulate hate speech on the Internet, and the assertion of universal jurisdiction over international crimes (Parrish 2009). Analogous debates surround international tribunals such as the International Criminal Court and the ad hoc international criminal tribunals for Rwanda and the former Yugoslavia, which also permit conduct that occurred in one country to be sanctioned by authorities from outside the country (Chehtman 2010). The proponents of these sorts of transnational and international regulatory initiatives claim that they are necessary and appropriate responses to impunity. Critics describe them as acts of legal imperialism (see, for example, Mattei 2003).

Some critics are concerned about the impact that broad assertions of jurisdiction will have on the interests of defendants (Goldsmith and Krasner 2003). First, defendants may be unfairly judged against substantive norms of which they had no notice, in violation of the fundamental principle of legality. Second, this approach will permit multiple proceedings to arise from the same incident. Multiple proceedings may be both inefficient and unfair to defendants. Third, relatedly, it may be unfair to subject

defendants to proceedings in foreign jurisdictions that most likely will be conducted in accordance with unfamiliar procedural rules and relatively inaccessible.

Critics also fear that foreign actors will impede local authorities' efforts to respond to predominantly local misconduct. An important source of concern is that foreign authorities will be relatively unaccountable to members of the affected society. Some argue that as a result, transnational or international proceedings necessarily lack legitimacy (see, e.g. Duff 2010). Others critics focus on the likely consequences of this lack of accountability. There is a general concern that foreign actors will regulate selectively and in accordance with their own material interests. This may lead them to launch proceedings in cases where the costs to local society outweigh the benefits, as in cases in which local actors have opted to provide leniency or even amnesty to potential defendants (Goldsmith and Krasner 2003).

A standard response to complaints about legal imperialism is the claim that transnational or international institutions can and should complement rather than undermine weak local institutions. Where local institutions are too weak to generate local proceedings the concern about multiple proceedings is obviated, and in these conditions there is no reason to expect any local proceedings that take place without international assistance to be either fair, effective or legitimate. The idea of institutional complementarity is enshrined in the Rome Statute that creates the International Criminal Court (Article 17) and has been recommended as a guiding principle for the ad hoc international criminal tribunals (Alvarez 1999).

These debates about the fairness, efficacy and legitimacy of transnational and international law, and especially international criminal law, have direct application to

transnational anti-corruption law. The concern about legality is muted by the fact that norms against corruption have largely been harmonized as a result of the widespread adoption of multilateral instruments such as the OECD Convention and, more recently, UNCAC. Otherwise, transnational anti-corruption law manifests the same tension between the urgency of confronting impunity and fear of legal imperialism that we observe in international criminal law (compare Nichols 1999 and Salbu 1999). Most significantly for present purposes, the idea that foreign anti-corruption institutions can and should complement local institutions – the institutional complementarity theory – plays a significant role in the discourse that explains and justifies transnational anti-corruption law (Davis 2010; Rose-Ackerman 2013).

In this context the institutional complementarity theory is based on two foundational claims: 1) local institutions have limited capacity to address political corruption and, 2) foreign institutions bring to the table valuable resources that local institutions are unable to match. These premises in turn support the conclusions that transnational law enforcement will enhance the effectiveness of local anti-corruption institutions – in other words, local and foreign institutions will be complements – and that it will reduce corruption (see generally, Davis 2010).

The most obvious example of a resource that foreign institutions are uniquely able to provide is the ability to deploy coercive force in the foreign territory. Foreign courts, law enforcement agencies and other branches of the state typically regulate the use of force within their territory quite closely and so may be indispensable in efforts to arrest individuals or seize assets located overseas.

Foreign institutions may also have access to superior information. This is particularly plausible in cases in which corruption involves collusion between local officials and corporations operating on a transnational scale. Information about corporate misconduct tends to flow from firms' employees, regulators, competitors or financiers. With the advent of globalization, those sources can just as easily be located outside the jurisdiction of the corrupt official as inside. Courts and law enforcement agencies in a corrupt official's jurisdiction are less likely to have access to foreign sources than the courts and law enforcement agencies in the jurisdictions where the headquarters and most employees are located.

Foreign institutions may also be better able to process whatever information is available about a corruption case. In other words they may have superior expertise, either across the board, or in relation to specific aspects of the investigation or prosecution, or to specific forms of misconduct. For instance, foreign prosecutors may possess special expertise in forensic accounting, asset tracing or money laundering techniques; or, they may have special insight into the tactics that will induce whistleblowers in their jurisdiction to come forward.

Foreign institutions may be particularly valuable because they are not impeded by local political obstacles. If corruption has compromised local legal institutions then foreign intervention may be the only viable response. Foreign actors may be inherently less corruptible than local institutions – whether because they have been selected more carefully or because they are subject to more effective schemes of monitoring, rewards and punishments. Perhaps more plausibly, even if they are not inherently less corruptible than local institutions, foreign institutions are less likely to have been corrupted in a way

that impairs their ability to deal with the local problem. Local actors will find it relatively difficult to establish illicit relationships with foreign legal institutions that allow to them to subvert the course of justice.

The institutional complementarity theory holds that these kinds of contributions from foreign legal institutions will have positive effects on both local and anti-corruption institutions and the broader societies in which they operate. Those effects may be felt well beyond the specific cases in which foreign institutions have intervened. For instance, in the course of an investigation foreign authorities might share information about investigative techniques that local institutions can use in subsequent cases. There may also be demonstration effects. Foreign enforcement actions that hold corrupt firms or officials accountable can publicize the nature and extent of corruption in a society and, if successful, undermine perceptions of impunity. The result can be new awareness among local actors – including not only anti-corruption officials but also members of business, civil society and the public sector – of what can or should be done to combat corruption. Local media may play a critical role in this process.

The institutional complementarity theory can be challenged on several fronts (Davis 2010). To begin with, the theory is most persuasive in cases in which transnational corruption is a significant problem and local legal institutions have limited resources, expertise and independence. These conditions do not always exist. Moreover, local media or political institutions can often serve as substitutes for local legal institutions (Power and Taylor 2011: 256-7).

The theory's assumptions about the relative strength of foreign institutions are also contestable. In general, attempts to shore up weak legal institutions from abroad do

not have a promising track record. Ineffectiveness, ignorance of appropriate solutions to local problems and, occasionally, self-interest on the part of foreign actors often undermine externally-driven efforts to improve legal institutions and enhance respect for the rule of law (see generally, Davis and Trebilcock 2008). These concerns can carry over to transnational anti-corruption law.

No matter how well-intentioned and competent they might be, there are inherent limits to the ability of foreign anti-corruption institutions to influence local actors and activity. Like all institutions, foreign anti-corruption institutions are subject to resource constraints. But the most significant constraints on the effectiveness of foreign institutions stem from the fact that they are typically unable to deploy coercive force within the local territory, or at least not without the cooperation of the local government. As a result, it is difficult to punish, or sometimes even investigate, local participants in corrupt activities. So long as they remain at home, public officials and their assets are typically beyond the reach of foreign institutions. The same is true of corrupt private actors, such as bribe-payers, whose operations are entirely local.

There are other reasons why the net benefits of intervention by foreign anti-corruption institutions may be low, or even negative. To begin, foreign anti-corruption institutions may have particular biases and blind spots when they operate across borders. Foreign actors may not have the interests of the local population at heart and may prefer to devote scarce institutional resources to issues that affect their own populations. They may also be unfamiliar with the best ways of addressing corruption in a distant society. Of course if foreign interventions are unsuccessful the effects are potentially just as far-

reaching as the effects of successful interventions. For example, a failed prosecution might demoralize a population and cement views that impunity is ineradicable.

Another line of attack focuses on the claim that foreign intervention will serve to enhance the effectiveness of local institutions. Foreign and local institutions may be substitutes rather than complements. For example, prosecuting multinational corporations for paying bribes or seizing proceeds of corruption that have been transferred overseas may reduce the marginal benefits of prosecuting corrupt public officials locally. In this scenario foreign intervention will undermine rather than enhance the effectiveness of local institutions. At first glance this represents only a partial rejection of the institutional complementarity theory. In the short term a society might benefit from foreign interventions that serve as substitutes for local action. But what if the displaced local institutions would have improved over time and eventually surpassed their foreign counterparts? In this scenario the use of foreign institutions as substitutes for local anti-corruption institutions will lead to a net decline in the effectiveness of *all* anti-corruption activity in a society. That would be a fundamental contradiction of the institutional complementarity theory.

Finally, there is the fact that institutional complementarity theory does not respond to concerns about the potential illegitimacy of transnational law enforcement – foreign anti-corruption institutions may be complementary yet illegitimate. Accountability is widely considered to be the key determinant of legitimacy. Foreign anti-corruption institutions typically are not accountable to the general public in the societies most affected by their activities. The local public generally has only the most indirect input into the drafting of multilateral anti-corruption treaties; little or no input

into the formulation of policies adopted by the various international, inter-governmental and non-governmental organizations involved in transnational anti-corruption efforts; no input into the drafting of foreign legislation that is enforced extra-territorially; and no say in the appointment of foreign compliance officers, police officers, prosecutors and judges who implement the regime. These problems are exacerbated by the fact that many anti-corruption institutions are considered to be part of the criminal justice system. It is conventional to grant organizations and individuals charged with enforcing criminal law norms a fair amount of independence from political control. Another factor is that some of the institutions that perform critical roles in the transnational anti-corruption regime are conventionally viewed as private in nature. The best examples are the compliance programs adopted by private firms and the norms adopted by commercial arbitrators. Traditionally, these sorts of private institutions have not been governed by the sorts of legal mechanisms that serve to make public actors accountable to the general public. For all these reasons foreign institutions will often struggle to achieve legitimacy in the eyes of local actors.

1.2 Methodology

This study represents a modest initial step toward the ultimate aim of conducting a comprehensive evaluation of transnational anti-corruption initiatives. Its aim is to provide a small-scale examination of transnational anti-corruption law in action with a view to exploring some of the challenges to the institutional complementarity theory.

The empirical analysis focuses on cases in which institutional complementarity theory is most likely to represent a valid response to concerns about legal imperialism. The logic behind this approach is that if the institutional complementarity theory is not

valid in these ‘best cases’ it is unlikely to be valid in other cases. Focusing on best cases may also help to identify the most significant challenges to the institutional complementarity theory – factors that limit the efficacy of transnational institutions in these cases are likely to be significant obstacles in other cases. Of course since the cases are not representative our findings should be viewed as suggestive of directions for further research rather than as bases for conclusive generalizations.

The claim that transnational anti-corruption law complements local institutions is most compelling in relatively poor countries in which corruption is a sufficiently serious problem that it is plausible that local anti-corruption institutions would be overmatched without foreign assistance. Concerns that transnational anti-corruption law represents a form of legal imperialism are most muted in countries which have formally endorsed key aspects of transnational anti-corruption law and, perhaps, in which local institutions are not so weak as to be irrelevant.

Only a small number of countries satisfy these criteria. Until the adoption of UNCAC, which had 169 parties as of December 2013, the most significant international legal instruments were the OECD Convention and the FATF, which focus on criminalization of foreign bribery and money laundering respectively. We conjecture that middle-income countries which have endorsed these instruments but have relatively weak anti-corruption institutions are likely to benefit from the intervention of foreign anti-corruption institutions in ways that do not raise concerns about legal imperialism.

Only five countries that are not high-income countries are members of both the OECD Convention and the FATF: Argentina, Brazil, Mexico, South Africa and Turkey. All are currently classified by the OECD as upper-middle income countries. We have

chosen to focus on Argentina and Brazil on account of the authors' personal expertise. They satisfy our selection criteria because not only have they endorsed the key elements of the transnational anti-corruption regime but local anti-corruption institutions in both countries have historically been regarded as weak. A major concern is that local institutions are too intimidated to challenge members of the political elite. Concerns have also been raised that local authorities are hampered by antiquated criminal procedures that bar cooperation between different branches of government, the absence of provisions for corporate criminal liability, and absence of the expertise required to conduct sophisticated forensic investigations. These weaknesses are presumed to allow public officials to engage in corruption without being held legally accountable (Tulchin and Espach 2000; Helmke and Levitsky 2006; Power and Taylor 2011). At the same time, it is at least debatable whether the institutions in Argentina and Brazil have been so compromised that foreign intervention would be pointless. In short, in each country it is plausible that foreign anti-corruption institutions might have enhanced the effectiveness of local institutions without raising significant concerns about legal imperialism.

The study focuses on cases that involve the interaction between local anti-corruption law in Argentina and Brazil, and foreign law enforcement agencies located in the US, Germany and Switzerland, as well as the international investment regime and the World Bank's sanctions process. Consistent with our focus on best cases, each of the cases selected was widely viewed as one in which foreign institutions worked intensely and effectively to enable either transnational prosecution or transnational asset recovery

in response to incidents of corruption that were also addressed by local legal institutions.³ In Brazil, all of the cases that fit our criteria involved transnational asset recovery. Accordingly, in Argentina, we went out of our way to choose a prominent case that involved transnational prosecution for bribery.⁴ The two cases are designed to

³ The TRT Case was listed among nine “prominent episodes of alleged federal political corruption, 1988-2008” by Power and Taylor (2011, 2-3) and referred to as “one of the biggest corruption and money laundering scandals in Brazilian history” (Soares 2013, 305). It was the only case that involved (i) a wide range of local legal institutions (i.e. civil and criminal proceedings as well as a parliamentary commission and an audit by the supreme audit institution); (ii) enforcement of several decisions and (iii) participation of both public and private foreign actors. Other possible case studies were the legal proceedings arising from Paulo Maluf’s terms as Governor and Mayor of São Paulo. It proved difficult to use those events to create a well-defined case study because Mr. Maluf is involved in dozens of proceedings related to different public works.

⁴ The ID cards case was extremely prominent in Argentina because bribes were paid to top officials of three administrations with different political leanings at several points in time. The case fits our best case criterion because the legal responses were remarkably vigorous. The misconduct triggered multiple proceedings in Argentina involving the national anticorruption agency, federal criminal prosecutors, criminal courts and civil courts. The contract awarded to Siemens was the only contract unilaterally terminated by the Government after a (allegedly) highly corrupt 10-year long privatization process (Macetti, 1999). It was also the only case –out of 40 cases – in which the team of attorneys representing Argentina before the ICSID requested annulment based on

complement one another: they allow us to examine the most significant components of transnational anti-corruption law while demonstrating that not every case involves all of those components.

Although the particular cases examined are not intended to be representative, they do involve forms of corruption that were fairly typical for their respective countries (Manzetti 1999; Speck 2002). This feature of the case studies maximizes the relevance of our findings to policymakers: from a policy perspective it seems particularly important to evaluate the potential performance of transnational institutions in relation to relatively common forms of corruption.

The data for the case studies were collected using three main methods. First, we reviewed all of the publicly available documents produced in connection with the various legal proceedings that emerged from the transactions of interest. Files from criminal, civil, administrative and foreign courts were scrutinized. Due to national secrecy rules, some of the files could only be accessed indirectly. Second, we reviewed all of the major media reports from La Nacion, Clarin and Pagina 12 (in Argentina) and Folha de São

allegations of bribery. The broader multijurisdictional enforcement action against Siemens and its executives was a landmark case, mainly because the penalties imposed on Siemens were the largest in the history of the transnational bribery regime. Among other cases we considered for our case study the set of proceedings concerning payments made by IBM to obtain several contracts in Argentina during the 1990s was a leading candidate. Those proceedings did not involve as wide a range of legal institutions as the ID cards case, especially outside of Argentina, and so were less suitable for our purposes.

Paulo and Veja Magazine (in Brazil). Third, we conducted a total of 25 interviews with law enforcement officials, private attorneys and representatives of international organizations: 6 in Argentina, 9 in Brazil, 1 in Paris and 9 in Washington DC.⁵

ID cards for Argentina

On November 4th, 2009, the President of Argentina, Cristina Fernández de Kirchner, inaugurated the state-owned plant that would produce the new state-of-the-art digital national Identity Card. Citizens would be able to have their ID cards delivered to their home address for less than 4 dollars (AR\$ 15). In her speech, President Kirchner proudly recalled that almost 15 years earlier former President Menem had privatized the same service, but then the cost was to have been 30 dollars per card, that is to say: almost 8 times the cost of the cards offered by the Kirchner administration. President Kirchner did not make any further explicit reference to the billion dollar contract the Menem administration signed in 1998 with Siemens Information Technology Services SA (SITS SA), a wholly owned subsidiary of Siemens AG, the German corporation. It was not necessary: every voter associated the ID card project with one of the most significant corruption scandals in Argentina's recent history.

1.3 A contract that never materialized

In August 1994, the Argentine Government put out a call for tenders for the digital national identity cards, 50 border posts and the national electoral register. The Decree was issued 15 days after a bomb killed 86 people in a Jewish community center,

⁵ To preserve anonymity the interviewees are referred to by numbers.

under public pressure to improve the state's capacity to process intelligence information and control the borders of the country.

The process was far from being transparent. Many sources suggested that the three consortia that finally presented their bids used both legal and illegal means to influence the process. When finally published, however, it became clear that the call for tenders had been drafted to favor a local consortium backed by Mr. Alfredo Yabrán, a tycoon alleged to have ties to organized crime and with monopolistic interests in several industries, including private couriers, duty-free shops, bonded warehouses, customs services, personal security and business intelligence⁶ (Bonasso 1999; Caviglia and Sanz, 1998; Cavallo 1997). From an anti-corruption perspective, the bidding process raised several red flags: many not-necessarily-connected services put out to tender at once; bid conditions that were excessively costly to obtain (US\$ 80,000); and, specifications with which only one competitor would be able to comply – e.g., through his monopoly of private couriers, Yabrán's group was the only bidder in the position to guarantee the required territorial distribution of the IDs.

Right after the bid specifications were released, representatives of a center-left Peronist faction (Menem's party) tried to stop the process by initiating a civil action—grounded in the idea that the bid specifications were tailored to Yabrán's group—and a

⁶ The fact that the bid conditions were not made public until two years after they were drafted was due to the fierce opposition of Domingo Cavallo, then Minister of Finance and main architect of Argentina's market-oriented economic reforms. Cavallo opposed the project because it was tailored to favor Mr. Yabrán. It was only after Cavallo's resignation –precisely 2 weeks after— that the bid conditions were published in the official gazette.

criminal investigation. Both cases were handled by judges beholden to Menem and, after some routine paperwork, both were closed and the decisions upheld by their respective Chambers of Appeals. As one of the complainants stated: *“Our claims were rejected, but we made enough political noise to delay the process for a while”* (Liascovich 2004: 15).

The delay was not futile. In January 1997, just as the “independent commission” in charge of examining the offers was about to announce that the consortium backed by Yabrán was the winner, Yabrán was accused of ordering the murder of a photojournalist from a weekly political magazine. Soon after Yabrán was indicted as instigator of the crime. A new “independent” evaluating commission was then appointed which contradicted its predecessors and agreed that Siemens’ offer was the most suitable.

In other words, Siemens won by accident. The Government, however, forced Siemens to compensate the “losing” consortium. Before awarding the contract to Siemens, the Government convened secret meetings where Siemens agreed to 1) replace its mail supplier with the newly privatized mail service, 63% of whose shares were owned by an affiliate of one of the losing consortium members; and 2) buy another company from the losing consortium for around US\$ 50 million, a disproportionate price according to several sources (Noticias Magazine, 01/09/1999; Liascovich 2004: 35; Alconada Mon: 53). In exchange, the losing consortium agreed not to challenge the award.

Siemens apparently paid bribes not only to secure the contract but also to settle any differences arising in its interpretation (SEC 2008: 21; DOJ 2008: 6-7; Alconada

Mon 2011). Siemens used a consulting group controlled by Carlos Sergi, a director of the Siemens Argentine subsidiary, as a conduit for these payments.

A new criminal complaint, based on the high price of the ID cards was filed when the contract was awarded. However, this complaint suffered the same fate as the previous two.

Before Siemens started to produce the IDs, Menem was voted out of office and a coalition headed by President Fernando de la Rúa assumed office on December 1999, promising nationwide anticorruption reform. In spite of strong political pressure exerted by Siemens⁷ the new administration terminated the contract. A few months later, cornered by a deep economic crisis, de la Rúa was forced to resign. Siemens renewed its efforts to re-launch the contract with the transitional administration that replaced De la Rúa,⁸ but those efforts were not successful either (Clarín 05/18/2002).

⁷ Siemens' lobbying to keep the contract alive included explicit pressure from German Chancellor Gerhard Schröder, who not only conditioned the German support on the approval of an IMF loan to Argentina on the continuation of the contract but also insinuated that all German investments in the country were at risk if Argentina could not guarantee Siemens' property rights. (Liascovich, 2004: 65; La Nación, 10/13/2002). In parallel, Siemens engaged formal and informal lobbyists to convince key players through additional improper payments (DOJ, 2008:11).

⁸ In February 2002, Heinrich Von Pierer, then CEO of Siemens AG and Chancellor Gerhard Schröder threatened transitional President Duhalde with demanding compensation in the amount of around US\$600 million before an arbitral investment

1.4 ICSID arbitration

Siemens' next step was to file a claim with the International Centre for the Settlement of Investment Disputes ("ICSID") under the German-Argentine bilateral treaty. The company claimed US\$ 602 million in damages stemming from the loss of its investment in the ID Project. Around 10% of the claim corresponded to "unproductive expenses", including the expenses of lobbyists hired to re-launch the contract at various stages and, presumably, the bribes channeled through Mr. Sergi. The lawyers for the Argentine government argued that the ICSID tribunal's jurisdiction would be impaired if there was evidence the contract had been obtained through corrupt means. In order to pursue such evidence, they coordinated efforts with the National Anticorruption Office (NAO) –an office within the Executive created by the Government of President de la Rúa— to request the re-opening of the criminal complaint that was sent to the archives in 1999.

In the meantime, Siemens was facing strong pressure from Mr. Sergi. In preparation for its complaint before the ICSID Siemens terminated all contracts with the phony companies controlled by Sergi that had been used to channel the improper payments. Sergi threatened Siemens that he would pass information about the bribes to the Argentine Government, an action that would jeopardize Siemens' chances before ICSID. Sergi demanded US\$ 22 million in exchange for his silence. However, the fact that Siemens listed its securities on the New York Stock Exchange in March 2001 and thereby became subject to the United States' FCPA made it complicated for Siemens to

panel (Clarín, 02/16/2002). Apparently, the threat coincided with more bribery (SEC; 2008: 21).

pay off Sergi. The Siemens legal department was of the view that the company could only pay Sergi if it was “legally required” to do so. Based on the annulment of the contracts with the phony companies and on the payments he had received before, Sergi opened a commercial arbitration claim before the Zurich Chamber of Commerce. A panel awarded Sergi US\$ 8.8 million and Siemens, satisfied with the “legal support”, honored the award (Alconada, 172).

With Sergi’s silence ensured, the lawyers for the Argentine Government were unable to show strong evidence of corruption and the ICSID panel decided to assume jurisdiction. In February 2007, the panel awarded Siemens US\$ 218 million plus 75% of its legal expenses and an indemnity for all claims that Siemens’ sub-contractors might have regarding the contract. In July 2007 Argentina launched proceedings to set aside the award, first by applying for an annulment and later by requesting “revision” of the award.⁹

1.5 The foreign investigations

While the ICSID arbitration was under way in Washington, Michel Kutschenreuter, a former senior Siemens Executive, testified before the Munich Prosecutor’s Office that he was aware that bribes had been paid in 1999 in order to obtain the ID Cards Project in Argentina. Mr. Kutschenreuter’s testimony followed his arrest in October 2006 as part of a criminal investigation by the Munich Public Prosecutor’s office into allegations that Siemens routinely paid bribes to obtain public contracts in countries

⁹ See information about “procedural details” of Siemens A.G. v. Argentine Republic (ICSID Case No. ARB/02/8) posted on www.icsid.worldbank.org.

around the world. The information he provided was eventually supplemented by the products of an extensive internal investigation initiated by the audit committee of Siemens and conducted by a private law firm. The internal investigation report –for which Siemens has allegedly paid more than US\$ 200 million- was shared with German and US law enforcement agencies but has not been made public.

The German and US investigations resulted in record-breaking liability for Siemens. In October 2007 Siemens agreed to a settlement with the Munich Public Prosecutor's Office which involved payment of a €1 million fine and €200 million in disgorgement of profits. That settlement related exclusively to the activities of Siemens' telecommunications group. On December 15, 2008 Siemens AG agreed to pay the Munich Public Prosecutor's Office another €395 million, including a €250,000 corporate fine and €94.75 million in disgorgement of profits, to settle charges stemming from parts of the company other than its telecommunications group. On the same date, Siemens and three of its subsidiaries based in Argentina, Venezuela and Bangladesh pleaded guilty to violations of both US and German law relating to foreign corrupt practices. As part of the plea agreement Siemens AG agreed to pay a fine of US\$ 448.5 million and its subsidiaries in Argentina, Bangladesh and Venezuela each agreed to pay US\$ 500,000 fines. Siemens AG separately agreed to pay US\$ 350 million to the US Securities and Exchange Commission (SEC) in disgorgement of profits. At the time the combined US penalties represented the highest monetary sanctions ever imposed in an FCPA case.

In addition to sanctions imposed by organs of the German and US governments, Siemens AG was investigated and sanctioned by the Integrity Department of the World

Bank. The settlement with the World Bank included a commitment by Siemens to pay \$100 million over the next 15 years to support anti-corruption programs, a four-year debarment for Siemens' Russian subsidiary and a voluntary two-year exclusion from bidding on Bank-financed projects for Siemens AG and all of its consolidated subsidiaries and affiliates. As part of the settlement, Siemens also agreed to co-operate with the World Bank in changing industry practices and to engage in "collective action to fight fraud and corruption."¹⁰

1.6 Repercussions in Argentina: much ado about (almost) nothing

The information generated by the investigations in Germany and the US gave fresh impetus to the Argentine government's efforts to set aside the ICSID award and to the criminal proceedings in Argentina. The lawyers for the Government as well as the criminal investigative magistrate requested assistance from foreign authorities. They were not able to obtain information from official sources in Germany or in the USA until the plea agreement with Siemens was signed. Requests for assistance through civil, criminal and diplomatic channels all failed.

In the case of the ICSID arbitration, the consequences of the initial lack of cooperation were immaterial. Having failed to secure cooperation from foreign officials, Argentina was compelled to base its application for annulment on news reports. However, its submissions in the revision proceeding were based on admissions by

¹⁰ Information on the settlement is available at:

<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22234573~pagePK:34370~piPK:34424~theSitePK:4607,00.html>

Siemens released by the US authorities. None of these issues were ever adjudicated by the ICSID panel because on August 12, 2009 Siemens discontinued its initial proceeding against Argentina, thereby waiving its entitlement to the US\$ 218 million award.¹¹ Siemens also agreed to pay the claims of its sub-contractors on the project. The lawyers for the Government were fully satisfied with this outcome.

In the criminal case, the investigative magistrate requested copies of the Siemens internal investigation from both foreign authorities and the company. When all replied that the information was privileged, in February 2009 the magistrate ordered a raid on all Siemens offices located in the city of Buenos Aires, justifying the measure on the grounds of the “obvious lack of cooperation” from the company (Criminal File, page 3369). The disruption caused by the raids and the ensuing media coverage seemed to convince Siemens of the need to change the magistrate’s poor opinion of the company. Shortly afterwards Siemens produced a 400-page report which included a list of all financial transactions and accounting documentation which –according to Siemens– were the data that allowed the USDOJ to affirm: “*From in or about 1997 to January 2007, Siemens Argentina paid or caused to be paid at least \$ 15,725,000 directly to entities controlled by members of the Argentine Government, at least \$ 35,150,000 directly to the Argentine Consulting Group and at least \$ 54,908,000 to other entities*” (DOJ, 2008: 7).

From then on the investigation concentrated on getting corporate and financial evidence from various financial centers. In May 2009, mutual legal assistance requests were sent to the USA, Switzerland, the United Arab Emirates, the British Virgin Islands, Guernsey, the Bahamas, the Cayman Islands, Panama, Costa Rica, Uruguay and

¹¹ Argentina simultaneously discontinued its annulment and revision proceedings.

Germany. The magistrate also travelled to Germany in June 2009. In January 2010, answers began to come in from Germany, Panamá, the USA, the Bahamas, Guernsey, the Cayman Islands, Uruguay and Switzerland.

In March 2011, after having analyzed the information collected internationally, the investigative magistrate indicted Mr. Carlos Sergi, the engineer of the bribes, and called 22 individuals to present their defenses. The press questioned the fact that none of the defendants were public officials. The investigative magistrate explained that he would call the former public officials once he had heard from all the private parties involved. As some of the defendants were living in Germany, taking the 22 depositions took him more than two years. In December 2013, 17 defendants were charged with paying bribes: 9 former executives of Siemens, 3 intermediaries working for Mr. Sergi, and 5 individuals working for the losing consortium, (on the grounds that, by agreeing not to challenge the award, they contributed to the bribery scheme). Remarkably, no one was charged with receiving the bribes. In spite of the fact that the USDOJ and the German authorities identified several recipients of the bribes, the Argentine magistrate ordered further investigation to determine the final recipients of the illicit payments. Some interviewees questioned the impartiality of the magistrate. They suggested that he “owed” his appointment to Carlos Corach, former Minister of Interior of the Menem administration and one of the most prominent defendants in the case.

1.7 Media coverage

Some of our interviewees argue that the pro-active steps taken in 2009 – searches of Siemens’ premises, forensic analysis, mutual legal assistance requests to more than 15

countries, missions to Germany to hear witnesses and so forth –were forced by the flurry of information generated by other jurisdictions and reported in the local press.

The media has played an important role in exposing corruption in Argentina. This has been especially true since many of the institutions charged with oversight were captured during the Menem administration (Vervitsky, 1993). The ID cards case was not an exception.

The 3 national newspapers averaged 42 stories about the case every year from 1997 to 2012, with a peak of 99 stories in 2008. In one newspaper, La Nación, the number of stories appearing in the first pages of the political section tripled when milestones in the case were reached: when the contract was awarded in 1998; when the contract was terminated in 2001; when Siemens deployed its political power to re-launch it in 2002; and, when Siemens filed the ICSID complaint in 2005. Most of the coverage was translations of news appearing in foreign media followed by a local analysis focused on identifying the public officials mentioned (only by their positions) in the foreign proceedings and comparing the performance of the American and German institutions with that of the Argentine criminal justice system. It did not go unnoticed that the foreign institutions were able to close the case in less than two years while in more than fifteen years Argentine institutions were unable to get past the first step of criminal proceedings.

The TRT Case

1992 was a remarkable year in Brazil's history. In that year the establishment of a Parliamentary Investigation Commission (CPI) resulted in the impeachment of Fernando

Collor de Mello, the country's first elected President in three decades. Several other CPIs followed, some of which resulted in expulsion, resignation or removal of public officials, and all of which were accompanied by extensive media coverage (Power and Taylor 2011: 18; Pedone 2002). In *O jornalismo dos anos 90*, Nassif (2003: 3) describes the period as “the period of denunciation.”

Analyses of media coverage from the period suggest that in the early 1990s public works was the sector most vulnerable to corruption and embezzlement of public money (Nahat, 1991: 19; Abramo 2002: 105; Arantes 2011: 185). And that is exactly where our story begins, with an edict soliciting bids for construction of a new headquarters for tribunals of first instance of the São Paulo Labor Regional Court of the Second Region (TRT-SP).

Twenty-nine companies obtained copies of the edict, but only three presented formal bids. One of them was “Incal Indústria e Comércio de Alumínio Ltda.” On March 21, 1992 the bidding commission announced that the winner was a fourth company “Incal Incorporações S.A” and the contract was awarded to that company.¹² Incal Incorporações S.A. was later described as the result of an association between the Monteiro de Barros Group and Incal Alumínios.¹³ Incorporated on February 21, 1992, the company's owners, directly or indirectly, were Fabio Monteiro de Barros Filho, João Julio Cesar Valentini, and Luiz Estevão de Oliveira Neto.¹⁴

¹² TCU's decision No. 231/1996 (p. 03).

¹³ CPI 2000, 63.

¹⁴ Proceeding No. 2000.61.81.001198-1, addendum to the arraignment (p. 04) and judgment (p. 37-38).

This innocuous transaction led to one of the most notorious corruption scandals in recent Brazilian history. Between April, 1992, when the Treasury effected the first payment under the contract, and July 1998, Incal Incorporações received 80 bank transfers totaling R\$ 226 million. According to one report, only R\$ 63 million was used for the construction of the building, leaving R\$ 169 million of public funds unaccounted for.¹⁵ It would later come to light that the engineer appointed by TRT to monitor the works and verify that progress justified the payments made by TRT had received payments from the Monteiro de Barros Group, in 1993 and 1994, totaling US\$ 42,000 (CPI Report 2000: 71).

The TRT-SP case led to legal proceedings that were remarkable in both their number and variety. Within Brazil there were administrative, civil and criminal proceedings as well as a CPI and an impeachment proceeding in the Senate.¹⁶ Meanwhile, outside the country there were path-breaking asset recovery proceedings in Switzerland and the United States.

1.8 The Federal Accounting Tribunal: Round One

Problems with the TRT-SP contract were detected almost immediately. Shortly after the contract was executed, between October 26 and November 13, 1992, employees based in the São Paulo branch of the Federal Accounting Tribunal (*Tribunal de Contas*

¹⁵ Report of the Court of Appeals' decision 591/2000 concerning Rendering of Accounts by TRT-SP for fiscal year 1995 (TC-700.115/1996).

¹⁶ For a complete list of the 204 proceedings and appeals related to Nicolau dos Santos Neto, see Machado (2013: 23).

*da União, TCU*¹⁷ conducted a “regular sectoral inspection” of the TRT-SP. The inspection team’s report listed 17 irregularities in the bidding process and the contract between TRT and Incal. The team’s report recommended a number of corrective actions including: the “prompt interruption of payments to Incal Incorporações S.A.”, invalidation of the contract, and a refund of certain sums improperly paid prior to the signature of the contract (TCU, Proceeding TC-700.731/92-0, Decision 231/96). The inspection team’s report was reviewed by the full TCU tribunal in May, 1996 which closed the case without ordering any corrective action. The Tribunal decided to “preliminarily accept the procedures adopted up to this time by the TRT-SP, taking into consideration the final stage of the works,” and determined that the President of the TRT-SP should “adopt urgent measures to immediately transfer the construction site to TRT’s name (Law No. 8666/93)” (TCU, Proceeding TC-700.731/92-0, Decision 231/96). There does not appear to have been any appeal against this decision.

1.9 The Public Civil Action

In May, 1997 the Federal Public Prosecutor (*Ministério Público Federal*) (MPF) launched a “Public Civil Investigation” of the TRT-SP case. The investigation was first proposed by the Federal Deputy Giovanni Queiroz, a then-member of the National

¹⁷ The Federal Accounting Tribunal (TCU) is responsible for overseeing the accounts of the federal government and also for deciding if any irregularities have been committed by companies, administrators or employees responsible for public goods. For a complete description of TCU’s activity see Speck (2011: 127-161)

Congress's Budget Commission.¹⁸ His statement to the MPF expressed concern regarding the project's sluggish pace and the fact that the TCU seemed to have turned a blind eye to the alleged contractual irregularities (CPI 2000, 73).

In July, 1998, the MPF secured an injunction preventing the National Treasury from continuing to transfer funds to Incal.¹⁹ Subsequently, on August 26, 1998, the MPF filed a public civil action²⁰ before the Federal Court.²¹ The commencement of the civil action led to the freezing of several Brazilian bank accounts. The bank accounts remain frozen to this day but the civil action has not yet been resolved; dozens of appeals have been filed in the thirteen years since the first judgment was handed down in 2001. These

¹⁸ Note by the Federal Senate's Permanent Commission concerning the 6th Extraordinary Meeting of 08/10/2000 of the CCJ Commission - Judiciary Sub-Commission, p. 04.

¹⁹ Injunction Relief n. 93.0032242, 12a Federal Civil Circuit Court.

²⁰ The public civil action was created in 1985 (Federal Statute n° 7.347, of 24/07/85) authorizing the Public Prosecutors, some public bodies and civil associations to begin investigations focused on accountability and reparation for damages in cases which involve the protection of collective rights, such as the environment, consumers' rights and economic rights. When the law of administrative improbity came into force, the public civil action also started being used to investigate civil responsibility in corruption cases.

²¹ Public Civil Action n. 98.0036590-7. The lawsuit was filed against Nicolau dos Santos Neto, Luiz Estevão, Fábio de Barros, José Eduardo Ferraz, Delvio Buffulin, Antonio Carlos Gama, Incal Incorporações S/A, Monteiro de Barros Investimentos S/A, Fabio Monteiro de Barros Filho, José Eduardo Ferraz, Construtora Ikal Ltda., Incal Ind. and Com. de Alumínio Ltda. The suit was filed before the 12th Federal Criminal Court in light of the motion for injunctive relief.

kinds of delays are not out of the ordinary; our interviews suggest that public civil actions—especially those involving allegations of administrative misconduct—regularly languish in Brazil’s Federal Courts.²²

After more than ten years of proceedings, on October 26, 2011, judgments were handed down in both of the public civil actions²³ holding the defendants²⁴ responsible for: material and moral damages caused to the State, “to be arbitrated at the sentencing phase;”²⁵ a civil fine equivalent to three times the monetary gain that the defendants accrued from the corrupt acts; and, returning to the State any increase in the value of assets gained unlawfully. The court also revoked the defendants’ right to enter into government contracts, and suspended certain political rights for ten years. Furthermore, the court confirmed an injunction maintaining the unavailability of defendants’ assets and blocking their bank accounts.

²² See also Taylor (2011: 170) (“the system is delay ridden, formalistic; and subject to constant appeal”).

²³ It seems that a consolidated trial had taken place for Bill of Review no. 2000.03.00.033614, of TRF3 (Federal Court of Appeals), and ACPS 2000.61.00.012554-5 and 98.0036590-7.

²⁴ The defendants Jail Machado Silveira, partner-manager of Construtora e Incorporadora CIM, and Délvio Buffulin, President of the Regional Labor Court, were acquitted due to lack of evidence. ACP Sentence n. 98.0036590-7, DJ 26.10.11.

²⁵ ACP Sentence n. 2000.61.00.012554-5.

1.10 The CPI

On March 25, 1999, the Federal Senate launched a Parliamentary Investigation Commission (*Comissão Parlamentar de Inquérito, CPI*) to investigate allegations relating to the Brazilian justice system.²⁶ The Federal Senate had received more than four thousand complaints relating to the justice system but the CPI selected just nine cases for in-depth investigation. One of those cases was the TRT-SP case.

The CPI's investigation relied upon evidence gathered by compelling disclosure of the bank records of people and companies involved in the case as well as fifteen individual depositions. As we have already mentioned, the bank records revealed payments to the engineer appointed by TRT to monitor the works. The investigation also revealed transfers of funds totaling US\$ 6 million to Swiss bank accounts owned by Nicolau dos Santos Neto. Funds were transferred to a shell company and then used to purchase a deluxe apartment in Miami. Other funds were transferred to accounts in banks located in the Cayman Islands, the Bahamas and Panama.²⁷

In November 1999 the CPI issued a 360-page report detailing these irregularities. The CPI report also laid out 21 recommendations, including mandates to: (i) “institute external control of the Judiciary”; (ii) “speed up the approval of the treaty on Mutual Legal Assistance in Criminal Matters, entered with the United States of America in October, 1997, and the OECD Convention on Combating Public Bribery of Foreign

²⁶ The Brazilian Federal Constitution has provided for CPIs since 1934. The current Constitution, of 1988, for the first time grants to the CPIs the same investigative powers granted to the judicial authorities (Federal Constitution, art. 58, 3rd).

²⁷ CPI Report 2000: 97 and 79; interviews 2, 3 and 9.

Public Officials, concluded in Paris in December, 1997”; (iii) “Re-examine the constitutional law regarding letters rogatory...in order to expedite cooperation between Brazil and other countries under existing international agreements”; (iv) “require the Senate Foreign Affairs Commission to examine how to more effectively implement bilateral and multilateral agreements of international judicial cooperation to which Brazil is already a party” (CPI Report 2000, 615 and 616).

1.11 Media coverage

The CPI’s investigation and report sparked investigations and proceedings by a variety of other institutions, both inside and outside of Brazil.²⁸ The most immediate impact was seen in media coverage of the case. Even after the commencement of the Public Civil Actions the TRT case attracted little attention from the media. That changed, however, in April 21, 1999 when *Folha de São Paulo* began to cover the CPI’s hearings regarding the TRT Case. On the first day of coverage there was a front page story based on the breach of Santos’ bank secrecy and new stories were published virtually every day that week. The watershed came on April 28, 1999 when the weekly magazine *Veja* published a three page exposé of Nicolau dos Santos Neto’s personal finances.²⁹ Ironically, *Veja* did not regard the TRT case as the biggest scandal of the

²⁸ Soares (2013, 312) reports that Brazilian media coverage led to Nicolau dos Santos Neto being identified as a politically exposed person (PEP) and “prompted Santander Bank to notify the Geneva Attorney General of suspicious transactions”.

²⁹ The main source of information for the report was Santos’s son-in-law, Marco Aurélio Gil de Oliveira, who was interviewed by *Veja* a few days after his testimony before the

week. The cover story of that issue, accompanied by an eight page article, was about the overseas accounts of a former president of the Central Bank.³⁰

1.12 The Federal Accounting Tribunal: Round Two

In May 1999 the TCU reopened its audit of the TRT case (decision 45/99), citing a 1998 letter from the Chief Federal Prosecutor of the State of São Paulo on February, 1998 (TC-001.025/98-8). On July 11, 2001 the TCU decided that the accounts were irregular and ordered the defendants to pay R\$ 169,491,951.15. It also imposed fines of R\$ 10 million on Incal Incorporações, Grupo OK and Nicolau dos Santos Neto, individually. The decision was affirmed on December 5, 2001.

On August 2012 the Federal Attorney General's Office and Grupo OK signed an agreement to partially resolve the proceedings launched by the Federal Attorney General. The settlement was described as "the biggest recovery in Brazilian History" (AGU 2012). Under the agreement Grupo OK will pay roughly R\$ 450 million: R\$ 61 million in cash and the rest in ninety-six installments of R\$ 4 million. Grupo OK's payment included a fine of almost R\$ 19 million in cash and an agreement to renounce its right to appeal that fine. The Attorney General's initial claim of R\$ 169 million grew to R\$ 991 over the

CPI. According to Marco Aurélio, when he threatened to publicize Nicolau's wealth and spending habits Nicolau retorted, "you may denounce me, but nothing is going to happen to me. I am a respected judge and have powerful friends." *Veja*, April 28, 1999 (Issue No. 1595), p. 46.

³⁰ "Scandal's X-ray: Chico Lopes (Central Bank's former president) has 1.6 million dollars, undeclared, abroad". 'Veja', April 28, 1999 (Issue No. 1595), front page.

course of eleven years so the agreement actually provided for payment of less than half the amount sought by the Attorney General. As of January 2013 proceedings aimed at collecting the remaining R\$ 542 million were still under way.

1.13 The Senate

On December 8, 1999, just a few weeks after the CPI report was published, several political parties submitted a statement to the Senate Ethics Committee repeating the allegations against Senator Luiz Estevão set out in the report. According to the statement, the illegal activities reported amounted to a breach of parliamentary decency and not only made Estevão subject to expulsion but also disqualified him from holding public office. On June 28, 2000, the Senate's Plenary Assembly approved Luiz Estevão's expulsion."³¹

1.14 Criminal proceedings

In April, 2000, MPF initiated two criminal proceedings related to the TRT case. The first proceeding focused on charges of corruption; the second proceeding charged Nicolau dos Santos Neto with money laundering. Preventive detention was ordered for both Nicolau dos Santos Neto, Fábio and José Eduardo but only Nicolau was actually detained.

The decision at first instance was handed down in June, 2002. Nicolau was sentenced to 8 years' imprisonment for money laundering and influence peddling. All of the other defendants were acquitted. The MPF appealed against the decision and, in 2006,

³¹ Published on the D.O.U., resolution No. 51/2000 of June 29, decreeing the revocation of Luiz Estevão's mandate.

the Federal Regional Appeals Court of the 3rd Region (Tribunal Regional Federal da 3ª Região, TRF-3) overturned the rulings in the corruption case. The Appeals Court convicted all defendants and sentenced them to between 26 and 31 years' imprisonment. The Appeals Court also imposed fines ranging from R\$ 900 thousand to R\$ 3 million.

The defendants appealed to the Superior Court of Justice (Superior Tribunal de Justiça, STJ). Three of the defendants - Luiz Estevão, Fábio de Barros and José Eduardo Ferraz – were allowed to remain free pending the outcome of the appeal. They were detained for a total of only a few days through the course of the proceedings. Nicolau dos Santos Neto, however, was denied the right to remain at liberty, presumably because he had absconded. On account of his health Nicolau was ordered to remain confined to his home. Curiously, this new sentence attracted little media coverage: it was mentioned in only two of the eight stories published during the year.

1.15 Proceedings in Switzerland

The news reports published in April, 1999 caught the attention of the Swiss authorities. Geneva's General Public Prosecutor initiated preliminary investigations of Nicolau dos Santos Neto for money laundering (P/5132/99) and, on May 4, 1999, breached secrecy of banking documents and froze funds totaling just over US\$6.8 million in two accounts at Banco Santander (CPI Report 2000: 96).³²

Two attempts to have the funds repatriated to Brazil were made. The first attempt was by the first District Court of the Federal Tribunal in São Paulo. Early in 2000 the Court sent a letter rogatory to Geneva, explaining that Nicolau dos Santos Neto was

³² Federal Penal Court. RR 2007.131, p.02

under investigation for corruption and embezzlement of public money and requesting seizure and repatriation of all assets frozen in Switzerland. The Swiss judge granted the motion. When Nicolau appealed the *chambre d'accusation* upheld the freeze but held that a final decision from the Brazilian judiciary would be required for the assets to be forfeited and repatriated. In addition, the “*chambre d'accusation*” called attention to the existence of a Swiss proceeding - the above-mentioned P/5132/99 - which might also allow the seizure assets in the Swiss territory.³³ Therefore, if Brazilian authorities did not reach a final decision, the Swiss proceeding (P/5132/99) against Nicolau dos Santos Neto for money laundering could guarantee repatriation. And that is what finally happened.

In 2004 a new attempt to repatriate the frozen assets was made, this time by lawyers from Geneva retained by the Brazilian Federal Attorney General's Office. Once more the trial judge granted the motion. Again Nicolau appealed and the *chambre d'accusation* allowed the appeal, this time on a procedural ground as well as because of the absence of a final decision from Brazil.

In 2007 Nicolau requested that the trial court revoke the decision freezing his accounts. The judge denied the motion and Nicolau appealed, pointing to the lapse of over 8 years and the lack of connection between the bank accounts in Switzerland and the facts ascertained in Brazil. The appeal was dismissed on November 27, 2007³⁴.

In 2009, the Swiss proceeding (P/5132/99) was concluded with a decision to forfeit the money frozen ten years before . The decision was confirmed by the *Tribunal de Police de Geneve* in 2010 and became final in August 2012 with a decision of the

³³ Federal Penal Court. RR 2007.131, p. 02

³⁴ Federal Penal Court. RR 2007.131, p. 07

Tribunal Federal, which also awarded compensation for amounts transferred to foreign institutions (Ribeiro 2013).³⁵

1.16 Proceedings in Miami

In August, 2000, the Ministry of Justice set up a “task force” to organize the efforts of the different bodies handling the case.

On September 1, 2000, lawyers from a Washington-based law firm hired by the Brazilian State filed an action in the 11th judicial Circuit Court of Miami seeking transfer to the Brazilian State of title to the apartment in Miami.³⁶ In the previous month the property had been showcased in the television show “Fantástico” by the journalist Caco Barcelos and ever since it had become a symbol of the scandal. That same week, Nicolau’s face appeared on the cover of *Veja* above the headline “Anatomy of a crime: the story of the most outrageous coup in Brazilian history.” The ten-page story included photos of the building, as well as of the apartment’s interior.³⁷

Why did Brazil file a civil claim instead of requesting international cooperation based on reciprocity? At the time the suit was filed in Miami the MLAT between Brazil

³⁵ Decision available at http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=21.08.2012_6B_688/2011 (as of January 28, 2013). According to the decision, roughly US\$ 3.8 million was transferred abroad between 1994 and 1999.

³⁶ The suit was filed against Nicolau dos Santos Neto and two Florida corporations. Materials filed in connection with the claim are available from the website of the Circuit and County Courts, Miami, at the address <HTTP://www2.miami-dadeclerk.com/civil/search.aspx>. The law firm had previously represented Brazil in debt negotiations with the IMF and in an earlier asset recovery proceeding in the United States.

³⁷ ‘Veja’, August 02, 2000. Issue 1660. Printing of this issue: 1 257 444 copies.

and the United States, which had been signed in October, 1997, was still awaiting approval by Brazil's National Congress – recall that in December 1999 the CPI had expressly recommended that approval of the agreement be expedited. The agreement was not approved until December 18, 2000.

The Brazilian State was ultimately able to satisfy the Miami court that the apartment had been acquired with funds arising from Nicolau's account in Switzerland, which, in turn, had received a number of transfers following the payments that the Treasury made to Incal. In late August, 2001, the judge recognized a constructive trust in favor of the Brazilian State. The apartment was auctioned and, in November 2002, US\$ 690,113.81 was deposited in the National Treasury's account.

Discussion

1.17 Limitations of local anti-corruption institutions

At first glance, the outcomes of our two cases are consistent with the general perception that local anti-corruption institutions in Argentina and Brazil are and have been weak. Both cases originated in corrupt acts that took place in the last decade of the 20th century, from 1992 to 1998 in the TRT case and from 1997 to 2007 in the case of the ID cards. Although the allegations of corruption were widely reported within a few years of their occurrence, more than ten years later legal proceedings are still under way. Moreover, the local authorities have only managed to deprive one person – Nicolau dos Santos Neto — of his liberty for any meaningful amount of time and they have only managed to recover a portion of the proceeds of the crimes.

The performance of the Brazilian institutions in the TRT case belies any general claim that Latin American institutions at the turn of the twentieth century were irredeemably compromised. The wrongdoing was uncovered within a reasonably short period of time by a specialized government agency (the Accounting Tribunal) and further civil, criminal and administrative proceedings were commenced in due course. Most of those proceedings moved slowly thereafter, but the creation of the CPI for the Judiciary and the way in which it dealt with the TRT case are inconsistent with the idea that Brazilian institutions lacked either the will or the capacity to investigate high-level corruption.³⁸

The sheer number of proceedings in Brazil suggests that concerns about defendants being burdened by multiple proceedings are not misplaced and that transnational proceedings risk exacerbating that problem.

The TRT case also demonstrates some of the strengths and weaknesses of the effectiveness of the Brazilian media as an anti-corruption institution. Particularly notable is the role the media appears to have played in triggering the proceedings in Switzerland and Miami. More generally, the amount of attention the Nicolau case received in the media arguably weighs against any suggestion that Brazilian society at the time was

³⁸ This is consistent with Power and Taylor's conclusion (2011: 259) that "after analyzing other countries experiences (...) Brazil not only is doing fairly well but may be on the cusp of a very positive equilibrium, if it can push itself over the hump and improve the overall performance of its web of accountability". For a slightly earlier less optimistic conclusion, focusing specifically on the failure to impose sanctions in political corruption cases, see Taylor and Buranelli 2007.

somehow tolerant of grand corruption.³⁹ This is all consistent with Nassif’s argument that during the 1990s Brazilian journalists served “to submit the State to the control of the public opinion and defend it from all sorts of corporatism” (Nassif 2003: 3; see also Porto 2011).

At the same time, the TRT case also illustrates the selective impact of media attention. Much of the coverage of the case focused on the most scandalous pieces of the story. Table 1 reveals that the period during which Nicolau was considered to be “on the run from justice” - from early April, 2000 until the end of January, 2001⁴⁰ – accounts for 55% of all reports about the TRT case published in the course of over fifteen years, and almost 67% of the cover stories. After that period, the case was no longer news: only 24 stories were published in 2002, for example, when the first criminal decision was handed down. The media also paid much more attention to Nicolau than to other alleged wrongdoers. Table 2 shows a large discrepancy between the number of media stories published about Nicolau and the number of stories concerning the private actors involved in the TRT case.⁴¹ The media was also fickle. For example, the initial sentences imposed in the criminal case against Nicolau, Fábio and José Eduardo attracted remarkably little media attention. They were made public late in the afternoon on Friday June 26, 2002. Folha de São Paulo published a report on Monday and the next report did

³⁹ For more recent research on social acceptance of corruption in Brazil and its impact on voting see Power and Taylor (2011: 10-11) and Reno (2011).

⁴⁰ During this period a total of 302 stories were published, including 21 cover stories.

⁴¹ It was not possible to analyse media stories mentioning Senator “Luis Estevão” or “José Eduardo Ferraz” in a similar fashion because each of these individuals was referred to by multiple names.

not appear for another 15 days. Why the inattention? The finals of soccer's World Cup were held on Sunday June 28th and Brazil was playing for its fifth championship (it won).⁴²

[Table 1 about here.]

[Table 2 about here.]

The TRT case suggests that effective anti-corruption institutions need not mimic institutions found in the United States. For instance, the absence of corporate criminal liability does not appear to have been a major impediment to local anti-corruption efforts in Brazil since public civil liability appears to serve as a functional equivalent.⁴³ Similarly, the TRT-SP CPI played a unique role that does not directly parallel that of any institution in another jurisdiction.⁴⁴

The TRT case also highlights the importance of evaluating a country's anti-corruption institutions in a dynamic framework and taking into account those institutions' ability to learn from experience and improve their performance over time. Since the TRT

⁴² Interview 3. Notwithstanding the soccer match, this feature of the TRT Case is consistent with Porto's concern about the growth of the *journalism about investigations* (as opposed to *investigative journalism*) which he claims "reflects the system's emphasis on the investigation phase and the corresponding neglect of the stages of oversight and sanction" (2011: 119).

⁴³ For more details see Machado 2013. On August 1st, 2013, Brazil passed law 12.846 enhancing corporate liability for corruption offences.

⁴⁴ Cf. Taylor (2011: 176): "[c]ongressional investigations, in particular, are often of little or no added value".

case first came to light, several new anti-corruption institutions have been created in Brazil, including the Federal General Inspection Office, the National Justice Council, the Financial Intelligence Unit, the Department of Assets Recovery and International Cooperation of the Ministry of Justice, and specialized divisions in the Federal Attorney General's Office, and the Federal Public Prosecutor. The current set of anti-corruption institutions is fundamentally different from the set that was in existence at the end of the 20th century.

Our study suggests that these kinds of changes in anti-corruption institutions can be driven at least in part by pressures created by specific cases. The TRT case was viewed by many players as a watershed for the Brazilian justice system. Although it is impossible to draw direct causal connections, many of the above-noted changes in Brazilian anti-corruption institutions were inspired in part by the TRT case.⁴⁵ The case also prompted considerable debate – as well as some innovation – around the legal doctrines that govern anti-corruption proceedings, especially those that define the roles of various branches of the state in responding to political corruption. Most notably, the TRT case sparked a contest over whether to retain a rule that required proceedings against former holders of public office to be dealt with by the superior courts if based on allegations of crimes committed during the exercise of a public function. In August 1999 the Supreme Federal Court reversed a 1964 ruling that provided for this kind of special venue. In 2002 a statute reversed the 1999 rule and restored and amplified the special venue law. Within days of its coming into force the constitutionality of that statute was

⁴⁵ The TRT Case was also key to the approval of a new rule governing the budget process (Lei de Diretrizes Orçamentárias 2001) (Speck 2011: 147).

challenged by magistrates and prosecutors' associations. In 2005 a majority of the Supreme Federal Court declared the statute unconstitutional but the issue is still under debate. As Ferreira (2013) shows, these changes were the main cause of at least 25 appeals - in both criminal proceedings and public civil actions - led to four changes of jurisdiction - among federal and superior courts - and interrupted the proceedings for almost four years.

It is more difficult to interpret the ID cards case as evidence of the strength of Argentine legal institutions. The landscape of anticorruption institutions in Argentina definitely changed during the period. Changes included: the creation of a National Anticorruption Office when Menem was voted out of office; the creation of a centralized financial intelligence unit soon after; the establishment of a constitutional rule reserving the Presidency of the oversight bodies to the first minority in Congress; a new statute considerably limiting the immunities of public officials when suspected of corruption; an amendment to the criminal procedure establishing that the statute of limitations in cases involving public officials would only start to run once the public official left office. These changes were, however, prompted by scandals of corruption other than the ID cards case.

The outcome of the ID cards case does, however, point to the important role that political institutions and the media can play in combating corruption. Although the Argentine courts and prosecutors were ineffective in responding to the corruption of the Menem regime, the electorate, the De la Rúa administration and Congress were not. Recall that in December 1999 Argentine voters threw Menem out of power and allowed De la Rúa and Congress to cancel the Siemens contract. Political institutions can also

complement the media and legal institutions. When asked about the role of his office in the Siemens case one of the lawyers with the National Anticorruption Office –created by the De la Rúa Administration- representing the Government in the criminal investigation replied: “Our main goal is to keep the case alive, no matter how, and wait for a political window of opportunity.” (Interview 15)

The ID cards case also illustrates the potential for bias in media coverage. As in the TRT case, we found a bias in favor of coverage of public officials involved in the ID cards case. Figure 1 shows that public officials involved in the case were mentioned an average of 3.5 times more than Siemens executives. We also found evidence that the pattern of media coverage was influenced by parties motivated by their own political or economic interests rather than purely by a desire to combat corruption. In other words, patterns of media coverage are explained by the dynamics of political and economic competition rather than the actions of an independent investigative media (Balan, 2011). After the contract was awarded to Siemens in 1998, the main source of information for the press was the CEO of a local company that was part of the joint venture backed by Yabrán. The company –which had been left out of the agreement reached between the Government, Siemens and its former partners in the joint venture- first challenged the award in an administrative court. The Government rejected the challenge on formal grounds: only the joint venture (not the company alone) had legal standing to challenge the award. Exposing the case appears to have been part of an apparently unsuccessful campaign aimed at prodding the government to offer compensation.

[Figure 1 about here.]

1.18 The benefits of foreign assistance

On balance, the ID cards case supports the proposition that foreign institutions offer valuable resources that compensate for the shortcomings of local anti-corruption institutions.

Not all foreign institutions were helpful. The ICSID panel which initially upheld Siemens' complaint and the German government which lobbied on Siemens' behalf initially hindered rather than helped the De la Rúa administration in its efforts to annul Siemens' corruptly procured contract. At least for a while, the international investment regime seemed oriented toward upholding the rights of actors who procured their investment through corruption rather than the rights of states victimized of corruption.

Argentina derived greater benefits from the application of US and German anti-bribery laws. The US and German authorities were able to draw upon political will, investigative resources and leverage over Siemens that Argentine institutions could not hope to match. They evidently were not intimidated by the prospect of confronting a large multinational corporation or embarrassing high-ranking Argentine public officials. The Munich Prosecutors' Office, and perhaps to some extent the US law enforcement officials, also took advantage of their relatively easy access to corporate records and Siemens executives located in Germany and the US. That information allowed officials, first in Germany and then in the US, to access information that revealed both the extent of Siemens' corrupt practices and the means by which they were carried out. Moreover, the prosecutors and administrative agencies in both the US and Germany clearly also took advantage of their ability to enforce penalties against the parent company of the Siemens group as opposed to just a local subsidiary. Siemens could not afford to ignore

the threat of being sanctioned in the jurisdictions where such a large proportion of its assets and business opportunities were located. Their leverage over Siemens allowed the US and German officials to secure a level of cooperation from the firm that Argentine institutions could only dream of obtaining on their own. Under Argentine criminal law there are no incentives for companies to cooperate; there is neither corporate criminal liability nor any of the associated institutions, such as mandatory compliance programs, deferred prosecution agreements or non-prosecution agreements.

The fruits of this labor were not immediately shared with Argentine law enforcement officials. For instance, the Argentine investigative magistrate asked US authorities to send a copy of the report on the Siemens internal investigation. The US authorities responded (consistently with applicable law) that such information was privileged and protected by the work-product doctrine. The same information was requested from Siemens Argentina and Siemens AG, with similar results. Moreover, when the investigative magistrate attempted to get information from the German authorities, he first phoned the Munich Prosecutor Officer, who—against recommended international best practices—advised him to use the diplomatic channel. The investigative magistrate followed the Munich Prosecutor’s advice; nevertheless, the German authorities reported that the investigation in Munich was ongoing at that time and, in order to “avoid future contradictions” the German authorities were not capable of sharing information with the Argentine authorities. It was only in December 5, 2008, when an agreement with Siemens had finally been reached, that the German authorities informed the investigative magistrate in Argentina that the German Prosecutor would be glad to

receive him in Spring 2009. A few days later, the USDOJ and the SEC released the plea agreements signed with Siemens.

Nonetheless, the US and German institutions ultimately made tangible positive contributions to Argentine institutions' efforts to respond to the misconduct of Siemens and its collaborators. The high-profile plea agreements concluded between Siemens and its subsidiaries in the US and Germany, reported in the local press, created political pressure to revive the Argentine criminal proceedings that had stalled in the face of resistance from powerful local actors. The only substantive decision taken in 15 years – the indictment of December 2013—explicitly recognized that the investigation only seriously considered a bribery charge after receiving the information from the US and Germany and, in fact, around 80% of the evidence used to support the indictment was collected abroad. In addition, the information set out in the plea agreements helped Argentina to set the record straight in the ICSID proceedings concerning the civil consequences of the ID cards contract. Finally, while it might ultimately turn out to have been insufficient to lead to convictions, the information from the plea agreements also appears to have been of at least some assistance in the local criminal proceedings. Siemens paid more than US\$ 200 million for its internal investigation and by accessing the resulting plea agreements Argentina captured at least a portion of the value of that investigation.

At the same time the ID Cards case shows that countries like Argentina are capturing only a limited portion of the benefits generated when foreign institutions apply transnational anti-corruption laws. The fact that Argentine authorities were not given access to the report from the internal investigation is only one manifestation of this

phenomenon. Recall that the USA and Germany imposed roughly US\$ 1.6 billion in fines and penalties on Siemens for engaging in corrupt activities in Argentina and other countries. That money was paid to the US and German treasuries and was not shared with Argentina or any of the other countries whose officials were corrupted. This is not an uncommon result in transnational anti-bribery prosecutions. A recent study shows that between 1999 and 2012, approximately US\$6 billion worth of monetary sanctions were imposed on firms or individuals for engaging in transnational bribery but only 3.3 per cent of that sum was eventually transferred to the countries whose officials were bribed or allegedly bribed (StAR 2013).⁴⁶

The TRT case provides more limited support for the notion that foreign institutions provide valuable resources for local anti-corruption institutions. The key contribution of the US courts in Miami and the Swiss Prosecutor was to give the Brazilian state access to the assets transferred overseas by Nicolau dos Santos Neto. An intriguing feature of the case is the way in which the foreign authorities' actions complemented the efforts of the Brazilian media as well Brazilian law enforcement agencies. Journalistic reports published in April, 1999 triggered the Swiss investigation and the Miami apartment was first revealed by Rede Globo.

Despite this evidence of institutional complementarity, the overall benefits from foreign intervention in the TRT case were modest. The amounts of money recovered by Brazil were insignificant, unlike cases in which assets of much greater value have been

⁴⁶ UNCAC only provides for sharing of confiscated proceeds of crime (Articles 51, 55 and 57).

recovered for the benefit of much smaller countries. In addition, the CPI uncovered evidence that funds from the National Treasury were transferred to accounts in banks located in the Cayman Islands, the Bahamas, and Panama.⁴⁷ These funds were not the objects of any legal proceedings, suggesting that Brazil was not able to exploit all of the possible opportunities to secure assistance from foreign institutions. At the same time, the amounts that have been recovered may be significant to Nicolau dos Santos Neto and other officials who hope to transfer the proceeds of corruption overseas. But without knowing what portion of dos Santos Neto's ill-gotten gains have been found that claim is purely speculative.

The transnational dimension of the TRT case is particularly interesting because it highlights how the interaction between foreign and local institutions can change over time. Two changes seem particularly important. First, the case prompted Brazilian officials to develop innovative techniques for recovering stolen assets from the US and Switzerland (Soares 2013 and Ribeiro 2014). Second, the CPI's report appears to have played a role in motivating the Brazilian Congress to approve the cooperation agreement with the United States.

1.19 The costs of foreign assistance

The benefits of assistance from foreign anti-corruption institutions should not be assessed without taking into account the costs – foreign assistance sometimes comes at a price.

⁴⁷ CPI 2000, 97 and 79; interviews 2, 3 and 9.

The price to Argentina of the foreign proceedings against Siemens in the ID cards case is uncertain. Although the Argentine investigation advanced as a result of the US and German proceedings, the fact that no local actors have been punished risks reinforcing perceptions of impunity and demoralizing the local population. It is possible that bringing Siemens' misconduct to light did Argentina more harm than good. It is also possible that the foreign proceedings reduced the pressure on Argentine institutions to respond to the misconduct of local actors. Our research cannot resolve either of these issues.

In the TRT case the price of foreign assistance was more obvious, in the form of the fees charged by the private lawyers retained by the Brazilian state to represent its interests in the proceedings in Miami and Switzerland. Those fees were significant. For instance, the confiscation of Nicolau dos Santos Neto's apartment in Miami is hailed in Brazil as an example of legal creativity and the potential for transnational asset recovery. What is less well known is that the fees charged by the law firm which represented the Brazilian state in that case almost equaled the entire amount recovered.⁴⁸

The magnitude of these legal fees surprised Brazil and prompted it to explore the possibility of retaining foreign lawyers on a contingency fee basis (see also Soares 2013: 311, 313). The costs of retaining private lawyers to recover assets from abroad may also lead countries like Brazil to take a fresh look at the option of relying on assistance from foreign law enforcement officials pursuant to the provisions of mutual legal assistance

⁴⁸ Interview 2 (14:36) and Interview 1 (20:12).

treaties.⁴⁹ We have received conflicting reports on the viability of this approach. One American private lawyer we interviewed suggested that using mutual legal assistance mechanisms for the purposes of transnational asset recovery is slow and unreliable, especially to the extent it involves securing cooperation from local assistant U.S. Attorneys with little interest in or experience with such proceedings. This view was shared by lawyers and prosecutors in Argentina. The U.S. Attorneys we interviewed had a different view, claiming that mutual legal assistance was a relatively straightforward process.⁵⁰ It is, however, clear from the TRT case that when a criminal conviction is a pre-requisite to the repatriation of assets through mutual legal assistance mechanisms the process can take a very long time.⁵¹

1.20 Limitations of foreign anti-corruption institutions

The limited capacity of foreign institutions is on full display in the ID cards case. Although the US and German institutions were able to impose record-breaking fines on Siemens AG, to date they have done nothing to any of the individuals who received corrupt payments from Siemens. The foreign proceedings attracted considerable attention

⁴⁹ US mutual legal assistance treaties typically provide that a party to which assets have been forfeited may share them with the other party upon such terms as it considers “reasonable” or “appropriate” (Treaty with Argentina on Mutual Legal Assistance in Criminal Matters, Art. 16:3; Treaty with Brazil on Mutual Legal Assistance in Criminal Matters, Art. 16:3).

⁵⁰ Soares (2013, 311) concurs.

⁵¹ UNCAC recommends either waiving such pre-requisites (UNCAC, 57, 3) or using other legal avenues for recovering assets (UNCAC 53).

from the Argentine media⁵² and the media had, in turn, put local players under renewed pressure by reinvigorating the local criminal proceedings. As mentioned above, this was the most active period of investigation. So far, the only legal consequence has been the arrest in 2011 of the Siemens director who orchestrated the bribery scheme. On account of his age, he is serving preventive detention – in his luxury apartment located on the 40th floor of one of the most expensive buildings in Buenos Aires.

The ID cards case also points to the possibility that even if foreign institutions succeed in discouraging transnational forms of corruption, the effect may be to encourage a shift to more local varieties. The penalties imposed on Siemens are probably enough to make any multinational corporation think twice before neglecting its obligations to discourage its employees and agents from paying bribes to obtain public contracts. But if multinational firms like Siemens are unwilling to pay bribes, contracts may end up being awarded to local firms with less direct connections to multinational firms. This outcome is not necessarily desirable for host states--it is not obvious that Argentina would have been better served if the ID cards contract had been awarded to the consortium backed by Yabrán.

The TRT case illustrates the fact that in many countries, and especially in large middle-income countries like Brazil, a large proportion of corrupt activity is likely to involve only local firms and local public officials. But the TRT saga also reminds us how easy it is for these cases to take on transnational dimensions.

⁵² The number of stories mentioning the case peaked with the announcement of Siemens' plea agreement with the US and German authorities.

1.21 Accountability of foreign institutions

Our findings are consistent with the view that foreign anti-corruption institutions are largely unaccountable to the general public in host countries. There is no sense in which the US Department of Justice, the Munich Prosecutor, ICSID panelists, or the Miami courts were accountable for their actions to the public in Argentina or Brazil. The exception to this general proposition might be the World Bank which is at least formally accountable to all of its members.

Our research also suggests that while it is dangerous to presume that local anti-corruption institutions are significantly more accountable than foreign ones, meaningful forms of accountability have developed at the local level in both Argentina and Brazil. This is particularly true in Brazil, where the extensive array of institutions with the ability to investigate and prosecute political corruption creates a ‘web of accountability’ (Power and Taylor 2011). The initial investigation by the TCU obviously was not the end of the TRT case. That decision was essentially second-guessed by a range of courts and electoral institutions, as well as the media. The proceedings against the judge who initially sentenced dos Santos Neto and his co-defendants are a reminder of ongoing threats to the integrity of Brazil’s judiciary and senate, but also underscore the effectiveness of the applicable accountability mechanisms.

The level of transparency of the Brazilian anti-corruption institutions leaves much to be desired though. Most of the judicial proceedings in Brazil are under secrecy, in marked contrast to the proceedings in the Miami courts. It was possible to obtain access to some of the Brazilian court files through documents filed during appeals and uploaded to the Court’s website. However, even then the complexity of the case and the sheer

volume of materials serve to inhibit transparency. The documents filed only in the judicial proceedings presented above totaled more than 45,000 pages.⁵³

The situation in Argentina is somewhat different. In Argentina the appointments and impeachments of judges and prosecutors are usually politically motivated and their performance is not subject to regular evaluations. This situation of limited accountability creates incentives and opportunities for judges to manipulate the progress of corruption investigations for their personal benefit. At one point corruption investigations lasted an average of 15 years and were typically concluded by the operation of the statute of limitations. Troubled by this state of affairs, two Buenos Aires-based NGOs devoted to transparency efforts decided to make formal requests for access to the most prominent ongoing corruption criminal files.⁵⁴ Their main argument was that such delays gave rise to impunity. They claimed that the way to challenge that impunity was to recognize the existence of a collective right to understand the reasons for delay. The NGOs presented their request in 90 different cases and in half of them the petition was rejected based on a rule of criminal procedure establishing that the process is only accessible to the parties. In the other half of the cases access to the file was granted with the consent of the

⁵³ The TRT case encompasses hundreds of appeals. As of January 2013, 49 out of the 189 appeals relating to Nicolau dos Santos Neto alone were still pending decision (Machado 2013).

⁵⁴ Asociacion Civil por la Igualdad y la Justicia (ACIJ) and Centro de Investigación y Prevención de la Criminalidad Economica (CIPCE). A couple of preliminary analyses of the cases to which the NGOs obtained access are available at www.acij.org.ar.

defendants. Ultimately, an appellate court upheld the second approach. The file for the Siemens case was one of the many files to which these NGOs obtained access.

Conclusion

William Blake encourages us “to see a world in a grain of sand” (Blake, 1863). There are obvious limits to what we can learn about a complex set of institutions by examining their application to one or two incidents of wrongdoing. However, perhaps because the institutions are so complex and their operations have attracted so little scholarly attention, we have found it extremely enlightening to conduct our analysis at this microscopic level.

At least in the microcosms represented by our two cases, the institutional complementarity theory has considerable traction. In both cases important limits on the capacity of local anti-corruption institutions were partially overcome with the assistance of foreign institutions. In addition, in each case foreign intervention could have yielded even greater financial benefits.

At the same time our findings also point to several challenges to the institutional complementarity theory. For instance, in both Argentina and Brazil we found evidence of important (positive) changes in the capacity and level of accountability of local anti-corruption institutions over time, and those changes were prompted, especially in Brazil, in part by local actors’ experiences in the cases we studied. These findings should motivate further study of the role of learning-by-doing and critical cases in explaining

improvements in institutional capacity.⁵⁵ As our Brazilian case shows, the greater the capacity of local legal institutions, the greater the risk that defendants will confront the burden of participating in multiple proceedings and that transnational proceedings will add to that burden. Our Argentine case demonstrates that some defendants will face multiple foreign proceedings arising from the same misconduct.

We also saw evidence of limits on the capacity of foreign institutions to affect purely local actors and activities. A better understanding of those limits will be valuable in informing proposals to extend the extra-territorial capacity of various institutions. For example, there is longstanding controversy over whether countries like the US should assert criminal jurisdiction over foreign public officials as well as the people who bribe them.

Other challenges to the institutional complementarity theory were more surprising. For instance, before conducting our case studies we did not appreciate the potential significance of the costs of engaging foreign institutions in anti-corruption activities. The demand for and the costs of dealing with private lawyers were especially surprising.

Finally, we were intrigued by indications that under certain conditions engagement by foreign institutions can have negative rather than positive effects on local anti-corruption efforts. For instance, the possibility that focusing on transnational forms of corruption will have a displacement effect, in the sense that it will encourage corrupt officials to focus on more local forms of corruption, deserves further empirical study.

⁵⁵ Comparable studies of international criminal law include Burke-White 2005 and Sikkink 2011.

Similarly, the possibility that the international regime designed to protect the rights of foreign investors might end up protecting the rights of corrupt investors also merits attention. We hope that our case studies will encourage future research in these and other directions.

References

- AGU. 2012. Advocacia-Geral fecha acordo com Grupo OK para ressarcir quase R\$ 500 milhões desviados dos cofres públicos. Aug 23. Available online at: http://www.agu.gov.br/sistemas/site/TemplateImagemTextoThumb.aspx?idConteudo=205939&id_site=3. English version of the story available at: <http://en.mercopress.com/2012/08/24/brazilian-former-senator-agrees-to-reimburse-234-million-dollars-of-looted-money>
- Alconada Mon, Hugo. 2011. *Las Coimas del gigante Alemán*. Planeta, Buenos Aires.
- Abramo, Claudio et al. 2002. Contratação de obras e serviços licitações, in Bruno Speck ed). *Caminhos da Transparência. Análise dos componentes de um sistema nacional de integridade*. Campinas: Editora da Unicamp.
- Alvarez, José. 1999. Crimes of State/Crimes of Hate: Lessons from Rwanda. *Yale Journal of International Law* 24: 365-483.
- Arantes, Rogerio. 2011. The Federal Police and the Ministerio Publico. In Timothy Power and Matthew Taylor ed., *Corruption and Democracy in Brazil. The struggle for accountability*. Indiana: University of Notre Dame Press, p. 184-216.
- Balan, Manuel. 2011. Competition by Denunciation: The Political Dynamics of Corruption Scandals in Argentina and Chile. *Comparative Politics*, 43: 459-478.

- Blake, William. 1863. Auguries of Innocence in Alexander Gilchrist, *Life of William Blake: Pictor Ignotus*, 2 volumes. London: Macmillan, 1863; enlarged, 1880.
- Bonasso, Miguel. 1999. *Don Alfredo*. Ed. Planeta: Buenos Aires, Argentina.
- Burke-White, William W. 2005. Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo. *Leiden Journal of International Law* 18:557-590.
- Cavallo, Domingo. 1997. *El Peso de la Verdad* (6th Edition).. Ed. Planeta: Buenos Aires, Argentina.
- Caviglia, Franco and Christian Sanz. 1998. *La Larga Sombra de Yabrán*. Ed. Sudamericana: Buenos Aires, Argentina.
- Chehtman, Alejandro. 2010. *The Philosophical Foundations of Extraterritorial Punishment*. New York: Oxford University Press.
- CPI Report. 2000. Relatório da Comissão Parlamentar de Inquérito. Congresso Nacional.
- Davis, Kevin E. 2010. Does the Globalization of Anti-Corruption Law Help Developing Countries? in Julio Faundez and Celine Tan (eds.), *International Economic Law, Globalization and Developing Countries* (Cheltenham, UK and Northampton, MA: Edward Elgar).
- Davis, Kevin E. and Michael J. Trebilcock. 2008. “The Relationship Between Law and Development: Optimists versus Skeptics.” *American Journal of Comparative Law* 56: 895-946.

- Duff, Antony. 2010. Authority and Responsibility in International Criminal Law. In *The Philosophy of International Law*. Samantha Besson and John Tasioulas eds. Oxford University Press: New York, 589-604.
- Ferreira, Luisa. 2014. O impacto das normas sobre foro especial no Caso TRT in Machado, Maira and Luisa Ferreira (eds.). *Sistema de justiça e corrupção no Brasil: estudos sobre o Caso TRT*. São Paulo: Editora Academica Livre (forthcoming).
- Goldsmith, Jack and Stephen D. Krasner. 2003. The Limits of Idealism. *Daedalus* 47-63.
- Halliday, Terence C. 2009. Recursivity of Global Normmaking: A Sociolegal Agenda. *Annual Review of Law and Social Science* 5: 263-89.
- Helmke, Gretchen and Steven Levitsky eds. 2006. *Informal Institutions and Democracy: Lessons from Latin America*. Baltimore: Johns Hopkins Press.
- Levitsky, S. and Murillo, M. 2006. *Argentine Democracy: The Politics of Institutional Weakness*. Pennsylvania State University,
- Liascovich, Carlos. 2004. *Identidad Fallida* (Master in Journalism Thesis). Universidad de San Andrés-Clarín: Buenos Aires, Argentina.
- Machado, Maira (2013). *The TRT Case*. IDRC Digital Library. Available at <http://idl-bnc.idrc.ca/dspace/handle/10625/52302>.
- Manzetti, Luigi. 1999. *Privatization South American Style*. Oxford University Press: New York, United States.
- Mattei, Ugo. 2003. A Theory of Imperial Law: A Study on U.S. Hegemony and The Latin Resistance. *Indiana Journal of Global Legal Studies* 10: 383-448.
- Nahat, Ricardo. 1991. *Anatomia da Corrupção*. São Paulo: R. Nahat.

- Nassif, Luis. 2003. *O jornalismo dos anos 90*. São Paulo: Futura.
- Nichols, Philip M. 1999. Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under the Global Conditions of the Late Twentieth Century? Increasing Global Security by Controlling Transnational Bribery. *Michigan Journal of International Law* 20: 451-476.
- Parrish, Austen L. 2009. Reclaiming International Law from Extraterritoriality. *Minnesota Law Review* 93: 815-874.
- Pedone, Luis et al. 2002. O Controle pelo legislativo in Bruno Speck (ed). *Caminhos da Transparência. Análise dos componentes de um sistema nacional de integridade*. Campinas: Editora da Unicamp.
- Porto, Mauro. 2011. The media and political accountability in Timothy Power and Matthew Taylor (eds.) *Corruption and Democracy in Brazil. The struggle for accountability*. Indiana: University of Notre Dame Press, pp. 103-125.
- Power, Timothy J. and Matthew M. Taylor eds. 2011. *Corruption and Democracy in Brazil. The struggle for accountability*. Indiana: University of Notre Dame Press.
- Rennó, Lucio. 2011. “Corruption and voting” in Timothy Power and Matthew Taylor (ed.) *Corruption and Democracy in Brazil. The struggle for accountability*. Indiana: University of Notre Dame Press, p. 56-78.
- Ribeiro, Rochelle. 2014. Reparação dos ativos do caso TRT: equilibrando a interdependência de jurisdições com a utilização de diferentes estratégias legais. in Machado, Ferreira and Machado (eds.). *Sistema de justiça e corrupção no Brasil: estudos sobre o Caso TRT*. São Paulo: Editora Academica Livre (forthcoming)

- Rose-Ackerman, Susan. 1999. *Corruption and Government: Causes, Consequences, and Reform*, New York and Cambridge, UK: Cambridge University Press.
- (2013) Introduction: The Role of International Actors in Fighting Corruption, in Susan Rose-Ackerman and Paul Carrington eds. *Anti-Corruption Policy: Can International Actors Play a Constructive Role?* (Durham, North Carolina: Carolina Academic Press).
- Salbu, Steven R. 1999. The Foreign Corrupt Practices Act as a Threat to Global Harmony, *Michigan Journal of International Law* 20: 419-449.
- Securities and Exchange Commission. 2008. Complaint against Siemens AG, available at <http://www.sec.gov/litigation/complaints/2008/comp20829.pdf>
- Shaffer, Gregory. 2012. Transnational Legal Process and State Change. *Law and Social Inquiry*, 37: 229-264.
- Sikkink, Kathryn. 2011. *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics*. New York: W.W. Norton. & Co.
- Soares, Boni. 2013. Early restitution of assets: The Nicolau dos Santos Neto case. In Zinkernagel, Gretta and others (eds.). *Emerging trends in asset recovery*. Bern: Peter Lang, p. 305-315.
- Speck, Bruno. 2011. Auditing institutions, in Timothy Power and Matthew Taylor (ed.) *Corruption and Democracy in Brazil. The struggle for accountability*. Indiana: University of Notre Dame Press, p. 127-160.
- 2000. Inovação e Rotina no Tribunal de Contas da União: O papel da Instituição Superior de Controle Financeiro no Sistema Político-Administrativo do Brasil. São Paulo: Fundação Konrad Adenauer.

- 2002. Caminhos da Transparência, in Bruno Speck (ed). *Caminhos da Transparência. Análise dos componentes de um sistema nacional de integridade*. Campinas: Editora da Unicamp.
- StAR. 2013. *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*.
- Taylor, Matthew. 2011. The Federal Judiciary and the Electoral Courts in Timothy Power and Matthew Taylor (ed.) *Corruption and Democracy in Brazil. The struggle for accountability*. Indiana: University of Notre Dame Press, p. 162-182.
- Taylor, Matthew and Vinicius Buranelli. 2007. Ending up in Pizza: Accountability as a problem of institutional arrangement in Brazil. *Latin American Politics and Society* 49: 59-87.
- Tulchin, Joseph S. and Ralph H. Espach, eds. 2000. *Combating Corruption in Latin America*. Washington, DC: Woodrow Wilson Press.
- United States Department of Justice. 2008. Statement of Offence Siemens Argentina, available at <http://www.justice.gov/opa/documents/siemens-argentina-stmt.pdf>

Legislation

Foreign Corrupt Practices Act of 1977, [Pub. L. No. 95-213, § 102,91 Stat. 1494](#), codified as amended at [15 U.S.C. §§78m\(b\), \(d\)\(1\), \(g\)-\(h\), 78dd-1, 78dd-2, 78dd-3, 78ff](#); amended by Foreign Corrupt Practices Act Amendment of 1988 (part of Omnibus Trade and Competitiveness Act of 1988), [Pub. L. 100-418, 102 Stat. 1107](#), 1415 (1988), and International Anti-Bribery and Fair Competition Act of 1998, [Pub. L. 105-366, 112 Stat. 3302 \(1998\)](#).

International instruments

Organization for Economic Cooperation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, November 21, 1997, 37 I.L.M. 4 (1998).

Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998).

United Nations Convention against Corruption, in force 14 December 2005.

Table 1 - News items about “Nicolau dos Santos Neto” in Folha de São Paulo

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	total
News	1	35	256	99	23	21	24	16	8	14	7	1	2	5	5	517
Covers	-	3	18	4	1	-	2	1	-	2	-	-	-	1	0	32
Total	1	38	274	103	24	21	26	17	8	16	7	1	2	5	5	549

Table 2 –News items about TRT defendants in Folha de São Paulo.

	Fábio Monteiro de Barros Filho	Incal Incorporações	Monteiro de Barros Investimentos	Construtora Ikal	Nicolau dos Santos Neto
1999–2000	41	26	1	10	312
1998–2012	52	26	1	13	549

Figure 1: Public officials and Siemens officials mentioned by La Nación

