# Corporate Criminal Law and Anticorruption in the Northern Triangle

Alex Green*

## Abstract

*Corruption is a perennial problem in the Northern Triangle (Guatemala, Honduras, and El Salvador), eliciting attention from domestic actors, international civil society, and foreign states. Regional anticorruption efforts focus on the roles of government actors and civil society, whereas corporations are a less explored resource. This Comment argues that corporate anticorruption compliance programs would complement existing anticorruption strategies in the Northern Triangle. Each Northern Triangle country should change its criminal codes to promote corporate anticorruption compliance; civil society should include a focus on corporate criminal law in their advocacy efforts; and states with extraterritorial domestic anticorruption laws should enforce them against activities in Northern Triangle countries to supplement regional anticorruption resources and the rule of law.*

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## I. INTRODUCTION

Corruption is a recurrent issue in Guatemala, Honduras, and El Salvador—otherwise known as the Northern Triangle of Central America. It is often facilitated by corporate activity, as in the Zelaya case in Honduras and the Martínez case in El Salvador, both of which involved government officials laundering public funds through businesses and other commercial enterprises.[1] Such corruption has contributed to migration, limited local economic development, and impunity, among other issues.[2] Despite some progress achieved by anticorruption efforts, the region has recently experienced major setbacks with the dissolution of anticorruption bodies. Between 2019 and 2021, Northern Triangle governments each discontinued the investigation and prosecution committees they had established with the United Nations (U.N.) or the Organization of American States (OAS) to pursue accountability for corruption and other crimes.[3] Yet these impediments do not result from a lack

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1 In the Zelaya embezzlement scheme, then-director of the Honduran Social Security Institute (IHSS) Mario Zelaya led the embezzlement of 300 million USD in public funds from 2010 to 2014 through front companies, improper contract grants, and the overvaluation of equipment. This theft is alleged to have resulted in the death of nearly 3,000 patients due to inadequate medical resources. A demonstrative example of corporate involvement is Zelaya's solicitation and receipt of approximately 2 million USD in bribes from a Honduran information-technology company contracted to digitize IHSS records. The funds were disbursed from the IT company's subsidiary to conceal and launder the payments, either via wire transfers and through a South American bank, or via checks to Honduran companies and then by wire transfers to U.S. banks to be used in the purchase of real property in Louisiana. *See* WASHINGTON OFFICE ON LATIN AMERICA (WOLA), COMBATTING IMPUNITY: EVALUATING THE EXTENT OF COOPERATION WITH THE MISSION TO SUPPORT THE FIGHT AGAINST CORRUPTION AND IMPUNITY IN HONDURAS 19 (Sept. 2019). In the Martínez case, then-Prosecutor General of El Salvador Luis Martínez was discovered to have funneled public funds he received through a plastics company, using them to pay off his and his family's credit card debts. *See* WOLA, COMBATTING CORRUPTION IN EL SALVADOR: EVALUATING STATE CAPACITY TO REDUCE CORRUPTION AND IMPROVE ACCOUNTABILITY 41 (Jan. 2020).

2 For migration, see Karen Musalo, *El Salvador: Root Causes and Just Asylum Policy Responses*, 18 HASTINGS RACE & POVERTY L. J. 178, 212–15 (2021). On local economic development, see, for example, WOLA, COMBATTING CORRUPTION IN HONDURAS: ASSESSING THE STATE'S CAPACITY TO REDUCE CORRUPTION AND IMPROVE ACCOUNTABILITY 8 (Dec. 2019). On impunity, see CONG. RSCH. SERV., R45733, COMBATTING CORRUPTION IN LATIN AMERICA: CONGRESSIONAL CONSIDERATIONS 15 (May 21, 2019).

3 In September 2019, the Guatemalan government opted not to renew the mandate of the United Nations International Commission Against Impunity in Guatemala (CICIG), a body that prosecuted three former presidents and various other Guatemalans accused of corruption. Sonia Pérez D., *As U.N. Body Wraps Up in Guatemala, Fears for Anti-Graft Fight*, ASSOCIATED PRESS (Sept. 2, 2019), https://perma.cc/43LP-JGPW. Soon after, in January 2020, the anticorruption-focused Mission to Support the Fight Against Corruption and Impunity in Honduras (MACCIH), which assisted corruption investigations and efforts to strengthen anticorruption laws, expired after Honduras and the OAS were unable to agree to an extension of the mandate. *See* Marlon Gonzalez & Christopher Sherman, *Honduras Government Fails to Extend Anticorruption Mission*, ASSOCIATED PRESS (Jan. 17, 2020), https://perma.cc/CLW7-ASXN. *See generally* MACCIH-OAS,

of international interest in regional anticorruption advocacy—civil society groups like the Washington Office on Latin America (WOLA) have criticized the demise of these commissions,[4] civic groups seeking to collaborate on anticorruption efforts recently formed the Northern Central America Center Against Corruption and Impunity,[5] and just last year the U.S. established the fight against corruption in Central America as an American national security interest.[6]

Anticorruption efforts have predominantly focused on the roles of government and extra-governmental actors. For example, the Inter-American Convention Against Corruption (IACAC)[7] and the U.N. Convention Against Corruption (UNCAC)[8] focus on the prevention, investigation, and prosecution of corruption-related crimes. Yet, despite corporate corruption, these efforts predominantly concentrate on public officials, with limited emphasis on the corporation as a medium for corruption and as a resource for fighting it.

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TOWARDS INSTITUTIONAL STRENGTHENING: "UFECIC-MP/MACCIH-OAS PARTNERSHIP, BREAKING PARADIGMS" (Apr. 2019) (sixth semiannual report). Likewise, in June 2021, El Salvador left the OAS-backed International Commission Against Impunity in El Salvador (CICIES), which aimed to prevent, investigate, and punish corruption and related crimes. *See* Marcos Alemán, *El Salvador to End Work with OAS Anti-Impunity Mission*, ASSOCIATED PRESS (Jun. 4, 2021), https://perma.cc/72YL-ZJTQ; Press Release, Organization of American States (OAS), Statement from the General Secretariat of the OAS on CICIES (Jun. 7, 2021), perma.cc/2PH5-HK6L; Press Release, OAS, Government of El Salvador and the OAS Install CICIES (Sept. 6, 2019), https://perma.cc/5B3M-TVKT.

4 *See, e.g.*, Adeline Hite & Álvaro Motenegro, *Guatemala's Corrupt are Threatening to Erase its Historic Anti-Corruption Legacy*, WOLA (Jan. 8, 2020), perma.cc/9TWE-PZQE; Julia Aikman Cifuentes and Adriana Beltrán*, A Year of Setbacks to Honduras' Anti-Corruption Efforts*, WOLA (Feb. 4, 2021), perma.cc/B2E9-ZYAT; Joint Statement from Washington Office on Latin America, Due Process of Law Foundation, and Latin America Working Group, In Leaving Anti-Corruption Accord, Bukele Moves Close to Unchecked Power in El Salvador, WOLA (Jun. 14, 2021), https://perma.cc/9VBU-B3EH.

5 *Central American Groups Found Regional Anticorruption Body*, ASSOCIATED PRESS (Jun. 3, 2021), https://perma.cc/E8B3-P57J.

6 On the U.S. prioritization of fighting corruption in Latin America, see THE WHITE HOUSE, MEMORANDUM ON ESTABLISHING THE FIGHT AGAINST CORRUPTION AS A CORE UNITED STATES NATIONAL SECURITY INTEREST (Jun. 3, 2021), https://perma.cc/6FEG-D4AY; Alexandra Jaffe & Christopher Sherman, *Harris Targets Corruption, Immigration on Latin America Trip*, ASSOCIATED PRESS (Jun. 6, 2021), https://perma.cc/EY4Q-UNEX. The American focus on corruption from a national security perspective perhaps reflects a shift in U.S. policy—the Trump Administration and U.S. Republicans have been accused of playing a role in undermining CICIG in Guatemala, contributing to its demise. *See* Matthew Stephenson, *The CICIG Crisis in Guatemala: How the Trump Administration is Undermining U.S. Anticorruption Leadership*, THE GLOBAL ANTICORRUPTION BLOG (Feb. 19, 2019) https://perma.cc/NF28-PB9H; Colum Lynch, *Corrupt Guatemalans' GOP Lifeline*, FOREIGN POLICY (Feb. 5, 2019), https://perma.cc/ZX6S-UM9A.

7 Inter-American Convention Against Corruption (IACAC), Mar. 29, 1996, reprinted in 35 I.L.M. 724 (1996). Since then, Member S. 29, 1996, 35 I.L.M. 724 (1996).

8 U.N. Convention Against Corruption (UNCAC), G.A. Res. 58/4, U.N. Doc. A/RES/58/4 (Oct. 31, 2003).

Corporations are advantageous anticorruption tools because of their anticorruption compliance programs. Such programs collectively dedicate substantial resources to anticorruption efforts, are separate from corrupt governments, and are driven by different incentives. In addition, they can be influenced by foreign domestic law, international civil society advocacy, and (for multinational corporations) cross-jurisdictional internal policies and industry norms. As institutions reassess their Northern Triangle anticorruption strategies, they should consider that private sector businesses can be an alternate mechanism to advance the rule of law.

In Part II, this Comment surveys corruption in the Northern Triangle and Latin America and the relationship between corruption and corporations there. Part III discusses best practices for a criminal legal regime aiming to discourage corporate crime. Finally, Part IV assesses the domestic, international, and extraterritorial laws impacting business corruption in the Northern Triangle, and provides recommendations for how they could be improved.

## II. CORRUPTION IN THE NORTHERN TRIANGLE AND LATIN AMERICA

Corruption pervades Latin America, as eleven former or sitting presidents have recently been imprisoned, placed under investigation, or removed from office.[9] Corruption has been linked to violent crime and has fed perceptions that law enforcement or judicial authorities have been "captured."[10] Gangs, violence, and the economic and social impact of corruption—limited growth, skewed incentives, undermined public services—drive people out of these countries, resulting in international migration.[11]

According to the Inter-American Commission on Human Rights (IACHR), "vari[ous] private agents actively participate in . . . corruption, including businesses, corporations, conglomerates, and others."[12] The Latin American private sector has been viewed as both a resource for resisting corruption and a part of the problem.[13] Businesses can offer bribes for their own gain or be vehicles for corrupt government officers to syphon money.[14] Guatemalan and

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9 *See* CONG. RSCH. SERV., *supra* note 2, Summary.

10 *Id.* at 16–17.

11 *Id.* at 16.

12 IACHR, CORRUPTION AND HUMAN RIGHTS IN THE AMERICAS: INTER-AMERICAN STANDARDS 43 (2019).

13 *See* CONG. RSCH. SERV., *supra* note 2.

14 For an example of businesses being used as a vehicle for diverting funds, see WOLA, THE COOPTATION OF THE STATE CASE IN COMBATTING CORRUPTION IN GUATEMALA: EVALUATING STATE CAPACITY TO REDUCE CORRUPTION AND IMPROVE ACCOUNTABILITY 34–36 (Feb. 2020). Another prominent example beyond the Northern Triangle is the international corruption scandal involving the Brazilian construction company Odebrecht, which paid at least 788 million USD in bribes to more than half of Latin American countries for building contracts. See Understanding

Honduran business leaders have lobbied to "weaken anticorruption efforts and controls."[15] Yet, other business leaders have supported anticorruption legislation, seeking a level economic playing field,[16] and some have turned to business norms as an anticorruption resource.[17]

## A. Efforts to Strengthen Northern Triangle Rule of Law

Domestic and international institutions have focused the fight against corruption on strengthening rule of law. The UNCAC and IACAC require member states to criminalize various corrupt activities, particularly public corruption.[18] Recognizing institutional limitations in the Northern Triangle, the U.N. and OAS negotiated the creation of independent commissions to assist with corruption investigations and prosecutions.

### 1. Guatemala

In Guatemala, where government corruption has been called "the greatest threat to democratic rule,"[19] the International Commission Against Impunity in Guatemala (CICIG) was formed in 2006, in the aftermath of the Guatemalan Civil War.[20] Fully independent from the Guatemalan government, the CICIG had broad investigatory authority, power to file criminal complaints, access to criminal courts, and the right to join criminal proceedings as a private

Odebrect: Lessons for Combatting Corruption in the Americas: Testimony to House Committee on Foreign Affairs, Subcommittee on the Western Hemisphere, Civilian Security, and Trade, DUE PROCESS OF THE LAW FOUNDATION (Mar. 26, 2019) (testimony of Katya Salazar), https://perma.cc/2ZBR-864T; Fergus Shiel & Sasha Chavkin, *Bribery Division: What is Odebrecht? Who is Involved?, International Consortium of Investigative Journalists*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Jun. 25, 2019), https://perma.cc/W4CL-LU4D; *Odebrect Case: Politicians Worldwide Suspected in Bribery Scandal*, BBC (Apr. 17, 2019), https://perma.cc/4Q8N-MGG9.

15 CONG. RSCH. SERV., *supra* note 2, at 15.

16 *See id.*

17 For example, the Inter-American Development Bank highlighted the impact of corruption indicators by ratings agencies like Standard & Poor's, Moody's, and Fitch on directing investment in and loans to certain Latin American countries. *See id.* at 16.

18 *See generally* UNCAC, *supra* note 8; IACAC, *supra* note 7.

19 Justin Rearick-Hoefflicker, *CICIG's Anti-Corruption Approach in Guatemala*, 14 GONZ. J. INT'L L. 121, 121 (2011).

20 *See Antecedentes,* CICIG (Mar. 5, 2018*),* https://perma.cc/FPW9-YZHY. Guatemala's thirty years of civil war destroyed the country's ability to govern, and public institutions have since been subject to influence from drug cartels, organized crime, and gangs, groups that are both separate and interrelated there. Such groups are linked to "powerful businessmen, military officials, politicians, civil servants, and law enforcement officials" such that Guatemala has been described as a "Corporate Mafia State." To provide a sense of the institutional interference from these groups, it is estimated that cartels alone provide Guatemalan public officials with at least 1 billion USD in corrupt payments annually. *See* Rearick-Hoefflicker, *supra* note 19 at 125–28.

prosecutor.[21] It was a lauded and imitated model for similar anticorruption commissions in other countries.[22] The Commission worked closely with Guatemalan public officials, giving advice and cooperating with law enforcement on investigations and prosecutions.[23] CICIG also provided public policy recommendations to the Guatemalan government.[24]

CICIG's downfall lay in its effectiveness. In August 2017, in response to CICIG investigations into President Jimmy Morales's family and other powerful executives, a "political, diplomatic, legal and institutional crusade" began with the goal to end the CICIG.[25] This campaign culminated in 2019 when the Guatemalan government refused to renew CICIG's mandate.[26]

### 2. Honduras

Corruption is likewise a structural problem in Honduras.[27] Major corruption scandals between 2014 and 2017 brought massive protests[28] that led to the formation of the Mission to Support the Fight Against Corruption and Impunity in Honduras (MACCIH) with the OAS.[29] MACCIH's mandate was to "support, strengthen, and collaborate with Honduran institutions to prevent, investigate, and punish acts of corruption."[30] While MACCIH was modeled after the CICIG, key differences limited its effectiveness: MACCIH lacked prosecutorial authority and required government approval of its leader, limiting independence.[31] Thus, MACCIH's role in anticorruption efforts was generally

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21 *See id.* at 133–39.

22 *See* Richard Messick, *The Legacy of Guatemala's Commission Against Impunity*, THE GLOB. ANTICORRUPTION BLOG (Sept. 11, 2019), https://perma.cc/4WHD-486R.

23 *See* Rearick-Hoefflicker, *supra* note 19, at 134.

24 *See* Rearick-Hoefflicker, *supra* note 19, at 137.

25 *See* Messick, *supra* note 22.

26 Sonia Pérez D., *supra* note 3; Tiziano Breda, *Curtain Falls on Guatemala's International Commission Against Impunity*, INT'L CRISIS GRP. (Sept. 3, 2019), https://perma.cc/L9YF-24GW.

27 The economic cost of corruption in Honduras is estimated to be 22 billion lempiras (HNL) annually (nearly 900 million USD), or 4.5% of the Honduran Gross Domestic Product and over 10% of the Honduran General Budget. *See* WOLA, *supra* note 2, at 8.

28 *See* WOLA, *supra* note 2, at 6.

29 *See id.*; Miguel Zamora, *Institutional Inosculation: The International Commission Against Impunity in Guatemala (CICIG), International Rule of Law Mechanisms, and Creating Institutional Legitimacy in Post-Conflict Societies*, 57 COLUM. J. TRANSNAT'L L. 535, 595 (2019).

30 *See* CONG. RSCH. SERV., IN11211, CORRUPTION IN HONDURAS: END OF THE MISSION TO SUPPORT THE FIGHT AGAINST CORRUPTION AND IMPUNITY IN HONDURAS (MACCIH) 2 (Jan. 23, 2020); *see also Mission to Support the Fight Against Corruption and Impunity in Honduras: About the Mission,* OAS, https://perma.cc/87Y4-NXKD.

31 *See* Miguel Zamora, *supra* note 29, at 595–97. In contrast, the head of CICIG was independently appointed by the Secretary-General of the U.N. *See also* Richard Messick, *Will Honduras' MACCIH Become Another CICIG?*, THE GLOB. ANTICORRUPTION BLOG (Jan. 27, 2016), https://perma.cc/GR4A-8TSW.

advisory.[32] Yet, MACCIH had successes, achieving legislative reforms and the establishment of corruption-combatting institutions, like anticorruption courts for high-level cases.[33]

After a major political investigation,[34] the Honduran congress weakened MACCIH's mission and ultimately elected to not extend its mandate in 2020.[35] However, recent developments could signal a political shift. Honduran courts approved the extradition of former President Juan Orlando Hernández to the U.S. to potentially face charges for a drug trafficking and corruption scheme, and newly elected President Xiomara Castro has an anticorruption agenda.[36]

3. El Salvador

El Salvador's political climate is similarly shaped by corruption—presidents past and current have been mired in corruption scandals and allegations.[37] The 2019 creation of the International Commission Against Impunity in El Salvador (CICIES), El Salvador's OAS–backed international anticorruption commission,

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32 *See* Miguel Zamora, *supra* note 29, at 596.

33 *See* CONG. RSCH. SERV., *supra* note 30, at 2; WOLA, *supra* note 2, at 6. To provide an example for why these specialized courts were necessary, the former president of the Supreme Court of Justice and five members of the now-defunct Judiciary Council (individuals who financially and administratively ran the Judicial Branch and appointed and removed trial and appellate judges) were accused of embezzling public funds, among other illegal acts. *Id.* at 26–27.

34 The Network of Legislators case—in which five members of the National Congress were accused of misappropriating 8.3 million HNL (337,000 USD) and over sixty members of Congress were likewise implicated—is an example of the embeddedness of corruption in the legislative branch. In response to the investigation, the Honduran Congress passed a law to prevent MACCIH and the Public Prosecutor's Office from investigating legislators involved in the case. *See* WOLA, *supra* note 2, at 27–28.

35 *See* CONG. RSCH. SERV., *supra* note 30, at 2; Gonzalez & Sherman, *supra* note 3. This lack of enforcement aid is unfortunate, as WOLA observed that Honduras's "problem is not so much a lack of anticorruption laws, tools, and bodies, but the lack of effective enforcement due to institutional weaknesses." WOLA, *supra* note 2, at 6.

36 *See* Joan Suazo & Anatoly Kurmanaev, *Former Honduras President Detained After a U.S. Extradition Request*, N.Y. TIMES (Feb. 15, 2022), https://perma.cc/Z32W-W8HS; *Juan Hernández: Honduras judge grants extradition of ex-president*, BBC (Mar. 17, 2022), https://perma.cc/6K9A-23XY; Gustavo Palencia, *Honduras Political Dispute Resolved, Paving Way for President's Anti-Corruption Agenda*, REUTERS (Feb. 7, 2022), https://perma.cc/NJ24-BWXS; *Incoming Honduran President Wants U.N. Help to Battle Corruption*, FRANCE 24 (Apr. 12, 2021), https://perma.cc/TR92-P2QC.

37 *See* Musalo, *supra* note 2, at 185, 214; CONG. RSCH. SERV., R43616, EL SALVADOR: BACKGROUND AND U.S. RELATIONS 1 (Jul. 1, 2020). The two most recent presidents from ARENA were investigated for corruption—Francisco Flores, who died in 2016 while awaiting trial, was accused of embezzling earthquake relief donations, and Tony Saca, who pled guilty to money laundering and embezzlement of approximately 300 million USD and is serving a ten-year prison sentence; recent FMLN president Muricio Funes was investigated for allegedly embezzling over 350,000 USD of public funds after his presidency, and El Salvador is currently seeking his extradition from Nicaragua. *See id.* at 2–3. For more information on the Saca investigation, as well as on the investigation of El Salvador's former prosecutor General Luis Martínez, see WOLA*, supra* note 1, at 32–41.

was a political promise of President Nayib Bukele's campaign.[38] CICIES was also modeled after CICIG,[39] and its mandate involved "supporting, strengthening and actively collaborating with institutions . . . responsible for preventing, investigating and sanctioning acts of corruption."[40]

However, CICIES was hamstrung by inadequate resources and limits to its investigatory authority and independence.[41] The Bukele government ultimately broke El Salvador's ties with CICIES in 2021 after investigations into mishandling of, and possible self-dealing using, COVID relief funds:[42] Bukele's party members in the Legislative Assembly replaced the attorney general and Supreme Court members with allies, and the new attorney general ended the CICIES agreement with the OAS.[43]

## B. Lessons from Northern Triangle Setbacks and Foreign Successes

The failures of CICIG, MACCIH, and CICIES are regional setbacks to accountability, the rule of law, and anticorruption. But they provide an opportunity to assess shortcomings and consider alternative or complementary strategies. Key themes from the commissions' post-mortems include the need for independence from the government to mitigate interference with anticorruption efforts, the usefulness of additional resources to supplement government enforcement, and the futility of exterritorial influence where government cooperation is limited. These themes must be considered in future anticorruption efforts to avoid repeating former deficiencies.

The success of Brazil's Clean Companies Act (CCA) suggests a new route to consider.[44] Modeled after the U.S.'s Foreign Corrupt Practices Act (FCPA)[45]

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38 *From Hope to Skepticism: The International Commission Against Impunity in El Salvador (CICIES)*, DUE PROCESS OF THE L. FOUND. (Apr. 1, 2020), https://perma.cc/LMX2-FP5J; Richard Messick, *Will Honduras' MACCIH Become Another CICIG?*, THE GLOB. ANTICORRUPTION BLOG (Jan. 27, 2016), https://perma.cc/3K9G-AYBY. Such anticorruption assistance was viewed as necessary because of corrupt relationships between politics and El Salvador's substantial gang presence. *See id.*; *see also* CONG. RSCH. SERV., *supra* note 37, at 6. Additionally, the criminal justice system's "[c]orruption, weak investigatory capacity, and an inability to prosecute officers accused of corruption and human rights abuses" have become substantial impediments to accountability in the country. *Id.* at 7.

39 *See* Musalo, *supra* note 2, at 212–13.

40 DUE PROCESS OF THE L. FOUND., *supra* note 38.

41 *See id.*; CONG. RSCH. SERV., *supra* note 37, at 8; Musalo, *supra* note 2.

42 *See* Alemán, *supra* note 3; Musalo, *supra* note 2, at 214–15.

43 *See* Alemán, *supra* note 3.

44 Lei No. 12.846, de 1 de Agusto de 2013, Diário Oficial da União [D.O.U] de 2.8.2013 (Braz.)

45 Foreign Corrupt Practices Act of 1977 (FCPA), Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 USC. §§ 78dd-2, 78dd-3, 78ff, 78m (2012)).

and the U.K.'s Bribery Act of 2010,[46] the CCA facilitates anticorruption by incentivizing the development of corporate compliance systems with the threat of civil and administrative liability (but not criminal liability) for companies whose employees engage in bribery and other corrupt practices.[47] The CCA demonstrates that the legal framework underlying anticorruption programming in developed economies can be successfully replicated in Latin America.

## III. BEST PRACTICES FOR A LEGAL REGIME DESIGNED TO DETER CORPORATE CRIME

A legal regime that effectively mitigates corporate crime should use incentives to promote deterrence measures. Adequate incentivization first requires criminal liability for both individual perpetrators and the companies at which they work, in other words, *respondeat superior* liability.[48] Firms can then

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46 The Bribery Act 2010, c. 23 (Eng.).

47 *See* Robert S. Huie, *Brazil: The Clean Company Act*, *Corp. Compl. Series: FCPA* § 2:48 (2022–2023); Pamela R. Davis, *The FCPA is No Longer the Only Game in Town: Recent Anti-Corruption Enforcement Trends in the BRICS*, 2014 WL 10500, *2 (2014); Carina Tenaglia, *All Bark, No Bite? Proposals to Transform the Clean Company Act into an Effective Anti-Corruption Tool*, 51 GEO. WASH. INT'L L. REV. 555, 579 (2019). Penalties are up to 20% of the company's Brazilian annual gross income (or, if that is incalculable, up to about 26 million USD), and can include dissolution, asset seizure, restitution, and cessation of government financing. The Act also allows "leniency agreements" that support reduced fines for cooperation with law enforcement.

The CCA is seen as a success with room for improvement. Critics note that the CCA fails to cover exclusively private corrupt transactions; only covers businesses, not individuals; does not exempt payments in other countries that are legal locally; and contains insufficient clarity on what compliance and cooperation will support leniency agreements. *See id.* Yet experts find that the CCA has improved Brazil's corruption environment, resulting in the proliferation of compliance systems among Brazilian companies, which investigate corrupt activity among employees through such systems. *See* Zachary B. Tobolowsky, *Brazil Finally Cleans Up its Act with The Clean Company Act: The Story of a Nation's Long-Overdue Fight Against Corruption*, 22 L. & BUS. REV. AM. 383, 400–01 (2016). CCA violation enforcement has started slowly, but leniency agreements through mid-2018 had resulted in the equivalent of over 800 million USD in fines, damages, and disgorgement. *See Five Years of the Brazilian Clean Companies Act: Lessons Learned*, DLA PIPER (Dec. 5, 2018), https://perma.cc/QGT7-NDT5. And the CCA has "paved the way for many other related [anticorruption] laws," including a new five-year anticorruption plan. *Id.*; *see also* Jay Darden et al., *Key Takeaways for Businesses from Brazil's Newly Announced 5-Year Anticorruption Plan*, PAUL HASTINGS (Dec. 17, 2020), https://perma.cc/8H4F-J2WZ.

48 *See, e.g.*, Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW (Keith Hylton & Alon Harel eds., 2012); Jennifer Arlen, *The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.*, *in* NEGOTIATED SETTLEMENTS IN BRIBERY CASES 138, 158 (Tina Søreide and Abiola Makinwa eds., 2020) ("[C]ountries cannot effectively deter misconduct unless corporations are liable for all their employees' crimes committed in the scope of employment."). This is so for two reasons. First, it is individuals within the corporation who perform criminal acts, not the entity itself, so the law's deterrent effect must reach those persons. Second, corporate liability can spur a corporation to take preventative measures against criminal conduct among its employees. If a firm must

mitigate crimes committed by their employees through internal incentives and deterrents. Wrongdoers generally benefit from corporate crimes indirectly through compensation and other benefits received from profit-increasing activities. Firms should therefore structure compensation and promotion policies to make crime less profitable.[49] Firms can also use "policing measures," such as "*ex ante* monitoring, *ex post* investigation, and cooperation [with government enforcement officers]," to increase the likelihood of identifying and punishing illegal behavior.[50] Deterrence through incentivization is generally the most cost-effective approach to preventing and policing corporate crime, effectively functioning as a tool of the state beyond public enforcement programs and resources.[51]

A government seeking to incentivize corporate policing should also utilize a "duty-based" system requiring firms to monitor, self-report, cooperate, and remediate, and subjecting firms to sanctions for violations of those duties.[52] This

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internalize the costs of illegal activity committed by its agents, it has an impetus to avoid those costs and therefore has incentives to mitigate malfeasance.

49 *See* Arlen, *Corporate Criminal Liability: Theory and Evidence*, *supra* note 48, at 144. An employee who provides a bribe to secure some transaction does not receive the direct benefit of the bribe as the profitability of the transaction is realized by the business. The malfeasant employee would instead hope to benefit through a bonus payment, a promotion, or some other indirect advantage. This subject of employees indirectly benefitting from bribery and how compensation might be adjusted to counteract such incentives is elaborated upon by Teichmann and Sergi:

> Paradoxically, until their bribery is discovered, culpable employees often receive bonus payments for increased sales or performance resulting from their unlawful acts. . . . Agents wish to be compensated for acting in their principal's best interests. This does not occur if the principal is interested in both productivity and compliance but only pays agents in relation to the former. Hence, linking an anti-bribery programme to an incentive system could arguably have the potential to prevent employees from shifting the majority of the risk onto the owners. . . . Incentive systems could help to align the interests of principals and agents by rewarding both productivity and compliance with anti-bribery rules. This would encourage agents to focus on compliant productivity, more accurately reflecting the principal's interests. . . . Through a performance matrix measuring both compliance and productivity, employees could be awarded a bonus for productivity, a bonus for compliance, and a malus imposed for non-compliance. Under such a system, employees would still be financially rewarded for sales but would also receive part of their bonus for compliance. At the same time, should they commit an act of bribery, their entire bonus would be withdrawn, thereby removing the incentive for uncompliant sales.

FABIAN M. TEICHMANN & BRUNO S. SERGI, COMPLIANCE IN MULTINATIONAL CORPORATIONS 6, 24–25 (2018). Teichmann and Sergi also favor a whistleblower incentive scheme in which a whistleblowing employee would receive a proportion of fines and investigation costs avoided. *Id.* at 6, 25.

50 Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, *supra* note 48, at 144–45.

51 *See id.* at 145.

52 *See id.*, citing Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994); Arlen, *The Potential Promise and Perils of Introducing Deferred Prosecution Agreements*

is because *respondeat superior* liability does not effectively incentivize policing on its own—a compliant corporation and a noncompliant corporation would both face equal penalties.[53] Instead, firms that comply with policing requirements should be able to avoid criminal punishment, although civil liability should typically remain to further incentivize the prevention of misconduct.[54] Noncompliant firms should receive sanctions that are sufficiently large and likely to be imposed to make misconduct unprofitable.[55]

Deferred Prosecution Agreements (DPAs) are one criminal enforcement approach used to incentivize compliance (alongside guilty pleas and declinations with disgorgement).[56] Under a DPA, a prosecutor agrees not to pursue a criminal conviction of a firm, instead imposing sanctions in exchange for cooperation in the investigation, admission to the facts of the crime, and requirements that direct the firm's future behavior.[57] DPAs can include compliance program requirements, new reporting or business practices, governance changes, or employment of a corporate monitor.[58] In an optimal enforcement regime, firms only have access to DPAs "if they self-reported or fully cooperated and

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*Outside the U.S.*, *supra* note 48, at 162 ("These ['corporate policing'] efforts include compliance measures designed to detect misconduct (e.g., internal reporting systems), internal investigations, self-reporting and full cooperation that provides the government with actionable evidence about the misconduct and the identity of those involved.").

53 *See* Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, *supra* note 52; Jennifer Arlen & Renier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability* Regimes, 72 N.Y.U. L. REV. 687 (1997). Internalization of costs via *respondeat superior* liability alone does not necessarily incentivize deterrence because some crimes could remain profitable. This can be demonstrated with a simple example. If the penalty for engaging in corruption is one dollar, the likelihood of being subject to the penalty is 100%, and the benefit of that corrupt behavior is ten dollars, a business made to internalize the cost of that corruption would still benefit from the corruption by nine dollars. One would expect a profit-maximizing firm to engage in corruption in such a circumstance, despite having to internalize the corruption penalty. The penalty becomes similar to an increase in typical operating costs.

54 *See* Arlen, *Corporate Criminal Liability: Theory and Evidence*, *supra* note 48, at 145 (citing Arlen & Kraakman, *supra* note 53).

55 *See* Arlen, *The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.*, *supra* note 48, at 165 ("In addition to broad corporate liability, governments must ensure that the sanctions imposed on companies for their employees' misconduct is sufficiently large, and imposed with a sufficiently large probability, to render misconduct unprofitable.").

56 *See id.* at 157, 168.

57 *See* Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Nonprosecution*, 84 U. CHI. L. REV. 323, 325 (2017). A nonprosecution agreement (NPA) is also used to similar effect. "Under a DPA, the prosecutor files charges but agrees not to seek conviction. Under an NPA, the prosecutor agrees not to file formal charges against the firm. Both [agreements] enable prosecutors to sanction the firm without triggering the collateral consequences of a formal conviction, such as debarment or delicensing." *Id.* at 332–33. DPAs alone are discussed for the sake of simplicity, but they can be considered synonymous for the purposes of this paper.

58 *See id.* at 325.

remediated."[59] Notably, DPAs have been criticized for being inconsistent with the rule of law, given the broad liberties they afford prosecutors to restrict and direct corporate actions.[60]

## IV. ASSESSING LEGAL REGIMES FOR DETERRING CORRUPTION IN BUSINESS IN THE NORTHERN TRIANGLE

There are underutilized opportunities for fighting corruption in the Northern Triangle by leveraging the independence, pervasiveness, and susceptibility to influence of corporations to implement compliance programs as a means to advance the rule of law. The relative autonomy of the private sector compared to public anticorruption mechanisms suggests that criminal laws designed to disincentivize business corruption could create anticorruption programming that is more independent from corrupt political actors. Furthermore, such programming would require less funding or political capital than traditional rule of law mechanisms. Private anticorruption compliance would likely have a broader reach than even a robustly funded and politically supported public enforcement program because it would marshal existing private sector resources rather than requiring government spending. Moreover, the private sector is susceptible to advocacy and legal influence from international organizations and foreign states, so anticorruption in businesses could be promoted with or without local political support. Such a private anticorruption strategy would depend on actions from the three major bodies of influence on Northern Triangle States: domestic criminal law, international conventions, and extraterritorial law applicable to the Northern Triangle.

### A. Improving Northern Triangle Domestic Anticorruption Law

Guatemala, Honduras, and El Salvador have criminal codes that inadequately incentivize corporations to develop anticorruption compliance programs. These countries therefore lack the most cost-effective anticorruption approach that is sufficiently independent from government. Each country has a

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59 *See* Arlen, *The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the US*, supra note 48, at 168.

60 *See* Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 195 (2016) ("[P]rosecutorial discretion to impose [DPA] mandates falls outside the rule of law."). For example, DPAs in the U.S. often include mandates obligating a firm to modify its compliance program beyond federal requirements, such as requiring that certain information be collected, dictating employee training, elevating the chief compliance officer in the managerial hierarchy, or implementing an internal whistle-blowing program. DPAs can also require changes to an organization's governance, requiring specific board appointments, creation of committees, or prohibiting certain officers from holding particular governance positions. *Id.* at 200.

different degree of relevant existing criminal legal infrastructure, but each should pass laws such that the overall regime conforms with best practices.

1. *Respondeat Superior* Liability

It is fundamentally important that Northern Triangle Countries have vicarious corporate liability for illegal acts undertaken by employees within the scope of their employment, in other words, *respondeat superior* liability. Guatemalan and Honduran law both contain this feature, specifying criminal liability for legal persons.[61] Conversely, El Salvador does not have vicarious criminal liability for corporations,[62] and corrupt employee activity there cannot generally be reached by criminal corruption law. Thus, El Salvador is at odds with the largest economies, which hold businesses accountable for corrupt employee behavior.[63]

Holding businesses legally accountable with monetary and disbarment sanctions for employee malfeasance is the first step in building incentives to deter corporate crime because it imposes substantial, possibly existential costs on businesses for corrupt misconduct. While the doctrine is an insufficient incentive alone because it penalizes entities with and without sophisticated compliance structures equally (or, additionally, entities that do and do not cooperate with government enforcement), it assures that the social cost of criminal activity is internalized by the business. It is therefore vital that each country has laws that explicitly create vicarious liability for corporate crimes, at least with regard to crimes affiliated with corruption.

2. Broad Penalization of Corrupt Activity

Northern Triangle countries must also ensure that their sanctions regimes are broad enough to penalize all corrupt conduct and that the penalties are sizeable enough to impact firm behavior. Various corruption crimes are not criminalized by Guatemala, Honduras, and El Salvador, and all three fail to criminalize some private sector crimes.[64] Guatemala and El Salvador fail to outlaw private sector bribery, and none of the three ban private sector embezzlement.[65] Furthermore, El Salvador has not criminalized abuse of authority, money laundering, or various obstructions of justice.[66] Moreover, the

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61 *See* Código penal, Artíuco 38 (Guat.); Código penal, Artíucos 102 a 106 (Hond.).

62 U.N. Conference of the States Parties to the UNCAC, *Review of Implementation of the United Nations Convention Against Corruption: El Salvador*, 4, U.N. Doc. CAC/COSP/IRG/I/2/1/Add.22 (June 2–4, 2016), https://perma.cc/9GEW-XB4F.

63 *See* Daniel Seltzer & Aaron G. Murphy, *The End of Whac-A-Mole Compliance: A Global Approach to Anti-Corruption Actions*, 32 NO. 10 ACC DOCKET 50, 55 (2014).

64 *See generally* Código penal (Guat.); Código penal (Hond.); Código penal (El Sal.).

65 *See generally* Código penal (Guat.); Código penal (El Sal.).

66 *See id.*

monetary penalties associated with many Northern Triangle criminal laws are unlikely to impact firm behavior. Unless fines are sufficiently large, indicted businesses will absorb the fine as a cost of business.

Honduras differentiates itself favorably from its neighbors in criminalizing some private sector corruption, as well as conspiracy, proposition, and provocation to commit such corruption crimes.[67] This structure brings a substantial swath of misconduct into the criminal system. In contrast, Guatemala and El Salvador lack criminal laws pertaining specifically to private sector corruption and should therefore replicate these aspects of Honduras's new criminal code.

### 3. Adequate Sanctions

Although vicarious liability and a broad sanctions regime would ensure that the penalties imposed on employee wrongdoers are felt by their employing companies, the application of those costs is inadequate if sanctions will not influence firm behavior. Unlike individual employees, businesses cannot be jailed. While disbarment penalties represent a serious threat, prosecutors can be reluctant to impose such punishments because of the unjustified knock-on impacts on innocent stakeholders like employees or shareholders.[68] Thus, serious monetary penalties represent a useful middle-ground spur to catch the attention of corporations whose employees have committed wrongdoing.

Monetary penalties associated with corrupt criminal activity in Honduras have limited potential to properly incentivize businesses. Legal entities there can

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[67] Honduras replaced its criminal code in June 2020. *See* Decreto No. 130-2017 Código Penal, May 9, 2020; *see also* Marlon González, *Honduras' New Penal Code Lightens Sentences for Corruption*, ASSOCIATED PRESS (Jun. 25, 2020), https://perma.cc/7MQT-XHDG. The new code has been criticized for lowering penalties on corruption and drug trafficking crimes, among other measures. Héctor Silva Ávalos, *Honduras' New Criminal Code Will Help Impunity Prosper*, INSIGHT CRIME (Jun. 29, 2020), https://perma.cc/VH2Y-TTSW; HUMAN RIGHTS WATCH, WORLD REPORT 2021: HONDURAS (2021), https://perma.cc/C8DU-W2G6. For provisions criminalizing some private acts, see Código penal, Artíucos 418 a 420 (Hond.).

[68] To be sure, disbarment is a possible penalty for violations of various corruption-related laws in Guatemala, Honduras, and El Salvador, and such a sanction would be catastrophic for any business. That said, there are various social and economic risks associated with an indictment, not to mention disbarment. A clear example of these risks can be seen through the American prosecution of Arthur Andersen over the Enron scandal. *See, e.g.*, James Kelly, *The Power of an Indictment and the Demise of Arthur Andersen*, 48 S. TEX. L. REV. 509 (2007). Today, at least in the U.S., federal prosecutors consider and balance various factors when deciding whether to prosecute a business, considering, among other things, the benefits of prosecution against the knock-on effects such a prosecution might have on uninvolved employees, shareholders, and others. *See generally* U.S. Dep't of Just., Just. Manual § 9-28.000 (2020), https://perma.cc/35N8-4GJ6. While disbarment might be a potent threat to businesses, Northern Triangle prosecutors may be hesitant to make good on that threat given those possible harms to others. Thus, effective non-disbarment repercussions are an important component of a legal regime that intends to discourage corruption in business.

face a maximum fine of 100 million Honduran lempiras (HNL), equal to about 4.15 million USD.[69] In many cases this may not be enough to deter corrupt behavior. In a hypothetical bribe of a public official by a Honduran business to secure a government contract valued at 5 million USD, with a 20% chance of discovery by law enforcement, the expected value of that bribe is 3.17 million USD, so making the bribe is a profitable business decision.[70] The likelihood of discovery would need to approach 55%—a highly unrealistic probability—before the expected value would reach zero. The deterrent effect would be smaller for more valuable schemes. While these fines might deter smaller firms, sufficiently large organizations are unlikely to be substantially influenced.

Potential monetary penalties in Guatemala are less clear than in Honduras, but likely face similar challenges. Though the Guatemalan penal code specifies a maximum penalty of 625,000 USD when a criminal act is approved by a corporation's decision-making body, there is no associated penalty.[71] Again, the sufficiency of this amount is questionable, given its expected value. Bribery of a foreign official carries a lower maximum fine—500,000 quetzales, equivalent to about 65,000 USD—providing a similarly doubtful deterrent.[72]

For many El Salvadorian corruption-related crimes, it is unclear whether monetary penalties are possible at all. For example, both domestic and transnational bribery only carry the possibility of imprisonment. However, El Salvadorian law does provide for subsidiary civil liability, in which an employer would be responsible for the balance of a fine that the penalized individual is unable to afford in certain cases.[73]

### 4. Incentives for Self-Reporting, Cooperation, and Remediation

It is difficult to assess the Guatemalan, Honduran, and El Salvadorian systems that incentivize self-reporting, cooperation, and remediation, as the

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69 Código penal, Artíuco 104 (Hond.). Honduras applies some fines by the "day." In the case of legal persons, the maximum number of "days" an entity can be penalized is 2,000, and the maximum value of a "day" is 50,000 HNL. Thus, the maximum fine for a legal person is 100 million HNL.

70 80% x 5,000,000 + 20% x -4,150,000 = 3,170,000. *Cf.* TEICHMANN AND SERGI, *supra* note 49, at 7 ("Many observers suggest that the chances of being caught and punished [for bribery] are rather low. Corrupt public officials rarely suffer the consequences of taking bribes. Hence, the expected utility of this unlawful act continues to be high, with disproportionate benefits from taking bribes and very low risk of being caught.").

71 Código penal, Artíuco 38 (Guat.).

72 Código penal, Artíuco 439 (Guat.). The statute providing criminal liability for legal persons otherwise states that fines will be determined according to the economic capacity of the legal entity and will be set based on the circumstances in which the crime was committed. Código penal, Artíuco 38 (Guat.). Whether this provides an unlimited scope for monetary penalties or mere discretion up to 650,000 USD is unclear.

73 Código penal, Artíucos 38, 116, 118 a 121 (El Sal.).

relevant information is not easily identifiable. Whereas the U.S. Department of Justice makes its corporate prosecution standards publicly available, similar information for the Northern Triangle countries was not readily accessible.[74] This is problematic, first, because transparency about enforcement procedures would allow Northern Triangle businesses to better develop compliance systems aligning with government incentives. And, second, openness about enforcement procedures enables interested parties to provide feedback that can lead to improvements.

None of the three countries are known to allow DPAs, limiting law enforcement's latitude to negotiate cooperation agreements with lawbreakers. Although DPAs are a useful resource for American prosecutors, critics have decried their use as abusive.[75] It may be questionable whether DPAs are sensible to employ in environments known for corruption, given the associated risks discussed below.

5. Considering Risks

Implementing these proposed changes may undermine existing anticorruption efforts, which leverage the Northern Triangle governments' institutional powers to incentivize private actors to create compliance regimes. However, where there is a pervasive perversion of the rule of law, the mechanisms intended to promote compliance can be wielded for improper aims. For example, those same tools could be leveraged to solicit payments in exchange for discretionary enforcement waivers. A corrupt official could use criminal statutes and large potential sanctions to negotiate non-enforcement for an employee's crimes in exchange for illicit payments. Tools like deferred and non-prosecution agreements would also increase a prosecutor's extractive power. However, the risk of corrupt non-enforcement is already present, as in the above example of the corrupt official negotiating non-enforcement, given that Guatemala and Honduras have *respondeat superior* liability. The possibility of bribes increasing is thus a purely theoretical risk that does not necessarily outweigh the benefits of best practices to honest enforcement officers.

Beyond that, the private sector's focus on profitability would still induce responses to anticorruption incentives in a regime where there are corrupt prosecutors or judges. Even a legal system with the rule of law presents the possibility of an incompetent prosecutor, a lucky trial break, or the avoidance of detection, but responsible businesses do not rely on such chance occurrences. A corrupt enforcement or judicial system is not much different in an expected value calculation; actually, all else being equal, a system in which a lawbreaking

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74 The Justice Department provides this information in the Justice Manual's Principles of Federal Prosecution of Business Organizations. U.S. Dep't of Just., *supra* note 68.

75 *See generally* Arlen, *supra* note 60.

business must pay a bribe to evade legal consequences more strongly incentivizes private sector compliance systems relative to one with lucky breaks. This is because the added cost of bribes decreases the profitability of illegality. Sanctions can be set to ensure that incentives match the likelihood of accountability. A fine-to-crime-value ratio of ten-to-one makes the expected value of misbehavior negative, at around a 10% likelihood of accountability.[76] If detection is less likely, say, 7%, then a fifteen-to-one fine is sufficient; if 4%, then twenty-five-to-one, and so on. Ultimately, a system with proper incentives should result in a private sector response away from corrupt behavior and into policing measures.

There is another risk that, despite properly codified laws and cooperation incentivization policies, compliance-program-promoting accountability could be impeded by underfunded enforcement or an unstable judiciary. Naturally, a law or policy is only as impactful as its capacity to affect the real world. And, in the face of enforcement or judicial barriers, it could seem wasteful to spend political capital and resources on legal improvements that may not ultimately impact public life. Still, the suggested improvements to the Northern Triangle's legal systems are worthwhile. First, these suggested amendments should be part of any comprehensive anticorruption plan, so it is valuable to secure such changes wherever possible. Second, where each country's leadership is rejecting U.N. and OAS assistance, advocates should seize any opportunity to secure anticorruption advancements. The fact that governing administrations could both retain enforcement control while bragging of domestic anticorruption actions suggests a political opportunity for compromise. Finally, implementing these changes would ensure that future rule of law improvements would have broader impacts because the legal structures would provide the right incentives. Thus, benefits of future law enforcement or judiciary improvements would be amplified by the enhanced legal architecture.

### B. International Conventions

As the bodies overseeing the anticorruption-related international obligations of Northern Triangle countries, the U.N. and OAS are best situated to promote development of private sector anticorruption compliance systems. Implementation review programs and broader advocacy would promote a more complete and rapid adoption of such a system by recognizing the potential for a properly structured corporate-crime-deterring legal regime and integrating that acknowledgement into the relevant conventions. This is because advocates could

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[76] To demonstrate, imagine the penalty was $100 for a crime valued at $10. This fine-to-crime ratio is ten-to-one. In such a scenario, a 10% chance of getting caught means the expected value of committing the crime is $10 x 90% (the expected payoff of crime multiplied by the probability of "getting away with it") + -$100 x 10% = -$1.

use the conventions as a basis for urging application of best practices. Given the recent demises of CICIG, MACCIH, and CICIES, the U.N. and OAS would be sensible to promote private sector compliance programs as part of future efforts that are more independent from local governments.

The UNCAC is the most substantial international anticorruption agreement affecting the Northern Triangle. It aims to reduce cross-border corruption—including private sector corruption—and Guatemala, Honduras, and El Salvador are all signatories.[77] Among the UNCAC's provisions are directives relating to criminal treatment of corruption and cooperation with civil society and nongovernment organizations.[78] Provisions requiring criminalization of certain acts predominantly concern the public sector,[79] and its private sector provisions include both mandatory and non-mandatory requirements.[80]

The UNCAC generally promotes best practices for discouraging corporate crime. The convention requires member states to "establish the liability of legal persons," criminalize a broad range of corrupt behavior,[81] and "ensure that legal persons held liable . . . are subject to effective, proportionate and dissuasive . . . sanctions, including monetary sanctions."[82] Finally, the convention encourages promotion of cooperation with law enforcement with mitigated punishment or even immunity.[83] However, the convention fails to require *respondeat superior* liability—a problematic oversight.[84]

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77 *See UNCAC Signature and Ratification Status*, U.N. (2021), https://perma.cc/B3DN-6LPH.

78 *See* IACHR, *supra* note 12, at 24.

79 *See* UNCAC arts. 15–27.

80 *See* AKIN GUMP STRAUSS HAUER & FELD LLP, INTERNATIONAL TRADE ALERT: THE UNITED NATIONS CONVENTION AGAINST CORRUPTION 5–6 (Jan. 14, 2004), https://perma.cc/XAL6-CAUC. Member states must adopt measures to prevent private sector corruption broadly, maintain appropriate private sector accounting and auditing standards, and provide civil, administrative, or criminal penalties for noncompliance "where appropriate." *See* UNCAC art. 12. Member states must also prohibit the tax deductibility of bribes. *See id.* In economic, financial, or commercial activities, states may "consider adopting" laws criminalizing embezzlement and the provision, receipt, or solicitation of bribes. *See* UNCAC arts. 21–22. And they are required to establish the criminal, civil, or administrative liability of legal persons (in other words, businesses), which will be subject to deterrent sanctions, including monetary penalties. *See* UNCAC art. 26. In matters involving offenses established in the UNCAC, states must also take measures to encourage cooperation between national investigating and prosecuting authorities and private sector entities, and states must consider encouraging the public to report offenses to prosecuting authorities. *See* UNCAC art. 39.

81 *See* UNCAC arts. 15–27.

82 *See* UNCAC art. 26.

83 *See* UNCAC art. 37. Despite language that might seem to support cooperation, deferred prosecution, and non-prosecution agreements, this article seems instead geared mostly toward coordination between investigators and institutions that may be able to provide evidence of malfeasance, such as financial institutions.

84 *See supra* Part IV.A.1.

Yet, a review of the UNCAC Implementation Review Group Reports for Guatemala, Honduras, and El Salvador—in which the countries' measures to apply the provisions on criminalization and law enforcement were assessed—suggests that reviewers may not have received effective guidance on how to evaluate the capacity of Northern Triangle countries' legal systems to incentivize private sector anticorruption compliance programs. This is particularly so with respect to the magnitude of penalties and cooperation. For example, while reviewers for Guatemala and Honduras note that many criminal sanctions can be adjusted to the gravity of the offense, there is no assessment of whether those sanctions are "effective, proportionate and dissuasive,"[85] which is key to establishing the proper incentives. Likewise, whereas reviewers for Honduras and El Salvador noticed the availability of prosecutorial discretion in some circumstances, discussions of immunity for cooperators suggested a predominant focus on accommodations for natural persons rather than for legal persons, which includes corporations.[86] The implication from these reports is that the checklists used in UNCAC reviews do not encourage reviewers to identify whether the member states are incentivizing the private sector to undertake its own corruption policing measures. The fact that the UNCAC does not require member states to criminalize private sector bribery underscores the limited focus on private sector activities,[87] which appears to manifest in the inadequate attention given to private sector bribery and other anticorruption efforts identified in the implementation review reports.[88] The U.N. should increase its focus on accountability for implementation of UNCAC provisions relating to private sector corruption by pushing for effective review.

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85 *See* U.N. Conference of the States Parties to the UNCAC, *Review of Implementation of the United Nations Convention Against Corruption: Republic of Guatemala*, 4, U.N. Doc. CAC/COSP/IRG/I/4/1/Add.33 (June 20–24, 2016), https://perma.cc/SUD9-NUNA; U.N. Conference of the States Parties to the UNCAC, *Review of Implementation of the United Nations Convention Against Corruption: Republic of Honduras*, 4, U.N. Doc. CAC/COSP/IRG/I/4/1/Add.28 (June 20–24, 2016), https://perma.cc/AZ9J-ELH9.

86 *See id.*; U.N. Conference of the States Parties to the UNCAC, *Review of Implementation of the United Nations Convention Against Corruption: El Salvador*, 4, U.N. Doc. CAC/COSP/IRG/I/2/1/Add.22 (June 2–6, 2016), https://perma.cc/9GEW-XB4F.

87 For discussion of how the UNCAC both does and does not acknowledge the relevance of private corruption to overall anticorruption efforts, see A. Katarina Weilert, *United Nations Convention Against Corruption (UNCAC): After Ten Years of Being in Force*, 19 MAX PLANCK Y.B. OF U.N. L. 216, 222 (2015).

88 *See* U.N. Conference of the States Parties to the UNCAC, *Review of Implementation of the United Nations Convention Against Corruption: Republic of Guatemala*, *supra* note 85, at 2; U.N. Conference of the States Parties to the UNCAC, *Review of Implementation of the United Nations Convention Against Corruption: Republic of Honduras*, *supra* note 85, at 3; U.N. Conference of the States Parties to the UNCAC, *Review of Implementation of the United Nations Convention Against Corruption: El Salvador*, *supra* note 86, at 3.

The OAS's IACAC—the other key regional anticorruption convention to which Guatemala, Honduras, and El Salvador are signatories[89]—is generally overshadowed by the more thorough and robust UNCAC.[90] Like the UNCAC, the IACAC obligates its member states to mitigate local corruption, establish systems for whistleblower protection, encourage civil society participation, and adopt criminal procedures for prosecuting corruption.[91] However, the IACAC does not contain corollaries to the private corruption directives in the UNCAC.[92] Still, the IACAC applies requirements to its member states, and accountability is maintained through its own implementation review process.

The IACAC's prescriptions fail to promote best practices for a corporate anticorruption regime, which severely limits its promise—no IACAC provisions discuss private sector corruption or legal liability for businesses.[93] The IACAC does not require liability for legal persons. It urges criminalization of various corrupt acts, but it does not necessitate criminalization of private sector corruption (mentioning businesses only in relation to transnational bribery of public officials) and provides little guidance for the magnitude of sanctions. It also fails to mention the promotion of cooperation with law enforcement and the resultant possibility of penalty reduction. The effect is a dramatic narrowing of the scope of potential IACAC-related advocacy that could lead to more robust enlistment of the private sector in the fight against corruption. OAS should consider amendments to the IACAC—perhaps mirroring the UNCAC—to bring its private sector prescriptions in line with best practices for deterring corporate crime and ensuring that advocacy for implementation of such practices can be more legitimately shared between itself and the U.N.

### C. Extraterritorial Laws

Foreign nations that have anticorruption laws with broad jurisdictional reach can lend the integrity of their legal systems and their enforcement resources to Northern Triangle countries. In this way, foreign nations can supplement the enforcement limitations in the region, increase the likelihood of catching illegal corporate actors, and bolster incentives for private sector organizations to develop robust compliance programs.

The U.S.'s FCPA bars corrupt business payments to foreign government officials and imposes record-keeping and internal control requirements for

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89 *See IACAC Signatories and Ratifications*, OAS (2021), https://perma.cc/4Z8S-P5YQ.

90 This is likely in part because the UNCAC was established later and was influenced by the IACAC. *See* Christopher R. Yukins, *Integrating Integrity and Procurement: The United Nations Convention Against Corruption and the UNCITRAL Model Procurement Law*, 36 PUB. CONT. L.J. 307, 311 (2007).

91 *See generally* IACAC, *supra* note 7; IACHR, *supra* note 12, at 22.

92 *Id.*

93 *See generally* IACAC, *supra* note 7.

American public companies.[94] It also affords jurisdiction over non-U.S. companies and companies that operate outside the U.S. if they trade on a U.S. stock exchange, qualify as a domestic concern, act within the territory of the U.S. in furtherance of a corrupt payment or promise, or are an agent or stockholder of an issuer or domestic concern.[95] Despite broad latitude to bring extraterritorial actions, the U.S. has not pursued FCPA enforcement actions in Northern Triangle Countries.[96]

Any FCPA enforcement in Guatemala, Honduras, or El Salvador would be a financial and rule of law subsidy, increasing anticorruption resources devoted to the region and the quality of enforcement and adjudication. Such an approach would be consistent with attempts through CICIG, MACCIH, and CICIES to solicit assistance from foreign entities,[97] with the benefit of stronger independence from local governments. In fact, replication of American and Brazilian collaboration in FCPA and CCA enforcement actions is reminiscent of collaborations between each Northern Triangle commission and local law enforcement counterpart, except without the risk of jeopardizing the accountability mechanism by investigating the political establishment too closely.

Such an anticorruption strategy would carry a simultaneous risk: if profitability is limited in the Northern Triangle, then increasing business anticorruption compliance costs could discourage foreign investment, thus hampering economic development. This suggests that anticorruption efforts undertaken to promote economic growth could be somewhat counterproductive. The effect would be even more dramatic should a stuttering economy also be corruption-producing. This could partially explain the lack of Northern Triangle FCPA enforcement—perhaps anticorruption investigations have a greater negative impact on investment and productivity in a low-growth developing economy compared to more successful ones like Mexico or Brazil, where U.S. FCPA investigators focus.[98]

Yet, corruption in the Northern Triangle presumably deters foreign investment from countries with strong anticorruption laws. A company

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94 *See* Roger M. Witten et al., *Prescriptions for Compliance with the Foreign Corrupt Practices Act: Identifying Bribery Risks and Implementing Anti-Bribery Controls in Pharmaceutical and Life Sciences Companies*, 64 BUS. LAW. 691, 695 (2009).

95 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

96 Of the nearly one hundred FCPA enforcement actions undertaken by the U.S. Department of Justice in 2021 and the U.S. Securities and Exchange Commission since 2016, many have involved activity in Latin American countries, but none have involved actions in Northern Triangle Countries. *See FCPA Enforcement Actions*, U.S. DEP'T OF JUST. (2022), https://perma.cc/RGK2-JX7F; *SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCH. COMM'N (2022), https://perma.cc/U63L-HF8Y.

97 *See* Messick, *supra* note 22.

98 *See id.*

considering enterprises in Guatemala would be wary of law enforcement at home if bribes were a necessary cost of business. The investment might be profitable if "clean," but corruption costs and enforcement risk may create unprofitability or excessive risk. Given that many wealthy countries have strong anticorruption laws, hesitancy could cause underinvestment in the Northern Triangle.[99] Thus, countries lending their anticorruption enforcement laws to Guatemala, Honduras, and El Salvador could be advantageous insofar as they reduce corruption exposure risk for prospective investors. Ventures would need to be profitable with anticorruption compliance costs included, but many businesses already have such programs in place elsewhere, meaning compliance costs from foreign investment would only include marginal costs, much lower than the costs of building an entire program.

Such an analysis is only bolstered by the potential long-term and difficult-to-value noneconomic benefits to other countries from reducing corruption in the Northern Triangle. For example, should reduced corruption in Guatemala provide more social stability and economic opportunity to locals, then the U.S. would reap its own political and social benefits from a decrease in Guatemalan migrants. Thus, an exclusively economic analysis may not be able to capture the full scope of benefits of investing in extraterritorial corruption enforcement.

## V. CONCLUSION

This Comment argues that corporate compliance regimes can serve as an alternate mechanism to advance rule of law for Northern Triangle countries that struggle with anticorruption accountability, and that changes to domestic laws, international agreements, and extraterritorial legal enforcement can produce more effective development of such regimes. It is reasonable to hope that mechanisms like CICIG, MACCIH, and CICIES can all be revived, but corporate compliance schemes would complement the effectiveness of such mechanisms. One could rightly presume that these international anticorruption bodies would rely on compliance systems to broaden their reach and amplify the impacts of their investments, whereas the effectiveness of the compliance systems would be likewise benefitted by the anticorruption bodies' focuses on strengthening the rule of law and creating predictable and effective enforcement.

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[99] Underinvestment does not necessarily mean *no* investment. There could be investment from companies glad to make corrupt payments and without fear of anticorruption enforcement actions in their home countries. Such investments could be a reason why Northern Triangle Countries have not already made legal changes to attract investment from currently corruption-concerned businesses. In an environment in which public officials are bribed by businesses, those officials' incentives might be to maintain the status quo in which they are enriched for their personal benefit, rather than to purge corruption to attract aboveboard investments for the country's benefit.

Understanding the full breadth of actions needed to effectively incentivize compliance systems in the Northern Triangle requires additional research. Domestically, a more sophisticated understanding of law enforcement procedures in Guatemala, Honduras, and El Salvador would unearth inefficiencies and allow comparison to investigative, prosecutorial, and cooperation-related best practices. Analysis of additional activities undertaken by international bodies, such as guidance for doing business in Latin America, would enable full stock to be taken of broader advocacy efforts in the region. And analysis of American FCPA prosecution priority-setting, as well as a similar study of other extraterritorial anticorruption laws, would support critiques for how other countries can best support anticorruption efforts in the Northern Triangle.