

## Never Waste A Crisis: Anticorruption Reforms in South America

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*In the midst of dramatic corruption scandals, South American countries have passed some of the most noteworthy anticorruption legislation in the region's history. This Article examines the wave of anticorruption reforms and how international law, and in particular anticorruption treaties, has had an important influence on the content of these reforms. Specifically, this Article argues that the OECD Anti-Bribery Working Group has acted as a political entrepreneur, advocating for specific and meaningful reforms. The influence of international law was critical in ensuring that the reforms adopted during these corruption scandals were robust and that the opportunity presented by these scandals was not lost.*

*This Article also makes several important contributions to the growing field of anticorruption law. First, it applies a theory of government decision-making during crises to the South American corruption crisis. Drawing on theories of reform during financial crises, this Article explains how corruption crises present unique opportunities for popular reforms to take hold. Second, this Article discusses how political entrepreneurs, including the international bodies responsible for implementing anticorruption treaties, can use international law and global standards to promote meaningful reforms. Third, this Article traces recent anticorruption reforms in multiple South American countries to illustrate these processes in action. This Article illustrates how countries that were members of the OECD Anti-Bribery Convention responded systematically differently to corruption crises than non-member countries. Finally, this Article demonstrates how interwoven international and national law have become in the anticorruption field. International law not only has influence by providing global rules, but also by offering credible policy recommendations in times of national crisis.*

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## I. INTRODUCTION

In the last five years, corruption scandals have rocked South America, leading to the indictment and conviction of top elected officials as well as civil and criminal charges against some of the region's largest and most powerful corporations. The largest corruption investigation, Operação Lava Jato (Operation Carwash) in Brazil,<sup>1</sup> has ensnared the former president Lula da Silva,<sup>2</sup> led to the arrest of industrial magnates,<sup>3</sup> and uncovered similar bribery schemes in twelve other countries, including Peru, Argentina, Panama, and Venezuela.<sup>4</sup> In Peru, all three living former presidents have been implicated in the scandal.<sup>5</sup> A fourth former Peruvian president, Alan García, took his own life as police raided his home as part of the corruption investigation.<sup>6</sup> In response to this and other scandals, protestors have taken to the streets to demand changes to how government and businesses operate.<sup>7</sup>

The political crisis brought on by corruption scandals—Operação Lava Jato and others—has created the conditions necessary for major legal

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1. Natalia Mori, *Operation Car Wash and Its Impact in Peru*, N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM (2018), <https://nyujlpp.org/quorum/operation-car-wash-and-its-impact-in-peru/> (describing Lava Jato as “the largest bribery case in the history of Brazil and Latin America”).

2. Samantha Pearson & Luciana Magalhaes, *Former Brazilian President Is Convicted of Corruption*, WALL ST. J. (July 12, 2017), <https://tinyurl.com/y9pqs97o> (describing Lula's conviction as “the highest-profile sentence yet in the Car Wash case”).

3. Andrew Jacobs & Paula Moura, *At the Birthplace of a Graft Scandal, Brazil's Crisis Is on Full Display*, N.Y. TIMES (June 10, 2016), <https://tinyurl.com/ybwok8q7> (reporting that the Lava Jato “has led to the arrest of more than 150 business tycoons and elected officials”).

4. Stephanie Nolen, *Corruption Beyond Brazil: Where the 'Car Wash' Scandal Has Splashed Across Latin America*, GLOBE & MAIL (June 7, 2017), <https://tinyurl.com/y745mfk> (observing that the Lava Jato scandal has spread outside of Brazil and has led to the investigation of prominent politicians in half a dozen Latin American countries).

5. Andrea Zarate & Nicholas Casey, *Alan García, Ex-President of Peru, Is Dead After Shooting Himself During Arrest*, N.Y. TIMES (Apr. 17, 2019), <https://tinyurl.com/yarkdnw3> (discussing how Peruvian officials are investigating all of the country's living former presidents, including Pedro Pablo Kuczynski (the predecessor to the current president, Martín Vizcarra), Alejandro Toledo, and Ollanta Humala). Former President Alejandro Toledo was living in the United States when he was arrested by American authorities based on an extradition request by the Peruvian government. Nicholas Casey & Andrea Zarate, *Former Peru President Arrested in U.S. as Part of Vast Bribery Scandal*, N.Y. TIMES (July 16, 2019), <https://tinyurl.com/y4n3cnrt> (discussing how Toledo was arrested by American authorities after he repeatedly refused requests from Peruvian courts to return).

6. Ryan Dube & Juan Forero, *Former Peruvian President Dies After Shooting Himself During Police Raid*, WALL ST. J. (Apr. 17, 2019), <https://tinyurl.com/y9pk7elx> (describing how García committed suicide as police came to arrest him due to corruption investigations tied to the Operação Lava Jato scandal).

7. Simon Romero, *In Nationwide Protests, Angry Brazilians Call for Ouster of President*, N.Y. TIMES (Mar. 15, 2015), <https://tinyurl.com/y94sshzo> (reporting that hundreds of thousands of Brazilians took to the streets to protest and demand reforms); David Segal, *Petrobras Oil Scandal Leaves Brazilians Lamenting a Lost Dream*, N.Y. TIMES (Aug. 7, 2015), <https://tinyurl.com/y78j49e3> (placing the number of protesters at approximately one million).

reforms in the region.<sup>8</sup> Governments, responding to popular pressure, are motivated to prosecute high-ranking governmental officials and corporations, and to adopt new legislation.<sup>9</sup> However, these efforts have not resulted in harmonious regulatory or criminal frameworks.<sup>10</sup> While there are certain themes present in many legal reforms—*ex ante* controls, the possibility of deferred prosecution agreements, leniency agreements, and independent prosecutors—there remains significant variance among the anticorruption regimes in South American countries.<sup>11</sup>

For all of the economic and political upheaval created by the corruption scandals, there is surprisingly little academic analysis of how these crises have changed the policy landscape in South America.<sup>12</sup> This Article provides a holistic evaluation of how governments in South America have responded and why they have adopted specific reforms. Importantly, we find that one of the major explanations for the change in national policy is international law. Specifically, we argue that membership in the Organisation of Economic Cooperation and Development (OECD) Anti-Bribery Convention<sup>13</sup> (OECD Anti-Bribery Convention) has a significant effect on policy reforms in member states. This Article provides the foundations for demonstrating how treaty membership can change national government policy, particularly in moments of political crisis.

This Article examines South America's recent anticorruption reform process through several case studies, focusing on various OECD Anti-Bribery Convention members and several non-members. We examine how governmental responses to corruption are driven by their own national politics, their experiences and interactions with other nations' anticorruption laws, and the influence of international treaties (most notably the OECD Anti-Bribery Convention) and international organizations.

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8. See AMS. SOC'Y/COUNCIL OF THE AMS., *LATIN AMERICA'S BATTLE AGAINST CORRUPTION: A PATH FORWARD* (2018) [hereinafter *LATIN AMERICA'S BATTLE*] (discussing how corruption scandals have changed the political and legal environment in Latin America).

9. *Id.* (discussing region-wide reform efforts to combat corruption). For specific country developments, see, e.g., Ligia Maura Costa, *The Dynamics of Corruption in Brazil: From Trivial Bribes to a Corruption Scandal*, in *CORRUPTION SCANDALS AND THEIR GLOBAL IMPACTS* 189, 196-201 (Omar E. Hawthorne & Stephen Magu eds., 2018) (analyzing legal reforms in Brazil after Lava Jato); Mori, *supra* note 1, at 4-7 (analyzing legal reforms in Peru); Luis Vieira, *Argentina to Expand Use of Plea Bargaining, Inspired by Brazil*, AMS. Q. (Mar. 24, 2016), <https://tinyurl.com/yb9oleuj> (discussing legal reforms in Argentina resulting from the Lava Jato scandal).

10. See discussion *infra* Section IV.

11. *Id.*

12. There are excellent academic articles examining responses from individual countries. See, e.g., Costa, *supra* note 9, at 196-201 (describing the corruption scandal and its impact on Brazilian politics); Guillermo Jorge, *The Impact of Corporate Liability on Corruption in Latin America*, 113 AM. J. INT'L L. UNBOUND 320 (2019) (discussing the impact of corruption scandals in Brazilian politics concerning corporate liability).

13. Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, T.I.A.S. No. 99-215, 37 I.L.M. 1 [hereinafter *OECD Anti-Bribery Convention*].

Specifically, we explore how national laws have developed in parallel, adopting several foreign legal concepts while retaining important differences. A process of transnational legal collaboration is clearly taking place, but each exchange occurs in a unique national system with particular local qualities.

This Article also presents a theoretical framework for understanding legal change in South America. As we discuss, South American states that have joined the OECD Anti-Bribery Convention respond to corruption crises in systematically different ways than non-members. We argue that this is because the OECD Anti-Bribery Convention presents member states with an existing set of policy recommendations backed by transnational pressure to adopt said policies. We discuss how treaty membership not only influences countries' responses to corruption but also provides a legal framework for ensuring that responses to the crisis produce meaningful policy change. Restated, membership improves the likelihood that countries will make substantive anticorruption reforms in response to a crisis, rather than simply adopting weak measures that temporarily satisfy demands for change.

This paper proceeds as follows. In Section II, we discuss the corruption scandals that have shaken South America's political establishment. In particular, we discuss the Operação Lava Jato case, which is the largest corruption scandal, in terms of the money involved, in the history of South America—if not the world.<sup>14</sup> We also analyze how the related discovery of corrupt practices within the Brazilian construction giant Odebrecht led to political scandal, economic crisis, and popular outrage across South America.<sup>15</sup>

In Section III, we present a theory of how governments act in a political crisis and apply it to the present context in South America. Specifically, drawing on Professor John Coffee's concept of the "regulatory sine curve," we examine the political dynamics of government decision-making during and after a crisis.<sup>16</sup> The popular demands for policy action during a crisis create the political space for corruption reforms that are not possible during "normal" politics.<sup>17</sup> However, these policies are vulnerable to backsliding

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14. Jonathan Watts, *Operation Car Wash: Is This the Biggest Corruption Scandal in History?*, GUARDIAN (June 1, 2017), <https://tinyurl.com/ycxdexus> (discussing the web of corruption between Brazilian construction company, Petrobras, and Brazilian government officials and how it may be the largest corruption scandal ever uncovered); *see also* Costa, *supra* note 9, at 196, 200 (discussing how the Lava Jato scandal is likely the world's largest corruption scandal).

15. Anthony Faiola, *The Corruption Scandal Started in Brazil. Now It's Wreaking Havoc in Peru*, WASH. POST (Jan. 23, 2018), <https://tinyurl.com/yccuo65e> (reporting how the Lava Jato corruption scandal has spread to fourteen countries due to Odebrecht's practice of bribery); *see also* Nolen, *supra* note 4.

16. John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1020-42 (2012).

17. *Id.* at 1020-31.

when politics return to normal.<sup>18</sup> We discuss how membership in the OECD Anti-Bribery Convention makes salient certain policy options, and thus influences government leaders' response to popular demands during crises. We argue that this effect is generally positive as it prevents policymakers from self-interestedly choosing superficial or ineffective reforms. In addition, OECD membership offers the benefit of international monitoring, which may prevent backsliding in the post-crisis period.

In Section IV, we describe how various South American countries have responded to corruption crises, highlighting the variance between OECD Anti-Bribery Convention member states, while also illustrating the relative commonalities in response as compared to non-member states. The details of the crisis, the national government's particular goals, and the existing legal framework all influence reform proposals, yet the OECD Anti-Bribery Convention plays a notable role in each member state. In the midst of complicated and chaotic domestic politics, the case studies bring to life the theory set out in Section III.

In Section V, we conclude by summarizing the influence of corruption crises on legal reforms in South American over the past decade. We further examine the evolving global prosecution landscape; specifically, the challenges posed by multiple nations' prosecutors pursuing the same defendant. We discuss how future investigations will likely require even greater cooperation between national governments and outline some of the hurdles that deeper cooperation will face.

## II. THE CORRUPTION SCANDALS

The Operação Lava Jato (Operation Car Wash) investigation in Brazil was the largest corruption scandal in the nation's history,<sup>19</sup> leading to the

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18. *Id.* at 1030.

19. For a discussion of the Lava Jato scandal, see Claire Felter & Rocio Cara Labrador, *Brazil's Corruption Fallout*, COUNCIL ON FOREIGN REL. (Nov. 7, 2018), <https://tinyurl.com/yamhhe4c> (describing the corruption scandal and noting that the probe "reached the highest levels of Brazilian government and corporate elite, implicating President Michel Temer, former presidents, and dozens of cabinet officials and senators"); Costa, *supra* note 9, at 196-201 (describing the corruption scandal and its impact on Brazilian and Latin American politics); Mori, *supra* note 1 (describing Lava Jato as "the largest bribery case in the history of Brazil and Latin America" and explaining the link between Odebrecht, Petrobras, and Brazilian public officials); Watts, *supra* note 4 (discussing the web of corruption between Brazilian construction companies, Petrobras, and Brazilian government officials); Nicholas Zimmerman, *How Brazil Went From Neoliberal Success Story to Total Political Chaos in 10 Years*, N.Y. MAG. (Dec. 19, 2017), <https://tinyurl.com/ycnk2wfo> (tracing origins of the scandal from 2005 to 2017). For the role of Petrobras in the Lava Jato investigation, see generally Segal, *supra* note 7. The Lava Jato scandal has become so notorious that Netflix is creating a series, "The Mechanism," based on it. See Larry Rohter, *Brazil's Jaw-Dropping Corruption Scandal Comes to Netflix*, N.Y. TIMES (Mar. 16, 2018), <https://tinyurl.com/y9ckcwt5>.

conviction of top government officials<sup>20</sup> and industry leaders<sup>21</sup> and aiding the fall of the nation's president.<sup>22</sup> The scope of the scandal is broad and complicated, involving a host of industries and national government leaders.<sup>23</sup> The scandal gets its name from a police wiretap of a gas station involved in a money laundering investigation.<sup>24</sup> From that original investigation, Brazilian authorities discovered evidence that private corporations, largely construction firms, were offering bribes to the Brazilian state-owned oil company Petrobras to secure lucrative contracts.<sup>25</sup> Billions and billions of dollars of state assets stolen in the form of bribes<sup>26</sup>

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20. The most notable conviction was that of "Lula," Brazilian former President, Luiz Inácio Lula da Silva, who was found guilty of accepting bribes for Petrobras' contracts. *See* Pearson & Magalhaes, *supra* note 2 (describing Lula's conviction as the "highest-profile sentence yet in the Car Wash case" and "the first verdict to emerge from five graft-related charges against Mr. da Silva"). Other convicted government leaders include Brazilian House Speaker Eduardo Cunha, who brought the impeachment charges against President Dilma Rousseff. Paul Kiernan, *Brazil's Former House Speaker Eduardo Cunha Sentenced to Prison for Corruption*, WALL ST. J. (Mar. 30, 2017), <https://tinyurl.com/ycefj7gd> (reporting that House Speaker Cunha was sentenced to 15 years in prison for corruption charges coming out of the Operation Car Wash probe).

21. Over 120 others have been convicted in the Lava Jato investigation, including the CEO of Odebrecht, Marcelo Odebrecht, and other Odebrecht executives. *See* Manuela Andreoni et al., *Ex-President 'Lula' of Brazil Surrenders to Serve a 12-year Jail Term*, N.Y. TIMES (Apr. 7, 2018), <https://tinyurl.com/ybgy47uu> (noting that Lava Jato "has so far resulted in the conviction of 120 people and billions of dollars in restitution payments"); Jacobs & Moura, *supra* note 3 (reporting that the Lava Jato "has led to the arrest of more than 150 business tycoons and elected officials"); Luciana Magalhaes, *Odebrecht to Cooperate with Prosecutors in Corruption Probe*, WALL ST. J. (Mar. 22, 2016), <https://tinyurl.com/y7ldullf> (reporting that the CEO of Odebrecht was sentenced to 19 years in prison for bribery); Luciana Magalhaes & Reed Johnson, *Marcelo Odebrecht Agrees to Plea Deal in Brazilian Corruption Probe*, WALL ST. J. (Dec. 1, 2016), <https://tinyurl.com/y8un5qr9> (reporting that Marcelo Odebrecht and many other former and current Odebrecht executives were signing plea deals with prosecutors regarding bribery schemes).

22. The Lava Jato scandal is widely attributed as one of the primary causes of President Dilma Rousseff's impeachment, which ended her hold on power. *See* Jacobs & Moura, *supra* note 3 (noting that "[a]lthough her alleged crimes are not directly tied to Lava Jato, her downfall has been fueled by public anger over the scandal's revelations of epic and systematic corruption"); Mica Rosenberg & Nate Raymond, *Brazilian Firms to Pay Record \$3.5 Billion Penalty in Corruption Case*, REUTERS (Dec. 21, 2016), <https://tinyurl.com/yc5zovhl> (observing that the Lava Jato scandal "contributed to the downfall of Brazil's former president, Dilma Rousseff").

23. *See* Segal, *supra* note 7 (discussing how the initial money laundering investigation expanded to include grand corruption that involved the state-owned oil company, a host of industrial giants, and the most powerful politicians in Brazil).

24. Will Connors & Paulo Trevisani, *Brazil 'Carwash' Shrugs Off Notoriety Tied to Petrobras Scandal*, WALL ST. J. (June 21, 2015), <https://tinyurl.com/ybwco3yd>. Several commentators have noted that the term 'carwash' is a misnomer given that the gas station, Posto da Torre (Tower Gas Station), had a laundromat, not a carwash. *Id.*; Jacobs & Moura, *supra* note 3.

25. *See* Joe Leahy, *What Is the Petrobras Scandal that Is Engulfing Brazil*, FIN. TIMES (Mar. 31, 2016), <https://tinyurl.com/jsfutyh> (noting that the bribes were distributed to Petrobras executives and directors as well as to politicians and political parties); *see also* Segal, *supra* note 7 (examining in detail how the investigation expanded from the wiretaps to uncover widespread corruption at the highest levels of Brazilian industry and government); Watts, *supra* note 14 (discussing the wide-ranging investigation); sources cited *supra* note 19.

26. The exact amounts involved in the Lava Jato scandal are uncertain but range between \$3 billion and \$5 billion. *See* Segal, *supra* note 7 (placing the number at \$3 billion); Watts, *supra* note 14 (describing the sums involved as \$5 billion).

were then funneled to Petrobras executives and corrupt Brazilian government officials, who used the money for their own enrichment and to finance their political campaigns.<sup>27</sup>

The scandal caused a political earthquake in Brazil.<sup>28</sup> Even though Brazil has had a history of corruption, the scale of the corruption and the involvement of Petrobras were unprecedented.<sup>29</sup> Petrobras, whose revenues represented ten percent of Brazilian gross domestic product, was viewed as a symbol of Brazil's economic success and development.<sup>30</sup> The scandal also tarnished current and past Brazilian governments,<sup>31</sup> leading to a corruption conviction against former president and labor rights leader Luiz Inacio de Silva<sup>32</sup> and contributing to the fall of de Silva's successor, President Dilma Rousseff.<sup>33</sup>

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27. See Felter & Labrador, *supra* note 19 (discussing the corrupt schemes uncovered by the Lava Jato investigation); Segal, *supra* note 7 (examining how money passed from cartel members to corporations to politicians in the Lava Jato scheme); Watts, *supra* note 14 (describing how the investigation uncovered corruption among political and corporate executive elites).

28. Costa, *supra* note 9, at 196 (describing the scandal as one that has “shaken Brazil's foundations”); Segal, *supra* note 7 (“Brazilians are in the midst of an identity crisis. Much of Brazil's recently acquired cachet looks as if it was the product of fraud, and for an added touch of humiliation, a fraud cooked up at a company long regarded as an emblem of Brazil's success and aspirations.”).

29. See Segal, *supra* note 7 (describing the scandal that “convulsed the country with fury and a stinging sense of betrayal”); Watts, *supra* note 14 (reporting how the investigation exposed an “unprecedented web of corruption” in Brazil and around the world).

30. See Segal, *supra* note 7 (discussing the importance of Petrobras to the nation's aspirations and the Brazilian economy); Watts, *supra* note 14 (describing Petrobras as the “flagship” for Brazil's emerging economy and noting that it accounted for one-eighth of all investment in Brazil).

31. See Segal, *supra* note 7; Watts, *supra* note 14.

32. Andreoni et al., *supra* note 21 (describing Lula's imprisonment as “perhaps the biggest triumph” of the Lava Jato investigation while noting that the bribes that Lula accepted “were a small chapter in the annals of Lava Jato”). The fall of President Luiz Inacio de Silva, known as “Lula,” was dramatic, as he had been one of the most popular presidents in Brazil's history and was considering a re-election bid. For more discussion of the impact of Lula's conviction, see ‘Lula’ Is in Prison, and Brazil's Democracy is in Peril, N.Y. TIMES (Apr. 12, 2018), <https://tinyurl.com/ybd93aun> (describing Lula's conviction as “only one outcome, albeit the most dramatic” of the Operation Car Wash bribery investigation). However, a recent Brazilian Supreme Court decision may open the door to having the corruption sentences of Lula and others overturned. See Brad Brooks, *Brazil Supreme Court Decision Seen as ‘Blow’ to Car Wash Probe*, REUTERS (Mar. 14, 2019), <https://tinyurl.com/ybkfceuq> (analyzing the Brazilian Supreme Court opinion finding that corruption cases against politicians should have been heard by electoral courts, not federal criminal courts).

33. The Lava Jato scandal, along with the failing Brazilian economy, is generally viewed as one of the primary causes of President Dilma Rousseff's impeachment, which ousted her from power. See Jacobs & Moura, *supra* note 3 (noting that “[a]lthough her alleged crimes are not directly tied to Lava Jato, her downfall has been fueled by public anger over the scandal's revelations of epic and systematic corruption”); Paulo Trevisani & Reed Johnson, *Dilma Rousseff Ousted in Historic Brazil Impeachment Vote*, WALL ST. J. (Aug. 31, 2016), <https://tinyurl.com/ydxdgtz7> (observing that Rousseff's ouster “was widely expected, though only partly because of the legal evidence marshaled against her. Well before the trial's final phase opened last week, Ms. Rousseff's administration had come under pressure over the brutal recession and a massive corruption scandal at the state oil company that splintered her political base and devastated her popular support.”); Rosenberg & Raymond, *supra* note 22 (observing that the Lava Jato scandal “contributed to the downfall of Brazil's former president, Dilma Rousseff”); Zimmerman, *supra* note 19 (“Lava Jato hit Rousseff hard. After all, she had chaired the Petrobras board from 2003-10. Although the investigation has not implicated her personally, her professed ignorance



The discovery of the extensive corruption scheme also hurt the Brazilian economy, which was already beginning to slide by the time the scandal made headlines. Petrobras's market capitalization plunged, in part due to a decline in oil prices but also due to the bribery revelations.<sup>34</sup> Petrobras subsequently paid US\$2.95 billion to settle a class-action investor suit based on its corrupt practices<sup>35</sup> and another US\$853 million to American and Brazilian authorities to settle corruption charges.<sup>36</sup>

The Lava Jato scandal did not end in Brazil. Investigations of Brazilian construction giant Odebrecht S.A., one of the alleged bribe-paying companies, spread the accusations, political drama, and economic repercussions to at least twelve other countries, including Peru, Panama, Colombia, Argentina, and Venezuela.<sup>37</sup> Odebrecht used its corrupt business model to win valuable construction contracts across the region.<sup>38</sup> In fact, Odebrecht's corruption was so institutionalized that the company centralized bribes into its "Division of Structured Operations," which prosecutors have dubbed its "Division of Bribery."<sup>39</sup> Odebrecht's Chief

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of the scheme, despite her proximity to its most influential players, has struck few as credible . . . As Rousseff's popularity ratings dropped to single digits, the pace of the recession quickened, and as *Lava Jato* progressed, talk of her impeachment grew.").

34. See Segal, *supra* note 7 (noting that Petrobras lost half of its market value after the bribery revelations, which was worse than other oil companies who were also suffering due to lower oil prices); Watts, *supra* note 14 (noting that Petrobras was ordered by courts to suspend business after the bribery scandal was public, hurting its bottom line).

35. Paul Kiernan, *Petrobras to Pay \$2.95 Billion to Settle U.S. Suit Over Corruption*, WALL ST. J. (Jan. 3, 2018), <https://tinyurl.com/y9g7g727>.

36. Aruna Viswanatha, Jeffrey T. Lewis & Samuel Rubinfeld, *Petrobras to Pay \$853.2 Million to Settle Corruption Probes in U.S., Brazil*, WALL ST. J. (Sept. 27, 2018), <https://tinyurl.com/yb9yz4lb>.

37. Nicolas Casey & Andrea Zarate, *Corruption Scandals With Brazilian Roots Cascade Across Latin America*, N.Y. TIMES (Feb. 13, 2017), <https://tinyurl.com/yba13n2q> (discussing how some Latin American countries are investigating whether the Brazilian construction giant, Odebrecht, which is at the center of the Lava Jato scandal, bribed their government officials); Faiola, *supra* note 15 (stating the corruption scandal has spread to fourteen countries); Mori, *supra* note 1 (observing that Odebrecht has acknowledged paying "\$778 million in bribes in twelve different countries in Latin America and Africa"); Nolen, *supra* note 4 (observing that the Lava Jato scandal has spread outside of Brazil and has led to the investigation of prominent politicians in half a dozen Latin American countries); *Odebrecht Case: Politicians Worldwide Suspected in Bribery Scandal*, BBC (Apr. 17, 2019), <https://tinyurl.com/y79wyw78> [hereinafter *Odebrecht Case*] (listing the total bribes paid by Odebrecht in Brazil (\$349 million), Venezuela (\$100 million), Dominican Republic (\$92 million), Panama (\$59 million), Angola (\$50 million), Argentina (\$35 million), Ecuador (\$33.5 million), Peru (\$29 million), Guatemala (\$18 million), Colombia (\$11 million, and an alleged additional \$16 million), Mexico (\$10 million), Mozambique (\$1 million), Antigua (alleged \$10.5 million), El Salvador (alleged amount uncertain), and further investigations into Chile and Portugal); Alexandra Stevenson & Vinod Sreeharsha, *Secret Unit Helped Brazilian Company Bribe Government Officials*, N.Y. TIMES (Dec. 21, 2016), <https://tinyurl.com/ycw8sben> (reporting that Odebrecht's bribery scheme "lasted more than two decades and involved bribes to government officials in a dozen countries across three continents").

38. Casey & Zarate, *supra* note 37 (reporting on Odebrecht's corrupt business practices throughout South America and other parts of the world).

39. See Matthew M. Taylor, *The Odebrecht Settlement and the Costs of Corruption*, COUNCIL ON FOREIGN REL. (Dec. 27, 2016), <https://tinyurl.com/ycrwre4c> (noting that Odebrecht's "business model was rooted in a remarkable amount of subterfuge, including a shadow budget administered by a 'Division of Structured Operations' using two shadow computer systems (one of which was destroyed

Executive Officer, Marcelo Odebrecht, and other Odebrecht executives ultimately signed plea deals and cooperated with the Lava Jato investigation.<sup>40</sup> Marcelo Odebrecht was sentenced to nineteen years in prison for bribery, which he is serving in house arrest.<sup>41</sup>

The corruption probe into Odebrecht has resulted in the investigation or indictment of top government officials in Peru,<sup>42</sup> Colombia,<sup>43</sup> and Ecuador.<sup>44</sup> The allegations of bribery in those countries have also been dramatic.<sup>45</sup> This is particularly true in Peru, where all of the country's living former presidents, most of whom are well-regarded, are now under investigation for accepting bribes from the construction company.<sup>46</sup>

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to hide evidence”); *see also* Magalhaes & Johnson, *supra* note 21 (reporting that prosecutors argue that Odebrecht “maintained a clandestine ‘department of bribes’ along with a detailed accounting of payment to potentially hundreds of political figures”); *Odebrecht Case*, *supra* note 37 (reporting that Odebrecht used its Division of Structured Operations as “essentially the bribery department” to bribe “government officials and political parties at home and abroad”); Stevenson & Sreeharsha, *supra* note 37 (quoting Department of Justice officials as saying “Odebrecht and Brasken used a hidden but fully functioning Odebrecht business unit – a ‘Department of Bribery,’ so to speak – that systematically paid hundreds of millions of dollars to corrupt government officials in countries on three continents”).

40. Magalhaes & Johnson, *supra* note 21 (reporting that Marcelo Odebrecht and many other former and current Odebrecht executives were signing plea deals with prosecutors regarding bribery schemes).

41. Magalhaes, *supra* note 21; Luciana Magalhaes & Samantha Pearson, *Brazil Tycoon Marcelo Odebrecht Gets Early Prison Release*, WALL ST. J. (Dec. 19, 2017), <https://tinyurl.com/y7hh2975>.

42. Four former Peruvian presidents have been accused of receiving bribes from Odebrecht. *See* Mori, *supra* note 1 (noting that the then Peruvian President Pablo Kuczynski was implicated in the Lava Jato scandal and ultimately was forced to resign); Faiola, *supra* note 15 (noting that Presidents Kuczynski, Humala, García, and Toledo have either been arrested or are under investigation for receiving bribes from Odebrecht for construction projects); Nolen, *supra* note 4 (noting that the then current Peruvian president and two former presidents were under investigation resulting from the Lava Jato scandal); *Odebrecht Case*, *supra* note 37 (reporting that two ex-presidents from Peru were under investigation and that a third, Ollanta Humala, and his wife, Nadine Heredia, were in pre-trial detention for alleged receipt of bribes from Odebrecht).

43. Then Colombian president Juan Manuel Santos, who won the Nobel Peace Prize in 2016, was investigated for receiving bribes from Odebrecht. *See* Casey & Zarate, *supra* note 37 (discussing allegations that Santos received \$1 million for his campaign from Odebrecht); Nolen, *supra* note 4 (noting that Santos was under investigation from bribery allegations stemming from Lava Jato); *Odebrecht Case*, *supra* note 37 (reporting that Colombia had charged a former vice-minister for transport and a former senator with bribery related to Odebrecht contracts). President Santos has subsequently acknowledged that his 2010 campaign received \$400,000 in illegal contributions from Odebrecht but maintains that he was unaware of the payment. *See* Helen Murphy, *Colombia's Santos Apologizes for Illegal Funds Paid into Campaign*, REUTERS (Mar. 14, 2017), <https://tinyurl.com/yazhxm2> (reporting on President Santos's statement that he did not have knowledge of the illegal payments).

44. Ecuador's Vice President Jorge Glas was convicted of “illicit association” in a scheme to favor contracts from Odebrecht and sentenced to a six-year prison term. *See* Stephan Kuefner, *Ecuador's Vice President Found Guilty in Odebrecht Corruption Case*, BLOOMBERG (Dec. 13, 2017), <https://tinyurl.com/y62y6fpp>; Nicholas Casey, *Ecuador's Vice President Is Jailed in Bribery Investigation*, N.Y. TIMES (Oct. 3, 2017), <https://tinyurl.com/y76wmy47> (reporting on Glas's arrest for allegedly receiving bribes from Odebrecht); *Odebrecht Case*, *supra* note 37 (reporting that Glas was convicted of receiving \$13.5 million in bribes from Odebrecht).

45. Casey & Zarate, *supra* note 37 (“Latin America's biggest corruption scandal is shaking the continent's political establishment. It can all be traced back to Odebrecht, the Brazilian construction company, which has built major projects throughout the region . . .”).

46. *See* Faiola, *supra* note 15.

Odebrecht's actions have also had serious economic repercussions in South America: twenty-five major infrastructure projects totaling US\$7 billion have been suspended by the Brazilian Development Bank (Banco Nacional de Desenvolvimento Economico e Social (BNDES)) as part of lenders' investigations into Odebrecht's practices.<sup>47</sup>

This unprecedented wave of corruption investigations in South America has led to public protests and a new push to pass anticorruption legislation.<sup>48</sup> In each state, protestors took to the streets demanding that the government "do something" to address corruption.<sup>49</sup> This Article examines governmental responses to these demands and the ways in which international law was instrumental (or not) in placing reform proposals on the political agendas.<sup>50</sup>

Core to this discussion is the concept of transnational legal exchange,<sup>51</sup> which asserts that countries are influenced by each other's laws, unilateral legal actions, and multilateral legal endeavors. Scholars discuss how legal ideas are transplanted,<sup>52</sup> translated,<sup>53</sup> diffused,<sup>54</sup> and acculturated.<sup>55</sup> Studies

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47. Luciana Magalhaes, *Brazil's BNDES Working to Unlock Close to \$5 Billion in Loan Disbursements*, WALL ST. J. (Feb. 22, 2017), <https://tinyurl.com/ycxob3zs> (noting that the Brazilian development bank had suspended close to \$5 billion in payment on 25 projects valued at \$7 billion because "they were linked to companies involved in the sweeping Operation Car Wash corruption probe"); Nolen, *supra* note 4 (reporting that Brazilian development bank loans "for 25 projects in nine countries worth \$7 billion (U.S.) are now frozen" due to investigations into Odebrecht resulting from Lava Jato).

48. In addition to being the largest corruption scandal ever in dollar terms, the Lava Jato probe has led to changes in legislation and prosecutorial practices in many South American countries. See AMS. SOC'Y/COUNCIL OF THE AMS., *supra* note 8 (noting that Latin America is experiencing a "truly regional anti-corruption movement, even if results have varied widely among countries," and also crediting the Lava Jato prosecutors with demonstrating the effectiveness of plea bargains in corruption investigations); Luis Vieira, *Argentina to Expand Use of Plea Bargaining, Inspired by Brazil*, AMS. Q. (Mar. 24, 2016) (noting that the Lava Jato investigation "is changing the legal and political landscape not just in Brazil, but also around Latin America").

49. See *supra* note 37 and accompanying text (discussing the political fallout region-wide of these corruption scandals).

50. See *infra* Section IV.

51. The transnational flow of ideas and legal concepts is a core part of modern law and legal processes. See Gregory Shaffer & Daniel Bodansky, *Transnationalism, Unilateralism and International Law*, 1 TRANSNAT'L ENVTL. L. 31, 31 (2012) ("We have long lived in an age of transnationalism but transnational processes have intensified with economic and cultural globalization following the fall of the Berlin Wall.").

52. Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT'L REV. L. & ECON. 3, 3-4 (1994) ("In most cases changes in a legal system are due to legal transplants.").

53. Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1 (2004) (highlighting how the same rules act differently in various national legal traditions and broader legal system and, thus, translation is a better metaphor than transplantation).

54. KATERINA LINOS, *THE DEMOCRATIC FOUNDATIONS OF POLICY DIFFUSION: HOW HEALTH, FAMILY, AND EMPLOYMENT LAWS SPREAD ACROSS COUNTRIES* (2013) (noting that legal ideas often flow through observation and diffusion).

55. Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004) (emphasizing the importance of acculturation in countries' adoption of human rights law).

of transnational legal exchange analyze the process by which national and international legal concepts move between states and international organizations. This Article fits within that tradition.

In the area of anticorruption law, scholars have noted that transnational influence can be complementary or antagonistic (and possibly both simultaneously).<sup>56</sup> In the case of multinational anticorruption prosecutions, cross-national exchange can increase a country's legal capacity to address corruption by lending additional resources or prosecutorial best practices.<sup>57</sup> Yet the same positive processes can contain negative undercurrents. Foreign actors may have political blinders or self-interested political agendas.<sup>58</sup> There are also accountability concerns, as the local population has little voice in the policy processes that lead to the opening and settlement of cases.<sup>59</sup> In addition, the intervention of foreign officials may lead local actors to introduce legal reforms without proper analysis or without prioritizing the systemic causes of corruption.

Within the realm of transnational legal exchange, this Article focuses specifically on the process by which foreign and international legal ideas are translated into domestic law. Our definition adheres closely to that of Professors Davis, Jorge, and Machado, which states that “[transnational law] can be imagined as a rather disorderly series of interactions between local, foreign, and supranational legal institutions, prompted by specific actions or events, with each set of interactions both being shaped by and shaping the institutions involved.”<sup>60</sup> This definition thus encompasses transnational interventions which are less direct than foreign prosecutions (although we argue that the mere possibility of foreign prosecutions is an important factor in understanding the flow of legal concepts across borders).

In the next section, we present a political theory that provides specific mechanisms to understand when countries will be open to foreign and international legal exchange. We emphasize the central role of the crisis in anticorruption policy adoption, and the importance of foreign law and supranational recommendations in providing model policy responses to

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56. Kevin E. Davis, Guillermo Jorge, & Maira R. Machado, *Transnational Anticorruption Law in Action: Cases from Argentina and Brazil*, 40 LAW & SOC. INQUIRY 664, 666-71 (2015); see also Kevin E. Davis, *Does the Globalization of Anti-Corruption Law Help Developing Countries?*, in INTERNATIONAL LAW, ECONOMIC GLOBALIZATION AND DEVELOPMENT 9 (Julio Faundez & Celine Tan eds., 2010); Susan Rose-Ackerman, *Introduction: The Role of International Actors in Fighting Corruption*, in ANTI-CORRUPTION POLICY: CAN INTERNATIONAL ACTORS PLAY A CONSTRUCTIVE ROLE? 3 (Susan Rose-Ackerman & Paul D. Carrington eds., 2013).

57. See Davis et al., *supra* note 56, at 668-68; see also Juan O. Perla, *A Game Theoretic Analysis of the Inter-American Convention Against Corruption*, 16 RICH. J. GLOBAL L. & BUS. 61 (2017) (discussing how Latin American countries have used foreign prosecutions to fight corruption).

58. See Davis et al., *supra* note 56, at 670.

59. *Id.*

60. *Id.* at 667.

domestic crises. Section IV then applies this framework to the recent corruption reforms in South America.

### III. POLITICS AND LEGAL REFORM DURING CRISIS

Politics are different in a crisis. A crisis creates the political opportunity for new coalitions to form and generate policies that would not be possible in ordinary politics. However, such changes—good or bad—may promptly come under threat once the crisis passes. Part A of this Section examines Professor John Coffee’s work on American financial regulation. As is the case with anticorruption policy, changes to finance policy often result after a crisis and involve complex regulatory measures. We highlight Coffee’s idea of a “regulatory sine curve,” which captures the tendency of policy entrepreneurs to capitalize on a crisis-motivated window of opportunity for reform before the return of politics as usual.

Part B applies this analysis to the context of anticorruption law. It discusses how anticorruption legal reform comes out of periods of scandal and national crisis. Popular demand that the government proactively address corruption can lead to a multitude of policy proposals, some of which are likely to be more effective than others. We argue that in this moment, countries that are members of the OECD Anti-Bribery Convention will act systematically differently than countries that are not members. The OECD Anti-Bribery Convention and its organizational staff resemble political entrepreneurs by inserting their policy agenda into the national legislative discussions of member states. The OECD Anti-Bribery Convention can provide a set of vetted policy options and, once politics return to normal, the OECD Working Group and other member states can monitor and support continued enforcement of the reforms. At the margins, this can reduce the rollback of anticorruption reforms and lax enforcement.

#### *A. The “Regulatory Sine Curve” in Financial Regulation*

It is a mantra in politics that politicians “should never let a good crisis go to waste.”<sup>61</sup> Crises create the space for unusual political alignments, permitting a range of constituencies to unite and demand political reforms in a manner that would not be possible outside of the crisis. In his work on the Dodd-Frank financial reforms that followed the 2008 financial crisis in the United States, Professor John Coffee discusses how corporate

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61. The quote has been attributed to many political figures including Winston Churchill (although the Churchill source may be a misattribution). Its most famous use in the last decade is attributed to Rahm Emanuel discussing the 2008 financial crisis and the opportunity crisis created to pass financial regulatory laws. See Fred Shapiro, *Quotes Uncovered: Who Said No Crisis Should Go to Waste?*, FREAKONOMICS BLOG (Aug. 13, 2009), <https://tinyurl.com/ya9v77p7>.

regulation—an area normally dominated by a small group of well-financed insiders—was opened to broad new federal rules in a manner that would not have been possible without strong popular demands for governmental action.<sup>62</sup> Yet this window for legislative reform is short-lived. The popular demands for change lessen as the crisis passes and politics return to their normal course. As the status quo power players regain their control on the policymaking process, reforms are frequently rolled back or gutted. Coffee refers to this as the “regulatory sine curve,” and he argues that it explains both the passage of strong statutory reforms and their subsequent erosion.<sup>63</sup>

Drawing on the work of economist Mancur Olson,<sup>64</sup> Coffee discusses how financial regulation is controlled by the financial services industry, which is tightknit, knowledgeable, well-funded, and organized—more so than secondary forces, such as shareholders and other investors.<sup>65</sup> The organizational advantages of the financial services industry allow it to dominate the often-competing interests of other stakeholders in legislative and regulatory processes.<sup>66</sup>

However, a crisis can change the status quo.<sup>67</sup> Crises change politics in several ways. First, they shine a spotlight on a particular policy area. Instead of being one of many issues on a national agenda, scandals or crises focus national attention on a specific set of policies and the relevant failures of the current governance structure.<sup>68</sup> The public has a heightened awareness of the importance of the policy area and will demand change. Yet such demands may nonetheless remain diffuse.

Into this political void come policy entrepreneurs.<sup>69</sup> Policy entrepreneurs attempt to focus the public’s discontent into a concerted push for policy reforms, institutional reform, or a combination of both.<sup>70</sup> Policy entrepreneurs are able to put proposals on legislators’ agendas.<sup>71</sup> They can harness the public’s general demands, build coalitions, shape the policy

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62. See Coffee, *supra* note 16; see also Christopher H. Schroeder, *Rational Choice Versus Republican Moment-Explanations for Environmental Laws, 1969-73*, 9 DUKE ENVTL. L. & POL’Y F. 29, 33-38 (1998) (applying and critiquing Olson’s framework in explaining the development of American environmental law).

63. Coffee, *supra* note 16, at 1020-31.

64. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (2d ed. 1971).

65. Coffee, *supra* note 16, at 1021-42.

66. *Id.*; see also Dan Awrey, *Complexity, Innovation, and the Regulation of Modern Financial Markets*, 2 HARV. BUS. L. REV. 235, 262-65 (2012) (discussing the regulatory dominance of financial firms and their ability to innovate around regulation).

67. Coffee, *supra* note 16, at 1021-22.

68. *Id.*

69. *Id.*

70. *Id.*

71. Michael Mintrom, *Policy Entrepreneurs and the Diffusion of Innovation*, 41 AM. J. POL. SCI. 738 (1997). For an application to international organizations, see Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT’L ORG. 1 (1992).

debate, and fill in regulatory details for policy areas that are often opaque and complex.<sup>72</sup>

For instance, in the wake of the 2008 U.S. financial crisis caused by the subprime mortgage market, Professor Elizabeth Warren acted as a policy entrepreneur in the passage of the Dodd-Frank Act.<sup>73</sup> Professor Warren had previously argued that American consumer financial regulation was insufficient to protect American consumers from the profit-focused strategies of the American financial industry.<sup>74</sup> In normal politics, Professor Warren's proposals made little headway as the powerful financial industry could effectively beat back regulatory reform.<sup>75</sup> But in the midst of the financial crisis, the American public's focus on the governance failures in the mortgage industry was at its height, making possible new alignments.<sup>76</sup> Professor Warren was able to successfully lobby the Obama administration and top Democratic lawmakers to incorporate an independent consumer protection agency as part of the Dodd-Frank Act. Notably, Warren argued the agency's semi-autonomous nature was necessary to prevent its power from being trimmed back post-crisis.<sup>77</sup>

The opportunity presented by a crisis is often short-lived. Public attention turns quickly to new issues or other scandals, allowing the political status quo to reemerge. Post-crisis, there is a constant threat of weak implementation of crisis-motivated reforms.<sup>78</sup> Public attention turns quickly to new issues or other scandals, allowing the political status quo to reemerge.<sup>79</sup> As Coffee describes,

“[t]he standard cyclical progression along the Regulatory Sine Curve from intense to lax enforcement is driven by a basic asymmetry between the power, resources, and organization of the [diffuse] group (i.e. investors) and the interest groups affected by the specific

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72. See Mintrom, *supra* note 71, at 738-70.

73. See Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace*, 81 GEO. WASH. L. REV. 856, 857-64 (2013) (referring to Warren as both the “founding mother” and the “intellectual godmother” of the institution); John C. Coffee, Jr., *The Retreat from Systemic Risk Regulation: What Explains It? (And Why It Was Predictable)*, ANNALES DES MINES - RÉALITÉS INDUSTRIELLES, Nov. 2018, at 80, n.16 (“The CFPB was clearly the brainchild of Senator Elizabeth Warren.”); see also Susan Block-Lieb, *Accountability and the Bureau of Consumer Financial Protection*, 7 BROOK. J. CORP. FIN. & COM. L. 25, 27-28 (2012) (discussing how the financial service industry's normal lock on interest group politics was broken for a time and how the interests of diffuse consumer groups won).

74. The specific article that discussed a consumer financial protection agency was Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008).

75. See Block-Lieb, *supra* note 73, at 27-28.

76. See sources cited *supra* note 73.

77. See Zywicki, *supra* note 73, at 860-64 (analyzing the institution but acknowledging that it was the product of entrepreneur lobbying); see also Leonard J. Kennedy, Patricia A. McCoy & Ethan Bernstein, *The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-First Century*, 97 CORNELL L. REV. 1141, 1144-50 (2012) (discussing the institution's autonomy).

78. Coffee, *supra* note 16, at 1030.

79. *Id.*

legislation. Cohesion among investors begins to break down once ‘normalcy’ returns.”<sup>80</sup>

Moreover, many critics argue that legislation passed in a crisis is poorly thought out.<sup>81</sup> Although these critics might have their own agendas, popular policies are often characterized as blunt or insufficiently sophisticated approaches to addressing complex and dynamic relationships.<sup>82</sup> For instance, in a now famous article, Professor Roberta Romano referred to previous American financial legislation, the Sarbanes-Oxley Act, as “quack” corporate governance.<sup>83</sup> The Dodd-Frank Act similarly has many critics who argue that it was adopted at the height of public fury over the financial crisis and will be counter-productive.<sup>84</sup>

All of this leaves crisis-motivated policies under siege.<sup>85</sup> Any such reform has to be made quickly and is thus vulnerable to the charge that they are substantively unsophisticated.<sup>86</sup> In addition, the lack of support from the predominant interest groups, whose preferences are sidelined during a crisis, can lead to policy erosion upon return to politics as usual.<sup>87</sup>

#### B. The “Regulatory Sine Curve” in Anticorruption Law

Anticorruption laws are subject to a similar political dynamic as finance reform. During periods of normalcy, the dominant interest groups that control the regulatory environment are politicians themselves (who may or may not prefer strong anticorruption laws) and domestic corporations who understand the channels by which government contracts are granted and business is operated. In general, neither of these groups has reason to alter the status quo.<sup>88</sup> Furthermore, reminiscent of the power dynamic in the finance context, the secondary stakeholders, such as politicians, firms, and

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80. *Id.*

81. *See, e.g.,* Zywicki, *supra* note 73, at 864-917 (criticizing the Bureau of Consumer Protection).

82. *Id.*

83. Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005). *But see* Coffee, *supra* note 16, at 1027-39 (critiquing this position).

84. Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779, 1782 (2011) (stating that the act was a response to “populist outrage” and adopted quickly without any serious analysis); Zywicki, *supra* note 73, at 864-917 (discussing the Bureau of Consumer Financial Protection as having a poor agency design and counterproductive substantive policy).

85. Coffee, *supra* note 16, at 1029-37.

86. *See* sources cited *infra* note 89.

87. Coffee, *supra* note 16, at 1029-37.

88. *See* Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611, 1641 (2017) (pointing out that OECD governments were “initially reluctant to sign on” to the OECD Anti-Bribery Convention due to fears that domestic corporations might lose business); Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT’L L. 665, 680 (2004) (“[M]any OECD members were satisfied with the status quo, in which U.S. companies were forbidden by their domestic laws from bribing foreign officials but European and other companies were not.”).



citizen groups, are too diffuse and unorganized to provide a sufficient counter-balance.<sup>89</sup> Thus, any demands for major anticorruption reforms can be suppressed or ignored at little political cost.

The existence of a corruption scandal changes this calculus—the public’s attention fixates on the injustice of corruption: self-serving politicians, corporate theft, profit-driven political priorities, and sidelined public interest.<sup>90</sup> The public’s demand for the government to take action against corrupt practices can overwhelm ordinary politics and provide the space for a new alignment of interests.<sup>91</sup> In the moments of crisis, an opportunity for governance reform emerges.

In South America, the recent Lava Jato corruption scandal is one such crisis for many countries. Although civil society in much of South America had treated corruption with resignation for many decades, a growing middle class, more representative democracy, and, possibly, the influence of social media have created a more vocal South American populous.<sup>92</sup> These factors, as well as others, have opened the door to possible reform. As Professor and former Chair of the Chilean Presidential Advisory Council on Corruption, Eduardo Engle, noted, “[t]here is a silver lining to these scandals: you have a window of opportunity to make major reforms in favor of accountability. In normal times, these reforms are almost impossible.”<sup>93</sup>

In corruption crises, the OECD Anti-Bribery Convention and the organization’s staff work similarly to political entrepreneurs. South

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89. See Sean J. Griffith & Thomas H. Lee, *Toward an Interest Group Theory of Foreign Anti-Corruption Laws*, 2019 U. ILL. L. REV. 1227, 1241-42 (“As the U.S. moved to adopt the FCPA, the Paris-based International Chamber of Commerce (‘ICC’), a business association promoting international trade and investment, promulgated a set of anti-bribery commitments . . . . Because the contractual language was not mandatory, however, the best the ICC could do was encourage its members to opt in to anti-bribery commitments. Non-US businesses, aware of their advantages vis-à-vis their U.S. competitors, routinely chose not to make the commitment.”); Tarullo, *supra* note 88, at 689 (noting that external factors such as public pressure waned after the OECD Anti-Bribery Convention was ratified, leading to under-enforcement).

90. See Brewster, *supra* note 88, at 1637 (stating that one of the primary factors behind OECD members’ views on foreign corruption shifting was the “need to respond to domestic corruption scandals”); Griffith et al., *supra* note 89, at 1249 (“[Under the realist theory, t]he basic intuition is that a state will enact or enforce foreign anti-corruption laws when to do so is perceived to be in the state’s national interest.”); Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 932-49 (2012) (describing how discovery of corruption during the Watergate scandal motivated the passage of the FCPA).

91. See Brewster, *supra* note 88, at 1641 (noting that in the late 1990s, multiple European governments—including Germany, France, and the United Kingdom—experienced their own domestic bribery scandals, leading to corruption achieving greater political salience in these countries’ electoral politics and necessitating political reform to move the topic “off the political agenda”); Tarullo, *supra* note 88, at 678 (“Domestic bribery scandals in several European countries had sensitized the European press and, by extension, publics to the foreign corruption issue.”).

92. LATIN AMERICA’S BATTLE, *supra* note 8; see also Brian Winter, *The Amazing Case That Proved Latin America’s Crackdown on Corruption Is for Real*, 10 AMS. Q., no. 1, 2016 (citing the above circumstances as factors in the growth of anti-corruption practices in Latin America).

93. LATIN AMERICA’S BATTLE, *supra* note 8, at 6.

American countries that have joined the OECD Anti-Bribery Convention not only have international legal obligations to adopt anti-bribery measures, but they also face regular monitoring and peer-review that accompany the recommended anticorruption policy reforms. In particular, the OECD Working Group provides regular monitoring and produces reports (Phases 1-4) on country compliance with the OECD Anti-Bribery Convention commitments.<sup>94</sup> These peer review reports are highly regarded in the international community as objective assessments of iterative and multilateral legal processes. The reports also provide policy recommendations that can be readily placed on national legislative agendas when crises arise.<sup>95</sup>

Additionally, these measures are likely to be good policy. Compared to the financial sector, where accusations of “quack policies” are regularly attached to crisis-driven financial regulations, OECD Anti-Bribery Convention commitments (and the recommendations of the OECD Working Group) are the product of debate by scholars, policy analysts, and government leaders, and are already in practice in multiple jurisdictions. While we certainly do not want to argue that there is one universally applicable approach to anticorruption policy, OECD Anti-Bribery Convention policies are more debated and tested than many parallel crisis-driven reform proposals. Thus, OECD Anti-Bribery Convention commitments and OECD Working Group recommendations are more likely to lead to positive and lasting changes and are, therefore, a good (if not optimal) source of policy innovation.

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94. Monitoring of parties' implementation and enforcement of the Convention takes place in several phases. Phase 1 aims to evaluate a country's implementing legislation to determine whether the texts meet Convention standards. *Phase 1 Country Monitoring of the OECD Anti-Bribery Convention*, OECD, <https://tinyurl.com/y7x3a39x> (last visited Jan. 27, 2020). Once this initial evaluation is complete, every party to the Convention adopts a report that incorporates conclusions and recommendations. *Id.* Phase 2 assesses whether the country is effectively applying its anti-bribery legislation, and similarly concludes with the adoption of a report including recommendations concerning the country's performance. *Phase 2 Country Monitoring of the OECD Anti-Bribery Convention*, OECD, <https://tinyurl.com/y85kpa9j> (last visited Jan. 27, 2020). Phase 3 aims to maintain updated assessments of parties' efforts to enforce their implementing laws and to implement the 2009 Anti-Bribery Recommendation. *Phase 3 Country Monitoring of the OECD Anti-Bribery Convention*, OECD, <https://tinyurl.com/ycd22h99> (last visited Jan. 27, 2020). Phase 3 also evaluates countries' progress responding to Phase 2 recommendations. *Id.* At the end of the Phase 3 evaluation, the Working Group on Bribery adopts a report on the country's performance that again incorporates recommendations. *Id.* The Phase 4 evaluation focuses on “cross-cutting issues” that are tailored to country needs, progress made on previously identified weaknesses and recommendations, enforcement efforts and results, and issues raised by changes in domestic legislation or a country's institutional framework. *Phase 4 Country Monitoring of the OECD Anti-Bribery Convention*, OECD, <https://tinyurl.com/y72wborp> (last visited Jan. 27, 2020). After the evaluation has concluded, the Working Group on Bribery again adopts a report incorporating recommendations and issues for follow-up. *Id.*

95. The OECD also launched the Latin America and Caribbean Anti-Corruption Initiative in 2007 to help implement the convention in Latin America and to provide a forum for law enforcement officials to share ideas, experiences, and best practices. See OECD, FIGHTING TRANSNATIONAL CORRUPTION IN LATIN AMERICA AND THE CARIBBEAN (2018).

For OECD Anti-Bribery Convention members, pressure from the treaty body as well as the other member states makes the OECD Anti-Bribery Convention commitments politically salient. As in the financial sector, crises require governments to act quickly and in a manner meaningful to the domestic audience. This leads governments to turn to ideas that are vetted and readily adoptable.<sup>96</sup> As Professor Bainbridge notes, “[in a crisis], the pressure of time tends to give advantages to interest groups and other policy entrepreneurs who have prepackaged purported solutions that can be readily adapted into legislative form.”<sup>97</sup>

However, once a crisis passes, the major interest groups often regain their grip on legislative and regulatory control. This can result in a sense of disillusionment with corruption reforms. The optimism that comes with broad demands for change can be mirrored by equal levels of disappointment with the lack of structural transformation.<sup>98</sup> In addition, the perception (however legitimate) that anticorruption measures are politically motivated can lead to cynicism.<sup>99</sup> In such moments, major interest groups can roll back the crisis-motivated reforms or selectively enforce the new provisions. However, continuing pressure from the OECD Working Group and other OECD Anti-Bribery Convention member countries can reduce backsliding.

In this stage, the OECD Anti-Bribery Convention can serve an important function by monitoring and reporting the country’s implementation of the recommended reforms. The OECD Working Group’s peer review process monitors member states’ continued compliance with the OECD Anti-Bribery Convention as well as other aspects of the countries’ anticorruption laws (such as the even application of the law, enforcement resources, and adjudication transparency).<sup>100</sup> Notably, while this monitoring and reporting process helps prevent policy

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96. For a view of the negative side of this process, see Romano, *supra* note 83, at 1591 (“The dismal saga of the SOX governance mandates demonstrates that congressional lawmaking in times of perceived emergency offers windows of opportunity to well-positioned policy entrepreneurs to market their preferred, ready-made solutions when there is little time for reflective deliberation.”).

97. See Bainbridge, *supra* note 84, at 1786.

98. LATIN AMERICA’S BATTLE, *supra* note 8, at 5 (“Regionwide [in South America], some countries have seen a perceptible decline in popular support for anti-corruption efforts. This may be partly due to natural fatigue as time passes. But many citizens see a pattern of selective justice, in which some parties or individuals are singled out for prosecution while others continue to operate with impunity.”).

99. Felter & Labrador, *supra* note 19.

100. See, e.g., WORKING GRP. ON BRIBERY, OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN BRAZIL (2014), <https://tinyurl.com/y9x2v9kp>. For instance, the report makes recommendations on clarifying the liability of corporations, corporations’ responsibility for their employees’ actions, and the sanctions that applied to them. *Id.* at 69. In addition, the report calls for the consistent application of cooperation and leniency agreements, as well as greater transparency surrounding the rationale for such agreements in specific cases. *Id.* at 71.

reversals, it by no means precludes the rolling back of anticorruption reforms after the period of crisis has passed.

Beyond the influence of the OECD Anti-Bribery Convention, the U.S. Foreign Corrupt Practices Act (FCPA) likely has an influence on legal reforms in South American countries. The United States is the most active prosecutor of foreign corruption and has a very broad set of jurisdictional bases, including listing on American stock exchanges.<sup>101</sup> Approximately one third of all FCPA cases arise out of allegations of corruption in Central and South America.<sup>102</sup> Moreover, some of the most significant FCPA settlements have involved activity in South America. The first “blockbuster” FCPA settlement, involving US\$800 million paid by Siemens, was the result of that corporation’s activities in Argentina (as well as Venezuela and Bangladesh).<sup>103</sup> In addition, the Odebrecht settlement between the United States, Switzerland, and Brazil was in part related to an FCPA violation originating from the company’s activities in Brazil.<sup>104</sup>

The American FCPA model functions almost exclusively on settlements: the so-called deferred prosecution agreements (DPA) or non-prosecution agreements (NPA) that the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) negotiate with corporations to resolve foreign corruption charges.<sup>105</sup> Although subject to significant critique, America’s tendency toward plea agreements allows the government to resolve cases quickly and without trial. Importantly for South American countries, however, the ability to join forces with American law enforcement officials and become part of a global settlement requires domestic legal authority to establish a cooperation or leniency agreement with corporations. These types of agreements have not traditionally been available in South American countries for allegations of significant crimes.<sup>106</sup>

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101. See Brewster, *supra* note 88, at 1671 (discussing the very broad basis for FCPA jurisdiction particularly based on accessing American capital markets even indirectly as a “deposit receipt”).

102. James G. McGovern & Robert Toll, *Anti-Corruption Trends Across Latin America*, ETHICAL BOARDROOM, Spring 2017, at 135, 135.

103. See Press Release, U.S. Dep’t of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008) (another \$800 million was paid to German authorities).

104. See Press Release, U.S. Dep’t of Justice, Odebrecht and Braskem Plead Guilty and Agree to Pay at Least \$3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016) [hereinafter Dep’t of Justice 2016 Press Release]. The case was part of a global settlement between the United States, Switzerland, and Brazil. The United States and Switzerland each claimed ten percent of the total fine with Brazil receiving the remaining eighty percent. *Id.* The United States share was initially set at \$260 million but, due to Odebrecht’s inability to pay, the fine was reduced to \$93 million.

105. Annalisa Leibold, *Extraterritorial Application of the FCPA Under International Law*, 51 WILLAMETTE L. REV. 225, 239-40 (2015); Joseph W. Yockey, *FCPA Settlement, Internal Strife, and the “Culture of Compliance,”* 2012 WIS. L. REV. 689, 696-705 (2012).

106. The legal hurdles can be significant. States may not have expansive liability for corporations (legal persons) and corporations may not be liable for all of the actions of their employees. In addition, the ability to resolve these cases without trial may be limited. See Daniel Pulecio Boek, *The United States*

To this end, as Section IV describes, a number of South American countries have altered their legal codes to provide for more leniency and cooperation agreements. Such legal reforms provide the tools necessary to enter into multinational global settlements regarding corrupt activity that falls within the country's jurisdiction. The desire to join these settlements, particularly American resolutions under the FCPA, can motivate South American countries to consider adopting these legal reforms. For instance, the Brazilian government was able to join the global settlement regarding Odebrecht with the United States and Switzerland, thus receiving eighty percent of the criminal fine assessed in that case.<sup>107</sup>

In the next section, we apply this lens on transnational legal influence to the policy reforms adopted in South America after the recent corruption crisis. We argue that South American OECD Anti-Bribery Convention member states behave systematically differently during a crisis than non-member states. Although there is policy variation among OECD Anti-Bribery Convention members, these countries are more likely to respond to a crisis by adopting (or expanding) the liability of legal persons (i.e. corporations), and developing (or increasing) the ability of law enforcement officials to form leniency or cooperation agreements.

#### IV. SOUTH AMERICAN COUNTRIES' RESPONSES TO CORRUPTION CRISES

This Section describes how South American countries have responded to recent corruption scandals. It demonstrates how countries that have become members of the OECD Anti-Bribery Convention have adopted different laws than those which have not joined the convention. It notes changes in government priorities when it comes to fulfilling their international commitments, such as those under the OECD Anti-Bribery Convention, and what forces have guided legislative discussions on the enactment of specific statutes and legal reforms. Moreover, it exposes the impact of regional corruption scandals, such as the Odebrecht case, which, while infrequent, are likely to increase as international cooperation toward, and commitment to, the investigation and prosecution of corruption grows.

The OECD Working Group reports can provide countries valuable recommendations for the implementation of legislation. One of the main concerns of the OECD Working Group regarding the implementation of

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*Foreign Corrupt Practices Act and Latin America: The Influence of Local Prosecutorial Efforts in Transnational White-Collar Litigation*, 24 INTERNATIONAL LAW: REVISTA COLOMBIANA DE DERECHO INTERNACIONAL BOGOTÁ [INT. LAW: REV. COLOMB. DERECHO INT. BOGOTÁ] 21, 30 (2014).

107. Richard L. Cassin, *DOJ and SEC Take Small Slice of Odebrecht-Braskem \$3.5 Billion Global Settlement*, FCPA BLOG (Dec. 21, 2016, 6:18 PM), <https://tinyurl.com/yatvzadh>.

the Anti-Bribery Convention in South America was the absence of legislation that held legal persons (corporations) responsible for foreign corruption. As examined in detail in the country studies below, this resulted in the Working Group repeatedly recommending that South American OECD Anti-Bribery Convention member countries adopt and strengthen laws related to corporate liability. This is a particularly meaningful reform because it targets entities which directly benefit from corrupt corporate conduct and creates incentive for corporate leaders to adopt measures to prevent bribery.<sup>108</sup> In the absence of corporate liability, corporations can entirely avoid liability by scapegoating individual employees when accusations arise.

Although it took several years for these countries to implement such recommendations, as this Section will show, many began doing so starting in 2009, often in response to a corruption scandal.<sup>109</sup> These laws were frequently accompanied by a provision that required or incentivized corporations to adopt anticorruption compliance programs.<sup>110</sup> The reforms also often included the possibility that corporations could settle corruption charges with prosecutors or regulatory agencies.<sup>111</sup> Part F will describe how several South American countries that are not part of the OECD Anti-Bribery Convention have enacted anticorruption statutes and reforms in recent years, though not quite as extensive as OECD member states.<sup>112</sup>

This Section provides case studies of several South American countries. We begin with legal reforms undertaken in Argentina and Peru, where the effects of the OECD Anti-Bribery Convention and the recommendations of the Working Group are clearest. We next discuss Brazil, Colombia, and Chile, where there is more variation but where similar themes unfold. We end by examining several non-OECD Anti-Bribery Convention countries and highlight how reform proposals differ significantly in those countries.

One issue that we do not address, as it is outside the scope of our already broad paper, is why countries choose to join the OECD Anti-Bribery

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108. Philip M. Nichols, *The Business Case for Complying with Bribery Laws*, 49 AM. BUS. L.J. 325, 367-68 (2012) (discussing the impact of corruption liability on corporations); see also Brewster, *supra* note 88 at 1645-55 (examining the impact of strong anticorruption enforcement policies against corporations in the United States).

109. See Jorge, *supra* note 12, at 321-22 (observing that, since 2009, several Latin American countries—including Chile in 2009, Mexico in 2016, and Colombia, Peru, and Argentina in 2018—introduced “corporate liability regimes for corruption offences” and that the Odebrecht scandal led to investigations in many of these countries); see, e.g., Diego Escallón Arango, *Reacción del Estado Colombiano Frente al Carrusel de la Contratación en Bogotá: ¿Eficacia o Discurso?*, 32 REVISTA DE DERECHO PÚBLICO DE LA UNIVERSIDAD DE LOS ANDES [REV. DERECHO PUB. U. ANDES] 6-11 (2014); Press Release, OECD, Argentina Must Urgently Enact Corporate Liability Bill to Rectify Serious Non-Compliance with Anti-Bribery Convention (Mar. 24, 2017) [hereinafter OECD Press Release].

110. Jorge, *supra* note 12.

111. *Id.* at 323 (noting the use, “in most countries for the first time, of leniency agreements between prosecutors and implicated companies or individuals”).

112. See *infra* Section IV.F.

Convention. In our interviews, local observers informed us that joining the OECD Anti-Bribery Convention was important (or perceived as important) for attracting foreign investment. If true, there is a possibility that the anticorruption reforms discussed in this Article are more directly the result of a desire to entice foreign capital, rather than a response to the transnational legal process. While we cannot disprove that hypothesis with our current data, we believe that our case studies show that the OECD Anti-Bribery Convention has at least had an intervening effect. That is, even if countries are primarily adopting these reforms to attract foreign investment (which we are skeptical of given the intensity of domestic pressure on these issues), the OECD Anti-Bribery Convention nonetheless has an important effect in identifying and expanding the desirability of specific policies.

#### *A. Argentina*

Argentina was one of the first South American countries to join the OECD Anti-Bribery Convention in 2001.<sup>113</sup> However, it was not until the Odebrecht scandal spread to Argentina, over fifteen years later, that the Argentine legislature considered adopting key aspects of the Convention, including liability for legal persons.<sup>114</sup> In 2015, Mauricio Macri became Argentina's President, ending twelve years of Kirchners in office. Candidate Macri promised to make substantial changes to Argentina's economy and had announced his intention to analyze the possibility of becoming a full member of the OECD itself (beyond joining the Anti-Bribery Convention).<sup>115</sup> His campaign also emphasized the promise to fight corruption, particularly considering the several corruption allegations against the incumbent president, Cristina Kirchner.<sup>116</sup> In March 2017, Argentina presented an Action Plan to the OECD with the aim of implementing OECD standards and best practices.<sup>117</sup> In the same month,

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113. See *Argentina - OECD Anti-Bribery Convention*, OECD, <https://tinyurl.com/yd28um3z> (last visited May 27, 2020).

114. See OECD Press Release, *supra* note 109. The Working Group, in their Phase 3 Report on 2014, expressed their concern regarding the state's commitment to fight foreign bribery, considering that the majority of key recommendations made since 2001 had not been implemented, such as holding legal person liable for transnational corruption. See WORKING GRP. ON BRIBERY, OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN ARGENTINA 5-6 (2014), <https://tinyurl.com/yb6nvddv> [hereinafter OECD WORKING GRP. ARGENTINA PHASE 3 REPORT].

115. Argentina was interested joining the broader OECD organization, not just the Anti-Bribery Convention. See *Macri's OECD Seduction to Continue at G20 Summit*, BUENOS AIRES TIMES (Nov. 29, 2018), <https://tinyurl.com/y77c7dlt> (noting that among President Macri's "key objectives is his desire for Argentina to become a full member of the Organisation for Economic Co-operation and Development").

116. Roberto P. Bauza, *Argentina's Fight Against Corruption: New Reality, New Tools*, INT'L B. ASS'N (Dec. 19, 2017), <https://tinyurl.com/ya4xpg72>.

117. See *The OECD and Argentina: A Mutually Beneficial Relationship*, OECD, <https://www.oecd.org/latin-america/countries/argentina/> (last visited May 27, 2020).

the OECD Working Group issued a report (Phase 3bis) noting that despite recent efforts by the current administration, Argentina was still not compliant with key recommendations including the codification of legal persons liability for crimes of corruption.<sup>118</sup> Although the president had presented a bill to Congress in October 2016, addressing the issue of liability for legal persons, it was not passed until November 2017.<sup>119</sup>

The Odebrecht scandal helped accelerate the legislative process, with scholars, media, and even President Macri speaking, on several occasions, about the importance of embracing corporate liability in order to move forward with the Odebrecht investigations.<sup>120</sup> Law 27,401 implemented criminal liability for legal persons for the commission of: (i) local or international bribery and influence peddling; (ii) negotiations incompatible with public office; (iii) extortion by public officers; (iv) unjust enrichment by public officers and employees; and (v) falsification of balance sheets and reports.<sup>121</sup> This law also codified corruption-related compliance programs—providing that the adoption and implementation of a compliance program could mitigate, and even exempt entities from, legal person liability.<sup>122</sup> While such programs generally remained optional, the law mandated the implementation of compliance programs among entities that engaged directly with the Federal Government.<sup>123</sup>

The Lava Jato scandal also had an important impact on Argentinian anticorruption policy by leading to the adoption of cooperation agreements with defendants. The Argentinian government was heavily criticized for its slow investigation into Odebrecht and other entities, particularly compared to Brazil's ability to quickly form plea agreements. In response, Argentina embraced the option of plea agreements for legal persons in its adoption of Law 27,401 in November 2017.<sup>124</sup> The law opened the possibility of effective collaboration agreements between legal persons and prosecutors, without judicial prior approval, which allowed them to recover assets or seek

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118. Argentina had already implemented legal person liability for tax offenses, insider trading and other securities offenses, money laundering, and terrorism financing. For example, joint liability for companies and individuals has existed in Argentina since 1981.

119. DEPARTAMENTO GESTIÓN LEGISLATIVA ARGENTINA, TRÁMITE PARLAMENTARIO DE LEYES SANCIONADAS DURANTE EL PERÍODO LEGISLATIVO 135 - AÑO 2017, AÑO VI-NO. 148, at 161-64 (May 2018); *see also* *FCPA Winter Review 2018*, MILLER & CHEVALIER (2019), <https://tinyurl.com/yatpsfsp> (providing details on the Argentine law).

120. *See* Maximiliano Rizzi & Caroline Stauffer, *Argentina Bans Brazil's Odebrecht from New Projects for 12 Months*, REUTERS (July 3, 2017, 5:57 PM), <https://tinyurl.com/ybelkakw>; Caroline Stauffer & Maximilian Heath, *Argentina Congress Passes Law to Fight Corporate Corruption*, REUTERS (Nov. 8, 2017, 6:44 PM), <https://tinyurl.com/y84logwn>; Natalia Volosin & Susan Rose-Ackerman, *Argentina Must Reform to Tackle Government-Business Corruption*, HILL (June 20, 2017, 3:00 PM), <https://tinyurl.com/y7k7j3og>.

121. Law No. 27401, Dec. 1, 2017, 33.763 B.O. 3 (Arg.).

122. *Id.* art. 9.

123. *Id.* art. 24.

124. *Id.* art. 16-21.



reduced penalties in exchange for accurate, useful, and verifiable information regarding facts, principals, and participants in the crime.<sup>125</sup> This type of settlement, designed to fight corruption, was new in Argentinian legislation. Law 27,304, enacted in October 2016, provided for judge-approved sentence reductions for this kind of cooperation, but it was only available to individuals, not legal persons.<sup>126</sup> The 2018 reforms aimed to address the 2014 OECD Working Group observations regarding the delays in the investigation and prosecution of economic crimes.<sup>127</sup> Although Law 27,401 arguably does not provide the same broad prosecutorial powers to enter into plea agreements that Brazilian and American law enforcement officials have, it provides Argentine prosecutors additional flexibility in reaching multistate settlements.<sup>128</sup>

### B. Peru

In 2014, Peru launched an OECD Country Programme, aiming to become a full member of the OECD.<sup>129</sup> The Peruvian government, in collaboration with the OECD, built the Programme upon five key areas, one being anticorruption.<sup>130</sup> This Programme consisted of “policy reviews, implementation and capacity building projects, participation in OECD Committees and adherence to selected OECD legal instruments.”<sup>131</sup> Based on this commitment, in April 2016, during the first month of Pedro Pablo Kuczynski’s presidency, Peru enacted Law 30424 to adhere to the OECD Anti-Bribery Convention requirements and to incorporate liability of legal persons.<sup>132</sup> The law only provided administrative liability for legal persons for transnational corruption.<sup>133</sup> The law contemplates sentencing bonuses or exemption from liability to those companies that adopt or had previously

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125. *Id.* The agreement is subject to the conditions established in Article 18 of Law 27,401.

126. The information must incriminate another person of equal or greater responsibility for the crime. This figure already existed in Argentina legislation, but did not apply to bribery crimes. *See* Law No. 27304, Nov. 2, 2016, 33.495 B.O. 1 (Arg.).

127. *See* OECD WORKING GRP. ARGENTINA PHASE 3 REPORT, *supra* note 114. The Working Group observed that systemic deficiencies in Argentina’s criminal justice system identified in Phase 2 still persist and that widespread delays in economic crime cases continue to plague the criminal justice system. Moreover, the few cases of foreign corruption opened to investigate foreign bribery, had progressed very slowly.

128. *See* Benjamin N. Gedan & Christopher Phalen, *In Argentina, Why Is All Quiet on the Odebrecht Front?*, AMS. Q. (Apr. 9, 2018), <https://tinyurl.com/yd6fxut3>.

129. *See* Angel Gurria, OECD Secretary-General, Remarks at Launch of the OECD Country Programme with Peru (Dec. 8, 2014), <https://tinyurl.com/y7bx6hda>.

130. *Id.* The five areas were economic growth, public governance, anti-corruption and transparency, human capital and productivity, and environment.

131. *Id.*

132. *See* Law No. 30424 art. 1-3, Abril 21, 2016, DIARIO OFICIAL [D.O.] (Peru); *Compliance: Un Término Clave que Toda Empresa Debe Conocer*, EL COMERCIO (Apr. 11, 2018, 1:34 PM).

133. Law No. 30424 art. 3, Abril 21, 2016, DIARIO OFICIAL [D.O.] (Peru).

implemented anticorruption compliance programs.<sup>134</sup> Though the law does not include an express provision regarding settlements, it permits companies to receive sentencing bonuses for cooperation, disclosure, and other factors.<sup>135</sup>

As the Lava Jato scandal expanded into Peru, so did the government's motivation to expand liability for legal persons engaged in corruption. At the end of 2016, with the U.S. DOJ's disclosure of the nature and scale of Odebrecht's bribe scheme, Peru's government went into shock. Kuczynski, who had campaigned on promises to fight against corruption and who, while in office, had obtained powers from Congress to do so, was under pressure.<sup>136</sup> On January 5, 2017, Odebrecht agreed to collaborate with the investigations and disgorged US\$8.9 million in corruption-tainted profits.<sup>137</sup> Two days later, Peru enacted Law Decree 1352. The decree's preamble stated that its objective was to fulfill several international commitments, including those enumerated in the OECD Anti-Bribery Convention, and to remedy deficiencies highlighted by the Financial Action Task Force (FATF) regarding legal person liability for money laundering and terrorism financing.<sup>138</sup> This Decree reformed Law 30424 by expanding its scope, holding legal persons liable under administrative law for domestic and transnational bribery, money laundering, and terrorism financing

Peruvian legal reform aimed at expanding plea bargaining also appears to originate with the Lava Jato scandal. Although individuals facing charges related to organized crimes had the opportunity to seek a plea bargain since 2000, President Kuczynski issued an important legal reform (enacted through Law Decree 1301) days after the U.S. DOJ release of Odebrecht's payments.<sup>139</sup> This law aimed to strengthen "efficient cooperation" processes in order to facilitate the investigation and prosecution of criminal organizations.<sup>140</sup> Under this law, defendants could make a request to the Prosecutor's Office that they be considered a cooperator in a plea deal, thus obtaining an exoneration, reduction, or suspension of penalty in exchange for verifiable information that permitted the Prosecutor's Office to identify those criminally liable for certain crimes, including national and

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134. *Id.* art. 12, 17-19.

135. Law No. 30424 art. 12, Abril 21, 2016, DIARIO OFICIAL [D.O.] (Peru).

136. Pedro Kuczynski obtained through Law 30506, enacted in October 2010, a delegation from congress to legislate for a period of ninety days in a limited number of subjects, including the law necessary to implement OECD instruments and measures to fight corruption. These laws are referred to as law decrees, rather than decrees. Law No. 30506 art. 1-2, Octubre 9, 2016, DIARIO OFICIAL [D.O.] (Peru).

137. *¿En Qué Va el Caso Odebrecht? Cronología Interactiva del Escándalo*, CNN (Mar. 7, 2017, 6:53 PM), <https://tinyurl.com/ycebhwjn>.

138. Legislative Decree No. 1352, Enero 7, 2017, DIARIO OFICIAL [D.O.] (Peru).

139. Legislative Decree No. 1301, Abril 21, 2016, DIARIO OFICIAL [D.O.] (Peru).

140. *Id.* art. 1-2.

transnational bribery.<sup>141</sup> Though this law initially did not apply to legal persons, Law 30737, enacted in March 2018, allowed entities to enter into “efficient cooperation” agreements that would permit prosecutors to exempt, suspend, or reduce sanctions in exchange for timely, efficient, and corroborated information that would permit the identification of others involved in the crime.<sup>142</sup> Law 30737’s main purpose was to guarantee the payment of civil fines imposed on legal persons in corruption cases.<sup>143</sup> At the time of enactment, the only matter that would fall within this new expansion was the agreement between Peru and Odebrecht.<sup>144</sup>

### C. Brazil

Although Brazil ratified the OECD Anti-Bribery Convention in August 2000, the government did not hold legal entities responsible for transnational corruption until 2013. The OECD Working Group expressed its concern regarding this issue in 2004, 2007, and 2010.<sup>145</sup> However, before the release of the Working Group’s 2010 follow-up report, the Comptroller General of Brazil, in cooperation with the Ministry of Justice and the Federal Attorney General’s Office, presented bill 6,826 to the Chamber of Deputies, the lower house of the Brazilian Congress. The bill proposed civil and administrative liability for legal entities for acts against national and foreign public administrations.<sup>146</sup> The Chamber of Deputies formed a special committee in October 2011 to review the bill and prepare a report. The committee did not issue its report until April 2013.<sup>147</sup>

As the committee worked on this legislation, the Brazilian public grew increasingly dissatisfied with the government’s spending priorities and the growing number of corruption cases. In June 2013, Brazil faced historic protests over the costs of the FIFA World Cup and the Olympic Games,

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141. See *Ministra: Decreto Legislativo No. 1301 Facilitará Investigación y Sanción del Crimen Organizado*, MINISTERIO DE JUSTICIA Y DERECHOS HUMANOS DEL PERÚ (Mar. 13, 2017), <https://tinyurl.com/yd8zeduw>. The Minister of Justice of Peru discussed the specifics of this law with the special commission created by Peru’s Congress to investigate the Lava Jato case. She argued that the reform gave prosecutors more power to negotiate, protected the identity of the cooperator, and allowed criminal organization leaders to be subject to this process as long as they identify a higher leader within the organization.

142. Law No. 30737, Marzo 12, 2018, DIARIO OFICIAL [D.O.] (Peru).

143. *Id.* art. 1-2.

144. *¿Cómo Pretende la Ley 30737 Asegurar el Pago Inmediato de la Reparación Civil a Favor del Estado en el Caso Lava Jato?*, IUS 360° (Mar. 20, 2018), <https://tinyurl.com/ybzc9q6e>.

145. See WORKING GRP. ON BRIBERY, OECD, BRAZIL: PHASE 2 FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2 RECOMMENDATIONS 4 (2010), <https://tinyurl.com/y9orktg3>.

146. See William Coelho & Leticia Barbabela, *The New Brazilian Anticorruption Law: Federation Challenges and Institutional Roles*, 6 WORLD BANK LEGAL REV. 365, 371-74 (2015) (arguing that this bill was inspired by the FCPA and the U.K. Bribery Act).

147. *Id.* at 374.

both set to take place within the following three years.<sup>148</sup> Brazilians insisted that the government increase public spending on health, education, and transportation and also demanded actions against corruption. This last demand was motivated by the ongoing Mensalão case—a vote-buying scandal in front of Brazil’s Supreme Court.<sup>149</sup> This case caught the attention of the media and caused public debates that led to a social media-based anticorruption campaign, which contributed to Brazilians’ growing intolerance of corruption.<sup>150</sup>

Public discontent and demands for corruption reform led to the passage of new legislation in record time. Bill 6,826, which had been in the Chamber of Deputies for over three years, flew through the rest of the legislative process and was enacted as Law 12,846 in August 2013.<sup>151</sup> The law not only incorporated civil and administrative liability for legal persons that committed illicit acts against national and foreign public administrations, but it also established a regime through which legal persons could enter into leniency agreements.<sup>152</sup> This would allow relevant fines to be reduced by up to two-thirds in exchange for cooperation with and disclosure in, the investigation.<sup>153</sup> In addition, the law introduced compliance programs into Brazilian legislation. It established the effective implementation of a corporate compliance program and internal code of ethics as a mitigating factor.<sup>154</sup>

The same political dynamics also led to the quick passage of a previously slow-moving reform bill regarding cooperation agreements. The day after the enactment of Law 12,846, the Brazilian legislature passed Law 12,850, which had stagnated in the legislative process since 2009. The law addressed cooperation agreements and judicial pardons and reformed the definition of “criminal organization.”<sup>155</sup> The law gave prosecutors an important new tool in the fight against corruption: it allowed individuals, but not legal persons, to enter into a judge-approved settlement agreement with prosecutors at any stage of any criminal prosecution, including after sentencing.<sup>156</sup> In exchange

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148. *Id.* at 373.

149. *See id.* at 373 n.23. This scandal took place in 2004 during Lula da Silva’s government. Congressmen of the Workers Party were requiring monthly payments in exchange for political support inside the Congress. This scandal also involved high ranking political figures, financial institutions and public institutions. The Ministerio Publico accused forty people including an important politician of the Workers Party and an official who worked closely with Lula da Silva. This case was considered the biggest corruption scandal until the Lava Jato investigation.

150. *Id.*

151. *Id.* at 374.

152. *See* Ley No. 12.846 art. 1, 3, 16-17, de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 2.8.2013 (Braz.).

153. *Id.* art. 16.

154. *Id.* art. 7, 8.

155. Ley No. 12.850 art. 1, 3-7, de 2 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 5.8.2013 (Braz.).

156. *Id.* art. 3-4.

for voluntary cooperation and aid in the investigation, an individual would receive a judicial pardon, a reduced sentence by up to two-thirds, or the replacement of a custodial sentence with a sentence of restrictive rights.<sup>157</sup>

#### *D. Colombia*

Colombia's decision to join and implement the OECD Anti-Bribery Convention occurred during a domestic corruption scandal. In June 2010, a bribery scheme, known as "Carrusel de la Contratacion," at that time considered the biggest corruption scandal in Colombian history, shook the nation.<sup>158</sup> This case brought Colombia's corruption problem into public debate, and put pressure on the government to take action. President Juan Manuel Santos took office in August 2010, soon after the scandal came to light. His National Plan prioritized the goals of gaining international relevance and improving good governance<sup>159</sup>—both of which tied into Santos's plan to become a full member of the OECD and to strengthen the fight against corruption.<sup>160</sup> In the first months of Santos's presidency, the executive branch presented a bill that was passed in 2011, known as the Anti-Corruption Statute.<sup>161</sup> This statute aimed to respond to public outcry related to the recent scandal and to implement the OECD Anti-Bribery Convention.<sup>162</sup>

The Law provided administrative liability for legal entities if they had sought benefits from the commission of crimes against public

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157. According to Article 4 of the law, such cooperation had to produce one or more of the following results: (I) identification of joint principals and accessories that integrate a criminal organization and of the criminal offenses committed by them; (II) the disclosure of the hierarchical structure and the division of tasks within a criminal organization; (III) prevention of criminal offenses arising from the activities performed by a criminal organization; (IV) full or partial recovery of the products or proceeds derived from criminal offenses committed by a criminal organization; (V) location of any victims of a criminal organization provided their physical integrity is preserved.

158. Arango, *supra* note 109, at 6-11. The Carrusel de la Contratacion scandal implicated the former mayor of Bogota, city council members, congressmen, and politicians. The scandal revealed a network where these officials would award projects to important private firms in exchange for commissions. Illicit payments were funneled through contracts awarded to fake companies and consultancies that were never provided.

159. *See generally* DEPARTAMENTO NACIONAL DE PLANEACION, RESUMEN EJECUTIVO PLAN NACIONAL DE DESARROLLO 2010-2014: PROSPERIDAD PARA TODOS (2010), <https://tinyurl.com/ya5baxj9>.

160. *Id.*

161. L. 1474 de 2011, art. 34, julio 12, 2011, [48.128] DIARIO OFICIAL [D.O.] (Colom.).

162. *See* WORKING GRP. ON BRIBERY, OECD, PHASE 1 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN COLOMBIA 5 (2012). The OECD Working Group on Bribery in its Phase 1 Report in Implementing the OECD Anti-Bribery Convention recognized that the Anti-Corruption Statute aimed to bring Colombia's legislation into compliance with the Convention.

administration, or any criminal offense related to public property.<sup>163</sup> However, the OECD Working Group in its Phase 2 Report stated its concern regarding deficiencies of legal person liability in the Anti-Corruption Statute, such as lack of liability for certain legal entities, the impossibility of enforcing an action against a company without establishing the responsibility of a natural person, and the ineffectiveness of sanctions to produce their expected effects.<sup>164</sup> Based on these observations, a bill was presented to Congress with the objective of implementing the OECD Anti-Bribery Convention accordingly. In February 2016, Law 1778 established an administrative procedure for the investigation and sanction of legal persons for bribery of foreign officials, independent and not subject to the criminal responsibility of an individual.<sup>165</sup> The law also introduced compliance programs—permitting entities to receive a sentencing bonus or exemption from liability for adopting and implementing said programs.<sup>166</sup> However, it provides that the Superintendence of Companies (a government agency within the Ministry of Commerce) would determine, based on relevant factors, which entities must implement such compliance programs.<sup>167</sup> In addition, Law 1778 introduced a leniency process that could allow legal persons to receive a full exemption from punishment in exchange for disclosure and cooperation.<sup>168</sup>

#### *E. Chile*

Chile ratified the OECD Anti-Bribery Convention in 2001 and quickly enacted legislation to implement the Convention, which entered into force in 2002.<sup>169</sup> The OECD Working Group, while analyzing Chile's

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163. While the majority of State members of the Convention in the region did not establish legal persons liability for bribery in their first reforms to implement the Convention requirements, Colombia did.

164. *See* WORKING GRP. ON BRIBERY, OECD, PHASE 2 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN COLOMBIA 5 (2015).

165. *See* L. 1778, art. 2-22, febrero 2, 2016, DIARIO OFICIAL [D.O.] (Colom.).

166. *Id.* art. 7, 23.

167. The Superintendence of Companies of Colombia is technical body through which the President of the Republic exercises the inspection, surveillance and control of commercial companies, as well the faculties appointed by law in relation to other entities, legal persons and natural persons. Article 3 of Law 1778 designates the Superintendence of Companies as the entity in charge of investigating and sanctioning conduct covered by the law.

168. Under Colombian criminal procedure, which only applies to individuals, a defendant can only enter into a plea bargain for the commission of specific crimes. Private corruption is considered as one of those. However, under Colombian criminal law, private corruption takes place when an individual gives a bribe to the agents of a private entity in exchange for a benefit for him or a third party that is against the private entity's interest.

169. *See* Law No. 19829, Septiembre 30, 2002, DIARIO OFICIAL [D.O.] (Chile) (reforming Chile's Criminal Code regarding bribery); BIBLIOTECA DEL CONGRESO NACIONAL DE CHILE, HISTORIA DE LA LEY N° 20.393 4-15 (2018), <https://tinyurl.com/y9frelxa> [hereinafter HISTORIA DE LA LEY N° 20.393].

implementation of the Anti-Bribery Convention in October 2007, expressed its concern regarding Chile's noncompliance with key recommendations expressed in an earlier OECD report from 2004.<sup>170</sup> One of those recommendations was the adoption of legislation holding legal persons accountable and subject to sanctions.<sup>171</sup> Based on the seriousness of Chile's noncompliance with the Convention, the Working Group decided to do an additional review, which took place in 2009.<sup>172</sup> Chile took important steps in the intervening two-year-period to fulfill several of the key recommendations. In March 2009, President Michele Bachelet presented a bill to the Chilean Congress introducing corporate criminal liability.<sup>173</sup> The vice president explained that Chile had been invited in May 2007 to be a full member of the OECD, conditional on the full implementation OECD regulations.<sup>174</sup> Given the Working Group's express demand for legal person liability in its most recent recommendations to the Chilean government, Congress promptly enacted the president's bill into law, which entered into force in December 2009 as Law 20,393.<sup>175</sup>

This law specifically holds legal persons criminally liable for bribing local or foreign officials, money laundering, and financing terrorism.<sup>176</sup> It also introduced the mitigating role of anticorruption compliance programs.<sup>177</sup> Article 3 of the Law provided that, for a legal entity to be held liable, the criminal offense must be the result of a breach of the entity's "duty of direction and supervision."<sup>178</sup> The law deems such duties to be met if the legal person has adopted and implemented a "sufficient" organization, administration, and supervision model before the commission of the offense.<sup>179</sup>

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170. WORKING GRP. ON BRIBERY, OECD, CHILE: PHASE 2 REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 REVISED RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 4 (2007), <https://tinyurl.com/y9tlfnal> [hereinafter OECD WORKING GRP. REPORT CHILE PHASE 2].

171. *Id.*

172. *See* WORKING GRP. ON BRIBERY, OECD, CHILE: PHASE 2 FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2 RECOMMENDATIONS ON THE APPLICATION OF THE CONVENTION AND THE 1997 REVISED RECOMMENDATION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (2009) [hereinafter OECD WORKING GRP. REPORT CHILE PHASE 2 FOLLOW-UP].

173. HISTORIA DE LA LEY N° 20.393, *supra* note 170.

174. *Id.* at 5.

175. Law No. 20,393, Establece la Responsabilidad Penal de las Personas Jurídicas en los Delitos que Indica, Noviembre 25, 2009, DIARIO OFICIAL [D.O.] (Chile).

176. *Id.* art. 1, 3; *see also* HISTORIA DE LA LEY N° 20.393, *supra* note 170 (laying out the legal implications of Law No. 20393).

177. Law No. 20,393 art. 6, Establece la Responsabilidad Penal de las Personas Jurídicas en los Delitos que Indica, Noviembre 25, 2009, DIARIO OFICIAL [D.O.] (Chile).

178. *Id.* art. 3.

179. *Id.* art. 4.

Law 20,393 further allowed entities to settle through a “conditional suspension,” which, resembling a deferred prosecution agreement, permits the criminal process to be terminated without trial if the defendant abides by the conditions of the suspension. This provision was completely different to what natural persons could do while facing prosecution for bribery.<sup>180</sup> Chile’s general rule of mandatory prosecution, which applied to bribery of local and foreign officials, previously precluded prosecutors from closing an investigation without presenting charges, unless there was no evidence of commission of a crime.<sup>181</sup> Law 20,393 granted prosecutors the flexibility of entering into a conditional suspension in any bribery case where there was no sentence or other conditional suspension of the ongoing proceeding against a legal person.

While, unlike in the aforementioned countries, the passage of Law 20,393 was not in direct response to a discrete national scandal, corruption crises nonetheless play a central role in Chile’s legislative agenda. Since 2014, several corruption scandals focused the nation’s attention on Chile’s lobbying, campaign finance, and conflicts of interest regulations.<sup>182</sup> These cases resulted in a growing lack of confidence in Chile’s democratic institutions and led President Bachelet to create an advisory commission that would draft a legislative response within a forty-five-day window.<sup>183</sup> In August 2016, the Chilean Congress put forth an anticorruption agenda, which led to the enactment of several laws such as Law 20,880 and Law 20,900, which regulated conflict of interests and disclosure of assets and interest by public officials, and prohibited firms from financing campaigns, respectively.<sup>184</sup>

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180. See OECD WORKING GRP. REPORT CHILE PHASE 2 FOLLOW-UP, *supra* note 172, at 25-27; see also WORKING GRP. ON BRIBERY, OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN CHILE 26-27 (2014) (noting that criminal proceedings involving individuals could also be suspended without trial only if the offense was punishable with prison time of three years or less). Chile, like many South American countries, has established a process that allows abbreviated procedures when a prosecutor seeks a sentence of five years or less and the accused agrees to it. *Id.*

181. OECD WORKING GRP. REPORT CHILE PHASE 2 FOLLOW-UP, *supra* note 172, at 25.

182. See Pascale Bonnefoy, *As Graft Cases in Chile Multiply, a ‘Gag Law’ Angers Journalists*, N.Y. TIMES (Apr. 7, 2016), <https://tinyurl.com/ycgmr3pn>; Simon Romero, *Chile Joins Other Latin American Nations Shaken by Scandal*, N.Y. TIMES (Apr. 9, 2015), <https://tinyurl.com/yb6j5eav>.

183. CONSEJO ASESOR PRESIDENCIAL CONTRA LOS CONFLICTOS DE INTERÉS, EL TRÁFICO DE INFLUENCIAS Y LA CORRUPCIÓN, INFORME FINAL (2015), <https://tinyurl.com/ybxnz7fm>.

184. *Conoce la Agenda de Probidad y Transparencia, Agenda de Probidad y Transparencia*, GOBIERNO DE CHILE, <http://www.lasnuevasreglas.gob.cl/> (last visited Nov. 18, 2018).



*F. Non-OECD Anti-Bribery Convention Countries*

South American countries that are not party to the OECD Anti-Bribery Convention have not followed the recent patterns seen in member states. As will be described in this subsection, the only non-OECD Anti-Bribery Convention countries that have adopted legal person liability for bribery are Ecuador and Venezuela, but they have not required or incentivized legal persons to adopt and implement anticorruption compliance programs. Neither have they enhanced anticorruption investigative or prosecutorial tools.

Ecuador experienced ten years of stagnation on anticorruption legislation prior to the Odebrecht scandal. With the U.S. DOJ's release of the bribes paid by Odebrecht in Ecuador, the media and general public demanded immediate action from the government and judicial institutions.<sup>185</sup> The information provided by the United States and Brazil led the General Prosecutor to open corruption-related investigations of the former vice president, several ministers, the State Comptroller General, and officials of the state-owned oil company Petro Ecuador.<sup>186</sup> After the subsequent imprisonment of the vice president in December 2017, recently-elected President Lenin Moreno called for a general referendum to fight corruption that was approved with sixty-five percent of votes in February 2018.<sup>187</sup>

The referendum proposed several reforms, which included an amendment to the criminal code to implement criminal liability for corporate entities that commit national bribery and influence peddling.<sup>188</sup> However, the amendment did not require the government to give any sentencing bonus for companies that implemented a compliance program, nor did it allow legal persons to reach a settlement agreement during the proceedings. Recently, several members of Congress have presented anticorruption bills as a response to the Odebrecht scandal. The Justice Commission of the Ecuadorean Congress analyzed the bills and consolidated them for congressional debate. Though several scholars emphasized the need for strengthening legal person liability by

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185. See Dep't of Justice 2016 Press Release, *supra* note 104.

186. See Sasha Chavkin, *Leak Exposes Millions of Dollars in New Payments in Odebrecht Cash-for-Contracts Scandal*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (June 25, 2019), <https://tinyurl.com/y32ez3xh>; *Las Claves para Entender el Caso de Sobornos de Odebrecht en Ecuador*, EL UNIVERSO (Nov. 1, 2017), <https://tinyurl.com/y7et6oqm>.

187. See Suplemento del Registro Oficial No. 180, Febrero 14, 2018, REGISTRO OFICIAL 1-11 (Ecuador).

188. Ecuador had already incorporated criminal liability for legal persons but only for specific crimes that did not include bribery. The referendum also prohibited those found guilty of bribery or other corruption crimes from running for office, obtaining public employment, and contracting with public entities. The referendum also proposed different measures to strengthen the independence of Ecuadorean institutions, and prohibited re-election of public officials.

implementing compliance programs and other measures, the Commission's ultimate proposal focused on asset recovery.<sup>189</sup> The President vetoed the bill in September 2017 and presented a new bill that would implement whistleblower provisions for public officials and enhance plea bargaining.<sup>190</sup> However, this law has yet to be seriously reviewed by Congress.

In Venezuela, there have been two significant anticorruption reforms over the past decade. The law against Organized Crime and Terrorism Financing of 2012 broadly incorporated legal person criminal liability, including liability for bribe payments.<sup>191</sup> However, it did not require or incentivize legal persons to implement compliance programs, nor did it allow them to enter into settlement agreements with prosecutors. The law stated that its purpose was to investigate, prosecute, and regulate organized crime and terrorism financing in accordance with the Constitution and international instruments.<sup>192</sup> In November 2013, due to the severe economic crises in Venezuela, corruption allegations, and rising protests, Congress delegated legislative power to President Maduro, for one-year, to enact laws to fight corruption and defend the economy.<sup>193</sup> In November 2014, through a Presidential Decree, President Maduro enacted the Anti-Corruption Law.<sup>194</sup> This law created the Anti-Corruption National Body, provided for asset recovery, and mandated the disclosure of assets by public officials.<sup>195</sup> It also criminalized transnational corruption in order to fulfill regional treaty commitments under the Inter-American Convention Against Corruption (IACAC).<sup>196</sup>

In 2010, Bolivia enacted the Marcelo Quiroga Santa Cruz Anti-Corruption Law in order to comply with the United Nations Convention Against Corruption (UNCAC), the IACAC,<sup>197</sup> and President Evo Morales's

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189. This was due to a great number of public complaints regarding the lack of asset recovery in the Odebrecht investigations and the impunity of officials who have avoided trial by fleeing the country.

190. *Gobierno Nacional Entregó Proyecto de Ley Anticorrupción a la Asamblea Nacional*, SECRETARÍA GENERAL DE COMUNICACIÓN DE LA PRESIDENCIA (Sept. 2018), <https://tinyurl.com/y7c4zw12>.

191. *See* L. Orgánica contra la Delincuencia Organizada y Financiamiento al Terrorismo, abril 30, 2012, [39912] GACETA OFICIAL [G.O.] 393057 (Venez.).

192. *Id.* art. 1.

193. *See* Nicolás Maduro Moros, President of Venez., Address at the Sesión Especial con Motivo de Solicitud de Ley Habilitante Asamblea Nacional, Contra la Corrupción y la Guerra Económica: Una Nueva Ética Política (Oct. 8, 2013), *in* CORREA DEL ORINOCO, at 5 (alleging that elite groups have declared a war against Venezuela, requiring them to take special measures in order to face such challenges).

194. *See* Decreto No. 1.410 art. 23-33, 47-53, noviembre 19, 2014, [6155] GACETA OFICIAL [G.O.] 48 (Venez.).

195. *Id.* art. 23-33, 47-53.

196. *Id.* art. 85; *see* Organization of American States, Inter-American Convention Against Corruption art. VIII, Mar. 29, 1996, O.A.S.T.S. No. B-58.

197. *See* L. 004 art. 1, 2, marzo 31, 2010, [118NEC] GACETA OFICIAL [G.O.] (Bol.); *Bolivia Expone la Experiencia en la Lucha contra la Corrupción como Garantía de los Derechos Humanos*, MINISTERIO DE

pledge of zero tolerance for corruption.<sup>198</sup> The law criminalizes active and passive corruption and bribery of foreign officials.<sup>199</sup> It also enhances whistleblower protections and rights to anonymity.<sup>200</sup> While the law does not hold legal persons liable for corruption or bribery, it allows the legal representative of a legal person to be charged for illicit enrichment committed by entity.<sup>201</sup> Since 2010, there have been no significant legal reforms in Bolivia.

Paraguay's fight against corruption has advanced at a slow pace. Paraguay has not enacted any anticorruption legislation in over ten years.<sup>202</sup> Although, in 2012, it did create through decree a National Anti-Corruption Secretary who implemented anticorruption policies and international commitments contained in the UNCAC and IACAC.<sup>203</sup> However, in April 2019, protest erupted in Paraguay after several members of Congress were re-elected despite facing corruption charges.<sup>204</sup> Protests led to the investigation and prosecution of high-ranking officials. Yet, no legislative reforms have been adopted to date. David Riveros Garcia, president of the pro-transparency NGO reAccion Paraguay, stated that “[u]nless convictions and reforms happen quickly, the recent anticorruption protests could run out of steam.”<sup>205</sup>

Uruguay's corruption index is significantly better than other countries in the region with Transparency International declaring it the cleanest country in Latin America.<sup>206</sup> Nevertheless, there have been no significant anticorruption reforms since 1998.<sup>207</sup>

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RELACIONES EXTERIORES DE BOLIVIA (Nov. 5 2015), <https://tinyurl.com/y7y42osu>; *Un Enfoque Integral contra la Corrupción O.A.S.*, ORG. AM. STATES (Mar. 4, 2016), <https://tinyurl.com/yajym9u5>.

198. See Evo Morales Aima, President of Chile, Discurso de Posesión del Presidente Constitucional de la República (Jan. 22, 2006), in REVISTA RELACIONES INTERNACIONALES, no. 30, 2006. Evo Morales was the first indigenous president of Bolivia. His campaign offered radical changes in Bolivian politics. One of the main promises of his first presidential campaign was the fight against corruption—an issue that had long been present in Bolivia's history.

199. See L. 004 art. 2, marzo 31, 2010, [118NEC] GACETA OFICIAL [G.O] (Bol.).

200. *Id.* art. 17.

201. *Id.* art. 28.

202. See Decree No. 10.144/2012 por el Cual se Crea la Secretaria Nacional Anticorruption (SENAC) Dependiente de la Presidencia de la Republica art. 1-2, Nov. 28, 2012 (Para.).

203. TRANSPARENCY INT'L, PARAGUAY: OVERVIEW OF CORRUPTION AND ANTI-CORRUPTION 1-2 (2016).

204. Laurence Blair, *Long Overdue, Can an Anti-Corruption Surge in Paraguay Last?*, WORLD POL. REV. (Nov. 14, 2018), <https://tinyurl.com/y96vxzdj>; Ernesto Londoño & Santi Carneri, *In Paraguay, Fighting Graft with Eggs and Toilet Paper*, N.Y. TIMES (Apr. 22, 2019), <https://tinyurl.com/yyw2vmk5>.

205. Blair, *supra* note 204.

206. TRANSPARENCY INT'L, URUGUAY: OVERVIEW OF CORRUPTION AND ANTI-CORRUPTION 1-2 (2016).

207. See Law No. 17.060, Dec. 23, 1998 (Uru.). Rules of this legislation were enacted in the 2003 Decree No. 30.

## V. CONCLUSION

The political maxim to never waste a crisis is only the starting point for understanding government decision-making in times of political upheaval. Though crises frequently ignite reform processes, getting meaningful and effective proposals before legislators is the critical next step.

This Article examines this process in the context of the recent wave of corruption scandals in South America and analyzes whether international law can help ensure that crisis-inspired legislation includes robust and effective measures. By comparing the response of South American OECD Anti-Bribery Convention member states to that of non-member states, we can observe the treaty's effect in national legislative reform efforts.

We find that the OECD Anti-Bribery Convention did have a significant impact on the content of anticorruption reforms. The reports and recommendations of the OECD Anti-Bribery Working Group continually emphasized the need for corporate liability for acts of domestic and foreign bribery. In the aftermath of the crises, OECD Anti-Bribery Convention member states overwhelmingly adopted or meaningfully strengthened their national laws regarding corporate liability for corruption. This is a significant and consequential reform because it centers liability on the entity that profits from corrupt conduct and incentivizes corporate leaders to prevent bribery in their business dealings. OECD Anti-Bribery Convention member states also generally provided mechanisms for corporations to limit or mitigate their liability via *ex ante* corporate compliance programs and pre-trial settlements. By contrast, countries that had not joined the OECD Anti-Bribery Convention did not focus their reforms on creating a system of corporate liability, corporate compliance programs, or pre-trial resolution.

*A. The Challenges Ahead*

Notwithstanding the success of the reforms in many South American states, there are challenges on the horizon. While the fight against corruption has caused steep economic losses in the region, it is important to acknowledge that the costs of corruption are even higher (by a large order of magnitude)<sup>208</sup>—robust anticorruption reform is essential to a nation's economic success. Corruption distorts political leaders' focus from public goods to private gain, redirects state resources away from socially optimal projects to projects with a greater opportunity for bribes, and distorts market competition.<sup>209</sup>

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208. Daniel Kaufmann, *Corruption: The Facts*, FOREIGN POL'Y, Summer 1997, at 114-31.

209. *Id.* at 119-21; see also Nichols, *supra* note 108, at 325-68 (discussing the direct and indirect costs of corruption to businesses).

Nonetheless, fighting corruption can also have negative economic repercussions, particularly in the short term. This was true for the recent South American corruption investigations and prosecutions. Two economic impacts stand out and are worth addressing here.

First, the corruption allegations throughout South America regarding Odebrecht's business practices (and the business practices of some other major firms revealed by the Lava Jato investigation) have led to the suspension of major infrastructure projects. The Brazilian development bank (Banco Nacional de Desenvolvimento Economico e Social (BNDES)) froze twenty-five infrastructure projects across South America, totaling US\$7 billion, due to concerns of corrupt construction companies, including Odebrecht.<sup>210</sup> Not only does this hurt the companies and individuals employed by the projects, but it also prevents the public from benefiting from the projects' completion.<sup>211</sup>

Second, there is the risk of multiple governments "piling on" similar corruption allegations.<sup>212</sup> Because many governments prohibit foreign as well as domestic corruption, several countries may have jurisdiction over the same activity. Between nations, there is no "double jeopardy" bar against adjudicating the same charges: the legal resolution of charges in one nation does not necessarily resolve or preclude charges in other nations' legal systems.<sup>213</sup> For instance, Odebrecht entered into a joint settlement pertaining to its transnational bribery scheme with the United States,<sup>214</sup> Switzerland, and Brazil.<sup>215</sup> However, Odebrecht still faces potential claims in other countries where it engaged in bribery.

The difficulty of resolving all possible claims can result in continued uncertainty, particularly for multinational corporations, and make

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210. Magalhaes, *supra* note 47.

211. Jorge, *supra* note 12 (discussing the harms to employees and Brazilian taxpayers who have funded these loans).

212. "Piling on" is the term used by the U.S. Justice Department and others to describe the challenge of uncoordinated prosecutions of the same activity by multiple governments. Henry Cutter, *The Morning Risk Report: DOJ Takes Aim at Enforcement 'Piling On,'* WALL ST. J. (May 10, 2018), <https://tinyurl.com/yar75hhd>.

213. Lindsay B. Arrieta, *How Multijurisdictional Bribery Enforcement Enhances Risks for Global Enterprises*, AM. B. ASS'N: BUS. L. TODAY (June 20, 2016), <https://tinyurl.com/y7ol72zh>. The idea of dual sovereignty gives each sovereign the right to adjudicate violations of its laws. Some nations may take into account foreign prosecutions and thus bar domestic prosecution, but this would be a matter of national legal doctrine. See Fredrick Davis, *Does International Law Require an International Double Jeopardy Bar?*, GLOBAL ANTICORRUPTION BLOG (Oct. 18, 2016), <https://tinyurl.com/yddeane9> (discussing French law on this issue and in specific corruption investigations).

214. The United States had jurisdiction under its Foreign Corrupt Practices Act because Odebrecht listed on an American stock exchange. As a result, American prosecutors had jurisdiction over bribes by Odebrecht in Brazil just as Brazilian prosecutors did.

215. Samuel Rubinfeld, Paul Kiernan & Luciana Magalhaes, *Brazil's Odebrecht to Pay Up to \$4.5 Billion to Settle Bribery Case*, WALL ST. J. (Dec. 21, 2016), <https://tinyurl.com/yabs2sxh>.

rehabilitation difficult.<sup>216</sup> Indeed, Odebrecht filed for bankruptcy in the summer of 2019, which is set to be the largest bankruptcy in South American history.<sup>217</sup> This bankruptcy will additionally hurt Brazilian tax payers by shifting losses to BNDES, which holds over US\$2 billion of Odebrecht's debt.<sup>218</sup> Although Odebrecht's bankruptcy was partly due to the downturn in the Brazilian economy, the company's corruption-related settlements and restructuring certainly contributed.<sup>219</sup>

Neither of these challenges should be dismissed lightly, but neither should they be barriers to continued progress in the fight against corruption. On the first point, the economic costs of fighting corruption are real and frequently more visible than the direct and indirect costs of corruption itself. For instance, while bribes silently erode public infrastructure, investigation-related project suspensions loudly interrupt people's lives and expectations. But these short-term costs are vastly outweighed by the benefits of deterring corrupt behavior. In addition, the public may be willing to accept these costs as part of the process of cleaning up the government and the market. In fact, many in Brazil celebrated Odebrecht's bankruptcy as a type of "cleansing" of corporate behavior.<sup>220</sup>

The fear of never-ending prosecution is also a genuine challenge. The overlapping jurisdiction of corruption cases is a source of concern for many corporations and national governments, which worry that their national corporations may be too harshly punished for past practices. However, deeper transnational cooperation, rather than a retreat from anticorruption enforcement, may be the answer to this concern. The U.S. government has officially adopted a policy of trying to coordinate with other nations to resolve anticorruption cases where multiple claims of jurisdiction exist. The goal of the policy is to achieve an "equitable result" and avoid duplicative penalties.<sup>221</sup> To this end, countries have recently started to engage in multinational settlements.<sup>222</sup> In addition, countries that have jurisdiction

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216. Michelle R. Sanchez-Badin & Arthur Sanchez-Badin, *Anticorruption in Brazil: From Transnational Legal Order to Disorder*, 113 AM. J. INT'L L. UNBOUND, 326, 329-30 (2019) (discussing the difficulty of reorganization with Odebrecht).

217. Paulo Trevisani, Samantha Pearson, & Luciana Magalhaes, *Odebrecht Bankruptcy to Hurt Brazilian State-Owned Bank*, WALL ST. J. (June 18, 2019), <https://tinyurl.com/yasx89fq> (discussing Odebrecht's bankruptcy filing).

218. *Id.*

219. *Id.*

220. *Id.* ("Many Brazilians viewed the bankruptcy—and the at least \$2.6 billion anticorruption settlement it paid U.S., Brazilian, and Swiss authorities in 2016—as a sort of cleansing of corporate Brazil.")

221. Henry Cutter, *DOJ Targets 'Duplicative Penalties' Through Increased Coordination*, WALL ST. J. (May 9, 2018), <https://tinyurl.com/yc3e6og1>.

222. William Garrett & Kristen Savelle, *FCPA Enforcement in Q3 Shows Results of International Collaboration*, WALL ST. J. (Oct. 24, 2017), <https://tinyurl.com/y9xpumwa> (discussing the DOJ's efforts to make international settlements of corruption cases); see also Jay Holtmeier, *Cross-Border Corruption*

over a corruption case often will not bring charges if they believe that another countries' courts have adequately resolved the matter.<sup>223</sup> Barriers still remain to this approach, particularly in countries where pre-trial settlements on corruption charges are not permitted.<sup>224</sup> Nonetheless, the clear trend is toward greater international cooperation as countries pool their resources to bring meaningful enforcement to anticorruption law worldwide.<sup>225</sup>

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*Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities*, 84 FORDHAM L. REV. 493, 508-11 (2015) (discussing recent cases of coordinated enforcement actions).

223. Rachel Brewster & Christine Dryden, *Building Multilateral Anticorruption Enforcement: Analogies between International Trade & Anti-Bribery Law*, 57 VA. J. INT'L L. 221, 255-57 (2017).

224. The inability to settle charges makes a timely and internationally coordinated settlement more difficult.

225. Arrieta, *supra* note 213; Brewster & Dryden, *supra* note 223, at 257-61.

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