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LEGAL REMEDIES FOR GRAND CORRUPTION

Empowering the Victims of Corruption: The Potential of Sleeping Third-Party Beneficiary Clauses

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This paper is the sixth in a series examining the challenges and opportunities facing civil society groups that seek to develop innovative legal approaches to expose and punish grand corruption. The series has been developed from a day of discussions on the worldwide legal fight against high-level corruption organized by the Justice Initiative and Oxford University's Institute for Ethics, Law and Armed Conflict, held in June 2014.

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I. Introduction

This paper proposes that third-party beneficiary clauses, rights *ius quaesitum tertio*,[1] can be used to create platforms for private actor intervention in the fight against corruption that can help to shape an environment that discourages corruption in a self-regulatory manner. In the course of my Ph.D. research work on private remedies for corruption, I came to believe that people affected by corruption should be empowered to act against it. In the words of Simon Young, an expert on financial crime at the law faculty of the University of Hong Kong, corruption is "unique in many ways":

> The gains and losses can be massive. The state or government is often the victim. The proceeds of corruption, if traceable, are often in another jurisdiction, thereby complicating recovery … [;] civil actions against corruption are indicative not necessarily of a failing of the criminal justice system but of the absence of a better alternative to recovery.[2]

My work in this area was inspired by an illiterate farmer from Erin-Oke in Nigeria's Osun State. In 2008, as part of my research for my PhD thesis on private remedies for corruption, I had been interviewing selected Nigerians on their experiences of corruption. My discussion with this farmer was quite accidental as he was not one of the persons I had selected to interview.

I happened on him while vising my father in my home-town of Erin-Oke. From his dress I could see that he was a local farmer. I greeted him, and, out of curiosity, I explained that I had been speaking to several persons about their experiences of corruption. I asked whether he also had any experience he would like to share. To my surprise he launched into a very passionate discourse in Yoruba. He lamented at length the lack of basic public services such as electricity, running water, roads, drugs at the local health center. He explained the difficulties of obtaining fertilizer at an affordable price, of a general lack that that made his life "very hard". His weathered face was filled with frustration as he attributed the cause of all this to corruption—to big men who came with big promises and delivered nothing. He was articulate. He was passionate. He was also angry, and his anger and experiences belied the idea that

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[1] See, generally, D. Ibbetson, E. Schrage, "Ius quaesitum tertio: A Comparative and Historical Introduction in the Concept of Third Party Contracts," in E. Schrage (Ed.), *Ius quaesitum tertio*, (Duncker & Humblot), 2008, pp. 1–34; J. Hallebeek, H. Dondorp, *Contracts for a Third-Party Beneficiary: A Historical and Comparative Account* (Martinus Nijhoff), 2008; N. Andrews, "Strangers to Justice No Longer: The Reversal of the Privity Rule Under the Contracts (Rights of Third Parties) Act 1999," *Cambridge Law Journal*[volume and issue numbers?], 2001, p. 353; A. Burrows, C. Busch, (Eds.), *Contract Terms in Favour of Third Parties* (OUP), 2004.

[2] S. Young, "Why Civil Actions against Corruption?" *Journal of Financial Crime*, Vol. 16, No. 2, 2009, p.144-145.

corruption is somehow a victimless crime. I looked at him and wondered to myself as he spoke how this energy might be harnessed in the fight against corruption.

By linking those who bear the brunt of the negative consequences of corruption to public contracts tainted by corruption, third-party beneficiary clauses would give victims of corruption—such as my farmer— a seat at the table, a right to sue and a right to be engaged in the sanctioning processes with regard to such corrupt transactions. This approach can also act as a check on the actions of government officials and corporations by increasing the risk they incur through corrupt activity.

Until legal regulations translate to real change in the experience of people, the mechanisms for fighting corruption will at best be still evolving. New strategies that anticipate and overcome the challenges of existing approaches remain an urgent priority. Empowerment—giving victims legal standing to challenge corruption—has the potential to address two main challenges that flow from the existing regulatory framework:

- The conflict of interest created by criminalization. Most legal systems give the state a monopoly on the right to initiate criminal sanctions, making it typically the primary enforcer of anti-corruption rules. When corporations or governments commit crimes, as in the case of public contracts affected by corruption, the state has a conflict of interest that may prevent it from finding the political will to investigate or conduct prosecutions. The United Kingdom supplies an illustrative example; in 2006 the government successfully claimed that investigations into bribery payments made to a Saudi official as part of a deal with BAE Systems over the supply of military equipment, would pose a threat to national security.[3] Government actors may be the primary beneficiaries of contracts tainted by corruption. This is a strong argument for empowering other actors against corruption.[4]

- The lack of attention traditional criminal law approaches pay to contracts that result from successful acts of bribery. Bribery in transnational business is a means to a contract and not an end in itself. Yet international regulations have focused on punishing the giver and taker of the bribe. They have rarely addressed the contracts tainted by corruption.

Empowerment of victims, however, like any new proposal, faces several challenges, including the challenge of the enforcement of judgments. The enforcement of domestic and international anti-corruption rules has been lax in many countries, especially those where corruption is endemic.

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[3] See *R (On the Application of Corner House Research and Others) v. Director of SeriousFraud Office* [2008] UKHL 60.

[4] Rose-Ackerman includes the private litigant in her checklist of international actors who may play a role in the fight against corruption. See S. Rose-Ackerman, P. Carrington (Eds.), *Anti-Corruption Policy: Can International Actors Play a Constructive Role?* (CAP), 2013, p. 6.

Empowerment also faces the limitations of legal standing to sue. There are good reasons for rules of standing; the machinery of justice might otherwise break down under the weight of a multiplicity of claims or, worse, an onslaught of frivolous claims. But I argue that it is possible to provide third party redress, while also providing mechanisms to avoid encouraging excessive litigation, through establishing a *sleeping* third-party beneficiary clause in procurement contracts. Such clauses remain dormant unless the third party can demonstrate evidence of corrupt activity relating to the award of a specific contract. Such a clause would be most successful if the specter of direct intervention discourages corruption so effectively that the clause is never triggered into operation.

Inserting sleeping third-party beneficiary clauses as standard clauses in procurement contracts would usher in a new dynamic in the fight against corruption by linking different layers of interactions that corrupt transactions simultaneously affect. In taking a transaction approach to fighting corruption, these clauses would trade on the notion of restoring interactions damaged by a corrupt exchange. These clauses would work by identifying and addressing broken interactions at the mandate, violation, and consequence levels.[5]

By creating a direct link between (1) the public that grants government officials the mandate to represent the public interest in contracts with a public dimension; (2) the parties to contracts that result from the exercise of this mandate; and (3) the contracts that result from the exercise of that mandate, sleeping third-party beneficiary clauses can positively influence the environment in which a corrupt exchange takes place by creating more awareness and multi-level opportunities for dialogue between all parties affected by a corrupt exchange.

II. The Legal Case for Empowering Victims of Corruption

A 2008 report of the Special Representative of the U.N. Secretary-General points out that "States should strengthen judicial capacity to hear complaints and enforce remedies against all corporations based in their territory, while also protection against frivolous claims."[6]

[5] See Chapter 10, "Towards a Transaction Approach," in A. Makinwa, *Private Remedies for Corruption: Towards an International Framework* (Eleven), 2013, pp. 437–462. In his seminal work, *Restorative Justice and Responsive Regulation* (OUP, New York, 2002), John Braithwaite argues that restorative practices may serve as more effective deterrent systems than traditional criminal punitive sanctions.

[6] See J. Ruggie, "Protect, Respect and Remedy: A Framework for Business and Human Rights," Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5, 7 April 2008, para. 91, available at http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf.

However, the United Nations Convention against Corruption (UNCC) acknowledges that while the prevention and eradication of corruption is a responsibility of all states, if their efforts *are to be effective* they must cooperate not just with other states but also *citizens and groups outside the public sector, such as civil society, non-governmental organizations, and community-based organizations*.[7] Art. 13 of the UNCC expatiates more fully on the participation of civil society, calling on states to take measures "to promote the active participation of citizens and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption."[8] The UNCC has 174 parties and 140 signatories as of 12 November 2014. The logical extension of the framework the UNCC created is the empowerment of third parties.[9] This criminalization is one of the major achievements in the fight against corruption in the last two decades.

The emergence of a global standard criminalizing corruption in international business transactions reflects a crisscross of international, regional, and domestic instruments.[10] The effect of this network of rules is a new norm repudiating corruption that transcends national boundaries and criminalizes transnational bribery.[11] While it does not provide for a third-party right to sue, its logical extension does. Art. 35 of the UNCC, for example, demarcates corrupt acts established under

[7] Preamble, UNCC.

[8] See United Nations Convention against Corruption, New York, 31 October 2003, in force 14 December 2005, 2349 UNTS, p. 41; (2005), 43 *ILM*, p. 37.

[9] See A. Makinwa, Private Remedies for Corruption, pp. 383–384.

[10] In 1996, the Organization of American States adopted the Inter-American Convention against Corruption in Caracas, Venezuela (35 ILM, p. 724). In 1997, the Organisation for Economic Co-operation and Development adopted a Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (37 ILM, p. 1). Also in 1997, the Council of the European Union adopted a convention drawn up on the basis of Art. K.3(2)(c) of the Treaty on European Union on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union (Official Journal C 195, 25 June 1997, pp. 0002–0011). This prohibition was extended to private sector bribery with the Council Framework Decision on combating bribery in the private sector (see Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, Official Journal L 192, 31/07/2003 pp. 0054–0056). In 1999, the Council of Europe adopted the Criminal Law Convention on Corruption in force 1 July 2002 (173 CETS) as well as the Civil Law Convention on Corruption (174 CETS). In 2000, the United Nations Convention against Transnational Organized Crime (40 ILM, p. 353) was adopted, followed by the adoption of the African Union Convention on Preventing and Combating Corruption in 2003 (43 (1) ILM, p. 1). Finally, in 2003, the United Nations Convention against Corruption (UNCC) was adopted (43 ILM, p. 37). At the domestic level, the U.S. 1997 Foreign Corrupt Practices Act (15 USC Sec. 78dd-1, et seq.) and the U.K. 2010 Bribery Act (C.23) have a universality of application for multinational corporations that gives them a special status in the international framework of rules regulating corruption in international business.

[11] P.Nichols, "Regulating Transnational Bribery in Times of Globalization and

the convention as wrongs for which there is a concurrent private right of redress, stating:

> Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.[12]

Such codifications recognize any legal wrong that has caused injury as founding a right of civil action in both civil and common law.[13] Wrongs may be criminal, civil, or both.[14] Where a party acts contrary to obligations imposed by the anti-corruption instruments, the breach of this obligation creates corresponding infringements of rights. The party whose rights the corruption infringes implicitly has the right to oppose such infringements.[15]

Not least because Art. 35 subjects its provisions to the principle of sovereignty and non-interference, it does not bestow a third-party right to sue. The fundamental principles of domestic laws of participating states supersede it. Further, by virtue of its pre-conditions, it only permits parties who suffered a direct, quantifiable harm from corruption to seek redress, and only in a case involving a clear causal link to actions by a particular party. This places a significant evidential burden on the plaintiff seeking redress under Art. 35, and severely curtails such claims.

Fragmentation" (1999) 24 *Yale Journal of International Law* 257, pp. 302–303.

[12] Art. 35, UNCC.

[13] For example, Sec. 7 of the U.S. Restatement (2nd) Torts explains that injury is the violation of some legally protected interest while harm is the infliction of any loss or detriment on the person of the plaintiff. Recognized heads of legal injury, which are of relevance to the issue of corrupt acts is[as?] the damage suffered, are the common law causes of breach of fiduciary duty and fraud; damages that result from misrepresentation (Chapter 22 Restatement (2nd) Torts), interference with contractual relations (Chapter 37 Restatement (2nd) Torts), as well as interference with economic relations (Chapter 37A Restatement (2nd) Torts). The European Principles of Private Law speak in terms of legally relevant damage as a loss or injury that results from a right conferred by law or worthy of protection by law. See Book 6 Sec. 2:101, C. von Bar, E. Clive, H. Schulte-Nölke (Eds.), *Principles, Definitions and Model Rules of European Private Law*, Draft Common Frame of Reference (DCFR) Outline Edition, Sellier, Munich, 2009. Particular instances of legally relevant damage that have a bearing on the act of corruption are losses that result from the reliance on incorrect advice or information (Book 6, Sec. 2:207 DCFR); losses incurred upon unlawful impairment of business (Book 6, Sec. 2:208 DCFR); and losses resulting from the inducement of non-performance of an obligation (Book 6, Sec. 2:210 DCFR).

[14] B. Zipursky, "Rights, Wrongs, and Recourse in the Law of Torts," 51 *Vanderbilt Law Review*, Vol. 85, No. 1, 1998.

[15] J. Goldberg, B. Zipursky, "Torts as Wrongs," *Texas Law Review*, Vol. 88, 2010; Fordham Law Legal Studies Research Paper No. 1576644.

Art. 34 of the UNCC's address of secondary contracts that result as consequence of the corrupt exchange likewise paves the way for third-party beneficiary clauses.[16] It raises the possibility of declaring such transactions invalid, rescinding contracts tainted by corruption, and withdrawing contracts or other concessions entered into by government authorities, thereby broadening the sanctioning environment for corrupt activities:

> [W]ith due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.

Such a shift brings into focus the contracts, assets, and liability for harm to the victims of corrupt government contracting. This allows the process of contracting for public contracts, the transparency of the process, and the performance of such contracts to serve as additional avenues for intervention in the fight against corruption.

Empowering the victim of corruption to commence private actions for corrupt acts can occur independently of an unwilling state. Therefore, such victims can have a *welcome deterrent effect by piercing the veil of impunity that a state monopoly on* anticorruption measures creates. An alternative trigger for enforcement that exists wherever there is a jurisdictional link would help to create an environment where victims are more prepared to take steps and wrongdoers are mindful of the risk of litigation. The criminal process is predictable, with pre-determined fines and punishment that corrupt actors can readily factor into the decision as to whether or not to give a bribe. Private claims also introduce an element of uncertainty in terms of the number, duration, and costs (both financial and reputational) of private suits. Empowering victims of corruption to bring private actions with respect to contracts awarded through corrupt activity addresses two challenges simultaneously.

III. Claims on Contracts Tainted by Corruption

1. Claims on Contracts Tainted by Corruption

Two types of contracts accompany a corrupt exchange. The first is the primary contract for the exchange of the bribe itself. Contracts for special fees, kickbacks, consultancies, and commissions are examples of such agreements. This agreement, the *primary contract*, evidences the payment of a bribe and kicks off the sequence of actions and contracts that this original act of bribery taints. The *secondary contract*

[16] Emphasis added. The Civil Law Convention on Corruption predates the UN Convention but is an intergovernmental instrument of Council of Europe member states. See the Council of Europe Civil Law Convention on Corruption, April 1999, EUROP. T.S. 127 (entered into force November 2003).

results from the success of the primary agreement.[17] Such secondary contracts include public contracts awarded because of bribes.

A secondary contract might involve building a school, equipping a hospital, or providing telecommunications, electricity, roads, or clean water. Such contracts are intended to benefit the public as well as the signatories to the contract; the justification for the use of public funds entirely rests on this benefit.[18] Yet tradition bars the public as a beneficiary of the contract from addressing the harm when a company that won a contract did so through bribery, even though poor performance affects the public directly. The general principle of privity of contract in most jurisdictions, as well as the requirement for consideration in common law jurisdictions ordinarily bars such victims from the right to sue on a contract. While a private right of action exists, it conforms to the classic traditional basis for actions based on non-contractual obligations in tort, namely to compensate the plaintiff for injury *caused by* another party. Only a *direct causal link* between the damage suffered by a victim and a proven act of corruption confers the legal standing to initiate legal proceedings. Furthermore only where a party has provided consideration does a right of suit on a contract arise with respect to contractual obligations. Both barriers almost always prevent the ultimate victim of corruption, who is not a direct party to a public contract and cannot quantify the specific loss he or she personally experiences, from bringing legal action in the absence of third-party beneficiary clauses.

IV. Exploiting Third-Party Beneficiary Principles

It is possible, in most jurisdictions, for parties to a contract to extend the right to sue on the contract to parties who have not participated in the negotiation of the contract and who have not signed the contract. As Farnsworth notes, "[i]f the parties have provided either that the third party has the right to enforce the agreement or that the third party does not have the right the court will give effect to that provision."[19] With such a move, the parties who ultimately stand to gain (or lose) from a public contract can acquire the legal standing to play a role in the proper execution of such a contract.

In general, the third party has to become a beneficiary of the contract within the contemplation of the parties to the contract. In the United Kingdom, for example, the Contracts (Rights of Third Parties) Act 1999 provides a statutory exception to the doctrine of privity by providing for a limited right of action for a person who is not a party to a contract (referred to as a third party) if the *contract expressly provides* that

[17] See A. Makinwa, Private Remedies for Corruption, pp. 11–12.

[18] I. Alvik states that part of the dilemma occasioned by state contracts is the political and economic development issues that are usually tied up with such contracts. See I. Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration* (Hart, Oxford), 2011, pp. 2–4.

[19] E. Farnsworth, *Contracts*, 4th edn., Aspen, New York, pp. 657–661.

the third party may enforce a contractual term[20] or where the contract purports to confer a benefit on the third party.[21] However, if on a proper construction of the contract it appears that the parties to the contract did not intend the term to be enforceable by the third party,[22] or the third party is not expressly identified in the contract by name as a member of a class or as answering a particular description, the third party has no right of enforcement.[23] U.S. law functions similarly.[24] The Dutch Civil Code provides for a limited right by third parties to seek performance where "the *contract provides* the right for a third party to claim performance from one of the parties or to otherwise invoke the contract against any of them if the contract contains a stipulation to that effect and the third party so accepts."[25] Once the third party has accepted the stipulation, the third party is deemed to be a party to the contract.[26]

These examples from common law and civil law suggest a third-party beneficiary clause must fulfill certain conditions. Firstly, while the third party must be expressly identified in the contract by name, as a member of a class, or as answering a particular description, the class or description need not be in existence when the contract is entered into. The third party must be ascertainable with certainty at the time when the right to enforce the contract has arisen. Depending on the particular public contract, a class of persons can be identified as representative of the public at large by virtue of the location, service, and targeted public or other linking element of the public contract. To give some examples, a defined community association, famers' union, neighborhood association, association of residents of a defined area, or workers' union of a defined establishment might be third-party beneficiaries empowered to sue.

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[20] UK Contracts (Rights of Third Parties) Act 1999 Sec. 1(1) (a).

[21] Id Sec. 1(1) (b).

[22] Id Sec. 1(2).

[23] Id Sec. 1(3).

[24] In the United States, parties to a contract can by agreement give rights to a beneficiary that is not a party to the contract[Should there be a period here?] Sec. 302 of the Restatement (2nd) Contracts,[Delete comma?] provides that: (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. An intended beneficiary can be distinguished from an incidental beneficiary who has no enforcement rights, as there was no intention or promise by the parties to the agreement to confer rights on such a person. See Sec. 302 (2) Restatement (2nd) Contracts.

[25] Art. 6:253(1) DCC.

[26] Art. 6:254(1) DCC.

Inserting a third party-beneficiary clause as a standard clause in a government public procurement would require identifying and describing the ultimate beneficiaries of the contract. Therefore contracting parties would need to identity the eventual beneficiaries of the contract with sufficient certainty to create a meaningful right to sue. Satisfying this requirement would justly involve government, corporations, and the communities that ultimately stand to benefit from a public contract.

This process of identification and definition gives a public contract a public face. By increasing consumers' awareness of corruption, and therefore the reputational implications of corruption, it can increase the risks of corrupt activity and positively influence compliance. The abstraction of public corruption becomes more concrete and evokes a desire for more direct repercussions for the offenders in the eyes of the general public.[27] Beneficiaries and representatives of beneficiaries become more aware of public contracts and their potential ramifications. Civil society gains an opportunity to play a partnering role with government and corporations to ensure transparency and accountability in government contracting. It enables governments to show that they are willing to be transparent and accountable to their public while contracting on their behalf. It gives corporations the opportunity to demonstrate their willingness to be socially responsible in a manner that is directly linked to the financial interests of the corporation. All players become united in a common interest to ensure that the contracting process is transparent and that contracts are duly executed.

V. The Sleeping Clause as a Carrot

It is important to devise a third-party beneficiary clause in such a way as to avoid creating an excessive financial burden through a multitude of claims, and impairments of services, which would deter investment.[28] The need to avoid frivolous suits or opening the floodgates to litigation is an important consideration that supports a very restrictive approach to third-party beneficiary rights. Accordingly, this chapter proposes that third-party beneficiary clauses be *sleeping*. That is, they should stipulate a threshold of evidence of corruption or fraud that will be required to trigger the clause into operation, upon which it automatically comes into effect, making the identified third-party beneficiaries parties to the contract and giving them standing to sue on the contract.

[27] See E. Salcedo-Albarán, I. De León-Beltrán, M. Rubio, "Feelings, Brain and Prevention of Corruption," *International Journal of Psychology*, Vol. 3, No. 3, 2008, p. 2 and p. 11ff.

[28] See E. Farnsworth, *Contracts*, p. 667.

V. Conclusion

The European Union estimates that corruption alone costs the EU economy € 120 billion per year, just a little less than its entire annual budget.[29] Three-quarters of respondents in the European Union say that corruption is widespread in their own country.[30] The 2014 Transparency International Corruption Perceptions Index measures the perceived levels of public sector corruption worldwide, finding that more than two-thirds score less than 50 on a scale from 0 (highly corrupt) to 100 (very clean).[31] The list of corporations that have entered into settlements with a U.S. agency for allegations of bribery in their business affairs include Weatherford International Ltd., Diebold (an Ohio-based manufacturer of ATMs and bank security systems), Stryker Corporation (a Michigan-based medical technology company), Total, S.A. (a France-based oil and gas company), Ralph Lauren Corporation, Parker Drilling Company (a worldwide drilling services and project management firm) and Koninklijke Philips (a Netherlands-based health care company).[32] The need for remedies is urgent.

A *sleeping* third-party beneficiary clause would serve as an incentive for parties to contract in such a manner as not to activate the clause. Such a clause will be to the benefit of the government seeking to fight corruption by providing an incentive for companies to comply with government anti-corruption rules. It would also be an incentive for corporations engaged in the procurement process not to succumb to demands for bribes by providing a strong argument for the choice to comply with anti-corruption rules. It would level the playing field because triggering the sleeping clause would affect all parties bidding for the public contract equally.

Corporations, whistle blowers, or other agents involved in a competitive bid for a public contract may be more willing to come forward with concrete evidence of corruption in the procurement process knowing that this will trigger the third-party clause embedded in the contract. The interventions of strongly motivated third-party beneficiaries to redress a lack of performance or lack of transparency in the public procurement processes can have a positive impact on the fight against corruption. The process by which such a sleeping third-party beneficiary clause is drafted and included in public contracts would require co-operation between funding agencies, governments, corporations, and local communities. Civil society will play a crucial

[29] EU Anti-Corruption Report, p.3.

[30] EU Anti-Corruption Report, p.6. Available at http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf;

[31] See Corruption Perceptions Index 2014 Brochure, available at http://www.transparency.org/cpi2014/results.

[32] The U.S. Department of Justice website provides full details of DOJ FCPA cases since 1977: www.justice.gov/criminal/fraud/fcpa/cases/2013.html. The U.S. Securities and Exchange Commission website provides full details of SEC cases since 1978: www.sec.gov/spotlight/fcpa/fcpa-cases.shtml.

role as the channel for the identification and representation of intended beneficiaries. The *sleeping* nature of the clause would avoid creating an excessive burden. It also means that the clause would simultaneously provide a reward for good behavior and a sanction for non-compliance in a self-regulatory manner. Compliance with anti-corruption laws becomes a function of the "smart" sanctioning environment independent of government authorities.