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A Comparative Analysis of Domestic and International Legislation on Combating International Bribery and Corruption

Jose W. Alvarez

A COMPARATIVE ANALYSIS OF DOMESTIC AND INTERNATIONAL LEGISLATION ON COMBATING INTERNATIONAL BRIBERY AND CORRUPTION

JOSE W. ALVAREZ*

This composition compares and contrasts the legislation used in addressing and preventing transnational bribery and corruption at the domestic, regional, and international level. Using the history and current application of the United States Foreign Corrupt Practices Act as a foundation, this composition analyzes the legislation of fifteen nations, two international organizations, and three regional bodies, and their approaches in combating the growing issue of transnational bribery and corruption. This composition analyzes and interprets the common themes, historical and contemporary patterns, as well as trends at each government level, and potential future courses of action. The denouement of this work seeks to present an egalitarian solution that accentuates the noteworthy characteristics of each level, and how they can function in a single, harmonious mechanism.

* Jose W. Alvarez, J.D. Candidate, May 2023, St. Thomas University College of Law; Bachelor of Arts in English and Political Science, Saint John's University, 2017; This paper is written under the supervision of Professor Dr. Roza Pati.

I. FOREWORD: INTERNATIONAL BUSINESS AND CORRUPTION

International commerce and negotiation are the zenith of both private businesses and governmental entities' wealth, power, and status in the world. The intermixing of business and politics at the international level became the perfect breeding ground for dishonest practices such as bribery and corruption to develop. The invasive parasite propagated and grew unimpeded, reaching all corners of the globe.

For over a millennium, transnational bribery and corruption had no place for arbitration or recourse. Domestic laws did not have transnational jurisdiction to enforce civil penalties or decree criminal punishment.[1] International organizations and treaties had no

1. *See* Salman Bahoo et al., *Corruption in International Business: A Review and Research Agenda*, 29 INT'L BUS. REV. 1, 4 (2020) (discussing the emergence of corruption as a global political issue "with dire implications for international business . . . despite the passage of national and international legislation to control

foundation for multilateral regulation or jurisdiction, and many nations viewed corruption and bribery as a quintessential part of daily business practice. Nevertheless, globalization compelled governments and international business experts to investigate corruption as well as its association with foreign direct investment, beginning with the United States.[2]

II. AMERICAN INTERVENTION ON INTERNATIONAL CORRUPTION

A. THE 1977 FCPA

Foreign bribery and corruption appeared on the radar of The United States following the Watergate Scandal. The investigation led the Special Prosecutor's Office to inspect contributions by business entities.[3] In doing so, they discovered that many corporations used "slush funds" that didn't appear in the reported accounts as enticement for foreign government officials.[4] This compelled the Securities Exchange Commission (hereinafter, "SEC") to broaden its investigation, yielding over 400 companies engaging in illicit activities, and over 300 million dollars spent in bribing foreign officials.[5]

In rejoinder to the dilemma of rampant bribery and corruption at the international level, United States President Jimmy Carter signed into law the Foreign Corrupt Practices Act (hereinafter, "FCPA") in 1977. The FCPA made it unlawful for certain classes of persons and business

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it").

2. *Id.* at 4 ("The United States was the first country to pass laws prohibiting corruption by individuals or firms, namely, the 1977 Foreign Corrupt Practices Act (FCPA).").

3. Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO STATE L.J. 929, 932–33 (2012) (presented in the Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices).

4. *Id.* at 932, 936 (detailing how the SEC discovered that these "'slush funds' [were] disbursed outside the normal financial accountability system. These secret funds were used for a number of purposes, including in some instances, questionable or illegal foreign payments").

5. *Id.* at 934–35 (including United Brands for payments to the President of Honduras and Ashland Oil for payments to the President of Gabon).

entities to make payments to foreign government officials to assist in obtaining or retaining business.[6] The FCPA uses a dual-enforcement mechanism: the SEC has narrow civil enforcement power over issuers or other corporations that are required to file periodic reports with the SEC.[7] The Department of Justice (hereinafter, "DOJ") retains all criminal enforcement power and the remaining civil enforcement power.[8] The FCPA has a three-pronged purpose: minimize the risks of foreign bribery and corruption with civil and criminal consequences; give businesses a clear understanding of prohibited practices such as money laundering, racketeering, and conspiracy; and keep world leaders and legal advisors aware of enforcement.[9]

Applicability of the FCPA affects two categories of persons: individuals with formal ties to the United States, and those who act in furtherance of a violation while in the United States. Business entities are also divided into two specific categories: the narrower category of "Issuers" encompasses business entities that have either registered their securities in the United States, or are required to make periodic report filings with the SEC.[10] The broader category is that of "Domestic Concerns" which includes any business entity with its principal place of business in the United States or organization under the laws of a state, territory, possession, or commonwealth within the sovereignty and jurisdiction of the United States.[11] These two categories are subject to the provisions of the FCPA's anti-bribery

6. *See Foreign Corrupt Practices Act: An Overview*, U.S. DEP'T OF JUST., http://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act (last updated Feb. 3, 2017).

7. *See* CRIM. DIV. U.S. DEP'T JUST. & ENF'T DIV. U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 4, 73 (2d ed. 2020) [hereinafter FCPA RESOURCE GUIDE] (the FCPA Unit of the SEC's Enforcement Division staffs lawyers across the country to investigate possible FCPA violations).

8. *See id.* at 3 (overseen by the Fraud Section of the Criminal Division which has primary responsibility for all FCPA matters).

9. *See The Foreign Corrupt Practices Act: An Overview*, JONES DAY (Jan. 2010), http://www.jonesday.com/en/insights/2010/01/the-foreign-corrupt-practices-act-an-overview#_ednref3.

10. *Foreign Corrupt Practices Act (FCPA)*, 15 U.S.C. § 78dd-1(a) (these companies could be registered pursuant to the provisions of the Securities Exchange Act of 1934, or publicly listed on the U.S. stocks exchange).

11. *Id.* § 78dd-1(h)(1) (in rare instances, they could be individuals).

prohibitions and accounting requirements. The anti-bribery prohibitions are designed to prevent and hold United States business entities and nationals liable for bribes paid to foreign officials even if no actions or decisions take place within the physical borders of the United States.[12] The accounting requirements are designed to prevent dishonest accounting tactics to hide payments and ensure that shareholders and the SEC have access to an accurate representation of a business entity's finances.[13]

Whenever an individual or business entity is accused of committing acts of bribery in violation of the FCPA, the following five elements have to be met: (1) a payment, offer, authorization, or promise to pay money or anything of value (2) to a foreign government official (including a party official or manager of a state-owned concern), or to any other person, knowing that the payment or promise will be passed on to a foreign official (3) with a corrupt motive (4) for the purpose of (a) influencing any act or decision of that person, (b) inducing such person to do or omit any action in violation of his lawful duty, (c) securing an improper advantage, or (d) inducing such person to use his influence to affect an official act or decision (5) in order to assist in obtaining or retaining business for or with, or directing any business to, any person.[14] "Payment" and "foreign official" are purposefully defined with broad language in the FCPA to effectively encompass any benefit conferred on an individual positioned to affect another's business transactions with a foreign government.[15] Nonmonetary

12. *See* FCPA RESOURCE GUIDE, *supra* note 7, at 10 (with issuers and domestic concerns at risk of prosecution for using the U.S. mails or any means or instrumentality of interstate commerce in furtherance of a corrupt payment to a foreign official).

13. *See id.* at 38 (detailing the two primary components of the accounting provisions: 1) the "books and records" provision which directs issuers to "keep books, records, and accounts that, in reasonable detail, accurately and fairly reflect an issuer's transactions . . . "; and 2) the "internal controls" provision which ensures issuers "devise and maintain a system of internal accounting controls sufficient to assure management's control, authority, and responsibility of firm's assets.").

14. FCPA §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

15. *See* FCPA RESOURCE GUIDE, *supra* note 7, at 14, 19 (recognizing that "bribes can come in many shapes and sizes" thus defining "payment" as any "offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift promise to give, or authorization of the giving of anything of value to" a foreign official; and defining "foreign official" as "any officer or employee of a foreign

benefits, including travel and entertainment, may also fall within the FCPA's scope of liability.[16]

The language of the FCPA accentuates that a bribe does not need to be completed to constitute a violation; an offer, authorization, or promise to make a corrupt payment along with the genuine payment.[17] A preliminary meaning of the term "corrupt" motive in the FCPA can be understood by the legislative history of the Act, which uses the language "evil motive or purpose, an intent to wrongfully influence the recipient."[18] The Supreme Court of the United States fortified the definition of "corrupt" conduct to require a "consciousness of wrongdoing" in *Arthur Andersen LLP v. United States*, although the Court declined to provide an all-encompassing definition of the statutory term.[19]

Provisionary exceptions and defenses are also written into the language of the FCPA. The first exception is known as the "Grease Payment" exception, which covers "facilitating or expediting payment[s]" made to foreign officials to make them perform "routine governmental actions."[20] The reason for this is that a "routine governmental function" does not fall within the parameters of a decision by a foreign official to award new business or to continue business with a party.[21]

If the above-referenced elements are met, and no exceptions or defenses apply, individuals can face criminal punishment of up to five

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government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.").

16. *See id.* at 15 (describing how "a number of FCPA enforcement actions have involved the corrupt payment of travel and entertainment expenses. Both DOJ and SEC have brought cases where these types of expenditures occurred in conjunction with other conduct reflecting systemic bribery or other clear indicia of corrupt intent.").

17. FCPA § 78dd-1(a).

18. S. REP. NO. 95-114, at 10 (1977).

19. Arthur Andersen L.L.P. v. United States, 544 U.S. 696, 705–06 (2005).

20. FCPA §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).

21. *See* FCPA RESOURCE GUIDE, *supra* note 7, at 25 ("[E]xamples of 'routine governmental action' include processing visas, providing police protection or mail service, and supplying utilities like phone service, power, and water.").

years' imprisonment per violation of the anti-bribery provisions of the FCPA, or up to 20 years if the violation is deemed to be willful.[22] Civil penalties for business entities include fines of up to $2 million for per violation, and individuals as much as $100,000 per violation.[23] If the violation is found to be willful, the maximum fine may be increased to $25 million for corporations and $5 million.[24]

B. BACKLASH AND 1988 AMENDMENTS

With the creation of the FCPA, American business entities began to criticize the legislation. The crux of the complaints stemmed from the United States being the only nation-state at the time with an enacted law that prohibited foreign bribery aside from Sweden.[25] Critics felt the FCPA was anti-American, due to its hindrance on American businesses, and ineffective against international competitors.[26] In response, on August 23, 1988, Ronald Reagan signed into law the Omnibus Trade and Competitiveness Act of 1988; Title V of which was known as the Foreign Corrupt Practices Act Amendments of 1988.[27] The amendments maintained the three major components of the 1977 Act, but made significant changes to the language of the FCPA. One change was the enactment of the "knowing" standard for violations of the FCPA.[28] This standard was intended to encompass

22. FCPA §§ 78dd-1(a)–(c), 78ff(a), 78ff(c)(2)(A).

23. *Id.* § 78ff(c)(1)(A), (2)(A); *see also* 18 U.S.C. § 3571.

24. FCPA § 78ff(a).

25. Sweden criminalized foreign bribery in 1978, but its enforcement was extremely limited to the point of being ineffective because it required perfect reciprocity in the country where the bribe was committed. *See* Michael Bogdan, *International Trade and the New Swedish Provisions on Corruption*, 27 AM. J. COMP. L. 665, 669.

26. *See* U.S. GEN. ACCT. OFF., AFMD-81–34, IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS 14 (1981) ("Although the majority of our questionnaire respondents reported that the act has had little or no effect on their overseas business, more than 30 percent of our respondents engaged in foreign business reported they had lost overseas business as a result of the act.").

27. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 5001–5003, 102 Stat. 1107, 1415–25 (1988); *see also* H.R. REP. NO. 100-576, at 916–24 (1988) (discussing the FCPA 1988 amendments); FCPA RESOURCE GUIDE, *supra* note 7, at 3 (discussing the background of the FCPA 1988 amendments).

28. MICHAEL V. SEITZINGER, CONG. RSCH. SERV., R41466, FOREIGN CORRUPT PRACTICE ACT (FCPA): CONGRESSIONAL INTEREST AND EXECUTIVE ENFORCEMENT, IN BRIEF 4 (2016).

"conscious disregard" and "willful blindness."[29]

The 1988 Amendment also created two new defenses for violations of the FCPA, known as the "Bona Fide Promotion Expense" defense, and the "Local Law" defense.[30] The "Bona Fide Promotion Expense" allows for an individual or entity accused under the FCPA to escape liability if it is revealed that the payment at issue constituted "a reasonable and bona fide expenditure, such as travel and lodging expenses," and that it was directly related to (A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof."[31] The "Local Law" defense permits payments that are lawful under the written laws and regulations of the foreign official's country.[32] The reason is twofold: (1) to respect sovereignty of other nation states and (2) because other countries do not define bribery or corruption within their laws in the same manner as the United States.[33]

C. 1998 AMENDMENTS

The FCPA was further amended by Congress in 1998 in order to correspond with the International Anti-Bribery and Fair Competition Act. Congress broadened the criminal liability provisions to include: (1) foreign nationals who use "any means or instrumentality of interstate commerce"[34] or act in furtherance of an FCPA violation; and (2) American nationals who commit FCPA violations outside the territorial borders of the United States.[35]

As aforementioned, the FCPA's jurisdiction was originally tailored

29. *Id.* ("[T]he Conferees agreed that 'simple negligence' or 'mere foolishness' should not be the basis for liability. However, the Conferees also agreed that the so-called 'head-in-the-sand' problem—variously described in the pertinent authorities as 'conscious disregard,' 'willful blindness' or 'deliberate ignorance'—should be covered so that management officials could not take refuge from the act's prohibitions by their unwarranted obliviousness to any action (or inaction), language or other 'signalling [sic] device' that should reasonably alert them of the "high probability" of an FCPA violation.").

30. FCPA RESOURCE GUIDE, *supra* note 7, at 3.

31. FCPA §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

32. *Id.* §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1).

33. FCPA RESOURCE GUIDE, *supra* note 7, at 24.

34. FCPA § 78dd-3(a).

35. *Id.* §§ 78dd-1(g)(1), 78dd-2(i).

for individuals and business entities who fell under the category of "Issuers" or "Domestic Concern," with the latter being the broader category.[36] The new language broadened the FCPA's reach for the United States Government to prosecute foreign nationals that may not be physically within the borders of the territorial United States.[37] However, in the legislative notes, Congress addressed governmental limitations on its revamped jurisdictional provisions by stating that jurisdiction will only be asserted "when consistent with national legal and constitutional principles."[38]

In one regard, the amended FCPA had a positive domestic impact on American business entities abroad. The expansion of the FCPA's jurisdiction bolstered American businesses in the international arena by leveling the playing field. Foreign nationals and corporations, and their agents, now had to conduct business matters while adhering to the same policies as American businesses.[39] With the breadth of the FCPA, failure to follow these rules would make a foreign national or business susceptible to investigation, even prosecution, by the United States Government based on conduct viewed as corrupt or bribing in nature.[40]

Following the amendments, a non-issuing foreign agent or business entity that takes steps in furtherance of a corrupt payment—regardless of whether they have ever physically stepped onto U.S. territory—can

36. *See FCPA: An Overview*, *supra* note 9 (" encompassing any individual who is a citizen, national, or resident of the United States.").

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. REG. 239, 292 (2001) ("At the time of both the original enactment of the FCPA in 1977 and the amendments in 1988, Congress refrained from asserting jurisdiction over non-U.S. individuals and entities.").

38. S. REP. NO. 105-277, at 3 (1998).

39. *See U.S. Foreign Corrupt Practices Act*, INT'L TRADE ADMIN., https://www.trade.gov/us-foreign-corrupt-practices-act (last visited Mar. 28, 2023) ("The FCPA also covers foreign persons or companies that commit acts in furtherance of such bribery in the territory of the United States, as well as U.S. or foreign public companies listed on stock exchanges in the United States or which are required to file periodic reports with the U.S. Securities and Exchange Commission.").

40. *See* FCPA RESOURCE GUIDE, *supra* note 7, at 69 (including different criminal and civil penalties for companies and individuals).

be held liable under the FCPA and be prosecuted within the territorial borders of the United States at the government's discretion.[41] All that is required is a connection between the bribery and interstate commerce. Although the FCPA is silent on what kind of connection can trigger an FCPA violation, commonplace activities such as the use of the U.S. mail or telephone calls have been used by the DOJ to invoke jurisdiction so long as the communication formed an incidental component of the underlying violation.[42]

D. THE FCPA AND EXTRATERRITORIAL REACH: *U.S. V. HOSKINS*

Following the 1998 Amendment, the polished version of the FCPA experienced greater success, particularly in terms of civil penalties.[43] However, both domestically and abroad, critics echoed concerns centered around the broad scope of the FCPA's extraterritorial reach;

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41. *See What the SEC and DOJ Resource Guide to the FCPA Means for Multi-National Companies*, A.B.A. (July 31, 2013), https://www.americanbar.org/groups/business_law/publications/blt/2013/07/02_murphy ("[S]o long as another member of the bribery scheme engages in such conduct or otherwise is subject to FCPA jurisdiction. A foreign national or company may also be liable under the FCPA if it aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the United States."); *District Court Rules FCPA Jurisdiction Has Limits*, JONES DAY (Mar. 2013), https://www.jonesday.com/en/insights/2013/03/district-court-rules-fcpa-jurisdiction-has-limits ("DOJ and SEC offered very little enlightenment [on] the extent to which the FCPA permits enforcement proceedings against foreign nationals whose allegedly unlawful conduct occurs wholly outside the U.S.").

42. *See* Lauren Ann Ross, *Using Foreign Relations Law to Limit Extraterritorial Application of the Foreign Corrupt Practices Act*, 62 DUKE L.J. 445, 453 (2012) (The FCPA, part of the Securities Exchange Act of 1934 (1934 Act), is divided into two parts: the antibribery provisions, which make it a crime to bribe foreign officials, and the accounting provisions, which impose upon companies various bookkeeping obligations. The former follows the traditional pattern of a crime, with a requisite *actus reus* and *mens rea*, whereas the latter impose affirmative obligations on companies."); United States v. Kunzman, 54 F.3d 1522, 1526–27 (10th Cir. 1995) (involving fraud and money laundering: "The indictment specifically alleges an effect on interstate commerce through the use of interstate highways, the use of telephone and mails, and transactions involving banks and financial institutions engaged in interstate commerce.")

43. *See Where the Bribes Are: Penalties in U.S. Government FCPA Cases Since 1977*, MINTZ GROUP, https://www.fcpamap.com (last updated Jan. 22, 2021) (since the FCPA passed in 1977, there have been more than 500 cases covering activity in more than 100 countries many of which came following the 1998 amendments).

mainly that there was an absence of precedence.[44] However, in *United States v. Hoskins*, the FCPA received an opportunity to test its muster in a court of law.[45] Hoskins was employed by Alstom S.A., a transnational company with its headquarters in France, and branches around the world.[46] Hoskins was the senior vice president for the Asia region of Alstom U.K., but Hoskins worked at Alstom Resources Management S.A. in France when the allegations against him arose.[47] The United States government charged Hoskins with participating and conspiring to participate in a bribery scheme with Alstom's U.S. subsidiary office to secure a business contract in Indonesia.[48] The accusations specified that Hoskins conspired with two consultants in the Alstom U.S. subsidiary and authorized them to bribe Indonesian officials, including members of the Indonesian parliament, using wire transfers from a bank located in the United States.[49] Issues for the prosecution arose as a result of Hoskins never having worked for nor traveled to the U.S. branch, although he did communicate with employees of the Alstom U.S. subsidiary in a "direct capacity" via email, and telephone calls.[50] However, the DOJ argued before the Court that, under the FCPA, Hoskins' telecommunications with the Alstom U.S. subsidiary employees was sufficient to establish jurisdiction through the agency relationship.[51]

The Second Circuit disagreed with the DOJ's argument, and concluded that Hoskins could not be criminally liable under the FCPA as a foreign national located outside the United States because the DOJ could not establish an agency relationship formed in the United

44. *See* Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 UNIV. TOL. L. REV. 99, 146 (2011) (unimpeded by a judge to interpret the language and test its constitutionality). The 1998 Amendment led many FCPA violations to settle due to many companies believing that it was in their best interest as opposed to going to trial. This resulted in the FCPA being used by the U.S. Government relatively unimpeded by a judge to interpret the language and test its constitutionality. *Id.*

45. United States v. Hoskins, 902 F.3d 69, 71 (2d Cir. 2018).

46. *Id.* at 72.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 73.

States.[52] The Gebardi Principle barred the DOJ from charging Hoskins with being the second object of the conspiracy, and therefore could not be liable under Section 78dd-3 of the FCPA, because accomplice liability did not extend beyond the individuals included within the FCPA's principal liability.[53] The Court made this determination through the "text and structure of the FCPA" and its "legislative history," opining that Congress "did not intend to impose accomplice liability on non-resident foreign nationals who were not subject to direct liability," Hoskins was not an "officer, director, employee, or agent" of a "domestic concern."[54]

E. FCPA JURISDICTIONAL SCOPE TODAY: U.S. V. DAISY T. RAFOI-BLEULER AND UNITED STATES V. MURTA[55]

Not long after *Hoskins*, the United States government continued to use the FCPA's extraterritorial reach as a mechanism for combating international corruption and bribery. However, another matter arose that further chipped away at the DOJ's interpretation of jurisdiction over foreign nationals. On November 10, 2021, the United States District Court for the Southern District of Texas dismissed all three counts against Daisy Rafoi-Bleuler, a Swiss citizen residing in

52. *See id.* at 89 (citing to United States v. Bodmer, 342 F. Supp. 2d 176, 188 (S.D.N.Y. 2004)).

53. *Id.* at 98. The *Gebardi* Principle is an exception to accomplice liability that applies when a statute proscribes a criminal conspiracy that must involve two classes of individuals. The statute assigns principal liability to one of those classes, but the government cannot punish the other class via accomplice liability. The Gebardi Principle was broadened to include the Court's reliance on legislative history in determining Congress' intent as well as the statute's text to find accomplices liable under the statute. *See* Gebardi v. United States, 287 U.S. 112, 121 (1932); *see also* United States v. Amen, 831 F.2d 373, 381–82 (2d Cir. 1987) ("Ultimately, a subordinate may have all the attributes of a third party and render even greater assistance to the kingpin yet escape enhanced criminal responsibility because it depends solely on the degree of control exercised by the kingpin over the individual.").

54. *See Hoskins*, 902 F.3d at 85–95 (looking to Congress's concern with the SEC's enforcement anility, public perception, foreign policy, and economic market if Congress imposed liability on foreign nationals).

55. United States v. Rafoi-Bleuler, No. 4:17-CR-0514-7, 2021 U.S. Dist. LEXIS 263507, at *2 (S.D. Tex. Nov. 10, 2021); United States v. Murta, No. 4:17-CR-00514-8, 2023 U.S. Dist. LEXIS 97979 (S.D. Tex. June 6, 2023).

Zurich.[56] The indictment alleged that her codefendants, six former employees of PdVSA, dishonestly awarded PdVSA service agreements for two U.S.-based PdVSA subsidiaries in exchange for kickbacks and for preferential treatment[57] The allegations stated that Rafoi-Bleuler's role was providing financial services through her wealth management firm to the codefendants, conspiring to violate the Money Laundering Control Act of 1986 (hereinafter, "MLCA") concerning funds derived in violation of the FCPA, conspiring to violate the FCPA, and aiding and abetting violations of the MLCA.[58]

As determined in the *Hoskins* case, the FCPA provides a limited basis for extraterritorial jurisdiction over foreign individuals and requires that the government establish that the individual was an "officer, director, employee, or agent" of a "domestic concern."[59] Rafoi-Bleuler was a principal and owner of a Swiss wealth management firm that had no prior association or affiliation with the United States or the codefendants. Her defense emphasized that she was not in violation of Swiss laws regarding anti-money laundering laws and other regulations, and that ultimately she did not knowingly or intentionally involve herself.[60] The DOJ alleged that Rafoi-Bleuler received wire instructions and communicated with codefendants over e-mail while she was in Switzerland and while her codefendants were in the United States or Venezuela.[61]

The District Court dismissed the indictment for lack of subject matter jurisdiction,, highlighting specifically that the FCPA's jurisdictional reach over Ms. Rafoi-Bleuler was limited to acts

56. *See id.* (granting the defendant's motion to dismiss due to a lack of jurisdiction).

57. PdVSA is a Venezuelan state-owned and state-controlled oil company, and the alleged co-defendants were citizens of Venezuela. *See id.* at *3–5.

58. *See id.* at *4–5 (identifying ambiguity in defining "agent" under Title 15 Section 78dd's sub-sections like the *Hoskins* court noted and deferred to Congressional intent).

59. *See Hoskins*, 902 F.3d at 98 (examining the text of the FCPA and its jurisdictional reach to foreign nationals not acting on behalf of a U.S. entity or person outside the United States).

60. *See Rafoi-Bleuler*, 2021 U.S. Dist. LEXIS 263507, at *6–8 (discussing the defendant's defense that the United States government lacked jurisdiction, so she complied with Swiss anti-money laundering laws).

61. *See id.* at *8 (determining that the government failed to establish the defendant's agency relationship of domestic concern under the circumstances).

committed in the United States or acts committed by a domestic concern, its officers, directors, employees or agents, none of which was met in the allegations by the DOJ.[62] The court emphasized that calling Rafoi-Bleuler an agent was not enough.[63] "The existence of an agency relationship presents a question of law . . . agency does not exist simply because the government alleges . . . that the defendant committed certain acts."[64]

The Court added that,

> The application of the term "agent" to the defendant, as a basis for jurisdiction, is such a novel application that no court has interpreted the statute or rendered a judicial decision that fairly discloses the manner in which the term may be applied to establish jurisdiction. That fact alone establishes the vagueness of the term.[65]

The Court concluded that using the term "agent" as the jurisdictional basis to prosecute a foreign national is so vague that it denies a defendant the "due process" that the federal Constitution mandates.[66]

F. THE FCPA AND JURISDICTION UNDER INTERNATIONAL LAW

Hoskins and *Rafoi-Bleuler* demonstrate the difficulty in domestically legislating a solution to combating international bribery

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62. *Id.* at *15–16 (holding finding a criminal act without a jurisdictional nexus is insufficient to establish an agency relationship).

63. *Id.* at *14.

64. *See id.* (finding criminal acts is also insufficient under 15 U.S.C. § 77d(3)).

65. *Id.* at *21.

66. *See id.* at *22; U.S. CONST. amend. V ("No person shall be . . . be deprived of life, liberty, or property, without due process of law . . . "). On February 8, 2023, the Fifth Circuit Court of Appeals reversed the district court's decision dismissing the FCPA and money laundering charges against *Rafoi-Bleuler* for lack of subject-matter jurisdiction. (United States v. Rafoi-Bleuler, 60 F.4th 982 (5th Cir. 2023). However, on June 7, 2023, the District Court dismissed the case once again; this time for violations of both the Speedy Trial Act and Sixth Amendment right to a speedy trial. (*See* Mem. & Order at 24, United States v. Murta, No. 4:17-CR-00514-8, 2023 U.S. Dist. LEXIS 97979 (S.D. Tex. June 6, 2023). Despite the district court's direct ruling on the issue of FCPA liability for jurisdiction over non-U.S. persons, unless based on statutory relationship or presence—which was indistinctly addressed by the Second Circuit in *Hoskins*—the Fifth Circuit's failure to address the matter leaves the issue of co-conspirator liability in a nebulous and inconclusive state.

and corruption—primarily constitutionally asserting jurisdiction over foreign nationals. It is paramount to note that customary international law dictates the boundaries of what is legal in terms of states exercising extraterritorial jurisdiction.[67] While it is not a new phenomenon that nation states exercise extraterritorial jurisdiction in criminal and civil matters, the authority comes from well-established principles of customary state practice.[68] States may prescribe jurisdiction under the following permissive rules: (1) conduct that takes place wholly or partially within its territory (territoriality jurisdiction); (2) conduct dealing with the state's nationals or nationally based entities (nationality jurisdiction); (3) conduct outside the home territory that has a substantial effect within its territory (passive personality jurisdiction); (4) conduct that threatens the national security of the prescribing state (protective jurisdiction); and (5) conduct that is abhorrent to humanity (universality jurisdiction).[69]

Since the inception of the FCPA, multiple jurisdictional principles have been applied, with the United States experiencing the most success using nationality jurisdiction to prosecute American nationals who violate the FCPA abroad.[70] Territoriality jurisdiction was the preferred method for the U.S. to claim extraterritorial jurisdiction over foreign businesses and nationals.[71] Nationality jurisdiction continues to be effective in prosecuting corruption and bribery abroad by

67. *See Universal Jurisdiction*, CTR. FOR JUST. & ACCOUNTABILITY, https://cja.org/what-we-do/litigation/legal-strategy/universal-jurisdiction (last visited Mar. 29, 2023) (describing the showing, such as national security demands, that a state must do in establishing universal jurisdiction outside the state's territory).

68. *See id*.

69. *See* RESTATEMENT (THIRD) OF FOREIGN RELS. LAW OF THE U.S. § 402 (1987) (outlining the bases for prescribing and limiting jurisdiction of law to a reasonableness standard).

70. *See* Ellen S. Podgor, *Globalization and the Federal Prosecution of White Collar Crime*, 34 AM. CRIM. L. REV. 325, 342 (1997) (noting nationality jurisdiction allows the United States to exert their jurisdiction over their own subjects abroad and applies to persons and entities under 15 U.S.C. § 78dd-2 of the FCPA regarding jurisdiction for domestic concerns).

71. *See* CONG. RSCH. SERV., 94–166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW (2021) (highlighting that traditional U.S. criminal law is territorial, so extraterritorial criminal laws require a showing of implied or express congressional intent, compliance with international law, and alignment with Congress's enumerated powers to pass constitutional muster).

American companies and nationals.[72] As for territoriality jurisdiction, the *Hoskins* and *Rafaoi-Bleuler* courts not only refused to find jurisdiction, but have ruled that the FCPA's jurisdictional basis through vague terms such as agency are unconstitutional.[73] Effectively, this resurrects the previous impasse of American and foreign businesses no longer being on a level playing field, which were the basis of critiques of the FCPA prior to the 1998 amendment.[74]

III. DOMESTIC LEGISLATION WORLDWIDE TO COMBAT BRIBERY AND CORRUPTION

Understanding the ebb and flow of the FCPA gives a foundation for understanding how other nation states address bribery and corruption. The global anti-corruption landscape continues evolving with nation states continuing to update their anti-bribery and corruption laws, with some only just beginning to instill legislation in their own laws.[75] Nation states have tackled the task in a variety of ways: creating entirely separate acts of legislation, amending their criminal code or constitution, or creating agencies or departments entrusted with legislation and enforcement.[76] Most nation states that have enacted

72. *See* U.S. DEP'T JUST. & SEC. EXCH. COMM'N, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN PRACTICE ACT 3, 11, 105 (2nd ed., 2020) (describing the FCPA amendments to adhere to the Anti-Bribery Convention's standard of criminalizing bribery of foreign officials).

73. *See, e.g.,* United States v. Hoskins, 902 F.3d 69, 98 (2d Cir. 2018) (refusing to extend the FCPA's jurisdiction leaving the government's option to prove the defendant is an agent of domestic concern); United States v. Rafoi-Bleuler, No. 4:17-CR-0514-7, 2021 U.S. Dist. LEXIS 263507, at *22 (S.D. Tex. Nov. 10, 2021) (declining to address the case's merits because of the lack of jurisdiction and ambiguity on an agent establishing jurisdiction).

74. *See* SEITZINGER, *supra* note 28 (summarizing critiques of the FCPA of 1977 because of its effects on chilling trade, commandeering firm management, minimalizing foreign presence, burdening accounting controls, and demonstrating biases).

75. Org. for Econ. Co-Operation and Dev. [OECD], Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, at 6–8, OECD Doc. 0378 (Nov. 25, 2009) [hereinafter OECD, Bribery in Int'l Bus. Transactions] (recommending legislation, training, international cooperation, and audit practices to identify and curb bribery of foreign officials).

76. *See id.* (suggesting the involvement of law enforcement authority and judiciary bodies to proactively detect and prevent bribes through public disclosure

legislation to combat bribery and corruption have also made advances toward addressing these acts outside of their territorial borders by incorporating extraterritorial jurisdiction.[77] This potentially triggers questions of customary international law, mainly concerning extraterritoriality and respect for the sovereignty of other nations. Regardless, many nations continue to strengthen their anti-bribery and corruption legislation by way of integrating corporate liability for bribery offenses, increasing in maximum penalties available for these offenses, penalizing bribery on the giving and receiving ends, and other creative tactics.[78] One of the trailblazing continents for bribery and corruption legislation today is Europe.

A. EUROPE

1. UK—The Bribery Act

In 2010, the United Kingdom legislated the Bribery Act 2010 (hereinafter, "UK Bribery Act"), and it came into force on July 1, 2011.[79] The UK Bribery Act has noticeable similarities to the FCPA, such as that of extraterritorial jurisdiction. The UK Bribery Act extends to offenses committed within the UK, and to offenses committed outside the UK where the accused has a close connection with the UK by virtue of being a British national or resident, or an entity incorporated in the UK or Scotland.[80] For corporations, the offenses extend to both UK and non-UK organizations that conduct

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of relevant laws and raising awareness).

77. *See* CEDRIC RYNGAERT, EUR. PARL., TOWARDS AN INTERNATIONAL ANTI-CORRUPTION COURT? 6 (2022) (depicting the need for extraterritoriality to hold states accountable for investigating corruption, like the U.S. FCPA and UK Bribery Act).

78. *See* ORG. FOR ECON. CO-OPERATION AND DEV. [OECD], CORPORATE ANTI-CORRUPTION COMPLIANCE DRIVERS, MECHANISMS, AND IDEAS FOR CHANGE 35–46 (2020) (advocating for conduct codes, corporate policies, employee oversight, and ethics training to reduce corruption and bribery risks).

79. *See generally* Julia Lippman, *Business Without Bribery: Analyzing the Future of Enforcement for the U.K. Bribery Act*, 42 PUB. CONT. L.J. 649, 652 (2013) (contextualizing the Bribery Act's intent to eliminate bribery and the influence of the OECD on the U.K.'s legislation).

80. Bribery Act 2010, c.23 § 12(4)(a)–(g) (U.K.) (defining the close connection aspect of territoriality to British or overseas citizens, British nationals, and residents in the United Kingdom).

business or part of a business in the UK.[81] In essence, a Dutch transnational company that exports to the United Kingdom can be in breach of an offense under the UK Bribery Act for bribery occurring in Holland, even though that bribery does not encompass any United Kingdom nationals.

There are notable differences that are tailored to encompass a wider array of conduct that fall under the umbrella of bribery. Specifically, the UK Bribery Act prohibits bribing foreign officials and private business entities, including private business entities bribing one another.[82] The UK Bribery Act also includes that directors, senior managers, and other managerial persons can also be found guilty of an offense if their company commits an offense with their consent or connivance.[83] The civil penalties and criminal punishment are harsher. The UK Bribery Act includes an unlimited fine, up to 10 years in prison, and orders for directors to be disqualified, as well as allowing companies to be prohibited from public procurement and confiscating the proceeds from the bribe.[84]

2. France—Sapin II

Most of the French anti-corruption provisions relevant to businesses are legislated in the French Criminal Code and relate to both the public and private sector.[85] However, on December 9, 2017, the French government promulgated a new anti-bribery law: Law no. 2016-1691, better known as the "Loi Sapin II pour la transparence de la vie économique" (hereinafter, "Sapin II"), to hone and further fortify the anti-corruption system currently in place in France.[86] Sapin II is

81. *Id.* § 12(4)(h)–(i), (5) (extending jurisdiction to U.K. corporations, Scottish partnerships, and entities conducting business deals in the U.K.).

82. *Id.* § 14(1) (forbidding corporations from offering an advantage to incentivize or compensate someone for performing in an intended manner).

83. *Id*. at § 14 (2)(a).

84. *Id.* at § 11 (1)(a)–(b).

85. *See* Guillaume de Rancourt, *The Anti-Bribery and Anti-Corruption Review: France,* CLEARY GOTTLIEB STEEN & HAMILTON LLP (Nov. 8, 2022), https://thelawreviews.co.uk/title/the-anti-bribery-and-anti-corruption-review/france (reviewing France's anti-corruption framework in its compliance program obligation, extraterritoriality application, and agency monitoring).

86. *See Anti-Corruption Measures and Remedies Applicable to Companies*, COUNCIL OF EUR. PORTAL (2016), https://www.coe.int/en/web/human-rights-

modeled off the FPCA and UK Bribery Act.[87] The first section of the Sapin II establishes the French Anti-Corruption Agency (hereinafter, "AFA").[88] The AFA is responsible for monitoring the implementation of internal corruption prevention programs ("anti-corruption compliance programs") in the private and public sectors, with powers to investigate and levy sanctions.[89] Section two implements an anti-corruption compliance program for French companies with at least 500 employees and/or companies with consolidated or non-consolidated sales of more than 100 million euros.[90] Section three establishes the Convention Judiciaire d'intérêt public, (hereinafter, "Judicial Convention in the public interest" or "CJIP") which gives offenders the option for criminal settlement without admitting to acts of corruption, money laundering, or tax fraud.[91] Section four provides whistleblower protection from criminal prosecution for persons who disclose, in a manner necessary and proportionate to the safeguarding of the interests in question, disinterestedly and in good faith with

intergovernmental-cooperation/-/anti-corruption-measures-in-companies (last visited March 29, 2023) (detailing France's Anti-Corruption Agency to detect corruption and penalize violators through its sanctions committee).

87. *See* Alexandre Bailly & Xavier Haranger, *Sapin II Law: The New French Anticorruption System—La Loi Sapin II: Le Nouveau Dispositif Français Anti-Corruption* (Nov. 27, 2017), http://www.morganlewis.com/pubs/2017/11/sapin-ii-law-the-new-french-anticorruption-system (observing the similarities between France's Sapin II Law and the U.S. and UK's regimes on attacking bribery, aligning France with European and international standards).

88. Loi 2016-1691 du 9 decembré 2016 relative a la transparence, a la lute contre la corruption et a la modernization de la vie economique [Law 2016-1691 of December 10, 2016 Relating to Transparency, the Fight Against Corruption, and the Modernization of Economic Life], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], December 9, 2016, arts. 1–5 [hereinafter Law 2016-1691] (delegating leadership of the Anti-Corruption Agency to a magistrate the President appoints for a term of six years and a six-member sanctions committee).

89. *Id.* (mandating the Anti-Corruption Agency's responsibilities of disseminating information, creating recommendations, maintaining procedures, exercising bestowed powers, monitoring adherence, alerting prosecutors, and reporting activities).

90. *Id.* arts. 17–24 (applying anti-corruption responsibilities to presidents and managing directors of companies to implement codes of conduct, audit systems, trainings, disciplinary protocols, and risk controls).

91. *See id.* art. 22 (enabling the public prosecutor to offer a judicial agreement so long as public proceedings have not begun).

respect to the reporting procedures laid down by the law, a secret protected by the law, except for classified military information, medical secrecy, or that pertaining to attorney-client privilege.[92] Section five extends jurisdiction of the French criminal courts for international acts of corruption such as prosecution of French nationals, people domiciled in France, and "persons having all or part of their economic activity in France" for corruption violations or influence peddling.[93]

3. Germany—Gesetz zur Bekämpfung der Korruption

Germany legislated its first act to combat bribery and corruption back in 1999.[94] Then, on November 26, 2015, Germany enacted the Gesetz zur Bekämpfung der Korruption (hereinafter, "German Bribery Act"), which is a special regulation regarding both foreign and European public officials, for integration into the Strafgesetzbuch (hereinafter, "Germany's Criminal Code").[95] The German Bribery Act adopted language from the German Criminal Code for bribery crimes: Passive bribery (taking bribes) in fulfilling one's public duty; Passive bribery (taking bribes) as incentive for violating one's duties; Active bribery (giving bribes) in fulfilling one's public duty; and Active bribery (giving bribes) as incentive for violating one's duties.[96] Those that could receive the bribes included: a public official, a European public official, persons entrusted with special public service functions, a soldier, a German judge or a judge of an EU court, of the

92. *Id.* arts. 1, 6 (disclosing a whistleblower's identity or attributes only if they provide their consent).

93. *Id.* art. 21 (extending French law outside the territory of France if a citizen or resident who conducts business in French is abroad and defining accomplice liability).

94. *See* FED. MINISTRY OF THE INTERIOR, COMBATING CORRUPTION IN GERMANY (1999) (Ger.) (articulating standards for regulating corruption in international business transactions which are monitored by a working group).

95. *See Gesetz zur Bekämpfung der Korruption [Gazette of the Federal Republic of Germany]*, BUNDESGESETZBLATT (Nov. 25, 2015), https://www.bgbl.de/xaver/bgbl/start.xav#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl115s2025.pdf%27%5D__1680310020293 (highlighting changes in Germany's Criminal Code).

96. *See* Strafgesetzbuch [StGB] [Crim Code] §§ 331–35 (Ger.) (penalizing public officials, judges, and arbitrators for accepting gifts or taking bribes in exchange for performing or abstaining from performance of an act).

International Criminal Court, or an arbitrator or public servant of the International Criminal Court.[97] The German Bribery Act made changes to the territorial scope of anti-corruption laws relating to offenses committed in public office. Particularly, the German Criminal Code now applies to offenses committed by a German citizen abroad or by European public officials who have their office in Germany.[98]

Like the UK Bribery Act, the German Bribery Act includes criminal penalties for the conduct of employees, whose duties stem from the employer-employee relationship.[99] Unlike Sapin II, which offers whistleblower protections, there are no protective provisions enacted in the Germany Bribery Act. There are only a few criminal laws that address whistleblowing, and focus on penalties for failing to report offenses and violations.[100]

4. Spain—Código Penal

In Spain, bribery is regulated in the Código Penal (hereinafter, "Spanish Criminal Code" or "SCC"). The traditional crimes included in the SCC are bribery, embezzlement, fraud and illegal extortion, negotiations, and activities involving public officials in the exercise of their function.[101] Over time, more offenses were added. The next offenses added to the SCC included the crimes of paying bribes to obtain competitive advantages (either corruption in the private or corruption of a foreign public agent).[102] The newest legislation to the SCC includes regulating first time crimes of financing political

97. *Id.* §§ 11, 334, 334(2), 335a(2), 334(2) (defining a public officials as a person who serves in a judicial or civil servant position, fulfills duties of public office, or performs administrative public service).

98. *Id.* §§ 5, 15 (attributing liability if the offender is a German national or European official in a German office at the time of the violation).

99. *Id.* § 299 (imposing a penalty or imprisonment on agents or employees who receive benefits or bribes).

100. *Id.* § 138 (criminalizing the failure to report the planning of bribery offenses to authorities).

101. C.P., Boletin Official Del Estado n. 19 arts. 419–27, 432–38, Nov. 23, 1995 (Spain) (prohibiting corruption, embezzlement, fraud, and unlawful taxation).

102. *Id.* at n. 13 art. 286 (penalizing directors and employees who receive unjustified benefits after promising or contracting for specific performance).

parties.[103] Today, the following crimes are listed separately and subject to their own civil penalties and criminal punishments under the SCC: urban prevarication (articles 320 and 322), administrative prevarication (articles 404, 405 and 408), infidelity in the custody of documents and violation of secrets (articles 413, 414, 415, 416, 417 and 418), bribery (articles 419, 420, 421 and 422), influence peddling (articles 428, 429 and 430), embezzlement (articles 432, 433, 434 and 435), fraud and illegal exactions (articles 436, 437 and 438), negotiations and activities prohibited to public officials and abuses in the exercise of their function (articles 439, 441, 442 and 443), and corruption in international commercial transactions (articles 286, 3rd and 4th).[104]

Like Germany, the SCC has terms for both "passive bribery," which is when the public official receives or requests the bribe, and "active bribery," which occurs when an individual offers or gives a bribe to a public official. In Spain, active bribery and passive bribery are regulated as separate offenses.[105] Interestingly and unlike other previously mentioned nation states, Spain does not define "corruption" in the SCC or in any other domestic legislative document.[106] Rather, Spain uses the language and terminology for corruption from the international organizations within which it has membership.[107]

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103. *Id.* at n. 13 art. 304 (referring to money laundering provocation, conspiracy, and proposition).

104. *Id.* arts. 286, 320, 322, 404–05, 408, 413–22, 428–30, 432–38, 439, 441–43.

105. *Id.* at n. 19 art. 419 (imposing imprisonment liability on public officials for engaging in active bribery, or receiving or requesting a bribe).

106. *See* Carlos Berbell, *El Delito de Corrupción Como al No Existe en el Código Penal de España [The Crime of Corruption as Such Does Not Exist in the Penal Code of Spain]*, CONFILEGAL (2020), https://confilegal.com/20200926-el-delito-de-corrupcion-como-tal-no-existe-en-el-codigo-penal-de-espana (last visited Mar. 30, 2022) (discussing corruption's inclusion of malfeasance, infidelity in documents, violation or trade secrets, bribery, and international commercial transaction corruption).

107. Spain is a signatory to, and has effectively transposed, the following international anti-corruption agreements: The United Nations Convention against Corruption; the United Nations Convention against Transnational Organized Crime; the OECD's Anti-Bribery Convention; and the Council of Europe's Criminal and Civil Law Conventions on Corruption.

5. Albania—Kodi Penal i Republikës së Shqipërisë

Following the transition from dictatorship to democracy in the 1992 election, Albania began to legislate laws to address corruption beginning with the Kodi Penal i Republikës së Shqipërisë Ligjin Nr. 7895 (hereinafter, "Albanian Criminal Code" or "ACC") in 1995.[108] The ACC focused primarily on foreign nationals aimed at addressing technology, propaganda, and terrorism.[109] The ACC language was adopted and used to address bribery and corruption in the Bashkëpunimi publik në luftën kundër korrupsionit Ligjin Nr. 9508 (hereinafter "Public Collaboration in the Fight Against Corruption" or "PFCFAC") in 2006, and the Përgjegjësia penale e personave juridikë Ligji Nr. 9754 (hereinafter, "Criminal liability of legal entities" or "CLLC") in 2007.[110] The most recent amendments to the ACC were enacted in 2012 and enhanced the provisions governing corruption by adding new articles that give more concrete definitions.[111]

The ACC, PFCFAC, and CLLC focused on corruption in the private sector, and like other European nations, divided corruption offenses into active and passive.[112] Like the FCPA, the ACC prohibits corruptive practices in both the public and private sectors, treating the

108. Criminal Code of the Republic of Albania, Law No. 7895 (Jan. 27, 1995) [hereinafter ACC].

109. *Id.* arts. 7 § (j), 74 § (a). Implementation of the law on criminal acts committed by foreign nationals—Section (j)—applies to criminal acts related to technological information field, and Article 74 computer dissemination of materials pro genocide or crimes against humanity—Section (a) states that "public provision or distribution of deliberate public through computer systems, materials, to deny, minimize, significantly approve or justify acts that constitute genocide or crime against humanity, punishable by imprisonment of three to six years."

110. Public Cooperation in Combating Corruption, Law No. 9508, (Apr. 3, 2006) (Alb.) [hereinafter PFCFAC]; "Për përgjegjësinë penale të personave juridikë, Law No. 9754 (June 14, 2007) (Alb.) [hereinafter CLCC].

111. ACC, *supra* note 108.

112. Active corruption in the private sector entailed direct or indirect promise, offer, or gift to a person who exercises a management function in a commercial company or who works in any other position in the private sector, of any irregular benefit for himself or for a third party, in order to act or not to act contrary to his duty. Passive corruption in the private sector addressed direct or indirect soliciting or taking of any irregular benefit or of any such promise for himself or for a third party, or accepting an offer or a promise that follows from the irregular benefit by the person who exercises a management function or whatever other position in the private sector in order to act or not to act contrary to his duty. *See id.*

giving of gifts or hospitality to any public official as active bribery.[113]

The ACC also addresses that any person must self-report when he has knowledge about any crime committed or that is taking place, and like Germany, does not address protection for whistleblowers.[114] A distinctive feature of Albanian legislation is that the CLLC does not provide for the specific offense of bribery of companies, but does provide for the criminal liability of a legal entity for offenses performed on its behalf or for its benefit by: (i) the bodies and representatives of such legal entity; or (ii) by a person being under the authority of the person that manages the legal entity.[115]

6. Holland—Nederlands Wetboek van Strafrecht

Like many other countries in Europe, Holland has implemented most of its anti-corruption and bribery legislation into its criminal code, Nederlands Wetboek van Strafrecht, (hereinafter, "Dutch Criminal Code" or "DCC"). Holland's anti-corruption and bribery laws are predominantly aimed at attempts to bribe public officials, covering: bribing a public official, accepting bribes as a public official, bribing a non-public official, and accepting bribes as a non-public official.[116] While thorough, the DCC contains relatively limited jurisdictional reach, focusing more on domestic matters, and increasingly lenient punishment and fines[117]. In regard to the DCC's limited jurisdictional reach, a foreign non-Dutch company that has committed acts of bribery of a non-Dutch foreign official outside the

113. *Id.* arts. 164/a, 244, 245, 245/1, 319, 319/b, 328. These articles concern public sector corruption. Note: Unlike the FCPA however, gifts and hospital are allowed if: (1) they do not exceed Albanian Lek 10,000 (approximately 70 Euros) during a one-year period (gifts hospitality are not subject to disclosure to the respective public authority), and (2) the gift or hospitality is disclosed to the respective public authority. Article 164 (a) deals with private sector corruption. NOTE: There are no specific currency limits.

114. ACC, *supra* note 108, art. 300; Criminal Procedure Code of the Republic of Albania, No. 7905, arts. 281–83 (Mar. 21, 1995) [hereinafter ACPC].

115. CLCC, *supra* note 110, art. 3.

116. Criminal Code arts. 177, 328b pts. 1–2, 363 (Neth.) [hereinafter DCC]. Article 177 of the DCC addresses bribing a public official, Article 363 addresses accepting bribes as a public official, Article 328b part 2 addresses Bribing a non-public official, and Article 328b part 1 addresses accepting bribes as a non-public official.

117. *Id.*

Netherlands is not subject to the criminal laws of the Netherlands.[118]

7. Europe: Success as Individuals, but Failure as a Whole

Nation states throughout Europe have vastly improved their laws and addressed bribery and corruption with positive results. As evidenced by the Corruption Perception Index (hereinafter, "CPI"), Western Europe received the highest regional score of 66 out of 100 from the (CPI) in 2021.[119] Yet, there is a great disparity between nation states throughout Europe, especially to the east.[120] The main contribution to Eastern Europe's difficulty in addressing corruption is due to geo-political turmoil due to their history of being satellite nations of the USSR.[121] While Eastern Europe's challenges differentiate from their neighbors, states to the west experience their own issues while trying to legislate and enforce laws to limit corruption.[122]

Many states in Europe used the FCPA and other general principles in combatting bribery and corruption to create their laws. However, each state has constructed and tailored their laws in a specific manner to their own state. Some nations focus on company size, while others

118. Rob Elvin & Stephanie Faber, *Five Minutes On . . . Anti-Bribery and Corruption Laws in the EU*, SQUIRE PATTON BOGGS (2017), http://www.squirepattonboggs.com/~/media/files/insights/publications/2015/07/five-minutes-on-antibribery-and-corruption-laws-in-europe/17890five-minutes-on-briberythought-leadership.pdf (providing a description and comparison of the EU Member State regimes and concluding that most laws in the EU are stricter than those in the U.S.).

119. *CPI 2021 for Western Europe & European Union: Trouble Ahead for Stagnating Region*, TRANSPARENCY INT'L (Jan. 25, 2022), http://images.transparencycdn.org/images/CPI2021_Report_EN-web.pdf [hereinafter *CPI 2021: Trouble Ahead*]. The CPI scores 180 countries and territories by their perceived levels of public sector corruption, according to experts and business people. The CPI aggregates data from different sources that provide perceptions among business people and country experts of the level of corruption. The U.K. received an CPI score of 78, France received a CPI score of 71, Germany received a CPI score of 80, Spain received a CPI score of 61, Albania received a CPI score of 35, and the Netherlands received a CPI score of 82. *See id.*

120. TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2021 11 (2022) https://www.transparency.org/en/cpi/2022. Eastern Europe received a region score of 36 in comparison to Western Europe which received a 66.

121. *CPI 2021: Trouble Ahead*, *supra* note 119.

122. *Id.*

focus on individuals and not the company itself. Some nations created separate anti-bribery legislation, while others added the provisions to their already existing criminal codes. Some states failed to acknowledge the possibility of whistleblower protections, and others do not define key language such as "corruption."

The lack of harmony has created difficulties for state interactions and for the continent, resulting in haphazard enforcement of anti-bribery and corruption laws outside of a nation's territorial borders. The lack of ratification, transposition, implementation, and enforcement of international and European state norms different in each body of anti-corruption legislation has ultimately created a deadlock in the European fight against corruption.[123] This is further evidenced by the European Commission's failed European Union (hereinafter, "EU") Anti-Corruption Report.

The EU Anti-Corruption Report was established in 2011, and was assigned by the European Commission to publish bi-annual reports for the purposes of monitoring and assessing the efforts of member states of the EU in tackling corruption.[124] The non-binding report was first commissioned in 2013 with the specific objectives of assessing the overall situation in the EU's fight against corruption; identifying trends and best practices; making general recommendations for adjusting EU policy on preventing and fighting corruption; making tailor-made recommendations; and helping member states, civil society, or other stakeholders identify shortcomings, raise awareness, and provide training on anti-corruption.[125] The first and only report was published in 2014, and prior to publication of the second report in 2017, the Anti-Corruption Report was discontinued.[126] An internal letter to the chair of the EU Parliament's Civil Liberty Committee

123. Elvin & Faber, *supra* note 118; Berbell, *supra* note 106.

124. European Commission, *Report from the Commission to the Council and the European Parliament EU Anti-Corruption Report*, COM (2014) 038 final (Mar. 2, 2014) [hereinafter *EU Anti-Corruption Report*].

125. *Id.*

126. Janie Matthews, *Commission 'Quietly Shelves' Corruption Report*, EURACTIV (Feb. 3, 2017)) https://www.euractiv.com/section/justice-home-affairs/news/commission-quietly-shelves-corruption-report/ (stating that this decision drew condemnation from transparency campaigners, who criticized it because of political turmoil in Romania regarding an emergency decree that many are against).

stated that the Anti-Corruption Report was beneficial but no longer necessary.[127] These multifaceted issues are not just unique to Europe and the EU. Other regions such as Asia have experienced similar success, as well as their own issues.

B. ASIA

1. Singapore—Prevention of Corruption Act

One of the earliest examples of anti-bribery and corruption law is exhibited by Singapore's Prevention of Corruption Act (hereinafter, "PCA"). The legislation was introduced by Ong Pang Boon, the Minister for Home Affairs, in the Legislative Assembly in January 1960.[128] Domestic corruption was an ongoing problem in Singapore, and the Prevention of Corruption Ordinance (hereinafter, "PCO") that was enacted in 1937 had little effect in alleviating the issue.[129] The PCA empowered the Corrupt Practices Investigation Bureau (hereinafter, "CPIB") with sufficient authority to deal with corruption.[130] The definition of corruption was revised to explicitly include various forms of gratifications, penalties for corrupt behaviors became more severe, provided for the authority to arrest a person suspected of corruption, and the ability to access the suspect's financial accounts or premises to search for evidence.[131]

127. Frans Timmermans, (Eur. Comm'n First Vice-President), Letter dated Jan. 25, 2017 from the Eur. Comm'n First Vice-President addressed to the Chairman, ARES (2017) 455202 (Jan. 25, 2017) ("While the first report was useful in providing an analytical overview and creating a basis for further work, this does not necessarily mean that a continued succession of similar reports in the future would be the best way to proceed."). The letter stated that the first report was useful in providing an analytical overview and creating a basis for further work, but because of the complexity and evolving nature of corruption and its prevention, a more efficient and versatile approach would therefore be a better focus given to corruption issues in the European Union with operational activities to share experience and best practices among Member States.

128. Corrupt Practices Investigation Bureau, *The Journey: 60 Years of Fighting Corruption in Singapore* 1–10 (2012).

129. Singapore. Legislative Assembly *Debates: Official Report* (Jan. 13, 1960). Prevention of Corruption Bill (Vol. 12, col. 15).

130. Singapore. Legislative Assembly *Debates: Official Report* (Jan. 13, 1960). Prevention of Corruption Bill (Vol. 12, col. 15).

131. Singapore. Legislative Assembly. *Debates: Official Report*. (Feb. 13, 1960). Prevention of Corruption Bill (Vol. 12, col. 377).

Today, the PCA has been amended numerous times to include more than just acts occurring within Singapore's borders, with its most recent amendment in 2002.[132] The PCA targets individuals and business entities who assist those individuals who either (a) corruptly solicit or receive, or agree to receive, from any other person; or (b) corruptly give, promise or offer to any person, whether for the benefit of that person or of another person, any gratification as an inducement to or reward for, or otherwise on account of: (i) any person doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed; or (ii) any member, officer or servant of a public body doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body is concerned.[133] Penalties for violations include imprisonment up to seven years if it involves the government or any public body; otherwise the imprisonment is up to five years, and a fine up to SGD 100,000 (73,340 USD), and confiscation of benefits.[134] Extraterritorial jurisdiction of the PCA is broad and encompasses any Singaporean national (including foreign nationals domiciled in Singapore) who commits acts of bribery abroad, and any Singaporean company or subsidiary (including partnerships and directors of those companies) who commits bribes abroad.[135] The PCA's jurisdictional reach, however, does not address foreign companies that commit bribes abroad.

2. China—Zhōnghuá rénmín gònghéguó xíngfǎ (中华人民共和国刑法)

In 1980, the Zhōnghuá rénmín gònghéguó xíngfǎ or Criminal Law of the People's Republic of China (hereinafter, "PRC Criminal Law") was enacted and contained criminal offenses for acts of bribery and corruption.[136] The act was further amended in 1997, 2015, and with

132. Prevention of Corruption Act [PCA] (1960) (rev. 2002) (Sing.). The Act has been amended in 1963, 1966, 1972, 1981, 1989, 1991, 1998, 2002.

133. *Id.* pt. 3, arts 5–6.

134. *Id.* pt. 3, art. 7.

135. *Id.* pt. 6, art. 37.

136. Hui Xu et al., *China*, *in* GLOB. LEGAL INSIGHTS, BRIBERY & CORRUPTION 46 (Anneka Randhawa & Jonah Anderson eds., 9th ed. 2022) (providing a brief overview of China's law and enforcement regime).

the most recent updates to the bribery and corruption provisions occurring in 2020.[137] The PRC Criminal Law prohibits acts of official bribery and commercial bribery, with broad language being used to define terms such as "state functionary," encompassing both active and passive actions in furtherance of bribery, and distinguishing the offenses of bribe giving[138] and receiving.[139]

The PRC Criminal Law, unlike Singapore's PCA, has wide extraterritorial jurisdictional reach over foreigners and foreign business entities, which must adhere to the same laws of the PRC Criminal Law as Chinese nationals.[140] The PRC Criminal Law mirrors the DOJ's pre-*Hoskins* interpretation of the FCPA, in that it also claims jurisdiction over bribery and other crimes that are committed outside of China with the intention of obtaining improper benefits within China.[141] The PRC Criminal Law, also like the FCPA, provides defenses for hospitality and lodging, such as not to establish quantitative nor qualitative limitations on hospitality expenses.[142]

3. Malaysia—Akta Suruhanjaya Pencegahan Rasuah

The anti-corruption legislation in Malaysia is Akta Suruhanjaya Pencegahan Rasuah or the Malaysian Anti-Corruption Commission Act (hereinafter, "MACCA"), which came into force in January 2009. MACCA is enforced by the Malaysian Anti-Corruption Commission (hereinafter, "MACC").[143] Section 17A, a new provision that came in

137. *Id.*

138. Criminal Law of the People's Republic of China (1979). Article 164 prohibits offering a bribe to a non-state functionary and offering a bribe to a foreign public official or official of international public organization. Article 389 prohibits offering a bribe to a state functionary. Article 391 prohibits offering a bribe to an entity. Article 390 prohibits offering a bribe to a close relative of, or any person close to, a current or former state functionary. Article 393 prohibits offering of a bribe by an entity.

139. *Id.* arts 163, 385, 387, 388.

140. *Id.* arts. 6–8.

141. *Id.*

142. *Id.*; Anti-Bribery and Books 7 Records Provisions of The Foreign Corrupt Practices Act, 15 U.S.C. § 2B (1994). The FCPA's "Bona Fide Expense" defense requires balancing the reasonableness of the expense with the cost of the expense for hospitality, and lodging, whereas in China they look at the totality of the facts in the present circumstance.

143. Malaysian Anti-Corruption Commission Act No. 694 (2009).

the summer of 2020, expanded the MACC's corruption investigation powers by criminalizing commercial and private-public bribery modeled after the UK Bribery Act's corporate liability rules.[144] MACCA pertains to both the private sector and the public sector as well as officers within the government.[145] MACC places substantial fines, imprisonment, and extension of personal criminal liability for senior personnel and other individuals convicted of bribery, and the new provision harshening the penalties added that individuals who are tied to a bribe deal and accounted as liable can be charged and receive a maximum fine up to 10 times higher than the sum of the bribe, and/or receive a maximum jail sentence of 20 years.[146]

The MACCA does not use the word bribe, but instead uses the word "gratification" which is divided between both pecuniary and non-pecuniary bribes; nor does the MACCA make a distinction between private sector bribery and bribery of public officials.[147] With the addition of Section 17A, the jurisdiction of the MACCA has greatly increased.[148] The MACCA now applies to any company or partnership incorporated or established anywhere outside Malaysia but which conducts business within the territorial borders of Malaysia.[149] While not as broad as China's PRC Criminal Law, the MACCA also has extra-territorial jurisdiction by including Malaysian incorporated companies and partnerships committing corrupt practices outside of Malaysia.[150]

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144. Imani Muguku & Ben Schmidt, *Malaysia Boldly Enforces Private Sector Bribery Law*, ANTI-CORRUPTION & GOVERNANCE CTR. (May 24, 2021), http://acgc.cipe.org/business-of-integrity-blog/malaysia-boldly-enforces-private-sector-bribery-law/#:~:text=According%20to%20the%20new%20provision, MACC%20to%20prosecute%20corporate%20leaders. (describing the construction of the new provision). § 17A goes further than the U.K. Bribery Act because it contains a provision regarding personal liability.

145. Malaysian Anti-Corruption Commission Act No. 694, pt. IV, art. 16 (2009).

146. *Id.* art 17. § 17A of the MACCA governs the offence of corruption committed by a commercial organization. § 17A(1) provides that a commercial organization commits an offence if an associated person promises gratification to any person with an intent "to obtain or retain business," or "an advantage in the conduct of business for the commercial organization."

147. *Id.* art. 17.

148. *Id.* art. 17.

149. *Id.* art. 17.

150. Norhisham Bahrin, *Corporate Liability Provision Under Section 17a Macc*

4. Asia: ACA Effectiveness and Weaknesses

Per the CPI, the Asia-Pacific region received a score of 45 out of 100, which was second to Western Europe in addressing bribery and corruption.[151] Asia's method of addressing corruption on a continental and regional level is done through the use of Anti-Corruption Agencies (hereinafter, "ACAs").[152] Asia has a total of 47 ACAs which are divided into two categories: Type A ACAs, which generally are more effective due to their dedicated focus on anti-corruption functions, and Type B ACAs, which have been less effective because of their division to performance of both anti-corruption and non-corruption-related functions.[153]

Like Europe, the region as a whole performed relatively well, but many nations throughout Asia have struggled in legislation and enforcement, mainly those with Type B ACAs.[154] The nation states that have experienced less geopolitical upheaval have been able to make greater strides in preventing bribery offenses in their own territory, as well as their nationals and transnational companies abroad.[155] Nation states like Afghanistan, Myanmar, Pakistan, Philippines, and Thailand, have been ensnared by ongoing conflict for years.[156] Other nation states such as Cambodia, Nepal, Papua New

Act 2009 and Why it Matters to You, LEGAL 500 (2021), https://www.legal500.com/developments/thought-leadership/corporate-liability-provision-under-section-17a-macc-act-2009-and-why-it-matters-to-you/ (detailing MACCA's broad territorial reach).

151. *CPI 2022 for Asia Pacific: Basic Freedoms Restricted as Anti-Corruption Efforts Neglected*, TRANSPARENCY INT'L (Jan. 31, 2023), https://www.transparency.org/en/news/cpi-2022-asia-pacific-basic-freedoms-restricted-anti-corruption-efforts-neglected. (reporting on the Corruption Perceptions Index for Asia Pacific in 2022).

152. *But see*, Jon S.T. Quah, *Anti-Corruption Agencies in Asia Pacific Countries: An Evaluation of Their Performance and Challenges*, TRANSPARENCY INT'L, 3 (2017) (stating that performance of these ACAs has been disappointing as corruption remains a serious problem in many Asia Pacific countries, as reflected in their low scores in Transparency International's Corruption Perceptions Index (CPI) in 2016).

153. *Id.* Both Singapore (CPI score of 88) and Malaysia (CPI score of 48) are type A, and China is a type B (CPI Score of 45). *CPI 2022*, *supra* note 151.

154. Quah, *supra* note 152, at 15.

155. *Special Report on Exploiting Disorder: al-Qaeda and the Islamic State,* INT'L CRISIS GRP., 18 (Mar. 14, 2016), https://www.crisisgroup.org/global/exploiting-disorder-al-qaeda-and-islamic-state.

156. *South Asia and Afghanistan*, STRATEGIC SURV. 111, 118, 146 (2018)

Guinea, Sri Lanka, Timor-Leste, and Vietnam are post-conflict countries that have endured drawn-out moments of civil war. [157] These countries have historically been more vulnerable to corruption because of the combined effect of the legacy of wartime corruption, the management and distribution of massive inflows of funds from natural resources or foreign aid, and the weakness of centralized government in the state.[158]

Today, the South-East Asia Anti-Corruption and Business Integrity (hereinafter, "SEACAB") Project is the most recent initiative for the Asian continent.[159] Although it remains to be determined whether the goals of the SEACAB will be accomplished, the goals are to promote business integrity in the region, including strengthening businesses' awareness of, and ability to mitigate, corruption risks.[160] The Project is delivered in collaboration with key partners and projects in the region, which include activities being carried out under the auspices of the SEACAB Project such as: (i) regional thematic workshops and collective action events, (ii) capacity building, and (iii) regional reports on anti-corruption trends and corruption risk assessments.[161] Another area of the globe that has seen growing cooperation and success is sub-Saharan Africa.

(discussing the prospects for peace in Afghanistan).

157. *See generally* Thomas Parks et. al., THE CONTESTED CORNERS OF ASIA: SUBNATIONAL CONFLICT AND INTERNATIONAL DEVELOPMENT ASSISTANCE, THE ASIA FOUNDATION (2013) (discussing various states capacity and subnational conflict).

158. Mari Chene, *U4 Expert Answer: Lessons Learned in Fighting Corruption in Post-Conflict Countries*, TRANSPARENCY INT'L 3, 6 (Dec. 12, 2017), https://www.transparency.org/files/content/corruptionqas/355_Lessons_learned_in_fighting_corruption_in_post-conflict_countries.pdf.

159. *Anti-Corruption Initiative for Asia and the Pacific*, OECD https://www.oecd.org/corruption/anti-corruption-initiative-for-asia-pacific.htm (last visited Apr. 17, 2023) (announcing the 11th Regional Conference taking place from May 9–11th, 2023). The project has been ongoing since 2018 and was originally a four-year plan to be finalized by the end of 2021, but due to COVID-19 has experienced delays.

160. *Id.* ("The Anti-Corruption Initiative for Asia and the Pacific (ACI), established in 1999, provides a regional forum for policy makers, practitioners, experts, and private sector representatives to exchange practices and experiences in anti-corruption and business integrity efforts.").

161. *Id.*

C. SUB-SAHARAN AFRICA

1. Botswana—Corruption and Economic Crime Act

In response to several corruption scandals involving senior officials in the ruling Botswana Democratic Party, the 1994 Corruption and Economic Crime Act (hereinafter, "CECA") was passed into law, creating the Directorate on Corruption and Economic Crime (hereinafter, "DCEC").[162] The DCEC was modeled after Hong Kong's Independent Commission Against Corruption and its broad operational independence and discretion powers.[163] The DCEC consists of a "three-pronged strategy" consisting of investigation, prevention, and public education.[164] The DCEC was given well-defined investigative powers, such as the power to arrest, trace, and freeze assets, to search and seize, to confiscate travel documents, and to extradite suspects, and it can also recommend prosecutions to the Directorate of Public Prosecutions (DPP).[165]

Some distinguishable characteristics of the CECA include the use of the term "valuable consideration" as the trigger word for offenses carried out in the furtherance of corruption.[166] The CECA also has a section specifically addressing conflict of interest, and how they can be punishable as acts of corruption.[167] The offenses section of the CECA also does not discriminate in its prohibition on corrupt behavior; it equally addresses penalties and punishment for individuals or companies offering the bribes as well as for the public

162. *See* Corruption and Economic Crimes Act [CECA], No. 13 of 1994 (1994) (Bots.).
In the early 1990s, multiple corruption scandals involving high ranking officials in the Botswana Democratic Party ensued and caused public outrage.

163. *See* Rudolph L.B. & Josephine Seapei Moeti-lysson, Ben-Africa Conference, *The Workings and Achievements of the Anti-Corruption Departments-Botswana Case Study-Directorate on Corruption and Economic Crime (DCEC)* 7 (Univ. Bots., 2011) (The Independent Commission Against Corruption is the main body of legislation for combating bribery and corruption in Hong Kong).

164. *Id.*

165. *See* CECA, *supra* note 162, Parts 2, 3 (These functions are those of the directorate, which was created by Part 2 of the CECA. The functions of the Directorate are listed in Part 3).

166. *Id.* pt. 4, § 23.

167. *Id.* pt. 4, § 31(a).

official on the receiving end.[168]

Developments of the DCEC consisted in 2010 with the hiring of a director of training and development who worked directly with foreign experts and the Basel Institute of Governance to develop an internal training framework for the DCEC.[169] The position was included to incorporate a new investigative manual, an induction course, and regular lessons for all investigators for operational planning and management of complex cases.[170] Then, in 2011, the DCEC "created an assessment section to better triage corruption reports. Assessment officers analyzed incoming complaints and supporting evidence to produce reports for panels of experienced officers—a move that enabled the directorate to respond to most complaints within four weeks."[171]

2. Kenya—Sheria ya Rushwa na Sheria ya Kupambana na Rushwa na Uhalifu wa Kiuchumi

In 2003 the Kenyan Parliament passed the Sheria ya Kupambana na Rushwa na Uhalifu wa Kiuchumi or the Anti-Corruption and Economic Crimes Act of 2003 (hereinafter, "ACECA"). The ACECA established the Kenya Anti-Corruption Commission (KACC) as the government organization with the authority to enforce the ACECA, and established special magistrates to preside over cases involving corruption.[172] However, in August 2010, a new constitution was declared in Kenya, and the Kenyan Parliament enacted the Ethics and Anti-Corruption Commission Act, No. 22 of 2011 (hereinafter, "EACCA").[173] The EACCA amended AECEA by repealing the

168. *Id.*

169. *See, e.g.,* Gabriel Kuris, *Managing Corruption Risks: Botswana Builds an Anti-Graft Agency, 1994–2012*, INNOVATIONS FOR SUCCESSFUL SOC'Y, PRINCETON UNIV. 15 (2013) (information about the DCEC's evolution and changes over time).

170. *Id*.

171. *Id.* at 11.

172. Anti-Corruption and Economic Crimes Act, No. 3. (2003) (Kenya) [hereinafter ACECA].

173. *See* BRIAN KENNEDY & LAUREN BIENIEK, MOVING FORWARD WITH CONSTITUTIONAL REFORM IN KENYA: A REPORT OF THE CSIS AFRICA PROGRAM 1 (2010), https://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/101203KennedyMovingForwardKenyaWeb.pdf (overview of new constitution and specific provisions therein); Ethics & Anti-

provisions establishing KACC and its advisory board, while retaining all other provisions relating to corruption offenses and economic crimes, their investigation and prosecution.[174] Then, in 2016, the Kenyan Parliament passed the Sheria ya Rushwa or Bribery Act of 2016 (hereinafter, "Kenyan Bribery Act") as supporting legislation for the AECEA.[175]

While the ACECA targets public officers, the Bribery Act targets all persons; prosecutors will often charge public officials under the Bribery Act as read with ACECA.[176] The main offenses under the Kenyan Bribery Act are giving and receiving of bribes, the bribery of foreign public officials, as well as failure of a private entity to put in place procedures for the prevention of bribery or prevent bribery by a person in association with that entity, as well as reference to an associated person in the Act shall mean a person who performs services on behalf of another person as an agent, employee or in any other capacity.[177] The Kenyan Bribery Act applies to the conduct of citizens of Kenya, public and private entities within Kenya as well as activities done outside Kenya.[178]

3. Nigeria—Corrupt Practices Act and Other Related Offenses

Nigeria over time has had many legislative provisions, laws, and acts in attempts to thwart corruption and bribery.[179] The main body of legislation is the Corrupt Practices Act and Other Related Offenses (hereinafter, "CPORO"), which was enacted in 2000.[180] The CPORO's

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Corruption Commission Act, No. 22 (2011) (Kenya) [hereinafter EACCA].

174. Ethics & Anti-Corruption Commission Act, No. 22 (2011) (Kenya).

175. The Kenyan Bribery Act 2016, Part II, §§ 5–6 (Kenya).

176. *See* Rubin Mukkam-Owuor & Elizabeth Kageni, *Bribery & Corruption Laws and Regulations 2023*, GLOB. LEGAL INSIGHTS (2023), https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations (providing overview of laws and regulations).

177. The Kenyan Bribery Act 2016, Part II, §§ 5–6 (Kenya).

178. *See id.* § 15 (the acts are treated as if they took place in Kenya).

179. *See 5 Laws on Corruption in Nigeria*, LAW PADI, http://lawpadi.com/5-laws-corruption-nigeria/#:~:text=The%20Corrupt%20Practices%20%26%2 (last visited Apr. 26, 2023) (noting the five significant corruption laws Nigeria has used are its 1999 Constitution, The Economic and Financial Crime Commission Act, The Corrupt Practices and Other Related Offenses Act, The Criminal Code of Lagos State, and The Money Laundering Prohibition Act).

180. Corrupt Practice and Other Related Offences Act (2000) [hereinafter

most recent amendments were 2010, and the explanatory memorandum states that the Act seeks to prohibit and prescribe punishment for corrupt practices and other related offenses.[181] The CPORO created the Independent Corrupt Practices and Other Related Offences Commission vesting it with the responsibility for investigation and prosecution of offenders thereof.[182] A provision has also been made for the protection of anybody who gives information to the Commission with respect to an offense committed or likely to be committed by any other person.[183] The main provisions of the CPORO include: official corruption, corrupt offers, gratification and bribery of public officers, and bribery for giving assistance regarding contracts.[184]

In 2016, Nigeria took a rather unique approach to getting their citizens involved in assisting the government in addressing corruption by approving a new policy on whistleblowing that aims to encourage any Nigerians to report financial and other related crimes to relevant authorities.[185] The highlight of the policy is that whistleblowers are entitled to receive as much as five percent of the amount recovered if the matter is successfully arbitrated.[186] The CPORO's extraterritoriality provisions are derived from Nigeria's longstanding history of corruption as a result of foreign intervention and influence.[187] The CPORO's approach to extraterritoriality covers

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CPORO] (Nigeria).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* §§ 8, 9(1), 10, 18, 22.

185. *See* Sani Tukur, *Expose Corruption and Make Money as Nigerian Govt Adopts New Whistle Blowing Policy*, PREMIUM TIMES (Mar. 24, 2023), https://www.premiumtimesng.com/news/headlines/218608-breaking-expose-corruption-make-money-nigerian-govt-adopts-new-whistle-blowing-policy.html?tztc=1 ("The Federal Government has approved a new policy on whistle blowing that aims to encourage Nigerians to report financial and other related crimes to relevant authorities. The highlight of the policy is that whistleblowers whose revelations lead to recovery of money will be entitled to as much as 5 per cent of the recovered sum").

186. *Id.*

187. *See, e.g.,* Olakule O. Olagoke, *The Extra-Territorial Scope of the Anti-Corruption Legislation in Nigeria*, 38 INT'L L. 71, 76, 83–84 (2004) (description of history of Nigeria in the context of corruption stemming from foreign influence and similar interventions).

person, property, and business activities mentioned in specific provisions covering acts "outside Nigeria," as well as those who perpetrate corruption abroad due to the effects it has on society at large.[188]

4. Sub-Saharan Africa: Historical Exploitation

Corruption continues to harm Africa, hindering democracy, development, and upward mobility for the common citizen. The continent ranks the lowest amongst global regions on the CPI, with an average score of 33 out of 100 for its CPI scores.[189] The impact of corruption in Africa has been crippling, and is a theme that is both common and historical in most of Africa.[190] The African continent has experienced sacking and pillaging of its natural resources for generations, and as a result has experienced foreign corrupt practices take root in the soil of its territory.[191] Due to oppressive foreign intervention, many nation states in Africa have constructed their anti-bribery and corruption laws to be especially detailed in their provisions covering foreign companies and nationals operating within their territory.[192]

Today, Africa is one of the most heavily invested-in regions of the world with billions of dollars being sent in aid to assist with combatting corruption annually, yet over 50 billion USD worth of stolen assets flow out of Africa every year.[193] This comes as the result

188. *Id.* at 84.

189. *See CPI for Sub-Saharan Africa: Amid Democratic Turbulence, Deep-Seated Corruption Exacerbates Threats to Freedoms*, TRANSPARENCY INT'L (Jan. 25, 2022) [hereinafter *CPI for Sub-Saharan Africa*], https://www.transparency.org/en/news/cpi-2021-sub-saharan-africa-amid-democratic-turbulence-deep-seated-corruption (providing data on CPI scores of countries).

190. *See* Jean-François Médard, *Corruption in the Neo-Patrimonial States of Sub-Saharan Africa*, *in* POLITICAL CORRUPTION 379–402 (Michael Johnston ed., 3rd ed., 2002) (Africa's roots of corruption date back to colonial times due to its rich resource reserves).

191. *Id.*

192. *Id.* at 141.

193. *See How to Win the Fight Against Corruption in Africa*, TRANSPARENCY INT'L (July 11, 2018), https://www.transparency.org/en/news/how-to-win-the-fight-against-corruption-in-africa (providing additional information and context on corruption within African countries); Stephanie Hanson, *Corruption in Sub-Saharan Africa*, COUNCIL ON FOREIGN RELS. (Aug. 6, 2009, 2:36 PM),

of years of bribery being treated as common business practice in Africa.[194] Experts believe that African governments need to fight corruption instead of relying on foreign aid; however, anti-corruption efforts in Africa have shown minimal progress and analysts fear that major international partners are unwilling to continue applying influence over African governments.[195]

However, not every nation state in Africa has been viewed in this light. Botswana is regarded as a "shining light and beacon of hope" in the fight against corruption in Africa and has one of the best anti-corruption profiles on the continent.[196] Botswana has established anti-corruption ideals across government and parastatal organizations as well as in local authority in order to root out corruption.[197] As a result of Botswana's success, many nation states are beginning to take a similar strategy by addressing government inefficiency, lack of transparency and accountability, lack of awareness, and a lack of motivation to change, although there were some jurisdictional disparities using the same approach.[198]

D. LATIN AMERICA AND THE CARIBBEAN

1. Brazil—Código Penal Brasileiro

The Código Penal Brasileiro or the Brazilian Penal Code

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https://www.cfr.org/backgrounder/corruption-sub-saharan-africa. A 2002 African Union study estimated that corruption cost the continent roughly $150 billion a year. To compare, developed countries gave $22.5 billion in aid to sub-Saharan Africa in 2008, according to the Organization for Economic Cooperation and Development.

194. *See* Ziavash, *20 Countries Where Bribery in Business is Common Practice*, WORLDATLAS (Apr. 25, 2017), https://www.worldatlas.com/articles/20-countries-where-bribery-in-business-is-common-practice.html (describing prevalence of bribery and demonstrating widespread use of the tactic).

195. Hanson, *supra* note 193.

196. *See* U.N. Econ. Comm'n for Afr., Botswana is a Shining Beacon of Hope in the Fight Against Corruption in Africa (June 18, 2018), https://archive.uneca.org/stories/botswana-shining-beacon-hope-fight-against-corruption-africa [hereinafter UNECA, Fight Against Corruption in Africa] (Botswana received a CPI score of 55, which is 22 points higher than the continent average); *CPI for Sub-Saharan Africa*, *supra* note 189; Olagoke, *supra* note 187, at 84.

197. UNECA, Fight Against Corruption in Africa, *supra* note 196.

198. *Id.*

(hereinafter, "BPP") is the primary legislative act that sets forth the crimes of active and passive corruption.[199] Active corruption convictions are for individuals who offer or promise an undue advantage to public servants to omit or delay an official act, whereas passive corruption penalizes anyone who solicits, receives, or accepts an offer of an undue advantage made by virtue of the public function they exercise.[200] The most recent amendment to the BPP came in June 2002, which added active corruption of foreign public officials and the act of influence-peddling in the course of an international business transaction.[201] Other anti-corruption laws in Brazil include the Law of Crimes Against the Tax System, the Economic Order and Consumer Relations, which targets cases of passive corruption by officers of the Brazilian Revenue Service,[202] and the Anti-Money Laundering Act, which is used for the more serious corrupt acts.[203] The most recent law targeting corruption is the Public Bid Law passed in April 2021, which replaced the previous public procurement law in Brazil.[204] The Public Bid Law also added a new list of criminal conduct associated with big rigging into the BPP.[205]

Since 2015, Brazilian anti-corruption law has been at the forefront of multi-jurisdictional resolutions such as Odebrecht-Braskem, Rolls Royce, and Technip.[206] This trend has resulted in Brazil gaining

199. Código Penal, Decreto No. 2848, de 7 de Dezembro de 1940 (Braz.) [hereinafter BPP].

200. *Id.* arts. 317, 333.

201. ORG. FOR ECON. COOP. & DEV. [OECD], DIRECTORATE FOR FIN. & ENTER. AFFS., BRAZIL: PHASE 1 REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION (Aug. 31, 2004) [hereinafter OECD, BRAZIL: PHASE 1].

202. Decreto No. 8137, art. 3, de 27 de Dezembro de 1990 (Braz.) [hereinafter Law of Crimes].

203. *See* Decreto No. 9613, de 1998 (Braz.) [hereinafter Anti-Money Laundering Act]. This act facilitates the prosecution of corruption-related crimes and their subsequent acts, but also facilitates the use of precautionary measures such as the freezing and recovering as assets.

204. *See* Decreto No. 14133, de 1 de Abril de 2021 (Braz.) [hereinafter Public Bid Law] (only criminal provisions have been enacted; Civil and administrative provisions will come into effect in 2023); Anti-Money Laundering Act, *supra* note 203.

205. *See* BPP, *supra* note 199, arts. 317, 333 (BPP amendments are to Article 337-E to Article 337-0 and increases the penalties for public bids of undue favors to private interests); Public Bid Law, *supra* note 204.

206. Press Release, U.S. Dep't. of Just., Odebrecht and Braskem Plead Guilty and

experience to further strengthen its anti-corruption enforcement and legislation with each amendment to the BPP and enacted supplemental law.[207] While the Brazilian Constitution designates a multi-agency system to right corruption and its growth has resulted in showing some success, the public sentiment throughout the country continues to be pessimistic about the government's ability to handle corruption.[208]

2. Mexico—Sistema Nacional Anticorrupción

In 2015, Article 113 of the Constitución Política de Los Estados Unidos Mexicanos or the Political Constitution of the United Mexican States was amended to create the *Sistema Nacional Anticorrupción* or the National Anti-Corruption System (hereinafter, "NAS").[209] NAS is the government entity tasked with prevention, detection, and sanctioning of corrupt acts.[210] The implementation of NAS resulted in other laws in Mexico receiving amendments, with the most significant Código Penal Federal or the Federal Criminal Code (hereinafter, "FCC")[211] receiving corruption provisions and the Ley General de

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Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History, U.S. Press Release 16-1515 (Jan. 16, 2016); Press Release, U.S. Dep't. of Just., Rolls-Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case, U.S. Press Release 17-074 (Jan. 17, 2017); Press Release, U.S. Dep't. of Just., TechnipFMC Plc and U.S.-Based Subsidiary Agree to Pay Over $296 Million in Global Penalties to Resolve Foreign Bribery Case, U.S. Press Release 19-714 (June 25, 2019).

207. Shin Jae Kim et al., *Brazilian Evolution in the Anti-Corruption Arena*, GLOB. INVESTIGATIONS REV. (Oct. 13, 2020), https://globalinvestigationsreview.com/review/the-investigations-review-of-the-americas/2021/article/brazilian-evolution-in-the-anti-corruption-arena (providing information about interplay between various authorities in Brazil within the anti-corruption landscape).

208. *See, e.g.*, Rogério Taffaerello et al., *Brazil*, *in* GLOB. LEGAL INSIGHTS, BRIBERY & CORRUPTION LAWS AND REGULATIONS 2023 (2022) ("Lastly, we unfortunately do not see foreseeable reasonable likelihood that state enforcement agencies become more independent, transparent, and efficient in only a few years' time").

209. Constitución Política de los Estados Unidos Mexicanos, CP, Art. 113, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-2015 (Mex.) [hereinafter Mexican Constitution].

210. *See generally* MAUREEN MEYER & GINA HINOJOSA, WOLA, MEXICO'S NATIONAL ANTI-CORRUPTION SYSTEM: A HISTORIC OPPORTUNITY IN THE FIGHT AGAINST CORRUPTION (2018) (providing information on the history of Mexico's fight against corruption).

211. Código Penal Federal [CPF], art. 212-222, Diario Oficial de la Federación

Responsabilidades Adminstrativas or the General Law of Administrative Responsibilities (hereinafter, "GLAR") being enacted in 2017.[212] Most bribery and corruption-related crimes are established in the local criminal codes as well as in the FCC, whereas administrative offenses committed by private entities or individuals, both foreign and domestic, are written in GLAR.[213]

Noteworthy, GLAR contains a defense for administrative corruption offenses known as the "Integrity Policy."[214] This allows for companies to escape liability if the relevant authority determines that the company had an adequate "integrity policy" in place.[215] The requirements that a company needs to meet in order to avoid liability are: a manual of organization and procedures, a published code of conduct that is practiced by all of the corporation, supervision, control and auditing systems with periodic examination, whistleblowing measures properly in place, a human resources department and policy, and public transparency mechanisms.[216]

Mexico's approach to extraterritorial jurisdiction is uniquely deferential. Pursuant to GLAR, local enforcement and authority are required to cooperate and yield to other transnational policies to fight against foreign corruption.[217] This is further outlined in the Código Nacional de Procedimientos Penales or the National Code of Criminal Procedures (hereinafter, "NCCP"), which states that Mexico will prove, to any foreign state upon request, the broadest assistance in the investigation, prosecution, and punishment of crimes that fall within the foreign state's jurisdiction.[218]

[DOF] 14-08-1931, últimas reformas 06-01-2023 (Mex.) [hereinafter FCC].

212. Ley General de Responsabilidades Administrativas, Diario Oficial de la Federación [DOF] 18-07-2016, últimas reformas 27-12-2022 (Mex.) [hereinafter GLAR].

213. *See* María Paula Boustani, *Q&A: Anti-Corruption Regulation in Mexico*, LEXOLOGY (Mar. 12, 2020), https://www.lexology.com/library/detail.aspx?g=c67f0c4f-d020-4052-bddc-224cb7e22fa8 (differentiating between laws that apply to foreign public officials and domestic public officials).

214. *Id.*

215. GLAR, *supra* note 212, art. 25.

216. *Id.*

217. *Id.* art. 90.

218. Código Nacional de Procedimientos Penales [CNPP], art. 433–34, Diario Oficial de la Federación [DOF] 05-3-2014, últimas reformas DOF 19-02-2021 (Mex.) [hereinafter NCPP].

3. Ecuador—Código Orgánico Integral Penal

Ecuador's most significant legislative body that addresses bribery and corruption is the Código Orgánico Integral Penal or the Comprehensive Organic Criminal Code (hereinafter, COCC"), passed in 2014 as an auxiliary law authorized by the Ecuadorian Constitution.[219] The main provisions for combatting corruption in the original COCC address embezzlement, unlawful enrichment, facilitation of illicit payments, and extortion.[220] In 2021, Ecuador strengthened the COCC with the addition of the Ley Orgánica Reformatoria del Código Orgánico Integral Penal en materia Anticorrupción or the On Amendments to the Comprehensive Organic Criminal Code in Relation to Anti-Corruption (hereinafter, "Anti-Corruption Supplement").[221] The Anti-Corruption Supplement added the crimes of obstruction of justice, overpricing in public procurement, as well as private sector bribery.[222] The Anti-Corruption Supplement also increased potential terms of imprisonment for active and passive bribery, including bribery of foreign officials, solicitation, and embezzlement of public funds.[223]

Uniquely, the Anti-Corruption Supplement states that if any of the crimes in the COCC are committed during a state of emergency, they will receive a maximum sentence.[224] Taking a page out of Nigeria,

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219. Código Orgánico Integral Penal, Law No. 180, Febrero 10, 2014, Registro Oficial 20, 16-III-2022 (Ecuador) [hereinafter COCC]; Constitución Política de la República de Ecuador [C.P.] art. 233 [hereinafter Constitution of Ecuador]. Article 233 of the Ecuadorian Constitution aims is to prevent them from being involved in bribery, extortion, influence peddling, embezzlement, and unlawful enrichment.

220. COCC, *supra* note 219, arts. 278–280, 285–286.

221. Ley Orgánica Reformatoria del Código Orgánico Integral Penal en Materia Anticorrupción, Segundo Suplemento No. 292, Febrero 17, 2021, Registro Oficial No. 392 (Ecuador) [hereinafter Anti-Corruption Supplement]. The Anti-Corruption Supplement is to be read with the COCC (as a protocol is to be read with a treaty or convention).

222. *Id.* arts. 8, 14, 15.

223. *Id.* arts. 9–11 (substituting Article 280 of COCC, imprisonment terms increased from five to seven years from seven to ten years in the event that the official was bribed to commit unlawful actions; Article 11, substituting Article 281 of COCC, punishable with imprisonment from three to five years to five to seven years; Article 9, continuing Article 270.1 of COCC, maximum prison term increased to 13 years).

224. *Id* arts. 10–11 (substituting Article 280 of COCC; Article 11, substituting

Mexico, and France's book, Ecuador also added a whistleblower provision.[225] The provision guarantees confidentiality of whistleblower personal data, and a financial reward ranging from 10% to 20% of the value of confiscated property.[226] Even with these progressive amendments, Ecuador still has limited extraterritorial jurisdiction, specifically concerning bribery against foreign officials.[227]

4. The Bahamas—The Prevention of Bribery Act

As with countries previously mentioned, The Bahamas has multiple bodies of law for dealing with corruption, however the most main law is the Prevention of Bribery Act, (hereinafter, "PBA") which was enacted in 1976, with its most recent amendment being in 2014.[228] The 2014 amendment to the PBA was to bring the Bahamas up to par with larger countries such as the United States and United Kingdom by adding provisions to address "transitional bribery and to criminalize the corruption of or by the foreign public official and for connected purposes."[229] This was done by giving a concrete definition for foreign public official, foreign state inserting the crime and elements for bribery of a foreign public official, accounting measures, as well as a defense for routine acts.[230]

Since this PBA was amended, the Bahamas has consistently

Article 281 of COCC). This was particularly aimed at companies committing acts of bribery and corruption during the Covid-19 Pandemic.

225. ANTICORRUPTION ACTION PLAN: PROTECTION OF WHISTLEBLOWERS: STUDY ON WHISTLEBLOWER PROTECTION FRAMEWORKS, COMPENDIUM OF BEST PRACTICES AND GUIDING PRINCIPLES FOR LEGISLATION 6, 14–19 (2011) [hereinafter G20 ANTICORRUPTION ACTION PLAN] (providing examples of frameworks to protect whistleblowers, including awareness-raising campaigns and criminal codes to ensure whistleblowers can speak freely without intimidation, etc.).

226. Anti-Corruption Supplement, *supra* note 221, art. 18.

227. *See* AGUSTIN ACOSTA CÁRDENAS & ESTEBAN VIVERO PAZHOROWITZ, LATIN LAWYER INSIGHT, LATIN LAWYER REFERENCE ANTI-CORRUPTION 2021: ECUADOR 2 (2020) (Ecuador does not have a law or regulation that prohibits or sanctions the offering, payment or receipt or bribes by foreign government officials.).

228. Prevention of Bribery (Amendment) Act, 18 O.G. § 3(2) (2014) (Bah.) [hereinafter PBA].

229. *Id.*

230. *Id.* § 2.

received CPI scores in the top 20% of all categorized nation states.[231] However, reports of corruption, including allegations of widespread patronage and the routine directing of contracts to party supporters and benefactors, continues to occur.[232] This is in part due to yielding mechanisms in the 2014 amendment. Acts that would be considered bribery of a foreign public official can be permitted if the laws of the foreign state for which the foreign public official performs their duties or if the payments made are considered "good faith" reasonable expenses to that official.[233] Thus, both national and international business entities and businesspeople have seen inconsistency in the application of the PBA. This has affected the sentiment of Bahamian Nationals as well as created hesitancy in foreign investment.[234] To further complicate the matter, the Bahamian judicial system has proven to be a futile option to recover investments. Cases of fraud and bribery, often in the amounts of multi-millions of United States dollars, are years from resolution due to being entangled in a system with insufficient resources.[235]

5. Latin America and the Caribbean: Shotguns and Deadlocks

From a birds-eye-view, nation states of Latin America and the Caribbean show promise, by continuously strengthening and modernizing their laws to combat transitional bribery and corruption. Much of Latin America and the Caribbean has availed itself to international initiatives to assist in the development, legislation, and enforcement of corruption. The most promising was the Organization

231. *See, e.g.*, Paige McCartney, *Bahamas Improves One Notch in Corruption Perception Index*, THE NASSAU GUARDIAN (Jan. 26, 2022), https://thenassauguardian.com/bahamas-improves-one-notch-in-corruption-perception-index/ (report on Bahamas' CPI score, showing they have "remained in the middle for the past six years and scored 71 in 2014.").

232. *Bahamas Country Commercial Guide: Bahamas—Corruption*, PRIVACY SHIELD FRAMEWORK, http://www.privacyshield.gov/article?id=Bahamas-Corruption (last visited Apr. 14, 2023).

233. PBA, *supra* note 228, § 3(2).

234. *See, e.g.*, Neil Hartnell & Youri Kemp, *Bahamas 'Inconsistent' In Anti-Corruption Battle*, TRIBUNE 242 (Feb. 5, 2021), http://m.tribune242.com/news/2021/feb/05/bahamas-inconsistent-anti-corruption-battle/ (referencing the effect of inconsistency in application of the anti-corruption framework on the Bahamian public and foreign investors such as the US).

235. *Id.*

of Economic Cooperation and Economic Development (hereinafter, "OECD").[236] The Latin America and Caribbean Anti-Corruption Initiative (hereinafter, "LAC Initiative") was established in 2007, with the support of the Inter-American Development Bank and the Organization of American States, to promote the OECD Anti-Bribery Convention in the region and strengthen the Convention's implementation.[237]

The LAC Initiative provided a platform for countries from the region to compare and contrast experiences, share effective legislation, and discuss challenges in the fight against foreign bribery.[238] The intent was to bring representatives from a wide range of ministries, government agencies, non-government organizations, and the private sector through the use of meetings, hosted by countries in Latin American and the Caribbean.[239] In furtherance of the LAC Initiative, the OECD has created a permanent subgroup to monitor anti-corruption enforcement efforts in countries such as Brazil.[240]

However, like most other regions in the world, transnational anti-corruption efforts in Latin America and the Caribbean have seen more problems arise than problems solved in the past year. The Caribbean as a whole continues to trend downwards; not a single nation received an improved CPI score in 2021 from previous years aside from Guyana.[241] The Brazilian Supreme Court annulled former president Luiz Inácio Lula da Silva's conviction for corruption, and allowed him to run for president in 2022.[242] Mexican President Obrador held an

236. *See generally* ORG. OF ECON. COOP. & DEV. [OECD], WORKING GROUP ON BRIBERY: 2010 ANNUAL REPORT 42–46 (2010) [hereinafter OECD, 2010 REPORT] (explaining the "OECD-Latin America Anti-Corruption Programme" aimed at "strengthen[ing] the implementation and enforcement of international and regional anti-corruption conventions in Latin America.").

237. *Id.*

238. *Id.*

239. *Id.*

240. Mariana Sanches, *OCDE Adota Medida Inédita contra o Brasil Após Sinais de Retrocesso no Combate à Corrupção no País [OECD Adopts Unprecedented Measure Against Brazil After Signs of Setback in the Fight Agaisnt Corruption in the Country]*, BBC NEWS BRASIL (Mar. 15, 2021), https://www.bbc.com/portuguese/brasil-56406033.

241. *See* TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2021 11 (2022) https://www.transparency.org/en/cpi/2022.

242. *See* Ricardo Brito, *Brazil's Supreme Court Confirms Decision to Annul Lula*

anti-corruption referendum aimed at ending immunity for ex-presidents, but achieved only 7% of the electorate vote.[243] United States nationals Arturo Carlos Murillo Prijic, Sergio Rodrigo Mendez Mendizabal, Luis Berkman, Bryan Berkman, and Philip Lichtenfeld were arrested and charged with crimes relating them to a bribery scheme targeting the Bolivian government.[244] In Colombia, prosecutors closed an investigation into Grupo Aval Acciones y Valores SA CEO, Luis Carlos Sarmiento Gutiérrez, concluding there was no evidence linking him to the bribery scheme surrounding the Ruta Del Sol Highway.[245] Thus, much is left to be desired of the region in its battle against corruption and bribery.

IV. INTERNATIONAL ANTI-BRIBERY AND CORRUPTION ORGANIZATIONS

As nation states continue to develop policies designed towards combating bribery and corruption, international organizations and accords have been created to provide common ground and streamline

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Convictions, REUTERS (Apr. 15, 2021, 6:21 PM), https://www.reuters.com/world/americas/brazils-supreme-court-confirms-decision-annul-lula-convictions-2021-04-15/ ("A majority of Brazil's Supreme Court confirmed on Thursday a decision to annul criminal convictions against former President Luiz Inacio Lula da Silva, teeing up a presidential run against current President Jair Bolsonaro in 2022.").

243. *See* Greg Weeks et al., *In Mexico, AMLO's Anti-Corruption Referendum Falls Flat*, GLOB. AMS., (Aug. 6, 2021) (despite achieving only seven percent voter turnout, ninety-eight percent of those who came to the ballot voted in favor of ending immunity).

244. *See* Press Release, U.S. Dep't of Just., Press Release 21-489 Former Minister of Government of Bolivia, Owner of Florida-Based Company, and Three Others Charged in Bribery and Money Laundering Scheme (May 26, 2021) (press release by the U.S. Department of Justice explaining the charges facing the Americans).

245. *See* Atif Hussain, *Prosecutors Drop Odebrecht-linked Probe into Grupo Aval's CEO*, S&P GLOB. (Mar. 12, 2021) https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/prosecutors-drop-odebrecht-linked-probe-into-grupo-aval-s-ceo-63156692#:~:text=Prosecutors%20in%20Colombia%20closed%20an,Odebrecht%20corruption%20scheme%2C%20Semana%20reported ("In closing the investigation against Sarmiento Gutiérrez, prosecutors said there were no elements that could link the Aval CEO with the irregularities related to the signing of the contract for Ruta del Sol."). Barbados scored 69, Bahamas scored 64, Saint Vincent and the Grenadines scored 59, Saint Lucia scored 56, Dominica scored 55, Grenada scored 53, Cuba scored 46, Jamaica 44, Trinidad and Tobago scored 41, Guyana scored 39, Suriname scored 39, Dominican Republic scored 30, Haiti scored 20.

the justice process for transnational acts for nation states.[246] Each international body provides resources, guidance, and establishes a foundation for multilateral state action to work in a cohesive manner.[247] The major transnational bodies combating transnational bribery and corruption are divided between international bodies such as the OECD and its Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereinafter, "OECD Convention"), the United Nations Convention Against Corruption, (hereinafter, "UNCAC"), and regional organizations such as the Council of Europe Criminal Law Convention on Corruption and Civil Law Convention on Corruption (hereinafter, " Council of Europe CLCC"), the Organization of American States Inter-American Convention against Corruption, (hereinafter, "OAS Convention") and the African Union Convention on Preventing and Combating Corruption (hereinafter, "AUCPCC").[248]

A. OECD AND THE OECD CONVENTION

In 1988, Congress moved President Ronald Regan to propose to the OECD and its nation-state members to begin developing an international body of legislation to address bribery and corruption.[249] In 1989, the OECD established an ad hoc working group for

246. *See, e.g.*, CPI 2021, *supra* note 119 (showing the work of Transparency International to map out corruption in various countries).

247. *See generally* Org. for Econ. Coop. and Dev. [OECD], Revised Recommendation of the Council on Combatting Bribery in International Business Transactions, at 2–6, OECD Doc. C(97)123 (May 29, 1997) [hereinafter OECD, Combatting Bribery in Int'l Bus.] (showing the work of OECD on combatting corrupt business practices, and recommendations to Member States on how to implement effective practices).

248. *See generally id.*; *Convention on Combating Bribery of Foreign Public Officials in Int'l Business Transactions*, ORG. FOR ECON. COOP. & DEV. [OECD], https://www.oecd.org/corruption/oecdantibriberyconvention.htm (last visited Apr. 2, 2023) (Convention establishing "legally binding standards to criminalise bribery of foreign public officials in international business transactions and provid[ing] for a host of related measures that make this effective."); U.N. Convention Against Corruption, Oct. 31, 2003, S. TREATY DOC. NO. 109-6, 2349 U.N.T.S. 41 [hereinafter UNCAC] ("The Convention covers five main areas: preventive measures, criminalization and law enforcement, international cooperation, asset recovery, and technical assistance and information exchange.").

249. Foreign Corrupt Practices Act of 1977, Pub. L. No 100-418, §5003(d) 102 Stat. 1107, 1424.

comparative review of member nations' legislations regarding bribery and corruption of foreign public officials.[250] The years following proved fruitful, and in 1994 the OECD Ministerial Council adopted the Recommendation of the Council on Bribery in International Business Transactions, as "necessary to criminalize the bribery of foreign public officials in a coordinated manner."[251]

The working group that drafted the 1994 Recommendation was then formalized as the Working Group on Bribery in International Business Transactions (hereinafter, "WGB"), and continued their efforts to find a well-designed uniformity amongst the members' varying legal systems, and create a harmonizing OECD convention to tackle bribery and corruption.[252] In 1997, the OECD Ministerial Council adopted all the recommendations of the WGB and issued its Revised Recommendations of the Council on Combating Bribery in International Business Transactions.[253] The Revised Recommendations were a significant improvement from their 1994 predecessor. The abstract ideas for detecting, dealing, and further preventing bribery of foreign officials now were becoming tangible, regulatory areas, such as tax deductibility of bribes.[254] The

Revised Recommendations also gave instruction for the WGB to conduct a program of organization for monitoring and promotion of the full implementation of these provisions.[255] This allowed for the WGB to act with two separate but streamlined means: (1) inclining nation-state members of the OECD to begin negotiations for an international convention of anti-bribery and corruption, and (2) pushing for these same nation-state governments to draft, legislate, and implement anti-bribery regulation into their national laws.[256]

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250. *See* Org. for Econ. Coop. and Dev. [OECD], U.S. Proposal on the Issue of Illicit Payments, at 1–3, OECD Doc. C(89)49 (Mar. 23, 1989) (U.S. "proposal to create an ad hoc group under the Council to examine feasibility of an international agreement on illicit payments, with a view towards negotiating a binding agreement among OECD members on that subject.").

251. OECD, Combatting Bribery in Int'l Bus., *supra* note 247, at 2.

252. *See id.* at 6 (explaining the review and implementation system recommended by the working group).

253. *Id.* at 2.

254. *Id.* at 2–3.

255. *Id.* at 5.

256. *Id.* at 3.

In December 1997, the OECD Convention became open for signatories, and went into effect in September 1999.[257] The OECD Convention is open to signatures by any country that is a member of the OECD or has become a full participant in the OECD Working Group on Bribery in International Business Transactions.[258] To date, there are 44 countries (the 37 member countries of the OECD and 7 non-member countries) that have ratified or acceded to the convention.[259] The overarching purpose of the OECD Convention is to "ban bribery of foreign public officials to gain an 'improper advantage in the conduct of international business,'" "establish its jurisdiction over the bribery of a foreign public official when the offense is committed in whole or in part in its territory," and "for countries to broadly interpret jurisdiction so that an extensive physical connection was not required."[260] The OECD Convention's jurisdictional provision also made mention of the fact that when two signatories had jurisdiction over the same wrongful act, signatories were to "consult with a view to determining the most appropriate jurisdiction for prosecution."[261]

The OECD Convention continues to modernize, with the most recent focuses being implemented in the 2021 Recommendations.[262] Adopted in November 2021, the 2021 Recommendation includes sections in areas that have emerged or developed in the anti-corruption area, including, "inter alia, on strengthening enforcement of foreign bribery laws, addressing the demand side of foreign bribery, enhancing international cooperation, introducing principles on the use of non-trial resolutions in foreign bribery cases, incentivizing anti-corruption compliance by companies, and providing comprehensive

257. *See generally* Org. for Econ. Co-operation and Dev. [OECD], Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, S. Treaty Doc. No. 105-43, 37 I.L.M. 1 (1998) (entered into force Feb. 15, 1999).

258. *See, e.g.*, *List of OECD Member Countries—Ratification of the Convention on the OECD*, ORG. FOR ECON. CO-OPERATION & DEV. (last visited Mar. 29, 2023) https://www.oecd.org/about/document/ratification-oecd-convention.htm (showing the list of countries that have ratified the Convention).

259. *Id.*

260. OECD, Combatting Bribery in Int'l Bus., *supra* note 246, at 4–5.

261. *Id.* at 5.

262. *Id.*

and effective protection for reporting persons."[263]

1. The Rich Man's Exclusive Club and Talking Shop

Even with its most recent progress, the OECD and its Convention, many critics, including other world powers, are skeptical of its abilities to act in addressing bribery and corruption. One major critique of the OECD is the apparent narrowness of its membership: it excludes major market players like China, and critics point to an overarching like-mindedness of its members as hindering more effective outreach and engagement.[264] The countries that make up the OECD are primarily composed of western powers (the United States, the UK, Germany, France, etc.), which all have the tendency to view the problems of corruption through a western lens. This creates an echo-chamber of ideas, which results in slowed development and failure of free thought to address the most pressing issues. This is reflected in not only their handling of corruption and bribery, but also in sibling areas of international business such as international tax reform.[265] As can be observed by the aforementioned nation states and their approach, history, and reasoning for anti-corruption legislation, anti-corruption legislation is not a "one-size-fits-all." Yet, this is precisely what occurs in the OECD–the major western powers approach is law, and you must adhere to it.[266]

Another critique observed throughout research is the OECD's lack of "bite" or any ability to provide any real enforcement measures. While its signatories have been given an easier jurisdictional pathway

263. *Id.* at 4, 6, 9.

264. *See, e.g.*, Natasha Turak, *OECD Forum Spotlights 'What Brings Us Together' as a Response to Rising Populism*, CNBC (May 29, 2018), https://www.cnbc.com/2018/05/29/oecd-forum-spotlights-what-brings-us-together-as-a-response-to-rising-populism.html ("Criticisms of the OECD include perceived narrowness of its membership; it excludes major market players like China, and critics point to an overarching like-mindedness of its members as hindering more effective outreach and engagement.").

265. *See, e.g.*, Sissie Fung, *The Questionable Legitimacy of the OECD/G20 BEPS Project*, 2 ERASMUS L. REV. 76, 77–78 (2017) (explaining the work of OECD to streamline regulations surrounding tax reform).

266. ORG. FOR ECON. COOP. AND DEV. [OECD], STOCKTAKING OF BUSINESS INTEGRITY AND ANTI-BRIBERY LEGISLATION, POLICIES AND PRACTICES IN TWENTY AFRICAN COUNTRIES 61 (2012).

to seek dispute resolution through arbitration, there is still no enforcement body to make sure abuses and enforcement during the judicial process occur.[267] There are no mechanisms to prevent a powerhouse nation (such as the United States) from bullying smaller signatories to the OECD Convention into forcing its citizens and corporations who commit acts in violation of the FCPA to play to the tune of the United States.[268] The inverse is also true: if an American national or company was to commit a violation of another signatory's domestic anti-bribery and corruption law, there is nothing in place to stop the United States from protecting their interests against the other nation state's legislation.[269]

B. UNCAC

In December 2000, the UN General Assembly understood the "corrosive effect that corruption has on democracy, development, the rule of law and economic activity," and the need for the creation of an international agreement against corruption.[270] An Ad Hoc Committee was established for nation states to begin diplomacy on terms for the agreement and adoption of those terms for draft purposes.[271] Then in 2001, the Centre for International Crime took requests from nation states to submit proposals for the agreement.[272] Following the proposal submissions, the UNCAC was negotiated by delegates of different nation states beginning in 2002.[273] In October 2003, the UN General Assembly adopted the UNCAC, which then entered into force in

267. *See, e.g.*, Fung, *supra* note 265, at 79 (pointing to the lack of accountability in international law and institutions).

268. *See, e.g.*, *id.* at 83 (explaining the power imbalance between different OECD Member States).

269. *Accord id.* at 83 (commenting that the United States enjoys a position of influence on the tax policymaking of the OECD but ignore those policies that are not consistent with U.S. interests).

270. G.A. Res. 55/61, at 1 (Jan. 22, 2001).

271. *See id.* § 7.

272. *See id.* § 2.

273. *See* U.N. Off. on Drugs & Crime, *United Nations Convention Against Corruption*, https://www.unodc.org/unodc/en/corruption/uncac.html (last updated Nov. 18, 2021) (noting that the text of the United Nations Convention against Corruption was negotiated during seven sessions of the Ad Hoc Committee for the Negotiation of the Convention against Corruption, held between January 2002 and October 2003).

December 2005.[274]

Unlike the OECD and the OECD Convention, the UNCAC is a much broader international document of law, encompassing the cross-border nature of corruption with provisions on international cooperation and on the return of the proceeds of corruption.[275] As of December 2021, there are 189 parties to the UNCAC, which includes 181 UN member states, the Cook Islands, Niue, the Holy See, the State of Palestine, and the European Union.[276]

The UNCAC has binding provisions to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court, to extradite offenders, and non-binding recommendations and conclusions.[277] The UNCAC calls for state parties to cooperate in criminal matters and consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.[278] The Convention further calls for the participation of civil society and non-governmental organizations in accountability processes and underlines the importance of citizens' access to information.[279] The UNCAC does this through its eight chapters and 71 articles by: highlighting the three main goals of the Convention, setting preventive measures aimed at hindering corruption in the public and private sectors, requiring countries to criminalize—or consider criminalizing—different corruption-related offenses, addressing the cross-border nature of corruption, prevention and detection of transfers of the proceeds of crime and measures for asset recovery, improvement of specific training programs for personnel responsible for preventing and combating corruption, promotion of

274. *See generally* G.A. Res. A/58/422 (Oct. 7, 2003).

275. *See id.* at 30.

276. *See generally* U.N. Off. on Drugs & Crime, *Signature and Ratification Status*, https://www.unodc.org/unodc/en/corruption/ratification-status.html (last updated Nov. 18, 2021) (depicting states parties in blue, signatories in yellow, and counties that have not signed or ratified the UNCAC in red).

277. *See* G.A. Res. A/58/422, at 41 (Oct. 7, 2003).

278. *See About UNCAC*, STOLEN ASSET RECOVERY INITIATIVE, https://star.worldbank.org/focus-area/uncac (last visited Apr. 13, 2023) (noting that the UNCAC addresses the "cross-border nature of corruption" by accounting for the need for international cooperation and conditions related to the return of stolen assets).

279. *See id.*

UNCAC implementation, and calling upon nation states to take necessary legislative and administrative measures, in accordance with fundamental principles of domestic laws, to ensure the implementation of the obligations deriving from UNCAC.[280]

UNCAC implementation has resulted in compliance and improvement in regional regulations for transnational bribery and corruption.[281] Many of these ACAs are the result of articles 6 and 36 of the UNCAC, which recommend the creation of specialized agencies to prevent and curb corruption.[282] In Sub-Saharan Africa, some nation states have begun to publish self-reporting transparency reviews, while others have conducted civil society organizations to contribute their expertise during the different stages of the UNCAC review.[283] The UNCAC Coalition Latin America Anti-Corruption Platform has provided exploration on a country by country basis in the region related to attended trainings and multi-stakeholder workshops on UNCAC and publishing reviews and reports of member states.[284] Since 2008, all member states and institutions of the EU have been bound to the UNCAC, and adhere to strict compliance of all legal obligations, in full respect of the principle of sincere cooperation and administrative autonomy of the institutions.[285]

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280. *See* MATHIAS HUTER & RUGGERO SCATURRO, UNCAC IN A NUTSHELL 2021: A QUICK GUIDE TO THE UNITED NATIONS CONVENTION AGAINST CORRUPTION FOR DONOR AGENCY AND EMBASSY STAFF 2–9 (2021) (clarifying that the UNCAC does not define "corruption," but rather lists and defines a series of offences that States Parties must criminalize).

281. *See* Gillian Dell, *UN & Grand Corruption: Time to Break Out of the Silos*, TRANSPARENCY INT'L (May 12, 2022) (noting that the UNCAC was a "landmark achievement" that triggered anti-corruption acts around the world).

282. *See supra* note 112 and accompanying text.

283. *See Africa Regional Overview: Taking Stock of Good Practices—The UNCAC and Beyond*, UNCAC COALITION (Aug. 20, 2021), https://uncaccoalition.org/africa-regional-overview-taking-stock-of-good-practices-the-uncac-and-beyond/ (highlighting the civil society organizations of Ghana, Kenya, Zimbabwe, and Benin, among others).

284. COALITION, https://uncaccoalition.org/anti-corruption-platforms/latin-america (last visited Apr. 25, 2022) (encouraging groups to share their anti-corruption work and contact information).

285. *See* European Commission Press Release IP/20/2416, Anti-Corruption: First Review of the EU's Implementation of United Nations Convention Against Corruption (Dec. 14, 2020) (The EU Rule of Law Report highlights the fight against corruption as a fundamental pillar for upholding the rule of law and is supplemented

1. Broader Does Not Mean Better

Although regional and national compliance has improved and continues to do so, research and studies have demonstrated that the broad brushstroke of the UNCAC also has its flaws. Primarily, the language used in the UNCAC came from nation states with conflicting interests, varying resources and different degrees of alacrity to combat corruption.[286] This is evidenced by the fact that the UNCAC does not define corruption but defines specific acts of corruption that should be considered in every jurisdiction covered by UNCAC.[287] To assure that as many nation states as possible would sign and ratify the UNCAC, the text unavoidably acclimated to all the differentiating perspectives.[288]

Another cause for concern is the failure of effective implementation of the UNCAC in nation states. This multilayered issue can be seen in Georgia, Indonesia, Nicaragua, Pakistan, Tanzania, and Zambia, where the design and implementation of explicit national anti-corruption strategies have been unsuitable and ineffective in implementing coordinated anti-corruption policies with UNCAC due to the lack of national perspective implementation into the convention.[289] This compounds with the fact that many national justice systems are corrupt themselves, and have no aspirations of ameliorating the system by which they built upon and remained for generations. In some nation states, bribery and corruption run deeper than just judiciary and government entities; it is part of their culture and tradition. In parts of the Middle East, North Africa, and Sub-Continental Asia, they are called "baksheesh," which means "a tip"

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by the Recovery and Resilience Plans).

286. *See generally Signature and Ratification Status*, *supra* note 276 (listing state signatories).

287. *See* HUTER & SCATURRO, *supra* note 280, at 1 (clarifying that the UNCAC does not define "corruption," but rather lists and defines a series of offences that States Parties must criminalize, including bribery of national and foreign public officials as well as embezzlement by a public official).

288. UNCAC, *supra* note 248.

289. *Center, Anti-Corruption Policy Making in Practice: What Can Be Learned for Implementing Article 5 of UNCAC?* U4 BRIEF, no. 1, 2007, at 40–42 (arguing that a new approach is called for in considering how anti-corruption dimensions can be woven or embedded into good governance reforms instead of ending up as unmanageable stand-alone anti-corruption strategies).

and is common with other informal financial practices that result in the "greasing of the wheels of business."[290] In Mexico, a "mordida" or little bite refers to bribes, and alludes to police officers and other public officials being seen as dogs, on the lookout for an innocent citizen to take a bite out of.[291] In Nigeria, a "dash" is a cover or a euphemism for a bribe, or a levy.[292] And in Italy, they use "bustarella," which means little envelope in the Neapolitan dialect, and refers to an envelope in which money is hidden in order to facilitate favors or smooth a process, thus equating to a kickback or bribe.[293] These reasons are demonstrative for why the UNCAC may be a good general foundation, but not the best suited solution.

C. REGIONAL CONVENTIONS

1. Council of Europe CLCC

The Council of Europe CLCC was open to signatories and ratification for EU member states as well as non-EU nation states in 1999, and it entered into force in 2002.[294] The most recent addition to the Council of Europe CLCC is the Additional Protocol to the Criminal Law Convention on Corruption, which was enacted in 2003 and entered into force in 2005.[295] The Council of Europe CLCC

290. *See* ANDREW DELAHUNTY, FROM BONBON TO CHA-CHA: OXFORD DICTIONARY OF FOREIGN WORDS AND PHRASES (2d ed., Oxford Univ. Press 1997).

291. Stephen D. Morris, *Corruption and Mexican Political Culture*, 45 J. SW. 671, 680–81 (2003) (referencing studies that pointed to the general public's understanding the bureaucratic corruption and *mordita* constituted the most common forms of corruption).

292. *See generally* MARCEL MAUSS, THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES (Ian Cunnison, trans., Cohen & West Ltd. 1966) (1925); J. P. Olivier de Sardan, *A Moral Economy of Corruption in Africa?* 37 J. MOD. AFR. STUDS. 25 (1999) (surveying various forms and expectations of corruption in African nations).

293. *See* Donatella Della Porta & Alberto Vannucci, *Corruption and Anti-Corruption: The Political Defeat of "Clean Hands" in Italy*, *in* ITALY—A CONTESTED POLITY 174–97 (M. Bull & M. Rhodes eds., 2009).; Alex Roe, *Briber Methods in Italy—a Guide*, ITALY CHRONICLES (last visited Apr. 13, 2023), https://italychronicles.com/corruption-in-italy/ (describing how the "bustarella" is the traditional way of paying off greedy politicians or officials).

294. Council of Europe, Criminal Law Convention on Corruption, Jan. 27, 1999, E.T.S No. 173 [hereinafter "Council of Europe CLCC"].

295. Council of Europe, Additional Protocol to the Criminal Law Convention on

applied to transnational acts of bribery of foreign public officials, members of foreign public assemblies, officials of international organizations, and judges and officials of international courts made by both public and private entities and individuals.[296] All parties to the Council of Europe CLCC were obligated to integrate provisions into their domestic legislation to be in compliance with the Council of Europe CLCC.[297] To date, there are signatures by 50 nation states, 48 of which have ratified the Council of Europe CLCC.[298]

2. OAS Convention

At the Specialized Conference on the Draft Inter-American Convention against Corruption held in March 1996, the OAS member states adopted the OAS Convention to promote and strengthen state parties' instruments to prevent, detect, punish, and eradicate corruption, as well as to promote, facilitate, and regulate cooperation between member states to ensure the effectiveness of these measures.[299] The OAS Convention was the first regional and international organization to adopt a binding transnational body to combat corruption, and focused on acts committed in the Americas.[300] To date, 34 nation states have ratified the OAS Convention.[301]

3. AUCPCC

The youngest regional body tasked with combatting transnational

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Corruption, May 15, 2003, E.T.S. No. 191.

296. Council of Europe CLCC, *supra* note 294.

297. *Id.* art. 2. The provisions of compliance that were added dealt with covering acts of active and passive bribery.

298. *See Chart of Signatures and Ratifications of Treaty 173*, COUNCIL OF EUR. PORTAL https://www.coe.int/en/web/conventions/full-list2?module=signatures-by-treaty&treatynum=173 (last updated Apr. 19, 2023). Alongside the Council of Europe CLCC, Council of Europe also enacted and entered into force the Civil Law Convention on Corruption, which focuses on civil litigation in corruption cases. It currently has 42 signatories, and 35 ratifications.

299. Organization of American States, Inter-American Convention Against Corruption, Mar. 29, 1996, O.A.S.T.S. No. B-58 [hereinafter "OAS Convention"].

300. *Id.* The OAS Convention was entered into force in 1997.

301. *See* ORG. OF AM. STATES, *Inter-American Convention Against Corruption (B-58): Signatories and Ratifications*, https://www.oas.org/en/sla/dil/interamerican treatiesB-58againstCorruptionsignatories.asp (last visited Apr. 12, 2023). The only nation state that has not ratified the OAS Convention is Cuba.

corruption and bribery is the AUCPCC.[302] Adopted in July 2003, and entered into force in August 2006, the AUCPCC objectives are to endorse, enable, and standardize cooperation amongst member nation states in a coordinated effort to legislate and enforce policies and legislation throughout the African region.[303] To date, there are 49 signatories, to which 43 nation states have ratified the AUCPCC.[304]

4. Regional Forces: Their Benefits and Limitations

Regional entities such as the aforementioned nation states are able to operate in a similar manner to the federal system that the United States has between state and local government. While not necessarily as widespread, regional entities are better suited to create stronger legislation to tackle bribery and corruption in the region in which they are applicable. Many of the historical roots and cultural implications for why corruption is so rampant in the African region are not mutual to those in Latin America. Therefore, the methods of addressing bribery and corruption must juxtapose.

While regions like Africa and Latin America may share similar historical traits such as colonization, corruption has very different roots for both. Much of corruption in Latin America comes as a result of the undying drug conflict.[305] The drug conflict has resulted in armed groups battling over trade routes and territory, and political figures giving into demands of these groups, all of which result in rampant corruption.[306] This varies significantly from Africa, where corruption stems from neo-colonization of precious natural resources on the

302. African Union, African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5 [hereinafter "AUCPCC"].

303. *Id.*

304. African Union, List of Countries Which Have Signed, Ratified/Acceded to the African Union Convention on Preventing and Combating Corruption, https://anticorruption.au.int/sites/default/files/files/2021-06/36382-sl-africanunion conventiononpreventingandcombatingcorruption.pdf (last visited May 12, 2023).

305. *See* George Henry Millard, *Drugs and Corruption in Latin America*, 15 DICKINSON J. INT'L L. 533, 534 (1997) (explaining that the practice of narcotics-related corruption has attained previously unimagined levels of scale as an attempt by the criminal State to overwhelm the legal State).

306. *Id.* (stating that top police officers and authorities have been directly implicated in trafficking or in the protection of trafficking networks, making it impossible to distinguish the wealth originating from legal activities from wealth resulting from drug trafficking).

continent.[307]

Even on the regional level, however, there can be staunch differences between nation states. The CLCC applies to all of Europe, yet there are significant differences in the degree of corruption, the roots of corruption, and culture of corruption between the eastern and western halves of the region.[308] Most of Eastern Europe's corruption stems from the totalitarian regimes and the geopolitical upheaval resulting from the USSR's hold on the region.[309] This set Eastern Europe well behind much of its western neighbors in terms of resource allocation, legislation, and governmental aptness to combat bribery and corruption.[310]

V. AN EGALITARIAN SOLUTION FOR THE FUTURE

International bribery and corruption are an affliction that has manifested throughout history and continues to affect international trade today. In the span of almost 50 years of legislation and enforcement, it has become evident that a one-size-fits-all solution does not exist on any echelon. At the domestic level, nation states are closest to the people, hence domestic governments are able to best assess how to legislate and enforce laws effectively. However, many nation states do not have the resources, experience, or willingness to

307. Robert Kelly, Corruption in Africa: Cultural, Economic and Political Factors Which Impact Corruption and Potential Solutions, 33 (May 2014) (M.A. thesis, Rutgers University) (characterizing the so-called "Resource Curse" as a strong correlation between resource-heavy nations and the levels of economic development and corruption).

308. Council of Europe CLCC, *supra* note 294.

309. *See* Anastassia Obydenkova & Alexander Libman, *Understanding the Survival of Post-Communist Corruption in Contemporary Russia: The Influence of Historical Legacies*, 31 POST-SOVIET AFFS. 304, 304–06 (2014) (exploring the Communist legacy's potential impact on modern corruption as an explanation for the survival of corruption and the failure of the federal government to eradicate it).

310. *See, e.g.*, *CPI 2022 for Eastern Europe & Central Asia: Growing Security Risks and Authoritarianism Threaten Progress Against Corruption*, TRANSPARENCY INT'L (Jan. 31, 2023), https://www.transparency.org/en/news/cpi-2022-eastern-europe-central-asia-growing-security-risks-authoritarianism-threaten-progress-corruption (finding a positive correlation between democracy and corruption in Moldova, Ukraine, and Belarus).

fight corruption.[311] Regional organizations and conventions have increased resources and fostered cooperation between nation states in regions based on common traits like language, history, relations, and other culture-forming factors.[312] Still, regional member states often have divergent approaches towards solutions, and are sometimes unable to deal with matters outside of their jurisdiction, but concerning states within. These differences, if unresolved, can result in nation states displaying hesitancy in the signing or ratifying process, and delays of enactment and enforcement.[313] International bodies can streamline jurisdictional complications, have the largest resource reserve, and can lift the heavy burden off individual states from relying solely on their domestic legislation and judicial system.[314] Nevertheless, international bodies are notorious for implementing ineffective enforcement mechanisms, allowing diplomats to hem and haw during assemblies, and chiseling away necessary language due to state reservations, thereby rendering once instrumental policies fruitless.[315] In addition, international bodies are far removed from the

311. *See* U.S. AGENCY FOR INT'L DEV., USAID GUIDE TO COUNTERING CORRUPTION ACROSS SECTORS 7 (Sept. 22, 2022), https://www.usaid.gov/sites/default/files/2023/01/USAID_Guide_to_Countering_Corruption_Across_Sectors_0.pdf (noting that corruption diverts countries' scarce resources for essential public services and infrastructure, robbing communities and nations of resources that should be used for development and leaving them dependent on foreign aid).

312. *See generally* Louise Fawcett, *Exploring Regional Domains: A Comparative History of Regionalism*, 80 INT'L AFFS. 429 (2004) (highlighting the benefits of regionalism).

313. *See The Pitfalls and Potential of International Cooperation*, BUFFETT INST. FOR GLOB. AFFS. (Dec. 3, 2020), https://buffett.northwestern.edu/news/2020/the-pitfalls-and-potential-of-international-cooperation.html (noting that international agreements are often defined by coercion and domination, with key actors bullying others into cooperating).

314. *See* Karen Mingst, *International Organization*, BRITANNICA https://www.britannica.com/topic/international-organization (last updated Apr. 13, 2023) (defining the many functions that international bodies can serve, including collecting information and monitoring trends, delivering services and aid, providing forums for bargaining, settling disputes, legitimatizing the actions of states, and constraining the behavior of other states).

315. *See, e.g.*, Gwen P. Barnes, *The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir*, 34 FORDHAM INT'L L.J. 1584, 1588 (2011) (acknowledging the ICC's vulnerabilities that result in largely ineffective enforcement mechanisms).

common people of each nation, and of each region being affected.[316] Nonetheless, there are efficacious elements of all three levels that can be used to develop a viable solution.

The recommended solution would bring the superlative qualities of all three, beginning with a proper foundation from which to build on at the individual nation state level. Primarily, national governments would be required to investigate and research the historical roots and cultural manifestations of corruption in their nation state. By mandate, the investigation would be well documented, supported, and approved by the national legislature and an independent third-party agency in a finalized report. The finalized report would be the groundwork for the domestic legislation document for addressing international bribery and corruption as pertinent to their people and nation state, and would be separately legislated from all other laws.[317] Both documents would then be sent to the respective regional agency of that nation state.

The approval from the regional agency would be conducted by a three-person panel. The panel members would include: a representative who is independent of the national government of the nation state from which the report and legislation originates, a representative of a different nation state located in that region, and a representative of a different regional agency. Acknowledgement and acceptance would require a cohesive synthesis of the report and legislation demonstrating a clear understanding and practicable resolution to international bribery and corruption in that nation state, and incorporate clearly defined universal terms as provided by the international organization.[318]

Once approved by a majority, the report would be recorded by the

316. *See* Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RESOLUTION 3, 24–25 (1998) (suggesting that while international organizations are intended to act as a representation or embodiment of a community of states, that aspiration remains partially unfulfilled).

317. This means that an anti-bribery and corruption act could not be included in an amendment of a criminal code or already existing law. It would operate and exist separately and independently.

318. *See, e.g.*, Council of Europe CLCC, *supra* note 294. Universal terms will include words and phrases such as "public official," "private entity," "requesting a bribe," "promising a bribe," "corruption," etc.

regional agency, and the transnational anti-bribery and corruption legislation would then be submitted to the international organization. The international organization would be comprised of an international approval body, ordained by international treaty, as well as a neutral enforcement body on the ground with judiciary representatives from all member nation states. By mandate, only the international agency would give final approval of the nation states' legislation, as to ensure that it meets the required defined-term provisioned in the international treaty.

The approval would be done by a three-person review panel consisting of one representative from the region (but not of the nation state whose legislation is under review), and two representatives of different regional bodies (neither of which are from the same region as the independent region) during the review process by the regional body. If approved by the majority, the legislation would be admitted into the international organization's database of nation states' transnational bribery and corruption laws with accessibility and transparency. Thereafter, the nation state would be formally accepted into the international organization.

The international treaty would be comprised of mandatory provisions defining specific terms unique to bribery and corruption, as well as default jurisdictional provisions for all member states to the international body, and an enforcement mechanism to work both independently and harmoniously through all three tiers: domestic, regional, and international. The judiciary would be comprised of three-magistrate panels for smaller offenses, and five-magistrate panels for larger matters. Any act of bribery or corruption committed against another nation state would be submitted to the international judiciary and enforcement body for determining the magistrate panel size. Once the panel size is decided, the matter would be conducted using the approved laws of the entity or nation which had the offense committed towards it.[319] The three-panel magistrates would consist of one magistrate from the nation in which the act was committed

319. *See, e.g., id.* It is immaterial if the recipient was a public or private sector entity, or individual, nor if the one committing the act was a public or private sector entity or individual.

towards, one magistrate from the nation of which committed the act, and one neutral magistrate that is not from either region of the two nations in the ongoing matter. The five-panel magistrates would consist of one magistrate from the nation in which the conduct allegedly occurred, one magistrate from the nation whose citizen (or resident) allegedly committed the act, and three neutral magistrates not from either region from which the parties' hail. There would be both civil and criminal arbitration for each matter. All settlements would be mediated by three-person panels consisting of a representative of each nation-state party to the matter, and an independent representative who is from a nation state outside of the regions of the other two parties and would be determined by a majority.

This three-tiered national, regional, and international mechanism provides the best elements of each layer of organization. It provides resources and a common source of redressability for acts in furtherance of bribery and corruption while also respecting and understanding each nation state's individuality and sovereignty.

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