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Mark Pieth

Collective Action and Corruption

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Responsibility for the views expressed and for any errors of fact or judgment rests with the author alone.

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About the author

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Introduction

The term *Collective Action*¹ has long been used in economics and the social sciences to address the difficulties associated with jointly accessing public goods: citizens are sometimes expected to *refrain from individually profitable actions for the sake of the common good*². And yet individual self-interest usually prevails³. With *The Logic of Collective Action*⁴, Mancur Olson founded the theory of Collective Action, though some of the underlying ideas are much older⁵. Economists have employed *game analysis*⁶ to explore aspects of the *prisoner's dilemma*⁷. From this perspective, corruption is a typical *Collective Action problem*⁸. Kingston puts it rather bluntly when he says: “The citizens or firms dealing with a corrupt government official would all benefit from an agreement not to pay bribes, but each has an incentive to pay bribes to try to get preferential treatment”⁹. His fellow academics have put forward several models to overcome *Collective Action impediments*¹⁰, including in the area of corruption¹¹. They attempt, amongst other things, to neutralize the *free-rider problem*¹².

In the area of combating corruption, the topic of Collective Action has transitioned from being a major academic think-piece into a very concrete policy issue: Collective Action is now a kind of catch-all term for industry standards, multi-stakeholder initiatives, and public-private partnerships (PPPs)¹³. It may take on the form of an anti-corruption declaration¹⁴, an Integrity Pact (or an “*Island of Integrity*”)¹⁵, a principle-based initiative¹⁶ or, even, a certifying effort¹⁷. The World Bank Institute (WBI), in its *Fighting Corruption Through Collective Action, A Guide for Business*¹⁸, defines – and justifies – “*Collective Action*” as

a collaborative and sustained process of cooperation amongst stakeholders. It increases the impact and credibility of individual action, brings vulnerable individual players into an alliance of like-minded organizations and levels the playing field between competitors. Collective Action can complement or temporarily substitute for and strengthen weak local laws and anti-corruption practices.

Its main significance is as a way out of serious dilemmas in international business. Over the last two decades, states and international organizations have promulgated regulatory standards in the areas of environmental protection, labor relations, and

- 1 Bandiera/Barankay/Rasul 2005; Holzinger 2003; Kingston 2004; Olson 1965; Reuben 2003; Zürn 1992, 154 et seq.
- 2 Bandiera/Barankay/Rasul 2005, 2.
- 3 Holzinger 2003, 2.
- 4 Olson 1965.
- 5 Hardin 2012, 3 et seq.
- 6 Holzinger 2003, 4 et seq.
- 7 Hardin 2012; Reuben 2003, 26 et seq.; Sandler 2010, 40 et seq.
- 8 Brüttsch/Lehmkuhl 2007, 12; Kingston 2004; Mostipan 2009.
- 9 Kingston 2004.
- 10 Olson 1965. Cf. Bandiera/Barankay/Rasul 2005; Hardin 2012; Holzinger 2003; Nielsen 2009; Reuben 2003; Sandler 2010, 4 et seq.
- 11 Kingston 2004; Mostipan 2009.
- 12 Hardin 2012.
- 13 Pieth 2007, 81 et seq.
- 14 This was the goal of early Collective Action initiatives in the power systems and the defense industries between 2000 and 2003.
- 15 Wiehen 1999a; 1999b.
- 16 WBI 2008, Slide 33.
- 17 WBI 2008, Slide 34.
- 18 WBI 2008, Slide 4.

safety, as well as on the “macro crimes” of illegal trusts, money laundering, embargo breaches, and corruption. Since the turn of this century, they have dramatically stepped up law enforcement on international commercial corruption in particular. Multinational enterprises (MNEs) and small and medium-sized enterprises (SMEs) alike face considerable risks when caught bribing foreign public officials. And yet, they find themselves in a tight spot in many areas of the world where corruption remains endemic and they are regularly confronted with extortionate demands. On the one hand, if they give in to solicitation they may face legal action in the “victim country” or their country of domicile. Since solicitation is not a valid excuse¹⁹, a defense of extortion will only be heard in extreme cases of physical threat²⁰. On the other hand, if they take the ethical high road they could easily lose business. Now, commercially strong players may be well-connected in the “victim country” – even in places with particularly bad reputations – and they may be able to resist the challenge by escalating the issue appropriately. Typically, however, even large companies are uneasy about “going it alone”. They are uncertain whether their competitors are following the same virtuous path and they are aware they may be sidelined by ministers “on the take” and replaced by less scrupulous suppliers. This is what Collective Action theorists meant by *defection*²¹. In such circumstances, Collective Action – be it a common standard amongst competitors, a joint demarche to government, or a bidders’ anti-corruption pledge – could be used to escape the dilemma collectively.

The historical background

De-regulation and re-regulation

Ironically, new international forms of regulation were themselves responses to new forms of de-regulation. With increasing economic, political, and social globalization during the 1970s and 1980s, national governments and international organizations (including the Bretton Woods institutions) promoted the goals of market liberalization and privatization²². It rapidly became apparent, however, that nation states, especially in the South, were unable to protect themselves against abuses by MNEs, which were typically domiciled the North. Environmental catastrophes, child labor, and corruption were commonplace²³. Increasing criticism by civil society groups prompted international organizations to opt for *re-regulation* of a different kind: international behavioral standards (such as the Organisation for Economic Cooperation and Development’s *OECD Guidelines for Multinationals*²⁴), coupled with industry self-regulation. Self-regulation was considered cheaper, more flexible, and less burdensome than public regulation²⁵. However, it too soon emerged as insufficient to deal with the formidable international challenges. Amongst other things, transnational economic and organized criminals were making use of the newly guaranteed free movement of people, goods, and capital.

19 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, November 26, 2009, as amended February 18, 2010, available at <http://acts.oecd.org/instruments/ListByInstrumentDateView.aspx>, Annex I.A).

20 Murphy 2011, 136; Pieth 2011, 70.

21 Mostipan 2009, 6 (referring to Olson 1965).

22 Jenkins 2001, 1 et seq.

23 Hauffer 2001, 11; Jenkins 2001, 2 et seq.

24 OECD Declaration and Decisions on International Investment and Multinational Enterprises, June 21, 1976, last revised May 25, 2011, Annex 1, Guidelines for Multinational Enterprises, available at www.oecd.org/daf/investment/declaration On corruption, see Recommendation VII, pp. 47 et seq.

25 On advantages, see Black 2001, 16; Brütsch/Lehmkuhl 2005, Introduction. On disadvantages, see Black 2001, 10; Jenkins 2001, 26; Klauser 1994, 53; Pieth 2007a, 94; Ruch 2004, 449.

Co-regulation

Supplanting traditional *command and control*-style regulation²⁶ was “co-regulation”²⁷. A hybrid system of regulation²⁸, it is made up of international “hard” and “soft” law standards that are set, implemented, and monitored by state and non-state actors²⁹ (private sector and civil society organizations). It quickly became the regulatory model of choice for nation states. Researchers talk of the *law of co-operation* replacing the *law of co-existence* amongst states in a world of *increased international legalization*³⁰. Monitoring by peers and third parties is now a regular element of regulation both between states and amongst companies.

Regulating corruption

As for corruption, a new phase of regulation followed the end of the Cold War and the opening of new markets in the former second and third worlds. In view of the upcoming redistribution of markets, major economic players (states and corporations) were not content to allow access to be influenced by unfair trade practices, such as corruption. Increasingly, states used task forces to focus on specific topics and to circumvent cumbersome negotiation procedures³¹. Alongside traditional conventions and dispute settlement procedures, new international instruments began to appear. The radical change was first apparent in regulations on the financial sector particularly, the soft law standards and peer pressure enforcement mechanisms of the Financial Action Task Force (FATF). What started as an effort to reduce money laundering³², was rapidly extended to the financing of terrorism³³, corruption-related money laundering³⁴, and, eventually, financial flows from tax fraud³⁵. When tackling corruption after 1989³⁶, the OECD broadly copied the FATF methodology. The OECD Working Group on Bribery (OECD-WGB) opted to develop an actual convention on criminalization, the OECD Anti-Bribery Convention (OECD-ABC)³⁷ and a recommendation for related matters in 1997³⁸. Both the FATF and the OECD-WGB used peer review aggressively³⁹. Regional organizations in Europe⁴⁰ and the Americas⁴¹ soon followed suit, as did the UN, ultimately, with its 2003 Convention against Corruption (UNCAC)⁴².

Ensuring enforcement

The various monitoring mechanisms have adopted a variety of styles, the OECD-

26 Black 2002, 2 et seq.

27 Black 2001, 6 et seq.; Haufler 2001, 12; Pieth 2007a, 94.

28 Brüttsch/Lehmkuhl 2007, 23.

29 Peters/Koehlin/Förster/Fenner Zinkernagel 2009.

30 Brüttsch/Lehmkuhl 2007, 13.

31 Pieth 2007a, 94 et seq.

32 FATF, The 40 Recommendations of the FATF, first edition, Paris, 1990 (FATF 40 Recommendations).

33 FATF, IX Special Recommendations, first edition, Paris, 2002.

34 From the second, 1996 edition of the FATF 40 Recommendations.

35 FATF, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations, Paris, 2012. All FATF recommendations are available at <http://www.fatf-gafi.org>.

36 Pieth 2007b, 11 et seq.

37 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Paris, December 17, 1997, in force February 15, 1999, (1998) 37 ILM 1.

38 Revised Recommendation of the Council on Combating Bribery in International Business Transactions, May 23, 1997 reprinted (1997) 36 ILM 1061.

39 Bonucci 2007, 445 et seq.

40 Council of Europe: Criminal Law Convention on Corruption, Strasbourg, January 27, 1999, in force July 1, 2002, 2216 UNTS 225, 173 ETS. See also Civil Law Convention on Corruption, Strasbourg, November 4, 1999, in force November 1, 2003, 2246 UNTS 3, 174 ETS.

41 Organization of American States: Inter-American Convention against Corruption, Caracas, March 29, 1996, in force March 6, 1997, (1996) 35 ILM 724.

42 United Nations Convention against Corruption, New York, October 31, 2003, in force December 14, 2005, 2349 UNTS 41 (2004) 43 ILM 37.

WGB probably being the most outspoken and undiplomatic. Since its goals are most directly linked to the competition agenda, it assesses how countries deal with specific cases, as well as their laws and levels of awareness. Even though the OECD-WGB is not an international court, it can require states, through the responsible law enforcement agencies, to tell their peers why they have not opened or why they have closed a particular case. If there is no reasonable explanation for the state's decision to close an individual case (such as a lack of evidence, lapse of time, or lack of jurisdiction), and a cluster of such allegations are not followed up, the effectiveness of the country's system will be put into question⁴³. A country may even be put on probation and forced to explain at regular intervals (e.g., every six months) how its cases are advancing⁴⁴. As a last resort, the group can ask a country to reopen a specific case that has been closed and threaten trade sanctions in the event of non-compliance⁴⁵.

With increased pressure for implementation on states, has come a dramatic increase in the risk to companies of enforcement. It should be no surprise that the private sector is itself becoming more active in combating corruption. First, it is very much interested in extending the anti-corruption standards to other exporting nations, especially Brazil, Russia, India, and China (the BRIC countries). Here, the G20 format is proving very handy⁴⁶. Second, the private sector has become even more insistent than the peer countries that anti-corruption standards are applied equally. Third, companies have acknowledged that they are dependent on the evolution of a reliable body of common standards⁴⁷.

Corporate motives?

Companies have complex motivations for entering into particular Collective Action initiatives. Industry representatives usually emphasize the need to create “a *level playing field for commerce*” and “prevent *regulatory arbitrage*”. However, collective risk management is always, at least in part, expectation management: with similar levels of regulation amongst all competitors, companies are also better able to *limit costs*. Also, members of the “club of the virtuous” may hope to be rewarded for their efforts with preferential treatment, e.g., in public procurement processes (by definition, they pose a lower risk to potential “victim states”). In all, there could be a strong *business case*⁴⁸ for collectively combating corruption. Once again, this is a clear reference back to the theory of Collective Action, where ways are sought to exclude *free riders* from benefits⁴⁹.

43 See, e.g., OECD 2012.

44 OECD 2005. See further Pieth 2007b, 36.

45 See, e.g., OECD 2008.

46 See the Letter of the B20 Working Group on Improving Transparency and Anti-Corruption to President of Mexico, Felipe Calderón Hinojosa, Chair of the G20 Nations for the Los Cabos Summit, June 2012, available www.iccwbo.org.

47 See the B20 Task Force Recommendations, June 2012, Improving Transparency and Anti-Corruption: Key Policy Messages and Recommendations, available at <http://b20.org/documentos/B20-Complete-Report.pdf>.

48 Mostipan 2009, 6; Sandler 2010, 44.

49 Reuben 2003, 7.

Early experiments

The history of early experiments with Collective Action in relation to corruption and money laundering is far from straightforward: it is a story of early success and failure, and renewed efforts.

Early success: Wolfsberg

During the 1990s, regulation of the financial industries dramatically increased, anti-money laundering standards abounding in particular. For banks, it seemed that regulators had gone out of control. It was as if they were continuously raising the bar for compliance without really understanding the challenges for business. And, though complaints about singling out by regulators were rife, competitors had not yet considered the possibility of sitting down together and drafting an anti-money laundering compact of their own. Indeed, when civil society organizations⁵⁰ and far-sighted bankers first raised the idea, most executives responded semi-automatically with concerns about breaching laws on anti-competitive trusts. Perhaps this was a self-protective reflex, aimed at preventing their institutions from rushing prematurely into an ill-considered adventure. The common efforts were, nonetheless, the starting point for an initiative that served as a pattern for Collective Action initiatives to come: *the Wolfsberg Banking Group*⁵¹.

Initially, Wolfsberg's standards were relatively simple. They did not really go beyond what regulators had already decided. However, the activation of the private sector was a sensation in itself, drawing close to 200 journalists to a press conference⁵². The fact that banks – so frequently criticized for laundering drug money and hiding dictator's loot – would go on the offensive, was apparently spectacular in 2000.

The group met intensively and produced further compacts. It rapidly established itself as a crucial industry reference group for regulators and international public bodies, not unlike the FATF. Now, beyond its internal meetings, the Wolfsberg Group even holds an annual "Wolfsberg Forum", inviting all relevant regulators and competitors to participate and comment on its annual catalogue of working documents. Thus, with time, the Wolfsberg Group matured into a strong self-regulatory body of the financial sector, one capable of dealing with issues of money laundering, the financing of terrorism, corruption, and embargo-busting.⁵³

Failed first attempts at anti-corruption Collective Action

Shortly after the Wolfsberg success, similar groups formed around the issue of corruption. One needs to keep in mind that the US law on foreign bribery, the Foreign Corrupt Practices Act (FCPA)⁵⁴, had been in force since 1977, but that it had taken until 1997 for states to agree to enlarge its scope through the instruments of the OECD. State parties to the OECD-ABC⁵⁵ and the related recommendation⁵⁶ were just about to enact laws on foreign bribery when these groups formed. The common denominator with the Wolfsberg Group was, then, the threat of intense cross-border

50 The Basel Institute on Governance and TI.

51 Wolfsberg AML Principles, as amended, available at <http://www.wolfsberg-principles.com>. See further Pieth/Aiolfi 2003, 243 et seq.

52 The original principles were made public in a well-attended press conference in Zurich on October 30, 2000.

53 Wolfsberg Statement on the Suppression of the Financing of Terrorism, 2002; Wolfsberg Anti-Corruption Guidance, 2011, both available at www.wolfsberg-principles.com/standards.html.

54 Pub. L. No. 95-213, 21, 91 Stat. 1494 (FCPA 1977); Pub. L. No. 100-148, 102 Stat. 1107 (FCPA 1988); Pub. L. No. 105-366, 112 Stat. 3302 (FCPA 1998).

55 N. 37.

56 N. 38.

public regulation; this motivated key players in certain industries to jointly formulate detailed standards.

Between 2000 and 2003, companies in the defense and the power systems sectors made early and impressive attempts to harmonize their compliance systems. In both sectors, groups labored for two to three years. However, distrust remained strong and public enforcement weak. In contrast to the financial sector, where regulators were already hitting non-compliant companies with heavy penalties, companies in these other industries were initially able to play a double game: they had incentive enough to say the right things and have convincing compliance systems on paper; but they also maintained impressive slush funds, just in case the anti-corruption initiatives did not really take off and they needed to bribe their way into contracts again. So, a European version⁵⁷ of the successful US *defense integrity initiative*⁵⁸ was derailed by the BAE scandal⁵⁹; only several years later, was a new – and genuinely transnational – text adopted⁶⁰. Similarly, a *power systems initiative* stalled shortly before signature, General Electric voicing particular concerns about the depth of commitment on the part of its colleagues⁶¹.

Public-private partnerships: the Extractive Industries Transparency Initiative (EITI)

In the meantime, it had also rapidly become obvious that combating corruption from the *supply side* alone might not work since it hit at soft targets (companies and their employees), but it missed the recipients who (the *demand side* of corruption) and the financial intermediaries. In particular, oil producing states and their officials were identified as major contributors to the corruption cycle. The idea that oil companies (and mining corporations) would publicly declare what they had paid into the budgets of the producing state (“*publish what you pay*”) was a major contribution to public accountability in these states. The EITI was then one of the first major PPPs in combating corruption. Governments of the North and the South, as well as corporations active in the entire sector, were linked up with the help of mediators from civil society⁶².

A generic intermezzo

After the failure of the first initiatives in defense and heavy industry, new initiatives maintained the need for common standards as the fundamental point of departure. Rather than develop new codes, however, they went back to the generic, older texts, especially the *ICC Rules of Conduct*⁶³ and the *TI Business Principles*⁶⁴.

The generic industry standards for companies were gradually overtaken by a new generation of public regulations: national standards on corporate liability. These began to integrate the notion of a “sound compliance program”, as defined by the *US Sentencing Commission’s (USSC) Guidelines*⁶⁵, and (later) the *guidance* that ac-

57 The Clovis Principles for the Defence Industry, Paris 2003.

58 Defense Industry Initiative on Business Ethics and Conduct – Principles, February 1997, as amended March 2010, available at <http://www.dii.org/about-us/dii-principles>.

59 Pieth 2011, 19 with further references.

60 See International Forum on Business Ethical Conduct for the Aerospace and Defense Industry, available at <http://ifbec.info>.

61 The trust generated through this original process was lost when misconduct by major competitors became obvious.

62 Brew/Moberg 2006, 128 et seq.

63 International Chamber of Commerce (ICC), Combating Extortion and Bribery: ICC Rules of Conduct and Recommendations, Paris, 2005, available at [http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2004/ICC-Rules-of-Conduct-and-Recommendations-to-Combat-Extortion-and-Bribery-\(2005-Edition\)](http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2004/ICC-Rules-of-Conduct-and-Recommendations-to-Combat-Extortion-and-Bribery-(2005-Edition)).

64 TI, Business Principles for Countering Bribery, Berlin, 2009, available at http://archive.transparency.org/global_priorities/private_sector/business_principles.

65 USSC, Guidelines Manual, September 15, 2009, in force November 1, 2009, and as amended November 1, 2011, available at www.usss.gov.

complicated the *UK Bribery Act 2010*⁶⁶. Spanning these efforts, the OECD Council enacted a *Good Practice Guidance on Internal Controls, Ethics, and Compliance*⁶⁷. The US Department of Justice is currently working on a new *FCPA Guidance* in an effort to neutralize criticism from US companies⁶⁸ and comply with the recommendations of the OECD-WGB in its third phase evaluation⁶⁹. Together with detailed benchmarking by the compliance industry, these standards are rapidly congealing into a coherent body of rules. The rules themselves are no longer center stage: as major companies have harmonized their approaches to compliance, implementation and application, particularly in difficult business environments, is now at the forefront of Collective Action.

Methods and challenges

Initiating Collective Action

In thinking about the possibilities for future Collective Action, one needs to consider why companies do not end up cooperating on their own. The answer is relatively simple: competitors usually trust each other little and they usually fear being perceived as “trusting” each other too much. In other words, many companies are wary of anti-corruption compacts lest they be regarded as engaging in anti-competitive behavior.

Now, their fears are baseless if the goal is genuinely to reduce the risk of bribery. The contrary is true, since Collective Action allows companies to focus on price and quality once more. But, trade associations, the traditional mediators, have generally failed to take on the role of bringing companies together⁷⁰. In my experience, they may be too slow and too risk averse. They typically represent a broader range of companies, beyond those interested in demanding a common solution to bribery and extortion⁷¹. Repeatedly, therefore, Collective Action has been promoted first by an ad hoc group of representatives from one or more non-governmental organizations (NGOs), together with select private sector protagonists⁷².

These consortia perform a crucial task in the early days of a Collective Action initiative by bringing together a group of industry representatives that is able to generate its own momentum.

The first moves are extremely sensitive. Though there is no set model for success, the civil society representatives frequently need to obtain the support of at least one industry champion⁷³. Together, they attempt to convince other major players to participate. At the outset, the participants avoid committing to anything beyond a preliminary exchange of views. It takes time to convince the participants of the benefits of the initiative, and much depends on the subtlety of the mediators⁷⁴. Once the initiative has taken off, however, the collaboration is publicized and corporate exponents take their share of the responsibility⁷⁵. In the meantime, it is also the task of the NGO representatives to ensure that the members of the group do not embark on

66 O’Shea 2011, 371 et seq.

67 OECD Recommendation 2009, n. 19, Annex II: Good Practice Guidance on Internal Controls, Ethics, and Compliance.

68 In particular, the US Chamber of Commerce 2011. See further Henning 2012.

69 OECD 2010, p. 23 et seq.

70 Kingston 2004, 12 et seq.; Mostipan 2009, 10 et seq.

71 Frequently such business associations are shy of initiating a process, even if they may want to take it over once it is running (see, e.g., the defense industries).

72 See, e.g., Wolfsberg, PACI, and the aeronautics industries.

73 Siemens, TNT, or UBS in their respective contexts, to name just a few.

74 Brew/Moberg 2006, 132.

75 Pieth/Aiolfi 2003, 267 et seq.

anti-competitive behavior.

Thus, in starting a particular Collective Action initiative, the key factor is not (simply) the size of the group⁷⁶, as frequently suggested in academic debates about the conditions for overcoming Collective Action problems⁷⁷. It is assumed that a few, especially strong, players achieve more than a multitude of small actors – the larger the number, the greater the risk of truancy. Really, the challenges to Collective Action are concrete and tangible.

Contents

The substantive contents of the initiatives have evolved with the methodology of Collective Action. Originally, the fine-tuning of public standards that aimed at leveling commercial playing fields was at the forefront⁷⁸. Later, *Collective Action initiatives* became more refined, being expanded to involve the public sector⁷⁹, in public procurement pledges and so-called “*Integrity Pacts*”⁸⁰, amongst other things. These were intended to ensure that sound competitive practices became more relevant. More recently still, competitors have begun finding new creative uses for Collective Action, mutually opening their whistle-blower hotlines to each other, for example. Finally, several initiatives are directed at certifying business behavior⁸¹.

Major challenges

There are still major challenges to Collective Action, however. Its informality is a particular impediment. Most initiatives have their basis in soft law and are only concluded among private operators, public players getting involved only occasionally. So, Collective Action initiatives typically suffer from the same deficiencies as *self-regulation* initiatives: it is unclear who is supposed to ensure that commitments are implemented.

Recent examples

Categorizing Collective Action

Over the last decade an entire spectrum of local, regional, and global Collective Action initiatives on corruption has emerged. They have been divided by the WBI into four categories:

- anti-corruption declarations
- principle-based initiatives
- Integrity Pacts
- certifying business coalitions

Pioneered by NGO, Transparency International (TI), sometime back, these very concrete forms of Collective Action are usually tied to specific contracts and monitored by civil society organizations.

76 Bandiera/Barankay/Rasul 2005, 15 et seq.; Holzinger 2003, 18 et seq.; Nielsen 2009.

77 Sandler 2010, 40 et seq.

78 Such as the early efforts in the power systems sector, or the TI’s Business Principles, n. 64, or the PACI Principles.

79 See, e.g., the EITI, discussed further, Brew/Morberg 2006, n. 62.

80 Wiehen 1999a; 1999b.

81 E.g., The Makati Business Club’s activities in the Philippines under the Siemens Integrity Initiative, Siemens Integrity Initiative Slide Presentation, First Funding Round, February 2012, Slide 20.

Back to sector-wide initiatives

The time is also ripe for a fresh look at sector-wide Collective Action initiatives against corruption. Regulation has intensified to a point that non-compliance and law enforcement are perceived as real legal and reputational risks to corporations. They are now especially interested in reducing risks and leveling playing fields in emerging markets, such as Russia, Nigeria, Angola, China, and the Middle East.

Industry-specific groups are concentrating on particular topics: “facilitation payments” at customs in the logistics and transport industry; “offsets” in the defense industry and, to give another example, “signature bonuses” in the oil and gas industry.

Industry-specific groups are developing an overall interest in cross-cutting issues, like the obligation to hire intermediaries, a so-called “sponsor” (particularly in the Middle-East), or the problem of the solicitation of bribes.

Activating creativity

The future for Collective Action lies in addressing very real challenges with creative means, including the use of information technology. Some such initiatives have emerged; two examples are mentioned here:

Logistics and transport

Recently, major express carriers agreed to cooperate with the World Customs Organisation (WCO) and the People’s Republic of Vietnam in the introduction of an electronic customs procedure. The collaboration was facilitated by the World Economic Forum (PACI) and the Basel Institute on Governance, two civil society organizations. The new customs procedure, which is endorsed by the logistics and transportation industry, is more efficient than the existing manual process and far less vulnerable to misuse for rent-seeking. Therefore, it is an indirect means of reducing corruption, in the form of facilitation payments at customs. On the basis of the experiences gathered during the pilot study, it is thought that the procedure may be used in other emerging markets⁸².

High-Level Reporting Mechanisms (HLRM)

The idea of “HLRMs” was born originally of discussions between general counsels of the largest heavy industries (power systems) groups, which was mediated by the Basel Institute on Governance. Frequently, even large companies find themselves confronted with outright extortion and, in some of the most difficult markets, are uneasy with escalating the matter individually. Hence, participants suggested the creation of ombudsman offices close to heads of government or heads of state. The organization of the structure would obviously be a matter for each country. The central idea, though, is not primarily of a law enforcement agency. Rather, from a company perspective, a complaint to the ombudsman would be a last-ditch effort at corruption prevention.

With the help of TI-USA, the idea was picked up and developed beyond one sector. The OECD agreed to act as a platform to promote the concept. The G20 countries and their B20 business representatives expressed their interest in this initiative at the summits of Cannes and Los Cabos in 2011 and 2012 (respectively). Colombia is the current pilot country, and has developed a concept in which complaints of solicitation trigger increased due diligence in specific procurement procedures.

82 World Economic Forum, PACI Annual Report 2010, Case Study 1, 13.

The current policy discourse on Collective Action

I mentioned that Collective Action has moved from being *one of the most challenging problems in economics and the social sciences*⁸³ – an academic riddle – to being an eminently practical challenge for a diverse range of actors interested in combating corruption. For the private sector, Collective Action offers a way out of very concrete dilemmas. The private sector is most interested in Collective Action initiatives that are already underway and that could yet be created. The issue is no longer how to prevent *free-riders*. It is highly likely that non-compliant companies will be caught by law enforcement, especially if their competitors are ready to denounce them. The challenge is now to develop a reliable methodology for initiating and supporting Collective Action and to map and categorize the complex patchwork of current initiatives.

In G20 states, public and private sector policy groups (especially the B20)⁸⁴ are currently promoting the creation of a network (“hub”) and web-based resources to collect and offer information about existing initiatives. So far, two such attempts to create a “hub” for Collective Action initiatives stand out.

First, the *WBI’s* 2008 guide for business on Collective Action⁸⁵ contained a log of Collective Action case studies.

Second, together with actors from the private sector, the *Basel Institute on Governance* is establishing an *International Center on Collective Action (ICCA)*⁸⁶. A network of organizations active on Collective Action and anti-corruption work, the ICCA is currently developing IT tools to provide business with information about Collective Action drawn from network members. The ICCA is already providing assistance in setting up concrete Collective Action initiatives and is using its experiences as the basis for further research⁸⁷.

Concluding remarks

The current interest in Collective Action as a means for combating corruption is a response to a drastic increase in regulatory risks for corporations. The topic has emancipated itself from the classic debates about “*Collective Action problems*”, “*free-riders*”, and “*prisoners’ dilemmas*”. It is a complex form of *hybrid regulation* (co-regulation) in which public and private sanctions together form a strong incentive to behave. The motivation for companies to participate in Collective Action on anti-corruption reflects their wish to escape from the trap of extortion, as well as their desire to earn recognition for their efforts to comply.

Promoting Collective Action is a crucial element in a wider strategy of combating corruption. It is about moving from talk to action. The private sector is taking its share of responsibility and control over the anti-corruption agenda. Civil society is there to foster, mediate, and monitor this development.

83 Reuben 2003, 1.

84 See the B20 Task Force Recommendations, June 2012, Improving Transparency and Anti-Corruption: Key Policy Messages and Recommendations, available at <http://b20.org/documentos/B20-Complete-Report.pdf>.

85 WBI 2008.

86 See further Basel Institute on Governance, Collective Action, About the ICCA, available at www.collective-action.com.

87 The ICCA has received seed funding from the Siemens Integrity Initiative.

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