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INTERNATIONAL CENTRE FOR
ASSET RECOVERY

Opportunities and challenges for NSAs to enhance the enforcement of legislation on bribery in transnational business transactions

Policy paper

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List of abbreviations

CoE	Council of Europe
CSO	Civil-society organisation
ECOSOC	United Nations Economic and Social Council
EU	European Union
FATF	Financial Action Task Force
FCPA	Foreign Corrupt Practices Act 1977
FDI	Foreign direct investment
HLRM	High-level reporting mechanism
ITT	International Telegraph and Telephone
MSI	Multi-stakeholder initiative
NGO	Non-governmental organisation
NSA	Non-state actor
OECD	Organisation for Economic Co-operation and Development
PPP	Public-private partnership
SEC	Securities and Exchange Commission
TNC	Transnational corporation
UN	United Nations
UNCAC	United Nations Convention Against Corruption
UNGA	United Nations General Assembly

Summary

This policy paper seeks to identify and present opportunities and challenges non-state actors (NSA) have when seeking to enhance the enforcement of legislation on bribery in transnational business transactions. It does so by first defining the terms ‘transnational business transactions’, ‘NSA’ and the group of actors nestled within it. The paper then presents a brief overview of the efforts to implement a transnational legal framework to combat bribery in transnational business transactions since the 1970s and how NSAs have sought to support, expand and strengthen this international framework, leading to the anti-corruption drive of the late-1990s. The paper additionally establishes a non-exhaustive list of activities NSAs undertake in the field of preventing and combating corruption. The conclusion presents opportunities and challenges which NSAs may encounter in the prevention and combating of transnational corruption.

1 Defining non-state actors

NSAs are a heterogeneous group of entities, from opposing categories, which share the common feature in that they are not the state and yet can only be defined based on their relationship to the state (Peters, Koechlin and Fenner Zinkernagel 2009, 14; Arts 2003, 5; Alston 2005, 3-4; Josselin and Wallace 2001, 2; Büthe 2004, 281).

The European Union (EU) defines NSAs as (EU 2002, 5):

> "(…) a range of organisations that bring together the principal, existing or emerging, structures of the society outside the government and public administration. NSAs are created voluntarily by citizens, their aim being to promote an issue or an interest, either general or specific. They are independent of the state and can be profit or non-profit-making organisations."

For the purposes of this policy paper, the term 'NSA' has been defined as encompassing transnational corporations[1] (TNCs), non-governmental organisations[2] (NGOs) and international organisations.[3] They have been the main drivers of preventing and combating bribery in transnational business transactions.

The role of NSAs in enhancing the enforcement of legislation on bribery in transnational business transactions[4] has been thrust into greater importance since the 1980s. The liberalisation of trade, deregulation, expanded foreign direct investment (FDI) and privatisations expanded the power of TNCs and reduced the role of states (Alston 2005, 17). The normative and policy gaps generated by de-regulation enabled and required NSAs to step in and fill the void. TNCs proceeded initially with self-regulating their standards through codes of conduct. Non-governmental organisations (NGOs) played (and continue to play) an important role, by informing public opinion through awareness raising of the roles and responsibilities of states and NSAs in preventing and combating bribery in transnational business transactions. They moreover engage in advocacy campaigns that seek to generate and influence political will, and to promote reform in public policy. Consequently, NSAs have been given responsibility for arrangements relating to a wide range of functions previously provided or overseen by public actors (Alston 2005, 17).

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1 Transnational corporations are companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed. (OECD Guidelines on Multinational Enterprises, 2000).

2 NGOs is here defined as non-profit, non-violent pressure groups that pursue certain public goals. They seek to influence, directly or indirectly, the outcomes in matters that cross or transcend national borders (Arts 2003, 5-6; Charnovitz 2006, 350).

3 International organisations are defined as those established by treaty or other instrument governed by international law and possessing their own international legal personality (art. 2 of the Draft Articles on the Responsibility of International Organisations, Report of the International Law Commission. UN Doc A/58/10, 38)

4 The term 'bribery in transnational business transactions' involves bribing a foreign public official by TNCs operating in international business (Lord 2015, 377).

2 Understanding bribery in international business transactions

The free movement of capital, goods and persons, resulting from the economic globalisation, liberalisation and privatisation has led to an increase of cross-border business transactions among states with different norms and practices (Baughn et al. 2010, 15). The increased visibility of certain local events such as bribery in international business transactions has pushed for the trans-nationalisation and diversification of norm formation (Machado 2004, 18; Currie 2010, 19; Peters et al. 2009, 1; Getz and Volkema 2001, 7).

International standard setting on bribery in transnational business transactions gained international attention from the 1970s onward. Generally defined as 'the (mis)use of public office and power for private gain' (Council of Europe 2014, 12), corruption encompasses bribery, embezzlement, extortion, ethic violations, illegal asset accumulation, favouritism and nepotism (McCoy 2001, 68; Boehm and Olaya 2006, 432; Andvig et al. 2000, 15-18). To effectively control corruption, different regulatory and policy instruments to be put in place by states or NSAs. These may include: the criminalisation of corruption-related acts (e.g., active[5] and passive[6] bribery), ensuring transparent decision-making (Nichols 1999, 259; Assaf 2009, 77) and public and corporate codes of conduct, seeking to ensure the accountability of the actors involved. Preventing and combating corruption requires public and private institutions to regulate their common affairs (Peters, Koechlin and Fenner Zinkernagel 2009, 17).

While bribery in transnational business transactions occurred prior to the 1970s, anti-bribery legislation focused on acts of corruption occurring within one state. By the mid-1970s, criticism toward the economic power and behaviour of TNCs increased and the international community sought to develop international standards for corporate behaviour (Sauvant 2015, 13). Several soft law mechanisms to combat bribery and other corrupt practices were established by both international organisations (the United Nations[7] – UN) and NSAs (the International Chamber of Commerce[8] – ICC) (McCoy 2001, 71). This initial drive furthered the discussion into the need for combating bribery in international business transactions, but ultimately did not yield any concrete normative results.

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5 Active bribery is understood as the promise, offering or giving to a public official of an undue advantage so that he or she may act or refrain from acting in the exercise of his or her official duties.

6 Passive bribery is understood as the solicitation or acceptance by a public official of an undue advantage so that he or she may act or refrain from acting in the exercise of his or her official duties.

7 UNGA Res. 3514(XXX), Measures against corrupt practices of transnational and other corporations their intermediaries and others involved, UN Doc. A/RES/3514(XXX) (15 December 1975); ECOSOC Res. 2041, Corrupt practices, particularly illicit payments, in international commercial transactions, UN Doc. E/RES/2041 (5 August 1976); ECOSOC, Report of the Ad Hoc Intergovernmental Working Group on the Problem of Corrupt Practices on its First, Second, Third and Resumed Sessions, UN Doc. E/6006 (5 July 1977); ECOSOC Res. 2122(LXIII), Corrupt Practices, particularly illicit payments, in international commercial transactions, UN Doc. A/RES/2122(LXIII) (4 August 1977).

8 International Chamber of Commerce (ICC). Guidelines for International Investment.

While the 1970s saw the peak of nationalisations (Kobrin 1984, 333) and of command-and-control-style regulation, states increased their efforts to attract foreign investment in the 1980s (Jenkins 2001, iii), resulting in deregulation, privatisation and liberalisation of their economies. States were less willing and less able to perform regulatory functions, and regulation no longer was the exclusive domain of the state (Hutter 2006, 1; Jenkins 2001, 1). TNCs increased their role in standard setting through corporate responsibility and the elaboration of codes of conduct. It was the period of self-regulation of TNCs.

The deregulation of the 1980s was followed in the mid-1990s by a period of re-regulation and regulatory reform (Hutter 2006, 1). Unlike the 1970s, where the driving force for regulation were the states and centred in actions within the state, the re-regulatory push of the 1990s came principally from international organisations and NGOs (Pieth 2007, 83). International organisations such as the OECD (through their Financial Action Task Force (FATF) and the Working Group on Bribery) began implementing regulation on anti-money laundering to curb illicit financial flows (1989) and in bribery in international business transactions (1994-1997).

The end of the Cold War and the subsequent fall of communism changed the world from one of limited co-operation into one with a plurality of actors (Lehmkuhl 2012, 27). The rise of volume of trade and international business transactions in the 1990s further contributed to the increased awareness of bribery in transnational business practices, resulting in the negotiation of anti-corruption treaties encompassing a range of civil and criminal anti-corruption measures (Rubin 1998, 261; Low, Lamoree and London 2015, 569).

The culmination of the legislation on bribery in transnational business transactions came with the adoption in 1997 of the Organisation for Economic Co-operation and Development's (OECD) Anti-Bribery Convention.[9] The system created by the mentioned Convention contains provisions of hard law (e.g., the criminalisation of foreign bribery), requiring states to criminalise, in national legislation, the passive bribery of foreign public officials. Furthermore, the OECD Anti-Bribery Convention requires states to ensure that TNCs can also be held liable for bribery in transnational business transactions and that the sanctions afforded to both natural and legal persons are effective, proportionate and dissuasive. Moreover, the OECD Anti-Bribery Convention introduced elements of soft law, mandating signatory states to undergo periodic mutual evaluations by peers. The Anti-Bribery Convention became a powerful instrument to ensure not only compliance with the text of the treaty, but also its implementation by the signatory states.

Since then, several other major anti-bribery treaties have been negotiated and currently are in force: the Inter-American Convention Against Corruption (1996); the CoE Civil Law Convention on Corruption (1999) and its Additional Protocol; the CoE Criminal Law Convention on Corruption; and the United Nations Convention Against Corruption (UNCAC) (2003).

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

The scope of application of these treaties varies greatly. The OECD Anti-Bribery Convention focuses narrowly on measures to combat transnational bribery of foreign public officials, focusing on the supply side of corruption (passive bribery). The UNCAC, on the other hand, contains a comprehensive list of corruption-related offences which must be criminalised by its signatories. Common to these conventions is the introduction of peer review mechanisms whereby states evaluate the effective implementation of the treaty obligations into national law. Common to all, however, is the requirement to undergo mutual evaluations to ensure their implementation.

3 The role of NSAs in enhancing bribery legislation in international business transactions

States, through international organisations, have been discussing manners in which to curb bribery in international business transactions since the 1970s. The role of NGOs and TNCs in combating international business transactions is less clear. Since the mid-1990s, a vast option of mechanisms, tools, and methods have been developed for TNCs to ease the challenges resulting from the solicitation of bribes (passive bribery) (Wehrle 2015, 10). States and international organisations have sought to criminalise corruption-related offences, strengthen the integrity of public officials and establish conflict of interest regulation. NGOs and TNCs, on the other hand, have established a wide array of mechanisms seeking to enhance the enforcement of anti-corruption legislation. This section focuses on the activities which NSAs have been undertaking to prevent and combat corruption.

The identification of relevant policy issues has allowed NSAs in general and NGOs in particular to play an important role in setting standards concerning bribery in transnational business transactions. Governance is carried out not only through formal, institutionalised mechanisms, but also through non-institutionalised processes (Peters, Koechlin and Fenner Zinkernagel 2009, 17). Thus, policy issues formerly treated solely by states (e.g., environmental protection, labour and bribery) are increasingly understood as local paradigms which are addressed as global paradigms (e.g., organised crime, bribery in transnational business transactions) and which cannot be tackled solely through state regulation alone (Peters et al. 2009, 2; Santos 2005, 5). The harmonisation of these local paradigms requires states and NSAs to work in tandem to ensure an effective setting of standards and the implementation of anti-corruption norms.

Since the early 1990s, NGOs focusing on combating corruption have been raising awareness through research, enhancing the policy dialogue and the general understanding on corruption. UNCAC goes as far and indicating, in its article 13 that States Parties should promote the active participation of NSAs in the prevention of and the fight against corruption. Research projects uncover issues and formulate ideas backed by established evidence, which in turn support awareness campaigns targeting these ideas and issues to a wide audience. NGOs raise awareness about the roles and responsibilities of states and NSAs in preventing and combating corruption.

Another area of activity of NGOs relate to advocacy and behaviour modification. Here, NGOs seek to influence political will, promoting reform in public policy, strengthening the accountability of states and TNCs with regards their anti-corruption efforts. NGOs contribute to the debate for the reform of public policy, including efforts towards strengthening systems to prevent future wrongdoing, thereby enhancing democratic legitimacy.

Since the deregulation period in the 1980s, government regulation has given way to corporate self-regulation and other voluntary initiatives. Many functions previously within the remit of the state began to be assumed by NSAs (Blagescu and Lloyd 2009, 271). The self-regulatory efforts of TNCs during this time translated into industry standards or codes of conducts. These are guidelines, rules or recommendations issued to enhance the responsible behaviour of TNCs (Fransen and Kolk 2007, 667).

Since the late-1990s, however, governance for TNCs has been emphasised through co-regulation: a hybrid system of regulation, whereby two or more stakeholders from different areas (states, TNCs or NGOs) are involved in the design and implementation of norms and instruments that attempt to improve the performance of TNCs (Utting 2002, 65; Pieth 2012, 6). These initiatives have attracted considerable attention as a possible compromise between government command-and-control regulation of the 1970s, and corporate self-regulation of the 1980s. Known as collective action (Pieth 2012, 4), these co-regulatory methods include a wide number of multi-stakeholder initiatives (MSI).

MSI is a private governance mechanism involving NGOs, TNCs, international organisations and states (Mena and Palazzo 2012, 528; Koechlin and Calland 2009, 85). MSIs seek to fill regulatory gaps in existing national legislation, conflicting legislation on the same areas (e.g., bribery, money laundering) among states, and in setting industry standards for these specific areas (Utting 2002, 61; Mena and Palazzo 2012, 528; Koechlin and Calland 2009, 84). The incorporation of all relevant actors in a joint process enables MSIs to achieve a comprehensive approach to (individual and common) problems facing each actor and to find appropriate collective solutions to them (Koechlin and Calland 2009, 86). The value of MSIs lies on the fact that they present an effective and efficient alternative to government regulation, recognising the interconnected nature (spatially and thematically) of certain problems and the interdependencies among the involved stakeholders and their actions (Koechlin and Calland 2009, 86).

One of such MSIs are integrity pacts. These occur when stakeholders are involved in a specific process (e.g., states and TNCs in procurement) and agree, prior to the initiation of the specific process, to operate free from corruption (de Swardt and Wiehen 2012, 83; Boehm and Olaya 2006, 443). This agreement is signed by the involved parties, who additionally agree to disclose the agreed upon information, thus enhancing transparency in the process. Such integrity pacts moreover enable those involved to seek redress when violations occur. In the case of procurement, for example, these could range from loss of contract to blacklisting from future contracts (Boehm and Olaya 2006, 443). In integrity pacts, the disincentive to bribe is the knowledge that all competitors are bound by the same agreement and have access to the same information (Boehm and Olaya 2006, 443).

Another example is public-private partnerships (PPPs). In many instances, the patchwork regulation established by states to locally implement international standards (e.g., money laundering and corruption) increased both regulatory competition and arbitrage (Pieth and Aiolfi 2003, 360). Conflicting local regulation interpreting these international norms further allowed those seeking to launder money profit from these discrepancies (Pieth and Aiolfi 2003, 360). NSAs noted the need for greater harmonisation and noted that state regulators were not adequately addressing the problem (Pieth and Aiolfi 2003, 360). The identification of these issues made information held by NSAs a

valued commodity (Josselin and Wallace 2001, 9). Moreover, by identifying the purpose (e.g., articulating high standards in relation to due diligence in private banking), it is possible to set standards under which competitors within a sector (e.g., banking) will work under. Thus, much of the influence of NSAs comes from their ability to affect new norms and standards on issues of societal concern (Blagescu and Lloyd 2009, 271).

4 Challenges and opportunities

Effective engagement of NSAs to enhance the legislation on bribery in transnational business transactions requires willing political systems[10] that encourage such engagement (Börzel and Risse 2010, 113-114; Peters, Förster and Koechlin 2009, 499). Thus, the challenges and opportunities mentioned in this section will focus on the activities carried out by NSAs and how they: (i) influence policy making (advocacy); (ii) can frame the transnational corruption discourse (awareness raising through research) and (iii) can set standards and engage in the topic with other actors (standard setting) (Arts 2003, 40).

4.1 Challenges

The ability for NSAs to set standards (through self-regulation or co-regulation), to influence policymaking and to raise awareness is closely linked to the legitimacy of their actions within the system. Peters et al. (2009, 498) breaks down the legitimacy into: reputation, accountability, inclusiveness, transparency and representability. Legitimacy itself is further sub-divided into the extent to which regulations are perceived as justified and the effectiveness of the norm to solve problems, resulting in beneficial effects (Mena and Palazzo 2012, 527; Peters, Förster and Koechlin 2009, 511-512).

Legitimacy of standard setting, awareness raising and policymaking by NSAs through MSIs depends on inclusion of affected stakeholders in the NSA decision-making process and how these stakeholders can influence the process (Mena and Palazzo 2012, 539). Legitimacy is unlikely to be met if it depends solely on the interests of one actor alone (Bernstein and Cashore 2007, 351). Indeed, the legitimacy of MSIs is likely to be greater when the stakeholders involved (or neutral third parties) are convinced that the action sought is in their own interest and of those of a wider group (Aiolfi 2012, 111).

In standard setting, legitimacy of any action taken by the stakeholders will more likely than not require a consensus based decision-making process. This is because collective action involves joint action among competitors. Another method of decision-making may risk dividing the stakeholders and diluting the collective nature of the action (Aiolfi 2012, 110). In awareness raising, the legitimacy will derive from the objective factual criteria under which the research is based on, and the ability of NSAs to effectively convey the results to a wider audience. In relation to policymaking, legitimacy stems from the acceptance that the NSA has specialised knowledge on the given topic and thus is able to provide insightful input to further specific policies.

[10] Political will is the commitment to undertake actions to achieve a set of objectives (Brinkerhoff 2010, 1). The level of political will in an initiative can be measured through 7 components (2): (i) initiative; choice of policy or programme to be undertaken; (iii) mobilisation of stakeholders; (iv) commitment and allocation of resources; (v) application of credible sanctions; (vi) continuity of effort; and (vii) learning and adaptation.

In an awareness raising or an advocacy campaign, the likelihood of shaping the societal discourse or policy is greater when representation and inclusiveness is higher. Representation here both implies representation of sector-specific actors who are knowledgeable on the specific subject-matter (e.g., corruption in the extractive industries), as well as representatives of society, who should be given the opportunity to voice their concerns early on and upon presentation of the outcome.

Reputation is another challenge for NSAs when setting standards, raising awareness or conducting advocacy campaigns. On one hand, a NSA with little reputation is less likely to have the necessary credibility to effectively set sector-specific standards on bribery in transnational business transactions, shaping societal discourse or policy. On the other hand, a reputational risk may derive from choosing the wrong stakeholders to partner with. Another risk to reputation may result from a false complementarity between state and NSAs: states may enter partnerships with NSAs to propose complementary initiatives to inter-governmental processes and then promote them as replacements to state regulation (Martens 2007, 6).

A lack of accountability and transparency of actions undertaken by NSAs may further hinder the effectiveness of their efforts. Whereas states normally have a complex web of accountability mechanisms to ensure, among others, transparency in the decision-making process, NSAs as private actors are not required to adhere to the same transparency requirements expected from states and public actors (Assaf 2009, 77). The reluctance from NSAs, particularly TNCs, to share information with the wider public and the state is understandable: information disclosed could find its way to competitors (Assaf 2009, 78). A need to establish a business case for TNCs is therefore instrumental to ensure accountability and transparency. MSIs, in this sense, may provide an avenue for greater transparency and accountability: when competitors sit to discuss standard setting (e.g., integrity pacts in procurement processes, harmonising the understanding of state standards in sector-specific areas), it must be shown to them the cost-benefit of such standard setting, establishing as a result a transparent industry standard which indicates their willingness to be held accountable.

4.2 Opportunities

There are several opportunities for NSAs to enhance the enforcement of legislation on bribery in transnational business transactions. Whether engaging directly with states or amongst themselves, NSAs identify subjects of common interest, thereby assisting in norm formation, policymaking and awareness raising. This section will focus on the opportunities NSA have in: (i) complementing existing state norms and policies; (ii) increasing awareness and transparency over norms and policies; and (iii) neutral facilitation in MSIs.

Complement existing state norms and policies

Simply put, standard setting by NSAs complements existing legislation. Where legislation or policy has not been issued by a state, NSAs can fulfil a para-law function (Peters, Förster and Koechlin 2009, 501), filling the normative gap. States benefit from the participation of NSAs in setting or complementing standards of prospective, existing or unavailable legislation, since they add value to

the process with their practical expertise and experience in specific sectors. This practical expertise and experience held by NSAs further allow guidance and interpretation of the mentioned norms.

It should be noted that the democratic legitimacy of a norm is further strengthened when the decision-making process involves those affected by the standard or policy, making the actors involved more likely to accept the policy outcome, even if the interests of a wider audience have not been fully accommodated (Börzel and Buzogány 2010, 159). Thus, NSAs can help shape policy by raising awareness of the proposed standard or policy and to discuss the social impact that the norm will have. The involvement of NSAs can therefore significantly strengthen the capacity of state actors in public policymaking.

Increase transparency and awareness over a certain norm

Transparency is an important tool in preventing and combating bribery in transnational business transactions. It reduces information asymmetries (Boehm and Olaya 2006, 439) which in turn lowers the risk of bribery, benefiting all stakeholders. An audience which is affected by a certain standard or policy is more likely to accept the outcome when they are heard in the decision-making process, or when the decision-making process itself is visible. The visibility increases transparency and accountability, which are deterrents to corruption. Seen through this optic, NSAs can support states and the wider audience by issuing awareness campaigns or advocating for a specific outcome.

Neutral facilitation of norms

TNCs may not have an immediate incentive to collaborate in MSIs with competitors. NGOs can, through research and awareness raising, identify subjects of common interest which will in turn fuel collective action among TNCs from a specific sector (e.g., art trade, private banking). Where NGOs are able to present a business plan to TNCs which demonstrate the added value of sector-specific collective action and show that such collective action is in their own interest and that of a wider group, success of collective action is more likely (Aiolfi 2012, 111).

NGOs can additionally act as neutral third parties facilitating the dialogue between sector-specific competitors which seek to discuss common interests with a view to enabling collective action, more effectively enhancing the enforcement of legislation on bribery in transnational business transactions. Finally, individuals and NGOs can act as independent observers into the process, monitoring and advising what may become an appropriate group outcome (Aiolfi 2012, 111).

5 Conclusion

This policy paper has sought to bring to the fore different activities undertaken by NSAs to enhance legislation on bribery in transnational business transactions. Understanding the progression made in preventing and combating bribery by state and non-state actors since the last quarter of the 20th century has enabled the reader to perceive the different approaches over the last decades. From a state command-and-control regulation, to market liberalisation, states and NSAs have been assisting one another in closing the normative gap which enables bribery to flourish.

From awareness raising and advocacy campaigning to MSI standard setting, the initiatives have been many and, with the plurality of actors involved, it is not possible to present an exhaustive list of roles which NSAs could perform in the field. Some of the roles with NSAs have in enhancing the prevention and combating of bribery have been grouped into thematic areas. More importantly, and less obvious, are the activities that can develop amongst the different groups of NSAs (TNCs, NGOs and international organisations) in a manner which positively effects change and enhance legislation combating bribery in transnational business transactions.

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Project profile

ANTICORRP is a large-scale research project funded by the European Commission's Seventh Framework Programme. The full name of the project is "Anti-corruption Policies Revisited: Global Trends and European Responses to the Challenge of Corruption". The project started in March 2012 and will last for five years. The research is conducted by 20 research groups in fifteen countries.

The fundamental purpose of ANTICORRP is to investigate and explain the factors that promote or hinder the development of effective anti-corruption policies and impartial government institutions. A central issue is how policy responses can be tailored to deal effectively with various forms of corruption. Through this approach ANTICORRP seeks to advance the knowledge on how corruption can be curbed in Europe and elsewhere. Special emphasis is laid on the agency of different state and non-state actors to contribute to building good governance.

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