The (in)Efficacy of Multilateral Corruption Laws: Why the United States Should Endorse the International Anti-Corruption Court

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Cover Page Footnote
Law student at Northwestern Pritzker School of Law. My gratitude to Professor Juliet Sorensen for her guidance and feedback throughout the research process; to my brilliant peer editors who provided helpful revisions on this piece Sara Schlesinger, Erin Murphy, Leo Soh, and Laura Kim; and to the excellent editorial team of the Northwestern Journal of International Law and Business who made this publication possible.
The (in)Efficacy of Multilateral Corruption Laws: Why the United States Should Endorse the International Anti-Corruption Court

Peter Cates*

Abstract:

Public corruption, the abuse of state power for personal gain, plagues the international community by undermining democracy, exacerbating human rights issues, and stymying economic development. To combat this threat, the international community has taken on multiple treaties to collaboratively curb corruption and its effects including, significantly, the United Nations Convention Against Corruption and the OECD Anti-Bribery Convention. For its part, the United States prosecutes international corruption through the Foreign Corrupt Practices Act (FCPA). The FCPA subjects U.S. companies who engage in bribery schemes (the “supply-side” of corruption) to criminal and civil penalties regardless of whether the actions took place outside of the borders of the United States. This broad jurisdiction, however, does not extend to the foreign corrupt officials (the “demand-side” of corruption) outside of the jurisdiction of U.S. laws. Although the FCPA is meant to be just one lever of the broader international anti-corruption mechanisms, the OECD Anti-Bribery convention identifies the United States as one of only two active enforcers of the treaty's standards.

In international commercial markets, kleptocrats have created a sort of corruption marketplace in which these corrupt officials offer advantages like valuable government contracts or workarounds to regulations in exchange for bribes. Since the United States is one of the only countries in the world to enforce anti-corruption standards, American companies face higher consequences for engaging in this corrupt marketplace under the FCPA than their foreign peers, placing them at a competitive disadvantage. Because corruption is such a negative force on the world, the solution cannot be to make the U.S. laws less stringent. Instead, this Note seeks a solution that brings more countries into the fight against corruption, centered on the values of cooperation, accountability, and practicability. And, vitally, it seeks a solution that goes after the demand-side

* Law student at Northwestern Pritzker School of Law. My gratitude to Professor Juliet Sorensen for her guidance and feedback throughout the research process; to my brilliant peer editors who provided helpful revisions on this piece Sara Schlesinger, Erin Murphy, Leo Soh, and Laura Kim; and to the excellent editorial team of the Northwestern Journal of International Law and Business who made this publication possible.
This Note endorses the International Anti-Corruption Court (IACC). First proposed by former federal U.S. Judge Mark Wolf in 2013, the IACC has steadily gained momentum in the last few years, including an endorsement by the European Parliament in 2023, which indicates the increasingly realistic probability of the court materializing. Notably, the United States is absent among the supporters. Aside from the humanitarian and economic benefits, an IACC would also create a more equitable international commercial market in which American companies are currently disadvantaged. The IACC also provides an avenue to prosecute the demand-side of corruption and root out powerful kleptocrats abusing their offices, which would break down the corruption marketplace. President Biden has made combating public corruption a core policy interest of his administration's objectives; the IACC satisfies the goals of this initiative and would produce meaningful value to American companies and people. For all of those reasons, the United States should endorse and ultimately participate in the IACC.
# TABLE OF CONTENTS

I. Introduction .............................................................................................................. 176

II. Background: The Current Global Anti-Corruption Enforcement Efforts ................................................................. 180
   A. United States Enforcement: The Foreign Corrupt Practices Act ................................................................. 180
   B. United Kingdom & Canada’s Unilateral Enforcement Mechanisms ............................................................. 183
   C. Multilateral Enforcement ......................................................................................................................... 185
      1. The OECD Anti-Bribery Convention .................................. 185
      2. The United Nations Convention Against Corruption ........................................................................ 186
   D. The Effectiveness of Current Anti-Corruption Enforcement ........................................................................ 188
      1. Cooperation Between Nations ........................................ 188
      2. Accountability for Offenders ........................................ 189
      3. Practicability of Adoption .............................................. 190

III. A New Way Forward: The International Anti-Corruption Court ......................................................... 190
   A. The Proposal for an International Anti-Corruption Court ............................................................................. 191
   B. Support for the Proposed International Anti-Corruption Court ................................................................. 192
   C. Engagement with Criticism of the Proposed International Anti-Corruption Court .................................... 193
   D. Evaluating Alternative Solutions ........................................................................................................... 196
      1. Alternatives of Improvement ........................................ 197
      2. Alternatives of Modification .......................................... 197
      3. Alternatives of Incorporation ........................................ 198

IV. Why the United States Should Support an International Anti-Corruption Court ........................................... 199
   A. The Biden Administration’s Strategy on Countering Corruption ............................................................. 200
   B. How the IACC Satisfies the Principles Laid Out in Part II ........................................................................... 201
   C. U.S. Companies’ Competitive Disadvantage ............................................................................................ 202
   D. Addressing Further Potential Counterarguments .................................................................................... 204

V. Conclusion ................................................................................................................ 204
I. INTRODUCTION

I first encountered foreign public corruption when I was seven years old. My family was traveling outside of the United States for the first time to Mexico. At the customs desk, after allowing my mother to take my brother and me into the country, the border officer stopped my father, stating that he did not have the proper documentation to enter. My fastidious father looked back through his carefully organized documents, insisting he had provided everything that was required. The border officer then told him he was missing "a tip" and that he could not accompany us and enter the country without one. Left with no other option, my father placed twenty dollar bills on the customs counter, one by one, until the officer picked up a neat stack of $200 and stamped his customs form.

Public corruption, or the abuse of public office for private gain, can manifest in forms such as the kind of petty corruption I witnessed my father navigate over twenty years ago. It can also occur as grand corruption at the highest levels of government and erode checks on political power. Kleptocrats, the high-level government actors of public corruption, drain a state and its citizens of funds and resources through bribery, embezzlement, gratuities, and fraud.¹ One particularly egregious example of kleptocrats abusing their constituents in such a way came to light a few years ago in a case involving Malaysian officials. Malaysian officials conspired with a U.S. banking partner to set up a bond offering to develop the Malaysian energy sector.² The total value of the bonds amounted to $6.5 billion, and $2.7 billion of those bonds were misappropriated as bribes and kickbacks to the public officials and their co-conspirators.³ This example, undermining both the citizens’ investments and the infrastructure development of the country, highlights how extreme the abuse of public power can go in thwarting the interests of the officials’ own people.

Corruption has significant adverse effects on the world. First, corruption is a barrier to economic development.⁴ Several studies have found a correlation between higher gross domestic product per capita and lower levels of public corruption.⁵ Moreover, developing countries lose ten times

¹ Some scholars also consider tax evasion to be a part of public corruption schemes. See Diane Ring & Constantino Grasso, Foreword: Tax Evasion, Corruption and the Distortion of Justice, 85 L. & CONTEMP. PROBS., i (2022).
³ Id.
⁴ See generally Olatunde Julius Otusanya, Corruption as an Obstacle to Development in Developing Countries: A Review of Literature, 14 J. MONEY LAUNDERING CONTROL 387, 388 (2011).
⁵ See, e.g., Bo Rothstein & Sören Holmberg, Correlates of Corruption (Quality of Government Inst., Working Paper Series 2019:9, 2019) (finding a strongly positive correlation between GDP and Control of Corruption based on data from the World Bank’s World Business Environment Survey); the data sets finds public corruption as a negative correlative
more to public corruption than they receive in public aid, amounting to more than $1 trillion per year in losses to illicit schemes, with some estimates being significantly higher. The impact of corruption stretches into nearly every sector. The International Bar Association has identified kleptocracy as “a major barrier to . . . responding effectively to pandemics, fighting climate change, creating a level playing field for ethical international businesses, promoting democracy and human rights, establishing international peace and security, and securing a more just, rules-based global order.”

Second, public corruption is strongly linked to human rights abuses. Countries with high levels of corruption have fewer protections for their citizens’ civil liberties and higher rates of state violence. For instance, ninety-eight percent of murdered human rights defenders come from countries with high levels of public sector corruption. Prominent Canadian diplomat and human rights advocate Alan Rock noted regarding the “linkage between grand corruption and human rights” that he “saw the linkage between corrupt regimes and the consequence of forced displacement, bad governance, violence, and conflict.” Corruption threatens democracy itself, because it erodes the relationship between officials and their constituents and the proper functions of government, threatening democracy itself. This erosion of trust perpetuates corruption since free and fair elections function as a backstop against corrupt systems of
to other vital economic indicators like economic equality, economic freedom, GDP growth, and ease of doing business. Id. For myriad additional sources, see generally Marie Chêne, The Impact of Corruption on Growth and Inequality, TRANSARENCY INT’L (Mar. 15, 2014), https://www.transparency.org/files/content/corruptionqas/Impact_of_corruption_on_growth_and_inequality_2014.pdf.

6 DEV KAR & JOSEPH SPANJERS, GLOB. FIN. INTEGRITY ILlicit FINANCIAL FLOWS FROM DEVELOPING COUNTRIES: 2003-2012 12 (2014); accord Dev Kar & Joseph Spanjers, GLOB. FIN. INTEGRITY, ILlicit FINANCIAL FLOWS FROM DEVELOPING COUNTRIES: 2004-2013 (2015); but see Matthew Stephenson, It’s Time to Abandon the “$2.6 Trillion/5% of Global GDP” Corruption-Cost Estimate, GLOB. ANTICORRUPTION BLOG (Jan. 5, 2016), https://globalanti-corruptionblog.com/2016/01/05/its-time-to-abandon-the-2-6-trillion5-of-global-gdp-corruption-cost-estimate (explaining that international organizations’ claim that global cost of corruption amounts to $2.6 trillion appears incorrect).


10 Rock is Canada’s former Minister of Justice & Attorney General, Minister of Health, Minister of Industry & Infrastructure, and Canadian Ambassador to the United Nations.


government. Furthermore, “ensuring basic rights and freedoms means there is less space for corruption to go unchallenged.”

The United States criminalizes public corruption domestically for both state and local officials as well as for federal officials and possesses a uniquely prolific international enforcement mechanism through the Foreign Corrupt Practices Act (FCPA). Other countries have implemented similar unilateral enforcement mechanisms against public corruption, like the United Kingdom’s Bribery Act and Canada’s Corruption of Foreign Public Officials Act. Moreover, in seeing public corruption as the global crime that it is, international organizations have taken on public corruption through cooperative multilateral instruments, like the OECD’s Anti-Bribery Convention and the UN’s Convention Against Corruption. Despite these efforts, the global average for corruption has remained unchanged for over a decade, with 155 countries making no progress or declining in the last ten years, and two-thirds of the world having “serious corruption problems.”

In response to the persistent corruption problem, politicians, scholars, and practitioners have debated a path forward. In 2014, former United States District Court Judge Mark L. Wolf founded Integrity Initiatives International and launched a campaign to form an International Anti-Corruption Court (IACC). The IACC has since garnered hundreds of endorsements from various groups, including heads of state, Nobel laureates, intergovernmental organization leaders, scholars, and leaders in business and faith communities. The IACC has steadily gained momentum in the last few years, including an endorsement by the European Parliament in 2023.

17 Bribery Act 2010, c. 23 (U.K.).
18 Corruption of Foreign Public Officials Act, S.C. 1998, c. 34 (Can.).
24 European Parliament, Subcommittee on Human Rights (Mar. 20, 2023), at 17:03:00,
which indicates the increasingly realistic probability of the court materializing. And a group of global jurists began drafting the multilateral treaty for the creation of the IACC in the fall of 2023.²⁵ As a result of strong forward momentum, a flurry of recent scholarship directed significant criticism at the IACC.

This Note synthesizes and categorizes this scholarly commentary in order to better engage with the new body of literature surrounding the IACC. Moreover, while much attention has been paid to whether the IACC is the right solution to the stagnated public corruption problem, it is becoming increasingly clear that it is the most likely solution in the foreseeable future. This Note adds to that debate by analyzing the strengths and weaknesses of the proposed IACC. This Note goes further and makes a novel contribution to scholarship by considering whether the United States—which currently leads the world in anti-corruption enforcement and has been notably absent from the conversation regarding forming an IACC—should endorse and ultimately participate in such a court.

The Note proceeds as follows. Part I, the introduction, has set the stage for the need to fight corruption as an impairment to economic development and human rights. Part II will catalogue and evaluate the current anti-corruption enforcement systems, highlighting unilateral enforcement mechanisms like the United States’ Foreign Corrupt Practices Act as well as the current multilateral enforcement mechanisms, namely the OECD Anti-Bribery Convention and the United Nations Coalition Against Corruption. Part II concludes by acknowledging the inadequacies apparent in the current enforcement mechanisms, and I synthesize the criticism by identifying three guiding standards with which to evaluate current and future proposals for anti-corruption enforcement: cooperation, accountability, and practicability. Part III summarizes and considers the proposal for an IACC, noting its broad and growing support as well as the influx of criticism it has received. Part III concludes by considering the IACC against the alternatives proposed by these critics as framed by the guiding standards identified in Part II. Part IV fills the gap in the literature regarding the United States’ position on the IACC, urging the United States’ government to endorse and participate in this multilateral mechanism. Part IV takes into account the Biden administration’s Strategy on Countering Corruption, the first of its kind, including its many international and multilateral objectives. Part V offers a brief conclusion about the future of anti-corruption enforcement and the opportunity the United States has to participate in reducing the abuses inflicted upon the world by kleptocrats.

II. BACKGROUND: THE CURRENT GLOBAL ANTI-CORRUPTION ENFORCEMENT EFFORTS

As kleptocrats seek bribes or pursue other corrupt schemes, they rely on private actors to pay the bribes or otherwise participate in the schemes. On the aggregate, these scenarios create a marketplace for corruption: the demand-side corrupt official presents an offering, like a government contract which he will help a company secure for a bribe; the supply-side private businesses then offer these bribes to fulfill the contract. Due to issues of international comity and foreign sovereignty, countries are limited in their ability or political will to pursue charges against the demand-side corrupt officials and often limit prosecution of these criminal schemes to the suppliers, that is the private businesses who pay the bribes. This part outlines those prosecutorial efforts, focusing first on the United States’ unilateral efforts, then considering similarly situated countries’ efforts to implement their own unilateral mechanisms, and last looking at global multilateral enforcement mechanisms including the OECD Anti-Bribery Convention and the United Nations Convention Against Corruption. The section concludes by considering the effectiveness of the current anti-corruption enforcement instruments. This part seeks to both summarize the current system and begin to synthesize the values and characteristics behind the most effective ways to combat corruption around the world.

A. United States Enforcement: The Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act (hereinafter the “FCPA”) is the United States’ primary mechanism for prosecuting international corruption. Congress passed the FCPA in 1977 in response to heightened attention to public corruption in the United States after the Watergate scandal, which included investigations that revealed corporate slush funds used to bribe public officials.26 The act contains both accounting provisions and anti-bribery provisions.27 For the sake of considering international anti-corruption measures, this Note will focus on the anti-bribery provisions.

When a U.S.-based company or affiliate gives or promises a foreign government official anything of value in exchange for improper advantage in obtaining or retaining business, that company has committed an FCPA anti-bribery offense.28 Some examples of cases that the Department of Justice has prosecuted under the FCPA include bribing Haitian officials to underreport rice exports to reduce taxes and duties,29 bribing Azerbaijani

28 Id.
29 United States v. Kay, 359 F.3d 738 (5th Cir. 2004).
officials for private investment in state-owned oil reserves, and even instances where the party seeking the bribe is a private company as long as it is primarily controlled by the government and performs a public function, like a government-owned telecommunications company in Haiti.

These offenses are not limited to, and in practice regularly extend beyond, merely cash bribes. “Anything of value” includes anything that is valuable to the receiver, for instance: gifts, loans, charitable contributions, political contributions, and offers of employment for relatives or friends. The FCPA does provide affirmative defenses. First, there is the local laws defense, which applies when the payment was lawful under the written laws and regulations of the foreign country. Second, there is a defense for reasonable and bona fide promotional expenses, which include payments, services, and gifts for a legitimate business purpose.

The FCPA provides for broad jurisdiction and reaches U.S.-based actors for actions outside the borders of the United States. The FCPA, however, does not apply to foreign officials, including as a conspiracy charge. Therefore, the FCPA is limited to the supply side—those paying the bribes—of public corruption and cannot reach the demand side of corruption, i.e., the corrupt public official. For example, in the Malaysian bond case referenced in the introduction, the Department of Justice prosecuted the U.S. bank, its Malaysian subsidiary, the intermediaries between the bank and the officials, and the individual at the bank who oversaw the transactions under the FCPA; significantly, the Department of Justice could not reach the Malaysian officials themselves under the FCPA.

It should be noted that the United States prosecutes public officials through wire fraud and money laundering statutes in some cases, but even these prosecutions often exclude powerful officials. For instance, Donville Inniss—Minister of Industry, International Business, Commerce, and Small Business Development of Barbados—was prosecuted for Money Laundering charges in a bribery scheme for insurance contracts, while the Department of Justice prosecuted the insurance company involved in the scheme under the FCPA. See Case Information: In Re: Insurance Corporation of Barbados Limited, STANFORD LAW SCHOOL FOREIGN CORRUPT

31 United States v. Esquenazi, 752 F.3d 912 (11th Cir. 2014).
public officials who have criminal financial networks and are likely to be the most serious offenders and leave consequences to those without more robust criminal networks.\textsuperscript{39}

The majority of FCPA violations are settled out of court with the Department of Justice and the Securities and Exchange Commission. The vast majority of defendants in FCPA criminal acts are corporate entities and are much more likely to enter into a settlement than to proceed to trial.\textsuperscript{40} These negotiated resolutions can generally take the form of deferred prosecution agreements (DPAs), non-prosecution agreements (NPAs), declinations, or plea agreements. In a DPA, the Department of Justice files criminal charges in court but will agree to dismiss the charges at the expiration of the agreement, so long as the corporation satisfies the terms of the agreement. In NPAs, there are terms of an agreement like in a DPA, but the Department of Justice does not file criminal charges; instead, the department retains the right to file charges but declines to do so. In a declination, the Department of Justice initiates an investigation but decides not to pursue a case. This is the only option that is not public and therefore is generally the most desirable outcome for defendants. In plea agreements, the defendant pleads guilty and the terms of the agreement are governed by Rule 11 of the Federal Rules of Criminal Procedure.

Enforcement increased significantly starting in the mid-2000s.\textsuperscript{41} In the past ten years, the Department of Justice has pursued 320 FCPA or FCPA-related enforcement actions.\textsuperscript{42} 2019 saw the most enforcement actions with fifty-four.\textsuperscript{43} 2015 had the fewest with only twelve.\textsuperscript{44} Some scholars and practitioners speculate that FCPA enforcement is declining. Others insist that a drop off in enforcement during 2020 and 2021 was due to slowed global commercial activity due to COVID-19. Indeed, 2022 saw a modest increase

\textsuperscript{39} For example, illicit profits from the Inniss case were less than $100,000, making it one of the smallest FCPA enforcement actions in terms of dollars. *Heat Map of Related Enforcement Actions, STANFORD LAW SCHOOL FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE*, https://fcpa.stanford.edu/bribe-profit.html?bribe_profit=4.

\textsuperscript{40} The SEC has historically resolved FCPA-related charges through an administrative action heard by an administrative law judge or through the filing of a consent judgment based on the filing by the SEC of a civil complaint in federal court. The SEC also may use DPAs or NPAs or decline enforcement action based on the evidence, resources, and seriousness of any given violation.

\textsuperscript{41} *DOJ and SEC Enforcement Actions per Year, STANFORD LAW SCHOOL FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE*, https://fcpa.stanford.edu/statistics-analytics.html.


\textsuperscript{43} Id.

\textsuperscript{44} Id.
from 2021 with thirty enforcement actions, and early trends from 2023 suggest a continued rebound.\textsuperscript{45}

Within the marketplace of corruption, U.S. companies can be liable as suppliers, which has a meaningful deterrent effect on the United States’ involvement in these corrupt schemes. However, without diminishing the demand side of corruption, these corrupt schemes still play out with other, non-U.S. suppliers. To the extent that the global commercial marketplace overlaps with the marketplace of corruption, this situation puts U.S. international businesses at a competitive disadvantage compared to its international peers without corruption oversight similar to the FCPA. While one could justifiably argue that such an endeavor is worthwhile to prevent businesses of the United States from being a contributor to the negative effects of corruption like human rights abuses and stymied national economies, a globalist perspective would note that the negative effects proliferate whether or not the U.S. businesses are amongst the suppliers for the corruption marketplace.

Although the scope of FCPA is limited to supply-side corruption, the United States does employ some mechanisms against foreign corrupt public officials. Most prominently, in January 2004, President George W. Bush issued Proclamation 7750 “to suspend entry as immigrants or nonimmigrants of persons engaged in or benefitting from corruption.”\textsuperscript{46} As a result, foreign officials involved in public corruption who have caused “serious adverse effects on the national interests of the United States” and their families cannot enter the United States.\textsuperscript{47} The banned officials remain confidential within high levels of the State Department.\textsuperscript{48} A few corrupt foreign leaders believe they have been subject to these lifetime bans and have complained about the treatment they received from U.S. authorities, but otherwise, the results remain largely invisible.\textsuperscript{49} While these actions do not result in criminal charges or other enforcement actions to bring down the demand side of corruption, it does indicate a willingness of the United States government to take some action against foreign officials engaging in corrupt practices.

B. United Kingdom & Canada’s Unilateral Enforcement Mechanisms

Looking beyond the United States, other countries have emulated the FCPA. These enforcement mechanisms are relevant to the analysis of the IACC for two reasons. First, they provide a broader framework of understanding the global fight against public corruption. Second, and more significantly, they highlight the failures of well-intentioned unilateral

\textsuperscript{45}Id.
\textsuperscript{47}Id.
\textsuperscript{49}Id.
mechanisms as neither the United Kingdom nor Canada are considered active enforcers of the multilateral anticorruption treaties of which they are members.\(^{50}\)

The United Kingdom’s dominant anticorruption enforcement mechanism is the Bribery Act of 2010.\(^{51}\) The act covers both domestic and international acts of bribery.\(^{52}\) It imposes strict criminal liability for domestic actors as well as extraterritorial jurisdiction for corporations with agents acting internationally.\(^{53}\) Moreover, the Bribery Act offers fewer defenses than the FCPA, including no business promotion expenditure defense nor an exception for facilitation payments.\(^{54}\) These aspects of the act have been lauded as the strictest anti-corruption legislation to date; however, these qualities also have drawn broad criticism as rendering enforcement of the act impractical. Indeed, enforcement has been extremely limited, with only five convictions and five DPAs across the ten years following its enactment.\(^{55}\) One example of strict liability for agents was when Standard Bank’s Tanzanian subsidiary bribed senior government officials for debt financing; that prosecution ended with a DPA, including a public approval hearing and £21.3 million in financial penalties.\(^{56}\)

Canada has also taken on public corruption with the Corruption of Foreign Public Officials Act (CFPOA), passed in 1998 and amended in 2013 and 2017.\(^{57}\) Unlike the UK Anti-Bribery Act, the CFPOA does not criminalize the failure to prevent bribery.\(^{58}\) It is also less stringent than the UK Anti-Bribery Act in that it does not impose a strict liability standard.\(^{59}\) In the last four years, Canada has taken action under the CFPOA only three times, making Canada only a country of limited enforcement under the OECD Anti-Bribery Convention standards.\(^{60}\) It has, however, been more successful at pursuing individuals involved in bribery schemes than the UK Bribery Act.\(^{61}\)

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50 See infra Part II.C.
51 Bribery Act 2010, c. 23 (U.K.).
52 Id.
53 Id.
54 Id.
57 Corruption of Foreign Public Officials Act, supra note 18.
58 Id.
59 Id.
61 See, e.g., R. v. Karigar, 2013 SCC 37784 (Can.) (holding Nazir Karigar liable as an individual under the CFPOA).
C. Multilateral Enforcement

The unilateral mechanisms above suffer from a lack of coordination, which hinders effective communication and cooperation between countries. The nature of international corruption schemes is to evade prosecution or accountability by strategically evading countries with strong unilateral mechanisms against bribery. In an increasingly globalized world, both financially and politically, kleptocracy can only be undone through coordinated efforts. Hence, governments worldwide have implemented multilateral enforcement mechanisms to fight corruption around the world. This subsection briefly summarizes the two most significant multilateral enforcement mechanisms currently in place: The OECD Anti-Bribery Convention and the United Nations Convention Against Corruption.62

1. The OECD Anti-Bribery Convention

The Organisation for Economic Co-operation and Development (OECD) is made up of thirty-eight member countries.63 In 1997, the countries signed the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Anti-Bribery Convention).64 By 1999, the countries ratified the Anti-Bribery Convention, and today all thirty-eight OECD member countries plus Argentina, Brazil, Bulgaria, Peru, Romania, Russia, and South Africa have adopted the Convention.65 The Convention emphasizes the negative economic impact of corruption, the growing international action to combat it, and the role of the private sector.66 Modeled after the FCPA, it advises signatory countries “shall take such measures as may be necessary” to implement anti-corruption legislation, criminalizing bribery of foreign public officials in international business transactions and providing for monitoring and evaluation of parties to the convention.67 The OECD Anti-Bribery Convention boasts itself as “the first and only international anti-corruption instrument focused on the ‘supply side’ of the bribery transaction—the person or entity offering, promising or giving a bribe.”68

The OECD most recently updated recommendations for signatories in

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62 There are other notable regional corruption conventions, like the Inter-American Convention Against Corruption from 1996 and the African Union Convention on Preventing and Combating Corruption from 2003, but for the sake of the scope of this Note, I will proceed with focus on the two global conventions most relevant to this discussion.


64 Id.

65 Id.


67 Id.

68 OECD Anti-Bribery Convention, supra note 63.
2021. These additional recommendations reiterate the need for enforcement, including detection and investigation, with an emphasis on cooperation. The new recommendations include other provisions encouraging a more holistic approach to anti-corruption by training government agencies and tax authorities to handle corruption, incentivizing corporations to develop stronger internal controls, and protecting whistleblowers. The new recommendations also call on member countries to address the demand side of foreign bribery cases by legislating the solicitation of bribes.

While the OECD Anti-Bribery Convention reiterates that it is “a legally binding international agreement,” the actual implementation leaves much to be desired. Ultimately, the language of the Convention relies on the compliance of the individual countries who are signatories for implementation, which renders the OECD Anti-Bribery Convention a list of recommendations. Indeed, according to Transparency International’s most recent biannual report, only two of the forty-three signatory countries—the United States and Switzerland—are considered “active enforcers” under the Anti-Bribery Convention’s own standards. The United States and Switzerland only account for 11.8% of global exports, leaving 33.2% of the world’s exports underenforced against corruption, and 55% of the world’s exports without any oversight for bribery abuses at all. That deficiency points to one of the glaring issues with the OECD Anti-Bribery Convention: many of the world’s top exporters—including China, India, Singapore, and all African countries—are not signatories.

2. The United Nations Convention Against Corruption

In response to the inadequacies of prior anti-corruption efforts and the stubbornly high rates of corruption around the world, the United Nations held the Convention Against Corruption (UNCAC) in 2005 that resulted in a binding treaty with the broadest scope of any international anti-corruption legislation to date. 190 countries, nearly every recognized country in the world, have joined the convention, including those notably missing from the

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70 Id.
71 Id.
72 Id.
73 OECD Anti-Bribery Convention, supra note 63.
75 Id.
76 Id.
OECD Anti-Bribery Convention. Its seventy-one articles—compared to the OECD Anti-Bribery Convention’s seventeen articles—create a cohesive international framework that includes prevention, criminalization and enforcement, international cooperation, recovery, and implementation of information exchange. The actions addressed in the criminalization section include bribery (national and international), embezzlement (or misappropriation), trading in influence, abuse of functions, laundering of proceeds, concealment, obstruction of justice, and legal person liability.

While its influence is broad in the sense that it has attracted near-global adoption, broad acceptance may come at the cost of stricter enforcement. Article 42 of UNCAC deals with jurisdictional questions, making territorial jurisdiction mandatory; however, Article 42 provides only optional guidance for jurisdiction through nationality, habitual residence, and against a national of the state or the state itself. The UNCAC also has binding language for the supply side of bribery schemes (stating that parties “shall” implement criminal laws against bribery) but provides discretion for the demand side of bribery (stating instead that parties “shall consider” bringing criminal enforcement against officials receiving bribes).

While the UNCAC was quite effective at garnering signatories and providing a framework for combatting corruption, it is “regrettably weak” at compelling the governments to actually enforce the agreement, only providing for outside oversight upon the offending country’s consent. The legislation required by the UNCAC has not materialized in the countries with grand corruption and therefore “there is wide impunity for the corrupt, and especially for kleptocrats.” Indeed, seventeen years after the passage of the UNCAC, two-thirds of the world has “serious corruption problems” according to Transparency International’s Corruption Perception Index. And, although the convention eventually adopted a monitoring system modeled on the OECD’s, it does not provide for the same transparency to ensure implementation and enforcement.

80 Id.
81 Id.
82 Id.
84 Goldstone, supra note 22.
86 Dhir, supra note 12, at 220.
D. The Effectiveness of Current Anti-Corruption Enforcement

Transparency International’s Corruption Perception Index has found that the global average for corruption has remained unchanged for over a decade, with 155 countries making no progress or declining in the last ten years.\(^{87}\) These figures suggest that the current anti-corruption efforts are ineffective. World leaders, scholars, and practitioners have speculated as to what makes the current enforcement mechanisms inadequate and suggested ways to improve enforcement going forward. I have synthesized these ideas to identify three interrelated metrics that make for effective anti-corruption enforcement: (1) cooperation, (2) accountability, and (3) practicability.

1. Cooperation Between Nations

Because of jurisdictional limits, the United States is restricted in who it can prosecute, leaving only companies domiciled in the United States or those who can otherwise be prosecuted through extraterritorial jurisdiction. Other countries’ anti-corruption legislative efforts, like the United Kingdom’s Bribery Act of 2010 and Canada’s Corruption of Foreign Public Officials Act of 2013, face the same limitations. To the extent that the goal is actually to curb corruption broadly, these statutes do little to dismantle the marketplace for public corruption, since corrupt officials can seek bribery elsewhere when actors from countries like the United States, Canada, and the United Kingdom are risk-averse to their own country’s unilateral enforcement. Therefore, the importance of cooperation, at a minimum, requires countries to go beyond unilateral enforcement to seek coordinated multilateral mechanisms for combatting corruption.

But even with the current multilateral treaties, cooperation is insufficient. The OECD studied fifty-five international bribery cases to better understand the results from enforcement actions.\(^{88}\) The survey found that communication between countries was problematic, describing “the information flow between demand-side and supply-side enforcement authorities” as “slow” and “sporadic.”\(^{89}\) In fact, the supply-side countries (like the United States in an FCPA case) did not communicate the illicit activity to the demand-side authorities in any of the cases.\(^{90}\) For cases where the supply-side country learned of the scheme first, it took on average over two years for the demand-side countries to find out about the illicit scheme, and that was primarily through media outlets.\(^{91}\) If, instead, government authorities were working collaboratively—notifying one another when they

\(^{87}\) Corruption Perceptions Index (2022), supra note 21.


\(^{89}\) Id. at 7.

\(^{90}\) Id.

\(^{91}\) Id.
detect international corruption schemes, sharing evidence, and coordinating prosecutions—they could more effectively deter and dismantle international corruption schemes. Moreover, lack of coordination leads to “overlapping legal instruments” that result in overregulation for some and lack of accountability for others.

2. Accountability for Offenders

The current multilateral mechanisms, however, are also inadequate. The OECD Anti-Bribery Convention relies on individual countries to enact and enforce its recommended framework and, as a result, only two countries are considered enforcers under the convention’s own terms. Moreover, it lacks many key signatories that even under perfect enforcement would still leave a corruption marketplace at large. The UNCAC does better. It has at least nominal buy-in from nearly every country in the world and acts as a binding treaty with the force and effect of law, but it lacks crucial monitoring systems and still relies on implementation from individual countries. Accountability means not only must the anti-corruption legislation be in place but also that there are corresponding mechanisms for monitoring their implementation, enforcing actions against wrongdoers both on the supply and demand side of corrupt schemes, and remedying the violations.

The glaring substantive issue with the current systems is “the lack of punitive effects in cases of violations.” Whichever basic theories of criminal punishment one subscribes to—retributivism or utilitarianism—both are thwarted without accountability. For a retributivist, justice is denied when the guilty go unpunished. For a utilitarian, a lack of enforcement cannot deter future crime. As one article summarized, “the absence of risk of punishment—particularly imprisonment—contributes greatly to the pervasiveness and persistence of grand corruption.” As another scholar puts it, the UNCAC is ineffective because of “[w]eak investigation, weak prosecution, and . . . weak provisions for tracing illicit proceeds of crime.”

The recurring problem in all of the current methods of enforcement, even if enacted perfectly, is that none of them require action against the demand-side. These are the kleptocrats creating a market for bribery, without whom there would be no opportunity for public corruption at all. Without criminalizing the demand for corruption, kleptocrats will keep the market open to anyone willing to risk supply-side punishment as long as the benefit

95 González et al., supra note 7.
96 Danny Singh, Anticorruption, Cultural Norms, and Implications for APUNCAC, 10 LAWS 1, 12 (2021).
provides enough leverage.

3. Practicability of Adoption

Ultimately, no enforcement mechanism can be effective if it is impractical that it would be adopted at all. This issue relies on the political will of the very government officials who will be subject to the enhanced regulations. It is true that governments are not monoliths and therefore a majority of officials can hold the few corrupt ones accountable; however, the countries most tolerant of—and therefore most affected by—corruption are usually the ones providing the demand for corrupt bribery schemes in the first place. In the worst (and also the most necessary) scenario, the demand-side corrupt official would have to implement mechanisms against himself, sacrificing the bribe money in exchange for the betterment of his constituents—a sacrifice he already declined by taking the bribe in the first place.

Moreover, the question of political will does not only occur at the moment of implementation; for those mechanisms that depend on domestic enforcement like the OECD Anti-Bribery Convention and the UNCAC, political will must be sufficient at the moment of every enforcement action. Therefore, for these conventions to be practicable “relies on the political will of each successive government in its efforts to combat corruption.”

Then, what is ultimately necessary is a mechanism, whether treaty or statute, that does not require several instances of political will to perpetuate its efficacy. This mechanism could come in the form of a single moment of political will that establishes an effective external oversight watchdog. Another potential solution is external incentives so great as to overcome any political resistance.

III. A NEW WAY FORWARD: THE INTERNATIONAL ANTI-CORRUPTION COURT

The shortcomings of the current anti-corruption mechanisms beg the question of whether there is a better way to monitor and prosecute corruption in a way that would actually dismantle the marketplace for corruption. In 2013, former federal U.S. Judge Mark Wolf proposed the establishment of an International Anti-Corruption Court (IACC). His proposal has gained significant meaningful support, particularly in the last two years. With mounting recognition, the proposal has also garnered harsh criticism in recent years. Part III summarizes the proposal for an IACC, notes its support, and engages with its critics and their proposed alternatives, underpinning the analysis through the framework of the guiding standards identified in Part II supra.

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97 Bello y Villarino, supra note 94, at 397.
98 Dhir, supra note 12, at 222.
A. The Proposal for an International Anti-Corruption Court

Judge Wolf originally proposed the International Anti-Corruption Court in an article published in 2014. 99 He subsequently founded Integrity Initiatives International, an international organization dedicated to supporting the creation of the court and combatting grand corruption broadly. 100 His proposal seeks to speak directly to the issues lacking in the UNCAC, seeking to “fill the crucial enforcement gap in the international framework for combatting grand corruption.” 101 The most recent version of the proposal—and therefore the version on which I base this section—can be found as the top featured writing on Integrity Initiatives International’s website. 102

The IACC seeks to prosecute high-level public officials and those who conspire in a criminal scheme with these officials. 103 The prosecutions would extend to their official acts while in office, and member states would waive personal and functional immunity for present or formal officials. 104 The IACC would be able to prosecute crimes, either those domestic laws required by the UNCAC—bribery, embezzlement, misappropriation, money laundering, and obstruction of justice—or a uniform version of them included in the treaty creating the court. 105 The court would not seek to create new laws but only ensure that existing laws are enforced against kleptocrats and their collaborators. 106 Not only could these prosecutions result in imprisonment but also disgorgement and recovery of funds for the benefit of victims. 107

The court’s jurisdiction would extend to nationals of member states regardless of where they commit the crimes and nationals of non-member states who commit any element of these crimes in the territory of a member

103 Id. at 5.
104 Id.
105 Id. at 6.
106 Id.
107 Id. at 9.
state, including through financial systems. This jurisdiction is broad and modeled off of the International Criminal Court in which "states are free to assert territorial criminal jurisdiction, even if part of the criminal conduct takes place outside of its territory, as long as there is a link with their territory." Jurisdiction is limited for the IACC, however, by the principle of complementarity, meaning "it would investigate or prosecute only if a member state itself were unwilling or unable to prosecute." Again, modeling itself off of the International Criminal Court, the IACC would consider whether the member state is already investigating in good faith, whether it has the capacity for such a prosecution, and whether the judiciary is corrupt. This would serve both as an incentive for countries to conduct their own investigations as well as a backstop for when they are unwilling or unable to do so.

Moreover, the investigators, prosecutors, and judges in the IACC will be experienced in financial crimes and grand corruption. As such, they will be able to advise member countries and support them, empowering domestic prosecuting bodies and judiciaries who may not otherwise be able to prosecute major corruption cases.

B. Support for the Proposed International Anti-Corruption Court

The Declaration in Support of the Creation of an International Anti-Corruption Court has received support from hundreds of individuals, including forty-six current or former heads of state and thirty Nobel Laureates. The governments of Canada, the Netherlands, and Ecuador have become vocal advocates of the creation of the court. On January 18, 2023, the European Parliament adopted a favorable position and called on the UN to work towards an IACC. Danilo Türk—the former president of Slovenia, current president of Club de Madrid, and member of the UN Secretary-General’s High-Level Advisory Board—wrote an op-ed calling...

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108 Id. at 6.
110 Id. at 8.
111 Id.
112 Id.
113 Id. at 8–9.
114 Id. at 9 (referencing the International Commission against Impunity in Guatemala (CICIG)).
115 Declaration in Support of the Creation of an International Anti-Corruption Court, supra note 23.
116 WOLF, GOLDSTONE & ROTBERG, supra note 102, at 15.
the creation of an IACC “critical.” He specified that in these times, “[d]emocracies have a unique mandate to take action and show that they can deliver on something as essential to their very nature as the rule of law.” Moreover, recent debates in the United Kingdom’s House of Lords have shown cross-party support for the creation of the IACC. The proposal also sees broad support from citizens in powerful countries on the international stage; a recent survey across G7 and BRICS countries found majority support for the IACC in all twelve countries surveyed.

Scholars and practitioners have also declared their support for the creation of the IACC. Noting that current anti-corruption enforcement is ultimately weak, despite the existence of multilateral mechanisms, one scholar noted “[a]n IACC would fill this implementation gap by investigating what domestic institutions do not currently investigate, and by carrying out this mandate effectively in the complex global system.” One group of practitioners praised the IACC for its particular strengths in its specialization and cooperation, emphasizing that “the IACC will be able to contribute to strengthening the capacity of many countries to prosecute major corruption cases.”

C. Engagement with Criticism of the Proposed International Anti-Corruption Court

The IACC’s rapidly growing support also comes with blowback as scholars criticize the proposal and offer their own perspectives on the future of anti-corruption enforcement. For example, Dr. Juanita Olaya Garcia, former Chairperson of the UNCAC Coalition, criticizes the IACC as a paternalistic approach “[w]ith a slight touch of superiority” that “inevitably looks like another effort from the West to create oversight to look down with a neo-colonial gaze on a few singled-out countries.” She explains that of the countries most ardently supporting the IACC—Canada, the Netherlands, and Ecuador—only the Netherlands has signed the UNCAC transparency pledge, which she sees as hypocrisy: “Why is it possible to encourage others to do better but stop short of promoting basic foundational ideals at home?”

118 Danilo Türk, We Need an International Anti-Corruption Court, POLITICO (June 24, 2022), https://www.politico.eu/article/need-international-anti-corruption-court.
119 Id.
120 Integrity Initiatives Int’l, Cross-Party Support for the Int’l Anti-Corruption Court in the UK, YOUTUBE (May 9, 2023), https://www.youtube.com/watch?v=oFh8CDTUJrc.
122 Dhir, supra note 12, at 219.
123 González et al., supra note 7.
125 Id.
But beyond her ideological frustrations with the IACC, she also sees it as impractical, noting that garnering signatories will not be plausible in the current political climate: “That Russia, Belarus, Iran, Pakistan, and Venezuela are unlikely to support such a measure should not come as a surprise... democracy is receding, civic space is shrinking, and human rights protection is on a downturn.”

Moreover, she says the proposal will fall short because it does not address the networks of kleptocracy like “the numerous ranks of enablers that are decisive in ensuring corrupt deals happen, let alone the myriad of straw men and sub-contractors that lend their names, their shell companies and their accounts in tax-havens to pass the money around.”

She concludes, “[d]eterrence doesn’t work on kleptocrats.”

Dr. Garcia’s critiques situate neatly alongside the principles identified in Part II.D: cooperation, accountability, and practicability. Her commentary fails to address essential aspects of what makes the IACC an improvement over UNCAC. She insists that the decline of democracy, civic space, and human rights protection are arguments against an IACC. I would maintain that those are the precise reasons international oversight is necessary, not as a neo-colonial imposition of Western values but as a guardrail against the exploitation of people in developing economies (which is itself tied to the corruption). And, while she maintains that the IACC proposal does not do enough to deter kleptocrats, it does create a first-of-its-kind mechanism for prosecuting kleptocrats and their networks at all, a capability that the UNCAC notably lacks by providing mere guidance for the demand side of corruption.

To her point about the networks of kleptocracy, the proposal criminalizes the conduct of those who work in the corrupt schemes of kleptocrats. The broad jurisdiction of the court to prosecute nationals of non-member states whose scheme touches member states, like the ones whose financial systems facilitate her examples of shell companies and tax havens, means that an IACC actually solves the problem she claims it ignores. In the end, even if she is correct that deterrence does not work on kleptocrats, imprisonment still would.

Professor Stephenson picks up on this point, stating, “I’m skeptical that simply creating the court will strike fear into the heart of kleptocrats everywhere.” He explains that kleptocrats “understand that actually building these cases getting the evidence getting jurisdiction all the stuff that has to happen is extraordinarily difficult, particularly in the absence of cooperation in their home jurisdictions.” Another Harvard Law professor

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126 Id.
127 Id.
128 Id.
129 University of British Columbia, supra note 11, at 1:14:30–1:15:00.
130 Id.
and special prosecutor for the International Criminal Court, Alex Whiting, takes this further, explaining that prosecuting under these circumstances is nearly impossible.\(^{131}\) He says that Judge Wolf analogizing IACC prosecutors to federal prosecutors in the U.S. is “false and misleading.”\(^{132}\) Prosecutors in this court would instead be “almost entirely reliant on state cooperation to conduct their investigations” because “[i]f they want to obtain documents or conduct any investigative actions requiring coercive legal measures . . . they must make a request to state authorities.”\(^{133}\) Northwestern Professors Juliet Sorensen and Karen Alter have similar concerns about the complications of prosecution, saying, “corruption is a particularly difficult crime to prosecute: the perpetrators are public officials wielding power, victims are often reluctant to report a shakedown, so that most effective investigations are covert and ongoing.”\(^{134}\) These criticisms raise two issues: (1) kleptocrats who control governments can make membership in the IACC and the resulting prosecutions an unattainable goal by blocking the legislation that would be used against them, and (2) these countries plagued by corruption will not cooperate in prosecution, rendering them difficult to the point of futility.

Regarding the first criticism, Professor Stuart Yeh says the underpinning assumption is misguided.\(^{135}\) He draws on several examples from history, spanning America, Romania, the UK, Rome, Guatemala, Honduras, and Ukraine, to show that strong anti-corruption legislation was approved by the very corrupt actors in positions of power.\(^{136}\) He attributes this to the willingness of politicians, even corrupt ones, to bend to political expediency in the face of growing calls for change and their hubris to believe their own laws will not reach them.\(^{137}\) Therefore, for our purposes, the rapidly growing sentiment of support around an IACC would create political pressure on leaders, even corrupt ones, to cooperate even as a rhetorical act. In that sense, Professor Stephenson’s criticism that kleptocrats understand how difficult a prosecution can be would actually compel the kind of hubris Professor Yeh references to make them believe they will remain untouchable.

The second criticism regarding the difficulty of the subsequent prosecutions is mitigated through the broad jurisdiction of the IACC. With

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\(^{132}\) Id.

\(^{133}\) Id.


\(^{135}\) Stuart S. Yeh, *APUNCAC and the International Anti-Corruption Court (IACC)*, 10 LAWS 1, 6–11 (2021).

\(^{136}\) Id.

\(^{137}\) Id.
the global nature of corruption crimes, much of the needed information will actually come from cooperating member countries, whether through financial transactions or supply-side actors. Moreover, the existence of an outside oversight body creates opportunities for evidence that might not otherwise be available, like an avenue for a whistleblower to come forward with the guarantee of asylum protections. In that sense, the IACC could give footing to these kinds of difficult prosecutions that would otherwise never be brought at all.

Another related criticism is the idea that countries will not want to lose control of their own prosecutions. Professor Stephenson asserts that “[t]here’s essentially zero chance that states ruled by corrupt elites—or, for that matter, states sensitive to sovereignty concerns—will ever sign onto this. And without that consent, the whole proposal is stillborn.”138 In another article, scholars argue that “[d]eciding what cases to bring and on what terms to settle involves significant discretion, and national governments may prefer to keep this discretion in-house rather than delegate this power to an international prosecutor. 139

This concern is significantly mitigated by the principle of complementarity in the proposed IACC, which respects country sovereignty by only prosecuting where the country has not. Of course, the ultimate issue will be the degree of deference given to member countries’ decisions not to prosecute: too much deference could leave grand corruption untouched and defeat the point of the IACC; too little deference could trample national sovereignty and make even minor domestic issues an international affair. The concern of overreach, however, is mitigated by the limitations of the IACC’s resources, guidance by experienced judges and prosecutors from various countries to use their discretion, and the explicit language of the IACC proposal to focus on grand corruption.

D. Evaluating Alternative Solutions

Many of the critics and commentators regarding the IACC proposal have different ideas for a system that could work better. None of them dispute that the current mechanisms are inadequate as they currently stand. I separate these alternative proposals into three groups: improvement, modification, and incorporation.

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1. Alternatives of Improvement

The first group of alternatives are those that want to align domestic standards between countries through a treaty. This has been the default approach for the anticorruption conventions starting with IACAC in 1996 and the OECD Anti-Bribery Convention and the UNCAC followed suit. Proponents of these plans seek to maintain the current systems, and just improve the areas that are not working. Unsurprisingly, the IACC’s biggest critics also tend to fall into this camp, including prominent critics Dr. Garcia and Professor Stephenson. Garcia advocates for strengthening the UNCAC by adopting its anti-kleptocracy regulations at home and improving the UNCAC’s review mechanism. Stephenson thinks it would be more of a deterrent than an IACC to enforce the current laws more aggressively and get the dirty money out of the US and Canada. Garcia and Stephenson support in-country mechanisms of local prosecution authorities to effect the change rather than an actual international court, because “you can do it in a more tailored way to the particular circumstances and the needs of the particular country.”

While Garcia’s proposals would improve the accountability principle in terms of monitoring and potentially enforcing demand-side recommendations, it is still incumbent upon each individual country to fight the battle to get these laws passed on their own and then deal with the hurdle of enforcement. To Stephenson’s point, better enforcement would certainly be more effective, but as discussed in depth in Part II, the current UNCAC mechanisms receive inadequate enforcement because they are recommendations with little monitoring and no enforcement mechanism. They both clearly value the individuality and tailoring available to local laws, but part of the point is that corruption is often an international crime, and increasingly so as the world becomes more globalized. Consistent enforcement, cooperation between countries, and international political support outweigh localization and tailoring. Neither of these comments accounts for the principles of coordination and practicality under which the current mechanisms are insufficient.

2. Alternatives of Modification

The second group is related to the first: provide greater support for local authorities, but these proposals expand the current systems more radically. Professor Yeh, through a series of essays spanning nearly a decade, proposes the Anticorruption Protocol to the United Nations Convention Against Corruption (which he calls APUNCAC). His proposal would establish

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141 Garcia, supra note 124.
142 University of British Columbia, supra note 11, at 1:15:00–1:16:00.
143 Id. at 58:50–1:00:23.
144 See Yeh, supra note 135, at 1.
Dedicated Domestic Courts, specialized anti-corruption courts existing in each country with investigators who report to the UN under UNCAC. Another scholar ardently supports his proposal as a supplement to UNCAC. Yeh has said he can see it being cooperative with the IACC. Yeh’s proposal builds on the current anti-corruption systems, satisfying those in the first group, plus his proposal is focused on localization, keeping with the spirit of their proposals. It better satisfies the principle of accountability by creating monitoring systems, albeit without strong international oversight, and creates opportunities to pursue demand-side corruption. However, it undermines the principle of cooperation, failing to strengthen transparent coordination between prosecuting countries. Perhaps more importantly, it seems highly impractical; not only does it need political will from each individual country to actually create and maintain enforcement; it requires funding of judiciary and prosecutors outside and above existing legal systems.

Another proposal in this group advocates for expanding the FCPA jurisdiction on the basis of complementarity by allowing the U.S. to prosecute FCPA violations by non-US actors. Such a system, they suggest, creates incentives for other countries to better enforce their own laws in a sort of competitive prosecution framework to meet their standards under the OECD Anti-Bribery Convention or otherwise be subject to outside prosecuting bodies. This proposal seems the most radical as it would greatly expand the influence of the United States in global corruption issues, even those that do not involve U.S. actors. It still fails to address the demand-side corruption issues, which is the most glaring issue in global corruption. In relation to the IACC, it shares the protection of complementarity but would likely receive more pushback than a multilateral enforcement mechanism like an IACC because there are national sovereignty concerns but from an individual country instead of an international body with more checks in place. The main distinction between this alternative and the IACC is centralization versus decentralization, but the authors do not sufficiently justify the value of decentralization at the cost of these other factors.

3. Alternatives of Incorporation

Incorporation, as defined by another scholar, is adopting anticorruption measures into existing international regulatory frameworks to the extent that anti-corrupt norms are a part of the norms of other regulations. Proposals in this group include: incorporating anticorruption obligations into

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145 Id.
146 Singh, supra note 96.
147 Yeh, supra note 135, at 1.
148 Brewster & Dryden, supra note 139, at 252–58.
149 Id.
international trade law with sanctions on countries unwilling to follow the standards,\textsuperscript{151} incorporating anti-corruption provisions into the International Criminal Court or otherwise reinterpreting the provisions covering “other inhumane acts” to include grand corruption,\textsuperscript{152} and incorporating grand corruption into already-existing human rights courts because corruption often implicates human rights abuses.\textsuperscript{153} These proposals benefit from already existing structures that have proven successful, including their own monitoring, investigating, and enforcement mechanisms.

They also benefit from being placed in an international setting, and therefore offering the benefits of international cooperation. They lack, however, the benefit of specialization that gives the IACC credibility and provides meaningful benefits to the local prosecutors dealing with these crimes. Moreover, in terms of feasibility, these organizations have their own agreements and structures in place not intended for the work of an international anti-corruption court. As such, their founding agreements would have to be amended. The IACC proposal accounted for this consideration, directly speaking to the question of whether prosecuting grand corruption through the International Criminal Court would be better than the IACC.\textsuperscript{154} The judges explained the procedural complications: “[a]n amendment to the Rome Statute would require a vote of two-thirds of the Assembly of States Parties and would not come into effect until one year after seven-eighths of the states parties ratified the change.”\textsuperscript{155} Moreover, it would be “unlikely to be politically feasible” because “[s]ome of the ICC’s 123 member states are ruled by kleptocrats who would oppose such an amendment.”\textsuperscript{156} These incorporation proposals run into stronger practicability problems than the IACC because of these amendment processes.

IV. WHY THE UNITED STATES SHOULD SUPPORT AN INTERNATIONAL ANTI-CORRUPTION COURT

The critiques and alternatives seldom speak specifically to the position

\begin{itemize}
\item \textsuperscript{151} Id. at 398–99.
\item \textsuperscript{154} WOLF, GOLDSTONE & ROTBERG, supra note 102, at 11.
\item \textsuperscript{155} Id.
\item \textsuperscript{156} Id.
\end{itemize}
of the United States on the creation of the International Anti-Corruption Court, other than to briefly note its silence on the topic. This section fills the gap in the literature regarding the United States’ position on the IACC, urging the United States government to endorse and participate in this multilateral mechanism. This part takes into account the Biden administration’s Strategy on Countering Corruption, the IACC’s fit to the principles established in Part II, and the potential upside for leveling the playing field for U.S. companies.

A. The Biden Administration’s Strategy on Countering Corruption

During his first year in office, President Biden established the fight against corruption as a core interest of his administration’s objectives through National Security Study Memorandum 1 (NSSM-1) of June 3, 2021, stating:

“Corruption threatens United States national security, economic equity, global anti-poverty and development efforts, and democracy itself. But by effectively preventing and countering corruption and demonstrating the advantages of transparent and accountable governance, we can secure a critical advantage for the United States and other democracies.” – President Joe Biden

The administration solidified this position later that year by releasing the United States Strategy on Countering Corruption, the first of its kind. This plan features five pillars: (1) Modernizing, Coordinating, and Resourcing U.S. Government Efforts to Better Fight Corruption, (2) Curbing Illicit Finance, (3) Holding Corrupt Actors Accountable, (4) Preserving and Strengthening the Multilateral Anti-Corruption Architecture, and (5) Improving Diplomatic Engagement and Leveraging Foreign Assistance Resources to Advance Policy Goals.

Each of these pillars are accompanied by strategic objectives for a total of nineteen strategic objectives, ten of which focus on international aspects of corruption. Strategic Objectives 1.2, 2.2, 3.3, and 5.4 address cooperation through international information sharing, law enforcement cooperation, sanctions, and joint prosecutions. Strategic Objectives 3.2, 3.4, 4.2, 5.1, and 5.4 address accountability through demand-side prosecutions, incentivizing and supporting prosecutions by partner countries, monitoring the current mechanisms in place, bolstering oversight capacities

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159 Id. at 5.
160 See id. at 9–15.
161 Id.
of willing governments, and risk analysis. Strategic Objectives 1.3, 2.2, and 4.1 address practicability through diplomatic engagement, holding countries accountable when they fail to follow the agreements (specifically invoking the UNCAC and OECD Anti-Bribery Convention), addressing governance deficiencies, and preventing the establishment of new safe havens.

The IACC is a particularly good fit to satisfy the objectives laid out by the Biden administration, specifically bolstering many of these strategic objectives. It creates a centralized system for information sharing, uniting the once disparate prosecutions. The premise of complementarity retains autonomy for compliant countries but ensures accountability for those who are deficient in their prosecutions, inherently incentivizing domestic responses. And, crucially, it would by design pursue the grand corruption committed by demand-side kleptocrats.

B. How the IACC Satisfies the Principles Laid Out in Part II

In accordance with the current administration’s goals, the IACC would be a more effective multilateral instrument than the current mechanisms because it implements the principles laid out in Part II: cooperation, accountability, and practicability. These principles will make the IACC effective and therefore beneficial to the United States.

The IACC would be an inherently cooperative body. Currently, nearly every country in the world is failing to carry out the commitments they have made against corruption. The unilateral systems and treaties that try to unify them are failing, and the plans to expand them or replicate them do not create a network of coordinated prosecutions. These individualized prosecutions “often generate evidence, including from witnesses who are willing to testify that foreign officials have received bribes, but that evidence is frequently not used to prosecute them.” The IACC, on the other hand, would make good use of this information. This would make information the United States has regarding its own FCPA prosecutions more widely available to bring down grand corruption, particularly as it applies to demand-side prosecutions. It would also expand the resources the United States has to bring prosecutions through this information-sharing network.

The IACC would greatly strengthen accountability measures. The Corruption Perceptions Index, “the most widely used global corruption ranking in the world,” uses metrics like bribery, diversion of public funds,

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162 Id.
163 Id.
164 Exporting Corruption 2022: Enforcement Against Foreign Bribery Hits Historic Low, supra note 74.
165 González et al., supra note 7.
166 Id.
transparency laws, and enforcement to measure public corruption. The United States currently ranks 24th on the list, indicating it still has room to grow: “the U.S. is already behind the European Union and other G7 and G20 countries in entity transparency and gatekeeper regulation.” The IACC would provide a framework and support for the United States to improve these mechanisms. Most importantly, the IACC’s focus on the demand side of corruption would elevate developing countries impacted by corruption and mitigate circumstances in which U.S. companies are faced with corrupt governments.

The IACC, despite the criticism, is quite practicable. Because of the jurisdictional scope in the proposal, “the IACC could...be effective if it consisted of 20 to 25 representative states, as long as they include some financial centres and attractive destinations for the laundered proceeds of grand corruption.” Indeed, Integrity Initiatives International estimates that only “a relatively small number of founding member states” would be necessary to create an effective court since “[g]rand corruption is transnational by nature.” As a global financial center, the United States would be particularly valuable in the formation of the court, meaningfully broadening the range of available prosecutions.

This effect is directly in line with the goals laid out by the Biden Administration and discussed in Part IV.A. Due to the nature of electoral politics and the ability of the executive branch to focus the country’s efforts, the current president’s objectives could be threatened considering “the next administration may abandon and/or dilute these initiatives.” If this administration is genuine in its stated goals, it could preserve them from shifting administrations’ priorities by solidifying them in an international oversight body like the IACC. Of course, the political will of U.S. leaders would determine whether the country joins the IACC, but that obstacle would be present for unilateral initiatives—including legislation and funding for Biden’s proposals—as well, and it would lack the soft power of global support currently mounting for the IACC.

C. U.S. Companies’ Competitive Disadvantage

The last element that has gone largely overlooked in discussions about

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[171] The International Anti-Corruption Court and the International Campaign to Establish It, supra note 101.
[172] Zagaris, supra note 169.
[173] Id.
the creation of the IACC is the effect it would have on U.S. companies. The FCPA imposes particular burdens on U.S. companies: “The FCPA...is not an ordinary domestic criminal law, but a novel expansion of criminal liability to impose duties on American businesses to conform to domestic ethical standards even when they operate beyond our borders, in lands with different cultures, laws, and traditions.” Therefore, to the extent that a corrupt marketplace exists, U.S.-affiliated companies are excluded from it or otherwise at higher risk for participating in it than their counterparts. In a perverse way, this consideration disadvantages U.S. companies on the global stage.

American corporations have noticed. “Since the passage of the FCPA more than twenty-five years ago, U.S. companies have complained about the competitive disadvantage it creates for them vis-á-vis their foreign competitors.” Multilateral enforcement of anti-corruption laws levels the playing field and alleviates the disproportionate impact anti-corruption laws, objectively a good thing for humanity, have against U.S. companies. But as previously discussed in depth, the current multilateral mechanisms are inadequate and therefore more effective measures would provide greater benefit to the United States. The IACC would be that effective mechanism.

After the adoption of the IACC, the FCPA could function as it has before, allowing the United States to pursue corruption when the suppliers are U.S. entities. The principle of complementarity ensures that these prosecutions could still be handled by the United States and would only fall under the IACC when the United States would not or could not prosecute the cases itself. The IACC could also extend the efficacy of these prosecutions by providing an avenue for the discovery and investigation materials to be used in prosecutions against the corrupt officials that are currently beyond the jurisdictional reach of the United States. It would put these efforts to good use and achieve greater justice against those perpetuating such crimes and, moreover, provide a pathway for recovering the assets of the citizens affected by the misappropriations through the IACC’s disgorgement mechanisms.

The United States is reticent to sign onto international agreements; most notably, it does not take part in the International Criminal Court. And although the IACC would subject the United States to additional oversight, it currently stands as the most active country on this topic, as one of only two

174 Although the topic is largely overlooked, Judge Wolf did mention it briefly in his original proposal. Wolf, supra note 99 (arguing “the United States has good reason to fully support an International Anti-Corruption Court. American companies generally behave ethically and, in any event, are significantly deterred from paying bribes by the threat of prosecution for violating the FCPA. They would benefit from the more level international playing field an IACC would provide.”).
177 Id.
“active enforcers” under the standards of the OECD Anti-Bribery Convention. That is to say, the United States actually stands to benefit the most from other countries being under the same degree and kind of regulation already applied to American companies abroad since all companies would be held to the same standards globally, thus mitigating the American disadvantage in the demand for bribery.

D. Addressing Further Potential Counterarguments

Of course, such a court would open the United States to an international body meddling in national affairs. Accusations of corruption have been especially prominent in recent years, from alleged bribery in the country’s highest court to a twice-impeached president facing multiple criminal investigations and indictments. The United States Department of Justice and other oversight bodies walk a tenuous line in investigating and enforcing these claims, gesturing towards the broader themes throughout this note of national sovereignty, political will, and protecting democratic institutions. While some may fear that an International Anti-Corruption Court may interfere and thereby exacerbate the political tensions so prominent in the United States, I maintain that the IACC would serve to alleviate these hard questions.

First, the essential principle of complementarity would protect against overreach into domestic affairs. The IACC would start from a place of deference as the United States navigates through the complicated nature of pursuing legal action against its own officials. It is only where its institutions fail to investigate or prosecute that would warrant intervention, and likely that is when a body outside the United States who does not share in the same political divides would be most beneficial.

Second, the backstop to a functioning democracy without corruption is free and fair elections. There may come a moment when the democratic systems of the United States may waiver, like the world saw during the January 6, 2021 attack on the United States Capitol in an effort to overturn a presidential election. Defending the people from the abuses of unethical leaders is the precise reason we seek to combat corruption around the world. We should not fear being a part of a broader system of protections; we should take comfort in it.

V. CONCLUSION

From petty corruption like the border agent I watched shake down my tourist father for $200 to grand corruption like the Malaysian officials who undermined their citizens’ investment in the country’s infrastructure amounting to nearly $3 billion, the world is worse off when officials abuse their power.

Corruption is not a uniquely American problem, nor is the proposed IACC a uniquely American solution. But as the world’s most vigorous
enforcer against public corruption, the United States is uniquely situated to benefit greatly from the adoption of an IACC. It would serve to mitigate the marketplace for corruption, lessening the effect on American companies that are more stringently regulated under the FCPA than their counterparts—to varying degrees—around the world.

In an increasingly globalized world, a domestic approach to regulation and criminality is simply insufficient. The ability to skirt jurisdictional limitations and hide illicit funds keeps kleptocrats out of jail. These actors are a threat to economic development and human rights. The United States would give the IACC more momentum and credibility, which could provide meaningful change in countries plagued with corrupt officials and relief to the people who suffer under them. Moreover, it would provide a backstop for the United States itself if faced with the effects of corrupt officials at home.

The United States government has positioned itself as a serious opponent to corruption. The Biden administration’s first-of-its-kind strategy on countering corruption signals as much. The United States is the host country for the upcoming UNCAC at the end of 2023. These rhetorical statements can have meaningful weight on the international stage but only if they are accompanied by action. The IACC gives the United States an opportunity to take the fight against corruption seriously and make a meaningful difference in improving the governments and lives of people around the world.