



10-1-2011

Assessing the Relevancy and Efficacy of the United Nations Convention against Corruption: A Comparative Analysis

Ophelie Brunelle-Quraishi

Follow this and additional works at: <http://scholarship.law.nd.edu/ndjicl>



Part of the [International Law Commons](#)

Recommended Citation

Brunelle-Quraishi, Ophelie (2011) "Assessing the Relevancy and Efficacy of the United Nations Convention against Corruption: A Comparative Analysis," *Notre Dame Journal of International & Comparative Law*: Vol. 2: Iss. 1, Article 3.
Available at: <http://scholarship.law.nd.edu/ndjicl/vol2/iss1/3>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Journal of International & Comparative Law by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

**ASSESSING THE RELEVANCY AND EFFICACY OF THE UNITED NATIONS
CONVENTION AGAINST CORRUPTION: A COMPARATIVE ANALYSIS**

*Ophelie Brunelle-Quraishi**

ABSTRACT

The United Nations Convention Against Corruption (adopted in 2003) is the first global in-depth treaty on corruption. This work attempts to assess its significance by analyzing its provisions, in particular, those concerning the areas of prevention, criminalization, and asset recovery. It then seeks to assess its relevancy and effectiveness by giving an overview of the UNCAC's main compliance challenges, as well as other existing initiatives that tackle corruption. Two types of compliance challenges are suggested throughout this work: direct and indirect compliance challenges. Among direct compliance challenges are the treaty's language, the existence of sanctions, and its monitoring mechanism. Indirect compliance challenges on the other hand include good governance and prosecution difficulties. Although the UNCAC innovates in many respects, it is argued that it also suffers from weaknesses that cannot be overlooked, preventing it from having a real impact on States' behavior.

INTRODUCTION

"Little did we suspect that our own people . . . would be as corrupt as the apartheid regime."¹

"Corruption" stems from the Latin word *corruptus*, meaning "to break."² Although corruption is a difficult concept to define, it is widely assimilated to "the abuse of public office for private gain."³ It is argued that to even attempt to define a vast concept such as corruption will inevitably

* The author holds an LL.M. in International Law and an LL.B. from the University of Montreal. She has worked as an intern for the United Nations Office on Drugs and Crime in Vienna and is currently practicing law as a Crown Prosecutor for the *Bureau de lutte aux produits de la criminalité* (Proceeds of Crime Office, within the office of the Director of Criminal and Penal Prosecutions), prosecuting white-collar crime and organized crime cases.

¹ See ROBERT GUEST, *THE SHACKLED CONTINENT* 232 (2005) (citing *A Sense of Hope*, MAIL & GUARDIAN ONLINE (March 2, 2001), <http://madiba.mg.co.za/article/2001-03-02-a-sense-of-hope>).

² See COLIN NICHOLLS ET AL., *CORRUPTION AND MISUSE OF PUBLIC OFFICE* 1 (2006).

³ See James W. Williams & Margaret E. Beare, *The Business of Bribery: Globalization, Economic Liberalization, and the 'Problem' of Corruption*, in *CRITICAL REFLECTIONS ON TRANSNATIONAL ORGANIZED CRIME, MONEY LAUNDERING, AND CORRUPTION* 88, 117 n.3 (2003).

encounter legal and political difficulties, and that defining specific types of corruption offers less challenges.⁴

The United Nations considers this issue by offering a “multi-layered”⁵ definition of corruption in its Anti-Corruption Toolkit.⁶ According to the UN, the more common types of corruption are grand corruption, petty corruption, passive and active corruption. Whereas petty corruption often refers to an exchange of small amounts of money or minor favors (such as grease or facilitation payments), grand corruption involves high-ranking officials and is “distinguished by the scale of wealth appropriated and the seniority of public officials involved.”⁷ The following passage differentiates between both types of corruption: “The most critical difference between grand corruption and petty corruption is that the former involves the distortion or corruption of the central functions of Government, while the latter develops and exists within the context of established governance and social frameworks.”⁸

Active and passive corruption are used often to refer to the offer or acceptance of a bribe.⁹ Although corruption is universally considered reprehensible and is criminalized around the world,¹⁰ difficulties remain in the lack of a consensus in defining corrupt behavior.¹¹ Extrapolating on this argument, it is suggested that “while all cultures eschew corruption, culture remains a critical differentiator as opinions vary on what conduct falls inside and outside of that label.”¹² In other words, what may be considered an improper transaction in one country may be acceptable in another. In order to successfully create a consensus among varying state opinions, international treaties must consider the many possible definitions of corruption.¹³

⁴ See Nicholas A. Goodling, *Nigeria's Crisis of Corruption—Can the U.N. Global Programme Hope to Resolve this Dilemma?*, 36 VAND. J. TRANSNAT'L L. 997, 1001 (2003).

⁵ See *id.* at 1002.

⁶ See U.N. Office on Drugs & Crime, *The Global Programme Against Corruption, U.N. Anti-Corruption Toolkit*, 10–17, (Sept. 2004), http://www.unodc.org/documents/corruption/publications_toolkit_sep04.pdf, [hereinafter UNODC Anti-Corruption Toolkit].

⁷ Simeon A. Igbinedion, *A Critical Appraisal of the Mechanism for Prosecuting Grand Corruption Offenders Under the United Nations Convention Against Corruption*, 6 MANCHESTER J. INT'L ECON. L. 56, 58 (2009).

⁸ UNODC Anti-Corruption Toolkit, *supra* note 6, at 10–11.

⁹ See *id.* at 11.

¹⁰ See Philip M. Nichols, *The Myth of Anti-Bribery Laws as Transnational Intrusion*, 33 CORNELL INT'L L. J. 627, 629 (2000).

¹¹ See Stephen R. Salbu, *Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 420, 423 (1999); Barbara Crutchfield George & Kathleen A. Lacey, *A Coalition of Industrialized Nations, Developing Nations, Multilateral Development Banks and Non-Governmental Organizations: A Pivotal Complement to Current Anti-Corruption Initiatives*, 33 CORNELL INT'L L. J. 547, 554 (2000).

¹² Salbu, *supra* note 11, at 423; George & Lacey, *supra* note 11, at 555. The existence of this divergence is even said to have fuelled a “symbiotic relationship” often arising between developing and industrialized countries, whereby the latter profit from corrupt transactions.

¹³ See Joongi Kim & Jong Bum Kim, *Cultural Difference in the Crusade Against International Bribery: Rice-Cake Expenses In Korea and the Foreign Corrupt Practices Act*, 6 PAC. RIM L. & POL'Y J. 549, 557 (1997).

Corruption is more and more perceived as a cause of underdevelopment and poverty: “[c]orruption is now seen as a cause of poverty, not merely a consequence It is no longer possible to justify corruption and oppression on the ground that they are part of the culture.”¹⁴ It is suggested that corruption is a result of imposing western economic and political models onto developing societies: “it can be best described as a result of Western Structures being applied to cultures with very different traditions of political and economic organization.”¹⁵ Others argue that corruption prevails wherever wide discretionary powers are left in the hands of one individual, regardless of the prevalent political or social model.¹⁶ Whatever the cause of corruption may be, the importance of putting a global anti-corruption convention in place is obvious when one considers its devastating consequences.

It is argued that three particular consequences flow from corruption: “diminished economic development and growth, increased social inequality, and further distrust of government.”¹⁷ Many developing countries rely on foreign direct investment as a sure method of obtaining investment. Corruption however deters such investment by acting as an added cost or tax for investors. Government spending then becomes inefficient and public funds are often diverted away from needed areas, leading to poor infrastructure, health systems, and education systems:¹⁸ “[c]orruption hurts the poor disproportionately by diverting funds intended for development, undermining a government’s ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid.”¹⁹

The issue of corruption received unprecedented attention in recent years and is a testament to the urgency of the battle against corruption.²⁰ The priority assigned to the adoption of effective instruments to combat corruption is revealed by the following five international anti-corruption instruments created within a short period of time:²¹ The Organization for Economic Co-Operation and Development Convention on Combating Bribery of Foreign Public

¹⁴ Claes Sandgren, *Combating Corruption: The Misunderstood Role of Law*, 39 INT’L L. 717, 717 (2005).

¹⁵ Andrea D. Bontrager Unzicker, *From Corruption to Cooperation: Globalization Brings a Multilateral Agreement Against Foreign Bribery*, 7 IND. J. GLOBAL LEGAL STUD. 655, 657 (2000).

¹⁶ See Dimitri Vlassis, *The United Nations Convention Against Corruption Origins and Negotiation Process*, 66 RESOURCE MATERIAL SERIES 126, 126 (2002).

¹⁷ Patrick X. Delaney, *Transnational Corruption: Regulation Across Borders*, 47 VA. J. INT’L L. 413, 419 (2007).

¹⁸ See Vlassis, *supra* note 16, at 126.

¹⁹ U.N. Secretary-General, Statement On The Adoption By The General Assembly Of The United Nations Convention Against Corruption, (Oct. 31 2003), <http://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html> (last visited July 19 2010).

²⁰ See generally Rajesh R. Babu, *The United Nations Convention Against Corruption: A Critical Overview*, ASIAN AFR. LEGAL CONSULTATIVE ORG. 2 (2006) (providing a critical analysis on the UN Convention Against Corruption).

²¹ These instruments were adopted between 1996 and 2003.

Officials in International Business Transactions (OECD Anti-Bribery Convention),²² the Inter-American Convention Against Corruption (IACAC),²³ the African Union Convention on Preventing and Combating Corruption (AUCPCC),²⁴ the Council of Europe Criminal Law Convention on Corruption (CCLC),²⁵ and the United Nations Convention Against Transnational Organized Crime (UNCATOC).²⁶ These agreements will be analyzed alongside the United Nations Convention Against Corruption (UNCAC),²⁷ which rests at the center of our analysis.

This paper attempts to assess the relevancy and effectiveness of the UNCAC. Part I offers an overview of the measures adopted by UNCAC as well as the language used in its relevant provisions. The provisions which will be examined include preventive measures, anti-bribery measures, and the more innovative asset recovery provisions. Part II of this article illustrates two different types of challenges faced by the UNCAC: compliance challenges and existing multilateral anti-corruption treaties. While it is argued that compliance is a measure of the UNCAC's effectiveness, relevancy is measured by the need for the adopted treaty. The UNCAC cannot be qualified as relevant if it has no purpose. Giving an overview of other existing multilateral agreements meant to tackle corruption will help evaluate the need for a global anti-corruption convention. Given the lengthy task that is the fight against corruption, short-term results should not be the only measure in assessing the effectiveness of anti-corruption tools. If, however, the UNCAC is unable to sustain compliance in the long-run, then it cannot be considered an efficacious tool.

²² See Organization for Economic Co-Operation and Development [OECD], Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, *available at* http://www.oecd.org/document/20/0,3343,en_2649_34859_2017813_1_1_1_1,00.html (last visited Feb. 16, 2011) [hereinafter OECD Anti-Bribery Convention].

²³ See Organization of American States [OAS], Inter-American Convention Against Corruption, March 29 1996, *available at* <http://www.oas.org/juridico/english/treaties/b-58.html> (last visited Feb. 16, 2011) [hereinafter IACAC].

²⁴ See African Union, African Union Convention on Preventing and Combating Corruption, July 11, 2003, *available at* <http://www.unhcr.org/refworld/docid/493fe36a2.html> (last visited Feb. 16, 2011) [hereinafter AU Corruption Convention].

²⁵ See Council of Europe, Criminal Law Convention on Corruption, Jan. 27, 1999, *available at* <http://conventions.coe.int/treaty/en/treaties/html/173.htm> (last visited Feb. 16, 2011) [hereinafter CLCC].

²⁶ See United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Jan. 8, 2001) [hereinafter UNCTOC].

²⁷ See United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. Doc. A/58/4 (Nov. 21, 2003), *available at* http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf [hereinafter UNCAC].

II. Overview of the United Nations Convention against Corruption

“[*The United Nations Convention against Corruption*] is balanced, strong and pragmatic, and it offers a new framework for effective action and international cooperation.”²⁸

The battle against corruption has not only become more urgent, it has also become more obvious as the extent of its reach is growingly apparent.²⁹ Not only does corruption impoverish economies, threaten democracy and undermine the rule of law, it channels terrorism, organized crime and human trafficking.³⁰ These far reaching consequences clearly indicate that the war against corruption cannot be fought at the national level alone.³¹ Corruption is without a doubt a problem of international interest as it touches developed and developing countries alike and respects no borders.

The UNCAC is a product of this heightened consciousness of corruption as a growing and indiscriminate threat. In fact, the question of a convention against corruption was initially debated during the negotiations for the United Nations Convention Against Transnational Organized Crime (UNCTOC), adopted in November of 2000.³² It was agreed that even though corruption was inherent to the matters included in the UNCTOC and should be dealt with,³³ it was also far too complex a problem to be exhaustively covered by the UNCTOC. Limited provisions on corruption were included with the understanding that a separate treaty was to be envisaged in order to appropriately tackle the vast issue of corruption.³⁴ To that end, the General Assembly stated in 2001 that “an effective international legal instrument against corruption, independent of the [UNCTOC]”³⁵ was necessary. Member States agreed that preserving the “spirit achieved during the negotiation

²⁸ UN Secretary-General, *supra* note 19.

²⁹ In recent years, growing public interest has encouraged international organizations, private organizations and governments to commission numerous studies illustrating the effects and more concretely, the scale of the problem. *See e.g., Corruption Perception Index 1995*, TRANSPARENCY INT'L, available at http://www.transparency.org/policy_research/surveys_indices/cpi/previous_cpi (last visited Nov. 29, 2011).

³⁰ *See generally* U.N.O.D.C. Compendium of Int'l Legal Instruments on Corruption (2005), <http://www.unodc.org/documents/corruption/corruption-compendium-en.pdf>.

³¹ *See* Ndiva Kofele-Kale, *The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime Under International Law*, 34 INT'L L. 149, 152 (2000).

³² The UNCTOC entered into force on September 29, 2003.

³³ Furthermore, it was also decided that corruption constitutes a crime in which organized criminal groups engage to fund their activities and therefore could not be overlooked in the UNCTOC.

³⁴ *See* Vlassis, *supra* note 16, at 127.

³⁵ G.A. Res. 55/61, para. 7, U.N. Doc. A/RES/55/61 (Jan. 22, 2001), available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan010993.pdf>; *see also* François Vincke, *L'anti-corruption après la Convention de Mérida*, 85 REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE [REV. DR. PÉN. & CR.] 351, 363 (2005) (Fr.).

process for the UNCTOC”³⁶ and basing the negotiation process on shared objectives and views as to the scope of the future convention were all crucial in guaranteeing the success of the treaty. Following preparatory efforts, negotiations started in the first quarter of 2002 and were conducted over the course of seven negotiating sessions, between January 21, 2002 and October 1, 2003. The UNCAC was finally signed in Merida, in December of 2003.³⁷ Entering into force in December of 2005,³⁸ the UNCAC already had 140 signatures and 50 ratifications by April of the following year.

The UNCAC attempts to create global anticorruption standards and obligations. With 148 Parties, the UNCAC’s claim to universality, some argue, positions it as the leading international anti-corruption tool.³⁹ In fact, the list of parties includes States that have not yet ratified any other international treaty dealing with corruption.⁴⁰

An overview of the UNCAC and the negotiation process leading up to its adoption are preliminary steps in order to assess its relevancy and effectiveness. As is often the case, the negotiation rounds demonstrate those areas of the UNCAC deemed to be controversial, the concessions made, and the differing positions among Member States regarding the inclusion of certain offences. These issues are important in determining its effectiveness and will be highlighted throughout this overview of the UNCAC. Furthermore, a clear understanding of the UNCAC’s many provisions on corruption is necessary in order to fully assess its contribution to the existing legal anti-corruption framework.

The purpose of the UNCAC is threefold:

- (a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
- (b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;
- (c) To promote integrity, accountability and proper management of public affairs and public property.⁴¹

³⁶ Vlassis, *supra* note 16, at 128.

³⁷ See Philippa Webb, *The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?*, 8 J. INT’L ECON. L. 191, 205 (2005).

³⁸ In accordance with Article 68(1) of Resolution 58/4, UNCAC, *supra* note 27, art. 68(1), the UNCAC entered into force ninety days after the deposit of the thirtieth instrument of ratification.

³⁹ See generally Lucinda A. Low, *The United Nations Convention Against Corruption: The Globalization of Anticorruption Standards*, THE AWAKENING GIANT OF ANTICORRUPTION ENFORCEMENT, conference presentation give on May 4, 2006, at pt. I, available at <http://www.steptoe.com/assets/attachments/2599.pdf>.

⁴⁰ For example, the People’s Republic of China ratified the UNCAC on Jan. 13, 2006.

⁴¹ UNCAC, *supra* note 27, art. 1.

Four main areas can be identified in the UNCAC, each divided into separate chapters: preventive measures, criminalization, international cooperation, and asset recovery.⁴² These issues are the UNCAC's founding pillars.⁴³

This section will give a brief overview of the UNCAC's content, and try to give a preliminary assessment as to whether or not it has any "teeth"⁴⁴ by attempting to interpret the language used. As will be demonstrated, the obligations imposed upon the Member States by the UNCAC are drafted using terms that vary from highly discretionary to mandatory.

A. Preventive Measures

The "multifaceted" nature of corruption and the need to eliminate it in a sustainable manner (as opposed to a short-term fix) requires the pursuit of extensive preventive measures.⁴⁵ Where such measures are lacking, reliance is habitually placed on defined offences and sanctions in cases of violation. However, this type of approach does not serve as a strong deterrent in practice,⁴⁶ but rather as a band-aid to a bleeding wound. Prevention is therefore necessary in order to deny criminal activity its breeding ground and to cut off corruption before it can take root. The UNCAC's provisions on preventive measures are applicable to both the public and private sectors.⁴⁷ In this respect, the UNCAC goes much further than previous anti-corruption treaties, such as the AU Corruption Convention and the IACAC.⁴⁸

Among the UNCAC's preventive public sector measures is the requirement that Member States ensure the existence of independent anti-corruption bodies capable of implementing, coordinating, and overseeing anti-corruption policies:

1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:
 - (a) Implementing the policies referred to in article 5 of this

⁴² See *id.*, chs. II–V.

⁴³ See *United Nations Convention against Corruption*, UNODC UPDATE (Dec. 1, 2003), at 3, available at http://www.unodc.org/pdf/newsletter_2003-12-01_1.pdf (last visited Feb. 2, 2011).

⁴⁴ The expression refers to a form of coercive enforcement. See Press Release, U.N. News Centre, General Assembly Approves International Treaty Against Corruption, (Oct. 31, 2003); see also ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 29 (1995).

⁴⁵ See Benjamin W. Heineman & Fritz Heimann, *The Long War Against Corruption*, 85 FOREIGN AFFS. 75, 77 (2006).

⁴⁶ See Indira Carr, *The United Nations Convention on Corruption: Making a Real Difference to the Quality of Life of Millions?*, 3 MANCHESTER J. INT'L ECON. L. 3, 40 (2006).

⁴⁷ See Thomas R. Snider & Won Kidane, *Combating Corruption Through International Law in Africa: A Comparative Analysis*, 40 CORNELL INT'L L. J. 691, 718 (2007).

⁴⁸ See UNCAC, *supra* note 27, at arts. 5–14; see also Low, *supra* note 39, at pt. II.

Convention and, where appropriate, overseeing and coordinating the implementation of those policies;
(b) Increasing and disseminating knowledge about the prevention of corruption.⁴⁹

The importance of such bodies or agencies cannot be stressed enough: they are the intermediary between governments and public opinion, making their political independence that much more important. If they are neither transparent nor held accountable to the public, their impact becomes trivial. The result is similar in situations where anti-corruption agency employees dare not criticize government conduct for fear of being removed or demoted.⁵⁰ In light of these concerns, the UNCAC requires that state parties confer upon these agencies the necessary independence in order to ensure the absence of any undue influence.⁵¹

At first glance the article seems to be phrased in legally binding terms. However, the use of the stringent term “shall” is offset by the phrase “in accordance with the fundamental principles of its legal system.” In light of this clause, opinions regarding the mandatory versus permissive quality of the language are divided.⁵² It is clear that the provision contains a “qualifying clause,”⁵³ allowing for a potential escape route for Member States. What at first glance may seem as a result-oriented obligation may prove to be deceiving; the result in each case will be different and subject to each Member State’s existing legal structure, which may cause uneven implementation among parties.

The most controversial preventive public sector measure created by the UNCAC is related to the oversight of campaign finance.⁵⁴ It calls upon Member States to enhance transparency in the funding of political parties and of candidates for elected office.⁵⁵ However novel in its nature, the obligation has a discretionary quality, allowing members to “consider” taking measures with respect to political funding.⁵⁶

Other preventive public sector requirements include provisions concerning the establishment of transparent public procurement systems, public financing accountability measures,⁵⁷ merit-based systems for the

⁴⁹ UNCAC, *supra* note 27, art. 6.

⁵⁰ See Jeremy Pope & Frank Vogl, *Making Anticorruption Agencies More Effective*, 37 FIN. & DEV. 6, 6 (2000).

⁵¹ UNCAC, *supra* note 27, art. 6(2).

⁵² Indeed, some authors consider that the provision is written in mandatory terms. See Snider & Kidane, *supra* note 47, at 707. Whereas others maintain it is permissive in nature. See Webb, *supra* note 37, at 206; Low, *supra* note 39, at pt. II.

⁵³ Webb, *supra* note 37, at 206 (“These qualifying clauses provide a potential escape clause for reluctant legislators.”).

⁵⁴ See Low, *supra* note 39, at pt. II.

⁵⁵ See UNCAC, *supra* note 27, art. 7(3).

⁵⁶ See *id.* art. 7(2)–(3).

⁵⁷ See *id.* art. 9.

selection of civil servants,⁵⁸ and the application of codes of conduct for public officials.⁵⁹ The clause “in accordance with the fundamental principles of its legal system” is present in all of these articles, once again affording Member States a certain level of discretion.

Provisions relating to the judiciary, as well as the prosecution, strive to prevent “opportunities for corruption,” by using very broad language:

Bearing in mind the independence of the judiciary and its crucial role in combating corruption, *each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence*, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. *Such measures may include* rules with respect to the conduct of members of the judiciary.⁶⁰

Private sector corruption was most definitely a hot topic of discussion during the negotiations among Member States, as previous international treaties had remained silent on this matter.⁶¹ Regional instruments had however already gone in this direction, for example in Europe and Africa.⁶² Given the fact that the line between the public and private sectors is becoming increasingly blurred as a result of outsourcing and privatization, the rapid growth of the private sector in some countries,⁶³ and the growing influence of multinational corporations, it would have been negligent to refuse to criminalize corruption in both sectors.⁶⁴ The adoption of anti-corruption measures in the private sector in the UNCAC, similar to those applicable to the public sector, recognizes the gradual convergence of both sectors.⁶⁵

The preventive measures that are focused on the private sector pertain to auditing and accounting standards as well as to the enforcement of penalties (whether civil, administrative, or criminal). Although the terminology used in these provisions is broad, at least an important number of measures are proposed. However, countries are once again called upon to uphold such measures without prejudice to the fundamental principles of their national law.⁶⁶ More forceful language is used regarding tax deductions. In effect,

⁵⁸ See *id.* art. 7.

⁵⁹ See *id.* art. 8.

⁶⁰ *Id.* art. 11. (emphasis added).

⁶¹ See Webb, *supra* note 37, at 213.

⁶² See Joint Action 98/742, arts. 2–3, 1998 O.J. (L 358) 2 (EU) [hereinafter Joint Action] (addressing corruption in the private sector); AU Corruption Convention, *supra* note 24, art. 4.

⁶³ This is the case for example in China. See *Annual Report*, ASIAN DEVELOPMENT BANK (2006), www.adb.org/Documents/Reports/Annual_Report/2006/ADB-AR2006-East-Asia.PDF.

⁶⁴ See Irwin Arief, *UN Anti-Corruption Pact Raises Last-Minute Alarms*, REUTERS, June 29, 2003 (comments made by Jeremy Pope of Transparency International).

⁶⁵ See Webb, *supra* note 37, at 215.

⁶⁶ UNCAC, *supra* note 27, art. 12(1).

article 12(4) of the UNCAC requires that Member States prohibit the tax deductibility of expenses that constitute bribes.⁶⁷ Having created a number of measures aimed at preventing corruption, the UNCAC then tackles the heart of the issue with a detailed list of specific offences, some of which will be illustrated in the following chapter.

B. Criminalization and Law Enforcement

The UNCAC's chapter entitled "Criminalization and Law Enforcement" constitutes the core of the UNCAC and defines various offences as well as provisions detailing their application and enforcement.⁶⁸ This section will attempt to give an overview of some of the articles under the UNCAC as well as the measures set out to enforce them.

1. Criminalization

There is a wide array of opinions on what constitutes public corruption, and some are more inclusive or broad than others. There is indeed a lack of uniformity among international instruments regarding the scope of the crime, and the often broad or unspecific language allows for differing interpretations. This complicates harmonization efforts, as Member States will have differing interpretations of the offence, causing them to apply different legal standards and solutions. It has, however, been widely maintained that public corruption refers almost exclusively to bribery and it is viewed as the "most identified form of corruption."⁶⁹ In fact, past international anti-corruption tools have relied on bribery as the standard offence of public corruption.⁷⁰ It can be contended that bribery has over time become almost synonymous with corruption. This unfortunate outcome restricts the scope and reach of anti-corruption tools, ignoring other activities enabling personal enrichment through the misuse of authority, which therefore fall under the breadth of corruption.⁷¹

The UNCAC innovates by criminalizing corruption in its wider meaning⁷² including bribery but also other bribery-related offences. These include embezzlement,⁷³ trading in influence,⁷⁴ abuse of functions,⁷⁵ illicit

⁶⁷ See *id.* at art. 12(4).

⁶⁸ See *id.* at arts. 15–42.

⁶⁹ See Ruth Nicholls, *Corruption in the South Pacific: The Potential Impact of the UN Convention Against Corruption on Pacific Island States*, 2 N.Z. Y.B. INT'L L. 207, 225 (2005).

⁷⁰ Such as the IACAC, the OECD Anti-Bribery Convention and the CLCC.

⁷¹ See Peter J. Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 ARIZ. J. INT'L & COMP. L. 793, 796 (2001).

⁷² See Ndiva Kofele-Kale, *Change or the Illusion of Change: The War Against Official Corruption in Africa*, 38 GEO. WASH. INT'L L. REV. 697, 723 (2006).

⁷³ See UNCAC, *supra* note 27, at arts. 17, 22.

⁷⁴ See *id.* art. 18.

⁷⁵ See *id.* art. 19.

enrichment,⁷⁶ money laundering,⁷⁷ and obstruction of justice.⁷⁸

According to experts, there are three principal justifications for criminalizing bribery at the domestic and international levels.⁷⁹ The first justification offered is the need to uphold the integrity of public administration as it influences the public's view of society. Indeed, society's trust in governance mechanisms is essential in fostering the democratic society model. This "need" creates a beneficial cycle in that the public nature of the officials' job plays a role in preventing bribe taking. For instance, the risk of removal from office may in some cases prevent the acceptance of a bribe. A second justification in defense of criminalizing bribery is the need to protect the proper functioning of public administration. Although this principle sounds similar to the first, it refers to efficiency rather than integrity (whereas efficiency refers to the internal functioning of public administration, integrity refers to the appearance of proper functioning).⁸⁰ Finally, safeguarding fair competition and transparency are paramount in ensuring that government funds are not allocated to undeserving bidders.⁸¹

The most commonly accepted definition of bribery is "the abuse of public office for private gain."⁸² The term 'abuse' refers to the supply and demand sides of bribery.⁸³ The supply side concerns the offering of a bribe, whereas the demand side refers to its acceptance or request.⁸⁴ Within the UNCAC, both the bribery of national and foreign public officials is criminalized,⁸⁵ and both offences are defined using mandatory terms.⁸⁶

The specific actions that are criminalized are the offering, giving, promising, acceptance, and solicitation of any "undue advantage."⁸⁷ Unfortunately the UNCAC does not define the notion of "undue advantage." It is however agreed that it covers any type of advantage, whether material or immaterial, monetary or non-pecuniary.⁸⁸ Previous national and multilateral instruments criminalizing bribery distinguished pecuniary benefits from favors

⁷⁶ See *id.* art. 20.

⁷⁷ See *id.* art. 23.

⁷⁸ See *id.* art. 25.

⁷⁹ See Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 233, 241 (1999); Guy Stessens, *The International Fight Against Corruption*, 72 REVUE INT'L DE DROIT PENAL 892, 894 (2001) (Belg.); see also Henning, *supra* note 71, at 794 n.5.

⁸⁰ See Stephen R. Salbu, *A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery*, 33 CORNELL INT'L L. J. 657, 676 (2000).

⁸¹ See Stessens, *supra* note 79, at 895.

⁸² See Williams & Beare, *supra* note 3, at 117.

⁸³ Also commonly referred to as active and passive bribery. See Stessens, *supra* note 79, at 901.

⁸⁴ See Salbu, *supra* note 80, at 671; see also U.N.C.A.C., *supra* note 27, art. 15(a), (b).

⁸⁵ See UNCAC, *supra* note 27, at arts. 15–16.

⁸⁶ See Low, *supra* note 39, pt. III(a).

⁸⁷ UNCAC, *supra* note 27, at arts. 15–16, 21.

⁸⁸ See Stessens, *supra* note 79, at 904; Martin Polaine, *Criminalizing Bribery of National and Foreign Officials*, 8 ADB/OECD ANTI-CORRUPTION INITIATIVE FOR ASIA AND THE PACIFIC (Feb. 14, 2005), <http://www.oecd.org/dataoecd/21/1/35167663.pdf>.

and other types of advantages.⁸⁹ It can therefore be argued that the UNCAC encompasses a wider array of advantages, as it “clearly refers to something to which the recipient concerned was not entitled.”⁹⁰ The bribe must be carried out in the individual’s official capacity, “in the exercise of his or her official duties.”⁹¹ The illicit advantage need not be destined to the official, but any third party, whether a person or an entity, such as a family member or an organization of which the official is a member.

The provision criminalizing the bribery of national public officials uses strong, binding terms: the Parties to the UNCAC must adopt legislative measures targeting supply and demand bribery.⁹² An important concern with regard to the article’s application is the definition of “public official” as defined in article 2(a) of the UNCAC.⁹³ It is a semi-autonomous definition in that it defines the notion regardless of domestic law, but in addition it allows for the consideration of local definitions.⁹⁴

The definition applies to all government branches, namely the legislative, executive, administrative, and judicial branches. The officials need not be permanently employed or remunerated in order to fall under the scope of the definition.⁹⁵ Unfortunately, the UNCAC does not define the term “public enterprise,” meaning that its interpretation will be left to the discretion of each Member State.

The bribery of foreign public officials, as well as those of public international organizations, is covered in article 16 of the UNCAC.⁹⁶ The supply and demand sides of bribery have both been criminalized in respect to foreign public officials, but the two offences are not treated equally. The supply side requires criminalization using the terms “shall adopt,” whereas the demand side need only be “considered” as an offence.⁹⁷ The choice of terms reflects the influence of jurisdictional issues: the demand side, holding foreign countries accountable, is criminalized using more discretionary terminology.

Many international instruments have focused merely on the supply aspect of bribery.⁹⁸ Reasons for the sparse criminalization of passive bribery in the past have had more to do with legal issues such as enforcement,

⁸⁹ See Snider & Kidane, *supra* note 47, at 720; see e.g., Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, et seq. (1977); IACAC, *supra* note 23, at 724, available at <http://www.oas.org/juridico/english/Treaties/b-58.html>; AU Corruption Convention, *supra* note 24, art. 4.

⁹⁰ Polaine, *supra* note 88, at 8.

⁹¹ UNCAC, *supra* note 27, at arts. 15–16.

⁹² See *id.* art. 15.

⁹³ See Low, *supra* note 39, pt. III(A).

⁹⁴ See UNCAC, *supra* note 27, art. 2(a)(iii).

⁹⁵ See *id.* art. 2 (a)(i).

⁹⁶ See *id.* art. 16.

⁹⁷ See *id.* ¶¶ 1–2.

⁹⁸ See David A. Gantz, *Globalizing Sanctions Against Foreign Bribery: The Emergence of New International Legal Consensus*, 18 NW. J. INT’L L. & BUS. 457, 480 (1997). There are, however, multilateral instruments that criminalize both the supply and demand sides of bribery, such as the A.U. Corruption Convention and the IACAC.

implementation, and jurisdiction, rather than political or social considerations. It is more feasible to control the offering of a bribe through extra-territorial legislation than it is to control the actions of a foreign official:

Transnational laws that attack the demand side of bribery are feasible, but jurisdictional impediments create additional hurdles that are not applicable to supply-side legislation regulating domestic firms. Outlawing foreign officials' acceptance of bribes would require multilateral treaties that confer the necessary jurisdictional authority. However, these efforts would prove frustrating. Those nations that would participate in that kind of treaty arrangement would probably be committed to fighting corruption, making extraterritorial intervention unnecessary. In contrast, those nations that refuse to participate may lack a commitment to fight transnational corruption.⁹⁹

The "jurisdictional impediment" refers to the lack of enthusiasm on the part of States towards initiatives aimed at criminalizing the actions of another country's public officials, as this would clearly impede sovereignty.¹⁰⁰

Before the adoption of the UNCAC, it had been argued that legislators should consider drafting passive bribery provisions to complement the already existing provisions against supply-side bribery.¹⁰¹ The following explanation may help to explain why the UNCAC's provisions are not more stringent in regards to the solicitation of bribes: "corruption is like adultery: ninety percent of it is a matter of opportunity. If you eliminate the opportunities, you eliminate the crime."¹⁰² Although this may be logical in theory, a persistent demand for bribery will encourage its illicit counterpart. Indeed, many acts of bribery are initiated by public officials.¹⁰³ The reason for this is simple. The officials are the ones with the upper hand, with the position of power. It is therefore more likely that they would be the ones to broach the subject of bribes.¹⁰⁴

Similar to previous conventions,¹⁰⁵ the UNCAC's definition of what

⁹⁹ See Salbu, *supra* note 80, at 685 n.211.

¹⁰⁰ See Webb, *supra* note 37, at 228; see, e.g., Constitutive Act of the African Union, art. 4, July 11, 2000, http://www.au2002.gov.za/docs/key_oau/au_act.htm; Charter of the Organization of American States, art. 21, Dec. 13, 1951, 119 U.N.T.S. 3; U.N.C.A.C., *supra* note 27, art. 4. Sovereignty is defined as the power of a State over its territory, government, and people. It is limited by its physical borders. JEAN-MAURICE ARBOUR & GENEVIÈVE PARENT, *DROIT INTERNATIONAL PUBLIC* 265 (Yvon Blais ed., 2006).

¹⁰¹ See, e.g., Salbu, *supra* note 80, at 678; Stessens, *supra* note 79, at 903.

¹⁰² Gantz, *supra* note 98, at 480.

¹⁰³ See Salbu, *supra* note 80, at 686. The author suggests this as a speculative argument.

¹⁰⁴ Taking this further, some argue that highly corrupt officials purposely instigate a feeling of uncertainty in order to increase the offer of bribes. See Nichols, *supra* note 10, at 632.

¹⁰⁵ The OECD Anti-Bribery Convention also contains an autonomous definition of foreign public official, ensuring that the offence is prosecuted regardless of local law definitions and

constitutes a foreign public official is completely autonomous, as it does not call for Member States to consider domestic law. In comparing the definitions of “public official” and “foreign public official,” it is clear that the latter is broader because it contains no reference to national law. For instance, a foreign public official could be prosecuted in a situation where, if it were a matter of internal or national conduct, the act would not be punishable.¹⁰⁶ Such an outcome could have serious far-reaching implications for state sovereignty. However, in addition to the fact that the bribery of foreign public officials is phrased in a non-mandatory manner, it is unlikely to apply to the demand aspect of bribery because the definition disregards domestic law.¹⁰⁷ Simply put, it is difficult to conceive that a foreign public official should be punished for passive corruption when the reproached conduct is not prohibited in the official’s own country.¹⁰⁸

The meaning of “foreign public official” is stated as “any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise.”¹⁰⁹

An “official of a public international organization” is held to be “an international civil servant or any person who is authorized by such an organization to act on behalf of that organization.”¹¹⁰ This development reflects the fact that public international organizations have a significant economic impact in developing countries through development projects and humanitarian aid.¹¹¹ Other tools such as the AU Corruption Convention and the IACAC failed to include this category of individuals.¹¹²

The debate on private sector corruption during the UNCAC’s negotiation process highlighted strong opposing opinions.¹¹³ More and more public oriented activities are being transferred to the private sector through outsourcing and privatization, blurring the line between sectors. This convergence not only calls for anti-corruption measures, but may potentially create fraud or bribery opportunities in the very act of transferring substantial budgets and regulatory powers from one sector to another.¹¹⁴ Furthermore, multinational corporations have a significant economic influence that must be included in any international anti-corruption strategy if it is to be effective.¹¹⁵

providing for a lower burden of proof on the prosecuting party. *See* Stessens, *supra* note 79, at 911.

¹⁰⁶ *See id.* at 911.

¹⁰⁷ *See* UNCAC, *supra* note 27, art. 16(2).

¹⁰⁸ *See* Stessens, *supra* note 79, at 912.

¹⁰⁹ UNCAC, *supra* note 27, art. 2(b).

¹¹⁰ *Id.* art. 2(c).

¹¹¹ *See* Snider & Kidane, *supra* note 47, at 733.

¹¹² *See id.*

¹¹³ *See* Webb, *supra* note 37, at 212–13.

¹¹⁴ *Id.* at 212–13; Babu, *supra* note 20, at 15; Vlassis, *supra* note 16, at 126; Stessens, *supra* note 79, at 914.

¹¹⁵ *See* Webb, *supra* note 37, at 213.

During the UNCAC's negotiation, the EU held strong in its drive to include a private-to-private provision, backed by the Group of Latin American and Caribbean States that stated: "adopting a 'limited' approach 'would adversely affect the implementation of the future convention.'" ¹¹⁶ These States were of the opinion that targeting only the public sector would have a detrimental effect on the UNCAC's success and ability to tackle public corruption. ¹¹⁷ On the other hand, the United States' opposition to the inclusion of a purely private sector provision was forceful, despite their own existing national legislation regarding bribery in the private sector as applying to private-to-public situations. ¹¹⁸ The fear was that "extending the treaty to the private sector could create a private right of action opening the door to lawsuits in foreign courts." ¹¹⁹ A compromise was reached where private-to-private corruption was ultimately criminalized, yet not phrased in mandatory terms. ¹²⁰

In the past, the phenomenon of private corruption has been commonly dealt with through civil law proceedings, not criminal law. ¹²¹ Within the UNCAC, private sector bribery is criminalized under article 21. The obligation, however, is framed in non-binding language. ¹²²

Both the supply and demand sides are criminalized, although using non-mandatory wording. ¹²³ Nevertheless, it is believed that many countries might still adopt such measures by following the examples of the Council of Europe and the EU. ¹²⁴ Furthermore, many States that have undergone significant privatization have come to realize that bribery in the private sector should be criminalized on the same level as public sector bribery. ¹²⁵

The UNCAC also criminalizes bribery-related offences in the public and private sectors, such as trading in influence, abuse of functions or position, illicit enrichment, embezzlement, and laundering of crime proceeds. ¹²⁶

¹¹⁶ See *id.* (quoting *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption, Third Session, Vienna*, Ad Hoc Committee for the Negotiation of a Convention Against Corruption, A/AC.261/9 (2002), at 3).

¹¹⁷ See Antonio Argandoña, *The United Nations Convention Against Corruption and its Impact on International Companies* 9 (Univ. of Navarra IESE Bus. Sch., Working Paper No. 656, 2006) ("Tolerance of private corruption inevitably makes it more difficult to prevent and combat public corruption.").

¹¹⁸ The *Foreign Corrupt Practices Act of 1977* nationally criminalizes private-to-public bribes paid abroad. See *Foreign Corrupt Practices Act of 1977*, 15 U.S.C. §§ 78dd-1, et seq. (1977). See also Webb, *supra* note 37, at 213.

¹¹⁹ Arieff, *supra* note 64, at 2.

¹²⁰ See UNCAC, *supra* note 27, art. 21 (stating that each Member State "shall consider adopting" measures outlawing bribery in the private sector).

¹²¹ See Stessens, *supra* note 79, at 914.

¹²² See UNCAC, *supra* note 27, art. 21.

¹²³ See *id.* art. 21(a)-(b).

¹²⁴ See *Criminal Law Convention on Corruption (EC)*, art. 7, (Treaty No.27 2006) 7, (stating that the criminalization of commercial bribery and the CECC require the criminalization of commercial bribery). The EU has decided that the states should do the same. See *Joint Action*, *supra* note 63.

¹²⁵ See Low, *supra* note 39, at 10.

¹²⁶ See UNCAC, *supra* note 27, at arts. 18-20, 22, 23. These specific offences are not

2. *Interpretive and Law Enforcement Measures*

Along with the list of specific offences detailed above, Chapter III of the UNCAC also includes interpretive and law enforcement measures. These provisions add important practical measures that should help in promoting harmonization among national anti-corruption laws.¹²⁷

a. *General Law Enforcement Considerations*

This section groups together certain provisions of a more general nature. They refer to basic concepts of criminal law, such as sanctions, intent, and liability.

i. *Intent*

In the realm of transnational criminal activity, a major problem in prosecuting offences is the difficulty of obtaining evidence, coupled with the heavy burden of proof imposed upon the prosecution.¹²⁸ The presumption of innocence requires that the prosecuting counsel prove that the accused intended his or her actions and their consequences.¹²⁹ Within the UNCAC, intent is a required element in the offence of bribery as it is for all of the other offences created.¹³⁰

The interpretation of the fault element or *mens rea* of the crime will vary in different legal systems.¹³¹ For instance, in the common law tradition, corruption requires specific intent. In other words, the intent to commit the act is required (in this case the offering or accepting of a bribe) as well as for the action's consequences (in this case the intent to act upon the given or accepted bribe).¹³² In other jurisdictions, specific intent is not required,¹³³ lightening the burden of proof for the prosecution. In this respect, the UNCAC is the first anti-corruption convention that clearly stipulates how intent is to be construed, diminishing the debate on whether a subjective or objective test is to be

discussed in detail in this study.

¹²⁷ See Low, *supra* note 39, at 12.

¹²⁸ See Abdullahi Y. Shehu, *Combating Corruption in Nigeria: Bliss or Bluster?*, 12 J. FIN. CRIME 69, 82 (2005). Requirements relating to burden of proof also hinder the possibility of speedy trials. Furthermore, it is contended that anti-corruption efforts in most countries have been affected by evidentiary difficulties: "Among the challenges of proof are issues of how funds were stolen from the public treasury in one country and stashed in another jurisdiction with completely different legal systems."

¹²⁹ See Heba Shams, *The Fight Against Extraterritorial Corruption and the Use of Money Laundering Control*, 7 LAW & BUS. R. AM. 85, 113 (2001).

¹³⁰ See UNCAC, *supra* note 27, arts. 15–27.

¹³¹ See Ruth Nicholls, *supra* note 69, at 227.

¹³² See POLAINE, *supra* note 88, at 17. This is the case in Canada in relation to the bribery of officials. See Criminal Code of Canada R.S.C., 1985, c. C-486, art. 20 (Can.).

¹³³ See *id.* at 18. This is the case in Slovenia in relation to the crime of bribery.

applied.¹³⁴ To soften the burden of proof resting on the prosecution, the UNCAC allows for reliance on inferential evidence: “[K]nowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances.”¹³⁵ Given that the burden is slightly lightened, this provision should considerably help the prosecution of offences under the UNCAC.¹³⁶

ii. *Sanctions*

Although the UNCAC lists many offences, the sanctions which attach to each offence are far from exhaustive.¹³⁷ The UNCAC stipulates in article 30, “each Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.”¹³⁸ However, it is unclear how the concept of gravity should be construed.¹³⁹ Does it refer to the gravity of the act itself or to its consequences? The answer will vary with the interpretation given by each Member State. In fact, considering that sentencing policies vary greatly among countries, it is understandable that this area of the law has thus far not been harmonized.¹⁴⁰

One of the principle provisions dealing with sanctions has proven to be quite controversial and touches the issue of immunities.¹⁴¹ Article 30 of the UNCAC stipulates:

Each State Party *shall take* such measures as may be necessary to establish or maintain, *in accordance with its legal system and constitutional principles*, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.¹⁴²

From this particular wording, it appears that the UNCAC grants Member States a very wide discretion regarding immunities and privileges, which considering their role in hindering the prosecution of officials in the past, may prove to be a significant barrier to the removal and punishment of

¹³⁴ See Carr, *supra* note 46, at 21.

¹³⁵ See UNCAC, *supra* note 27, art. 28.

¹³⁶ See Shehu, *supra* note 128, at 83.

¹³⁷ See Carr, *supra* note 46, at 34.

¹³⁸ See UNCAC, *supra* note 27, art. 30.

¹³⁹ See Carr, *supra* note 46, at 35.

¹⁴⁰ See *id.* at 36.

¹⁴¹ See Low, *supra* note 39, at 13.

¹⁴² UNCAC, *supra* note 27, art. 30(2) (emphasis added).

corrupt officials.¹⁴³

iii. *Jurisdiction*

The UNCAC's provision on jurisdiction is of broad significance as it applies to all criminalization articles under the UNCAC, and is consistent with similar provisions adopted by previous anti-corruption agreements, such as the OECD Convention.¹⁴⁴ In regards to both conventions, parties are asked to merely consult with one another when determining the appropriate jurisdiction for prosecution.¹⁴⁵ Article 42 of the UNCAC confers jurisdiction whether the offence is committed on the state's territory, by or against a national of the state party, or against the state itself.¹⁴⁶ However, since many of the offences under the UNCAC are capable of being committed in more than one jurisdiction,¹⁴⁷ the provision may not have been adequately drafted and should have anticipated this scenario. In money laundering cases in particular, assessing the location of the crime is complex and can lead to the investigation and prosecution of a crime in two countries.

In assessing the efficacy of the UNCAC, the actual wording of the provisions that criminalize specific acts of corruption is of the utmost interest. Other aspects need to be considered, however, for they will undoubtedly impact the UNCAC's ability to eradicate corrupt practices.

b. *Investigation and Procedural Aspects*

Anti-corruption tools typically suffer from enforcement difficulties in part because of investigation shortcomings and because of the concealed nature of the crimes.¹⁴⁸ The successful prosecution of cases depends highly on leads provided by informants (sometimes referred to as whistleblowers) who—because of the sensitive nature of the information they possess—are often threatened and intimidated.¹⁴⁹ Unfortunately, the UNCAC must face these difficulties, and to that end it has anticipated the need for measures to protect witnesses, experts, victims, and reporting individuals, thus aiding them in coming forward with information.¹⁵⁰ States are called upon to either “consider incorporating”¹⁵¹ into their domestic legislation appropriate measures to protect reporting persons or to establish measures “in accordance with [their] domestic legal system and within [their] means.”¹⁵² The reason for the

¹⁴³ See Low, *supra* note 39, at 13.

¹⁴⁴ See *id.* at 15.

¹⁴⁵ See OECD Anti-Bribery Convention, *supra* note 22, art.4.

¹⁴⁶ See UNCAC, *supra* note 27, art. 42, paras. 1–2.

¹⁴⁷ See Low, *supra* note 39, at 15.

¹⁴⁸ See Carr, *supra* note 46, at 27.

¹⁴⁹ See *id.* at 27.

¹⁵⁰ See UNCAC, *supra* note 27, arts. 32–33.

¹⁵¹ *Id.* art. 33.

¹⁵² *Id.* art. 32.

discretionary language is perhaps explained by the costs and resources needed to implement such measures.¹⁵³ This is particularly so in countries facing high levels of corruption, therefore needing to provide for the protection of more individuals.¹⁵⁴ In addition, these countries are most often some of the poorer developing countries.¹⁵⁵

Another measure that may prove to be costly for Member States concerns the obligation to establish enforcement bodies. In order to ensure that Member States can effectively prosecute and investigate offences under the UNCAC, Member States must establish independent and specialized anti-corruption enforcement bodies, subject to the fundamental principles of their legal systems. Emphasis is put on the importance of independence and the need for cooperation between law enforcement agencies.¹⁵⁶ The degree of autonomy conferred upon such authorities is however left to the discretion of each state, to be determined through relevant national legislation.¹⁵⁷ It is the author's opinion that this provision was placed in the UNCAC's chapter on criminalization and law enforcement despite the fact that it can also be qualified as a preventive provision.¹⁵⁸

Parties to the UNCAC must take measures in order to strengthen cooperation between public or government officials and prosecuting authorities, in accordance with Member States' domestic laws.¹⁵⁹ Such measures include but are not limited to providing enforcement authorities with requested information and to inform them when they have reasonable grounds to believe that an offence has been committed.¹⁶⁰ The same types of measures are called for between national authorities and the private sector, with particular emphasis on financial institutions.¹⁶¹ These provisions encourage the transmission of relevant information in regard to the commission of offences under the UNCAC.

¹⁵³ See Carr, *supra* note 46, at 27.

¹⁵⁴ This assumption is based on the premise that a higher number of corruption cases causes a higher number of informants. This is undoubtedly a simple reasoning because it does not factor in environmental considerations such as social pressure, culture, and poverty.

¹⁵⁵ In 2007, Transparency International's yearly Corruption Perception Index Report assessed that the countries facing the 10 lowest scores were the following: Somalia, Myanmar, Iraq, Haiti, Uzbekistan, Tonga, Sudan, Chad, Afghanistan, and Laos. See *Corruption Perception Index Report*, TRANSPARENCY INT'L http://www.transparency.org/policy_research/surveys_indices/cpi/2007 (last visited Feb. 2 2011).

¹⁵⁶ See UNCAC, *supra* note 27, art. 38.

¹⁵⁷ See Snider & Kidane, *supra* note 47, at 736.

¹⁵⁸ See UNCAC, *supra* note 27, art. 36.

¹⁵⁹ See *id.* art. 38.

¹⁶⁰ See *id.*

¹⁶¹ See *id.* art. 39.

c. *Consequences of Corruption and Private Rights of Action*

The UNCAC's measures on civil liability and damages are far reaching,¹⁶² and will undoubtedly enhance deterrence by creating additional weapons: civil and administrative sanctions. A possible outcome of the implementation of these provisions is a gradual privatization of law enforcement: "[t]hese two articles thus signal a resolve on the part of negotiators of the UN Convention to unleash the power of private civil litigation and collateral legal and administrative sanctions on persons that commit corrupt practices."¹⁶³ Moreover, recalling the difficulties associated with the investigation and prosecution of offences, the evidence obtained from civil trials could be used in ongoing investigations or in future criminal trials.¹⁶⁴

Article 35 explicitly establishes a private right of action, using discretionary terms:

*Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.*¹⁶⁵

The language used in the provision seems to give considerable latitude to countries in determining the parameters of a private right of action.

The UNCAC also contains a separate provision allowing Member States to "consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument . . ." ¹⁶⁶ Article 34 allows Member States to take measures allowing them to address the consequences of corruption. Although implementation is subject to the fundamental principles of the State's domestic law, its inclusion is significant since this type of provision was not previously part of anti-corruption treaties.¹⁶⁷ Furthermore, the provision is not limited to convicted offenders under the UNCAC, which allows it to apply to a wider array of situations.¹⁶⁸ Close attention should therefore be paid as to how Member States will implement this measure: "Companies that do business abroad or at home through government contracts, concessions, licenses and permits should be aware that this provision may prompt more widespread revocation of rights

¹⁶² See Low, *supra* note 39, at 15.

¹⁶³ *Id.* at 17.

¹⁶⁴ See *id.*

¹⁶⁵ UNCAC, *supra* note 27, art. 35 (emphasis added).

¹⁶⁶ *Id.* art. 34.

¹⁶⁷ See Low, *supra* note 39, at 15–16.

¹⁶⁸ See *id.* at 16.

than has historically been the case.”¹⁶⁹

C. Asset Recovery

The UNCAC is seen as revolutionizing the realm of asset recovery in the field of international law.¹⁷⁰ The importance of the UNCAC’s provisions pertaining to asset recovery, however, can only be properly understood when considered against past international initiatives aimed at curtailing corruption and the looting of funds. The International Monetary Fund estimates that the equivalent of approximately two percent of the world’s gross domestic product (up to US \$1.8 trillion) is laundered on a yearly basis and that a “significant portion of that activity involves funds derived from corruption.”¹⁷¹

An interesting example of the severity of the problem is the case of Nigeria, which has been flagged for its high profile corruption cases.¹⁷² Of the estimated \$400 billion that has been looted from the African continent, about a quarter is said to originate from Nigeria, a country in which an important majority of the population lives on less than a dollar a day.¹⁷³ Another example is that of Indonesia, where Mohamed Suharto (President for almost thirty years and recently deceased) allegedly stole up to \$35 billion from his own people.¹⁷⁴

Considering the staggering amount of funds lost, it is surprising that only

¹⁶⁹ *Id.*

¹⁷⁰ See Saliou Bah, *La restitution des avoirs issus de la corruption dans les conventions anti-corruption internationales: une avancée conceptuelle et normative à la portée pratique limitée*, 1 REVUE DE DROIT DES AFFAIRES INTERNATIONALES [REV. DR. AFF. INT’L] 15, 16 (2010) (Fr.).

¹⁷¹ *Financial System Abuse, Financial Crime and Money Laundering—Background Paper*, INTERNATIONAL MONETARY FUND, 10 (Feb. 2001), available at <http://www.imf.org/external/np/ml/2001/eng/021201.htm> (last visited Feb. 13, 2011), (citing *Global Study on the Transfer of Funds of Illicit Origin, Especially Funds Derived From Acts of Corruption, Ad Hoc Committee for the Negotiation of a Convention Against Corruption*, 4th Session, Agenda item 3, U.N. Doc. A/AC 261/12 (2002) at 3 [hereinafter *Global Study*]); see also Bah, *supra* note 170, at 16–17 (containing other staggering amounts).

¹⁷² See GUEST, *supra* note 1, at 121. See also Guillermo Jorge, *Notes on Asset Recovery in the United Nations Convention Against Corruption* (2003) available at www.abanet.org/intlaw/hubs/programs/Annual0316.03-16.06.pdf at 2 (last visited June 15, 2010); Ige Bola, *Abacha et le banquiers: la lumière sur la conspiration*, 2 FORUM SUR LE CRIME ET LA SOCIÉTÉ [FOR. CR. & SOC.] 123, 130 (2002) (Fr.). Sani Abacha, Nigeria’s late military and political leader and *de facto* President from 1993 to 1998, was named fourth most corrupt leader (in recent history) by Transparency International in 2004 and is estimated to have stolen up to five billion dollars. See TRANSPARENCY INT’L, *supra* note 154. Records have shown that he and his associates stole over \$1 million for each day he was in office. Such cases reveal the disparities between different countries’ legal systems for dealing with asset recovery. To mention but a few, such disparities include the legal value of the evidence obtained abroad, privileges and immunities applicable to public officials, and measures for the immobilization of assets.

¹⁷³ See *Global Study*, *supra* note 169, at 4

¹⁷⁴ See J. EDGARDO CAMPOS & SANJAY PRAHAN, *THE MANY FACES OF CORRUPTION* 390 (World Bank 2007).

recently, clauses on the recovery of stolen assets have been included in a multilateral treaty dealing with corruption. Indeed, while previously adopted regional and multilateral anti-corruption tools provide for the seizing and freezing of assets, they do not extensively cover the issue of asset recovery.¹⁷⁵ The UNCAC therefore enters new territory in this respect, being the first anti-corruption treaty to tackle the issue.¹⁷⁶ Veering away from a penalty approach to criminal law, the UNCAC targets a more profit-oriented perspective in its attempt to create mechanisms to recover stolen assets.¹⁷⁷

The draft resolution for the negotiation of the UNCAC originally proposed that a separate instrument be negotiated on the subject of the repatriation of stolen funds. As a result of negotiations, however, it was decided that both draft resolutions would be combined into one, placing asset recovery at the very center of the UNCAC.¹⁷⁸ During the first negotiation session, representatives from the Group of 77,¹⁷⁹ the European Union and other Latin American and African States insisted that the UNCAC should address the issue of asset recovery. They stressed the need to develop measures and mechanisms for the recovery of stolen funds and property. Furthermore, several representatives insisted on the highly complex nature of these issues, referring to the tracing of funds and the identification of their rightful owners.¹⁸⁰

To that effect, an informative seminar on the return of illicit funds was proposed by Peru and supported by Spain to cover practical and legal issues surrounding the implications of cases involving stolen funds and their return.¹⁸¹ At the second negotiation session held in Vienna in June of 2002, the Chairman of the Ad Hoc Committee for the negotiation of the UNCAC stated the following: “[T]he question of asset recovery is one of the fundamental aspects of the [UNCAC] and would also serve as an indicator of the political will to join forces in order to protect the common good.”¹⁸² It was the general

¹⁷⁵ See Carr, *supra* note 46, at 29 (referencing the AU and OAS conventions on corruption.)

¹⁷⁶ See Low, *supra* note 39, at 19.

¹⁷⁷ See Jorge, *supra* note 172, at 4.

¹⁷⁸ Vlassis, *supra* note 16, at 128.

¹⁷⁹ The Group of 77 was established on June 15, 1964 by developing countries signatories to the Joint Declaration of the Seventy-Seven Countries. Among its goals is to provide “the means for the countries of the South to articulate and promote their collective economic interests and enhance their joint negotiating capacity on all major international economic issues within the United Nations system, and promote South-South cooperation for development.” See THE GROUP OF 77 AT THE UNITED NATIONS, <http://www.g77.org/doc/> (last visited Feb. 16 2011).

¹⁸⁰ See REPORT OF THE AD HOC COMMITTEE FOR THE NEGOTIATION OF A CONVENTION AGAINST CORRUPTION, U.N.O.D.C., 2d Sess., A/AC.261/4 (2002) at 9 [hereinafter ANTI-CORRUPTION REPORT, 2d Sess.].

¹⁸¹ See Paper Submitted by Spain Concerning the Seminar on Return of Illicit Funds as Proposed by Peru, Anti-Corruption Rep., 1st Sess., A/AC.261/CRP1 (2002) at 2.

¹⁸² See REPORT OF THE AD HOC COMMITTEE FOR THE NEGOTIATION OF A CONVENTION AGAINST CORRUPTION, U.N.O.D.C., 1st Sess., A/AC.261/7 (2002) [hereinafter ANTI-

opinion that these matters would be quite difficult to negotiate, given the complexities involved in investigating and recovering stolen assets, as well as problems related to the gathering of evidence, international cooperation, issues of cost, and jurisdiction.¹⁸³

The asset recovery chapter received important support from both developing and developed countries:

This is a particularly important issue for many developing countries where high-level corruption has plundered the national wealth, and where resources are badly needed for reconstruction and the rehabilitation of societies under new governments. Reaching agreement on this chapter has involved intensive negotiations, as the needs of countries seeking the illicit assets had to be reconciled with the legal and procedural safeguards of the countries whose assistance is sought.¹⁸⁴

Many countries submitted proposals with specific sections addressing the proceeds of corruption. The United States found the subject so pressing that one of its draft proposals concerned only the redrafting of the asset recovery provisions,¹⁸⁵ whereas Austria and the Netherlands submitted revised texts on virtually every provision of the UNCAC.¹⁸⁶ Canada, however, qualified the discussion on asset recovery as unsatisfactory, arguing that the concept itself was too broad and its consequences far-reaching, and that it covered a multitude of legal situations, some more complex than others.¹⁸⁷ Indeed, recovering stolen assets in an international setting can be a highly complex task, necessitating the availability of funds, technical cooperation, and experts from many countries (to name a few, experts in accounting, criminal law, civil

CORRUPTION REPORT, 1st Sess.]; *see also* REPORT OF THE CONFERENCE OF THE STATES PARTIES TO THE UNITED NATIONS CONVENTION AGAINST CORRUPTION, U.N.O.D.C., 3d Sess., A/AC.261/9 (2002), at 4, para. 11 [hereinafter ANTI-CORRUPTION REPORT, 3d Sess.]. *See also* Philippa Webb, *supra* note 37, at 208.

¹⁸³ *See* ANTI-CORRUPTION REPORT, 1st Sess., *supra* note 182, at 3.

¹⁸⁴ Press Release, UNODC., *Consensus Reached On U.N.C.A.C.: High-Level Signing Conference Planned for December in Mérida, Mexico*, U.N. Press Release, UNIS/CP/447, (Oct. 2, 2003). After all, developing countries have been and still are victims of large scale corruption, and are in need of recovering funds stolen from them.

¹⁸⁵ Informal Preparatory Meeting of the Ad Hoc Comm. for the Negotiation of a Convention Against Corruption, Proposals and Contributions Received from Gov'ts: U.S. Proposed Chapter on Recovery of Assets, U.N. Doc. A/AC.261/IPM /19 (Dec. 3, 2001); Lisa M. Landmeier et al., *Anti-Corruption International Legal Developments*, 36 INT'L LAW. 589, 590 (2002).

¹⁸⁶ *See* Informal Preparatory Meeting of the Ad Hoc Comm. for the Negotiation of a Convention Against Corruption, Proposals and Contributions Received from Gov'ts: Austria and Neth., U.N. Doc. A/AC.261/IPM /4 (Nov. 2, 2001).

¹⁸⁷ *See* Informal Preparatory Meeting of the Ad Hoc Comm. for the Negotiation of a Convention Against Corruption, Proposals and Contributions Received from Gov'ts: Can., U.N. Doc. A/AC.261/IPM /27 (Dec. 7, 2001); Landmeier et al., *supra* note 182, at 590.

law, and money laundering).¹⁸⁸

Although developed and developing countries had diverging opinions about the content and scope of the asset recovery provisions, the need for some type of measure to be included was not a matter of debate. Although solidarity can sometimes give way to differing interests,¹⁸⁹ the contrary is also true: When a problem or issue affects many, efforts tend to coalesce.

In its final version, not only is asset recovery explicitly stated as a “fundamental principle” of the UNCAC, but Member States are required to “afford one another the widest measure of cooperation and assistance in this regard.”¹⁹⁰ A whole chapter is dedicated to the recovery of stolen assets as well as other measures dealing with money laundering and prevention.¹⁹¹ As set out in the UNCAC, the recovery of assets must be preceded by three stages: investigation, prevention, and confiscation.¹⁹² The prevention provisions are unique to the UNCAC and are written using mandatory language.¹⁹³ Prevention refers to the freezing and seizing of assets to prevent their transfer into unlawful hands.¹⁹⁴ For instance, article 52, focusing primarily on the prevention and detection of the transfer of proceeds of crime, requires Member States to take measures to ensure that financial institutions verify their customers’ identity and maintain client records in a multitude of situations. The provision’s overall goal is to detect suspicious transactions and address large-scale corruption carried out by high-ranking officials.¹⁹⁵ Furthermore, disclosure systems for public officials, although discretionary in nature, are provided for to enable information sharing among states during investigations.¹⁹⁶

As for recovery of assets, the UNCAC covers direct and indirect recovery.¹⁹⁷ The direct recovery provision requires that States take measures to afford Member States a civil right of action to “establish title to or ownership of property,”¹⁹⁸ acquired through corrupt behavior and later recovered, in accordance with their domestic law.¹⁹⁹ This provision not only helps

¹⁸⁸ See Bah, *supra* note 170, at 28.

¹⁸⁹ See ARBOUR & PARENT, *supra* note 100, at 89.

¹⁹⁰ UNCAC, *supra* note 27, art. 51. The reallocation of assets toward development is not the only positive outcome of asset recovery, as “the process of accountability can [also] have positive spillover effects in terms of generating a climate of rule of law.” Mark V. Vlasic & Jenae N. Noell, *Fighting Corruption to Improve Global Security: An Analysis of International Asset Recovery Systems*, 5 YALE J. INT’L AFFS. 106, 111 (2010).

¹⁹¹ See UNCAC, *supra* note 27, chs. V–VI.

¹⁹² See Jorge, *supra* note 172, at 5.

¹⁹³ See Snider & Kidane, *supra* note 47, at 742.

¹⁹⁴ See Jorge, *supra* note 172, at 5.

¹⁹⁵ See UNCAC, *supra* note 27, art. 52(1), (3). Such measures are commonly referred to as “knowing assistance” measures within the financial sector. See NICHOLLS, *supra* note 2, at 247.

¹⁹⁶ See UNCAC, *supra* note 27, art. 52(5).

¹⁹⁷ See *id.* art. 53, 54; Snider & Kidane, *supra* note 47, at 742.

¹⁹⁸ UNCAC, *supra* note 27, art. 53(a).

¹⁹⁹ See *id.*

harmonize civil and criminal proceedings, it also offers plaintiffs an important advantage: that of a lower burden of proof (preponderance of probability as opposed to beyond all reasonable doubt).²⁰⁰ Indirect measures include the recognition of confiscation orders prepared by other States,²⁰¹ and measures allowing for the freezing and seizure of property pending investigation.²⁰² Articles 55 through 57 pertain to confiscation through international cooperation, seizure and the return and disposal of assets. While these provisions can be considered as an expansion of earlier international anti-corruption tools, article 57 merits special attention.²⁰³ The disposal of proceeds obtained through corruption was widely discussed, mainly regarding whether the requesting State or the confiscating State should be lawfully compensated on the basis of either a surviving property right or on compensation for malfeasance. The provision provides an answer to this dilemma by setting out: “a series of provisions governing return of confiscated proceeds and other property which generally prefers return to the requesting State Party, but sets stronger rules in cases where the property interest of that state party is the strongest.”²⁰⁴ Article 31 of the UNCAC, which is included in the “Criminalization and Law Enforcement” chapter, also deals with the confiscation of the proceeds of crime, as well as their freezing and seizure.

While these provisions were always necessary to guarantee the effectiveness of the UNCAC, their inclusion and acceptance by Member States represent a significant breakthrough and was never a foregone conclusion. Because of the UNCAC’s universal quality, it may prove to have an important advantage over regional anti-corruption tools in respect to asset recovery, especially when considering that States are not necessarily members of the same regional initiatives.²⁰⁵ Although previous regional agreements, such as the AU Corruption Convention, the IACAC, and the Council of Europe’s Criminal Law Convention on Corruption, do address the question of asset recovery, none offer the legal framework contained in the UNCAC.²⁰⁶

One may observe the different levels of norms contained in the UNCAC. The mixture of strict and discretionary language is not unusual within international agreements and is not a weakness per se.²⁰⁷ The following chapter attempts to assess what issues may affect the UNCAC’s effectiveness from a legal standpoint. In the last chapter we will offer an overview of the

²⁰⁰ See Philippa Webb, *supra* note 37, at 211.

²⁰¹ See UNCAC, *supra* note 27, art. 54(1)(a).

²⁰² See *id.* art. 54(2); Snider & Kidane, *supra* note 47, at 743.

²⁰³ Previous international and multilateral anticorruption tools, such as the IACAC, the AU Corruption Convention and the OECD Anti-Bribery Convention, did not contain such detailed provisions pertaining to the recovery of assets.

²⁰⁴ UNODC Anti-Corruption Toolkit, *supra* note 6, at 582.

²⁰⁵ See Snider & Kidane, *supra* note 47, at 742.

²⁰⁶ See Bah, *supra* note 170, at 24.

²⁰⁷ See Peter M. Haas, *Choosing to Comply: Theorizing from International Relations and Comparative Politics*, in COMMITMENT AND COMPLIANCE, COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 70 (Dinah Shelton, ed., 2000).

existing multilateral anti-corruption framework in order to assess the need for further anti-corruption legislation, and therefore the UNCAC's relevancy.

III. Barriers to the Effectiveness and Relevancy of the UNCAC

The title of this chapter refers to effectiveness and relevancy. In this article, it is suggested that effectiveness is measured by results, both on the long and short terms. A high level of compliance will yield positive results, and to ensure compliance, a legal tool must be enforceable: "an agreement is likely to be more effective the greater the degree to which its parties comply with its obligations."²⁰⁸

Compliance may be defined as "the degree to which a State behaves in a manner that conforms to its legal obligations."²⁰⁹ Compliance, even where strict enforcement exists, is, however, never perfect. Taken on a smaller scale, there are in each society individuals who break the law. There are other factors which will influence compliance, such as a government's monetary and human resource capacity, the law's content and language, cooperation among institutions, and so on. Effectiveness, however, cannot be measured simply by assessing the goals achieved. The bigger picture must also be taken into consideration; simply put, is the overall situation better than it would have been without the Treaty?²¹⁰ Moreover, one cannot expect a legal tool to completely eradicate corruption. Realistically, the desired result should be a change in the behavior of States.²¹¹

A. Barrier to the UNCAC's Effectiveness: Compliance Challenges

*"[A]greements have value only if the promises exchanged serve to bind the parties. The agreements are, therefore, more valuable if they can bind the parties more effectively."*²¹²

Enforcement is a major hurdle in international law. It is generally very difficult to convince a group of nations to agree to have their territorial rights diminished, even if the long-term outcome would be beneficial to all parties. Multilateral treaties have always been faced with this difficulty, as they are a product of their negotiators' will. Once countries do decide to take part in such

²⁰⁸ Brett Frischmann, *A Dynamic Institutional Theory of International Law*, 51 *BUFF. L. REV.* 679, 693 (2003) (quoting John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 *ECOLOGY L.Q.* 1, 4, n.1 (2001)).

²⁰⁹ *Id.* at 693.

²¹⁰ See Shirley V. Scott, *The Political Interpretation of Multilateral Treaties: Reconciling Text With Political Reality*, 5 *N.Z. J. POL. INT'L L.* 103, 107 (2007).

²¹¹ See Giorleny D. Altamirano, *The Impact of the Inter-American Convention Against Corruption*, 38 *U. MIAMI INTER-AM. L. REV.* 487, 508 (2007).

²¹² Andrew T. Guzman, *The Design of International Agreements*, 16 *EUR. J. INT'L L.* 579, 580 (2005).

a process, not even the largest or most influential States manage to have all of their demands met. The process is one of compromise and that is precisely what enables treaties to accommodate diverging interests. Enforcement problems are often the result of the accommodation of broad scopes of interests during the negotiations since they often create obligations that are less strict and more loosely defined.²¹³

Many factors and causes of State disobedience have been identified by academics.²¹⁴ Although closely linked, each study offers a particular insight and a different approach. To better understand the challenges to compliance, three theories will be summarily described in the following paragraphs.

The first theory, illustrated by Haas, endeavors to predict the probability of compliance with international legal tools.²¹⁵ Among the developed factors are State capacity (political and technical), national concern, institutional constraints on a domestic level, and the availability of monitoring mechanisms.²¹⁶ No mention is made of the treaty's language or of issues relating to jurisdiction. In fact, apart from monitoring mechanisms, the variables are not particularly dependent on a treaty's content and are rather focused on extraneous circumstances, such as the Member States' economic, political, and social situation.

Two other authors, Chayes and Chayes, identify three variables that can explain why treaty obligations are violated: Ambiguities in the language of the treaty, limitations of the Member State's capacity, and the "temporal dimension" of the social and political changes contemplated by international conventions.²¹⁷ This last variable refers to the lapse in time many agreements face from the moment they are adopted to their implementation. These elements may be considered causes but are sometimes used as justifications for infringements.²¹⁸ Thus, Chayes and Chayes' theory gives significant weight to variables flowing from the treaty itself and unlike the first theory, lists treaty language as a cause for non-compliance. These factors, however, also consider external elements to the UNCAC. Interestingly, they do not consider the absence of a monitoring mechanism to be a threat to compliance.

Lastly, Benvenisti's study, in our view, is the most detailed and relevant theory to the UNCAC. Eleven factors affecting compliance are enumerated, some of which are of particular interest.²¹⁹ For instance, the number of parties to an agreement: the higher the number, the more difficult the monitoring. This is clearly a problem within the UNCAC: because of the high number of Member States, a monitoring mechanism was negotiated much

²¹³ See CHAYES & CHAYES, *supra* note 44, at 7.

²¹⁴ See EYAL BENVENISTI & MOSHE HIRSCH, *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION* (Cambridge Univ. Press 2004); *see also* Haas, *supra* note 207, at 72.

²¹⁵ See Haas, *supra* note 207, at 72.

²¹⁶ See *id.*, at 70.

²¹⁷ See CHAYES & CHAYES, *supra* note 44, at 10.

²¹⁸ See *id.*

²¹⁹ See BENVENISTI & HIRSCH, *supra* note 214, at 141. Not all factors are discussed here.

later in November of 2009.²²⁰ Another element is the participation of a higher number of countries in the agreement: the rationale is that the more actors participate, the more others will feel compelled to join.²²¹ There is, however, a downside: the more members there are to an agreement, the more difficult it is to monitor and to find common ground. The Member States' behavior before engaging in negotiations is also a factor.²²² On this point, it is our view that if a Member State willingly takes part in an international agreement, modifications in behavior, however small they might turn out to be, are not only reasonable, but should be expected. Capacity is another element of importance and is also a variable figuring in Benvenisti's list.²²³ This refers to a government's financial capacity and its human resources, which vary from country to country. Furthermore, it is essential that leading countries take part in the negotiation of a convention, as they tend to exert greater influence upon others.²²⁴ These factors relate to the treaty's membership, and not necessarily to the treaty itself. Benvenisti, however, does include criteria relating to an agreement's monitoring mechanism, stating that "international secretariats to the agreements play important roles in promoting compliance."²²⁵

These theories seem to share the opinion that a treaty's content does not, in itself, heighten compliance levels among Member States: The social and political circumstances of the Member States involved also play an important part.²²⁶ With respect for this opinion, important treaty or content-related elements do have a considerable role in ensuring compliance. These elements include, but are not limited to the treaty's language, its monitoring mechanism, and its sanctions. These criteria are discussed in the following paragraphs.

1. Direct Compliance Challenges

The UNCAC's language is important in determining its enforceability. Its monitoring mechanism and sanctions (or lack thereof) are also pivotal in this respect. We refer to these factors as "direct compliance challenges," as these challenges are internal to the UNCAC: They exist as direct consequences of the treaty's wording.

²²⁰ This factor is number 1 of the 11 factors. *See id.* The UNCAC's Members met in November of 2009 in Doha, Qatar, to negotiate a review mechanism, during the Conference of the States Parties' Third Session.

²²¹ *See* BENVENISTI & HIRSCH, *supra* note 214, at 143.

²²² *See id.* Number 2 out of 11.

²²³ *See id.* Number 3 out of 11.

²²⁴ *See id.* at 144. Numbers 10 & 11.

²²⁵ *Id.* at 143. Number 9 out of 11.

²²⁶ For instance, Guzman suggests that given certain conditions, a state might choose to violate its obligations, and gives the example of a nation under conditions of "great national crisis." *See* Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1862 (2002). Furthermore, a State's technical and financial capacity must be taken into consideration. *See* ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 184 (2000).

a. *The Treaty's Language*

Compliance can be defined as “an actor’s behavior that conforms to a treaty’s explicit rules.”²²⁷ It assesses whether the participants’ actions conform to the treaty. Some experts argue that with regard to most international agreements, governments negotiate and ratify treaties that they are certain they can comply with without having to alter their current legislation: “A situation of high compliance that lacks implementing efforts occurs when the [treaty] merely codifies the current behavior of a Member State. In such a case, compliance can be automatic.”²²⁸ This passage clearly illustrates that the utility of the treaty may be lost. *A contrario*, the impact of a treaty is palpable when it breaks new ground by codifying controversial obligations. There is no question that the UNCAC covers a wide array of requirements that are sure to necessitate active implementation on the part of many signatories. Problems may arise, however, in regards to its quality as an enforceable treaty, as well as the preciseness of the language used to promote effective implementation. These potential obstacles will be assessed in the present section.

The consensus of the negotiators on the content of the treaty is reflected in its text, which “constitutes the authentic written expression of their wills.”²²⁹ The following passage illustrates difficulties that can arise from international treaty interpretation:

For multilateral treaties, the greater the number of negotiating states, the greater is the need for imaginative and subtle drafting to satisfy competing interests. The process inevitably produces much wording which is unclear or ambiguous. Despite the care lavished on drafting, and accumulated experience, there is no treaty which cannot raise some question of interpretation.²³⁰

This is clearly the case of the UNCAC as it encompasses a large and diverse number of Member States whose interests are divergent. Certainly, when attempting to resolve ambiguities flowing from the text of the UNCAC, the actual words themselves, the context, purpose and goal of the UNCAC must all be considered.²³¹ Indeed, Article 31 of the Vienna Convention on the Law of Treaties states that treaties “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”²³² If the application of this provision leaves the meaning unclear, Article 32 can be applied, giving

²²⁷ Altamirano, *supra* note 211, at 508.

²²⁸ *Id.*

²²⁹ CARLOS FERNANDEZ DE CASADEVANTE Y ROMANI, SOVEREIGNTY AND INTERPRETATION OF INTERNATIONAL NORMS 37 (2007).

²³⁰ *See* AUST, *supra* note 221, at 184.

²³¹ *See id.* at 187.

²³² UNCAC, *supra* note 27, art. 31.

additional means of interpretation, namely reference to preparatory works of the treaty and the circumstances surrounding its conclusion.²³³

The effectiveness of the UNCAC may face challenges partly because it attempts to prevent and punish corrupt behavior. Interpretation difficulties tend to arise in obligations meant to alter and prevent criminal behavior and most obligations within treaties are meant to affect behavior in some form.²³⁴

The concept of corruption creates enforcement difficulties because of the lack of consensus for its legal definition.²³⁵ Indeed, experts qualify the concept as an “expanding and malleable concept” varying over time and societies.²³⁶ Because of this, the UNCAC’s negotiators agreed that the UNCAC should not explicitly define corruption, but rather identify the specific behaviour classified as criminal misconduct.²³⁷ When reading the UNCAC’s Preamble, one may conclude that the UNCAC’s reach is meant to be vast.²³⁸

Ambiguity, however, tends to produce grey zones within which it becomes difficult to assess what behavior is allowed or prohibited.²³⁹ This is for example the case of facilitation payments under the UNCAC:²⁴⁰ It is unclear whether such transactions are prohibited or not.²⁴¹ Considered “bribery loopholes,”²⁴² Argandona defines facilitation payments as follows: “[u]nlike the worst forms of corruption, facilitating payments do not usually involve an outright injustice on the part of the payer, as she is entitled to what she requests, but they may lead to a certain moral callousness.”²⁴³ Such payments are therefore acceptable, in theory, for tasks that would be accomplished with or without the payment.²⁴⁴

²³³ It should be noted that these general rules of interpretation apply only in cases of interpretative dispute, and where a third party intervenes. See FERNANDEZ DE CASADEVANTE Y ROMANI, *supra* note 229, at 45. Furthermore, article 33 provides for the situation whereby the meaning of a treaty differs in different languages. If the use of articles 31 and 32 do not solve the issue, the parties should apply the “meaning which best reconciles the texts, having regard to the object and purpose of the treaty.” UNCAC, *supra* note 27, art. 33.

²³⁴ See FERNANDEZ DE CASADEVANTE Y ROMANI, *supra* note 229, at 41 n.15 (giving civil liability requirements as an example).

²³⁵ See *id.* at 81.

²³⁶ See Henning, *supra* note 71, at 805.

²³⁷ See FERNANDEZ DE CASADEVANTE Y ROMANI, *supra* note 229, at 70.

²³⁸ A treaty’s preamble may be used as an interpretation tool in order to assess its objectives. See Scott, *supra* note 210, at 109–10 (“[T]he context for the purpose of the interpretation of a treaty shall comprise the whole treaty text, including its preamble and annexes.”).

²³⁹ See CHAYES & CHAYES, *supra* note 44, at 10.

²⁴⁰ These are a form of petty corruption. For a comprehensive overview of facilitation payments, see Low, *supra* note 39.

²⁴¹ See Ruth Nicholls, *supra* note 69, at 228.

²⁴² Ethics Resource Center, *Facilitation Payments: Whether Considered Custom or Bribery, They Put Companies in a Precarious Position*, 8 ETHICS TODAY ONLINE (April 2003), available at http://www.rtbrain.com/ethics/today/et_v1n80403.html (last visited July 12, 2010).

²⁴³ See Argandona, *supra* note 117, at 1.

²⁴⁴ The difference lies in the expediency of the task. They are also known as grease payments.

There are, however, drawbacks to allowing facilitating payments. For instance, they create a competitive advantage: those not financially able to offer such payments are unfairly penalized. Furthermore, they distort local bureaucracies, confuse government employees about what behavior is permitted, and create accounting difficulties.²⁴⁵ In the end, “facilitation payments do not achieve their goals. Instead they increase delays, and become costs and risks in themselves.”²⁴⁶ One may infer that because the UNCAC includes concerns for good governance, facilitation payments should be considered as “undue advantages.”²⁴⁷

The United States, however, has taken a different stance, interpreting the UNCAC’s language as allowing facilitation payments, whereas the United Kingdom’s legislation states that such payments constitute an offence under the Anti-Terrorism Act.²⁴⁸ The position of the United States is understandable since the Foreign Corrupt Practices Act²⁴⁹ allows exceptions for such payments, which include payments to obtain permits, licenses, or other official documents.²⁵⁰ The unequal treatment of such transactions among Member States will undoubtedly create unequal standards towards companies conducting business abroad.²⁵¹

The OECD Anti-Bribery Convention, although not defending such behavior, explains that these types of payments should be dealt with nationally because they are “minor domestic offences and not ones of an international nature that, like the larger scale bribing of foreign officials, will distort international trade.”²⁵² This subject is still being debated, and the merits of either allowing facilitation payments or prohibiting them are still unclear.

Two conclusions can be drawn. The first is that by refusing to acknowledge facilitation payments’ legality, the UNCAC was inherently meant to leave a measure of discretion to the Member States. The second is that there was no consensus on the matter during negotiations and a broad definition of

²⁴⁵ See Toby Webb, *Strategy and Management: Facilitation Payment—Stop Paying and they Stop Asking*, (2006), ETHICAL CORPORATION, available at <http://www.ethicalcorp.com/content.asp?ContentID=4471> (last visited June 29, 2010).

²⁴⁶ *Id.* (quoting Alexandra Wrage, President of TRACE).

²⁴⁷ See Nicholls, *supra* note 69, at 229.

²⁴⁸ See Anti-Terrorism Act, Crime and Security Act (2001) (U.K.). The Parties position may eventually have significant influence over the treaty’s interpretation. Indeed, art. 31(3)(b) of the Vienna Convention on the Law of Treaties states that “there shall be taken into account, together with the context . . . any subsequent practice in the application of the treaty . . .” See Nicholls, *supra* note 69, at 230; Scott, *supra* note 210, at 109. See also Gerald McGinley, *Practice as a Guide to Treaty Interpretation*, 9 FLETCHER FOR. 211–30 (1985) (offering an in depth analysis of this provision).

²⁴⁹ See Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, et seq. (1997).

²⁵⁰ See United States Department of Justice, *Foreign Corrupt Practices Act Antibribery Provisions* (June 2001), available at <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> (last visited Feb. 14 2011).

²⁵¹ See Nicholls, *supra* note 69, at 230.

²⁵² Martjin Wilder & Michael Ahrens, *Australia’s Implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 2 MELB. J. INT’L L. 568, 582 (2001).

corruption was necessary in order to ensure that as many states as possible would adhere to the UNCAC.²⁵³ It is our view that both factors played a part in the UNCAC's lack of a specific provision criminalizing facilitation payments.

Another example of ambiguity concerns the concept of undue advantage. Because it is not specified within the UNCAC, the notion must be defined locally. This omission is most probably due to the reluctance of the negotiating states to see their sovereignty infringed upon by a requirement which might be contrary to local practices. In other words, states feared "extraterritorial browbeating"²⁵⁴ and the infringement of their sovereignty.

Critics against harmonizing the notion of "undue advantage" have also argued that bribery remains a domestic concern and the responsibility of the victimized state.²⁵⁵ The variance in individual and national treatments of bribery, however, is far from optimal. Extradition and international cooperation are subject to the dual criminality principle under the UNCAC (this is also the case with other international and regional anti-corruption initiatives), and as such, if an offence is not criminalized by both the requesting and requested states, the extradition and cooperation provisions cannot be enforced.

Although ambiguity invites interpretation and leads to enforcement difficulties, detail and precision have their own drawbacks. For instance, precision does not always allow for evolution or changes in society. It may also create narrow requirements, omitting unforeseeable elements at the time of the treaty's drafting, and thus restricting its scope.²⁵⁶ This in turn may create eventual loopholes.

Stating that "far from creating a set of fixed and immutable rights and duties, treaties may over the course of time mutate with surprising and perhaps unwelcome results,"²⁵⁷ Professor Merills exposes situations depicting the mutability of treaty obligations. One of them concerns developments in international law that are external to the international instrument.²⁵⁸ He gives as an example the World Trade Organization's Appellate Body decision in the *Shrimp/Turtle*²⁵⁹ a 1998 case in which it was decided that current international

²⁵³ See Snider & Kidane, *supra* note 47, at 731. The UNCAC, by neither expressly allowing nor prohibiting facilitation payments, refuses to take a stance, highlighting the existing controversy.

²⁵⁴ Kim & Kim, *supra* note 13, at 558.

²⁵⁵ See *id.* See also Delaney, *supra* note 17, at 418 (discussing the narrow scope on domestic bribery).

²⁵⁶ See CHAYES & CHAYES, *supra* note 44, at 11. A treaty doted on general language can be just as effective as a more precisely drafted instrument. Although citing an example of an international organization's constitutive treaty, the Chayes' work gives the example of the North Atlantic Treaty that contains very general terminology, yet has shown remarkable sustainability.

²⁵⁷ John Merills, *The Mutability of Treaty Obligations*, in MATTHEW C. R. CRAVEN & M. FITZMAURICE, *INTERROGATING THE TREATY* 101 (2005).

²⁵⁸ See *id.* at 93.

²⁵⁹ See generally Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, NT/DS58/AB/R (Oct. 12 1998); see also Merills, *supra* note

concerns must be taken into account when interpreting treaty obligations, as well as taking into consideration objectives stated in the preamble.²⁶⁰

The use of broader terms and the absence of specificity within the UNCAC are justified; these characteristics will allow room to consider external factors, such as future legal and political developments that might affect the interpretation of obligations. In the event that such developments should arise, a broader terminology will ensure that the requirements under the treaty can adapt over a long period of time and not become obsolete. Furthermore, disputes between Member States can also be avoided as they are granted larger latitude to comply with the treaty's requirements.²⁶¹ The maxim *expressio unius est exclusio alterius* summarizes these arguments and may be translated as "to express one thing is to exclude the other."²⁶²

Aside from precision, the compulsory nature of the language used is determinant in instigating State compliance. In other words, both the vagueness of the terminology and the absence of specific indications as to how obligations should be enforced are decisive.²⁶³ It is argued that although a treaty is legally binding, its value can be diminished if lacking specific indications as to how the parties' obligations are to be carried out.²⁶⁴

There are however drawbacks to including precise and mandatory language in a treaty: it can create legal complexities making implementation more costly and strenuous. For instance, some argue that the obligations derived from the UNCAC's asset recovery chapter are heavy, creating "a further layer of bureaucracy"²⁶⁵ and might end up having the opposite effect, especially in many developing countries where banks are already overloaded with administrative burdens.²⁶⁶ It is likely that many developing countries will lack the capacity to fully implement such demands. There will therefore have to be a certain level of flexibility in regard to the application of these types of obligations. Adaptability to social, economic, and political changes is necessary.²⁶⁷ If one is to follow this opinion, it can be argued that including detailed and precise enforcement provisions may not be the best solution, as they may not be able to adapt to the changing and evolving needs of anti-corruption legislation and leave little room for unilateral interpretation.

The absence of definitions and the resulting ambiguity in the text allow for a broader interpretation of the UNCAC. The manner in which a State will interpret a given obligation is closely if not inextricably linked to its cultural practices and domestic legal system, which determines how it will implement the treaty. Monitoring mechanisms may therefore be necessary in order to

257, at 95.

²⁶⁰ See Merills, *supra* note 257, at 95.

²⁶¹ Dispute settlement is provided for by Article 66 of the UNCAC.

²⁶² CHAYES & CHAYES, *supra* note 44, at 10.

²⁶³ *See id.*

²⁶⁴ *See* FERNANDEZ DE CASADEVANTE Y ROMANI, *supra* note 229, at 38.

²⁶⁵ Carr, *supra* note 46, at 31.

²⁶⁶ *See id.*

²⁶⁷ *See* CHAYES & CHAYES, *supra* note 44, at 15.

ensure compliance, whether through recommendations, oversight commissions, and sanctions. These review challenges are examined in the following sections.

b. *Monitoring Mechanism and Implementation*

In order to ensure a country's commitment to the UNCAC, a review mechanism is essential for monitoring implementation: "Anything less would undermine the credibility of UNCAC."²⁶⁸ The goal of monitoring provisions is to encourage countries to ratify conventions and to put them into practice.²⁶⁹ Most of the UNCAC's provisions are not self-executing and therefore require national implementation on the part of its Member States.²⁷⁰ The mechanisms created to ensure proper domestic implementation are of critical importance in light of the large and diverse array of participating states. This diversity in the UNCAC's membership also makes it more difficult for Member States to reach a consensus on a monitoring mechanism.²⁷¹

The presence of one disobedient state is enough to create an incentive for other members to disobey the rules. This argument is based on the assumption that compliance is in part a result of the expectation that all states will comply.²⁷² Proper implementation is said to take into account the existing social, cultural, and economic 'incentive systems;'

Reform works when it gets the incentives right, that is, when its design and implementation take into account existing social, economic, and cultural incentive systems; and works with them adaptively [r]eformers must also take into account the incentives of natural resisters—those who profit from things as they are—who are likely to oppose, resist, or manipulate reforms and who somehow often co-opt or neutralise these parties.²⁷³

The concept of "natural resisters" is quite pertinent in the case of legal anti-corruption measures in that many individuals already profit from the way things currently stand. The incentive to allow the status quo to continue and to refrain from implementing international anti-corruption laws will therefore probably prove to be a significant problem in many countries. Without a proper

²⁶⁸ See TRANSPARENCY INT'L, *Effectively Monitoring the United Nations Convention Against Corruption*, Policy Position Paper No. 1/2008 (Jan. 17, 2008), available at http://www.transparency.org/publications/publications/policy_positions/ti_pp_01_08_uncac.

²⁶⁹ See Argandona, *supra* note 117, at 10.

²⁷⁰ See Low, *supra* note 39, at 4.

²⁷¹ Fritz Heimann, *Follow-Up Monitoring Needed for the UN Convention Against Corruption*, COMPACT QUARTERLY (Jan. 2005), http://www.enewsbuilder.net/globalcompact/e_article000350362.cfm?x=b11,0,w.

²⁷² See CHAYES & CHAYES, *supra* note 44, at 142.

²⁷³ TIM LINDSEY, LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES 107 (2007).

monitoring mechanism, States may decide not to properly implement certain obligations under the UNCAC.

In addition to the problem that “natural resisters” present for compliance, the “temporal dimension,”²⁷⁴ identified by Chayes’ theory as a factor of non-compliance, should also be underlined. This temporal problem arises more specifically in regard to instruments dealing with major international problems and necessitating a considerable timeframe for implementation. Such treaties invariably require a transitional period between their adoption and their implementation. The UNCAC without a doubt falls into this category of treaty, as corruption is a major global problem to be remedied.

In its final version, Chapter VII of the UNCAC consists of two provisions covering mechanisms for implementation.²⁷⁵ Article 63 establishes a Conference of the States Parties to the Convention (COSP) to “improve the capacity of and cooperation between States Parties to achieve the objectives set forth in [the UNCAC] and to promote and review its implementation.”²⁷⁶ The UNCAC also states that the COSP will periodically review Member States’ implementation²⁷⁷ and make necessary recommendations for improvement.²⁷⁸ The COSP can decide to establish a mechanism or body in order to aid in the effective implementation, “if it deems it necessary.”²⁷⁹

The vague terminology used unfortunately recalls the expression *lex simulata*, which refers to “a vehicle for sustaining or reinforcing basic civic tenets, but not for influencing pertinent behavior.”²⁸⁰ One may sustain the view that although certain means for enforcing the UNCAC were provided for in its implementation provisions, they were perhaps not meant to foster immediate action among states.

During the negotiations, many countries held the position that a monitoring system should be established. However, the only proposal retained was that of Austria and the Netherlands, suggesting the adoption of a Conference of States Parties (Article 63 of the UNCAC). States opposing a more stringent monitoring system feared it would violate their sovereignty.²⁸¹ Other proposals suggesting a subsidiary monitoring body, a regional evaluation process, and a peer review system including sanctions for non-compliance were all rejected due to that same fear.²⁸² Because of the lack of consensus, the issue was deferred to the COSP to be held one year after the UNCAC’s entry

²⁷⁴ CHAYES & CHAYES, *supra* note 44, at 10.

²⁷⁵ See UNCAC, *supra* note 27, arts. 63–64. UNCAC article 63 establishes the Conference of the States Parties to the UNCAC, and Article 64 establishes the Secretariat.

²⁷⁶ *Id.* art. 63.

²⁷⁷ See *id.* art. 63(4) (e).

²⁷⁸ See *id.* art. 63(4) (f).

²⁷⁹ *Id.* art. 63(7).

²⁸⁰ W. MICHAEL REISMAN, FOLDED LIES: BRIBERY, CRUSADES AND REFORMS 32 (1979); See Webb, *supra* note 37, at 221; see also Babu, *supra* note 20, at 27.

²⁸¹ See Argandona, *supra* note 117, at 10.

²⁸² See Webb, *supra* note 37, at 221; Babu, *supra* note 20, at 25.

into force.²⁸³ The COSP's first session took place in December 2006 at which time it deferred any decision as to an implementation review mechanism.²⁸⁴ A second Conference took place in late January and early February of 2008,²⁸⁵ which again deferred the matter to its third session, held in Doha in November 2009.²⁸⁶ The first two sessions, although not bringing about any firm decisions on the review process, still covered many issues relating to technical assistance, asset recovery mechanisms, and certain guidelines or principles to be followed in deciding on a future implementation review mechanism.²⁸⁷ The third session finally brought about a much awaited review mechanism.

The UNCAC's review mechanism is based on an intergovernmental process and is best described as a "peer review mechanism."²⁸⁸ Although the term has not been officially defined, it has, throughout the years, been given a specific meaning:

Peer review can be described as the systematic examination and assessment of the performance of a state by other states, with the ultimate goal of helping the reviewed state improve its policy making, adopt best practices and comply with established standards and principles. The examination is conducted on a non-adversarial basis, and it relies heavily on mutual trust among the states involved in the review, as well as their shared confidence in the process.²⁸⁹

Other types of review mechanisms include self-evaluation and expert reviews. Self-evaluation occurs when a government is asked to review itself. It often requires that Member States answer a questionnaire, assessing their own performance. This method is, in our view, the most lenient of review

²⁸³ See Heimann, *supra* note 271. Article 63(2) of the UNCAC foresees this delay.

²⁸⁴ See REP. OF THE CONFERENCE OF THE STATES PARTIES TO THE U.N. CONVENTION AGAINST CORRUPTION, 1st Sess., CAC/COSP/2006/12 (Dec. 10–14 2006) [hereinafter UNCAC CONFERENCE REPORT, 1st Sess.]. The following passage gives reasons for deferring these negotiations to a conference of parties: "on the one hand the negotiators might not be able to agree on the text of a particular provision but do not want to delay the adoption of the text. Therefore, they authorize further negotiations on this point to be held in the future. On the other hand, negotiators did not want to agree on a particular provision, as more details have to be known in order to make it functional and to be most effective." Merills, *supra* note 257, at 104. This authorization to delay negotiations is given through "enabling clauses," such as article 63 of the UNCAC.

²⁸⁵ REP. OF THE CONFERENCE OF THE STATES PARTIES TO THE U.N. CONVENTION AGAINST CORRUPTION, 2d Sess., CAC/COSP/2008/15 (Jan. 28–Feb. 1, 2008) [hereinafter UNCAC CONFERENCE REPORT, 2d Sess.].

²⁸⁶ REP. OF THE CONFERENCE OF THE STATES PARTIES TO THE U.N. CONVENTION AGAINST CORRUPTION, 3d Sess., CAC/COSP/2009/15 (Dec. 1, 2009).

²⁸⁷ UNCAC CONFERENCE REPORT, 1st Sess., *supra* note 284; UNCAC CONFERENCE REPORT, 2d Sess., *supra* note 285.

²⁸⁸ Fabricio Pagani, *Peer Review as a Tool for Co-Operation and Change*, 11 AFR. SEC. REV. 15, 15 (2002).

²⁸⁹ *Id.* at 1.

mechanisms, as it is not independent or impartial. Expert reviews, on the other hand, are a more adversarial method, whereby government performance is assessed by a panel of independent experts who are generally well versed in the reviewed State's national law as well as on the applicable agreement. This process ensures a higher level of independence and expertise than both the self-evaluation and mutual evaluation processes.²⁹⁰

Some of the main objectives of the mechanism under the UNCAC are transparency, impartiality, the absence of ranking among states and the sharing of good practices.²⁹¹ More specifically, its characteristics include a self-assessment checklist, a desk review and dialogue between the reviewer and reviewed state. The country review is carried out by two other Member States, one of which must be from the same geographical region as the state under review. The reviewers, made up of government experts, are chosen on a random basis by the drawing of lots. However, the reviewed state may request that different reviewers be drawn and this privilege can be exercised up to two times within the same review period; exceptionally, this process can be repeated more than twice.²⁹² Within the peer review process, country reviews are deemed as one of the crucial elements and are said to be part of a process which is formal, systematic, and representative of the entire membership of the agreement.²⁹³

The self-assessment checklist consists mainly of a questionnaire that must be filled out by the reviewed state.²⁹⁴ Each reviewing state appoints experts for the purpose of the review process.²⁹⁵ A desk review is then conducted, which consists of an analysis of the responses given by the reviewed State in the self-assessment checklist,²⁹⁶ as well as pertinent information produced by similar mechanisms under other agreements covering anti-corruption measures.²⁹⁷ An on-site visit can follow but only if the reviewed state agrees to it.²⁹⁸

An important aspect of any review process is its follow-up procedure. Within the UNCAC, follow up occurs during the review phase and consists of

²⁹⁰ See *How Does Intergovernmental Monitoring Work in General?*, TRANSPARENCY INT'L, http://www.transparency.org/global_priorities/international_conventions/advocacy/monitoring/monitoring_mechanisms (last visited Feb. 21 2011).

²⁹¹ See UNCAC CONFERENCE REPORT, 1st Sess., *supra* note 284 at 6, ¶ 5.

²⁹² See *Id.* at 8, para. 18. The mechanism states that: "the State party under review may request, a maximum of two times, that the drawing of lots be repeated. In exceptional circumstances, the drawing of lots may be repeated more than twice." These 'exceptional circumstances' are not defined, but a definition might come to light in the future, following practical applications of the rule.

²⁹³ See CYRILLE FIJNAUT & LEO HUBERTS, CORRUPTION, INTEGRITY AND LAW ENFORCEMENT 353 (2002).

²⁹⁴ See UNCAC CONFERENCE REPORT, 3d Sess., *supra* note 286, at 8, ¶ 15.

²⁹⁵ See *id.* ¶ 21.

²⁹⁶ See *id.* at 9, ¶ 23.

²⁹⁷ See *id.* ¶ 27.

²⁹⁸ See *id.* ¶ 29.

an analysis of the progress made in regard to the observations received by the reviewed state.²⁹⁹

Finally, a country review report is then created by the reviewing states and is based on all of the information gathered. It identifies the country's challenges, successes, and good practices and contains "observations" for future implementation.³⁰⁰ These reports are never published and remain confidential.³⁰¹

The peer review mechanism is said to be an "instrument for formalizing cooperation,"³⁰² in that it is not considered a strict monitoring mechanism but rather a cooperative one. Its effectiveness is said to depend on four factors: value sharing, commitment, mutual trust, and credibility. Value sharing implies that the participating countries share similar standards upon which to evaluate their respective performance. Commitment, on the other hand, refers to the use of an adequate level of financial and human resources by Member States in the fulfillment of their obligations. While the mutual trust requirement might seem self-explanatory, it includes transparency and openness in the sharing of information and data. Finally, credibility implies complete independence on the part of the evaluators.³⁰³

There is an added element that is considered as pivotal in the proper functioning of the peer review process, that of the participation of civil society, which adds public pressure to the existing peer pressure.³⁰⁴ The OECD Anti-Bribery Convention serves as a good example of the possible benefits of civil society participation, as its monitoring mechanism is qualified as elaborate: reports and recommendations are made public and private sector and civil society play an active role throughout each review phase of the convention's monitoring mechanism.³⁰⁵

In our view, the confidentiality of the country reports goes against the UNCAC's guiding principles of transparency and impartiality, as well as its own article 13 that states each member should take measures to promote the participation of civil society and non-governmental organizations by allowing the public to contribute to the decision-making process and by ensuring the public's access to information.³⁰⁶ Indeed, before the UNCAC's mechanism was adopted, Transparency International suggested that its monitoring mechanism be as transparent as possible, by implementing a mechanism that includes the participation of civil society and the private sector: it stated that "[a] process limited to governments reviewing governments behind closed

²⁹⁹ See *id.* at 10, ¶ 40.

³⁰⁰ See *id.* ¶ 33.

³⁰¹ See *id.* ¶ 37.

³⁰² FERNANDEZ DE CASADEVANTE Y ROMANI, *supra* note 229, at 40.

³⁰³ See Pagani, *supra* note 288, at 21.

³⁰⁴ See TRANSPARENCY INT'L, *supra* note 290.

³⁰⁵ See Marie Chêne and Gillian Dell, *U4 Expert Answer: Comparative Assessment of Anti-Corruption Conventions' Review Mechanisms*, 2 (2008), available at <http://www.u4.no/helpdesk/helpdesk/query.cfm?id=163>.

³⁰⁶ See UNCAC, *supra* note 27, art. 13.

doors will have far less public credibility than a more broad-based process and will be less effective in achieving UNCAC's basic objective of overcoming corruption."³⁰⁷ It could, however, be argued that confidentiality is necessary in order to ensure the active participation of Member States. However, secrecy is said to have resulted in diminished compliance in other regimes, by highlighting difficulties in the disclosure of information throughout the evaluation process:³⁰⁸ "Access to data is essential if . . . representatives are to evaluate meaningfully the compliance of parties."³⁰⁹

Although transparency is listed as one of the main objectives of the UNCAC's mechanism, negotiations unfortunately did not give rise to the participation of civil society or the private sector in the review process.³¹⁰ Reviewed states must however consult impartial parties in order to answer the self-assessment checklist.

Another guiding principle within the UNCAC's monitoring mechanism is impartiality.³¹¹ In this respect, Transparency International recommends that longer term funding come from the regular United Nations budget, as opposed to voluntary contributions, as such contributions might affect state impartiality. Indeed, they allow the donating governments to exert a measure of control over the disbursement of funds.³¹² Furthermore, voluntary contributions are not always consistent and may differ from year to year. The Conference of the States Parties decided to follow this recommendation in part only:

³⁰⁷ Fritz Heimann & Gillian Dell, *Recommendations for Review Mechanism for UN Convention Against Corruption*, 10 (2007), available at http://www.transparency.org/publications/publications/conventions/uncac_review_ti_recommendations.

³⁰⁸ It is said that secrecy in the International Atomic Energy Agency and human rights regimes has led to difficulties in evaluating implementation; the International Labor Organization regime is based on the premise of "full disclosure," using publicity as a tool for encouraging compliance. See Elizabeth P. Barratt-Brown, *Building a Monitoring and Compliance Regime Under the Montreal Protocol*, 16 YALE J. INT'L L. 519, 568 (1991).

³⁰⁹ *Id.*

³¹⁰ See UNCAC CONFERENCE REPORT, 1st Sess., *supra* note 284, at 6.

³¹¹ See *id.* at 6.

³¹² See Heimann & Dell, *supra* note 307, at 3. The United Nations budget has three components: the "core" budget, the peacekeeping budget, and the "extrabudgetary" fund financed by voluntary contributions for development, environment, food aid, refugees, and other social programs. The regular or core budget mainly finances the UN's administrative costs, covering, for instance, salaries, headquarter offices, and transport and communications. It is funded by regular Member contributions and the budget is approved every two years by the General Assembly. While the peacekeeping budget may speak for itself, the social and developments programs budget is more relevant to this study. The resources of such programs come almost exclusively from voluntary contributions. See Ruben Mendez, *Financing the United Nations and the International Public Sector: Problems and Reform*, 3 GLOBAL GOVERNANCE 283, 284-88 (1997). For example, less than 10% of UNODC's 2010-2011 funding was derived from the UN's regular budget, while the rest came from donor contributions. See *UNODC Funding Highlights and Budget*, <http://www.unodc.org/unodc/en/donors/index.html?ref=menutop> (last visited Feb. 11 2011) (providing further information on funding).

The requirements of the Mechanism and its secretariat shall be funded from the regular budget of the United Nations [t]he requirements . . . relating . . . to the requested country visits, the joint meetings at the United Nations Office at Vienna and the training of experts, shall be funded through voluntary contributions³¹³

It seems that two fundamental principles of the UNCAC, transparency and impartiality, were watered down during the negotiations of the monitoring mechanism in order to please the largest number of Member States.

Other obstacles need to be overcome for the mechanism to be most effective. First, many developing countries are worried that close monitoring will expose deficiencies that their governments will be unable to adequately remedy. This is where the UNCAC's technical assistance provisions become essential. Article 60 of the UNCAC states that:

States Parties shall, according to their capacity, consider affording one another the widest measure of technical assistance, especially for the benefit of developing countries . . . which will facilitate international cooperation between States Parties in the areas of extradition and mutual legal assistance.³¹⁴

Second, some industrialized members are concerned that the UNCAC's monitoring process will duplicate efforts under other regional anti-corruption conventions.³¹⁵ In order to avoid this, proper coordination among the different agreements is necessary and is provided for in the desk review: the reviewed participant must expose its efforts based on other anti-corruption initiatives.³¹⁶ As the implementation of the UNCAC goes forward, any overlap with other anti-corruption initiatives can be avoided.³¹⁷

It is still widely debated whether it is more advantageous to have less strict obligations with wider compliance or strict obligations with lower compliance.³¹⁸ Only once the review process has been given some time to progress will the UNCAC's long-term benefits and flaws become visible.

c. *Sanctions Towards Member States*

The UNCAC is devoid of sanctions (military or monetary) and does not penalize its Member States for non-compliance. There is, however, considerable debate as to the necessity and benefits of sanctions in fostering

³¹³ See UNCAC CONFERENCE REPORT, 1st Sess., *supra* note 284, at 12.

³¹⁴ UNCAC, *supra* note 27, art. 60(3).

³¹⁵ See Heineman & Heimann, *supra* note 45, at 81.

³¹⁶ See UNCAC CONFERENCE REPORT, 1st Sess., *supra* note 284, at 9, para. 27.

³¹⁷ See Heineman & Heimann, *supra* note 45, at 82.

³¹⁸ See Low, *supra* note 39, at 20.

compliance with international treaties.³¹⁹ In fact, it is argued that emphasis should be placed on cooperative instead of punitive tactics. The following passage explains this position:

[A]n emphasis on compliance may point towards a backwards-looking and essentially legalistic approach focusing on state 'misbehaviour,' rather than towards a productive enquiry into devising and deploying better normative techniques and arrangements that facilitate more effective international dealings and cooperation.³²⁰

If one were to compare national enforcement systems with that at the international level, the latter might disappoint the unsuspecting eye. A closer look, however, reveals that the two mechanisms do not affect the same players: The reign of sovereignty among countries inevitably means that international rules are almost always created through a consensual rather than adversarial process.³²¹ According to one author, this fact creates a perpetual conundrum, as the state must negotiate between its desire to assure itself enough latitude for its own compliance and its desire for predictability in other states' behavior.³²² This reality can perhaps serve to explain in part why the UNCAC does not include sanctions.

There are further arguments positing that sanctions (in either an economic³²³ or military form) are not necessarily beneficial to a treaty's implementation or sustained enforcement. This is due in part to financial constraints: repeated sanctions may be costly over time and diminish legitimacy.³²⁴ The following passage illustrates this reality:

The costs of economic sanctions are also high, not only for the state against which they are directed, where sanctions fall mainly on the weakest and most vulnerable, but also for the sanctioning states. When economic sanctions are used, they tend to be leaky. Results are slow and not particularly conducive to changing behaviour. The most important cost, however, is less obvious. It is the serious political investment required to mobilize and maintain a concerted military or economic effort over time in a system without any recognized or acknowledged hierarchically superior authority.³²⁵

³¹⁹ See COMMITMENT AND COMPLIANCE, *supra* note 207, at 72

³²⁰ *Id.*

³²¹ See *id.* at 67.

³²² See *id.*

³²³ This is also known as a monetary sanction or fine.

³²⁴ See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599, 2636 (1997).

³²⁵ CHAYES & CHAYES, *supra* note 44, at 2.

Another opinion suggests that cooperative enforcement models do not exclude the application of sanctions, but that they may in fact complement one another. The success of the cooperation-based model would be enhanced by the mere fear or threat of sanctions.³²⁶ It is also argued that military and economic sanctions or fines are rarely invoked due to the high risk of failure: the “membership dilemma”³²⁷ posits that the failure to impose sanctions on the non-abiding member is a sign of acceptance of the prohibited behavior. Expulsion, on the other hand, cuts off cooperation completely, allowing the member to act freely.³²⁸ These possibilities, however, represent extreme measures, whereas monetary sanctions are a more moderate solution. The downside with monetary sanctions is that poorer states might not be able to pay the sanction, whereas richer states might not be deterred. It can therefore be argued that monetary sanctions and member expulsion are not beneficial in fostering state compliance and negatively impact the more vulnerable states.

Another argument downplaying the importance of economic or military sanctions is related to the concern a state has over its reputation. The following author believes that a country’s reputation within a treaty regime affects its behavior: “Even in situations with considerable incentives to defect and unavailable reciprocal and institutional sanctions, the prospect of exclusion from future agreements and/or having participation in current agreements discounted suffices to ensure compliance.”³²⁹ Thus, states guilty of non-compliance can face the prospect of a reputation-oriented sanction: “The parties to an agreement know that reservations, exceptions, escape clauses, and so on capture only some of the possible future situations. They recognize that there is a risk that they will violate a commitment, and that this may generate a loss of reputation.”³³⁰

One of the benefits of this type of sanction is that it affects states more equally. Wealthier states are normally better able to answer to economic or military sanctions, whereas no state is sheltered when it comes to its reputation. However, the reputation of poorer Member States might suffer due to their lower compliance rate as a result of their developing economies.³³¹

There are different theories concerning a state’s reputation. A more traditional theory suggests that a state has a single reputation, making less financially stable states more vulnerable to being typecast as non-cooperative.³³² However, another theory posits that any given state has a different reputation for each of its different regimes.³³³ This multiple reputation-based theory is less penalizing, as it allows weaker developing states to be perceived as non-compliant in one regime, and compliant in

³²⁶ See Koh, *supra* note 324, at 2639.

³²⁷ CHAYES & CHAYES, *supra* note 44, at 74.

³²⁸ See *id.*

³²⁹ BENVENISTI & HIRSCH, *supra* note 214, at 117.

³³⁰ See Guzman, *supra* note 226, at 1856.

³³¹ *Id.*

³³² See BENVENISTI & HIRSCH, *supra* note 214, at 121

³³³ See *id.*

another. Guzman's theory regarding reputation-oriented sanctions suggests that the impact that a violation might have on a state's reputation must be contextualized on a case-by-case basis:

It seems clear that the reputational impact of a violation of international law varies depending on the nature of the violation. For example, a failure to comply with a minor international obligation that is a result of oversight or human error and that is promptly corrected without damage to other states is unlikely to have a major reputational impact. In contrast, an egregious and intentional violation, such as support of terrorist activities against another state, is likely to have a profound impact on a nation's reputation. . . . [A] list of factors that influence the reputational impact of a violation, therefore, should include (1) the severity of the violation; (2) the reasons for the violation; (3) the extent to which other states know of the violation; and (4) the clarity of the commitment and the violation.³³⁴

It can be argued that one of the main goals of law is to affect behavior, whether in individuals or international actors.³³⁵ This behavioral change is also considered essential in creating effective conventions.³³⁶ Although the UNCAC does not provide for economic or military sanctions, Member States cannot escape their reputation. Therefore, there is in fact an important incentive for them to comply with their obligations: the perception of society and their peers.

2. *Indirect Compliance Challenges*

"Indirect compliance challenges," refers to external factors to the UNCAC, meaning difficulties that arise not from the UNCAC's wording or content, but from elements that exist independently and cannot easily be, if at all, modified; such as the absence of good governance in some countries and the inherent nature of the offences covered by the UNCAC.

³³⁴ Guzman, *supra* note 226, at 1861.

³³⁵ *See id.* at 51; *see also* Haas, *supra* note 207, at 67.

³³⁶ *See* Guzman, *supra* note 226, at 51. This author stipulates that behavioral change requires three conditions. First, the agreement must have substantive content governing the behavior in need of changing. Second, members whose behavior is consequential must be part of the agreement, and finally, they must feel obligated to modify their behavior. These three conditions are considered key elements to a different kind of level of compliance: cooperation.

a. *Good Governance*

The greatest challenges in combating corruption are mostly related to good governance.³³⁷ Good governance is a broad notion that has many meanings, one of which defines it as the proper functioning of governmental machinery.³³⁸ Another specifies that it can be measured using three main criteria: the nature of a state's political regime, the process by which economic and social resources are managed, and the ability of the state to prepare and apply economic policy.³³⁹ A more normative description illustrates governance as "the conscious management of regime structures with a view to enhancing the legitimacy of the public realm."³⁴⁰

Strong existing domestic institutions are considered an obvious requirement of good governance.³⁴¹ Their importance in fostering compliance is apparent when considering the work of Hathaway:

[S]trong domestic institutions are essential not only to domestic rule of law, but also to international rule of law. Where international bodies are less active in enforcement of treaty commitments . . . it falls to domestic institutions to fill the gap. In some states, this reliance on domestic institutions is effective. In others it is less so. In democratic nations, where domestic rule of law and hence enforcement tend to be relatively strong (because the judiciary, media, and political parties are free to operate independent of the executive), states are more likely to abide by international law whether it is externally enforced or not. In less democratic nations, where domestic enforcement can be less effective, states are less likely to abide by international law that is not enforced by transnational bodies.³⁴²

³³⁷ See Shehu, *supra* note 128, at 75. The term "good governance" is however not used in the UNCAC.

³³⁸ See Francis N. Botchway, *Good Governance: The Old, The New, The Principle, and The Elements*, 13 FLA. J. INT'L L. 159, 160 (2001); Gerry Stoker, *Cinq propositions pour une théorie de la gouvernance*, 155 REVUE INTERNATIONALE DE SCIENCES SOCIALES [REV. INT'L SC. SOC.] 19–30, 23 (1998) (Fr.).

³³⁹ See Jean-Cartier Bresson, *La Banque mondiale, la corruption et la gouvernance*, 41 TIERS MONDE 165, 167 (2000) (Fr.).

³⁴⁰ *Id.*

³⁴¹ See Karim Dahou, *La bonne gouvernance selon la Banque mondiale: au-delà de l'habillage juridique*, in MARC TOTTÉ ET AL. EDS., *LA DÉCENTRALISATION EN AFRIQUE DE L'OUEST* 58 (Éditions Karthala 2003) (Fr.).

³⁴² Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 520 (2005).

According to the World Bank, transparency is a core component of good governance³⁴³ and includes many facets, such as the “public disclosure of assets and incomes of candidates running for public office . . . public disclosure of political campaign contributions,”³⁴⁴ campaign expenditures and “public disclosure of all parliamentary votes, draft legislation and parliamentary debates.”³⁴⁵ The following paragraphs attempt to assess this specific aspect of transparency that we consider particularly relevant to the persisting lacuna in multilateral anti-corruption agreements: that of political party financing.³⁴⁶

Political parties should arise independently from the state as an answer to the will of societies.³⁴⁷ It is therefore imperative that they remain free of government influence as the voice of the people. The rationale for limiting political party financing is supported by the opinion that “transparency has a curative effect on the process of raising money, and contribution limits diminish the possibility of corruption.”³⁴⁸ Other justifications include the fast growth of competition derived from campaign financing,³⁴⁹ and the frequent instances of diversion of funds for personal use, favoritism, and vote purchasing.³⁵⁰

During the UNCAC’s negotiations, political corruption, or, more specifically, the use of illegally obtained funds to finance political parties caused intense debate. The views of the delegations diverged considerably regarding the inclusion of a provision incorporated in the Draft Convention³⁵¹ entitled “Funding of Political Parties,” which tentatively read as follows:

1. Each State Party *shall adopt, maintain and strengthen measures and regulations concerning the funding of political parties.* Such measures and regulations shall serve:
 - (a) To prevent conflicts of interest;
 - (b) To preserve the integrity of democratic political

³⁴³ See AHMED SHAFIQL HUQUE & HABIB ZAFARULLAH, INTERNATIONAL DEVELOPMENT GOVERNANCE 270 (2006); see also World Bank, *Governance and Development*, 7 (May 1, 1992).

³⁴⁴ DANIEL KAUFMANN, WORLD BANK, *Myths and Realities of Governance and Corruption, Global Competitiveness Report 2005–2006*, 92 (2005).

³⁴⁵ *Id.*

³⁴⁶ Neither of the following agreements contains provisions on political party financing: the OECD Anti-Bribery Convention, IACAC, and the CLCC. Although the AU Corruption Convention does contain such provisions, they are far from detailed and simply call on states to “incorporate the principle of transparency into funding of political parties.” AU Corruption Convention, *supra* note 24, art.10).

³⁴⁷ See Antonio Argandona, *Political Party Funding and Business Corruption*, Res. Paper No. 458, INSTITUTE OF HIGHER BUSINESS STUDIES, 4 (2002).

³⁴⁸ Henning, *supra* note 71, at 843.

³⁴⁹ See Webb, *supra* note 37, at 215.

³⁵⁰ See Babu, *supra* note 20, at 15.

³⁵¹ Proposed by Austria, the Netherlands, and France. See *Proposals and Contributions Received from Governments: Austria, France and The Netherlands*, U.N. Doc. A/AC.261/L.21 (2003).

- structures and processes;
- (c) To proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and
- (d) To incorporate the concept of transparency into funding of political parties by requiring declaration of donations exceeding a specified limit.
2. Each State Party shall take measures to avoid as far as possible conflicts of interest owing to simultaneous holding of elective office and responsibilities in the private sector.³⁵²

A number of delegations however suggested that the provision be deleted because of the important differences in the State parties' legal systems.³⁵³ The provision was eventually removed during the sixth session of the Ad Hoc Committee.³⁵⁴ There did, however, remain a shadow of the deleted offence included in article 7 of the UNCAC which stipulates that:

Each State Party *shall also consider* taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, *to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.*³⁵⁵

The final non-mandatory language has been labeled a disappointment and criticized as “toothless.”³⁵⁶ Indeed, the revised provision is stripped of its content, scope, and enforceability. The removal of the more detailed and stringent provision was, however, deemed necessary to accommodate the concerns of a substantial number of delegations and to ensure the completion of the Draft Convention before the fast-approaching deadline.³⁵⁷ It should be

³⁵² Revised Draft United Nations Convention Against Corruption, G.A. Res. 3/Rev.3, art. 10, U.N. Doc. A/AC.261/3/Rev.3, (March 1–21 2003) (second emphasis added).

³⁵³ See *Argandona*, *supra* note 347, at 9. This was the position of the United States, which called for its deletion as a condition of the UNCAC's endorsement. Ironically, the position adopted by the U.S. is diametrically contrary to their position during the negotiations for the OECD Anti-Bribery Convention approximately twenty years prior, during which the exclusion of a similar provision elicited major disappointment for U.S. officials. They believed that “excluding political party officials would create a huge loophole for foreign countries, which could then channel illicit payments to party officials rather than government officials.” See Press Release, Transparency International, U.S. Weakens U.N. Convention by Blocking Measures Tackling Political Corruption, (Aug. 11, 2003), *available at* http://www.transparency.org/news_room/latest_news/press_releases/2003/2003_08_11_us_blocking_measures; see also G.A. Res. 3/Rev.4, 15, U.N. Doc. A/AC.261/3/Rev.4 (Aug. 22, 2003).

³⁵⁴ See G.A. Res. 22, 10, U.N. Doc. A/AC.261/22 (Sep. 29–Oct. 1 2003).

³⁵⁵ UNCAC, *supra* note 27, art. 7(3) (second emphasis added).

³⁵⁶ Low, *supra* note 39, at 6.

³⁵⁷ See Webb, *supra* note 37, at 217. Adopted in late August 2003, the deadline being in October of 2003.

noted that no existing multilateral instrument contains detailed provisions on the funding of political parties and that perhaps attempting to arrive at a global consensus on this sensitive issue was an unrealistic goal.³⁵⁸

b. *The Prosecution of Bribery and Bribery Related Offences*

Unlike other crimes, “crimes of corruption are carried out in secret.”³⁵⁹ As bribery is a consensual act, there is no apparent or direct victim. Indirect victims are usually not aware that a specific transaction has occurred.³⁶⁰ Only incomplete transactions are likely to be reported, unless there is third party knowledge of the corrupt transaction. Logically, if the transaction is completed, both parties to it are guilty of a crime, and neither will denounce the act or want to come forward as a witness. This makes detection of the crime and its enforcement quite problematic. Furthermore, the low reporting rate of such crimes may be explained by the fact that complaints are made only when bribery deals fail to come to fruition.³⁶¹ The following passage clearly demonstrates the difficulties in prosecuting such offences:

Bribery takes place in the shadows. It may never be visible to anyone but the immediate actors. Where there are hints of bribery, investigations backed with some form of compulsory process may be necessary to establish the case that a signatory is obliged to take action. Finally, even if there is information available about a specific, possibly illicit payment, a prosecutor may have good reasons for declining to prosecute the case: insufficient evidence to meet a criminal conviction standard of proof, potential cost of the prosecution relative to other enforcement priorities, etc.³⁶²

Another aspect making prosecuting corruption offences difficult lies in the inadequacy of procedural and evidentiary laws in many countries. For instance, many money laundering offences or financial offences are carried out with the use of computers and advanced software. Developing countries do not always have the necessary legislation in place to manage the admissibility of

³⁵⁸ See Henning, *supra* note 71, at 853.

³⁵⁹ Benjamin B. Wagner & Leslie G. Jacobs, *Retooling Law Enforcement to Investigate and Prosecute Entrenched Corruption: Key Criminal Procedure Reforms for Indonesia and Other Nations*, 30 U. PA. J. INT’L L. 183, 215 (2008).

³⁶⁰ See Justine Nolan, *The United Nations’ Compact With Business*, 24 U. QUEENSL. L. J. 445, xiii (2005).

³⁶¹ See Nlerum S. Okogbule, *Official Corruption and the Dynamics of Money Laundering in Nigeria*, 14 J. FIN. CRIME 49, 51 (2007).

³⁶² Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT’L L. 665, 689 (2004).

such evidence before national courts.³⁶³ This is still the case in Nigeria. Even dating back to 1976, the Nigerian Supreme Court rendered a decision stating that new means of reproducing bank account information needed to be considered, referring to computer generated bank statements:

The law cannot be and is not ignorant of modern business methods and must not shut its eyes to the mysteries of computer. In modern times reproductions or inscriptions or ledgers or other documents by mechanical process are common place and S.37 cannot, therefore, only apply to books of account so bound and the pages not easily replaced.³⁶⁴

A further drawback concerns the availability of testimonial evidence. When witnesses live abroad, obtaining statements or ensuring witness cooperation is more difficult. This is not a rare occurrence in money laundering or bribery cases, and without key witnesses the possibility of losing the case at trial can be high.³⁶⁵ Even with the arrival of the UNCAC, this scenario is probable when taking a closer look at its extradition requirements. Article 44 of the UNCAC creates loopholes by subjecting extradition to Member States domestic laws.³⁶⁶ Moreover, in cases where extradition is refused, local trials rarely produce any outcome as a result of the inaccessibility of evidence, such as witnesses located overseas.³⁶⁷

Furthermore, the investigation and prosecution of transnational crimes can become expensive and time-consuming as they may require specialized forensics in certain areas such as accounting and money laundering. For these types of offences, local forensic offices are necessary. If countries such as Germany, Italy, Japan, and the United Kingdom are not equipped with proper forensic offices, the chances that developing countries might possess the necessary means are quite slim.³⁶⁸

The prosecution of transnational crimes is wholly dependent upon national prosecution. Even with a comprehensive international treaty, it is up to each Member State to either prosecute locally or to cooperate with its counterparts. The following passage illustrates the difficulty in effectively prosecuting transnational organized crime:

³⁶³ See Okogbule, *supra* note 361, at 58.

³⁶⁴ *Esso West Africa Inc. v. T. Oyegbola* [1969] 1 NMLR (Nigeria) at 198, *cited in* Festus S. Yesufu v. ACB Ltd [1976] 4 NSCC 1 (Nigeria). The need to amend Nigeria's *Evidence Act* to include computer print outs was also mentioned in a more recent Court of Appeal case: *United Bank for Africa Plc. C. Sani Abacha Foundation for Peace and Unity & 5 Others*. See *United Bank for Africa Plc. v. Sani Abacha Foundation for Peace and Unity & 5 Others* (2004) 3 NWLR pt. 861, at p. 516, 541–42.

³⁶⁵ See Andreas Schloenhardt, *Transnational Organized Crime and the International Criminal Court Developments and Debates*, 24 U. QUEENSL. L. J. 93, 95 (2005).

³⁶⁶ See UNCAC, *supra* note 27, art. 44, paras. 8–10.

³⁶⁷ See Schloenhardt, *supra* note 365, at 95.

³⁶⁸ See Heineman & Heimann, *supra* note 45, at 83.

But it is this reliance on national action that creates the greatest obstacle against effective action against transnational organized crime, and which has created so many safe havens for drug traffickers, migrant smugglers, money launderers and other suspects The opportunities offered by globalization have enabled sophisticated criminal organizations to take advantage of the discrepancies in different legal systems and the non-cooperative attitude of many nations.³⁶⁹

These are critical arguments justifying the need for the centralized prosecution of bribery and bribery-related crimes through the International Criminal Court (hereafter “ICC”). It is argued that such a step would make international law enforcement more efficient by providing a further layer or forum in addition to prosecutions at the national level.³⁷⁰

Although some might assume that the ICC’s jurisdiction is universal, it is in fact subsidiary and complementary to national tribunals.³⁷¹

The ICC has jurisdiction over a limited number of offences, namely genocide, crimes against humanity, war crimes and crimes of aggression.³⁷² Although the ICC’s jurisdiction initially extended itself to other offences such as drug trafficking, opposition to including them grew due to several considerations. Among these was the fear that such an inclusion might substantially burden the court’s resources and that “sovereignty issues of some nations might bar prosecution of such offences by an international authority.”³⁷³

The ICC’s statute would have to be amended in order for it to have jurisdiction over the offences included in the UNCAC. The following passage illustrates the difficult task of amending the ICC’s statute to include other offences: “A review and inclusion is not going to happen soon, and the mere fact that the ICC’s statute will have to be amended to include such offences will be a formidable barrier to the ICC ever taking responsibility for them.”³⁷⁴

Given the previous analysis, it is clear that the UNCAC’s effectiveness is threatened by its direct and indirect compliance challenges. The next chapter will attempt to determine the UNCAC’s relevancy by studying competing multilateral anti-corruption agreements.

³⁶⁹ See Schloenhardt, *supra* note 365, at 96.

³⁷⁰ See *id.*

³⁷¹ Although the I.C.C. is not the central focus of this paper, a brief overview of its jurisdiction is necessary. For more on the I.C.C., see ARBOUR & PARENT, *supra* note 100, at 700–04.

³⁷² See Schloenhardt, *supra* note 365, at 94; see also U.N. General Assembly, The Rome Statute of International Criminal Court arts. 5–7, art. 9, A/CONF. 183/9 (July 17, 1998) available at <http://www.unhcr.org/refworld/docid/3ae6b3a84.html> (last visited Feb. 17 2011).

³⁷³ Schloenhardt, *supra* note 365, at 113.

³⁷⁴ *Id.*

B. Barriers to the UNCAC's Relevancy: Existing Anti-Corruption Initiatives

Relevancy addresses the urgency of the problem tackled by the UNCAC. It can be assessed in part by studying other similar instruments and laws already in place, as these, we argue, are in competition with one another.³⁷⁵ If the UNCAC is able to tackle more diverse corruption offences and to incorporate a higher number of players than its counterparts, it can in our view be qualified as relevant regardless of the already existing anti-corruption instruments.

The UNCAC is not the first international instrument to tackle corruption. It is however argued that it is the most comprehensive anti-corruption tool.³⁷⁶ The following sections will briefly consider previous anti-corruption related international and regional agreements by starting with an overview of the agreement, followed by a brief summary of its monitoring mechanism.

1. *The OECD Convention against Bribery of Foreign Public Officials*
 - a. *Overview of the Instrument*

The OECD Anti-Bribery Convention entered into force in 1999, after two years of negotiations.³⁷⁷ The OECD Anti-Bribery Convention “marked the beginning of an international movement based on the premise that all have a stake in the integrity of the global marketplace deserving the protection of law.”³⁷⁸ The United States exerted considerable pressure on its fellow OECD Member States to bring about their participation in the OECD Anti-Bribery Convention. The United States, up to that period, was the only country to have made the act of bribing a foreign public official illegal with the adoption of its Foreign Corrupt Practices Act in 1977. In fact, the FCPA was used as a model for the OECD Anti-Bribery Convention.³⁷⁹ All thirty-four members of the OECD are party to the 1999 Convention, and as of December 1999, eighteen members had also enacted their own national anti-bribery laws.³⁸⁰

The OECD Anti-Bribery Convention's main requirement is that each Member State adopt national legislation against the bribery of foreign

³⁷⁵ See Juliette Tricot, *Les figures de l'internationalisation en droit penal des affaires: La corruption internationale*, 4 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ [REV. SC. CR. & DR. COMP.] 753, 759 (2005) (Fr.).

³⁷⁶ See Low, *supra* note 39, at 3.

³⁷⁷ See Tarullo, *supra* note 362, at 668.

³⁷⁸ Paul D. Carrington, *Enforcing International Corrupt Practices Law*, 32 MICH. J. INT'L L. 129, 140 (2010).

³⁷⁹ See Unzicker, *supra* note 15, at 655, 661.

³⁸⁰ See *id.* at 666.

government officials in international business transactions:³⁸¹ it therefore deals strictly with transnational bribery, making it its main punishable offence. The OECD Anti-Bribery Convention is a clear example of an agreement dealing with the supply-side of bribery only.³⁸² Its application is therefore limited when considering that the UNCAC covers both the supply and demand sides of bribery. The following passage demonstrates that the main goal of the agreement was to hinder active bribery as opposed to passive bribery: “[t]he OECD initiative against bribery in international business transactions developed out of the pledge by industrialized nations . . . to combat the supply side of bribery. The approach is aimed at reducing the influx of corrupt payments.”³⁸³

Although it is still unclear whether the UNCAC’s provisions apply to facilitation payments in practice, it is quite clear that the OECD Anti-Bribery Convention creates an exception allowing such payments when made to lower level public officials: “[s]mall ‘facilitation’ payments do not constitute payments made ‘to obtain or retain business or other improper advantage. . . .’ and, accordingly, are also not an offence.”³⁸⁴

Similar to the UNCAC, the OECD Anti-Bribery Convention does not provide for any sanctions against offenders, nor does it provide sanctions against Member States for non-compliance. It leaves the use of sanctions towards legal persons to the discretion of the parties, stating that among the sanctions used there should be effective and dissuasive criminal penalties, including the “deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.”³⁸⁵ Moreover, the OECD Anti-Bribery Convention contains two provisions that attempt to hinder Member States from trying to circumvent the goal of the agreement. Firstly, a State must not be influenced by the potential effect its decisions might have on relations with another member, nor should it be influenced by national economic interests:

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.³⁸⁶

³⁸¹ See Ibrahim F.I. Shihata, *International Finance and Development Law*, in, LIBER AMICORUM 237 (Sabine Schlemmer-Schulte & Ko-Yung Tung eds., 2001).

³⁸² See Tarullo, *supra* note 362, at 681.

³⁸³ FIJNAUT & HUBERTS, *supra* note 293, at 349.

³⁸⁴ OECD Anti-Bribery Convention, *supra* note 22, art. 1; Alison Von Rosenvinge, *Global Anti-Corruption Regimes: Why Law Schools May Want to Take a Multi-Jurisdictional Approach*, 10 GER. L. J. 785, 789 (2009).

³⁸⁵ OECD Anti-Bribery Convention, *supra* note 22, art. 3; see also Juliette D’Hollander, *Ethics in Business: The New OECD Convention on Bribery*, 33 REVUE JURIDIQUE THÉMIS 147, 163 (1999) (Fr.).

³⁸⁶ OECD Anti-Bribery Convention *supra* note 22, art. 5.

Secondly, regarding the issue of a statute of limitations, the OECD Anti-Bribery Convention states that every Member State's national legislation must "allow an adequate period of time for the investigation and prosecution",³⁸⁷ of all offences.³⁸⁸

When comparing the OECD Anti-Bribery Convention to the UNCAC, a few elements stand out. First is the length of the agreements. The OECD Anti-Bribery Convention has a mere seventeen articles, whereas the UNCAC has over seventy. Second is the number of Parties: the UNCAC has over a hundred parties, whereas the OECD Anti-Bribery Convention has roughly thirty-five.³⁸⁹ Although this is in part due to the regional quality of the latter agreement, it still merits consideration when assessing the universal characteristic of the conventions. Third, the OECD Anti-Bribery Convention does not address asset recovery, a key issue provided for in length by the UNCAC. However, the OECD Anti-Bribery Convention's monitoring mechanism is said to be its distinguishing characteristic.³⁹⁰

b. *Monitoring Mechanism*

The OECD Anti-Bribery Convention monitoring mechanism was the first mechanism to be adopted in the field of anti-corruption and is considered one of the most vigorous among its counterparts.³⁹¹ The OECD has conducted over 150 investigations from which approximately sixty individuals and companies have been sanctioned.³⁹² It contains a questionnaire prepared by the reviewing states, a mandatory on site visit and a public country review report. Furthermore, civil society and the private sector play an active part in all phases of the process.³⁹³

The review process consists of two phases. The first phase focuses on whether the enacted national legislation is consistent with the OECD Anti-Bribery Convention's requirements. The second phase focuses on enforcement and the Member State's capacity to prevent, deter and sanction transnational bribery.³⁹⁴ In order to create incentives to cooperate with the reviewing countries and to properly implement the convention requirements, the review reports include specific recommendations as well as a follow-up mechanism. The review process is set up so as to allow participants enough time to start implementing changes in their national regime according to the

³⁸⁷ *Id.* at art. 6.

³⁸⁸ *See id.*

³⁸⁹ Thirty-six states have either ratified or acceded to the OECD. Anti-Bribery Convention.

³⁹⁰ *See* Von Rosenvinge, *supra* note 384, at 790.

³⁹¹ *See* Lucinda A. Low et al., *Milestones in Mutual Evaluation: The Phase 2 Review of the United States Under the OECD Antibribery Convention*, 5 INT'L L. FOR. 106, 108 (2003).

³⁹² *See* Von Rosenvinge, *supra* note 384, at 790.

³⁹³ *See* Chêne & Dell, *supra* note 305, at 2.

³⁹⁴ *See* Low, *supra* note 382, at 108.

recommendations they receive in each phase.³⁹⁵ By rendering the results of the review process public, significant pressure is brought to bare on members to improve their implementation of the OECD Anti-Bribery Convention's obligations.

In practice, the country evaluations are carried out by experts from two countries who in the first phase will use questionnaires answered by the reviewed state as well as submitted legal materials. In this phase, the standard of implementation is evaluated and a report is published on the Internet. In the second phase, the examined state's deployed resources and structures are considered by using once again questionnaires followed by on-site visits.³⁹⁶

It is safe to conclude that the UNCAC represents a significant step forward in many respects, for instance by the number of its Member States, its geographical pull, the wide array of offences it includes (such as the bribery of a domestic official and bribery in the private sector), its detailed provisions and the inclusion of detailed asset recovery provisions. However, when comparing both agreements' monitoring mechanisms, one must conclude that the OECD Anti-Bribery Convention's enforcement mechanism is more effective: contrary to the UNCAC's monitoring process, the results of the country reviews are rendered public, a quality that in our view, enhances the process' transparency as well as any effect public dishonor might have on the reviewed State's behavior.

2. *The Inter-American Convention against Corruption*

a. *Overview of the Instrument*

The Inter-American Convention Against Corruption, adopted by the Organization of American States (OAS) in March of 1996, was the first regional agreement to impose anti-corruption obligations.³⁹⁷ It became effective almost exactly a year later and consists of 28 articles with 33 parties to date.³⁹⁸ Its approach is qualified as hemispheric due to the region it covers³⁹⁹ and it is considered "a compromise between Latin-American interests in mutual legal assistance and extradition and the North-American agenda in criminalizing active transnational commercial bribery."⁴⁰⁰

The IACAC's scope is wider than that of the OECD Anti-Bribery Convention, also criminalizing transnational bribery in the public and private sector but including both the supply and demand sides of bribery, as well as provisions criminalizing illicit enrichment. Furthermore, the IACAC does not

³⁹⁵ See Chêne & Dell, *supra* note 305, at 2.

³⁹⁶ See FIJNAUT & HUBERTS, *supra* note 293, at 354.

³⁹⁷ See Nancy Boswell, *International Law Standards for Domestic Governance*, 97 AM. SOC'Y INT'L L. PROC. 133, 134 (2003).

³⁹⁸ See Altamirano, *supra* note 211, at 499.

³⁹⁹ See Henning, *supra* note 71, at 807.

⁴⁰⁰ Mark Pieth, *The Harmonization of Law Against Economic Crime*, 1 EUR. J. L. REFORM 527, 538 (1999).

contain any exceptions allowing facilitation payments, but rather criminalizes “any article of monetary value, or other benefit, such as a gift, favor, promise or advantage.”⁴⁰¹ It also reverses the burden of proof pertaining to cases where there exists a sudden increase in an official’s assets. In these respects, it rivals the UNCAC: It does not create any *prima facie* exception for facilitation payments and contains provisions that lighten the burden for the prosecution in certain circumstances.⁴⁰² It leaves the criminalization of other corruption related offences to the discretion of its members by encouraging them to consider establishing additional offences.⁴⁰³ Once adopted, these additional offences become acts of corruption under the IACAC triggering requirements concerning cooperation with States that have not necessarily criminalized the same offences.⁴⁰⁴ The OAS Convention has other noteworthy provisions relating to extradition and cooperation:

[T]he convention constitutes the most important inter-American legal instrument for extraditing those who commit crimes of corruption [and] in co-operation and assistance among the states in obtaining evidence and facilitating necessary procedural acts regarding the investigation or trials of corruption.⁴⁰⁵

Similar to the OECD Anti-Bribery Convention and the UNCAC, the IACAC is devoid of any penalties,⁴⁰⁶ and is therefore criticized as being weak.⁴⁰⁷ While the compulsory quality of the language varies within the IACAC, its key provision on acts of corruption is drafted in mandatory terms:

Article VI specifies all acts of corruption that fall within the IACAC’s scope. While Article VI does not provide a specific definition of corruption, it does list a number of ‘acts of corruption’ that must be criminalized. Article VI condemns both active and passive bribery, but limits its reach to corrupt practices by public officials within the State Party’s territorial boundary.⁴⁰⁸

One of its shortcomings is its limited geographical scope, centered on the western hemisphere. Although this is explained by the fact that the IACAC remains a regional initiative, accession is open to any other state, not only to

⁴⁰¹ IACAC *supra* note 23, art.VI (1) (a).

⁴⁰² For example, Article 20 of the UNCAC shifts the burden of proof to the defendant where he or she is accused of illicit enrichment.

⁴⁰³ See IACAC *supra* note 23, art.V, para. 4.

⁴⁰⁴ See Webb, *supra* note 37, at 194.

⁴⁰⁵ FIJNAUT & HUBERTS, *supra* note 293, at 393.

⁴⁰⁶ See IACAC *supra* note 23, art.V, para. 4.

⁴⁰⁷ See Nicholls, *supra* note 69, at 214.

⁴⁰⁸ Altamirano, *supra* note 211, at 501.

members of the OAS.⁴⁰⁹ European Union countries and other important non-Western nations have therefore no incentive to adhere to the OAS scheme.⁴¹⁰ Furthermore, contrary to the UNCAC, the IACAC does not contain any actual asset recovery provisions.⁴¹¹

Finally, no compliance mechanism was initially set up in the IACAC.⁴¹² Such a mechanism was only subsequently adopted in June of 2001 during the OAS' thirty-first General Assembly after participants to the agreement realized that the agreement had a limited chance of success unless a monitoring process was put into place.⁴¹³ The state parties used the OECD Anti-Bribery Convention as a model and adopted a similar procedure based on peer review.⁴¹⁴

b. *Monitoring Mechanism*

The IACAC's monitoring mechanism is composed of two bodies: the Conference of the States Parties to the IACAC and the Committee of Experts. The latter is responsible for the analysis of the implementation of the IACAC among its members, whereas the COSP reviews the performance of the Committee.⁴¹⁵ Contrary to the UNCAC's monitoring mechanism, the State under review can decide to change, and appoint, experts to the Committee.⁴¹⁶ The Committee of Experts reviews the State Party's performance in multiple rounds, each round pertaining to an individual provision of the IACAC.⁴¹⁷

An important aspect of the IACAC's review process is that it is subject to the public's scrutiny: country reports are made public at the end of the review process and civil society can take part in the self-assessment phase. Furthermore, civil society organizations may submit documents to the experts carrying out the review in order to ensure that the information available to them is not biased or purely one-sided.⁴¹⁸ They may also make presentations in Committee meetings, whether formal or informal.⁴¹⁹ Experts can also decide to search or to receive any information pertinent to the review process.⁴²⁰ The importance of experts using information submitted by third parties is illustrated

⁴⁰⁹ See IACAC *supra* note 23, art. XXIII.

⁴¹⁰ See Gantz, *supra* note 98, at 482.

⁴¹¹ See Bah, *supra* note 170, at 24.

⁴¹² See Gantz, *supra* note 98, at 480.

⁴¹³ See Roberto De Michele, *The Follow-Up Mechanism of the Inter-American Convention Against Corruption: A Preliminary Assessment*, 10 SW. J. L. & TRADE AM. 295, 297 (2004).

⁴¹⁴ See *id.* at 300.

⁴¹⁵ See Altamirano, *supra* note 211, at 506.

⁴¹⁶ See Rules of Procedure and Other Provisions of the Committee of Experts of the Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption, ch. III, June 29, 2007, SG/MESICIC/doc.9/04 rev.3, available at http://www.oas.org/juridico/english/mesicic_rules.pdf.

⁴¹⁷ See Altamirano, *supra* note 211, at 506.

⁴¹⁸ See De Michele, *supra* note 413, at 308, 311.

⁴¹⁹ See Altamirano, *supra* note 211, at 506.

⁴²⁰ See De Michele, *supra* note 413, at 312.

in the following passage:

These are some of the reasons why civil society organizations should keep an appropriate distance from the responsibilities of their own governments in responding to the questionnaire. Failing to do so can affect the independence of judgment expected from non-governmental organizations. In fact, one of the debates within the *Conference of the State parties* focused on how to avoid governments providing unreliable information on the implementation of the [IACAC]. Logically, a third party—civil society—could play a role in providing alternative opinions that could help balance the information and avoid governments acting softly on each other.⁴²¹

On a more practical front, there have been problems with the timeliness of the review process. The following passage dating back to 2003 criticized the first stage of the review process and demonstrates a clear lagging in the mechanism:

This initial phase has demonstrated the need for resources to do a thorough review of all the parties within a reasonable time. The original timetable has already slipped Some countries will not be reviewed until eight years after the [IACAC] entered into force. Moreover, this stage of review only examines certain [IACAC] provisions. As the program is currently organized, others will not be addressed until 2005. It is urgent that the process be accelerated if the [IACAC] is to have an impact on governance in the hemisphere.⁴²²

While the IACAC criminalizes more offences than the OECD Anti-Bribery Convention, its scope and wider applicability do not compare to that of the UNCAC. When comparing review mechanisms, one can observe that the OECD and the IACAC's mechanisms have an important aspect in common: they are more transparent than the UNCAC's review process in that they allow the participation of the private sector and of non-governmental organizations, a crucial facet of transparency. Furthermore, the IACAC's monitoring mechanism comprises of a COSP and a Committee of Experts. It seems that the IACAC's Committee of Experts has quasi-investigatory powers that enable it to conduct inquiries. Such powers were not provided for in the negotiation of the UNCAC's monitoring mechanism. Creating such a committee within the UNCAC's review process would not only afford the mechanism greater independence, but would bring it closer to the expert review process (as opposed to the peer review mechanism), rendering the evaluation process more

⁴²¹ *Id.* at 317.

⁴²² *See* Boswell, *supra* note 397, at 135.

adversarial and effective.

3. *The United Nations Convention Against Transnational Organized Crime*

a. *Overview of the Instrument*

The UNCATOC was the United Nations' first attempt to create a binding international agreement in the fight against corruption. It was drafted by a committee composed of 127 states, was adopted in November of 2000 and has 159 parties.⁴²³ It entered into force three years later with the submission of the fortieth instrument of ratification, and contains little over twenty articles.⁴²⁴

Focusing mainly on organized crime, the UNCATOC recognizes that corruption can be a result of organized criminal activity. It addresses various transnational criminal offences, such as money laundering, corruption, and obstruction of justice.⁴²⁵ The UNCATOC does not address the issue of corruption in the private sector. Regarding bribery related offences, both the supply and demand sides are criminalized, and the criminalization of other forms of corruption is left to the discretion of the Member States.⁴²⁶ Because of the UNCATOC's main concern with organized crime, its cooperation provisions can only apply to corruption cases if they contain a transnational component or if they involve an organized criminal group.⁴²⁷ Unfortunately, the UNCTOC does not provide for any penalties or sanctions. However, it does call on Member States to adopt measures enabling the confiscation of proceeds of crime, as well as their identification, tracing, freezing and seizure.⁴²⁸

Any rivalry between the UNCTOC and the UNCAC is trivial, because the UNCTOC was not meant to vastly cover corruption. In fact, during the negotiations for the UNCTOC, it was understood that the problem of corruption was so important that a separate agreement should be negotiated in order for it to be properly addressed.⁴²⁹ However, because the UNCTOC's monitoring mechanism has been widely criticized, its overview against that of the UNCAC's is far from trivial.

⁴²³ For a full list of the Parties to the UNCTOC see UNCTOC signatories (Dec. 25, 2003), <http://www.undoc.org/undoc/en/treaties/CTOC/countrylist-traffickingprotocol.html>.

⁴²⁴ See Webb, *supra* note 37, at 203.

⁴²⁵ See Gerhard Kemp, *The United Nations Convention Against Transnational Organized Crime: A Milestone in International Criminal Law*, S. AFR. J. CRIM. JUST. 152, 152 (2001).

⁴²⁶ See UNCTOC *supra* note 26, art.8.

⁴²⁷ See Webb, *supra* note 37, at 204.

⁴²⁸ See UNCTOC *supra* note 26, art.12.

⁴²⁹ See Vlassis, *supra* note 16, at 127.

b. *Monitoring Mechanism*

The UNCTOC's monitoring mechanism has been deemed too weak in order to be considered a "fully fledged review mechanism."⁴³⁰ It is carried out by the Conference of States Parties (COSP) to the Convention and consists mostly of questionnaires. While the COSP has the ability to recommend improvements to the reviewed Member State, there is, however, no process allowing for the verification or publicity of country reports. Furthermore, the mechanism does not provide for any on-site visits.

The UNCTOC's mechanism suffers from some of the same lacunas as the UNCAC's: Civil society is not involved and the evaluations are based on similar questionnaires or checklists. This is quite interesting as there had been high hopes that the UNCTOC would rectify many of the UNCAC's gaps. The will of the Member States to either carry out their reviews zealously or to abstain in doing so will be decisive in the new convention's success. Indeed, part of the problem with the UNCTOC's review process was the lack of participation by its members: the questionnaires based on self-assessments received a very low response rate.⁴³¹

When considering the UNCTOC, it is safe to conclude that the UNCAC is not at risk of becoming obsolete or without purpose. It was after all understood at the time of the adoption of the UNCTOC that a separate and more complete anti-corruption agreement needed to be negotiated in order to remedy the legislative gaps relating to corruption, and in this respect, the UNCAC does not disappoint. Counting over seventy articles, it contains detailed provisions on private sector corruption, detailed asset recovery measures, and many other bribery related offences, such as trading in influence, embezzlement, and obstruction of justice.⁴³² What is disappointing is that the UNCAC, having adopted a similar review mechanism, does not seem to have surpassed the UNCTOC in this respect.

4. *The African Union Convention on Preventing and Combating Corruption*

a. *Overview of the Instrument*

The Convention on Preventing and Combating Corruption (AUCPCC) was adopted by the African Union in July 2003 after five years of negotiations.⁴³³ Its main goals are to "promote and develop mechanisms of prevention, to detect, to punish and to eradicate corruption both in the public as

⁴³⁰ Chêne & Dell, *supra* note 305, at 6.

⁴³¹ *See id.*

⁴³² *See* Vincke, *supra* note 35, at 364.

⁴³³ *See* Kolawole Olaniyan, *The African Union Convention on Preventing and Combating Corruption: A Critical Appraisal*, 4 AFR. HUM. RTS. L. J. 74, 78 (2004). The African Union was established in 2000 to replace the Organization of African Unity. *See* Webb, *supra* note 37, at 202.

well as the private sectors.”⁴³⁴ It therefore criminalizes both public and private sector corruption, the supply and demand sides of corruption, money laundering, concealment, as well as illicit enrichment.⁴³⁵ Similarly to the UNCAC and the IACAC, the AUCPCC criminalizes the solicitation or acceptance of “any goods of monetary value, or other benefit, such as a gift, favor, promise or advantage,”⁴³⁶ and does not create any exception allowing facilitation payments. It contains a total of twenty-eight articles and one of its main long-term objectives is to strengthen the political and economic development of the African continent.⁴³⁷ The AUCPCC counts forty-four state signatories and thirty-one parties to date.

The AUCPCC does not address corruption offences implicating foreign public officials or officials of international organizations. Nevertheless, it does concern public officials or “any other person” as stated in the provision on the AUCPCC’s scope of application.⁴³⁸ According to some experts, the meaning of “any other person” is “exceedingly wide-ranging” and creates confusion: if the drafters intended to extend corruption offences to the private sector, this inclusion was unnecessary because Article 11 of the AUCPCC requires that Member States criminalize similar conduct in the private sector.⁴³⁹ Therefore, the term was most likely meant to encompass any person carrying out a public official’s tasks in order to ensure the provision’s equal application to temporary employees.

Similar to the previously studied anti-corruption agreements, the AUCPCC does not include sanctions or penalties.⁴⁴⁰ However, all of its substantive provisions are drafted in mandatory terms.⁴⁴¹ Indeed, Member States must “undertake to” adopt legislation in order to establish the AUCPCC’s offences nationally. In this respect, “[t]he African Convention is comprehensive on paper and is largely phrased in mandatory terms. However, its expansiveness may actually deter countries from ratifying it.”⁴⁴²

An important measure in regard to transparency was considered during the AUCPCC’s drafting: that of political party funding. Although it was a contentious issue, it was finally inserted and calls on Member States to adopt local measures prohibiting the use of funds acquired illegally or in a corrupt manner and used to finance political parties.⁴⁴³ Moreover, Member States are required to establish an independent authority or agency in order to combat

⁴³⁴ Mpazi Sinjela, *The African Union Takes a Legal Stand On Corruption*, 11 AFR. Y.B. INT’L L. 143, 150 (2003).

⁴³⁵ See AU Corruption Convention, *supra* note 24, art. 4.

⁴³⁶ *Id.*

⁴³⁷ See *id.* art. 2, para. 1.

⁴³⁸ See *id.* art. 4.

⁴³⁹ See NICHOLLS, *supra* note 2, at 354.

⁴⁴⁰ See Kofele-Kale, *supra* note 31, at 719.

⁴⁴¹ See NICHOLLS, *supra* note 2, at 352.

⁴⁴² Webb, *supra* note 37, at 203. See AU Corruption Convention, *supra* note 24, art. 5.

⁴⁴³ See Sinjela, *supra* note 434, at 153; AU Corruption Convention, *supra* note 24, art. 10.

corruption and carry out cooperation among nations when necessary.⁴⁴⁴ A similar provision was initially included in the UNCAC, but was ultimately removed during negotiations.⁴⁴⁵ The importance of such measures in diminishing corruption cannot be stressed enough: limiting contributions to political parties lessens the possibilities for corruption, as does transparency in political financing.⁴⁴⁶

b. *Monitoring Mechanism*

The AUCPCC establishes a monitoring mechanism, also based on a peer review process, by creating an advisory board consisting of eleven experts elected by Member States for a period of two years.⁴⁴⁷ These experts are chosen from a list of people who are deemed as having the highest measure of integrity, impartiality, and recognized competence in matters relating to the AUCPCC.⁴⁴⁸ As part of its tasks it must “submit a report to the Executive Council on a regular basis on the progress made by each state party in complying with the provisions of this Convention.”⁴⁴⁹ Member States must report to the Board on their progress and they must also provide for the participation of civil society during the monitoring process. The Board possesses purely advisory powers, meaning it is devoid of any investigatory authority.⁴⁵⁰

The AUCPCC’s success is deemed quite low due to the reluctance of many African governments to criticize each other. The mechanism has also faced important financial and technical challenges.⁴⁵¹ Furthermore, the short mandate of the board of experts is criticized: “[i]ts limited mandate means that there is little chance for the Advisory Board to translate the norms of the [AUCPCC] into reality or provide important clarifications of the obligations imposed by the [AUCPCC].”⁴⁵² It is also argued that for the AUCPCC to have any positive results, the public needs to be more involved in the monitoring mechanism: “civil society and other pressure groups will have to claim possession of the monitoring process. By joining forces as coalitions, they can help ensure its [parties] successfully implement this new treaty.”⁴⁵³

Another main problem concerns the AUCPCC’s regional limitations. As is the case with many regional anti-corruption initiatives, neighboring

⁴⁴⁴ See AU Corruption Convention, *supra* note 24, art. 20.

⁴⁴⁵ See UNCAC CONFERENCE REPORT, 6th Sess.

⁴⁴⁶ See Henning, *supra* note 71, at 843.

⁴⁴⁷ See AU Corruption Convention, *supra* note 24, art. 22.

⁴⁴⁸ See Sinjela, *supra* note 434, at 157.

⁴⁴⁹ AU Corruption Convention, *supra* note 24, art. 22, para. 5(h).

⁴⁵⁰ See Sinjela, *supra* note 434, at 157.

⁴⁵¹ See Chêne & Dell, *supra* note 305, at 6.

⁴⁵² Olaniyan, *supra* note 433, at 86. The members of the Advisory Board are elected for a period of two years, renewable once. See *id.*

⁴⁵³ Akere Muna, *The African Convention Against Corruption*, in REGIONAL CORRUPTION REPORT 116, 121 (2004).

countries are made to evaluate each other within the review process, which in this case creates a reluctance to participate. The AUCPCC is however one of the few multilateral agreements to contain asset recovery measures: Within the African continent, the scale of illicitly obtained public assets is immense. In the worst cases, the amounts held in individual foreign accounts amount to billions of dollars.⁴⁵⁴ Unfortunately, these measures under the AUCPCC address the confiscation of looted funds only, without providing for specific seizing and freezing measures.⁴⁵⁵

One of the UNCAC's advantages over the AUCPCC is that it allows for a much larger number and wider diversity of reviewing Member States. Furthermore, it provides for detailed cooperation and technical assistance among Member States, detailed asset recovery measures, and provisions criminalizing a larger number of offences, such as concealment, trading in influence, embezzlement, abuse of functions and obstruction of justice. Interestingly, it seems that while the UNCAC and the AUCPCC share similar qualities—they both deal with bribery in the public and private sectors, supply and demand-side bribery, bribery related offences, preventive provisions, etc.—they also share a similar difficulty: The lack of political will in creating an enforceable implementation system. A first step to remedying this is to prioritize the participation of civil society organizations in their monitoring process.⁴⁵⁶

5. *The Council of Europe Criminal Law Convention on Corruption*

a. *Overview of the Instrument*

The Council of Europe, consisting today of forty-seven nations, adopted the Criminal Law Convention on Corruption (CLCC) in 1999. Originally, the Council of Europe had planned on drafting a framework convention containing more general requirements pertaining to corruption. After realizing that the incorporated principles were drafted using such vague terminology that it would be practically impossible to implement them in a formal treaty, they became the Twenty Guiding Principles for the Fight Against Corruption.⁴⁵⁷ These principles enabled the Council of Europe to start working on a corruption convention and are the foundation of the CLCC.⁴⁵⁸ At the time of the CLCC's adoption in 1999, it was considered the broadest among regional efforts to combat corruption.⁴⁵⁹ Cooperation was made easier

⁴⁵⁴ See REPORT OF THE COMMISSION FOR AFRICA, reprinted in *Getting Systems Right: Governance and Capacity-Building*, 3 INT'L J. CIV. SOC'Y L. 20, 38 (2005).

⁴⁵⁵ See Bah, *supra* note 170, at 25.

⁴⁵⁶ See Sinjela, *supra* note 434, at 158.

⁴⁵⁷ See Comm. of Ministers, Resolution (97) 24 on the Twenty Guiding Principles for the Fight Against Corruption, EUR. CONSULT. ASS., *Reply of the Comm. of Ministers*, 101st Sess., (1997) [hereinafter *Guiding Principles*].

⁴⁵⁸ See Shihata, *supra* note 381, at 240.

⁴⁵⁹ See Pieth, *supra* note 400, at 537.

among its members due to the tradition of cooperation as well as the smaller number of participating nations.⁴⁶⁰

The CLCC prohibits both the supply and demand sides of bribery in both the public and private sectors.⁴⁶¹ It also applies to foreign and international public servants, members of legislatures, judges, domestic public officials, and members of international organizations.⁴⁶² When the CLCC was adopted, it was the first international agreement to deal with private sector corruption.⁴⁶³ Other than bribery, the CLCC incorporates provisions on trading in influence, money laundering, and account offences.⁴⁶⁴ It is compared to the OECD Anti-Bribery Convention in that it treads “a very thin line between corruption and acceptable interaction in public administration.”⁴⁶⁵ Although its scope is considered broad, the range of conduct that Member States are required to criminalize is quite narrow, as most offences are limited to active and passive bribery.⁴⁶⁶ The agreement does not contain any specific measures pertaining to facilitation payments. However, similar to the UNCAC, one may infer that such payments are included in the following conduct: “the promising, offering or giving by any person, directly or indirectly, of any undue advantage.”⁴⁶⁷

The CLCC contains provisions ensuring that Member States provide sanctions that include the deprivation of liberty and monetary sanctions to offending individuals.⁴⁶⁸ There are however no sanctions or penalties against Member States to the CLCC for non-compliance. Furthermore, contrary to the UNCAC, the CLCC’s asset recovery measures are succinct and limited in scope. Indeed, the provisions simply call on Parties to adopt legislation in order to “trace, freeze, and seize instrumentalities and proceeds of corruption,”⁴⁶⁹ without anticipating any specific measures.

b. *Monitoring Mechanism*

The monitoring process is implemented by the Group of States Against Corruption (GRECO), which uses a peer pressure model combined with mutual evaluation measures. GRECO was established in order to improve its members’ capacity to fight corruption and compliance with corruption related

⁴⁶⁰ The Council of Europe was implemented in 1949, counting 10 signatories. *See Key Dates*, COUNCIL OF EUR., <http://www.coe.int/aboutCoe/index.asp?page=datesCles&l=en> (last visited October 6, 2010).

⁴⁶¹ *See Henning, supra* note 71, at 822.

⁴⁶² *See CLCC, supra* note 25, arts. 2, 3, 9; NICHOLLS, *supra* note 2 at 360.

⁴⁶³ *See Shihata, supra* note 381, at 247.

⁴⁶⁴ Account offences pertain to the use of false accounting documents and omitting to hold payment records. *See CLCC, supra* note 25, art.14.

⁴⁶⁵ *See Henning, supra* note 71, at 824.

⁴⁶⁶ *See Webb, supra* note 37, at 199.

⁴⁶⁷ *See CLCC, supra* note 25, art. 2.

⁴⁶⁸ *See id.* art. 19.

⁴⁶⁹ *Id.* art. 23.

undertakings.⁴⁷⁰ It monitors compliance with the CLCC and with the Guiding Principles. GRECO has forty-seven Member States, including the United States; membership is open to all members of the Council of Europe and to non-member states as well.

Ad hoc expert teams are created to evaluate each country with the use of questionnaires, country visits, evaluation reports and plenary sessions. The process is made public by publishing the country reports on the Internet. These reports contain measures that need to be taken by the evaluated Member State in order to ensure future compliance. In the subsequent evaluation round, a follow-up procedure assesses whether the measures have been implemented.⁴⁷¹ In less than five years, GRECO managed to issue forty-two country reports.⁴⁷²

Although mutual legal assistance treaties already exist within the region, the CLCC also provides for international cooperation measures because its ratification is open to states outside of the Council of Europe.⁴⁷³ The mandatory nature of language used in the Corruption Convention, coupled with the existing ties among its members, makes this regional agreement attractive. The UNCAC however benefits from a much higher number of Member States, criminalizes a higher number of offences, and contains much more detailed provisions on the recovery of stolen assets.⁴⁷⁴ However, once again, the UNCAC is faced with a multilateral anti-corruption agreement that chose to arm itself with a public review mechanism.

Having given an overview of existing anti-corruption agreements, the UNCAC's relevancy is quite clear in our view: it criminalizes a number of offences that are much more important and applies to a much higher number of states than any other multilateral anti-corruption treaty. It also creates a "normative mechanism" for the recovery of assets, whereas other anti-corruption agreements barely broach the subject.⁴⁷⁵ Furthermore, unlike other agreements, the UNCAC contains a chapter devoted entirely to technical assistance and information exchange.⁴⁷⁶ Our main criticism is directed towards the UNCAC's monitoring mechanism: it seems to fall short compared to multilateral agreements such as the OECD Anti-Bribery Convention, the IACAC and the Council of Europe Criminal Law Convention. Indeed, the public aspect of the UNCAC's review process is lacking. By making the country reports available to civil society scrutiny, and by giving the COSP the authority to verify reported information, the monitoring mechanism would gain significant value.

Furthermore, the issue of political party funding is also lacking in the criminalization chapter of the CLCC and is an important aspect of anti-

⁴⁷⁰ See Shihata, *supra* note 381, at 260.

⁴⁷¹ See NICHOLLS, *supra* note 2, at 367.

⁴⁷² See Webb, *supra* note 37, at 200.

⁴⁷³ See Shihata, *supra* note 381, at 257.

⁴⁷⁴ As previously discussed in Part I, Chapter IV, the UNCAC dedicates a whole chapter to asset recovery.

⁴⁷⁵ See Bah, *supra* note 170, at 25.

⁴⁷⁶ See UNCAC, ch. VI; Nicholls, *supra* note 69, at 220.

corruption measures. For instance, the AUCPCC contains such a measure, by calling on Member States to adopt measures that “[p]roscribe the use of funds acquired through illegal and corrupt practices to finance political parties,”⁴⁷⁷ and that “[i]ncorporate the principle of transparency into the funding of political parties.”⁴⁷⁸ By incorporating these small changes, the UNCAC might live up to its high expectations.

CONCLUSION

The need for a global, in-depth corruption convention is obvious when considering the devastating effects of corruption. To name a few, corruption diminishes development, increases social inequalities and poverty, and discredits the rule of law. It also channels criminal activity, such as terrorism, organized crime, drug and human trafficking, and deters foreign direct investment by acting as an additional expense or tax for investors. Finally, corruption diverts government funds away from essential sectors, such as health and education sectors, and enhances the public’s distrust towards political and government authorities.⁴⁷⁹

The UNCAC attempts to create a universal framework against corruption and is the first of its kind. It is described as the most detailed, complex, and broadest international anti-corruption agreement to date.⁴⁸⁰

The UNCAC revolutionizes asset recovery in the field of international law, dedicating a whole chapter to provisions that create mechanisms to recover stolen funds.⁴⁸¹ In order to be successful, such provisions must be accompanied by investigatory provisions, preventive recovery provisions such as the freezing and seizing of funds, and provisions allowing the confiscation of assets.⁴⁸² In addition to considering these aspects, the UNCAC also calls on Member States to incorporate measures in order to detect criminal activity and to afford each other the needed cooperation and assistance in investigations.⁴⁸³

The breadth of the UNCAC is unparalleled, due to the global quality of the UNCAC and the many offences it covers. Although the use of precise language is an important component of effective implementation, strict or narrow definitions are not always beneficial, as they may not be adaptable to political and social change. The UNCAC, by purposely omitting a precise definition of corruption, ensures itself a wider and longer applicability. One of the drawbacks to choosing vague terminology is the uncertainty of its applicability to certain behavior.⁴⁸⁴ Furthermore, the UNCAC’s provisions are mostly phrased using discretionary terms and lack the use of mandatory

⁴⁷⁷ AU Corruption Convention, *supra* note 24, art. 10.

⁴⁷⁸ *Id.*

⁴⁷⁹ See Delaney, *supra* note 17, at 19–21.

⁴⁸⁰ See Low, *supra* note 39, at 3.

⁴⁸¹ See UNCAC, *supra* note 27, ch. V.

⁴⁸² See Bah, *supra* note 170, at 27.

⁴⁸³ See UNCAC, *supra* note 27, art. 51.

⁴⁸⁴ See CHAYES & CHAYES, *supra* note 44, at 10–11.

language. This outcome is unfortunate as it renders the UNCAC “toothless”. Aside from re-drafting the provisions, we believe that a more adversarial monitoring mechanism would be sufficient to solve or compensate for this issue.

The UNCAC’s monitoring mechanism, based on a mutual evaluation or peer review process, is considered more rigorous than the self evaluation method, but more lenient than the expert review process.⁴⁸⁵ All-in-all, peer review can be quite effective, especially when it contains an element of public pressure. This aspect, although lacking within the UNCAC, can be remedied in the future by namely making country reports available to the public and by including civil society organizations in the review process. Furthermore, by giving the UNCAC’s COSP investigatory powers similar to the IACAC’s Committee of Experts, the review process would acquire a more adversarial quality.

The specific aspect of good governance that we deemed most relevant to this study was that of political party financing. Provisions limiting political financing and ensuring financing transparency are necessary when one considers the fast growth of competition derived from political party financing, the diversion of funds for personal use, and vote purchasing.⁴⁸⁶ An earlier draft of the UNCAC contained a provision on the funding of political parties. It was however deleted during the UNCAC’s negotiation because of important differences in the legal systems of Member States.⁴⁸⁷ This outcome is disappointing, particularly in light of the AUCPCC’s political party funding provision.⁴⁸⁸ Although the offence is not criminalized in other major anti-corruption agreements, the UNCAC had the possibility to do so, and chose not to. Member States could, in the future, choose to include such a provision by adding precision to the UNCAC’s public sector measures.

The UNCAC’s relevancy was measured against existing regional and multilateral anti-corruption initiatives, such as the OECD Anti-Bribery Convention, the IACAC, the UNCTOC, the AUCPCC, and the CLCC. Following the overview of these competing agreements, one may conclude that the UNCAC is relevant in today’s international legal forum and has many qualities, such as criminalizing a large number of bribery and bribery related offences both in the public and private sectors, extensively covering asset recovery and technical assistance measures, and its number of parties. However, the UNCAC seems to have failed to fulfill expectations in regards to its monitoring mechanism. Although having adopted a peer review monitoring mechanism (which is not the least adversarial form of review method *per se*), the UNCAC failed to include three key features which would have given it a

⁴⁸⁵ See *Monitoring Mechanisms*, TRANSPARENCY INT’L, http://www.transparency.org/global_priorities/international_conventions/advocacy/monitoring/monitoring_mechanisms (last visited Oct. 7, 2011).

⁴⁸⁶ See Webb, *supra* note 37, at 215–16.

⁴⁸⁷ UNCAC CONFERENCE REPORT, 6th Sess., *supra* note 445, at 10.

⁴⁸⁸ See AU Corruption Convention, *supra* note 24, art. 10.

more independent and transparent quality, namely, the participation of civil society, ensuring that country review results are made available to the public, and affording the COSP with any investigatory powers. These three characteristics are all the more crucial when one considers that an important number of provisions are phrased in non-mandatory terms and that the UNCAC is devoid of economic or military sanctions. Without these changes, we fear that the UNCAC may not foster compliance in any meaningful way.

Nevertheless, the UNCAC is a step forward in the fight against corruption, as it creates a forum for continued discussions among many countries around the world. Due to the UNCAC's recent entry into force, only time will tell whether it can sustain compliance. There is still a chance for political and business leaders to act upon their rhetoric.