

## WORKING PAPER

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**What If? A Look at Integrity Pacts**

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*An affection regarding a thing we know not to exist in the present, and which we imagine as possible, is, other conditions being equal, more intense than if it referred to a contingent thing.*

On Human Bondage or the Strength of the Affections,  
Proposition XII.

*Time considered, affections that originate in Reason or are stimulated by it are stronger than those attributable to singular things that we regard as absent.*

On the Power of the Understanding, or of Human Freedom,  
Proposition VII.

Baruch Spinoza, *Ethics*.

## Summary

This note examines the Integrity Pact (IP) methodology proposed by Transparency International to confront the problem of corruption in public procurement. The examination draws from a decision model for participants developed elsewhere, in which the critical elements are shown to be the vulnerability of the conditions under which the tender is conducted and the risk of bribing. The IP methodology intends to interfere with the central elements in individual tender instantiations by a process of discussion leading to mutual trust; participants and public officials sign a pledge of honesty. Disputes are to be resolved by private arbitration and allegedly enforcement is attained by force of a private contract between participants. Preferably, a civil society organization stimulates and monitors the process and acts as fiducial guarantor. Publicising proceedings stimulates discussion and enhances transparency. All this is held to favourably affect the process, leading to better results. This, in turn, is held to affect the overall environment over time. In order to accommodate for the ethical dimension introduced by IPs, the present analysis incorporates an “ethical” factor operating over the conditions under which tenders are conducted. Ascertaining the operation of this hypothetical factor is an empirical question.

The examination of IP premises, together with evidence collected from instantiations of the methodology, plus the absence of comparative empirical data on bribery, leads to the conclusion that IPs do not heighten the risk of bribing for participants. Contrary to the methodology’s claim, enforcement, be it from arbitration or otherwise, is shown to be dependent on each particular environment. Conditions under which particular tenders are conducted might be bettered, but not unconditionally, as the institutional framework perforce dominates private agreements. The influence of the “ethical” factor cannot be assessed for lack of empirical evidence, and the honesty pledge IPs rely on is argued to be devoid of significance. Although for lack of data the economic efficiency of the methodology cannot be ascertained, there is no reason to suppose that IPs do not better the outcomes piecewise. The methodology fails to address the problem of cartelisation that affects public markets, and – perhaps due to the low frequency of its application – does not discuss measures to counterbalance the action of cartels.

Interpreting the premises behind the IP idea, it is argued that they stem from a perspective on corruption rooted on morality rather than on the mechanisms that propitiate bribery. Thus, tackling individual instantiations is favoured over confronting systemic factors.

IP guidelines stipulate that the absence of allegations of bribery in a tender authorises the sponsoring NGO to announce that the tender was “clean”. It is argued that such manifestations of overconfidence are hazardous for the reputation of NGOs that adopt the methodology. It is also argued that

the continuous involvement of NGOs with IPs raises questions about their entitlement to it, moreover because NGOs are not bound by oversight and accountability constraints that formally characterise State organisms. It is contended that for both governments and NGOs, promoting and participating in IPs is a strategic decision that should be balanced with their effectiveness towards the aim of changing the institutional environment.

Keywords: Control, corruption, integrity pact, public procurement, regulation.

JEL classification numbers: D44, D84, H57, K23.

## **Introduction**

Corruption in public procurement is almost universally recognised as being responsible for diseconomies. Collusion between public officials and private suppliers, oiled by bribery, misdirects public expenditures, elevates prices, allows for non-performance of contract specifications and generally erodes the efficiency of public inversions. Reducing corruption in procurement is much needed to better the chances of countries to develop and to reduce social injustices.

One of the strategies used to tackle the problem is the Integrity Pact (IP), developed by Transparency International (TI). The official exposition is [TI 2002b]. At their root, IPs seem to be based on the following assumptions:

1. Given that corruption in public procurement heightens transaction costs, hampers technological evolution and brings other systemic diseconomies, it is detrimental to the interests of private firms.
2. Individual firms cannot effectively avoid bribing because they fear that other firms will bribe to win contracts.
3. As bribery introduces information asymmetry amongst participants, one way to reduce it is by sharing subjective information about values.
4. The participatory process of discussing and sharing values stimulates non-bribery collaboration among participants, while preserving business competition.

An IP allows for participants and public officials to agree in writing to a set of rules to be applied to one specific tender. Within such an IP, agreement is also reached regarding conditions for participation, decision criteria and other particularities. Participants and officials also agree on an “honesty pledge”, that is, a pledge by participants that they will not attempt to bribe officials and a pledge by officials that they will not accept bribes. Penalties for infringement of the pact are also included in the agreement. Wide publicity of proceedings is essential, as is the aggregation of experience stemming from particular instantiations.

IPs draw a measure of conceptual justification by appealing to private interests, who are invited to adopt a proposed solution to the so-called “prisoner’s dilemma”, whereby the best strategy for participants would be mutual collaboration (playing the procurement game fairly) rather than confrontation (bribing to win contracts). Originally, the intended target of IPs were transnational corpora-

tions operating in third-world countries affected by serious institutional problems, and the main purpose was lowering the economic losses brought by bribes being extorted from holders of already decided big contracts.<sup>1</sup> The arguments one finds in expositions aimed at specialised international audiences are framed according to such a perspective.<sup>2</sup> The rules for procurement prevailing in a given environment were taken as given, and changing or adapting the regulations to particular cases was not an objective. [TI 2002b] expanded the IP to “all the activities related to the contract from the pre-selection of bidders, the bidding and contracting proper, through the implementation, to the completion and operation”.<sup>3</sup> Subjecting a tender to public discussion to ascertain whether its terms are fair vis à vis the extant regulations is part of the methodology. Moreover, some of the organizations that use it realise the significance of the rules of the game, and accordingly include in their practice the discussion of the terms of the tender.

A third party, in principle a civil society organization, participates in the IP playing a variety of different roles, among them being the facilitator between the other parties and (preferably) monitoring. Private arbiters resolve controversies and impose penalties.

On laying out the “Main characteristics” of IPs, [TI 2002b] gives as the elements of the concept the following. The words “CORE” (absence of the item means the initiative cannot be called an Integrity Pact), “HD” (for highly desirable) and “OP” (for optional) that appear between {curly brackets} categorise the elements according to the same source.<sup>4</sup>

- 1) A pact (a contract) between a principal (a State office) and bidders. {Signing mandatory, HD, signing voluntary, OP.}
- 2) An undertaking by the principal (the contracting State institution) that its functionaries will not take or extort bribes, with “appropriate disciplinary or criminal sanctions in case of violation”. {CORE.}
- 3) A statement by each bidder that they did not and will not pay bribes “in order to obtain or retain” the contract being procured. {CORE.}
- 4) An undertaking by all bidders that they will “disclose all payments made in connection with the contract in question [it is to be imagined that the intended reference here is not to only to the contract, but to the entire procurement process] to anybody”. {Disclosure of names, CORE; disclosure of payments, OP.}
- 5) The acceptance “that the no-bribery commitment and the disclosure obligation as well as the attendant sanctions remain in force” for the duration of the contract.
- 6) “Undertakings on behalf of a bidding company will be made ‘in the name and on behalf of the company’s’ CEO” [elsewhere it is admitted that the CEO can be of the national subsidiary of a transnational corporation, if that is the case]. {HD}
- 7) An advice to bidders that they should have a Code of Conduct explicitly condemning corruption and a compliance program thereof. {OP}
- 8) “The use of arbitration as conflict resolution mechanism”. {CORE}
- 9) “A pre-announced set of sanctions” for violators {CORE}, “including (some or all):
  - o denial or loss of contract; {HD}
  - o forfeiture of the bid security and performance bond; {HD}
  - o liability for damages to the principal and the competing bidders; {HD} and

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<sup>1</sup> See e.g. the opening statements of [Wiehen and Mohn 1998].

<sup>2</sup> [Wiehen 1999], [Wiehen 2000].

<sup>3</sup> [TI 2002b] p. 4.

<sup>4</sup> [TI 2002b] pp. 4f and pp. 25ff. Numbering by CWA.

- debarment of the violator by the principal for an appropriate period of time [blacklisting]. {HD}”

The text continues to state that

As such, the IP will establish contractual rights and obligations of all the parties to a governing contract and thus eliminate uncertainties as to the quality, applicability and enforcement of criminal and contractual legal provisions in a given country. This means that applying the IP concept can be done anywhere without the normally lengthy process of changing the local laws.

These characteristics (we will refer to them as “Elements”) are not and could not be cast in iron, and organizations willing to promote IPs enjoy wide discretion in adapting to their respective environments, provided that the “core” elements are in place. This leads to a natural diversity of applications, according to which countries and which organizations are involved.<sup>5</sup>

It must be kept in mind that, because it depends on experience, the Integrity Pact methodology is a “work-in-permanent-progress”. Spreading the methodology is mainly done by word of mouth rather than by recourse to written material. The scarcity of information on actual IPs makes it additionally difficult to take a snapshot of the methodology’s application and examine what comes up in the film.

The mechanism of IPs has not been subjected to scrutiny in the literature, be it on anti-corruption in general or on procurement in particular. A few case studies were conducted in 2001-2002.<sup>6</sup> The present observations correspond to a first approximation to the Integrity Pact methodology. We will look at its rationale and will examine practical applications as reported in the extant documents and in texts produced by personalities and representatives of organizations that promote it.

[The first section addresses from a formal perspective the question of bribing or not bribing in procurement, and the placement of the ethical factor posited by IPs. This entails using some elementary mathematics. This was kept at a minimum, but nevertheless the reader who wants to skip the symbology and the mathematics can safely do so, needing only to follow the text, which – hopefully – is written urbanely.]

## 1. The briber’s calculus

The argument for collaboration as a better strategy than confrontation in certain social situations stems from discussions around the so-called “prisoner’s dilemma”. However, the application of the dilemma to the procurement situation is inadequate. See [CWA 2003b] for the argument leading to this conclusion. But let us not despair in following the game-theoretical approach, because it can

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<sup>5</sup> It seems that in practice the term “Integrity Pact” is used loosely. In Mexico, for instance, an unilateral pledge of honesty and fair dealings regarding future tenders by a principal (Consejo de Promoción Turística, [www.sectur.gob.mx/wb/distribuidor.jsp?seccion=8914](http://www.sectur.gob.mx/wb/distribuidor.jsp?seccion=8914)) is presented as an IP. In the same country, a form imposed by a principal (PEMEX, [www.cneec.org.mx/info/?\\_x=CNEC1031844889.doc](http://www.cneec.org.mx/info/?_x=CNEC1031844889.doc)) to its contractors is so titled; similarly in Peru (RENIEC, [www.reniec.gob.pe/cp0002\\_2002.pdf](http://www.reniec.gob.pe/cp0002_2002.pdf)).

<sup>6</sup> [Holsen et. al. 2002].

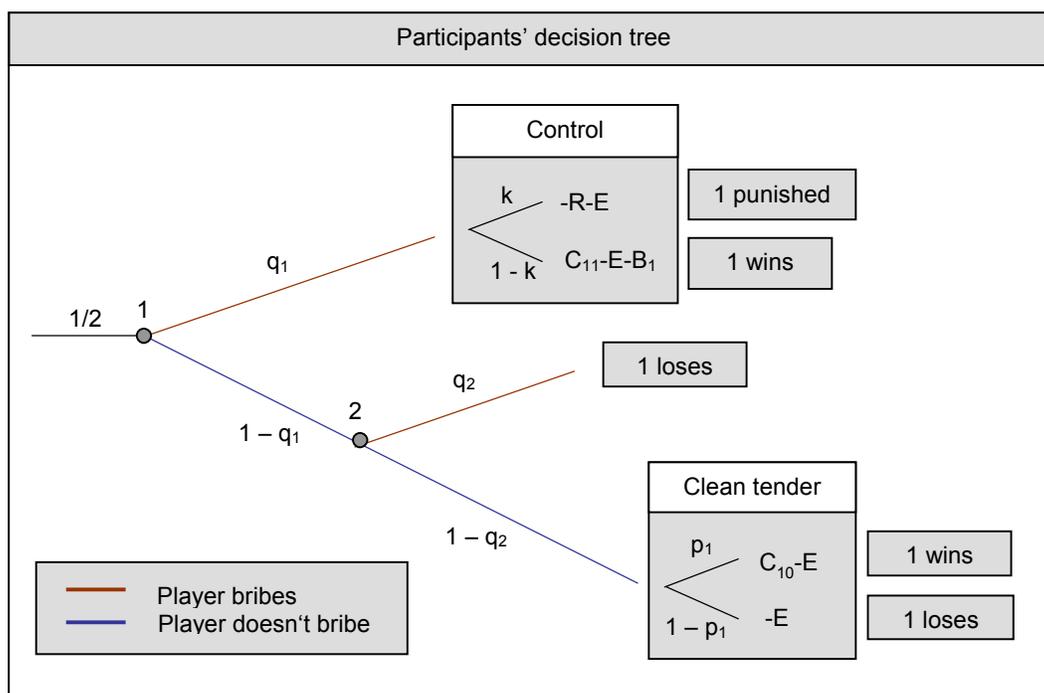
be illuminating. In order to better depict the situation in procurement, one must start with the factors that enter the process.<sup>7</sup> Those factors are:

- The probability of a bidder winning a clean tender.
- The likelihood of participants deciding to bribe.
- The penalties applicable to firms found guilty of bribery.
- The probability of bribers being caught, arising from the efficiency of the control mechanisms in place.

The third and fourth factors compound the risk. Risk is the value of the probable loss, relative to an intended objective. The same happens with the expectation of winning cleanly, which depends on the contract's value and on the probability of winning.

*a. The participants' decision tree*

Using the elements just listed, the decision tree governing a two-participant bidder's game is the following. The game starts by selecting at random the participant that plays first. The branches inside the boxes do not belong to the decision tree proper, representing the alternatives that are not subjected to the players' will, leading to the outcomes.



<sup>7</sup> For the reasoning leading to the elements used in this section, see [CWA 2003a]. The sequel extensively quotes from that reference.

Player **1** has probability  $\frac{1}{2}$  of being the first to play. If **1** bribes, then **2** cannot bribe. Player **2** can only bribe if **1** plays cleanly. If **2** is the first to play, the tree is the same, swapping **1** and **2**. The various components have the following meanings:

- $p_1$  The probability of Player **1** winning the contract in open bidding (so that the probability of **2** winning is  $p_2 = 1 - p_1$ );
- $u$  The systemic likelihood of bribing (the percentage of all contracts in the market in question that are biased);
- $q_j$  The likelihood of player  $j$  bribing, depending on the probability of bribery occurring in that market ( $u$ ), on the number of participants and on factors peculiar to each  $j$ ; if  $q_1, q_2 \neq 1$ , these likelihoods obey to  $1 - u = (1 - q_1)(1 - q_2)$ ;
- $C_{j0}$  The value of the contract awarded to Bidder  $j$  if he is the winner in the absence of bribes;
- $C_{j1}$  The value of the contract won with a bribe  $B_j$  (and associated diseconomies) by Bidder  $j$ ; we will consider an overprice in excess of the bribe, so that  $C_{j1} - B_j > C_{j0}$ ;
- $E$  The regular expenses incurred in participating (excluding bribes; for simplicity, defined as the same for both participants and normalized to 0 in the sequel);
- $B_j$  The amount paid by  $j$  as a bribe;
- $R$  The penalty paid if a briber is caught red-handed; for simplicity, the same for both participants; expressed as a percentage of the average contract value in the market in question.
- $k$  The probability of a briber being caught given that the tender was rigged.

Now, if Bidder **1** decides to bribe, then he wins the contract, pays the bribe back and discounts the expenses. Bidder **2** is just a bystander. Because **1** bribed, he incurs in the risk of paying the penalty  $R$  with probability  $k$ . If Bidder **1** decides not to bribe, then it is Bidder **2**'s turn to play. He can decide either to bribe or not to bribe. If he does bribe, he gets the contract under the same conditions just stated. If **2** decides not to bribe, then the tender is openly contested and the contract goes to **1** with probability  $p_1$  or to **2** with probability  $1 - p_1$ . Whatever the case, players pay the amount corresponding to the expenses to participate.

Choosing the best strategy for playing the game depends on the vulnerability of the tender (the probability  $u$ , stemming from the propensities of each player to bribe), on the risk of being caught in bribery (the penalty  $R$  and the probability  $k$ ) and at least in principle on the probability of cleanly winning the contract. Suppose that the conditions are lax. Suppose also that there are penalties, but that the likelihood of a briber being caught is small. Bidder **1** evaluates that if he bribes, the contract would be his with small risk of incurring in penalties. He also reasons that if he refrains from bribing, then the opponent will evaluate the situation similarly, so his decision would be to bribe. Therefore, in order not to be duped, **1**'s decision again would be in favour of bribing. If **2** knows that **1** did not bribe, then he holds all the trumps. Observe that for either participant, the probability of cleanly winning the contract does not play a role in the reasoning. Such is the situation in corrupted environments, and presumably suggests the allusions to the prisoner's dilemma.

If the opportunities to bribe ( $u$ ) are few and the likelihood of being penalised for bribery ( $k$ ) is high, then it would be better to take one's chances in the open bidding process. And for this one must enhance one's own probability of offering the lower price and/or other conditions in order to win (by cutting costs, developing better production processes etc.). If everybody does that continuously over time, prices fall down (and the law of diminishing returns takes hold). Of course, if the opportunities to attempt bribery are few, then on average bidders will decide to bribe less often. If, furthermore, bribes are often detected when practiced, then the risk grows and the rational justification to bribe loses weight.

What one gets from the model is confirmation of the common belief that in unhealthy environments participants who play cleanly most likely lose. Notice that this holds even for fairly "clean" environments.

For the "game masters" – i.e., the planners and regulators of procurement policy –, the most rational aim would be to develop a procurement environment where the conditions maximally prevent opportunities for bribery and where the risk of bribers being caught is guaranteed to be extremely high. Notice that this is not simply a matter of stipulating stiff penalties, but also of minimising, in the regulations, the conditions that allow public officials to direct tenders, and of enhancing the monitoring and enforcement mechanisms. As tightening controls is expensive, preventing bribery has a better chance of achieving success.

The Integrity Pact official literature indirectly addresses the formal conditions governing a tender, from which stems the likelihood to bribe (our factor  $u$ ), even if, sometimes, the conditions are considered as given, and the apparent intention is to ascertain that the rules of the game are followed as given. Thus,

Once the decision has been made to go ahead with the project as designed, the government needs to: Decide whether it will use a general contractor or individual contractors; prepare, or get prepared by consultants, the bidding documents [...].<sup>8</sup>

Although the methodology in itself does not aim at reforming the institutional environment, but instead applies to particular instantiations, it does aim to create, by repetition, a climate of trust in the procedure, so subjectively altering the overall conditions. Furthermore, on describing the objectives of IPs, [TI 2002b] contends that "The IP helps enhance public trust in government contracting and hence should contribute to improve the credibility of government procedures and administration in general". This is repeated in the same section thus: "Beyond the individual contract in question, the IP is of course intended to create confidence and trust in the public decision-making process in general [...] and public support for the government's procurement, privatisation and licensing programs".<sup>9</sup>

### *b. Collusion*

Before proceeding, we must introduce a possibility that till now was not mentioned, but must be taken into account if the problem is to be credibly depicted. If procurement is addressed from the

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<sup>8</sup> [Wiehen 1999] p. 24.

<sup>9</sup> [TI 2002b], p. 4. Observe the emphasis on "privatisation and licensing programs".

perspective of the “collaboration vs. confrontation” dichotomy, then there is one type of collaboration that in actual practice often happens among participants of procurement in certain sectors (notoriously, public works), namely, colluding to fix minimum prices, erecting barriers to new entrants and adopting the “merry-go-round” method of divvying up the market among a number of firms that in time get all contracts stemming from a series of different rigged biddings. The pre-arranged losers guarantee to offer prices that are higher than the pre-defined winner for each turn of the wheel. Obviously, this method can only work if new would-be entrants are either co-opted or, if they disagree, are subjected to entry barriers. In stable markets, the survival of such a method would be impossible without the public agents’ collaboration. Note also that collusion to fix prices, being a private matter circumscribed to suppliers, does not directly depend on the institutional framework governing procurement.<sup>10</sup>

In the presence of a low risk of detection, such a collaboration is in fact more attractive to participants than actually competing in open tenders, because, as the decision is preordained, no extra effort need to be applied to offer a lower price in any given tender. This has the additional advantage of considerably lowering the “normal” cost of participating. In clean open tenders, where all participants have more or less the same likelihood of winning – the typical situation in stable markets –, the expectation of losses due to the cost of participating in a sequence of tenders mounts with the number of contestants. But in merry-go-round schemes, why should anyone spend more than the absolute minimum to draft proposals? This is why participants try to eliminate the cost altogether, leaving the responsibility of drafting losing proposals to the pre-ordained winner, or even use especially projected common templates (which is why one of the techniques to identify the action of cartels is to examine proposals looking for stylistic and even physical similarities).

In the long run, cartelisation is of course detrimental to the economic sector in question (as such a strategy stifles progress), but experience abundantly shows that few firms put a sector’s strategic interests before their own immediate goals.<sup>11</sup> As Lord Keynes remarked, in the long run we’re all dead. If this dimension is introduced in our “bidder’s calculus” and if more broadly we include the

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<sup>10</sup> In 1993, in São Paulo, Brazil, one journalist managed to penetrate two meetings of about 60 civil construction contractors held in their Association, in which they first attributed to each of an extended list of future contracts which would be the corresponding “winning” prices and then proceeded to run a bingo to decide which firm would “win” each contract. Firms not lucky enough were guaranteed chunks of the spoil from future subcontracting by “winners”. In schemes like that, dissenting firms are kept apart by their own volition – that is, they are economically threatened by the others and “voluntarily” renounce to compete. Oscar Pilagallo and Xico Sá, series in *Folha de S. Paulo*, 1993, winner of one of the Esso journalism awards of that year. In July 2003, a cartel of ca. 20 suppliers of gravel for contractors was discovered, also in the state of São Paulo, complete with specially developed computer software to randomize offers’ details. In September 2003, would-be contenders in an auction for the concession of small-capacity public transportation for the city of São Paulo (a very huge city, with very huge long-term concessions) colluded when forming consortiums, in order to guarantee that no one was left out; in this case, the public agent responsible for the auction was privy to the arrangements. On October 27, 2003, the media reported on a cartel formed in the Southern state of Rio Grande do Sul by 18 private security firms to fix prices and distribute public contracts among members.

<sup>11</sup> Apropos the “bingo” scandal, at the time the author heard from a prominent Brazilian contractor that fixing minimum prices in a given market is a perfectly admissible procedure undertaken by suppliers in defence of commercial interests perceived as being threatened. The practice is explicitly prohibited by the Brazilian procurement law.

consideration that the “liquid” price arising from a rigged bidding tends to be higher than the equivalent in an open bidding, then the scales are further tipped in the direction of corruption. So, in order to lower the likelihood of bribery contaminating tenders, the various components must be further strengthened.

*c. The IP ethical factor*

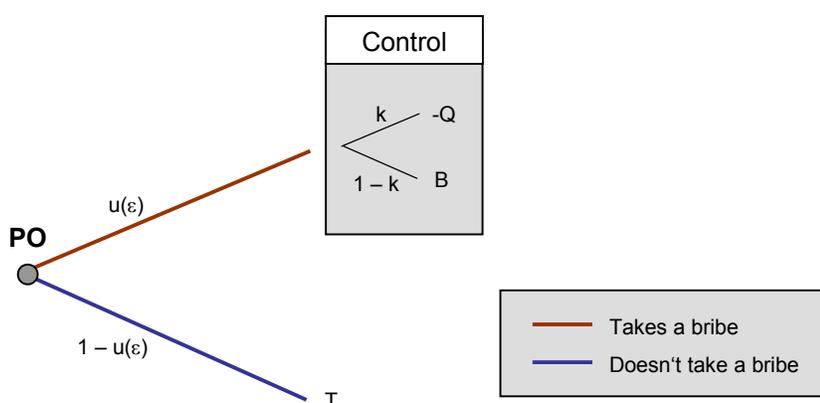
If one accepts the “briber’s calculus” metaphor as a plausible depiction of the problem at hand, how does the IP procedure enter the game? The purpose of IPs is not to enhance the likelihood of somebody winning a contract, nor to heighten the value of a clean contract vis à vis a “dirty” one, but to do away with the amount paid in bribes (together with other uncertainties and diseconomies entailed by a faulty environment). Thus, the only remaining variables at the reach of the IP are the conditions, the penalties and the probability of corruption being detected. IPs aim at stimulating a subjective ethical factor, and also strive to opening up the conditions for participation, thus presumably lowering the probability of entry barriers being erected, but the question remains as to whether the economic stimuli to bribe under such conditions are effectively superseded.

We must try to imagine what modifications should be introduced in our model in order to accommodate the ethical commitment of participants and public officials not to participate in bribery. According to the doctrine, such commitment is justified by mutual trust emerging from a process of negotiating the conditions of the tender, the penalties incurred in case of non-compliance etc. However, jumping from a commitment not to bribe to actually not performing the act cannot be introduced in the model because it would simply do away with the very option to bribe, and then there would be no decision to make and the game would become trivial. We could weaken this absolute (and absolutely implausible) condition and adopt instead the stipulation that the IP aims at diminishing the likelihood of participants deciding to bribe. Then, one possible adaptation would be to add somewhere an “ethical factor” (which we will name  $\varepsilon$ ) that would strengthen other factors. This can be accomplished in the game model by making the probability  $q$  of a player deciding to bribe dependent of the “ethical” factor (so that  $q = q(\varepsilon)$ , entailing that  $u = u(\varepsilon)$ ) in such a way as to make  $q$  approach 0 when  $\varepsilon$  is high enough. (In principle,  $k$  should also be subjected to the same operation, but we will not complicate matters.) Environments where the probability of bribing (stemming from the conditions under which tenders are performed) is small and monitoring is weak would require a very strong ethical factor ( $\varepsilon$  close to 1), while in healthier environments, where erecting entry barriers is difficult, the ethical factor would not be as relevant. In an iterated IP game, the influence of the “ethical” factor could be made to grow with previous successes, thus allowing for the “change of climate” effect alluded to in p. 8. Therefore, the “briber’s calculus” modified as it was just suggested would – formally – incorporate the ethical commitments of IPs as a factor operating to reduce the propensity to bribe.

To recapitulate the discussion up to this point, within the scope of the proposed game-theoretical model it was found that the proposition that IPs are effective to reduce the propensity of bidders to pay bribes translates into the statements that objective conditions governing tenders can be enhanced (thus lowering probability  $q$ ), that penalties can be stiffened (making  $R$  bigger), that control mechanisms can be strengthened (enhancing  $k$ ) and that there exists a subjective “ethical” factor ( $\varepsilon$ ) that, when strong enough, is able to supersede other factors and to induce the rational decision not to bribe. Simply stating that such factors operate as desired on the rational decision-making process in Integrity Pacts is clearly not enough. Empirical evidence must be presented.

*d. The agent's decision tree*

Let us not forget the side of the public officials. They may also be construed as participating in a “bribe’s calculus” game. It is easy to see that the decision tree for them is much simpler (already including an ethically-modified likelihood for the occurrence of bribing, which for simplicity we consider to be the same as previously). Given a tender, the meanings of the various elements are the same as in the former diagram, and so are the values, excepting for the penalty  $Q$ . The outcome for not taking bribes is symbolised as  $T$ . The best strategy for public officials is straightforward. If the system easily allows for entry barriers to be erected (and the hypothetical “ethical” factor is low), then the likelihood of his deciding to take bribes turns out to be high. And if they take bribes, then they benefit from the amount  $B$  of the bribe, incurring in the corresponding risk. If the risk is



low, then the propensity to participate in corruption is enhanced. Note that normally  $T = 0$ . Differently from firms, there are no material gains to be earned by public officials that do not take bribes. This is nothing more than the classical problem with the public sector: There are no direct material incentives for not abusing power. (A similar diagram appears in [Klitgaard 1991] Ch; 3, with the difference that a “moral penalty” is added to the material penalty  $Q$ . However, as there is no way to quantify moral penalties, Klitgaard’s diagram is not a model but only a verbal metaphor, not amenable to analysis.)

For the agent, the expectation remains positive (the official is not caught and retains the bribe) till the control and enforcement factor reaches a certain level, regardless of the systemic vulnerability, and gets negative from that point on. The turning point depends on the ratio between the penalty and the bribe, in the same manner as previously discussed in relation with participants. Using the same reasoning we applied then (p. 8), from this and from the observation that for the majority of officials penalties are usually stiff in comparison to the bribes taken, one concludes that the prevalence of corruption in some environments directly stems from lack of control and enforcement – in these environments, perforce the control probability is less than the “clean” threshold.

*e. Questions to be answered*

The questions we are left with, and must compare with the odds we discussed in this section, are:

- Do IPs offer incentives for public officials not abusing power?
- Do IPs define stiffer penalties for firms and public officials? Recalling that, as argued above, penalties affect the decision about to bribe or not to bribe only insofar as the risk factor is high enough. So, the second question:

- Do IPs heighten the probability of bribery being discovered? That is, do they establish better control mechanisms?
- Do IPs reduce the probability of bidders deciding to bribe and public officials deciding to take or extort bribes? This divides into asking whether they diminish the opportunities for entry barriers to be erected and whether ethical influences supersede others.

And, in general:

- Do IPs contribute to get better results in procurement?
- Do IPs contribute to perfecting the overall procurement environment?

We will examine those questions as we go. Such examination will address conceptual assumptions accompanying IPs as well as the empirical evidence available as to prevailing conditions and results. Before we proceed, it is worth mentioning that the importance attributed to the various components affecting bribery (the conditions under which the tender is held, the penalties, the efficiency of control mechanisms and the ethical factor) varies with IP practitioners. There are those, like the Colombian organization that is leader in the field, which heavily favour the subjective component symbolised by the ethical factor. And there are others, like the Ecuadorian, that primarily direct their attention to the conditions governing the tender.

## **2. Incentives not to take bribes**

The question about public officials being offered specific incentives not to abuse power in IPs can be straightforwardly answered in the negative. Although one practitioner states that in the IPs her organisation promotes the functionaries “agree on rewards and penalties” arising from discussions,<sup>12</sup> there is no mention to rewards in the actual IPs that was possible to consult.

This is not to say that subjective incentives to principals (as opposed to their agents) to adopt IPs are absent. On the contrary, becoming associated with the promotion of mechanisms that allegedly promote cleaner tenders is a political advantage, especially for senior and, notably, elected officials. As noted in p. 8, this is an important component of the strategy of promoting the IP methodology. It must be kept in mind, however, that such incentives have no objective relation to specific tenders. Principals are not the same thing as their agents. Moreover, as the political mores abundantly demonstrate, verbal self-identification with honest practices is not identical to actually practising what is preached.

Naturally, the practicability of defining positive incentives for not performing secret acts (taking bribes) is debatable. Be it as it may, the proper scope under which to discuss incentives to public functionaries is performance evaluation. We will not go into this, but only point out that evaluating the performance of public officials has to do with the whole administrative institutional framework, not being reasonable to expect that isolated offices would be able to apply special administrative regulations pertaining to their officials’ wages, rewards and so forth. A different question is

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<sup>12</sup> [Ospina 2001] p. 9.

whether not abusing power gets subjective enhancement as a consequence of the IP “ethical” factor. This can only be answered by recourse to empirical data comparing IP-driven tenders with non-IP-governed procurement. As will be repeatedly seen in the sequel, the absence of empirical evidence stands in the way of reaching a conclusion.

### 3. The risks of bribing

There are two components in the risk: The penalties incurred if one is caught bribing and the probability of somebody being caught bribing. We begin with

#### *a. Penalties*

We recall that among the “Elements” of IPs there are the “core” requirements to include

- 2) An undertaking by the principal (the contracting State institution) that its functionaries will not take or extort bribes, with “appropriate disciplinary or criminal sanctions in case of violation”.
- 9) “A pre-announced set of sanctions” for violators, “including (some or all):
  - denial or loss of contract;
  - forfeiture of the bid security and performance bond;
  - liability for damages to the principal and the competing bidders; and
  - debarment of the violator by the principal for an appropriate period of time [blacklisting].”

We also recall the contention reproduced in p. 5 that

[...] the IP will establish contractual rights and obligations of all the parties to a governing contract and thus eliminate uncertainties as to the quality, applicability and enforcement of criminal and contractual legal provisions in a given country. This means that applying the IP concept can be done anywhere without the normally lengthy process of changing the local laws.<sup>13</sup>

The statement is very strong. It says that IPs are binding no matter the legal environment they are exercised in (“anywhere”). Because the IP contract purportedly “eliminate uncertainties [...] in a given country”, it effectively says that the rights and duties expressed in the “Elements” would be enforceable irrespective of the law, “without the normally lengthy process of changing” it. It is also contended that “The concept of a contractual arrangement appeals to many governments as well as corporations acting globally”.<sup>14</sup>

But how is it possible for an isolated State (or private, for that matter) organization to arbitrarily define “disciplinary and criminal sanctions” for violators? How can the signers of a private agreement define sanctions such as those listed under Element 9 if they are not defined by law? Public agents are usually subjected to regulations specifying rights, duties and punishments for breaching them. As for companies contracting with the State, it is true that not all country regulations define penalties if they participate in collusion, bribery etc. But in any case, how can a private agreement define punishments and penalties, including criminal, at will? All this might perhaps be possible in

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<sup>13</sup> Also found in [Wiehen 2000] p. 91 and other references by the same author. This formulation found its way into [WCD 2000], p. 249.

<sup>14</sup> [Wiehen 2000] p. 92.

environments where the rule of law is essentially absent (even then enforcement would be problematic), but certainly not “anywhere”.

Under a more understanding stance, it might be that by “appropriate disciplinary and criminal sanctions” it is meant sanctions provided for by law, to violations likewise defined by law.<sup>15</sup> As the same source somewhat contradictorily puts it, “In substance, these commitments are nothing other than an agreement to respect and apply the existing laws of [the country] and the other party’s country of residence”.<sup>16</sup> Leaving aside the improbable willingness of any single participant to sign something binding it to all the other participants’ countries’ laws, even if the agreement is limited to existing laws there would be no reasonable grounds to maintain that enforcement would be attainable by “contractual rights and obligations”. After all, due process (investigation, prosecution, defence etc.) is at least theoretically guaranteed in most legal systems. Under normal circumstances, either a complaint about corruption in a procurement process finds its way to administrative and/or criminal court or there would be no possibility of punishment. And so, the distance between enforceable and non-enforceable dispositions is explicit in a Mexican IP (although the absence of almost all other “core” Elements rises doubts about the arrangement being an IP at all): “The content of the [ethical declaration] do not juridically bind subscribers, since it is an ethical commitment”.<sup>17</sup>

A third possibility is that IPs should define penalties in excess of the law, but not encroaching on it. These would be essentially limited to material compensation, but even then conditionally: If the firm is found guilty of bribery etc. in a court of law, then, and only then, it would have to pay compensation to the others by force of “contractual rights and obligations”. Nevertheless, in [TI 2002b] a different view is presented. It is contended as an example that

[...] German practice is to treat a no-contest statement or an admission of guilt as equally persuasive [as a criminal conviction], and recently the practice is emerging of considering it as adequate evidence of a violation if “on the basis of the facts available there are no material doubts”.<sup>18</sup>

No information is given about what type of controversy the situation refers to, or the amounts involved. The premise operating in such reasoning is that the accused either did not contest the accusation or confessed to it. Transporting this to a public procurement situation is not totally outside the realm of possibility, but anchoring an entire enforcement mechanism on the likelihood of a firm suspected of bribery voluntarily confessing to it or even not denying the act, and thus subjecting itself to pay sizable amounts of money in compensation, stresses credibility. Not to mention that having paid a separate compensation might be construed as evidence of guilt in a court of law.

A fourth and last possibility, which essentially follows the line just commented, is that penalties are expected to be voluntarily self-applied. The Colombian “Compartel 1” IP, reproduced in [TI 2002b] pp. 70ff as model, states that a firm found guilty of corruption “pledges to refrain from participating in procurement [...] for five years [...]”. Likewise, functionaries guilty of taking bribes

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<sup>15</sup> But see p. 36.

<sup>16</sup> [Wiehen 1999] p. 28.

<sup>17</sup> [http://www.shcp.gob.mx/estruct/ahisa/ahisa\\_5.pdf](http://www.shcp.gob.mx/estruct/ahisa/ahisa_5.pdf) p. 39.

<sup>18</sup> [TI 2002] p. 9. No source is given to the quotation.

“commit to declare themselves non-qualified to work in any public or private telecommunication entity for five years [...]”.<sup>19</sup> Thus, it was expected that such promises would be honoured because the culprits, having been found guilty of criminal acts capitulated in an ethical commitment, nevertheless would remain voluntarily bound by the very same ethical commitment.

We must examine the particular role played by requiring that participants and public officials sign a pledge not to become involved in bribery and generally follow the IP methodology as to its legality and enforceability. If the State establishes by law a set of rules, then it is not clear why it would be necessary for people to affirm in writing that they will follow such rules. The enforcement power of the State and the obligatory knowledge of the law by participants (alleging ignorance of the law in order to avoid the consequences of breaching it is not acceptable in any legal system, even less when it comes to transactions with the State) would not change if the oath were not required. Nevertheless, the rules are no less enforceable because of the pledge, and there might be a subjective advantage in including such a requirement in the agreement.

The situation is not as straightforward when the requirement to adhere to IP mechanisms is included informally in an environment, but is not provided for in the regulations. In a reasonably developed legal environment, such a requirement would be at least subjected to controversy.

The contention that IPs are applicable to each and every legal environment might be discussed under another angle: Whether or not it makes sense, from the point of view of IP proponents, to require that every interested firm signs IPs in order to become able to participate in tenders. IP literature presents the matter as an open question:

[...] experience up to now did not demonstrate whether it is better to make the signing mandatory from the start or whether it is better to negotiate the IP with the competitors until agreement is reached on a pact that then will be signed by everybody.<sup>20,21</sup>

In most reasonably developed legal environments, it is very difficult to imagine that a requirement to sign something that is not required by law, stipulating conditions likewise not necessarily contemplated by the law, would be enforceable. In fact, the requirement would hardly be legal and attempts to prohibit the participation of non-signatories would be open to challenge. According to [TI 2002a], this happened in Milan, Italy, where a number of firms went to court against one or more IPs. The cases were pending ruling at the time of this writing. In a Mexican situation, it is explicitly stated that “Subscribing the unilateral statement of integrity is a voluntary act from participants and the absence of such document is not sufficient reason to disqualify any registered participant”.<sup>22</sup>

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<sup>19</sup> [TI 2002b] p. 72.

<sup>20</sup> [TI 2002b] p. 6.

<sup>21</sup> [Ospina 2001] p. 28 advocates that on being mandatory, “the integrity pact would turn into just one additional formal requirement that must be signed [...] along with all the other forms needing to be signed for a firm’s eligibility to participate in the bidding or competition”. This source consistently stresses the participatory and voluntary character of the IP as its main capital, and likewise her organization includes self-perfectioning as one of its strategic aims. See [www.transparenciacolombia.org.co/formacion\\_cambio/1formacion\\_ca\\_cu\\_vol.htm](http://www.transparenciacolombia.org.co/formacion_cambio/1formacion_ca_cu_vol.htm). Nevertheless, see below the participation of this same organization in efforts to make IPs mandatory.

<sup>22</sup> [www.shcp.gob.mx/estruct/ahisa/ahisa\\_5.pdf](http://www.shcp.gob.mx/estruct/ahisa/ahisa_5.pdf) p. 39.

The fact that the doubts expressed above are not born from mere abstract speculation is demonstrated by an interchange between a non-identified interested party and an official of the Colombian Ministry of Communications around the contract stemming from an IP-governed auction<sup>23</sup> for the concession of licensing for Personal Communication Services in that country. It is worth quoting the exchange at length.<sup>24</sup>

**Interested party:** The document titled “Integrity Pact”, which the concession-holders are required<sup>25</sup> to sign, describes conducts typified in the Penal Code [...] and [consists in] an arbitration pact in whose formation and operation, as well as in the procedures to be performed before them, there is the intervention of parties not part [of the auction/contract], with the faculty of imposing pecuniary penalties [...] and ordering the contract’s termination. [However], as that faculty [belongs to the State], and the State is not permitted to renounce to its exercise, it cannot be subjected to arbitration. [In view of this], recourse is made to the subterfuge [...] of stating that the contract was terminated by mutual consent. **Questions:** 1) Can the State, without violating [...] the Constitution, require that a pact is signed not to violate the Penal Code? 2) The violation of penal norms is not amenable to transaction, and therefore the arbitration pact cannot refer to them. Thus, can Arbiters address matters defined by the Penal Code or exercise prerogatives that belong to the State? Can Arbiters declare that someone incurred in cause for dis-habilitation?

**Official:** 1) [...] The Pact does not consist in the agreement you state, but in a pledge where the commitment to morality is reiterated [...] and, in case of non-compliance, a monetary sanction applicable once the pre-established procedure has been followed, which is independent of the State’s proceedings [...] following a violation of the laws. [...] In case of violation of legal duties, there is a pre-defined pecuniary sanction that in no way precludes the exercise of [other legal procedures]. Can Arbiters declare that someone incurred in cause for dis-habilitation? [No]. The disposition generates obligations that, in case of non-compliance, allow for the corresponding responsibilities and indemnities. That is, the proponent penalised by the Arbiters can validly participate in a procurement or contest sponsored by the Communications Ministry [...].

This was a consultation answered by an administrative functionary. One can imagine what would happen in the legal arena in a concrete case. It is to be noted that, according to the understanding of the official quoted, the “highly desirable” condition of blacklisting would not be applicable.<sup>26</sup> Moreover, from this one surmises that the whole “core” element of special penalties an IP should define are not enforceable in that country under the private agreement of an IP. Indeed, if the functionary’s interpretation was not mistaken, it follows that, according to the definition of IP “core” elements, the Colombian IP in question can be called an Integrity Pact by a hair’s breath, and only because it includes a pecuniary penalty payable to the other participants.

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<sup>23</sup> One single proponent (who got the concession) participated in this auction.. According to the auction’s announcement ([www.pcs.gov.co/docs/Pliego\\_de\\_Condiciones.doc](http://www.pcs.gov.co/docs/Pliego_de_Condiciones.doc)), the IP was to be monitored by the organization Transparencia por Colombia under the provision of Law 555/2000, Art. 5, paragraph – however, soon after the provision was judged unconstitutional.

<sup>24</sup> [www.pcs.gov.co/docs/preguntas\\_respuestas/respuestas\\_proponente.pdf](http://www.pcs.gov.co/docs/preguntas_respuestas/respuestas_proponente.pdf). Access to this file was discontinued soon after it was fetched.

<sup>25</sup> Required, not invited. The reference is to the document found at [www.pcs.gov.co/docs/adenda5/Anexo\\_2\\_Pacto\\_de\\_Integridad\\_con\\_cambios\\_adenda\\_5.pdf](http://www.pcs.gov.co/docs/adenda5/Anexo_2_Pacto_de_Integridad_con_cambios_adenda_5.pdf).

<sup>26</sup> Blacklisting ruled by arbiters was included in prior drafts of this tender, but eliminated. See *Ibid.*, p. 6. The same document provided for blacklisting by the principal (p. 7), but from the exchange just quoted it is to be surmised that it would not be enforceable for lack of legal footing.

It so happens that the Colombian regulations pertaining to procurement (Law 80/1993) do not even address bribery nor do they define any penalties applicable to corruptors. The only possible consequence for firms would be the cancellation of the contract, provided that it was celebrated “with abuse or deviation of power” from some public official,<sup>27</sup> which, of course, must be proved. The reasons a public office can unilaterally claim to terminate an ongoing contract (Art. 17) do not include corruption. Public officials are subjected to penalties for “abuse or deviation of authority”, stemming from Title XV of the Colombian Penal Code. The Ecuadorian law is even more permissive.<sup>28</sup> There is no mention to corruption and suppliers suffer no penalties. Unilateral termination of the contract under the initiative of the principal can only happen (Art. 104) for bureaucratic-operational reasons. The Mexican general law on procurement (Title 6, Art. 60) does mention culpable behaviour from firms, which are subjected to fines and blacklisting (but, curiously, not cancellation of the contract). The same with that country’s public works law (Title 7, Art. 78).

We conclude that IPs very fractionally, if at all, stiffen the penalties payable by participants in corrupted schemes, but, as one would expect, such added penalties are only applicable if and when the party is found guilty in a court of law. It is hardly plausible, although not altogether impossible, that firms would agree to pay separate compensation otherwise.

### *c. Control mechanisms and enforcement*

The risk of indulging in bribery depends on the size of the penalties and the probability of being caught. When such probability is very low, the risk approaches zero. We need to query whether IPs enhance that probability. This depends on the presence of monitoring mechanisms. Opening up the process for public discussion is an important component of IPs, and likewise getting promises from public officials that rules will be followed, and both can be interpreted as parts of control. Otherwise, IPs are not required to establish special monitoring mechanisms, although the “Elements” specify the need for

- 4) An undertaking by all bidders that they will “disclose all payments made in connection with the contract in question [it is to be imagined that the intended reference here is not to only to the contract, but to the entire procurement process] to anybody”.

Disclosure of names is “core”, disclosure of payments is optional. Participants in IPs are not required to report suspicions of corrupt practices,<sup>29</sup> although one practitioner states that “Because of the integrity pact’s ethics-related and voluntary nature, the key to following through on it is to stipulate in the text of the pact all signatories’ obligation to report any irregular process-related act of which they become aware”.<sup>30</sup> Thus, the Colombian “Compartel 1” IP mentioned previously did define reporting of suspicions as a condition for interested parties to participate. It is not informed whether it happened. Other IPs reproduced in [TI 2002b] and surveyed elsewhere do not seem to include a requirement to report suspicions of bribery. There is, however, provision for monitoring

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<sup>27</sup> Law 80/1993, Art. 44, item 3.

<sup>28</sup> Law 272/2001.

<sup>29</sup> Pointing this out should not to be understood as holding that such a requirement would in any way enhance the likelihood that reporting would happen.

<sup>30</sup> [Ospina 2001] p. 30

and supervision, in which it is declared that these “should be specified and in particular those for dealing with dangers, suspicions or actual instances of corrupt practices should be clearly defined”, so that implicitly it is expected that suspicions are to be reported. The very existence of a monitoring procedure is necessarily reported in the IP proceedings: “The ultimate result of such monitoring and supervision should be a statement at the end of the process that the procedure was clean and did not lead to any incidents related to possible corruption, or – if this was not the case – what incidents occurred, how these were dealt with, and what the outcome was in the various cases”.<sup>31</sup>

The available documentation does not inform about isolated or aggregated data on such reporting, although a text commenting on the application of IPs in Colombia by the organization that promotes the methodology in that country points out that “it seems that there are conditions that inhibit the participants to use the scenario created by the Pact to report doubts about the behaviour of other participants. In general, they are more willing to point out the risks of corruption before the adjudication [of the contract] than after”.<sup>32</sup> This seems to be the same situation whereby “several high-tech firms [...] have an agreement [!] about not providing information on each other for fear that this could harm their access to the market”;<sup>33</sup> and, again: “Most of those [participants in IPs] interviewed [in Colombia] said they would not denounce a competitor because it would hurt their commercial relations.”<sup>34</sup>

As for the public official’s side, the “Elements” posit

- 2) An undertaking by the principal (the contracting State institution) that its functionaries will not take or extort bribes, with “appropriate disciplinary or criminal sanctions in case of violation”.

But how can a responsible person (the head of the State office in question) sign anything on behalf of third parties (the officials belonging to that office) stating that these will not take or extort bribes?<sup>35</sup> Imagining that somebody would be as adventurous as to sign such a pledge, in the event of somebody being caught red-handed, whom will suffer the sanctions provided by the IP: The functionary, who did not sign anything, or the office head, who pledged wrongly? Furthermore, as the IP intends to encompass the whole duration of the contract, any public official or private subcontractor involved in following up the object’s execution would become subsumed. In a big project, this can involve hundreds of persons. Pledging that third parties will not act according to any given set of criteria is so clearly devoid of practical consequences that one wonders whether the requirement (which, being a “core” element, is mandatory for the accord to constitute an IP) is meant to be only symbolic.

A matter connected to enforceability is the use of arbitration in lieu of formal mechanisms to resolve matters arising from public procurement. The possibility of using private arbitration to solve disputes arising from public procurement (or, in general, any public matter) varies according to the

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<sup>31</sup> [TI 2002b] p. 7.

<sup>32</sup> [www.transparenciacolombia.org.co/formacion\\_cambio/contruccion\\_cultura/2ncontrata\\_pub\\_trans.htm](http://www.transparenciacolombia.org.co/formacion_cambio/contruccion_cultura/2ncontrata_pub_trans.htm).

<sup>33</sup> [TI 2002b], p. 137.

<sup>34</sup> [Holsen et. al.2002], p. 8.

<sup>35</sup> Although the IPs (Colombian and Ecuatorian) about which it was possible to obtain information, all functionaries directly involved sign the pledge, and not only the highest authority.

environment. One of the reasons often mentioned to use arbitration is to circumvent the slowness of Justice. Another is avoiding Judiciary corruption. But why is it taken for granted that private arbitration, especially if institutionalised in a mined field as public procurement, is freer from corruption? There is no reason to believe that the pressures operating upon private arbitration are any different than those operating upon the Judiciary. As for the more rapid resolution of conflicts arbitration is assumed to provide, it must be balanced by the possibility of private parties deciding contrary to the public interest. In fact, there are countries where recourse to private arbitration is not allowed to resolve matters involving the public interest in general.<sup>36</sup>

We can ask the question about control mechanisms from a different, more direct, perspective. Assessing the probability we are examining is in fact an empirical question, which can only be answered by recourse to empirical data. Namely, how many IP-governed processes were shown to be corrupted, and how the statistics compare with non-IP-governed tenders? In Colombia, the organization responsible for conducting IPs reports that 51 tenders were subsumed to IPs between 1999 and 2000. Of these, it is informed that the sponsoring organization withdrew from 11. In all cases, the reasons for withdrawal were connected to disagreements about the conditions surrounding the procedures, although no specifics are provided.<sup>37</sup> No data is given on whether or not allegations of corruption came up during the remaining 40 instances.<sup>38</sup>

Our quest for empirical data is of course a tongue-in-cheek question. There are no reliable data on corrupted ordinary procurement (a common observation is that corrupted tenders seldom reach the light of day, let alone the Judiciary), and the literature on IPs does not point to one single instantiation of an IP that turned out to be corrupted. Of course, we reject as unjustified a contention along the lines that, since no allegations were voiced, then *ipso facto* IPs are impervious to corruption. Since there is no empirical evidence available to assess a hypothetical enhanced likelihood of being caught when bribing within an IP in comparison to the probability of bribing being discovered in ordinary procurement, one is forced to adopt the neutral stance of assuming that they are the same. As it was observed elsewhere, “[...] those with whom the problem was discussed recognize that the lack of incentives for, and protection of, ‘whistleblowers’ as a deficiency in the system which, in the medium-term, could erode the effectiveness of the Integrity Pact”.<sup>39</sup>

Together with part a) above, relative to penalties, we conclude that the risk of bribing in IP-governed tenders is only very fractionally enhanced, if at all.

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<sup>36</sup> As, for instance, is the case of Brazil. Law 9307/96, Art. 1, defines arbitration as exclusively applicable to resolve disputes involving disposable patrimonial rights. In Colombia, arbitration is regulated by Decree 2279/1989, modified and complemented by other legal dispositions. Art. 1 states that arbitration applies to “controversies susceptible to transaction arising between persons able to compromise”. Matters concerning public contracts seem not to be transactionable. In contrast, the Ecuatorian procurement law (272/2001, Art. 108) explicitly admits arbitration to resolve controversies.

<sup>37</sup> [Ospina 2001].

<sup>38</sup> Effectively monitoring 51 procurement processes, some of them major, in the space of about one year, is an impressive accomplishment. During the three following years, the organization monitored nine more tenders.

<sup>39</sup> [Holsen et. al. 2002], p. 8.

#### 4. The propensity to bribe

As we saw in Section 1, an important component in the decision to win a contract with bribery is the environment's vulnerability, translated as the likelihood that the conditions are manipulated to favour one participant over others. Given the heavy weight the IP methodology attributes to ethical influences in the decision-making process, we incorporated into this factor the hypothetical counter-weight of an "ethical" component. As before, we will examine those elements in turn.

##### *a. Objective conditions*

The ability of manipulating the conditions governing tenders corresponds to the most important element inducing the likelihood of a bribe being offered or extorted. Consequently, IPs that do not address the conditions renounce to interfere with the most crucial component.

Some NGOs that promote IPs intend to provide a localised environment where participants are able to discuss the terms under which the process will be conducted. In principle, such terms would include from the conditions to participate (capital, liabilities, "prior experience" etc.), to the object's definition, the criteria to define the winner and the terms of the contract. The relevance of the matter justifies quoting in length the views of the leader organization in the IP field:

[...] the component that most contribute to impress transparency to public inversions and to generate trust among participants is carefully and equitably formulating the rules of the game and amply publicising them prior to the tender. It is consensual among both participants and public officials that it is in that phase that most frequently elements to direct the outcome are included. In order [for the NGO] to get protection against that it is necessary to maximally publicise the terms of the tender and of the ensuing contract, in such a way as, still as drafts, making them known and subjected to comments and criticism by experts, beneficiaries and interested parties. Their observations are the best guarantee as to the suggested process' equitability, efficiency and transparency, since the debate and the tensions between different interests that necessarily arise are the only possibility of earning confidence, arriving at an adequate point of equilibrium.<sup>40</sup>

Although the stress is on trust and confidence earned by reaching consensus, rather than on the conditions themselves, the recognition as to the primary relevance of the latter, and as to the fact that participants are good judges of fairness, are clearly stated. Trust, being a subjective state of individuals, can only be directly ascertainable by asking the persons involved whether or not it developed. Indirectly, trust in a process can be partly evaluated by measuring the frequency of participation of the subjects in repeated instantiations of the process – although for many participants in public markets, this is not really an option: Either they participate or change their line of business. However, due to the relatively small number of IPs that were applied, and due to the diverse fields involved, such statistics, even if collected, would not allow for significant conclusions.

The question about whether IPs lead to better competitive conditions can be answered by thorough examination of the conditions actual IPs impose and comparing them with the "normal", non-IP conditions prevailing in the market. But if information on this is collected, it is not available. Examining which conditions were discussed was only possible in two cases from Ecuador<sup>41</sup> and in one case found in a principal's website in Colombia. In fact, one of the most surprising lacunae in

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<sup>40</sup> [TI-COL 2000] p. 46.

<sup>41</sup> See e.g. [CLD 2003].

IP literature refers to the actual conditions governing tenders. Although striving for fairness is the pivotal centre of the whole methodology, the absence of discussions on how to identify unfairness in order to (try to) neutralise it is striking.

To sum up, there is no reason to suppose that IPs do not favourably affect conditions governing tenders, diminishing the opportunities for entry barriers to be artificially erected. The process of discussing conditions should in principle help to identify and avoid artificial entry barriers, although the lack of analytical information on IPs stands in the way of affirming it with sufficient conviction.

*b. Subjective conditions*

From the point of view of formal justification, the weaker component of IPs is its stronger claim, the “ethical” factor. It is weak because a public tender is an event governed by economic considerations, and non-economic subjective inclinations do not have a place in economic rationality. According to an orthodox perspective, the “ethical” factor we introduced in the equation has no actual role in the decision-making process. However, just leaving matters at that would not do in the present circumstances, because the IP methodology is based on the assumption that there is a place for ethics in economic decision-making, and if economic modelling is unable to incorporate it, so much the worse for economic modelling. Additionally, simply sweeping aside ethical influences would be unfair to the effort IP practitioners apply to further the device.

Asking whether ethical considerations apply to economic decision-making is, at bottom, an empirical question. As it happens, indirect partial evidence that exposure to ethical discussions produce effects under some circumstances do exist. Thus, [James and Cohen 2003] reports on an experiment conducted among economics students which indicated that those that attended an ethics module tended to collaborate more often in the prisoner’s dilemma game than those that did not attend the module.<sup>42</sup> However, not only the prisoner’s dilemma is fundamentally dissimilar to the briber’s calculus<sup>43</sup> but also an actual tender is not a classroom exercise. Evidence concerning IP-governed procurement must be sought in actual IP-governed procurement events, controlling for variables that must also be assessed in non-IP-governed procurement.

Then, are ethical commitments strong enough to outweigh the stimuli for bribery operating in procurement? An IP introduces, or tries to introduce, environmental stimuli intended to make tenders more transparent and inclusive, in order to tranquillise participants that they will not be subjected to unfair surprises. Thus, part of the “defensive” stimuli to bribe is presumably diminished. This would go a long way, provided that the objectives of participating in tenders were limited to taking part of fair play competition. However, this is not so. The central justification for a firm to participate in a tender is actually winning the contract, and this furnishes aggressive stimuli to bribe and collude. The monetary benefits of bribery also furnish similarly aggressive stimuli for public officials to accept offers or to extort participants, moreover when it is remembered that agents receive no special compensation for being honest.

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<sup>42</sup> There are also numerous experiments showing how much people tend to cheat when given the opportunity.

<sup>43</sup> See the Annex.

As much as one can sympathise with the proposition that fair play is desirable by some of the firms and some of the public officials participating in procurement, accepting that the drive for fair play is generally stronger than the drive of firms to win contracts or of officials to abuse power in order to earn extra money would require too much from such sympathy. Our question can thus be interpreted as asking whether the ethical commitments of participants in IPs are as strong as to supersede the will to win the contract by any means.<sup>44</sup> This question can only be answered by recourse to empirical evidence, which, again, is not available. If there is an effort of collecting, aggregating and analysing data on IPs in order to test the methodology's premises, this is not reflected in the extant documents.

The organization that promotes IPs in Italy does report that 45 firms were excluded from participating in tenders in a municipality (commune) as a direct consequence of the adoption of the IP methodology.<sup>45</sup> However, the commune in question made IPs mandatory, and refusing to sign the IP automatically excludes the firm from participating. The commune itself reports (June 2003) that there were 211 exclusions involving 64 firms, resulting in 12 cases reported to the Judiciary authorities. Nevertheless, according to the commune, this did not come about exclusively because of IPs, but as a result of a broader effort to clean up procurement, to which IPs are a part, perhaps even the predominant part, but not the whole.<sup>46</sup> It is also to be observed that after the 1990's "tangentopoli" scandals, and following obligations stemming from European Union rules, the Italian procurement regulations were changed. According to [Bologna and Del Nord 2000], this brought about a profound transformation in public markets.

A different type of evidence could be collected from the results of IP-governed procurement. Bettering the State's allocation of resources is high among the objectives of the IP methodology: "To enable governments to reduce the high cost and the distortionary impact of corruption in public procurement, privatisation or licensing".<sup>47</sup> There are many market-by-market comparative measurements that can be made ("before" and "after", as well as international) in order to collect evidence on the relative openness of procurement environments. Among them the number of participants in similar bids; the concentration of the market (ratio of aggregated contract values vs. the number of firms winning such contracts); the average ratio of contract values and capital of winning firms; unit prices resulting from the bid; etc.

There are also more immediate evaluations, made case by case, that could provide indications about the effect an IP has on the tender in question. For instance, the comparison between conditions in ordinary procurement in a certain environment and IP-governed instances could permit an independent party to qualitatively evaluate the presumable advantages of adopting IPs. Even grant-

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<sup>44</sup> The exposition in [Ospina 2001] seems to lean in that direction.

<sup>45</sup> [www.transparency.it/3\\_12.htm](http://www.transparency.it/3_12.htm).

<sup>46</sup> [www.comune.milano.it/webcity/comunicati.nsf/weball/AC88F78471873184C1256D04004EA672](http://www.comune.milano.it/webcity/comunicati.nsf/weball/AC88F78471873184C1256D04004EA672). In this case, as in others, actual civil society monitoring of the proceedings is not clear (CSO monitoring is in fact not essential, although preferable. Cf. [TI 2002b] p. 14).

<sup>47</sup> [TI 2002b] p. 4. The public interest justification for using IPs is considerably more developed in the Italian version of the Pact ([www.transparency.it/3\\_20.htm](http://www.transparency.it/3_20.htm), "Premessa"). Not included in the English translation in [TI 2002b] pp. 76ff.

ing that compiling and analysing data is resource-intensive and also depends on local availability of organised information, it would be expected that the official document supporting IPs would address the matter, which it does not. Reports on specific IPs likewise are silent about that. This does not preclude practitioners from referring to economic advantages: “[...] since May 1999, the organization followed 60 contracting processes [...] and more than US\$ 2.3 billion were protected”.<sup>48</sup> The intention to state that the whole aggregate amount of the 60 contracts was “protected” (presumably from inefficiency and/or corruption) is unmistakable.

On the other hand, as far as it was possible to check, this same organization is the only one that provides information in its website and elsewhere on number of participants, budgeted amounts, prices and identification of who won the contracts. As much as this is commendable when contrasted with other organizations, the data is presented in isolation, and the usefulness of the information to assess the IP financial efficiency is limited for lack of comparative data. There is no information on unit prices achieved (when applicable), precluding the observer to compare outcomes with other markets. Similarly, an IP in Pakistan was heralded as allowing for an economy of about 75% in consulting fees for the project of a water-treatment plant, such savings having been calculated by comparing the winning price of the tender (US\$ 1.04 million) with the original estimation of US\$ 4.2 million.<sup>49</sup> The basis for the latter is not examined. In another source, it is contended that a similar previous contract resulted in a much higher price, but no specifics are provided.<sup>50</sup>

Lack of organised evidence notwithstanding, there is no reason to suppose that IPs fail to deliver better outcomes. Provided that the playing field is relatively levelled and conditions to participate are made more open, then the economic outcomes should follow. It is an open question whether localised effects in individual tenders induce similar behaviours in the market in question.

What the discussion so far indicates is that the lack of relevant data precludes stating that the ethical commitments by participants and public officials objectively counterbalance the stimuli for corruption that exist in procurement. Less opportunity for erecting entry barriers can be presumed in isolated cases. There is no sufficient data on actual outcomes of IP-driven processes that could be compared with ordinary tenders in order to evaluate the aggregated comparative worth of IPs.

## **5. A bit of an overstatement**

As pointed out before, IPs must be monitored. On completion, an IP’s proceedings must be described in a report made public, and such report must include allegations of corruption, if any, and how they were dealt with:

The ultimate result of such monitoring and supervision should be a statement at the end of the process that the procedure was clean and did not lead to any incidents related to possible corruption, or – if this was not the case – what incidents occurred, how these were dealt with, and what the outcome was in the various cases.<sup>51</sup>

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<sup>48</sup> [www.transparenciacolombia.org.co/formacion\\_cambio/contruccion\\_cultura/2ncontrata\\_pub\\_trans.htm](http://www.transparenciacolombia.org.co/formacion_cambio/contruccion_cultura/2ncontrata_pub_trans.htm).

<sup>49</sup> [TI-Pakistan 2002], p. 80; also [www.transparency.org/pressreleases\\_archive/2002/2002.02.27.karachi.html](http://www.transparency.org/pressreleases_archive/2002/2002.02.27.karachi.html).

<sup>50</sup> [TI 2002a], p. 8.

<sup>51</sup> [TI 2002b] p. 7.

Such formulation allows for only two possibilities: Corruption allegations having been reported; or the proceedings having been, literally, “clean”. Being “clean” is identified with the absence of bribery-related complaints from participants. This is unjustified. The absence of reporting on certain facts is not the same thing as the absence of the facts themselves. As quoted in p. 18, the promoters of IPs are aware of that. Nevertheless, the drive to reaffirm the comparative cleanliness of IPs vis à vis ordinary procurement sometimes gains the upper hand, as e.g.:

It is important to promote the fairly regular issuance of public statements by the signers of the integrity pact so that participants, in advancing from stage to stage in the contract process, may publicly confirm their satisfaction with the probity of the process up to that point, based on the information available to them. **Providing for such statements at every stage of the process makes it easier along the way to ascertain the exact moment at which any possible doubt may have begun to arise as to the cleanness of the process.**<sup>52</sup>

It is worth pointing out that confusing the absence of complaints about a process with the non-existence of reasons for complaining is a device frequently used by governments to justify inaction, and justly rebuked by critics. It is especially common in the area of procurement. Whereas the most one can conclude from the absence of complaints is that complaints were not filed, and never that the process was “clean”, much less beyond “any possible doubt”.

From the point of view of an independent observer, why is it that protestations of cleanliness coming from the various actors in an IP should in principle be more credible than the exact same allegations coming from the exact same actors operating in non-IP procurement?

It must be noted, however, that not all IP practitioners fall into the trap. Thus, the report issued from the Ecuatorian NGO that monitored an auction on Personal Communications System states that

[...] Nevertheless, this document does not constitute a certification or confirmation that the process has been free of possible irregularities. [...]<sup>53</sup>

This essential disclaimer (which, if we take the IP prescription literally, prevents the initiative from being named an IP), or advice about the need to express it, cannot be found anywhere else, making this instance all the more noteworthy.

Another type of logical slip sometimes appears when practitioners interpret the central commitment of IPs, the honesty pledge. Thus, the objective of an IP is

[...] to enable companies to abstain from bribing by providing **assurances** to them that their competitors will also refrain from bribing, and that government procurement agencies will undertake to prevent any form of corruption, including extortion and to follow transparent procedures.<sup>54</sup>

The following example from a practising organization apparently corresponds (the original is in Spanish) to a direct translation of the above:

[...] to allow companies to abstain from bribing by **assuring** them that their competitors will refrain from take recourse to bribery and that the contracting authorities will take measures **to prevent any kind of corruption**, including extortion, and will follow transparent processes.<sup>55</sup>

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<sup>52</sup> [Ospina 2001] p. 13. Here and in the sequel, CWA emphasis.

<sup>53</sup> [CLD 2003] p. 4.

<sup>54</sup> [Wiehen and Mohn 1998].

And, again,

The Pact is intended to accomplish a number of objectives. It is meant to enable companies to abstain from bribing by providing **assurances** that their competitors won't offer bribes and that government agencies will prevent corruption, including extortion by their officials.<sup>56</sup>

The integrity pact would operate in the process of privatisation to **ensure** that no bribe was offered by the person trying to buy the business and no bribe is asked for by the person in charge of selling it.<sup>57</sup>

Expressions of confidence along the same lines can be found elsewhere. Thus, the IP:

[...] is designed to **safeguard** public procurement from corruption. [...]<sup>58</sup>

[...] **insures** that all activities and decisions of public offices are transparent and that the projects/works are implemented, services are provided or taken, and goods/materials are supplied without giving or taking any kind of benefit, financial or otherwise. Justification of the decisions taken is provided without discrimination to all parties concerned or to any individual or institution/organization.<sup>59</sup>

Commenting on public audiences sponsored by the then mayor of the Argentinean capital of Buenos Aires around the construction of a subway branch, a primary source on IPs stated that the mayor was “[...] elected as the new President of Argentina – the people reward honesty!”<sup>60</sup>

But how can one *assure* that bribery will not happen, that authorities will be able (or really willing) to *take measures to prevent any kind of corruption*, that participants will refrain from attempting bribery nevertheless, so *safeguarding* procurement from corruption? The use of this type of language allows for secondary sources to go a step further:<sup>61</sup>

[...] advocated the incorporation of Transparency International's “Integrity Pact” with bid documents to **make the procurement system corruption-free**.<sup>62</sup>

The Consejo de Promoción Turística de México and [an NGO] signed an Integrity Pact to **guarantee** the legality, transparency and results [!] of seven tenders [...].<sup>63</sup>

[...] many corporations want to participate in [Integrity Pacts] because they allow for **everybody to know** that the corporation will not bribe anyone [...].<sup>64</sup>

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<sup>55</sup> [www.transparenciamexicana.org.mx/pactos.html](http://www.transparenciamexicana.org.mx/pactos.html). The text is illustrated with a diagram in which the contracting State entity is depicted as a green malice-eyed blob, while the private participants are represented as attaché case-carrying executives. No allusion to IPs monitored by this organization can be found on its website.

<sup>56</sup> [www.transparencypng.org.pg/news/issue2/ip.htm](http://www.transparencypng.org.pg/news/issue2/ip.htm).

<sup>57</sup> [www.postcourier.com.pg/20000303/focus.htm](http://www.postcourier.com.pg/20000303/focus.htm).

<sup>58</sup> [www.transparency.org/building\\_coalitions/integrity\\_pact](http://www.transparency.org/building_coalitions/integrity_pact).

<sup>59</sup> [www.transparency.org.pk/news/IP-Karachi.htm](http://www.transparency.org.pk/news/IP-Karachi.htm).

<sup>60</sup> [Wiehen 2000] p. 93, footnote 1. This was Fernando de la Rúa, who resigned from the Presidency in December 2001 on the wake of an institutional crisis with corruption at its epicenter.

<sup>61</sup> It is to be noted, however, that the language is a little more cautious in other TI sources: “In such Pacts, all the players start on a level playing-field so that the risk of a bribe is greatly reduced”. [Pope/TI 2000], p. 144. Although in other parts of this book one can find the same formulation extensively quoted previously.

<sup>62</sup> [www.rediff.com/news/2001/aug/31arms.htm](http://www.rediff.com/news/2001/aug/31arms.htm).

<sup>63</sup> [www.infoanalis.com.mx/boletincptm/numero61/new\\_page\\_1.htm](http://www.infoanalis.com.mx/boletincptm/numero61/new_page_1.htm).

<sup>64</sup> USA Under Secretary of State for the Western Hemisphere Otto Reich, according to a dispatch distributed by USIA, September 2002.

Why is it that primary sources tend to overstate the power of IPs? It will be recalled that a central feature, arguably the most important one, of IPs is a pledge by both participants and public officials not to enter into dishonest dealings (backed by special provisions as to disclosure, reporting, monitoring etc.). However, the pledge is a negative statement about private behaviours.<sup>65</sup> It is fundamentally different from a positive pledge about public behaviour. In the latter case (“I will do such and such thing within such and such timeframe”), partial or total non-compliance is immediately verifiable. It suffices to show that any or all the clauses were not fulfilled: Such and such thing did not happen, and/or the timeframe was wrong. It would not be possible to plausibly say that the thing was done if it wasn’t, and conversely, it would be impossible to plausibly say that the thing was not done if it was.<sup>66</sup>

In a negative oath about private behaviour (“I will not secretly do such”) the situation is not equivalent. Although it is possible to say that the thing was in fact done *provided that* sufficient evidence is presented, exactly because the act is private, the absence of evidence makes it impossible to ascertain that the thing was or was not done. Thus, if two persons agree among themselves to sign an honesty pledge within an IP and, at the same time, secretly agree that the pledge is just window-dressing for the benefit of a third party, the latter will only be able to check that it happened if evidence is presented. Whereas the absence of evidence will not authorise any conclusion whatsoever, and will not justify saying that the oath was not breached. Moreover, for someone who is willing to pay bribes to win contracts, it is not clear why honesty pledges and more open conditions for competition would function as deterrents. After all, irrespective of the legal environment, bribery is not an accepted behaviour, and furthermore it is often a crime. If someone is willing to commit a crime, then breaking one’s word by signing an honesty pledge and not abiding by it is a minor inconvenience. This is the central credibility problem of the IP honesty pledge: Non-compliance remains secret, and therefore the pledge has no meaning. Further, the recommendation stated in [TI 2002b], that an IP’s report states that the process was “clean” if no cases of suspected bribery were registered, is plainly hazardous.

A still additional matter regarding overstatements is the contention that IPs

[...] can and should be applied to the full range of activities concerning a particular investment, sale, license or concession: [...] extending to the implementation of the main activity (execution of the construction or supply contract, especially the compliance with all the contract specifications agreed and all change and variation orders); indeed, for projects such as big dams or toxic plants (such as nuclear power plants), the protection by the IP should continue until the decommissioning and the disposal of the project assets.<sup>67</sup>

It is to be recalled that, preferably, an IP should be monitored by a civil society organization, so that such a CSO would have to be able to do all this over the entire execution of the contract. Thus, in a sizable contract, it would have to amass sufficient resources to hire extensive technical expertise, acquire or rent equipment and provide for a host of ancillary details during dilated periods of

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<sup>65</sup> The argument here expands [CWA 2001a].

<sup>66</sup> This is of course a simplification. There might be debate on whether or not something done in fact corresponds to a previous pledge. However, the essential remains, namely, *something* was done or not done and evidence is available for independent perusal.

<sup>67</sup> [TI 2002b] p. 9. This is also stated as one of the “main characteristics” of IPs, cf. p. 4 above.

time. This is implausible. On the other hand, as many corruption mechanisms operate during the contract's execution (such as the official deliberately over-specifying expensive components and the contractor under-performing the corresponding execution), and as these are often linked to peculiarities and/or omissions in the tender and/or the contract itself, everything stemming from the law and the (in)competence of the authorities' oversight, the inability to monitor the execution must pose a dilemma for IP practitioners.

## 6. Information lag

A maximum of transparency all along the various steps leading to the Contract and throughout its implementation is the basis of the successful design, set-up and implementation of an IP. Such transparency, in turn, calls for extensive and easy public access to all the relevant information including design [... etc.]. It is highly desirable that there be a forum in which representatives of civil society can discuss the official steps taken on the context of the Contract. At the present time, the Internet provides a near ideal platform. [...]

However, to monitor systematically and in detail the above processes in the context of an IP, civil society [!] may delegate these activities to entities professionally equipped to do this, e.g. an [...] Independent Private Sector Inspector General, a suitable government office with no involvement whatsoever in the supervised procedures, a Transparency International Chapter, or another NGO. In each case the monitoring and supervision procedures should be specified [...].<sup>68</sup>

Airing information, reporting, making otherwise hidden or difficult to obtain data available for public perusal, would be essential features of any initiative seeking more transparency in any field. Many corruption schemes in procurement feed on hiding information that should be public. Accordingly, the IP methodology stresses the point. Likewise, the CSOs involved in IPs must report and make their processes transparent. In principle, this could also help to show that the CSOs address their own limitations and are open to criticism.

Nevertheless, when it comes to practice, IP-promoting NGOs almost totally fail to fulfil the obligation of reporting on the IPs they monitor. An effort was made by the author to find reports for the many IPs the organizations mentioned in [TI 2002b] promoted or were promoting at the time of this writing. The survey included not only the websites of the organizations themselves, but also a good number of the principals' and of the firms that won the respective contracts (not all, though). Reports on IPs were almost totally absent. The partial exceptions were two: the Argentinean NGO, which summarily reported on one of the two initiatives it promoted. Two full reports from the Ecuadorian NGO that followed auctions on Personal Communications Systems and on a Wireless Local Loop, found in the principal's website, which give full information on the procedures.<sup>69</sup>

The Colombian NGO that is leader in the field publishes a summary of IPs, but no reports.<sup>70</sup> One cannot eliminate the possibility that in this case, as in others, reports do exist but the various organizations failed to update the relevant information. The end result is the same. In fact, documents relative to an auction for a PCS system in Colombia, published under the responsibility of

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<sup>68</sup> [TI 2002b] pp. 7f.

<sup>69</sup> See p. 24. [www.conatel.gov.ec/espanol/subasta/subastas.htm](http://www.conatel.gov.ec/espanol/subasta/subastas.htm).

<sup>70</sup> On this, see p. 23.

the principal and not of the NGO, were found in a server of that country's Communications Ministry, but they are not easily accessible to ordinary visitors.

Further, the leader NGO states that one of its objectives to participate in IPs is "To produce empirical information on the risk map of corruption about [...] public resources inversions, by means of analysing the common elements and particularities of the different tenders it monitors".<sup>71</sup> The organization in question issues a summary report on the IP methodology as applied in Colombia.<sup>72</sup> The substance of the report is giving advice on how to build IPs, together with general remarks on opacity. Besides summary numbers, no statistics or detailed analyses are provided. If detailed and thorough reporting both on particular IPs and on aggregated collected information is not extant, then it becomes difficult to understand how is it that the lessons learned can be spread in the environment and thus help to disseminate a culture leading to better practices and able to induce changes in the institutional framework.

Within a full-fledged IP, the participants discuss rules and conditions, or so states the doctrine. Knowledge about how to do that and what aspects to address is absorbed along the time by all concerned, but the NGOs that sponsor IPs are in a privileged position, because they participate in a higher number of them. If they fail to adequately share their knowledge, then their experience becomes encapsulated and quasi-proprietary, and part of the justification for installing IPs is effectively voided.

## 7. A matter of strategy

Running underneath the lawfulness and legal sensibleness of IPs there is a more fundamental question, namely, whether IPs contribute to the betterment of a country's procurement environment. Or, to put it in other words, whether it is best to apply one's efforts to promote IPs or to seek changes in the institutional environment. This is in reality the most fundamental question for those who strive to curb corruption. As one practitioner in Ecuador puts it,

[The organization] mainly focus on the structural changes of the conditions that allow for and promote corrupt activities in public acquisitions. The opportunity to implement IPs would help to create a favourable environment for the promotion of structural reforms in the country's public acquisition system.<sup>73</sup>

By definition, IPs are centred on individual tenders. Series of individual IPs are hoped to help induce gradual changes in the environment. As we have seen, practitioners are not of a single mind about whether or not those changes should aim at the legal environment. The most successful promoter consistently expresses that IPs are directed to cultural values and not institutional reform, and goes as far as opposing the institutionalisation of IP particularities (see footnote 21).<sup>74</sup> On the other hand, the institutionalisation of IPs, as in some Italian communes and Seoul (South Korea), is

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<sup>71</sup> [TI-LAC 2001], "Pactos de integridad". See note 94.

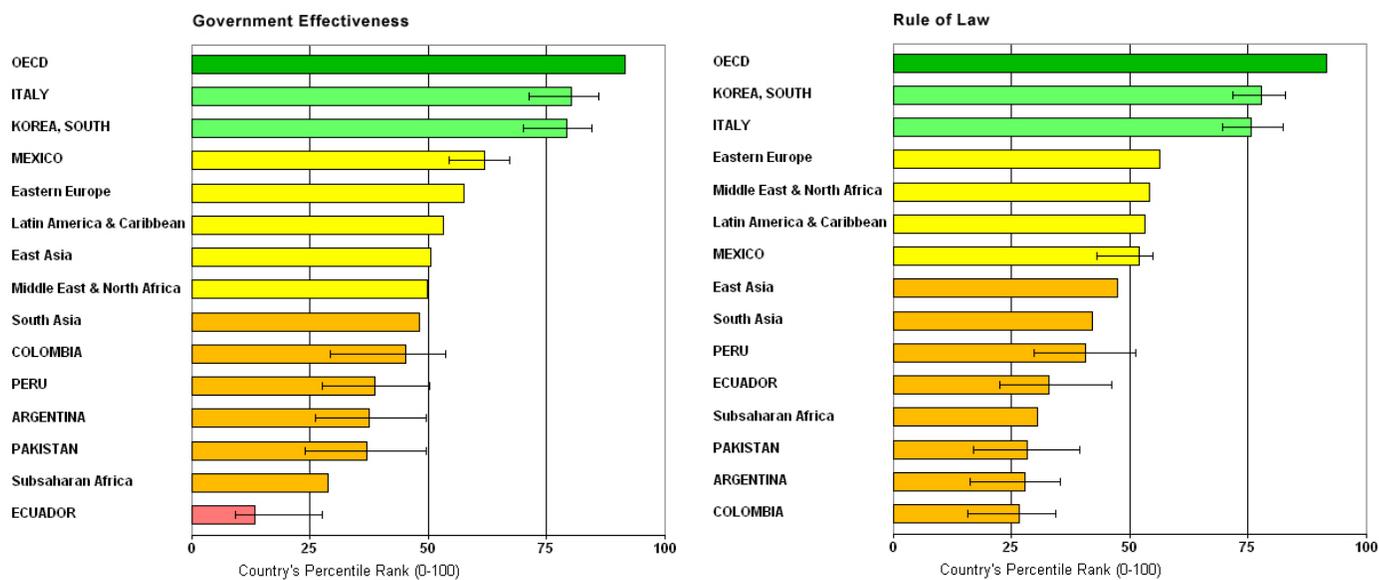
<sup>72</sup> [TI-COL 2000].

<sup>73</sup> [CLD 2003] p. 8.

<sup>74</sup> But not as far as rebuking the adoption of IPs as a government's preferential policy (Colombian Presidential Directive number 9, December 29, 1999), or the choice of the organization as official caretaker of telecommunication tenders (Law 555/2000, Art. 5, paragraph – alas, found unconstitutional by that country's Supreme Court).

welcomed by proponents. IPs are suggested by the World Commission on Dams as a “Strategic priority” to stimulate compliance to contracts.<sup>75</sup>

Given the fact that IPs intend to establish a healthier environment to conduct procurement, it stands to reason that they primarily aim at unhealthy environments, that is, situations where the rules governing procurement and the apparatus for enforcement are shaky, incomplete, confusing etc. Much of a complete IP deals with establishing more open conditions for participating and rules of procedure applicable to all phases of the process. Whereas a reasonably healthy environment would have all this essentially dealt with in the legislation, in the administrative regulations and in the commercial practices. Thus, according to a secondary source, “Integrity pacts are of particular use in situations where regulatory systems and institutional capacity are weak, but they have universal application”.<sup>76</sup> It also makes sense to say that in unhealthy situations, anything working along the direction of enhancing transparency, equity, accountability and striving for better practices is to be welcomed, and IPs should not be judged differently in that regard. Moreover, in such situations, if the spirit of IPs finds a way to become included in the formal framework, so much the better. This is apparently the way things went in Seoul and in the Italian communes mentioned above. Conversely, however, a healthier environment, especially concerning the formal rules, would not seem to need as much “external” complementation. In that regard, it is useful to compare governance indicators for some countries where IPs were/are practiced and/or are being initiated. The following graphs depict the “Government Effectiveness” (left) and “Rule of law” (right) indicators of [KKM, 2003] for a number of countries and regions.<sup>77</sup>



<sup>75</sup> [WCD 2000] p. 278.

<sup>76</sup> Ibid. p. 305.

<sup>77</sup> [KKM 2003]. See there the meaning of these and other governance indicators.

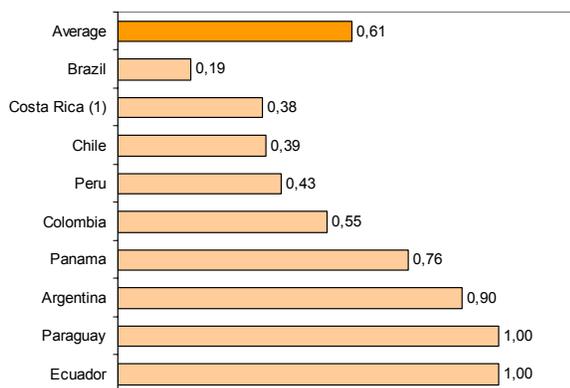
Countries where the transparency principles behind IPs were or are being introduced in local rules, as Italy and Korea (and perhaps some Mexican public offices, but this is not clear)<sup>78</sup> fare better than other countries, where IPs are promoted case-by-case. Nevertheless, the preferential adequacy of IPs to weaker institutional environments is contested by the representative of the organization that spearheads their use. Thus,

An adequate legal framework already exists in Colombia [to impose] efficient, equitable, and transparent public-resource contracting processes. Colombia's Contracting Law – namely, Law 80 of 1993, the central axis of all contracting-related legislation in the country – is sufficient, clear, flexible, and complete and is widely known by all the parties involved in public contracting. [...] <sup>79</sup>

A similar claim by the same author, registered elsewhere, was that among the strengths of the Colombian environment one could find: “Proper legal framework; Constitutional guarantees for citizenry control; Sufficient public institutionality; Control agencies strengthening process; Tradition of public policies and programs against corruption; Skilled and capable human resource in central administration; Transparent contracting experience”.<sup>80</sup> However, contrary to this, a commentator observed that

[...] some sections of [Ospina 2001] mention a series of problems within the legal system, such as the following: Legal norms do not assure that tenders are clear, fair, viable and transparent; The existence of legal mechanisms that allow for “direct (or emergency) contracting” [...]; There is little or no knowledge of tenders and of the “rules of the game” applicable to public procurement processes, and that the practice – we presume – is not properly regulated by the law; That subjective criteria are applied in the evaluation of bids; or, that the draft of the contract is not previously and publicly discussed.<sup>81</sup>

Ascertaining whether or not a country's legal environment is adequate – thus deciding which of the conflicting evaluations is more accurate, and therefore accepting or not either author's contentions



– requires examining that country's institutional environment. This was in fact done in early 2002 by the organization the first author represents, within an initiative aimed at evaluating the vulnerabilities of the procurement environments of a number of Latin American countries. The methodology was based on defining possible entry barrier-erecting opportunities and verifying whether or not the environments allowed for them to be exercised.<sup>82</sup> The result was that the Colombian environment was diagnosed as failing to fulfil a number of basic crite-

<sup>78</sup> See footnote 5.

<sup>79</sup> [Ospina 2001] p. 6.

<sup>80</sup> [www.respondanet.com/english/anti\\_corruption/reports/presentation\\_materials/more/OSPINA-SPAN.ppt](http://www.respondanet.com/english/anti_corruption/reports/presentation_materials/more/OSPINA-SPAN.ppt). Available also in English. Also in [TI-COL 2000], p. 12.

<sup>81</sup> [Merino 2001] p. 6.

<sup>82</sup> A weakness of the procedure was that country assessments did not necessarily obey to a standard methodology and that they were not subjected to independent counter-check.

ria,<sup>83</sup> thus confirming the second author's earlier observation. The graph depicts a "naïve" vulnerability index aggregating risks identified in the countries subjected to the exercise and excluding controversial issues (i.e., two peculiarities about which there was no consensus on whether their presence meant a vulnerability or not); maximum vulnerability is 1, and minimum 0. (In the case of Costa Rica, the information is limited to road construction and maintenance.)<sup>84</sup>

Elsewhere it was observed that in Colombia

The almost exclusive emphasis on reforms of the procurement legal framework would appear to be condemned to failure as far as that emphasis does not effectively address the identification and punishment of corrupt practices among public officials and corporations, and does not allow for opening up competition.<sup>85</sup>

It is to be observed, though, that, curiously, this perspective considers that "opening up competition" does not depend on the legal framework, whereas one of the central points of regulating procurement, perhaps the central one, should be promoting competition by way of diminishing the opportunities for agents erecting entry barriers for participants. Legal reforms that fail to target that goal are indeed doomed to failure.<sup>86</sup>

Of course, there is no inherent tension between, on the one hand, striving to change the institutional background and tightening up enforcement, and on the other hand promoting isolated initiatives as IPs. But a tension may develop if the weight of institutional changes is negated or downplayed. After all, if we take for granted that legal provisions are not sufficient to guarantee fair dealings in procurement (as in anything else), this is not to say that they are not necessary. Denying, even if not in so many words, the necessity of a healthy legal framework is very dangerous, as such a position in effect stimulates disbelief in the rule of law and, at the very least, is self-defective:

If in fact the solution to the problems affecting public procurement cannot concentrate solely in the design of a new legal framework or in a legal reform, it is indisputable that an inadequate judicial framework not only contributes to corruption, [...] but also makes the application of the "integrity pacts" impossible.<sup>87</sup>

More importantly, in the absence of facts, numbers and publicising of IP inner workings (see below), it becomes more difficult to see how their possible impact on the general procurement environment could be exercised. After all, the crushing majority of financial State-private interactions arising from procurement (and the diseconomies thereof) is not associated with gigantic projects, privatisations, licensing and other events confronting transnational corporations, but from thousands of instantiations of all sizes happening continuously along the year. What are the chances of a few isolated IPs influencing them?

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<sup>83</sup> See [www.transparency.org/tilac/trabajo\\_en\\_red/contrataciones/dnld/riesgos\\_colombia.pdf](http://www.transparency.org/tilac/trabajo_en_red/contrataciones/dnld/riesgos_colombia.pdf). See also [CWA/TI-LAC et. al. 2002] for the aggregated report, including all participating countries.

<sup>84</sup> [CWA/TI-LAC et. al. 2002].

<sup>85</sup> [World Bank 2002]. Some particularities of Colombian Law 80 of 1993 were changed since, the last time in September 2002 (Presidential decree 2170).

<sup>86</sup> See also the chapters on procurement in [TI-LAC 1996] and [TBrasil 2002] for expositions of procurement regulations according to the perspective of market competition.

<sup>87</sup> [Merino 2001], p. 7.

Directing a civil society organization's main efforts (not to mention the State's) to particular instantiations of a general procedure is an important strategic decision in view of the scarcity of resources. Such a decision might preclude giving due attention to the general conditions.

IP-promoting texts frequently mention the development of trust, and it is expected that such trust should come from trusting the virtues of the IP itself, without recourse – even if only in a supporting role – to data. For instance, “The process of implementing each Integrity Pact is an invitation to a voluntary cultural change”. Among the objectives themselves of IPs there is “Positioning and winning credibility among private firms about the IP's effectiveness as an instrument to generate confidence in processes and to prevent corruption acts”.<sup>88</sup>

The stress on cultural change was commented in an internal TI study:

The importance of “cultural changes”, whereby ethical considerations would replace legal compulsion as the reason for honest behaviour by public officials and private contractors, is mentioned a number of times in the Colombia case studies. Further analysis and discussion is needed of the role of ethics and voluntarism, as opposed to legal compulsion, in strengthening public sector procurement processes. Can motivation based on ethics be encouraged, while at the same time motivation based on law and judicial enforcement is relied upon to obtain the desired behaviour from all participants? Or could it be that, in at least some country situations, the problems in the legal system are so great that this is not really an effective alternative?<sup>89</sup>

## 8. Who minds the minders?

Firms competing in markets do not discriminate between the terrains where they compete. They try to gain advantages over their competitors everywhere. The pervasiveness of pressures and counterpressures of all kinds, exercised by private interests, has been recognised as a central feature – and a central problem – in the modern State, especially in what regards corruption. Integrity Pacts, being just another terrain where firms compete, should not be looked at as privileged in what concerns those movements and counter-movements.

One particular preoccupation an independent party might justly formulate regards the possible action of cartels in IPs. It was previously observed that in public procurement there exists a collaborative economic stimulus for firms to fix prices, erect barriers to new entrants in the market and distribute contracts amongst members.<sup>90</sup> The common characteristic binding such cartels depends on a number of factors, the more usual being geographical (contractors, suppliers of goods), thematic (IT systems, telecommunications etc.) and client-specific (contractors purportedly specialising in building schools, or health care centres etc.). There are very strong economic stimuli for es-

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<sup>88</sup> [www.transparenciacolombia.org.co/formacion\\_cambio/contruccion\\_cultura/2ncontrata\\_pub\\_trans.htm](http://www.transparenciacolombia.org.co/formacion_cambio/contruccion_cultura/2ncontrata_pub_trans.htm).

<sup>89</sup> [Holsen et. al. 2002], p. 6.

<sup>90</sup> It suffices to quote Adam Smith: “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or some contrivance to raise prices” (*The Wealth of Nations*, Book 1, Chapter X, Part 2). Modern investigation on cartels heavily rely on the tensions between competitive and collaborative strategies.

tablished providers to stabilise the supply conditions and so beat the law of diminishing returns.<sup>91</sup> This cannot happen without public officials' knowing and abetting. Suppliers also try to stimulate the demand side, and in public markets they notoriously do so by pressuring and colluding with high-level policy-makers to invent expenditures (e.g. by financing political campaigns). Of course, the expedient is not limited to cartels.

Given a cartel, and given an institution that adopts IPs, at least in principle there would be no impediment for it to attempt "capturing" the IP procedure. The IP documentation partly recognises the danger of cartels defining artificially high prices in one particular tender, although not as a danger of capture of the IP procedure itself.<sup>92</sup>

Whoever is invited to adopt the IP methodology may ask – and if they are experienced in procurement they will certainly ask – what compensatory measures, if any, IPs offer to the problem of cartels. Asking the question is not the same thing as suggesting that there exists a fast and easy solution. Nevertheless, there are some relatively simple procedures that could be undertaken to at least address the worry. Listing all companies operating in a given market together with their capitals and liabilities (registers of suppliers are becoming increasingly common, although not everywhere) goes a long way to exhibit market distribution and concentration; even in the absence of the former, listing who win contracts (not only IP-related) shows preferences, if any, that might operate. Evidence as to the presence of "merry-go-round" methods can be sought by analysing medium-term patterns of contract adjudication. Lastly, one would naturally surmise that in order to be able to compare the performance of IPs with ordinary procurement, unit prices would be collected and systematised.<sup>93</sup> When the IP methodology is adopted by entire State organizations, it would be natural to expect that the same drive towards transparency would prompt initiatives to open up the structural features of suppliers' markets, even if only to build performance indicators. Likewise, it would be expected that the promoters of IPs did the same.<sup>94</sup>

Economic globalisation and the surge of privatisations in many third-world and transition (ex-socialist Eastern European) countries raise the matter of cartels and trusts operating globally and taking advantage of the fragility of Integrity Pacts. Global and regional markets are just markets, albeit big. The lack of international regulations over tenders in those markets, together with the absence of controls and the incipient character of enforcement mechanisms (such as e.g. the OECD convention against transnational bribery, the Organization of Inter-American States anti-corruption convention and the new United Nations convention) should ring alarms. Take, for instance, auctions for privatisations, especially in cross-nationally integrated fields as e.g. telecommunications, or energy. There is no reason to disregard the possibility of players in that field colluding to divide regional markets and exclude other entrants: firm A colludes with firm B in order to secure market

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<sup>91</sup> In a perfect market, competition forces prices down, making profits tend to zero.

<sup>92</sup> [TI 2002b] p. 136.

<sup>93</sup> Of course, directly comparing unit prices is only possible within a given market. In order to perform cross-market comparisons, it is necessary to introduce environmental factors to reduce essentials to a common ground.

<sup>94</sup> In [TI-COL 2000] p. 43 the Colombian NGO that is leader in IPs states that it reached an agreement with the School of Administration of the Universidad de los Andes to do just that. There is no further mention to such activities and the School's website does not mention them.

X to A and market Y to B, excluding firm C in both cases. The mutual benefit is partitioning the regional market among them. Integrity Pacts operating under such conditions would make practitioners innocent participants in high-powered transnational collusion.<sup>95</sup>

The NGO role as the monitoring instance also rises a number of questions. The first and most obvious is where their legitimacy comes from. It does not suffice simply to write down that

[...] to monitor systematically and in detail [proceedings] in the context of an IP, civil society may delegate these activities to [...] a Transparency International Chapter, or another NGO. [...]<sup>96</sup>

What is “civil society” here? If not by voting, how is it exactly that civil society “delegates” anything to an NGO? This is of course a standing question regarding the role and accountability of NGOs in general, but in this case there is direct involvement of public money, in some cases in huge amounts. Dealing with public money is a public matter, so that choosing a particular NGO to act as oversight likewise is, or should be, a public matter. In addition, it is to be observed that the organization that promotes IPs in Colombia is paid by the government to do it.<sup>97</sup> It is worth mentioning that specifying one particular NGO to exercise civil society oversight in bulk was attempted in Colombia. Law 555/2000, which regulates concessions for Personal Communications Services, established in its Article 5, paragraph, that:

Both in the procurement and the adjudication of contracts for concession of licenses to operate PCS there will be intervention by Transparency International, directly or through its branch Transparencia Colombia, and/or a non-government organization of recognised international prestige, dedicated to the fight against corruption, with the aim of safeguarding the principles of equal opportunity, democratic access, transparency, non-discriminatory dealings and, in general, of avoiding any form of corruption.

However, in October 2002, the Colombian Constitutional Court found (sentence C-887-02):

NON-EXEQUIBLE the paragraph of Article 5 of Law 555/2000, for violating the right to equality [derecho de la igualdad], since it ignores the generality principle when it specifically designates a non-government organization and because there exist internal oversight and citizen participation mechanisms that may intervene in the process of procurement and adjudication of contracts for PCS concessions.<sup>98</sup>

Evidently, money is needed in order to monitor anything. An NGO doing it needs to finance its activities. But the appropriateness of getting the financing from the State entity itself that is being monitored raises questions. Although one fully realises that it is a difficult decision for an NGO to turn down financing from a government to monitor procurement, and one can appreciate the dilemma posed, it would seem that the circumstances plant at least the seed of a conflict of interest. Notice that this is not the same situation as in the case of an NGO that is paid by the State to provide a service. In an IP, the NGO is an integral part of the proceedings and is supposed to vouch

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<sup>95</sup> It is interesting to observe that during the discussions currently being held within the World Trade Organization around a possible agreement on transparency in public procurement, an opinion was expressed as to “any eventual agreement on transparency in government procurement should be limited in scope to procurement of goods only and should not include procurement of services or any combination of goods and services”. See [WTO 2003], para. 12.

<sup>96</sup> [TI 2002b] pp. 7f.

<sup>97</sup> [TI-LAC 2001], “Pactos de integridad”. The information was not provided at the organization’s website at the time of this writing.

<sup>98</sup> There is no mention to the ruling at the NGO’s website.

for the tender's "cleanliness". The main author on IPs considers such relationship possible only in developed countries (why is it that rich countries are singularised is not explained), and even then with reservations:

In more developed countries, the cost of TI-NC exercising this function may have to be covered, at least in part, by the government although one must take extreme care that reliance on government funding will not undermine or jeopardize the critical element of independence.<sup>99</sup>

In the general case, if an NGO is dedicated to systematically participate in procurement, then it becomes the target of questions regarding the transparency of its own dealings. Saying this by no means should be construed as to insinuate that there are suspicions of collusion between NGOs and agents/participants. However, as trying to achieve the maximum possible transparency in procurement is, after all, what ultimately justifies the whole IP methodology, it follows that the exact same concerns automatically affect all aspects of NGO participation. At the very least, the dictum about the wife of Caesar applies. There is no reason to take for granted that NGOs are impervious to failure.<sup>100</sup>

Contrary to this, it appears that the IP theorists do think that private sector entities and civil society organizations are endowed with special prerogatives vis à vis government organizations. Thus, it is stated that monitoring the procedures within an IP should be done by entities such as an Independent Private Sector Inspector General or NGOs, but when it comes to State institutions, the special provision is specified that they must have "no involvement whatsoever in the supervised procedures",<sup>101</sup> which is of course absolutely sensible (and required for State oversight organisms in any reasonably healthy environment). However, why is it that, in contrast, an NGO with total "involvement in the procedures" is considered acceptable to monitor the very same procedures it sponsored in the first place? A concern along the same general lines, expressed under a different but compatible perspective, was expressed elsewhere:

The broad acceptance and increasing institutionalisation of an instrument may not be without risks [...]. One case worth examination concerns integrity pacts in Colombia. This instrument is now well established and [...] the [NGO] is being reimbursed for its contribution. However, once an instrument becomes well established, there may be a case for having it implemented by a properly independent office [...]. This might avoid the otherwise possible "bureaucratisation" [of the NGO].<sup>102</sup>

Further, differently from a government, which in some cases is practically expected to be accused of misusing public money, an NGO that finds its name linked to a case of corruption, even if by well-intentioned association, would find itself in an untenable position – notably if it followed the IP methodology recipe and vouched for the proceedings' cleanliness. In any other circumstance, the potential loss of prestige following a possible discovery of errors or omissions would be

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<sup>99</sup> [Wiehen 2000] p. 89.

<sup>100</sup> The recent (June 2003) launch of an organization to monitor NGOs (NGO Watch, [www.ngowatch.org](http://www.ngowatch.org)) by two American institutions (the American Enterprise Institute for Public Policy Research and the Federalist Society for Law and Public Policy Studies) should not be heralded as a progress, due to its clear ideological objectives. It is a pity that an initiative aiming at achieving more accountability from NGOs did not come from other, non-partisan, organizations that could have taken the lead in this field.

<sup>101</sup> [TI 2002b], p. 7.

<sup>102</sup> [Holsen et. al. 2002], p. 6.

enough to identify a conflict of interest. Even in the absence of financial dependence of the NGO to the government, becoming intimately involved with what is in final analysis a duty of the State prompts the speculation that the incumbent NGO-government-private sector relationship should be, itself, submitted to independent monitoring. It is easy to see that this new situation would in turn need monitoring, entailing an infinite regress.

At the bottom of the problem is the role envisaged for civil society oversight. As we have seen, although there is no formal environmental limitation to the IP applicability, the soil for its growth seems to be the more fertile the more intense the perception is that the State does not function very well. On p. 14 it was commented that, language notwithstanding, IPs cannot really intend to operate outside the law. In point of fact, such stance is perhaps unwarranted. The leader organization that practices IPs contends<sup>103</sup> that within an IP, participants “accept common regulating systems linked to rewards [?] and penalties above those [por encima de] defined by law”. The empirical question as to whether there were attempts to apply such penalties “above the law” (or even “in addition to the law”, if this is what was meant) to somebody is unanswerable, as there is no reporting of non-compliance of parties to any IP.

On a more fundamental plane, a civil society organization stimulating people to work “above the law” and announcing its willingness to do so on the basis of its militants’ own beliefs raises the question as to why everybody else might not feel entitled to the same. Why is it that one particular set of beliefs has the right to be arbitrarily adopted and others not? The whole apparatus of representative democracy and the interplay of the institutional powers are meant to resolve the matter via suffrage, and by subsuming disputes to Justice. If these do not work very well, then, if one sticks to representative democracy, one is bound to operate within the confines of the institutional mechanisms, more so when striving to change them. Whereas the result of ad hoc groups operating in society independently of the rule of law inevitably backfires, leading to the rule of the strongest.

## 9. By way of conclusion

We recall the reasoning we interpret behind the Integrity Pact idea:

1. *Given that corruption in public procurement raises transaction costs, hampers technological evolution and brings other systemic diseconomies, it is detrimental to the interests of private firms.*

While it is reasonably clear that this is true if the object is the public interest (entire markets), its particularisation to individual firms is not. The private sector vigorously combat whatever environmental factor it considers harmful to its interests, so *prima facie* if bribery were viewed as so harmful to individual private firms as implied, they would not initiate bribery as often as they effectively do. From a strictly actuarial point of view, the supposition also takes for granted that the cost of bribery affects the firms themselves – while it is not reasonable to dis-

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<sup>103</sup> [Ospina 2001] p. 22. Also in [www.respondanet.com/english/anti\\_corruption/reports/presentation\\_materials/more/OSPINA-SPAN.ppt](http://www.respondanet.com/english/anti_corruption/reports/presentation_materials/more/OSPINA-SPAN.ppt).

regard that the cost of bribery is incorporated into the price the State pays for contracts. Otherwise, firms would consistently, predictably and irrationally lose money.

2. *Individual firms cannot effectively avoid bribing because they fear that other firms will bribe to win contracts.*

This premise seems to be reasonable, although not exactly as formulated. There is no reason to imagine that firms (or rather their executives) *want* to avoid bribery, as a value. Firms include in their calculations whatever cost factors they perceive, and if bribery is a part of a certain market, then this just brings another cost factor into the equation. Nevertheless, bribery does tend to encompass all participants, and not just a few.

3. *As bribery introduces information asymmetry amongst participants, one way to reduce it is by sharing subjective information about values.*

This confuses values with information. “Information” is a concept restricted to data ascertainable by third parties. It does not include privately held intentions, which are not testable.

4. *The participatory process of discussing and sharing values stimulates non-bribery collaboration among participants, while preserving business competition.*

This assumption can only be judged empirically. Nevertheless, it is in turn based on the assumption that firms are willing to collaborate in order to compete better. However, observed commercial practices do not seem to support the view that firms collaborate in order to perfect competition. Instead, they try to get the upper hand over competitors, stopping only under the external force of opposing strategies, regulations and enforcement. Under these constraints, they explore all avenues at their disposal to beat their opponents. Always from the perspective of individual firms, bribery is not intrinsically different from other competitive factors.

A possible origin for the reasoning behind Integrity Pacts is the view that corruption is in essence a moral problem. As by definition moral questions refer to individuals, thus the emphasis on self-perfecting, beliefs, the development of trust etc., and thus playing down the regulatory conditions. However, from the perspective of a society’s economic efficiency, the latter is what matters; whether or not individuals vocally profess this or that particular moral code is irrelevant.

It is interesting to observe that depicting corruption as a moral issue badly backfires. The following is an extract of discussions held in the World Trade Organization in February 2003 about an intended multilateral agreement on transparency in public procurement. A contribution by the representative of the European Community on “Positive Effects of Transparency in Government Procurement and Its Implementation” was discussed. On being criticised by various country representatives for having mentioned corruption in the document, the EU representative recouped and stated that *because* corruption is “a moral issue”, it does not belong to the domain of the WTO:

With regard to the issue of the relationship between transparency in government and the reduction of corruption, the view was expressed that corruption existed in all countries, even notwithstanding the application of transparency rules. Nevertheless, transparency rules enhanced the ability of countries to combat this problem. In response, the point was made [by the EU representative] that, while reducing corruption was a laudable objective for all national governments, it should not be a principal objective, nor should it be built into any possible agreement on transparency in government procurement. This was a moral issue, and that moral, social and similar kinds of issues were not the domain of the WTO. Rather, such issues should be addressed by each Member in accordance with its own respective legislation. It was also questioned how a multilateral agree-

ment could assist Members in combating such practices. In response, it was noted that the rationale underlying a future agreement on transparency in government procurement would not be to reduce corruption. Nor would a future multilateral agreement contain specific provisions on corruption. Rather, the reduction of corruption would be a side-effect of the agreement.<sup>104</sup>

As observed previously, trying to directly insert moral considerations into economic reasoning is not feasible due to the private character of values and to the unsolvable problem of ascertaining whether or not one's professed values actually projects onto one's non-observable behaviour – as is the case of bribery. *Mutatis mutandis*, the same problem affects trust. In an interesting discussion on honesty in negotiation centred on the role of deception in business, [Cramton and Dees 1993] establish the link between trust and reputation, show why the development of trust is affected by faulty information and suggest a number of mechanisms to depersonalise the matter. Of course, mechanisms are of the essence because nobody would believe somebody else solely on the basis of the latter's say-so. The suggested mechanisms – not exhaustive – are: legal and regulatory protection, institutional sources of reputational information, independent rating and evaluation services, the intervention of third-party professionals, the adoption of standardised contractual mechanisms and using accredited affiliations and credentials as ancillary support.

None of this is a novelty, and one can identify in the Integrity Pact idea echoes of some of these suggestions. The difference lies in the confidence IP practitioners place on personal morals and non-operational provisions as opposed to regulatory conditions and to depersonalised sources of information. Evidently, one does not need to subscribe to the present author's scepticism about the existence of a place for morals in business in order to accept that the more impersonal information there exist about processes and players, the better players are equipped to play.

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Due to the scarcity of resources that generally affects civil society organizations, staking one's bets on Integrity Pacts to try to curb corruption in procurement, instead of targeting the institutional framework in a given environment, is a strategic decision. While, evidently, if taken under proper perspective, IPs may help to achieve cleaner particular tenders in some circumstances, whoever adopts them – be it governments or NGOs – as a standing methodology should maintain in mind their limitations.

In any given country, especially if its institutions are weak, the lack of sufficient empirical data on procurement in general and on IP-driven tenders in particular precludes reaching conclusions about the effectiveness of the methodology, be it in particular instantiations, be it concerning its influence upon the general environment. If one takes a pragmatic stance and limits oneself to results, one is forced to look at places where IPs have been applied and ask whether the respective environments experienced changes that could be traced back to the methodology, even if indirectly.

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<sup>104</sup> [WTO 2003], para. 14. See the minutes of the meeting, available at the WTO website (document WT/WGTGP/M/18), for an instructive journey across the resistances of many governments to include anti-corruption provisions in an agreement about transparency. The European Community document is WT/WGTGP/W/41.

Lack of data denies an answer. Thus, the fundamental question as to what has been the impact of Integrity Pacts in bettering the State's efficiency in public procurement remains open.

This means that, while there is no reason to suppose that IPs result in worst outcomes than normal procurement or that they deteriorate the overall system, the converse is also true. Even while one might maintain an optimistic stance towards the potential worth of the IP general idea, only hard information can transform optimism into tenable conviction. Ironically, the best environments where to collect and analyse data in order to properly assess the instrument are those, like Seoul and some Italian communes, where IPs were institutionalised – and, so, where they are less dependent on NGO participation.

The many uncertainties surrounding tenders, all of them arising from the financial benefits of winning contracts and incumbent stimuli to collude and to bribe, together with the inconclusiveness affecting the IP's ability to enhance the likelihood of firms refraining from bribing, recommends caution when promoting, developing and announcing the results of IPs. In particular, stating that IPs lead to “clean” procurement is dangerous.

The hazard goes far beyond a single instantiation of an IP. If an NGO becomes identified with the promotion of IPs, and if it fails to state disclaimers about the actual cleanliness of the procedures and other cautionary provisions, then the organization itself becomes fully accountable for the outcomes, more so if it is paid to do it. What happens, then, if somebody comes up with evidence that an IP was corrupted, or did not address a corrupted scheme in the execution phase, or even simply led to grossly inefficient results? To argue that none of this would possibly happen, because the procedures were governed by an IP, would beg the question. An independent observer would ask a host of questions, beginning with the appropriateness of an NGO taking on duties that belong to the State and proceeding with case-specific demands for clarification. What possible line of defence could the NGO take that would be any different from a government's?

Contrariwise, if the involvement is adequately coached by caution, if the NGO clearly states that it cannot vouch for the honesty of the proceedings or the execution's efficiency, and if information on numbers and conditions is collected, aggregated, analysed and publicised, then there would be a better chance for independent observers to become convinced that the device is worth trying.

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Epigraphs from Spinoza: The standard English translation for the Latin *affectus* is “emotion” (e.g. Elwes). In French, “passion”. We follow Appuhn in representing it as “affection”.