



## A qualitative reframing of private sector corruption

Considerations from the natural  
resource sectors in South Africa

Sarah Bracking

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Sarah Bracking  
University of Manchester

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## About the author

Sarah Bracking is a Professor in International Development in the School of Environment and Development at the University of Manchester. Sarah teaches Politics and Development and the Political Economy of Development, particularly with reference to southern African states. She is editor of *Corruption and Development* (Palgrave, 2007) and author of *Money and Power* (Pluto, 2009) which is about development finance institutions and the construction of power in African markets. She was invited as an Expert Witness to the UK Parliamentary Committee on International Development in December 2010, because of her research work on the CDC Group, the UK's development finance institution, and has also previously worked for Ankor in Norad on secrecy jurisdictions, development finance and corruption. Sarah is currently completing a book on *The Financialisation of Power in Africa*, under contract to Routledge.

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## Abstract

This paper reviews types of private sector corruption in South Africa in order to provide suggestions for the design of anti-corruption policies in the natural resource sectors. It uses qualitative research to explore how corruption is framed by respondents and performed by market actors. The currently used concept of private sector corruption does not cover new types of corruption that have emerged in response to the increasing complexity of the public-private boundary and the effects of more liberalized markets. Moreover, transparency initiatives are largely ineffective in cases such as South Africa, where the market and state are entwined and political connection is a critical gatekeeper for economic opportunity. The paper advocates both *redefinition* of the concept of corruption and reform of the *process* of policy design in anti-corruption work. The two are related: the redefinition suggested would advance the important debate over how the global community defines acceptable behaviour in the private sector by providing a usable foundational morality.

## Abbreviations

|        |                                                                     |
|--------|---------------------------------------------------------------------|
| ANC    | African National Congress                                           |
| B-BBEE | Broad-Based Black Economic Empowerment                              |
| BEE    | Black Economic Empowerment                                          |
| CBPE   | Centre for Business and Professional Ethics, University of Pretoria |
| CEO    | chief executive officer                                             |
| CSR    | corporate social responsibility                                     |
| EITI   | Extractive Industries Transparency Initiative                       |
| GDP    | gross domestic product                                              |
| OECD   | Organisation for Economic Co-operation and Development              |
| UN     | United Nations                                                      |
| UNCAC  | United Nations Convention on Corruption                             |

# 1. Introduction

This paper considers the problem of private sector corruption in natural resource sectors in South Africa, based on primary research. Normally research on corruption in natural resource sectors looks at the firms involved in extraction, but not firms upstream or downstream. This paper, by contrast, draws on interviews with firms involved in shipping, brick making, construction, skills training, transport, and logistics, all servicing natural resource extraction in and around the port of Durban. The purpose is to show how corrupt and immoral behaviours by firms are treated somewhat superficially in contemporary anti-corruption work and to argue for an expansion of the activities included under the heading of corporate corruption. Such a conceptual reframing, we argue, constitutes a first step toward more effective policies and practices in the field of anti-corruption.

The subject of corporate corruption has received increasing attention over the past decade, in part because of high-profile scandals such as Enron and Worldcom, as well as the various forms of corporate fraud and misconduct implicated in the financial crisis of 2008. Yet the treatment of corporate corruption by the mainstream anti-corruption movement has a number of shortcomings (see Sampson 2010).

One of these is the persistent assumption that corruption is predominantly a public sector problem, one that imposes costs and difficulties on firms and investors. Good governance reforms are often justified on the grounds of making life easier for businesses. Yet the private sector is not always the victim, and there are numerous examples, especially from the resource sectors, that illustrate this. Indeed, the World Bank began work in the mid-2000s on the notion of “state capture,” that is, the ability of powerful firms to exert undue influence on political processes for their own benefit. Unfortunately this work has not been expanded upon or integrated centrally in the mainstream anti-corruption policy debates. Private sector corruption, when it is acknowledged, is often depicted in overly simple terms, positing a scenario in which bribes are solicited by deviant state actors and/or paid by unscrupulous companies.

Donors have recognized these conceptual weaknesses for some time (see, for example, Norad 2011). However, the interaction between the public and private spheres in relation to corruption is more complex than commonly acknowledged. Indeed, the “private sector” must be viewed as a dense network of public and private actors, some of whom are simultaneously public and private. This in turn forces a rethinking of anti-corruption policy, presently informed by a principal-agent model that promotes consensus-based policies. Greater consideration is needed of ways to overcome collusion and collective action problems. In particular, a broader understanding of corporate corruption highlights the limits of transparency initiatives, which have gone only part way in meeting community and donor needs. A seemingly intractable core of endemic corruption has remained, as actors have found complex means of complicity.

A second shortcoming of mainstream approaches to corporate corruption is the tendency to view these problems as an aberration in market economies, something that is essentially deviant. A growing body of evidence questions this and suggests that various forms of fraud and deceit, which do not necessarily violate criminal statutes, are increasingly *normalized*. That is, corruption in various sectors and situations, including in South Africa, is an embedded feature of the economy and society and not merely the doings of rogue businesspeople. Work on corporate crime by Tillman (2009a, 2009b) illustrates that such malfeasance has become structural and deeply rooted in contemporary capitalism. Kramer and Michalowski (1990) outline a type of corruption in which governance and market institutions are partners in collusion, instigated or facilitated either by the state or by the corporation (see also Kramer, Michalowski, and Kauzlarich 2002; Lasslet 2010a). Yet the language of the anti-corruption movement still encourages the view that corruption is *parasitic* on the market economy—

an external threat. There is a need to review this thinking and acknowledge the systemic nature of these problems, a realization that in turn has profound policy implications.<sup>1</sup>

A third and related shortcoming of mainstream accounts of corporate corruption is the inability of the anti-corruption movement to fully encapsulate the range of unethical and harmful corporate behaviours. There is a muddled and inconsistent approach to what is considered corrupt and what is not. In particular, a range of practices have emerged that can be understood as new types of corporate corruption, including deliberate bankruptcy, thin capitalization, illicit financial flows, transfer (mis)pricing, trade mispricing, jurisdiction shopping, and tax evasion. In the case of South Africa, several locally specific forms of corruption can similarly be considered new, including fronting, cover quoting, and javelin throwing. These mainly derive from post-apartheid institutional systems for procurement and from policies aimed at Black Economic Empowerment (BEE) and its later variant, Broad-Based Black Economic Empowerment (B-BBEE). Box 1 gives brief definitions for the new forms of corruption mentioned in this paper.

The common denominator in these new forms of corruption is that the public sector, the public revenue, and/or the common public good are adversely affected by them. These activities are particularly important in sectors such as oil, petrochemicals, mining, minerals, forestry, and fisheries, because the market advantages of large corporations enable them to crowd out small competitors and generate global markets that allow multiple opportunities for collusion, price setting, transactional corruption, and tax avoidance across opaque legal jurisdictions or “tax havens.” We would argue that the prevailing approach towards corporate corruption, which has been criticized for being heavily influenced by neoliberalism (Doig and Marquette 2005; Brown and Cloke 2004; Bracking 2007), not only is too narrow but is *disconnected* from wider political and social discourse. This includes the emerging movement on economic and tax justice.

The salient point here is that the mainstream anti-corruption literature has failed to establish a philosophical basis for the field that incorporates underlying assumptions about morality and ethics. Thinking about the boundaries of corporate corruption forces us to revisit these fundamental considerations.

## 1.1 Research questions

The underlying assumption of this paper is that law works best when it aligns well with cultural and sociological views of “the moral.” Thus the research protocol asked private sector actors to explain how they viewed corruption, what it meant for their businesses and others, their experience of corruption, and what they thought should be done about it. The paper examines whether the concept of private sector corruption should be broadened to include currently legal but arguably immoral practices in the corporate sector, many of which are in evidence in Durban. It also considers the opposite proposition, that a reframing should exclude certain illegal practices which actors view as transformative and in the common good. We explore contradictions around the signification of corruption in order to find out the effect this has, or could have, on policy design.

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<sup>1</sup> Thanks are due to André Standing for alerting me to the importance of this literature and for the references

**BOX 1. NEW FORMS OF CORRUPTION: A GLOSSARY**

**Deliberate bankruptcy:** Practices in which the owners and/or managers of a company knowingly take excessive remuneration, strip the firm's assets, or otherwise conduct corporate affairs for short-term private gain at the expense of the firm's continued operational viability. This sometimes also occurs in the context of avoiding future financial obligations of the operating entity, such as pension funds.

**Illicit financial flows:** "Money that is illegally earned, transferred, or utilized" (Kar and Cartwright-Smith 2007, iv). This concept incorporates the related category of illegal capital flight (but not legal capital flight), where flows are specifically in violation of laws and regulations. According to Global Financial Integrity, it does not currently include the proceeds of criminal smuggling, trade mispricing, or mispriced asset swaps, which are not direct money flows (see Kar and Cartwright-Smith 2007, iii–iv; ADB and GFI 2013, 1).

**Jurisdiction shopping:** In the corporate context, the active selection of a particular jurisdiction in which to domicile part or all of an economic entity away from its material operations in order to avoid or evade tax (see Palan 2002, 172). This often involves the fictional fragmentation of a firm into a complex and opaque set of distinct legal entities located in different jurisdictions.

**Tax evasion:** Criminal nonpayment of tax. Tax avoidance is a related practice that also leads to nonpayment but is technically legal.

**Thin capitalization:** Underinvestment of a domestic company relative to its offshore parent in order to evade or avoid tax. It is often accompanied by an inverted company structure in which the bulk of the assets are kept offshore, with an onshore shell (see Heggstad and Fjeldstad 2010). This is an established term, and some countries have "thin-cap" regulations.

**Trade mispricing:** Abuse of pricing in trade between apparently unrelated parties, such as through the deliberate overinvoicing of imports or underinvoicing of exports, usually for the purpose of tax evasion.

**Transfer pricing:** "A transfer price is a price, adopted for book-keeping purposes, which is used to value transactions between affiliated enterprises integrated under the same management at artificially high or low levels in order to effect an unspecified income payment or capital transfer between those enterprises" (OECD 2001). Transfer pricing is "not, in itself, illegal or necessarily abusive" in all definitions (Tax Justice Network 2013), but here we will assume a mispricing element.

***New forms of corruption specific to South Africa***

**Cover quoting:** The collusion of firms in a procurement bidding process where all parties agree on who will tender the most competitive price, allowing the bidders to artificially raise their bids and misrepresent their costs. The "winner" is chosen in rotation. The actual work is often reapportioned under memorandums of understanding between the parties after the result is announced by the public authority.

**Fronting:** The use of an individual or firm belonging to a historically disadvantaged group (black, Indian, or coloured) to act as the lead bidder in a procurement process in order to raise the chances of a firm or individual that would otherwise be characterized as white. Once the contract is awarded to the front person or firm, the work is often carried out by another entity.

**Javelin throwing:** Practice in which a public employee uses insider or advance information about an economic opportunity that will arise in the future in order to become the eventual beneficiary of the tender or bid. Metaphorically, they throw the "javelin," or opportunity, into the future, then move into the private sector or set up a firm which includes their disguised participation or ownership in order to catch the javelin later.

The research was guided by the following three broad lines of inquiry. The full protocol with specific questions administered to the respondents is reproduced in annex 1.

Research question 1:

**To what extent are new forms of corruption evident in the Durban economy, and how is the domain of corruption understood by businesspeople?**

We addressed this question by conducting long interviews with seven chief executive officers (CEOs) in Durban. We included questions on various new forms of corruption such as illicit financial flows, trade mispricing, transfer pricing, tax avoidance, and deliberate bankruptcy (see box 1).

Research question 2:

**How effective are current policy instruments, conventions, soft laws, codes of conduct, and regulatory measures in reducing corruption in the private sector?**

We reviewed the type and scope of instruments currently used to reduce private sector corruption and then evaluated the effectiveness of this policy set, building on recent summaries of effectiveness as well as on the primary data collected through research.

Research question 3:

**What new policy measures are feasible?**

Finally, after reflecting on the research findings and policy review (corresponding to questions 1 and 2), we offer suggestions for carrying the anti-corruption agenda forward. This includes proposed changes in how the problem of corruption is framed, defined, and acted on, with a view to increasing the effectiveness of the anti-corruption movement.

## 1.2 Methodology

The study used an interpretative approach combined with a review of secondary literature on anti-corruption interventions in the private sector generally and in South Africa in particular. Long interviews (between 29 and 145 minutes), using the protocol reproduced in annex 1, were carried out between 14 August and 10 September 2012 with CEOs of medium-to-large enterprises in South Africa.

The data we collected involve perception and thus are not suited to quantitative research methods. Indeed, the objective here was not typical: we were not interested in measuring the scope, frequency, or consequences of corruption empirically. Instead, the purpose was to study the strategic intelligence of rational agents in an environment where they are exposed to incentives and pressures to involve themselves in corruption, and to find out how they interpret and negotiate that context. The interviews were designed to elicit perceptions of corruption among business people and compare them to the respondents' relative degree of connectivity to public governance nodes.

To identify respondents for our survey, we used a selective sampling frame with two initial inclusion criteria:

1. The business of the respondent had to be in the natural resource sectors
2. Our overall sample had to be demographically balanced in terms of South Africa's three principal racial groups

However, given the perceived political sensitivity of the questions, it was difficult to recruit interviewees, so eventually we took the decision to include a wider range of companies in terms of criterion (1). This resulted in the inclusion of logistical and support industries such as shipping and transportation, as well as downstream industries such as brick making and skills training. While we were able to conform to criterion (2) in terms of racial balance, we unfortunately were not able to interview any women. A summary of our respondents and their businesses is presented in annex 2.

## 2. Respondents' perceptions of corruption and its mitigation

Field respondents reported that corruption in South Africa is systemic, despite the extensive legal and institutional provisions in place to prevent it. Respondent 6 confirmed that he was constantly pressured into kickbacks, saying, "If you want anything done in this country, you have to pay. It is a game in all levels of government."

Corruption is found in its new internationalized forms, but it is more widely present in its traditional renditions. Thus, while respondents were aware of the newer forms of corruption we described to them, they remained preoccupied with conventional problems such as bribery and procurement fraud, mostly in the context of transactions with public sector actors. Respondents tended to view internationalized forms of corrupt business practice as limited to a thin layer of elite large firms in South Africa's case—"We are not a Switzerland," one person said—although our research did not empirically test this perception. This means that the need to expand the definition of unacceptable business practice was not supported by the primary data we collected. We only return to this issue in the next section on the basis of secondary empirical evidence which does point to widespread tax avoidance and use of secrecy jurisdictions.

However, the field research does illustrate several reasons why predominant theories of corruption are relatively ineffective.

First, behaviours which are legal are closely intertwined with those which are not. Thus businesspeople demonstrate profound uncertainty about "the rules" in terms of how to interpret and respond to them and how they are applied by regulators. This problematizes rational choice theories of corruption, which assume that agents are presented with unambiguous choices and have clearly defined self-interests.

Second, the structural and endemic nature of corruption and the arbitrary application of regulation leave a generalized sense of unfairness. This situation is then often used as justification by businesspeople for participating in corrupt acts. Respondents offered explanations such as "everybody knows that everybody is doing that."

Third, the liberal distinction between "public" and "private" spaces has little meaning when many owners of large businesses participate in both spheres. The latter two observations also problematize principal-agent theories, in which oversight involves two actors whose institutional positions and behavioural codes are unambiguously defined.

### 2.1 Political connectivity

We asked about respondents' connections to political actors, which I term "political connectivity," and about the nature of networking. They replied that successful businesspeople had to have significant political connectivity and the ability to influence the behaviour of politicians, regulators, and law enforcement officers. These public sector actors were unanimously identified as the purveyors of anti-competitive practices, who would enjoy direct personal or family gain as a result. Rewards, while expected, were to be carried out with "style," removed in space or time from the actual procurement contract or business deal: examples include the later gift of a designer handbag, job, or holiday to a daughter or mother of the politician. The respondents also spoke of group benefits to comrades in political parties, much of it channelled through the provincial and municipal (local government) structures.

However, links to politicians were not always seen as exclusively beneficial, which suggests a foundational alignment with ideas of civic virtue. For example, Respondent 2 saw involvement with politicians or political programmes as a source of irksome trouble for his business. He said he wanted to grow with “unconnected” firms, arguing,

*You can't invite politicians to participate in your business, because they have their own agendas as politicians . . . Now we want people who are like normal businesspeople . . . who will never ask you about membership of politics . . . If you want to buy a pack of cigarettes, buy a pack of cigarettes. You work in a shop, you don't say “Who did you vote for?” You can't work in a shop like that. But this attitude, they want to score points for their followers. The politicians just want to get things for their voters.*

Three respondents spoke of wanting an application process for a license or permit to be simple, without need for a political connection. They were frustrated by the need for connections, with the attendant patrimonial expectations—colloquially expressed as “You do something for me, then I do something for you, and we both get on.” They preferred what political scientists would describe as a meritocratic, open-access polity. In contrast, in Durban the market appears to be part of a patrimonial cultural economy, where many transactions, including bribes, are nonpecuniary. Within this system, only a small subset of transactions are referred to as “corrupt,” mostly those where direct and monetized kickbacks are involved. When the system itself is patrimonial, personalistic, and based on favouritism, the outlawing of a small subset of its component transactions can only cause normative confusion.

Respondent 2 was frustrated that he was not a big enough actor to compete in this market. Bigger actors could offer favours to politicians and be rewarded with licenses and contracts: their “money talks.” As one of the original African National Congress (ANC) activists, Respondent 2 explained that he was losing out in the “struggle within a struggle” because others have taken key positions in the ANC and actively seek to exclude him. He had good ideas and abilities as an entrepreneur in the printing and watermarking sector, he said; but because he was insufficiently connected, if he proposed one of his ideas to government they would merely take it and then give the actual tender to someone else who is connected to them. He perceived this as an injustice. Similarly, Respondent 6, a smaller independent businessperson, thought that by failing to climb high enough to talk to the minister, he was losing out to the empowered and advantaged few, who win contracts repeatedly—those whom Respondent 7 called the “creamy layer.” Respondent 2 concurred with this analysis, claiming that support for large-scale development in general was crowding out black businesses from their traditional markets.

Respondent 4, who is a successful and relatively well-connected businessman, securing many public tenders, is much more ambivalent about the role of political connection. Asked how important it was for the success of a business, he replied,

*It is a difficult question to answer because there are times when you [are] well connected but connection doesn't mean it's equivalent to business. You could have a relationship with “x” minister, but that minister is not going to give you business, or you could have a relationship to “x” minister who has influence [or] who could influence the person who has influence . . . So it is a yes and no in this industry [coal, shipping]. Knowing [people], having political connections, it might work, it might not work. It depends on who, where, and to whom, and what kind of business it is, so it is not a cut and dry. I know so many people who know so many people but they don't even have a thing.*

On reflection, he thinks that success “takes skill; you need to know your trade.” His employee, Respondent 5, concurs that “skill and expertise” are crucial.

Overall, respondents who owned medium-size businesses showed a preference for open-access, meritocratic markets over a system of favours, whether they benefitted from favouritism or not. Therefore, specific policies which support greater transparency or criminalize kickbacks will not necessarily produce the overall social change our respondents wanted, which was for the role of politics and politicians to be curtailed in the business sphere. Greater transparency can help in situations where users of previously unavailable information can then change their environment to reduce the role of politics. But knowledge of corruption is “everywhere,” according to our respondents, so merely increasing civic consciousness of the problem is neither necessary nor sufficient to bring about change. This is why it is necessary to redefine corruption to allow the information users already have to carry weight in political negotiations with an unaccountable elite. The critical question is how to build accountability that works for the public good, which may or may not require greater transparency.

Indeed, all the respondents pointed out that actors at the highest level in the public or private sector, and sometimes in both at once, typically enjoyed immunity from prosecution. Some felt that the ability of these people to evade accountability and prosecution made petty offenses irrelevant by comparison. Respondent 7 compared the de jure state of legal regulation and institutional structures in South Africa with the low level of implementation and prosecution. He referred to “alluvial evidence” that could be “picked up” if not for the lack of incentive for the political class to do so. Moreover, perpetrators of corruption are able to close down investigations or get other high-ranking personnel to do this for them. Suggesting a breakdown in the principal-agent theory of corruption, Respondent 7 pointed out that

*the principals, the people you report the misbehaviour of agents to . . . don't act upon it. . . . I've come across arguments rooted in culture (brother needs a job, don't do him down). Or it could be, further, that the principal is involved in it, getting a cut.*

The endemic, structural nature of political corruption in the public sector allows private agents associated with it to also go unprosecuted, unless they fall out of favour with their political partners. This suggests that anti-corruption policy should link efforts in public sector reform and management to initiatives for transparency in firms' reporting in order to reconfigure petty offenses as morally significant and in order to implicate both parties to a corrupt activity simultaneously. The potential importance of civic ethics to all parties is again demonstrated.

## 2.2 Anti-competitive practices

Our respondents did not appear to rank the maximization of profit over moral choice. Three people cited cases in which they had chosen not to act corruptly, with negative consequences for profitability, at least in the short term. The two dimensions of morality and profitability had a complex interconnectivity which tends to undermine the validity of a rational choice theory of corruption. This theory presents a clear privileging of pecuniary profits in its framing of what a “rational” choice means for a businessperson. However, within this framework, actors may calculate long-term as well as short-term benefits. Thus, an underlying rationale for corporate social responsibility is that reductions in current profit caused by social responsibility policies can be offset by improvements in the firm's long-term market position. Our respondents either used no such clear calculative logics, or they concluded that forgoing current profit maximization would not bring any payback in the future.

The arbitrary application of regulation by state personnel leads to contextual and localized decision making and ultimately to practices that our respondents considered moral, even though to an outsider they might suggest immorality. For example, one respondent recounted how politicized and arbitrary interventions by regulators—sometimes at the behest of, and presumably because of the payments made by, his competitors—had caused constant disruption to works in his cement factory. This was part of a pattern in which business owners would induce inspectors to scrutinize their competitors, hoping to generate costs for the competition in order to “wipe them out.” In response, our respondent and the inspectors would spend long hours drinking tea while “inspections” took place.

Similarly, Respondent 3 reported that the mining firm he works for had not had a valid permit for around five years. He maintained, counter-intuitively, that operating without a permit was evidence of integrity, since his firm would “never buy one.” While a license could be gained by “taking a few thousand rand and leaving it on [the official’s] desk,” his company had chosen not to go this route. Instead, they had gone through the lengthy process of commissioning expensive environmental reports and had filed them, only to have their case “frozen” by their unwillingness to leave gifts on desks. Thus they operated unlicensed. These examples suggest that it is not regulatory reform per se that is needed to reduce private sector corruption, but the integrity to apply the regulations for the public good.

The respondents identified some activities, such as “javelin throwing,” which are not currently illegal in South Africa but which in other countries would be seen as a problem and addressed with a revolving-door policy. In South Africa’s public sector, Respondent 7 noted,

*there is a thing called javelin throwing, where a DG [director general] or deputy DG will identify an area of potential work and will then create tenders [which] will be sent out to do this work. Then, they will resign and form a consultancy which then picks up that javelin [the tender] that they themselves have thrown. So, there is no cooling off period when you leave the public service.*

Respondent 2 asked rhetorically,

*They see how much work is outsourced to consultants, so why must they who have the power to give those contracts make other people rich? Why mustn’t they make themselves rich?*

Similarly, there are some legal behaviours that encourage unfairness, such as the use of “entrepreneurial policing” in ownership disputes. In such cases one person is targeted for a police investigation purely to ensnare him in criminal proceedings and exclude him de facto from the contract process, even though the proceedings invariably are eventually dropped.

Public tendering was also reported as a source of anti-competitive practice, rather than as an instrument to encourage competition on price and quality. Respondent 3 spoke of technological lock-ins, where the tender would ask for a particular brick that only one firm made. Respondent 1 spoke of a specific case that he had successfully fought in the Competition Commission, saying, “This single manufacturer had it all tied up with the local authorities and the provincial authorities to be the sole suppliers of their products.”

Respondent 7 tells of how principals and agents collude so that those writing tender specifications and those adjudicating the winners of contracts are operating in a space where these two functions are not separate, as they should be according to supply chain management principles.

*It's just known, and the word is out: "Listen, don't go against this person. If he's involved in a tendering thing, he's got to get it." So, one of the safeguards in corruption doesn't work, because the principal is himself involved.*

When it is "known" who must win because of political imperatives, principals and agents end up colluding in elaborate ways. In South Africa, techniques include cover quoting, fronting, kickbacks to assessment committee members, technological disqualification on spurious grounds, and subjective downgrading of cheaper quotes. In other words, the performance of fairness covers up for its lack of substantive application. There may not even appear to be any rule breaking, just an absence of the social welfare maximization function that should frame public sector decision making in a democracy. It is absent because the participants have ranked a private interest over the common interest, do not understand the difference between the two and the moral importance of the distinction, fear the consequences of doing the right thing, or desire the rewards of collusion in the absence of restraint.

Respondent 3 talks of how the tender economy is beyond his reach because of high entry costs. Indeed, this perception of the existence of a tender cartel at the very top of the construction industry was confirmed recently by the *Mail and Guardian* (Gedye 2013, 1). Respondent 1 describes the same barrier and also sees the tender process as generally corrupt, as the preferred winner is told what price to bid in advance of the performance of the competition, the "opening of envelopes."

*Kickback, favours . . . The bad side is so well known, "tenderpreneurship," it's like a cancer in our society. It's eating away at fair practice . . . The guys who are in the business have learned the tricks to hoodwink society, hoodwink the local authorities, but they are in cahoots with the people who are inside there, so we do have this cancer and that is a big problem. Ordinary people feel cheated because they can't even begin to enter.*

Respondent 1 argued that the South African economy is unduly geared to the interests of big capital, and that the entry barriers in mining are so high as to exclude start-ups. However, Respondents 4, 5, and 6 all see market entry barriers not as merely a result of costs and capital requirements, but as complex hurdles deliberately erected by business associations to exclude others by making market entry financially, bureaucratically, and logistically impossible. While this type of anti-competitive practice or monopoly behaviour is not new, it could potentially be added to our list of new forms of corruption, as something that should be explicitly addressed in a more exhaustive anti-corruption policy.

Respondent 4 is a shipping agent who organizes cargo, much of it generated in the natural resource sectors, with his most frequently shipped item being coal. He notes,

*Monopolies dominate, and start to close the industry. Hence you will not find [even] a drop of black South Africans in the maritime industry. [Our firm is] one of the few. . . . It is a closed business . . . dominated by the big boys.*

The market gatekeeper for shipping is Transnet, which charges port access fees and shipping agent registration fees even before a firm has any business. Our other respondents concurred that regulatory authorities in the natural resource sectors regularly promoted anti-competitive practices by applying arbitrary regulation and/or engaging in nepotism.

The public procurement system in South Africa uses scorecards to weight black applications preferentially. However, Respondent 7 described a new form of corruption which combines political connectivity with the performance of political rhetoric, but which works to exclude the very people whom the preferential system is intended to help. As outlined by Respondent 7, "political deployees,"

who are generally active members of political parties with good connections to the leaders of those parties, are placed in commercial ventures to give a good performance of the empowerment discourse and by so doing win public subsidies. This enables them to benefit repeatedly from BEE policy while others are excluded. The result is the abuse and subversion of public policy designed to assist historically disadvantaged persons, who become further excluded by the political deployees who are better skilled in political rhetoric and working the procurement system. Public perception of this monopolization of public subsidies and contracts contributed to the relaunching of BEE (established in 2003) as B-BBEE in 2007.

Respondent 7 further speaks to the use of political deployees by white firms as “front” persons:

*Political connectivity . . . enables fronting, because political connectivity is the extra amount of authority that is given to undeserving tenders, to deviate from price and to deviate from other criteria. . . . Political connectivity allows you to cloak your claims to rent seeking within self-serving notions of transformation, in terms of the advancement of women and people of colour. There is a lot of good work that happens where women, people of colour, and people with disabilities are advanced, I'm not disputing that. But if you have the right lingo and the right rhetoric, you are able, through political connectivity, to stake a claim to information, to public goods and monies, which if pricing were the sole criteria would have gone to someone else. . . .*

*It's the same thing with affirmative action. The way that affirmative action and preferential procurement work, it's not to exclude the white firm that is yet again benefitting, but to exclude the not-politically-connected black firm: that's how it works in practice. The real victims of affirmative action now are those black small entrepreneurs . . . who are not connected, [when] there's another black firm who might have outsourced the work to whites for that matter, but who are able to get that particular job because of political connectivity. Who do you know, how to register in the database, when questions are asked, who stops you from asking those questions, who threatens you, who fires the whistleblower, who calls you a counterrevolutionary because you are raising [questions].*

Respondent 4, who runs a successful BEE firm with political connections, confirms that there are those who abuse the system, who pretend their corporate social responsibility, and who should be prosecuted. He laments how easy it is to appear to do something but to do little of substance, like saying that your firm is sponsoring children by paying school fees and then keeping the same pictures of child “beneficiaries” on your website until they are grown up.

Respondent 7 agrees that corporate social responsibility (CSR) can be done with little substance:

*CSR buys you credit, self-serving capitalist point of view. You have heard of green washing? Well there is black washing, community washing yourself.*

Respondent 7 critiques BEE policy for ignoring class. Black people can be disadvantaged by BEE, he says, as it reproduces

*eliteness within a thin level; in India they call it the creamy layer . . . You can't keep recycling yourself and be the perpetual beneficiary of affirmation [affirmative action]; you have to start recognizing who is the individual beneficiary, and their class.*

## 2.3 “New” forms of corruption

The classic definition of corruption as a transactional bribe has become less relevant over time. In this study we consider behaviours and practices that we propose should be designated as new forms of corruption, as defined in the glossary in box 1, although our respondents were familiar with only some of them. While we did not collect sufficient data from our field respondents to empirically test our hypothesis of the *growth* of new forms of corruption, the six respondents who were CEOs of large firms believed trade mispricing, transfer pricing, tax avoidance, use of secrecy jurisdictions, jurisdiction shopping, and asset stripping (if not deliberate bankruptcy) to be widespread in the largest firms. We could not corroborate this, as gaining research access to the largest firms with internationalized structures proved an insurmountable challenge. However, secondary data suggest that these forms of corruption are prevalent in South Africa (Sharife and Cullinan 2011; Ndikumana and Boyce 2008). Here, as elsewhere, the interests of the owners and controllers of firms can diverge from the interests of everybody else.

One example is the practice of asset stripping, in which one firm buys another in order to take only certain assets and dispose of the rest through bankruptcy. Asset stripping, which emerged in the 1980s, began a trend of company takeovers in which the longevity and sustainability of the purchased firm is woefully secondary to the interests of the hawkish new parent. For private equity, the largest source of profit is to invest in a liquid firm with good assets, then drain it and place it in debt to the parent, all while taking management fees. Finally, the investing firm exits, leaving behind a weaker and unstable firm (Surowiecki 2012). Weigratz (2012) recently explored why economic fraud has become “mainstreamed” in even ostensibly mature markets, considering this and other increasingly prevalent immoral behaviours to be driven by neoliberal policy.

Parent firms can use transfer pricing and/or intra-firm leasing and debt to cause “thin capitalization” of subsidiaries, while also charging excessive and arbitrary management and technical fees between parent and subsidiary, which constitutes a form of transfer mispricing. Thus it is quite easy to prey on the future of others, including workers and their pensions. This model is one that Julius (“JuJu”) Malema, controversial former leader of the ANC Youth League, used with a family trust holding in an outsourced “programme management unit.” His firm, On-Point Engineering, was paid 52 million rand in management fees by the Limpopo Department of Roads and Transport to manage contracts on its behalf. On-Point would allegedly demand to be a silent partner with the company that “won” the contract, demanding up to 70 per cent of profits in “management and design fees,” later transferred to the trust fund (Forde 2011). Malema is now facing trial, but many view his prosecution as political.

As Surowiecki (2012) points out, private equity funds have been raiding productive corporations in the United States for some time. But since such business practices have been globalized to include the less developed markets of Africa, they have contributed to a net outpouring of wealth from the region (ADF and GFI 2013). Also, from the early 2000s, greater financialization has caused bank-based companies and funds to take control of investment at the top of underlying portfolio companies, that is, the companies invested in by the financial funds from secrecy jurisdictions. None of this is illegal, but the morality of what happens to the companies and societies subject to such investment must prompt a change in what is defined as private sector corruption. For example, investments which are solely and singularly intended to bankrupt an enterprise for the benefit of fund members should be criminalized.

### 3. Interpreting the South African case

Four of our respondents saw connectivity to politicians as critical to market entry and public tender opportunities in South Africa, although the two firms that had actually received public tenders credited this to their market specialization and expertise. For example, in our second interview, the need for remediation of historical injustice led the respondent to see political patronage in the allocation of job opportunities as legitimate as long as jobs were distributed equally among the different residential areas, rather than by political party. Four interviewees raised distributional issues in relation to market opportunities deriving from the public sector, although they all stressed that they had no moral concerns about affirmative action or broad-based economic empowerment policies per se.

If this analysis is accurate, then South Africa has a structural problem in that corruption is instrumentally rational, suggesting a patrimonial structure despite the elements of a neoliberal and radical state that are also present (Szeftel 2004; Bond 2004). This is confirmed by research (see Sharife and Cullinan 2011).

In probing whether corruption is primarily a public or a private sector problem, a survey by the University of Pretoria's Centre for Business and Professional Ethics (CBPE), presented to the National Anti-Corruption Forum, identified 36.3 per cent of respondents accepting bribes as belonging to the private sector, while 29.6 per cent were in the public sector. These findings counter the perception that corruption in South Africa is principally a public sector problem (CBPE 2007, 14). In categories such as BEE fronting, abuse of confidential information, and manipulation of competitive processes for quotes and tenders, companies were perceived to be the perpetrators, although in the latter two categories the public and private sectors are more or less equally implicated (18–19).

Over 79 per cent of the CBPE respondents stated that pressure to land contracts was a primary reason that companies get involved in corruption, while 76 per cent named poor internal controls, 74 per cent override of controls by management, and 70 per cent unethical organizational culture (27). A further concern was that in private sector corruption the “majority of role players are . . . from middle management followed by top or senior managers. The prevalence of leadership's involvement in corruption is disconcerting. It offers substantiation of the general contention that ‘the fish rots from the head’” (16).

The CBPE survey also confirms the importance of intermediaries and middlepersons in providing access to the all-important political connections. In this survey, third parties and intermediaries were identified as being important conduits in both supply- and demand-side corruption, although the identity of the people and organizations acting as intermediaries was not clear and needs further research. It appears that much corruption is contracted out and that some individuals may even make their living as intermediaries (15).

However, deniability seems to still be required on both sides. Politicians, ostensibly representing the public sector, blame BEE businesspeople for being greedy and collusive, while the latter blame politicians and public sector officials for not doing their jobs unless they receive bribes and grease money. A spat reported in South African newspapers during the fieldwork period illustrated this dynamic well. First ANC secretary-general Gwede Mantashe was quoted in the *Star* to the effect that BEE companies “used the state as their cash cow by supplying substandard goods at abnormally huge fees” (Rampedi 2012). The newspaper then interviewed businesspeople for a response, reporting that:

BEE company owners say they are forced to provide poor quality goods at inflated prices to recoup the costs of paying mandatory kickbacks to corrupt politicians and government officials. (Rampedi 2012)

According to the *Star*, nine businesspeople (or “businessmen,” to be exact) said that kickbacks of “between 5 and 10 percent of the total contract value, or up to 50 percent of the total value of the profit” were required. In addition, “they were expected regularly to donate huge sums of money to the ANC, its leagues, the [South African Communist Party] or even opposition parties in charge of a province or municipality.” Kickbacks are in cash through subcontracts to relatives and spouses or in the form of gifts such as cars worth 1 million rand. The businessmen reportedly claimed that it is not an exclusively black practice, but that in general big tenders are usually “spoken for,” and that if they were to resist paying bribes they would be disqualified on questionable grounds during evaluation and adjudication committee hearings. According to a Gauteng-based businessman quoted in the *Star*, “You pay to be introduced to the political principals, you pay to get a tender, you pay to be paid and you must also grease the machinery. These things come at a price.” A Limpopo businessman is quoted as saying that “Certain tenders of R5m and above are reserved for [certain] people . . . R2m to R5m are for the mayors. R1m to R2m are for the mayoral committee members and below are for the municipal managers” (Rampedi 2012).

However, our study respondents also spoke of people falling in and out of favour, of some rotation among benefitting elites. This was seen to create market opportunities for changing groups of rent takers in the industry of intermediation between political fixers and “private firms.” In particular, successful patrons were seen to change depending on who holds office in the presidency and in provincial administrations. Thus political connectivity is a complex phenomenon, and three of our respondents asserted that a successful firm had to bring on board a politically connected partner, not necessarily to contribute to productivity but in order to assure contract and tender success. Respondent 7 summarized this for KwaZulu-Natal, emphasizing the need to pick partners carefully:

*The partnering with a South African, giving some value essentially for nothing, to a South African firm, is not about reducing bureaucracy, although that's officially what they are on the books to do. It is about understanding what corners can be cut and got away with legally, positioning yourself. An example: you are coming to South Africa, and two firms could be a local partner, and one is owned by Tokyo Sexwale's son. Someone needs to tell you, don't go with this man [Sexwale], even though he has the credentials of a black-owned firm, and it is his son. Or don't be confused by Penuell Maduna's name: now he has fallen out with the current ANC lot. Don't be confused by his name or his prior c.v.; he was part of the Mbeki cabinet. [If you are] going to swan round KwaZulu-Natal with Ngcuka or Maduna's name on your business plan you will go nowhere, despite them being ANC people . . . An even better plan is to go to a Zuma sidekick or distant family member. Someone needs to informally adjudicate between rival claims for rent-seeking behaviour and decide who is the best rent seeker to go with. That is what the local person will know.*

For the firms in our survey, there was an issue of paying for this type of connectivity, an extra rent to ensure that access to the right people could be secured.

### 3.1 Theorizing the role of the South African state

If we regard corruption in South Africa as instrumentally rational, then it is facilitated by the close proximity of public and private actors. Somewhat by necessity, the post-apartheid private economy in South Africa is closely linked to the political elite, in that new black-owned businesses have often been spun out by the state acting as midwife and handmaiden (Southall 2004). The chief source of

growth and investment in most provinces, except possibly Gauteng, is money from procurement contracts to serve the public sector. This public-to-private transfer, which accounts for a high proportion of gross domestic product (GDP), has led to patrimonial structures. Indeed, the South African state “does” redistribution and can arguably be seen as an example of “developmental patrimonialism” (Kelsall et al. 2010). In the populist narrative around economic justice as practised through patriotic nationalism, the BEE “dudes” are pursuing entrepreneurship through their rent-making activities, normatively echoing the somewhat ruthless go-getter style of market capitalism.

This implies that orthodox theorization fails, as it sees corrupt behaviours as a *deviation* or *aberration* from the competitive norm—a liberal market conception. Influential recent work argues that characterizing corruption as a principal-agent problem, and as an aberration from a Weberian institutional norm, misunderstands it in an African context, where corruption is instead a collective action problem because it is so endemic (Mungiu-Pippidi 2006; Persson, Rothstein, and Teorell 2010; Rothstein 2011).

These authors see the inappropriate application of the principal-agent model to public administrations exhibiting systemic corruption, with Africa often used as the stereotypical example, as the result of erroneously assuming Weberian rationality and institutional norms. In this paper, a similar argument is applied to “private” space, where the error of assuming liberal markets corresponds to the error of assuming Weberian rationality in public administration. In both cases corruption is seen as individual persons acting outside well-established rules, where the rule base of each has a common origin.

However, a central feature of the South African state is the reproduction of noncompetitive markets and the production of market entry barriers, with political narratives used to impart political legitimacy to market distortion. For example, in response to the businesspeople interviewed by the *Star* (Rampedi 2012), Mantashe responded that they must report “those things. Otherwise, we are destroying the state and the concept of BEE. In fact, they are confirming the parasitic nature of BEE.” South African Communist Party spokesman Malesela Maleka is quoted as saying that the businessmen’s claims are “the worst form of dishonesty.” Thus there is a deniability facilitated by the public-private intersection that is strategically useful for all parties. The navigators and conduits of the intersection are politicians, political principals, and persons colloquially known as political “deployees” (cadre of political parties), as well as businesspeople, who ironically are acting in concert, or as a class.

The limitations of the orthodox definition of corruption—as an aberration from the norms of public-private interaction, usually in the form of a transactional bribe initiated by the public sector actor—became apparent when we explored actual practice in our field interviews. Individuals and groups did not have to be in the public sector to be able to “do” corruption; we found complex negotiations within and between the public and private domains. Some of the schemes that respondents told us about were javelin throwing (described above), cover quoting, and the courting of politicians’ wives with gifts and favours. Also, while the corrupt action is often modelled as an individual one, our interviews allude to the systematic capture of public subsidy by some private firms and not others, and by groups of people in *braaskap*.<sup>2</sup> Correspondingly, as we were told by Respondent 7, principal-agent theory breaks down in provincial administration, as political deployees invest in collusive relationships which leave no incentive for whistleblowing or integrity.

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<sup>2</sup> Translated by our respondent as “we are really thick buddies together.” A related Afrikaans word, *baaskap*, means more specifically the control of nonwhites by whites.

Our research thus confirms recent work on the Extractive Industries Transparency Initiative (EITI) and on transparency initiatives more generally (summarized in Kolstad and Wiig 2009; Lindstedt and Naurin 2010). These studies argue that the extortive type of corruption, when a public official demands a bribe, is easier to thwart with transparency interventions than the collusive type of corruption, where both parties benefit, generally because there is an underlying theft from the government which is shared between them. In the latter cases there is little incentive for either party to report (Brunetti and Weder 2003; see also Shleifer and Vishny 1993). In other words, the traditional modelling of the individual bribe taker and bribe payer within principal-agent theory, where the principal of a public institution lacks enough knowledge about what the agent is doing to adequately control the transaction, is unsuitable. Instead, we have a collective action problem (Mungiu-Pippidi 2006) in which the principal, the agent, and the firm are likely to be cooperating with each other, and the incentive for anyone to report corruption is negligible since it would lead only to their own exclusion. The means by which regulatory capture is achieved—whether through “revolving doors” between the public and private sector in personnel or through more secretive transfers of ownership and directorships, or indirectly through lobbying, clientelism, or political financing—is an area which deserves more research attention, alongside more traditional emphasis on direct bribes in exchange for public tenders (see Kolstad and Wiig 2009).

In sum, there is no clear delineation of the “public” and “private” domains. Anti-corruption interventions which encourage the voluntary self-policing of these boundaries and transparent accounts of transactional exchanges between them fall short of exposing complex nodes of corruption in hybrid spaces and networks and corruption which takes place without a transaction between fully distinct agents. The underlying paradigm for understanding corruption—classical liberal theory and its neoliberal reincarnation—needs to be questioned in terms of relevance and validity. In an operational sense, policy solutions derived from this theoretical base need to be reviewed and supplemented with something more effective in tackling the structural relationships of political economy in which private sector corruption is entrained.

## 4. Current policy measures to reduce private sector corruption

The United Nations Convention on Corruption (UNCAC) defines general areas in which countries should legislate to criminalize acts of corruption such as “bribery, embezzlement, misappropriation, trading in influence, illicit enrichment, money laundering and obstruction of justice, witness protection, and freezing of assets” (UNCAC, Articles 15–25, summarized in Johnsen, Taxell, and Zaum 2012, 12). The role of the private sector in reducing corruption is also recognized in the UNCAC, in the United Nations Global Compact, and in publications by epistemic institutions such as Transparency International’s *Global Corruption Report 2009: Corruption and the Private Sector* (2010) and the U4 brief by Weimer (2007). Professional and ethical standards and integrity pacts have been shown to have some effect in reducing corruption, especially in public procurement (Boehm and Olaya 2006), when such activities are promoted in the private sector by donors (see Weimer 2007; Sullivan and Shkolnikov 2008; CIPE 2010). However, it is safe to conclude, as do Johnsen, Taxell, and Zaum (2012, 38–39), that the role of private sector involvement in reducing corruption remains weak, in part because of the relatively limited attention that donors have paid to the issue (see also Norad 2011).

### 4.1 International soft law

The most prevalent policy measure aimed at reducing private sector corruption has been international soft law contained in a range of multilateral agreements and codes of conduct. These seek to encourage behaviour change through increased transparency and accountability and through procedural mechanisms to codify standards and make them enforceable.

The category of international soft law includes a diverse array of consensual codes such as the Extractive Industries Transparency Initiative, along with United Nations (UN) human rights treaties and associated instruments. Four key instruments can be identified: the Financial Action Task Force (FATF), established in 1989; the EITI of 2002; the UNCAC of 2003; and the Stolen Asset Recovery Initiative (StAR) of 2007 (Johnsen, Taxell, and Zaum 2012). In addition, the Organisation for Economic Co-operation and Development (OECD) has the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1999).

However, in terms of legal valence—for example, how they are treated by domestic courts—the various codes and agreements are very different. They also differ in terms of implementation, as a given instrument may be enforceable under public (administrative or criminal) or private law, and at the international or domestic level. Instruments of the UN system differ from those outside the UN system, and also differ among themselves.

Voluntary instruments have contributed to more consistent norms around reporting and resource governance (Gillies 2010) and anti-money laundering (Alexander 2000).

For the private sector participants, the incentive to become involved in this work has to do with enhanced reputation and brand value. For country governments, adoption of the EITI offers a number of economic and developmental benefits related to improvements in the investment environment for companies and associated rises in fiscal revenue (Florini 1999; Leipprand and Rusch 2007; Lambsdorff 2007). Also, the EITI has helped highlight the lack of development in mining areas (EITI 2006), although the likelihood of this type of initiative leading to positive benefits for communities and workers is small (Bracking 2009).

However, there remain chronic problems with the EITI and associated instruments, beginning with their voluntary nature. There are also weaknesses in domestic domicile requirements for corporations. Moreover, in systems characterized by a high level of corruption, increased transparency does not necessarily lead to either greater accountability or proven reductions in corruption; it can lead, instead, to fictitious reporting and collusion (Johnsøn, Taxell, and Zaum 2012, 48). In our field research, respondents perceived the South African regulatory framework—in terms of both soft and hard law—to be of high quality, but compliance and implementation were seen as weak, a point confirmed by a high-level public auditor in interview (Respondent 9).

Further research is needed on issues of legal feasibility, including the feasibility of giving legal effect to consensus-based principles—for example, by incorporation into an investment contract. While this generally does not occur, given the inequality of power between public and private agents, a redefinition of the concept of corruption could catalyse such legal “upgrading.”

## 4.2 Policy effectiveness in private sector corruption

Much corruption in the private sector is separately addressed in corporate law, especially legal measures aimed at contract and procurement fraud, bribery, and embezzlement. This leaves a rather narrow scope for the specific use of the term “corruption,” which many now use to refer only to the private bribery of public officials to generate a decision, contract, or rent in their favour. Indeed, definitions of corruption from the early 1990s have tended to focus solely on the public sector (Polzer 2001; Brown and Cloke 2004, 283–84), with some scholars arguing that public sector workers who use state resources or their influence or position to further their private gain are the ubiquitous purveyors of corruption in development (Doig and Marquette 2005). Thus the orthodox definition is that corruption is the “abuse of public office for private gain” (World Bank 1997, 8).

Accordingly, the United States law known as the Foreign Corrupt Practices Act (1977), the OECD bribery convention, and the EITI are all designed as if private sector corruption only happens at the boundary of the firm when it interacts with the public sector, typically when an official demands a bribe. While these measures suggest that anti-corruption efforts are not disregarding private sector agency entirely, as they prosecute private sector entities for their corrupt actions, in practice such prosecutions are few. In addition, the OECD bribery convention and the EITI are little integrated into national law. Transparency International has also expanded the traditional definition somewhat to include abuse by those in “entrusted authority,” including in the private sector, but policy practices still tend to focus predominantly on public sector reform.

There is little doubt that a lack of transparency, in itself, is a problem for development. There is “a strong and robust negative causal association running from (point) resource export revenues to transparency” and “some evidence” of a correlation between lack of transparency and a “subsequent decrease in economic growth” (Williams 2011, 490). The doubt arises over whether lack of transparency is the most proximate context or cause of integrity deficits more specifically. Thus Kolstad and Wiig (2009, 524) contend that “transparency is a necessary, but not sufficient condition to reduce corruption,” because once equipped with information, people still need the incentive and ability to process, understand, and use it. These authors also claim that there is no empirical evidence for giving transparency reform priority over other policy options (529).

The premise here is that the current regulatory regime, which includes the EITI, is weak and too limited in what it addresses, since it excludes immoral behaviour taking place solely in the private sector and in new internationalized exchanges. Private sector corruption can still take place within and

between firms. One such form of corruption, trade mispricing, imposes staggering costs on developing countries, estimated at between US\$775 and US\$903 billion in illicit payments globally each year (Kar and Freitas 2011, vii).<sup>3</sup> Private sector corruption can also take place between firms and other institutions or persons, including those charged with regulation and governance (this is termed regulatory capture), as well as third sector bodies, communities and their leaders, and private individuals. The “private to private” type of corruption appears to have grown rapidly, facilitated by greater financialization of the global economy. Kar and Freitas (2011, vii) estimate that illicit flows increased by 14.9 per cent per year from 2000 to 2009, surging from US\$353 billion to US\$775 billion. Adjusting for inflation, this gives a 10.2 per cent increase, with outflows from Africa growing fastest at 22.3 per cent.

South Africa is estimated to lose over 20 per cent of its GDP each year to capital flight (McKenzie and Pons-Vignon 2012). These outflows are not directly motivated by political and economic uncertainty, but instead by perceived economic advantage for the private sector. During the apartheid years, when South Africa was subject to international sanctions in sectors ranging from banking to athletics, capital flight was estimated at 5.4 per cent of GDP (1980–1993). That rate has almost doubled in post-apartheid South Africa, with capital flight of 9.2 per cent annually (Mohamed and Finnoff 2004, 2). A company seeking to artificially reduce its profits and therefore its taxes in South Africa can relocate intangible capital to secrecy jurisdictions relatively easily, enabling a host of new forms of corruption such as thin capitalization, illicit flows, and trade mispricing.

### 4.3 A way forward

The limitations of the established definition of corruption, which obscures issues of power and private sector-based corruption, might be addressed with a simple wording change: “corruption is the use of public *and/or private* office for personal, group, or family gain.” This presumes that “private” in the sense of a personal economic undertaking should be distinguished from “private” in the sense of a social institution. This makes explicit the conflict of interest that always exists and must be negotiated between the interests of the firm as a social institution, which includes the workers, the community, and the environment in which it is embedded, and the interests of the owners and managers as individuals with personal interests to serve. When the latter act solely or predominantly to enhance their own remuneration, to the point where the sustainability of the firm as a social institution is at stake, then we should view this as corruption. Not all profit seeking need be viewed as corruption, only that which directly conflicts with and undermines the wider interests of the social institution.

Redefining corruption to include private sector agency is the first step. Politically, however, to make the definition work to produce better corporate regulation, one must also apply the principle that the interests of the firm should be more important than the interests of the owners and managers. This act of redefinition, and principle, makes legal adjudication possible and opens up opportunities on a number of fronts to reign in “sharp practice” by corporate actors. Thus acts of deliberate bankruptcy and asset stripping, tax avoidance and trade mispricing, or the use of workers’ pension funds for reinvestment or bonuses would become acts of corruption, and unlawful in some cases, as the interests of executives and parent company shareholders are placed above the interests of the operating firm.

However, even application of this principle would not be sufficient, given the complex interconnectedness of actors and the ambiguity as to whether an action is in the public or private realm. Our research data suggest a further departure: that the domain in which the activity takes place—public or private—should not be at the core of our definition of corruption. Instead, we should

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<sup>3</sup> It should be noted that some have criticised this methodology (Fontana 2010).

define corruption as a deviation from civic responsibility, or as a failure to act in the public good as defined by law. From this we can derive a list of activities that are problematic and deal with each in turn.

## 4.4 New policy measures

I argue in this paper that the neoliberal body of propositions and assumptions about market capitalism (Hay 2004) leads to a narrow definition of corruption that elides the agency of the private sector, and to an exaggerated sense of the effectiveness of consensus-based policies. As Deval Desai argues, liberal consensus processes, such as the EITI and similar measures, fail to stop corruption “owing to the capital-driven power dynamics they mask and paper over, offering formal legitimacy to inequity.”<sup>4</sup> He points to the ways in which Exxon “met” requirements for consultation and for free, prior, and informed consent with regard to their Papua New Guinea pipeline (Onishi 2010). Another example would be the ease with which the Zimbabwean African National Union–Patriotic Front (ZANU-PF) cadre who control the Marange diamond fields in eastern Zimbabwe were able to hollow out the consensus process and obtain Kimberley Process certification despite extreme human rights abuses and environmental degradation.

Thus this paper calls for both a redefinition of corruption and a “changing process” path in terms of policy because they are so closely related: from theory, we frame policy. The redefinition should better reflect market actors’ views of what is going on and allow a means to fix these behaviours in a less ambiguous normative framework. It must also allow us to move beyond simple distinctions between public and private in conceptualizing corruption. Changing the theorization of corruption also enables clearer policy making by clarifying that “new forms of corruption” have a common feature: the pursuit of excessive wealth, defined as wealth that comes at the expense of the common good, or in Machiavellian terms, the pursuit of a particular interest over a common interest.

There does remain the issue of whether improvement in policies aimed at reducing corruption in the private sector can progress as a “step change,” to use contemporary terminology, or only incrementally. It could be argued that there is some worth in upgrading certain voluntary and consensus-based processes to give them more legal traction. Certainly the public sector could commit to this by mandating firms to improve transparency and integrity through investment agreements contracted with financial intermediaries for spending development finance. A step-change approach is, however, preferable, as the incremental approach allows for a business-as-usual approach in the private sector, given the ease with which voluntary codes of conduct, corporate social responsibility campaigns, and transparency initiatives can be performed as a spectacle, with little substantive effect on underlying firm behaviour (see Standing 2013). A step change necessarily involves a paradigm shift in our understanding of corruption, requiring a rethinking of how economic justice is presented in supranational governance structures in order to gain enhanced policy traction. This would ideally include the anti-corruption movement as a key advocate within a wider umbrella group, where those working on illicit financial flows, tax justice, poverty reduction, corporate social responsibility, transparency, secrecy jurisdictions, asset recovery, and debt could construct a collective platform for action.

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<sup>4</sup> Dr Deval Desai of Harvard University and the University of Manchester, e-mail to author, 2012.

## 5. Conclusion

What is striking from the testimony of field respondents in South Africa is that arbitrary bureaucracy around permits and licenses, combined with strategic interventions by representatives of state bodies, creates an uneven application of regulation, in which favouritism and bribery seem relatively common. The business context is characterized by multiple opportunities for anti-competitive practice, motivating companies to engage in extra-market or extra-legal actions. Some respondents felt they lacked, and wished they had, the political connectivity required to influence events in their favour. The South African case study illustrates that private sector corruption needs to be theorized in a systemic way, as endemic and structural and as occurring within complex state-corporate interactions and discursive framings where connection facilitates financial gain. We found both conventional types of private sector corruption and “new” types of corruption which have grown as a consequence of the ever greater internationalization of the global economy. The primary data refer mostly to traditional transactional bribes and kickbacks and to particularly South African practices such as fronting, cover quoting, and javelin throwing.

Improved policy instruments for reducing corruption in the private sector should address a number of odious corporate practices that are currently framed outside of the mainstream view of private sector corruption but are nonetheless socially objectionable, insofar as the management and/or owners of a firm are using their employment and capital ownership for private gain at the expense of the firm (along with its workers, the larger community, and the environment).

A redefinition of corruption, as proposed above, would open up a policy repertoire which could include mandatory regulatory and command and control instruments, with sufficient enforcement power to solve the collective action problems outlined above. We can expect that as a consequence, voluntary instruments would become less prominent in anti-corruption policy. In countries where both the private and public sectors are effectively captured by particularistic interests, this would necessitate governance reform to resuscitate principles of social welfare maximization in state institutions, the type of work already being carried out in policy interventions aimed at tax authorities, police, revenue services, border agencies, and oversight and audit commissions. This work in departments of the core state needs to be supplemented by improvements in parliamentary practice, political parties, and political discourse to minimize opportunities to treat political participation as principally an opportunity for self-aggrandizement.

Indeed, the assumption that solving a problem in one sector requires intervention solely in that sector seems to be contradicted by our evidence that making a sharp public-private distinction is not useful in understanding what corruption is. In other words, treating corruption as a structural problem would require policy makers to change the social articulation and regulation of economic structures, including through a redesign of the markets in which private actors are constrained to operate. But for this work to be effective there needs to be a synergistic programme of public administration reform, one that elevates concepts of public service and the political equality of citizens in relation to the state and the economic opportunities it distributes. In our research, state agencies charged with aspects of market regulation did not emerge as consistently corrupt, although there was some evidence of employees’ arbitrary performance or nonperformance of their constitutional duties. But our respondents spoke of the undue influence of political persons in the public sector, causing a politicization of regulation, of policy, of redistributive programmes, of Black Economic Empowerment programs, and of political party financing, all of which is creating incentives for private sector actors to behave corruptly. Our respondents desired nonarbitrary regulation in the service of economic meritocracy and economic justice.

This is not to say that there are no corrupt workers in the public sector, for example, in the revenue service, planning department, and so forth. There obviously are such cases in South Africa, as there are everywhere. But these acts of fraud and theft did not emerge as salient in our research: none of our respondents specifically mentioned public sector workers as a problem for them, except at the senior level where key decisions about resource flows, procurement, and contracts are made. Thus our mining firm refused to pay a bribe for its license (top level), but its owner did offer a long line of inspectors, sent to bankrupt the firm by its competitor, cups of tea! South Africa also has extensive legal means and customized anti-corruption infrastructure, if not the political will, to prosecute fraud and theft, as well as constitutionally embedded oversight agencies.

Instead, corruption seems to be thriving in the close connections between some private firms and state personnel in charge of large industrial and infrastructure interventions and investments. In our research, the role of politically connected persons in forcing arbitrary application of rules and regulations was a key driver of rent taking, while politicians, political employees, and political parties emerged as the main beneficiaries. This would suggest that it is not more regulation in the private sector that is required to reduce corruption, but political reform more broadly. In particular, South Africa would benefit from types of democratization reform that would radically change the role and practice of provincial government and political parties and encourage people to value the public good over party loyalty (see Myeni 2012). Such measures might include effective revolving-door legislation to curb javelin throwing, a register of the private interests of politicians and senior civil servants, transparent political party financing, and an overhaul of procurement systems. Also beneficial would be additions to the Corruption Act to cover new forms of corruption and the political will to enforce them, since the same narrow elite and corporate partners have the greatest access to these complex internationalized means of corporate malfeasance.

Indeed, corruption in the private sector can be viewed as deeply rooted in social and economic structures. It is exacerbated in the South African case by a generalized feeling that injustice reigns no matter what, so that any individual responses, even those that take advantage of political connections, can be morally justified. In this context, reform of the political system would assist and complement anti-corruption intervention, since the infrastructure for anti-corruption is already in place but is circumvented by political actors. It is also clear that the new forms of corruption discussed in this paper are indeed present in South Africa, and our initial hypothesis that a reframing of the definition of private sector corruption would help arrest these can be upheld. The concept of corruption could usefully be expanded to include these, since they are causing a growth in anti-competitive markets and a generalized sense of injustice in the private sector which acts as a negative incentive for all actors to reduce their integrity. Also, these forms of corruption have been shown elsewhere to have seriously corroded the fiscal base from which development must be funded (Government Commission on Capital Flight from Poor Countries 2009; Palan, Murphy, and Chavagneux 2010; Sharman 2010; Bracking 2012).

This paper has not suggested actual legal measures that would be required to operationalize such an expansion of the concept, as this would require further feasibility analysis. Enabling new global law and criminal penalties would also require a radical overhaul of international institutions to bring together a set of disparate demands on economic justice in one institutional focal point or convention; this would be difficult, which is not to say that it should not be done. Research on reform of global governance institutions would be useful in suggesting sites and capacities for further anti-corruption work in the private sector. However, while it is possible to create the requisite corporate law, and reforms are under way to address arm's length pricing and trade mispricing, an additional capacity problem pertains to implementation at a nation-state level, since many governments are already struggling to enforce existing law.

The wider consequences for global anti-corruption policy have been outlined above. Consensus-based, “name and shame,” and voluntary codes designed to change individual firms’ behaviour, often in the context of transparency initiatives, are giving legitimacy to very weak efforts to boost corporate social responsibility and integrity. They are also detracting attention from the real work that needs to be done, first of all by redefining the boundaries of what the global community thinks is acceptable in private sector practice. Further research could usefully establish the feasibility of legal instruments in draft or design that could directly apply to managing tax havens, jurisdiction and treaty shopping, trade mispricing, thin capitalization, and deliberate bankruptcy; ideally, these would be drawn together in a new international corruption convention aimed at reforming the private sector, with derivative national acts. It seems certain that this would include moving away from the domiciliary principle in tax calculation to the contributory principle, thus eroding the value of a secrecy jurisdiction. The work of the Financial Action Task Force and the OECD on illicit flows would be helpful, as would the efforts of the Publish What You Pay campaign and the Tax Justice Network.

There could then emerge a generic “economic justice” movement globally, drawing together and revitalizing work around debt, the right to development, trade, and poverty, with anti-corruption work as a key plank. While the voluntary sector has made an enormous contribution to putting these issues on the agenda, a formal political process is needed to fulfil the mandate of achieving greater economic justice. Such an effort could conceivably also help avert another financial crisis such as the one which occurred in 2008. Also, additional political science research is required to craft new means to catalyse the private sector using public investment, while at the same time reducing cronyism and patrimonial rents. This might mean bringing more economic activity inside the state and expanding parastatals rather than relying on procurement contracts to get things done. It might mean establishing the feasibility of more inclusive, lower-level incentives and grants to provide liquidity to medium-size businesspeople like those interviewed here, rather than predominantly to the “creamy layer,” since in South Africa at least, the “broad-based” aspect of B-BBEE has not, as yet, been delivered.

Thus there remains work to be done on how governments can deliver equitable markets by means of economic interventions designed to reduce economic and race-based inequalities and build economic justice. This would also benefit traditional donors who provide finance to promote development. They too are searching for mechanisms to catalyse economic, social, and environmental justice—mechanisms that are resistant to corruption, can adequately manage the behaviour of financial intermediaries and middlepersons, and can fairly control for adverse consequences in safeguarding systems. If such efforts are successful, the result would change the *context* in which much of the corruption described by our respondents takes place. This requires the redefinition of corruption as proposed above, as well as a new emphasis on economic justice in corporate regulation. The final step is the development of commensurate legal instruments across a range of “new” forms of corruption and established acts of private corporate malfeasance.

## Annex 1: Interview schedule and protocol

1. How is your firm performing now in relation to, say, five years ago?
2. What are the most critical factors to firm success in Durban?
3. What are the most critical impediments to the success of your firm?
4. If you were a legislator, what is the most urgent piece of business legislation required to make South Africa a fairer place to do business?
5. Do you think South Africa has the correct balance between commercial confidentiality and market transparency in terms of the data about firms that is required to be reported in company accounts?
6. How often do you think firms, not just your own, are pressured into favours, kickbacks, or concessions to people working in the public sector in order to carry out their rightful business?
7. Are you involved with foreign firms and investors, and if so, are they happy with the level of bureaucracy in South Africa or do they see it as restrictive?
8. If foreign firms that you trade with are unhappy with the level of bureaucracy, do they ask you to conduct transactions in other jurisdictions in order to make them simpler?
9. Is your firm successful in securing public tenders, and if so, why do you think this is the case?
10. Do you think that the level of tax that your firm pays is fair? [prompt: in relation to your principal competitors and/or in comparison with firms trying to sell into your markets from abroad?]
11. Do you think that the government could do more to assist your business and South African business in general? [prompt: in terms of strategic industrial policy, tax holidays, increasing public tendering, sponsoring trade fairs abroad, facilitating business networking?]
12. Do you think that having a part of a large firm in another jurisdiction with lower tax is the only way that a firm can stay competitive and in business in the current trading environment?
13. Do you think it is important for South African firms to try and assist in overcoming the historical disadvantages of some communities using corporate social responsibility instruments?
14. Is this type of “beyond the firm” and “beyond the project” social impact critical to being successful in current markets? [or does it just undermine the bottom line and/or facilitate political goodwill?]
15. What do you think are the main anti-competitive practices that your competitor firms employ?
16. In order to make South Africa a fairer place to do business, are new laws required, or codes of business practice of a voluntary nature?
17. Do you think that firms who are well connected socially and politically fare better than other firms?
18. Do you think that the globalization of the South African economy has made it fairer or more anti-competitive? [both in terms of who has been brought in, and the new international connections that national firms have made]

## Annex 2: List of interviewees

1. Indian-Muslim business owner, mining, clay brick making, construction and housing, clothing; age approximately 50–60 years.
2. Black midlevel businessman, skills centre, paper and pulp industries, watermarking; age approximately 40–50 years.
3. White Afrikaner, deputy CEO-level employee, mining and brick making; age approximately 70–80 years.
4. Black very senior business owner and former CEO of one of South Africa's largest shipping firms, maritime and shipping logistics, coal bulk haulage; age approximately early 50s.
5. Indian junior businessman, senior adviser, and trainee in shipping, employee of interviewee no. 4; age approximately early 30s.
6. Black small business owner, tavern owner, merchant trader; age approximately mid-50s to early 60s.
7. White South African lawyer, business adviser, consultant; age approximately late 40s to early 50s.
8. Trade unionist, mining sector; age mid-40s.
9. South African Revenue Service representative.

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U4 Anti-Corruption Resource Centre  
Chr. Michelsen Institute (CMI)  
Phone: +47 47 93 80 00  
Fax: +47 47 93 80 01  
u4@u4.no  
www.U4.no

P.O.Box 6033 Bedriftssenteret  
N-5892 Bergen, Norway  
Visiting address:  
Jekteviksbakken 31, Bergen

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University of KwaZulu-Natal

This paper reviews types of private sector corruption in South Africa in order to provide suggestions for the design of anti-corruption policies in the natural resource sectors. It uses qualitative research to explore how corruption is framed by respondents and performed by market actors. The currently used concept of private sector corruption does not cover new types of corruption that have emerged in response to the increasing complexity of the public-private boundary and the effects of more liberalized markets. Moreover, transparency initiatives are largely ineffective in cases such as South Africa, where the market and state are entwined and political connection is a critical gatekeeper for economic opportunity. The paper advocates both redefinition of the concept of corruption and reform of the process of policy design in anti-corruption work. The two are related: the redefinition suggested would advance the important debate over how the global community defines acceptable behaviour in the private sector by providing a usable foundational morality.