

# International Anticorruption Law, Revisited

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*A first step in sensibly discussing the challenges of preventing and combating corruption at the international level is to comprehend the existing anticorruption regulatory framework and, particularly, its limitations. This Article offers an overview of more than twenty-five years of international anticorruption instruments, providing a novel understanding of the dynamics behind them. It suggests that this quarter of a century can be better interpreted if we divide it into four different periods with four different underlying logics: the (i) transborder, (ii) international, (iii) transnational, and (iv) disruptive periods. Part I of this Article is devoted to explaining this evolution. Part II explores the limitations of the main anticorruption instruments created during the transborder and international periods (1996–2006)—called here “conventional anticorruption law”—to provide an effective international response to corruption. This Article calls for a fifth period of “conventional” disruption, in other words, a new approach to anticorruption formalized in binding treaties. This call is an invitation to the supporters of the “conventional” instruments to (i) reflect on why the “disruptive” proposals are being tabled and (ii) push themselves outside of the conventional cocoon to explore the insights offered by the transnational instruments to advance the international fight against corruption. This Article suggests that the most feasible way to do this would be to incorporate “real” anticorruption obligations in trade law treaties, which is just a minor expansion from best existing practices.*

## INTRODUCTION

On June 2, 2021, in a Special Session of the U.N. General Assembly, political leaders adopted a high-profile political declaration pledging to “prevent and combat corruption and strengthen international cooperation.”<sup>1</sup> Yet, an abstract global agreement is not likely to bring about change by its mere existence; it must be transformed into concrete measures providing a bridge between ideas and facts. International law is not the only way to create that bridge, but is a crucial means towards that end.<sup>2</sup>

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1. G.A. Res. A/RES/S-32/1, at pmbl. (June 7, 2021).

2. See BARBARA KOREMENOS, *THE CONTINENT OF INTERNATIONAL LAW: EXPLAINING AGREEMENT DESIGN* 25 (2016) (“Straightforward design provisions . . . allow states to realize common interests and achieve a Pareto-improving cooperative outcome.”).

In the anticorruption context, this process of transformation has been extremely successful. Existing international law has translated that agreement into a panoply of norms with remarkable width and span. Anticorruption instruments enjoy overwhelming degrees of ratification<sup>3</sup> and cover multiple dimensions of the phenomenon.<sup>4</sup> While they vary in the specific anticorruption measures adopted,<sup>5</sup> they all share a declared objective of fighting and preventing corruption, which is seen as a problem that goes beyond national boundaries.<sup>6</sup> This shared objective of mitigating a transnational problem justifies the coordinated anticorruption actions mandated in those instruments, which are designed to contribute to the reduction of corruption levels across the world.

Yet, corruption is still prevalent on every continent and, as noted by some, perhaps even growing by certain measures.<sup>7</sup> There is, therefore, a gap between legal mandates—the norms that have translated the agreement to fight corruption into law—and observed behavior.<sup>8</sup>

To see that gap as a problem is, in the words of Richard Abel, “to make a choice.”<sup>9</sup> In contrast to Abel’s reasoning—which claims that this choice is often unconscious<sup>10</sup>—this Article reasons that the choice is both conscious and essential to its objective. The underlying assumption of this piece is that it is desirable—and expected—to find harmony between law and behavior rather than dissonance or “purely accidental conjunction.”<sup>11</sup> Although Abel’s classic writings refer to domestic law, this idea of harmony is particularly relevant to multilateral international law.

The purpose of signing and ratifying an instrument (such as a treaty, convention, agreement, etc.) is to accept the norms or principles reflected in that instrument. The addressees of those norms are normally states, which, through a process of ratification, accept an obligation to make their behavior consistent with both the objectives and concrete stipulations of those

3. Ellen J. Guterman & Mathis Lohaus, *What is the “Anti-corruption” Norm in Global Politics?*, in CORRUPTION AND NORMS: WHY INFORMAL RULES MATTER 241, 248 (Ina Kubbe & Annika Engelbert eds., 2018).

4. See generally JULIO BACIO TERRACINO, *THE INTERNATIONAL LEGAL FRAMEWORK AGAINST CORRUPTION: STATES’ OBLIGATIONS TO PREVENT AND REPRESS CORRUPTION* (2012) (conducting a systematic analysis of anticorruption instruments and describing the variety of approaches).

5. Rachel Brewster & Alexandra Huneus, *Introduction to the Symposium on New Directions in Anticorruption Law*, 113 *AJIL UNBOUND* 317, 317 (2019).

6. G.A. Res. A/RES/S-32/1, *supra* note 1, pmb. (“We recognize that corruption is often transnational in nature.”).

7. As noted in the latest report from the Corruption Perceptions Index, “[D]espite commitments on paper, 131 countries have made no significant progress against corruption over the last decade and this year 27 countries are at historic lows in their CPI score.” Transparency International, *Corruption Perceptions Index 2021* 4 (2022).

8. BERTA VAN SCHOOR, *FIGHTING CORRUPTION COLLECTIVELY: HOW SUCCESSFUL ARE SECTOR-SPECIFIC COORDINATED GOVERNANCE INITIATIVES IN CURBING CORRUPTION?* 46 (2017).

9. Richard L. Abel, *Law Books and Books about Law*, 26 *STAN. L. REV.* 175, 185 (1973).

10. *Id.*

11. *Id.*

norms—that is, to cooperate to solve a problem.<sup>12</sup> The reasons for that decision are relatively irrelevant, as the organs of the state that accept those engagements may not believe in their purpose or may not be interested in achieving the objectives of the norms.<sup>13</sup> Yet, a legally binding commitment is made.<sup>14</sup>

In the context of international anticorruption law, that commitment entails agreeing that corruption is something that should be fought, prevented, and ultimately eliminated.<sup>15</sup> The international community has made conscious efforts to make the behavior of individual countries consistent with this shared expectation regarding corruption at the international level. Yet this harmony is far from achieved.<sup>16</sup>

International law, as a “social positivization”<sup>17</sup> of these efforts,<sup>18</sup> is key to concretizing the exact degree of commitments made by states in the fight against corruption. As discussed below, existing international legal commitments are substantive in nature and one should therefore expect that their implementation would deliver substantive anticorruption results. Yet, as noted above, this is not the case. One of the objectives of this Article is to understand why.

Within these international commitments, this Article focuses exclusively on measures that fall strictly within existing and developing international *legal* efforts to fight corruption. In contrast to other works, I do not discuss any policy initiatives of international actors not reflected in legal instru-

12. See ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 13 (2008); KOREMENOS, *supra* note 2, at 1.

13. For similar reasoning in the human rights context, see HEATHER SMITH-CANNOY, *INSINCERE COMMITMENTS: HUMAN RIGHTS TREATIES, ABUSIVE STATES, AND CITIZEN ACTIVISM* 20–28 (2012).

14. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 3–4 (1995).

15. The only possible exception to this is the acceptance as legal of “facilitation payments” in the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECDCCB”), probably the only international law norm that accepts a seemingly corrupt behavior. See SENATE ECONOMICS REFERENCES COMMITTEE, *FOREIGN BRIBERY* ch. 7 (Ausl.) (2018) (“A facilitation payment is a minor payment made to a foreign public official for the purpose of speeding up minor routine government action. Such a payment is legislatively recognised in Australia as a complete defence to the core foreign bribery offence in the Criminal Code Act 1995 (Criminal Code). However, it can be difficult to differentiate between a facilitation payment and a bribe . . . The 1997 Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) permits facilitation payments as an exception to member states’ anti-bribery legislative frameworks. Though more recently the OECD’s position has shifted, and since 2009 it has consistently recommended that states review the facilitation payment defence and encourage private enterprises to prohibit, or discourage, facilitation payments in internal company policies.”).

16. SCHOOR, *supra* note 8, at 4.

17. This term refers to the process in which individual regimes take note of the expectations of wider society and validate them internally through reflexive decision-making procedures, accepting them as a value or norm of expected conduct. See Mark Patrick Hanna, *Barking Up the Wrong Tree? Systems Theory and the ‘Social Positivism’ of Human Rights*, in *LEGAL POSITIVISM IN A GLOBAL AND TRANSNATIONAL AGE* 155, 157 (Luca Siliquini-Cinelli ed., 2019).

18. See GUNTHER TEUBNER, *CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION* 129 (2012) (applying the framework of positivization to human rights).

ments—namely, codes of conduct or similar soft law approaches.<sup>19</sup> This is not to diminish the importance of those other efforts—or their effectiveness—but to acknowledge that these initiatives are, by nature, not binding commitments and, hence, unable to reflect the concretization process from declarations to norms.<sup>20</sup>

By contrast, legal instruments are meant to perfectly reflect the level of agreement by international actors about what to do in relation to corruption.<sup>21</sup> In normal conditions, if the drafting of an agreement is vague, it is due to a conscious choice of the negotiators of the instrument. In that sense, treaties are the most tangible representation of this concretization process, as they are the result of negotiations about precise wording and are accompanied by a decision—the process of ratification—to explicitly accept them.

Nevertheless, the importance of treaties, when compared to other sources of law, should not be overstated. International law is—or could be—used to fight corruption in multiple ways and with different legal tools (including soft law, acts of international organizations, global administrative practices, etc.). Although the relevance of corruption as an international law issue was questionable a few decades ago,<sup>22</sup> there is now a broad array of mechanisms to address corruption beyond conventions, as illustrated in Part I.

Yet, despite this wide span of available tools *within* international law to fight corruption, treaties are still the preferred instrument, probably because of their suitability for complex regulatory regimes.<sup>23</sup> Though there may be good reasons to prefer treaties in the anticorruption context, it is more difficult to justify continued reliance on the same legal mechanism of domestication: engaging signatories to align domestic legislation to certain treaty standards. This has been the default approach since the adoption of the 1996 Inter-American Convention Against Corruption (“IACAC”). I call this group of instruments “conventional anticorruption law” because the instruments are formalized in “conventions,” but also because they lack creative thinking.<sup>24</sup>

There are other mechanisms for implementing anticorruption measures contained in treaties. One is conditionality. As its name clearly indicates, conditionality implies setting an anticorruption objective that, when

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19. For an overview, see SCHOOR, *supra* note 8, at 41–46.

20. See, e.g., CECILY ROSE, INTERNATIONAL ANTI-CORRUPTION NORMS: THEIR CREATION AND INFLUENCE ON DOMESTIC LEGAL SYSTEMS 17 (2015).

21. See Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT’L ORG. 175, 180 (1993) (“The process by which [treaties] are formulated and concluded is designed to ensure that the final result will represent, to some degree, an accommodation of the interests of the negotiating states.”).

22. Ugo Draetta, *The European Union and the Fight Against Corruption in International Trade*, 1995 INT’L BUS. L.J. 699, 700 (1995) (“Corruption at the national level is an issue dealt with differently by each country and, if contained at that level, should have no international significance.”).

23. CHAYES & CHAYES, *supra* note 14, at 2.

24. José-Miguel Bello y Villarino, *Will the Anti-corruption Chapter in the TPP11 Work? Assessing the Role of Trade Law in the Fight Against Corruption Through International Law*, 2018 N.Z.Y.B. INT’L L. 39, 43 (2018).

achieved, triggers something else. This mechanism sometimes operates at the margins of international law,<sup>25</sup> and, more often, is part of a complex international regulatory regime regulated by formal agreements governing integration,<sup>26</sup> where well-defined (and higher) standards are to be met in order to access a regional organization.<sup>27</sup> Given the complexity of the mechanisms of regulatory alignment in this context, conditionality is well beyond the scope of this piece.

Another mechanism, which may also be reflected in treaties, is the incorporation of anticorruption measures into existing international regulatory frameworks created for purposes other than addressing corruption. In certain areas of international law, the need to address corruption becomes an issue when dealing with the implementation of other norms. This normally happens in area-specific international regulations (for example, procurement, contracts, sports, money laundering, investment, etc.) in which the “default” solution is not satisfactory when corruption—or some suspicion of corrupt behavior—is present. In these cases, certain norms to prevent—or respond to—corrupt behavior are created to facilitate the regular application of the international norms in those domains. In that sense anticorruption mechanisms in existing regulatory frameworks can be “reverse engineered.” A brief discussion of some of these cases is presented in Section C of Part I. Yet, their relevance for an analysis of the evolution of international anticorruption law is limited as, in the end, they are ancillary solutions to the main objective of these treaties, which is not to fight corruption. Therefore, it would be unreasonable to demand impact on wider corruption levels from these measures.

There is, finally, a fourth way to translate the will to fight corruption into treaty-based obligations, but one that is still in its infancy. This (mainly academic) approach involves creating new anticorruption mechanisms which use the tools of existing areas of international law, but do not require a process of legal domestication of international standards. The logic here is to create standards which can be directly applied at the international level. In theory, this kind of anticorruption approach can only be materialized in a formal treaty—for example, the creation of a global anticorruption court modelled on the International Criminal Court—but it is also possible to imagine modifications to existing treaties that do not require formal amendments, which can be achieved through interpretation mechanisms—for example, as discussed later in this Article, it could be possible to establish a human right to live free of corruption, deriving it from other existing

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25. See, e.g., Doug Johnson & Tristan Zajonc, *Can Foreign Aid Create an Incentive for Good Governance? Evidence From the Millennium Challenge Corporation* (Ctr. for Int'l Dev. Harv. Univ., Working Paper No. 11, 2006) (discussing the role of anticorruption conditions in funding for the Millennium Challenge Corporation).

26. See, e.g., GUZMAN, *supra* note 12, at 14 (explaining the logic of compliance in the European Union).

27. Bello y Villarino, *supra* note 24, at 43.

human rights obligations, especially through litigation in international courts. Sometimes, the mechanisms themselves need to be created as well, as was the case in the Extractive Industries Transparency Initiative, but the preferred approach in that case was to avoid the formality of a legal instrument<sup>28</sup> that satisfied the conditions in the Vienna Convention on the Law of Treaties.<sup>29</sup> A brief description of these anticorruption efforts, which I call “disruptive approaches,” is presented below in Section D of Part I.

Taking these four mechanisms into account, this Article provides the reader with a presentation of the evolution of the international legal anticorruption framework. I do so immediately below in Part I, where I describe the different instruments’ genesis and dynamics. Though Part I primarily serves as a description of existing or proposed international law measures, the division of their evolution into four periods is an innovative framework and a discussion like this one has not yet appeared in a U.S. legal journal.<sup>30</sup> Furthermore, this overview serves a richer purpose of helping the reader grasp the main traits of the different initiatives—with their different dynamics and objectives—of that international anticorruption legal framework. This leads to Part II, which presents the common characteristics of the core “conventional anticorruption law” and argues that a new and disruptive approach to conventional anticorruption law is needed.

## I. THE DEVELOPMENT OF INTERNATIONAL ANTICORRUPTION NORMS: AN OVERVIEW

As noted above, this section’s aim is to offer the reader a different way of looking at existing and developing international “hard” anticorruption norms. The concept of “hard norms” in this section goes beyond its traditional meaning of legally binding—as opposed to “soft” or not binding. Here, “hard” also takes into account the real capacity of the norms to constrain behavior,<sup>31</sup> both in legal and practical terms. Therefore, “hard norms” are both the traditional binding sources of international law (commonly referred to as “hard law”) *and* the norms that, although not formally binding, envisage direct consequences from their violation, thereby creating “hard” enforcement mechanisms.

Thus, this section includes only norms that are expected to shape or direct behavior, consistent with the prior discussion on Abel’s ideas regarding the

28. ROSE, *supra* note 20, at 140.

29. Vienna Convention on the Law of Treaties, May 23, 1969, 11155 U.N.T.S. 331.

30. Some previous works with similar scopes have focused instead on concrete instruments. *See, e.g.,* Jan Wouters, Cedric Ryngaert & Ann Sofie Cloots, *The International Legal Framework Against Corruption: Achievements and Challenges*, 14 MELB. J. INT’L L. 205 (2013).

31. *See* Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421 (2000); *see also* Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, J. LEGAL ANALYSIS 171, 182 (2010) (noting that instruments that are nominally “hard law” provide limited enforcement).

relation between the law and the expected behaviors. Norms created without legally binding character or without substantive mechanisms to favor their fulfilment serve other purposes (for example, preparing the way for binding norms or shaping expectations), but are not created under the assumption that they will be systematically respected. One can think, for example, of model laws, as they are international instruments and serve a regulatory purpose, but no one would regard them as “binding” or “hard” law.

The different strains of “hard” norms in international anticorruption law can be grouped according to their subjacent dynamics into four groups. These groups represent four relatively distinct—although sometimes overlapping—phases: (i) a transborder period, where the objective is to extend the scope of domestic anti-bribery criminal law beyond territorial borders; (ii) an international period, where corruption is looked at in more holistic ways and approached with the classic mechanisms of the international law of cooperation; (iii) a transnational period, where different entities operating within the boundaries of international law—not necessarily states—develop mechanisms to address corrupt behaviors (or suspicions of corruption) within their domains of work; and (iv) a disruptive period, where we are witnessing new proposals that address the limitations of existing international anticorruption norms, using known mechanisms of international law that, until now, have not been brought into the fight against corruption.

#### A. *Transborder period: Leading to the OECDCCB*

Like many other analyses of the evolution of international anticorruption law, this contextual overview starts with the enactment in the United States of the Foreign Corrupt Practices Act (“FCPA”).<sup>32</sup> As noted somewhere else, the 1970s witnessed the establishment of several anticorruption processes at the international level, notably the development Code of Conduct for Public Officials within the UN framework.<sup>33</sup> In that sense, starting this overview with the FCPA may seem biased towards a Global North/U.S.-centric view. There is some truth to this.

For most authors,<sup>34</sup> the reason for starting their analysis with the FCPA is that it was the first legal act, domestic or international, that considered bribing a foreign official to deserve legal punishment—a turning point for Western countries. It was a break with a U.S. tradition of “comparing their country with others [instead] of looking deeply into themselves.”<sup>35</sup> The FCPA started treating transnational conduct where the bulk of the damage

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32. The Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§78dd-1, et seq. [hereinafter FCPA].

33. José-Miguel Bello y Villarino, *Middle point, end of the road or just the beginning? Anticorruption efforts, failures and promises at the United Nations*, 25 MAX PLANCK Y.B.U.N.L. ONLINE (forthcoming 2022).

34. See, e.g., Wouters, Ryngaert, & Cloots, *supra* note 30.

35. Byoung Kook Min, *Corruption and Law*, 8 KOR. J. COMPAR. L. 157, 164–65 (1980).

is caused in a foreign jurisdiction as a domestic crime.<sup>36</sup> As such, it was the legal reflection of a domestic moral judgment about the rightfulness of the behavior of U.S.-based businesses when operating abroad. In that sense, this piece of legislation was the child of a post-Nixon environment, when the United States had an inward look into its rights and wrongs,<sup>37</sup> an approach to regulation that prioritized ethical (global) judgments over the protection of private and public (domestic) interests.

Regretfully, it did not last long. By 1980, the U.S. government received a report estimating the cost of the FCPA in terms of “lost business opportunities” to be around one billion USD, and official recommendations to abandon the legislation surfaced.<sup>38</sup> The U.S. government was then faced with a choice between “raising the moral standard upon which United States corporations conduct foreign business and maintaining the competitive position of its corporations in world markets.”<sup>39</sup>

In my view, the path the United States decided to take at that point is the real importance of the FCPA from a global perspective. The solution was not to abandon the FCPA—although it was weakly enforced<sup>40</sup>—but to export the legislation, that is, to internationalize it.<sup>41</sup> Though not intended, the FCPA indirectly triggered a period of negotiations focused on developing international instruments that would look at corruption from a domestic point of view, but as a crime that could go across borders. I have named this phase of international anticorruption law the “transborder period” as the logic behind it is the domestic criminalization of conduct when it happens beyond the borders of that jurisdiction.

From this perspective, the Organization for Economic Co-Operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECDCCB”)<sup>42</sup>—and the non-binding recommendations that preceded and followed the 1997 OECDCCB—is the end result of this U.S.-driven agenda to criminalize the bribery of foreign officials within the Organization for Economic Co-Opera-

36. See generally E.C. Lashbrooke, Jr., *The Foreign Corrupt Practices Act of 1977: A Unilateral Solution to an International Problem*, 12 CORNELL INT'L L.J. 227 (1979).

37. See H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed its Grasp?*, 26 N.C. J. INT'L L. & COM. REGUL. 239, 241 (2001); Eric Engle, *I Get by with a Little Help from My Friends? Understanding the U.K. Anti-Bribery Statute, by Reference to the OECD Convention and the Foreign Corrupt Practices Act*, 44 INT'L L. 1173, 1176 (2010).

38. David R. Slade, *Foreign Corrupt Payments: Enforcing a Multilateral Agreement*, 22 HARV. INT'L L.J. 117, 118 (1981).

39. *Id.* at 119.

40. Rebecca L. Perlman & Alan O. Sykes, *The Political Economy of the Foreign Corrupt Practices Act: An Exploratory Analysis*, 9 J. LEGAL ANALYSIS 153, 154 (2017).

41. Brown, *supra* note 37, at 260–62.

42. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. No. 105–43 [hereinafter OECDCCB].



tion and Development (“OECD”).<sup>43</sup> Within this view, the OECDCCB could be then seen as a “global FCPA” that delivered the desired leveled playing field for U.S. corporations.<sup>44</sup>

A similar dynamic can be observed in the European Union Convention on the Protection of the European Communities’ Financial Interests.<sup>45</sup> This convention, like the OECDCCB, only mandates criminalization and cooperation in the prosecution of very precise conduct—in this case corruption in connection to European Union (“E.U.”) funds. There is also a certain logic to leveling the playing field: the norm reassures net E.U. contributors, which already criminalize the siphoning of their funds, that all countries receiving funds would have similar laws in their books. Finally, also in parallel to the OECDCCB, the E.U. convention targets private behavior that causes financial damage outside the jurisdiction that is obliged by the norm to criminalize that behavior.

With the exception of this E.U. convention, this phase mainly follows the path marked by the linear relation between the FCPA and the OECDCCB, with the U.S. in a leading role. Beyond the OECD framework, the United States also promoted this “transborder approach” in other settings.<sup>46</sup> The General Agreement on Tariffs and Trade looked like a closed door, so the United States tried to bring FCPA logic to the Organization of American States (“OAS”),<sup>47</sup> which somehow “backfired” into the Inter-American Convention Against Corruption. The United States then brought this logic to the United Nations, where, after failing in the Economic and Social Council,<sup>48</sup> was backed by the General Assembly in the 1997 United Nations Declaration against Corruption and Bribery in International Commercial Transactions,<sup>49</sup> which encouraged countries to adopt new laws—that is, their own versions of the FCPA, particularly for non-OECD countries—and enforce existing laws.<sup>50</sup>

In broad terms, this phase and the process that led to the adoption of the OECDCCB are characterized by four elements:

- (i) It is focused on business transactions,<sup>51</sup> particularly on private behaviors of exporters of industrial goods, services and capital. This focus

43. Ellen J. Gutterman, *On Corruption and Compliance: Explaining State Compliance with the 1997 OECD Anti-Bribery Convention* 11–12 (2005) (Ph.D. thesis; University of Toronto) (ProQuest); Gutterman & Lohaus, *supra* note 3, at 245.

44. ROSE, *supra* note 20, at 64.

45. *EU Convention on the Protection of the European Communities’ Financial Interests*, 1995 O.J. (C 316) 49.

46. Brown, *supra* note 37, at 261–63.

47. A. Katarina Weilert, *United Nations Convention against Corruption (UNCAC) – After Ten Years of Being in Force*, 19 MAX PLANCK Y.B. U. N. L. ONLINE 216, 219 (2016).

48. Brown, *supra* note 37, at 261–63.

49. UNGAOR, 51st Sess., 1st plen mtg., U.N. Doc. A/51/PV.86 10–11 (Dec. 16, 1996).

50. Weilert, *supra* note 47, at 219.

51. Ingeborg Zerbes, *Article 1. The Offence of Bribery of Foreign Public Officials*, in THE OECD CONVENTION ON BRIBERY: A COMMENTARY 45, 51 (2007).

made the OECD the adequate forum for these initiatives, something explicitly noted in the 1988 reform of the FCPA.<sup>52</sup>

- (ii) It is about leveling the playing field, according to the view that businesses from jurisdictions that had criminalized the bribery of foreign officials were at a disadvantage compared to those from non-criminalizing countries.<sup>53</sup> In that sense, in the traditional dichotomy in international law between the law of coexistence and the law of cooperation,<sup>54</sup> this would fit in the former.
- (iii) The moral consideration that triggered the dynamic—the post-Nixon effort to clean up politics and corporate behavior in the United States<sup>55</sup>—is tempered by a sense of practicality, abandoned after 1997,<sup>56</sup> which favored business interests—for example, limiting enforcement or allowing facilitation payments in the FCPA and the OECDCCB.
- (iv) The focus is exclusively on criminalization and harmonization of certain conduct across countries (for example, criminalizing bribery of foreign officials and removing tax exemptions for foreign bribes).

All these characteristics are perfectly represented by the OECDCCB, as analyzed in the following subsection.

### 1. *OECD Convention on Combating Bribery*

**Objective:** The OECDCCB is a very specific treaty with a unidimensional goal: getting countries to commit to criminalizing foreign bribery or, in policy terms, curtailing a system of “exporting” corruption through international bribes.<sup>57</sup> Although this objective may seem modest today, it was moderately ambitious before the turn of the century, when bribes to foreign officials were not only legal but tax deductible in many Global North countries.<sup>58</sup>

Understood this way, the main goal of the OECDCCB perfectly aligns with the U.S.-driven agenda of internationalizing the FCPA discussed above, which is both its strongest and weakest point. On the one hand, its

52. Brown, *supra* note 37, at 264.

53. Wouters, Ryngaert, & Cloots, *supra* note 30, at 209.

54. Rüdiger Wolfrum, *Cooperation, International Law of*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Anne Peters & Rüdiger Wolfrum eds., 2010).

55. Christopher F. Corr & Judd Lawler, *Damned If You Do, Damned If You Don't—The OECD Convention and the Globalization of Anti-Bribery Measures*, 32 VAND. J. TRANSNAT'L L. 1249, 1255–56 (1999).

56. The 1998 reform of the FCPA took decisive steps to ensure and facilitate enforcement. See Lucinda A. Low & Timothy P. Trenkle, *U.S. Antibribery Law Goes Global*, 8 BUS. L. TODAY 14, 14–20 (1998–1999). Post-FCPA laws implementing the OECDCCB removed the facilitation payments exception. See Roger P. Alford, *A Broken Windows Theory of International Corruption Symposium: The FCPA at Thirty-Five and Its Impact on Global Business*, 73 OHIO STATE L.J. 1253, 1279 (2012).

57. José-Miguel Bello y Villarino, *Unsustainable Finance: Targeting Corruption Linked to Investments Through International Agreements* (Global Research Alliance for Sustainable Finance and Investment 3rd Annual Conference, 2020) (on file with author).

58. See Giorgio Sacerdoti, *The 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 1 INT'L BUS. L.J. 3, 5–6 (1999).

objective is clear and easy to evaluate—that is, how many countries make that conduct criminal. On the other hand, it represents a limited way of approaching anti-corruption from an international perspective, which Kevin Davis has called the “OECD paradigm”<sup>59</sup> of fighting corruption.

This paradigm has shaped policy and (at least) anglophone academic writings about international bribes for over twenty years. This has evolved into a relatively uncontested acceptance of its three main assumptions.<sup>60</sup> Its main one—“high-level bribery is wrong”—is relatively uncontested, but the other two—“every little bit helps” and “as many different jurisdictions as possible should play a role in enforcement”—may require further analysis.<sup>61</sup> One can then wonder whether the “OECD paradigm” is the right response in terms of effectiveness, efficiency, and fairness to fight high level bribery.<sup>62</sup>

**Regulatory scope:** Although the OECDCCB is directly linked to the FCPA in its objective,<sup>63</sup> its regulatory logic is slightly different. As a conventional instrument it does not directly create the obligations and mechanisms to prosecute the companies and individuals that bribe foreign officials—which, as noted above, was the origin of the FCPA. Instead, its regulatory scope addressed the problem of the “governance gap” in transborder bribery. As some have noted, the convention’s objective is to solve the problem created by an absence of prosecution of a transborder bribe by the jurisdiction best placed to do it, that is where the public official performs her duties.<sup>64</sup> This is not a domestic regulatory gap—bribe giving and bribe taking is a criminal offense in the vast majority of countries across the world,<sup>65</sup> and hence the tools in criminal law to address such conduct were already in place—but a governance one. This gap would not exist if the countries that are most interested in prosecuting bribery—that is, those where the officials were bribed—had the capacity to do it or if the institutions mandated to initiate such prosecutions were not influenced by spurious interests.<sup>66</sup>

What is missing in an analysis of the regulatory scope of the OECDCCB is why criminalization of international bribery by the countries of origin of the bribe-giver was the preferred approach to close that gap. There has been

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59. KEVIN E. DAVIS, *BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY* 10 (2019).

60. *See id.* at 5, 6, 9–10.

61. *See id.*

62. *See id.* at 10.

63. ROSE, *supra* note 20, at 63–64.

64. *See* Elizabeth Acorn, *Twenty Years of the OECD Anti-Bribery Convention: National Implementation and Hybridization*, 51 U.B.C. L. REV. 613, 614 (2018).

65. Though sometimes, some legislative systems do deviate from this assumption. A key example is the story of King Fahd Bin Abdul Aziz of Saudi Arabia, who could not be corrupt in relation to oil revenues because all petrodollars were his personal property. *See* Franklin E. Zimring & David T. Johnson, *On the Comparative Study of Corruption*, 45 BRIT. J. CRIMINOLOGY 793, 800–01 (2005).

66. *See* Acorn, *supra* note 64, at 614–15.

a certain degree of obscurantism about the negotiations of the OECDCCB as no *travaux préparatoires* have ever been published.<sup>67</sup>

The negotiating process was driven by what is called the “interactive” method of the OECD, in which an expert group—the Working Group on Bribery (“WGB”) here—analyzes issues from a “shopping list”—in this case between 1995 and 1997—and maintains a dialogue with the OECD Council about areas for possible regulation and options.<sup>68</sup> Yet, the lack of a clear record on this dialogue makes it difficult to answer Davis’s question: how can we know if the response is right if we do not know what (or if) other options were explored?

Alternative options could have included establishing compensation for countries where the officials were bribed or creating a system of support and cooperation in those countries for the prosecutions. Yet, these are not part of the regulatory scope of the convention. The choice to ignore a bilateral approach to transborder bribery, where countries exporting and importing corruption work in cooperation, is a core characteristic of the OECDCCB. The OECDCCB decided instead to look at that gap from the perspective of the countries more likely to export corruption through their businesses—which seemed coherent with the OECD membership and its institutional framework. This was made explicit in Article 15 by conditioning the OECDCCB’s entry into force on its ratification by five of the ten states with the biggest share of international exports.<sup>69</sup>

Once the geographical scope was established, the substantive scope—the “regulatory standard” that the convention sets for those countries—was much simpler to define. The main options available to the drafters were harmonization, that is, establishing the specific elements of conduct and penalties that needed to be included in the domestic law, or functional equivalence, that is, establishing the principle and leaving the choice of means to the signatories.<sup>70</sup> Although harmonization seemed possible among countries relatively homogenous in terms of their institutional and economic development, the drafters opted for the latter.<sup>71</sup>

Although the convention emphasizes uniformity, its regime is quite permissive<sup>72</sup> as it allows parties to envisage very different outcomes from violating the prohibition. Article 5 establishes that the “[i]nvestigation and prosecution of the bribery of a foreign public official shall be subject to the

67. ROSE, *supra* note 20, at 41. Granted, the OECDCCB negotiating conference adopted a commentary that provides some insight into the negotiations. OECD, *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Adopted by the Negotiating Conference on 21 November 1997* (1997).

68. Mark Pieth, *Introduction*, in *THE OECD CONVENTION ON BRIBERY: A COMMENTARY*, 13–14 (Mark Pieth et al. eds., 2007).

69. OECDCCB, *supra* note 42, art. 15.

70. *Id.* at 113.

71. OECD, *supra* note 67, at 11.

72. See Acorn, *supra* note 64, at 621.

applicable rules and principles of each Party.”<sup>73</sup> This means that consequences could be as disparate as agreements to defer prosecution, non-prosecution agreements, fines, or substantive criminal sentences against companies or individuals.

Furthermore, an article-by-article analysis of the obligations transmits the impression of a soft-touch approach to international bribery. The convention appears to be primarily concerned with declaring the principle that transborder bribery should be criminalized, but does not necessarily seem concerned with how effective this will be to actually reduce transborder bribes. The lack of *travaux* makes this observation a conjecture, but this impression is consistent with some commentaries of authors who participated in the negotiations.<sup>74</sup>

In my view, the only text of the OECDCCB that manifests a real<sup>75</sup> concern about its effectiveness is Article 5, which includes the rule that prosecutions “shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.”<sup>76</sup> Yet, even this apparently assertive article has been questioned by critics who have observed that it is vague enough that its practical effect is not clear.<sup>77</sup> The SNC-Lavalin saga in Canada—still unfolding at the time of writing—where evidence surfaced about the Canadian government’s interference with a prosecution for foreign bribery in Libya<sup>78</sup> may be the test to assess how serious the OECD is about fighting corruption, once the organization has publicized its concern about the process.<sup>79</sup>

**Enforcement mechanisms:** In the end, how serious the OECD is about the bribery of foreign officials—and by extension the convention’s value—is a question of effectiveness. The effectiveness of the OECDCCB can be analyzed according to two main parameters: one formal and one substantive. The latter is the one used by Transparency International in its biannual

73. OECDCCB, *supra* note 42, art. 5.

74. See, e.g., Sacerdoti, *supra* note 58, at 8.

75. The commentary also establishes that complaints of bribery of foreign public officials “should be seriously investigated,” seemingly favoring investigation in case of doubt, Peter J. Cullen, *Enforcement, in THE OECD CONVENTION ON BRIBERY: A COMMENTARY* 300 (Mark Pieth et al. eds., 2007), but balances this requirement with the recognition of prosecutorial discretion, see Zimring & Johnson, *supra* note 65, at 16.

76. OECDCCB, *supra* note 42, art. 5.

77. See Sam Hickey, *The OECD Convention’s Article Prohibiting the Politicization of Foreign Bribery Enforcement Is in Desperate Need of Clarification*, THE GLOBAL ANTICORRUPTION BLOG (June 7, 2019), <https://globalanticorruptionblog.com/2019/06/07/the-oecd-conventions-article-prohibiting-the-politicization-of-foreign-bribery-enforcement-is-in-desperate-need-of-clarification/> [https://perma.cc/JEZ3-SL9K].

78. See generally Tamas Kopllyay & Mario Malouin, *A Framework for Understanding Illegal Business Activities, from Competition to Corruption – The Case of SNC Lavalin* (Proceedings of the International Annual Conference of the American Society for Engineering Management, 2019).

79. See OECD, *OECD will follow Canadian proceedings addressing allegations of political interference in foreign bribery prosecution* (Nov. 3, 2019), <http://www.oecd.org/corruption/oecd-will-follow-canadian-proceedings-addressing-allegations-of-political-interference-in-foreign-bribery-prosecution.htm> [https://perma.cc/DZ4D-8DQF].

reports *Exporting Corruption*.<sup>80</sup> This approach assumes that companies from all parties to the treaty are involved in corruption abroad and monitors the extent of enforcement in terms of ongoing investigations, prosecutions, and final decisions. The results of this assessment<sup>81</sup> are consistent with the general view in recent literature that the OECDCCB suffers a problem of “ineffective enforcement,” which can be attributed to the “underperformance” of the OECD monitoring system<sup>82</sup> as discussed below.

I contend that this is an unfair assessment. Although its logic perfectly aligns with the ultimate objective of the OECDCCB, such an assessment does not adequately consider its declared regulatory scope. The convention does not require the investigation or prosecution of cases of international bribery—although that is the final intention—but simply the alignment of the domestic legislation to certain regulatory standards.<sup>83</sup>

These standards—namely the criminalization of the bribery of foreign officials by corporations and individuals as well as ancillary standards<sup>84</sup>—have generally been achieved.<sup>85</sup> In that sense, at least at a formal level the OECD has been a success. From this point of view, the OECD system of monitoring through “phases”<sup>86</sup> is a more accurate reflection of the implementation of the “actually binding” parts of the convention. The system is essentially an assessment by a few selected peers of the implementation and application of the OECDCCB,<sup>87</sup> mostly relying on “peer pressure” as its enforcement mechanism.<sup>88</sup> The system has worked in a sequence of thematic phases, and it is now in phase 4 for the countries that first ratified the convention.<sup>89</sup> Each phase has addressed an issue in the process of implementation. According to the OECD’s own description of the process,<sup>90</sup> phase 1 evaluated the adequacy of a country’s legal framework; phase 2 assessed whether a country was applying this legislation in practice; and phase 3 and

80. For the latest at the time of writing, see TRANSPARENCY INTERNATIONAL, EXPORTING CORRUPTION 2020 (2020), <https://www.transparency.org/en/projects/exporting-corruption> [<https://perma.cc/Z546-SPMQ>].

81. *Id.* at 14 (“Only four of the 47 countries surveyed actively enforce against foreign bribery and only nine countries moderately enforce against companies that pay bribes abroad.”).

82. Lianlian Liu, *A Solution Model for the Problem of “Ineffective Enforcement,”* in THE GLOBAL COLLABORATION AGAINST TRANSNATIONAL CORRUPTION: MOTIVES, HURDLES, AND SOLUTIONS 151, 154 (Lianlian Liu ed., 2019).

83. See OECD, *supra* note 67, art. 1, commentary 3.

84. Nicola Ehlermann-Cache, *The Impact of the OECD Anti-Bribery Convention 2* (2008), <https://www.oecd.org/mena/competitiveness/39997682.pdf> [<https://perma.cc/D9U5-HBJH>].

85. See, e.g., the table summarizing the mid-term study of implementation across 21 parties in THE OECD CONVENTION ON BRIBERY: A COMMENTARY 553–62, annex A (Mark Pieth et al. eds., 2007).

86. See OECD, *Country monitoring of the OECD Anti-Bribery Convention*, <http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm> [<https://perma.cc/7SEK-WKB6>].

87. Pieth, *supra* note 68, at 30.

88. Nicola Bonucci, *Monitoring and Follow-up*, in THE OECD CONVENTION ON BRIBERY: A COMMENTARY 448 (Mark Pieth et al. eds., 2007).

89. See, e.g., OECD, *Phase 4 Monitoring Report: Netherlands* (2020), <https://www.oecd.org/corruption/anti-bribery/netherlands-phase-4-report-en.pdf> [<https://perma.cc/YMK4-DTEF>].

90. OECD, *supra* note 79.

phase 4 have focused on enforcement and cross-cutting issues (tailored to the country in the latest phase), as well as any unimplemented recommendations from previous phases.

Despite some efforts of the Working Group<sup>91</sup> and the way some of the phases were described on paper, the process has chiefly remained a “compliance check,”<sup>92</sup> which is the way it was initially designed.<sup>93</sup> When the country reports by the OECD refer to enforcement, what they are assessing is the number of foreign bribery investigations conducted,<sup>94</sup> but they are—perhaps by design—blind to how prevalent or accepted corruption is among the companies from that country.

As noted before in relation to Transparency International’s approach to assessing OECDCCB enforcement, anything else would be unfair to signatories and likely outside of the convention’s regulatory scope. It would be impossible for the enforcement mechanisms of the OECDCCB to provide a fair assessment of practical effectiveness, as the necessary data is beyond the scope of the monitoring. This is because the monitoring process does not collect information from “companies or foreign officials who are direct participants in foreign bribe exchanges in international markets,” relying instead on “documentary evidence from laws-on-the-book and anecdotal evidence provided by the administrators of national law in signatories.”<sup>95</sup> This is an excellent method for assessing formal implementation, but, as Lianlian Liu has noted, cannot be a representational evaluation of national anti-bribery efforts.<sup>96</sup>

I, however, disagree with Liu in terms of the overall evaluation of the OECDCCB. In her view—representative of many others, as she correctly notes—the convention has a problem of ineffective enforcement which can be attributed to the underperformance of the OECD monitoring system.<sup>97</sup> I believe this is not the case, as the OECDCCB has performed fairly well in its main objective of criminalizing foreign bribery, at least within its core membership.<sup>98</sup> There may have been in the past an issue of low implementation of the binding obligations,<sup>99</sup> but, for a few years now, all signatories have satisfied the literal tenor of the main obligations.<sup>100</sup> How one values that in relation to the broader objective of effectively reducing corruption—

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91. Elizabeth K. Spahn, *Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption*, 23 *IND. INT’L COMP. L. REV.* 1, 12–13 (2013); ROSE, *supra* note 20, at 93.

92. Liu, *supra* note 82, at 163.

93. See Corr & Lawler, *supra* note 55, at 1320.

94. See, e.g., OECD, *supra* note 86, at 5.

95. Liu, *supra* note 82, at 163.

96. See *id.* at 163.

97. See *id.* at 154.

98. See Spahn, *supra* note 91, at 12.

99. See Gutterman, *supra* note 43, at 66.

100. See Pieth et al., *supra* note 85.

that is, the spirit of the convention—is what determines the judgment about its success.

*B. International period: From IACAC to the UNCAC*

The second phase was partially a reaction to this transborder period and involved much more complex dynamics. If the transborder period was relatively linear from the FCPA to the OECDCCB, the international period was a multitrack phenomenon in which different actors played different roles as promoters and procrastinators. It opened with the negotiations to enact the IACAC<sup>101</sup> (1996) and concluded with the entry into force in 2006 of the African Union Convention on Preventing and Combating Corruption<sup>102</sup> (2003). The United Nations Convention Against Corruption<sup>103</sup> (“UNCAC”) (2003) was part of this process, and the final rales and crackles of this period are still felt in some regional areas.<sup>104</sup> Some other minor regional treaties that predate these broader conventions can also be included here, namely the EU Convention Against Corruption Involving EU Officials,<sup>105</sup> the Council of Europe Criminal Law Convention on Corruption,<sup>106</sup> the Council of Europe Civil Law Convention on Corruption<sup>107</sup> and its recommendations,<sup>108</sup> as well as the Southern African Development Community (“SADC”) Protocol Against Corruption (2001)<sup>109</sup> and the lesser-known, not in force and barely ratified Economic Community of West African States (“ECOWAS”) Protocol on the Fight against Corruption.<sup>110</sup> Although of minor practical rele-

101. Inter-American Convention Against Corruption, Mar. 29, 1996, S. TREATY DOC. NO. 105–39, 35 I.L.M. 724 [hereinafter IACAC].

102. African Union Convention on Preventing and Combating Corruption art. 5, July 11, 2003, 2860 U.N.T.S. 50008 [hereinafter AUCPCC].

103. United Nations Convention Against Corruption, Dec. 9, 2003, 2349 U.N.T.S. 41 [hereinafter UNCAC].

104. In the Asia-Pacific context, some discussions around 2010 were still considering the same type of mechanisms envisaged in the UNCAC, even without formally entering into a treaty. For example, a 2009 review of the (then-called) “ADB/OECD Anti-Corruption Initiative” (now the Anti-Corruption Initiative for Asia Pacific) proposed the establishment of peer reviews in this geographical context on the basis of the UNCAC obligations. HARRY GARNETT & TONY KWOK, OECD, INDEPENDENT REVIEW OF THE ADB/OECD INITIATIVE – FINAL REPORT 33–34 (2009), <http://www.oecd.org/site/adbocedanti-corruptioninitiative/meetingsandconferences/44084819.pdf> [<https://perma.cc/KP4A-H2FH>].

105. Convention Drawn upon the Basis of Article K.3(2)(c) on the Treaty on European Union on the Fight Against Corruption Involving Officials of the European Communities or Member States of the European Union, May 26, 1997, 1997 O.J. (C 195) 2.

106. Criminal Law Convention on Corruption, *opened for signature* Jan. 27, 1999, E.T.S. 173.

107. Civil Law Convention on Corruption, *opened for signature* Nov. 4, 1999, E.T.S. 174.

108. Council of Europe, *Recommendation of the Committee of Ministers to Member States on Codes of Conduct for Public Officials*, Recommendation No. R(2000)10 (May 11, 2000); Council of Europe, *Recommendation of the Committee of Ministers to Member States on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns*, Recommendation Rec(2003)4 (Apr. 8, 2003).

109. SADC Protocol Against Corruption, done at Blantyre Aug. 14, 2001, in force since June 6, 2005 (not reported).

110. Economic Community of West African States Protocol on the Fight against Corruption (2001), [https://eos.cartercenter.org/uploads/document\\_file/path/406/ECOWAS\\_Protocol\\_on\\_Corruption.pdf](https://eos.cartercenter.org/uploads/document_file/path/406/ECOWAS_Protocol_on_Corruption.pdf) [<https://perma.cc/3MER-TL8H>], not in force.



vance today given the subsequent adoption of the AUCAC, the SADC and ECOWAS instruments deserve the credit of being the first African anti-corruption treaties.<sup>111</sup>

Going back to the starting point of this period, some have seen the IACAC as the “geographic and legal bridge” between the FCPA and the OECDCCB.<sup>112</sup> Yet, in my view, the IACAC represents a substantive break from the transborder logic as its approach cannot be further from the leveling-the-field process that triggered the OECD Convention. Within that context, the IACAC is better seen as the counterargument of other American countries to the US proposal to bring its FCPA ideas to the OAS and the Inter-American context. It is the result of a demand by other American countries to deal with corruption while respecting the logic of non-intervention through classical mechanisms of the international law of cooperation to address state-level problems with transnational effects.<sup>113</sup>

As the concrete instruments are discussed in detail in the next sections, I present here only the main characteristics of this phase:

- (i) It is both a regional and global process, which encompasses countries in very different levels of development. This is reflected in the legal texts, which consider very different aspects of corruption and, particularly, its connection to development.
- (ii) It (pretends to be) comprehensive, moving beyond bribery. It approaches corruption from diverse legal perspectives—the criminalization of certain conduct is only one of the angles used. The question of prevention is a significant consideration.<sup>114</sup>
- (iii) It fits neatly within the international law of cooperation,<sup>115</sup> where countries work together to achieve an objective that can benefit each of them and the international society as a whole.
- (iv) It also fits neatly within the logic of cooperation in terms of its implementation and drafting, affording countries significant leeway about how to put those conventions into practice. Respecting sovereignty and not interfering in domestic affairs are of paramount concern.<sup>116</sup>

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111. Daniel Barkley & Claire Maduka, *The Impact of Anti-Corruption Conventions in Sub-Saharan Africa, in POVERTY REDUCTION STRATEGIES IN AFRICA*, 65, 67 (2018).

112. Corr & Lawler, *supra* note 55, at 1297.

113. Robert H. Sutton, *Controlling Corruption through Collective Means: Advocating the Inter-American Convention against Corruption Note*, 20 *FORDHAM INT'L L.J.* 1427, 1472–73 (1996).

114. Barkley & Maduka, *supra* note 111, at 68–70 (offering an overview of the balance between prevention and punishment in the SADC protocol, the UNCAC, and the AUCPCC).

115. Luis F. Jimenez, *The Inter-American Convention against Corruption*, 92 *AM. SOC'Y INT'L L. PROC.* 157, 171 (1998); Schoor, *supra* note 8, at 40.

116. Sutton, *supra* note 113, at 1473; Weilert, *supra* note 47, at 224.

1. *Inter-American States Convention Against Corruption 1996*

**Objectives:** As noted in the above discussion of the international period, the IACAC was the first time a group of countries signed an international instrument taking steps to “prevent, detect, sanction, and eradicate corruption,” through actions both within their borders and internationally.<sup>117</sup> Those who see in the IACAC a “symbol of consensus” in the Americas or “a legal framework to harmonize laws to establish an anti-corruption network”<sup>118</sup> are likely to regard it in an excessively positive light, as the convention’s explicit objectives and political ambition are more modest:

1. To promote and strengthen the development by each of the States Parties of the mechanisms needed to prevent, detect, punish and eradicate corruption; and

2. To promote, facilitate and regulate cooperation among the States Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance.<sup>119</sup>

The first paragraph addresses corruption from a domestic dimension. In this context, the IACAC’s aim is to favor domestic solutions that the convention “promotes and strengthens.”<sup>120</sup> The second paragraph is the international angle of the convention, where cooperation between OAS states is not only “promoted and facilitated” but also “regulated” to achieve the objectives set in paragraph one.<sup>121</sup> The implications of this “typical” internationalist approach, called “comprehensive” by some,<sup>122</sup> have often been disregarded in the literature,<sup>123</sup> but this approach sets the IACAC apart from the coetaneous process at the OECD, as it indirectly acknowledges the limitations of putting too much emphasis on transborder corruption.

Furthermore, the IACAC’s declared objectives do not seem particularly concerned with transborder bribery, as it refers more generally to international and domestic manifestations of corruption, well beyond the United States’ initial objective of extending the FCPA approach to the OAS,<sup>124</sup> even

117. Jimenez, *supra* note 115, at 147.

118. Giorleny D. Altamirano, *The Impact of the Inter-American Convention Against Corruption*, 38 U. MIAMI INTER-AM. L. REV. 487, 539 (2007).

119. IACAC, *supra* note 101, art. II (emphasis added).

120. *Id.*

121. Edmundo Vargas, *La lucha contra la corrupción en la agenda regional e internacional. Las convenciones de la OEA y de la ONU*, 194 NUEVA SOCIEDAD 133, 136–37 (2004).

122. Sutton, *supra* note 113, at 1472.

123. It is either not given adequate attention or directly ignored in several of the commentaries following the adoption of the IACAC. See, e.g., Lucinda A. Low, Andrea K. Bjorklund & Kathryn Cameron Atkinson, *The Inter-American Convention against Corruption: A Comparison with the United States Foreign Corrupt Practices Act Perspectives on Latin America*, 38 VA. J. INT’L L. 243 (1997); Peter J. Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 ARIZ. J. INT’L & COMP. L. 793 (2001); CARLOS A. MANFRONI, MICHAEL FORD & RICHARD S. WERKSMAN, *THE INTER-AMERICAN CONVENTION AGAINST CORRUPTION* 16–19 (2003).

124. Henning, *supra* note 123, at 809–10.

if such an objective was explicitly achieved in Article VIII. Article II, in combination with the preamble, can be seen instead as materializing the objectives identified by the American heads of state at the First Summit of the Americas, namely, to create a concerted “hemispheric approach to acts of corruption in both the public and private sectors.”<sup>125</sup>

Both parts of that statement are somehow reflected in the IACAC. The best example of the “hemispheric approach” can be found in Article IX on illicit enrichment, a crime on the books of ten OAS member states but viewed by the U.S. Congress as inconsistent with its constitution and fundamental principles.<sup>126</sup> Although illicit enrichment was finally incorporated into the text, its appearance in the convention was initially met with resistance from several countries with an Anglo-Saxon legal tradition, led by the United States.<sup>127</sup> The “hemispheric approach” on the issue is a wording that reflects the transactional nature of the text of every convention: it does not give up on building into the convention an important anticorruption tool for Latin American countries, but it softens the language with so many disclaimers to respect the U.S. reticence<sup>128</sup> that it is doubtful that the article could really open the door to any effective cooperation on illicit enrichment.

The final part of that declaration (“in both the public and private sectors”) is also relevant when looking into the objectives and the regulatory scope of the convention. The IACAC is definitely an instrument focused on public corruption, as seen in Article IV, but one that creates a framework that considers “private” dimensions, particularly those most pertinent to the American context, such as the obstacle created by bank secrecy rules in requests for cooperation.<sup>129</sup> However, it does not regulate what is understood today as “private-sector” corruption, that is, within a corporation,<sup>130</sup> even when private entities are providing services formerly performed by the state.<sup>131</sup>

**Regulatory scope:** The IACAC deserves credit for trying to create norms related to corruption that would open the door for international cooperation in an area where cultural differences may build overwhelming barriers.<sup>132</sup> Yet the negotiators of the working group, led by Venezuela, managed to

125. *Summit of the Americas Plan of Action* (December 9-11, 1994), <http://www.summit-americas.org/miamiplan.htm> [<https://perma.cc/V3UG-Q5KF>].

126. Henning, *supra* note 123, at 815.

127. MANFRONI, FORD, & WERKSMAN, *supra* note 123, at 68.

128. *Id.*

129. IACAC, *supra* note 101, art. XVI.

130. Cecily Rose, *International Regulation of Private Sector Corruption* (2014) (Ph.D. thesis, University of Cambridge), <http://ethos.bl.uk/OrderDetails.do?did=1&uin=uk.bl.ethos.648506> [<https://perma.cc/3LVN-VB4F>].

131. Jimenez, *supra* note 115, at 158.

132. Wayne Sandholtz & William Koetzle, *Accounting for Corruption: Economic Structure, Democratic Norms, and Trade*, 44 INT'L STUD. Q. 31, 33-34 (1998) (“[T]he brute fact is that practices that one society condemns as corrupt are considered harmless or even appropriate in another cultural context.”). See also different examples across countries and sectors in SHARON EICHER, *CORRUPTION IN INTERNATIONAL BUSINESS: THE CHALLENGE OF CULTURAL AND LEGAL DIVERSITY* (2016).

produce a draft convention in just three meetings in Washington, D.C., a draft which was barely modified at the Caracas conference in March of 1996.<sup>133</sup>

To some extent, the regulatory scope of the IACAC<sup>134</sup> gives us a preview of the UNCAC, as the legal technique and drafting is very similar in both.<sup>135</sup> In that sense, many of the observations noted below apropos the UNCAC could be brought here, but are better discussed in a global context and at the height of the international period.

Jaime López distinguishes the different types of norms in the IACAC according to their addressees: public officials, public institutions, the private sector, and citizens.<sup>136</sup> Yet, a better way to analyze the convention for the purpose of this thesis is to follow the classification originally established by Lucinda A. Low, Andrea K. Bjorklund, and Kathryn Cameron Atkinson.<sup>137</sup> According to these authors, the convention's provisions can be distributed in a four-tier hierarchy, depending on the level of constraint imposed on its signatories. First, some articles, are binding on states parties. Among these, one can find two subtypes of norms: some are self-executing in nature (such as the provision of a legal basis for extradition in Article XIII) and others, such as the mandate to criminalize domestic and international bribery (Art. VIII), require the member states to pass new laws, in particular criminal laws. In the second tier we can find conditional provisions such as Article XIV(1), which limits affording the "widest measure of mutual assistance" to a series of situations.<sup>138</sup> The third tier includes those envisaging progressive development, precisely the title of Article XI. The fourth and final tier can be better described as "aspirational" as is the case with the preventive measures of Article II in which parties simply "agree to consider the applicability of measures."<sup>139</sup>

Overall, the IACAC suffers the same problems discussed below in relation to the UNCAC regarding the binding character of its provisions. Once the conditional, progressive, and aspirational clauses are removed, the actual legal mandates derived from the convention are fairly limited.<sup>140</sup> In that sense, Luis Jiménez's early observations about the convention being just a "first step in a series of [OAS-driven] activities" to promote cooperation have proven to be right.<sup>141</sup> His example of the model laws drafted for transna-

133. Vargas, *supra* note 121, at 136.

134. An exegesis of each article and detailed analysis of each provision can be found in JAIME LÓPEZ, *NORMAS Y POLÍTICAS INTERNACIONALES CONTRA LA CORRUPCIÓN* (2003); MANFRONI, FORD & WERKSMAN, *supra* note 123.

135. Vargas, *supra* note 121, at 139.

136. LÓPEZ, *supra* note 134, at 134–48.

137. Low, Bjorklund & Atkinson, *supra* note 123, at 247.

138. *Id.* at 253.

139. *Id.* at 250.

140. See MATHIS LOHAUS, *TOWARDS A GLOBAL CONSENSUS AGAINST CORRUPTION: INTERNATIONAL AGREEMENTS AS PRODUCTS OF DIFFUSION AND SIGNALS OF COMMITMENT* 64–67 (2019).

141. Jiménez, *supra* note 115, at 157.

tional bribery and illicit enrichment (Articles VIII and IX of the convention, respectively) is illustrative in that sense, as they were developed within the framework of the IACAC, but they go beyond the obligations listed in those articles. Therefore, it is not surprising that the ambition of having a first international legal instrument against corruption had to be tempered by less constraining language.<sup>142</sup> Even in strict monist countries such as Peru, this meant that the IACAC was considered a non-self-executing rule,<sup>143</sup> even if it was used later by its Supreme Court to support the condemnation of a soon-to-be congressman against the literal tenor of the domestic law.<sup>144</sup>

**Enforcement mechanisms:** As the eldest sibling of the conventions, the IACAC's enforcement mechanism has received significant academic attention since its inception<sup>145</sup> and has been used as a learning-process and model for conventions such as the UNCAC,<sup>146</sup> among others.<sup>147</sup> There are also several academic papers devoted to implementation of the convention in concrete domestic settings<sup>148</sup> and a plethora of policy documents produced by states parties and other actors on the sidelines of the monitoring process.<sup>149</sup> More surprisingly, perhaps, such an interest has not faded in recent years and several scholars are reassessing the processes and results of the IACAC enforcement mechanisms, with the benefit of almost twenty years of hindsight.<sup>150</sup>

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142. Mathis Lohaus intuitively presents this information in a table comparing the mandatory language in the different provisions of several anticorruption conventions. The number of non-mandatory provisions in the IACAC, with the exception of its monitoring system, sets this convention apart. LOHAUS, *supra* note 140, at 66–67.

143. César Augusto Nakazaki Servigón, *La Inaplicabilidad de la Convención Interamericana contra la Corrupción por Falta de Modificación en la Legislación Penal Interna*, 9 *ADVOCATUS* 267, 267–68 (2003).

144. *Id.* at 268–69, 276.

145. See, e.g., Roberto de Michele, *The Follow-up Mechanism of the Inter-American Convention against Corruption: A Preliminary Assessment: Is the Glass Half Empty Symposium*, 10 *SW. J. L. & TRADE IN THE AMERICAS* 295 (2003); NÉSTOR BARAGLI & NICOLÁS RAIGORODSKY, *CONVENCIÓN INTERAMERICANA CONTRA LA CORRUPCIÓN: IMPLEMENTACIÓN DE UN EFICAZ INSTRUMENTO INTERNACIONAL DE LUCHA CONTRA LA CORRUPCIÓN* (2004).

146. Mathis Lohaus points to “intra-group signalling motives” as the cause of this influence, while noting the differences. LOHAUS, *supra* note 140, at 72; see also Miguel Peñailillo Bergen, *Cuán preparados estamos para evaluar la real implementación de las convenciones anticorrupción? Lecciones desde las Américas 12* (2009), <https://www.u4.no/publications/how-prepared-are-we-to-assess-real-implementation-of-anti-corruption-conventions-lessons-from-the-americas-es-ES> [<https://perma.cc/E2US-G26C>].

147. See, e.g., Florencia Guerezovich, *Effectiveness of International Anticorruption Conventions on Domestic Policy Changes in Latin America* 50 (2012), <https://www.opensocietyfoundations.org/publications/effectiveness-international-anticorruption-conventions-domestic-policy-changes-latin-america> [<https://perma.cc/8NJ9-8ZJB>].

148. See Nakazaki Servigón, *supra* note 143, (regarding Peru); Grettel Rosales Hidalgo, *La Convención Interamericana contra la corrupción y su impacto en la reforma penal costarricense: un análisis crítico* (2007) (regarding Costa Rica); Altamirano, *supra* note 118 (regarding Guatemala, Honduras, Jamaica, and Trinidad and Tobago).

149. The official page notes that 189 organizations have so far participated in the MESICIC, many of them contributing multiple times. *Anticorruption Portal of the Americas*, OAS (2022), <http://www.oas.org/en/sla/dlc/mesicic/sociedad-civil.html> [<https://perma.cc/4NU9-WE53>].

150. For an analysis of Ecuador, see Mariuxi Baquerizo Andrade, *Mecanismo de Seguimiento de la Convención Interamericana contra la Corrupción en el Estado Ecuatoriano para la Contratación Pública* (2019), <http://www.dsace.uce.edu.ec/handle/25000/19646> [<https://perma.cc/7ADL-XSXA>]; see also Gloria Perez

The Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (better-known by its Spanish acronym “MESICIC”) was created at the first conference of states parties to the IACAC in 2001 and officially adopted on June 4, 2001.<sup>151</sup> The account of its creation by the chair of the meeting of the government experts, Roberto de Michele, paints a landscape where delegations agreed on the need of a follow-up mechanism to ensure the implementation of the convention, but were limited by the fear of being “certified [. . .] according to their level of compliance and enforcement.”<sup>152</sup> In de Michele’s view, this explains why the text of the IACAC includes “words such as study, analysis, and review instead of words with stronger connotations, such as evaluation, or examination”.<sup>153</sup> The result of this process is a “voluntary peer review system” where each country provides a “self-assessment of improvement through a questionnaire,” which is the basis of an analysis by other states parties through the Conference of the States Parties to the IACAC and the Committee of Experts.<sup>154</sup> An insight into the initial experiences of a country as a peer reviewer and the object of review was offered by two Argentinian civil servants with unusual detail.<sup>155</sup> The system is a selective process where certain provisions of the convention are explored in more detail in each round and then re-evaluated a few rounds later.<sup>156</sup> The current sixth round, for example, will be focused on bank secrecy (Article XVI) and follow up on the recommendations of the countries that took part in the third round.<sup>157</sup> The logic of the whole mechanism is one of mutual respect and non-interference, imposing on expert reviewers the three principles of “Equal Treatment, Functional Equivalence and Strengthening of Cooperation.”<sup>158</sup>

Probably the biggest innovation in the IACAC system since its creation was the establishment of a systematic methodology for country visits in 2011,<sup>159</sup> which regulates the purpose of those visits and the mechanism for countries to consent to such visits. Since 2011, consent has been obtained through an ex-ante process at the beginning of the round, before any con-

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Torres, *The Effectiveness of the International Anti-Corruption Legal Framework in the Context and Practice of Colombia*, 27 J. FIN. CRIME 437 (2020) (on Colombia).

151. Néstor Baragli, *La Convención Interamericana contra la Corrupción como instrumento de cooperación entre los Estados*, LA TRAMA, 4 (2015).

152. de Michele, *supra* note 145, at 301–02.

153. *Id.* at 302.

154. Altamirano, *supra* note 118, at 505.

155. BARAGLI & RAIGORODSKY, *supra* note 145.

156. Baragli, *supra* note 145, at 6.

157. Committee of Experts MESICIC, *Methodology for Follow-Up on the Implementation of the Recommendations Formulated and Provisions Reviewed in the Third Round and for the Review of the Convention Provisions Selected for the Sixth Round* 1 (2020).

158. This is the “skeptical” view presented in de Michele, *supra* note 145, at 309. He, however, prefers to see the glass half full and hope that, in the long term, political pressure derived from the follow up of the MESICIC reports could deliver change.

159. COMMITTEE OF EXPERTS MESICIC, *Methodology for Conducting On-site Visits* (2011), [http://www.oas.org/en/sla/dlc/mesicic/docs/met\\_onsite.pdf](http://www.oas.org/en/sla/dlc/mesicic/docs/met_onsite.pdf) [<https://perma.cc/HK6P-72CS>].

crete activity has taken place.<sup>160</sup> The preparation of the visit “shall” include meetings with civil society organizations that have submitted independent reports about the situation in the country under review.<sup>161</sup> Interestingly, in a report for Open Society Foundations, Florencia Guertzovich points out that these reforms were not necessarily the result of pressure from civil society but made possible by several key states parties and a general belief in the need to improve the whole MESICIC.<sup>162</sup>

In its current form, the enforcement mechanism seems to have been effective at showcasing good practices—for which the Committee of Experts has developed a thorough methodology—and supporting those interested in introducing better domestic anticorruption legislation through, for example, the development of model laws.<sup>163</sup> In contrast, there is very little in the MESICIC that could solve the problem of the most reluctant reformers or those not willing to domesticate the convention,<sup>164</sup> such as mechanisms for “naming and shaming” or ways to introduce concrete consequences to certified violations of the convention. Despite this, the abovementioned report expressly notes that, for activists, the Inter-American mechanism feels more advantageous than other international review systems.<sup>165</sup>

## 2. *United Nations Convention Against Corruption*

**Objectives:** The UNCAC is an anomaly in the international codification process of the early 2000s, as it cannot be traced back directly to one of the usual triggers of the time: terrorism, security concerns, interests of the business sector, climate change, etc.<sup>166</sup> Neither can it be linked to the sudden appearance of a new issue or a significant scandal. Instead, the UNCAC is better understood as the paramount example of the international period. This is its strength and its limitation.

As the foremost example of this period, it shows the capacity of the global community to translate its intention to deliver a legal statement against corruption into the first self-standing global instrument against corruption in a relatively short period of time. Apparently, the UNCAC had originally been planned for the 50th anniversary of the United Nations,<sup>167</sup> but the formal kick-off for a legal instrument was marked by a proposal to have a separate instrument for corruption, sent to the General Assembly in early

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160. *Id.* at 5–6.

161. *Id.*

162. Guertzovich, *supra* note 147, at 31–32.

163. Currently, two model laws (protection of whistle-blowers and declarations of incomes, assets and liabilities) and twelve legislative guidelines distributed by themes. See e.g., OAS, *Anti-Corruption Model of the Americas*, <http://www.oas.org/en/sla/dlc/mesicic/leyes.html> (last visited Apr. 13, 2022)

164. de Michele, *supra* note 145, at 316.

165. Guertzovich, *supra* note 147, at 22.

166. ROSE, *supra* note 20, at 3.

167. Gerald E. Caiden, *A checkered history of combating official corruption*, 2 *ASIAN EDUC. DEV. STUD.* 92, 103 (2013).

January 2000 by the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime.<sup>168</sup> The U.N. General Assembly established an ad hoc committee for the negotiation of the instrument in resolution 55/61 on December 4, 2000,<sup>169</sup> and it took just seven (relatively smooth) negotiating sessions to have a document ready for signature on December 9, 2003 in Merida, Mexico.<sup>170</sup>

Yet, the price to pay for this swift turnaround was its modest regulatory ambition, which was heavily influenced by the need to attract the most reluctant jurisdictions.<sup>171</sup> In the usual dichotomy between “depth” of the regulation and “rigidity” of its rules and enforcement mechanisms,<sup>172</sup> the UNCAC drafters opted to lower both to increase membership and make the convention more of a strong anticorruption message in terms of span and reach and less of a binding norm.

The best illustration of such a message can be found in the foreword of then Secretary-General Kofi Annan to the United Nations Office for Drug and Crime (“UNODC”) edition of the convention: “It will warn the corrupt that betrayal of the public trust will no longer be tolerated.”<sup>173</sup> From this perspective, the UNCAC has primary value as a warning: a formal and legal declaration that corruption is not accepted from an international perspective and that all States should commit themselves to fight it. The latter is expressly recognized in Article 1, which describes the UNCAC’s “statement of purpose”<sup>174</sup>:

The purposes of this convention are:

- (a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
- (b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;
- (c) To promote integrity, accountability and proper management of public affairs and public property.<sup>175</sup>

**Regulatory scope:** The conflict noted above between geographical span and substantive depth caused negotiators to “approach the problem of cor-

168. U.N. General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on its seventh session, held in Vienna from 17 to 28 January 2000*, 6 (2000).

169. G.A. Res. A/RES/55/61 (Dec. 4, 2000).

170. CECILY ROSE, MICHAEL KUBICIEL & OLIVER LANDWEHR, *THE UNITED NATIONS CONVENTION AGAINST CORRUPTION: A COMMENTARY 2* (2019).

171. See LOHAUS, *supra* note 140, at 69.

172. Leslie Johns, *Depth versus Rigidity in the Design of International Trade Agreements*, 26 J. THEORETICAL POL. 468 (2014).

173. UNITED NATIONS OFFICE FOR DRUG AND CRIME, *United Nations Convention Against Corruption (UNODC edition)* iii (2004), [https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf) [<https://perma.cc/Y7RA-XNFJ>].

174. UNCAC, *supra* note 103, art. 1.

175. *Id.*



ruption with a mixture of ambition and apprehension,”<sup>176</sup> as they had to ensure that the anticorruption message was clear while making global support for such a message feasible.

The most favorable views about the UNCAC point out the ambition of the convention within that context. It introduced a “comprehensive set of standards, measures and rules . . . to strengthen . . . legal and regulatory regimes,”<sup>177</sup> and it was the first time a treaty established rules for the return of assets.<sup>178</sup> It is also relevant that the UNCAC sought to close legal loopholes and did not restrict itself to grand corruption, organized crime, or transborder events (like the OECDCCB), including instead in Chapter III provisions addressing petty corruption and actions with merely national character.<sup>179</sup> In the same tenor, the UNCAC must be praised for the achievement of incorporating within a universal international treaty law the vastly different views in the world about corruption.<sup>180</sup> Finally, one cannot ignore that UNCAC was able to altogether “tackle diverse corruption offenses [while] incorporat[ing] a higher number of players than its counterparts”<sup>181</sup> and their disparity of views, a more challenging feat than when attempted within a regional setting, as discussed below, where having a distinct regional view is both an objective and an advantage.

More balanced views, nonetheless, tend to highlight the UNCAC’s limitations as an anticorruption regulatory framework. They note that the convention was intentionally drafted to allow “[p]arties great leeway in determining the extent to which the treaty will influence their legal systems.”<sup>182</sup> This view is supported by an analysis of the different types of provisions according to their rigidity.

Akeem Bello distinguishes three types of rules in the UNCAC: (1) mandatory provisions, that is, obligations to legislate (either absolutely or where specified conditions have been met); (2) measures to consider applying or endeavor to adopt; and (3) optional measures.<sup>183</sup> Even though the number of “apparent” mandatory provisions might at first glance seem to create a powerful legal instrument,<sup>184</sup> a more detailed exegesis shows that,

176. ROSE, KUBICIEL & LANDWEHR, *supra* note 170, at 1.

177. United Nations Office for Drug and Crime, *supra* note 173, at iii.

178. *Id.*

179. ROSE, KUBICIEL & LANDWEHR, *supra* note 170, at 2–3.

180. Weilert, *supra* note 47, at 239.

181. Ophelie Brunelle-Quraishi, *Assessing the Relevancy and Efficacy of the United Nations Convention against Corruption: A Comparative Analysis*, 2 NOTRE DAME J. INT’L COMP. L. 101, 150 (2011).

182. ROSE, *supra* note 20, at 99.

183. Akeem Olajide Bello, *United Nations and African Union Conventions on Corruption and Anti-corruption Legislations in Nigeria: A Comparative Analysis*, 22 AFR. J. INT’L COMP. L. 308, 309 (2014).

184. In terms of substantive scope, Gerald Caiden has provided a partial, but insightful description of its provisions, listed here in order of their appearance: (i) the need for independent, adequately resourced and properly trained anticorruption authorities that implement the policies and disseminate anticorruption knowledge; (ii) provision of a merit system for recruitment, promotion and retirement based on aptitude; (iii) special measures for selection, training and rotation for positions vulnerable to corruption; (iv) training in public ethics; (v) transparent political funding; (vi) reporting of internal corruption; (vii)

when mandates are established, the conditions inserted in the majority of these articles severely undermine their binding character, creating a text awash “with qualifying language and semi-mandatory provisions,”<sup>185</sup> which have been estimated to be over 40 percent of all provisions.<sup>186</sup> Some euphemistically refer to these as “safeguard clauses.”<sup>187</sup> Others, in more stark terms, have noted that this approach makes the UNCAC, as a norm, weak “especially with respect to political corruption, private sector corruption, and asset recovery”<sup>188</sup> and that the lack of mandatory language renders the UNCAC “toothless.”<sup>189</sup> An analysis of these different “gradations” is provided by Cecily Rose,<sup>190</sup> who also insightfully remarks that the different obligations are quite vague, and open to highly varying interpretations.

The reason behind this reluctance to push further is, to a significant extent, caused by the approach of the UNCAC. The “heart” of the convention is setting criminal-law standards and mandating the parties to align their domestic legislation to it,<sup>191</sup> a perfect example of the default approach of conventional anticorruption law. The problem, as A. Katarina Weilert has noted,<sup>192</sup> is that the changes required to be more aggressive in the fight against corruption in the criminal domain would encroach on the inner structure of states or those closely affiliated with state power. Weilert seems to suggest that the drafters, conscious of this, addressed this need of “reassurance” to states—so they feel inclined to become a party—through the acknowledgement by the convention of its commitment towards the protection of sovereignty (see, for example, Article 4).<sup>193</sup> As noted before, this is a characteristic of the international period also found in the regional (African and Inter-American) instruments. Yet, some authors have suggested that this apparent respect for sovereignty is undermined by its substantive provisions, which “inevitably require infringements upon the sovereignty of another state.”<sup>194</sup>

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disclosure of activities and gifts giving rise to conflicts of interest; (viii) disciplinary measures; (ix) citizen access to information and decision-making processes; (x) simplification of administrative procedures; (xi) reporting of public administration activities; (xii) enhanced accounting and auditing standards; (xiii) prohibition of off-the-record accounts and tax deductible bribes; (xiv) proportionate and dissuasive sanctions; (xv) cooperation between public and private law enforcement bodies; (xvi) ensure the active participation of civil society; (xvii) enhance transparency and public access to information; and (xviii) encourage citizens to report and expose corrupt practices. Caiden, *supra* note 167, at 103–04.

185. ROSE, KUBICIEL, & LANDWEHR, *supra* note 170, at 1.

186. Alan Doig, *Time for UNCAC Mark II?*, THE GLOBAL ANTICORRUPTION BLOG (Jan. 14, 2021), <https://globalanticorruptionblog.com/2021/01/14/guest-post-time-for-uncac-mark-ii/> [https://perma.cc/NN58-MKVX].

187. Weilert, *supra* note 47, at 239.

188. HANNES HECHLER ET AL., CAN UNCAC ADDRESS GRAND CORRUPTION? vi (2011).

189. Brunelle-Quraishi, *supra* note 181, at 165.

190. ROSE, *supra* note 20, at 97–98.

191. Michael Kubiciel, *Core Criminal Law Provisions in the United Nations Convention Against Corruption*, 9 INT'L CRIM. L. REV. 139, 141 (2009).

192. Weilert, *supra* note 47, at 239.

193. *Id.* at 224.

194. DAVIS, *supra* note 59, at 58.

In my view, however, what really matters for potential states parties is to know that the rules established by the text will not be particularly constraining and not likely to become something that could excessively restrict their margin of maneuver—think, for example, of the European Convention of Human Rights as a counterexample to this, being a regulatory regime that keeps evolving beyond the literal interpretation of the treaties.<sup>195</sup> As Rose has noted,<sup>196</sup> the UNCAC provisions are unlikely to evolve into something stronger, given that the convention is not particularly amenable to change. It does not seem reasonable either to assume that the drafting technique responds to a logic of progressive development, that is, that the reason behind this weakness is an intentional first step to be followed by further and more restrictive U.N. norms.

**Enforcement mechanisms:** Chapter VII of the UNCAC, formally titled “Mechanisms for Implementation,” comprises two articles: Article 63 on the Conference of the States Parties and Article 64 on the Secretariat. Interestingly, the text of those articles do not envisage any concrete mechanism to monitor implementation, which triggered some authoritative voices to note the obvious risk that, without “formal” enforcement mechanisms, there would be no concrete incentive for some states to implement what they ratified.<sup>197</sup>

This is precisely the opposite of the OECD approach in the OECDCCB, where the text refers to a “systematic”<sup>198</sup> or “rigorous”<sup>199</sup> mechanism, even if its configuration was not well defined. The reason for this divergence could be found in the UNCAC *travaux*, which explicitly refers to an agreement between negotiating parties that the chapter should not “deter participation,”<sup>200</sup> whereas the main objective of the OECDCCB was that no business interests of any country were put at a disadvantage.

The UNCAC mechanisms were revised in 2009 to address these concerns “under heavy pressure from governments, anticorruption organizations, civic associations, researchers, multinational development banks, and TI’s Advocacy and Legal Advice Centers.”<sup>201</sup> The new mechanism was designed as an “intergovernmental process” which “shall not serve as an instrument for interfering in the domestic affairs.”<sup>202</sup>

195. Julian Arato, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations*, 38 *YALE J. INT’L L.* 289, 343 (2013).

196. ROSE, *supra* note 20, at 99.

197. Philippa Webb, *The United Nations Convention Against Corruption. Global Achievement or Missed Opportunity?*, 8 *J. INT’L ECON. L.* 191, 224 (2005).

198. OECDCCB, *supra* note 42, art. 12.

199. OECD, RECOMMENDATION OF THE COUNCIL FOR FURTHER COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (2009).

200. UNITED NATIONS OFFICE FOR DRUG AND CRIME, TRAVAUX PRÉPARATOIRES DE LA NEGOTIATIONS FOR THE ELABORATION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION 555 (2010).

201. Caiden, *supra* note 167, at 103–04.

202. Conference of State Parties to the UNCAC Res. 3/1 (2009).

So far, the system has worked as a peer review process by two countries on the basis of self-assessment checklists, divided by their substance in two cycles: the first cycle (2010–2015) covered chapters III (criminalization and law enforcement) and IV (international cooperation) and the second (2015–2020) chapters II (prevention) and V (asset recovery).<sup>203</sup> This calendar is the first problem with the system, as it makes follow-ups of any recommendations too distant in time, requiring at least ten years to explore the same issue in relation to the same country, assuming there are no delays. Furthermore, the possibility of maintaining confidentiality of reports and the voluntary character of country visits make the review system less transparent<sup>204</sup> and, consequently, less likely to influence change.

Such an implementation design explains the skepticism of some authors regarding the effectiveness of the UNCAC, some of whom have gone as far as to call it *lex simulata*: “apparently operable, but never intended to be applied.”<sup>205</sup> Yet, in my view, which generalizes from an analysis conducted by Hannes Hechler and others for the U4 center on the suitability of the convention to address grand corruption in Kenya, Indonesia, and Bangladesh, it seems reasonable to think that the limitations of the UNCAC are not gaps in the domestication process of the norms—precisely what the UNCAC requires in its mandatory provisions—but rather in enforcement.<sup>206</sup> This is exacerbated by the vagueness and non-mandatory character of some of its key provisions, which have allowed some countries to ratify the convention without feeling obliged to change key legislation.<sup>207</sup> Finally, it is possible that the anticorruption measures contained in the UNCAC may not be suitable to be effective, as proven in some laboratory and field experiments.<sup>208</sup> This is, however, a point requiring a more nuanced approach as discussed in Part II.

### 3. *African Union Convention on Preventing and Combating Corruption*

**Objectives:** From a legal perspective, anticorruption is almost a foundational element of the African Union, which adopted the AUCPCC on the second Ordinary Session of the Assembly of the Union. Yet, the negotiation process for the AUCPCC cannot be seen as an exclusively African affair, as it took place in parallel with the UNCAC, and some influences are obvious.<sup>209</sup> However, as Antoine Martin has pointed out, the AUCPCC takes a slightly

203. Philippa Webb & Oliver Landwehr, *Mechanisms for Implementation, in THE UNITED NATIONS CONVENTION AGAINST CORRUPTION: A COMMENTARY* 627, 627–37 (2019).

204. ROSE, *supra* note 20, at 105.

205. Antoine Martin, *Implementation as the Best Way to Tackle Corruption: A Study of the UNCAC and the AUC 2003* 10 (Surrey Law Working Paper No. 07, 2011).

206. Hechler et al., *supra* note 188, at 20–22.

207. ROSE, *supra* note 20, at 98.

208. Caiden, *supra* note 167, at 92–111.

209. Adem Kassie Abebe, *The African Union Anti-Corruption Regime, in CORRUPTION AND CONSTITUTIONALISM IN AFRICA* 436–37 (Charles M. Fombad & Nico Steytler eds., 2020).

different approach from the UNCAC in terms of its objectives.<sup>210</sup> In his view, the AUCPCC aims to create a “primary level anti-corruption framework,” meaning that instead of being a comprehensive framework, it provides a foundational structure upon which countries can build their own anticorruption systems.<sup>211</sup>

The convention declares in Article 5 that its aim is to establish “the necessary conditions to foster transparency and accountability in the management of public affairs.”<sup>212</sup> This is a very modest approach when compared to “promot[ing] and strengthen[ing] measures to prevent and combat corruption more efficiently and effectively” in the UNCAC<sup>213</sup> or “prevent[ing], detect[ing], sanction[ing], and eradicat[ing] corruption” in the IACAC.<sup>214</sup>

One way to see this is not as a lack of ambition, but as a different approach altogether. The AUCPCC can be considered a building block in creating an emerging African<sup>215</sup> anticorruption voice,<sup>216</sup> justified by the emphasis on and (somewhat) distinctive approaches to certain issues. Selemani Kinyunyu argues that such an African voice has four distinguishing traits: (i) the need to bring the “Western-side” of corruption in Africa (that is, the supply side, represented by the bribing by corporations) into the spotlight; (ii) the framing of the fight against corruption as part of a broader debate around global economic and tax justice, including the progressive elimination of tax havens and secrecy; (iii) the notion that asset recovery is a

210. MARTIN, *supra* note 205, at 8.

211. *Id.*

212. AUCPCC, *supra* note 102.

213. UNCAC, *supra* note 103, art. 1.

214. IACAC, *supra* note 101, art. II(1).

215. In *The Shadow of the Sun*, Ryszard Kapuściński provided one of the most quoted quips about Africa: “[o]nly with the greatest simplification, for the sake of convenience, can we say ‘Africa’. In reality, except as a geographical appellation, Africa does not exist.” RYSZARD KAPUŚCIŃSKI, *THE SHADOW OF THE SUN* epigraph (1998). It is true indeed that we cannot speak of Africa as a country and that generalizations are always risky. Yet, despite the wide cultural and economic differences within the continent, there are some regional specificities of the African context that could justify a distinct “African approach to anticorruption.” Among others, one can think of (i) the high concentration of Least Developed Countries in the region, see UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *LEAST DEVELOPED COUNTRIES REPORT 2017* xi (2017), <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1902> [<https://perma.cc/TA53-B456>]; UNCTAD, *UN LIST OF LEAST DEVELOPED COUNTRIES* (2018), <http://unctad.org/en/pages/aldc/Least%20Developed%20Countries/UN-list-of-Least-Developed-Countries.aspx> [<https://perma.cc/AG5B-59BS>]; (ii) the sheer size of some estimates of corruption in Africa that could have reached 25% of its GDP, N.G. Elbahnasawy & C.F. Revier, *The Determinants of Corruption: Cross-Country-Panel-Data Analysis*, 50 *DEV. ECON.* 311, 312 (2012); (iii) the importance of exports of natural resources to many of its economies, often linked to prevalence of corrupt practices, UNITED NATIONS ECONOMIC COMMISSION FOR AFRICA, *AFRICAN GOVERNANCE REPORT V: NATURAL RESOURCE GOVERNANCE AND DOMESTIC REVENUE MOBILIZATION FOR STRUCTURAL TRANSFORMATION* 85 (2018); OECD, *Illicit Financial Flows: The Economy of Illicit Trade in West Africa* (2018), <http://www.oecd.org/dac/illicit-financial-flows-9789264268418-en.htm> (referring to West Africa only); or (iv) the relative prevalence of non-democratic regimes, PAUL BROOKER, *NON-DEMOCRATIC REGIMES* 187 (2013).

216. Selemani Kinyunyu, *Towards an African Voice on Anticorruption*, *THE GLOBAL ANTICORRUPTION BLOG* (Aug. 9, 2018), <https://globalanticorruptionblog.com/2018/08/09/guest-post-towards-an-african-voice-on-anticorruption> [<https://perma.cc/U8Y3-LQ9P>].

matter of special concern for African countries; and (iv) the emphasis on anticorruption education and public awareness campaigns targeting young people, due to the juvenilizing demographics of Africa.<sup>217</sup>

The AUCPCC partially reflects some of these traits, especially when compared to the UNCAC.<sup>218</sup> The AUCPCC does not approach corruption from a narrow criminal law point of view—in obvious contrast to the OECDCCB, which focuses on one type of conduct—or establish complex procedural frameworks to render the fight against corruption through international cooperation and asset recovery possible—unlike the UNCAC.<sup>219</sup> Instead, the AUCPCC is better understood as a panoply of general tools and references to certain minimum standards that an African country should utilize to build its anticorruption framework. In that sense the AUCPCC is the foremost example of the international period, as it reads as a model regulatory regime comprising the basic elements a country in Africa should address to tackle corruption in the public and private spheres.<sup>220</sup>

**Regulatory scope:** Although at first sight the regulatory scope of the AUCPCC may not appear to be that different from the UNCAC in terms of its structure and the areas regulated (criminalization, law reform, cooperation, extradition, etc.), the “emerging African voice”—or, at least, a different approach to international measures in anticorruption—can be seen from the very first articles of the English version: Parties will “undertake” to “adopt legislative and other measures” to criminalize the corruption-related behaviors listed in Article 4,<sup>221</sup> while they “*shall*” adopt norms to criminalize the laundering of proceeds<sup>222</sup> and “undertake” to “strengthen national measures to ensure that the setting up and the operations of foreign companies in the territory of a State party *shall be subject to* the respect of the national legislation in force.”<sup>223</sup> Although some have noted that AUCPCC has a more “mandatory” tone than the UNCAC, systematically using the word “shall” to bind states to criminalize certain conduct,<sup>224</sup> I believe that a better reading of the convention is to stress where it places emphases and note where its wording allows for a wider margin of maneuver for states.

Beyond the “African voice,” the AUCPCC also departs from other instruments from the international period in more substantive terms. I will leave

217. *Id.*

218. Thomas R. Snider & Won Kidane, *Combating Corruption through International Law in Africa: A Comparative Analysis*, 40 CORNELL INT'L L.J. 691, 748 (2007).

219. MARTIN, *supra* note 205, at 9.

220. Indira Carr, *Corruption in Africa: is the African Union Convention on Combating Corruption the answer?*, J. BUS. L. 111, 118–20 (2007).

221. AUCPCC, *supra* note 102, art. 5(1).

222. *Id.* art. 6.

223. *Id.* art. 5(2).

224. Bello, *supra* note 183, at 311.

aside some problems identified in different language versions,<sup>225</sup> and focus instead on more explicit regulatory choices. Some are linked to the nature and membership of the African Union—as we will see below in relation to the enforcement mechanism—but others are the result of compromises during negotiation that are more telling of traits unique to the “African” approach to anticorruption.

First, the AUCPCC,<sup>226</sup> unlike the UNCAC,<sup>227</sup> has well-defined mandatory provisions on “pure” private sector corruption.<sup>228</sup> With all its problems,<sup>229</sup> this is nonetheless a reflection of the African Union’s regional definition of corruption, which includes actions fully within the private sphere. This definition is complemented by the special consideration and strong wording given to the funding of political parties: states parties “shall adopt legislative and other measures . . . (1) to proscribe the use of [illegal] funds to finance political parties; and (2) incorporate the principle of transparency” into their funding.<sup>230</sup> The analogous articles in the UNCAC were well-known to have created strong disagreements during negotiations,<sup>231</sup> which were finally resolved by using the softest possible terms: “each state party shall consider.”<sup>232</sup>

Second, similar to the IACAC and unlike the UNCAC,<sup>233</sup> the AUCPCC regulates certain criminal offenses (namely, illicit enrichment<sup>234</sup> and diversion of public assets)<sup>235</sup> in a more aggressive way. Article 8—despite its soft wording permitting countries to avoid regulation if it is inconsistent with their legal tradition—clearly establishes that significant and unexplained increases of wealth by public officers and elected officials can be criminalized in a manner more familiar to the civil law tradition, as discussed above in the IACAC context. Diversion (that is, theft or reallocation of public property belonging to the state for private use not envisaged by law), according to Article 4(1)(d),<sup>236</sup> must be considered corrupt behavior and criminalized.<sup>237</sup> Although some are very critical of these criminal provisions,<sup>238</sup> Bello

225. See Peter W. Schroth, *The African Union Convention on Preventing and Combating Corruption*, 49 J. AFR. L. 24, 25–27 (2005) (discussing the interpretation problems created by the different language versions).

226. AUCPCC, *supra* note 102, art. 11.

227. Abebe, *supra* note 209, at 436–37.

228. Bello, *supra* note 183, at 319.

229. Schroth, *supra* note 225, at 32–33 (“[W]hatever message [in the UNCPCCC on private corruption] is cryptically conveyed.”).

230. AUCPCC, *supra* note 102, art. 10.

231. UNITED NATIONS OFFICE FOR DRUG AND CRIME, *supra* note 200, at 99, 202.

232. AUCPCC, *supra* note 102, arts. 7(2)–(3), 21.

233. LOHAUS, *supra* note 140, at 66–67.

234. AUCPCC, *supra* note 102, art. 8.

235. *Id.* art. 4(1)(d).

236. *Id.*

237. It is possible that this more determined approach to diversion is perhaps justified by social experience. See Emeka Emmanuel Okafor, *Combating High-Profile Corruption in Transitional Societies: Overview of Experiences from Some African Countries*, 11 ANTHROPOLOGIST 117, 117 (2009) (describing how African populations are exposed to some distinct experiences of corruption).

has shown that it is possible to domesticate these mandates in common-law countries such as Nigeria.<sup>239</sup>

Third, the AUCPCC clearly moves away from a purely criminal law driven approach to anticorruption. Beyond the usual preventive and education measures present in all instruments of the international period, the clearest example of the AUCPCC is its explicit use of codes of conduct to fight corruption in public service, intervening at a more administrative level with non-criminal procedural standards.<sup>240</sup> However, the AUCPCC still encourages enforcement through independent authorities,<sup>241</sup> avoiding conflicts of interest common in other models of self-assessment.

Fourth, the AUCPCC regulates in some detail the (then) relatively novel issue of whistleblowers and their protection.<sup>242</sup> The convention balances rights afforded to whistleblowers with protection against abuses of those rights. In particular, it mandates countries to create a system for punishing “those who make false and malicious reports against innocent persons.”<sup>243</sup>

Fifth, the AUCPCC grants jurisdiction to states parties for offences committed outside its jurisdiction if conduct in its view affects “its vital interests or the deleterious or harmful consequences or effects of such offences impact [ ] the [s]tate [p]arty,”<sup>244</sup> probably considering the possibility that a kleptocrat, once they have left power, can escape prosecution by evading territorial jurisdiction.

Overall, the claim that the AUCPCC regulatory scope is so seriously flawed and poorly executed that it “would create many problems in litigation and international disagreements for decades to come”<sup>245</sup> seems excessive. In my view, the way norms are drafted in the African convention should be seen as a willingness to create an African perspective in the fight against corruption, adapted to regional realities and societal concerns as discussed above. A more legitimate criticism would be to question how much of the convention is really mandatory or binding. This would be an issue more closely connected to the convention’s wording and enforcement mechanisms, not its substantive scope.

**Enforcement mechanisms:** It is refreshing to note that one of the first lines of the 2018 African Union Assembly Declaration on the African Anti-Corruption Year acknowledges the failure of anticorruption measures on the continent.<sup>246</sup> First, regarding effectiveness of the measures, its preamble

238. Schroth, *supra* note 225, at 28–34.

239. Bello, *supra* note 183, at 318–19.

240. AUCPCC, *supra* note 102, art. 7(2).

241. *Id.*; Carr, *supra* note 220, at 119.

242. AUCPCC, *supra* note 102, arts. 5(5)–(7), 32, 33.

243. *Id.* art. 5(7).

244. *Id.* art. 13(1)(d).

245. Schroth, *supra* note 225, at 38.

246. The African Union declared 2018 as the African Anti-Corruption Year. The fight against corruption was a central focus of the 31<sup>st</sup> Summit of the African Union, held on the 1<sup>st</sup> and 2<sup>nd</sup> of July 2018 in Mauritania, where the Declaration on the African Anti-Corruption Year was passed. Afr. Union Gen.



states that “adoption of the [existing] legal and policy frameworks have not had the desired success in effectively tackling corruption in many member [s]tates.”<sup>247</sup> Second, the resolution diplomatically declares that the adoption and implementation of the AUCPCC “has been uneven across the continent,”<sup>248</sup> with a fairly low rate of domestic implementation of the convention provisions.<sup>249</sup> These low levels of implementation persist in 2021 despite continued concern and unusual institutional investment from the African Union—the Advisory Board on Corruption<sup>250</sup> is one of only three treaty bodies created to monitor compliance with an A.U. treaty.<sup>251</sup>

The reasoning of the Declaration seems to assume that if the AUCPCC was fully implemented, there would be a noticeable effect on corruption. Although one may disagree with this logic—a country may be in full conformity with the convention and still have rampant corruption if it only implements the letter and not the spirit of the convention—it is interesting to analyze in some detail the enforcement mechanism, or what the convention calls the “follow-up” mechanism.<sup>252</sup>

The AUCPCC has a top-down approach to monitoring and enforcement for an anticorruption convention unseen outside of the African continent.<sup>253</sup> As I have noted elsewhere,<sup>254</sup> this ground-breaking approach<sup>255</sup> deserves some credit as it moves from peer evaluation, which has a tendency for under-deterrence because peers fear that they will become the subject of such evaluations themselves in the future,<sup>256</sup> to evaluation by an indepen-

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Assembly, Decl. 1(XXXI), Declaration on the African Anti-Corruption Year, pmb. (Jul. 2, 2018). The Advisory Board on Corruption of the African Union had a vision of having, by 2020, “an efficient organization that provides pertinent support to Member States in the sustainable implementation of the A.U. Convention and the fight against corruption in Africa.” AFR. UNION ADVISORY BD. ON CORRUPTION, *Mission and Vision of the Board*, <https://anticorruption.au.int/index.php/en/mission-and-vision> [<https://perma.cc/95QN-AU7H>] (last visited Apr. 2, 2022).

247. Afr. Union Gen. Assembly, *supra* note 246.

248. *Id.*

249. Hon. Daniel Batidam, *Remarks on UN System Support of the African Union in Winning the Fight against Corruption*, ¶ 1 (May 12, 2018).

250. AUCPCC, *supra* note 102, art. 22.

251. The other two were the African Commission on Human and Peoples’ Rights and the African Committee of Experts on the Rights and Welfare of the Child. Tiyanjana Maluwa, *Ratification of African Union Treaties by Member States: Law, Policy and Practice*, 13 MELB. J. INT’L L. 636, 674 (2012).

252. AUCPCC, *supra* note 102, art. 22.

253. SAMUEL M. MAKINDA, F. WAFULA OKUMU & DAVID MICKLER, *THE AFRICAN UNION: ADDRESSING THE CHALLENGES OF PEACE, SECURITY, AND GOVERNANCE* (2015).

254. See generally José-Miguel Bello y Villarino, *Women in Anticorruption Laws: The Case for More Gender-responsive International Treaties*, in INTERNATIONAL WOMEN’S RIGHTS AND GENDER EQUALITY: MAKING THE LAW WORK FOR WOMEN 149 (R. Vijayarasa ed., 2021).

255. The only other international instrument with a similar top-down approach is the New Partnership for Africa’s Development.

256. This is a possibility discussed in the context of the Universal Periodic Review in relation to the behavior of African countries. Allehone Mulugeta Abebe, *Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council*, 9 HUM. RTS. L. REV. 1, 20 (2009).

dent body.<sup>257</sup> It has even been called the “most advanced monitoring system” in a multilateral anticorruption instrument.<sup>258</sup>

Its two-phase design is also promising. In the first phase, experts assess the conformity of states parties with the standards recognized by the convention.<sup>259</sup> In the second, they focus on the enforcement structure implementing the domesticated norms and its practical application.<sup>260</sup> The general view is that first phase has been generally successful and the second a failure, due to a lack of domestic implementation.<sup>261</sup> In my view, the reasons for such a failure are the usual ones that condemn expert-driven mechanisms in international settings, even before they start operating: lack of state-driven political support and lack of resources.

As some have noted, many African leaders are “the products of corrupt practices [and] not ready to dismantle the patron-client political systems that promote corruption.”<sup>262</sup> Of the longest serving non-royal heads of state or government, African leaders take four of the top six spots.<sup>263</sup> The Advisory Board, consequently, has no power to research or investigate cases and no viable mechanism to impose any kind of formal or informal sanctions.<sup>264</sup> Furthermore, the Board has no real autonomy, as it must submit its findings to the Executive Council of the African Union “for . . . decision and action.”<sup>265</sup>

From the AUCPCC’s inception, it was clear that African countries could not finance this monitoring system on their own,<sup>266</sup> which would easily explain the very limited budget allocated to the advisory council: \$1.5 million USD in 2014.<sup>267</sup> According to its own webpage, the current substantive staffing of the board—beyond the board members—is composed of the executive secretary, a documentalist, and two policy officers.<sup>268</sup> For compari-

257. AUCPCC, *supra* note 102, art. 22.

258. Abebe, *supra* note 209, at 445.

259. MARTIN, *supra* note 205, at 10.

260. *Id.*

261. *Id.*

262. MAKINDA, OKUMU & MICKLER, *supra* note 253, at 87.

263. Zoe Ettinger, *After a historic vote, Vladimir Putin could remain in power in Russia until 2036. Here are 15 of the world's longest-serving leaders.*, BUSINESS INSIDER AUSTRALIA (Jul. 3, 2020), <https://www.businessinsider.com.au/worlds-longest-serving-leaders-2020-7> [<https://perma.cc/9VVM-3HXS>].

264. Guy Marcel Nono, *L'effectivité des normes du développement durable dans le processus d'intégration en Afrique* (May 24, 2019), <http://hdl.handle.net/20.500.11794/34966> [<https://perma.cc/3FWQ-S48U>].

265. Mpazi Sinjela, *The African Convention on the Prevention and Combating of Corruption*, in THE AFRICAN UNION: LEGAL AND INSTITUTIONAL FRAMEWORK 291, 300 (A.A. Yusuf & F. Ouguerouz eds., 2012).

266. MARTIN, *supra* note 205, at 10.

267. MAKINDA, OKUMU & MICKLER, *supra* note 253, at 85.

268. The webpage also lists a driver, a secretary, an IT person, and a finance officer and accounts assistant. See Afr. Advisory Bd. on Corruption, *Secretariat* (2022), <https://anticorruption.au.int/en/secretariat> [<https://perma.cc/8NVY-GN4E>].

son, the European Anti-fraud Office at the European Commission has almost 400 employees.<sup>269</sup>

C. *Transnational Period: From the Financial Action Task Force to the 2012 WTO Procurement Agreement*

In the years surrounding the adoption of the UNCAC, the anticorruption tide also reached several international organizations and global actors, which, until then, had only tangentially considered the phenomenon within their mandates. The global trend of placing corruption as a problem to be addressed in the international landscape emboldened these international actors to openly address the issue through legal mechanisms within their mandates.

This period created a series of powerful mechanisms that gave anticorruption enforcement the “teeth” absent in the transborder and international periods. The approaches developed in the transnational period were—and still are—sectoral, and lacked the legitimacy of treaties arising from their consent mechanisms,<sup>270</sup> but those limitations were partially mitigated by higher degrees of effectiveness, especially when compared to the instruments developed in the previous phases.<sup>271</sup> The most significant examples of this phase are the extension of the Financial Action Task Force’s (“FATF”) activity to corruption and the creation of World Bank (“WB” or “Bank”) sanctions for corrupt practices, but I also briefly discuss other lesser known initiatives: the work of the International Chamber of Commerce (“ICCh”) in Paris and the World Trade Organization Global Procurement Agreement (“WTO GPA”).

The FATF was an initiative of the Reagan Administration to involve other G7 members in its war on drugs by targeting the laundering of profits derived from that trade.<sup>272</sup> After an unsuccessful attempt in 1988, the Task Force was created by the G7 in 1989 as a coordination mechanism without international legal personality, specifically aimed at money laundering connected to drug trafficking.<sup>273</sup> This was expanded to other offenses in 1996.<sup>274</sup> The heyday of the FATF came in the context of the U.S.-led “War on Terror,” which reinforced the mechanism to effectively undermine the

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269. EUR. ANTI-FRAUD OFF., *The OLAF Report 2019* (2020), [https://ec.europa.eu/anti-fraud/system/files/2021-09/olaf\\_report\\_2019\\_en.pdf](https://ec.europa.eu/anti-fraud/system/files/2021-09/olaf_report_2019_en.pdf) [<https://perma.cc/RM89-GRPv>] (with a very different mandate).

270. See ROSE, *supra* note 20, at 14 (regarding the FATF).

271. *Id.* at 178.

272. *Id.* at 179.

273. *Id.* at 179–80.

274. David Chaikin, *Commercial corruption and money laundering: a preliminary analysis*, 15 J. FINANC. CRIME 269, 277 (2008).

finance channels of terrorist organizations, particularly Al Qaeda<sup>275</sup> and, later, the Islamic State of Iraq and Syria (“ISIS”).<sup>276</sup>

Within this expansion process, at some point in the early 2000s the FATF showed a concern for wider corrupt practices. It first noted that private corruption—for example, bribes to bank officers to evade reporting obligations—had the capacity to undermine anti-money-laundering regulations.<sup>277</sup> Sometime in the following years (although it is not clear precisely when), the FATF started including anticorruption within its mandate. In contrast to its work on antiterrorism, there was no clear announcement declaring the beginning of the fight against public corruption.<sup>278</sup> The clearest sign of this expansion was probably the decision to include among its recommendations “enhanced due diligence” (“EDD”) by financial institutions for Politically Exposed Persons (“PEPs”).<sup>279</sup> In my view, this was the defining moment linking the FATF to anticorruption, as grand public corruption is the only crime that systematically requires the intervention of a PEP and, therefore, the only one that would frequently include a PEP laundering the ill-gotten gains. This is now reflected in recommendations 22 and 23.<sup>280</sup>

In its current form the FATF has produced 40 recommendations<sup>281</sup> with two main objectives: criminalization (namely money laundering and terrorist financing) and prevention (introduction of measures to prevent proceeds of crime from entering the legitimate financial system).<sup>282</sup> Despite their misleading name, not following the FATF recommendations can result in very real sanctions for the worst offenders—namely, “restriction of financial transactions with the non-cooperative jurisdiction”<sup>283</sup>—that can severely affect the economy of a country.<sup>284</sup> FATF recommendations can also become

275. Kathryn L. Gardner, *Fighting Terrorism the FATF Way*, 13 GLOB. GOV. REV. MULTILATERALISM INT'L ORGAN. 325, 326 (2007).

276. Bjørn Skogstad Aamo, *Combating Money Laundering and Terrorist Financing: Monitoring the Implementation of FATF Recommendations*, 28 EUR. BUS. L. REV. 95 (2017).

277. Chaikin, *supra* note 274, at 269.

278. Lishan Ai, *A cost-effective strategy of implementing international anti-corruption initiatives: Enhancing the role of anti-money laundering in combating corruption*, 16 J. MONEY LAUNDERING CONTROL 83, 84 (2012).

279. Sungyong Kang, *Rethinking the Global Anti-Money Laundering Regulations to Deter Corruption*, 67 INT'L COMP. L.Q. 695, 700 (2018).

280. FIN. ACTION TASK FORCE, INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION 16 (2022), <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> [<https://perma.cc/L6UY-U3PP>].

281. *Id.*

282. Leonardo Borlini, *Regulating Criminal Finance in the EU in the Light of the International Instruments*, 36 Y.B. EUR. L. 553, 567 (2017).

283. ROSE, *supra* note 20, at 178; see also Leonardo Borlini & Francesco Montanaro, *The Evolution of the EU Law against Criminal Finance: The Hardening of FATF Standards Within the EU*, 48 GEO. J. INT'L L. 1009, 1016 (2016).

284. See Husain Haqqani, *Pakistan Remains in the UN Terror Financing Grey Zone* (Oct. 20, 2020), <https://thediplomat.com/2020/10/pakistan-remains-in-the-un-terror-financing-grey-zone/> [<https://perma.cc/6KJA-KAMH>] (discussing the risks for Pakistan as part of the FATF “grey list”).

compulsory for countries seeking loans from the IMF or WB through conditionality mechanisms often inserted in IMF or WB financial agreements.<sup>285</sup> The progressive application of these mechanism has led some authors to consider the FATF an effective tool in the fight against corruption.<sup>286</sup>

However, if one looks at the most recent consolidated assessments of the FATF,<sup>287</sup> and particularly at the implementation of the most relevant recommendations in the anticorruption context, that is, recommendation 12 in connection to 22 and 23, the effectiveness of FATF architecture for some of the most powerful global players is questionable.<sup>288</sup> After the fourth round of assessments, significant jurisdictions such as the United States, Australia, or China received a “Non-compliant - There are major shortcomings” score for implementation of EDD measures against PEPs.<sup>289</sup> In this sense, the FATF may be an effective tool against corruption overall, but not one that clearly guarantees such effectiveness equally across the world.

This is not a problem observed for the **sanctions procedures of the World Bank**, because it targets private individuals and not countries.<sup>290</sup> The procedures were developed following a similar path to the FATF in terms of the incorporation of anticorruption measures. In 2004 and 2006, the Executive Directors of the Bank approved reforms to the sanctions process to ensure that its loans were used for the purpose they were granted for and that the process was not marred by corruption.<sup>291</sup> The reforms meant that sanctions could be imposed on certain firms—and their controlling and controlled firms—when the Office of Suspension and Debarment found evidence of corrupt practices in existing or past contracts with the Bank.<sup>292</sup>

The system now has a long record and is generally considered an efficient way to deal with the problem of corruption at the World Bank level.<sup>293</sup> Leveraging the existence of debarment procedures (a ban from contracting

285. Nankpan Moses Nanyun & Alireza Nasiri, *Role of FATF on Financial Systems of Countries: Successes and Challenges*, 24 J. MONEY LAUNDERING CONTROL, 234, 237–38 (2021).

286. Ejike Ekwueme & Mahmood Bagheri, *Money Cleansing and Effectiveness of FATF Coercive Measures: An Overview*, 1 AMICUS CURIAE 274, 284 (2020).

287. FIN. ACTION TASK FORCE, CONSOLIDATED ASSESSMENT RATINGS (Mar. 22, 2022), <https://www.fatf-gafi.org/media/fatf/documents/4th-Round-Ratings.pdf> [<https://perma.cc/QW8D-CA93>].

288. Richard Messick, *Three Measures to Put Corruption Enablers Out of Business*, GLOBAL ANTICORRUPTION BLOG (Nov. 18, 2020), <https://globalanticorruptionblog.com/2020/11/18/time-to-crack-down-on-lawyers-accountants-and-other-corruption-enablers/> [<https://perma.cc/4TBW-W9WJ>].

289. FIN. ACTION TASK FORCE, *supra* note 287.

290. Tina Søreide, Linda Groning & Rasmus Wandall, *An Efficient Anticorruption Sanctions Regime? The Case of the World Bank*, 16 CHI. J. INT'L L. 523, 534 (2015).

291. WORLD BANK SANCTIONS PROCEDURES (Oct. 15, 2006).

292. WORLD BANK GROUP, SANCTIONS FOR FRAUD AND CORRUPTION, III.B.4 (Jul. 1, 2016).

293. See Sope Williams, *The Debarment of Corrupt Contractors from World Bank-Financed Contracts*, 36 PUB. CONT. L.J. 277, 305 (2006) (concluding that the World Bank's debarment measures represent a “watershed” moment for fighting corruption at the World Bank level, but nonetheless face risks to efficiency in fighting corruption at the country level); see Søreide, Groning & Wandall, *supra* note 290, at 551.

with the Bank for several years) in other international organizations<sup>294</sup> and some countries,<sup>295</sup> the current policy allows for “cross-debarment” among international financial institutions—that is, being barred from partaking in initiatives funded by any of the participating development banks if debarred by one of them.<sup>296</sup> This could be a powerful tool in modifying the conduct of certain international corporations, as one violation in one jurisdiction by a subsidiary can result in an almost global sanction for all companies in a group.<sup>297</sup>

Yet, the system’s efficacy is tarnished by its narrow scope. As it only targets economic actors, it is futile against governments and corrupt officials beyond the evidence it could collect about certain officials from a firm’s behavior. Furthermore, the system appears to be better suited to address fraud instead of corruption, as corruption is the cause of only less than one sixth of the sanctions, with debarment being the most common penalty.<sup>298</sup>

The transnational period also witnessed other new developments of anticorruption mechanisms connected to the financial and corporate sectors. In this period, various international actors faced similar problems on how to address corrupt practices in their areas of activity, which triggered some concerted efforts to develop rules to deal with those instances.

In the context of private-private corruption, the **International Chamber of Commerce** in Paris, which acts as a powerhouse for international commercial arbitration through its dispute resolution services, was probably the first international non-governmental institution to develop rules to deal with corruption (in this case, bribery) in 1977. This set of rules was relatively ambitious and even included a complaint mechanism for private parties to bring allegations against other private parties.<sup>299</sup> However, the rules had a very limited impact, as they were never properly implemented.<sup>300</sup> Over the course of seventeen years the mechanism was only used in one case, and the system was eventually abandoned.<sup>301</sup> The IChC’s second attempt to combat corruption was the adoption of a report in 1996 developing a less

294. Stuart H. Deming, *Anti-Corruption Policies: Eligibility and Debarment Practices at the World Bank and Regional Development Banks*, 44 INT’L L. 871, 884 (2010); see also Christopher R. Yukins, *Cross-Debarment: A Stakeholder Analysis*, 45 GEO. WASH. INT’L L. REV. 219, 221 (2013) (“[C]ross-debarment is now the norm among the World Bank and the other multilateral development banks[.]”).

295. See Pascale Helene Dubois, *Domestic and International Administrative Tools to Combat Fraud & Corruption: A Comparison of US Suspension and Debarment with the World Bank’s Sanctions System*, 2012 U. CHI. LEGAL F. 195 (2012) (comparing the debarment procedures of the World Bank and the United States).

296. WORLD BANK GROUP, *supra* note 292, at B.7.

297. Norbert Seiler & Jelena Madir, *Fight Against Corruption: Sanctions Regimes of Multilateral Development Banks*, 15 J. INT’L ECON. L. 5, 28 (2012).

298. Søreide, Groning & Wandall, *supra* note 290, at 534.

299. David Hess & Thomas W. Dunfee, *Fighting Corruption: A Principled Approach: The C Principles (Combating Corruption) Symposium: Fighting International Corruption & (and) Bribery in the 21st Century*, 33 CORNELL INT’L L.J. 593, 604 (2000).

300. Paul D. Carrington, *Enforcing International Corrupt Practices Law*, 32 MICH. J. INT’L L. 129, 133 (2010).

301. Hess & Dunfee, *supra* note 299, at 604.

ambitious set of rules, which was updated in 2005 to establish corporate rules of conduct and provide recommendations to governments.<sup>302</sup> In 2011, the IChC rules were significantly amended again to reflect the spirit of the U.N. Guiding Principles on Business and Human Rights. The IChC recommended inserting the rules into private contracts to bind parties.<sup>303</sup>

The importance of this initiative is that it perfectly illustrates the evolution of anticorruption measures. The first IChC attempt, even if well-designed, was too ambitious for its time, whereas the post-1996 evolution flows in parallel with the wider attention the corruption issue was receiving worldwide. The transnational period created an opportunity for the IChC to develop mechanisms within its mandate (private law and particularly dispute resolution mechanisms) that could prove effective in the fight against corruption by generating enforceable legal obligations between commercial parties.<sup>304</sup> However, as with the other initiatives discussed above, the narrow scope of the solution (only workable if parties include it in the contract and the arbitration is under IChC rules) limits its application. Even if applicable, tribunals (both in private-private and private-state arbitrations) are still facing serious difficulties in how to deal with corrupt behaviors in their decisions.<sup>305</sup>

Finally, a reference should be included here to the **Revised WTO Agreement on Government Procurement** (“GPA”),<sup>306</sup> as it provides a perfect endpoint for the transnational period. As in the previous case studies, corruption was undeniably a relevant issue for the activity of the organization. The trigger in this case was the development of a new agreement on the rules for procurements of international scope where corruption could be particularly relevant and would, therefore, need some degree of regulation.<sup>307</sup>

The result was the insertion of the obligation to prevent corruption in procurement in the GPA.<sup>308</sup> This obligation was included in the GPA’s operational part, which made it automatically enforceable<sup>309</sup> and, at face value, a potentially effective measure against corruption in international settings. Regrettably, this potential capacity was undermined by its vague drafting,<sup>310</sup>

302. ABIOLA MAKINWA, PRIVATE REMEDIES FOR CORRUPTION: TOWARDS AN INTERNATIONAL FRAMEWORK 129 (2012).

303. Wouters, Ryngaert & Cloots, *supra* note 30, at 32.

304. Michael Joachim Bonell & Olaf Meyer, *The Impact of Corruption on International Commercial Contracts*, in GENERAL REPORTS OF THE XIXTH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW 195, 195 (2017).

305. See Lucinda A. Low, *Dealing with Allegations of Corruption in International Arbitration*, 113 AJIL UNBOUND 341, 345 (2019).

306. WORLD TRADE ORG., REVISED AGREEMENT ON GOVERNMENT PROCUREMENT (2012), [wto.org/english/docs\\_e/legal\\_e/rev-gpr-94\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm) [https://perma.cc/WMR3-DWVY].

307. Chang-fa Lo, *Anti-Corruption Provisions in the New GPA*, 7 TRADE L. DEV. 21, 26 (2016).

308. WORLD TRADE ORG., *supra* note 306, at art. IV.4.

309. Robert D. Anderson & Anna Caroline Muller, *The Revised WTO Agreement on Government Procurement (GPA): Key Design Features and Significance for Global Trade and Development*, 48 GEO. J. INT’L L. 949, 969 (2016).

310. Lo, *supra* note 307, at 24.

which is both a reflection of the difficulty in agreeing on substantial anticorruption obligations when consensus is required and a reminder of the limitation of anticorruption measures in sectoral approaches, where the effectiveness of the anticorruption clauses could be set aside in favor of higher sectoral objectives—here, reaching an agreement that can promote international competition in procurement.

Regarding the latter, the GPA (similar to the FATF and the WB sanctions) addresses the fight against corruption not as an aim in itself but as a prerequisite for the achievement of other objectives—in this case, facilitating the participation of foreign firms in domestic procurements. This makes the anticorruption measure a rule of secondary order that is only useful insofar as it facilitates the main objective. The advantage of the anticorruption norms developed in this transnational period—their enforcement mechanisms—is then tempered by this secondary nature.

In this sense, the disruptive approaches analyzed in the next subsection are better attempts at expanding existing enforcement mechanisms specifically for anticorruption purposes. This is clearly illustrated when the characteristics of this period listed below are contrasted to the main traits of the disruptive approaches. The transnational period's main characteristics are:

- (i) It addresses the existence of corruption within another regulatory environment where existing international law already operates.
- (ii) It is a sector-specific approach that was developed mainly outside conventional norms. It experiments with selective approaches to aspects of corruption that may not always involve state actors.
- (iii) Its main approach to anticorruption is to focus on delivering primary results, linking consequences to the violation of its norms. The wider moral considerations about corruption are secondary to the declared objective of ensuring that corrupt behaviors do not undermine wider regulatory frameworks.
- (iv) It normally involves the expansion of existing mechanisms to corrupt practices. Existing sanctions or norm-based procedures are extended to cover corrupt practices without developing *ex novo* mechanisms to specifically target corruption.

#### D. Disruptive Approaches

Finally, in the last decade there have been several attempts to look at corruption through a legal lens in ways not envisaged before. Similar to the initiatives in the transnational period, they are generally designed to exploit known mechanisms and structures of international law. Yet, instead of placing anticorruption as an ancillary goal to other objectives, these new initiatives have been developed with the stated aim of fighting corruption.

These new approaches—which I call here “disruptive” given their declared or implicit objective of breaking from existing practices—are mainly



untested. Despite intrinsic differences between them, they can be grouped together as they have been devised to address some of the existing limitations of mechanisms created in previous periods and share some common traits.

The main disruptive approaches mentioned in the literature that have achieved some degree of policy traction are the configuration of a human right to live free of corruption,<sup>311</sup> the establishment of an international anticorruption court,<sup>312</sup> and the imposition of targeted individual sanctions for corrupt officials.<sup>313</sup> However, achieving policy traction does not mean that all of these are workable approaches as of today. As discussed below, in my view, some are more likely to come to fruition than others and the steps required for implementation differ widely.

Nonetheless, they are important for the purpose of this Article as they try to solve identified problems of the extant regime. The brief presentation below highlights to the reader the contrast between current positive international anticorruption law and proposed alternatives, with the aim of providing an adequate context for assessing the viability of the proposals espoused in Part II.

Yet, before entering the discussion of these unimplemented proposals, I believe it is necessary to discuss here a precursory (and implemented) disruptive initiative, the **Extractive Industries Transparency Initiative** (“EITI”). The EITI is a wider transparency and accountability initiative<sup>314</sup> that includes (at least) the Kimberley Process Certification Scheme of 2003, the Global Witness/Publish What You Pay Coalition of 2002 and the Fisheries Transparency Initiative of 2017.<sup>315</sup> The EITI is also of particular relevance for this Article as it was specifically created as a mechanism to respond

311. See generally MARTINE BOERSMA, *CORRUPTION: A VIOLATION OF HUMAN RIGHTS AND A CRIME UNDER INTERNATIONAL LAW?* (2012); MATTHEW MURRAY & ANDREW SPALDING, *BROOKINGS, FREEDOM FROM OFFICIAL CORRUPTION AS A HUMAN RIGHT* (2015), [https://humanrightscommission.house.gov/sites/humanrightscommission.house.gov/files/documents/Freedom%20from%20Corruption%20as%20a%20Human%20Right\\_0.pdf](https://humanrightscommission.house.gov/sites/humanrightscommission.house.gov/files/documents/Freedom%20from%20Corruption%20as%20a%20Human%20Right_0.pdf) [<https://perma.cc/5L3F-39AH>]; Cecily Rose, *The Limitations of a Human Rights Approach to Corruption*, 65 INT’L COMP. L.Q. 405 (2016); Simon Bronitt & David Kinley, *The Limits of Corporate Responsibility and Human Rights: A Right to Live Free from Corruption Symposium to Commemorate the Retirement of Professor Tom Campbell*, 42 AUSTL. J. LEGAL PHIL. 228–46 (2017); Anne Peters, *Corruption as a Violation of International Human Rights*, 29 EUR. J. INT’L L. 1251–87 (2018).

312. See Mark L. Wolf, *The World Needs an International Anti-Corruption Court*, 147 DAEDALUS 144 (2018).

313. Anton Moiseienko, “No safe haven”: denying entry to the corrupt as a new anti-corruption policy, 18 J. MONEY LAUNDERING CONTROL 400 (2015); ANTON MOISEIENKO, *CORRUPTION AND TARGETED SANCTIONS: LAW AND POLICY OF ANTI-CORRUPTION ENTRY BANS* (2019).

314. Andrés Mejía Acosta, *The Impact and Effectiveness of Accountability and Transparency Initiatives: The Governance of Natural Resources*, 31 DEV. POL’Y REV. 89, 89–90 (2013).

315. SCHOOR, *supra* note 8, at 140 (the Maritime Anti-Corruption Network (“MACN”), created in 2011, is sometimes included in this list, but it strictly operates as a coordination network, with no known legally binding rules or enforcement mechanisms between the parties).

to international corruption scandals—namely, bribes from oil companies in Angola.<sup>316</sup>

The EITI is a complex “hybrid”<sup>317</sup> multi-stakeholder mechanism registered as a non-profit association in Norway, where its International Secretariat is based.<sup>318</sup> Although the correlation between more transparency and less corruption is far from linear,<sup>319</sup> the EITI uses transparency as a tool to restrain the emergence of corrupt behavior in the extractive sector. The use of transparency is probably justified in the narrow context of the extractives sector for the reasons described by Ivar Kolstad and Arne Wiiig: namely, influencing the decision-making process of agents, the incentives of stakeholders, the selection of honest contract partners and bureaucrats, and the use of information.<sup>320</sup>

The EITI, essentially a voluntary mechanism where stakeholders publicize payments and levels of extraction through dedicated channels,<sup>321</sup> is enforced through a dual dynamic.<sup>322</sup> On the one hand, it operates at the level of motivating peers, signaling good intentions, responding to internal dynamics, and setting standards for others.<sup>323</sup> On the other hand, compliance with EITI objectives could be demanded by external entities as a requirement for loans from international financial institutions or rewarded by certain international actors with concrete benefits, such as increased aid,<sup>324</sup> which automatically converts the EITI into a conditionality mechanism.

The EITI, as the first truly disruptive anticorruption approach, offers several valuable lessons for the development of new initiatives. First, it shows that it is possible to be disruptive in the fight against corruption at an international level. The original forces behind the EITI—financier and philanthropist George Soros, U.K. Prime Minister Tony Blair, and the NGO Global Witness<sup>325</sup>—developed a promising solution from a vacuum, with the help of only their political and financial clout. In anticorruption, leverage really matters.

Second, and related to the above, the initiative demonstrates the difficulty of translating a disruptive approach into real results if that leverage is lim-

316. ROSE, *supra* note 20, at 136–37.

317. Wouters, Ryngaert & Cloots, *supra* note 30, at 67.

318. EITI INT’L SECRETARIAT, EITI GLOBAL FACTSHEET (Mar. 2022), [https://eiti.org/sites/default/files/attachments/eiti\\_factsheet\\_en\\_08.2020.pdf](https://eiti.org/sites/default/files/attachments/eiti_factsheet_en_08.2020.pdf) [<https://perma.cc/XMW2-65H2>].

319. Monika Bauhr & Marcia Grimes, *Transparency to curb corruption? Concepts, measures and empirical merit*, 68 CRIME L. SOC. CHANGE 431 (2017).

320. Ivar Kolstad & Arne Wiiig, *Is Transparency the Key to Reducing Corruption in Resource-Rich Countries?*, 37 WORLD DEV. 521, 522–25 (2009).

321. SCHOOR, *supra* note 8, at 8.

322. Elizabeth David-Barrett & Ken Okamura, *Norm Diffusion and Reputation: The Rise of the Extractive Industries Transparency Initiative*, 29 GOVERNANCE 227, 228 (2016).

323. ROSE, *supra* note 20, at 162.

324. *Id.*

325. CHAYES & CHAYES, *supra* note 14, at 137–38.

ited. The reason for the EITI's mixed track record<sup>326</sup> probably has little to do with the limitations of transparency to fight corruption. Transparency, indeed, seems like a powerful tool to mitigate corrupt behaviors in this context, as it can be in other areas where there are regulated payments for concrete goods, such as forestry.<sup>327</sup> Its limitation is probably better explained by the challenge of developing a set of norms through consensus and opt-in processes, which means that in order to garner support from all stakeholders, the adopted set of norms may not be the most likely to deliver quantifiable change.<sup>328</sup>

Third, the initiative highlights the need to transition into hard law territory if one wants a continuously functioning anticorruption mechanism. As is the case with other transparency and accountability initiatives, the EITI—as a non-binding mechanism by nature—relies intensively on the goodwill of the parties and only employs harder enforcement mechanisms in very narrow settings (e.g., conditionality for FMI loans or disbursement of foreign aid). Although this soft law character may seem like a good solution for facilitating cooperation between international and national actors—public and private—to close gaps in global and national regulation,<sup>329</sup> it is also the original sin of its limitations as the legal restrictions to exit the system (internationally and domestically) are almost irrelevant, as the U.S. withdrawal in 2017 clearly illustrates.<sup>330</sup>

Fourth, new mechanisms need to have their own tools to ensure compliance and permanence—in the EITI case, the conditionality for aid and an actor's reputational stake can fulfill this role. The importance of leverage at the creation level is paramount, but the design should envisage ways to maintain that leverage, ensuring that there is a significant cost for leaving the system or violating its rules.

In the end, these four learnings are just manifestations of the dilemma between the feasible and the ideal in anticorruption at the international level. To some extent, this dilemma is also a learning that some of the new disruptive approaches try to overcome. As discussed below one of the main traits of these approaches is their focus on creating legal obligations capable of being directly inserted into existing binding systems and, hence, bypassing the consensus stage.

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326. Compare Kerem Öge, *Which Transparency Matters? Compliance with Anti-Corruption Efforts in Extractive Industries*, 49 *RESOURCES POL'Y* 41, 48 (2016), with Mejía Acosta, *supra* note 314.

327. See generally Nalin Kishor & Richard Damania, *Crime and Justice in the Garden of Eden: Improving Governance and Reducing Corruption in the Forestry Sector*, in *THE MANY FACES OF CORRUPTION* 89–114 (J. Edgardo Campos & Sanjay Pradhan eds., 2007).

328. ROSE, *supra* note 20, at 172.

329. David-Barrett & Okamura, *supra* note 322, at 243.

330. Letter from Gregory J. Gould, Director, U.S. Dep't of Interior, Office of Natural Resources Revenue, to Fredrik Reinfeldt, Chair, Extractive Industries Transparency Initiative Board (Nov. 2, 2017) (on file with author).

This is a clear characteristic, for example, of the movement to consolidate a **right to live free of corruption as a human right**, as, in practical terms, it would bring the anticorruption fight into the system of international application and enforcement of human rights.<sup>331</sup> This was the original point made by Julio Bacio-Terracino in a seminal 2010 conference on the issue.<sup>332</sup> In his view, “Human rights standards, as established in major international treaties and domestic legislation, *impose obligations on states*. Focusing on specific human rights will help to *identify who is entitled to make claims when acts of corruption occur*.”<sup>333</sup>

The idea, with different degrees of intricacy, has witnessed several iterations over the last ten years, with advocates<sup>334</sup> being tempered by more skeptical voices.<sup>335</sup> I will only focus here on the specific idea of creating a human right, or in Anne Peters’ softer terms, the “legal claim that under certain conditions a corrupt act (or the toleration of corruption) itself may constitute an actual violation of human rights.”<sup>336</sup> This analysis disregards the multiple intersections between the human rights regime and the fight against corruption, as it is a matter that has already received some attention in the U.N. human rights system.<sup>337</sup>

A good review of the different dimensions this disruptive approach was provided by Peters in the above-mentioned 2018 article in the European Journal of International Law,<sup>338</sup> which triggered several reactions in the same outlet.<sup>339</sup> However, I believe this recent literature has misplaced its focus from a pragmatic point of view, as it does not satisfactorily consider what the creation of such a human right would mean in practical terms.<sup>340</sup>

First, establishing such a right would give an inherent status to the anticorruption fight that would allow it to permeate domestic jurisdictions,<sup>341</sup> particularly in countries where international human rights norms are automatically considered part of the domestic law or inform the latter’s applica-

331. See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1941 (2002).

332. Julio Bacio-Terracino, *Linking Corruption and Human Rights*, 104 AM. SOC’Y INT’L L. PROC. . 243 (2010)

333. *Id.* at 245 (emphasis added).

334. BOERSMA, *supra* note 311; MURRAY & SPALDING, *supra* note 311; Bronitt & Kinley, *supra* note 311.

335. Cecily Rose, *M. Boersma, Corruption: A Violation of Human Rights and a Crime under International Law?*, *Intersentia*, 61 NETH. INT’L L. REV. 455 (2014) (Book Review); Rose, *supra* note 311.

336. Peters, *supra* note 311, at 1258.

337. Human Rights Council Res. 29/11, U.N. Doc. A/HRC/RES/29/11 (July 2, 2015); Working Group on Business and Human Rights, Rep. of the Human Rights Council., U.N. Doc. A/HRC/44/43 (June 17, 2020).

338. Peters, *supra* note 311.

339. Kevin E. Davis, *Corruption as a Violation of International Human Rights: A Reply to Anne Peters*, 29 EUR. J. INT’L L. 1289 (2018); Franco Peirone, *Corruption as a Violation of International Human Rights: A Reply to Anne Peters*, 29 EUR. J. INT’L L. 1297 (2018).

340. See, e.g., Davis, *supra* note 339 (arguing that, given the “sophistication” of the existing anticorruption regime, the main advantage of a human rights-based approach would be its informational role).

341. MURRAY & SPALDING, *supra* note 311, at 12; Bronitt & Kinley, *supra* note 311, at 239.

tion.<sup>342</sup> Second, it would open the door to its enforcement through international human rights institutions, developing on the reasoning in a 2010 judgment of the Economic Community of West African States Court of Justice<sup>343</sup> or, more relevantly, a series of decisions by the Inter-American Court of Human Rights.<sup>344</sup> The work of this latter court may be crucial in this debate if the recognition of a special obligation to “prevent corruption that causes human right violations”<sup>345</sup> advances further into the recognition of that obligation of the state as a human right *per se*. Third, it could allow the international community to put the spotlight on cases of state capture as part of human rights reviews, shifting enforcement from domestic to international procedures.

That third argument—i.e., the idea that existing instruments were not effective mechanisms against corruption, especially in cases of state capture—is precisely what led Martine Boersma to argue in favor of a human rights-based approach, as well as proposing an alternative approach based on international criminal law, as discussed immediately below.<sup>346</sup> Yet, as a review of her book noted, this does not necessarily mean that the international human rights regime would prove useful to fight corruption, as the implementation of international recommendations or judgments would ultimately depend on the same domestic organs that are corrupt.<sup>347</sup> Further, as Peters noted, amalgamating human rights and anticorruption could fuel objections to the international anticorruption agenda frequently seen in the human rights context, as part of the European/Western model of statehood and rights.<sup>348</sup>

These objections are even more relevant to the idea of an **international anticorruption court**.<sup>349</sup> This proposal can be traced back to Boersma’s Ph.D. dissertation, redrafted in her 2012 book.<sup>350</sup> There, she suggested two international enforcement options as viable paths towards the prosecution of

342. Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT’L. L. 211, 217 (1998).

343. Peters, *supra* note 311, at 1257–58 (“The Court stated that corruption in the education sector has a ‘negative impact’ on the human right to quality education, as guaranteed by Article 17 of the African Charter of Human and People’s Rights but does not *per se* constitute a violation of that right.”).

344. CLAUDIO E. NASH ROJAS, PEDRO AGUILÓ BASCUÑÁN & MARÍA LUISA BASCUR CAMPOS, *CORUPCIÓN Y DERECHOS HUMANOS: UNA MIRADA DESDE LA JURISPRUDENCIA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS* (2014). In *Ramírez Escobar et al. v. Guatemala*, for example, the Inter-American Court of Human Rights explicitly recognized the negative impact of organized corruption on the enjoyment of human rights, even if the court did not qualify the corruption itself as a breach of a human rights obligation. Jimena Reyes, *State Capture through Corruption: Can Human Rights Help?*, 113 AJIL UNBOUND 331, 332 (2019).

345. Reyes, *supra* note 344, at 334.

346. BOERSMA, *supra* note 311.

347. Rose, *supra* note 335, at 457.

348. Peters, *supra* note 311, at 1278–79.

349. See, e.g., Lea Schneider, *The International Criminal Court (ICC) – A Postcolonial Tool for Western States to Control Africa?*, 1 J. INT’L CRIM. L. 90 (2020).

350. BOERSMA, *supra* note 311.

grand corruption.<sup>351</sup> First, Boersma put forward the possible inclusion of an anticorruption provision in the Rome Statute allowing for prosecution of high-level public officials for grand corruption.<sup>352</sup> Second, similar to but quite a few years before Mark L. Wolf, she considered the establishment of an international anticorruption court or tribunal, which could be permanent or ad hoc.<sup>353</sup>

As Rose noted when reviewing Boersma's book, such legal developments were "very unlikely" at the time.<sup>354</sup> The same can be said about Wolf's initial 2014 proposal,<sup>355</sup> which was received with polite<sup>356</sup>—and sometimes less polite<sup>357</sup>—skepticism. Wolf's ideas at the time were essentially a development of the original writings of Ndiva Kofele-Kale<sup>358</sup> on a new international crime, which he insightfully coined "patrimonicide," committed when economic rampage risks destruction of a country.<sup>359</sup>

This approach had its heyday with the signature in 2014 of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights ("the Malabo Protocol"), which would grant an international court jurisdiction to try corruption and money laundering.<sup>360</sup> Some even expected the Protocol to be a game changer in the African context,<sup>361</sup> but as of February of 2022, it has only been ratified by eight States, of the necessary fifteen ratifications.<sup>362</sup>

The last iteration of the idea, proposed by Wolf in 2018,<sup>363</sup> still has similar limitations. It appropriately identifies the need to offer an enforcement system for anticorruption measures outside of the domestic domain as, at

351. Rose, *supra* note 335, at 459.

352. BOERSMA, *supra* note 311, at 348; *see also* Ben Bloom, *Criminalizing Kleptocracy: The ICC as a Viable Tool in the Fight Against Grand Corruption*, 29 AM. U. INT'L L. REV. 627 (2013).

353. BOERSMA, *supra* note 311, at 348.

354. Rose, *supra* note 335, at 459.

355. MARK L. WOLF, THE CASE FOR AN INTERNATIONAL ANTI-CORRUPTION COURT (July 2014), <https://www.brookings.edu/wp-content/uploads/2016/06/AntiCorruptionCourtWolfFinal.pdf> [<https://perma.cc/GRX9-8KXR>].

356. *See* Matthew Stephenson, *The Case Against an International Anti-Corruption Court*, GLOB. ANTI-CORRUPTION BLOG (July 31, 2014), <https://globalanticorruptionblog.com/2014/07/31/the-case-against-an-international-anti-corruption-court/> [<https://perma.cc/38DT-BE3A>].

357. *See* BRETT D. SCHAEFER, STEVEN GROVES & JAMES M. ROBERTS, WHY THE U.S. SHOULD OPPOSE THE CREATION OF AN INTERNATIONAL ANTI-CORRUPTION COURT (Oct. 1, 2014), <https://www.heritage.org/global-politics/report/why-the-us-should-oppose-the-creation-international-anti-corruption-court> [<https://perma.cc/4XUH-LGSC>].

358. *See generally* Ndiva Kofele-Kale, *The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law*, 34 INT'L L. 149 (2000); NDIVA KOFELE-KALE, THE INTERNATIONAL LAW OF RESPONSIBILITY FOR ECONOMIC CRIMES: HOLDING STATE OFFICIALS INDIVIDUALLY LIABLE FOR ACTS OF FRAUDULENT ENRICHMENT (2013).

359. Kofele-Kale, *supra* note 358, at 174 n.113.

360. Afr. Union, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* art. 28(A) (June 27, 2018).

361. *See* MOISEIENKO, *supra* note 313, at 8.

362. Afr. Union, *supra* note 360.

363. *See* Wolf, *supra* note 312.

least in cases of state capture, leaders control prosecutors and judges.<sup>364</sup> It also aptly notes that there is no shortage of international anticorruption norms and that the problem is the need for good faith enforcement.<sup>365</sup> Yet, the assumption that this could be solved through an international anticorruption court seems naïve and unlikely to materialize.<sup>366</sup> Wolf's proposal lacks the originality of Boersma's, but it adequately points out a few factors to consider in new anticorruption norms.

First and foremost in this case, Wolf's proposal shows that a new norm should consider its own viability. Despite some very authoritative voices that see an international forum as a feasible option,<sup>367</sup> it seems that the initial skepticism towards international enforcement prevails.<sup>368</sup> The criticisms addressed to Boersma by Rose are even more evident today, when political support for the ICC and legal cooperation with its system seems to be crumbling, at least in Africa.<sup>369</sup> Political support both for the objective of a measure and the legal tools used to implement it are then essential, regardless of the scope of the instrument (bilateral, regional or global).

Second, it shows the limited impact of ideas exclusively developed in an academic setting, particularly compared to when the same arguments are voiced by other actors with different profiles. The EITI required the support of the best-known international financier and the UK Prime Minister to come to fruition, even as a voluntary system.<sup>370</sup> Bloom's and Boersma's ideas may have never reached international fora if they were not amplified by Wolf, a U.S. federal judge, and this would still be a fairly low standard in terms of political backing, if it were not reamplified by the support of the governments of Canada and the Netherlands. This highlights the need to find the right avenues to promote disruptive proposals.

Third and finally, it adequately identifies the problem of collecting evidence in international proceedings against corruption. Wolf's main solution to this problem is a better use of the International Anti-Corruption Coordination Centre,<sup>371</sup> an outcome of the 2016 London Anticorruption Sum-

364. *Id.* at 145.

365. *Id.* at 147, 148.

366. See MATTHEW STEPHENSON & SOFIE ARJON SCHÜTTE, AN INTERNATIONAL ANTI-CORRUPTION COURT? A SYNOPSIS OF THE DEBATE (2019), <https://www.u4.no/publications/an-international-anti-corruption-court-a-synopsis-of-the-debate> [https://perma.cc/YN7X-HBDU].

367. See generally RICHARD GOLDSTONE & ROBERT ROTBERG, GLOB. ANTICORRUPTION BLOG, An International Anticorruption Court Is Not a Utopian Dream or a Distraction, (Oct. 18, 2018), <https://globalanticorruptionblog.com/2018/10/18/guest-post-an-international-anticorruption-court-is-not-a-utopian-dream-or-a-distraction/> [https://perma.cc/Y24S-P6L8].

368. See Alex Whiting, *Is an International Anti-Corruption Court a Dream or a Distraction?*, GLOB. ANTICORRUPTION BLOG (Oct. 4, 2018), <https://globalanticorruptionblog.com/2018/10/04/guest-post-is-an-international-anti-corruption-court-a-dream-or-a-distraction/> [https://perma.cc/DL28-GHTN]; STEPHENSON & SCHÜTTE, *supra* note 366, at 5.

369. Mandiaye Niang, *Africa and the Legitimacy of the ICC in Question*, 17 INT'L CRIM. L. REV. 615, 618 (2017).

370. See ROSE, *supra* note 20, at 138.

371. Wolf, *supra* note 312, at 149.

mit.<sup>372</sup> Yet, more original answers should be envisaged in any disruptive proposal which involves the implementation of an internationalized dispute resolution mechanism. What is clear is that these answers cannot depend on the willing cooperation of the parties to the process—as required for the establishment of an international court—whose leaders may be the same ones exposed to prosecution.

This third consideration is also relevant in relation to the proposal of international anticorruption mechanisms for the imposition of **individual non-criminal sanctions**, as it would also require the collection of information in other jurisdictions. In my view, this is the most promising approach among the proposals developed in this phase due to its targeted character and the limited institutional actions that its creation would require. However, it is also the least developed from a theoretical perspective.

The main study about the links between corruption and targeted sanctions—concretely, entry bans—is relatively recent.<sup>373</sup> Anton Moiseienko's book is a comprehensive analysis of the existing mechanism to impose entry bans for those considered responsible for grand corruption in domestic law, and it adequately explores the common principles on denial of entry<sup>374</sup> adopted by the G20 Anti-Corruption Working Group in 2012<sup>375</sup> and APEC's Course of Action on Fighting Corruption and Ensuring Transparency.<sup>376</sup> Regretfully, it falls short in developing possible models for the internationalization of this approach or its extension to asset freezing. Nonetheless, based on Moiseienko's writings,<sup>377</sup> one can envisage two approaches: one within the Security Council and one through multi-state coordination.

First, from a political point of view, it is not impossible to imagine the creation of a system to chase individual perpetrators and impose on them individual sanctions (a global freezing of assets or general travel bans) based on a Security Council resolution following the model of the mechanisms established in the fight against terrorism<sup>378</sup> as, in the end, such a system is barely more than an administrative decision.<sup>379</sup> Beyond the well-known problems of the potential violation of human rights by these norms<sup>380</sup> ad-

372. Office of the UK Prime Minister, Communiqué (May 12, 2016).

373. MOISEIENKO, *supra* note 313.

374. *Id.* at 5.

375. See G20, G20 LEADERS DECLARATION (June 19, 2012), <http://www.g20.utoronto.ca/2012/2012-0619-loscabos.html> [<https://perma.cc/A74V-UMPX>].

376. Asian-Pacific Economic Cooperation [APEC], *APEC Course of Action on Fighting Corruption and Ensuring Transparency*, APEC Doc. 2004/AMM/033rev2 (Nov. 18, 2004).

377. MOISEIENKO, *supra* note 313.

378. See generally Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT'L L. 333 (2003) (describing the initial setting up of the U.N. system of individual sanctions in the counter-terrorism context).

379. See Rene Uruena, *International Law as Administration: The UN's 1267 Sanctions Committee and the Making of the War on Terror*, 4 INT'L ORG. L. REV. 321, 331 (2008).

380. Daniel Halberstam & Eric Stein, *The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, 46 COMMON MKT. L. REV. 13, 15–16 (2009).



dressed mainly by E.U. courts,<sup>381</sup> the system is fairly straight forward. In principle, nothing beyond political will would be an obstacle for an internationalization of a regime similar to that established in the U.S. Global Magnitsky Act.<sup>382</sup>

Second, a similar measure could be created through coordination among several states outside the Security Council. This approach could be materialized in certain formal settings (e.g., the OECD) or through more informal coordination (e.g., G7, G20, or regional meetings of leaders). However, this less ambitious proposal would face legitimacy problems, as it would involve a group of countries adopting decisions about nationals of other countries outside an established institutional structure.

Yet, in terms of legitimacy, it is important to distinguish here the differences between a travel ban and a freezing of assets. The establishment of a visa ban on someone does not require a complicated process, and it can be done at a discrete administrative level, as it is an essential prerogative of the state to decide which foreigners should be allowed in its territory.<sup>383</sup> The Schengen countries have a coordinated system in which one country can list a person as someone who should be denied entry into Schengen territory for, among other reasons, suspicion of involvement in acts of a criminal nature, including corruption, even if there is no conviction, through what is called an “alert” in the Schengen Information System.<sup>384</sup> The analogous process in the U.S. system since 2015 is the legal authority of the U.S. State Department to *publicly*—before it was possible to do it without publicity—designate individuals pursuant to § 7031(c), an “honor” first granted in 2018 to Adriatik Llalla, a judge in Albania.<sup>385</sup> Previous known cases—such as the Vice President of Afghanistan in 2016—were only publicly known as they were—more or less intentionally—leaked to the media.<sup>386</sup> Until the Llalla

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381. See Elena Chachko, *Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence*, 44 *YALE J. INT'L L.* 1, 5 (2019).

382. See 22 U.S.C. § 2656; Exec. Order No. 13818, 31 C.F.R. 583.501–583.508 (2017); Press Release, U.S. Dep't of Treas., United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe (Dec. 21, 2017), <https://home.treasury.gov/news/press-releases/sm0243> [<https://perma.cc/ZRP8-H5DQ>].

383. Rosalyn Higgins, *The Right in International Law of an Individual to Enter, Stay in and Leave a Country\**, 49 *INT'L AFF.* 341, 342 (1973).

384. The inner workings of this mechanism have been reformulated in recent E.U. legislation, but essentially involve one country adding an alert to the system with a brief explanation about the reason. The default consequence is that other countries should not issue a visa if an alert is active in the system. See Regulation 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the Establishment, Operation and Use of the Schengen Information System (SIS) in the Field of Border Checks, and Amending the Convention Implementing the Schengen Agreement, and Amending and Repealing Regulation (EC) No. 1987/2006, 2018 O.J. (L 312).

385. LIANA W. ROSEN & MICHAEL A. WEBER, CONG. RSCH. SERV., IF10905, FY2020 FOREIGN OPERATIONS APPROPRIATIONS: TARGETING FOREIGN CORRUPTION AND HUMAN RIGHTS VIOLATIONS 12 (2020).

386. Daniel Binette, *Visa Denial as an Anticorruption Tool: The Need for Clarity and Communication*, *GLOB. ANTICORRUPTION BLOG* (Aug. 1, 2016), <https://globalanticorruptionblog.com/2016/08/01/visa-denial-as-an-anticorruption-tool-the-need-for-clarity-and-communication/> [<https://perma.cc/76ZS-7TK3>].

case, the U.S. model was based on “credible information” gathered discretely by the U.S. State Department that designated foreign officials—and, by extension, their immediate family members—who “have been involved, directly or indirectly, in significant corruption . . . or a gross violation of human rights.”<sup>387</sup>

More substantive sanctions, however, such as freezing assets, require serious considerations of a legal nature, namely proportionality of the measure and, particularly, due process requirements in sanctioning procedures, as E.U. case law clearly illustrates.<sup>388</sup> Yet, even in these cases courts have given substantial deference to political actors to define their margin of maneuver on how to conduct foreign policy.<sup>389</sup>

In that sense, both the Security Council-based system and the coordination model of implementation could allow an asset freeze or a travel ban on persons considered to be essential in grand corruption. Public designations of senior officials would always have a cost in political terms, but they are substantive signals to other potentially corrupt actors. Bypassing the Security Council would exacerbate that political cost—imagine, for example, a designation of a high-ranking European official supported by Russia and China but opposed by the U.K. and France—and limit the legitimacy of the measure. It would also risk becoming a political tool undermining the moral value of the measure. Yet, the coordination model would offer obvious advantages as it would allow for more responsive exchanges of information between the parties when compared to more “structured” systems and a higher number of designations, as it would not be subject to vetoes.

In broader terms, this proposal illustrates the value of narrowing the aim of international measures to individual actors, be they natural or legal persons, something that avoids stigmatizing countries and could trigger domestic movements to hold those persons accountable. It also highlights how certain measures do not require complex *ex novo* systems and could be implemented relatively quickly and at a reasonably low cost. Finally, the existence of appeals to independent bodies—in the examples above a role played by the European Courts—ensures an element of transparency and protection for those accused of corrupt behaviors. Yet, if the courts are part of the same institutional structure as those imposing the measures, it is difficult for a foreigner accused of corruption to feel protected by those adjudication mechanisms. In the case of coordination mechanisms for targeted individual sanctions, it would be desirable to allow appeal of those sanctions to an international body or panel that could offer a better appearance of impartiality.

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387. LIANA W. ROSEN & MICHAEL A. WEBER, CONG. RSCH. SERV., R46362, FOREIGN OFFICIALS PUBLICLY DESIGNATED BY THE U.S. DEPARTMENT OF STATE ON CORRUPTION OR HUMAN RIGHTS GROUNDS: A CHRONOLOGY 2 (2020).

388. Chachko, *supra* note 381, at 14–15.

389. *Id.* at 14.

Overall, the four disruptive approaches discussed in this section offer very valuable lessons to the proposals included in the next section while highlighting the limitations of the conventional approaches. In contrast to the transnational period, these disruptive approaches present the following common characteristics:

- (i) They have mostly originated in academic or scholarly settings as ideas and have only received limited—if any—institutional or country support. Hence, their viability as feasible policy options remains mostly untested.
- (ii) They are designed to address limitations of the current regime, mainly by providing avenues for redress in courts or complaint mechanisms.
- (iii) They use the mechanisms of existing institutions, but develop an anticorruption angle for the specific purpose of fighting corruption, not as an ancillary approach to some other objective.

## II. THE SHORTCOMINGS OF CONVENTIONAL ANTICORRUPTION LAW

At this point one could forgive the reader for being overwhelmed by the breadth of legal initiatives used to fight corruption. However, for the purpose of Part II, I focus my critique on the main extant instruments comprising the normative international anticorruption framework created specifically to address corruption.<sup>390</sup> Within these boundaries, this final section first provides an overview of the limitations of the main conventional anticorruption instruments—the IACAC, OECDCCB, UNCAC, and AUCPCC—taking as a reference point the shortcomings that transnational and disruptive approaches try to address. It then concludes, on the basis of this analysis, with an idea of where to go in the next “phase”: injecting anticorruption measures into international trade law.

It is important to note here that restricting this analysis to these treaties limits the validity of the observations. Yet, as these instruments are the core of existing conventional anticorruption law, this limitation may be more theoretical than practical. Table 1 below lists these treaties and their entry into force, as well as their geographical scope and their parties, which adequately illustrates the wide scope of application of these instruments.

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390. Aram Khaghaghordyan, *International Anti-corruption Normative Framework: the State of the Art*, ANTICORRP (Dec. 11, 2014), <http://anticorpp.eu/publications/international-anti-corruption-normative-framework-the-state-of-the-art/> [https://perma.cc/698T-S3Y4].

TABLE 1. CONVENTIONAL ANTICORRUPTION NORMS DISCUSSED IN THIS SECTION

Open for signature (date)	Phase	Convention	Initialism	Entry into force (date)	Scope and parties (total and % of total) <sup>391</sup>
29.03.1996	<i>International</i>	<i>Inter-American Convention Against Corruption</i>	IACAC	03.06.1997	34 OAS members (97% of total membership; all but Cuba)
21.11.1997	<i>Transborder</i>	<i>Organization for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions</i>	OECDCCB	15.02.1999	44 (100% of total OECD membership + others)
11.07.2003	<i>International</i>	<i>African Union Convention on Preventing and Combating Corruption</i>	AUCPCC	05.08.2006	44 A.U. members (80%)
31.11.2003	<i>International</i>	<i>United Nations Convention Against Corruption</i>	UNCAC	14.12.2005	187 (186 States + E.U.) U.N. States + Econ. Integr. Organizations (96% of U.N. members)

#### A. *Why is thirty years not enough?*

The main observation derived from this subsection is that conventional anticorruption law is not sufficient to overcome factors at play that affect the prevalence of corruption, because it does not include the appropriate legal mechanisms that could respond to or prevent corruption.

391. This refers to the group of states parties as of November 2020.

Other authors have explored this issue with analogous purposes and similar optics. Ophelie Brunelle-Quraishi discussed the link between effects and a broader concept of implementation for the UNCAC.<sup>392</sup> A. Keith Thompson looked at the importance of the lack of political will of developed countries to implement what he calls “anti-corruption law,” which includes domestic laws on foreign bribery.<sup>393</sup> Liu saw structural flaws in the monitoring system of the OECDCCB, which could explain its lack of effectiveness.<sup>394</sup> Sean J. Griffith and Thomas H. Lee applied interest group theory to explore why and when anticorruption norms work.<sup>395</sup> Yet, as far as I can tell, no one has ever directly challenged the foundational idea of these instruments by arguing that the existing conventional approach cannot work. What I argue below is that the lack of effectiveness is explained, to a significant extent, by certain common characteristics intrinsic to the conventional approach itself.

I am well aware of the consequences of this claim, which I therefore qualify in two crucial respects. First, when I say “to a significant extent,” I use a non-quantitative standard that cannot be tested in a methodologically sound manner within the existing circumstances. The obvious way to prove that statement—i.e., studying a convention with a different approach that correlated with improvements in indicators of perceived corruption—does not exist. Second, what I propose below is not to accept defeat, but to look instead at conventional anticorruption law with new eyes and consider what we can learn from the experiences in the transnational and disruptive periods to inform a new generation of anticorruption norms that can leverage the legitimacy of treaties without suffering from their limitations in terms of effectiveness.

As I have argued in some detail before,<sup>396</sup> I believe that the effectiveness of existing conventional anticorruption law is undermined by two types of factors. The first group, which I call “mechanical,” relates to existing mechanisms for ensuring the fulfillment of international obligations. The second group, which I call “substantive,” refers to the limitations that can be found in the regulatory content of conventional anticorruption law.

Mechanical limitations encompass mainly one problem: the incapacity of the conventions’ dynamics to adequately address ineffective domestication of convention norms, or worse, a complete absence of domestication. Domestication is paramount for conventional anticorruption norms to work. This is

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392. See generally Brunelle-Quraishi, *supra* note 181.

393. See generally A. Keith Thompson, *Does anti-corruption legislation work?*, 7 *WORLD CUST. J.* 39 (2013).

394. See generally Liu, *supra* note 82.

395. See generally Sean J. Griffith & Thomas H. Lee, *Toward an Interest Group Theory of Foreign Anti-Corruption Laws*, 2019 *U. ILL. L. REV.* 1227 (2019).

396. An initial application of this framework can be found in Bello y Villarino, *supra* note 24.

nothing new.<sup>397</sup> From a wider point of view, this is a concern often repeated by scholars of international law.<sup>398</sup> Yet, in the anticorruption domain this is felt in a particular way. Compared to the mechanisms of the transnational period, there are limited incentives for conventional norms to be domesticated in the first place. Compared to the proposals from the disruptive period, there is no adequate system for enforcement of domestication. The absence of systems of adjudication,<sup>399</sup> as suggested in some of the proposals from the disruptive phase—such as the international anticorruption courts, the use of the human rights institutional systems—or the transnational phase—the administrative mechanisms of centralized enforcement, in the debarment system of the WB—make external enforcement impossible. Furthermore, as the obligations are not reciprocal—or to be more precise, are not synallagmatic—conventional norms do not allow other parties to respond to that lack of domestication. For example, it would make no sense for one state to reverse its domesticated transparency obligations because some other state has not incorporated that obligation in its legislation. Perhaps the only exception to this rule of thumb is the cooperation in asset recovery inserted in the UNCAC in Chapter V. Therefore, as I have argued before, the consequences of non-fulfillment of anticorruption obligations are mainly suffered at a domestic level.<sup>400</sup> This may remind readers of similar arguments in connection to the domestication of international human rights obligations.<sup>401</sup> Yet, in my view, when compared to the effects of negative comments in human rights peer-review mechanisms,<sup>402</sup> or the loss of compliance reputation<sup>403</sup> that often accompanies violations of human rights, the effects in the anticorruption domain of these other alternative compliance mechanisms are much more modest.

Regarding the second group of limitations, those of substantive character, there are essentially two types of problems. One is connected to this lack of implementation mechanism: the lack of punitive effects in cases of violations. The other is characteristic of anticorruption treaties: the implementation of the obligations by the subjects of the norms.

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397. See, e.g., Matti Joutsen & Adam Graycar, *When Experts and Diplomats Agree: Negotiating Peer Review of the UN Convention Against Corruption*, 18 GLOB. GOVERNANCE 425, 426 (2012).

398. See Pierre-Hugues Verdier & Mila Versteeg, *Modes of Domestic Incorporation of International Law*, in RESEARCH HANDBOOK ON THE POLITICS OF INTERNATIONAL LAW 149, 149 (2017).

399. The exception to this statement is the UNCAC, where Article 66 allows states parties to request the settlement of disputes between two or more states parties by arbitration or, on a subsidiary basis, at the International Court of Justice. Nonetheless, as I have noted before, given the “internal nature of the obligations under the convention, there are limited incentives and high political costs in pursuing this option.” Bello y Villarino, *supra* note 24, at 52.

400. See *id.* at 50.

401. See, e.g., ADAM MCBETH, JUSTINE NOLAN & SIMON RICE, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* (2017).

402. Edmund Bao & Kath Hall, *Peer Review and the Global Anti-Corruption Conventions: Context, Theory and Practice*, AUSTL. Y.B. INT’L L. (2017).

403. See generally Andrew Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823–88 (2002).

The lack of implementation mechanisms operates in two ways. First, it refers to how the texts of the conventions weaken their own implementation. For example, many substantive UNCAC obligations are undermined as they openly condition their implementation to being “appropriate” in the domestic legal system.<sup>404</sup> These qualifying clauses “provide a potential escape route for reluctant governments.”<sup>405</sup> This was a concern noted at the time of drafting by the chairman of the Ad Hoc Committee in reply to the insistence of states parties to condition the application of each article on “its conformity with domestic law.”<sup>406</sup> The chairman noted that “such references should be the exception rather than the norm, because international law was not meant to be a mere reflection of national laws.”<sup>407</sup> That is precisely what most proposals in the disruptive period tried to solve facilitating some degree of self-execution. Similarly, this problem is also observed in the WTO GPA, where its vague wording<sup>408</sup> has undermined its effectiveness. Secondly, even without complaint mechanisms or reciprocity it should be possible to facilitate collective enforcement if the conventions attached some automatic consequences, as it is the case with the conditionality attached to the EITI, where the release of IMF funds could be conditioned on meeting the obligations embedded in the EITI.

Finally, even if one assumes that a country is willing to domesticate and create the adequate structures for implementation, the actual implementation of conventional anticorruption norms depend on the willingness of those who benefit the most from the survival of corrupt practices: officials who could be bribe takers.<sup>409</sup> As commonly noted, police officers, elected officials, and administrative and judicial authorities are among those most commonly involved in corruption,<sup>410</sup> and, at the same time, the ones responsible for the implementation of the substantive obligations in conventional anticorruption law.<sup>411</sup> This is precisely the limitation that the proposals in the disruptive period favoring an international court are trying to solve, outsourcing enforcement to an independent judicial body and hence bypassing domestic implementation<sup>412</sup>

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404. Weilert, *supra* note 47, at 234.

405. Hechler et al., *supra* note 188.

406. Webb, *supra* note 197, at 228.

407. *Id.*

408. Lo, *supra* note 307, at 24.

409. See Nicholas J. Lord, *Responding to Transnational Corporate Bribery Using International Frameworks for Enforcement: Anti-bribery and Corruption in the UK and Germany*, 14 CRIMINOL. & CRIM. JUST. 100, 101 (2014).

410. Transparency International, *Global Corruption Barometer* (2017), <https://www.transparency.org/en/gcb/global/global-corruption-barometer-2017> [https://perma.cc/3J4X-XP6N].

411. Juan O. Perla, *A Game Theoretic Analysis of the Inter-American Convention against Corruption*, 16 RICH. J. GLOB. L. & BUS. 61 (2016) (making this case, although restricted to the IACAC).

412. Some have made a similar case, discussing the power of willful dishonesty by a small minority to block the implementation of anticorruption measures. See, e.g., ANDREW HAYWARD & TONY OSBORN, *THE BUSINESS GUIDE TO EFFECTIVE COMPLIANCE AND ETHICS: WHY COMPLIANCE ISN'T WORKING - AND HOW TO FIX IT* (2019).

B. *Where to go in the next thirty years?*

All conventions require a compromise. The shortcomings discussed in the previous section are *ex post* observations that many negotiators were probably anticipating as logical consequences of certain solutions adopted in a drafting process. Those solutions may have been rationally expected to undermine the effectiveness of the convention as noted, for example, by the observation of the Chairman of the Ad Hoc Committee of the UNCAC cited above.<sup>413</sup> Despite that, the negotiators opted to go ahead with them because, in the end, diplomacy—even in an international conference to draft new international law—is not an art of extremes but one of possibilities.

As an academic, I can only discuss the rationale of the conventions in terms of methodologically sound arguments. That will deliver a fairly negative judgment of the achieved results.<sup>414</sup> Yet, this may be unfair. As a diplomat, I believe that the relevance of powerful narratives—such as the existence of widely ratified international conventions against corruption—cannot be underestimated. In the words of another author who also wore both hats:

[We] are in desperate need of new, more engaging background narratives, instead of just endless calls for institutional reform [but this] requires thinking of legal and political expertise not as separate worlds, but as alternative descriptions of a single world, each in possession of its own kind of wisdom [to help] in the construction of just societies.<sup>415</sup>

This resonates with a long tradition of diplomat-authors which can be traced back to François de Callières in the 17th century who, in his book *De la Maniere de Négocier*, “conveys the belief that in unsettled political conditions where opposed interests cannot be overcome or suppressed, they can in part be mediated by honest dealings.”<sup>416</sup> What really matters then is to *honestly* understand why the conventions are not showing the desired effect and what can be done in following iterations to make them more effective, if possible.

The honest answer I propose is that, for the reasons detailed above, it seems plausible that conventional anticorruption law will keep failing in its objective to effectively fight corruption. It is not a matter of giving more time to these conventions to develop their full effect because their lack of effectiveness is linked to intrinsic flaws in their designs. This is not a peaceful claim, and many would disagree.

413. See Webb, *supra* note 197, at 228.

414. See generally Bello y Villarino, *supra* note 24.

415. Martti Koskeniemi, *Speaking the Language of International Law and Politics: Or, of Ducks, Rabbits, and Then Some*, in *MOBILISING INTERNATIONAL LAW FOR “GLOBAL JUSTICE”* 45 (Jeff Handmaker & Karin Arts eds., 2018).

416. Maurice Keens-Soper, *Francois de Callières and Diplomatic Theory*, 16 *HIST. J.* 485, 499 (1973).



An article comparing the evolution of four American countries that ratified the IACAC argued that “the fact that corruption perception has increased in these countries does not necessarily mean that the IACAC is failing to influence changes in behavior within the countries.”<sup>417</sup> Its author was at the time the Director of Democratic Security at the Nicaraguan Ministry of Foreign Affairs and, hence, she was well-placed to make that judgment. In her view the IACAC—the first of the conventional anticorruption norms—“has served as the basis to revise, update and enact new anti-corruption legislation.”<sup>418</sup>

However, it may be time for a new paradigm. Time for a fifth period in which the existing limitations can be addressed. In June of 2021, at the first-ever special session devoted to corruption, the U.N. General Assembly accepted the insufficiency of the current system and declared their firm commitment to “step up [their] efforts to promote and effectively implement [their] anticorruption obligations and robust commitments under the international anticorruption architecture, which we as a community have created together, and *will further work towards finding synergies and common solutions.*”<sup>419</sup>

In my view the best avenue to do so is through the use of international trade law. This is something where the international community already has some experience, as can be seen in Article 26 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.<sup>420</sup> As I have suggested elsewhere, comprehensive trade and investment treaties only require the political will of the parties, in which the party most interested in inserting anticorruption measures can entice the less inclined parties with benefits in other parts of comprehensive agreements.<sup>421</sup> Arbitration and international litigation can provide the incentives for effective domestication and solutions for cases of defective application (or non-implementation) of the anticorruption obligations. It could bring the interests of private parties and states into the system together, sidelining minorities reluctant to diminish the opportunities for corruption. It can, in the end, create a setting that would maintain the legitimacy of the international period without forgoing the effectiveness of top-down systems from the transnational or disruptive periods.

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417. Altamirano, *supra* note 118.

418. *Id.*

419. G.A. Res. A/RES/S-32/1, *supra* note 1.

420. Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 26, Mar. 8, 2018, 2018 A.T.S. 23 (Austl.). See Bello y Villarino, *supra* note 24 (discussing the advantages of this approach).

421. Bello y Villarino, *supra* note 57.

