Cleaning Up Atlantis: How to Put a Kleptocracy on the Road to Transparency

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Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman. —Justice Louis D. Brandeis

From our experience counseling U.S. and foreign companies and foreign governments on issues related to anti-corruption, we set forth below a preliminary sketch of a plan that governments and civil society actors might employ to move state regimes from kleptocracy to greater transparency, if not necessarily to mature democracy. In order to develop recommendations that may apply to a range of countries, we deploy a hypothetical situation in a hypothetical state we call “Atlantis.” The sketch is not a thinly veiled description of the situation in a real, existing country, nor a comprehensive historical study of anti-corruption practices. We offer merely a starting point for discussion.

The Republic of Atlantis is a transitional democracy that recently overthrew a kleptocratic regime. It is beset by a legacy of corruption, which it must now eradicate if it is to survive.

After Atlantis’s notoriously corrupt socialist regime collapsed in 2007, Anthony Soprano, a governor in a northern region rich in natural resources, took power promising a “shock therapy” program of privatization which, he said, would stimulate rapid economic development. In fact, Soprano and his cronies sold most state assets at bargain-basement prices to companies they secretly controlled. During his rule, the export of the country’s natural resources, including oil, coal, and diamonds, supported the country’s economy almost entirely. Typically, producers sold these resources to offshore companies controlled by Soprano and his cronies, which then resold them to foreign purchasers at market prices. The companies deposited the proceeds of these sales in Swiss bank accounts usually held in the name of foundations established in Panama and Lichtenstein.

Approximately six months ago, an opposition movement called “Transparency” published on the internet videos of orgies at European villas featuring Soprano and his cronies; photographs of their palaces, yachts and private jets; and documents showing the sale of Atlantis’s resources to Soprano-owned companies at ridiculously low prices. This led to popular revulsion and a series of protests. At one protest, Soprano’s private police opened fire, killing fifty people, many of them college students. The incident became known as “Bloody Sunday.”

After “Bloody Sunday,” a coalition of prominent businesspeople and military leaders (referred to in the press as the “military-industrial coalition” or just “the coalition”) that previously backed Soprano decided that he had become a liability and told him that if he did not flee at once, he would be arrested and executed. Soprano and his inner circle fled. The coalition then decided to support the formation of a new government headed by the leaders of Transparency, believing that this would help Atlantis present a good face to the world and attract foreign investment. The leaders of Transparency are, for the most part, young, well meaning, honest, and idealistic, but lacking in political experience and resources. Alas, members of the former regime still populate much of what passes for the government bureaucracy, some of them implicated in kleptocratic practices that still persist at least at the margins.
As a result of the Soprano regime’s corruption, Atlantis has depleted its treasury. This becomes an especially serious problem when Soprano and his cronies try to retake power. North Atlantis, an oil-rich military dictatorship that borders Atlantis to the north, has provided Soprano and his inner circle asylum and now backs the attempted countercoup. It also supports a pro-Soprano separatist paramilitary movement known as the Northern Liberation Front (NLF). According to some reports, the NLF has sent 20,000 troops into the pro-Soprano regions to “liberate” them from what it characterizes as an “illegitimate fascist regime.”

Atlantis’s new leadership is pleading for (among other things) international economic assistance, which, it claims, would allow it to put the country back to work, stimulate an economic recovery, and secure its political power. However, the international community is reluctant to provide support. The IMF and World Bank have both pointed to the country’s long history of corruption, the fact that many members of the previous regime remain in positions of power, and the continuing influence of the coalition. Thus, they say, the assistance money will likely be stolen or squandered. Before they will provide assistance, they insist, Atlantis must demonstrate that it is doing everything possible to clean up corruption, recover the assets stolen by the Soprano regime and create a stable, transparent, and attractive business environment. The international donors understand that this will not happen overnight and do not expect quick results. But they do expect a comprehensive anti-corruption plan to be developed and implemented immediately. Set forth below is a proposed ten-point plan for Atlantis based on best practices in a variety of countries.

The Ten-Point Plan

1. **Appoint an Independent Anti-Corruption Commission**

Atlantis should create an independent Anti-Corruption Commission (“ACC”) to oversee the new anti-corruption initiative. In order to ensure independence, we recommend that:

(a) Members should be nominated by Parliament and confirmed by the President. The President may refuse to confirm nominees only if he/she believes that the nominees cannot perform the services required honestly and professionally. If the President refuses to confirm a nominee, the President must provide a written statement articulating the reasons therefor;

(b) Only a majority vote of the Parliament can remove a member of the ACC;

(c) The representation of parties in the Parliament should determine the selection of members. Specifically, the two largest parties in the Parliament should each have the right to select three members of the Commission. The six members selected from the leading parties should then select three more members without regard to their party affiliation, at least one of whom should be a foreign national with relevant anti-corruption experience. Thus, the Commission should have a total of nine members, representing a range of views and political affiliations. The odd number of members is important in order to ensure a tie-breaking vote.

The functions and powers of the ACC should include:

- Administering the Amnesty Program (see below);
• Supervising the work of the Asset Recovery Task Force (see below);

• Studying corruption problems and developing reform proposals, both on its own initiative and as designated by the President;

• Analyzing (i) the adequacy of Atlantis’s anti-corruption legislation and enforcement infrastructure, (ii) the question of whether government and judicial salaries should be raised, and (iii) whether government employees should be required to complete annual asset declarations and, if so, what form the declarations should take (i.e., which assets should be declared, whether the declaration requirement should also apply to family members and, if so, which family members);

• Representing Atlantis in international anti-corruption organizations;

• Consulting with businesses and providing them with guidance on the development and implementation of appropriate compliance programs;

• Developing rules for financial institutions on Know Your Customer (“KYC”) requirements and disclosure of beneficial owners;

• Overseeing the development of anti-corruption plans by federal agencies;

• Other functions as determined by the President and the Parliament.

It is imperative that the Commission receive adequate resources to execute the tasks entrusted to it and that it have the authority and budget to hire adequate staff.

2. Declare a Limited Amnesty for Corruption Offenses

Second, Atlantis should declare an amnesty for certain corruption offenses. Although it will be controversial, a properly tailored amnesty will serve several purposes. First, provided that it requires applicants to repay a certain percentage of their ill-gotten gains, the amnesty will help Atlantis recover some of the money stolen by the kleptocrats and to supplement its budget. Second, provided that it requires applicants to admit their crimes and explain how they committed them, it will provide lustration and uncover important information about the crimes of those who choose not to cooperate and the location of the assets that they have stolen. Third, the amnesty will make it difficult to use corruption prosecutions as a political weapon. Given the all-pervasive corruption during the Soprano regime, almost all prominent business and political figures will be subject to prosecution going forward. This gives the government disproportionate power vis-a-vis its political opponents, which it can easily abuse. Moreover, absent an amnesty, the new regime’s opponents will always charge that corruption prosecutions have a selective, political motivation, undermining the proceedings’ legitimacy in the eyes of the public.

The amnesty law must be drafted and implemented very carefully. Its architects should consider the following:

(a) Who will administer the amnesty? We recommend that the ACC administer the amnesty. We further recommend that the new government announce the amnesty and define its parameters before the establishment of the commission in order to avoid claims that the commission is being sabotaged.
(b) *How much should the penalties be?*
Penalties must be set sufficiently low so as to encourage disclosures and cooperation, but not so low as to create the impression that criminals will remain unpunished and in nearly full possession of the money that they stole. We would recommend 75 percent of the corruption proceeds as a baseline figure with the possibility of upward or downward adjustment depending on the specific facts of the case and the extent and value of the applicant’s cooperation with the commission, as determined by the commission.

(c) *What offenses should be eligible/ineligible?*
The amnesty should define the scope of eligible offenses carefully. They should include only acts of official corruption and explicitly exclude crimes of violence, crimes committed after the declaration of the amnesty program, and crimes involving private victims, such as fraud against an individual or a private business.

(d) *What disclosures should be required of applicants?*
Applicants must disclose all eligible crimes in which they participated and/or of which they have knowledge. Failure to meet the disclosure requirements should render an applicant ineligible. Applicants should not be required to disclose crimes which are not eligible for the amnesty as such a requirement would expose applicants to the risk of prosecution and would therefore deter participation.

(e) *What benefits should applicants receive?*
Applicants who successfully complete all amnesty program requirements should receive immunity from criminal prosecution or civil penalties for any eligible crimes that they have disclosed.

(f) *To what extent should the Commission’s work be made public?*
An appropriate degree of publicity will help Atlantis come to terms with its corrupt past. It will also help to legitimize the new regime and the Commission. However, excessive publicity could serve as a deterrent to participation in the Amnesty Program and help others to hide their stolen assets more effectively. Therefore, we recommend that the Commission publicize only (i) the names of those who participate in the Program; (ii) the articles of the Criminal Code that they have admitted to violating; and (iii) the penalties imposed on them, with no further details. Unauthorized disclosure of information subject to the Commission’s rules on secrecy should be made a criminal offense.

3. **Trace and Recover Assets Stolen by the Soprano Regime**

The Transparency government should act immediately to trace and recover assets stolen by the Soprano regime if such assets have not been voluntarily disclosed and forfeited under the amnesty program. In addition to its importance as an anti-corruption measure, asset recovery also enhances national security by cutting off one of the sources of funding for the insurgency. Specifically, the regime should establish a special Asset Recovery Task Force (ARTF) under the supervision of the ACC. The ARTF should include forensic accountants and lawyers with both civil and criminal litigation experience. The ARTF should work with the intelligence agencies and the Amnesty Commission to compile as much information as possible about the stolen assets and their likely location. At the same time, the ARTF should retain outside counsel to supplement these efforts by means of disclosure orders, witness summonses, bank orders, search orders, mutual legal assistance requests, and insolvency actions. Once the assets have been definitively
located, the ARTF and outside counsel should obtain forfeiture orders in appropriate jurisdictions.²

4. Require All Federal Agencies to Develop Agency-Specific Anti-Corruption Plans

The Transparency regime should issue an order requiring all federal agencies to develop anti-corruption plans and to submit them to the ACC within a set period, for example, 90 days. The order should specify that the agencies’ anti-corruption plans should, at a minimum, include policies on: (i) conflicts of interest, (ii) receipt by agency officials of gifts, travel, and entertainment from private businesses, (iii) responding to whistleblower complaints and conducting internal investigations, (iv) protecting whistleblowers, (v) rules to ensure transparency in procurement, and (vi) establishing an appropriate “tone at the top” and implementing anti-corruption training for agency employees.

5. Institute Trial by Jury for all Civil and Criminal Cases

Both democracy and transparency rely on judicial independence. Kleptocracies regularly abuse their legal systems for politically motivated prosecutions designed to silence dissent and/or economically motivated proceedings designed to misappropriate property. Trial by jury is an effective antidote to such practices for several reasons.

First, it helps to ensure judicial independence and prevent the abuse of the legal system for corrupt motives. It is much more difficult to corrupt twelve jurors than one judge. Moreover, trial by jury allows judges to resist attempts to influence them by placing responsibility for decisions on the jury.

Second, trial by jury helps ensure the accountability of law enforcement to the population. When cases are tried before a jury, prosecutors must consider the “jury appeal” of any cases they intend to bring and are less likely to bring cases based on weak or fabricated evidence or cases that appear to be politically motivated. In addition, if citizens perceive the government to be corrupt or politically biased, jurors will likely view the evidence it offers in court with skepticism, and it will therefore have a hard time winning convictions. Thus, trial by jury gives law enforcement a professional incentive to win the trust of the population, by treating people with respect and behaving professionally in day-to-day interactions with them. In this way, trial by jury deters petty police corruption and rewards honest policing.

Third, trial by jury, by definition, makes legal proceedings transparent to the public. While some trials may be closed to the public, they will, at a minimum, be open to jurors who may speak to the press if they suspect corruption. This acts as a deterrent to corruption of the proceedings.

Fourth, trial by jury instills democratic values and respect for the rule of law in the populace and thus can help countries to overcome the “corrupt mindset” and “culture of corruption” that are so often cited as reasons why corruption cannot be eradicated in countries with a legacy of corruption. Thus, it can be a valuable supplement to the anti-corruption education project recommended below. Alexis de Tocqueville described the educational value of trial by jury best:

The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbibes all classes with a respect for the thing judged and with the notion of right. If these two elements be removed, the love of independence becomes a mere destructive passion. It teaches men to practice equity; every
man learns to judge his neighbor as he would himself be judged. And this is especially true of the jury in civil causes, for while the number of persons who have reason to apprehend a criminal prosecution is small, everyone is liable to have a lawsuit. The jury teaches every man not to recoil before the responsibility of his own actions and impresses him with that manly confidence without which no political virtue can exist. It invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society and the part which they take in its government. By obliging men to turn their attention to other affairs than their own, it rubs off that private selfishness which is the rust of society.

The jury contributes powerfully to form the judgment and to increase the natural intelligence of a people; and this, in my opinion, is its greatest advantage. It may be regarded as a gratuitous public school, ever open, in which every juror learns his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even the passions of the parties. I think that the practical intelligence and political good sense of the Americans are mainly attributable to the long use that they have made of the jury in civil causes.

I do not know whether the jury is useful to those who have lawsuits, but I am certain it is highly beneficial to those who judge them; and I look upon it as one of the most efficacious means for the education of the people which society can employ.

The introduction of trial by jury must be accompanied by strong protections for jurors that will insulate them from attempts to influence them improperly. These protections should include severe criminal penalties for jury tampering and also mechanisms for ensuring that jurors can deliberate in secret (i.e., soundproofing deliberation rooms) and for ensuring their anonymity when necessary (i.e., facilities for sequestering them and providing them with security during transportation to and from court). The ACC should study the issue of juror security and developing recommendations on how it can be guaranteed.

6. **Institute Corporate Liability for Failure to Prevent Corruption by Employees and Third Parties**

Corruption must be addressed from both the supply and the demand side. Corporations pay most bribes through third parties. Therefore, in order to address the supply side of corruption, Atlantis should adopt a law based on the UK Bribery Act, which (a) imposes liability on companies for failing to prevent bribes paid on their behalf by third parties and (b) provides an absolute defense for companies that can prove that they had in place “adequate procedures” to prevent bribery. Such a law will provide an incentive for companies to police the behavior of their third-party agents and also to train employees and third parties in anti-corruption procedures. These measures can prevent individual acts of corruption and also change the culture of corruption among the population. If companies can be held criminally liable for the acts of third parties, they will pay a premium to work with companies that are “clean,” which creates a strong financial incentive for their potential partners to develop good business ethics and compliance policies. Similarly, if employees are trained in anti-corruption measures and rewarded for compliant behavior, they too will begin to behave more ethically. Over time, such good behavior will develop into a new culture of business ethics that will supplant the old culture of corruption. The ACC should be charged with developing models of adequate practices for companies based on
international best practices developed by the OECD, the UN, the US DOJ/SEC, the UK Ministry of Justice and companies with distinguished compliance programs.

7. Institute Transparent Procurement Policies and Practices

Policing public procurement is one of the most important challenges for regimes trying to combat corruption. Collusion among bidders and between bidders and procurement officials often results in the state paying inflated prices for goods and services that it purchases. A 2014 OECD report found that 57 percent of foreign bribery enforcement actions that it studied involved bribes to obtain public contracts. Therefore, it is essential that procurement procedures be transparent and designed in such a way as to prevent any illegal collusion.

In order to mitigate the risks associated with fraud in public procurement, we recommend that the ACC appoint a special sub-committee to review procurement legislation and practices. The sub-committee should focus on the following key elements of honest procurement regimes:

(a) **Transparency.** Rules, requirements, contract opportunities, evaluation criteria, awards, prosecutions, debarment decisions, and settlements should all be publicly available.

(b) **Oversight.** The procurement regime should have adequate mechanisms for bid challenges and audits. An Inspector General should adjudicate bid challenges and conduct audits of procurement decisions that appear suspicious.

(c) **Contractor Ethics and Compliance.** The regime should have adequate mechanisms for evaluating the responsibility of contractors based on their financial resources, technical qualifications, and past performance record and for disqualifying those who do not meet certain minimal requirements. It must also have mechanisms for suspending and debarring contractors for misconduct. In addition, contractors must complete certifications of compliance with contract requirements and relevant laws. Contractors should also be subject to criminal liability for false statements and false claims and to vicarious liability for wrongful acts of subcontractors and vendors if they cannot demonstrate that they have made best efforts to prevent misconduct by such third party agents. The law should also include qui tam provisions to incentivize whistleblowers and the disclosure of improper conduct in procurements.

(d) **Fair Competition.** The regime should include mechanisms for identifying and eliminating organizational conflicts of interest among contractors and controls to prevent contractors from gaining improper access to bid and proposal information from other bidders and source selection information from government evaluators and procurement planners.

As a first step, we recommend that the sub-committee review existing law and practice in light of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Public Procurement and develop recommendations for amendments to Atlantis law based on the UNCITRAL Model Law.

8. Apply for Membership in Appropriate International Anti-Corruption Organizations

Atlantis should apply for membership in appropriate international anti-corruption institutions. Experience demonstrates that membership in international organizations that demand serious anti-corruption efforts from member states can play an enormous role in helping to combat
corruption. For example, the 2014 Transparency International (“TI”) rankings of the countries of the former Soviet Bloc (defined as the former Soviet republics, the former Warsaw Pact countries minus East Germany and the countries of the former Yugoslavia), demonstrates a strong correlation between EU membership and successful anti-corruption efforts. The lowest-ranked EU countries among this group are Romania and Bulgaria, which are both ranked at 69/175 on the TI Index. With the exception of Georgia and Macedonia, all the non-EU countries are ranked lower than Romania and Bulgaria.

EU membership is not a panacea for corruption. Corruption remains a serious problem in some EU countries, and EU monitoring may not be entirely responsible for the improvement in former Soviet Bloc countries. Nevertheless, we believe that some correlation is undeniable. As the leading scholar of Poland’s anti-corruption efforts, Kaja Gadowska, has written “international institutions have strengthened their pressure upon Polish reformers to tackle the problem [corruption] and limit corruption. An acceleration of the process of introducing anti-corruption legislation was brought about by Poland’s efforts to enter the European Union and the European Union’s demands to reduce corruption.”

The OECD Anti-Bribery Convention (ABC) and Working Group on Bribery have had a similarly positive effect on member states. For example, the average country signatory to the ABC has a TI ranking of 64, which would rank it 35/175 on the TI Index. As U.S. Assistant Attorney General Leslie Caldwell recently said, “Since their inception, the Working Group and the Convention have played a pivotal role in the worldwide battle against bribery. By requiring countries to criminalize bribery of foreign officials in international business transactions and creating a peer-driven monitoring mechanism to ensure the robust enforcement of those laws, the Convention has helped to bring about an international approach to rooting out a global problem.”

Membership in international institutions can also help Atlantis’s new Transparency government build political support for needed reforms, since the government can point out that its reforms are not simply a political initiative, but rather required of Atlantis by its international treaty obligations.

9. Develop and Implement of an Anti-Corruption Education and PR Campaign

Atlantis should develop an anti-corruption education campaign. The campaign should include: public service announcements by key opinion leaders; academic studies on the deleterious effects of corruption and the publicization of their results; mandatory lectures on anti-corruption in public schools; degree programs in anti-corruption and compliance at higher educational institutions; and public recognition of companies that demonstrate best practices in anti-corruption.

10. Establish Adequate Enforcement Mechanisms

Finally, it is crucial that Atlantis develop mechanisms to ensure adequate enforcement of its anti-corruption legislation. The ACC should review Atlantis’s anti-corruption legislation and enforcement apparatus to ensure that both are adequate to deter and punish corruption. An adequate enforcement apparatus should include, at a minimum:

(a) Criminal penalties adequate to deter and punish corruption.
(b) The establishment of a specialized unit to investigate and prosecute corruption. The ACC should vet all members of this unit itself. The unit should also include a special team dedicated to investigating fraud and misconduct in public procurement.

(c) Special investigative techniques including wiretapping, undercover investigations, and sting operations. Because most acts of corruption are committed secretly, uncovering and prosecuting them often requires these investigative techniques. Accordingly, national legislation must allow for their use while also providing sufficient judicial oversight and safeguards to ensure that they are not abused.

(d) Mechanisms to reward cooperating witnesses. Proving an act of corruption in court often requires the testimony of a participant in the scheme (especially if a jury tries the case.) Therefore, national legislation should provide a mechanism for rewarding co-conspirators for testifying. It should also regulate the procedures by which defendants enter into cooperation agreements with prosecutors and should provide extremely severe penalties for cooperating witnesses who provide false testimony and for prosecutors who provide illegal benefits to cooperating witnesses or who induce false testimony. Otherwise, such procedures can be easily abused and aggravate Atlantis’s corruption problems.

(e) Whistleblower incentives/protections. Whistleblowers can provide extremely valuable information about corruption but are unlikely to come forward unless they know that they will be both rewarded and protected. Therefore, Atlantis should adopt legislation that rewards whistleblowers who provide valuable leads to law enforcement. The law should also establish both civil and criminal penalties for retaliation against whistleblowers. The same legislation should protect the use of social media to disseminate information about corruption.

(f) In rem forfeiture. Asset forfeiture is crucial to deterring and punishing corruption. However, because of the inherent difficulties of proving corruption offenses in court, a criminal conviction should not be a prerequisite for asset forfeiture. In rem forfeiture allows prosecutors to file a civil forfeiture action against the property to be seized and to seize it based on a preponderance of the evidence, without having to obtain a criminal conviction of an individual based on proof beyond a reasonable doubt. Therefore, it can be extremely effective means of taking the profit out of corruption and hence deterring it.

Cleaning up Atlantis will require time, patience, and trial and error. This blueprint, drawn from the best practices developed so far to fight corruption, will help set it on the path toward good government. Once customized to fit real-world countries, it can do the same for them.

1 Thomas Firestone is a partner at Baker & McKenzie LLP. This paper was prepared at the request of Hudson Institute’s Kleptocracy Initiative and was first published by *The American Interest* on November 3, 2015. It is designed to identify possible “best practices” for countries attempting to transition from kleptocracy to transparency. Although it is written in the form of advice to a government, we hope that civil society activists and others advocating for positive change will make use of it as well.

2 In pursuing these efforts, we recommend that the regime consider working with the World Bank Stolen Asset Recovery Initiative (STAR), a partnership between the World Bank Group and the United Nations Office on Drugs and Crime. STAR works with developing countries to facilitate the return of stolen assets. More information about STAR can be found at star.worldbank.org.

4 We are grateful to Jessica Tillipman, Associate Dean, George Washington Law School, for her assistance in providing an overview of best practices in public procurement and identifying these key elements.


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