
IN THE SHADOW OF THE LAW: AN EXAMINATION OF CORRUPTION AND THE RULE OF LAW IN ARMENIA

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ABSTRACT

This note examines the tension between social norms and the rule of law within Armenia. The note begins with a survey of Armenia, discussing key components of Armenian history as well as providing a current profile of the nation. The note then takes a theoretical turn, exploring social norms theories as they have been applied to other communities characterized by a shared sense of morality and autonomy from formal law enforcement. I analogize the practice of corruption in

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Armenia to similarly established practices of extra-legal enforcement of informal business rules, and emphasize the compatibility of such practices with values of integrity and solidarity within highly homogenous communities. I then consider the possibility that Armenia avail itself of a bifurcated approach: using social norms to govern purely domestic affairs, while using the rule of law to govern international affairs in order to attract and protect foreign investment. I point out, however, the impracticalities of such an approach in an increasingly global economy, where national and international markets grow inexorably intertwined. Finally, I suggest that the solution with the most lucrative outcome is for Armenia to fully and honestly revise bribery laws while advancing the independence of the judiciary.

INTRODUCTION

International organizations are quick to make bold statements such as “Armenia must crack down on corruption.”¹ But what does that actually mean? Corruption is a contextually malleable concept.² In the United States, “[t]he Framers believed that an individual is corrupt if he uses his public office primarily to serve his own ends.”³ More broadly, a Western understanding of corruption might assert that corruption is “the rotting of positive ideals of civic virtue and public integrity . . . a particular kind of conscious or reckless abuse of the position of trust.”⁴ By this view, one has a duty to commit to a lifestyle contrary to corruption in an effort to promote and perpetuate the public good.⁵

The Western idea of corruption avoidance, however, starkly contrasts with many views on how life ought to be conducted in post-Soviet Union countries.⁶ Because of the “homogenizing impact of the Soviet period, with its single body of law, . . . citizens right across the USSR managed to live normal lives partly by learning how to be artful dodgers.”⁷ After the dissolution of the Soviet Union, this concept of

¹ *Armenia Must Crack Down on Corruption, Says OECD*, OECD, (Sept. 19, 2012, 10:07 PM), http://www.oecd.org/document/35/0,3746,en_2649_34857_37846947_1_1_1_1,00.html.

² See Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 374 (2009); see also David Kennedy, *The International Anti-Corruption Campaign*, 14 CONN. J. INT'L L. 455, 456 (recognizing that “the term ‘corruption’ is open to all sorts of interpretations. . .”).

³ Teachout, *supra* note 2.

⁴ *Id.*

⁵ *Id.* at 377 (“[Citizens] are fundamentally responsible for the integrity of their government. All citizens-- especially powerful citizens--are responsible for keeping public resources generally serving public ends.”).

⁶ See generally Marina Kurkchian, *The Illegitimacy of Law in Post-Soviet Societies*, in LAW AND INFORMAL PRACTICES THE POST-COMMUNIST EXPERIENCE 25 (Denis J. Galligan & Marina Kurkchian eds., 2003).

⁷ See *id.* at 26.

avoiding the law through corrupt practices continued within the emerging nations, often being “refined and improved by having to live through the transition. . . .”⁸

Scholars have categorized these two perceptions of the rule of law into two distinct models.⁹ The first model, referred to as the “positive myth,” resembles the Western rule of law traditions:

[T]here is a strong belief that most of the people function most of the time according to the rule of law; and that to break the law, or even to bend it, is socially disgraceful. In such societies the law is seen as a power above individuals and social groups; above politics and the play of interests; above the legislators who create it; and certainly above the bureaucrats and officials who implement it.¹⁰

In a positive myth rule of law culture, social life and the legitimacy of law are fused together and serve as the absolute base of society.¹¹ In such a society, “there is a common assumption that law is indeed legitimate and that the majority of people do obey it.”¹²

Not surprisingly, in the taxonomy of rule of law culture there is also a “negative myth.”¹³ In a negative myth culture:

[P]eople generally assume that everybody else is routinely disobeying the law. People are generally disrespectful, or believe that everyone else is, of all the agencies and agents of the law: the parliament, the civil service, the courts and judges, the police, the tax collectors, even the health and safety inspectors.¹⁴

Essentially, the hallmark of a negative myth culture is a sentiment of deep distrust and skepticism regarding the law and institutions associated with it.¹⁵ When examining a negative myth culture, however, one must recognize that the citizens’ distrust of the law, and even a willingness to embrace corrupt practices, does not necessarily translate into an expression of their personal values.¹⁶

Establishing precisely where an individual culture’s values fall on the rule of law spectrum is important, when attempting to assess the likelihood of success of the

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 28-29.

¹¹ *Id.* at 29 (summarizing Peter Fitzpatrick’s analysis of the positive myth (PETER FITZPATRICK, *THE METHODOLOGY OF MODERN LAW* (1992))).

¹² *Id.* at 30.

¹³ *Id.* at 29.

¹⁴ *Id.*

¹⁵ *Id.* at 31.

¹⁶ *Id.* (“People do conform to the general practices [of corruption], but in doing so they often act against their own values.”).

rule of law as commonly understood.¹⁷ In the words of Denis Galligan, “legal failure varies within and across societies.”¹⁸ Further, these variances derive from a variety of different sources: “a lack of legal rules covering the matter,”¹⁹ the implementation of laws that are “unsuitable for the task,”²⁰ and the presence of “ineffective or unsuitable institutions for the implementation of the law.”²¹ Regardless of the source of the legal failure, the rule of law must be understood as a “social institution” designed to regulate society.²² For the rule of law to be effective as a social institution, a given society’s social norms and values must correlate with the legal values imposed.²³ On the other hand, if social and legal norms conflict, a culture of legal manipulation and subversion will develop.²⁴

More precisely, the imposition of a rule of law that conflicts with cultural values “means that social norms, the norms by which people live their daily lives, are in significant ways a distortion of and alien to their own values.”²⁵ When this “pathology” occurs, citizens feel compelled to engage in corruption in order to survive.²⁶ This seemingly forced corruption not only effectively strips the law of its “inner integrity,” but also characterizes the law as “an instrument of power, a means to achieving social goals. . . .”²⁷ Absent a common understanding that the law itself is engendered with inner integrity, the primacy of the rule of law is unattainable.²⁸

This pathology resulting from the interaction between social norms and the law is endemic to post-communist countries.²⁹ Some legal scholars suggest that legal failures might be remedied through effective legislative drafting.³⁰ The argument

¹⁷ See Denis J. Galligan, *Legal Failure: Law and Social Norms in Post-Communist Europe*, in *LAW AND INFORMAL PRACTICES THE POST-COMMUNIST EXPERIENCE* 1, 1 (Denis J. Galligan & Marina Kurkchian eds., 2003).

¹⁸ *Id.* at 2.

¹⁹ *Id.*

²⁰ *Id.* at 3.

²¹ *Id.*

²² *Id.*

²³ See *id.* at 6-7.1

²⁴ *Id.* at 7.

²⁵ *Id.*

²⁶ *Id.*; see also Kurkchian, *supra* note 6, at 37 (“People understood fully that, if they wanted to prosper, they could not afford to place their trust in the formal, planned, legally constituted economy. So they created their own informal economy in its place, which operated both on and within the official economy. It meant that everyone was in effect doing two things at once all the time.”).

²⁷ Galligan, *supra* note 16, at 7.

²⁸ *Id.* at 7-8.

²⁹ *Id.* at 7; see also Kurkchian, *supra* note 6, at 40 (“The post-Soviet period is inevitably conditioned by this heritage.”).

³⁰ See ANN SEIDMAN, ROBERT B. SEIDMAN AND NALIN ABEYSEKERE, *LEGISLATIVE*

contends that “drafters can draft defensively to reduce the dangers of corruption by limiting officials’ opportunities and capacity to behave corruptly. . . .”³¹ This theory recognizes the threat of an official abusing a public office for personal gain, as feared by the Framers of the U.S. Constitution.³² Under this theory, the logical result of drafting legislation in such a way as to promote transparency in and accountability of public officials, is that a culture of corruption will yield to a culture of the rule of law.³³ This approach, however, only addresses one theory of legal failure as discussed by Galligan: the presence of incompetent or ineffective legal institutions.³⁴ More importantly, it discounts³⁵ the important role that daily behavior and social norms play in giving integrity to the law once in place.³⁶

This note will examine the story of Armenia as a case study of the interplay between domestic social norms in post-Soviet Union nations and the requirements of participation in an international legal community. In Part I, I will provide a brief history of important events in the development of modern Armenia. Then I will discuss the domestic legal institutions currently in place in the country. I will also discuss Armenia’s current participation in domestic and international legal institutions, and the use of domestic and international legal instruments designed to fight corruption. In Part II, I will apply various legal theories to the current state of affairs in Armenia as represented by its domestic and international legal instruments and institutions, and will consider the possibility that Armenia avail itself of a bifurcated approach: using social norms to govern purely domestic affairs, while using the rule of law to govern international affairs in order to attract and protect foreign investment. I will point out, however, the impracticalities of such an approach in an increasingly global economy, where national and international markets grow inexorably intertwined. Finally, I will suggest that even though Armenia might be able to continue to govern domestic affairs with social norms of corruption, if Armenia is to effectively open its economy to foreign

DRAFTING FOR DEMOCRATIC SOCIAL CHANGE: A MANUAL FOR DRAFTERS 341, 341-375 (2001).

³¹ *Id.* at 341.

³² *See* Teachout, *supra* note 2.

³³ *See* SEIDMAN, *supra* note 29 at 375; *see also* Kennedy, *supra* note 2, at 461 (discussing the possibility of permitting corruption even within a rule of law structure by drafting legislation with a large “discretionary margin” that might easily be used “politically, perhaps to favor party members, and experienced in ways which were not economically rational. . . .”).

³⁴ *See* Galligan, *supra* note 16, at 3.

³⁵ I use the term “discounts” because the Seidman theory does not contend that transparent laws are the only measure required to construct a positive rule of law culture. *See* SEIDMAN, *supra* note 29, at 375 (“Good laws alone do not guarantee development and good governance; poor laws, however, do constitute a major cause of their defeat.”).

³⁶ *See* Galligan, *supra* note 16, at 7.

investments and international trade, it must increasingly embrace a positive rule of law culture.

PART I: AN ARMENIAN FOUNDATION

A Brief Profile of Modern Armenia

Although Armenia is one of the world's oldest countries, modern Armenia has developed only after centuries of turbulent geographic and political shape-shifting. As a result, "[t]he majority of [Armenians] now live far away from the lands between the Black Sea and the Caspian . . . even though they continue to think of themselves as Armenians."³⁷ Presently, there are approximately seven million Armenians who, although scattered across the globe, remain linked to Armenia.³⁸

Historically, Armenia has been a battleground for expanding empires, including the Romans, the Byzantines, the Persians, the Ottomans, and the Russians.³⁹ Though all of these empires imposed their laws and values on Armenia,⁴⁰ Armenia's allegiance to Christianity (the national religion since 301 AD) provided the nation with a way to maintain its identity.⁴¹ In fact, many view the strength of the Armenian Apostolic Church as "the one social institution that could resist one alien rulership after another, thereby preserving the psychological identity and cultural integrity of the scattered local communities both inside the homeland and abroad."⁴²

Perhaps the two most influential factors in shaping modern Armenia were the tragic events of 1915⁴³ and the rule of the Soviet Union from 1921 to 1991.⁴⁴

³⁷ Marina Kurkchian & Edmund Herzig, *Introduction to(?) Armenia and the Armenians*, in *THE ARMENIANS PAST AND PRESENT IN THE MAKING OF NATIONAL IDENTITY* 1, 1 (Edmund Herzig & Marina Kurkchian eds., 2005).

³⁸ *Id.* at 2. Current population estimates for Armenians still living within Armenia range between 2,967,004 and 3,259,000 people. U.S. DEPARTMENT OF STATE, <http://www.state.gov/r/pa/ei/bgn/5275.htm> (last visited Jan. 9, 2012) [hereinafter STATE DEPARTMENT COUNTRY REPORT].

³⁹ See Kurkchian & Herzig, *supra* note 37, at 3.

⁴⁰ A useful way to think of Armenia is "as a channel and intermediary" that not only absorbed or incorporated new cultural elements into its own culture, but also conveyed elements between several foreign cultures. "The distinctive Armenian culture and identity emerged from that process of synthesis." *Id.* at 4.

⁴¹ See *id.* at 3.

⁴² *Id.* Another strong cultural element that withstood the forces of foreign empires is the Armenian alphabet, which developed in the early fifth century. See *id.* at 4. See generally James. R. Russell, *Early Armenian Civilization*, in *THE ARMENIANS PAST AND PRESENT IN THE MAKING OF NATIONAL IDENTITY* 23, 23-39 (providing a clear and concise overview of the origins of ancient Armenia, its language, and its culture).

⁴³ See generally Richard G. Hovannisian, *Genocide and Independence, 1914-*

Early twentieth century ethnic Armenia covered a vast expanse of land, with Armenians inhabiting the majority of the Anatolian plane.⁴⁵ The political boundaries and control, however, were divided between the Russian and Ottoman Empires.⁴⁶ As the political climate within the Ottoman Empire began “to point the general objective to achieve a homogenous Turkic society,” deportations and massacres of ethnic Armenians were used to “annihilate the Armenian population. . . .”⁴⁷ On April 24, 1915, 300 cultural and political Armenian leaders were rounded up and executed in Istanbul.⁴⁸ This sparked the murder of approximately 5,000 more Armenians in the city on that day, and approximately 1.5 million Armenians located elsewhere in the Ottoman Empire over the course of the subsequent year.⁴⁹ The Young Turk leadership finalized their efforts by destroying “any remnants of Armenian cultural heritage . . . even level[ing] entire cities. . . to remove all traces of the three thousand year old civilization.”⁵⁰ The efforts of the Ottoman government were halted only because of intervention by the Russian military.⁵¹ Today, only a few countries recognize the events as genocide,⁵² which helps to perpetuate the Armenians’ sense of national sorrow.⁵³

21, in *THE ARMENIANS PAST AND PRESENT IN THE MAKING OF NATIONAL IDENTITY* 89, 89-112 (Edmund Herzig & Marina Kurkchian eds., 2005).

⁴⁴ See generally Ronald Grigor Suny, *Soviet Armenia, 1921-91*, in *THE ARMENIANS PAST AND PRESENT IN THE MAKING OF NATIONAL IDENTITY* 113, 113-25 (Edmund Herzig & Marina Kurkchian eds., 2005).

⁴⁵ Hovannisian, *supra* note 43, at 89.

⁴⁶ *Id.*

⁴⁷ *Id.* at 91.

⁴⁸ Fact Sheet, Knights of Vartan Armenian Research Center, The University of Michigan-Dearborn: Armenian Genocide (Apr. 3, 1996), <http://www.umd.umich.edu/dept/armenian/facts/genocide.html>.

⁴⁹ *Id.*

⁵⁰ *Armenian Genocide*, UNITED HUMAN RIGHTS COUNCIL, http://www.unitedhumanrights.org/genocide/armenian_genocide.htm (last visited Jan. 9, 2011); see also Kurkchian & Herzig, *supra* note 37 (recognizing that these events also served to “cut [Armenians] off from the most emotive geographical symbol of the Armenian homeland, Mount Ararat. [Today,] attempt at travel in that direction is stopped at a heavily guarded border with Turkey.”).

⁵¹ See Hovannisian, *supra* note 43, at 91.

⁵² Currently twenty-one countries officially recognize these events as genocide. See *Recognition of the Armenian Genocide*, GENOCIDE.AM, http://genocide.am/article/recognition_of_the_armenian_genocide.html (last visited Jan. 9, 2012). The United States does not recognize the events as genocide, though thirty-nine states do. See Symeon C. Symeonides, *Choice of Law in the American Courts in 2009: Twenty-Third Annual Survey*, 58 AM. J. COMP. L. 227, 293-94 (2010).

⁵³ See Hovannisian, *supra* note 43, at 94 (“The lasting impact of the Genocide

Shortly after these events, Soviet Russia absorbed Armenia.⁵⁴ Although Armenia originally retained a certain degree of autonomy,⁵⁵ Armenian interests were relegated to a secondary status, beneath the interests of the Soviets.⁵⁶ Eventually, even private farming was eliminated by collectivization.⁵⁷ Under Stalin's rule, Armenia's economy transitioned from agrarian to industrial; but, it remained heavily dependent upon the larger Soviet economy.⁵⁸ Stalin "fundamentally changed Armenia [by establishing] the rigid authoritarian political system and state-run economy . . . [using] violence not only against the peasants but also, in the Great Purges of 1937-9, against other ordinary citizens, army officers, Communist Party officials, and intellectuals."⁵⁹ Remarkably, and despite efforts to effectuate absolute control, Stalin permitted the Armenian Church to remain present within Armenia.⁶⁰ Stalin used the church as a vehicle for relations between the Armenian diaspora and the Soviet government.⁶¹

Post-Stalin Soviet Armenia enjoyed an expansion of social and cultural freedoms, causing an explosion of rekindled Armenian nationalism.⁶² Armenians

cannot be overstated, especially as there was no recompense or restitution for the victims and no real punishment for the perpetrators. Until the issue is addressed by the international community it is likely that the trauma will cause a constant sense of isolation and insecurity and stand as a major obstacle to normalcy even as the Armenians move deeper into a new century.”)

⁵⁴ See Suny, *supra* note 44, at 113.

⁵⁵ Soviet Russia sought to impose a more “moderate” rule in Armenia. Under the encouragement of Vladimir Lenin, the Soviet Armenian government determined that “large scale enterprises, railroads and banks – were to be nationalized” in an effort to restore the Armenian peasant economy. *Id.* at 114.

⁵⁶ See *id.* at 115 (“[T]he territorial and political interests of Caucasian Armenians were [ultimately] subordinated to those of the Soviets.”). While some Armenians saw Soviet control as a way to secure the small remaining homeland against the encroaching Turkish and Persian empires, others viewed this as a “fraudulent homeland . . . [because] the Soviet government would not push the Armenian cause and attempt to retrieve lost lands in Turkey.” *Id.* Still, the early years saw a large-scale repatriation of Armenians from all over the world to Soviet Armenia. See *id.* 115-17.

⁵⁷ See *id.* at 117-18.

⁵⁸ *Id.* (“Supplies of raw materials and of energy came from outside the republic, and what was produced, in turn, was sold outside of Armenia. Many products were only partially produced in Armenia and finished elsewhere.”)

⁵⁹ *Id.* at 118.

⁶⁰ Stalin used many methods to maintain control: a “state-run command economy, one party rule enforced by arbitrary and massive terror, state control of the media and culture, and the propagation of an official Soviet patriotism.” *Id.* at 118-19.

⁶¹ *Id.*

⁶² *Id.* 119-20.

received a better education and obtained Soviet recognition of their tragic past in the form of a genocide memorial.⁶³ Perhaps most importantly, extra-Soviet influences began to appear within Armenia.⁶⁴ Suddenly, Armenians were able to compensate for their deficient standards of living under the strict Soviet Union regime “through the semi-legal ‘second economy’ . . . [in which nearly] everyone knew someone who could get something outside of the official government stores. . . .”⁶⁵

During this period of time, “[c]orruption, ‘speculation,’ black-marketeering, and simply ‘doing favors’ . . . became the normal way of doing business in Armenia.”⁶⁶ The commitment to corruption became so ingrained in citizens’ minds as a way of life that “the ‘second economy’ proved impossible to uproot” even though officials were dispatched to Armenia for that sole purpose. Officials, weary of fighting the second economy, eventually embraced the widespread system of corrupt politics, giving rise to a “political machine in [Ye]revan that enriched itself with little regard for the Armenian population at large.”⁶⁷

In the wake of its collapse, the Soviet Union left Armenia fundamentally changed forever.⁶⁸ Today, Armenia is homogenous in almost every sense of the word, with ethnic Armenians constituting 97.9 % of the population and 94.7% of the country belonging to the Armenian Apostolic church, while an additional 4% practice some other form of Christianity.⁶⁹ Geographically, the nation is landlocked and compact, slightly smaller than the state of Maryland, with closed borders to its east and west (Turkey and Azerbaijan respectively).⁷⁰ Politically, Armenia is a republic with a unicameral parliament and a president elected through popular vote for five-year terms.⁷¹

⁶³ *Id.* at 20.

⁶⁴ *See id.* at 119 (“Visitors from abroad became more common in Yerevan. . . .”).

⁶⁵ *Id.* *See also* Ronald Grigor Suny, *Soviet Armenia*, in *ARMENIAN PEOPLE FROM ANCIENT TO MODERN TIMES, VOLUME II* 347, 373-74 (Richard G. Hovannisian ed., 2004) [hereinafter Suny II].

⁶⁶ *See* Suny II, *supra* note 65, at 373.

⁶⁷ *Id.* at 374.

⁶⁸ *See* Suny, *supra* note 44, at 124-25.

⁶⁹ CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/am.html> (last visited Jan. 9, 2012) [hereinafter CIA Country Profile].

⁷⁰ *Id.*

⁷¹ *Investment in Armenia: Introduction for foreign companies considering doing business in Armenia*, KPMG IN ARMENIA 1, 4-5 (2009), <http://www.armeniapropertynews.com/library/KPMG%20Guide%20to%20Investment%20in%20Armenia.pdf> [hereinafter KPMG Report]. The President also enjoys the privilege of appointing the Prime Minister and any member of government nominated by the Prime Minister. *Id.* at 5.

Economically, Armenia has made progress by privatizing many industries,⁷² though often at the expense of creating “pervasive monopolies in important business sectors [that make] Armenia particularly vulnerable to the sharp deterioration in the global economy.”⁷³ To help strengthen and grow its economy, Armenia employs a liberal policy toward foreign investment, seeking to protect investors’ rights and provide equal conditions for business for foreign and domestic investors.⁷⁴ To further incentivize trade, Armenia has bilateral investment treaties with thirty-seven nations.⁷⁵ Finally, Armenia is a contracting party to the United Nations Convention Against Corruption,⁷⁶ as well as a full member of the Council of Europe, which conducts ongoing evaluations to assist Armenia in its efforts to fight corruption.⁷⁷ Still, Armenian public opinion seems to maintain that the government’s efforts to defeat corruption are illusory.⁷⁸ Further, the international

⁷² Armenia has used a two-pronged approach in its efforts to privatize: creation of new private enterprises, and conversion of existing State enterprises. “Currently, the private sector accounts for about 80% of the Armenian GDP.” *Id.* at 21.

⁷³ See CIA Country Profile, *supra* note 69 (“Armenia will need to pursue additional economic reforms in order to regain economic growth and improve economic competitiveness and employment opportunities, especially given its economic isolation from two of its nearest neighbors, Turkey and Azerbaijan.”).

⁷⁴ KPMG Report, *supra* note 71, at 11. Recognizing that their economy “largely depends on foreign trade, Armenia’s Government is making significant efforts to attract foreign investments.” *Id.* at 12. Some of the incentives include: 100% ownership of businesses (though foreign ownership of land is impermissible), no export duties, no import duties on raw materials, and investment guarantees through bilateral treaties and international dispute resolution. See *id.* at 12-13.

⁷⁵ *Treaties of Armenia*, ICSID DATABASE OF BILATERAL INVESTMENT TREATIES, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ParticularCountry&country=ST5> (last visited Jan. 9, 2012) [hereinafter ICSID DATABASE].

⁷⁶ *Summary of Treaty*, EUROPEAN COMMISSION TREATIES OFFICE DATABASE, <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=2781> (last visited Jan. 9, 2012).

⁷⁷ *GRECO Evaluations*, COUNCIL OF EUROPE GROUP OF STATES AGAINST CORRUPTION, http://www.coe.int/t/dghl/monitoring/greco/evaluations/index_en.asp (last visited Jan. 9, 2012).

⁷⁸ See e.g., *Watchdog Warns of Top-Level Corruption in Armenia*, RADIO FREE EUROPE RADIO LIBERTY, http://www.rferl.org/content/Watchdog_Warns_Of_Top_Level_Corruption_In_Armenia/1838462.html (last visited Jan. 9, 2012) (reporting that “Transparency International and its Yerevan-based affiliate, the Anti-Corruption Center. . . see no significant decrease in the scale of corrupt practices among various state

community also believes that “the [Armenian] system still suffers from several shortcomings both in the areas of legislation, of implementation of existing anti-corruption measures/legislation, and with regard to the organisation of the justice system.”⁷⁹

THE JUDICIARY, LEGAL INSTITUTIONS AND INITIATIVES, AND BRIBERY

A) *The Judiciary*

Under the letter of the Armenian Constitution, “[w]hen administering justice, judges and members of the Constitutional Court shall be independent and shall only be subject to the Constitution and the law.”⁸⁰ The judicial branch consists of a three-tiered appellate court system: the court of first instance, which is a court of general jurisdiction; the court of appeal, which entertains appeals from courts of first instance; and the Court of Cassation, which reviews all judicial decisions and may consider new circumstances if they have arisen.⁸¹ The President, however, retains the sole ability to appoint, terminate, and subject to investigation and judicial review all judges within the judicial system.⁸²

In its review, the European Commission observed that a governmental structure in which the Executive is in a position superior to the Judiciary creates a situation in which “the independence of the [Judiciary] seems to be at risk.”⁸³ Consequently, in 2005, the Council of Europe recommended “that the rules dealing with the organisation of the judicial system be reviewed in order to secure full independence of the judiciary vis-à-vis the executive power.”⁸⁴ In a 2011 audit of Armenia, however, the European Commission noted that “no progress [had been] made on enhancing the independence of the Judiciary.”⁸⁵

officials.”). *See also* Country Evaluation, Council of Europe Group of States against corruption [sic], Joint First and Second Evaluation Round Evaluation Report on Armenia ¶ 5 (Mar. 10, 2005), [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval1-2\(2005\)2_Armenia_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval1-2(2005)2_Armenia_EN.pdf) [hereinafter GRECO I-II] (stating that “[c]orruption is perceived as being widespread in the following spheres: privati[z]ation of state property; administration of public finances; service sector monopolies (such as energy, utilities, telecommunications, etc.); institutional and other monopolies (especially importation of oil, wheat, flour and other basic foodstuffs), and law enforcement agencies abusing the powers vested in them by law.”).

⁷⁹ GRECO I-II, *supra* note 78, at ¶ 38.

⁸⁰ ARM. CONST. art. 97.

⁸¹ *See* GRECO I-II, *supra* note 78, at ¶ 32 (discussing the general structure of the Armenian judicial system).

⁸² *See* ARM. CONST. art. 55(11)(a), (b), (c).

⁸³ GRECO I-II, *supra* note 78, at ¶ 38.

⁸⁴ *Id.* at 13, ¶ 41.

⁸⁵ Joint Staff Working Paper, European Commission, Implementation of the

B) *Enforcement, Initiatives, and Institutions*i) *Enforcement and Investigation*

The police function as one of the primary investigative bodies in Armenia's efforts to combat corruption.⁸⁶ The police have the broad-sweeping responsibility to fight corruption and abuse of office within the civil service, the economy, and the financial and credit systems,⁸⁷ as well as to investigate and prevent corruption cases internal to the Police Department itself.⁸⁸ The National Security Service may also investigate corruption offences.⁸⁹ The National Security Service, however, has a much more limited scope of operation, "mainly focus[ing] on corruption offences, in particular bribery in the sphere of management of the economy and privatisation."⁹⁰

Despite having institutions like the police and the National Security Service in place, serious debilitations hobble investigatory efforts.⁹¹ One major obstacle is the nature of the banking secrecy legislation in Armenia:⁹²

According to Articles 10, 13 and 16 of the Law on Banking Secrecy of 1996, banks are not allowed to reveal to the law enforcement authorities any account holder information nor information on any person authorised to effect transactions, unless a court order is issued and only when the holder has been formally charged with an offence.⁹³

Additionally, "by virtue of Article 11 of the Law on Banking Secrecy, banks are obliged to inform their customers of any judicial request for information

European Neighbourhood Policy in 2010 Country [R]eport: Armenia, 2 (May 25, 2011), http://ec.europa.eu/world/enp/pdf/progress2011/sec_11_639_en.pdf [hereinafter European Commission Report]. The country report further noted that "[j]udges are still strongly influenced by prosecutors, as well as by politically and economically powerful figures." *Id.* at 4. An excellent example of the extent to which the Executive may control the Judiciary took place in 2007, in a high-profile case involving corruption. Emil Danielyan, *Armenia: Presidential Dismissal of Judge Sparks Outcry Over Judicial Independence Issue*, UNHRC REFworld, <http://www.unhcr.org/refworld/country,,EURASIANET,COUNTRYNEWS,ARM,,473ae96123,0.html> (last visited Mar. 26, 2012).

⁸⁶ See GRECO I-II, *supra* note 78, at ¶¶14-18.

⁸⁷ See *id.* at 7, ¶ 16.

⁸⁸ See *id.* at ¶ 17.

⁸⁹ See *id.* at 12, ¶ 37.

⁹⁰ *Id.*

⁹¹ See *id.* at 13-15, ¶¶ 42-46.

⁹² See *id.* at 14, ¶ 43.

⁹³ *Id.*; see also REPUBLIC OF ARM. LAW ON BANKING SECRECY arts. 10, 13, 16 (1996), available at http://www.parliament.am/law_docs/141096HO80eng.pdf.

concerning their accounts.”⁹⁴

These laws make information collection extremely difficult, especially in investigations within the areas of corruption and money laundering.⁹⁵ In its 2005 evaluation, the Council of Europe noted that “[t]his situation calls for immediate improvement as, in cases of corruption, the interests of the customer should not take precedence over the interests of justice.”⁹⁶ Accordingly, the European Council submitted recommendations to amend legislation (1) to grant law enforcement authorities access to “all relevant information on account holders and operations on bank accounts even before formal charges are brought,”⁹⁷ and (2) “to prevent banks from disclosing judicial requests for information to their customers.”⁹⁸ The laws have remained unchanged to date.⁹⁹

According to the Council of Europe, another serious shortcoming in the investigatory process is the lack of legislative protection for those wishing to report corruption.¹⁰⁰ If an individual or company were to report corruption, that individual or company might face serious consequences, such as the arrest of its executives or being driven out of business.¹⁰¹ Accordingly, the Council of Europe recommended that public officials receive training in how to report instances of corruption and that Armenia “establish adequate protection for public officials who report instances of corruption (whistleblowers) in good faith.”¹⁰²

Finally, the Council of Europe observed a broad range of individuals who benefit from immunity from prosecution.¹⁰³ Ultimately, in order to combat corruption, the Council recommended restricting the scope of those who may benefit from prosecutorial immunity and amending the process of lifting immunity

⁹⁴ *Id.* at ¶ 44.

⁹⁵ GRECO I-II, *supra* note 78, at ¶ 43.

⁹⁶ *Id.* at ¶ 44.

⁹⁷ *Id.* at ¶ 43.

⁹⁸ *Id.* at ¶ 44.

⁹⁹ *See* REPUBLIC OF ARM. LAW ON BANKING SECRECY, *supra* note 93 (representing the most recent version of the laws on banking secrecy in use in Armenia).

¹⁰⁰ *See* GRECO I-II, *supra* note 78, at ¶¶ 107, 115.

¹⁰¹ *See*, *e.g.*, FREEDOM HOUSE, <http://freedomhouse.org/template.cfm?page=140&edition=7&ccrcountry=109§ion=73&ccrpage=31> (last visited Jan. 8, 2012) (discussing the severe consequences faced by a large coffee importer after it chose to publicly accuse senior customs officials of corruption in 2005).

¹⁰² *See* GRECO I-II, *supra* note 78, at ¶ 115.

¹⁰³ *See id.* at ¶¶ 47-55 (including the President, members of the National Assembly, members of the Constitutional Court, the Human Rights Defender, judges, prosecutors and investigators, members of electoral commissions, candidates for self government bodies, and diplomats).

in certain instances.¹⁰⁴ According to the European Commission's 2011 report, Armenia complied with the request to lift the immunity of prosecutors, despite limited progress made in the enforcement of anticorruption legislation generally.¹⁰⁵

ii) Education: Academic Institutions, Professional Trainings, Public Awareness Initiatives

Armenia currently has two academic institutions offering formal legal education through graduate level degree programs: Yerevan State University and American University of Armenia.¹⁰⁶ In order to become bar-certified in Armenia, one must obtain a law degree, practice law for at least two years, and pass the bar exam.¹⁰⁷ Additionally, the General Prosecutor's Office conducts several ongoing legal education seminars for prosecutors.¹⁰⁸ The Police have their own separate Police Academy and Training Center.¹⁰⁹ Nevertheless, professionals within the Armenian legal and law enforcement communities "complain[] about the inadequacy of training devoted to fighting corruption."¹¹⁰

In 2005, the European Council determined that the lack of "speciali[z]ed training [on corruption] for these categories of professionals (including members of the police) appears to be a genuine shortcoming of the Armenian system and contributes to the low level of professional knowledge of corruption."¹¹¹ Additionally, the Council determined that the methods of investigation were not in accordance with its guiding principles regarding investigatory methods.¹¹² As a result, the Council recommended that Armenia implement "appropriate means and training in order to make this system work efficiently."¹¹³

¹⁰⁴ See *id.* at ¶¶ 16, 17.

¹⁰⁵ European Commission Report, *supra* note 85, at 4.

¹⁰⁶ *Armenia Law Schools*, HG.ORG LEGAL DIRECTORIES, (last visited Jan. 11, 2012), <http://www.hg.org/law-schools-armenia.asp>.

¹⁰⁷ Irina Urumova, *The Legal Profession in Armenia*, 4, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE (Sept. 2008), <http://www.osce.org/odihr/36294>; see also THE LAW OF THE REPUBLIC OF ARMENIA ON ADVOCACY arts. 28-29, available at <http://legislationline.org/documents/action/popup/id/6626>.

¹⁰⁸ See GRECO I-II, *supra* note 78, at ¶ 30 (discussing several seminars and training courses offered).

¹⁰⁹ See *id.* at ¶ 15 (chart).

¹¹⁰ See *id.* at ¶ 41.

¹¹¹ *Id.*

¹¹² See GRECO I-II, *supra* note 78, at ¶ 45; see also COUNCIL OF EUROPE COMMITTEE OF MINISTERS: ON THE TWENTY GUIDING PRINCIPLES FOR THE FIGHT AGAINST CORRUPTION § 3 (1997), available at [http://www.coe.int/t/dghl/monitoring/greco/documents/Resolution\(97\)24_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/documents/Resolution(97)24_EN.pdf).

¹¹³ See GRECO I-II, *supra* note 78, at ¶ 45.

Again, in 2010, the Council of Europe determined that, notwithstanding the shortcomings of the letter of the law, “the main challenge in fighting corruption lies with the effective application of legislation.”¹¹⁴ Accordingly, it “urged [Armenia] to continue its efforts to train practitioners in the law, including on the use of evidence based on objective factual circumstances.”¹¹⁵ Although the Armenian government and non-governmental organizations still have much ground to gain in the promotion of anticorruption within Armenia,¹¹⁶ “Armenian authorities seem[] to be taking seriously all the international commitments in the anticorruption field.”¹¹⁷

C) *Current Bribery Legislation in Armenia*

Another problem that is interconnected with corruption in Armenia is bribery.¹¹⁸ The Criminal Code criminalizes both active bribery¹¹⁹ and passive bribery¹²⁰ of state officials. Additionally, “trading in the influence is partly

¹¹⁴ Country Evaluation, Council of Europe Group of States against corruption [sic], Evaluation Report on Armenia on “Incriminations (ETS 173 and 191, GPC 2)” (Theme I) ¶ 94 (Dec. 3, 2010), [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3\(2010\)4_Armenia_One_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2010)4_Armenia_One_EN.pdf) [hereinafter GRECO III]; see also Indira Carr, *Corruption, Legal Solutions and Limits of Law*, INT’L J. OF L. IN CONTEXT 227, 243-46 (suggesting methods of fighting corruption by re-socialization and education schemes).

¹¹⁵ *Id.*

¹¹⁶ Monitoring Report, OECD Anti-Corruption Network for Eastern Europe and Central Asia Istanbul Anti-Corruption Action Plan, Second Round of Monitoring Armenia 19-24 (Sept. 29, 2011) <http://www.oecd.org/dataoecd/38/51/48964985.pdf> [hereinafter OECD Country Report]

¹¹⁷ *Id.* at 24 (discussing Armenia’s willingness to subject itself to international bodies’ auditing processes).

¹¹⁸ While the Armenian Criminal Code criminalizes bribery in various sectors, I will only be discussing the criminalization of bribery as it pertains to state officials and business. See generally GRECO III, *supra* note 114 (presenting a comprehensive overview of the current bribery legislation in Armenia and proposing several recommendations for improvement).

¹¹⁹ See ARM. CRIM. CODE art. 312 (2011), available at <http://www.parliament.am/legislation.php?sel=show&ID=1349&lang=eng> (criminalizing the act of giving a bribe and providing penalties in the form of monetary sanctions, restrictions on ability to hold offices, and imprisonment).

¹²⁰ See ARM. CRIM. CODE art. 311 (2011), available at <http://www.parliament.am/legislation.php?sel=show&ID=1349&lang=eng> (criminalizing the act of taking a bribe and providing penalties in the form of monetary sanctions, restrictions on ability to hold offices, and imprisonment).

criminaliz[ed] by the provisions on bribery.”¹²¹ Finally, the Criminal Code criminalizes commercial bribery.¹²²

Even though the Armenian Criminal Code creates a “positive impression of . . . comprehensiveness . . . [it] still suffers from some noteworthy shortcomings.”¹²³ Despite the literal meaning of the laws on bribery, there are many misperceptions about bribery within the rank and file of Armenians.¹²⁴ Armenians remain firm in the belief “that the mere offer or promise of an undue advantage would be an act of preparation (or in some case[s] attempted bribery), which would . . . not be liable for prosecution.”¹²⁵ Many Armenians working in close connection with state officials or commercial enterprises also believe the class of individuals within the scope of bribery legislation to be much narrower than it actually is.¹²⁶

Additional critical shortcomings of the bribery laws exist in connection with the commercial bribery provisions.¹²⁷ Although the bribery provisions in this area extend to nonprofit enterprises (thereby exceeding the international norms), the provisions only apply to managers (thereby falling below international standards), and only apply to the actual receipt of a bribe.¹²⁸ Finally, in connection with all bribery provisions, the Council of Europe found the penalties to be far too weak to effectively combat bribery.¹²⁹ In order to overcome these shortcomings, the Council of Europe made several recommendations to increase professional

¹²¹ As categorized in the Armenian Criminal Code, “trading in the influence” refers to the act of a state official receiving a bribe in exchange for action or inaction regarding his or her official functions. *See* ARM. CRIM. CODE art. 311(2) (2011), *available at* <http://www.parliament.am/legislation.php?sel=show&ID=1349&lang=eng> (criminalizing only passive trading in the influence); *see also* GRECO III, *supra* note 114, at ¶ 53 (defining the offence in great detail).

¹²² *See* ARM. CRIM. CODE art. 200 (2011), *available at* <http://www.parliament.am/legislation.php?sel=show&ID=1349&lang=eng> (criminalizing the act of commercial bribery and providing penalties in the form of monetary sanctions, potential restrictions on trade practice, and imprisonment).

¹²³ GRECO III, *supra* note 114, at ¶ 77.

¹²⁴ *See, e.g., id.* at ¶ 79.

¹²⁵ *Id.*

¹²⁶ *See id.* at ¶ 80 (“[S]everal practitioners seemed to believe that the concept of a ‘public servant’ would only cover state/local government employees with certain relatively high-ranking positions: if a person employed in the public sector did not have any formal decision-making authority, s/he would consequently still not be captured by the reference to ‘public service’ for the purpose of the Criminal Code.”).

¹²⁷ *See* OECD Country Report, *supra* note 116, at 27-28.

¹²⁸ *See id.*

¹²⁹ *See* GRECO III, *supra* note 114, at ¶ 88.

trainings to clarify the applicability of the bribery laws,¹³⁰ to expand the scope of many provisions,¹³¹ and to increase the severity of the penalties.¹³² Although a draft law was proposed, “aimed at bringing Armenian criminal legislation in line with GRECO recommendations,”¹³³ many of the recommendations were not incorporated.¹³⁴

PART II: SOCIAL NORMS THEORY IN THE PENUMBRA OF ANTI-CORRUPTION¹³⁵

Before reaching an evaluation of a country’s anti-corruption efforts, one must ask the question whether that country ought to engage in an anti-corruption campaign at all.¹³⁶ Even those in favor of the implementation of anti-corruption campaigns “are often cautious to admit that anti-corruption should not be taken too far, [and] should not disrupt efficient and functional social networks or eradicate the informal economy, especially where the formal economy is characterized by large scale market failures and inefficiencies.”¹³⁷ This question grows increasingly more complicated when dealing with a developing nation that remains intent upon attracting foreign investment to bolster its economy.¹³⁸ Ultimately, this presents the challenge of allowing an economy to function in a way that makes sense to the local participants on the one hand, while on the other hand, providing safeguards and incentives for investment by foreign entities to facilitate economic

¹³⁰ See *id.* at ¶¶ 79, 80, 85.

¹³¹ See *id.* at ¶¶ 78, 85, 87.

¹³² See *id.* at ¶ 88.

¹³³ OECD Country Report, *supra* note 116, at 25.

¹³⁴ See ARM. CRIM. CODE arts. 200, 311, 312 (2011), available at <http://www.parliament.am/legislation.php?sel=show&ID=1349&lang=eng> for the most recently adopted version of the criminal code.

¹³⁵ See Kennedy, *supra* note 2, at 456 (characterizing anti-corruption campaigns as “a sort of persuasive penumbra which overhangs the force of [scholars’] specific political claim about abolition of a particular practice in a particular place.”).

¹³⁶ See *id.* at 457.

¹³⁷ *Id.* at 464.

¹³⁸ See *id.* at 464-65 (“The existing system for distributing licenses or offering administrative discretion in a developing society might be entirely predictable for local players even where it is not done in accordance with published rules, and allocating these opportunities to local players might be the best policy from the point of view of development. But these determinations are often neither favorable nor transparent to foreign investors. It may well be that in the long run it is not politically possible or economically desirable for a Third World society to do anything which does not meet with the approval of foreign direct investors, but this is a different sort of claim than the claim that without an aggressive anti-corruption campaign development will be retarded.”).

development.¹³⁹

Ellickson's Social Norms Theory and the Diamond Industry

In an in-depth study of the international diamond industry, Professor Lisa Bernstein applied Robert Ellickson's theory on social norms to the workings of the diamond industry.¹⁴⁰ She proposes that, with proper design, a given industry might be effectively governed by an independent extralegal system that caters to the needs of that specific industry.¹⁴¹ In her studies of the diamond industry, Bernstein discovered "that extralegal norms trump legal rules in a given market only where market participants find that keeping to the industry norms advances their own self-interest."¹⁴² The use of such extralegal systems, however, is not easily applied to broad legal settings.¹⁴³

Governance by social norms is dependent upon several key factors like race, class, gender, history, religion, and ideology.¹⁴⁴ On these terms, the diamond industry is a prime example of what is needed for an extralegal system based on social norms to function.¹⁴⁵ First, and perhaps most importantly, in order for a diamond merchant to participate in the extralegal system, that dealer must voluntarily agree "to submit all disputes . . . to the club's arbitration system."¹⁴⁶ Once an individual opts into the extralegal system, only "procedural irregularities"

¹³⁹ See *id.*

¹⁴⁰ See generally ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (providing an in-depth exploration of a thesis that suggests that social norms can be used as an extralegal system of governance in order to maximize wealth). See also Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) (discussing the extralegal system of reputational bonds and internal arbitration that controls the contracts and disputes within the diamond industry) (citing Robert C. Ellickson, *A Hypothesis of Wealth Maximizing Norms: Evidence from the Whaling Industry*, 5 J. L. ECON. & ORG. 83, 84 (1989)).

¹⁴¹ See generally Bernstein, *supra* note 140.

¹⁴² *Id.* at 117.

¹⁴³ See Douglas Litowitz, *A Critical Take on Shasta County and the "New Chicago School"*, 15 YALE J. L. & HUMAN. 295, 306 (2003) (discussing Robert Ellickson's famous research on governance by social norms in Shasta County, and finding that "they hold only for internal group affairs on humdrum disputes in close-knit communities where utilitarian concerns are paramount.").

¹⁴⁴ *Id.* at 298.

¹⁴⁵ See generally Bernstein, *supra* note 140.

¹⁴⁶ *Id.* at 120. Bernstein focuses primarily on the bylaws of the New York Diamond Dealers Club; however, for the purposes of arguments asserted in her article, as well as those asserted in this note, the bylaws and conduct of the New York Diamond Dealers Club can be understood as a fair representation of the diamond industry at large. See *id.* at 121 ("Each bourse has similar trade rules.").

may be appealed to state court, and then, the state court may only vacate the decision.¹⁴⁷ Enforcement of arbitration is dependent on social ostracism or reputational damage.¹⁴⁸ These methods of enforcement are reliable because of the insulated nature of the diamond industry¹⁴⁹ and the industry's commitment to reciprocity of enforcement among clubs internationally.¹⁵⁰

Arbitrators base their decisions on trade customs and usages, which are either established in bylaws or simply "generally known and accepted."¹⁵¹ Traditionally, the industry relies on "reputation-bond-based extralegal contractual regimes: the homogenous group regime that is generally associated with repeat transactions among members of small geographically concentrated and ethnically homogenous groups."¹⁵² While this method of governance is typically used in groups that are geographically isolated, the diamond industry is able to sustain its use because of the long-standing domination by Orthodox Jews, who are generally "a cohesive, geographically concentrated social group."¹⁵³

Additionally, the close connection between the diamond industry and the Orthodox Jewish community accounts for many of the factors scholars deem necessary¹⁵⁴ for effective governance by social norms.¹⁵⁵ Further, uniform

¹⁴⁷ *Id.* at 125.

¹⁴⁸ *Id.* at 133.

¹⁴⁹ *See id.* at 117-19 (discussing the tight controls on who may enter and conduct business in the diamond market); *see also id.* at 139 (discussing the nature of primary and secondary social bonds that, when sacrificed, serve to diminish reputations, reduce trustworthiness, and ultimately, a loss in opportunity to do business).

¹⁵⁰ *Id.* at 128.

¹⁵¹ *Id.* at 126; *see also id.* at 127 ("Arbitrators explain that they decide complex cases on the basis of trade custom and usage, a little common sense, some Jewish law, and last, common-law legal principles. There are *no* general rules of damages. When calculating damages, the arbitrators look at the stone, consider the circumstances, and apply their business experience.") (*italics original*).

¹⁵² *Id.* at 116. In the early 1990s, the diamond industry engaged in a transition to the use of an "information-intermediary regime in which technology links markets and secures the rapid and low-cost dissemination of information about reputation," while still using the reputation-bond-based regime for localized transactions. *Id.*

¹⁵³ *See id.* at 140-41.

¹⁵⁴ *See* Litowitz, *supra* note 142; *see also* Bernstein, *supra* note 140, at 140-43.

¹⁵⁵ *See* Bernstein, *supra* note 40, at 141 (drawing parallels between Judaic law and the diamond industry's regulations: bans on entering external courts to resolve commercial disputes, the use of shame and reputation to compel compliance with regulations, the use of oral contracts); *see also id.* at 141 n. 56 (offering an detailed comparison).

ideologies as to the practical necessities of the diamond industry, like reputation,¹⁵⁶ secrecy,¹⁵⁷ trustworthiness,¹⁵⁸ and doubts about judicial efficiency¹⁵⁹ also drive the functionality of the extralegal system. Ultimately, “[t]hat generation of diamond dealers have clung to nearly identical intraindustry norms in countries with a wide variety of legal rules and institutions suggests that [the industry’s] traditional rules and institutions are likely to be efficient from the perspective of market insiders.”¹⁶⁰ This conclusion reinforces the theory that parties will use extralegal norms as long as they advance the self-interest of the industry they serve.¹⁶¹

Bernstein’s Diamond Industry Model Applied to Armenia

In this portion of the note, I argue that modern Armenia¹⁶² is suited to governance by the social norm of corruption at the domestic level. This argument applies, as well, to the international network of ethnic-Armenian traders. In matters of international trade and investment with foreign partners, however, Armenia must adhere to a positive rule of law culture. To make this argument, I will construct an analogy between the diamond industry and Armenia, as they each employ elaborate extralegal systems of governance when conducting business transactions. Before engaging in this discussion, however, I would like to clarify that although the diamond industry and Armenia both rely on extralegal systems, the underlying purposes of these systems are divergent.

The diamond industry is not using its extralegal system to breach or circumvent the laws of their host countries. In fact, the diamond industry specifically contemplates the use of state legal systems to review some decisions if the parties

¹⁵⁶ The value the industry places on reputation is so powerful, that it can even demand a price premium for parties not wishing to use the extralegal system, thereby providing a powerful disincentive to insist on state rule of law. *See id.* at 145.

¹⁵⁷ *See id.* at 135 (“Given the well-established institutional premium on secrecy, parties are rarely willing to pay the reputational price of violating that norm simply to gain access to the courts.”); *see also id.* at 134 n. 43 (“[S]ecrecy raises high barriers to entry that reduce potential competition. Secrecy also helps ward off unwanted government regulation of the market.”).

¹⁵⁸ *See id.* at 132 (identifying the assessment of each parties trustworthiness as a condition precedent to commercial negotiations).

¹⁵⁹ The diamond industry generally doubts a court’s ability to accurately assign damages in connection with diamond transactions, and fears the potential for lost business opportunities because of the slow pace of the state legal system. *See id.* at 135-37.

¹⁶⁰ *Id.* at 157.

¹⁶¹ *Id.* at 117.

¹⁶² I use the term “modern Armenia” to refer to the nation of Armenia as it existed as a Soviet republic and continuing on to the nation’s existence today.

involved find the internal structures inadequate.¹⁶³ In contrast, the extralegal system of corruption exists specifically to bypass the law on the books. As will be discussed, however, players at each level of Armenian society do not see customs of bribery and corruption as inherently immoral, but rather, as a necessary and normal way of conducting business transactions in their day-to-day routines.¹⁶⁴ It is the perceived moral superiority of the extralegal system that allows us to analogize the Armenian socio-legal network to the one analyzed by Professor Bernstein.

A) Corruption on a Domestic Level

In modern Armenia, corruption has always been a dominating facet of day-to-day living,¹⁶⁵ and over time, has taken many different forms (e.g., blat, bribery, and privatization).¹⁶⁶ Regardless of its form, however, corruption has always served a significant social function as a social norm.¹⁶⁷

In Soviet Armenia, corruption was widespread and accepted as a social norm in the form of blat.¹⁶⁸ Scholars “define[] blat as ‘the use of personal networks and informal contacts to obtain goods and services in short supply and to find a way around formal procedures.’”¹⁶⁹ Blat was so ingrained in the social fabric that

¹⁶³ Bernstein, *supra* note 140, at 125 (“The decisions the arbitration board can be appealed to New York State court under New York law, but arbitration awards can only be vacated for procedural irregularities, such as an arbitrator engaging in an ex parte communication or a failure to allow the parties to be represented by counsel. [footnote omitted] The substantive rule of decision is not reviewed.”).

¹⁶⁴ See Kurkchian, *supra* note 6, at 35 (interviewing an Armenian businessman about corrupt practices used to promote the interests of all parties involved). See also Ivan Krastev, *Corruption, Anti-Corruption Sentiments, and the Rule of Law*, in *RETHINKING THE RULE OF LAW AFTER COMMUNISM* 323 (Adam Czarnota, Martin Krygier, & Wojciech Sadurski eds., 2005) (discussing the widespread roles of bribery, blat, and corruption across Soviet and post-Soviet cultures). To some extent, the contrasting purposes of these extralegal systems function as a concrete manifestation of the theoretical tension discussed between positive myth and negative myth rule of law cultures. See Kurkchian, *supra* note 6.

¹⁶⁵ See Krastev, *supra* note 164, at 325 (“It was commonplace among the ordinary citizens of the Soviet bloc to view corruption and privileges as the most disgusting features of ‘real socialism.’ Privileges were for the nomenclature, corruption was for the people.”).

¹⁶⁶ See *id.* at 328-31.

¹⁶⁷ See *id.* at 331.

¹⁶⁸ See *id.* at 332.

¹⁶⁹ *Id.* (quoting ALENA V. LEDENEVA, *RUSSIA’S ECONOMY OF FAVORS: BLAT, NETWORKING AND INFORMAL EXCHANGES* (1998)).

“[I]iving out of blat was a form of asocial behavior.”¹⁷⁰ Further, the use of corruption was so necessary, that blat was seen as a “survival strategy.”¹⁷¹ Even though many citizens engaged in the blat system, and even though scholars examining the blat system attempted to cast blat in terms of friendship and help, those within the system ultimately understood it to be a system of corruption, often involving the abuse of public office for personal gains.¹⁷²

Although the use of blat quickly disappeared upon the end of Soviet rule, the use of corruption as a social norm for conducting daily life did not.¹⁷³ In practice, one form of corruption was merely exchanged for another.¹⁷⁴ The transition from Communism to economic and political independence saw “the monetarization of blat relations and replacement of blat by bribe.”¹⁷⁵ On the one hand, this change in social norms demonstrated the public’s preference for the use of a particular social norm over the other; on the other hand, the change highlighted the fact that even if the public might not like a particular form of corruption, they will still resort to some other version of corruption for purposes of social governance.¹⁷⁶

Another form of corruption frequently used in business in Armenia, in addition to the bribe, is the use of grey business tactics.¹⁷⁷ An interview with an Armenian personnel manager describes how easily businesses might commit to grey business practices:

Every month I produce two lists of employees who are entitled to receive salary. One list goes to my accounts office for internal use, showing the actual salary that people are to be paid. The other list is for the tax inspector, and it shows a much

¹⁷⁰ See Krastev, *supra* note 164, at 332. Even the government expressed, at least, a tacit acceptance of the presence of corruption as a part of social life by refusing to criminalize blat. *Id.* at 333.

¹⁷¹ *Id.*, see also *id.* at 333 (“The citizen of communist society was aware of the social price of blat but he was also aware of the lack of any other realistic alternative for surviving.”)

¹⁷² See *id.* at 333; see also *id.* at 334 (asserting that understanding blat in terms of friendship merely a misrecognition of corruption); see also Teachout, *supra* note 2 (characterizing corruption as the use of public office for personal benefit).

¹⁷³ See Krastev, *supra* note 164, at 333.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* 333-35 (discussing the public’s use of corruption to conduct daily life, despite a general preference for blat over bribery); see also Kurkchian, *supra* note 6, at 31 (“People do conform to the general practices [of bribery], but in doing so they often act against their own values . . . [T]hey feel they must if they are to manage to live their lives and reach their personal goals.”)

¹⁷⁷ See Kurkchian, *supra* note 6, at 35 (defining a grey business as one that is “partly visible and partly hidden” from public authorities). Armenians outwardly acknowledge not only that the use of grey business is predominant, but also that there is “no such thing as ‘a white business.’” *Id.*

smaller sum of money against each name than that person will in fact be paid. I sign both lists, and each employee has to sign a receipt for the amount of money that is reported to the tax office.¹⁷⁸

This practice demonstrates an acceptance of corruption on a multitude of levels.¹⁷⁹ First, the manager demonstrates the willingness of the managerial class to use a position to defraud the state of higher tax revenues.¹⁸⁰ Second, the workers, who sign for the smaller amount for purposes of taxation on the understanding that they will receive a larger paycheck, demonstrate the willingness of the working public to commit to a system of corruption in order to earn a suitable wage and pay lower taxes.¹⁸¹ In fact, Kurkchian underscores this very point by noting that, in stark contrast to Western ideas of public conduct that would condemn these practices as dishonest or immoral, in Armenia, as well as other post-Soviet countries, “[t]here is a social contract that grants a kind of legitimacy to the false accounting, and it is that contract that makes such a practice acceptable to people in general.”¹⁸² Finally, the state seems to indirectly approve the entire system by accepting the manipulated payroll without conducting any further investigation, despite the fact that the practice is widespread and well-known.¹⁸³

By analogizing Armenia to the diamond industry as represented by Bernstein above, when confined to entirely internal, domestic affairs, these forms of corruption (i.e. bribery and “cooking the books”¹⁸⁴) can continue to exist as governing social norms.¹⁸⁵ For the purposes of drawing such an analogy, Armenia is sufficiently similar to the diamond industry. Like the diamond industry, there is an overwhelming homogeneity in the religious underpinnings of the community.¹⁸⁶ Like the diamond industry, Armenia also benefits from condensed size and ethnic

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* Looking at post-Soviet cultures more broadly, corruption is not just a morally acceptable practice, but rather a practice that is “*necessary* to survive within and around the law. . . .” Galligan, *supra* note 17, at 3 (emphasis added).

¹⁸³ *Id.* (“The research did not include any interviews with tax collectors, but it is safe to conclude that they are as familiar with the practice as everyone else.”); *see also id.* at 35 n. 32 (“The practice was so well known and widespread that the Armenian parliament discussed it. . .”).

¹⁸⁴ *Id.* at 35.

¹⁸⁵ *Id.* (recognizing corruption as “a social contract”).

¹⁸⁶ *See* Kurkchian & Herzig, *supra* note 37, at 3 (discussing the resilience of the Armenian Apostolic church); *see also* CIA Country Profile, *supra* note 69 (identifying nearly 100% of Armenians as members of the Armenian Apostolic church); *see also* Bernstein, *supra* note 140, at 140-41 (discussing the Orthodox Jews’ domination of the diamond industry).

homogeneity,¹⁸⁷ which are two more factors that make a given system amenable to governance by social norms.¹⁸⁸

The analogy is further strengthened by a multigenerational commitment to social norms as a form of governance: in the diamond industry, dealers consistently use oral contracts, reputation bonds, and arbitration,¹⁸⁹ while in Armenia, citizens consistently use social norms of corruption like blat, bribery, and false accounting.¹⁹⁰ Finally, as demonstrated earlier in this section, Armenia is committed to the ideology of corruption as a governing social norm.¹⁹¹

B) Corruption on an International Level

Governance by social norms of corruption, however, must necessarily end when business meets the Armenian border. As discussed above, Armenia's economy largely depends on foreign trade.¹⁹² Even though Armenia has made great efforts to design a liberal economic policy to facilitate this investment,¹⁹³ ultimately "[i]t is rule of law . . . that brings foreign investors, it is rule of law that secures development and protects rights."¹⁹⁴ Further, when one seeks to impose rule of law for these purposes, it cannot harmoniously coexist with corruption.¹⁹⁵

When attempting to draw an analogy to the diamond industry to Armenia's mission to conduct international business and attract foreign investment, many factors exist that would make governance by social norms undesirable. The major obstacle to governance by the use of social norms is that parties must voluntarily choose to adhere to those social norms.¹⁹⁶ As stated earlier, Armenia is a party to

¹⁸⁷ See Bernstein, *supra* note 140, at 140-41 (discussing the diamond industry's demographics); see also STATE DEPARTMENT, *supra* note 38 (discussing Armenia's demographics).

¹⁸⁸ See Krastev, *supra* note 164, at 325-26 (recognizing that a nation's size and ethnic homogeneity are two very influential factors that affect the spread of corruption); see also Litowitz, *supra* note 143, at 299 (discussing how important attention to the size and the ethnic breakdown of a given region are when examining social norms).

¹⁸⁹ See Bernstein, *supra* note 140, at 140-41.

¹⁹⁰ See generally Kurkchyan, *supra* note 6.

¹⁹¹ See Krastev, *supra* note 164, at 333-35, see also Kurkchyan, *supra* note 6, at 31, 35.

¹⁹² KPMG Report, *supra* note 71, at 12.

¹⁹³ *Id.* at 11

¹⁹⁴ Krastev, *supra* note 164, at 323.

¹⁹⁵ *Id.* at 323-24 ("Rule of law is not portrayed as society in which rule of the game are respected and the rights of the citizens are protected, but as a set of institutional devices and capacity building programs that should free people from the imperfections of democratic politics. And in this rule of law building exercise, the special role is reserved for anti-corruption campaigns.").

¹⁹⁶ See Bernstein, *supra* note 140, at 117.

thirty-seven bilateral investment treaties.¹⁹⁷ Each of these treaties expressly provides for a method of dispute resolution in some sort of internationally accepted court of law or house of arbitration.¹⁹⁸

Another significant obstacle in using social norms, and not rule of law, to govern international affairs is the lack of homogeny. As seen in the diamond industry, social norms are successful, in large part, because they exist in and are used by a homogenous culture.¹⁹⁹ The social norms used within the diamond industry benefit not only from the homogeny of a deeply rooted connection to Orthodox Judaism, but also from a homogeny of industry.²⁰⁰ In short, all parties opting into the extralegal system of social norms are engaged in the same business with substantially similar goals: sustained and profitable diamond transactions.²⁰¹

Unlike the diamond industry, however, international business and foreign investment do not benefit from the same kind of homogeny. First, even though sometimes there may be a common cultural background,²⁰² there is not always a homogenous religious background to serve as a foundation.²⁰³ Second, foreign investment is not an isolated industry, but rather a broad solicitation for the introduction of a spectrum of industries, businesses, and investments by a diversity of investors.²⁰⁴ Despite having goals to make wealth-maximizing decisions,²⁰⁵

¹⁹⁷ See ICSID DATABASE, *supra* note 75.

¹⁹⁸ See, e.g., Armenia Bilateral Investment Treaty, U.S.-Arm., Sept. 23, 1992, <http://www.state.gov/documents/organization/43477.pdf> (giving the investor the right to “choose between the International Centre for the Settlement of Investment Disputes (ICSID) (if the host country has joined the Centre-otherwise the Additional Facility is available) and ad hoc arbitration using the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The Treaty also recognizes that, by mutual agreement, the parties to the dispute may choose another arbitral institution or set of arbitral rules.”) [hereinafter US Treaty]; see also, e.g., Agreement between the Government of the United Kingdom of Great Britain and the Government of the Republic of Armenia for the Promotion and Protection of Investments, U.K.-Arm., May 27, 1993, http://www.unctad.org/sections/dite/ia/docs/bits/uk_armenia.pdf (requiring each contracting party to consent to dispute resolution by the International Center for the Settlement of Investment Disputes) [hereinafter UK Treaty].

¹⁹⁹ Bernstein, *supra* note 140, at 140.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 140-43.

²⁰² See generally Krastev, *supra* note 164 (discussing the broad sweeping cultural similarities that survived the Soviet Union in many ex-Soviet nations); see also Kurkchiyan, *supra* note 6 (providing specific examples of continuing similarities among ex-Soviet nations).

²⁰³ See STATE DEPARTMENT COUNTRY REPORT, *supra* note 38 (discussing the religious tensions with its neighbors that impeded foreign trade).

²⁰⁴ See, e.g., US Treaty, *supra* note 198.

the norms that function as the underpinning to those decisions will likely be different depending on the industry at hand.²⁰⁶ Moreover, “[b]ecause this standard is so general, it is vulnerable to conflicting interpretations in a concrete case.”²⁰⁷

C) *Armenia: Moving Forward*

There are two essential endeavors Armenia must undertake in order to effectively continue on a path of economic development. First, Armenia must make greater efforts to promote the rule of law as a controlling institution in its international dealings. Second, Armenia must revise its bribery laws to provide a credible signal to potential foreign investors or contracting partners that they actually value the idea of eradicating corruption, at least in the realm of international dealings.

i. Promotion of the Rule of Law

Armenia must take greater efforts to cultivate a culture of confidence among investors in Armenia’s commitment to rule of law in international dealings. To its credit, Armenia has included provisions in all of its treaties that call for international mediation or arbitration for dispute resolution.²⁰⁸ One problem that persists, however, is the sheer rarity of claims that exist against Armenia under investment treaties.²⁰⁹ Normally, rarity of claims against a nation might be

²⁰⁵ See, e.g., UK Treaty, *supra* note 198 (making use of the international agreement to “increase prosperity in both States”); see also ELLICKSON, *supra* note 140, at 167-83 (discussing the use of norms to maximize wealth).

²⁰⁶ Compare Bernstein, *supra* note 140, at 121-30 (discussing the diamond industry’s use of handshakes, shame, and informal arbitration to conduct business and settle disputes) with Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 677-78 (1986) (discussing the cattle and farming community’s use of gossip and self help sanctions to resolve disputes).

²⁰⁷ Litowitz, *supra* note 142, at 303.

²⁰⁸ See, e.g., US Treaty, *supra* note 198, at Article VI (providing a good example of a typical dispute resolution provision within a bilateral investment treaty).

²⁰⁹ See Luke Eric Peterson, *Armenia Successfully Fends Off Claims for breach of U.S.-Armenia Bilateral Investment Treaty Protections*, INVESTMENT ARBITRATION REPORTER, http://www.iareporter.com.ezproxy.bu.edu/articles/20111006_1 (describing the lodging of a complaint against Armenia as “rare”). In researching this note, I could only locate two instances of an investor bringing suit against Armenia. See Peterson, *supra*; see also Case Details, International Center for Settlement of Investment Disputes (Feb. 20, 2007), <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C97&actionVal=viewCase> [hereinafter Gold Case].

construed as a favorable indication of the nation's clean business practices.

A problem arises, however, when the nation is attempting to attract foreign investment through clean business practices. When this is the case, the nation should seize arbitrations as moments to demonstrate that their laws and commitments to those laws function successfully.²¹⁰ In each of the two cases filed against Armenia, however, Armenia has not taken the opportunity to signal to investors that their commitment to bilateral investment treaties resonates with importance: either no copies of the proceedings are published for public review,²¹¹ or the parties choose to quietly settle, precluding even the possibility of generating a public record.²¹²

Withholding public records and the use of settlement do not necessarily demonstrate a lack of commitment to promoting the rule of law under a bilateral investment treaty, but the context surrounding the cases would seem to encourage Armenia to place itself in the public eye for scrutiny. In the case that withheld records of the proceedings, "the investor complained the factory was dogged by improper audits and other impediments."²¹³ The nature of this claim closely relates to the problem of grey business tactics, which work to undermine the rule of law.²¹⁴ In the case that quietly settled, the claim alleged that the Environment Minister demanded a \$3 million bribe to renew a mining license.²¹⁵ This claim explicitly alleges a bribe, and then settles without comment, which could signal to investors that despite the filing of a claim under the bilateral investment treaty,

²¹⁰ If the purpose of these treaties truly is to attract foreign investment, then the arbitration that follows as a result of an alleged breach of a treaty is akin to an evaluation the period subsequent to the enactment of a piece of legislation. By taking advantage of an opportunity to conduct an ex post evaluation, the parties concerned are able to see if the treaty actually works in accordance with the purpose driving its design. In other words, all involved and observing parties will be able to see if the treaty does, in fact, provide a hospitable environment for foreign investment. See Ann Seidman & Robert B. Seidman, *ILMAT: A Guide for Drafting Legislation to Facilitate Democratic Social Change*, Article, 25-27 (on file with authors) (discussing the importance of post effective evaluation periods in legislation drafting).

²¹¹ See Peterson, *supra* note 209 ("Counsel for both sides were invited to release the award and/or make a public comment about the outcome. Neither has done so to date.").

²¹² See Gold Case, *supra* note 209.

²¹³ Peterson, *supra* note 209.

²¹⁴ See Kurkchiyan, *supra* note 175.

²¹⁵ See Luke Eric Peterson, *US Gold Mining Company Alleges Corruption & Breach of BIT by Armenia*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, (Mar. 16, 2007), http://www.iisd.org/pdf/2007/itn_mar16_2007.pdf; see also *Armenian Prime Minister Defends Embattled Minister*, RADIO FREE EUROPE RADIO LIBERTY, (Sept. 14, 2006), <http://www.rferl.org/content/article/1143716.html>

arbitration is secondary to bribes or payouts.

If Armenia wishes to signal to foreign investors that it is, in fact, committed to providing a safe harbor under the terms of bilateral investment treaties, then it might remedy the current situation in two ways. To satisfy ex post concerns, it might seek to make all proceedings available to the public eye. To satisfy ex ante concerns, Armenia ought to commit to pursuing claims fully and openly through public arbitration.²¹⁶

ii. Revision of Bribery Laws

The second endeavor Armenia must undertake is to revise its bribery laws to signal to potential foreign investors that the country subscribes to the idea of eradicating corruption in the realm of international dealings. As discussed earlier, bribery stands as a formidable obstacle to the development of the economy, and Armenia has made little progress in demonstrating that it truly wishes to criminalize or eradicate bribery and corruption, particularly in the private and business sectors.²¹⁷ Many international organizations have made numerous recommendations on how Armenia might move forward in a fight against corruption and bribery.²¹⁸

Compliance with these recommendations would certainly send a strong signal to foreign investors in two ways. First, it would demonstrate to foreign parties that Armenia has, at least, some semblance of protection on the books to secure their investments against bribery. Second, it would signal to foreign investors that Armenia is willing to ameliorate its conduct based on concerns raised by the international community. This second point indicates not only a respect for international norms, but also a willingness to cooperate with external parties' needs under the rule of law.

CONCLUSION

Though it has a long and diverse history, modern Armenia exists in a state of near homogeny. In the current political climate, Armenians live in a country where clinging to national identity and traditions is imperative to the preservation of the spirit of the nation. This resolution is true for the perpetuation of the Armenian language, religion, and tradition of education. To some extent this same sentiment might also be true for the use of the social norm of corruption in domestic affairs.

²¹⁶ I recognize that the costs of arbitration might be severely reduced through settlement options, but I believe that the willingness to pursue a claim fully and openly would send a strong signal to the international community and encourage future business. In this way, the long term benefits of signaling a commitment to the rule of law and a safe environment for foreign investment might exceed the short term costs of not settling.

²¹⁷ See generally, GRECO III, *supra* note 114.

²¹⁸ See *id.* See also OECD Country Report, *supra* note 116.

Though corruption is typically seen as undesirable in positive myth rule of law cultures, what are understood as forms of corruption by the West often constitute traditional ways of doing business in Armenia. Forms of corruption are frequently deep seated customs within a close-knit and homogenous society. As such, perhaps Armenians might continue to avail themselves of the social norms of corruption as a means to conducting domestic business. Unfortunately, Armenia's economic survival necessitates participation in a larger system that transcends national borders, customs, and norms.

Armenians must commit to a rule of law culture, free of corruption, in the realm of international affairs. The Armenian economy desperately needs to attract foreign investment for the nation's economic livelihood. Such a need, in turn, requires a willingness to conduct international business on international terms. This means that, when dealing with foreign parties, Armenia may no longer benefit from the comfort of social norms. It must convert its foreign policy to a positive myth rule of law culture, or lose the friendship of foreign investors, and the economic lifeline they might bring to the country.

This Janus-faced approach, with social norms governing domestic matters and rule of law controlling international transactions, poses a few problems. First, from a practical stand point, the disaggregation of domestic and foreign policies is not easily accomplished in modern societies that are growing increasingly interconnected. Second, even if Armenia could dissect its economy into two distinct and isolated spheres, convincing foreign investors that their business interests would be controlled by international rule of law standards once they are operational within Armenian borders stands to be a substantial challenge. Barring the rare exception of a foreign investor who might come from a similar cultural background, the tight-knit weave that constitutes the underpinning of a norms based system will quickly unravel as soon as foreign elements enter the system.

To some extent, treaty provisions requiring international arbitration seek to ameliorate these concerns. The sheer rarity of cases arbitrated, however, does not provide much of a record for investors to examine. Additionally, the two cases that do exist, both containing allegations of bribery and corruption, are shrouded in secrecy. The facts have been concealed from public record through settlement, which might, in itself, be fairly viewed as a formally accepted version of bribery. Examining such a record supports an inference that if an investor were pressured by social norms, he might actually retain no outlet of relief from those norms, even in an international forum.

Ultimately, Armenia must seize the opportunity to earnestly revise their bribery laws and increase the level of judicial independence. In this fashion, Armenia might effectively signal to foreign investors that the legal system has an internal integrity, and that the laws of Armenia exist to actually protect an investor's interests.