What Did International Anticorruption Institutions Learn from Operation Car Wash?

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The leading international institutions charged with guiding reform of transnational anticorruption law have adopted processes that are iterative and experimental to learn from enforcement and implementation experiences. To explore whether and how these processes are working, we use Brazil's Operation Lava Jato (Car Wash), and the related Odebrecht investigations in other Latin American countries, as a case study. These interconnected cases represent two of the largest corruption probes in the world today, with far-reaching legal, political and economic effects in multiple nations. We argue that the bodies that oversee reform under the OECD Convention and the UN Convention Against Corruption have neglected some of the lessons to be learned from these enforcement operations. They focused on lessons about how to achieve efficiency and effectiveness, rather than due process and human rights. The pattern of neglect is consistent with the hypothesis that international anticorruption institutions are dominated by law enforcement, and their lack of inclusiveness of other perspectives limit these institutions' ability to learn from experiences with enforcement of anticorruption law.

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INTRODUCTION

One of the great challenges of global governance is to ensure that norms and practices are constantly re-evaluated and revised in light of lessons learned. Such lessons are richer when they encompass the broadest possible range of past experiences. Existing literature suggests that international institutions can play an important role in promoting effective and legitimate revision of legal norms and practices, especially if they embrace iterative, experimental and inclusive processes.

Anticorruption law is a leading example of a field in which international institutions have been credited with positively influencing law reform by employing iterative and experimental processes that promote cross-country learning. We test this claim using a case study of how the two leading international anticorruption institutions, namely, the Organisation for Economic Co-operation and Development (OECD) Working Group on Bribery and the United Nations Convention against Corruption (UNCAC) Conference of the States Parties (CoSP), have responded to a high-profile set of anticorruption operations in Latin America.

Specifically, we examine the responses of the OECD Working Group on Bribery and the CoSP to Brazil's Operation *Lava Jato,* or, in English, Operation Car Wash (Car Wash), and the related Odebrecht investigations in other Latin American countries. Possibly the largest anticorruption enforcement operation in history, Car Wash targeted an enormous Brazilian corruption scheme involving the state-run oil company (Petrobras), the largest construction companies in the country, and high-ranking politicians. Car Wash also led to follow-on proceedings against one of the construction companies, Odebrecht, in eleven other countries. The Car Wash and Odebrecht investigations sparked numerous enforcement actions, public protests, and media campaigns, which ended in harsh corporate sanctions and the imprisonment and/or ouster of leading political figures. Taken together, the two sets of legal proceedings had far-reaching and largely negative effects on economic growth, human rights, and democratic governance in the region.

Latin American countries' experiences with Car Wash and Odebrecht call into question several of the approaches to anticorruption law recommended by the OECD Working Group on Bribery and the CoSP. Still, those institutions have only revised some of the recommendations in question. Our analysis of the outcomes of the two enforcement operations supports international institutions' calls for vigorous enforcement of anticorruption law to combat corruption and impunity. At the same time, some of the outcomes of Car Wash and Odebrecht suggest that the OECD and CoSP's model of anticorruption

law ought to be revised to exhibit more concern for due process and human rights, the dangers of recruiting the media into the fight against corruption, the political effects of anticorruption law enforcement, the importance of coordination among domestic enforcement agencies, and the impact of international cooperation on third parties. Our research suggests that the OECD Working Group and the CoSP have revised their recommendations on anticorruption law to incorporate some but not all of these insights. The pattern of revisions is consistent with the hypothesis that anticorruption institutions dominated by law enforcement will do a better job of incorporating lessons about how to achieve goals such as efficiency and effectiveness (at least as measured in terms of coercive outputs) than lessons about goals such as due process and human rights.

Our analysis draws on our previous works in which, using qualitative methods, we built thick descriptions of Car Wash and Odebrecht, including analyses of case files and the socio-political contexts in which they unfolded, and identified potential lessons for reforming anti-corruption laws.[1] For this study, we also reviewed documentation produced by the OECD Working Group and the CoSP, paying particular attention to documentation relating to the countries affected by Car Wash and Odebrecht, for indications of whether the international institutions formally expressed lessons from either of the cases.

The remainder of the article is organized as follows. Part I provides an overview of the international institutions involved in anticorruption law and sets out competing views on whether their mechanisms to learn from implementation experiences are likely to incorporate relevant lessons and ultimately improve the law. Part II describes the Car Wash and Odebrecht enforcement operations. Part III identifies several ways in which the outcomes of those operations offered lessons bearing on and, in many dimensions, called into question the wisdom of OECD and CoSP recommendations. Part IV discusses the extent to which the OECD and CoSP have revised their recommendations in light of Car Wash and Odebrecht. The final part concludes.

1. *See* Kevin E. Davis et al., *Introduction to the Special Issue: Legal and Political Responses to Systemic Corruption*, 17 REVISTA DIREITO GV 1 (2021); *see generally* Mariana Mota Prado & Marta Rodriguez de Assis Machado, *Using Criminal Law to Fight Corruption: The Potential, Risks, and Limitations of Operation Car Wash (Lava Jato)*, 69 AM. J. COMP. L. 834 (2021).

I. DO INTERNATIONAL INSTITUTIONS LEARN FROM ENFORCEMENT EXPERIENCES AND ULTIMATELY IMPROVE ANTICORRUPTION LAW?

A. How International Institutions Influence Anticorruption Law

The legal regulation of corrupt activity—anticorruption law for short—encompasses a broad range of domestic and international norms, institutions and practices. In formal terms, the sources of anticorruption law include not only domestic laws concerned with bribery and embezzlement, but also international instruments such as the UNCAC and the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (OECD Convention). Some of these instruments, such as the U.S. Foreign Corrupt Practices Act of 1977 and the OECD Convention, cover corrupt activity that crosses international borders, such as bribery of foreign public officials and international money laundering.[2]

The institutions that administer and enforce anticorruption law include a broad array of domestic and international bodies. The domestic institutions include legislatures, courts, prosecutors and administrative agencies. Meanwhile, at the international level, high-profile institutions are charged with implementing the OECD Convention and UNCAC respectively, namely, the OECD Working Group and the CoSP, as well as regional bodies such as MESICIC, the anticorruption mechanism for the Organization of American States.[3] Other important international institutions include the World Bank, Interpol, and arbitral panels constituted to adjudicate investment disputes. Finally, if we look beyond purely legal institutions, other bodies involved in regulation of corrupt activity include non-profits and civil society groups, international financial institutions that condition access to foreign aid and investment on anticorruption efforts, private firms that administer internal anticorruption compliance programs, as well as promulgators of corruption indicators, inter-governmental or sector-specific standards, and private firms' anticorruption compliance programs.[4]

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2. Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. § 78dd-1; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. No. 105-43 [hereinafter OECD Convention].

3. *See generally What is the MESICIC?*, ORG. AM. STATES, https://www.oas.org/en/sla/dlc/mesicic/ [https://perma.cc/YC6G-YGPY].

4. Radha Ivory, *Beyond Transnational Criminal: Anti-Corruption as Global New Governance*, 6 LON. REV. INT'L L. 413, 427–32 (2018); KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY 41 (2019).

International institutions influence the development of anticorruption law both directly and indirectly. The mechanisms of direct influence—our focus in this article—generally are designed to promote implementation of and compliance with international legal frameworks. The indirect mechanisms include acquiring and disseminating information across country contexts and among those pushing for action against corruption within a state or supporting specific domestic reform projects.[5] Indirect influence may also involve providing fora for raising international awareness and pressure in support of domestic actors pushing for reforms, such as journalists or media organizations documenting the harm caused by corruption.[6]

Our focus here will be on the two leading international anticorruption institutions, the OECD Working Group and the CoSP, and their direct efforts to influence domestic anticorruption law. Both institutions develop recommendations, resolutions, decisions and other forms of guidance on future implementation of their governing treaties. They also both oversee periodic peer reviews designed to identify instances in which states have failed to live up to standards established by the treaties, assist states in improving their implementation of the treaties, and provide a basis for identifying common challenges.[7] However, the two institutions' peer review mechanisms differ in significant respects. For instance, the meetings of the OECD Working Group include a *tour de table* in which the parties review open enforcement actions.[8] Under the UNCAC, responsibility for periodic peer reviews is assigned to a subsidiary body of the CoSP, the Implementation Review Group, which operates alongside other subsidiary bodies responsible for reviewing countries' prevention of corruption, asset recovery, and international cooperation.[9]

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5. Susan Rose-Ackerman, *International Actors and the Promises and Pitfalls of Anti-Corruption Reform*, 34 U. PA. J. INT'L. L. 447, 450–54 (2013).

6. *Id.* at 460–74; FLORENCIA GUERZOVICH ET AL., SEEING NEW OPPORTUNITIES: HOW GLOBAL ACTORS CAN BETTER SUPPORT ANTICORRUPTION REFORMERS 8 (2020); SUSAN ROSE-ACKERMAN & BONNIE J. PALIFKA, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 453 (2nd ed. 2016).

7. OECD Convention, *supra* note 2, art. 12; OECD, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 12, ¶ 34–36 DAFFE/IME/BR(97)17/REV1, (Nov. 21, 1997); G.A. Res. 58/4, United Nations Convention Against Corruption, art. 63 (Oct. 31, 2003).

8. United Nations Convention Against Corruption, *supra* note 7, art. 12.

9. *Conference of the States Parties to the United Nations Convention Against Corruption*, U.N. Off. Drugs & Crime, https://www.unodc.org/unodc/en/corruption/COSP/conference-of-the-states-parties.html [https://perma.cc/F2US-M833].

The country reports generated by the OECD Working Group's peer review mechanism can include recommendations and proposals for reform that are not included in either the Convention or formally issued guidance documents. Ivory and Søreide show that although negotiated settlements are not required by either the OECD Convention or the recommendations issued by the Working Group, the Working Group has repeatedly endorsed this method of resolving enforcement actions in country reports.[10] This effectively created pressure for countries to adopt negotiated settlements but through a relatively unsystematic and opaque process.

There is evidence that at least some of the mechanisms employed by the Working Group and CoSP have influenced domestic anticorruption law. Cecily Rose shows that the OECD Working Group's non-binding guidance documents have influenced practices and guidance documents issued by enforcement agencies in the US and UK.[11] She argues that the OECD Convention's peer review process also generates change, even though there are no binding sanctions attached.[12] Jongen is a bit more reserved: In a qualitative analysis of the OECD WGB peer review process, she argues that while it creates transparency about state behavior, mobilizes pressure (by domestic and international stakeholders), and stimulates learning across jurisdictions, its effectiveness in promoting change depends on political will.[13] Similarly, Brewster and Ortiz argue that the OECD Working Group played a decisive role in inducing Latin American governments to implement reforms to their anticorruption laws in the aftermath of Car Wash and Odebrecht, the two enforcement operations we study below.[14] There is less literature on the UNCAC Implementation Review Mechanism (IRM), but it does not appear to be as effective as the OECD peer review process.[15]

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10. Radha Ivory & Tina Søreide, *The International Endorsement of Corporate Settlements in Foreign Bribery Cases*, 69 INT'L & COMP. L.Q. 945, 960–62 (2020).

11. CECILY ROSE, INTERNATIONAL ANTI-CORRUPTION NORMS: THEIR CREATION AND INFLUENCE ON DOMESTIC LEGAL SYSTEMS 69–82 (2015).

12. *Id.* at 83–92. *See generally* Markku Lehtonen, *Harder Governance Built on Soft Foundations: Experience from OECD Peer Reviews*, 22 J. ENV'T POL'Y & PLAN. 814 (2020) (discussing OECD peer review mechanisms outside the corruption context).

13. *See generally* Hortense Jongen, *Peer Review and Compliance with International Anti-Corruption Norms: Insights from the OECD Working Group on Bribery*, 47 REV. INT'L STUDS. 331 (2021).

14. Rachel Brewster & Andres Ortiz, *Never Waste a Crisis: Anticorruption Reforms in South America*, 60 VA. J. INT'L L. 531, 547–48 (2020).

15. *See generally* ROSE, *supra* note 11, at 97–132 (explaining that the IRM is less robust, less transparent and more likely to be plagued by collective action problems than the OECD

There are mixed views on the performance of anticorruption regimes under the influence of international institutions.[16] For instance, in a contribution to a symposium on "New Directions in Anticorruption Law," Guillermo Jorge cites several Latin American cases in which these reforms, drawing on international standards, empowered domestic actors and made them more effective.[17] By contrast, in their contribution to the same symposium, Michelle Sanchez-Badin and Arthur Sanchez-Badin suggest that the Brazilian regime lacked coordination and effectiveness.[18] Meanwhile, James Gathii criticizes the OECD Convention and the UNCAC for being too narrowly focused on bribery of public officials, to the neglect of other illicit financial flows, to protect the interests of developing countries.[19] More generally, Emilie Hafner-Burton and Christina Schneider suggest that the effectiveness of international institutions varies depending on whether their membership is composed of more or less corrupt countries.[20] In response to some of the shortcomings of the domestic reforms promoted by international institutions, some have argued that the creation of international institutions (such as an International Anti-Corruption Court or a transnational mechanism for asset recovery) would be preferable.[21]

Unlike the works we have discussed so far, the issue that concerns us is not the extent to which international institutions influence

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peer review process, and that the UNCAC overall is less likely to be effective than the OECD Convention).

16. Rachel Brewster & Alexandra Huneeus, *Introduction to the Symposium on New Directions in Anticorruption Law*, 113 AJIL UNBOUND 317, 317–318 (2019) (contrasting positive and more critical assessments of Guillermo Jorge, Michelle Sanchez-Badin, and Arthur Sanchez-Badin respectively).

17. *See generally* Guillermo Jorge, *Symposium on New Directions in Anticorruption Law: The Impact of Corporate Liability on Corruption in Latin America*, 113 AJIL UNBOUND 320 (2019).

18. *See generally* Michelle R. Sanchez-Badin & Arthur Sanchez-Badin, *Anticorruption in Brazil: From Transnational Legal Order to Disorder*, 113 AJIL UNBOUND 326 (2019).

19. James Thuo Gathii, *Symposium on New Directions in Anticorruption Law: Recharacterizing Corruption to Encompass Illicit Financial Flows*, 113 AJIL UNBOUND 336 (2019).

20. Emilie M. Hafner-Burton & Christina J. Schneider, *Symposium on New Directions in Anticorruption Law: Donor Rules or Donors Rule? International Institutions and Political Corruption*, 113 AJIL UNBOUND 346 (2019).

21. MARK L. WOLF ET AL., THE PROGRESSING PROPOSAL FOR AN INTERNATIONAL ANTI-CORRUPTION COURT (2022); MATTHEW C. STEPHENSON & SOFIE ARJON SCHÜTTE, AN INTERNATIONAL ANTI-CORRUPTION COURT? A SYNOPSIS OF THE DEBATE 4–5 (2019) (discussing the "[c]oncerns about political feasibility" with implementing an IACC); Laurence R. Helfer et al., *Flexible Institution Building in the International Anti-Corruption Regime: Proposing a Transnational Asset Recovery Mechanism*, 117 AM. J. INT'L L. 559 (2023).

domestic anticorruption law or whether they influence it for the better. Rather, we are interested in exploring if they learn from experience. Before we turn to that question, we digress to discuss the general literature on the reasons why this learning process is desirable and the conditions under which international institutions are likely to learn from experience in the process of influencing domestic law reform.

B. Inclusive Experimentalism as a Prescription for Law Reform

There is a growing consensus in the specialized literature that processes for revising regulatory governance, including through formal legal mechanisms at both the domestic and international levels, can benefit from being *iterative*, *experimental* and *inclusive*.[22] Such processes allow for continuous feedback and revision of the regulatory framework, especially in light of experiences with implementation, and involve all affected actors. Iterative reform makes it possible to respond to unanticipated developments, which are virtually inevitable given the difficulty of determining how particular rules and norms will operate in different legal-political-cultural contexts.[23] Experimentation includes encouraging local actors to adapt general principles to local contexts, to find different solutions for a common problem, to design different ways of implementing shared general principles, and to find multiple ways of achieving common goals. Finally, inclusiveness entails maximizing participation by affected actors, which is expected to improve the quality of the information collected and help

22. A prominent concept that embodies these features is experimentalist governance, which is a "recursive process of provisional goal-setting and revision based on learning from the comparison of alternative approaches to advancing them in different contexts." *See* Charles F. Sabel & Jonathan Zeitlin, *Experimentalist Governance*, *in* OXFORD HANDBOOK ON GOVERNANCE 169 (David Levi-Faur ed., 2012); *see generally* Gráinne De Búrca et al., *Global Experimentalist Governance*, 44 BRIT. J. POL. SCI. 477 (2014). Such features are also embraced by the literature on New Governance, Responsive Regulation, Meta-Regulation, and Process-Based Regulation. *See, e.g.*, Colin Scott, *Reflexive Governance, Regulation, and Meta-Regulation: Control or Learning?*, *in* REFLEXIVE GOVERNANCE: REDEFINING THE PUBLIC INTEREST IN A PLURALISTIC WORLD 43, 43 (Olivier de Schutter & Jacques Lenoble eds., 2010). For applications to legal regulation, *see, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); *see generally* Michael Abramowicz et al., *Randomizing Law*, 159 U. PA. L. REV. 929 (2011).

23. For a description of these uncertainties, *see generally* Kevin E. Davis, *The Limits of Evidence-Based Anti-Bribery Law*, 71 U. TORONTO L.J. 35, 57–59 (2021) (for a general discussion); *Id*. at 65–75 (discussing these in the context of anti-bribery law).

build legitimacy.[24] Different actors typically have different information about how law functions in various contexts. Also, different interests may be affected in different ways by rules and norms, and implementation processes.

This theoretical framework suggests that international institutions that are limited in terms of inclusiveness will also be limited in their ability to learn from experience and supports the hypothesis that those limitations will be reflected in the institutions' contributions to law reform. Unfortunately, there is no consensus around how to determine the inclusiveness of alternative institutional arrangements, particularly in a fragmented international institutional landscape.[25] We conceive of inclusiveness as a measure of the distribution of power and influence across at least four dimensions: values, interests, expertise, and social position. The inclusiveness of a law reform process along each of these dimensions will depend on how, and to what extent, it incorporates the influence of people who have different professional backgrounds, national affiliations and demographic characteristics. This does not mean that assessing inclusiveness will be straightforward. In any given context, it may be challenging to determine whether different groups are represented in proportion to the extent they are affected by potential reforms or are likely to make distinctive contributions to the reform process. Moreover, influence can be incorporated in various ways and at various levels of government—ranging from voting to making submissions before a decision to commenting after the decision has been made—which is why inclusiveness is compatible with a variety of institutional arrangements.[26]

C. Competing Views of International Anticorruption Institutions

Champions of international anticorruption institutions can point to several reasons why the reforms they favor will be beneficial.[27] International institutions often have access to analytical resources and multinational datasets that can help domestic authorities

24. *See generally* Jochen Von Bernstorff, *New Responses to the Legitimacy Crisis of International Institutions: The Role of 'Civil Society' and the Rise of the Principle of Participation of 'The Most Affected' in International Institutional Law*, 32 EUR. J. INT'L L. 125 (2021); ROSE, *supra* note 11, at 36–37.

25. For discussions of the concerns about alternative approaches to inclusion of affected actors see Von Bernstorff, *id.,* at 153–155 and Rose, *id*., at 37.

26. Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, 108 AM. J. INT'L L. 211, 212 (2014); Bernstorff, *supra* note 24, at 154–55.

27. DAVIS, *supra* note 4; Brewster & Ortiz, *supra* note 14, at 548.

identify and assess the merits of alternative legal frameworks. As for the regulation of cross-border activity, international institutions can help overcome the fact that individual states generally lack incentives or the capacity to coordinate and account for parties' interests beyond their borders. Foreign states or international organizations are relatively well-placed to safeguard these neglected interests.

Champions of international anticorruption institutions as drivers of law reform can also point to the fact that the leading institutions have ostensibly embraced iterative and experimental approach to law reform.[28] Through the peer review mechanisms described earlier,[29] both regimes appear committed to learning from experience, even if it is not obvious that either treaty encourages individual countries to adapt international norms to local contexts.[30] These considerations lead Brewster and Ortiz to claim bluntly that measures recommended by the OECD Working Group "are likely to be good policy."[31]

Critics of international anticorruption institutions challenge this claim, arguing that measures favored by those institutions could detract from rather than improve anticorruption law.[32] To begin, international institutions are generally susceptible to the influence of self-interested agents and stakeholders, and so cannot always be counted on to pursue broader public interests.[33] They also have organizational and resource constraints and lack domestic legitimacy and legal authority, all of which means that they cannot operate without domestic partners, who are usually governments.[34] Without domestic support, the public might see international institutions as meddling in domestic politics, promoting political agendas, or failing to respect local cultural norms.[35] When international institutions do engage local governments, however, there is a risk that they will end up supporting

28. *See generally* Hannah Harris, *Experimenting with Corruption - An Analysis of the OECD Anti-Bribery Convention through the Lens of Experimentalism*, 51 GEO. J. INT'L L. 565 (2020); *see also* ROSE, *supra* note 11.

29. *See supra* Section I.A.

30. DAVIS, *supra* note 4.

31. Brewster & Ortiz, *supra* note 14, at 548.

32. Kevin E. Davis, *Does the Globalization of Anti-Corruption Law Help Developing Countries*?, *in* INTERNATIONAL ECONOMIC LAW, GLOBALIZATION AND DEVELOPING COUNTRIES 283, 290–96, 298–305 (Julio Faundez & Celine Tan, eds., 2010).

33. *See generally* Daniel L. Nielson & Michael J. Tierney, *Delegation to International Organizations: Agency Theory and World Bank Environmental Reform*, 57 INT'L ORG. 241 (2003); *see generally* RANDALL W. STONE, CONTROLLING INSTITUTIONS: INTERNATIONAL ORGANIZATIONS AND THE GLOBAL ECONOMY (2011).

34. ROSE-ACKERMAN & PALIFKA, *supra* note 6, at 447.

35. *Id*. at 446, 453.

self-interested institutions and actors within governments, pushing for reforms that tend to benefit local elites instead of the target population.[36]

These problems may affect both the initial recommendations made by these international organizations and their ability to learn lessons from experience. In fact, potential limitations of international anticorruption institutions are apparent in the much-lauded monitoring and review mechanisms established under the OECD Convention and the UNCAC. While these mechanisms clearly provide for iterative review of the conventions' implementation, it is unclear whether the standards they apply are based on evidence of effectiveness as opposed to the interests of a few powerful actors.[37] For example, in their analysis of how resolving foreign bribery prosecutions through negotiated settlements (DPAs) spread from the United States to other OECD countries, St-Georges and Saint-Martin question the hypothesis that the practice proliferated because of its functional advantages. Among other things, they argue that the OECD Convention came into existence as a result of U.S. coercion and that the OECD may have helped to promote the spread of DPAs because of how people within the organization have been socialized.[38]

The inclusiveness of the monitoring and review mechanisms is also debatable. The peer reviews often involve consultation of a broad range of parties within each country, including non-governmental actors. In addition, the OECD regularly engages in public consultations, including around revisions to guidance documents.[39] At the same time, in the UNCAC system, the inclusion of civil society in peer re-

36. *Id*. at 458.

37. Simon St-Georges & Denis Saint-Martin, *The Global Diffusion of DPAs: The Not So Functional Remaking of the Rules Against Business Corruption*, *in* THE TRANSNATIONALIZATION OF ANTI-CORRUPTION LAW 469, 469–89 (Régis Bismuth, et al. eds., 2021).

38. *Id.* at 481–482.

39. *See e.g.*, OECD, OECD WORKING GROUP ON BRIBERY, PUBLIC CONSULTATION DOCUMENT: REVIEW OF THE 2009 OECD ANTI-BRIBERY RECOMMENDATION (2019), https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/fighting-foreign-bribery/public-consultation-review-oecd-anti-bribery-recommendation.pdf [https://perma.cc/SKQ4-QAZC]. The OECD Working Group website also contains information about annual consultations with the private sector and civil society. *See Working Group on Bribery*, OECD, https://www.oecd.org/en/about/committees/working-group-on-bribery.html [https://perma.cc/SDA3-78RE].

views is at the discretion of the state being reviewed and has been inconsistent.[40] Also, while the delegations to the UNCAC CoSP include a mix of diplomats and law enforcement officials, delegates to the OECD Working Group and the peer reviewers employed by both the OECD Convention and the UN Convention are predominantly affiliated with law enforcement agencies.[41] Moreover, the United Nations Office on Drugs and Crime, whose mandate is to aid UN member States in drug and crime control, serves as the secretariat for UNCAC.[42] We conjecture that by virtue of their professional orientations, law enforcement officials are more likely to pursue deterrence through the enforcement of coercive measures, such as arrests, seizures and convictions, than, say, protecting human rights or avoiding political and economic disruptions.

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40. OECD, OECD ANTI-BRIBERY CONVENTION: PHASE 2 MONITORING INFORMATION RESOURCES (2006), https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/fighting-foreign-bribery/phase-2-monitoring-resource-guide.pdf [https://perma.cc/M4RS-VLL6]; OECD, OECD ANTI-BRIBERY CONVENTION: PHASE 3 MONITORING INFORMATION RESOURCES 17 (2009), https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/fighting-foreign-bribery/Phase-3-Information-Resources-Manual-ENG.pdf [https://perma.cc/5QPG-A8VF]; OECD, OECD ANTI-BRIBERY CONVENTION: PHASE 4 MONITORING GUIDE 14 (2023), https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/fighting-foreign-bribery/phase-4-guide-2023.pdf [https://perma.cc/A8N8-F8ZV] [hereinafter OECD, OECD ANTI-BRIBERY CONVENTION: PHASE 4 MONITORING GUIDE]; UN OFF. ON DRUGS & CRIME, MECHANISM FOR THE REVIEW OF IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION—BASIC DOCUMENTS 28 (2011), https://www.unodc.org/documents/treaties/UNCAC/Publications/ReviewMechanism-BasicDocuments/Mechanism_for_the_Review_of_Implementation_-_Basic_Documents_-_E.pdf [https://perma.cc/9GZZ-U9HL]; UNCAC COALITION, THE WAY FORWARD: ENSURING AN INCLUSIVE, TRANSPARENT AND EFFECTIVE UNCAC IMPLEMENTATION REVIEW MECHANISM 16–19 (2021), https://uncaccoalition.org/new-report-on-strengthening-the-uncac-implementation-review-mechanism-irm/) [https://perma.cc/J6KU-XUSC]. Some of the authors of the present article have participated in these consultations, including a consultation around the Phase 4 report on Brazil discussed below.

41. The bulk of delegates to the OECD Working Group in 2014 and 2015 were affiliated with public prosecutors, the police or dedicated anticorruption agencies. Jongen, *supra* note 13, at 338. The OECD Convention encourages each lead examiner country to ensure that their two experts include "at least one law enforcement official with corruption-related experience." OECD ANTI-BRIBERY CONVENTION: PHASE 4 MONITORING GUIDE, *supra* note 40, at 11. For a list of the governmental experts nominated to participate in the UNCAC peer review mechanism, *see* UN OFF. ON DRUGS AND CRIME, *Governmental Experts*, UNITED NATIONS, https://www.unodc.org/unodc/en/treaties/CAC/IRG-experts.html [https://perma.cc/3UHG-R2XB]. Membership of the delegations to the Conference of the State Parties can be inferred by reviewing the lists of participants in its working groups. *See* Davis, *supra* note 23; *see* Bernstorff, *supra* note 24.

42. G.A. Res. 58/4 (Oct. 31, 2003).

D. The Need for Empirical Analysis

A fundamental point of disagreement between champions and critics of international anticorruption institutions as drivers of legal reform is whether and how those institutions are likely to revise their recommendations in light of new experience. The champions expect to see learning from experience. Critics predict inflexible adherence to norms or adaptations favored by dominant groups. The remainder of this article tests these opposing views empirically by examining how the OECD Working Group and the CoSP have responded to events that appear to call into question the merits of their recommendations on anticorruption law.

II. OPERATION CAR WASH AND THE ODEBRECHT CASE

In the remainder of this article, we explore how the OECD Working Group and the CoSP have responded to the events set in motion by two interrelated enforcement operations: Car Wash and Odebrecht. These operations were unprecedented in their scale and scope, as well in terms of the magnitude of their social, economic and political effects. Consequently, they provided a rich set of experiences with the implementation of anticorruption law that were highly salient to the global anticorruption community. While some argue that these operations signal an end to historical patterns of impunity that would not have happened without the reforms promoted by international organizations,[43] Brewster and Ortiz characterize the "crises" created by these operations as opportunities for national governments to adopt further

43. Ligia Maura Costa et al., *Anticorruption Policies in Brazil and the Operation Car Wash: Institutional and Economic Analysis*, *in* LESSONS OF OPERATION CAR WASH: A LEGAL, INSTITUTIONAL, AND ECONOMIC ANALYSIS 22, 31–32 (Fabio Ramazzini Bechara & Paulo C. Goldschmidt eds., 2020), https://direitosp.fgv.br/sites/default/files/2021-09/bi-09212020-car_wash_report_v2.pdf [https://perma.cc/BV2F-3JFS]; *But see* Marjorie Marona & Fábio Kerche, *From the Banestado Case to Operation Car Wash: Building an Anti-Corruption Institutional Framework in Brazil,* 64 DADOS 1, 1 (2021) (arguing that the institutional framework that enabled Car Wash was largely domestically driven and incremental, starting right after the democratic transition in 1988).

measures recommended by international anticorruption organizations.[44] By contrast, we treat those crises as opportunities for the international organizations to learn from implementation experiences and to revise their initial and existing recommendations.[45]

A. Background Conditions: Brazil's Anticorruption Regime

Car Wash was enabled by a crucial set of changes in Brazilian anticorruption institutions and laws dating back over two decades. It was launched against the backdrop of widespread dissatisfaction with Brazil's long history of elites enjoying impunity for corruption. Before Car Wash, Brazil had a record of unsuccessful corruption cases (with the exception of the Mensalão case, which started in 2005 and resulted in the conviction of high-ranking members of the ruling party in 2013).[46] According to the OECD, the impunity reflected problems in Brazilian procedural law.[47]

First, Car Wash follows decades of investment in anticorruption institutions. The institutional reforms commenced with Brazil's transition to democracy in 1988. Since then, successive Brazilian governments had strengthened institutions responsible for preventing, monitoring, investigating, and sanctioning corrupt acts, including the Public Prosecutor's Office (*Ministério Público*), the Judiciary, accounting courts, comptrollers and other accountability agencies.[48]

Second, Car Wash started in 2014 almost concomitantly with a set of critical legal reforms. These legal reforms in the 2010s were

44. Brewster & Ortiz, *supra* note 14. *But see generally* Robert D. Anderson et al., *Brazil, Lessons From Operation Carwash*, *in* COMBATTING CORRUPTION AND COLLUSION IN PUBLIC PROCUREMENT: A CHALLENGE FOR GOVERNMENTS WORLDWIDE 213 (2024) (discussing Brazil and Operation Car Wash and arguing that there has not been enough attention to the importance of a coordinated set of reforms, including procurement and antitrust law (i.e. beyond criminal law), and coordination among enforcement agencies).

45. This approach is consistent with the idea that cross-border law enforcement processes both shape and are shaped by the institutions involved. Kevin E. Davis et al., *Transnational Anticorruption Law in Action: Cases from Argentina and Brazil*, 40 L. & SOC. INQUIRY 664, 666–71 (2015).

46. LUCIANO DA ROS & MATTHEW M. TAYLOR, BRAZILIAN POLITICS ON TRIAL: CORRUPTION AND REFORM UNDER DEMOCRACY 1–9 (2022).

47. OECD WORKING GRP. ON BRIBERY, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN BRAZIL 45–47 (2014), https://www.oecd.org/daf/anti-bribery/Brazil-Phase-3-Report-EN.pdf [https://perma.cc/9G3Z-EYPR].

48. ROS & TAYLOR, *supra* note 46, at 47–100; FÁBIO KERCHE & MARJORIE MARONA, A POLÍTICA NO BANCO DOS RÉUS: A OPERAÇÃO LAVA JATO E A EROSÃO DA DEMOCRACIA NO BRASIL [POLITICS IN THE DOCK: OPERATION LAVA JATO AND THE EROSION OF DEMOCRACY IN BRAZIL] 15–68 (2022).

largely influenced by international treaties and soft laws on corruption, terrorism, and money laundering. These included the OECD Convention which, among other things, required Brazil to recognize corporate liability for transnational bribery.[49] The most significant reforms were adopted in 2013 amidst an enormous wave of public demonstrations and as Brazil was preparing host the World Cup, the Rio Olympics and the Paralympics.[50]

Facing domestic and international pressure to combat corruption and control the protests, the government fast-tracked the adoption of two major pieces of legislation. One was an Anticorruption Law, which imposed strict administrative and civil liability on corporations for corrupt acts (both domestic and transnational).[51] The law also included a provision permitting non-trial resolutions of proceedings through leniency agreements, which was added by congressional amendment at the last minute before the law's approval. While this is not explicitly stated in the provisions of the Anticorruption Law, federal prosecutors have promoted an interpretation that allowed multiple enforcement authorities to have jurisdiction over a particular corrupt transaction, including themselves. This interpretation, however, created another legal dispute: whether the conclusion of a leniency agreement would preclude action by other authorities.[52] Congress also approved a separate Organized Crime Law that created new offences for individuals related to participation in organized crime and granted the police and the Public Prosecutor's Office enhanced investigative powers, as well as overlapping authority, to negotiate plea bargains with

49. OECD WORKING GRP. ON BRIBERY, BRAZIL: PHASE 2, REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 53–54 (2007), https://www.oecd.org/content/dam/oecd/en/publications/reports/2007/12/report-on-the-application-of-the-convention-on-combating-bribery-of-foreign-public-officials-in-international-business-transactions-and-the-1997-recommendation-on-combating-bribery-in-international-business-transactions-phase-2-report-brazil_598790d0/b577d159-en.pdf [https://perma.cc/TM9L-XXZP].

50. *See generally* Marta R. de Assis Machado et al., *Intertwining Public Security Policy and Protest Control in Brazil: Sports Mega-Events and International Diffusion of Repression*, 7 LAT. AM. L. REV. 81 (2021).

51. Mariana Mota Prado et al., *The Brazilian Clean Company Act: Using Institutional Multiplicity for Effective Punishment*, 53 OSGOODE HALL L.J. 107, 112 (2016); Brewster & Ortiz, *supra* note 14, at 557–588.

52. RAQUEL DE MATTOS PIMENTA, A CONSTRUÇÃO DOS ACORDOS DE LENIÊNCIA DA LEI ANTICORRUPÇÃO [THE CONSTRUCTION OF LENIENCY AGREEMENTS UNDER THE ANTICORRUPTION LAW] (2020).

individual defendants in criminal proceedings.[53] Plea bargaining in the criminal system was new to Brazilian criminal procedure, being a transplant from Anglo-Saxon systems. Nonetheless, both leniency agreements and plea bargains were immediately incorporated in anti-corruption investigations, including those related to Car Wash.

The third enabling factor for Car Wash was a cadre of judges and prosecutors who were willing to launch a crusade against corruption. The leading judge in the case, Sergio Moro, and the leading prosecutor, Deltan Dallagnol, were part of a generation of Brazilian enforcement agents with exposure to the American legal system who were familiar with international efforts to combat corruption. The Manu Pulite case in Italy, perhaps the largest anticorruption case prior to Car Wash, was a major source of inspiration for them.[54] Later, both Sergio Moro and Deltan Dellagnol left their positions in the justice system to become politicians, capitalizing on the spotlight and controversy that the Car Wash investigations brought.

B. Operation Car Wash

Car Wash targeted a massive scheme of bribery and embezzlement revolving around Petrobras, a giant oil company controlled by the Brazilian state, Latin America's most valuable company at the time the investigation started.[55] The scheme involved cartels among Brazil's major construction companies, including Odebrecht, which colluded to pay bribes to Petrobras officials and to obtain overpriced contracts.[56] The scheme also included kickbacks to politicians and other public officials which were then used both for private gain and campaign financing. The corruption extended beyond Petrobras and far outside Brazil. Odebrecht channeled bribes to and through trusts and

53. Mariana Mota Prado & Raquel de Mattos Pimenta, *Systemic Corruption and Institutional Multiplicity: Brazilian Examples of a Complex Relationship*, 71 U. TORONTO L.J. 74, 93 (2021).

54. Fernando Limongi, *From Birth to Agony: The Political Life of Operation Car Wash (Operação Lava Jato)*, 71 U. TORONTO L.J. 151, 153–160 (2021).

55. *Petrobras Volta A Ser Maior Empresa Da América Latina Em Valor De Mercado* [*Petrobas Once Again Becomes the Largest Company in Latin America in terms of Market Value*] UOL (Aug. 6, 2014, 4:16 PM), https://economia.uol.com.br/noticias/redacao/2014/08/06/petrobras-volta-a-ser-maior-empresa-da-america-latina-em-valor-de-mercado.htm [https://perma.cc/NA7Y-L89G] (Braz.).

56. Alison Jones et al., *Combatting Corruption and Collusion in Public Procurement: Lessons from Operation Car Wash*, 71 U. TORONTO L.J. 103, 109–110 (2021).

accounts abroad, especially in Switzerland.[57] In addition, Odebrecht, and other construction companies involved in Car Wash, paid bribes to public officials in over twelve countries, most of them in Latin America.[58] In Peru, for instance, where Odebrecht had large and complex infrastructure projects, the company participated in a local cartel, bribed high-ranking individuals across the political spectrum, and made campaign contributions, sometimes through illegal donations, to maintain its influence.[59]

Car Wash led to proceedings that involved every component of Brazil's anticorruption regime. There were criminal proceedings against politicians, officials of state-owned companies, business executives and middlemen; antitrust proceedings against individuals and corporations accused of collusion and bid-rigging; administrative actions in the accounting courts based on the misuse of federal funds by corporations, individuals and political parties; civil actions that imposed monetary sanctions on government officials and provided damages to the State; prosecutions in specialized electoral courts against individual politicians and political parties for violations of campaign finance laws; and proceedings seeking political sanctions in Congress. Some companies involved were also subject to administrative proceedings involving regulatory agencies.[60] Also, proceedings sparked many disputes among affected parties that ended in arbitration, as well as bankruptcies and tax collection cases.[61]

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57. Plea Agreement at B-7, United States of America v. Odebrecht S.A., 2016, No. 16-643 (RJD) (E.D.N.Y. Dec. 15); Ministério Público Federal Procuradoria Da República No Paraná [Federal Public Ministry Public Prosecutor's Office in Paraná], Odebrecht S.A. Termo de Acordo de Leniência [Odebrecht S.A. Leniency Agreement Term] (2016) (Braz.); OFF. ATT'Y GEN. OF SWITZERLAND, *Petrobras – Odebrecht Affair: The Office of the Attorney General of Switzerland Convicts Brazilian Companies and Demands Payment of over CHF 200 Million* (Dec. 21, 2016), https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-65077.html [https://perma.cc/WAP2-9MVE].

58. Plea Agreement at B-7, United States of America v. Odebrecht S.A., 2016, No. 16-643 (RJD) (E.D.N.Y. Dec. 15).

59. Raquel de Mattos Pimenta & Catherine Greene, *Comparing Peru and Mexico in the Lava Jato Corruption Scandal Corruption Scandal*, *in* CORRUPTION AND THE LAVA JATO SCANDAL IN LATIN AMERICA 143, 145 (Paul Lagunes & Jan Svejnar eds., 1st ed. 2020).

60. Jones et al., *supra* note 56, at 116–122.

61. Fernanda Guimarães, *O Estado de S. Paulo, Investigadores Cobram até R$ 60 Bilhões da Petrobrás em Processos de Arbitragem* [*The State of S. Paulo, Investigators Charged Petrobrás up to R$ 60 Billion in Arbitration Proceedings*], ESTADÃO 150 (2021), https://economia.estadao.com.br/noticias/geral,investidores-cobram-ate-r-60-bilhoes-da-petrobras-em-processos-de-arbitragem,70003690577 [https://perma.cc/NQ22-KUUS] (Braz.). In April 2021, a Court-Supervised Reorganization Plan was approved for Odebrecht S.A. *See Court-Supervised Reorganization*, OEC, https://www.oec-

The authorities who spearheaded Car Wash employed aggressive tactics on a scale that was unprecedented in the history of Brazilian anti-corruption enforcement. They divided the criminal investigation into phases, with each new phase involving searches, seizures, coercive questionings and arrests in different cities. Enforcement measures of each phase happened simultaneously, often commencing with dawn raids designed to take defendants and other targets by surprise. These were accompanied by extensive use of pre-trial detention.[62] Often these detentions were pursued on questionable legal grounds,[63] as it was not clear that they satisfied the statutory requirements of a threat to the "public order" or a risk of obstruction of justice.[64] There was also concern that detention was being used improperly to coerce the accused into entering plea bargain agreements.[65]

As a result of a carefully crafted publicity strategy, Car Wash was widely covered by the media in Brazil. Each phase of the criminal investigation had a memorable nickname such as 'Doomsday' (*juízo final*) and 'Slaughter' (*abate*).[66] Raids were fully televised, as media outlets were informed of them in advance.[67] The public prosecutor's office published voluminous statistics and colorful graphics about the investigations on its website. There were also regular press conferences, and all judicial hearings were livestreamed.

The most high-profile and controversial component of Car Wash was the prosecution and sentencing of the then former President

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eng.com/api/en/news/court-supervised-reorganization-odebrecht-sa [https://perma.cc/MH42-CSBX]; Flavia Maia, *Empresas e Pessoas Físicas Envolvidas na Lava Jato Acumulam Derrotas no Carf* [*Companies and Individuals Involved in Lava Jato Accumulate Defeats in Carf*], JOTA (Jan. 3, 2020, 6:06 AM), https://www.jota.info/tributos-e-empresas/tributario/lava-jato-derrotas-carf-03012020 [https://perma.cc/7L2Y-QKX7] (Braz.).

62. *Lava Jato em Números* [*Lava Jato in Numbers*], Ministério Público Federal, https://web.archive.org/web/20190504204854/http://www.mpf.mp.br/para-o-cidadao/caso-lava-jato/atuacao-na-1a-instancia/atuacao-na-1a-instancia/parana/resultado (last visited Apr. 30, 2025).

63. *See* Flávio Mirza, *Novos Paradigmas da Prisão Preventiva: Um Claro Retrocesso* [*New Paradigms of Preventive Detention: A Clear Setback*], 122 REVISTA BRASILEIRA DE CIÊNCIAS CRIMINALES 115 (2016).

64. Prado & Machado, *supra* note 1.

65. *Id*.; KERCHE & MARONA, *supra* note 48, at 63–67.

66. *Phases of Operation Car Wash*, WIKIPEDIA, https://en.wikipedia.org/wiki/Phases_of_Operation_Car_Wash [https://perma.cc/8XBQ-FSBB].

67. Ricardo Balthazar, *Mensagens Vazadas Da Lava Jato Indicam Favorecimento A Jornalistas Aliados* [*Leaked Lava Jato Messages Indicate Favoritism toward Allied Journalists*], UOL (Dec. 20, 2019, 11:07 AM) (Braz.), https://www1.folha.uol.com.br/ilustrissima/2019/12/mensagens-vazadas-da-lava-jato-indicam-favorecimento-a-jornalistas-aliados.shtml (last visited Apr. 30, 2025)

Luiz Inácio Lula da Silva for taking bribes from Odebrecht and another construction company. The proceedings raised concerns related to due process and impartiality, including the accusation that the criminal processes were being used for political purposes. In fact, these allegations formed the basis of a petition submitted by Lula to the UN Human Rights Committee.[68] Lula was sentenced in July 2017 and arrested in April 2018, thus being barred from running in the Presidential elections of October 2018. Concerns that the prosecution of Lula and other officials were politically motivated were amplified a few months later when judge Sergio Moro decided to leave the bench to become Minister of Justice in the administration of Jair Bolsonaro, the winning candidate in the 2018 Presidential election. These concerns were further reinforced in June 2019, when leaked private messages (*Vaza Jato*) between Moro and a group of Car Wash prosecutors suggested improper collaboration between investigative and adjudicative authorities.[69]

In November 2019, Lula was released by the Brazilian Supreme Court (STF).[70] In 2021, the Court first overturned Lula's conviction on the grounds that Judge Moro did not have jurisdiction over the case[71] and then vacated all decisions against Lula due to Moro's bias.[72] The sentences of many of the Car Wash accused have met the same fate.[73] In 2022, the UN Human Rights Committee found that the prosecution against Lula violated his rights both to fair trial and to be tried by an impartial judge, as well as the presumption of innocence. The Committee also concluded that these violations of due process

68. *Brazil's Lula Tells U.N. His Rights Violated in Corruption Probe*, REUTERS (Aug. 17, 2018, 8: 52 PM), https://www.reuters.com/article/us-brazil-corruption-un-idUSKCN1082OC [https://perma.cc/MVU9-KSFA].

69. ROS & TAYLOR , *supra* note 46, at 141–178.

70. S.T.F., Execução Penal Provisória No. 5014411-33.2018.4.04.7000, 8.11.2019, (Braz.).

71. S.T.F., AG. Reg. no Habeas Corpus 193.726, Relator: Min. Edson Fachin, 12.4.2021 (Braz.).

72. S.T.F., Habeas Corpus 164.493, Relator: Min. Edson Fachin, 9.3.2021 (Braz.). (There were actually three separate criminal proceedings against Lula involving a beach apartment, a country house, and the Lula Institute; all of them were terminated).

73. José Marques & Felipe Bachtold, *Folha de S. Paulo*, *Afastamento De Juízes Na Esteira Do Caso Lula-Moro Beneficia Políticos* [*Removal of Judges in Wake of Lula-Moro Case Benefits Politicians*], UOL (Mar. 2, 2019, 12:00 PM) (Braz.), https://www1.folha.uol.com.br/poder/2022/03/afastamento-de-juizes-na-esteira-do-caso-lula-moro-beneficia-politicos.shtml (last visited Apr. 30, 2025)

amounted to a violation of his political rights, as Lula was barred from running for political office in 2018.[74]

C. Odebrecht

Car Wash also triggered a flurry of legal proceedings outside of Brazil, the most prominent of which involved Odebrecht. In 2016, Odebrecht and its subsidiary Braskem entered into simultaneous settlement agreements ("the joint resolutions") with Brazil's Federal Public Prosecutors' Office, the US Department of Justice, the US Securities and Exchange Commission, and the Office of the Attorney General in Switzerland, based on misconduct both inside and outside of Brazil.[75] The U.S. agencies immediately publicized their settlement agreements and related documents. In those documents, Odebrecht admitted to paying bribes to government officials not only in Brazil but also in Angola, Argentina, Colombia, the Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru, and Venezuela.[76] These disclosures triggered follow-on investigations in all these countries against both Odebrecht and local government officials.[77] In many countries, contracts with Odebrecht were suspended or canceled.

Both the joint resolutions and the follow-up investigations involved significant amounts of cross-border cooperation between law enforcement agencies, both formal and informal.[78] Brazil's authorities made official arrangements with prosecutors and state attorneys from

74. *See generally* Hum. Rts. Comm Res., U.N. Doc. CCPR/C/134/D/2841/2016 (Mar. 27, 2022).

75. Plea Agreement ¶ 43–70, United States of America v. Odebrecht S.A., 2016, No. 16-643 (RJD) (E.D.N.Y. Dec. 15); *Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History*, U.S. DEP'T OF JUST. (Dec. 21, 2016), https://www.justice.gov/archives/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve [https://perma.cc/HW67-DLSY].

76. Plea Agreement ¶ 43–70, United States of America v. Odebrecht S.A., 2016, No. 16-643 (RJD) (E.D.N.Y. Dec. 15).

77. Camilo Carranza et al., *Major Odebrecht Corruption Cases and Investigations in 2019*, INSIGHT CRIME (Feb. 20, 2019), https://insightcrime.org/news/analysis/major-latam-odebrecht-corruption-cases-investigations-2019/ [https://perma.cc/9TZW-JBJ9], https://insightcrime.org/news/analysis/major-latam-odebrecht-corruption-cases-investigations-2019/ (referring also to investigations in El Salvador and Bolivia).

78. Raquel de Mattos Pimenta & Otavio Venturini, *International Cooperation and Negotiated Settlements for Transnational Bribery: A Study of the Odebrecht Case*, 17 REV. DIR. GV 1, 23 (2021).

Argentina, Chile, Colombia, Ecuador, Mexico, Panama, Peru, Portugal, the Dominican Republic and Venezuela by entering into the Brasilia Declaration on International Legal Cooperation Against Corruption.[79] The terms of this agreement overlapped with, but went beyond, the provisions on mutual legal assistance found in the OECD Convention and included Ecuador, Panama, the Dominican Republic and Venezuela, countries that are not parties to the OECD Convention.

On at least two occasions, international cooperation—without the involvement of international organizations—led to the development of *ad hoc* measures to protect the interests of the private actors targeted by the investigation of domestic law enforcers. For instance, before requiring Brazilian individuals who had previously entered into agreements in Brazil to give evidence to Peruvian authorities, the Brazilian Federal Prosecution Service required the Peruvians "to sign a memorandum confirming that they would not use the information against any of the individuals or the companies" to whom the Brazilians had agreed to grant leniency.[80] On a separate occasion, the STF granted former Peruvian President Ollanta Humala's petition for full access to documents and confidential information held by Brazilian prosecutors regarding Odebrecht's agreement. The purpose was to help Humala determine whether there was further information that could be beneficial to his legal defense against corruption charges in Peru.

Odebrecht signed non-trial agreements with another five countries after it had entered into joint resolutions with Brazilian, U.S., and Swiss authorities. Some countries, such as the Dominican Republic, relied on the information released by the United States, together with the results of their own investigations. Others relied more heavily on assistance provided after the joint resolutions.[81] However, in 2019, a team of investigative journalists uncovered millions of dollars in bribes paid to officials in the Dominican Republic, Ecuador, Panama and Peru that were not initially referred to in the agreements released by the US authorities.[82] The significance of this omission is considered in Section III(E) below.

In September 2023, Minister Toffoli of the STF, based on previous decisions on the partiality of judge and prosecutors, decided to

79. *Id*; *see also* BRASILIA DECLARATION (June 3, 2017).

80. Pimenta & Venturini, *supra* note 78, at 29.

81. *Id*.

82. Sasha Chavkin, *Leak Exposes Millions of Dollars in New Payments in Odebrecht Cash-for-Contracts Scandal,* INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (June 25, 2019), https://www.icij.org/investigations/bribery-division/leak-exposes-millions-of-dollars-in-new-payments-in-odebrecht-cash-for-contracts-scandal/ [https://perma.cc/DBD2-W6SY].

bar use of evidence obtained from the Odebrecht leniency agreement in any legal proceedings, whether or not they involved Lula. This decision was based in part on concerns about how evidence was obtained through international cooperation that involved the use of informal channels.[83] This decision calls into question the validity of many of the leniency agreements concluded under Operation Car Wash. The decision, issued by a single Justice, still needs to be analyzed by the entire court, but at the time of writing (August 2024) a decision of the STF on the matter was pending.

D. Aftermath

The Car Wash task force was officially disbanded in 2021 under the Bolsonaro administration, leaving a complicated legacy.

The legal legacy of Car Wash includes a series of measures (purportedly) designed to enhance due process. Some of those changes could be seen as proportionate responses to the perceived excesses of the Car Wash investigations. In 2017, the STF issued decisions condemning the abuse of pre-trial detention,[84] and in 2018 the Court curtailed the use of coercive questioning against suspects and the accused.[85] In 2019, Congress enacted the Law of Abuse of Authority (Law n. 13.869/2019), which, among other things, created a new position in the criminal law system— the *juiz de garantia*—which ensures that the same magistrate will not be responsible for both the investigative and adjudicative phases of a criminal proceeding.[86] This reform was motivated by fears of another case of judicial partiality, like the ones that occurred in Car Wash.

While these measures reinforced due process guarantees, other changes are more controversial. In 2021, a new statute (*Lei de Improbidade Administrativa,* Law n. 14.230/21) changed many provisions of the Administrative Improbity Law that governed civil liability of public officials and companies accused of corruption and other forms of wrongdoing. For instance, the law now makes intentionality

83. S.T.F., Decisão, Reclamação 43.007, Relator: Min. Dias Toffoli, 6.9.2023 (Braz.).

84. Prado & Machado, *supra* note 1.

85. S.T.F., Arguição de Descumprimento de Preceito Fundamental No. 444, Relator: Ministro Gilmar Mendes, 14.06.2018 (Braz.); S.T.F., Arguição de Descumprimento de Precieto Fundamental No. 395, Relator: Gilmar Mendes, 14.6.2018 (Braz.) (issuing a final decision determining that coercive questioning of suspects and accused persons violates the Constitution). In the following year, Congress criminalized the illegal ordering of coercive questioning Law No. 13,869/19).

86. ROS & TAYLOR, *supra* note 46, at 164.

(*mens rea*) a pre-requisite to the imposition of civil liability on individuals.[87] In 2023, the STF decided that the new law could not change the outcome of concluded cases but was applicable to cases in the course of being decided or appealed.[88] Moreover, the second highest court in the country (STJ) has decided that if a court determines that a person lacks *mens rea* in a civil lawsuit, prosecutors are prevented from pursuing a criminal lawsuit regarding the same conduct.[89] These decisions may benefit some public officials accused by Car Wash. The number of suits filed under the Improbity Law has fallen considerably since the new statute was adopted (by 36% in 2022 compared to 2021, and by 42% in 2023 compared to 2021).[90] Some have criticized the changes for hampering the operation of the Brazilian anticorruption system. Others argue that given the severity of the sanctions contemplated by the law (loss of political rights, removal from office), requiring proof of intentionality enhances due process and prevents law enforcement authorities from limiting the legitimate margin of discretion of public officers, and abusively targeting specific politicians. These commentators suggest that the original law failed to account for the challenges that public officials face, especially in subnational contexts.[91] Car Wash also had profound political and economic consequences for Brazil. In the political sphere, Car Wash helped to undermine a stable (albeit problematic) political dynamic that had prevailed since the country's democratic transition, contributing to the impeachment of President Roussef (who was not among the accused in the in-

87. See Rafael Tonicelli, *Narrowing the Scope of Brazil's Administrative Improbity Law: Why the New Limits Will Strengthen, Not Weaken, the Law's Efficacy*, GLOB. ANTICORRUPTION BLOG (Feb. 21, 2022) https://globalanticorruptionblog.com/2022/02/21/narrowing-the-scope-of-brazils-administrative-improbity-law-why-the-new-limits-will-strengthen-not-weaken-the-laws-efficacy/ [https://perma.cc/E7YC-9L6E].

88. Tema: 1199 de Repercussão Geral, Supremo Tribunal Federal, https://portal.stf.jus.br/jurisprudenciaRepercussao/verAndamentoProcesso.asp?incidente=4652910&numeroProcesso=843989&classeProcesso=ARE&numeroTema=1199. (holding decided in connection with S.T.F., Recurso Extraordinário com Agravo n. 0003295-20.2006.4.04.7006, 24.01.2022 (Braz.)).

89. S.T.J., Recurso Em Habeas Corpus Nº 173448 - DF (2022/0360731-1), Relator Min. Reynaldo Soares da Fonseca, 7.3.2023 (Braz.).

90. *See* Fernanda Cardoso de Almeida Dias da Rocha et al., BALANÇO SOBRE A ALTERAÇÃO DA LEI DE IMPROBIDADE ADMINISTRATIVA: ANÁLISE A PARTIR DOS DADOS DO CONSELHO NACIONAL DE JUSTIÇA [ASSESSMENT OF THE AMENDMENT TO THE ADMINISTRATIVE MISCONDUCT LAW: ANALYSIS BASED ON DATA FROM THE NATIONAL JUSTICE COUNCIL], Nota Técnica, MOVIMENTO PESSOAS À FRENTE 1 (2024) (Braz.), https://movimentopessoasafrente.org.br/wp-content/uploads/2024/07/balanco-sobre-a-alteracao-da-lei-de-improbidade-administrativa.pdf [https://perma.cc/85U3-38YF].

91. *Id*.

vestigations) and the rise to power of Jair Bolsonaro, a former congressman with explicit authoritarian inclinations.[92] President Bolsonaro and his government took several actions designed to dismantle or weaken accountability institutions and decrease transparency, including dismantling the Car Wash task force.[93]

The reputational taint and threat of liability hanging over many Brazilian companies led to paralysis of the infrastructure sector and a credit shortage, with knock-on effects for many other sectors. Losses to the Brazilian economy, which was already faltering for other reasons, have been estimated at 2% of the country's GDP in 2014 and 5% in 2015.[94] Later, after the STF handed down a series of decisions favoring Car Wash defendants and the public perception of Car Wash changed, several of the corporate defendants launched a series of judicial actions and public campaigns to revisit leniency agreements signed at the height of the Car Wash, claiming that the penalties were miscalculated and aggravated the dire situation of the economy.[95] These claims were amplified as enforcement agencies used different standards to calculate fines and damages. In February 2024, the Supreme Court authorized a mediation proceeding between law enforcers

92. *See generally* Oscar Vilhena Vieira, *Clash of Powers: Did Operation Car Wash Trigger a Constitutional Crisis in Brazil?*, 71 U. TORONTO L.J. 174 (2021).

93. Paul Lagunes et al., *President Bolsonaro's Promises and Actions on Corruption Control*, 17 REVISTA DIREITO GV 1, 19 (2021). *See also* ESTADO DE DIREITO E POPULISMO AUTORITÁRIO: EROSÃO E RESISTÊNCIA INSTITUCIONAL NO BRASIL (2018–2022) (Oscar Vilhena Vieira et al. eds., 2023).

94. William Nozaki, *Os Impactos Econômicos da Operação Lava Jato e o Desmonte da Petrobras* [*The Economic Impacts of the Operation of Lava Jato and the Disassemanteling of Petrobras*], INEEP (Aug. 27, 2018), https://ineep.org.br/os-impactos-economicos-da-operacao-lava-jato-e-o-desmonte-da-petrobras/ [https://perma.cc/F6CT-Y4SD]. Other studies point to negative effects of OCW on Petrobras. *See* Eunice Henriques Pereira Vilela et al, *A Petrobras após os Escândalos de Corrupção da Operação Lava-Jato: Uma Análise do Valor da Empresa até 2016*, [*Petrobras after the Lava Jato Corruption Scandals: An Analysis of the Company's Value until 2016*], 7 DESENVOLVE: REVISTA DE GESTÃO DO UNILASALLE 9 (2018); *see* Eliana M.M.F. Torga et al, *The Effects of Car Wash Operation on the Brazilian Capital Market: The Petrobras Case*, 22 REVISTA DE ADMINISTRAÇÃO MACKENZIE 3 (2021). *But see* Costa et al., *supra* note 43 (questioning these conclusions by pointing to other potential causes for the losses incurred by Petrobras during this period).

95. S.T.F., Decisão, Reclamação 43.007, Relator: Min. Dias Toffoli, 6.9.2023 (Braz.); S.T.F., Arguição de Descumprimento de Preceito Fundamental 1.051, Relator: Min. André Mendonça, 4.14.2023 (Braz.). As an example of public campaigns, see the book published by Emilio Odebrecht, one of the key figures of the Odebrecht group, titled *A War Against Brazil – How Car Wash Violated National Sovereignty, Weakened Brazilian Heavy Manufacturing Industry and Tried to Destroy the Odebrecht Group* (authors' translation of the original title in Portuguese), published in 2023.

and companies to revise leniency agreements, specifically, to apply more proportional pecuniary sanctions and damages' estimates.[96]

The Odebrecht investigations also had massive economic and political effects outside of Brazil. The suspension and cancellation of Odebrecht's contracts paralyzed infrastructure construction throughout Latin America with concomitant ramifications for employment and economic growth. In Peru, for example, some 60,000 workers were dismissed as of February 2017 due to Odebrecht's failure to pay its suppliers. The International Monetary Fund estimated that Car Wash-related delays in investment reduced economic growth in 2017 by 0.8 percent of GDP.[97] The political effects were equally significant. In most countries, officials at the very highest levels of government were implicated, including the last five presidents of Peru and former presidents in Bolivia, Ecuador, El Salvador, and Panama.[98]

III. LESSONS FROM CAR WASH AND THE ODEBRECHT CASES FOR INTERNATIONAL ANTICORRUPTION INSTITUTIONS

Car Wash and the Odebrecht case revealed strengths and weaknesses in several laws and cross-border enforcement practices endorsed by the CoSP and the OECD Working Group. On the one hand, the adoption of international approaches to the regulation of corruption, including transnational corruption, appeared to enhance the efficiency and effectiveness of Brazilian anticorruption institutions. On the other hand, the cases demonstrate risks associated with adhering to some of the approaches favored by international institutions. As we explain below, Car Wash and Odebrecht, and their aftermath illustrate the risks of failing to afford sufficient weight to guarantees of due process; the dangers of recruiting the media into the fight against corruption; the effects of anticorruption initiatives on a country's political landscape; the importance of coordination among domestic enforcement agencies; and the effects of international cooperation on third parties.

96. *See* S.T.F., Arguição de Descumprimento de Preceito Fundamental 1.051. Relator: Min. André Mendonça 3.4.2023 (Braz.).

97. ROBERTO DE MICHELE ET AL., EFFECTS OF CORRUPTION ON PUBLIC–PRIVATE PARTNERSHIP CONTRACTS: CONSEQUENCES OF A ZERO-TOLERANCE APPROACH, INTER-AM. DEV. BANK 7 (2018); INT'L MONETARY FUND, PERU: STAFF REPORT FOR THE 2018 ARTICLE IV CONSULTATION 21 (2018).

98. Carranza et al, *supra* note 77.

A. Fairness and Due Process Matter for Efficient Anticorruption Law Enforcement[99]

Some commentators have expressed concern that international anticorruption institutions subordinate respect for due process to the objective of achieving deterrence.[100] Car Wash and its legacy illustrate the complex relationship between these objectives and suggest that apparent tensions may be overstated.

International anticorruption law explicitly encourages embracing both due process and efficient deterrence (along with other objectives). The UNCAC acknowledges that anticorruption law must comply with "the fundamental principles of due process of law" (at least in the context of criminal proceedings or adjudication of property rights).[101] Similarly, the 2021 version of the OECD Convention Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, the main guide to the implementation of the OECD Convention, acknowledges the importance of due process in the context of non-trial resolutions.[102] However, neither instrument offers specific guidance on the meaning of due process. At the same time, as one of us has argued, it is clear that both the UNCAC and the OECD Working Group emphasize deterrence, which, in a context of scarce resources, entails maximizing the likelihood of sanctions being imposed and minimizing the cost of proceedings.[103]

It is a commonplace to view practices designed to ensure due process as obstacles to efficient deterrence.[104] Commentators claim

99. This section is based on the analysis of criminal proceedings of Car Wash, especially on plea bargains; post-trial detention; the use of coercive questioning, and the different concepts of quid pro quo, authorship, and intention, especially in the case against former President Lula. Sources are further detailed in Prado & Machado, *supra* note 1.

100. DAVIS, *supra* note 4, at 68-69; RADHA IVORY, CORRUPTION, ASSET RECOVERY, AND THE PROTECTION OF PROPERTY IN PUBLIC INTERNATIONAL LAW: THE HUMAN RIGHTS OF BAD GUYS 95-96 (2014); OFF. HIGH COMM'R HUM. RTS., OHCHR RECOMMENDED PRINCIPLES ON HUMAN RIGHTS AND ASSET RECOVERY 26-27 (2022).

101. United Nations Convention Against Corruption, *supra* note 7, preamble.

102. *Id.*; OECD, RECOMMENDATION OF THE COUNCIL FOR FURTHER COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS.

103. DAVIS, *supra* note 4.

104. For a discussion of the complexities around this tension, see Radha Ivory, *Asset Recovery in Four Dimensions: Returning Wealth to Victim Countries as a Challenge for Global Governance*, *in* CHASING CRIMINAL MONEY: CHALLENGES AND PERSPECTIVES ON ASSET RECOVERY IN THE EU 175, 191-92 (Katalin Ligeti and Michele Simonato eds., 2017).

that human rights and procedural rights "can be used by corrupt government officials to circumvent and avoid punishment and accountability."[105] Along these lines, the leaders of Car Wash have argued that due process guarantees in the Brazilian legal system are obstacles to efficient law enforcement.[106] To deal with these alleged obstacles, Car Wash, in general, and Judge Moro, in particular, adopted strategies to promote novel judicial interpretations of existing statutory provisions and legal doctrines, aiming to alleviate the burden of proving illicit conduct. They also pressed the limits on discretionary powers governing law enforcement measures, such as coercive questioning and pretrial detention. Some of these strategies tested the formal limits of the law, while others explicitly violated it.[107]

The discourse hostile to procedural guarantees attracted a great deal of public support in Brazil during the first few years of Car Wash. For example, coercive questioning and pre-trial detentions were not always in compliance with statutory requirements.[108] Still, they provided a public spectacle (as the media showed powerful people being handcuffed and escorted in police cars to the courthouse)[109] that was applauded by a population frustrated with impunity.[110] Car Wash was seen by many as breaking the cycle of impunity by jailing powerful politicians and businesspeople. These results, in turn, seemed to provide credence to the argument that the existing procedural guarantees in the Brazilian system were the source of the problem of impunity.

Eventually, however, both popular opinion and legal doctrine shifted, and the abusive nature of some tactics employed in Car Wash

105. James Thuo Gathii, *Defining the Relationship between Human Rights and Corruption*, 31 U. PA. J. INT'L L. 125, 126 (2009); NDIVA KOFELE-KALE, THE INTERNATIONAL LAW OF RESPONSIBILITY FOR ECONOMIC CRIMES: HOLDING STATE OFFICIALS INDIVIDUALLY LIABLE FOR ACTS OF FRAUDULENT ENRICHMENT (2nd ed. 2016).

106. DELTAN DALLAGNOL, A LUTA CONTRA A CORRUPÇÃO: A LAVA JATO E O FUTURO DE UM PAIS MARCADO PELA IMPUNIDADE [THE FIGHT AGAINST CORRUPTION: LAVA JATO AND THE FUTURE OF A COUNTRY MARKED BY IMPUNITY] (2017); Sérgio Fernando Moro, *Preventing Systemic Corruption in Brazil*, 147 DÆDALUS J. AM. ACAD. ARTS. & SCIS. 157 (2018).

107. For a detailed description, see Prado and Machado, *supra* note 1.

108. *Id*.

109. Jacqueline Saraiva & Eduardo Militão, *Presidentes da Odebrecht e Andrade Gutierrez são presos na Lava-Jato* [*Odebrecht and Andrade Gutierrez Presidents Arrested in Lava Jato*], CORREIO BRAZILIENSE (June 19, 2015), https://www.correiobraziliense.com.br/app/noticia/politica/2015/06/19/interna_politica,487150/presidentes-da-odebrecht-e-andrade-gutierrez-sao-presos-na-lava-jato.shtml [https://perma.cc/WRN2-N8LH].

110. George Mészáros, *Caught in an Authoritarian Trap of Its Own Making? Brazil's 'Lava Jato' Anti-Corruption Investigation and the Politics of Prosecutorial Overreach*, 47 J. L. & SOC'Y. S54, S61–62 (2020); KERCHE & MARONA, *supra* note 48, at ch. 6.

became widely acknowledged. In 2021, a poll showed that popular approval of the work of the former judge Sergio Moro had fallen from 65% to 45% in five years.[111] Meanwhile, the STF took a more active stance toward controlling abuses in the Operation. It reversed several lower court decisions and vacated convictions for breach of due process, as mentioned above. Although some of the STF decisions were important for reestablishing due process guarantees, others may have not only curtailed abuses but may have created new challenges for the anticorruption system.[112] Some argue that the pendulum has swung too far, resulting in excessive constraints on anticorruption enforcement in Brazil.[113]

The overall lesson we take from this episode is that disregarding due process concerns may promote enforcement in the short term but lead to a backlash which, as we will show in the next section, reverses anticorruption laws (including recent reforms) and hobbles anticorruption institutions in the longer run. In that sense, respect for due process is not only a goal in and of itself, but it may also be necessary to maintain the efficiency, effectiveness and legitimacy of anticorruption law enforcement and make these goals sustainable in the long term.

B. Political Fallout and Backlash

Anticorruption investigations frequently reach high-ranking public officials and powerful private actors, and, for that reason, the OECD Convention and the UNCAC generally stress the need for measures that insulate anticorruption enforcement institutions from political pressures.[114] The OECD Convention explicitly provides that

111. *DATAFOLHA: aprovação ao trabalho de Moro na Lava Jato cai de 65% para 45% em cinco anos* [*DATAFOLHA: Approval Rating for Moro's Work in Lava Jato Falls from 65% to 45% in Five Years*], GLOBO, (Mar. 22, 2021, 6:48 AM), https://g1.globo.com/politica/noticia/2021/03/22/datafolha-aprovacao-trabalho-moro.ghtml [https://perma.cc/F8CE-4YJU].

112. One example is the decision in February 2018 that mandated illegal donation cases to be tried before Electoral Courts. S.T.F., Embargos de Declaração no AG na Petição n.º 6.820. Min. Edson Fachin. In Brazil, illegal campaign financing is often associated with larger corruption schemes and are more effectively tried by the same courts trying such corruption schemes. Severing portions of the same case across different authorities can lead to numerous coordination challenges.

113. Da Ros & Taylor, *supra* note 46, Chapter 5.

114. United Nations Convention Against Corruption, *supra* note 7, art. 36 (requiring state parties to have specialized bodies charged with enforcement of anti-corruption laws which "shall be granted the necessary independence, in accordance with the fundamental principles

investigation and prosecution of foreign bribery "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," three considerations likely to motivate political actors to exert pressure on enforcement officials.[115] UNCAC does not contain an equivalent provision, but the UNCAC Implementation Review Group has interpreted a provision governing the exercise of prosecutorial discretion to require independence from members of the executive.[116]

Completely insulating anticorruption enforcement agencies from political influences risks granting unaccountable enforcement officials tremendous power to shape a country's political landscape and economy, potentially contravening principles of democratic governance and the rule of law. Car Wash illustrates several possible manifestations of these dangers.

First, unaccountable officials may use discretionary powers in law enforcement processes for electoral purposes. In Brazil, there is a dearth of guidance on when or what kind of information may be disclosed during criminal investigations and trials, which grants significant discretionary powers to officials and opens room for abuse.[117] One episode in Car Wash illustrates the attendant risk that prosecutors will strategically leak information to pursue political agendas. Six days before the 2018 presidential election, Judge Moro made public the plea bargain agreement of Antonio Palocci, a former minister in Lula's cabinet and chief of staff of President Rousseff. Palocci's agreement contained serious allegations against Lula and was intensively covered by the media. It was immediately weaponized by other parties against the Workers' Party candidate. While the disclosure was

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of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence"); OECD, *Commentaries on Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Negotiating Conference ¶ 26 (Nov. 21, 1997, ("[I]n order to protect the independence of prosecution, [prosecutorial] discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature.").

115. OECD Convention, *supra* note 2, art. 5.

116. UNODC, STATE OF IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION: CRIMINALIZATION, LAW ENFORCEMENT AND INTERNATIONAL COOPERATION 113 (2nd ed. 2017) (discussing implementation of UNCAC, Article 30(3)).

117. Mariana Mota Prado & Marta Rodriguez Machado, *Turning Corruption Trials into Political Tools in the Name of Transparency: The Lava Jato Case*, *in* THE LIMITS OF JUDICIALIZATION: FROM PROGRESS TO BACKLASH IN LATIN AMERICAN POLITICS 266 (Sandra Botero et al. eds., 2022).

not illegal, the timing was suspicious, and there were significant concerns regarding the credibility of Palocci's statements.[118] A few months later, Moro became Minister of Justice in the government of the newly-elected President, Jair Bolsonaro. Assuming the leak influenced the results of the presidential elections, then-candidate Bolsonaro was its main beneficiary. This raised suspicion that Moro released the agreement for partisan reasons.[119]

Second, non-elected officials may seek to use law enforcement to "fix" circumstances that they perceive as political problems. Fernando Limongi argues that Car Wash was a political project, as its main operators believed themselves to be engaged in a crusade against the entire political establishment to fight "systemic corruption."[120] This meant that some enforcement decisions were not guided by "technical" prosecutorial protocols but were instead driven by a concern with the overarching political objective of the investigations. This explains why Car Wash appeared to be partisan, and biased against the Workers' Party. Citizens' discontent towards the Workers' Party government became an important source of popular support for Car Wash, providing incentives for enforcers to target the party's leadership. Aware of the importance to their political project of reaching Lula and his family, the Car Wash task force initiated a concerted strategy to implicate him. While some have interpreted this as a crusade against Lula and his party (the Worker's Party), according to Limongi, this was actually the means to bolster support for Car Wash's broader political project of dismantling the entire political establishment in Brazil.[121]

Third, the insulation of law enforcement officials from concerns about the economic ramifications of their decisions encourages decision-making that is economically inefficient. It is an open question as to whether the costs of Car Wash outweighed the benefits. Indeed, part of the popular backlash against Car Wash and Brazil's anti-corruption institutions was caused by the perception that it had damaged the Brazilian economy and that this could have been prevented.[122]

Fourth, law enforcement agents may not be driven by partisan or political motives, but their discretionary decisions may have unintended political consequences. Car Wash significantly influenced the

118. See Prado & Pimenta, *supra* note 53 (discussing the credibility of the agreement).

119. Prado & Machado, *supra* note 117.

120. Limongi, *supra* note 54.

121. Limongi, *supra* note 54.

122. DAVIS, *supra* note 4, at 186-88; Ros & Taylor, *supra* note 46.

Brazilian political landscape. Ten of the 46 state governors elected between 2010 and 2014 were arrested by the Car Wash Operation and, as a result, could not finish their terms.[123] Car Wash also played a key role in the political turmoil that led to President Rousseff's impeachment in 2016. The President was not one of the accused; her impeachment was due to accusations of illegal accounting practices, not corruption. Although her vulnerability to impeachment stemmed in part from an ongoing economic crisis, her removal from office was strongly driven by Car Wash. Rousseff lost popular support due to the corruption scandal involving her party; she also lost support in Congress for not responding to pressures (including from members of her own party) to curtail Car Wash.[124] At the time, Car Wash was aggressively expanding its reach to include many Congressional representatives, including the Vice President, who became the President after her impeachment. A leaked conversation between two high-ranking politicians revealed that they assumed a "change" in government would result in a pact to "stop the bleeding" provoked by Car Wash.[125] Ultimately, that change took place and, intentionally or not, ended up empowering actors who then set about actively dismantling Brazilian anticorruption institutions to protect their own interests.[126]

C. The Dangers of Recruiting the Media in the Fight Against Corruption

The bodies charged with implementing the OECD Convention and the UNCAC have recently begun to characterize the media as a potential combatant in the fight against corruption.[127] Car Wash

123. Felipe Bachtold, *10 dos 46 Governadores Eleitos em Período Alvo da Lava Jato já Foram Presos* [*10 of the 46 Governors Elected During the Period Targeted by Lava Jato Have Already been Arrested*], UOL (Feb. 24, 2020, 2:00 AM), https://www1.folha.uol.com.br/poder/2020/02/10-dos-46-governadores-eleitos-em-periodo-alvo-da-lava-jato-ja-foram-presos.shtml (last visited Apr.30, 2025).

124. Vieira, *supra* note 92.

125. *'Conseguiu Estancar a Sangria?', Pergunta Mulher a Jucá Durante Voo ['Did You Manage to Stop the Bleeding?', Woman Asks Jucá During Flight*], UOL (Nov. 30, 2017, 3:27 PM), https://noticias.uol.com.br/ultimas-noticias/agencia-estado/2017/11/30/conseguiu-estancar-a-sangria-pergunta-mulher-a-juca-durante-voo.htm [https://perma.cc/G3MK-YH9H].

126. Lagunes et al., *supra* note 93.

127. OECD, THE ROLE OF MEDIA AND INVESTIGATIVE JOURNALISM IN COMBATING CORRUPTION (2018), https://www.oecd.org/daf/anti-bribery/The-role-of-media-and-investigative-journalism-in-combating-corruption.pdf [https://perma.cc/56ZV-8DBH]; OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in*

demonstrates both the potential benefits and pitfalls of deliberate efforts to recruit the media into anticorruption initiatives.

Members of the Car Wash task force often praised the media's coverage of the Operation, arguing that the media increased the transparency of the Operation, helped make public officials accountable, and served as protection against potential backlash by entrenched interests and powerful actors engaged in rent-seeking.[128] However, concerns have also been raised about the media coverage of the Operation. Bulla and Newell suggest that making information available to the media increased transparency of law enforcement measures, but it also discouraged independent fact-finding and investigative journalism. Instead, the media largely relied on the information provided by public officials (police, prosecutors and judges), which resulted in "a failure of the press to act as a watchdog for those engaged in undertaking the investigation."[129] Arguably, the fact that narratives about the Car Wash were dominated by uncritical reporting vastly increased the reputational cost of criticizing the Operation publicly.

There have also been concerns about bias in media coverage of the Operation. Scholars have argued that media reporting focused on proceedings against members of the governing party to the detriment of members of other parties who were also being charged. These studies suggest that biased reporting further contributed to polarization

International Business Transactions (2021), https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378 [https://perma.cc/RR7D-GUGS] ("Welcoming the efforts of companies, business organisations and trade unions, non-governmental organisations, and the media to contribute to the fight against bribery of foreign public officials."); Conference of the States Parties to the United Nations Convention against Corruption, Ninth Session, Resolution 9/1: Sharm el-Sheikh Declaration on Strengthening International Cooperation in the Prevention of and Fight Against Corruption During Times of Emergencies and Crisis Response and Recovery, https://www.unodc.org/unodc/en/corruption/COSP/session9-resolutions.html [https://perma.cc/D64M-P6TR]; U.N. Off. Drugs & Crime, *Conference of the States Parties to the United Nations Convention against Corruption, Ninth Session, Resolution 9/8: Promoting Anti-Corruption Education, Awareness-Raising and Training* (2021), https://www.unodc.org/unodc/en/corruption/COSP/session9-resolutions.html [https://perma.cc/D64M-P6TR] ("Recognizing also the important role of the media in raising public awareness about corruption.").

128. DALLAGNOL, *supra* note 106.

129. Beatriz Bulla & Cortney Newell, *Sunlight is the Best Disinfectant: Investigative Journalism in the Age of Lava Jato*, *in* CORRUPTION AND THE LAVA JATO SCANDAL IN LATIN AMERICA 82, 87 (Paul Lagunes & Jan Svejnar eds, 2020).

within Brazilian society and the political crisis that culminated in President Rousseff's impeachment.[130] The risks of media bias are particularly problematic in Brazil, where media ownership is highly concentrated and thus easily captured.

Deliberate use of the media by anticorruption officials exacerbates the risks of abuse of power by those officials. For example, in March 2016, Moro made public a wiretapping involving former President Lula and then President Rousseff, regarding Lula's appointment as Rousseff's Chief of Staff.[131] Rousseff claimed that the appointment would help to address the political schism between the President and Congress at the time. Critics were concerned that appointment to a cabinet position would make Lula immune from prosecution before the ordinary courts, meaning that he could only be judged by the STF and not by Moro. The outcry from the leak prevented Lula from being appointed and paved the way for his eventual prosecution and conviction. Some believe it also thwarted a move that prevented Rousseff from avoiding impeachment.[132] However, only a month after the recording was released, the Brazilian Supreme Court (STF) declared the release illegal and a violation of the Brazilian Constitution.[133] In other words, making the wiretap available to the public was politically significant but legally questionable.[134] Our point is that the media played a critical role in enabling this apparent abuse of judicial power, and the political consequences of the release could not be undone by the judicial decision that recognized its illegality.

Media coverage may also have influenced the institutions responsible for holding the Car Wash task force accountable. Defense lawyers in the case speculate that the intense and uncritical media coverage of Car Wash (along with strong public support) made appellate courts reluctant to reverse Moro's decisions or to initiate disciplinary

130. Daniela Campello et al., *Captured media? Examining Brazilian Coverage of Lava Jato*, *in* CORRUPTION AND THE LAVA JATO SCANDAL IN LATIN AMERICA 68 (Paul F. Lagunes & Jan Svejnar eds, 2020) (providing a review of these studies); *see also* Kerche & Marona, *supra* note 48, at ch. 6.

131. *Cf.* Bruce Douglas, *Release of Tapped Phone Calls between Lula and Rousseff Sparks Mass Protest in Brazil,* THE GUARDIAN (Mar. 17, 2016, 12:00 PM) https://www.theguardian.com/world/2016/mar/17/release-tapped-phone-calls-lula-rousseff-deepens-brazil-chaos [https://perma.cc/6T8W-PT8P].

132. Prado & Machado, *supra* note 117.

133. S.T.F., Reclamação 23.457 Relator: Teori Zavascki, 13.06.2016, 124, Diário da Justiciça Eletrônico [D.J.e.], 16/06/2016 (Braz.).

134. Prado & Machado, *supra* note 1.

actions, at least during the investigation's most intense period.[135] However, as popular support for, and media coverage of, the investigation faded, new disciplinary actions against enforcers were rolled out, as well as at least one investigation of members of civil society. Some of those investigations and proceedings raised concerns about unjust retaliation.[136]

D. Lack of Coordination Among Domestic Enforcement Agencies

Car Wash highlighted the importance of attending to coordination among domestic law enforcement agencies.

The transnational anticorruption regime is expressly designed to encourage international cooperation. Cooperation allows enforcement authorities to pool resources, such as information, investigators, and technology, in order to achieve desired enforcement outcomes, in much the same way that commercial agreements allow private actors to achieve mutually beneficial economic outcomes. It should come as no surprise, then, that international cooperation is the focus of roughly one-third of UNCAC's 71 articles as well as a lengthy new addition to the OECD Recommendation.[137]

In contrast, the OECD Convention and the UNCAC say little about the interactions between domestic law enforcement agencies.[138] This is a significant lacuna because institutional multiplicity, i.e., the existence of multiple legal avenues to pursue accountability for corrupt practices within a single legal system, is a feature of many countries'

135. Bela Megale, *'Lava Jato Causou Anestesia na Sociedade e nos Tribunais', diz Advogado de Lula* [*'Lava Jato Caused Anesthesia in Society and in the Courts,' Says Lula's Lawyer*], O GLOBO (Mar. 25, 2021, 4:00 AM), https://blogs.oglobo.globo.com/bela-megale/post/lava-jato-causou-anestesia-na-sociedade-e-nos-tribunais-diz-advogado-de-lula.html [https://perma.cc/B9N4-DRL6].

136. *See Transparency International Deeply Concerned Over Brazilian Supreme Court's Investigation Order* (Feb. 6, 2024), https://www.transparency.org/en/press/transparency-international-deeply-concerned-over-brazilian-supreme-court-investigation-order [https://perma.cc/T6YN-H8JE].

137. United Nations Convention Against Corruption, *supra* note 7, arts. 38, 41–64; OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, ¶ IV (Nov. 2021).

138. UNCAC Article 5.1 requires states to maintain "effective, coordinated anti-corruption policies." Article 14.1(b) encourages cooperation in relation to money laundering. United Nations Convention Against Corruption, *supra* note 7, arts. 5.1, 14.1(b).

anticorruption regimes.[139] Sometimes the alternative forms of accountability involve different modes of procedure (e.g., administrative, civil or criminal). In other cases, they involve institutions with authority over different subjects (e.g., competition, securities or sectoral regulations).

Coordination among enforcement agencies, whether domestic or international, has both advantages and disadvantages.[140] Coordination can prevent unnecessary duplication of effort. It also protects private actors—including innocent ones—from being subject to multiple investigations and enforcement actions. In addition, coordination ensures that the cumulative sanctions imposed on any given actor are appropriate to achieve their intended objectives, including the objective of inducing cooperation through promises of leniency. At the same time, uncoordinated institutional multiplicity can lead to healthy institutional competition and redundancy, with concomitant enhancements in the effectiveness of law enforcement. These benefits are particularly important in situations of systemic corruption where there is high risk that any single enforcement agency will be overwhelmed or captured.

Car Wash demonstrated the potential benefits of lack of coordination among domestic enforcement agencies, but it also revealed the potential costs. Many of the defendants in Car Wash, and especially the corporate defendants, were subject to multiple proceedings initiated by multiple Brazilian agencies.[141] Several agencies entered into formal coordination agreements, but there were still many cases in which agencies with overlapping jurisdictions failed to coordinate. In addition, the lack of coordination made the execution of leniency agreements much more turbulent. Entering into an agreement with one agency not only failed to insulate the accused corporation from investigations and punishments by other agencies. In addition, it enhanced the entity's exposure to parallel actions by generating information that could be used by other agencies. Competition among law enforcement agencies also undermined the corresponding protection granted to whistleblowers.[142]

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139. Mariana Mota Prado & Eduardo Cornelius, *Institutional Multiplicity and the Fight Against Corruption: A Research Agenda for the Brazilian Accountability Network*, 16 REVISTA DIREITO GV, 2020, at 1, 1 (2020).

140. Kevin E. Davis, *Anti-Corruption Law and Systemic Corruption: The Role of Direct Responses*, 17 REVISTA DIREITO GV, 2021, at 1, 13; Prado & Pimenta, *supra* note 53.

141. Jones et al., *supra* note 56, at 18.

142. Sanchez-Badin & Sanchez-Badin, *supra* note 18.

In the aftermath of Car Wash, coordination among Brazilian enforcement authorities has improved, both in specific cases, and through inter-institutional agreements, even if challenges persist.[143]

E. Effects of International Cooperation on Third Parties

Car Wash has drawn attention to the ways in which the information and penalties generated by agreements concluded by enforcement agencies, both with private actors and other enforcement agencies, might affect third parties, that is, actors who have little or no control over the agreement's terms. Those third parties can include individuals, firms, and even other countries. Car Wash illustrates the value of responding to these kinds of international externalities by including as many authorities as possible in any agreement and devising legal mechanisms to protect the interests of parties who are not included.

Although the initial investigation of Odebrecht was motivated by and focused on wrongdoing in Brazil, it also yielded information about potential wrongdoing in other countries, including potentially corrupt dealings between Odebrecht and numerous high-ranking public officials outside Brazil. Other countries' enforcement agencies were interested in obtaining as much incriminating information as possible from the parties to the joint resolution; Odebrecht had a corresponding interest in limiting the transmission and use of such information. Meanwhile, public officials tainted by association with Odebrecht had an interest in accessing any exculpatory information that had been gathered in the course of the initial investigation.

The Odebrecht proceedings highlighted the need for legal mechanisms designed to enhance the positive externalities associated with transnational anticorruption enforcement and to minimize the negative externalities. The Brasilia Declaration is an example of the former, a mechanism designed to enhance the positive externalities associated with the joint resolutions. The measures that Brazilian prosecutors and courts took to protect Brazilians who gave evidence in

143. Most prominently, the Technical Cooperation Agreement (*Acordo de Cooperação Técnica*) signed in 2020 between the Supreme Court, the CGU, the TCU, the AGU and the Ministry of Justice. The Federal Prosecution Service did not sign the agreement, on the grounds that the agreement would limit the FPS's independence. *See* Ministério Público Federal, 5ª Câmara de Coordenação e Revisão, Nota Técnica sobre o Acordo de Cooperação Técnica (2020), https://static.poder360.com.br/2020/08/Nota-Tecnica-Acordo-de-Cooperacao-Final.pdf [https://perma.cc/NXX9-39YF].

Peru and former President Humala are examples of mechanisms designed to minimize negative externalities.[144] However, the fact that the joint resolutions failed to uncover the full extent of Odebrecht's misdeeds in countries such as the Dominican Republic suggests that more can be done to encourage countries to maximize the benefits of their investigations for third parties.[145]

IV. IMPLICATIONS FOR INSTITUTIONAL DESIGN

In this Part, we consider whether there is any evidence that the OECD Working Group and the CoSP have learned directly from the experiences of Car Wash and Odebrecht. For this analysis, we reviewed documentation produced by the OECD Working Group and the UN CoSP, paying particular attention to documentation relating to peer reviews of the countries affected by Car Wash and Odebrecht.[146]

A. Lessons Learned

The OECD Working Group has demonstrated willingness to incorporate at least some lessons from Car Wash and Odebrecht into its reform agenda, especially ideas about how to make anticorruption law more efficient, effective, or accountable, and how to facilitate international cooperation.

While Car Wash was in progress, the OECD Convention's monitoring mechanism collected and produced a large amount of knowledge about the structural features of the Brazilian criminal law system that hampered enforcement of anticorruption laws. The 2014 *Report on Implementing the OECD Anti-Bribery Convention* presented statutes of limitation as a serious concern, together with lengthy judicial processes, the range of appeal options and the tendency of judges to award low sentences.[147] It also anticipated at least some of the ways in which the absence of coordination mechanisms among

144. Pimenta & Venturini, *supra* note 78.

145. *See* Ian O'Keefe, *Hands-On Help: Establishing A Mutual Legal Assistance Task Force to Facilitate Enforcement of Laws Effective Under the OECD Anti-Bribery Convention*, 50 GEO. WASH. INT'L L. REV. 679, 694–96 (2018).

146. We reviewed all peer review reports for the countries affected by Car Wash and Odebrecht published between 2014 and 2024 using keywords related to the investigation (such as "car wash") and to the particular lessons learned (e.g. "coordination"). We also reviewed the *OECD Recommendation* and Resolutions and Decisions adopted by the CoSP at sessions held in 2015, 2017, 2019, 2021 and 2023.

147. OECD, *supra* note 47.

agencies with overlapping jurisdiction might discourage firms from entering into leniency agreements (although the 2017 follow-up report avoided further inquiry into those concerns).[148] Similarly, in 2019, an OECD peer review report praised both Colombia's enforcement efforts regarding Car Wash and Odebrecht for respecting prosecutorial independence and facilitating international cooperation, but the report criticized Colombia's protection of whistleblowers.[149] More recently, a 2021 report on Peru also lauded its follow-on enforcement efforts but suggested that they had been jeopardized by inadequate safeguards against interference with prosecutors.[150] Finally, and more generally, the 2021 revision of the OECD's Recommendation contains extensive new recommendations on non-trial resolutions and the ways in which national enforcement agencies can cooperate to ensure that their efforts yield benefits for other countries.[151] We speculate that these recommendations drew upon member states' experiences in Car Wash and Odebrecht.

The OECD Working Group's most extensive discussion of Car Wash and Odebrecht can be found in the Phase 4 peer review report on Brazil released in October 2023, after the conclusion of the operations.[152] The Working Group's report commends Brazil for improvements since the last report, especially the new instruments for corporate liability and criminal non-trial resolutions based on lessons learned from the past decade of enforcement experience. The report also discusses how Brazil has dealt with politicization of anticorruption enforcement and promoted both domestic and international coordination. The Car Wash and Odebrecht operations, and their aftermath, feature prominently in all these discussions.

148. OECD, *supra* note 47, at 40–41.

149. OECD, IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION: PHASE 3 REPORT: COLOMBIA 52, 57 (2019), https://www.oecd.org/en/publications/2019/09/implementing-the-oecd-anti-bribery-convention-phase-3-report-colombia_62d013b3.html [https://perma.cc/GDS4-9FHE].

150. OECD, *IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION: PHASE 2 TWO-YEAR FOLLOW-UP REPORT: PERU* 33–34, 40, 43 (2021), https://www.oecd.org/en/publications/implementing-the-oecd-anti-bribery-convention-phase-2-follow-up-report-peru_ce3b2b2e-en.html [https://perma.cc/GP8P-EQUZ].

151. OECD, *supra* note 102, ¶¶ XVII–XIX.

152. OECD, IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN BRAZIL: PHASE 4 REPORT (2023), https://www.oecd.org/en/publications/implementing-the-oecd-anti-bribery-convention-phase-4-report-brazil_fd55d063-en.html [https://perma.cc/DV42-GMPK]. The consultation process that preceded this report included participants from law enforcement institutions, but also non-governmental stakeholders such as private companies and associations, law firms, legal academic institutions, and civil society and media.

The Working Group's discussion of "politicisation and lack of neutrality" is notable for going beyond the traditional focus on ensuring insulation of prosecutors and judges. The Working Group acknowledges that the leaked private messages between Car Wash prosecutors and Judge Moro "showed that federal prosecutors and a federal judge had acted with political bias in cases involving several national political figures."[153] The report goes on to express more conventional concerns about intervention in law enforcement by political actors during the Bolsonaro presidency. It also raises concerns that the combination of the newly enacted Abuse of Authority Law and retaliatory civil and disciplinary proceedings against federal prosecutors could have a chilling effect on prosecutors and create a perception of lack of independence.[154]

The Working Group also devotes considerable attention to Brazil's efforts to coordinate the actions of domestic enforcement agencies. This includes a detailed discussion of efforts to fine-tune coordination across agencies in cases involving corporate leniency agreements.[155] The report also discusses coordination within the Federal Prosecution Service, focusing on the demise of the task force model in the aftermath of Car Wash. The report recognizes that there are mixed views on how the discontinuation of the task force model would affect prosecutors' ability to pursue foreign bribery cases.[156]

Similarly, the Working Group's Phase 4 report pays close attention to Brazil's cooperation with international enforcement agencies, including in the Car Wash and Odebrecht cases, and commends Brazilian authorities for generally providing prompt and effective assistance. It took note of the Brazilian authorities' practice of not sharing information with other countries unless the receiving authorities agreed not to prosecute natural and legal persons that are cooperating,[157] which as noted above was an issue that arose in the Odebrecht case, but did not comment on the justification for the practice. The report also endorses Brazilian authorities' efforts to foster informal ties and contacts with foreign counterparts, arguing that "[d]eveloping and maintaining such informal ties and cooperation is recognized as crucial, and internationally accepted, good practice for successfully navigating formal MLA requirements."[158]

153. OECD, *supra* note 152, at 54.

154. *Id.* at 54–58.

155. *Id.* at 76–77.

156. *Id.* at 44, 46.

157. *Id.* at 65.

158. *Id.* at 67.

B. Lessons Ignored

Although the OECD has shown the ability to glean at least some lessons from the Car Wash and the Odebrecht cases, it has ignored other potential lessons.

To begin, the OECD Working Group's engagement with Brazil has mostly ignored concerns about due process. As insightful as it was about some of the shortcomings of Brazilian criminal procedure, the 2014 report on Brazil completely ignored longstanding problems of abuse of pre-trial detention and curtailment of defendants' human rights by law enforcement authorities. Similarly, the 2017 follow-up report celebrated the use of judicial pardons, a form of plea bargain introduced by the Organized Crime Law. The report cites the Car Wash case as an example of the appropriate use of judicial pardons, noting that "only those offenders who are indeed helping with the investigations and promoting reimbursement are being considered eligible for judicial pardons."[159] There is no mention of concerns about the lack of voluntariness of judicial pardons, despite the fact that these were often negotiated with individuals in potentially illegal pre-trial detention who may have seen the agreements as their only way out of jail.[160]

The 2023 report does not mention pre-trial detention, but it does acknowledge concerns about due process in the context of discussing the STF decision that prohibits the execution of sentences until after an unappealable judgment has been handed down. However, the report ultimately dismisses those due process concerns, arguing that the STF's ruling "could exacerbate the challenges Brazil's criminal justice system already faces by incentivizing every defendant to ap-

159. OECD, BRAZIL: FOLLOW-UP TO THE PHASE 3 REPORT AND RECOMMENDATIONS 56–60 (2017), https://www.oecd.org/content/dam/oecd/en/publications/reports/2017/02/follow-up-report-on-the-implementation-of-the-phase-3-recommendations-brazil_548958a3/a5740137-en.pdf [https://perma.cc/JM8F-FBDZ].

160. *Cf.* Murilo Thomas Aires & Fernando Andrade Fernandes, *A Colaboração Premiada como Instrumento de Política Criminal: A Tensão em Relação às Garantias Fundamentais do réu Colaborador* [*The Plea Bargain as a Criminal Policy Instrument: The Tension about the Fundamental Guarantees of the Defendant*], 3 REVISTA BRASILEIRA DE DIREITO PROCESSUAL PENAL [REV. BRAZ. DIR. PROC. PENAL] 253 (2017); Erica do Amaral Matos, *Colaboração Premiada: Análise de sua Utilização na Operação Lava Jato à luz da Verossimilhança e da Presunção de Inocência* [*Plea Bargain: Analysis of its Utilization in "Lava Jato" Operation in the light of Verisimilitude and Presumption of Innocence*], 143 REVISTA BRASILEIRA CIÊNCIAS CRIMINAIS [REV. BRAZ. CIS. CRIM.] 156 (2018).

peal." The Working Group goes on to worry that "combined with Brazil's statute of limitations rules, this creates a risk that Brazil's criminal justice system could provide *de facto* impunity for foreign bribery."[161]

By contrast, international human rights organizations and NGOs have long identified the arbitrary and excessive application of pre-trial detention as a 'chronic problem' in Brazil and many other Latin American countries.[162] Similarly, the threats to due process posed by the enforcement of anticorruption laws have been explicitly acknowledged by human rights organizations. In its report, *Corruption and Human Rights: Inter-American Standards*, the IACHR acknowledges that it can be challenging for states to comply with their duty to effectively respond to a "complex phenomenon for which the traditional investigative techniques appear to be insufficient," while simultaneously reaffirming that people accused of corruption "lose none on their human rights."[163] The Commission also emphasizes that pre-trial detention should be used for the limited purpose of protecting judicial proceedings and "cannot be based on general preventive or special preventive purposes, which could be attributed to the punishment."[164]

The OECD Working Group also appears to have paid little heed to Car Wash and Odebrecht's lessons about the importance of accounting for the economic ramifications of anticorruption law and its enforcement. The OECD remains committed to the idea that enforcement agencies should operate with as much independence as possible from other branches of government and should ignore economic

161. *See* OECD, *supra* note 152, at 40.

162. INTER-AM. COMM'N H.R., REPORT ON THE USE OF PRETRIAL DETENTION IN THE AMERICAS 1 (2013) http://www.oas.org/en/iachr/pdl/reports/pdfs/report-pd-2013-en.pdf [https://perma.cc/R48L-BNGF]. *See also* Bronstein v. Argentina, Case 11.205, Inter-Am. Comm'n H.R., Report No. 2/97, ¶ 8 (1997) ("Preventive detention constitutes a serious problem in various member countries of the Organization of American States."); REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE DOMINICAN REPUBLIC, OEA/Ser.L/V/II.104, doc. 49 rev. 1 (1999); UNITED NATIONS LATIN AM. INST. FOR PREVENTION OF CRIME AND TREATMENT OF OFFENDERS (ILANUD), CRIME, CRIMINAL JUSTICE AND PRISONS IN LATIN AMERICA AND THE CARIBBEAN: HOW TO IMPLEMENT THE UNITED NATIONS' RIGHTS AND DUTIES MODEL (2010); HUM. RTS. WATCH, BEHIND BARS IN BRAZIL (1998), https://www.hrw.org/sites/default/files/related_material/BRAZL98D.pdf [https://perma.cc/R297-35BR].

163. INTER-AM. COMM'N HUM. RTS., CORRUPTION AND HUMAN RIGHTS: INTER-AMERICAN STANDARDS 132 (2019), http://www.oas.org/en/iachr/reports/pdfs/CorruptionHR.pdf [https://perma.cc/9ECY-T5EK].

164. *Id.* at 133.

considerations or the interests of foreign states.[165] In the OECD 2023 Report, while it mentions several of the construction companies involved in the investigation, the report does not mention the economic struggles these companies faced or the fact that some filed for bankruptcy.[166] We have not come across any indications of concern about the legitimacy of granting unelected anticorruption officials the unchecked authority to pursue cases that are likely to have significant economic effects. Similarly, there is no indication that OECD and UNCAC have absorbed lessons about the pitfalls of collaborating with the media. It was just in 2021 that both the OECD Working Group and UNCAC CoSP endorsed the idea of recruiting the media in the fight against corruption, well after any lessons from Car Wash ought to have been learned.[167] In this sense, the OECD 2023 Report tracks initiatives taken by the authorities to monitor media reports to increase detection, and signals concern about journalists' accounts of attacks against the media, but does not mention the constant interactions between law enforcers and media outlets during the Car Wash years.[168]

Finally, we turn to the UNCAC CoSP. Our review of documents produced by the UNCAC peer review mechanism has yielded little evidence that the UNCAC regime has learned directly from Car Wash and Odebrecht.[169] The UNCAC peer review mechanism is divided into cycles. The first cycle, from 2010 to 2015, focused on the review of chapters III (Criminalization and law enforcement) and IV (International cooperation) of the Convention. The second cycle,

165. OECD, PHASE 2 EVALUATION OF PERU: FINAL REPORT 42 (2021), https://one.oecd.org/document/DAF/WGB(2021)20/FINAL/en/pdf [https://perma.cc/QNT2-GY9N].

166. *See* OECD, *supra* note 152, at 11 (referencing Odebrecht, OAS, and Engevix).

167. *See* OECD, *supra* note 126.

168. *See* OECD, *supra* note 151, at 33–34.

169. *See* U.N. OFF. ON DRUGS & CRIME, INFORME SOBRE EL EXAMEN DEL PERU [REPORT ON THE EXAMINATION OF PERU] 17 (2021), https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2021_05_04_CR_Peru_Cycle_II_SP.pdf [https://perma.cc/7TFH-5MNA]; U.N. Off. on Drugs & Crime, Review of Implementation of the United Nations Convention Against Corruption, 8 U.N. Doc. CAC/COSP/IRG/II/1/1/Add.11 (2019). Brazil's review by the UNCAC Review Mechanism first cycle was based on a site visit from 2011, before the launch of Car Wash. The country report became available in January 2017. It does not mention the investigations and recognizes generally the importance of due process or domestic coordination. U.N. OFF. ON DRUGS & CRIME, *Country Profile: Brazil*, https://www.unodc.org/corruption/en/country-profiles/data/BRA.html [https://perma.cc/4M95-9T4S]; *see also* U.N. OFF. ON DRUGS & CRIME, *Country Profile: Angola*, https://www.unodc.org/corruption/en/country-profiles/data/AGO.html [https://perma.cc/AJ5F-9WE9]; U.N. OFF. DRUGS & CRIME, *Country Profile: Venezuela*, https://www.unodc.org/corruption/en/country-profiles/data/VEN.html [https://perma.cc/HP4Z-KQ2B].

which is currently under way, reviews Chapters II (Preventive Measures) and V (Asset Recovery). While there are reports on the countries involved in the Car Wash and Odebrecht cases, there is little evidence of explicit learning from the investigations.

Several factors may explain the absence of evidence of learning. First, the IRM was created more recently than the OECD mechanism. Second, the UNCAC is more comprehensive than the OECD Convention. This means that the IRM's process covers more topics and so is more complex, which may inhibit the development of capacity to incorporate lessons. Third, some of the lessons we identify above are not clearly linked to the topics that have been reviewed by the IRM since the lessons to be learned came into focus. One might expect that due process, for instance, would be discussed in reviewing the implementation of Chapter III, but not Chapters II or V.[170] There presumably will be opportunities to revisit topics in subsequent cycles, but cycle two has been delayed.[171]

C. Explaining the Pattern of Revisions

There are several possible explanations for why the OECD Working Group and the UNCAC appear to have only partially revised their approach to anticorruption law in response to Car Wash and Odebrecht. To begin, in theory, individual actors within the institutions might be unaware of the evidence. This seems unlikely given the extreme prominence of the two operations and the above-noted indications that they prompted extensive revisions of the OECD Working Group's recommendations of 2023.

A second possibility is that decisionmakers within the OECD and the CoSP disagree with our interpretation of the evidence and the "lessons" to be learned from Car Wash and Odebrecht. The grounds of disagreement may be either empirical or normative. For instance, the relevant decisionmakers may disagree with our inferences about the causal connections between factors such as respect for due process and interaction with the media and backlash against anticorruption enforcement. Alternatively, they may disagree with our assessment of the relative importance of values such as due process, legitimacy, economic growth and deterrence of corruption.

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170. Note, however, that the Brazil Report of 2017, as well as a number of Executive Summaries regarding the first cycle, did not mention explicitly the concerns we have mapped. Yet, topics related to international cooperation or dangers of recruiting the media are at the heart of the current cycles, and we have not found evidence of learning.

171. *See* Implementation Rev. Grp., Review of the Implementation of the United Nations Convention against Corruption, U.N. Doc. CAC/COSP/2023/L.4/Rev.1 (2023).

A third possibility, which is not exclusive of the explanations listed above, is that lack of attention to lessons to be drawn from Car Wash and Odebrecht on the part of the OECD and the CoSP is explained by structural characteristics of the two institutions. For instance, the OECD Working Group's selective attention to the lessons of Car Wash and Odebrecht is consistent with the hypothesis that an international institution dominated by law enforcement officials will focus on learning how to promote efficient deterrence and neglect exploring ways to address concerns about due process, human rights, legitimacy or negative externalities associated with law enforcement. Alternatively, the lack of inclusiveness may involve exclusion of specific viewpoints, such as those of human rights organizations or unions, or decisions to focus consultations on themes related to effectiveness. Or the problem may be lack of inclusiveness in geographic rather than professional terms. The OECD is dominated by countries with relatively high levels of economic development and low levels of official corruption. This might make the OECD Working Group as a whole relatively insensitive to concerns about the negative economic and political externalities anticorruption enforcement might generate in jurisdictions whose public officials are likely to be implicated. A related hypothesis is that similar factors make officials within international institutions reluctant to learn from their counterparts in the Global South.

Structural factors such as lack of inclusiveness or bias are perfectly compatible with the possibilities that decisionmakers within international anticorruption organizations are ignorant of or disagree with lessons to be learned from Latin America. In fact, structural factors may explain ignorance or disagreement.

Further research is required to investigate the merits of these alternative explanations of why international anticorruption institutions have or have not revised their recommendations on anticorruption law in response to developments in Latin America, but different explanations will require different research methods. Explanations based on ignorance or disagreement can be investigated by reviewing the accounts of key decisionmakers within the relevant institution, either through interviews or reviewing documentary evidence. By contrast, the influence of structural factors such as lack of inclusiveness may not be visible to the decisionmakers within any given institution. Investigating the role of these structural factors typically will require comparisons across institutions. For instance, the UNCAC CoSP is less obviously dominated by law enforcement officials than the OECD Working Group and has a much broader membership. If institutional factors are important determinants of institutional learning, then we would expect, all other things being equal, the CoSP and the OECD

Working Group, or even a regional anticorruption organization such as MESICIC, to respond differently to developments in Latin America.

Naturally, the different explanations have different policy implications. The remedy for ignorance is further research and education. It is not clear that there is any "remedy" for disagreement, but disagreement can often be resolved through discussion, deliberation and persuasion. Finally, the implications of lack of inclusiveness are often indeterminate. Since the process of reforming anticorruption law typically involves multiple institutions and stages—an aspect of the broader phenomenon of fragmentation of international law—there are many alternative points at which to enhance inclusiveness.[172] For instance, our case study of responses to Car Wash and the Odebrecht case suggests that some of the most important excluded voices are people outside the law enforcement community, such as the human rights organizations who studied Brazil's criminal justice system for decades and were aware of the risk of abuse of pre-trial detention. Inclusiveness may help to reduce the risk that reforms will go awry and lead to the massive political, economic and social turmoil that Brazil and other countries experienced in the aftermath of Car Wash and Odebrecht. The OECD Working Group and the CoSP could ensure that human rights receive more significant consideration either by giving human rights organizations greater input into consultation processes initiated at the international level or by giving national governments greater latitude to deviate from international templates in response to human rights concerns raised at the domestic level.

CONCLUSION

Anti-corruption law has gained momentum in the last decades, generating an international consensus about combatting domestic and transnational corruption which was followed by a whirlwind of international and domestic reforms. There is now extensive literature analyzing both the international instruments that advance this agenda and the domestic reforms inspired by those instruments. Our focus here was slightly different. By looking at the international institutions promoting anti-corruption reforms, we asked if they have learned lessons from implementation and enforcement processes. The question is motivated by the fact that the advantages of embracing experimentation, iteration and inclusiveness in governance structures are now widely

172. For discussion of whether inclusiveness ought to be fostered at the domestic or international level, or in legislative, adjudicative or enforcement settings, see Bernstorff, *supra* note 24, at 154–157. *See also* ROSE, *supra* note 11.

acknowledged in academic and policy circles, and by the fact that the most prominent international actors in the anti-corruption arena, the OECD Working Group on Bribery and the UNCAC CoSP have both adopted elaborate peer review mechanisms and processes that aim at collecting information from enforcement experiences and incorporate the lessons learned in their policy prescriptions and recommendations.

To analyze the question of whether these international organizations have incorporated insights from experience to improve anti-corruption law, we looked at two case studies, Car Wash and Odebrecht. They represent two of the largest corruption probes in the last decade, with far-reaching legal, economic, social and political effects. Building on a thick description of these two cases and their consequences as identified in the specialized literature (including our own previous work), we identified potential lessons that could have been learned from these cases. Then, we tried to determine whether the OECD Working Group on Bribery and the UNCAC absorbed those lessons by analyzing the peer review reports they produced on countries affected by Car Wash and Odebrecht and the recommendations they adopted in the aftermath of the probes.

Our analysis shows that the OECD Working Group on Bribery and the UNCAC CoSP have incorporated some but not all of the insights from Car Wash and Odebrecht. More specifically, we show that those organizations neglected incorporating concerns with due process and human rights, focusing primarily on deterrence as measured by coercive outputs. They have also overlooked the dangers of recruiting media as an ally in efforts to combat corruption; in fact, they actively suggested this as a strategy in 2021, long after the problems with this approach had been documented in the case of Car Wash. Finally, they have not addressed effectively two important questions about governance structures to combat corruption: One is the issue of how politically insulated law enforcement officials should be, considering the far ranging and potentially devastating political and economic effects of anti-corruption probes; the other is the promises and perils of coordination for the accused and third parties, in both domestic and international spheres.

We end the article by offering three hypotheses that could potentially explain our findings. First, is ignorance, meaning lack of awareness of the existing evidence. Second, is the possibility of a different interpretation of the evidence—the international organizations may disagree with the lessons we take from the evidence, on either normative or empirical grounds. The third hypothesis refers to structural characteristics of the two organizations, specifically that they lack inclusiveness, a factor which the literature on global governance asso-

ciates with effective institutional learning processes. The last hypothesis is not exclusive of the first two and, in our view, deserves further exploration. Being dominated by law enforcement officials, especially in their peer review processes, excludes groups that could articulate human rights and due process concerns. This is particularly a concern with the OECD Working Group on Bribery. In addition to lacking diverse professional viewpoints, lack of geographic diversity may also impair the learning process. For instance, the Working Group on Bribery is dominated by high-income countries with low levels of official corruption and may be therefore ill-equipped to consider the challenges likely to be faced by countries in the Global South, which comprise many of those deeply affected by Car Wash and Odebrecht.

In sum, this article looks at a dimension of the anti-corruption reform process which has not been extensively analyzed in the literature until now: Who reforms the reformers? Our case studies suggest that international organizations could be learning more robust and insightful lessons from implementation and enforcement experiences. We have also hypothesized that inclusive governance structures at the global level could explain these missed opportunities. Further investigations of the causes of this flawed learning process and discussions on how to fix it should be at the top of the agenda of those who want to improve modern anti-corruption laws.