PREVENTING CORRUPTION, SUPPLIER COLLUSION, AND THE CORROSION OF CIVIC TRUST: A PROCOMPETITIVE PROGRAM TO IMPROVE THE EFFECTIVENESS AND LEGITIMACY OF PUBLIC PROCUREMENT

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INTRODUCTION

Governments around the world face the challenges of preventing corruption and collusion in the public procurement sector.[1] These issues are not principally ones of civic or corporate culture (though these can be contributing factors); rather, they derive directly from the inherent nature of public procurement systems. Under these structures, governments expend vast sums of money according to rules and procedures that differ from those used for private-sector purchasing,[2] often by bodies or persons that are inadequately

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[1] In this paper, public procurement is defined as the process by which governments (national, regional or local) and other public bodies, purchase goods, services, and works with public money. Public procurement rules may also regulate procurement by some private bodies such as utilities. "Corruption," in its strict sense, will be defined as the abuse, by public officials, for private gain, of power that has been entrusted to them through statutory or other means. *See infra* Section I.C and text accompanying note 99. "Collusion" will generally refer to explicit collusion through cartel agreements between suppliers to fix prices or market outcomes (in this paper, bid rigging in tender processes). *See infra* Section I.A. Two important points to note are: supplier collusion and corruption often coexist and can be mutually reinforcing in powerful ways; some authorities, including the World Bank Group, refer to supplier collusion as a sub-species of corruption. We treat these problems as analytically separate while emphasizing their mutually reinforcing nature and the need for a "joined-up" approach in countering them.

[2] *See* JEAN-JACQUES LAFFONT & JEAN TIROLE, A THEORY OF INCENTIVES IN PROCUREMENT AND REGULATION 307 (1993); Robert D. Anderson, William E. Kovacic & Anna Caroline Müller, *Ensuring*

trained or supported in the responsibilities they exercise and the challenges they face. The special procedures that characterize public procurement are, essentially, necessary in light of the principal–agent problem and moral hazards that public procurement entails.[3] These control mechanisms cannot, however, eliminate altogether the vulnerability of public procurement systems to corruption and may render them more susceptible to supplier collusion than private-sector purchasing.[4]

These concerns carry major implications for public welfare, economic growth, and the credibility and efficacy of governments. First, a significant amount of public money is at stake. Governments around the world spend an estimated $9.5 trillion on goods and services each year.[5] This accounts for nearly thirty percent of government expenditures (29.1% on average in member countries of the Organisation for Economic Co-operation and Development ("OECD")[6]) and ten to fifteen percent of total gross domestic product ("GDP") in many nations.[7] The scale of repeated procurement outlays means

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Integrity and Competition in Public Procurement Markets: A Dual Challenge for Good Governance, *in* THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM 697 (Sue Arrowsmith & Robert D. Anderson eds., 2011); Christopher R. Yukins, *A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model*, 40 PUB. CONT. L.J. 63, 63 (2010).

[3] Principal–agent problems and attendant moral hazards in public procurement derive first and foremost from the fact that spending power is exercised not by the intended beneficiaries of such spending (individual citizens) or those providing the funds (taxpayers) but by government bodies and civil servants acting on their behalf.

[4] *See* ROBERT C. MARSHALL & LESLIE M. MARX, THE ECONOMICS OF COLLUSION: CARTELS AND BIDDING RINGS 13–16 (2012); Robert D. Anderson & William E. Kovacic, *Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets*, 18 PUB. PROCUREMENT L. REV. 67, 81–82 (2009); Alberto Heimler, *Cartels in Public Procurement*, 8 J. COMP. L. & ECON. 849, 851 (2012).

[5] Antonio Capobianco, Senior Competition Law Expert, OECD, Presentation at LEAR Conference, Rome: Public Procurement and Competition Policy; Friends or Foes? 6 (July 10, 2017), http://www.learconference.com/wp-content/uploads/2017/07/CAPOBIANCO-Public-Procurement-and-Competition-Policy-Friends-or-Foes.pdf. In 2015, OECD countries were estimated to have spent €6.4 trillion on procurement. Antonio Gomes, Head, OECD Competition Div., Presentation at 5th BRICS International Competition Conference, Brazil: Safeguarding Public Procurement Against Anticompetitive Conduct; Views from the OECD 2 (Nov. 10, 2017), http://en.cade.gov.br/brics-presentations/plenary-4_antonio-gomes_oecd.pdf. The EU was estimated to have spent €1.9 trillion on procurement. *Rigging the Bids: Government Contracting is Growing Less Competitive, and Often More Corrup*t, ECONOMIST (Nov. 19, 2016) [hereinafter *Rigging the Bids*], https://www.economist.com/europe/2016/11/19/rigging-the-bids.

[6] Gomes, *supra* note 5, at 2.

[7] *See WTO and Government Procurement*, WORLD TRADE ORGANIZATION [WTO] (Apr. 5, 2019), https://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm; *see also* Capobianco, *supra* note 5, at 5 (OECD countries spent 28.1% of government expenditures on procurement in 2013); Organisation for Economic Co-operation & Development [OECD], Roundtable on Collusion and Corruption in Public Procurement, at 24, DAF/COMP/GF(2010)6 (Oct. 15, 2010), https://www.oecd.org/competition/cartels/46235884.pdf; Dan Sjöblom, *Screening for Cartels in Procurement Procedures and the Importance of Inter-Agency Cooperation*, KONKURRENSVERKET (May 7, 2015), http://www.konkurrensverket.se/globalassets/press/tal-artiklar/150507_dan-sjobloms-anforande-ecd.pdf ("Public procurement affects a substantial share of world trade flows and in Sweden it represents nearly 20% of GDP.").

that they are an attractive target for wrongdoers.[8] It also means that policy improvements that generate even small reductions in the "tax" imposed on these expenditures by collusion and corruption can yield major financial benefits.

Second, public procurement has a qualitative significance that transcends its importance as a dollar amount or a proportion of GDP. Public procurement is an essential input to the delivery of broader public services and functions of government that are vital for growth, development, and social welfare, including: investment in transportation, telecommunications, energy, and other public infrastructure; construction and maintenance of schools, hospitals, and public sanitation systems; and efficient delivery of medicines and other aspects of health care. Distortions created by collusion and corruption in these markets increase the cost and reduce the quality and quantity of these essential services and infrastructure; impose penalties on those who rely on them, especially the less advantaged; and diminish growth and create public safety risks (e.g., through shoddy contract performance[9]).[10]

Third, problems in public procurement can undermine the credibility and efficacy of governments more generally. Corruption fuels public discontent in what, for many countries, is already a fraught and potentially combustible political environment. Major cases of wrongdoing, such as those exposed by Operation Car Wash in Brazil (or "Caso Lava Jato," as it is known there)[11] and the other cases described in Part I tear at the fabric of trust between citizens and their public institutions, especially in nations battling high unemployment and weak economic growth. By contrast, increasing the integrity of the procurement system may help a government to build belief in its legitimacy and, more generally, create a civic sense that government institutions are dedicated to improving citizens' lives.

For all these reasons, honest and effective government procurement is widely recognized as being vital to broader efforts to promote development and prosperity in the twenty-first century.[12] Indeed, it can be argued that the

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8 Unless safeguarded, procurement systems may therefore become the equivalent of heavily funded, thinly protected, and regularly replenished banks that will be robbed again and again by illicit coalitions that may include employees of the bank itself.

9 *See* Stephen Kinzer, *The Turkish Quake's Secret Accomplice: Corruption*, N.Y. TIMES (Aug. 29, 1999), https://www.nytimes.com/1999/08/29/weekinreview/the-world-the-turkish-quake-s-secret-accomplice-corruption.html (reporting that an earthquake in Turkey revealed poor completion of infrastructure projects by contractors that could not withstand the natural disaster, and that public officials were partially to blame).

10 *See, e.g.*, Eur. Parliamentary Res. Serv., *The Cost of Non-Europe in the Area of Organised Crime and Corruption: Annex II Corruption*, at 9, PE 579.319 (March 2016) (noting that corruption risks during public procurement could cost Europe around €5 billion a year); *see also infra* Section I.D.

11 *Caso Lava Jato*, MINISTERIO PÚBLICO FEDERAL [MPF], http://www.mpf.mp.br/grandes-casos/lava-jato/entenda-o-caso/entenda-o-caso (last visited May 18, 2019).

12 *See Strong, Sustainable and Balanced Growth: Enhancing the Impact of Infrastructure Investment on Growth and Employment*, WORLD BANK GRP. 2 (Feb. 2014), http://siteresources.worldbank.org/EXTSDNET/Resources/infrastructure-background-note-G20.pdf.

success of major elements of the current United Nations Sustainable Development Goals is directly contingent on governments' efforts to grapple effectively with the problems of corruption and supplier collusion in public procurement systems.[13] This is acknowledged to be the case, for example, in the context of public health–related objectives.[14]

Conventional responses to the problems of corruption and supplier collusion in public procurement comprise two broad sets of tools. The first, focusing on corruption issues, involves measures to increase the transparency of public procurement systems—on the basis that sunlight is the best of disinfectants—and to strengthen the accountability of responsible public officials for malfeasance. The second, aimed at preventing supplier collusion, focuses on the effective enforcement of national competition (antitrust) laws, including through essential tools such as leniency programs, and related "advocacy" activities to enhance awareness of the requirements of competition law and to promote compliance.[15]

These tools and approaches are necessary but are proving to be insufficient on their own to address the related challenges. This reflects important systemic issues and concerns. First, there are limits on the abilities of governments to prevent and deter corruption through enhanced transparency and ex post scrutiny and accountability. These control systems themselves are not costless, and an undue emphasis on ex post accountability alone, arguably, runs a risk of chilling innovation and appropriate exercise of discretion, and also places unfair burdens on (frequently) poorly paid and trained administrators. Moreover, an important, and neglected, theoretical point is the assumption that the problems lie truly with corrupt "agents" (procurement officials) who need to be controlled by the responsible principals. Evidence suggests, however, that corruption in government procurement sometimes derives from the actions of corrupt principals—that is, corrupt governmental authorities—and not their subordinates.[16] These situations necessitate alternative remedial measures.[17]

Second, as suggested above and elaborated further in Part I, public procurement systems are intrinsically more vulnerable to supplier collusion than

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13 *See* Oshani Perera et al., *The Role of Public Procurement in Deploying a Sustainable Infrastructure*, INT'L INST. FOR SUSTAINABLE DEV., Nov. 2016, at 5–6, https://www.iisd.org/sites/default/files/publications/role-public-procurement-deploying-sustainable-Infrastructure.pdf.

14 *See* World Health Organization [WHO], World Intellectual Property Organization [WIPO] & World Trade Organization [WTO], *Promoting Access to Medical Technologies and Innovation: Intersections Between Public Health, Intellectual Property and Trade*, at 14 (2012), http://www.wipo.int/edocs/pubdocs/en/global_challenges/628/wipo_pub_628.pdf.

15 *See infra* Part II. An important related tool, developed in the OECD with input from multiple national competition authorities, involves the use of "certificates of independent bid preparation." *See infra* Part III.

16 For a compelling synthesis of related theoretical and empirical work, see Anna Persson, Bo Rothstein & Jan Teorell, *Why Anticorruption Reforms Fail—Systemic Corruption as a Collective Action Problem*, 26 GOVERNANCE 449, 452 (2013).

17 *See id.* at 452–53; *see also* related discussion in Part III.

are many other markets. This vulnerability derives directly from the structure, rules, and procedures governing them. Thus, while competition law enforcement remains critical, an effective approach to the prevention of supplier collusion will also involve refinements to the procurement process itself. Indeed, an awkward but unavoidable truth in this area is that tradeoffs exist between elements of the corrective measures needed to deter corruption (such as enhanced transparency and efforts to limit procurers' discretion) and those needed to reduce the likelihood of supplier collusion.[18] These tradeoffs need to be managed carefully: strict curtailment or elimination of transparency measures in public procurement markets would likely invite even worse abuses than supplier collusion, including unfettered self-dealing and the routine theft of public funds.[19]

This Article consequently seeks to develop the parameters of a more holistic approach to the public procurement problems and to propose a set of measures that can deter, and increase the resistance of these systems to, supplier collusion without necessarily increasing the systems' vulnerability to corruption. Indeed, in important ways, these measures and tools may also act to deter corruption.

Part I begins by examining some examples of bid rigging and bribery that have been uncovered in public procurement processes and the factors that facilitate such practices. It also notes quantitative indicators of the harm caused by both sets of practices. Part II outlines the main tools that are conventionally employed to address both supplier collusion and corruption in the procurement process, namely competition law enforcement and related advocacy and prevention measures, and anticorruption enforcement. It also considers various ways in which the effectiveness of these tools can be strengthened, for example, through the use of sophisticated screening and data-management tools;[20] through enhanced enforcement, sanctions, and remedies; and by multilateral development banks ("MDBs") acting to prevent and deter corruption.[21]

Part III develops the more comprehensive approach to address the twin scourges of supplier collusion and corruption in public procurement markets

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18 Robert D. Anderson, William E. Kovacic & Anna Caroline Müller, *Promoting Competition and Deterring Corruption in Public Procurement Markets: Synergies with Trade Liberalisation*, 26 PUB. PROCUREMENT L. REV., ISSUE 2, 77–97 (2017) [hereinafter Anderson, Kovacic & Müller, *Synergies with Trade Liberalisation*]. An early version of this article was circulated as Robert D. Anderson, William E. Kovacic & Anna Caroline Müller, *Promoting Competition and Deterring Corruption in Public Procurement Markets: Synergies with Trade Liberalisation*, E15 INITIATIVE, Feb. 2016, at 1, 9–10 [hereinafter Anderson, Kovacic & Müller, *Synergies Draft*], http://e15initiative.org/publications/promoting-competition-and-deterring-corruption-in-public-procurement-markets-synergies-with-trade-liberalisation/.

19 Anderson, Kovacic & Müller, *Synergies with Trade Liberalisation*, *supra* note 18, at 15.

20 *See About*, CURBING CORRUPTION GOV'T CONTRACTING, http://redflags.govtransparency.eu/index.php/about/ (last visited Jan. 23, 2020).

21 *See, e.g.*, Laurence Folliot-Lalliot, *Introduction to the World Bank's Policies in the Fight Against Corruption and Conflicts of Interest in Public Contracts*, *in* CORRUPTION AND CONFLICTS OF INTEREST: A COMPARATIVE LAW APPROACH 236, 237–38 (Jean-Bernard Auby et al. eds., 2014).

(beyond the activities profiled in Part II) through: (a) systematic and better efforts to ensure procompetitive approaches to tender design, including through the use of international performance-based standards rather than national ones; (b) careful market research as a core element of strengthening and fine tuning public procurement processes and more advanced and targeted competition advocacy promoting compliance with competition law and the reduction of barriers to procurement markets for new entrepreneurs; (c) professionalization of the procurement workforce, including but not limited to training the responsible officials to detect the signs of bid rigging and corrupt practices; (d) fine tuning, where appropriate, the interaction between anticorruption and anticompetition measures; (e) the liberalization of trade in government procurement markets as a tool to strengthen competition and deter corruption;[22] and (f) a contextualized approach to reform and consideration of both incremental and systemic changes. Underlying all of these suggestions is the need for a political commitment to the strengthening of procurement, competition, and related anticorruption systems and a recognition of their centrality both to the welfare of citizens and to the effectiveness and credibility of states.

I. SUPPLIER COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT MARKETS: DELINEATING THE SCOPE AND SOURCES OF THE PROBLEM

This Part examines examples of bid rigging and bribery that have been uncovered in public procurement processes and the factors that render such processes prone to them. It also discusses some quantitative indicators of harm resulting from both sets of practices. It thus seeks to indicate the benefits that can be achieved from fighting collusion and corruption in public procurement markets and to identify some of the factors that need to be tackled in order for such a fight to be successful.

A. *Bid Rigging and Bribery in Public Procurement Markets: Current Examples*

Despite increasingly concerted efforts by competition agencies to detect, prosecute, and deter cartel activity—anticompetitive arrangements between competitors to fix prices, make rigged bids (collusive tenders),

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[22] As elaborated in Part III, the opening of markets through trade liberalization can help to reduce their susceptibility to supplier collusion, by increasing both the number and the diversity of potential competitors. It can also help in preventing corruption by exposing procurement systems, and consequential individual procurements, to heightened scrutiny by a more diverse set of interested players, including foreign suppliers. The contribution of market opening is not wholly neglected in relevant literature and policy advocacy. The OECD Recommendation on Public Procurement refers, for example, to the potential benefits of market opening; still, in our experience, the benefits of market opening are rarely cited in competition agencies' public advocacy regarding problems and solutions in this area.

establish output restrictions or quotas, or share or divide markets[23]—cases of collusive tendering in public procurement markets certainly have not been eliminated. On the contrary, competition agencies across the world continue to expose bid rigging on a regular basis.[24]

Further, although some illicit bid rigging schemes have only been established to be horizontal cartels orchestrated by private actors,[25] a number have also been found to involve corruption,[26] a vertical alliance between a private firm (or firms) and government insiders. In such cases, an insider accepts bribes or other rewards to influence the design of a tender, to manipulate the selection process in favor of specific suppliers, or to ensure the bid-rigging scheme achieves its purposes. Indeed, evidence indicates that corruption may occur throughout the three stages of the procurement lifecycle: tender design, bidding, and contract performance (for example, through contract changes and extensions);[27] bid rigging and kickbacks are to be found in a number of procurement contracts;[28] and the overall level of competition for government contracts is falling in the EU given that in a high proportion of cases (up to thirty percent of large contracts) there is only a single bidder for government contracts.[29] Transparency International's Corruption Perceptions Index (a composite index based on a variety of business surveys and expert panels[30]) also records that over two-thirds of countries fall below the

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23 *See* Organisation for Economic Co-operation and Development [OECD], *Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels*, at 2, C(98)35/FINAL (Mar. 25, 1998). Although competition agencies increasingly prioritize their scare resources on cartel enforcement, the reality is that most authorities can only bring a small number of cartel cases each year and only a relatively small proportion of these relate to bid rigging. *See* Rosa M. Abrantes-Metz, *Proactive vs Reactive Anti-Cartel Policy: The Role of Empirical Screens* (2013) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2284740 ("Despite the successes of cartel detection over the last twenty years, there are many who believe that competition authorities have just started to scratch the surface.").

24 *See infra* note 32 and accompanying text.

25 Suppliers, perhaps with contributions from other private actors (such as an accounting firm that helps organize the cartel).

26 *See supra* note 1; Javier Miranzo Díaz, *A Taxonomy of Corruption in EU Public Procurement*, 12 EUR. PROCUREMENT & PUB. PRIV. P'SHIP L. REV. 383, 385 (2017); OECD, *Corruption: A Glossary of International Criminal Standards* 21–23 (2008).

27 *See* Ting Gong & Na Zhou, *Corruption and Marketization: Formal and Informal Rules in Chinese Public Procurement*, 9 REG. & GOVERNANCE 63, 72–73 (2015); Frédéric Boehm & Juanita Olaya, *Corruption in Public Contracting Auctions: The Role of Transparency in Bidding Processes*, 77 ANNALS OF PUB. & COOP. ECON. 431, 434 (2006).

28 *See* PWC, PUBLIC PROCUREMENT: COSTS WE PAY FOR CORRUPTION—IDENTIFYING AND REDUCING CORRUPTION IN PUBLIC PROCUREMENT IN THE EU 8 (2013), https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/pwc_olaf_study_en.pdf.

29 *See Rigging the Bids*, *supra* note 5. For a resource about all procurement documents published in the EU, see *TED Home*, TENDERS ELECTRONIC DAILY, http://ted.europa.eu/TED/main/HomePage.do (last visited May 19, 2019).

30 *Corruptions Perception Index 2019*, TRANSPARENCY INT'L (Jan. 23, 2020), https://www.transparency.org/cpi2019?/news/feature/cpi-2019; *see also infra* note 124 and accompanying text.

midpoint of their scale between zero (highly corrupt) and one hundred (very clean), thereby indicating endemic corruption across public sectors.[31]

Box 1 highlights a significant current example of an official investigation into relevant conduct: Brazil's Operation Car Wash. Box 2 sets out some other examples drawn from diverse economies around the globe.[32]

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[31] *See, e.g.*, Emmanuelle Auriol, *Corruption in Procurement and Public Purchase*, 24 INT'L J. INDUS. ORG. 867, 867–68 (2006) (noting that "[c]orruption is . . . a major problem" and "[t]he OECD Antibribery Convention . . . has apparently failed to cure it").

[32] For numerous other examples, see *In re* Western Coalfields Ltd., Competition Commission of India, Case No. 34, Sept. 14, 2017, at 3 (imposing penalties on ten companies for bid rigging in coal and sand transportation tenders); Resolución Baxter, S.A. de C.V. y otros [Resolution on Baxter], Comision Federal de Competencia [Federal Competition Commission], Case No. IO-03-2006, Aug. 15, 2006, at 93 (Mex.) (decision involving bid rotation in relation to the acquisition of human insulin and injectable serums between 2003 and 2006 in Mexico); *Unfair Cartel Case of 21 Contractors in Bidding Procedures for Turnkey Projects for Incheon Urban Railroad Line 2*, KOREAN FAIR TRADE COMM'N (Feb. 25, 2014), http://www.ftc.go.kr/eng/toEngSearchList.do?key=541 (type "Incheon Urban Railroad Line" in the Quick Search bar; then select "GO"; then follow the "Unfair cartel case" hyperlink) (KFTC decision imposing fines on twenty one construction companies for collusive tendering in relation to work on subway stations); Resolución Expte. 364/95, Ortopédicos of Castilla-León, Tribunal de Defensa de la Competencia, 1, Dec. 12, 1996 (Mex.), https://www.cnmc.es/sites/default/files/71166_7.pdf; Resolución Expte. 395/97, Vacunas Antigripales, Tribunal de Defensa de la Competencia, 1, Sept. 30, 1998 (Mex.), https://www.cnmc.es/sites/default/files/57298.pdf; COMISION NACIONAL DE LA COMPETENCIA, GUIDE ON PUBLIC PROCUREMENT AND COMPETITION, http://www.icnblog.org/wp-content/uploads/2011/03/GUIA_CONTRATACION_EN_v31.pdf; WORLD BANK, CURBING FRAUD, COLLUSION, AND CORRUPTION IN THE ROADS SECTOR 1, 6 tbl.1 (2011), http://documents.worldbank.org/curated/en/975181468151765134/pdf/642830WP0Curbi00Box0361535B0PUBLIC0.pdf (suggesting collusion in roads projects in developed and developing countries is significant); Albert Sánchez Graells, *Prevention and Deterrence of Bid Rigging: A Look from the New EU Directive on Public Procurement*, *in* INTEGRITY AND EFFICIENCY IN SUSTAINABLE PUBLIC CONTRACTS 7 (Gabriella M. Racca & Christopher R. Yukins eds., 2014); Lauren Brinker, *Introducing New Weapons in the Fight Against Bid Rigging to Achieve a More Competitive U.S. Procurement Market*, 43 PUB. CONT. L.J. 547, 557 (2014); Árpád Hargita & Tihamér Tóth, *God Forbid Bid-Riggers: Developments Under the Hungarian Competition Act*, 28 WORLD COMPETITION 205, 209 (2005); Robert Moldén, *Public Procurement and Competition Law from a Swedish Perspective–Some Proposals for Better Interaction*, at 562, http://www.konkurrensverket.se/globalassets/forskning/projekt/09-0062_artikel_robert-molden_public-procurement-and-competition-law-from-a-swedish-perspective-some-proposals-for-better-interaction.pdf (discussing in detail five Swedish bid-rigging cases from 2009 to 2010); *Guidelines for Procurers – How to Recognise and Deter Bid Rigging*, N.Z. COM. COMM'N, Sept. 2010, at 1, 3 (discussing Christchurch bus cartel); *Anti-Cartel Enforcement Manual: Relationships Between Competition Agencies and Public Procurement Bodies*, INT'L COMPETITION NETWORK [ICN], Apr. 2015, at 1, 37–38 (discussing Spanish Competition Authority decision imposing fines of more than €16 million for price fixing and bid rigging on tenders for asphalt affecting more than 900 projects in Northern Spain); OECD, *Fighting Bid Rigging in Public Procurement: Report on Implementing the 2012 Recommendation*, at 19 (2016) [hereinafter OECD, *Fighting Bid Rigging*], http://www.oecd.org/daf/competition/Fighting-bid-rigging-in-public-procurement-2016-implementation-report.pdf; OECD, *Recommendation of the OECD Council on Fighting Bid Rigging in Public Procurement* (2012), http://www.oecd.org/daf/competition/RecommendationOnFightingBidRigging2012.pdf; OECD, *supra* note 7, at 25; Luke Froeb, *Auctions and Antitrust* 11 (Econ. Analysis Grp. Discussion Paper 88-8, 1989) (noting that 81% of US criminal cartel cases from 1979 to 1988 were in auction markets); Rieko Ishii, *Collusion in Repeated Procurement Auction: A Study of a Paving Market in Japan*

Box 1. Operation Car Wash (centered in Brazil, but with effects spilling over to other Latin American countries)

Operation Car Wash, Caso Lava Jato, is the largest anticorruption, money laundering, and supplier collusion investigation in Brazil's history. Its name originates from the use, by one of the criminal organizations initially involved, of a car wash to launder money. The investigation commenced in March 2014 in the State of Parana with inquiries into dealing in the black market for currency exchange. These led to the finding of irregularities in Petrobras, a huge state-owned enterprise, in relation to the conclusion of large works contracts.[33]

Under the scheme uncovered, which lasted at least ten years, contractors organized into cartels paid bribes to ruling political parties and senior government officials, ranging from one to five percent of already inflated billion-dollar contracts to win contracts with Petrobras and other state firms. Confidential information exchanged by investigated firms, including Odebrecht SA in return for leniency, played a crucial part in the investigation and led to its snowballing.[34] Odebrecht SA was found to be at the center of the corruption investigation and paid a fine of 2.77 billion reais ($715.84 million) as part of the leniency settlements negotiated with Conselho Administrativo de Defesa Econômica ("CADE," Brazil's powerful competition agency) and the Attorney General.[35] Its CEO, Marcelo Odebrecht, was also sentenced to nineteen years in prison for paying over $30 million in bribes to Petrobras.[36]

The effects of Operation Car Wash spread outside Brazil and into other parts of Latin America. Politicians in a half-dozen countries across the region are now under investigation for similar bribery allegations, including the current and former presidents of Peru

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1 (Inst. of Soc. & Econ. Research, Discussion Paper No. 710, 2008); John Moore, *Cartels Facing Competition in Public Procurement: An Empirical Analysis* 1, (Econ. of Pub.–Private P'ships Discussion Paper No. 2012-09, 2012) (noting that between 1991 and 2010 the French Competition Authority issued more than 221 decisions finding collusion in public procurement (135 of which were in the construction industry), leading to the fining of more than 750 firms).

33 *See* MINISTERIO PÚBLICO FEDERAL, *supra* note 11.

34 *See infra* note 168 and accompanying text for a discussion of leniency.

35 *See*, *e.g.*, Assessoria de Comunicação Social, *Cade celebra acordo de leniência no âmbito da "Operação Lava Jato"*, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA [CADE] (Mar. 20, 2015), http://www.cade.gov.br/noticias/cade-celebra-acordo-de-leniencia-no-ambito-da-201coperacao-lava-jato201d; Ricardo Brito, *Odebrecht Signs New Leniency Deal with Brazil Authorities*, REUTERS (July 9, 2018), https://www.reuters.com/article/us-brazil-corruption-odebrecht/odebrecht-signs-new-leniency-deal-with-brazil-authorities-idUSKBN1JZ2U9.

36 *See Brasil: condenan a 19 años de cárcel a Marcelo Odebrecht, expresidente de la mayor constructora de América Latina*, BBC WORLD (Mar. 8, 2016), https://www.bbc.com/mundo/noticias/2016/03/160308_brasil_marcelo_odebrecht_condena_corrupcion_petrobras_ab.

and Colombia.[37] Moreover, the Paradise Papers, a set of confidential electronic documents relating to offshore investment, revealed that Odebrecht used at least one offshore company as a vehicle to pay bribes.[38]

Box 2. Examples of recent publicly disclosed cases of corruption or supplier collusion in other jurisdictions

* *Canada*. In 2015 the Commission d'enquete sur l'octroi et la gestion des contrats publics dans l'industrie de la construction of Quebec (the "Charbonneau Commission") and the Competition Bureau of Canada reported on corruption and collusion in Quebec's construction industry.[39] They set out allegations of widespread and systemic illicit payments and other favors to public officials and pervasive bid rigging.[40]

* *China*. In 2015, the National Development and Reform Commission of China ("NDRC") found that eight international RORO

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37 Stephanie Nolen, *Corruption Beyond Brazil: Where the 'Car Wash' Scandal has Splashed Across Latin America*, GLOBE & MAIL (Nov. 12, 2017), https://www.theglobeandmail.com/news/world/brazil-odebrecht-lava-jato-explainer/article35231409/.i

38 Emilia Delfino, *Paradise Papers: Salen a la luz 17 offshore de Odebrecht y al menos una se usó para sobornos*, PERFIL (Nov. 8, 2017), http://www.perfil.com/noticias/paradisepapers/paradise-papers-salen-a-la-luz-17-offshore-de-odebrecht-y-al-menos-una-se-uso-para-sobornos.phtml.

39 One hundred and twenty-three of the 654 immunity and leniency applications received by the Competition Bureau of Canada between 1996 and 2014 related to bid rotation, cover bidding, and side payments in the Quebec construction industry. Bid-rigging charges were brought against companies and individuals in the construction industry related to collusion in Montreal after a joint investigation by the Anti-Corruption Unit of Quebec's provincial police force and Canada's Competition Bureau. *See* ICN, *supra* note 32, at 42.

40 *See* Anderson & Kovacic, *supra* note 4. For most of the period of alleged illegal practices, Quebec's government procurements were excluded from Canada's market-access commitments under the Agreement on Government Procurement (see further discussion of the GPA, *infra* Part IV and note 339), a factor that arguably facilitated the apparent illegality by eliminating a source of potential competition (foreign suppliers) and minimizing external scrutiny of the relevant markets and practices. Recently, Canada has extended its GPA market-opening commitments to cover Quebec and other provincial government procurements—a development that will surely strengthen competition and make corruption more difficult. *See Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction [the Charbonneau Commission]*, QUEBEC, https://www.ceic.gouv.qc.ca/ (last visited Jan. 25, 2020); *Competition Bureau Submission to the OECD Global Forum on Competition Roundtable on Serial Offenders: A Discussion on Why Some Industries Seem Prone to Endemic Collusion*, GOV. OF CAN. (Oct. 30, 2015), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03989.html; *see also* Anderson, Kovacic & Müller, *Synergies with Trade Liberalisation*, *supra* note 18. For further information, see Robert Clark et al., *Bid Rigging and Entry Deterrence in Public Procurement: Evidence from an Investigation into Collusion and Corruption in Quebec* (Queen's Econ. Dep't Working Paper No. 1401, 2018), http://qed.econ.queensu.ca/working_papers/papers/qed_wp_1401.pdf.

shipping companies[41] repeatedly implemented agreements to set minimum quotes for RORO shipping services (between China and other countries) for RORO cargo suppliers.[42]

* *European Union*. The European Commission has imposed significant fines for bid rigging. In one example, the *Elevators and Escalators* case, the Commission found that four firms (Kone, Schindler, Otis, and ThyssenKrupp) had operated a number of bid-rigging cartels for the sale, installation, and maintenance of elevators and escalators in Belgium, Germany, Luxembourg, and the Netherlands (including in the buildings of the Commission itself and the EU courts in Luxembourg).[43]

* *Germany*. The Federal Cartel Office established that six firms had used a quota system to rig bids to supply combat boots for the German Armed Forces. An employee of the Armed Forces Procurement Agency facilitated the scheme—one part of a striking pattern of corrupt insider–outsider collaboration that German prosecutors have identified in other bid-rigging schemes.[44]

* *India*. In 2017, the Competition Commission of India imposed fines on a number of firms for rigging tenders for the supply of a water purification product.[45]

* *Japan.* The Japanese Fair Trading Commission ("JFTC") has uncovered numerous cases of collusion and corruption involving construction and engineering services on public contracts.[46] In one case involving steel bridges, the JFTC alleged that twenty public officials had supported bid-rigging schemes to secure future jobs with the companies after they retired from public service.[47]

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41 RORO (roll on, roll off) cargo refers to wheeled cargo, such as automobiles, construction machinery, and trucks.

42 Sinchit Lai, *Bid Rigging, a Faintly Discernible Enumeration Under Article 13 of the Anti-Monopoly Law in China*, 12 U. PA. ASIAN L. REV. 244, 256 (2016).

43 2008 O.J. (75) 20, *aff'd* Case C-493/11 P, United Techs. Corp. v. Comm'n, EU:C:2012:355 (June 15, 2012); *see also* Case C-557/12, Kone AG v. ÖBB-Infrastruktur AG, ECLI:EU:C:2014:4 (Jan. 30, 2014).

44 *See* OECD, *supra* note 7, at 198.

45 S.S. RANA & CO., INDIA: CCI IMPOSES PENALTY FOR BID RIGGING, RESTRICTS THE SCOPE OF SINGLE ECONOMIC ENTITY 4 (2017), https://s3.amazonaws.com/documents.lexology.com/f3124b80-f01d-4336-a522-48284d1ea579.pdf.

46 *See, e.g.*, Masako Wakui, *Bid Rigging Initiated by Government Officials: The Conjuncture of Collusion and Corruption in Japan*, *in* CARTELS IN ASIA: LAW AND PRACTICE (Thomas Cheng et al. eds., 2015) (between 2003 and 2012, twelve cases of government involvement in ten bid-rigging cases were found, resulting in requests for investigation to the head of the procuring office).

47 OECD, *supra* note 7, at 20.

* *Russia.* The Federal Antimonopoly Service uncovered a complex anticompetitive bid-rigging scheme, described as "ram,"[48] by using electronic trade spot resources.[49] The scheme was carefully designed to exclude non-cartelists from the process.[50]

* *Singapore*. The Competition Commission of Singapore has fined undertakings which rigged bids on electrical works contracts, motor trader vehicles, asset tagging services for the GEMS world academy tender, and electrical services for the Singapore F1.[51]

* *Spain.* In 2016 Spain's "biggest corruption case in decades" yielded allegations that thirty-seven businessmen and former politicians (including members of the ruling People's party) manipulated the public procurement system to steer construction contracts to "their buddies."[52] The colorful nature of the characters involved, who went by names such as Don Vito, El Bigotes, and El Albondiguilla, along with kickbacks in the form of Caribbean holidays, Louis Vuitton products, and call girls,[53] ensured that the case attracted popular attention. The scandal led to the arrest and imprisonment of several business officials and politicians.[54]

* *United States*. Cases of bid rigging have been uncovered and prosecuted criminally in the United States. In one example in 2017 involving an auction for public school bus transportation services in Puerto Rico, Yuval Marshak was sentenced to thirty months in prison for falsifying bid documents to make it appear that contracts

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48 "Ram" is a concerted bidding practice that does not directly fit into a definition of "hard core" cartel (i.e., an agreement on price fixing or market allocation by territory, product, or customer). However, this practice leads to the exclusion of conscientious bidders and allows the participants of such arrangements to receive excessive wealth. For further information, see ICN, *supra* note 32, at 35.

49 *Id*. at 35–36.

50 *See id.*

51 *See, e.g.*, Competition Comm'n, Nov. 28, 2017, CCS 700/003/15 (106) (Sing.), https://www.cccs.gov.sg/-/media/custom/ccs/files/public-register-and-consultation/public-consultation-items/id-for-bidrigging-in-electrical-services-and-asset-tagging-tenders/1-id--public-versionfinalsigned.pdf.

52 *Rigging the Bids*, *supra* note 5.

53 *Id.*

54 *Id.*; *Spain's Watergate: Inside the Corruption Scandal that Changed a Nation*, GUARDIAN (Mar. 1, 2019), https://www.theguardian.com/news/2019/mar/01/spain-watergate-corruption-scandal-politics-gurtel-case; Sam Jones, *Court Finds Spain's Ruling Party Benefited from Bribery Scheme*, GUARDIAN (May 24, 2018), https://www.theguardian.com/world/2018/may/24/court-finds-spain-ruling-party-pp-benefited-bribery-luis-barcenas.

> were won in a competitive bid process,[55] and four individuals were convicted for participating in bid rigging (and fraud).[56] The defendants allocated contracts among themselves, predetermining the winning bidder for each contract, and then submitting inflated complementary bids.[57]
>
> Bribery has also been exposed in public procurement. Earlier this decade, Leonard Francis obtained tens of millions of dollars of marine services contracts by bribing US naval officers and Department of Defense civilian personnel with cash, prostitutes, and luxury travel.[58] Further, the Department of Justice ("DOJ") obtained convictions of private individuals for rigging bids on disaster recovery projects following Typhoon Paka, which left thousands of people homeless.[59] One public official was sentenced to eight years in prison for helping organize the conspiracies and for soliciting and receiving bribes for contracts awarded to repair typhoon damage.[60]

The integrity units of MDBs have also uncovered numerous incidents of collusive tendering.[61] A common pattern involves corporations using the same agent to prepare and submit the relevant offers in a public tender.[62] In 2016, the World Bank Group ("WBG") reported that it had investigated nine collusion cases relating to public procurement and debarred a Ukrainian company (for over twenty-two years) for having participated in a corrupt and collusive scheme rigging contracts amounting to $43 million.[63] It also refused to

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55 *See, e.g.*, Remarks of Roger Alford, Deputy Assistant Att'y Gen., Antitrust Division, U.S. Department of Justice, *Antitrust Enforcement and the Fight Against Corruption*, at 6 (Oct. 3, 2017), https://www.justice.gov/opa/speech/file/1001076/download.

56 *Id.* at 9.

57 *Id.*

58 Craig Whitlock, *The Man Who Seduced the 7th Fleet*, WASH. POST (May 27, 2016), https://www.washingtonpost.com/sf/investigative/2016/05/27/the-man-who-seduced-the-7th-fleet.

59 OECD, Fighting Corruption and Promoting Competition, at 4, DAF/COMP/GF/WD(2014)19 (Jan. 16, 2014), http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2014)19&docLanguage=En.

60 U.S. DEP'T OF JUSTICE, PREVENTING AND DETECTING BID RIGGING, PRICE FIXING, AND MARKET ALLOCATION IN POST-DISASTER REBUILDING PROJECTS 1, https://www.justice.gov/atr/public/guidelines/disaster_primer.pdf.

61 *See infra* Part II.

62 *See* Marianela López-Galdos, OECD, *Latin American and Caribbean Competition Forum: Corruption and Collusion; Two Sides of the Same Coin Against Productivity*, at 8, DAF/COMP/LACF(2016)32 (Mar. 30, 2016); and *see, e.g.*, Case C-542/14, 'VM Remonts' SIA v. Konkurences padome, EU:C:2016:578 (Dec. 3, 2015).

63 WORLD BANK GRP., OUR DEVELOPMENT RESOURCES MUST REACH THE INTENDED BENEFICIARIES (2016), http://documents.worldbank.org/curated/en/330521476191334505/pdf/INT-

award contracts, and dismantled a collusion case, relating to a health project where $29 million in medical supplies to support disease control was at stake. Further, a WBG Report indicates that collusion schemes in relation to road building contracts are "significant" across the globe, even if difficult to establish definitively.[64]

B. *Incentives and Conditions Facilitating Collusion in Public Procurement Processes*

An extensive body of scholarship identifies the conditions in which cartels, bid rigging, and other collusive schemes to limit rivalry on price or quality are likely to flourish.[65] By illustrating how various characteristics of public procurement markets make them particularly prone to collusion, this literature both explains the number of cases uncovered and provides a useful starting point to devise countermeasures.

To collude effectively, firms must do three things: (1) cooperate in a way that allows them to align their behavior—that is, to reach an understanding as to how to cut their output and allocate the increased revenues from the affected market; (2) ensure the internal stability of the collusive scheme by detecting and punishing cheating,[66] or deviations, from it; and (3) cope with external threats that could boost supply to competitive levels, especially new entry.[67]

The art of successful collusion thus consists of both: creating incentives that make continued cooperation, rather than unilateral action and cheating, the most profitable strategy for the participants;[68] and designing organizational and operational structures that cope with internal and external threats to the scheme, in particular, by monitoring the market for, and acting against, internal deviations from the collusive scheme and discouraging external

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FY16-Annual-Update-10062016.pdf. The sanction was recognized by the rest of the MDBs—see *infra* Part II for further discussion.

64 WORLD BANK, *supra* note 32.

65 *See, e.g.*, JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANISATION (1988); Carl Shapiro, *Theories of Oligopoly Behavior*, *in* 1 HANDBOOK OF INDUSTRIAL ORGANIZATION (Richard Schmalensee & Robert D. Willig eds., 1998); George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964); MARSHALL & MARX, *supra* note 4.

66 Cheating on a cartel is easier where the market is less transparent, the number of firms is greater, products are differentiated, and demand is unpredictable. The incentive to deviate from the collusive strategy is also affected by the "punishment" (which usually takes the form of a promise of loss of profits) that can be levied on a firm that cheats. Operating an internal enforcement mechanism is time-consuming, expensive, difficult, and makes the cartel more vulnerable to detection.

67 *See* Stigler, *supra* note 65, at 45–46.

68 *See* CHRISTOPHER HARDING & JULIAN JOSHUA, REGULATING CARTELS IN EUROPE 230–31 (2d ed. 2010); MARSHALL & MARX, *supra* note 4, at 19–21.

competitive inroads and buyer resistance.[69] Repeated interaction and "the shadow of the future," involving punishment and rewards, are usually essential to overcome temptations to cheat and to ensure the expected profit from colluding today outweighs the expected profit of deviating from the cooperative arrangement.[70] As most competition-law systems categorically prohibit and severely punish explicit collusion,[71] cartelists ordinarily also have to strive to conceal their cooperation.

Public procurement typically involves significant regulation both to prevent corrupt practices and to ensure that the procurement goals are achieved, in particular that goods and services are obtained in ways that maximize value from taxpayer money.[72] While these objectives are of paramount importance, the design of the procurement system, combined with the value, volume, and frequency of public purchasing activity, can undeniably have adverse side effects and make government procurement markets vulnerable to persistent supplier collusion over extended periods.[73] Conditions conducive to procurement collusion include:

1. Constant, Predictable Demand

Collusion is more difficult to maintain in markets where there are cyclical changes in demand[74] and/or where large orders are put in for a product occasionally rather than on a regular basis.[75] In such cases, the gains to individual firms from cheating, and consequently the temptation to cheat, are significant. By contrast, government's demand in public procurement

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69 *See, e.g.*, Commission Decision of 21 October 1998 Relating to a Proceeding Under Article 85 of the EC Treaty (Case No IV/35.691/E-4: – Pre-Insulated Pipe Cartel) 1999 O.J. (L 24) 1 (noting that the cartel members had sought to win over, then threaten, boycott, and drive out a nonparticipating competitor); Moore, *supra* note 32, at 14–16.

70 *See* Pedro Dal Bó & Guillaume R. Fréchette, *On the Determinants of Cooperation in Infinitely Repeated Games: A Survey*, 56 J. ECON. LIT. 60, 63 (2018). *But see* B. Douglas Bernheim & Erik Madsen, *Price Cutting and Business Stealing in Imperfect Cartels*, 107 AM. ECON. REV. 387, 387 (2017) (observing two important gaps in the industrial cartel collusion scholarship: "[F]irst, apparently deliberate cheating actually occurs; second, it frequently goes unpunished even when it is detected.").

71 Collusion on a market can be explicit, where the mutual understanding arises through express communication among firms through verbal or other communication as to the strategies to be deployed, or tacit, where the mutual understanding occurs without express communication. Although most competition law systems struggle to deal satisfactorily with tacit cooperation and the line between it and explicit collusion is difficult to draw, it is widely accepted that cartel activity, including bid rigging, through explicit collusion should be condemned under antitrust laws.

72 But the objectives of public procurement may be complex. *See infra* note 282 and accompanying text.

73 *See, e.g.*, Anderson & Kovacic, *supra* note 4, at 76; Graells, *supra* note 32, at 1; Heimler, *supra* note 4, at 853.

74 In these circumstances, firms may find it difficult to determine whether or not the decline in demand is due to market changes or cheating, causing deviations from the terms of the cartel.

75 *See* Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?*, 44 J. ECON. LITERATURE 43, 64 (2006).

markets tends to be inelastic and governments often resort to a regular, predictable flow of auctions and tendering events.[76] Repetitive tendering increases the opportunity for bidders to divide contracts and makes it less likely that the benefits from deviating to win a single contract will outweigh those that derive from colluding over a series of contracts. If, however, the distance in time between tenders is long or irregular and if tender opportunities vary in size and content, successful collusion becomes more complex.

2. Few Competitors, Barriers to Entry, and (Often) Exclusion of Foreign Competitors

The more concentrated the market, the simpler it is for firms to form a consensus, detect cheating, and maintain secrecy. A smaller group of competitors are also likely to know each other well and to communicate among themselves more readily. Further, the larger the market share that each firm has, the greater the potential profits to be earned from successful collusion (the bigger the share that each will receive of the collusive "pie") and the more likely firms are to be willing to accept the risk of eventual detection. Procurement regulation sometimes increases concentration by artificially restricting the number of potential offerors, for example, by imposing onerous conditions or reserving contracts to domestic suppliers.[77] Requirements that exclude foreign or other suppliers may obstruct entry from potential competitors, which might otherwise undermine and destabilize collusion.[78]

3. Standardization and Restrictive Product Specifications

Collusion is more likely to flourish in markets where competition mainly occurs on one dimension (for example, price) rather than on several

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[76] Procurement markets often lack the elasticity of demand that is a primary defense of consumers: once the government has determined the need for a particular purchase, the procurement officer will generally go ahead with the procurement, provided that enough bids are made. *See* Gian Luigi Albano et al., *Preventing Collusion in Procurement*, *in* HANDBOOK OF PROCUREMENT 347, 349 (Nicola Dimitri et al. eds., 2006); John Haltiwanger & Joseph E. Harrington, Jr., *The Impact of Cyclical Demand Movements on Collusive Behavior*, 22 RAND J. ECON. 89, 92–93 (1991).

[77] Anderson, Kovacic & Müller, *Synergies with Trade Liberalisation*, *supra* note 18, at 2 ("The scale and importance of the government procurement sector are such that governments often seek to harness it in different ways, for example, through policies and regulations that reserve contracts to national suppliers or particular groups of suppliers. . . . Much experience suggests, though, that such reservations are a costly way of assisting the targeted groups, relative to direct transfers or similar measures.").

[78] Robert D. Anderson et al., *Ensuring Integrity and Competition in Public Procurement Markets: A Dual Challenge for Good Governance*, *in* THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM 681 (Sue Arrowsmith & Robert D. Anderson eds., 2011); Anderson & Kovacic, *supra* note 4, at 86.

dimensions,[79] and when there are few or no alternatives to the product or service. In such cases the possibility for nonprice competition through disruptive product differentiation or innovation is reduced, as are the costs of collusion. Procurement processes sometimes reduce the scope of differentiation through standardizing requirements or restrictive product specifications, which can be intended to limit procurers' broad discretion and opportunities for making corrupt contract awards.[80]

4. The Incentives of Procurement Officials

Buyers are ordinarily well-placed to identify supplier collusion. However, as Alberto Heimler observes, in many cases, procurement officers themselves may have weak or nonexistent incentives to identify cartels:

> The public official [typically] is not evaluated on how many cartels he discovers but on his ability to set up and to run bidding processes and how quickly the goods and services he purchases are actually delivered. Suspicion that there is a cartel delays the whole process of purchasing. Furthermore, the money that is being saved because of the dismantling of a cartel usually does not remain in the administration that actually discovered or helped discover the cartel, but is redistributed to the general administration's budget.[81]

If efforts to detect and deter cartels in public procurement are to succeed, therefore, this issue must be addressed through, for example, the provision of incentives (such as financial awards) for procurement officers that successfully detect collusive arrangements.[82]

5. Overly Sweeping Transparency Requirements

The imposition of transparency requirements is essential to ensure the integrity of public procurement processes.[83] Nonetheless, transparency provisions, especially those mandating the disclosure of both winning and losing bids, may increase the risk of collusion by allowing suppliers to observe identity and terms of transactions and so to monitor the conduct of their

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79 Robert H. Porter & J. Douglas Zona, *Detection of Bid Rigging in Procurement Auctions*, 101 J. POL. ECON. 518 (1993); Robert H. Porter & J. Douglas Zona, *Ohio School Milk Markets: An Analysis of Bidding*, 30 RAND J. ECON. 263 (1999) [hereinafter Porter & Zona, *Ohio School Milk Markets*].

80 Although it can be difficult to address such measures effectively through competition law enforcement, competition law and competition advocacy have an important role to play. *See generally* Eleanor M. Fox & Deborah Healey, *When the State Harms Competition—The Role for Competition Law*, 79 ANTITRUST L.J. 769 (2014); *infra* Section III.B.

81 Heimler, *supra* note 4, at 860; *see infra* Section III.C.

82 *See infra* note 310 and accompanying text.

83 *See* Robert A. Burton, *Improving Integrity in Public Procurement: The Role of Transparency and Accountability*, *in* FIGHTING CORRUPTION AND PROMOTING INTEGRITY IN PUBLIC PROCUREMENT 23, 25 (2005); *supra* note 7 and accompanying text.

competitors and detect deviations from a cartel agreement.[84] Therefore, unless appropriately tailored, transparency requirements can actually facilitate bid-rigging schemes.[85] In contrast, carefully designed transparency requirements can serve a variety of procompetitive purposes.[86]

6. Procurement Models

Procurement design may also create potential risks. For example, sealed bidding tenders are easier to rig than negotiated procurements, which allow the buyer to push for better terms and thus potentially induce a cartel to cheat. Nonetheless, negotiated procurements can also entail risks in corrupt systems where the negotiation is treated as an opportunity to broker a bribe.[87]

7. Corrupt Advisors

Cartels sometimes enlist the assistance of trade associations and consultants to design and manage their operations. Such assistance may be critical as the complexity of a collusive scheme increases.[88] In the EU, for example, Fides/AC Treuhand, an association-management company, was found to have helped guide the implementation of a number of chemical-sector cartels.[89] In public procurement, corrupt government officials may also play a role in facilitating the operation of cartels.[90]

In a study of bid rigging in relation to US public school milk, Robert Porter and Douglas Zona noted several market traits that encouraged collusion.[91] They found that: price competition was typically the only dimension

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84 It is harder for bidders to collude if sensitive bid data and tenderer information is not made publicly available during the course of, or subsequent to, an auction. *See, e.g.*, Edward J. Green & Robert H. Porter, *Noncooperative Collusion Under Imperfect Price Information*, 52 ECONOMETRICA 87, 90–91 (1984); Hong Wang & Hong-min Chen, *Deterring Bidder Collusion: Auction Design Complements Antitrust Policy*, 12 J. COMPETITION L. & ECON. 31, 33, 38–39 (2016); Stigler, *supra* note 65.

85 Transparency measures should not be abandoned but their ability to facilitate collusion must be recognized. *See, e.g.*, MARSHALL & MARX, *supra* note 4, 20–21; *infra* Part III.

86 *See infra* Sections III.A–B.

87 *See infra* Section III.A.

88 *See, e.g.*, SIMON BISHOP & MIKE WALKER, THE ECONOMICS OF EC COMPETITION LAW: CONCEPTS, APPLICATION AND MEASUREMENT 173–74 (3d ed., 2010).

89 Case C-194/14 P, AC-Treuhand AG v. Comm'n, ECLI:EU:C:2015:350 (Oct. 22, 2015); *see also* Case C-542/14, 'VM Remonts' SIA v. Konkurences padome, EU:C:2016:578 (Dec. 3, 2015), *supra* note 62; ; William E. Kovacic, Robert C. Marshall & Michael J. Meurer, *Serial Collusion by Multi-Product Firms* 6 J. ANTITRUST ENFORCEMENT 296 (2018) (King's Coll. London Dickson Poon Sch. of Law, Legal Studies Research Paper Series: Paper No. 2018-28, 2018), https://ssrn.com/abstract=3235398; Robert C. Marshall, *Unobserved Collusion: Warning Signs and Concerns*, 5 J. ANTITRUST ENFORCEMENT 329, 330 (2017).

90 *See infra* Section I.C.

91 Porter & Zona, *Ohio School Milk Markets*, *supra* note 79.

of competition; demand was inelastic and stable; firms faced similar costs of production; opportunities for new entry were limited; markets were concentrated and localized given relatively high transport costs; bidding was a repeated game, carried out in small lots; multimarket contact was enhanced by disaggregated contracts staggered throughout the year; bids and bidders were made public after sealed bid auctions allowing any cheating to be observed; pricing was transparent; and parties often met through trade associations or through being customers of one another.

Procurement markets may, therefore, be susceptible to well-documented collusive techniques, such as those listed in Box 3 below.

Box 3. Common bid-rigging practices

* *Bid suppression.* One or more competitors agree not to bid or to withdraw a bid to ensure that a designated firm wins.

* *Cover, courtesy, or complementary bidding*. One or more cartelists agree to submit bids they know will be unacceptable because they are too high or do not comply with other important terms.

* *Market or customer allocation.* Firms agree not to bid against competitors or to avoid competing for business (for example, by submitting only complementary bids) in certain geographic areas or in relation to certain tenderers.[92]

* *Bid rotation.* Cartel members all submit bids, but take turns submitting a winning bid.

* *Identical tendering, joint tendering, or subcontracting*. Although joint tendering[93] and subcontracting[94] can be legitimate (for example where allowing firms to be able to tender at all or to tender more efficiently), it may constitute anticompetitive bid rigging

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92 Firms may also engage in allocation of batches divided in a single tender. *See* U.S. DEPT. OF JUSTICE, PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES: WHAT THEY ARE AND WHAT TO LOOK FOR 2–3, https://www.justice.gov/atr/file/810261/download.

93 *See generally* Cyril Ritter, *Joint Tendering Under EU Competition Law*, 2 CONCURRENCES REV. 60 (2017); Christopher Thomas, *Two Bids or not to Bid? An Exploration of the Legality of Joint Bidding and Subcontracting Under EU Competition Law*, 6 J. EUR. COMPETITION L. & PRAC. 629 (2015) (discussing how a line can be drawn under EU competition law between legitimate joint tendering or selling—for example, where it allows two firms to produce efficiencies that outweigh the competition concerns or to be able to tender at all—and anticompetitive bid rigging).

94 *See generally* Thomas, *supra* note 93. Subcontracting is not necessarily anticompetitive, however, if it is not done in furtherance of efforts to limit competition in the award of the main contract. *Id.*

when used in relation to projects which could be undertaken individually.

Each of these practices is designed to mask collusion and create a false impression or illusions of a genuine competitive bidding process.[95] Instead of competing to submit the lowest possible tender at the tightest possible margin, the parties thwart the essence of the tendering process—to extract the most competitive, cost-effective bid for the products or services through tendering—by limiting price competition or sharing markets between bidders.[96] In many cases the schemes incorporate mechanisms to apportion and distribute profits among parties, for example, through compensation or side payments, or by having the winning bidder subcontract work to losing or nontendering firms.[97]

C. *Incentives and Conditions Facilitating Corruption in Public Procurement Markets*

Corruption is another major obstacle to achieving efficiency and optimizing the use of public money.[98] In a broad sense, corruption in public administration may be defined as the abuse, by public officials, for private gain, of power that has been entrusted to them.[99] In the context of public procurement markets, these abuses typically involve conduct such as the awarding of contracts, the placing of suppliers on relevant lists, or other administrative actions taken not for objective public interest reasons, but for improper compensation or other reciprocal benefits (e.g., bribes, lavish holidays, promises of subsequent employment, also known as golden parachutes,[100] or contribution to political funds).

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95 *See, e.g.*, Anderson, Kovacic & Müller, *Synergies with Trade Liberalisation*, *supra* note 18, at 5; Heimler, *supra* note 4, at 855; Robert C. Marshall, Leslie M. Marx & Michael J. Meurer, The Economics of Auctions and Bidder Collusion (Mar. 1, 2012) (unpublished manuscript). In procurement markets, customers may be vigilant for cartel behavior even if bid rigging is stable on the supply side; therefore, it may be vulnerable to detection on the buyer side. Anderson, Kovacic & Müller, *Synergies with Trade Liberalisation*, *supra* note 18, at 5; *infra* Section II.B.1.

96 It is distinct from joint bidding made openly and with knowledge of the party seeking the tenders. *See* Thomas, *supra* note 93, at 630, 633.

97 *See* U.S. DEPT. OF JUSTICE, *supra* note 92.

98 *See* OECD, PREVENTING CORRUPTION IN PROCUREMENT 6 (2016), http://www.oecd.org/gov/ethics/Corruption-Public-Procurement-Brochure.pdf.

99 *See, e.g.*, *FAQs on Corruption*, TRANSPARENCY INT'L, https://www.transparency.org/whoweare/organisation/faqs_on_corruption (last visited on Apr. 5, 2019).

100 *See* Steven Van Uytsel, Assoc. Prof., Kyushu Univ., Am I a Bid Rigger? How Bureaucrats Came Within the Focus of Regulating Bid Rigging in Japan, Presentation at the Asian Competition Forum (Dec. 12, 2017), https://asiancompetitionforum.com/s/Am-I-a-Bid-Rigger.pptx.

As emphasized in Sections I.A and I.B, corruption often coexists with, and supports or reinforces, supplier collusion. In bid-rigging schemes, it may not be easy for members to find a mechanism to agree who will win each tender and the winning price, to curb cheating, and to prevent nonmembers from disrupting the arrangement by submitting a lower bid. In this sense, the enlistment of a public official into the scheme may facilitate the policing and smooth operation of the cartel, boost its stability, protect firms' rents, and minimize the risk of the scheme's detection.[101] Particularly in industries where bidders and officials are in regular contact and have close and repeated interaction, public officials may turn a blind eye to and bolster the unlawful collusive arrangements by tailoring procurement specifications, directing contracts to favored bidders, informing cartelists about outsider bids, or allowing adjustment of bids at the unsealing stage in return for cash or other improper compensation.[102] In some situations, procurement officials may even instigate or orchestrate the cartel. Bribery may therefore have a demand-side ingredient (where the public officials solicit or extort pecuniary or other benefits) or a supply-side component (where businesses offer bribes or other advantages to public officials).

Indeed, procurement processes provide particularly severe temptations for government officials to sell their office and are among those most prone to corrupt practices.[103] Two commentators have observed that "few government activities create greater temptations or offer more opportunities for corruption than public sector procurement."[104] For example, incentives for corruption are exacerbated when poorly paid officials confront the opportunity for large financial gains or other rewards, while weak systems of public administration minimize the risk of detection or punishment. The large sums of money involved in government contracts makes the allure of skimming powerful, especially as in some cases "[t]he potential reward for a single contract . . . can exceed the legitimate lifetime salary earnings of [a] decision-maker."[105] In addition, where a culture of corruption is perceived to exist, all

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101 *See id*.; *see also* Ariane Lambert-Mogiliansky, *Corruption and Collusion: Strategic Complements in Procurement*, *in* 2 INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION 108 (Susan Rose-Ackerman & Tina Søreide eds., 2011); Diego Gambetta & Peter Reuter, *Conspiracy Among the Many: The Mafia in Legitimate Industries*, *in* THE ECONOMICS OF ORGANISED CRIME 116, 117, 119–20 (Gianluca Fiorentini & Sam Peltzman eds., 1995) (comparing government officials with family members policing organised crime in Sicily and New York).

102 Allan T. Ingraham, *A Test for Collusion Between a Bidder and an Auctioneer in Sealed-Bid Auctions*, 4 CONTRIBUTIONS IN ECON. ANALYSIS & POL'Y 1 (2005) (referring to a case involving New York City School Construction Authority auctions).

103 Anderson, Kovacic & Müller, *Synergies with Trade Liberalisation*, *supra* note 18.

104 SUSANNE KÜHN & LAURA B. SHERMAN, TRANSPARENCY INT'L, CURBING CORRUPTION IN PUBLIC PROCUREMENT: A PRACTICAL GUIDE 4 (2014), http://files.transparency.org/content/download/1438/10750/file/2014_AntiCorruption_PublicProcurement_Guide_EN.pdf.

105 *See* Donald Strombom, *Corruption in Procurement*, 1998 ECON. PERSP. 20, 20; *see also* TINA SØREIDE, CHRISTIAN MICHELSEN INST., CORRUPTION IN PUBLIC PROCUREMENT: CAUSES,

bidders may offer bribes even if they would be better off without corruption.[106] Tenderers may feel compelled to offer bribes out of fear that if they do not, they will be bound to lose a contract.

D. *Harm Caused*

1. Collusion

Successful cartels result in higher prices, deadweight loss, productive inefficiency, and dynamic harm from reduced incentives to innovate. The costs of forming and enforcing a cartel also reduce consumer welfare.[107] Further, bid rigging in public procurement wastes public funds, diminishes public confidence in, and the benefits of, the competitive process, and denies citizens, especially the disadvantaged, improvements in vital social services.[108] It may also be "detrimental for democracy and for sound public governance."[109] Finally, bid rigging inhibits "investment and economic development," and these "deficiencies in public procurement impact . . . the wider economy in a way that does not occur with private procurement."[110]

Although assessing cartel harm precisely is not easy, a paper focusing on bid rigging in Japan suggests that procurers paid sixteen to thirty-three percent more than they would have paid in a competitive bid process.[111] A report published by the WBG in 2011 investigating misconduct in WBG-funded road projects, provides evidence that bid rigging in procurement markets leads to sharply inflated prices[112] and reductions in quality or safety of products and services provided.[113] Further, it documents examples of bid rigging which reportedly increased prices in Korea, the Netherlands, the

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CONSEQUENCES AND CURES 4 (2002). *But see* Wakui, *supra* note 46, at 49 (procurement agents are also sometimes motivated by a desire to favor local suppliers and grow the regional economy, ensure continuity, reward suppliers with good reputation for past performance, and ensure high quality of performance; therefore, private financial interest may not be the sole or major reason for officials' involvement).

106 SØREIDE, *supra* note 105, at 32–33.

107 Mario Monti, *Why Should We Be Concerned with Cartels and Collusive Behavior?*, *in* FIGHTING CARTELS – WHY & HOW? 14, 16–17 (2001).

108 *See* OECD, COMPETITION AND PROCUREMENT: KEY FINDINGS 10 (2011), http://www.oecd.org/regreform/sectors/48315205.pdf.

109 *Id.* at 31.

110 *Id.*

111 *See* John McMillan, Dango*: Japan's Price-Fixing Conspiracies*, 3 ECON. & POL. 201, 201 (1991); Mitsuhiro Nihashi, Tatsuyoshi Saijo & Masashi Une, *The Outsider and Sunk Cost Effects on 'Dango' in Public Procurement Bidding: An Experimental Analysis* 1 (Inst. of Soc. & Econ. Res., Osaka Univ., Discussion Paper No. 514, 2000).

112 WORLD BANK, *supra* note 32, at 2 ("In the Cambodia Provincial Rural Infrastructure Project, collusion sharply inflated construction costs.").

113 *Id.* at 2 ("In Indonesia, the use of substandard construction materials reduced the useful life of a road and damaged the vehicles using it. . . . INT also saw contractors fraudulently failing to comply with such essential safety features as lane markings, resulting in a sharply increased risk of accidents.").

Philippines, Romania, Tanzania, Turkey, and the US, by up to sixty percent in some cases.[114]

More generally, some competition agencies estimate that cartels charge at least ten percent over the competitive price.[115] A number of empirical studies suggest, however, that this figure is conservative and cartels "lead to prices well in excess of 10 per cent, and sometimes in excess of 20 per cent, of competitive levels."[116] In his studies of US cartel decisions, Professor John Connor concludes that the median cartel overcharge is closer to twenty-five percent.[117] Although for the reasons described above, bid-rigging conspiracies are often considered to be especially harmful, their economic harm resembles that of other cartel activity.[118] It may be, however, that they occur more frequently and tend to last longer.[119]

If bid riggers can set prices at approximately twenty percent above competitive prices, then reducing the volume of bid rigging, even by a small percentage, can yield significant savings to the public purse and ensure better-quality work and the provision of more and improved public services.[120] There is, consequently, an attractive rate of return to be had from expanded antitrust enforcement work in this sphere.

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114 *Id*. at 14 tbl.3.

115 *See* OECD, GUIDE FOR HELPING COMPETITION AUTHORITIES ASSESS THE EXPECTED IMPACT OF THEIR ACTIVITIES 4 (2014), http://www.oecd.org/daf/competition/Guide-competition-impact-assessmentEN.pdf. Most competition agencies do not provide a formal analysis of how much higher prices were paid during a cartel in their decisions. According to the Competition & Markets Authority, evidence suggests that cartels—including bid rigging—lead to overcharges of up to twenty percent. *See* Press Release, Competition and Markets Authority & Crown Commercial Service, Procurement E-Learning Module Targets Bid-Rigging Cheats (June 20, 2016), https://www.gov.uk/government/news/procurement-tool-targets-bid-rigging-cheats.

116 Luke M. Froeb, Robert A. Koyak & Gregory J. Werden, *What Is the Effect of Bid Rigging on Prices?*, 42 ECON. LETTERS 419 (1993).

117 *See, e.g.*, John M. Connor, Price-Fixing Overcharges: Revised 3rd Edition 1, 51, 53–54 (unpublished working paper) (Feb. 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400780 (study of more than 700 economic studies and judicial decisions (and 2041 quantitative estimates of overcharges), estimating a long-run median overcharge of twenty-three percent for all cartels, but with twenty-five percent lower mark-ups in bid-rigging cases); *see also* John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 TULANE L. REV. 513, 559–60 (2005); Levenstein & Suslow, *supra* note 75, at 56.

118 *See, e.g.*, Connor, *supra* note 117, at 54. *But see* Anderson & Kovacic, *supra* note 4, at 80 (bid rigging of frozen-seafood contracts raised prices by 23.1%).

119 *See, e.g.*, Michael Hellwig & Kai Hüschelrath, *Cartel Cases and the Cartel Enforcement Process in the European Union 2001–2015: A Quantitative Assessment*, 62 ANTITRUST BULLETIN 400, 420 (2017); Rosa M. Abrantes-Metz, John M. Connor & Albert D. Metz, *The Determinants of Cartel Duration* 24 (Purdue Univ. Working Paper May 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2263782; Jeffrey E. Zimmerman & John E. Connor, *Determinants of Cartel Duration: A Cross-Sectional Study of Modern Private International Cartels* 22–23 (Purdue Univ. Working Paper, Aug. 2, 2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1158577.

120 Anderson & Kovacic, *supra* note 4, at 71.

2. Corruption

The cost and incidence of corruption[121] is, like cartel behavior, difficult to identify[122] and measure because of its hidden nature and because of the variety of forms it takes.[123] Further, it is hard to create robust corruption indicators. Those utilized tend to be derived from, for example, surveys of stakeholder attitudes and perceptions, reviews of institutional features controlling corruption, or audits and investigations of individual cases.[124]

Nonetheless, studies draw attention to a correlation between the level of corruption, competitiveness, economic development, and growth[125]—"a high level of corruption has a negative impact on economic development,"[126] especially because it leads to political instability—and between corruption, inequality, and populism.[127] More specifically, research suggests that procurement-related bribery: squanders resources that the government otherwise could invest productively in public goods, services, infrastructure, and social services (especially in education and health care) by increasing the cost of public procurement projects and draining public funds; undermines the effectiveness of procurement systems in selecting the most efficient contractor; hinders the efficient allocation of resources and reduces innovation incentives; curbs productivity, economic growth, and development; discourages foreign investment; lowers the quality of procured goods, services, and

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121 OECD, OECD BUSINESS AND FINANCE OUTLOOK 2017, at 95 (2017) ("Bribery and corruption are vast global industries."); Jakob Svensson, *Eight Questions About Corruption*, 19 J. ECON. PERSP. 19, 24–26 (2005) (corruption is driven by a country's wealth, its culture, whether citizens have a voice in a democratic process and good governance structures, such as freedom of the press).

122 Roberto Burguet & Yeon-Koo Che, *Competitive Procurement with Corruption*, 35 RAND J. ECON. 50, 51 (2004).

123 *See* Svensson, *supra* note 121, at 20–21.

124 Mihály Fazekas & Gábor Kocsis, *Uncovering High-Level Corruption: Cross-National Corruption Proxies Using Government Contracting Data* 4–5 (Gov't Transparency Inst., Working Paper Series: GTI-WP/2015:02, 2015), http://www.govtransparency.eu/wp-content/uploads/2015/11/GTI_WP2015_2_Fazekas_Kocsis_151015.pdf ("[T]he two most widely used [attitude and perception surveys] are the World Bank's Control of Corruption and Transparency International's Corruption Perceptions Index. Both of these have received extensive criticism . . . ." (citations omitted)); *see also* Svensson, *supra* note 121, at 34–36.

125 *See, e.g.*, ROBERT WADE, GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION 3–7 (Princeton Univ. Press, 1990); Sanjeev Gupta et al., *Corruption and the Provision of Health Care and Education Services*, *in* THE POLITICAL ECONOMY OF CORRUPTION 111, 115–19 (Arvind K. Jain ed., 2001); Roger P. Alford, *A Broken Windows Theory of International Corruption*, 73 OHIO ST. L.J. 1253, 1255–56 (2012); Patrick M. Emerson, *Corruption, Competition and Democracy*, 81 J. DEV. ECON. 193, 208, 211 (2006); Johann Graf Lambsdorff, *How Corruption Affects Persistent Capital Flows*, 4 ECON. GOVERNANCE 229, 230 (2003); Shang-Jin Wei, *How Taxing is Corruption on International Investors?*, 82 REV. ECON. & STAT. 1, 8 (2000).

126 Raymond Fisman & Roberta Gatti, *Bargaining for Bribes: The Role of Institutions*, *in* INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION 127, 127 (Susan Rose-Ackerman ed., 2006); *see also* Svensson, *supra* note 121.

127 *See* TRANSPARENCY INT'L, *supra* note 99.

infrastructure and leads to corrupt strategies during contract implementation; leads to the implementation of unnecessary contracts; contributes to the creation of unequal societies and higher levels of organized crime; weakens the institutional foundations on which economic growth depends; leads to the capture of state institutions by private firms; distorts the rule of law; undermines the reputation, credibility of and trust in government which threatens democracy; and lowers voter turnout in elections.[128]

Older work estimated that the volume of bribes changing hands for public sector procurement was approximately $200 billion per year (2004);[129] three percent of world GDP and 3.5% of world procurement spending has been paid in bribes in developing and developed economies each year;[130] and sixty percent of companies admit to paying bribes.[131] Further, an OECD study documents significant savings (sometimes of up to nearly fifty percent) in certain procurement costs in some countries following the introduction, or

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128 *See, e.g.*, OECD, *supra* note 121, at 116 (noting that less corrupt countries are likely to invest more abroad and so to benefit via foreign sales and scale economics); SØREIDE, *supra* note 105; Boehm & Olaya, *supra* note 27, at 439; Burguet & Che, *supra* note 122; Mohsin Habib & Leon Zurawicki, *Corruption and Foreign Direct Investment*, 33 J. INT'L BUS. STUD. 291, 303–04 (2002); Johann Graf Lambsdorff, *Causes and Consequences of Corruption: What Do We Know From a Cross-Section of Countries?*, *in* INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION 3, 4–5 (Susan Rose-Ackerman ed., 2006) (reviewing investigations suggesting that corruption lowers GDP growth, robust empirical findings that foreign investments are significantly deterred by corruption, and evidence that corruption is also caused by inequality); Paolo Mauro, *Corruption and Growth*, 110 Q. J. ECON. 681 (1995); Pak Hung Mo, *Corruption and Economic Growth*, 29 J. COMP. ECON. 66–79 (2001); OECD, CONSEQUENCES OF CORRUPTION AT THE SECTOR LEVEL AND IMPLICATIONS FOR ECONOMIC GROWTH AND DEVELOPMENT (2015), http://www.oecd.org/publications/consequences-of-corruption-at-the-sector-level-and-implications-for-economic-growth-and-development-9789264230781-en.htm; Sean Richey, *The Impact of Corruption on Social Trust*, 38 AM. POL. RES. 676, 687 (2010); Vito Tanzi, *Corruption Around the World: Causes, Consequences, Scope, and Cures*, 45 IMF STAFF PAPERS 559, 571 (1998); General Trevor N. McFadden, Acting Principal Deputy Assistant Attorney, Remarks Before the American Conference Institute's 7th Brazil Summit on Anti-Corruption (May 24, 2017), https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-american.

129 Yvan Lengwiler & Elmar Wolfstetter, *Corruption in Procurement Auctions*, *in* HANDBOOK OF PROCUREMENT 412, 413 (Nicola Dimitri et al. eds., 2006); *see also* Auriol, *supra* note 31, at 868 ("According to an ongoing research at the World Bank, the total amount of bribery for public procurement can hence be estimated in the vicinity of USD 200 billion per year. That is, approximately 3.5% of the world procurement spending. Assuming this figure is accurate, it represents only one part of the overall cost of corruption because corruption usually involves allocative inefficiency on top of the bribes." (footnote omitted)); Krista Nadakavukaren Schefer & Mintewab Gebre Woldesenbet, *The Revised Agreement on Government Procurement and Corruption*, 47 J. WORLD TRADE 1129, 1131 (2013).

130 *See* Auriol, *supra* note 31, at 868.

131 In a study conducted by Transparency International in 2002 to build its second Bribe Payers Index of leading exporting countries, sixty percent of the respondents claimed that corruption in international business, especially in public works contracts, construction and arms and defense industries, had either increased or remained the same. *See* Press Release, Transparency Int'l, Transparency International Releases New Bribe Payers Index (BPI) 2002, (May 13, 2002), https://www.transparency.org/news/pressrelease/transparency_international_releases_new_bribe_payers_index_bpi_2002.

improvement, of transparency and procurement procedures,[132] and studies prepared for the European Commission have found substantial savings following implementation of the EU Public Procurement Directives.[133]

More recently, it has been estimated that between twenty and thirty percent of the investment in publicly funded construction projects may be lost through mismanagement and corruption.[134] A 2016 European Parliamentary Research Service report assessed the cost of corruption risk in public procurement in the EU to be €5 billion,[135] while an OECD report estimated that "individuals and companies pay bribes in the vicinity of the size of France's GDP . . . . [A]round USD 2 trillion per annuum."[136] Transparency International also estimates that roughly $2 trillion disappears annually from procurement budgets and that "few examples of corruption cause greater damage to the public purse and harm public interests to such a grave extent."[137] Others have calculated that systemic corruption can add twenty to twenty-five percent to the cost of government procurement or roughly $200 billion per year[138] and that the bribes paid per annum amounts to "more than half of the global economy's needs for productivity-enhancing infrastructure investment to 2030."[139] The bribes also do not "help growth in host countries where foreign investment is concerned, but instead money disappears into shelf companies and foreign bank accounts of corrupt politicians and officials."[140]

In addition, the OECD's Foreign Bribery Report for 2014 indicates that nearly sixty percent of foreign bribery relates to public procurement (especially in the extractive, construction, transportation and storage, and information and communication sectors), and in a majority of cases senior corporate management knew of the bribery,[141] which dispels the idea that the

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132 *See* OECD, Transparency in Government Procurement: The Benefits of Efficient Governance and Orientations for Achieving It, at 8, TD/TC/WP(2002)31/FINAL (May 5, 2003), http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TD/TC/WP(2002)31/FINAL&docLanguage=En (discussing Colombia, Guatemala, Bangladesh, Nicaragua, and Pakistan).

133 *See Internal Market Industry, Entrepreneurship and SMEs: Studies, Data and Expert Groups*, EUR. COMM'N, (last visited April 4, 2019), https://ec.europa.eu/growth/single-market/public-procurement/studies-networks_en.

134 *See, e.g.*, JILL WELLS, CORRUPTION, GRABBING AND DEVELOPMENT: REAL WORLD CHALLENGES 23 (Tina Søreide & Aled Williams eds., 2014); Press Release, Constr. Sector Transparency Initiative, UK Launch of the CoST International Programme (Oct. 22, 2012) (stating annual losses from mismanagement, inefficiency and corruption in global construction could amount to $2.5 trillion annually by 2020).

135 *See* Eur. Parliamentary Res. Serv., *supra* note 10, at 50–51, 58 (estimating that ten to thirty percent of publicly funded construction projects in EU Member States is lost due to corruption).

136 *See* OECD, *supra* note 121, at 96.

137 TRANSPARENCY INT'L, *supra* note 104, at 8.

138 *See* KHI V. THAI, INTERNATIONAL HANDBOOK OF PUBLIC PROCUREMENT 20 (Evan M. Berman & Jack Rabin eds. 2009).

139 *See* OECD, *supra* note 121, at 95–96.

140 *See id.*

141 OECD, FOREIGN BRIBERY REPORT: AN ANALYSIS OF THE CRIME OF BRIBERY OF FOREIGN PUBLIC OFFICIALS 21 (2014).

conduct was merely that of a proverbial rogue, low-level employee. This is partly perhaps because of the close interaction between the public and the private sectors and the size of the financial flows public procurement generates. The OECD's Business and Finance Outlook for 2017 observes that "[o]btaining and retaining government contracts is, by far, the most common motivation for financial intermediaries" bribes to public officials (it was a motivating factor in seventy-three percent of cases).[142] "[T]he desire to obtain or retain government business was the dominant motivation for foreign bribery in all sectors, and even more so in the financial sector."[143] One judge from the Pole Financier reportedly stated there are few cases of large-scale collusion in procurement where corruption is absent; it is frequently necessary to buy the official's silence or to achieve strategic complementarities.[144]

II. STRENGTHENING CONVENTIONAL TOOLS TO ADDRESS SUPPLIER COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT MARKETS

The high risk and incidence of bid rigging and bribery in public procurement and their resulting harm underly the need for clear rules outlawing such conduct and effective enforcement of such rules.

A. *Putting the Requisite Frameworks in Place*

1. Competition law

More than 130 jurisdictions around the world now have competition systems in place,[145] which may be enforced publicly by competition agencies and privately by individuals harmed by violations. Most of these, to prevent firms from distorting competition, stand on three main substantive pillars, one of which prohibits restrictive agreements and cartel activity, including bid rigging or collusive tendering.[146] Indeed as consensus over the economic harm caused by cartels has emerged, international initiatives[147] and greater

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142 OECD, *supra* note 121, at 100.

143 *Id.*

144 *See* Lambert-Mogiliansky, *supra* note 101, at 2.

145 *See* William E. Kovacic & Marianela Lopez-Galdos, *Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Systems*, 79 L. & CONTEMP. PROBS. 85, 86 (2016).

146 Alison Jones & William E. Kovacic, *Identifying Anticompetitive Agreements in the U.S. & the Eur. Union: Developing a Coherent Antitrust Analytical Framework*, 62 ANTITRUST BULLETIN 254 (2017).

147 *See, e.g.*, OECD, FIGHTING HARD-CORE CARTELS: HARM, EFFECTIVE SANCTIONS AND LENIENCY PROGRAMMES (2002), https://www.oecd.org/competition/cartels/1841891.pdf; OECD, HARD CORE CARTELS: THIRD REPORT ON THE IMPLEMENTATION OF THE 1998 RECOMMENDATION (2005), https://www.oecd.org/competition/cartels/35863307.pdf. The GPA also promotes competition (and the eradication of collusion) in procurement markets in a number of ways.

multilateral and bilateral cooperation between competition authorities has contributed significantly to the dramatic shift in perceptions of, and attitudes towards, cartels and also to the development of an international fight against them.[148] A "truly global effort against hard core cartels" has emerged.[149]

As a result, modern antitrust systems clearly prohibit cartel activity, summarily condemning it through the application of a per se rule or a strong presumption of illegality.[150] Rather than the question of how substantive analysis should be conducted, therefore, the core issues in the context of cartels have become how cartel activity can be combatted, detected, deterred, and sanctioned.

2. National and International Anticorruption Instruments

Corruption in public procurement markets is generally targeted by national criminal justice rules, legislation on ethics in public office, and public procurement regulations.[151] An important, early example of a national instrument with far-reaching international application is the US Foreign Corrupt Practices Act ("FCPA"), signed into law by President Jimmy Carter in 1977. This legislation was enacted for the purpose of making it unlawful for US persons and certain foreign issuers of securities, to make payments to foreign government officials to assist in obtaining or retaining business. Since its 1998 amendment, the antibribery provisions of the FCPA also apply to foreign firms, persons, and corrupt payments taking place within US territory.[152]

Increasingly, corruption is also the subject of international instruments and guidelines.[153] As has been the case for cartels, recent years have brought

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148 *See* INT'L COMPETITION NETWORK [ICN], DEFINING HARD CORE CARTEL CONDUCT: EFFECTIVE INSTITUTIONS; EFFECTIVE PENALTIES 2, 5, 15 (2005), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_BuildingBlocks.pdf.

149 *Id.* at 5.

150 For example, in the US cartel arrangements are considered to be illegal per se under Section 1 of the Sherman Act of 1890. *See* N. Pac. R. v. United States, 356 U.S. 1, 5 (1958). Similarly, in the EU, cartels generally violate Article 101 TFEU—they automatically infringe Article 101(1) (restrict competition by object)—and, being naked, are incapable of satisfying the conditions for the legal exception set out in Article 101(3). *See* Jones & Kovacic, *supra* note 146.

151 Steven Schooner, Professor, George Washington Univ., Government Procurement and Corruption Prevention: Lessons from Recent International Experience, Presentation to the WTO Advanced Workshop on Government Procurement and Governance, 10–14 (Nov. 2018).

152 15 U.S.C. §§ 78dd-1 (1998). Petrobras has agreed to pay $853.2 million to settle charges relating to bribing politicians and seeking to conceal payments in breach of the Act. *See* MINISTERIO PÚBLICO FEDERAL, *supra* note 11; *Brazil's Petrobras to Pay $853 million fine in U.S. Car Wash Probe*, REUTERS (Sept. 2018), https://www.reuters.com/article/us-petrobras-lawsuit/brazils-petrobras-to-pay-853-million-u-s-fine-in-car-wash-probe-idUSKCN1M71J1; *supra* note 33 and accompanying text.

153 *See* UNITED NATIONS OFFICE ON DRUGS AND CRIME [UNODC], GUIDEBOOK ON ANTI-CORRUPTION IN PUBLIC PROCUREMENT AND THE MANAGEMENT OF PUBLIC FINANCES: GOOD PRACTICES IN ENSURING COMPLIANCE WITH ARTICLE 9 OF THE UNITED NATIONS CONVENTION AGAINST

a global change in thinking and a reshaping of many national anticorruption laws; a general acceptance of the economic and other harms caused by corruption; and a multipronged strategy for combatting it that includes harmonizing regulation and tying conditions to MDB infrastructure loans.[154] Of particular importance has been the United Nations Convention Against Corruption ("UNCAC"), which seeks to prevent and combat corruption and is designed to bring harmonization across the numerous signatories and ratifying jurisdictions.[155] It tackles demand- and supply-side corruption issues and specifically applies to corruption within procurement (especially Article 9) by requiring procurement systems to be based on "transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption."[156] UNCAC requires Member States to establish (or in some cases to consider establishing) criminal offenses against a wide range of corrupt acts, including domestic and foreign bribery and embezzlement of public funds.[157] Implementation is monitored through the Conference of States Parties, a peer-review process, and a country-based database is kept up to date on the United Nations Office on Drugs and Crime ("UNODC") website.[158]

UNCAC also contains provisions on international cooperation, asset recovery, and a chapter on preventive policies, including the establishment of anticorruption bodies, introduction of transparent recruitment processes, codes of conduct for public servants, and promotion of transparency and accountability in public finance.[159]

The OECD Convention on Bribery of Foreign Officials also promotes the adoption of anti-bribery laws by member nations[160] and the OECD has issued Recommendations on Combatting Bribery and promulgated a set of Principles for Integrity in Public Procurement, designed to enhance integrity throughout the entire procurement process.[161] Many international trade

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CORRUPTION 3 (2013), https://www.unodc.org/documents/corruption/Publications/2013/Guidebook_on_anti-corruption_in_public_procurement_and_the_management_of_public_finances.pdf.

154 *See, e.g.*, Indira Carr & Opi Outhwaite, Investigating the Impact of Anti-Corruption Strategies on International Business: An Interim Report 8 (2009) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1410642.

155 The UN General Assembly adopted the resolution on October 31, 2003. *See* G.A. Res. 58/4, United Nations Convention Against Corruption (Oct. 31, 2003).

156 *Id.* art. 9, ¶ 1.

157 *Id.* arts. 15–42.

158 *See generally* Edmund Bao & Kath Hall, Peer Review and Global Anti-Corruption Conventions: Context, Theory and Practice (2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3025230.

159 *See* G.A. Res. 58/4 arts. 5–14, 43–59.

160 *See* OECD, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 47 (2009) (entered into force Feb. 15, 1999).

161 *See* OECD, OECD PRINCIPLES FOR INTEGRITY IN PUBLIC PROCUREMENT 10 (2009), https://www.oecd.org/gov/ethics/48994520.pdf.

instruments also require signatories to ensure the procurement process is free of corruption and conflicts of interest.[162]

Numerous jurisdictions have now enacted or revamped bribery or anti-corruption laws to meet international standards, obligations, and the UNCAC requirements.[163] One of the most stringent anticorruption statutes is the UK's Bribery Act 2010, which overhauled ancient laws governing bribery to meet concerns about their effectiveness.[164] It criminalizes bribery (both the offering and receiving of bribes) in both the public and private sector, bribery concerning foreign public officials and officials of public international organizations as well as the failure to prevent bribes from being paid on an organization's behalf. As is the case in a number of jurisdictions, UK law also provides that a person convicted for specified bribery or corruption offenses may be debarred or excluded from bidding for public sector contracts or have existing contracts terminated.[165]

B. *Enhancing Enforcement*

In order to deter bid rigging and corruption in public procurement, there must be, in addition to clear rules against them, a high risk of the illegal conduct being uncovered[166] and prohibited and effective sanctions being imposed.

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162 *See Revised Agreement on Government Procurement*, WTO, https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm (last visited Mar. 30, 2019).

163 *See generally* FROM BACKSHEESH TO BRIBERY: UNDERSTANDING THE GLOBAL FIGHT AGAINST CORRUPTION AND GRAFT (T. Markus Funk & Andrew S. Butros eds., 2019) (surveying the global fight against corruption).

164 *See generally* MONTY RAPHAEL, BRIBERY: LAW AND PRACTICE (2016).

165 *See infra* Section II.C.

166 Becker's research on major felonies in the US suggests that the probability of detection had a greater impact on the commission of such offenses than the level of punishment. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 207–09 (1968); *infra* note 245 and accompanying text. Arguably, competition agencies could prioritize further resources on detecting these cartels. For example, out of 113 cartels uncovered by the European Commission between 2001 and 2015, only four of these related to bid rigging. *See* Hellwig & Hüschelrath, *supra* note 119. Some jurisdictions are taking steps to increase enforcement in this area. *See* Press Release, Dep't of Justice, Office of Pub. Affairs, Justice Department Announces Procurement Collusion Strike Force: A Coordinated National Response to Combat Antitrust Crimes and Related Schemes in Government Procurement, Grant and Program Funding (Nov. 5, 2019), https://www.justice.gov/opa/pr/justice-department-announces-procurement-collusion-strike-force-coordinated-national-response (announcing the DOJ's creation of a procurement collusion strike force); *see also* Makan Delrahim, Assistant Att'y Gen., Dep't of Justice, Remarks at the American Bar Association Antitrust Section Fall Forum (Nov. 15, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-remarks-american-bar-association-antitrust (confirming the Antitrust Division's commitment to effective antitrust enforcement against bid rigging which cheats the US Government and American taxpayer).

1. Detection of Cartels

Companies operating cartels are generally aware of their illegality. Bid rigging tends therefore to be operated in secrecy and arranged to simulate normal market behavior, creating a challenge for enforcers to adduce sufficient evidence to piece together and support a robust and convincing finding of infringement.[167]

To uncover such conduct competition authorities must therefore be able to collect evidence through a range of measures, including the use of both reactive detection techniques (customer, competitor, or employee complaints and reporting and whistleblowing mechanisms) and proactive ones (intelligence, screening, and monitoring of bids). In many jurisdictions, there is scope to improve or supplement detection methods through use of the tools described below.

a. *Complaints, Leniency, and Whistleblowing*

Many competition and criminal enforcement agencies obtain information or evidence of infringements from complainants (such as employees, purchasers, procurement officers, or the general public), self-reporting, leniency or amnesty applicants, and even through broader whistleblowing or bounty-hunting mechanisms involving paying informers for information.

More than fifty competition authorities encourage undertakings to cooperate with them prior to or during cartel investigations through the operation of "leniency" regimes.[168] Authorities operating such programs believe that the public interest in eradicating cartels outweighs the public interest in punishing the violators that are granted full or partial leniency or amnesty.[169] The leniency regime in the US, for example, seems to have initially been successful because it makes a genuinely good offer—complete immunity from a big penalty (both fines and/or imprisonment) for the first cartel member to come forward[170]—and it generates and exploits the insecure nature of cartels and a nervousness that other cartel members may well be tempted by the same offer and win the race to obtain leniency. This ploy is reinforced by the knowledge that only the first whistleblower gets the big prize.

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167 *See* Marshall, Marx & Meurer, *supra* note 95; Monti, *supra* note 107. The standard of proof will vary from jurisdiction to jurisdiction and depend in particular on whether the prohibition is a civil or criminal one.

168 *See* ANTI-CARTEL ENFORCEMENT IN A CONTEMPORARY AGE: LENIENCY RELIGION (Caron Beaton-Wells & Christopher Tran eds., 2015). For example, as part of the task force investigating Operation Car Wash, at least seven leniency agreements have been concluded by CADE in exchange for confidential information. *See supra* Box 1.

169 *See generally* OECD, *supra* note 147, at 105–07; *see also* ICN, *supra* note 32, at Annex B.

170 *See* HARDING & JOSHUA, *supra* note 68, at 235.

> [The US regime] is thus reminiscent of the classical 'Prisoner's Dilemma'—whether to play ball now, and quickly, or risk losing altogether. The strategy thus promotes within the cartel the sense of a higher risk, first, that somebody will blow the whistle and, secondly and consequently, of the other members being convicted. This serves to outweigh the previous benefits of solidarity, that is, of big profit from the offence plus a low risk of detection and conviction.[171]

Although leniency regimes have undoubtedly proved to be an important tool, there is a growing view that such regimes have their limits and antitrust authorities should not overly rely on them.[172] In particular, they may be most successful where a cartel is close to being discovered or breaking up.[173] They may be less effective in situations (such as public procurement) where a cartel is profitable and stable.[174] They may also be used by some larger multiproduct firms operating a number of cartels as a technique to prevent cheating and deviant conduct by smaller cartel members.[175] The increasing risk of individual sanctions, criminal prosecution, and private damages actions may be making persons more wary of submitting leniency applications. To be successful, there must be a good track record of enforcement following use of other detection techniques (without which, there will be no incentive to seek amnesty).[176] Thus "theory and practical experience seem to suggest that reliance on amnesty/leniency programmes alone may produce a sub-optimal probability of cartel detection, which in turn may have a negative effect on deterrence."[177]

As a result, competition enforcement agencies might wish to collect evidence from a broader range of complainants, including competitors, customers, employees, or other whistleblowers or informants capable of delivering credible evidence. In the EU, for example, the Commission has developed a whistleblowing tool encouraging any individual to provide the Commission with information about cartel behavior or other anticompetitive business

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171 *Id*.

172 *See* Carlos Mena-Labarthe, *Mexican Experience in Screens for Bid-Rigging*, ANTITRUST CHRON., vol. 3, 2012, at 2.

173 *See* JOSEPH E. HARRINGTON JR., HANDBOOK OF ANTITRUST ECONOMICS 213, 242–43 (Paulo Buccirossi ed., 2008).

174 *See* Heimler, *supra* note 4 at 849 ("Public procurement markets differ from all others because quantities do not adjust with prices but are fixed by the bidding authority. As a result, there is a high incentive for organizing cartels . . . that are quite stable because there are no lasting benefits for cheaters" and few incentives to apply for leniency.).

175 *See* Kovacic, Marshall & Muerer, *supra* note 89, at 5.

176 *See* Donald C. Klawiter, *Conspiracy Screens: Practical Defense Perspective*, CPI ANTITRUST CHRON., Mar. 2012, at 2 [hereinafter Klawiter, *Conspiracy Screens*]; Donald C. Klawiter, *Enhancing International Cartel Enforcement: Some Modest Suggestions*, CPI ANTITRUST CHRON., Sept. 2011, at 4; Kai Hüschelrath, *How Are Cartels Detected? The Increasing Use of Proactive Methods to Establish Antitrust Infringements*, 1 J. EUR. COMPETITION L. & PRAC. 522, 523 (2010).

177 OECD, Ex Officio Cartel Investigations and the Use of Screens to Detect Cartels, at 16, DAF/COMP(2013)27 (July 7, 2014), http://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf.

practices.[178] In the UK, the Competition and Markets Authority ("CMA") in exceptional circumstances offers financial rewards of up to £100,000 to those who offer information about cartel activity.[179] More broadly, the US Federal Civil False Claims Act, known as the *qui tam* statute, offers monetary rewards for exposure of fraud affecting the government.[180] Such schemes may be more effective where whistleblowers are protected from reprisal.[181]

Further, Leniency Plus programs, where leniency applicants can get additional credit in one cartel investigation for reporting involvement in another, can be effective especially where bid rigging has been uncovered and where participants may be involved in repeated infringements. In the Brazilian Car Wash case, for example, contractors that were not eligible for leniency in the Petrobras investigation brought new cases to the attention of the authorities in order to obtain leniency in the new cases as well as a discount in the original investigation.[182] These led to several new bid-rigging investigations being launched.[183]

In addition, it is crucial that agencies themselves have the ability to detect and expose illegal conduct. Proactive detection measures not only help uncover evidence but also produce "positive externalities in terms of improving the efficacy of amnesty/leniency programmes";[184] they thus allow agencies to detect and prosecute conduct which would otherwise remain stable under a standalone amnesty or leniency regime.[185]

b. *Indicators of Bid Rigging, Monitoring, and Screening Tools*

Screens (both structural and behavioral) can provide important prima facie evidence that bid rigging may have occurred.[186] A burgeoning area of literature explores how screens, especially empirical screens based on economic and statistical analysis of variable data, including quantitative

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178 *See Cartels: Overview*, EUR. COMM'N, https://ec.europa.eu/competition/cartels/overview/index_en.html (last visited Feb. 7, 2020).

179 *See Rewards for Information About Cartels*, COMPETITION & MKTS. AUTH. (2014), https://www.gov.uk/government/publications/cartels-informant-rewards-policy.

180 *See* Alexander Dyck, Adair Morse & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?*, 65 J. FINANCE 2213, 2214–15 (2010).

181 See the Criminal Antitrust Anti-Retaliation Act of 2019, S. 2258, 116th Cong. (2019), in the US (recently expanded to cover employees who provide information relating to criminal antitrust infringements) and the EU's new Directive setting out whistleblower protection in the EU, Council Directive 2019/1937, 2019 O.J. (L 305).

182 *See* MINISTERIO PÚBLICO FEDERAL, *supra* note 11.

183 *See id.*

184 OECD, *supra* note 177, at 17.

185 *Id.*

186 *See, e.g.*, Patrick Bajari & Garrett Summers, *Detecting Collusion in Procurement Auctions*, 70 ANTITRUST L.J. 143 (2002); Kai Hüschelrath & Tobias Veith, *Cartel Detection in Procurement Markets*, 35 MANAGERIAL & DECISION ECON. 404, 405 (2013) ("[M]onitoring procurement markets through screening tools has the potential of substantial cost reductions.").

techniques (such as price variance analysis),[187] can be applied to flag possible unlawful cartel behavior[188] and demonstrates that screens are becoming increasingly important in the detection of conspiracies and manipulations.[189] Because screens typically just flag indicators of possible collusion and cannot distinguish explicit from tacit collusion, they ordinarily provide just one piece of evidence on which an investigation, or evidence of collusion, can be founded.[190]

Public contract tenders are particularly suitable for the application of screening tools as the identification of a public tender market facilitates structural assessment and the data generated by the process facilitates subsequent behavioral assessments.[191] Examination of susceptible markets on the basis of structural factors,[192] bids, bidding patterns, suspicious behavioral patterns, and a periodic review of past tender information are therefore helpful. In particular, the following are recognized as indicators of possible collusion[193]:

* Fewer firms than anticipated bid, or bidders unexpectedly withdraw.

* The same suppliers submit bids and each company seems to take a turn being the successful bidder, or the same company always wins a particular procurement.

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187 *See, e.g.*, Rosa M. Abrantes-Metz et al., *A Variance Screen for Collusion*, 24 INT'L J. INDUS. ORG. 467, 467–86 (2006); Fabio Massimo Esposito & Massimo Ferrero, Variance Screens for Detecting Collusion: An Application to Two Cartel Cases in Italy 2–4 (2006) (unpublished manuscript).

188 *See* Abrantes-Metz, *supra* note 23, at 2 ("A screen is a statistical test based on an econometric model and a theory of the alleged illegal behavior designed to identify whether manipulation, collusion, fraud or any other type of cheating may exist in a particular market, who may be involved, and how long it may have lasted. Screens use commonly available data such as prices, bids, quotes, spreads, market shares, volumes, and other data to identify patterns that are anomalous or highly improbable.").

189 *See id.* at 2–3 (noting that use of screens have become increasingly popular in the antitrust context and were successfully used to identify the LIBOR conspiracy and manipulation); *see also* Rosa M. Abrantes-Metz & Patrick Bajari, *Screens for Conspiracies and Their Multiple Applications*, 8 COMPETITION POL'Y INT'L 177, 187 n.13 (2012); Kai Hüschelrath, *Economic Approaches to Fight Bid Rigging*, 4 J. EUR. COMPETITION L. & PRAC. 185, 186 (2013) [hereinafter Hüschelrath, *Economic Approaches*]; Hüschelrath, *supra* note 176, at 528; Ilya Morozov & Elena Podkolzina, *Collusion Detection in Procurement Auctions* (Basic Research Program, Working Papers, Series: Econ., WP BRP 25/EC/2013, 2013). Screens can also be used as means to strengthen compliance and audit programs, as a helpful tool for due diligence in M&A activities, during litigation, and in quantifying damage claims in private actions. *See, e.g.*, Klawiter, *Conspiracy Screens*, *supra* note 176, at 3–4.

190 *See* Hüschelrath, *supra* note 176, at 526 n.17; Hüschelrath & Veith, *supra* note 186, at 407; Porter & Zona, *Ohio School Milk Markets*, *supra* note 79, at 522.

191 *See, e.g.*, U.S. DEP'T OF JUSTICE, *supra* note 92; Hüschelrath, *Economic Approaches*, *supra* note 189, at 525; OECD, *supra* note 177, at 6; OECD, *Fighting Bid Rigging*, *supra* note 32.

192 *See, e.g.*, PAUL A. GROUT & SILVIA SONDEREGGER, PREDICTING CARTELS 18 (2005); *see also supra* Section I.B.

193 *See Detecting Bid Rigging in Public Procurement*, MALAYSIAN COMPETITION COMM'N (Aug. 28, 2014), https://www.mycc.gov.my/sites/default/files/pdf/advocacy/Detecting-Bid-Rigging-slides-MR-SUREN.pdf.

* Different bidders have the same contact details.

* There are indications that bids were prepared together—for example, two or more proposals are submitted at the same time or with similar handwriting, typeface, paper, calculations, or amendments or with identical errors,[194] or emanate from a common web or IP address.[195]

* Unusual or suspicious bidding patterns,[196] when viewed over time or when compared with other bids[197] or prior bids on different tenders, or where they involve identical prices or costs or persistently or suddenly high prices significantly above list prices or internal agency cost estimates.

* Bid prices drop whenever a new or infrequent bidder submits a bid.

* A winner does not take the contract, or winners routinely subcontract part of the tender to another (losing) bidder.

* There is evidence of communication between bidders, especially shortly before the tender deadline, or of statements indicating knowledge of competitors pricing or price schedules or other bid-rigging activity.

Some jurisdictions are now using data on market structure and data collected in the course of the bidding process (on tenders and bidders) to devise and run electronic tests to screen[198] for warning signs or red flags that warrant further investigation.[199] Some have warned that such tests can be costly and difficult to operate accurately.[200] They have nonetheless been successful in

194 For example, in a storm damage repair case in the US (Guam), identical typos were spotted in cover letters and in an ice cream case, identical mistakes were made in bid forms; it was noted that the bids had been mailed at the same time from the same post office and the postage stamps had been ripped from the same roll. *See id.*

195 Anderson, Kovacic & Müller, *Synergies with Trade Liberalisation*, *supra* note 18, at 12.

196 For example, where there appears to be rotation or allocation of winning bids by time, geography, job description, or product line.

197 For example, when identical, too close or far apart, or where bids are exact percentages apart.

198 Screens can also help firms to improve their corporate governance and find out about potentially infringing behavior. Firms that suspect they are affected by anticompetitive behavior may also use screens to collate evidence and potentially file a complaint. *See Hide and Seek: The Effective Use of Cartel Screens*, AGENDA (Sept. 2013), https://www.oxera.com/getmedia/210bc5bc-0cc9-40ea-8bc9-6c8b2406b485/Cartel-screens.pdf.aspx?ext=.pdf.

199 Florin Andrei & Mihail Bușu, *Detecting Cartels Through Analytical Methods*, 2014 ROM. COMPETITION J. 24, 29; OECD, Summary of the Workshop on Cartel Screening in the Digital Era, at 3, DAF/COMP/M(2018)3 (Jan. 30, 2018), http://www.oecd.org/daf/competition/workshop-on-cartel-screening-in-the-digital-era.htm.

200 *See* Mena-Labarthe, *supra* note 172, at 3 (Screens can be good but also can be costly wasting "resources and never ending work to find a needle in a haystack where ultimately there is none.").

revealing first evidence of some of the largest conspiracies, manipulations, and frauds uncovered to date, including Bernie Madoff's Ponzi scheme[201] and the LIBOR conspiracy.[202] Further, the Korean Fair Trade Commission ("KFTC"), for example, systematically monitors public procurement through a Bid Rigging Indicator Analysis System ("BRIAS"),[203] Colombia has devised a computer program,[204] Brazil has new technologies and a unit which analyzes procurement databases and identifies patterns of suspicious behavior ("Project Brain"),[205] and the UK's CMA has introduced a new screening tool for procurers, which was made available to the public in July 2017.[206] BRIAS, for example, automatically analyzes online public procurement data (which public procuring authorities are required to submit within thirty days of the tender award) and quantifies the likelihood of bid rigging, by assigning a score representing the statistical likelihood of collusion based on factors such as: the tendering method; the number of bidders, successful and failed bids; bid prices above the estimated price; and the price of the winning bid.[207] It enables the KFTC to analyze huge numbers of tenders each year using search criteria, flagging on average more than eighty tenders per year for investigation,[208] and has increased the number of successful bid-rigging prosecutions, including in the construction sector.[209]

Further, the Mexican competition authority, following an informal complaint from the Mexican Social Security Institute ("IMSS") which had observed strange patterns in the procurement processes of various generic drugs, used empirical and behavioral screening of procurement databases before targeting and launching an investigation and collecting evidence that supported its hypothesis of collusion.[210] Eventually, it issued a decision

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201 *See* HARRY MARKOPOLOS, NO ONE WOULD LISTEN: A TRUE FINANCIAL THRILLER 192 (2010).

202 *See* Abrantes-Metz, *supra* note 23, at 2.

203 *See, e.g.*, Brinker *supra* note 32, at 560–61.

204 In Chile, the competition authority uses procurement data acquired in part through a cooperation agreement with central purchasing body ChileCompra to monitor tenders and perform screening exercises.

205 *See* Screening and Data Mining Tools to Detect Cartels: Brazilian Experience, Presentation at the OECD Workshop on Cartel Screening in the Digital Era, (Jan. 30, 2018), https://www.slideshare.net/OECD-DAF/cartel-screening-in-the-digital-era-cade-brazil-january-2018-oecd-workshop. At least one publicly known case has been opened using algorithms as an investigation device. *See CADE's General Superintendence Initiates Administrative Proceeding to Investigate a Cartel in the Market of Orthoses, Prostheses and Special Medical Supplies*, CADE (Aug. 4, 2017, 12:21 PM), http://en.cade.gov.br/press-releases/cade2019s-general-superintendence-initiates-administrative-proceeding-to-investigate-a-cartel-in-the-market-of-orthoses-prostheses-and-special-medical-supplies.

206 In June 2016, the CMA launched a bid-rigging awareness campaign and a free e-learning tool. This followed a survey in 2015 which revealed that forty percent of businesses did not know that bid rigging was illegal. In July 2017 it produced a data analysis tool. *See About the Cartel Screening Tool*, CMA (Dec. 15, 2017), https://www.gov.uk/government/publications/screening-for-cartels-tool-for-procurers/about-the-cartel-screening-tool.

207 *See, e.g.*, Brinker, *supra* note 32, at 561 (discussing BRIAS).

208 OECD, *supra* note 177, at 62.

209 OECD, *supra* note 7, at 236–37.

210 *See* Mena-Labarthe, *supra* note 172, at 3–4.

(which also relied on the screens[211]) and fined four pharmaceutical laboratories for eliminating competition through bid rigging in the market for human insulin and three other laboratories for coordinating bids in IMSS's public procurement of serums.[212] Similarly, in Switzerland, the Swiss competition authority uncovered bid rigging by regional road construction companies after atypical price indices for new road construction in some regions in Switzerland (compared to other regions) were observed.[213] Brazilian and US authorities[214] have also relied on screens to identify potential anticompetitive behavior in gasoline markets.[215]

Access to procurement data can therefore increase the ability of many stakeholders, including reporters, academics, consultants, market experts, procurers, and competition agencies, to screen for suspicious market behavior.

2. Modern Anticorruption Techniques and Practices

Public procurement is generally complex, leaving considerable discretion to officials to evaluate multidimensional competing bids on the basis of price, quality, and other factors. It is therefore frequently difficult to detect corruption, although red flags may be raised where, for example, evidence indicates that steps have been taken that narrow the pool of bidders,[216] bidders have been arbitrarily excluded or disqualified at the assessment stage,[217] or

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211 *See* Resolución Recurso de reconsideración Fresenius Kabi México, S.A. de C.V. y otros, RA-019-2010, Diario Oficial de la Federación [DOF] 10-06-2010 (Mex.), formato pdf, https://www.cofece.mx/cfcresoluciones/Docs/Asuntos%20juridicos/v39/3/1371186.pdf. Most jurisdictions are cautious, however, about relying exclusively on economic evidence to establish collusion. *See* OECD, Prosecuting Cartels without Direct Evidence, at 9–11, DAF/COMP/GF(2006)7 (Sept. 11, 2006), https://www.oecd.org/daf/competition/prosecutionandlawenforcement/37391162.pdf.

212 The authority issued a decision in January 2010, which was upheld by the Mexican Supreme Court of Justice in 2015. *See* Resuelve la SCJN caso sobre colusión en licitaciones del IMSS, COFECE-009-2015, Ley Federal de Competencia Económica [LFCE], Diario Oficial de la Federación [DOF], 08-04-2015 (Mex.).

213 Hüschelrath, *Economic Approaches*, *supra* note 189, at 189.

214 *See, e.g.*, OECD, Competition in Road Fuel, at 329, DAF/COMP(2013)18 (Nov. 21, 2013), https://www.oecd.org/competition/CompetitionInRoadFuel.pdf.

215 *See, e.g.*, Carlos Emmanuel Joppert Ragazzo, *Screens in the Gas Retail Market: The Brazilian Experience*, CPI ANTITRUST CHRON. (Mar. 2012), at 3, https://www.competitionpolicyinternational.com/screens-in-the-gas-retail-market-the-brazilian-experience/.

216 For example, inadequate advertising of the tender process, not operating an open tender process, and the application of unreasonable procedures or tender criteria. *See* Mihály Fazekas, István János Tóth & Lawrence Peter King, *An Objective Corruption Risk Index Using Public Procurement Data*, 22 EUR. J. ON CRIM. POL'Y & RES. 369, 372–73 (2006).

217 *Excluding Qualified Bidders*, GUIDE TO COMBATING CORRUPTION & FRAUD IN DEV. PROJECTS, https://guide.iacrc.org/potential-scheme-excluding-qualified-bidders/.

there have been long delays in contract negotiations or post-award order changes that modify or lengthen the contract or increase the contract price.[218]

New technology and data tools also have the potential to advance corruption control. Data mining is now being used to audit public procurement and identify red flags. Moreover, data visualization is also being used to identify a corrupt intent in payments or transactions. For example, researchers at the Corruption Research Centre Budapest examine significant volumes of data sets of public procurement procedures from EU countries and search for abnormal patterns, such as exceptionally short bidding periods or unusual outcomes (e.g., no competition for the winning bid, or bids repeatedly won by the same company).[219] In Brazil, the Public Spending Observatory uses computer-assisted audit tracks to crosscheck procurement expenditure with other government databases to identify atypical situations warranting further investigation, such as conflicts of interest or personal relations between suppliers and public officials, inappropriate use of exemptions and waivers, substantial contractual amendments, suspicious patterns of bidding, or use of government payment cards.[220] Another benefit of technology that leads to detection and prevention of corruption is the automation of processes that possibly eliminate the need for contracting officials, thus removing corruption opportunities from procurement operations.[221]

3. Advocacy, Training, and Educating Business and the Public

Outreach to businesses and the wider community is also important to the successful creation of a procompetitive procurement system. Indeed, more could be done to encourage businesses to introduce competition and anticorruption compliance programs[222] backed by audits, monitoring, reviews, and risk assessments to ensure that companies themselves are proactive about preventing and seeking out any illegal conduct.[223] Like competition agencies and procurers, companies can use screens to identify the risk of malfeasance and to allow for targeted audits, more efficient monitoring of their own compliance regimes, and self-reporting of wrongdoing.[224]

Transparency International has also devised an "Integrity Pact" to encourage companies to abstain from bribery and to tackle the prisoner's

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218 Fazekas, Tóth & King, *supra* note 216, at 372–73.

219 Lauren Silveira, *4 Technologies Helping Us to Fight Corruption*, WORLD ECON. FORUM (Apr. 18, 2016), https://www.weforum.org/agenda/2016/04/4-technologies-helping-us-to-fight-corruption/.

220 *Id.*; OECD, OECD INTEGRITY REVIEW OF BRAZIL: MANAGING RISKS FOR A CLEANER PUBLIC SERVICE 313 (2012).

221 Silveira, *supra* note 219.

222 *See* Christopher R. Yukins, *Mandatory Disclosure: A Case Study in How Anti-Corruption Measures Can Affect Competition in Defense Markets* (GW Legal Studies Research Paper No. 2015-14, 2015).

223 For example, these could be required as a condition for public contracting. *See infra* Section III.A.

224 Hüschelrath, *supra* note 176, at 524.

dilemma by establishing a level playing field in the contracting process.[225] It involves an agreement between the procurer and bidders that neither will pay, offer, accept, or demand bribes nor collude, which provides assurance to each bidder that competitors will refrain from bribery and procurers will commit to preventing corruption by their officials. The pact incorporates sanctions for any violation of the agreement including denial or loss of contract; forfeiture of the bid, performance bond, or other security; liability for damages to the principal and to competing bidders; and debarment of the violator by the principal for an appropriate period of time. Integrity Pacts have been implemented in many countries, including India, Korea, Pakistan, Argentina, Mexico, Colombia, Austria, and Germany, and involve more than 300 contracts.[226]

Public education may also facilitate building public support for policies to counter bid rigging and bribery and create a wider group of stakeholders vigilant for illegal conduct.[227] Transparency International, for example, stresses the importance of social accountability and the engagement of communities, social groups, and professional associations affected by public contracts.[228] These mechanisms build trust in public procurement processes and ensure that such projects are monitored by those affected and reflect the public interest.[229]

Civil society groups can thus help identify and reduce corruption risks in government procurement by acting as independent monitors. This practice has been implemented in the Philippines and Mexico, where such a monitoring group is known as a "Social Witness."[230] Civil society participation increases transparency by increasing public engagement in the procurement process, which in turn enhances accountability by identifying and sanctioning corrupt actors.

4. The Role of Multilateral Development Banks

MDB loans are frequently used to fund public procurement projects. To prevent corruption from undermining the realization of their development goals, MDBs have developed legal structures and processes that allow them to fulfill their fiduciary duties and to ensure that loans are used only for the purposes for which they are granted. Many institutions now have integrity

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225 TRANSPARENCY INT'L, THE INTEGRITY PACT: A POWERFUL TOOL FOR CLEAN BIDDING 1 (2009), https://www.transparency.org/files/content/tool/IntegrityPacts_Brochure_EN.pdf.

226 *See* KÜHN & SHERMAN, *supra* note 104, at 27.

227 *See* G.A. Res. 58/4 art. 13.

228 *See* KÜHN & SHERMAN, *supra* note 104, at 12–13.

229 *See Integrity Pacts Programme – Safeguarding EU Funds in Europe*, TRANSPARENCY INT'L (2018), https://www.transparency.org/programmes/overview/integritypacts.

230 *See* KÜHN & SHERMAN, *supra* note 104, at 29.

units ("INTs"), such as the WBG's Integrity Vice Presidency[231] or the European Bank for Reconstruction and Development ("EBRD") Legal Transition Programme.[232] These provide advice to borrower countries on procurement reform and corruption prevention, investigate misconduct, and operate sanctions systems that allow them to debar entities found to have engaged in misconduct from bidding on future MDB-financed contracts. Indeed, clauses relating to sanctionable practices and procurement policies now form part of the standard financing and transaction arrangements executed by MDBs; typically such documents require local procurement offices to include equivalent terms in their procurement documents.[233] MDBs also prepare reports and can provide information to national law enforcement authorities in the country (or countries) where misconduct occurs.[234]

The WBG was one of the first MDBs to take action to counter corruption[235] and it now operates a two-tiered administrative system of investigation and decision-making with an expansive ambit of sanctionable practices and sanctionable entities.[236] Using these powers between 2007 and 2015, 368 entities were debarred or otherwise sanctioned by the WBG, and 359 more faced temporary suspensions.[237] Most MDBs now operate similar systems, with decision-making bodies embedded within the MDBs, making decisions

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231 INTs are independent units within the Bank that investigate sanctionable practices in relation to Bank–financed projects and monitor compliance by sanctioned entities. *See e.g.*, *Integrity Vice Presidency*, WORLD BANK (2019), https://www.worldbank.org/en/about/unit/integrity-vice-presidency; *see also* Timothy Dickinson, Corinne Lammers & Morgan Heavener, *The Increasing Prominence of World Bank Sanctions*, LAW 360 (Dec. 1, 2014), https://www.law360.com/articles/599965/the-increasing-prominence-of-world-bank-sanctions.

232 *See Integrity and Compliance*, EUR. BANK FOR RECONSTRUCTION & DEV., https://www.ebrd.com/integrity-and-compliance.html (last visited Feb. 24, 2020); *Legal Transition Programme*, EUR. BANK FOR RECONSTRUCTION & DEV., https://www.ebrd.com/what-we-do/sectors/legal-reform/transition-programme.html (last visited Feb. 24, 2020).

233 *See, e.g.*, WORLD BANK BORROWERS, GUIDELINES: PROCUREMENT OF GOODS, WORKS, AND NON-CONSULTING SERVICES UNDER IBRD LOANS AND IDA CREDITS & GRANTS 41 (2014), http://siteresources.worldbank.org/INTPROCUREMENT/Resources/Procurement_GLs_English_Final_Jan2011_revised_July1-2014.pdf.

234 *See, e.g.*, WORLD BANK OFFICE OF SUSPENSION & DEBARMENT [OSD], REPORT ON FUNCTIONS, DATA AND LESSONS LEARNED 8 (2d ed. 2007–2015), http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/OSDReport.pdf.

235 Committees and investigation units created in 1998 were replaced in 2001 by the establishment of INT (elevated to vice presidency in 2009) following recommendations of a review panel. *See* DICK THORNBURGH, RONALD L. GAINER & CUYLER H. WALKER, REPORT CONCERNING THE DEBARMENT PROCESS OF THE WORLD BANK15–16 (2002), http://siteresources.worldbank.org/PROCUREMENT/Resources/thornburghreport.pdf.

236 For a detailed history of the evolution of the Bank's Sanction System, see ANNE-MARIE LEROY & FRANK FARIELLO, THE WORLD BANK GROUP SANCTIONS PROCESS AND ITS RECENT REFORMS 9–11 (2012).

237 *See* OSD, *supra* note 234, at 15–25. Further its road investigations, for example, revealed evidence of "inflated highway construction costs," bribery, and "siphoning of funds during contract execution." WORLD BANK, *supra* note 32, at 1.

based on the preponderance of evidence standard,[238] appeals to an appellate authority, and harmonized sanctioning procedures and policies.[239] In particular, the Uniform Framework for Preventing and Combating Fraud and Corruption[240] sets out common guidelines for the conduct of sanction investigations and establishes a portfolio of sanctions available to MDBs, including permanent or conditional debarment, reprimand, restitution, and a requirement that the borrower repay tainted loans.[241] Further, the Agreement for Mutual Enforcement of Debarment Decision ("AMEDD"), conducted by the African Development Bank, the Asian Development Bank, EBRD, the Inter-American Development Bank Group, and WBG in 2010, allows for a sanction imposed by one MDB to be recognized by, and added to the sanctions list of, other MDBs, even if they were not directly affected by the sanctionable practice.[242]

C. *Effective Penalties for Both Supplier Collusion and Corrupt Practices*

1. General and Corporate Fines

In the competition law sphere, the international fight against cartels has led to "a global trend toward enhanced sanctions combined with common enforcement techniques."[243] In many jurisdictions, significant fines (whether civil or criminal) may be and regularly are imposed on firms found to have engaged in cartel activity in violation of antitrust laws. For example, in the

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238 Typically, once the investigating authority concludes that there is sufficient evidence to show that a sanctionable practice has been committed in the context of an MDB finance project, it presents the case for evaluation at the first tier of the adjudication phase.

239 For example, the Joint International Financial Institution Anti-Corruption Task Force focuses on the standardization of sanctions investigation procedures, definition of sanctionable practices, and fostering cooperation. *See Harmonization Efforts with Other International Financial Institutions*, INTER-AMERICAN DEV. BANK, https://www.iadb.org/en/transparency/harmonization-efforts-other-international-financial-institutions (last visited Feb. 7, 2020).

240 *See International Financial Institutions Anti-Corruption Task Force – Uniform Framework for Preventing and Combating Fraud and Corruption*, AFRICAN DEV. BANK GRP., ET AL. (Sept. 2006), http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=37018601.

241 *See General Principles and Guidelines for Sanctions*, AFRICAN DEV. BANK GRP., (Sept. 17, 2006), http://lnadbg4.adb.org/oai001p.nsf/0/CE3A1AB934F345F048257ACC002D8448/$FILE/Harmonized%20Sanctioning%20Guidelines.pdf.

242 *Agreement for Mutual Enforcement of Debarment Decisions*, AFRICAN DEV. BANK GRP. ET AL. (April 9, 2010), ¶ 4, http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35154738. MDBs may, however, decide not to enforce a sanction imposed by another MDB when such enforcement would be inconsistent with its legal or other institutional considerations. *Id.* ¶ 7.

243 Gregory C. Shaffer, Nathaniel H. Nesbitt & Spencer Weber Waller, *Criminalizing Cartels: A Global Trend?*, *in* RESEARCH HANDBOOK ON COMPARATIVE COMPETITION LAW (Arlen Duke, John Duns & Brendan Sweeney eds., 2015).

Elevators and Escalators case,[244] the European Commission imposed fines totaling €832,422,250 on the bid riggers.

A growing view, however, is that sanctions in many jurisdictions need to be bolstered or rethought as corporate fines may not be sufficient on their own to deter cartel behavior (or bribery). Not only do they not target responsible individuals, but they may have spillover effects (penalizing innocent shareholders, employees, and creditors) and, arguably, would need to be impossibly high to ensure optimal deterrence:

> To deter cartel activity, the sanctions imposed on cartel participants must produce sufficient disutility to outweigh what the participants expect to gain from the cartel activity. Moreover, the disutility of the sanctions must outweigh the expected gain by enough to account for the fact that the sanctions may not be imposed at all and would be imposed, if at all, after the gains had been realised.[245]

Some studies reinforce the view that corporate fines are not the highest concern to companies[246] and may not deter recidivism.[247] In the EU, for example, where corporate fines are the Commission's main weapon against cartels, a number of firms operating in chemical and electronics markets have been found to be involved in three or more Commission cartel decisions (and some as many as nine).[248] These cartels are arguably difficult to explain as the conduct of rogue division managers that are operated without the knowledge or help of senior management. Rather, they could suggest that there may be multiproduct and multinational firms which embrace, directly or indirectly, explicit collusion as part of their business model and profitmaking strategy.[249]

This suggests that additional controls may be desirable or required, including monetary and nonmonetary sanctions for individuals that play a role in instigating, or even not preventing, infringements;[250] and nonmonetary

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244 2008 O.J. (75) 23, *supra* note 43. *See also* ALISON JONES, BRENDA SUFRIN & NIAMH DUNNE, JONES & SUFRIN'S EU COMPETITION LAW 651 (7th ed. 2019); *Cartel Statistics*, EUR. COMMISSION, https://ec.europa.eu/competition/cartels/statistics/statistics.pdf.

245 Gregory J. Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime*, 5 EUR. COMPETITION J. 19, 28 (2009); *see also* John M. Connor, *Recidivism Revealed: Private International Cartels 1999-2009*, 6 COMPETITION POL'Y INT'L 101 (2010); Cento Veljanovski, *Cartel Fines in Europe: Law, Practice and Deterrence*, 30 WORLD COMPETITION 65, 65 (2007).

246 *See, e.g.*, OFFICE OF FAIR TRADING, DRIVERS OF COMPLIANCE AND NON-COMPLIANCE WITH COMPETITION LAW (2010), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284405/oft1227.pdf.

247 *See, e.g.*, Connor, *supra* note 245, at 108–09; *see also* Wouter P.J. Wils, *Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis*, 35 WORLD COMPETITION 5 (2012).

248 *See, e.g.*, Marshall, *supra* note 89, at 331; *see also* Kovacic, Marshall & Meurer, *supra* note 89, at 3–4.

249 *Id*.

250 *See, e.g.*, OFFICE OF FAIR TRADING, *supra* note 246, at 6; *see also* Adrian Hoel, *Crime Does Not Pay but Hard-Core Cartel Conduct May: Why It Should Be Criminalised*, 16 TRADE PRACS. L.J. 102

sanctions for corporations, such as debarment or even, in certain circumstances, structural remedies.[251]

2. Individual Accountability

Evidence implies that a number of personal factors may encourage procurement officials to receive bribes.[252] Further, senior corporate management is frequently aware of and endorses bribery by employees, and actors involved may receive high powered incentives for performance enhanced by bribes.[253] It therefore seems crucial that, to counterbalance the effects of these incentives, sanctions[254] for bribery should attach to responsible individuals, providing for fines, prison sentences, and the confiscation of bribes or the proceeds of corruption. Indeed, numerous jurisdictions now provide for criminal sanctions to be imposed on individuals who violate bribery laws (including those offering and receiving bribes and persons who have failed to prevent them)[255] and for confiscation of the proceeds of such crimes.

A number of states have also criminalized cartel activity. In the US, violation of the Sherman Act is a felony, and, for some time, the DOJ has aggressively pursued both corporations and individuals involved in cartels in criminal proceedings. Where violations are found, US courts may impose fines on corporations and individuals responsible, and sentence individuals to prison. US enforcers, working with and through organizations such as the OECD and the ICN, have not been shy about advocating their view that imprisonment of individuals is the most effective deterrent to cartel behavior.[256] However, although more than thirty jurisdictions have introduced criminal cartel or bid-rigging offenses significant obstacles to successful criminalization have arisen outside of the US.[257] Not only are criminal cartel cases,

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(2008). Individual sanctions do not necessarily have to be criminal in nature. *See* Aaron Khan, *Rethinking Sanctions for Breaching EU Competition Law: Is Director Disqualification the Answer?*, 35 WORLD COMPETITION 77, 82 (2012).

251 *See* Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6 COMPETITION POL'Y INT'L 3 (2010); Joseph E. Harrington, Jr., *A Proposal for a Structural Remedy for Illegal Collusion*, 82 ANTITRUST L.J. 335, 335–36 (2018).

252 *See* OECD, *Bribery in Public Procurement: Methods, Actors and Counter-Measures*, at 50–51 (2007), https://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44956834.pdf (describing greed, financial difficulties, public administration politics, frustration with compensation, and private connections as reasons that officials accept bribes).

253 OECD, *supra* note 141, at 22, ("In the majority of cases, corporate management (41%) or even the CEO (12%) was aware of and endorsed the bribery, debunking the 'rogue employee' myth . . . ." (footnote omitted)); *see also* OECD, *supra* note 121, at 101.

254 In addition to incentives to report or refuse bribes.

255 *See supra* Section II.A for discussion.

256 OECD, Roundtable on Promoting Compliance with Competition Law, at 5–6, DAF/COMP/WD(2011)38 (June 21, 2011), https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/1106complainceus.pdf.

257 *See, e.g.*, Shaffer, Nesbitt & Waller, *supra* note 243, at 1–2.

because of the higher standard of proof, more difficult to establish , but in many countries it has proved difficult to persuade juries to convict persons or to persuade courts to imprison offenders.[258] Criminalization has not generally been fruitful where introduced simply as a mechanism for creating deterrence but without a concerted attempt to build or shape attitudes or an understanding of what is morally reprehensible about cartel conduct. In the US, the DOJ generated support for its cartel enforcement program by targeting bid-rigging cases for prosecution, the subset of cartel activity where a lack of good faith is perhaps most evident—especially if a certification of independent bid determinations ("CIBDs")[259] has been required and signed. Further, many successful criminal convictions have ensued in Germany where the criminal offense is reserved exclusively for bid rigging (and not to other cartels).[260]

Alternatively, or in addition to criminal liability, civil liability might be expanded to provide a mechanism for ensuring accountability of individuals and increasing deterrence. For example, civil sanctions, such as fines[261] or individual disqualification orders,[262] could be imposed on responsible individuals. Further, the category of actors liable under civil rules could be expanded, to encompass not only individuals directly involved but also others, such as managers, lawyers, underwriters, outside directors, or accountants who have the capacity to influence firm behavior and to ensure compliance with the law.

3. Debarment

Debarment for corporations or contractors involved in bid rigging or corrupt conduct may both mitigate against the risk of, and deter, future violations and damage to a government's reputation.[263] The risk of losing the chance to secure public contracts for a period of time (or possibly permanently) in the future may act as a strong incentive to comply. A number of jurisdictions provide for the possibility of debarring those involved in an infringement of anticorruption or competition laws from participating in public

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258 *See* Alison Jones & Rebecca Williams, *The UK Response to the Global Effort Against Cartels: Is Criminalization Really the Solution?*, 2014 J. ANTITRUST ENFORCEMENT 1, 9 (2016).

259 OECD, Tool: Certificate of Independent Bid Determination, at 2 (2009), https://www.oecd.org/governance/procurement/toolbox/search/certificate-independent-bid-determination.pdf.

260 Florian Wagner-von Papp, *What If All Bid Riggers Went to Prison and Nobody Noticed? Criminal Antitrust Law Enforcement in Germany*, *in* CRIMINALISING CARTELS: CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT 157, 167, 172 (Caron Beaton-Wells & Ariel Ezrachi eds., 2011).

261 To be effective, however, personal liability must certainly be un-indemnifiable and un-shiftable and must be sufficient to counter any benefits made from the illegal conduct (such as bonuses received).

262 *See* Khan, *supra* note 250, at 78. One difficulty is that disqualification orders generally only take effect in the jurisdiction in which they are imposed.

263 *See* Jones & Williams, *supra* note 258, at 5.

tenders,[264] and debarment is a core sanction used by MDBs against firms engaged in bribery or collusion.[265]

One study notes that although debarment can operate as an effective deterrent, debarment rules are not generally enforced in predictable ways and corporations are relatively rarely debarred in practice, perhaps partly out of fear of exacerbating procurement difficulties that exist in already concentrated markets.[266] However, anxieties about debarment being impractical could be allayed by, for example: excluding only ringleaders from contracting; providing for exceptions where debarment would eliminate competition in a highly concentrated market; and operating initiatives, such as self-cleaning for bringing excluded contractors back into the fold (e.g., where infringers provide compensation to those harmed as a result of the wrongdoing and adopt measures to prevent further future violations). Greater use of debarment powers in this way would send a clear signal to the private sector that access to public procurement markets requires full compliance with the law.

4. Recovery of Bribes and Damages Actions

Asset recovery and damages actions will not only increase deterrence but will also ensure wrongdoers do not profit from their wrongs while those who suffered in consequence are compensated for their loss. It is therefore important that anticorruption enforcement agencies sanction persons involved in bribery and corruption and also ensure that illicit bribes (or the proceedings of corruption) are recovered.

Further, many antitrust systems enable victims to bring actions for damages.[267] Although this type of civil action by victims can contribute to

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264 *See, e.g.*, Office of Federal Procurement Policy Act of 1974, 41 U.S.C. §§ 401–38 (2012) (instituting the US Federal Acquisitions Regulations providing for the suspension and debarment (by a debarment official) of those committing crimes, including violation of federal or state antitrust laws); Council Directive 2014/24/EU, art. 54, 2014 O.J. (L 94) 65 (providing that contracting authorities may be required by Member states to exclude undertakings from procurement procedures where there are plausible grounds to conclude that they entered into agreements infringing Article 101; the implementing conditions are to be provided by the Member States); Case C-470/13, Generali-Providencia Biztosító Zrt v. Közbeszerzési Hatóság Közbeszerzési Döntőbizottság, ECLI:EU:C:2014:2469 (Dec. 18, 2014) (an undertaking may be excluded by public authorities from tendering for public contracts where it has committed an infringement of competition law, for which it was fined, even if the procurement procedure is not covered by the EU Procurement Directive).

265 *See* OSD, *supra* note 234 and accompanying text; *supra* note 242 and accompanying text (discussing the AMEDD).

266 Emmanuelle Auriol & Tina Søreide, *An Economic Analysis of Debarment*, 50 INT'L REV. L. & ECON. 36, 37 (2017). *See also, e.g.*, Susan Hawley, *Excluding Corrupt Bidders from Public Procurement: Real Threat or Pipe Dream? The UK Experience*, June 2017, https://www.spotlightcorruption.org/banning-corrupt-companies-from-public-contracts/.

267 *See also In re* Petrobras Securities Litigation, No. 14-CV-9662 (S.D.N.Y. 2018) (involving a $2.95 billion settlement following a class action securities fraud lawsuit brought in the US by investors). Actions for the tort of bribery may also be available in some jurisdictions.

effective enforcement of competition law while at the same allowing victims of violations to be compensated, there are relatively few jurisdictions in which private actions for damages are frequently lodged against bid riggers. Not only are these actions expensive and complex to bring and win, but procurers may have few incentives to seek recovery of lost public money and may be unwilling to sour relations with contractors they may have to continue to conduct business with. If routinely brought, however, actions for damages would allow a government to both claw back taxpayer money lost due to inflated contract prices and raise the stakes for those breaching competition law. Such claims may be facilitated by, for example, giving standing to public prosecutors (this is the case in Brazil) or other features of the system.

In Japan, where private litigation has formed "part of the enforcement arsenal from the very beginning of Japanese antitrust law," a preponderance of private lawsuits has been brought against bid riggers, including some by residents on behalf of their local government.[268]

In the US, where a sophisticated system of private antitrust enforcement exists,[269] section 4A of the Clayton Act specifically allows the government to recover treble damages in cases of collusive bidding. Between 1980 and 2009, however, only five cases were filed under section 4A, indicating that more needs to be done to ensure taxpayer money is not left on the table.[270] The DOJ has now pledged to revitalize its use: "Going forward, the Division will exercise 4A authority to seek compensation for taxpayers when the government has been the victim of an antitrust violation. We hope that these efforts will also deter future violations."[271]

In the EU, full compensation must, in principle, also be available to victims of antitrust violations.[272] Although private damages actions were initially slow to develop, such actions are beginning to play an increasingly important part in the EU enforcement framework, and an EU directive sets out rules designed to facilitate such claims in the national courts.[273] Studies published in 2017 and 2019 of cartel damages claims in EU member states indicate that private actions are growing, noting that some entities bringing damages claims are local authorities or municipality procurers, such as those in

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268 Simon Vande Walle, *Private Enforcement of Antitrust Law in Japan: An Empirical Analysis*, 8 COMPETITION L. REV. 7, 7 (2011).

269 *See, e.g.*, Alison Jones, *Private Enforcement of EU Competition Law: A Comparison with, and Lessons from, the US*, *in* HARMONISING EU COMPETITION LITIGATION 15, 16–17 (Maria Bergström et al. eds., 2016).

270 *See* Harry First, *Lost in Conversation: The Compensatory Function of Antitrust Law* 50 (NYU Ctr. for Law, Econ. and Org., Law & Econ. Research Paper Series, Working Paper No. 10-14, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1579343.

271 *See* Delrahim, *supra* note 166.

272 *See* Case C-295/04, Manfredi v. Lloyd Adriatico Assicurazioni SpA, 2006 E.C.R. I-6619, EU:C:2001:465; Case C-453/99, Courage Ltd v. Crehan, 2001 E.C.R. I-6297, ECLI:EU:C:2001:181.

273 Council Directive 2014/104, art. 1, 2014 O.J. (L 349) 1 (EU).

Hungary, Denmark, and France.[274] The latter study finds that in nearly two-thirds of the claims analyzed "the allegedly affected purchases resulted from tendering processes," and each provide examples of cases where damages have been awarded to victims of bid rigging. In one Danish case a municipality was awarded compensation from bid riggers (calculated by reference to the payments made to a losing tenderer by a bid winner as compensation).

The European Commission itself also sought damages against members of the Elevators and Escalators cartel for losses suffered as a result of the installation of elevators and escalators in Commission buildings. Although the action before the Belgian courts was rejected on the grounds that the Commission had failed to produce sufficient evidence of loss, in the future this type of action might be facilitated by provisions set out in the Damages Directive, especially on disclosure, which have now been implemented within Belgian Law.[275]

In Germany, a number of damages actions have also been brought by state authorities hurt by bid rigging or other anticompetitive conduct.[276] For example, the local transportation undertaking of the city of Darmstadt and Deutsche Bahn, relying on a competition law infringement finding by the Bunderskartellamt, successfully sued members of a rail manufacturer cartel (Schienenkartell) for damages resulting from overpriced rails and track switches.[277] In addition, Deutsche Bahn[278] and the Cities of Essen, Nürnberg, Dortmund, Bielefeld and Köln, relying on the EU Commission's elevators and escalators cartel decision,[279] successfully sought damages from the cartel members.[280]

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274 Jean-François Laborde, *Cartel Damages Claims in Europe: How Courts Have Assessed Overcharges (2018 ed.)*, CONCURRENCES REV. 2 (Feb. 2019); Jean-François Laborde, *Cartel Damages Claims in Europe: How Courts Have Assessed Overcharges*, CONCURRENCES REV. 36 (Feb. 2017).

275 *See* 2008 O.J. (75) 20, *aff'd* Case C-493/11 P, United Techs. Corp. v. Comm'n, EU:C:2012:355 (June 15, 2012); Council Directive 2014/104, art. 1, 2014 O.J. (L 349) 1 (EU); Jorge Marcos Ramos & Daniel Muheme, *The Brussels Court Judgment in* Commission v Elevators Manufacturers, *or the Story of How the Commission Lost an Action for Damages Based on Its Own Infringement Decision*, 36 EUR. COMPETITION L. REV. 384, 384 n.2 (2015).

276 *See, e.g.*, OECD, Relationship Between Public and Private Antitrust Enforcement, at 6, DAF/COMP/WP3/WD(2015)21 (June 15, 2015), http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2015)21&docLanguage=En.

277 *See* Landgericht [LG] [District Court] Mar. 30, 2016, Frankfurt am Main, Case No. 2-06 O 464/14, ECLI:DE:LGFFM:2016:0330.2.06O464.14.0A.

278 *See* Landgericht [LG] [District Court] Aug. 6, 2013, Berlin, Case No. 16 O 193/11, ECLI:DE:LGBE:2013:0806.16O193.11KART.0A.

279 *See Elevators and Escalators*, *supra* note 43.

280 *See* Press release, Bundeskartellamt, Bundeskartellamt Imposes Multi-Million Euro Fines Against Manufacturers of Fire-Fighting Vehicles (Feb. 10, 2011), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2011/10_02_2011_Feuerwehrfahrzeuge.html (explaining that manufacturers of fire-fighting vehicles were found to have infringed competition law).

III. TOWARDS A MORE COMPREHENSIVE APPROACH: ADDITIONAL TOOLS FOR PREVENTING AND DETERRING CORRUPTION AND SUPPLIER COLLUSION

Part I suggests that only a fraction of illegal collusion and corruption that occurs in procurement markets may be being detected and effectively sanctioned. Part II has suggested how conventional efforts can be intensified to fight corruption and conclusion. This Part examines additional means, beyond those that have been, or are being, widely employed, which may be used to supplement these efforts.

A. *Ensuring Procompetitive Procurement Design*

Although some synergies between national public procurement systems have resulted from international arrangements, bilateral trade agreements, and MDB rules (see Part E), a variety of approaches continues to exist. In some countries public procurement rules are limited or nonexistent. In others, sophisticated systems are in place.[281] But an essential starting point to achieving procompetitive procurement is the existence of a good and robust public procurement system, with clearly articulated objectives[282] reflecting the cultural, administrative, economic, legal, and social traditions of the state in which it is adopted[283] and constructed so as to minimize the risk of its objectives being undermined by bid rigging[284] or bribery.

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281 *See generally* ICN, *supra* note 32.

282 One goal of most systems is to maximize efficiency and ensure that contracts concluded represent the best value for money (i.e., to foster and encourage participation in procurement proceedings, promote competition among suppliers, boost production through ensuring efficient spending of public money (cost-quality efficiency of procurement), free and fair competition, and the opening up of markets to small- and medium-sized enterprises (SMEs) as well as cross-border trade). Regimes may, however, be designed to achieve broader goals, including public or socioeconomic policies (ensuring that public money is used to drive other national policies, such as industrial (e.g., growth, employment, innovation and the promotion of SMEs), social, environmental, or sustainability objectives); integrity, fairness, and public confidence in the process and safeguarding the process against bribery, corruption, incompetence, and distortions imposed by attempts to win influence; the facilitation of the free movement of goods and services across borders and between states (e.g., in the EU). Where multiple objectives are pursued, guidance as to how competing objectives are to be weighed and balanced should be provided.

283 *See* THAI, *supra* note 138, at 5–6.

284 Two influential documents widely disseminated and used effectively to fight collusion are the OECD's *Guidelines for Fighting Bid Rigging in Public Procurement* and the *Recommendation of the OECD Council on Fighting Bid Rigging in Public Procurement*. *See* OECD, *Report on Fighting Bid Rigging in Public Procurement* (2012), http://www.oecd.org/competition/cartels/fightingbidriggingin-publicprocurement.htm; OECD, *Fighting Bid Rigging*, *supra* note 32, at 1 (the recommendations have helped competition authorities both to launch advocacy programs and raise awareness of bid-rigging risks and procurement authorities in designing tenders and detecting bid rigging); *see also* Graciela Miralles, Senior Economist, WBG Trade and Competitiveness Global Practice, Connecting Public Procurement

Based on the best available international standards, the following steps and public procurement procedures can be considered in adopting open competitive bidding systems which reduce barriers to entry into the process and render the systems less susceptible to both collusion *and* corruption:

* Choosing the right form of procurement model. For example, sealed-bid tender models may diminish the ability and incentive to collude as compared with dynamic open-tender systems where bidders gather in the same place to submit bids.[285] Moreover, noted above, individual negotiations can serve as a tool to upset cartel stability.[286]

* Considering, where feasible, e-procurement (involving the use of electronic communications), using information and communication technologies, and electronic bidding. Although not a panacea, tender systems which are widely advertised (with a legal requirement to publish) by governments through electronic services[287] "can increase transparency, facilitate access to public tenders, reduce direct interaction between procurement officials and companies, increasing outreach and competition, and allow for easier detection of irregularities and corruption, such as bid-rigging schemes. The digitalisation of procurement processes strengthens internal anticorruption controls and detection of integrity breaches, and it provides audit services trails that may facilitate investigation activities. The e-procurement system KONEPS in Korea is an example of an integrated online platform for procurement . . . ."[288]

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and Competition Policies: The Challenge of Implementation, Presentation at Lear Conference (July 3, 2017). In addition to calling for appropriate law enforcement activities, these instruments rightly emphasize the need for procurers to identify markets in which bid rigging is more likely to occur; methods that maximize the number of bids; best practices for tender specifications requirements and award criteria; procedures that inhibit communication among bidders; and suspicious pricing patterns, statements, documents, and behavior by firms.

285 *See, e.g.*, Boehm & Olaya, *supra* note 27, at 435–36; Lengwiler & Wolfstetter, *supra* note 129, at 419; OECD, *supra* note 7, at 27; Wang & Chen, *supra* note 84, at 37 (oral auctions are more vulnerable to collusion than sealed bids, second price sealed-bid auctions are more susceptible than first-price sealed bids and collusion is easier in ascending than in descending auctions).

286 *See supra* note 87 and accompanying text.

287 In one case in Slovakia a €220 million tender was—to ensure that a favored competitor won—posted only on a bulletin board in a corridor inside a ministry building. *See Rigging the Bids*, *supra* note 5. Allowing bidding by mail, by telephone, or electronically will facilitate bidding by a broader pool of tenderers.

288 OECD, *supra* note 98, at 22.

* Offering contracts less frequently and on long, irregular time cycles may reduce bid-rigging opportunities[289] and create incentives for bidders to deviate from any collusive scheme.

* Purchasing centrally rather than locally may allow a purchasing agency to exercise countervailing market power against suppliers and places the agency in a better position to detect patterns of collusion.

* Incorporating anticollusion tender clauses, for example requiring bidders to sign a CIBD;[290] requiring bidders to operate audited compliance programs; clarifying that procurement agencies will be vigilant for bid rigging and take action if collusion is detected, setting out penalties that may result and reserving the right not to award contract if suspicion of bid rigging arises; and requiring bidders to disclose upfront any subcontracting plans.

* Incorporating anticorruption provisions,[291] such as those incorporated in Transparency International's Integrity Pact.[292]

* Clearly defining and streamlining requirements for bidders (omitting any unnecessary restrictions) that are likely to maximize participation and open markets to international trade (containing no territorial discrimination or foreign restrictions). This lowers barriers to entry and provides clear, objective, and well-defined guidance (with weightings where appropriate) for the evaluation and award of the tender. If combined with a provision allowing bids on a portion of a tender,[293] the process may increase participation, particularly by local small and medium enterprises ("SMEs"), which account for a significant percentage of all established businesses worldwide.[294]

* Defining technical specifications by reference to functional performance rather than design or descriptive characteristics, streamlining proof of technical expertise processes, and basing technical specifications on international standards where such exist (otherwise, on national technical regulations, recognized national standards, or building codes).[295]

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289 Wang & Chen, *supra* note 84. Larger contracts may, however, present a greater risk of corruption and, being larger, could possibly reduce the pool of bidders and opportunities for SMEs. *See supra* text accompanying notes 74–76.

290 *See, e.g.*, Competition Commission, *Model Non-Collusion Clauses and Non-Collusive Tendering Certificate* (Dec. 2017), https://www.compcomm.hk/en/media/press/files/Model_Non_Collusion_Clauses_and_Non_Collusive_Tendering_Certificate_Eng.pdf (model non-collusion clause published by Hong Kong Competition Commission); OECD, *supra* note 259.

291 *But see* Yukins, *supra* note 222.

292 *See supra* note 225 and accompanying text.

293 *See* Graells, *supra* note 32.

294 *See* OECD, *supra* note 7, at 489–91.

295 *See* discussions of requirements established under the GPA, *infra* Section III.E.

* Restricting preferential treatment of domestic suppliers.

* Incorporating an accessible, user-friendly, and rigorously operated complaints and domestic review procedure[296] to facilitate detection of irregularities and to build bidders' confidence in the integrity and fairness of the system.

Once tenders have been received they should be evaluated according to established criteria by a skilled team.[297] Procurers should discuss bids individually with tenderers rather than jointly, avoid splitting contracts between suppliers with identical bids, and be cautious about joint bids or bids made with the use of industry consultants. Even if the outcome of the process is transparent or there is a public bid opening, procurers should keep the terms and conditions of each firm's bid confidential. Records of the design process, decision process, and implementation process should be taken and monitored to ensure processes are carried out according to their letter, bids are allocated fairly, and contracts are not unduly changed or extended during the implementation stage.[298]

B. *Careful Market Research and More Advanced and Targeted Competition Advocacy*

Careful preparation and market research at the outset of a tender process can contribute very significantly to the tender's effectiveness. With modern electronic search tools and increased transparency, procurement officials can familiarize themselves with the goods and services that are potentially available, possible tenderers, and, in many cases, with the prices that have been paid in their own and in adjoining jurisdictions in similar procurements. Such a survey can also be useful in determining whether the market is likely to support collusion,[299] the potential bidders (their costs, prices, and previous tender history), and how the possibilities for soliciting innovative, competitive solutions can be maximized.

In markets where there is a high risk of collusion, this information can aid the construction of processes that will not enhance, but rather offset, the risk, especially by considering how to draw up appropriate prequalification criteria, reduce barriers to entry, structure the auction and tender

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296 *Id.*

297 *See infra* Section III.C.

298 *See, e.g.*, *Rigging the Bids*, *supra* note 5 (reporting on a case where the British Nuclear Decommissioning Authority was found by the High Court to have been fudging the evaluation of tender criteria to favor a particular bidder and conducting poor record keeping); *see also* Nuclear Decommissioning Auth. v. EnergySolutions EU Ltd [2017] UKSC 34.

299 *See supra* Section I.B.

specifications and process to allow for the maximum number of qualified bidders and a variety of goods and services, reduce opportunities for bidders to meet or coordinate conduct during the tender process (e.g., avoiding the organization of pre-bid meetings or site visits where possible, managing any meetings carefully, making procurement patterns less predictable, and avoiding presenting similar size contracts regularly), and design the process so as to ensure reduced communication and flow of competitively sensitive information among the bidders and between them and the tendering authorities. It can also help procurers to react quickly when, for example, likely bidders do not participate or where bids seem to exceed anticipated pricing levels.

More advanced and sophisticated approaches to competition advocacy are also needed. Issues to be addressed include continued operation of tender processes that do not comply with the best practices outlined in Section III.A, perhaps because they unnecessarily limit bidders' participation, and allow for easier coordination among the fewer remaining bidders. For example, national regulatory rules may make it difficult for foreign companies to qualify to bid. Further, the imposition of domestic or local content rules frequently excludes potential bidders. In the US, for example, foreign suppliers are effectively precluded from bidding on most federal government contracts unless they are: (1) based in a country that is a party to the Agreement on Government Procurement ("GPA"); (2) covered by provisions on government procurement in a preferential trade agreement between the US and another country; or (3) based in a Least-Developed Country.[300] Many other countries also have policies that favor domestic suppliers in at least some aspects of their public procurement process.[301] Entry may also be deterred by procedures that aim to increase the integrity of the procurement system,[302] for example, civil and criminal strictures against fraud in public procurement markets that create asymmetries between public and private contracting and so discourage firms from serving public purchasers.[303]

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300 The US approach has been defended on the basis that it provides an essential inducement for countries to seek accession to the GPA or other arrangement providing access to the US market. *See* Christopher R. Yukins & Steven L. Schooner, *Incrementalism: Eroding the Impediments to a Global Public Procurement Market*, 38 GEO. J. INT'L L. 529, 569 (2007). These authors refer to the US market as a "walled garden." *Id.*; *see also* Linda Weiss & Elizabeth Thurbon, *The Business of Buying American: Public Procurement as Trade Strategy in the USA*, 13 REV. INT'L POL. ECON. 701, 708 (2006).

301 An encyclopedic description of domestic preferences programs in regard to public procurement in OECD and non-OECD is provided in CHRISTOPHER MCCRUDDEN, BUYING SOCIAL JUSTICE: EQUALITY, GOVERNMENT PROCUREMENT, AND LEGAL CHANGE (2007). The GPA prohibits discrimination only regarding "covered" procurement; parties are free to discriminate in regard to non-"covered" procurement. *See* WTO, Revised Agreement on Government Procurement, art. II, ¶ 1 (Mar. 30, 2012) [hereinafter GPA], https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm.

302 *See generally* OECD, Competition Policy and Procurement Markets, DAFFE/CLP(99)3/FINAL (May 7, 1999), http://www.oecd.org/regreform/sectors/1920223.pdf.

303 *See* William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 SUP. CT. ECON. REV. 201, 217–18 (1998).

Competition agencies can also warn procurers when processes are not drawn up to minimize the risk of collusion, for example, where they are presented too regularly or incorporate inappropriately tailored transparency requirements.[304] Appropriately constructed transparency provisions can, however, facilitate participation by new participants (including those "outside the club")[305] through the open provision of information on how to participate in the procurement process.

C. *Professionalization of the Procurement Workforce*

1. Generally

Investment in human resources is vital to yielding good results from any procurement system. Indeed, experience suggests that appropriate investments in the procurement workforce may partially alleviate the need for costly ex post control systems and deliver better overall value for taxpayers. As suggested by Schooner and Yukins:

> States must promptly, dramatically, and aggressively invest in their acquisition workforces. . . . provide these business professionals with the most current, realistic and skills-based training available. . . . Then, governments should deploy these talented, skilled, incentivised procurement professionals to get the taxpayers the most for their money. No nation can reasonably conclude that additional investments in personnel to improve its performance in any of these disciplines would not pay significant dividends. Rather, most would enjoy dramatically increased return on their procurement investments by strengthening their capacity in each of these critical areas.[306]

As part of this professionalization effort, public procurement agencies and officials should understand the objectives of the procurement system and the importance of it not being undermined either by tenderers' actions or their own conduct. Appropriate remuneration is also important since an underpaid procurement workforce increases the risk of corrupt practices.[307]

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304 *See supra* notes 83–85 and accompanying text.

305 *See* Anderson, Kovacic & Müller, *Synergies with Trade Liberalisation*, *supra* note 18, at 9.

306 Steven L. Schooner & Christopher R. Yukins, *Public Procurement: Focus on People, Value for Money and Systemic Integrity, Not Protectionism*, *in* THE COLLAPSE OF GLOBAL TRADE, MURKY PROTECTIONISM, AND THE CRISIS: RECOMMENDATIONS FOR THE G20, at 87, 91 (Richard Baldwin & Simon Evenett eds., 2009).

307 *See* Tanzi, *supra* note 128, at 572–73 (discussing literature on the link between wages and corruption).

2. Increasing Procurement Officials' Ability and Incentives to Identify and Report Collusion and to Comply with Anticorruption Laws

Given their knowledge of the market and their capacities to observe patterns in bidding process, interact with bidders, observe behavior, and intercept documents, public officials are well-situated to detect bid-rigging arrangements when they arise. Public officials should therefore receive training in competition law, enabling them to understand when markets are prone to collusion, how the procurement process might facilitate or encourage it, and the usefulness of more open-ended approaches to procurement design. This will also ensure that the officials are aware of the risks that arise if bidders communicate with each other, submit joint bidding, or subcontract; are alert and screen for warning signs or indicators of possible collusion; and will be more likely to report suspicions to, and exchange information with, competition enforcers. Competition agencies thus routinely engage in advocacy, training, and outreach programs aimed at raising procurers' awareness of the rules against bid rigging. Agencies also produce guidelines and handbooks urging public procurement officials to be vigilant for cartels, act as a complainant where they suspect breaches, and collect and use or pass on key data for screening and monitoring compliance with the competition law rules.[308]

As procurers may be unwilling to derail or delay procurement they are employed to achieve (especially if their performance is evaluated not on how many cartels they discover, but on the basis of their ability to set up and complete the procurement process successfully and conclude contracts[309]), it is important that procurers should be provided with incentives to monitor for and report suspected bid rigging. For example, "[t]he money saved from a cartel that an administration helped discover [could] at least in part remain with the administration itself, and the official who helped discover a cartel [could] gain some career benefits."[310] Commending letters for uncovering collusion could also be considered along with the introduction of negative repercussions for not following relevant monitoring or reporting laws or guidelines.

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308 *See* ICN, *supra* note 32, at 25–27 (discussing activities in Australia, Botswana, Canada, Colombia, Cyprus, the EU, and Finland). In the US, the DOJ routinely engages in training of procurement officials, aiming to teach them how to evaluate bids like an antitrust expert prosecutor. *See id.* at 32–33. The ICN-WBG Competition Policy Advocacy Awards have revealed a number of examples of successful collaboration between procurers and competition agencies, which have led to significant savings in public money. *See* TANJA GOODWIN & MARTHA MARTINEZ LICETTI, WORLD BANK GRP., TRANSFORMING MARKETS THROUGH COMPETITION: NEW DEVELOPMENTS AND RECENT TRENDS IN COMPETITION ADVOCACY 51 (2016), http://documents.worldbank.org/curated/en/640191467990945906/pdf/104806-REPF-Transforming-Markets-Through-Competition.pdf.

309 *See* Heimler, *supra* note 4, at 860.

310 *Id.* at 862.

In addition, because bid riggers may offer procurement officials bribes and other kickbacks specifically designed to prevent them from reporting their wrongdoing, procurers should be informed of their duties to conduct procurement procedures in a fair, ethical and impartial way—in accordance with anticorruption laws—and measures put in place to prevent such misconduct. Procurers should therefore also receive training in anticorruption laws and be subject to civil-service regulation or codes of conduct that outline the relevant laws, standards, and expectations of good conduct, as well as the consequences of infringement. These should aim to ensure that officials' private interests do not improperly influence performance of their public duties and that public officials are obliged to disclose information or make asset declarations that may reveal conflicts of interest.[311] For example, procurement Codes of Conduct and training exist in Canada, Austria, and France.[312] To be effective, compliance with integrity standards and ethical codes throughout the procurement cycle must be overseen by a dedicated entity or government department.[313] Rewards for not accepting bribes (and turning in those that offer them), rotation of civil servants (to prevent them creating strong ties with industries with which they routinely work), and an increase of public sector wages may also constitute mechanisms for tackling the supply of corruption.[314] In addition to increasing the integrity of the procurement process, ethical codes promote good governance and build trust in public institutions.

D. *The Interaction Between Anticorruption and Pro-Competition Measures*

This Article has flagged the distinct but complementary nature of bid rigging and bribery in public procurement and stressed that a more "joined-up" approach to these problems is required. It is difficult to fight bid rigging effectively in public procurement markets without tackling corruption, and vice versa.

It is crucial, therefore, that, beyond advocacy and training, procurement, competition, and anticorruption agencies work closely together. Not only can

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311 OECD, *supra* note 98, at 11.

312 *See, e.g.*, Pub. Servs. & Procurement Can., *Context and Purpose of the Code*, GOV'T CAN., https://www.tpsgc-pwgsc.gc.ca/app-acq/cndt-cndct/contexte-context-eng.html (last modified Nov. 26, 2018) (outlining Canada's code of conduct imposed on all procurement officials, including pre-employment, post-employment, and conflict of interest prophylactic requirements); OECD, *supra* note 98, at 12–13 (outlining Austria's combined anticorruption and integrity training program and France's corruption and irregularity identification training program).

313 *See* Wakui, *supra* note 46, at 42–43 (discussing the JFTC's role of enforcing anti-bid-rigging legislation in Japan); OECD, *supra* note 161, at 36. In Brazil, the Public Spending Observatory scrutinizes procurement expenditures.

314 *See, e.g.*, Tanzi, *supra* note 128, at 572–73 (discussing literature on the link between wages and corruption).

this facilitate prevention and ensure the promotion and understanding of each other's remit, powers and procedures, but cooperation in monitoring for, detecting, and prosecuting violations is likely to contribute to effective enforcement and the deterrent effect of each set of laws. Indeed, indicators of collusion or corruption may emerge during a public procurement process, evidence of corruption may be uncovered in a bid-rigging investigation, and evidence of bid rigging may emerge in corruption probes. Consequently, it is vital that the complementarities between competition and anticorruption remits, which comprise "two sides of the same coin,"[315] are recognized. Careful consideration of institutional design, strong working relationships, dialogue, interagency cooperation, and joint enforcement in these spheres[316] will help to unravel synergies. Although coordination presents huge challenges, both formal and informal means may help to overcome these.

Cooperation can be internalized by entrusting the same agency with procurement, competition, or corruption remits. For example, in Germany, Sweden, and Russia, competition authorities have the power to supervise or oversee public procurement processes. In Germany, the competition authority has chambers that act as a public procurement review body, assessing whether procurers have met their obligations.[317] In the US, the DOJ, can use its full powers to prosecute violations of criminal law, including fraud, corruption, and antitrust.[318]

Where agencies are distinct, mutual assistance can be achieved not only through advocacy, training, and outreach, but also through placement and exchange of staff, cooperation, and knowledge-sharing systems, which allow information uncovered or gathered by one authority to be brought to the attention of the appropriate enforcement body, by interagency agreements, or by task forces and other oversight agencies. In some jurisdictions interagency task forces have been established (e.g., in Chile[319]) and many competition authorities now work closely with public procurement bodies[320] and routinely and carefully monitor public procurement.[321]

Relatively few jurisdictions, however, explicitly acknowledge the interaction between corruption and bid rigging or have mechanisms for competition and anticorruption agency cooperation or indeed for firms to cooperate with different agencies dealing with antitrust, anticorruption, and criminal

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315 López-Galdos, *supra* note 62, at 4.

316 *See* Alford, *supra* note 55, at 8 ("For example, the records of communications and the trail of unlawful payments may surface in the same file.").

317 *See* OECD, *supra* note 7, at 32, 331–32, 353–54.

318 *See* Alford, *supra* note 55, at 7–10 (discussing the DOJ's investigative and prosecutorial efforts against corruption).

319 *See* OECD, *supra* note 7, at 30.

320 *See supra* note 308.

321 *See supra* text accompanying notes 199–207.

enforcement.[322] Arguably, therefore, more could be done to ensure that enforcers probe both horizontal and vertical elements of bid rigging and to encourage evidence sharing between anticorruption and competition agencies where compatible with national evidentiary rules.[323] Analytical synergies may result from grouping these kinds of conduct together, and investigations in one sphere may lead to operational intelligence in the other.[324] The introduction of a formal cooperation policy could therefore significantly improve the chance that misconduct in public procurement is uncovered and prosecuted.[325]

In some jurisdictions, it is theoretically possible for competition agencies that uncover bid rigging involving procurement officials to find the procurer or procurement agency to have infringed competition laws by acting as a facilitator to the cartel.[326] In most cases, however, competition agencies focus only on the horizontal element of the cartel and do not have power, nor the incentive, to tackle corruption. Similarly, relatively few enforcers of anticorruption laws can proceed against bid rigging unless it involves fraud or a criminal cartel offense. MDBs adopt a more holistic approach to bid rigging, inquiring into both vertical and horizontal elements and sanctioning both, but they lack the investigative powers and techniques of competition and anticorruption agencies. Even if MDBs were more willing to impose sanctions for both corruption and collusion, they are therefore less able to expose it.

An example of how effective formally recognizing the link between bid rigging and corruption can be is seen in Japan where "dango," or bid rigging in public tendering, has for a long time been a core focus of criminal competition law enforcement.[327] Nonetheless, concern grew that the laws did not reach facilitators or procurement officials found to have been involved in such arrangements. In 2000, for example, government officials were found to have played a central role in bid rigging in construction contracts procured by the Hokkaido prefecture government, but the JFTC was powerless to

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322 *See* OECD, *supra* note 7, at 31. *But see* John Pecman, *Co-Operation Between Anti-Corruption and Competition Authorities*, GOV'T CAN. (June 14, 2016), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04114.html (discussing Canada's increasing cooperation with law enforcement agencies and procurement authorities on corruption and bid-rigging investigations). The Competition Commission of Singapore maintains a close relationship with the country's Corrupt Practices Investigation Bureau. OECD, *supra* note 7, at 30.

323 For example, by assisting competition agencies that (1) may not have access to the information to trigger an initial investigation and (2) tend to have more limited evidence-gathering powers than criminal justice agencies.

324 Alford, *supra* note 55, at 8.

325 OECD, *supra* note 7, at 31–32.

326 *See*, *e.g.*, Case C-194/14 P, AC-Treuhand AG v. Comm'n, ECLI:EU:C:2015:350 (Oct. 22, 2015). But in the EU, the procurer will only be caught by the competition law rules if it is an "undertaking"—an entity engaged in economic activity. *See* Case C-205/03 P, Federación Española de Empresas de Tecnología Sanitariav. Comm'n, ECLI:EU:C:2006:453 (July 11, 2016).

327 Wakui, *supra* note 46, at 42–43 (noting that almost half of the JFTC's 134 cases in the fiscal years 2006–2012 were related to bid rigging in public procurement).

sanction their conduct.[328] In recognition of this lacuna, and of the especially strong temptation that exists in Japan for procurement officials to become involved in bid rigging, legislation was adopted in 2002 specifically outlawing conduct that promotes and aides bid rigging (e.g., through determining the winner or disclosing information).[329] This legislation is enforced by the JFTC, which has the power to demand procuring departments investigate the issue, publish the outcome of the investigation, and take action against officials found guilty (for example, through claims for damages or disciplinary action).[330] Where involvement by officials is found, procuring departments must also implement improvement measures that will eliminate the illegal activity.[331] The law has thus "established a unique system under which the government procuring offices introduce measures to make public tendering system more competitive under the scrutiny of the [JFTC]."[332] Indeed, the 2002 Act has now been enforced in a number of cases in the construction and engineering industries.[333] In these cases bidders and public officials were found to have worked closely together and interacted frequently, especially in tight-knit local communities or where ex-officials moved to work for bidding companies.[334]

In addition, procurement, competition, and anticorruption agencies may benefit from cooperating not only on a national basis, but also internationally. Indeed, UNCAC, recognizing the strictly territorial nature of law enforcement, sets out extensive and detailed provisions relating to international cooperation in criminal matters and requires states to combat convention offenses through mutual legal assistance in investigations, prosecutions, and judicial proceedings.[335] Competition authorities also habitually work together, particularly through the ICN but also through other formal and informal bilateral and multilateral arrangements, to combat cartels and to coordinate searches and investigations across jurisdictions.[336]

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328 JAPANESE FAIR TRADE COMM'N, ANNUAL REPORT 6 (2000), https://www.jftc.go.jp/en/about_jftc/annual_reports/2000index_files/japan2000.pdf.

329 Kono nyūsatsu dangō-tō kan'yo kōi no haijo oyobi bōshi narabini shokuin ni yoru nyūsatsu-tō no kōsei o gaisubeki kōi [Act on Elimination and Prevention of Involvement in Bid Rigging, etc. and Punishments for Acts by Employees that Harm Fairness of Bidding, etc.], Law No. 101 of 2002 (Japan).

330 *See* Wakui, *supra* note 46, at 46.

331 *Id.*; *see also* Law No. 101 of 2002, *supra* note 329, art. 3, § 4.

332 Wakui, *supra* note 46, at 43.

333 *See* OECD, COMPETITION LAW AND POLICY IN JAPAN, at 8–9 (2002), http://www.oecd.org/japan/34832229.pdf.

334 *See* Daiske Yoshida & Junyeon Park, *Japan*, *in* BRIBERY & CORRUPTION 156–57 (Jonathan Pickworth & Jo Dimmock eds., 3d ed., 2015), http://www.lw.com/thoughtLeadership/gli-bribery-corruption-3rd-ed-japan.

335 G.A. Res. 58/4, United Nations Convention Against Corruption (Oct. 31, 2003).

336 *See Anti-Cartel Enforcement Manual*, *supra* note 32, at 14.

E. *The Contribution of Trade Liberalization to Strengthening Competition and Deterring Corruption in Public Procurement*[337]

Another policy tool that can contribute powerfully to the fight against corruption and the strengthening of competition in government procurement markets is to open access to procurement markets to suppliers from outside the tendering state. Not only does trade liberalization enhance competition in the home market, but it provides the opportunity for specialization, exchange, and access to technology that is not available in that home market.[338]

Liberalization of trade in relation to government procurement markets can, in principle, be undertaken unilaterally. In practice, however, it almost always occurs through participation in the WTO plurilateral GPA,[339] or in bilateral agreements embodying rules and commitments similar to those of the GPA.[340] MDBs also impose procurement (and anticorruption) requirements and regimes, which are similar to standards established under the GPA, on the borrowers responsible for the projects the MDBs fund.

The GPA's provisions promote an open approach to procurement in a number of ways. For example, it incorporates:

* Requirements for procurement to be conducted "in a transparent and impartial manner."[341] This provision encourages a wider pool of participants by ensuring information necessary to participate in and to prepare tenders is disseminated beyond "the usual suspects" (a procuring entity's preferred suppliers).[342]

* Market access or coverage commitments which make it more difficult for parties to design procurement rules to favor national suppliers through

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337 This section draws on material in Anderson, Kovacic & Müller, *Synergies with Trade Liberalisation*, *supra* note 18, and in Robert D. Anderson & Anna Caroline Müller, *The Revised WTO Agreement on Government Procurement (GPA): Key Design Features and Significance for Global Trade and Development*, 48 GEO. J. INT'L L. 949 (2017).

338 *See* Anderson, Kovacic & Müller, *Synergies with Trade Liberalisation*, *supra* note 18, at 90; *Parties, Observers and Accessions*, WTO, https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm (last visited May 23, 2019).

339 "The [GPA] consists of 20 parties covering 48 WTO members (counting the European Union and its 27 member states, and the United Kingdom, all of which are covered by the Agreement, as one party). Another 32 WTO members/observers and four international organizations participate in the GPA Committee as observers. 10 of these members with observer status are in the process of acceding to the Agreement." *Parties, Observers and Accessions*, *supra* note 338.

340 For further analysis, see Robert D. Anderson, Anna Caroline Müller & Philippe Pelletier, *Regional Trade Agreements and Procurement Rules: Facilitators or Hindrances?*, *in* THE INTERNATIONALIZATION OF GOVERNMENT PROCUREMENT REGULATION (Aris C. Georgopulos et al. eds., 2017).

341 GPA, *supra* note 301, art. IV, ¶ 4.

342 Anderson, Kovacic & Müller, *Synergies with Trade Liberalisation*, *supra* note 18, at 91.

technical specifications.[343] Procurement covered in this way is subject to rules requiring nondiscriminatory treatment ("national treatment") of other GPA parties' goods, services, and suppliers. Suppliers from other GPA parties cannot be arbitrarily excluded. This increases the pool of competitors, thereby making collusion more difficult.

* Provisions that discourage practices such as the "wiring" of technical specifications to favor particular brands or suppliers.[344] For example, the GPA articulates a clear preference for technical specifications that are framed in terms of performance and functional requirements, rather than design or descriptive characteristics. Procurers are specifically prohibited from prescribing technical specifications that require, for example, a particular trademark or trade name, unless there is no other way of describing the requirements and so long as equivalents are permitted.[345]

* An explicit stipulation that GPA parties' procuring entities may "not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification for a specific procurement from a person that may have a commercial interest in the procurement."[346] In each of these ways, the GPA serves as a guide for procompetitive policy reforms and reinforces the effects of domestic legislation aimed at ensuring open and procompetitive procurement design.[347]

* The ability to invoke the WTO's Dispute Settlement Understanding ("DSU") in cases where parties believe that international competition has been thwarted through measures taken in breach of their GPA commitments.[348] Although the DSU has been employed to challenge government procurement processes only relatively infrequently as compared to other areas of the WTO's jurisdiction, its applicability is "essential . . . to ensure that participating governments honor their commitments and do not arbitrarily exclude potential competitors from the other GPA parties."[349]

Evidence suggests that the entry into trade agreements can, in appropriate circumstances, help to change perspectives, engage a different set of

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343 GPA, *supra* note 301, art. IV, ¶¶ 1–2.

344 See discussion, *supra* Section III.A.

345 GPA, *supra* note 301, art. X, ¶ 4. In this and multiple other respects, the GPA aims simply to codify and enforce good procurement practice as it is understood by the forty-seven parties to the agreement.

346 *Id.* art. X, ¶ 5.

347 *See supra* Section III.A.

348 GPA, *supra* note 301, art. XX, ¶ 2; Anderson, Kovacic & Müller, *Synergies with Trade Liberalisation*, *supra* note 18, at 91.

349 Anderson, Kovacic & Müller, *Synergies with Trade Liberalisation*, *supra* note 18, at 91.

players, and signal parties' commitment to combat collusion and corruption.[350] In this context, the GPA:

* Requires all participating countries to establish "national bid protest or remedy systems ('domestic review procedures') through which suppliers can challenge questionable contract awards or other decisions by national procurement authorities" before impartial bodies.[351] Experience suggests that such systems can enhance supplier confidence that contracts will be awarded on the basis of product quality and competitive pricing—thereby encouraging participation from a broader pool of potential suppliers.[352] Further, foreign participants "are likely to have stronger incentives and fewer inhibitions . . . to report collusion and/or corruption [than domestic players], as they are less subject to ongoing scrutiny and social pressures."[353]

* Explicitly requires procurement to be conducted in a transparent and impartial way, avoiding conflicts of interest.[354] In our view, this provision can serve as an important "hook" for efforts to eradicate corruption on the part of both governmental and nongovernmental authorities.[355]

* Provides for external oversight of national procurement systems by the WTO Committee on Government Procurement,[356] also potentially helping to break vicious cycles.

Participation in the GPA may thus signal "to both domestic suppliers and the outside world that an acceding country is intent on conforming to international best practices . . . [and] challenging entrenched expectations . . . with regard to collusion and corruption."[357]

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350 *See id.* at 91–92.

351 *Id.* at 91; *see also* GPA, *supra* note 301, art. XVIII.

352 Anderson, Kovacic & Müller, *Synergies with Trade Liberalisation*, *supra* note 18, at 91.

353 *Id.* at 92.

354 GPA, *supra* note 301, art. IV, ¶ 4. The intention that the provision should ensure accord with international instruments and the view "that the integrity and predictability of government procurement systems are integral to the efficient and effective management of public resources [and] the performance of the Parties' economies" is spelled out clearly in the preamble and recitals. *Id.*

355 Anderson, Kovacic & Müller, *Synergies with Trade Liberalisation*, *supra* note 18, at 14 (noting also the experiences of Moldova and Ukraine).

356 GPA, *supra* note 301, art. XXI.

357 Anderson, Kovacic & Müller, *Synergies with Trade Liberalisation*, *supra* note 18, at 69. See also, for example, the announcement on January, 21 2020, by the Brazilian Minsiter of Economy that Brazil will request to join the GPA, so sending a powerful message that it is determined to grapple with corruption and collusion which has plagued its public procurement system in the past. Daniel Rittner, *Guedes diz que Brasil abrirá licitações públicas para fazer 'ataque frontal' à corrupção*, VALOR (Jan. 21, 2020), https://valor.globo.com/brasil/noticia/2020/01/21/guedes-diz-que-brasil-abrir-licitaes-pblicas-para-fazer-ataque-frontal-corrupo.ghtml.

The potential contribution of trade liberalization to the control of collusion and corruption is illustrated by some recent reports. For example, an empirical analysis conducted in 2018 using new data sources and sophisticated econometric techniques affirmed that GPA participation strengthens competition in at least three measurable ways: (1) it increases the number and diversity of firms bidding for particular procurements, including by allowing foreign firms to bid; (2) it decreases the number of contracts with single bidders; and (3) it decreases the total number of contracts awarded to individual firms.[358] The assessment also found that, in doing so, the GPA fosters cost-effective public procurement by lowering the probability that the procurement price is higher than estimated cost.[359] These findings build upon important new data sources that are expected eventually to yield even better understanding of the costs of protectionism and the benefits of liberalization in the public procurement sector.[360] Further, a report for the European Parliament by Alina Mungiu-Pippidi and her colleagues employs advanced statistical methods to test the major hypotheses arising from the modern literature on the causality of corruption, using time-series data covering a sample of 113 countries. In their words:

> The results show that power discretion and dependency on fuel-export determine poor control of corruption. By contrast, economic openness, consisting in lower trade and financial barriers, and social openness as well as press freedom positively influence control of corruption.[361]

It is true that trade liberalization entails its own set of political and other challenges, and many jurisdictions have been or are reluctant to embrace market opening in the procurement sector and may favor public procurement as a means of nurturing domestic businesses.[362] We do not expect that liberalization will now be universally embraced or serve as a panacea. Still, the benefits described in this Article are well-documented in relevant literature.[363] As such, trade liberalization needs to be seen as an important

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358 *See* Bedri Kamil Onur Taş et al., *Does the World Trade Organization Government Procurement Agreement Deliver What It Promises?*, WORLD TRADE REV. 5–7 (Oct. 26, 2018), http://dx.doi.org/10.1017/S1474745618000290.

359 *Id.* at 9.

360 *See* ZORNITSA KUTLINA-DIMITROVA, GOVERNMENT PROCUREMENT: DATA, TRENDS AND PROTECTIONIST TENDENCIES 11–20 (Lucian Cernat ed., 2018), http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157319.pdf.

361 *See* Alina Mungiu-Pippidi, *Fostering Good Governance Through Trade Agreements: An Evidence-Based Review*, *in* ANTI-CORRUPTION PROVISIONS IN EU FREE TRADE AND INVESTMENT AGREEMENTS 11 (2018); *see also* TRANSITIONS TO GOOD GOVERNANCE: CREATING VIRTUOUS CIRCLES OF ANTI-CORRUPTION (Alina Mungiu-Pippidi & Michael Johnston eds., 2017).

362 *See* KUTLINA-DIMITROVA, *supra* note 360, at 1–2.

363 For a recent and pathbreaking econometric assessment, see KUTLINA-DIMITROVA, *supra* note 360, at 18–20; *see also* Anderson & Kovacic, *supra* note 4; Schooner & Yukins, *supra* note 306, at 87–

complementary tool in the never-ending struggle to improve public procurement processes and protect them from being undermined by bid rigging and bribery.

F. *Incremental Versus Systemic Reforms: The Importance of Context*

The entrenched nature of corruption and supplier collusion in public procurement markets referred to in Section III.E underscores the difficulties involved in provoking a break from these practices. Indeed, the reform of public financial management processes, especially public procurement, is a perilous process fraught with possibilities for failure. It is therefore not surprising to find evidence indicating that even when based on international best practices it is difficult to make reforms "take root" and achieve real change.[364] To be successful, measures must be accompanied by a sustained effort to engage stakeholders in addressing the problems that are most critical to them. Incremental (rather than systemic) steps, in which reforms are introduced, tested, and become part of the civic culture progressively over time, may have important advantages in some contexts.[365]

At the same time, other research suggests that progress in this sphere is likely to be possible only with sweeping, systematic reforms that fundamentally alter incentives and expectations.[366] For example, in some countries corruption appears to be institutionalized, not just a sum of individual corrupt acts.[367] In countries where corruption is endemic, although relevant actors may understand that they would stand to gain from eradicating corruption, they cannot be confident that most other actors will refrain from corrupt practices, and thus they may have little reason to refrain from paying or demanding bribes themselves.[368]

> As a consequence of such unaddressed collective action problems, societies may face a vicious circle of corruption that nobody alone can break. For progress to occur, something more than the formal monitoring and sanctioning mechanisms described above is needed: what is

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21; Robert D. Anderson et al., *Assessing the Value of Future Accessions to the WTO Agreement on Government Procurement (GPA): Some New Data Sources, Provisional Estimates, and an Evaluative Framework for Individual WTO Members Considering Accession* (WTO, Staff Working Paper ERSD-2011-15, 2011).

364 *See generally Anticorruption: How to Beat Back Political & Corporate Graft*, DÆDALUS, Summer 2018.

365 The seminal contribution here is MATT ANDREWS, THE LIMITS OF INSTITUTIONAL REFORM IN DEVELOPMENT: CHANGING RULES FOR REALISTIC SOLUTIONS (Cambridge Univ. Press, 2013).

366 *See* Persson, Rothstein & Teorell, *supra* note 16, at 465.

367 *See* Alina Mungiu-Pippidi, *Seven Steps to Control of Corruption: The Road Map*, DÆDALUS J. AM. ACAD. ARTS & SCI., Summer 2018, at 20, 23.

368 *See* Persson, Rothstein & Teorell, *supra* note 16, at 457. This is, of course, a version of a prisoner's dilemma game.

> required is a "revolutionary change in institutions" or a perceived "new game in town," leading to fundamental changes in the shared expectations of citizens.[369]

In some jurisdictions this may necessitate dramatic change, requiring efforts to build corruption control from the ground up, to increase engagement by citizens and the freedom of the press, and even the introduction of political reform.[370] One tool which may play a role in the creation of such systemic change could be the entry by countries into binding, legally enforceable agreements such as the GPA. Experience suggests that some countries with well-documented problems in this area have used the GPA precisely for this purpose.[371]

It is clear that the requisite solutions are likely to differ substantially from country to country and to require careful diagnosis of the roots of the problems in procurement. Solutions that are potentially workable in some contexts may be problematic in others. For example, in jurisdictions where outright corruption problems are believed to be minimal, some lessening of transparency measures might be considered for the sake of preventing collusion. On the other hand, in economies where bribery and other "traditional" forms of corruption due to principal–agent problems are rampant, any lessening of transparency measures is likely to be a recipe for disaster.[372] International donors may arguably be well-placed to play an important role in diagnosing and coordinating efforts to tackle corruption and collusion in public procurement by conditioning receipt of aid on compliance with anticorruption requirements.[373]

CONCLUSION

Corruption and supplier collusion in public procurement markets impact negatively on consumer welfare, economic growth, and the provision of vital infrastructure that citizens rely on. The inherent nature and features of public procurement make procurement particularly prone to distortion through bribery and bid rigging. Despite increasingly vigorous efforts over the past two to three decades to fight these practices, such conduct continues to plague public procurement systems around the globe.

This Article argues that, given the persistent and enduring problems that exist, the traditional tools applied to the problems of corruption and supplier collusion in public procurement markets, which focus on transparency and effective enforcement of anticorruption and competition laws, require

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369 Anderson, Kovacic & Müller, *Synergies Draft*, *supra* note 18, at 4.

370 *See* SUSAN ROSE-ACKERMAN & BONNIE J. PALIFKA, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM (2d ed. 2016).

371 *Id.*; *see also supra* note 357.

372 ROSE-ACKERMAN & PALIFKA, *supra* note 370.

373 *See* Mungiu-Pippidi, *supra* note 367, at 33.

enhancement, whether through incremental or (where necessary) systemic change.

Fundamental to any reform is a political commitment to ensuring that appropriate foundations are laid, and appropriate systems are put in place to strengthen procurement, competition, and related anticorruption laws and systems. This in turn depends upon a recognition that: (1) these provisions are central to the welfare of citizens and to the effectiveness and credibility of states; (2) there is an extremely close connection between the three spheres of law, and no individual set of rules is likely to achieve its full objectives in the absence of the others; and (3) a joined-up approach and dialogue between enforcers is required at both the national and international level, as well as between enforcers and MDBs.

The proffered changes are likely in many jurisdictions to require modifications to laws, enforcement techniques, sanctioning practices, design of procurement systems, and working practices of procurement staff. In addition, a shift in the incentives affecting, and a change in the mindsets of, procurers, enforcers, businesses, and the public is required. If each of these stakeholder categories fully understands the overall benefits of procompetitive procurement and that significant consequences follow from transgression of the rules governing it, changes may materialize through, for example: a greater ability and willingness of procurers to combat bid rigging, to comply with ethical codes, and to recover public money lost; encouraging firms to comply with anticorruption and competition laws and to monitor for, and self-report, transgressions; enhancing the ability of enforcers to detect, act against, and sanction unlawful bid rigging and bribery; building public support for procurement; and allowing the public to play a greater role in monitoring compliance with the law.

This Article has argued that trade liberalization can play a significant role in helping to address corruption and competition concerns in public procurement markets. The GPA is the world's primary tool for facilitating progressive market opening and limiting the scope for protectionism in the public procurement sector. Participation in the GPA enhances possibilities for healthy competition in relevant markets through participation by foreign-based or affiliated contractors. The GPA also mandates adherence to minimum standards of transparency and commits its parties to the implementation of measures to prevent corruption and avoid conflicts of interest in their procurement systems.

In calling for these changes and enhanced cooperation to address corruption and supplier collusion problems in public procurement, this Article does not propose something that is entirely new. However, it argues that there is a need for cooperation and other mechanisms and steps that go beyond those currently engaged by the specialized disciplines of competition law enforcement, anticorruption work, and procurement policy in their respective spheres. It is only through a more integrated approach that the world will come to grips with a set of problems that routinely undermines economic

development, penalizes our most vulnerable citizens, and erodes the very foundations of states themselves.