

**ASSET RECOVERY AND NON-TRIAL RESOLUTIONS: CHALLENGES AND  
INNOVATIONS IN INTERNATIONAL ANTI-CORRUPTION LAW**

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## **Summary**

### **Asset Recovery and Non-Trial Resolutions: Challenges and Innovations in International Anti-Corruption Law**

The concept of asset recovery has been a crucial element of anti-corruption law for decades. Historically, corruption has led to the misappropriation of public funds by officials who transfer them to private accounts, often in foreign jurisdictions. This necessitated the development of legal tools to not only identify and prosecute corrupt actors but also to recover the illicitly acquired assets and return them to their rightful owners. Despite significant strides made through international cooperation, significant challenges including jurisdictional conflicts due to discrepancies in legal systems, procedural hurdles arising from the complexity of mutual legal assistance treaties (MLATs), and the reluctance of haven jurisdictions to cooperate persist in making asset recovery an effective deterrent and restitution mechanism. This thesis examines the evolution of asset recovery in international anti-corruption law, tracing its emergence and its role in combating transnational corruption. It critically analyzes the limitations hindering the return of stolen assets and investigates the increasing role of Non-Trial Resolutions (NTRs) as a tool for settling corruption cases, despite the absence of a clear international mandate. This study evaluates, further, whether NTRs enhance or obstruct asset recovery, offering a doctrinal critique of their impact on asset recovery. By assessing both their benefits and drawbacks, this work contributes to the ongoing debate on NTRs as a viable alternative for efficient asset recovery.

**Keywords: Asset recovery; Non-trial resolutions; Mutual legal assistance; International anti-corruption law**

## **Résumé**

**Recouvrement des avoirs et résolutions sans procès : défis et innovations en droit international de la lutte contre la corruption**

Le concept de recouvrement des avoirs constitue depuis des décennies un élément essentiel du droit de la lutte contre la corruption. Historiquement, la corruption a conduit au détournement de fonds publics par des agents publics qui les transfèrent

vers des comptes privés, souvent situés dans des juridictions étrangères. Cela a nécessité le développement d'outils juridiques visant non seulement à identifier et poursuivre les acteurs corrompus, mais aussi à récupérer les avoirs acquis illicitement et à les restituer à leurs propriétaires légitimes. Malgré les progrès considérables réalisés grâce à la coopération internationale, d'importants défis subsistent, notamment les conflits de compétence dus aux divergences entre les systèmes juridiques, les obstacles procéduraux résultant de la complexité des traités d'entraide judiciaire en matière pénale (MLATs), ainsi que la réticence des juridictions refuges à coopérer, ce qui continue de limiter l'efficacité du recouvrement des avoirs comme mécanisme de dissuasion et de restitution.

Cette thèse examine l'évolution du recouvrement des avoirs dans le cadre du droit international de la lutte contre la corruption, en retraçant son émergence ainsi que son rôle dans la lutte contre la corruption transnationale. Elle analyse de manière critique les limites qui entravent la restitution des avoirs détournés et étudie le rôle croissant des résolutions sans procès (Non-Trial Resolutions, NTRs) comme outil de règlement des affaires de corruption, malgré l'absence d'un mandat international clair. Cette étude évalue en outre si les NTRs renforcent ou entravent le recouvrement des avoirs, en proposant une critique doctrinale de leur impact sur celui-ci. En examinant à la fois leurs avantages et leurs inconvénients, ce travail contribue au débat en cours sur les NTRs en tant qu'alternative viable pour un recouvrement efficace des avoirs.

**Mots-clés :** Recouvrement des avoirs ; Résolutions sans procès ; Entraide judiciaire mutuelle ; Droit international de la lutte contre la corruption

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### *Abbreviations and Acronyms*

<b>1MDB</b>	1Malaysia Development Berhad
<b>AFA</b>	Agence Française Anticorruption (French Anti-Corruption Agency)
<b>CJIP</b>	Convention Judiciaire d’Intérêt Public (Judicial Public Interest Agreement, France)
<b>DPA(s)</b>	Deferred Prosecution Agreement(s)
<b>DOJ</b>	Department of Justice (United States)
<b>EU</b>	European Union
<b>FCPA</b>	Foreign Corrupt Practices Act (United States)
<b>NPA(s)</b>	Non-Prosecution Agreement(s)
<b>N</b>	Stands for “note” and is used to refer back to a previously cited footnote number.
<b>NTR(s)</b>	Non-Trial Resolution(s)
<b>OAG</b>	Office of the Attorney General (Switzerland)
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>PNF</b>	Parquet National Financier (French National Financial Prosecutor’s Office)
<b>SCC</b>	Swiss Criminal Code
<b>UNCAC</b>	United Nations Convention against Corruption
<b>USA</b>	United State of America

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## Part I: Introduction and Research Framework

### 1. Introduction

Over the past several decades, there has been a profound evolution in the global approach to the recovery of assets stolen through corruption.<sup>1</sup> Before the adoption of the United Nations Convention against Corruption (UNCAC), efforts to repatriate illicit wealth across borders were largely ad hoc and ineffective.<sup>2</sup> There was no binding international obligation to return stolen funds, and states often treated asset return as a matter of goodwill rather than their duty.<sup>3</sup> Several high-profile cases (e.g., the Marcos and Abacha affairs) highlighted how fragmented laws, sovereignty concerns, and weak cooperation mechanisms left victim states with little recourse.<sup>4</sup> While corruption was condemned in principle, corrupt leaders could shelter their loot abroad with impunity.<sup>5</sup> The fragmentation of laws and lack of enforceable norms meant that before the 2000s, asset recovery was largely aspirational or a matter of altruism, not an expectation grounded in law.<sup>6</sup> There was simply no international consensus to compel the restitution of stolen assets.<sup>7</sup> A doctrinal blind spot emerged: bribery and corruption were increasingly criminalised, but the restitution of looted public wealth was almost entirely absent from international law.

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<sup>1</sup> Helfer, Laurence R., Rose, Cecily and Brewster Rachel. "Flexible Institution Building in the International Anti-Corruption Regime: Proposing a Transnational Asset Recovery Mechanism." *American Journal of International Law* 117 (2023), 568.

<sup>2</sup> Bauer, Hans-Peter. How to deal with politically exposed persons, In Pieth, Mark (ed.). *Recovering Stolen Assets*, Bern: Peter Lang, 2008, 196.

<sup>3</sup> *Ibidem*, 19.

<sup>4</sup> *Ibidem*, 343, 350.

<sup>5</sup> Gless, Jael Lena. "One Foot In, One Foot Out - An Accountability Analysis of the United Kingdom's and Switzerland's Regulatory Frameworks in the UNCAC Regime." *University College London Journal of Law and Jurisprudence* 13 (2024), 153. Adam, Rita. "Innovation in Asset Recovery: The Swiss Perspective." *World Bank Legal Review* 4 (2013), 257, 258.

<sup>6</sup> Hickey, Samuel J. "Remediation in Foreign Bribery Settlements: The Foundations of a New Approach." *Chicago Journal of International Law* 21 (2021), 410. Gless, Jael Lena. "One Foot In, One Foot Out - An Accountability Analysis of the United Kingdom's and Switzerland's Regulatory Frameworks in the UNCAC Regime." (n 5) 144.

<sup>7</sup> Gless, Jael Lena. "One Foot In, One Foot Out - An Accountability Analysis of the United Kingdom's and Switzerland's Regulatory Frameworks in the UNCAC Regime." (n 5), 144.

The adoption of the UNCAC in 2003 marked a decisive turning point. In Chapter V, the convention explicitly transformed asset recovery from a vague aspiration into a fundamental principle and binding legal obligation of states.<sup>8</sup> The Article 51 requirement that states parties cooperate in recovering and returning the proceeds of corruption has made asset return a mandatory component of anti-corruption justice, not a courtesy.<sup>9</sup> This was a conceptual breakthrough. For the first time, a treaty (and one that has been almost universally adopted) requires states to trace, freeze, confiscate, and return stolen assets to their rightful owners.<sup>10</sup> By creating a binding international obligation grounded in restorative and global justice, UNCAC has revolutionised asset recovery.<sup>11</sup> As stated in UNCAC's framework, states now have a duty to ensure that corruption does not pay and that wealth stolen through abuse of public power is returned to those harmed.<sup>12</sup> This framing elevates asset recovery beyond mere technical cooperation; it is cast as a matter of legal, moral, and structural justice.

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<sup>8</sup> *Ibidem*, 144, 145. Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." *Journal of Financial Crime* 29, Nr. 4 (2022), 1250. Gless, Jael Lena. "One Foot In, One Foot Out – An Accountability Analysis of the United Kingdom's and Switzerland's Regulatory Frameworks in the UNCAC Regime." (n 5), 146.

<sup>9</sup> Rose, Cecily, Kubiciel, Michael and Landwehr, Oliver. Introduction, In Rose, Cecily, Kubiciel, Michael and Landwehr, Oliver (eds.). *The United Nations Convention Against Corruption: A Commentary*, Oxford: Oxford University Press, 2019, 10. Gerry Ferguson, *Global Corruption: Law, Theory & Practice* (3rd edn, University of Victoria 2018), 418. Bacio Terracino, Julio. *The International Legal Framework against Corruption: States' Obligations to Prevent and Repress Corruption*, Portland: Intersentia, 278. Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." Oxford: Oxford University Press, 2023, 130.

<sup>10</sup> Brun, Jean - Pierre. article 51 In Cecily, Rose, Kubiciel, Michael, Landwehr, Oliver (eds.). *The United Nations Convention Against Corruption: A Commentary*, Oxford: Oxford University Press, 2019, 517, 571. Claman, Daniel. The promise and limitations of asset recovery under the UNCAC, In Pieth, Mark (ed). *Recovering Stolen Assets*, Bern: Peter Lang, 2008, 335. Madruga, Antenor. Expectations of developing economies: A view from the Americas, In Pieth, Mark (ed.). *Recovering Stolen Assets*, Bern: Peter Lang, 2008, 369. Sharman, Jason C. *The Despot's Guide to Wealth Management: On the International Campaign against Grand Corruption*, New York/London: Cornell University Press, 2017, 49. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, Washington, DC: World Bank, 2014, 12. Ivory, Radha. *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys*. Cambridge: Cambridge University Press, 2014, 138.

<sup>11</sup> Madruga. 369.

<sup>12</sup> *Ibidem*, 336. Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9) 194. UNCAC art. 51. UNCAC art. 57(1). UNCAC art. 57(3)(c).

Legally, UNCAC created entirely new obligations. Morally, it treats returning stolen assets as essential to righting the wrongs of corruption and structurally, it aims to reform the international system that had enabled kleptocrats to hide wealth abroad.<sup>13</sup> The near-universal adoption of UNCAC signalled a belated but clear consensus that stolen assets must be returned to victimised states and communities as a matter of justice and international order.<sup>14</sup>

In the years since UNCAC entered into force (in 2005), the national-level enforcement of anti-corruption laws has taken an unexpected turn. Non-trial resolutions (NTRs) in the form of negotiated settlements, such as deferred prosecution agreements (DPAs), non-prosecution agreements (NPAs), plea bargains, and similar tools, have proliferated as a means to resolve corruption cases without full trials.<sup>15</sup> The explosive rise of these

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<sup>13</sup> Claman, 335, 336. Vlassis and 368. KOFI ANNAN in Merida 2003, Pieth, 387. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10 ), 5. Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa*, London: Hart Publishing, 2014, 364. Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1250.

<sup>14</sup> The interpretative notes to art 35 UNCAC state that the expression "entities or persons" includes "States as well as legal and natural persons", confirming that States may be treated as victims for the purposes of compensation for damage caused by corruption (United Nations Office on Drugs and Crime, *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Corruption* (New York, United Nations 2010), 299). Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), (noting that 'there is no consensus on the definition of victims of foreign bribery, their rights or the extent of their compensation' and, for the purposes of their analysis, defining 'victim states' as states legally entitled to represent the damaged nation in settlement procedures regarding corporate foreign bribery). Naomi Roht-Arriaza. *Fraud on the River: Victim Access to Corruption Proceedings In Fighting Grand Corruption* (Cambridge University Press 2025), (arguing from UNCAC arts 32 and 35 that the state is not the only victim of corruption, that the Convention contemplated individual, collective and legal victims, and that victims are 'entities or persons who have suffered damage as a result of an act of corruption'), 80. In this thesis, a 'victim of corruption' means any natural or legal person, group, community, or state whose rights, interests, or legally protected interests are adversely affected by corrupt conduct and who can demonstrate a causal connection between that conduct and the harm alleged. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10 ), 12. Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13), 112. Rose, Kubiciel, Landwehr, 10, 12. Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9), 300. Madruga. 369.

<sup>15</sup> Hock, Branislav. "Policing Corporate Bribery: Negotiated Settlements and Bundling." *Policing and Society* 31, Nr. 8 (2021), 961. Bacarese, Alan, Negotiated Settlements for Corruption Offences: Position in the United Kingdom In *Negotiated Settlements for Corruption Offences: A European Perspective*. The Hague: Eleven International Publishing, 2015. 178. Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred

mechanisms over the last two decades has fundamentally shifted how cases of corporate bribery and grand corruption are concluded. Once largely unique to the United States (US), NTRs have now been adopted in dozens of jurisdictions, including major economies and emerging markets.<sup>16</sup> By 2019, at least fifteen signatories of the OECD Anti-Bribery Convention had employed some form of NTR in a case of foreign bribery, and the US resolves an estimated 96% of its foreign-bribery enforcement actions through such agreements; the UK and France similarly resolve the vast majority of their bribery cases via NTRs.<sup>17</sup> The NTR trend has developed despite there being no explicit mandate for such settlements in UNCAC.

NTRs emerged as national innovations and go beyond the letter of international treaties. Their increasing use represents a fundamental shift in the architecture of corporate accountability and raises important questions about the balance between functional efficiency and the demands of justice in global anti-corruption enforcement.<sup>18</sup> On the one hand, NTRs promise expediency and flexibility; they allow states to avoid time and resources consuming and complex trials, and cooperation, and can be tailored to ensure companies disgorge illicit gains.<sup>19</sup> On the other hand, they depart from the traditional model of public adjudication and punishment, potentially sidestepping full accountability.<sup>20</sup> As the UNCAC era has progressed, a tension has come into focus: how

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Prosecution Agreements a Way for Companies to Evade Liability?" *Trento Student Law Review* 6, Nr. 1 (2024), 53.

<sup>16</sup> Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?" (n 15), 54. OECD, *Resolving Foreign Bribery Cases with NTRs* (2019), 24. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10 ), 2. Garrett, Brandon. "The Global Evolution of Corporate Prosecutions." *Law and Financial Markets Review* 11, Nr. 2-3 (2017), 58.

<sup>17</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 13.

<sup>18</sup> Ivory, Radha, and Søreide, Tina. "The International Endorsement of Corporate Settlements in Foreign Bribery Cases." *International and Comparative Law Quarterly* 69, Nr. 4 (2020), 945, 948. Hock, Branislav. "Policing Corporate Bribery: Negotiated Settlements and Bundling." (n 15) 952, 962. 963.

<sup>19</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 21, 37.

<sup>20</sup> *Ibidem*, 81, 88. Ferguson, Gerry. "Global Corruption: Law, Theory and Practice" (n 9 ), 632, 669. Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?" (n 15) 64.

do these pragmatic mechanisms align with the convention's promises that there should be no safe haven for corrupt wealth and that justice, including the restitution of assets, must be afforded to victims? The question then is whether the rise of NTRs is a smart, functional solution to practical enforcement challenges or a troubling compromise of the normative commitments enshrined in UNCAC.

## 2. State of Research

The tension identified above is well recognised in legal scholarship, policy debates, and comparative analyses of anti-corruption enforcement. UNCAC created a strong doctrinal and moral mandate for asset recovery and placed a duty on states to ensure stolen assets are recovered and returned as a form of restorative justice.<sup>21</sup> Under UNCAC, asset recovery is not merely about penalising corruption; it is about making victims whole and affirming that corruption should not be profitable.<sup>22</sup> Scholars have noted that UNCAC elevates asset return to a matter of righting wrongs and correcting the global imbalances caused by corruption.<sup>23</sup> The promise that corruption shall not pay is then the linchpin of the UNCAC regime.<sup>24</sup>

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<sup>21</sup> In this thesis, restorative justice is defined as an option for doing justice that is primarily focused on repairing the harm that has been caused by a crime. (Hartmann, Arthur, *Victims and restorative justice: Bringing theory and evidence together*, *The Routledge International Handbook of Restorative Justice* (Routledge 2018), 129). Gless, Jael Lena. "One Foot In, One Foot Out – An Accountability Analysis of the United Kingdom's and Switzerland's Regulatory Frameworks in the UNCAC Regime." (n 5), 144, 145, 146, 149. Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1250.

<sup>22</sup> Gless, Jael Lena. "One Foot In, One Foot Out – An Accountability Analysis of the United Kingdom's and Switzerland's Regulatory Frameworks in the UNCAC Regime." (n 5), 146. Trinchera, Tommaso. "Confiscation and Asset Recovery: Better Tools to Fight Bribery and Corruption Crime." *Criminal Law Forum* 31, Nr. 1 (2020), 3. Ivory, Radha, and Søreide, Tina. "The International Endorsement of Corporate Settlements in Foreign Bribery Cases." (n 18), 957.

<sup>23</sup> Ivory, Radha. *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys*. (n 10), 5. Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9), 309. Ivory Radha, 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* (Hart Publishing 2017), 206.

Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9), 129, 194. Brun, 518.

The recovery of illicit gain assets to affected states serves a punitive function (depriving wrongdoers of their gains) and a reparative function (restoring resources to their intended public purpose).<sup>25</sup> From a doctrinal and normative perspective, any instrument in the anti-corruption toolkit should ideally support, or at least not thwart, the realisation of these restorative justice goals.<sup>26</sup> The literature on global anti-corruption law emphasises that asset recovery is as much about justice for victim states and their populations as it is about international cooperation.<sup>27</sup> Put simply, corruption is not truly defeated unless the wealth illicitly siphoned away is returned and used to repair the harm done.<sup>28</sup>

While this is the ideal, the reality is that negotiated justice mechanisms have become prevalent worldwide.<sup>29</sup> Proponents of NTRs argue that these tools can, in fact, improve

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<sup>25</sup> Ölçer, Pinar. article 57 In Cecily, Rose, Kubiciel, Michael and Landwehr, Oliver (eds.). *The United Nations Convention Against Corruption: A Commentary*, Oxford: Oxford University Press, 2019, 571. Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9), 194, 260. Ligeti Katalin and Simonato Michele, *Asset Recovery in the EU: Towards a Comprehensive Enforcement Model beyond Confiscation? An Introduction In Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU* (n 23), 1, 2. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10 ) 143. Gless, Jael Lena. "One Foot In, One Foot Out - An Accountability Analysis of the United Kingdom's and Switzerland's Regulatory Frameworks in the UNCAC Regime." (n 5),152.

<sup>26</sup> Lord, Nicholas. *Accommodating Transnational Corporate Bribery Revisited: Performing Transparency in the Shadows of Negotiation* In Capus, Nadja, and Hohl Zürcher, Franziska (eds.), *Negotiated Justice in Transnational Corruption: Between Transparency and Confidentiality*, Basel: Helbing Lichtenhahn, 2024, 309, 311. Vincke, François, 'Emerging Control of and Sanctions Against Corruption: The International Chamber of Commerce' In *Corporate Compliance on a Global Scale: Legitimacy and Effectiveness*, New York: Springer, 2022, 304, 306, 307. Hock, Branislav. "Policing Corporate Bribery: Negotiated Settlements and Bundling." (n 15), 952. Hickey, Samuel J. "Remediation in Foreign Bribery Settlements: The Foundations of a New Approach." (n 6), 400.

<sup>27</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements.", (n 8), 1250. Adam, Rita. "Innovation in Asset Recovery: The Swiss Perspective" (n 5), 253, 262.

<sup>28</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1250 Gless, Jael Lena. "One Foot In, One Foot Out - An Accountability Analysis of the United Kingdom's and Switzerland's Regulatory Frameworks in the UNCAC Regime." ,146. Hickey, Samuel J. "Remediation in Foreign Bribery Settlements: The Foundations of a New Approach." (n 6),400.

<sup>29</sup> Gless, Jael Lena. "One Foot In, One Foot Out - An Accountability Analysis of the United Kingdom's and Switzerland's Regulatory Frameworks in the UNCAC Regime." (n 5), 166. Trinchera, Tommaso. "Confiscation and Asset Recovery: Better Tools to Fight Bribery and Corruption Crime." (n 22), 5. Adam, Rita. "Innovation in Asset Recovery: The Swiss Perspective" (n 5), 253.

asset recovery outcomes.<sup>30</sup> A body of policy analysis and practitioner commentary points out that NTRs often motivate corporate offenders to cooperate and disclose information, which can dramatically improve the ability of authorities to trace and confiscate hidden assets.<sup>31</sup> For example, instead of stonewalling investigations, a company facing a DPA will frequently agree to forensic audits and reveal the channels by which bribe money moved, leading investigators to bank accounts and shell companies that would otherwise remain concealed.<sup>32</sup> NTRs can surmount the procedural hurdles faced in the case of traditional mutual legal assistance.<sup>33</sup> They streamline multi-jurisdictional cases by achieving a coordinated resolution in months rather than the years it might take for a conventional court process.<sup>34</sup> Comparative studies highlight that states adopted NTRs precisely to deal with the evidentiary and legal difficulties of complex corruption cases.<sup>35</sup>

Critics of NTRs offer doctrinal, normative, and comparative critiques to construct a forceful counter-narrative. A key concern is that, by avoiding trials, NTRs risk undermining transparency and accountability in corruption cases.<sup>36</sup> Deals struck behind

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<sup>30</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 111, 127. Hickey, Samuel J. "Remediation in Foreign Bribery Settlements: The Foundations of a New Approach." (n 6), 402. Søreide, Tina, *Negotiated Settlements for Corruption Offences: Position in Norway* In *Negotiated Settlements for Corruption Offences: A European Perspective* (n 15), 146.

<sup>31</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 71, 72, 93, 94, 111, 135, 136, 214. OECD, *The Detection of Foreign Bribery* (OECD 2017), 18. Hock, Branislav. "Policing Corporate Bribery: Negotiated Settlements and Bundling." (n 15) 950.

<sup>32</sup> OECD, 'Resolving Foreign Bribery Cases with Non-Trial Resolutions' (2019), 73, 74, 93, 94, 111, 135, 136, 214. MacManus, Sabha, and Conroy, James. 54.

<sup>33</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 21, 37, 38, 166. Dennis, Eleanor. "Using N/DPAs to Achieve Global Settlements: Lessons for Canada." *Dalhousie Journal of Legal Studies* 29 (2020), 62.

<sup>34</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 21, 37, 84, 85, 191. Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." *Columbia Journal of Transnational Law* 60 (2022), 807.

<sup>35</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 21, 76, 77.

<sup>36</sup> Einbinder, Fred. "Borrowings and Boomerangs: A Comparative Law Perspective on Resonance in Transnational Anti-Corruption Law Enforcement." *Journal of International Business and Law* 21 (2021), 158. Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?' in Søreide, Tina, and Makinwa, Abiola (eds.). *Negotiated Settlements in Bribery Cases*, Northampton, MA: Edward Elgar Publishing, 2020, 57, 58, 63. Ivory, Radha, and Søreide, Tina. "The International Endorsement of Corporate Settlements in Foreign Bribery Cases." (n 18), 952. Bacarese, Alan, *Negotiated Settlements for Corruption Offences: Position in the United Kingdom* (n 15), 198.

closed doors may lack the rigorous fact finding and public airing of evidence that trials provide, reducing public accountability for offenders (both companies and individuals) and diminishing the truth-seeking aspect of justice.<sup>37</sup> Moreover, while UNCAC emphasises the involvement of and restitution to victims, many NTRs exclude victim states from the process and outcomes.<sup>38</sup> Settlements are often reached in the state in which the bribe-paying company is based, with that state's treasury collecting large fines, leaving the state in which the corruption occurred without compensation or return of assets.<sup>39</sup>

The World Bank and others have documented this pattern.<sup>40</sup> For example, a European company might admit to bribing officials in an African state and pay a penalty to European in the framework of NTR, with the African state obtaining nothing from the settlement.<sup>41</sup> Such outcomes offend the basic restorative-justice premise of UNCAC that stolen wealth should be returned to those harmed by corruption.<sup>42</sup> Commentators decry this as a neo-colonial inequity, whereby wealthy prosecuting states enrich themselves

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<sup>37</sup> Makinwa, Abiola, *Negotiated Settlements for Corruption Offences: Wither Europe?* (n 15), 10. Søreide, Tina, *Negotiated Settlements for Corruption Offences: Position in Norway* (n 15), 144. Ivory, Radha, and Søreide, Tina. "The International Endorsement of Corporate Settlements in Foreign Bribery Cases." (n 18), 952. Søreide, Tina. 276, 277. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 145.

<sup>38</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1259, 1263.

<sup>39</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1259. Lord Nicholas, *Accommodating Transnational Corporate Bribery Revisited: Performing Transparency in the Shadows of Negotiation* (n 26), 309. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 127.

<sup>40</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1251. Falconi, Felipe Freitas, et al. *Victims of Corruption: Back for Payback*. Washington, DC: International Bank for Reconstruction and Development/The World Bank, November 2023, 22.

<sup>41</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10 ) 2. Ölçer, 581, 582. Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9), 155, 156. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9 ), 500.

<sup>42</sup> Ölçer, 570, 571. Gless, Jael Lena. "One Foot In, One Foot Out - An Accountability Analysis of the United Kingdom's and Switzerland's Regulatory Frameworks in the UNCAC Regime." (n 5),146. Sharman, Jason C. *The Despot's Guide to Wealth Management: On the International Campaign against Grand Corruption*, (n 10), 48, 49. Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9), 119.

under the guise of enforcement, leaving poorer victim states uncompensated.<sup>43</sup> In addition to monetary exclusion, victim states often have no voice in the negotiation of settlement terms. As a result, their interests, whether full disgorgement of profits, public apologies, or use of recovered funds for specific local projects, are not represented in most cases.<sup>44</sup>

Criticism of the sidelining of victims in NTR processes has mounted, and international forums have discussed the need to incorporate the principles of victim compensation into settlements.<sup>45</sup> Notably, recent conferences of states parties to the UNCAC have begun to address guidelines for sharing fines or mandating some form of restitution in cross-border corruption settlements, reflecting a growing consensus that the current situation is unsustainable and threatens the legitimacy of the regime.<sup>46</sup>

Another set of critiques focuses on deterrence and moral hazard. Scholars warn that if NTR penalties are too lenient or simply viewed as a cost of doing business, they may fail to deter misconduct.<sup>47</sup> Companies could rationally determine that paying a settlement is cheaper than foregoing the illicit profits earned, undermining the very purpose of

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<sup>43</sup> Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9), 117, 120. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10 ), 97, 98. Ivory, Radha , *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*, (n 23), 206. Connors, Richard F., III. "In the Global Fight against Corruption, Transnational Bribery Is Still Winning." *Seton Hall Law Review* 52 (2022), 976.

<sup>44</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10 ), 57. Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9), 115, 116. Ölçer, 582.

<sup>45</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10 ), 49.

<sup>46</sup> Ölçer, 582, 583.

<sup>47</sup> Lund, Dorothy S., and Sarin, Natasha. "Corporate Crime and Punishment: An Empirical Study." *Texas Law Review* 100 (2021), 330, 339. Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets*. Oxford: Princeton University Press, 2023, 58, 59. Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?' (n 36 ), 60, 61.

enforcement.<sup>48</sup> If enforcement of anti-corruption provisions is perceived as a series of negotiable fines rather than presenting a serious risk of conviction, the pay-to-walk dynamic could embolden rather than deter corporate bribery.<sup>49</sup> Many observers worry that certain high-profile DPAs send exactly this message: wealthy corporations can buy their way out of trouble without admitting wrongdoing or seeing any individuals held to account.<sup>50</sup> This ties into a broader normative legitimacy concern that public confidence in the anti-corruption fight will be eroded if people believe that elites can simply strike a deal and avoid true justice.<sup>51</sup> Indeed, scholars argue for a degree of consistency and stringency in settlements across jurisdictions to preserve the legitimacy of the global anti-corruption regime, lest the perception of unfair, secretive deals lead to cynicism about whether corruption truly does not pay.<sup>52</sup>

Comparative analyses show that the proliferation of NTR practices across states, each with its own rules, has created a kind of enforcement asymmetry. Companies may seek out jurisdictions in which they can secure the best deal, and enforcement agencies might

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<sup>48</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10 ), 49. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9 ) 610. Coffee, John C., Jr. *Corporate Crime and Punishment: The Crisis of Underenforcement*. Oakland: Berrett-Koehler, 2020, 63.

<sup>49</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10 ), 49. OECD, *Resolving Foreign Bribery Cases with NTRs* (2019), 168. Ivory, Radha, and Søreide, Tina. "The International Endorsement of Corporate Settlements in Foreign Bribery Cases." (n 18), 950, 976.

<sup>50</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 759. Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?' (n 36), 53. Bu, Qingxiu. "The Viability of Deferred Prosecution Agreements (DPAs) in the United Kingdom: The Impact on Global Anti-Bribery Compliance." *European Journal of Comparative Law and Governance* (2021), 179. Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?" (n 15) 43.

<sup>51</sup> Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?' (n 36), 67. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9 ), 634, 637. Koehler, Mike. "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement." *University College Dublin Law Review* 49 (2015), 526.

<sup>52</sup> Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?' (n 36), 44, 67. Makinwa, Abiola, *Negotiated Settlements for Corruption Offences: Wither Europe?* (n 15), 10, 14. Dennis, Eleanor. "Using N/DPAs to Achieve Global Settlements: Lessons for Canada." (n 33), 45, 72. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10 ), 98.

even compete to be the first to resolve a case (to claim fines for their treasury).<sup>53</sup> This lack of coordination can trigger a race to the bottom, with multiple states scrambling to settle a bribery case, perhaps offering overly lenient terms to secure their share, with the perverse effect that total assets recovered are lower, and no one ensures the victims are repaid.<sup>54</sup> Such scenarios run counter to UNCAC's vision of mutual cooperation and maximised asset return, pitting national interests against collective justice.<sup>55</sup>

The critical literature highlights a fundamental tension between UNCAC's asset recovery mandate and the real-world practice of negotiated justice.<sup>56</sup> While NTRs can make enforcement more effective in a narrow sense, they can also dilute the normative commitments to transparency, accountability, equitable restitution, and global solidarity that are the backbone of the international anti-corruption legal order.<sup>57</sup>

This thesis is situated within these debates and aims to bridge the gap between doctrinal ideals and practice. By drawing on supportive and critical perspectives, it acknowledges that NTRs inhabit a grey zone; functioning neither as unqualified instruments of asset

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<sup>53</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10 ), 143, 144. Makinwa, Abiola, *Negotiated Settlements for Corruption Offences: Wither Europe?* (n 15), 14. OECD, *Resolving Foreign Bribery Cases with NTRs* (2019), 168. Hock, Branislav. "Policing Corporate Bribery: Negotiated Settlements and Bundling." (n 15) 961.

<sup>54</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10 ), 2, 3, 98, 143, 144. Hock, Branislav. "Policing Corporate Bribery: Negotiated Settlements and Bundling." (n 15), 61. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 126, 168. Ölçer, 582.

<sup>55</sup> Ölçer, 582. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10 ), 97. Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1250.

<sup>56</sup> Ölçer, 581, 583. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10 ), 67, 98. Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9), 116, 155. Hickey, Samuel J. "Remediation in Foreign Bribery Settlements: The Foundations of a New Approach." (n 6), 403.

<sup>57</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10 ), 10, 97, 98. Makinwa, Abiola, *Negotiated Settlements for Corruption Offences: Wither Europe?* (n 15), 9. Stawicka, Karolina and Matusiak, Arkadiusz, *Negotiated Settlements for Corruption Offences: Position in Poland* (n 15) 97. Hock, Branislav. "Policing Corporate Bribery: Negotiated Settlements and Bundling." (n 15) 951. Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?' (n 36), 57, 58, 60, 67. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 126, 127, 152.

recovery nor as mere betrayals of justice. Rather, they are a complex blend of pragmatic tools and potential compromise. The above discussions underscore the need for a nuanced analysis of whether NTRs in their current form serve the global public interest in recovering stolen assets, and how they might better fulfil the UNCAC-inspired promise that corruption will not pay and that its victims will see justice done.

### 3. Research Objectives and Guiding Question

The central question guiding this thesis is whether the recent proliferation of NTRs in corruption cases advances the global asset-recovery mandate by expediting the return of stolen assets or undermines it by prioritising expediency of settlement over the principles of justice and accountability. This question lies at the intersection of two core developments: the emergence of asset recovery as a binding duty under international anti-corruption law, and the rise of negotiated justice as a dominant enforcement tool in key jurisdictions.

The thesis first situates asset recovery in its historical and doctrinal context. Earlier international conventions, such as the Inter-American Convention (1996),<sup>58</sup> the OECD Anti-Bribery Convention (1997),<sup>59</sup> the Council of Europe instruments (1999),<sup>60</sup> and the UN Convention against Transnational Organized Crime (2000),<sup>61</sup> played an important role in framing corruption as a global concern. However, they did not provide a robust framework for asset recovery. The study examines why, despite an emerging international consensus against corruption, institutional efforts before the UNCAC failed

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<sup>58</sup> Inter-American Convention against Corruption (B-58) (*adopted 29 March 1996*).

<sup>59</sup> Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) (*adopted 21 November 1997; done 17 December 1997, Paris*) OECD/LEGAL/0293.

<sup>60</sup> Criminal Law Convention on Corruption (ETS No 173) (Strasbourg, 27 January 1999) and Civil Law Convention on Corruption (ETS No 174) (Strasbourg, 4 November 1999).

<sup>61</sup> United Nations Convention against Transnational Organized Crime (UNTOC) (*annex to UNGA Res 55/25, 15 November 2000*).

to support meaningful restitution. The conceptual limitations of earlier treaties are examined, including the disjointed efforts of international and regional institutions, and the doctrinal gaps that hindered practical enforcement.

The analysis then turns to UNCAC as a transformative moment in the development of legal instruments for asset recovery. The thesis considers how UNCAC reframed asset recovery as a normative and enforceable component of international law. It explores its multi-mechanism framework, which combines criminal confiscation, civil proceedings, and administrative tools, giving particular attention to their strengths and weaknesses, including their ability to overcome secrecy jurisdictions, foster international cooperation, and deliver restorative justice to victim states.

The thesis then shifts from the international to the national level, and an entirely different developmental direction: the rise of NTRs. UNCAC did not create a mandate for such instruments, but states began to adopt them independently in response to enforcement challenges. The study analyses why various national legal systems, including the US, the United Kingdom (UK), France, and Switzerland, have embraced NTRs in the absence of clear international guidance. It considers how these frameworks differ in terms of their statutory foundations, prosecutorial discretion, judicial oversight, corporate accountability, and transparency. This comparative approach highlights the common drivers of NTRs (efficiency, resource management, and the desire to incentivise corporate cooperation) and the variations in their legal design that reflect different traditions and institutional priorities.

The analysis further explores how judicial involvement in NTR frameworks shapes their legitimacy. In the US and UK, judicial approval or oversight balances prosecutorial discretion, whereas in France and Switzerland, settlement practices have developed within more limited statutory or doctrinal boundaries. Comparing these models, the

study identifies the consequences of divergent approaches for fairness, transparency, and accountability in corporate anti-bribery enforcement.

Finally, the thesis considers the broader implications of NTRs for the global asset recovery mandate established by UNCAC. It asks whether national innovations in negotiated justice can be reconciled with the treaty's binding obligation to return stolen assets. This requires evaluating the extent to which NTRs contribute to asset recovery – for example, by facilitating corporate self-reporting, accelerating proceedings, and creating flexible mechanisms for restitution – or hinder it, by excluding victims, limiting judicial oversight, and prioritising settlement over justice. Also considered is how national sovereignty can be balanced with the need for common principles to ensure fairness, legitimacy, and equitable participation in cross-border bribery cases.

The study is deliberately defined and limited in scope. It focuses on UNCAC as the cornerstone of the international legal framework for asset recovery, and on four jurisdictions illustrating distinct NTR models. The study does not survey all national practices worldwide, nor does it provide a detailed empirical measure of settlement outcomes.

In doing so, the thesis contributes to the scholarly and policy debate on the future of global anti-corruption enforcement. It shows that asset recovery cannot be analysed in isolation from the dominant national-level enforcement practices. Only by understanding how NTRs interact with state obligations under UNCAC can the international community assess whether these mechanisms strengthen or undermine the pursuit of justice and the return of stolen assets.

#### **4. Analytical Framework**

The thesis employs a multi-pronged analytical framework that is at once doctrinal, comparative, and normative. Starting with a core component of the research is traditional

doctrinal analysis of legal texts and frameworks. This involves a close reading of treaties (especially UNCAC and Chapter V in particular), relevant international instruments, and domestic laws governing asset recovery and NTRs. The thesis interprets the language of UNCAC (e.g. the obligations in Articles 51–59), national statutes enabling DPAs and NPAs, and judicial decisions to discern the applicable legal rules and principles. This doctrinal work establishes what the law is by clarifying, for instance, that UNCAC makes asset return a binding obligation or outlining the legal conditions of a DPA under UK law as the necessary foundation for further analysis.

Beyond describing the law, the thesis takes a normative approach and questions how the law ought to function in light of justice considerations. This requires evaluating the practices of asset recovery and NTRs against principles of transparency, accountability, fairness, and equity. The research engages with theories of restorative justice (how settlements can repair harm to victims), retributive justice (the need for accountability and deterrence), and global distributive justice (addressing inequalities between nations that have been exacerbated by corruption). In doing so, it critically examines whether the current legal regime upholds its underlying values. For example, the thesis asks whether a settlement that returns no assets to a victim state can truly be considered just, even if legal procedures were followed. Such questions require a value-based inquiry that draws on scholarly critiques, ethical frameworks, and the spirit of UNCAC's provisions.

A significant part of the research is comparative, examining how various jurisdictions have implemented NTR mechanisms and how these align with or diverge from international expectations. The thesis includes a detailed comparison of four key jurisdictions, notably the US, UK, France, and Switzerland, which together represent the spectrum of approaches from common law and civil law traditions. In each case, the legal basis for NTRs, procedural safeguards, involvement of victims, and linkages to asset return are analysed. This comparative study illuminates best practices and problematic divergences (such as differences in transparency or victim compensation). It also explores

how international standards (like the recommendations of the OECD Anti-Bribery Convention) have influenced national choices. The comparison of outcomes and structures makes it possible to assess the prospects for harmonisation or at least mutual reinforcement between national settlement practices and the UNCAC framework. This broad comparative lens ensures that the conclusions are not based on any one state's idiosyncrasies but reflect global patterns.

## **5. Structure of the Thesis**

This thesis has five main parts that build on each other and address different aspects of the research question. The thesis follows a logical progression from the historical foundations of asset recovery in international law to the current legal framework, the rise of NTRs at the national level, and concludes with a critical assessment of how these new practices interact with the goal of stolen assets being returned.

Part II examines the evolution of asset recovery in international anti-corruption law. It begins with the early conventions of the 1990s and early 2000s, including the Inter-American Convention, the OECD Anti-Bribery Convention, the Council of Europe Conventions, the UN Convention against Transnational Organized Crime and the African Union Convention on Preventing and Combating Corruption. This part also considers the role of international and regional institutions, development banks, and financial centres in shaping global anti-corruption standards. It concludes with the adoption of the UNCAC as a turning point that placed asset recovery at the heart of international anti-corruption efforts.

Part III turns to asset recovery under current international law. It explores the doctrinal foundations of asset recovery as a binding international obligation, a form of restorative justice, and an instrument of structural global justice. The analysis highlights the obligations created by UNCAC, particularly regarding cooperation and how these confront secrecy jurisdictions and safe havens. The main legal mechanisms available to

states are then considered: criminal proceedings, civil procedures such as non-conviction-based forfeiture, and administrative avenues. By doing so, it clarifies the current legal landscape and identifies the strengths and weaknesses of the existing framework.

Part IV addresses the rise of NTRs in national anti-corruption law. The historical drivers of NTRs are explored, including major corporate scandals, efficiency pressures, and the need for flexible enforcement mechanisms, followed by a comparative analysis of how NTRs operate in key jurisdictions: the US, the UK, France, and Switzerland. Studying these systems side by side shows the diversity of national approaches and the common trends that shape this global phenomenon.

Part V investigates whether NTRs facilitate or undermine asset recovery. It considers the ways in which NTRs may contribute to asset recovery by, for example, encouraging companies to self-report misconduct, speeding up proceedings, or creating flexible settlements that include provisions for compensation. It also critically examines the risks of limited transparency, weak accountability, the exclusion of victims, and reduced judicial oversight. This part brings together the findings of the earlier chapters to assess the overall impact of NTRs on the objectives of UNCAC and the broader pursuit of justice.

Taken together, these four parts provide a coherent framework for answering the central research question. Part II provides the historical context, Part III clarifies the current obligations under international law, Part IV highlights the emergence of national innovations, and Part V evaluates their implications for asset recovery. In this way, the thesis progressively develops the argument needed to determine whether NTRs strengthen or undermine the international community's efforts to recover assets lost to corruption.

## **Part II: The Evolution of Asset Recovery in International Anti-Corruption Law**

This part examines the international anti-corruption framework prior to UNCAC to explain how and why stolen-asset recovery has been neglected. The analysis is divided across four chapters. Chapter 1 surveys the key international anti-corruption conventions adopted in the 1990s and early 2000s, highlighting their doctrinal focus and omissions. Chapter 2 evaluates the role of institutions and networks in enforcing those conventions (or failing to do so) and the broader engagement of financial and development institutions in anti-corruption efforts. Chapter 3 assesses the legal ramifications of this fragmented regime, exposing the blind spots, enforcement failures, and lack of consensus that have led to the underdevelopment of asset recovery. Finally, Chapter 4 offers a concluding analysis.

### **1. International Anti-Corruption Conventions**

Asset recovery emerged as a component of the international anti-corruption framework before the adoption of UNCAC (2003). Although corruption became a global legal concern in the late 20th century, asset recovery has remained underdeveloped, inconsistently addressed across treaties, and lacking binding obligations. Using a doctrinal and historical approach, this chapter analyses the major treaties in this area to evaluate the evolution of asset recovery provisions and their legal force.

#### **1.1 Evolution of Key International Anti-Corruption Conventions**

By the late 20th century, states had begun moving from isolated anti-corruption laws at the domestic level to coordinated international agreements.<sup>62</sup> In the US, the Foreign Corrupt Practices Act of 1977 (FCPA) was an early effort to criminalise overseas bribery by US companies.<sup>63</sup> However, under unilateral measures like the FCPA, compliant firms

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<sup>62</sup> Wouters, Jan, Ryngaert, Cedric and Cloots, Ann Sofie. *The Fight Against Corruption in International Law*. Leuven Centre for Global Governance Studies Working Paper Nr. 94, July 2012, 6.

<sup>63</sup> Trautman, Lawrence J., and Kimbell, Joanna. "Bribery and Corruption: The COSO Framework, FCPA, and U.K. Bribery Act." *Florida Journal of International Law* 30 (2018), 201.

experienced a competitive disadvantage, and the act proved inadequate against transnational bribery networks.<sup>64</sup> These weaknesses spurred the negotiation of multilateral conventions during the 1990s. A series of regional treaties, notably the Inter-American Convention Against Corruption (IACAC, 1996) adopted by members of the Organization of American States (OAS),<sup>65</sup> the OECD Convention on Combating Bribery of Foreign Public Officials (1997),<sup>66</sup> the Council of Europe Criminal Law and Civil Law Conventions on Corruption (1999),<sup>67</sup> and the African Union Convention on Preventing and Combating Corruption (AUCPCC, 2003),<sup>68</sup> laid the groundwork for the more global UNCAC (2003).<sup>69</sup>

Each of these instruments marked a significant shift by establishing regional legal obligations to criminalise corruption and enhance cooperation in cases of corruption. Yet, as will be shown, their scope and enforceability varied greatly. These conventions expanded the legal definition of corruption and required states to enact domestic laws. However, their approaches to asset recovery are limited or secondary. This patchwork regime reflects a hesitant and fragmented consensus; corruption is condemned, but the crucial element of returning stolen wealth to victim states seems to have been no more than an afterthought.

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<sup>64</sup> Bello y Villarino, Jose-Miguel, 'International Anticorruption Law, Revisited' (2022) 63(2) *Harvard International Law Journal*, 350. Ghosh Dastidar, Krishnendu, and Yano, Makoto. "FCPA and Market Quality in Emerging Economies." *RIETI Discussion Paper Series* 20-E-087. Tokyo: Research Institute of Economy, Trade and Industry, November 2020, 3.

<sup>65</sup> Organization of American States, *Inter-American Convention Against Corruption* (adopted 29 March 1996, entered into force 6 March 1997) (IACAC) [https://www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_B-58\\_against\\_corruption.asp](https://www.oas.org/en/sla/dil/inter_american_treaties_B-58_against_corruption.asp).

<sup>66</sup> Organisation for Economic Co-operation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (adopted 21 November 1997, entered into force 15 February 1999).

<sup>67</sup> Council of Europe, *Criminal Law Convention on Corruption* (adopted 27 January 1999, entered into force 1 July 2002) ETS No 173 and Council of Europe, *Civil Law Convention on Corruption* (adopted 4 November 1999, entered into force 1 November 2003) ETS No 174.

<sup>68</sup> African Union, *African Union Convention on Preventing and Combating Corruption* (adopted 11 July 2003, entered into force 5 August 2006) AUCPCC.

<sup>69</sup> United Nations, *UNCAC* (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41.

### 1.1.1 Inter-American Convention (1996)

The IACAC was the first binding international anti-corruption treaty. It is a regional commitment by countries in the Americas to tackle the “supply” and “demand” sides of bribery.<sup>70</sup> It mandates that states criminalise a broad range of corrupt acts, including active and passive bribery, illicit enrichment, and diversion of public resources.<sup>71</sup> Importantly, the IACAC recognised that corruption is transnational and includes mandatory as well as optional provisions related to mutual legal assistance (MLA), extradition, and asset-recovery cooperation.<sup>72</sup> The latter commitment was a conceptual advance: the convention encourages members to cooperate in tracing, freezing, and repatriating assets obtained through corrupt means.<sup>73</sup>

However, the IACAC’s asset-recovery provisions are rudimentary and lacking in detail, applying only to certain offences and relying on goodwill rather than obligation. In practice, the IACAC’s impact has been constrained by weak institutional follow-up.<sup>74</sup> Legal scholars observe that it relies on the voluntary cooperation of states, with no robust enforcement.<sup>75</sup> The mechanism established by the OAS, MESICIC, is essentially a peer-review process based on self-reporting, lacking independent authority or sanctions.<sup>76</sup>

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<sup>70</sup> Webb, Philippa. “The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?” *Journal of International Economic Law* 8, Nr. 1 (2005), 193, 194.

<sup>71</sup> Organization of American States, *Inter-American Convention against Corruption* (adopted 29 March 1996, entered into force 6 March 1997) 35 ILM, 8.

<sup>72</sup> Manfroni, Carlos A. *The Inter-American Convention against Corruption: Annotated with Commentary*, Lanham, MD: Lexington Books, 2003, 126, 127.

<sup>73</sup> Altamirano, Giorleny D. The Impact of the Inter-American Convention against Corruption, *University of Miami Inter-American Law Review* 38 (2006), 489, 502.

<sup>74</sup> Brunelle-Quraishi, Ophelie. “Assessing the Relevancy and Efficacy of the United Nations Convention against Corruption: A Comparative Analysis.” *Notre Dame Journal of International & Comparative Law* 2, Nr. 1 (2011), 155.

<sup>75</sup> Dugard, Jackie et al. (eds.). *Research Handbook on Economic, Social and Cultural Rights as Human Rights*, Massachusetts: Edward Elgar Publishing, 2020, 70, 82, 83. Perla, Juan O, 'A Game Theoretic Analysis of the Inter-American Convention against Corruption' (2017) 16 Rich J Global L & Bus, 73, 75.

<sup>76</sup> Olaniyan, Kolawole. “Ownership of Proceeds of Corruption in International Law.” (n 9) 188, 189. Hernandez G., Jose Ignacio. “Fighting Corruption in Latin America and the Caribbean at a Supranational Level: Balances and Challenges of the Inter-American Convention against Corruption.” *Revista Derecho del Estado* 59 (2024), 276, 285.

The IACAC established an important normative baseline and even gestured toward asset recovery, but it revealed a gap in failing to entrench asset return as a binding duty. By leaving cooperation as largely voluntary and not specifying mechanisms to compel the return of stolen assets, the IACAC exemplified the early underdevelopment of asset recovery in international law.<sup>77</sup> It raised expectations but offered few tools to overcome the political and legal barriers to recovering the wealth looted by corrupt officials.

### 1.1.2 OECD Anti-Bribery Convention (1997)

Whereas the IACAC was broad in scope, the OECD Convention focuses on the narrow issue of curbing bribery in international business transactions.<sup>78</sup> Championed by the US and adopted by other industrialised nations, the OECD Convention targets the supply side of corruption and criminalises the act of offering or giving bribes to foreign public officials.<sup>79</sup> This treaty was groundbreaking in requiring its parties (initially 34 states) to punish companies and individuals for bribery committed abroad, thereby levelling the playing field for exporters.<sup>80</sup> It also established robust corporate liability and sanctions provisions, and set up a rigorous follow-up mechanism under the OECD Working Group on Bribery.<sup>81</sup> However, significant gaps remain. By design, the demand side of bribery,

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<sup>77</sup> Brunelle-Quraishi, Ophelie. "Assessing the Relevancy and Efficacy of the United Nations Convention against Corruption: A Comparative Analysis." (n 74), 154.

<sup>78</sup> Pieth, Mark, introduction in Pieth, Mark, Low, Lucinda A. and Cullen, Peter J. (eds.). *The OECD Convention on Bribery: A Commentary*, New York: Cambridge University Press, 2007, 21.

<sup>79</sup> Zerbes, Ingeborg, Article 1: The Offence of Bribery of Foreign Public Officials in Pieth, Mark, Low, Lucinda A. and Cullen, Peter J. (eds.). *The OECD Convention on Bribery: A Commentary* (n 78) 514. Rose, Cecily, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (OUP 2015), 65.

<sup>80</sup> Pieth, Mark, introduction in Pieth, Mark, introduction in Pieth, Mark, Low, Lucinda A. and Cullen, Peter J. (eds.). *The OECD Convention on Bribery: A Commentary* (n 78), 21.

<sup>81</sup> Carlberg, Christopher K. "A Truly Level Playing Field for International Business: Improving the OECD Convention on Combating Bribery Using Clear Standards." *Boston College International and Comparative Law Review* 26 (2003), 100. Screpante, Mirna Solange. "OECD Anti-Bribery Convention: Implications on Corporate Criminal Liability in Latin America." *Business Law Review* 42 (2021), 26, 27. Liu, Lianlian. "The Dynamic of General Compliance with the OECD Anti-Bribery Convention: Two Interpretative Approaches." *Crime, Law and Social Change* 69 (2018), 624. Tyler, Andrew. "Enforcing Enforcement: Is the OECD Anti-Bribery Convention's Peer Review Effective?" *George Washington International Law Review* 43 (2011), 149.

the corrupt officials who receive illicit payments, was omitted, and the convention did not address what should be done with the proceeds of corruption.<sup>82</sup>

The drafters did include requirements for international cooperation (MLA or extradition) in bribery investigations, but did not tackle asset repatriation.<sup>83</sup> It contains no obligation to confiscate or return the gains of corruption to victim states.<sup>84</sup> In effect, the OECD Convention treats corruption as a crime to be punished for the purposes of deterrence, rather than wrongdoing that demands restitution.<sup>85</sup> This reflects a limited conception of the problem of corruption; the focus was on bribery as an offence against fair commerce, rather than a looting of public resources.<sup>86</sup>

Efforts to enforce the OECD Convention revealed familiar weaknesses.<sup>87</sup> Its peer-review process spurred legislative reforms, but there is no way to compel reluctant states to prosecute offenders.<sup>88</sup> Early on, only a few states (e.g., the US and Germany) actively enforced the ban on foreign bribery.<sup>89</sup> The unevenness of implementation underscored the difficulty of achieving a truly effective international regime. While the convention made important progress by criminalising corruption across borders, it largely ignores asset recovery, an omission that, until UNCAC, would persist as a feature of the global

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<sup>82</sup> Zerbes, Ingeborg, Article 1: The Offence of Bribery of Foreign Public Officials in Pieth, Mark, Low, Lucinda A. and Cullen, Peter J. (eds.). *The OECD Convention on Bribery: A Commentary* (n 78), 51.

<sup>83</sup> Tyler, Andrew. "Enforcing Enforcement: Is the OECD Anti-Bribery Convention's Peer Review Effective?" (n 82), 146. Carlberg, Christopher K. "A Truly Level Playing Field for International Business: Improving the OECD Convention on Combating Bribery Using Clear Standards." (n 81), 100.

<sup>84</sup> Discussing UNCAC, Brewster notes: "Unlike prior agreements, it also provides that States return any gains from bribery ... to the host State." This indicates earlier instruments such as the OECD Convention did not include asset return provisions. Brewster, Rachel. "The Domestic and International Enforcement of the OECD Anti-Bribery Convention." *Chicago Journal of International Law* 15 (2014), 99.

Carlberg, Christopher K. "A Truly Level Playing Field for International Business: Improving the OECD Convention on Combating Bribery Using Clear Standards." (n 81), 102.

<sup>86</sup> *Ibidem*, 95. Spahn, Elizabeth K. "Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention." *Virginia Journal of International Law* 53 (2012), 11.

<sup>87</sup> Liu, Lianlian. *The Global Collaboration against Transnational Corruption: Motives, Hurdles, and Solutions*, Singapore/Beijing: Springer, 130.

<sup>88</sup> *Ibidem*.

<sup>89</sup> Rose, Cecily, 'International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems' (n 79) 93.

framework. In its design and implementation, the convention demonstrates how pre-UNCAC efforts were fragmented. Narrow mandates and enforcement deficits left the issue of stolen assets virtually unaddressed in practice.

### 1.1.3 Council of Europe Conventions (1999)

European states took a more comprehensive legal approach, with the Council of Europe (CoE), adopting two complementary conventions in 1999, one criminal, one civil.<sup>90</sup> The Criminal Law Convention on Corruption obliges parties to criminalise a wide array of corrupt acts, including active and passive bribery (both domestic and foreign), trading in influence, laundering the proceeds of corruption, and various accounting offences.<sup>91</sup> It also urges the protection of whistleblowers and the creation of specialised anti-corruption agencies.<sup>92</sup> By covering domestic and foreign cases of bribery and related crimes, the CoE's instrument fills some of the gaps resulting from the OECD's single-issue focus.<sup>93</sup> The Civil Law Convention on Corruption broke new ground by recognising the right of those harmed by corruption to seek compensation, effectively treating corruption as a civil wrong in addition to a crime.<sup>94</sup> The recognition of this right was conceptually significant; it implied that victims (including states or their citizens) could recover damages, hinting at an early form of asset recovery through private law remedies.<sup>95</sup>

In theory, the CoE conventions expanded the legal toolkit to fight corruption, to include commitments on prevention, enforcement, and victim redress.<sup>96</sup> However, they have

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<sup>90</sup> Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 90.

<sup>91</sup> Brunelle-Quraishi, Ophelie. "Assessing the Relevancy and Efficacy of the United Nations Convention against Corruption: A Comparative Analysis." (n 74), 161.

<sup>92</sup> *Ibidem*, 90.

<sup>93</sup> *Ibidem*.

<sup>94</sup> Council of Europe, *Civil Law Convention on Corruption* (adopted 4 November 1999, entered into force 1 November 2003) ETS No 174; see also Falconi, Felipe Freitas, et al. "Victims of Corruption: Back for Payback." (n 40).

<sup>95</sup> Young, Simon N. M. "Why Civil Actions against Corruption?" *Journal of Financial Crime* 16 (2009), 148, 150.

<sup>96</sup> Webb, Philippa. "The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?" (n 70), 199.

been criticised by scholars for being insufficiently comprehensive and narrow in scope. The reduced governmental control and inequities in access in the Civil Law Convention and the lack of robust enforcement have also been criticised; soft monitoring takes place via the COE's monitoring body, GRECO.<sup>97</sup> GRECO promotes transparency and evaluates compliance, but it cannot sanction non-compliant states.<sup>98</sup> As a result, implementation of CoE standards has hinged on national political will, leading to uneven application and undermining of the treaties' harmonising objective.<sup>99</sup> As regards the Civil Law Convention, relatively few member states have ratified the instrument, citing its provisions as complex and challenging to implement uniformly.<sup>100</sup> The convention's concept of empowering victims is laudable, but without broad acceptance and clear guidelines, it has remained largely aspirational.

Experience with the CoE instruments shows that even when the legal framework is broadened to include measures akin to asset recovery (e.g., compensation of victims and seizure of illicit assets via money-laundering provisions), the impact is minimal if enforcement is weak. The absence of strong incentives for compliance and centralised enforcement has meant that these conventions do not effectively compel states or institutions (like banks) to assist in asset repatriation. In essence, the European experience before UNCAC is a microcosm of the global problem: comprehensive laws on the books, but fragmented and uneven implementation, with asset recovery provisions either absent or ineffectual.

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<sup>97</sup> Webb, Philippa. "The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?" (n 70), 200. Bacio Terracino, Julio. *'The International Legal Framework against Corruption: States' Obligations to Prevent and Repress Corruption'* (n 9), 303.

<sup>98</sup> Bacio Terracino, Julio. *'The International Legal Framework against Corruption: States' Obligations to Prevent and Repress Corruption'* (n 9), 303.

<sup>99</sup> Morait, Branko, *'Implementation of Rules of Awarding Damages Pursuant to Civil Law Convention on Corruption'* (2022) 2022 Collection Papers from Conf Org on Occasion Day Fac L, 46. Bantekas, Ilias. "Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies." *Journal of International Criminal Justice* 4 (2006), 472. Alldridge, Peter. "Reforming the Criminal Law of Corruption." *Criminal Law Forum* 11 (2000), 289.

<sup>100</sup> Council of Europe, *'Chart of signatures and ratifications of Treaty 174: Civil Law Convention on Corruption'* (17 May 2025) <https://www.coe.int/web/conventions/full-list/-/conventions/treaty/174/signatures>. accessed 20 May 2025.

### 1.1.4 The UN Transnational Organized Crime Convention (2000)

A global anti-corruption consensus began to emerge with the United Nations Convention against Transnational Organized Crime (UNTOC), adopted in 2000.<sup>101</sup> Although aimed at organised crime, UNTOC was the first universal treaty to address corruption in a meaningful way.<sup>102</sup> It requires states to criminalise the bribery of public officials (whether as giver or receiver) and to take measures against corruption as facilitators of organised crime.<sup>103</sup> It also contains provisions on money laundering, the tracing, freezing, and confiscation of criminal proceeds, and mechanisms for international cooperation.<sup>104</sup> UNTOC extended the reach of the anti-corruption norms expressed in regional instruments and recognised that corruption was a global problem linked to cross-border crime.<sup>105</sup> However, UNTOC is also conceptually limited. Its provisions apply only when the corruption offence is transnational or involves an organised criminal group.<sup>106</sup> Purely domestic grand corruption by political leaders falls outside its scope unless such can be tied to a criminal organisation.<sup>107</sup>

Thus, while UNTOC foreshadowed UNCAC by introducing measures for the confiscation and recovery of assets, it did so within a narrow context. The convention's rapid adoption and near-universal ratification were signs of a growing international

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<sup>101</sup> Tennant, Ian. "Fulfilling the Promise of Palermo? A Political History of the UN Convention Against Transnational Organized Crime." *Journal of Illicit Economies and Development* 2, Nr. 1 (2020), 61, 62.

<sup>102</sup> Webb, Philippa. "The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?" (n 70), 203.

<sup>103</sup> *Ibidem*, 203, 204.

<sup>104</sup> Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 419.

<sup>105</sup> Rose, Cecily. "The Creation of a Review Mechanism for the UN Convention against Transnational Organized Crime and Its Protocols." *American Journal of International Law* 114 (2020), 51, 53. Albanese, Jay S. "Countering Transnational Crime and Corruption: The Urge to Action Versus the Patience to Evaluate." *Justice Evaluation Journal* 1 (2018), 84. Shang, Haowen, and Huang, Gui. "On the UN Convention against Transnational Organized Crime and Convention against Corruption in China: Domestic Efforts and International Cooperation." *Tsinghua China Law Review* 13 (2020), 115.

<sup>106</sup> Rose, Cecily, 'International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems' (n 79), 100.

<sup>107</sup> Brunelle-Quraishi, Ophelie. "Assessing the Relevancy and Efficacy of the United Nations Convention against Corruption: A Comparative Analysis." (n 74), 157.

consensus on basic anti-corruption principles.<sup>108</sup> Yet, its implementation framework was weak, purely intergovernmental, non-intrusive, non-adversarial, and non-punitive.<sup>109</sup> Despite acknowledging the advances made by the treaty in establishing mandatory criminalisation at the global level, scholars have noted UNTOC's monitoring mechanism as inadequate, highlighting its lack of timelines, independent verification, and on-site reviews.<sup>110</sup> UNTOC demonstrates both the possibility and the limits of global action pre-UNCAC. States agreed in principle to cooperate to end corruption as part of fighting organised crime, but they stopped short of creating comprehensive obligations to return assets to foreign victims. In the absence of such obligations, efforts to recover assets were ad hoc and contingent on the crimes falling within the treaty definitions. This reflects another doctrinal blind spot in the pre-UNCAC era: the idea of corruption as a predicate to organised crime was addressed, but there was no binding global norm against corruption as a standalone offence that robs nations of resources.

### **1.1.5 African Union Convention (2003)**

On the eve of UNCAC's adoption, African states advanced a regional instrument that explicitly addresses asset recovery. The AUCPCC, adopted in July 2003, was tailored to the continent's experience with grand corruption.<sup>111</sup> It criminalises a broad spectrum of corrupt practices, from bribery and illicit enrichment to abuse of office and diversion of public funds, mirroring many provisions of earlier regional and international

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<sup>108</sup> United Nations Office on Drugs and Crime, *Signatories to the United Nations Convention against Transnational Organized Crime and its Protocols* <https://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>, accessed, 20 April 2025.

<sup>109</sup> Kruessmann, Thomas. *Organised crime in International Conflict and Security Law: A Research Handbook*, The Hague: T.M.C. Asser Press, 2022, 1216.

<sup>110</sup> Webb, Philippa. "The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?" (n 70), 158.

<sup>111</sup> Olaniyan, Kolawole. "African Union Convention on Preventing and Combating Corruption: A Critical Appraisal." *African Human Rights Law Journal* 4 (2004), 74, 75, 76. Fombad, Charles M., and Steytler, Nico (eds.). *Corruption and Constitutionalism in Africa: Revisiting Control Measures and Strategies*, Oxford: Oxford University Press, 437, 441, 444. Udombana, Nsongurua J. "Fighting Corruption Seriously – Africa's Anti-Corruption Convention." *Singapore Journal of International & Comparative Law* 7 (2003), 448.

conventions.<sup>112</sup> Uniquely, asset recovery and repatriation are a cornerstone of the AUCPCC regime. It obliges member states to enact measures for identifying, seizing, and restoring stolen assets to their states of origin.<sup>113</sup> The convention's emphasis on returning stolen wealth to its rightful owners was a progressive development. It recognised explicitly that anti-corruption efforts must include reclaiming resources siphoned away through corruption, an approach that was only marginally developed in earlier treaties.<sup>114</sup>

The AUCPCC has been praised for its forward-looking approach, specifically, its inclusion of asset recovery (alongside innovations like protection of whistleblowers and the involvement of civil society).<sup>115</sup> In principle, the instrument offers a more holistic understanding of corruption's harm by coupling punitive measures with restorative justice for victim states.<sup>116</sup> For states ravaged by the looting of public assets, this recognition was vital. However, the AUCPCC has faced familiar hurdles in practice. Ratification and implementation have been uneven, hampered by a lack of political will and the limited capacity of some signatories.<sup>117</sup> Scholars have warned that the convention's expansive obligations might deter ratification or compliance, especially where governments feel it intrudes on sovereignty or threatens entrenched interests.<sup>118</sup> Moreover, like other regional pacts, it lacks a strong mechanism for enforcement.<sup>119</sup> There

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<sup>112</sup> Brun, Jean Pierre, et al. "Unexplained Wealth Orders: Toward a New Frontier in Asset Recovery." (n 74), 159.

<sup>113</sup> Ivory, Radha. *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys*. (n 10), 126.

<sup>114</sup> Bello y Villarino, Jose-Miguel, 'International Anticorruption Law, Revisited' (n 64), 371, 372.

<sup>115</sup> Brun, Jean Pierre, et al. "Unexplained Wealth Orders: Toward a New Frontier in Asset Recovery." (n 74), 161.

<sup>116</sup> Bello y Villarino, Jose-Miguel, 'International Anticorruption Law, Revisited' (n 64), 372.

<sup>117</sup> Bello y Villarino, Jose-Miguel, 'International Anticorruption Law, Revisited' (n 64), 375.

<sup>118</sup> Brun, Jean Pierre, et al. "Unexplained Wealth Orders: Toward a New Frontier in Asset Recovery." (n 74), 159. Webb, Philippa. "The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?" (n 70), 203.

<sup>119</sup> Brun, Jean Pierre, et al. "Unexplained Wealth Orders: Toward a New Frontier in Asset Recovery." (n 74), 160. Babu, R. Rajesh, 'The United Nations Convention Against Corruption: A Critical Overview' (2006) SSRN, 27, 28.

is no supranational authority to compel asset recovery, and success still depends on cooperation among states and on domestic action by those that are financial havens.

The AUCPCC highlights both the promise and limitations of pre-UNCAC initiatives. It effectively identified the normative gap, which is that fighting corruption requires giving back what was stolen. However, the convention only applies within Africa and only to the extent that political conditions allow. The convention's bold provisions were a best-case scenario on paper, illustrating what a robust asset recovery regime might look like, but, without a global enforcement framework, these remained institutionally underdeveloped. This regional effort underscored the need for a universally accepted solution, as corrupt assets flow across regions to financial centres worldwide.

## **1.2 Impact and Limitations of the Conventions**

Taken together, the pre-2003 conventions reveal a gradually evolving international legal doctrine against corruption that has incrementally expanded criminalisation and cooperation but left critical gaps regarding asset recovery. By 2003, there was a patchwork of treaties that together covered much of the world, the Americas, Europe, Africa, and a near-universal UN framework for crime cooperation (UNTOC). These instruments establish important norms, criminalise bribery (active and passive) in many jurisdictions, recognise illicit enrichment in some areas, and promote mechanisms like extradition and MLA in cases of corruption.

However, as the analysis above reveals, there is fragmentation and asymmetry. The conventions differ in their focus and the parties bound, and, prior to UNCAC, none impose a clear, binding obligation to return stolen assets to foreign states within a robust legal framework. At best, asset recovery is implied or encouraged rather than mandated, and this is often contingent on other crimes or limited to regional partners. The conceptual framework underlying most of these treaties mostly treats corruption as a crime to be prosecuted, not as a transnational injustice requiring restitution. This has

meant that despite the moral outrage at grand corruption, the international community has not fully recognised or operationalised the principle that ‘corruption should not pay.’ Without a single, comprehensive treaty in force globally, efforts were piecemeal, ambitious in legal texts but modest in real-world effect. This context helps explain why, prior to UNCAC, asset recovery remained an underdeveloped element; most of the many anti-corruption laws lacked a cohesive regime to recover and repatriate the fruits of corruption.

### **1.3 Interim Conclusion**

This chapter has traced the evolution of asset recovery within the international anti-corruption legal framework prior to UNCAC. Three key findings emerge from the analysis. First, systemic corruption was sustained by the weakness of domestic institutions, with problems including a lack of transparency, political shielding of elites, and minimal judicial independence, which enabled large-scale misappropriation of public assets. Second, corruption expanded transnationally due to permissive global financial systems, limited legal cooperation, and the absence of binding international norms on asset return. Third, existing international conventions, although increasingly comprehensive in terms of criminalising corruption, failed to create enforceable pathways for asset recovery. Legal provisions were fragmented, non-binding, and dependent on voluntary cooperation, leaving victim states with inadequate tools to reclaim stolen wealth.

These findings highlight the pre-UNCAC era as one of normative progress but structural deficiency. Anti-corruption obligations grew in scope, yet asset recovery remained weakly integrated, with no global standard or enforcement mechanism. This fragmented regime was deficient, with corruption treated as a crime to be punished but not yet recognised as a global injustice requiring restitution. This context provides the foundation for Part III, which examines the adoption of the UNCAC. It explores how UNCAC reframed asset recovery as a core legal obligation and evaluates whether its

enforcement mechanisms address the institutional and normative gaps identified in this chapter.

## **2. Institutional Engagement in Anti-Corruption Efforts**

This chapter explores how international and regional institutions engaged with anti-corruption efforts prior to UNCAC, and why their structures failed to support effective asset recovery. Although anti-corruption norms were gaining traction globally, the institutions tasked with promoting, monitoring, and implementing these norms lacked the authority, coordination, and legal frameworks to facilitate the return of illicitly acquired assets.

This chapter examines how different actors, including intergovernmental bodies, development institutions, and private financial entities, responded to corruption. It focuses on their mandates, enforcement tools, and institutional limitations with respect to asset tracing and repatriation. This chapter shows how institutional fragmentation undermined efforts to recover assets and set the stage for UNCAC's institutional innovations.

### **2.2 Actors**

#### **2.2.1 International and Regional Bodies**

Anti-corruption conventions have always depended on the institutions tasked with promoting and monitoring them. Prior to UNCAC, multiple organisations engaged in anti-corruption efforts, but their institutional capacities and mandates were limited, especially regarding asset recovery. At the regional level, bodies like the OAS and CoE set up mechanisms (MESICIC and GRECO, respectively) to oversee the implementation of their respective conventions.<sup>120</sup> As soft enforcement, these mechanisms were

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<sup>120</sup> Babu, R. Rajesh, 'The United Nations Convention Against Corruption: A Critical Overview' (n 119), 29. Bello y Villarino, Jose-Miguel, 'International Anticorruption Law, Revisited' (n 64) 364. Harrington, Alexandra R. "Conflicting Trends: Lessons from Current Evaluative Mechanisms in International and Regional Anti-

innovative, and their responsibilities included reviewing state progress, publishing reports, and facilitating information sharing.<sup>121</sup> However, as noted above, these bodies lacked coercive power.<sup>122</sup> MESICIC, for example, relies on self-reporting and peer evaluation without independent verification or sanctions.<sup>123</sup> Evaluation by GRECO fosters dialogue and transparency, but this body also lacks the power to impose punitive measures for non-compliance.<sup>124</sup>

The OECD Working Group on Bribery stands out as a relatively more active forum.<sup>125</sup> It conducts rigorous peer reviews and publicises the extent to which states enforce their obligations under the Anti-Bribery Convention.<sup>126</sup> This peer-pressure model did yield some improvements – it prompted governments to enact laws and prosecute some cases<sup>127</sup> – but has nevertheless been critiqued for being unable to force the hand of laggard states.<sup>128</sup> None of these various bodies had any direct mandate to ensure the return of stolen assets. Institutionally, states were encouraged to comply with their obligations

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Corruption Systems regarding Conflicts of Interest.” *George Mason Journal of International Commercial Law* 4 (2013), 188. de Souza, Renato Machado, 'Foreign Bribery: A Brief Report on Latin American States' (2023) 2 *Transnat'l Crim L Rev*, 168. Hernandez G., Jose Ignacio. “Fighting Corruption in Latin America and the Caribbean at a Supranational Level: Balances and Challenges of the Inter-American Convention against Corruption.” (n 76), 261. Eser, Albin, and Kubiciel, Michael (eds.). *Institutions against Corruption: A Comparative Study of the National Anti-Corruption Strategies Reflected by GRECO's First Annual Round*. München: Max Planck Institute for Foreign and International Criminal Law, 2005, 14, 16. Mladenov, Mladen. “Some Publicly Available Spots of Expertise in Anti-Corruption Matters.” *Politics & Security* 5, Nr. 3 (2021), 12.

<sup>121</sup> Mladenov, Mladen. “Some Publicly Available Spots of Expertise in Anti-Corruption Matters.” (n 120), 12. Borlini, Leonardo. “Monitoring and Compliance Mechanisms as a Diagnostic and Prognostic Tool of International Anti-Corruption Cooperation: A Data-Driven Study.” *International Journal of Constitutional Law* 22, Nr. 2 (2024), 492, 506.

<sup>122</sup> Borlini, Leonardo. “Monitoring and Compliance Mechanisms as a Diagnostic and Prognostic Tool of International Anti-Corruption Cooperation: A Data-Driven Study.”, (n 121), 497, 498.

<sup>123</sup> Olaniyan, Kolawole. “Ownership of Proceeds of Corruption in International Law.” (n 9), 188.

<sup>124</sup> Bacio Terracino, Julio. *The International Legal Framework against Corruption: States' Obligations to Prevent and Repress Corruption* (n 9), 303.

<sup>125</sup> Webb, Philippa. “The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?” (n 70), 197.

<sup>126</sup> Rose, Cecily, 'International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems' (n 79), 68.

<sup>127</sup> *Ibidem*, 83.

<sup>128</sup> *Ibidem*, 92.

through indirect persuasion rather than direct enforcement.<sup>129</sup> Cooperation in specific asset recovery cases remained subject to ad hoc political decisions and bilateral dealings, since no standing international agency or mechanism existed to coordinate such recovery.

From a governance standpoint, the pre-UNCAC institutions illustrate a broader failure to institutionalise asset recovery. They focused on advising and monitoring legal reforms (important for prevention and criminalisation) but did not, and perhaps could not, build an apparatus to track and repatriate illicit wealth. In hindsight, this was a major structural flaw in the international anti-corruption architecture; efforts were concentrated on setting standards, with insufficient attention to implementing justice for past corruption.

### **2.2.2 Multilateral Development Institutions**

The late 20th century also saw global financial and development institutions acknowledge corruption as a systemic problem.<sup>130</sup> The World Bank and International Monetary Fund (IMF), in particular, emerged as influential in the anti-corruption arena.<sup>131</sup> In 1996, World Bank President James Wolfensohn famously decried the cancer of corruption, expressing the institution's newfound willingness to address governance issues.<sup>132</sup> By 1997, the bank had formalised anti-corruption strategies and began conditioning its loans and projects on governance reforms.<sup>133</sup> In its 1997 report *Helping States Combat Corruption*, the World Bank highlighted how corruption and poorly regulated financial systems impede development.<sup>134</sup> The IMF has similarly adopted

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<sup>129</sup> Mladenov, Mladen. "Some Publicly Available Spots of Expertise in Anti-Corruption Matters." (n 120), 12. Borlini, Leonardo. "Monitoring and Compliance Mechanisms as a Diagnostic and Prognostic Tool of International Anti-Corruption Cooperation: A Data-Driven Study." (n 121), 497, 498, 507.

<sup>130</sup> Palifka, Bonnie J., and Rose-Ackerman, Susan, 'Corruption and Government: Causes, Consequences, and Reform' (2nd edn, Cambridge University Press 2016), 2.

<sup>131</sup> *Ibidem*.

<sup>132</sup> Heimann, Fritz, and Pieth, Mark, 'Confronting Corruption: Past Concerns, Present Challenges, and Future Strategies' (Oxford University Press 2018), 59.

<sup>133</sup> Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9 ), 85.

<sup>134</sup> *Ibidem*.

guidelines linking economic assistance to good governance, and has even suspended loans over corruption concerns, for example, a USD 220 million loan to Kenya in 1997 and a USD 120 million loan.<sup>135</sup> These moves represented an institutional commitment to incentivise anti-corruption policies.

The involvement of the World Bank and IMF reinforced an emerging norm that corruption was not just a legal or moral issue, but a development issue affecting poverty and stability.<sup>136</sup> Their lending conditionalities prompted many states to enact anti-corruption laws or create anti-corruption agencies as part of their economic agenda.<sup>137</sup> However, these financial institutions approached corruption largely as a matter demanding prevention and governance improvements, rather than demanding legal action to recover stolen assets. Prior to UNCAC, the World Bank did not have a mandate to help states recover assets; this changed with initiatives like the Stolen Asset Recovery (StAR) program.<sup>138</sup> Thus, while the World Bank and IMF helped mainstream anti-corruption concerns and encouraged domestic reform, they were institutionally ill-equipped to address the aftermath of corruption, namely, national wealth being plundered and hidden abroad. These institutions have been criticised for overstepping or imposing external solutions without regard for local conditions. As regards asset recovery, however, the bodies responsible for global economic governance, despite condemning corruption, did not create avenues to remedy past theft. Their focus on future governance left a gap in addressing past looting. This again reflects how asset recovery was conceptually sidelined; the priority was to prevent and punish going forward, rather than to make victims whole following past wrongs.

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<sup>135</sup> *Ibidem*, 86.

<sup>136</sup> Palifka, Bonnie J., and Rose-Ackerman, Susan, 'Corruption and Government: Causes, Consequences, and Reform' (n 130), 802.

<sup>137</sup> Wouters, Jan, Ryngaert, Cedric and Cloots, Ann Sofie. "The International Legal Framework against Corruption: Achievements and Challenges." *Melbourne Journal of International Law* 14 (2013), 214. Chanda, Parthapratim. "The Effectiveness of the World Bank's Anti-Corruption Efforts: Current Legal and Structural Obstacles and Uncertainties." *Denver Journal of International Law and Policy* 32 (2004), 348.

<sup>138</sup> 'About StAR', *Stolen Asset Recovery Initiative* <https://star.worldbank.org/about-star>. Accessed 20 Avril 2024.

### 2.2.3 Financial Centres and Private Actors

A critical, if paradoxical, aspect of international efforts to address corruption concerns the role of financial institutions and offshore jurisdictions.<sup>139</sup> It is clear that a reason that asset recovery has lagged is that the same international financial system needed to retrieve stolen assets has often been complicit in their concealment.<sup>140</sup> The major corruption scandals of the 1980s and 1990s (for example, those involving Ferdinand Marcos, Sani Abacha and Mobutu Sese Seko) showed that banks in developed states, as well as secretive offshore companies, were key enablers of transnational corruption.<sup>141</sup> High political official stealing from their own countries and transfers the stolen money to European countries.<sup>142</sup> The financial institutions involved in these transactions were de facto stakeholders in whether asset recovery succeeded or failed.<sup>143</sup>

Before UNCAC, there were few international obligations compelling banks to cooperate with foreign asset-recovery efforts.<sup>144</sup> There were anti-money laundering (AML) standards, for example, FATF's 40 Recommendations adopted in 1990 and revised in 1996. These required banks to detect and report suspicious transactions, including those

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<sup>139</sup> Christensen, John. "The Hidden Trillions: Secrecy, Corruption, and the Offshore Interface." *Crime, Law and Social Change* 57 (2012), 325, 326, 328. Moorman, Ted C, 'Kleptocracy and Foreign Corruption Manifesting in Illicit Financial Flows' (2018) 25 J Fin Crime, 688.

<sup>140</sup> Wouters, Jan, Ryngaert, Cedric and Cloots, Ann Sofie. "The International Legal Framework against Corruption: Achievements and Challenges." (n 137), 263, 265. Moiseienko, Anton 'The Ownership of Confiscated Proceeds of Corruption under the UN Convention against Corruption' (2018) 67 Int'l & Comp LQ, 669.

<sup>141</sup> Wabwile, Nyongesa Michael. "Transnational Corruption, Violations of Human Rights and States' Extraterritorial Responsibility: A Case for International Action Strategies." *African Journal of Legal Studies* 8 (2015), 92.

<sup>142</sup> David Smith, 'Switzerland to Return Sani Abacha "Loot" Money to Nigeria' *The Guardian* (18 March 2015) <https://www.theguardian.com/world/2015/mar/18/switzerland-to-return-sani-abacha-loot-money-to-nigeria> accessed 6 March 2025. Mbaku, John Mukum. "International Law and the Fight against Bureaucratic Corruption in Africa." *Arizona Journal of International and Comparative Law* 33 (2016), 751.

<sup>143</sup> Wouters, Jan, Ryngaert, Cedric and Cloots, Ann Sofie. "The International Legal Framework against Corruption: Achievements and Challenges." , 263, 265. Moorman, Ted C, 'Kleptocracy and Foreign Corruption Manifesting in Illicit Financial Flows' (n 139), 688.

<sup>144</sup> Christensen, John. "The Hidden Trillions: Secrecy, Corruption, and the Offshore Interface." (n 139), 325.

possibly linked to corruption.<sup>145</sup> However, enforcement was patchy and, crucially, there was no obligation to return the funds to their states of origin. Banks often cited client confidentiality and domestic legal barriers to refuse or delay cooperation with foreign requests.<sup>146</sup> In the Marcos case, Swiss banks initially refused to repatriate funds absent a lengthy legal process in Switzerland, delaying justice for years.<sup>147</sup> In the case of Abacha, complex corporate structures created delays, with litigation stretching over many years before some of the stolen assets were returned to Nigeria.<sup>148</sup> In Mobutu's case, new Congolese authorities were largely thwarted by foreign banks, which were reluctant to provide information or freeze assets, leading to a failed recovery effort.<sup>149</sup>

These examples illustrate an institutional mismatch; corrupt money flows globally, but law enforcement jurisdiction remains mostly national. Prior to UNCAC, requests to recover assets depended on bilateral MLA treaties or diplomatic persuasion, with no guarantee of success. Financial institutions, operating across borders, were not bound to assist foreign governments.<sup>150</sup> Indeed, many had incentives to protect depositors and avoid reputational damage, and operated within secrecy jurisdiction.<sup>151</sup> In effect, the global financial architecture provided a safe haven for illicit assets, and there was no agreed legal process to systematically pierce the veil those havens provided.<sup>152</sup> This was a profound failure of the international system, even as states decried corruption, major

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<sup>145</sup> El Banna, Badr. Articles 14, 52, 56 and 59, In Cecily Rose, Kubiciel, Michael and Landwehr, Oliver (eds.). *The United Nations Convention Against Corruption: A Commentary*, Oxford: Oxford University Press, 2019, 152.

<sup>146</sup> Harari, Maurice and Berthed, Anne Valerie Julen, Article 12: Monitoring and Follow-up in Pieth, Mark, Low, Lucinda A. and Cullen, Peter J. (eds.). *The OECD Convention on Bribery: A Commentary* (n 78), 430, 431.

<sup>147</sup> Ivory, Radha. *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys*. (n 10), 38-40.

<sup>148</sup> Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9) 149.

<sup>149</sup> *Ibidem*, 152.

<sup>150</sup> Cao, Lan. "The Transnational and Sub-National in Global Crimes." *Berkeley Journal of International Law* 22 (2004), 68. Christensen, John. "The Hidden Trillions: Secrecy, Corruption, and the Offshore Interface." (n 139), 325, 326.

<sup>151</sup> Christensen, John. "The Hidden Trillions: Secrecy, Corruption, and the Offshore Interface." (n 139), 325, 326.

<sup>152</sup> *Ibidem*.

financial centres often profited from it and faced little pressure to relinquish stolen funds.<sup>153</sup>

Institutional underdevelopment was especially apparent in the lack of a central authority or unified network devoted to asset recovery. Interpol, for instance, could issue notices for wanted persons, but there was no equivalent mechanism for assets beyond the slow channel of court-issued requests. It was not until the adoption of UNCAC that there was an impetus to more rigorously involve banks and financial regulators in the return of assets. Thus, before 2003, institutional engagement in anti-corruption remained fragmented, with governments, international organisations, and banks operating in silos. Development banks pushed governance reforms, law enforcement networks tackled bribery in piecemeal, and financial institutions shielded wealth unless compelled to do otherwise. Asset recovery was underdeveloped because the institutional framework to support it had not been built, and there was no system or incentive structure to trace and return stolen assets on a global scale.

### **2.3 Global Consensus and its Limits**

Internationally, high-level declarations by states in the 1990s condemned corruption and urged cooperation.<sup>154</sup> However, these political commitments did not immediately translate into effective institutions for asset recovery. Notably, early US attempts to globalise anti-bribery norms met resistance in some quarters. For example, efforts in 1996 and 1997 to have members of the Asia-Pacific Economic Cooperation forum agree to OECD-style anti-corruption principles failed because several states objected on the grounds of cultural and economic differences.<sup>155</sup> Such episodes revealed that without universal agreement, even well-intentioned institutional initiatives could falter. It was only in the late 1990s and early 2000s, as outrage over grand corruption mounted and the

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<sup>153</sup> *Ibidem*, 328, 329, 332, 335, 341.

<sup>154</sup> Mathis Lohaus and Ellen Gutterman, 'International Anti-Corruption Law' in *Oxford Handbook of Quality of Government* (Oxford University Press 2020) 5, 6.

<sup>155</sup> Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9 ), 85.

international implications became evident, that momentum gathered for a truly global solution.<sup>156</sup> The United Nations responded by convening negotiations for the UNCAC.<sup>157</sup>

Leading up to UNCAC, it was recognised that prior institutional efforts, while laying the necessary groundwork, were insufficient. Bodies such as the OAS, OECD, and CoE had demonstrated the value of international coordination, and institutions such as the World Bank had elevated the issue of corruption on the global agenda. However, without an integrated framework, asset recovery was at the mercy of politics and diplomacy. The pre-UNCAC institutional landscape was characterised by enforcement failures born of fragmentation. There was no single forum where all states could assert a right to the return of stolen assets, nor any body with authority to enforce such claims. Each institution addressed a piece of the puzzle: legal norms, compliance monitoring, financial governance, or technical assistance. Yet the collective blind spot was clear: the absence of a coordinated, binding approach to ensure that when leaders stole and stashed public funds abroad, those funds could be systematically traced and returned. This institutional blind spot directly contributed to the underdevelopment of asset recovery as a functional reality before 2003.

## **2.4 Interim Conclusion**

This chapter has examined the institutional dimensions of anti-corruption efforts before UNCAC, revealing important gaps that explain the underdevelopment of asset recovery. Three key findings emerge. First, although regional and international bodies like the OAS, OECD, and CoE promoted anti-corruption norms, their enforcement mechanisms were soft, fragmented, and lacked mandates for asset return. Monitoring systems fostered legal reform but were structurally incapable of compelling asset repatriation.

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<sup>156</sup> Lohaus, Mathis. *Towards a Global Consensus Against Corruption: International Agreements as Products of Diffusion*, New York: Routledge, 2, 3.

<sup>157</sup> Olivier, Cherrie and Álvarez Laura Mahecha, The United Nations General Assembly In *Las respuestas a la corrupción desde el derecho internacional de los derechos humanos. Parte I – Las respuestas desde el Sistema Universal de Derechos Humanos*, Valencia: Tirant lo Blanch, 2021, 71.

Second, global financial institutions like the World Bank and IMF helped elevate the significance of corruption as a development issue and linked aid to governance reforms. However, they focused on future-oriented prevention, not retrospective justice. Prior to UNCAC, they lacked the legal authority or institutional tools to support recovery of stolen assets, leaving a major enforcement void.

Third, financial centres and private actors, while central to concealing illicit wealth, operated within secrecy jurisdiction and resisted cooperation. AML rules were insufficiently enforced, and no binding international obligations required banks to assist in returning assets. As a result, financial institutions often became complicit, even when corruption was widely condemned.

This chapter has shown that no cohesive institutional architecture existed to support global asset recovery prior to 2003. Political will was dispersed, mandates were narrow, and cooperation was ad hoc. Each actor operated in their own silo without a unified, enforceable framework; regional bodies focused on legal standards, development banks on governance, and financial institutions on regulatory compliance. This institutional arrangement explains why even high-level political commitments failed to translate into action. It also clarifies the urgent need that UNCAC was designed to address.

### **3. Legal Outcomes and Persistent Deficits**

This chapter analyses the legal outcomes of the global anti-corruption regime prior to the UNCAC, with a focus on asset recovery. Despite growing international recognition of corruption's harms, in the early 2000s, the legal architecture in place was fragmented, weakly enforced, and conceptually incomplete. This chapter investigates how these legal gaps manifested as real-world obstacles for recovering stolen assets.

Using a doctrinal and case-based approach, the chapter examines legal shortcomings, high-profile enforcement failures, and structural inconsistencies across the various conventions. It also evaluates the absence of binding norms on asset return and the consequences of doctrinal blind spots for victim states.

### **3.2 Structural Gaps and Fragmentation**

By the early 2000s, despite multiple conventions and initiatives, the global anti-corruption framework was marked by incoherence and gaps. As observed above, many states had formally committed to combating corruption, but the effectiveness of these commitments varied widely. Legally, there was still no universal treaty in force mandating or providing a clear process for asset recovery.<sup>158</sup> The IACAC and AUCPCC, the two instruments that mentioned asset return, were limited in membership and enforceability. As a result, a state seeking to recover stolen funds in, say, a Western bank had to rely on general MLA agreements or the goodwill of the bank's home government.<sup>159</sup> This often proved ineffective.<sup>160</sup>

There were several fundamental gaps in the pre-UNCAC regime: key aspects of corruption (such as restitution for victim states or liability for bribe recipients) were not fully addressed or were treated as optional. For example, the crime of bribery had been rigorously defined by the international community, but comparatively little attention was given to the proceeds of that crime. The absence of a binding norm on asset repatriation meant that even when kleptocrats were exposed, there was no guarantee their ill-gotten assets would be returned. This was a striking omission. While corruption was condemned, the injustice it caused (the depletion of public resources) could not be

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<sup>158</sup> Brun, Jean Pierre, et al. "Unexplained Wealth Orders: Toward a New Frontier in Asset Recovery." (n 74), 122.

<sup>159</sup> Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 487.

<sup>160</sup> Adam, Rita. "Innovation in Asset Recovery: The Swiss Perspective" (n 5), 254, 261, 262. Djoyou Kamga, Serges. "Illicit Financial Flows, Asset Recovery, the Power Game and the Right to Development in Africa." *Comparative and International Law Journal of Southern Africa* 52 (2019), 203, 207.

directly remedied by international law. The fragmented nature of the conventions (each with different parties and provisions) also meant there was no coherent enforcement regime. Depending on those involved, states could easily find themselves without any applicable treaty basis to request asset recovery. In short, the legal landscape prior to UNCAC was a patchwork quilt with pieces missing; many important anti-corruption rules existed, but the overall design to reclaim stolen wealth was incomplete.

### 3.3 Evidence from High-Profile Cases

The real-world consequences of these legal shortcomings are most vividly illustrated by the grand corruption cases of the late 20th century. Ferdinand Marcos (Philippines), Sani Abacha (Nigeria), Mobutu Sese Seko (Zaire/D.R. Congo), and other notorious kleptocrats looted billions from their national treasuries and secreted the money abroad.<sup>161</sup> When successor governments or international investigators tried to reclaim these assets, they encountered enforcement failures at multiple levels.<sup>162</sup> Legally, there was possibility of facing the hurdle of *dual criminality* a request to freeze or seize assets could be denied if the act was not a crime in the jurisdiction holding the assets, or if no mutual assistance treaty applied.<sup>163</sup> Politically, recovery efforts were stymied by *foreign resistance*, with some governments slow or unwilling to cooperate, especially if their banks benefited from the deposits.<sup>164</sup>

Procedurally, the path to recovery was slow and convoluted, requiring extensive litigation in foreign courts, navigating different legal systems, and overcoming challenges

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<sup>161</sup> Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9), 152, 153. Ivory, Radha. *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys*. (n 10), 40, 41

<sup>162</sup> Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9), 152, 153. Ivory, Radha. *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys*. (n 10), 43.

<sup>163</sup> Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9), 221.

<sup>164</sup> Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 165, 167.

made by the accused officials' families or associates.<sup>165</sup> In the Marcos case, for instance, it took many years of legal battles in Switzerland and other jurisdictions before a portion of the assets was returned to the Philippines, and, even then, significant sums could not be recovered.<sup>166</sup> In the Abacha case, Nigeria engaged in protracted negotiations and litigation in Switzerland, the UK, Luxembourg, Liechtenstein and elsewhere, to retrieve funds, a process that continued well into the 2000s.<sup>167</sup> The Mobutu case essentially failed. After Mobutu's 1997 ouster, the new Congolese government's attempts to trace his wealth in European banks were met with refusal or foot-dragging, and virtually none of the funds were returned.<sup>168</sup>

These outcomes were not a mere coincidence. They resulted from the structural weaknesses of the international legal regime. As observed above, without binding multilateral rules, everything hinged on bilateral deals or discretion. The case studies show that wealthy nations and their financial institutions had little incentive to assist in returning assets.<sup>169</sup> Historically, bank secrecy constituted a significant impediment to the detection, investigation, and recovery of illicit assets, often shielding clients from scrutiny and facilitating the concealment of corrupt proceeds.<sup>170</sup> Even where laws against money laundering existed, enforcement was patchy, banks often did not perform due diligence on politically exposed persons, and regulators did not prioritise foreign corruption

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<sup>165</sup> *Ibidem* 487, 488. Brun, Jean Pierre, et al. "Unexplained Wealth Orders: Toward a New Frontier in Asset Recovery.", (n 163), 48. Ivory, Radha. *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys*. (n 10), 55.

<sup>166</sup> Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 487.

<sup>167</sup> Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9) 147-151.

<sup>168</sup> *Ibidem*, 152. Ivory, Radha. *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys*. (n 10), 43.

<sup>169</sup> Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13) 112.

<sup>170</sup> Anita Ramasastry, Secrets and Lies? Swiss Banks and International Human Rights, 31 *Vanderbilt Law Review* 325 (2021), 333. UN Commission on Crime Prevention and Criminal Justice, *Report of the Expert Group Meeting on Corruption, held at Buenos Aires from 17 to 21 March 1997*, noting that the "elimination or curtailment of bank secrecy is essential" due to the "difficulties in detecting and investigating related crimes"; UN General Assembly, *Report of the Economic and Social Council (A/51/601, 6 December 1996)*, emphasizing that bank secrecy should not "impede or hinder criminal investigations or other legal proceedings relating to corruption (...)and that full cooperation is extended to Governments" seeking relevant financial information.

cases.<sup>171</sup> These failures underscored an uncomfortable reality: the international order at the time tolerated de facto impunity for grand corruption. A leader could plunder their state, and if they or their family could whisk assets offshore, recovering those was exceedingly difficult. This impunity was not for lack of trying by victim states but for lack of an adequate legal framework to support their claims. The doctrinal failure became painfully evident: global anti-corruption efforts punished bribery in theory but did not ensure justice in the form of restitution.

### 3.4 Doctrinal Blind Spots and Enforcement Failures

An analysis of the pre-2003 framework reveals two mutually reinforcing problems. First, there was a doctrinal gap in the international law; asset recovery was not yet established as a fundamental principle. Early conventions contained a superficial mention, if any. There was no international consensus on the obligation to repatriate stolen assets, and many states were content to criminalise corruption without addressing where the money went.<sup>172</sup> This reflects a conceptual underdevelopment. The idea of corruption as a crime against the state or people, requiring restoration, had not fully penetrated international legal doctrine. The UNCAC negotiations (which began around 2001) would explicitly recognise the return of assets as a fundamental principle, precisely because it had been absent.<sup>173</sup>

Second, where there was law, enforcement failures were rife. Nations adopted treaties but were slow or selective in implementing them. Monitoring bodies lacked coercive

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<sup>171</sup> Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13) 91.

<sup>172</sup> Babu, R. Rajesh, 'The United Nations Convention Against Corruption: A Critical Overview' (n 119), 21-25.

<sup>173</sup> Koni, Ifelou J 'Mechanisms for Recovery and Repatriation of Stolen Assets under the United Nations Convention against Corruption' (2017) 20 Nigerian LJ, 243, 244. McCartney, Erin & Gumagay, Paul, 'Enhancing Global Commitments and Enforcement Efforts to Combat Corruption' (2022) 53 Geo Wash Int'l L Rev, 444. Djoyou Kamga, Serges. "Illicit Financial Flows, Asset Recovery, the Power Game and the Right to Development in Africa." (n 160), 200. Tromme, Mat. "Waging War against Corruption in Developing States: How Asset Recovery Can Be Compliant with the Rule of Law." *Duke Journal of Comparative & International Law* 29 (2019), 175. Gless, Jael Lena. "One Foot In, One Foot Out - An Accountability Analysis of the United Kingdom's and Switzerland's Regulatory Frameworks in the UNCAC Regime." (n 5), 142

power, and there is no international court or tribunal for corruption cases. Unlike in other fields (e.g. trade disputes or human rights courts), victims of corruption, often states whose sovereign wealth were stolen, had no international forum to plead their case. The result were that even when there were legal tools on paper (e.g. MLA processes or domestic laws allowing confiscation), these were not effective across jurisdictions.<sup>174</sup> Statistics from that era showed very few successful asset recovery actions relative to the massive amounts believed to have been stolen.<sup>175</sup> For instance, out of the estimated billions looted by Abacha, only a fraction was traced and frozen by the late 1990s, and it took many more years for those funds to be returned to Nigeria.<sup>176</sup> Such outcomes are illustrative of institutional underdevelopment; there was no dedicated international team or network to ensure follow-through, and actions were handled by individual prosecutors or investigators on an ad hoc or case-by-case basis.

### 3.5 Fragmented International Consensus

Another outcome of the pre-UNCAC regime was a patchwork of commitments. Different regions had different standards (e.g. illicit enrichment was criminal in Latin America under IACAC, but largely unknown in others, asset return was emphasised in Africa but not in Europe or OECD initiatives).<sup>177</sup> Culturally and politically, some governments viewed certain anti-corruption measures with scepticism, as observed before, some Asian

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Djoyou Kamga, Serges. "Illicit Financial Flows, Asset Recovery, the Power Game and the Right to Development in Africa." (n 160), 201. Adam, Rita. "Innovation in Asset Recovery: The Swiss Perspective" (n 5), 261.

<sup>175</sup> Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9 ), 486.

<sup>176</sup> Babatunde, Ekundayo Oluwaremilekun, and Adbulsalam, Mutiat Mobolanle. "Towards Attaining Sustainable Development Goals in a 'Fantastically Corrupt' World: Issues in International Legal Framework on Mutual Legal Assistance for Recovery of Proceeds of Corruption and the Nigerian Act." *Beijing Law Review* 12 (2021), 706. Djoyou Kamga, Serges. "Illicit Financial Flows, Asset Recovery, the Power Game and the Right to Development in Africa." (n 160), 205. Kingah, Stephen, 'The Effectiveness of International and Regional Measures in Recovering Assets Stolen from Poor States' (2011) 13 U Botswana LJ, 6, 7.

<sup>177</sup> Kingah, Stephen, 'The Effectiveness of International and Regional Measures in Recovering Assets Stolen from Poor Countries' (n 176), 15. Richter, Dagmar, and Uhrmeister, Patrick. "Returning Politically Exposed Persons' Illicit Assets from Switzerland - International Law in the Force Field of Complexity and Conditionality." *German Yearbook of International Law* 56 (2013), 462. Kingah, Stephen. "Measures for Asset Recovery: A Multiactor Global Fund for Recovered Stolen Assets." *World Bank Legal Review* 6 (2015), 468.

states in the 1990s resisted what they saw as Western-imposed norms.<sup>178</sup> This meant that even as a legal matter, not all major financial centres were party to strong anti-corruption conventions. For example, Switzerland (a key location for asset stashing) joined the OECD Convention, but that dealt only with bribery; it was obviously not a party to the OAS or African Union conventions that touched on asset return.<sup>179</sup> States in Africa or Latin America seeking help from a European banking haven were often stymied by the lack of a shared treaty framework to compel cooperation. They might both be parties UNTOC, but if the theft was not organised crime, the obligation to cooperate was arguable.<sup>180</sup>

Thus, in a practical sense, the international consensus was fragmented and incomplete. Many states agreed that it was bad, but not all agreed on the full suite of measures to combat corruption, especially asset recovery. This fragmentation indicated that sovereignty concerns and divergent interests still trumped any universal moral imperative to return stolen money. While there was growing recognition that corruption threatens the rule of law, democracy and development (as many of the conventions declared in their preambles), translating that into a shared commitment to remedy past corruption took longer. The near-universal ratification of UNCAC after 2003 would demonstrate a late but decisive consensus, even though the will to cooperate on asset recovery had lagged behind the will to criminalise bribery. This gap is precisely why asset recovery remained underdeveloped – the world had not agreed that it was an essential obligation.

### **3.6 Prelude to the UNCAC Turning Point**

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<sup>178</sup> Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9 ), 85.

<sup>179</sup> Richter, Dagmar, and Uhrmeister, Patrick. “Returning Politically Exposed Persons’ Illicit Assets from Switzerland – International Law in the Force Field of Complexity and Conditionality.” (n 177), 463.

<sup>180</sup> Kruessmann, 1214.

The combination of doctrinal blind spots, enforcement failures, and fragmented consensus created a strong case for a new global instrument that would learn from these shortcomings. By the time UNCAC was negotiated, the lessons were clear: without explicit legal mandates and robust cooperation, stolen assets would remain in safe havens and grand corruption would pay. Framing the answer to the research question here requires noting why UNCAC was necessary as a response to the inadequacies of the prior regime.

UNCAC's Chapter V on Asset Recovery directly addresses what had been missing. It declares asset return a fundamental principle and lays out detailed processes for tracing, freezing, confiscating, and returning proceeds of corruption.<sup>181</sup> For the first time, an international treaty required states to proactively help restore stolen assets to their rightful owners.<sup>182</sup> This was a conceptual breakthrough; what had been an underdeveloped idea became a positive legal norm. This is not to say that UNCAC instantly solved the problem of corruption and recovery. Implementation efforts since it took effect in 2005 have encountered a range of challenges, and some of its asset recovery provisions allow flexibility or are conditioned by domestic law (for example, non-mandatory clauses on certain offences).<sup>183</sup> Nonetheless, the contrast with the pre-UNCAC

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<sup>181</sup> Djoyou Kamga, Serges. "Illicit Financial Flows, Asset Recovery, the Power Game and the Right to Development in Africa." (n 160), 200. Koni, Ifelou J 'Mechanisms for Recovery and Repatriation of Stolen Assets under the United Nations Convention against Corruption' (n 173), 244. Richter, Dagmar, and Uhrmeister, Patrick. "Returning Politically Exposed Persons' Illicit Assets from Switzerland - International Law in the Force Field of Complexity and Conditionality." (n 177), 466, 467. Manea, Alexandra. "International, European and National Developments in Asset Recovery." Conferința Internațională de Drept, Studii Europene și Relații Internaționale, Editura Hamangiu Societate cu Răspundere Limitată, 3(2015), 897. Tromme, Mat. "Waging War against Corruption in Developing States: How Asset Recovery Can Be Compliant with the Rule of Law." (n 173), 175, 176.

<sup>182</sup> Koni, Ifelou J 'Mechanisms for Recovery and Repatriation of Stolen Assets under the United Nations Convention against Corruption' (n 173), 244.

<sup>183</sup> Manea, Alexandra. "International, European and National Developments in Asset Recovery." (n 181), 899. McCartney, Erin & Gumagay, Paul, 'Enhancing Global Commitments and Enforcement Efforts to Combat Corruption' (n 173), 446. Borlini, Leonardo. "Monitoring and Compliance Mechanisms as a Diagnostic and Prognostic Tool of International Anti-Corruption Cooperation: A Data-Driven Study.", (n 121), 506, 507, 508. Richter, Dagmar, and Uhrmeister, Patrick. "Returning Politically Exposed Persons' Illicit Assets from Switzerland - International Law in the Force Field of Complexity and Conditionality." (n 177), 467.

era is stark. Before 2003, asset recovery was largely aspirational or a matter of charity; after UNCAC, it became an expectation grounded in international law.

### **3.7 Interim Conclusion**

This chapter has demonstrated that the pre-UNCAC legal framework was fundamentally inadequate to support meaningful asset recovery. First, international conventions lacked coherence and enforceability, with asset return rarely treated as a binding legal obligation. Second, high-profile corruption cases such as the Marcos, Abacha, and Mobutu Sese Seko cases illustrated the serious legal, procedural, and political hurdles faced by victim states when attempting to retrieve stolen assets, often relying on bilateral arrangements or discretionary foreign cooperation.

Third, international law at the time exhibited significant gaps: while bribery was widely criminalised, the broader injustice of looted public resources was left largely unaddressed. Fourth, even where legal tools did exist, enforcement mechanisms were weak or non-existent, and monitoring bodies lacked coercive authority. Finally, the international consensus on asset recovery was fragmented, with states diverging on obligations and priorities, and many financial centres remaining outside relevant treaties or resisting cooperation. The above analysis reveals a system that condemned corruption in principle but tolerated impunity in practice. It also clarifies why UNCAC was both necessary and groundbreaking; it sought to transform asset recovery from an aspirational ideal into a binding principle of international law.

### **4. From Fragmented Standards to UNCAC: Setting the Stage for Asset Recovery**

Asset recovery was conceptually and institutionally underdeveloped prior to UNCAC due to a confluence of factors. Descriptively, the world had built a nascent anti-corruption regime focusing on criminalisation and prevention, but it had not yet built the pillars needed for restitution of stolen assets. Interpretatively, this reflected doctrinal blind spots in the early conventions (they criminalised bribery and related acts but largely omitted

obligations to return funds) and the limits of political consensus at the time. Many states were content to punish corrupt acts without prioritising remediation. Institutionally, enforcement mechanisms were weak, relying on voluntary cooperation, peer pressure, or the initiative of a few active jurisdictions, and there was no dedicated international process for asset recovery.

The fragmented international consensus meant that corrupt actors could exploit jurisdictional gaps, stashing wealth in states that had no legal duty to send it back. The enforcement failures meant that even where laws existed, they were not backed by sufficient international coordination or will, allowing justice to be evaded with respect to the proceeds of corruption. In essence, before UNCAC, the international community had acknowledged the problem of corruption but had not yet mustered a unified, forceful response to the problem of stolen assets. Asset recovery remained underdeveloped, treated as a secondary matter or a technical challenge, and an inadequate institution, with no global framework to ensure cooperation. It took the negotiation of UNCAC, driven by a coalition of affected nations and an emerging global consensus, to elevate asset recovery to a core principle of anti-corruption law. The pre-UNCAC era, with its doctrinal inconsistencies and enforcement voids, highlights UNCAC's significance. It demonstrates why a comprehensive, enforceable, and universal legal framework was needed (to address the very blind spots and failures that had long hindered the pursuit of justice for those enriched through corruption).

### **Part III: Asset Recovery Under Current International Law**

The UNCAC revolutionised how stolen assets are dealt with internationally. In its Chapter V (Articles 51–59), UNCAC elevates asset recovery from a matter of goodwill to a core legal obligation of states. In this next part, a conceptual framework is articulated in which recovering illicit assets is mandatory, restorative, and globally just. UNCAC’s conceptual architecture of asset recovery is reconstructed in three dimensions: as a fundamental principle, a vehicle of restorative justice for victimised states and communities, and an instrument of structural global justice aimed at levelling the playing field between wealth-abusing kleptocrats and their victims. It is also important to distinguish the criminal, civil, and administrative mechanisms for asset recovery contemplated by UNCAC, understand how each works, where each might fail, and how, combined, they represent a holistic approach. This next section will explain how UNCAC’s text and structure seek to reshape state behaviour and global norms.

#### **1. Asset-recovery-centred Approach**

In contrast to the pre-UNCAC regime, in which asset recovery was treated as discretionary or aspirational, UNCAC introduces detailed, binding obligations that require states to cooperate in the tracing, freezing, confiscation, and return of the proceeds of corruption. Using a doctrinal and normative lens, the chapter explores the imperative language of the treaty and the institutional mechanisms and justice-oriented philosophy embedded in its Chapter V.

##### **1.1 Asset Recovery as a Fundamental Principle**

Is the recovery of stolen assets a fundamental principle under international law, or simply a policy preference? UNCAC answers this unequivocally: asset recovery is a duty, not a courtesy. Article 51 declares that the return of assets pursuant to this chapter is a fundamental principle of the convention, and it requires states parties to afford one another the widest measure of cooperation in this regard.<sup>184</sup> The language

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<sup>184</sup> Rose, Kubiciel, Landwehr, 10.

is imperative, with the use of 'shall' throughout Chapter V (and related provisions) signalling legally binding obligations. States parties shall cooperate in tracing, freezing, confiscating, and returning the proceeds of corruption, they shall adopt legislative and other measures to enable these actions, and, in specified cases, they shall return confiscated assets to the requesting (victim) state.<sup>185</sup>

Codifying these duties makes clear that the purpose of this convention is to create an obligation to return illicit gain assets. As observed in previous chapters, before the adoption of UNCAC in 2003, efforts to recover stolen assets from foreign jurisdictions were largely dependent on the goodwill of the state in which the assets were found.<sup>186</sup> Many states were under no obligation to assist or to repatriate funds.<sup>187</sup> UNCAC's Chapter V transformed that landscape by establishing the first comprehensive legal regime to assist in asset recovery and return.<sup>188</sup>

The binding nature of UNCAC's asset recovery framework is evident in its diction and detail. The convention goes beyond general exhortations and enumerates specific actions that must be taken. For example, Article 54 obliges states parties to permit their authorities to enforce foreign confiscation orders and to allow for the freezing of assets upon a reasonable request from another state, even before a full domestic proceeding is concluded.<sup>189</sup> Article 55 then requires prompt action to execute foreign requests to identify, freeze, or seize proceeds of crime.<sup>190</sup> These provisions establish obligations ('each State Party shall...'), not mere recommendations. In the critical Article 57 on asset return, the convention uses mandatory language with respect to key scenarios,

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<sup>185</sup> Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9) 213.

<sup>186</sup> Bertossa, Bernard. What makes asset recovery so difficult in practice? A practitioner's perspective, In Pieth, Mark (ed). *Recovering Stolen Assets*, Bern: Peter Lang, 2008, 19.

<sup>187</sup> *Ibidem*.

<sup>188</sup> Ferguson, Gerry. *Global Corruption: Law, Theory and Practice*, 415 Kingah, Stephen. "Measures for Asset Recovery: A Multiactor Global Fund for Recovered Stolen Assets." (n 177), 461. Vlastic, Mark V. and Noell, Jenae N., Fighting Corruption to Improve Global Security: An Analysis of International Asset Recovery Systems, *Yale Journal of International Law & Foreign Affairs* (2010) 5 , 110, 111.

<sup>189</sup> Brun, Jean Pierre, et al. "Unexplained Wealth Orders: Toward a New Frontier in Asset Recovery." (n 163), 135.

<sup>190</sup> Ivory, Radha. *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys*. (n 10), 25.

stating that where public funds have been embezzled, and a final judgment exists in the requesting state, the requested state 'shall ... return the confiscated property' to that state.<sup>191</sup> Similarly, when assets confiscated are linked to other corruption offences, and the requesting state reasonably establishes prior ownership or damage, the requested state is obliged to return those assets.<sup>192</sup> Such clauses create clear duties under international law. What was once a matter of sovereign discretion or bilateral negotiation has become an expectation backed by treaty law.

UNCAC's innovation is to turn political resolve into a legal mandate.<sup>193</sup> During the treaty negotiations, many developing states, often victims of grand corruption, pushed for strong asset-recovery provisions.<sup>194</sup> The result was an unprecedented recognition that returning stolen assets is not just an act of cooperation but a right of the victim State and its citizens.<sup>195</sup> By cementing this principle in Article 51 and fleshing it out through Articles 52-59, UNCAC elevated asset recovery onto the same normative plane as the criminalisation of corruption.<sup>196</sup> States parties are now internationally accountable for taking steps to recover assets, and failure to do so can be framed as non-compliance with a treaty obligation. This represents a clear departure from the norms reflected in earlier conventions (mostly regional or focused on related crimes), which encouraged asset sharing or return in vague terms at best.<sup>197</sup> As we observed in Part 1. 2, UNCAC's Chapter V broke new ground by spelling out that stolen assets

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<sup>191</sup> Ölçer, 574.

<sup>192</sup> *Ibidem*, 521.

<sup>193</sup> Vlastic, Mark V. and Noell, Jenae N., 'Fighting Corruption to Improve Global Security: An Analysis of International Asset Recovery Systems' (n 188), 110, 111. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 415. Rose, Cecily. "Human Rights Law and the Return of Stolen Assets." In Blokker, Niels M., Dam-de Jong, Daniëlla, and Prislán Vid (eds.). *Furthering the Frontiers of International Law: Sovereignty, Human Rights, Sustainable Development. Liber Amicorum Nico Schrijver*, Leiden: Brill, 2021, 304. Biondi, Michael J., 'Building Trust(s): Rethinking Asset Return in Kleptocracy Forfeitures' (2023) 72 *Duke Law Journal*, 1090.

<sup>194</sup> Pieth, Mark. Recovering stolen assets - a new issue, In Pieth, Mark (ed). *Recovering Stolen Assets*, Bern: Peter Lang, 2008, 9.

<sup>195</sup> Pieth, 9, Claman, 336.

<sup>196</sup> Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 415. Stephenson, Kevin M., et al. *Barriers to Asset Recovery: Barriers and Recommendations*. Washington, DC: World Bank, 2011, 12. Biondi, Michael J., 'Building Trust(s): Rethinking Asset Return in Kleptocracy Forfeitures' (n 193), 1088. Rose, Cecily. "Human Rights Law and the Return of Stolen Assets." (n 193), 304.

<sup>197</sup> Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 415, 498. Rose, Cecily. "Human Rights Law and the Return of Stolen Assets." (n 193), 298, 304. Scher, Daniel. "Asset Recovery: Repatriating Africa's Looted Billions." *African Security Studies* 14, Nr. 4 (2005), 19.

should not be allowed a safe haven and that their return is part of the global anti-corruption public order.<sup>198</sup>

At a conceptual level, positioning asset recovery as a fundamental principle responds to the core justice question: Should nations be compelled to help right the wrongs of corruption beyond their borders? The response provided by UNCAC is yes, thereby reframing state sovereignty. Under traditional notions of sovereignty, one state's enforcement of law (for example, confiscating assets) on behalf of another was exceptional and often resisted.<sup>199</sup> UNCAC's cooperation mandate reconceives sovereignty as involving mutual dependence – sovereigns accept an obligation to assist others, recognising that corruption is a mutual threat.<sup>200</sup> The treaty's imperative language, 'shall cooperate... [and] shall afford the widest measure of assistance,' reflects a collective understanding that the fight against corruption transcends national boundaries and interests. Each state party has a legal responsibility to contribute to the recovery effort wherever corrupt assets may be found.

The question that arises is how absolute this duty is, and what its limits are. While UNCAC's text is replete with strong obligations, it also reflects calibrated flexibility. For example, in some provisions, states agree that they 'shall consider' adopting certain measures (for instance, Article 54(1)(c) urges consideration of non-conviction-based confiscation), or 'shall take measures to the greatest extent possible within their domestic law', phrases that qualify the absoluteness of the duty.<sup>201</sup>

These appear to be deliberate compromises. They acknowledge differences in legal systems and the political sensitivities involved, while still nudging states towards compliance. For example, Article 57(3)(c) stops short of a hard command in all

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<sup>198</sup> Pieth, 9.

<sup>199</sup> Bertossa, 19.

<sup>200</sup> Stolen Asset Recovery Initiative, 'UNCAC' (World Bank Group) <https://star.worldbank.org/focus-area/uncac> accessed 4 February 2025.

<sup>201</sup> Ivory, Radha. articles 54 and 55 In Cecily, Rose, Kubiciel, Michael and Landwehr, Oliver (eds.). The United Nations Convention Against Corruption: A Commentary, Oxford: Oxford University Press, 552, 554, 555.

situations, requiring the requested state to give priority consideration to returning assets in cases that do not fall under the mandatory return categories.<sup>202</sup> 'Priority consideration' clearly encourages return as the default outcome, but it leaves room for the exercise of discretion.<sup>203</sup> Such language was included to get buy-in from financial centres that were wary of unconditional obligations, and to respect legal processes in requested states.<sup>204</sup> The result is a tension within UNCAC's binding framework. On the one hand, asset recovery is a duty with clear mandatory elements; on the other, the convention embeds a degree of flexibility and conditionality.<sup>205</sup>

Critically, however, these softer formulations do not negate the treaty's overarching obligations; they shape its implementation. The net effect of UNCAC is to establish a presumption in favour of cooperation and return.<sup>206</sup> By agreeing to UNCAC, states have agreed, in principle, that returning stolen assets is the expected norm, not an extraordinary favour.<sup>207</sup> The inclusion of phrases like 'shall cooperate to the widest extent' and the designation of asset return as 'fundamental' create a powerful normative baseline.<sup>208</sup> States can not justify inaction by pointing to bank secrecy laws or the absence of identical offences in their legal code. UNCAC explicitly overrides those excuses.<sup>209</sup>

The UNCAC positions asset recovery as an international legal duty. States parties are bound to facilitate the tracing, freezing, confiscation, and return of corruption

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<sup>202</sup> *Ibidem*, 574,577,578.

<sup>203</sup> Manea, Alexandra. "International, European and National Developments in Asset Recovery." (n 181), 900. Biondi, Michael J., 'Building Trust(s): Rethinking Asset Return in Kleptocracy Forfeitures' (n 193), 1091, 1092. Rose, Cecily. "Human Rights Law and the Return of Stolen Assets." (n 193), 299.

<sup>204</sup> Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9) 51, 263.

<sup>205</sup> Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 415. Rose, Cecily. "Human Rights Law and the Return of Stolen Assets." (n 193), 299, 301, 304. Biondi, Michael J., 'Building Trust(s): Rethinking Asset Return in Kleptocracy Forfeitures' (n 193), 1091, 1092.

<sup>206</sup> UNCAC, art 40 and 46. Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9) 50, 51.

<sup>207</sup> Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 415. Stephenson, Kevin M., et al. *Barriers to Asset Recovery: Barriers and Recommendations*, (n 196), 12. Biondi, Michael J., 'Building Trust(s): Rethinking Asset Return in Kleptocracy Forfeitures' (n 193), 1089. Manea, Alexandra. "International, European and National Developments in Asset Recovery." (n 181), 900. Rose, Cecily. "Human Rights Law and the Return of Stolen Assets." (n 193), 301.

<sup>208</sup> Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9) 109.

<sup>209</sup> Art 49, UNCAC. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 433, 434, 505, 506.

proceeds, using all appropriate legal means.<sup>210</sup> In my view, this framework signals to all jurisdictions that turning a blind eye to stolen wealth is no longer acceptable. It tries to remove all excuses and encourages countries to return stolen assets.

## 1.2 Asset Recovery as Restorative Justice

Asset recovery under UNCAC is not solely about enforcing the law. It is fundamentally about justice for victims. What makes the return of assets a form of restorative justice? In essence, it seeks to repair the harm caused by corruption by restoring wealth to its rightful owners, often the public purse. The drafters of UNCAC were keenly aware that grand corruption inflicts collective trauma on nations. Money destined for hospitals, schools, and development is siphoned off, often into foreign bank accounts, leaving citizens impoverished and feeling betrayed.<sup>211</sup> By mandating asset return, UNCAC embraces a victim-centred ethos, aiming to make those victims whole.

UNCAC's Chapter V is consciously structured to favour the repatriation of assets to the affected state (or other legitimate owners) rather than allowing confiscated funds to be retained by the state that seized them.<sup>212</sup> Article 57 is the linchpin of this restorative approach. It provides that confiscated assets 'shall be returned' to the requesting state in several scenarios, particularly in the case of public funds.<sup>213</sup> In cases of embezzlement or laundering of public funds (Articles 17 and 23), where the victim of the corruption is clearly the state itself, Article 57(3)(a) makes return obligatory

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<sup>210</sup> *Ibidem*, 415 Stephenson, Kevin M., et al. *Barriers to Asset Recovery: Barriers and Recommendations*, (n 196), 12. Manea, Alexandra. "International, European and National Developments in Asset Recovery." (n 181), 900.

<sup>211</sup> Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9) 34. Webb, Philippa. "The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?" (n 70), 207. Horder, Jeremy, and Alldridge, Peter (eds.). *Modern Bribery Law: Comparative Perspectives*, 296.

<sup>212</sup> Ivory, Radha. *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys*. (n 10), 26. United Nations Office on Drugs and Crime, *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Corruption*, (n 14), 438.

<sup>213</sup> Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9) 265, 266. Helfer, Laurence R., Rose, Cecily and Brewster Rachel. "Flexible Institution Building in the International Anti-Corruption Regime: Proposing a Transnational Asset Recovery Mechanism." (n 1), 567. Webb, Philippa. "The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?" (n 70), 207.

upon a final judgment in the requesting state.<sup>214</sup> This straightforward rule echoes the justice principle of *restitutio in integrum*, the victim state should be restored, as far as possible, to the position it was in before the corruption occurred.<sup>215</sup>

Article 57(3)(b) covers other proceeds of corruption. If the requesting state reasonably proves prior ownership or harm (for example, showing that a bribe scheme defrauded the state's treasury or its citizens), then the assets must be returned to that state, again presuming a judgment or its equivalent is in place.<sup>216</sup> UNCAC thus treats the return of assets as a form of compensation and acknowledgement of harm. The wrongdoing (corruption) is addressed by punishing the perpetrator and by righting the wrong done to the victims.<sup>217</sup>

The restorative character of UNCAC is underlined by provisions allowing assets to go directly to other victims in appropriate cases. Articles 57(3)(c) and 57(2)(c) contemplate giving returned assets to 'prior legitimate owners' or using these to 'compensate the victims of the crime'.<sup>218</sup> In practical terms, this means that if an individual, company, or community was defrauded by the corrupt act, they are considered rightful claimants to the recovered wealth. The convention thereby ensures that asset recovery is not just an inter-state transaction, but one that can reach the real parties harmed. This focus on victims distinguishes UNCAC's regime from a purely punitive confiscation model.<sup>219</sup> It aligns with broader trends in international justice to put the victims at the centre (comparable, for instance, to how modern criminal law emphasises victim restitution and reparation). By embedding these options, UNCAC acknowledges that the damage of corruption is often very tangible, such as half-built

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<sup>214</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, ( n 10 ) 12.

<sup>215</sup> Brun, Jean Pierre, et al. "Unexplained Wealth Orders: Toward a New Frontier in Asset Recovery." (n 163), 10.

<sup>216</sup> *Ibidem*.

<sup>217</sup> Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." ( n 9)300.

<sup>218</sup> Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13), 364. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, ( n 10 ) 11, 12.

<sup>219</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, ( n 10 ), 11.

roads, crumbling clinics, funds missing from state coffers, and that true justice requires more than jailing the corrupt official; it requires giving back what was stolen.

Restorative justice is also reflected in the rhetoric around UNCAC. The convention's preamble and its champions frequently invoke the saying 'corruption shall not pay', which captures a particular moral logic: those who loot public resources should not be allowed to enjoy their illicit gains, and those gains should be returned to the public.<sup>220</sup> In practical effect, asset recovery turns this moral stance into reality. Each successful return of funds is a restoration of justice. Resources once diverted by corruption are put back to social use, ideally funding development projects, public services, or victim compensation programmes.<sup>221</sup> The return of Nigeria's stolen assets from the Abacha regime, for example, has been framed as a form of justice for the Nigerian people, a concrete reclaiming of national wealth.<sup>222</sup> UNCAC provided the legal backdrop for such cases, reinforcing that expectation.

Restorative justice through asset return is not without complications. One sensitive issue is that of conditionalities being placed on the use of returned funds.<sup>223</sup> UNCAC itself is silent on post-return arrangements, simply insisting that return occur in accordance with domestic law and 'pursuant to' the principles of the convention.<sup>224</sup> In practice, some states returning assets have sought assurances that the money will be used for designated development projects or subject to transparency and monitoring.<sup>225</sup> From a restorative justice perspective, this raises a dilemma. On the one hand, conditions can help ensure the returned money benefits the population

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<sup>220</sup> Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13), 111. Conference of the States Parties to the United Nations Convention against Corruption, *Report on its eighth session, Abu Dhabi, 16–20 December 2019* UN Doc CAC/COSP/2019/17 (19 March 2020), 23.

<sup>221</sup> Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13), 115. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10) 11.

<sup>222</sup> Brun, Jean Pierre, et al. "Unexplained Wealth Orders: Toward a New Frontier in Asset Recovery.", (n 163), 321, 322. Horder, Jeremy, and Alldridge, Peter (eds.). *Modern Bribery Law: Comparative Perspectives*, (n 211), 297, 298.

<sup>223</sup> Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 393.

<sup>224</sup> Rose, Cecily. "Human Rights Law and the Return of Stolen Assets." (n 193), 299, 302. Biondi, Michael J., 'Building Trust(s): Rethinking Asset Return in Kleptocracy Forfeitures' (n 193), 1090.

<sup>225</sup> Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13), 114 Brun, Jean Pierre, et al. "Unexplained Wealth Orders: Toward a New Frontier in Asset Recovery." (n 163), 11.

(preventing it from being re-corrupted or squandered). On the other hand, if taken too far, conditions can infringe on the sovereignty of the victim state and delay or dilute the restitution.<sup>226</sup>

In my view, assets should be returned unconditionally, after all, the money belongs to the victims, and imposing terms could be seen as paternalistic or as a continuation of control by the states that once harboured the illicit funds.<sup>227</sup> The UNCAC text leans toward unconditional return in clear-cut cases (for instance, where there is a judgment regarding stolen public funds). However, it also permits bilateral agreements under Article 57(5) for the 'final disposal' of confiscated property.<sup>228</sup> That implies some flexibility. States can agree on how the assets will be used or shared.<sup>229</sup> In an ideal restorative scenario, such agreements are collaborative and aimed at maximising the public good. For example, states may agree to channel funds into a monitored trust for infrastructure in the victim state that both parties see as beneficial.<sup>230</sup> But the very need for such agreements may be an acknowledgement that there is a trust deficit. The underlying principle remains that the people who suffered from the corruption should benefit from the recovered assets.

From a conceptual standpoint, UNCAC's asset recovery regime advances restorative justice on a global scale. It recognises states (and their citizens) as victims of corruption and seeks to restore to them what was taken, thereby rebalancing the scales.<sup>231</sup> Historically, when a kleptocrat looted a nation and deposited the wealth abroad, any confiscation by the foreign state often meant the foreign treasury retained the funds (as was common in cases of pure money laundering or drug trafficking).<sup>232</sup> UNCAC broke with that practice and insisted that under the convention, 'the default is to give

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<sup>226</sup> Rose, Cecily. "Human Rights Law and the Return of Stolen Assets." (n 193), 296.

<sup>227</sup> *Ibidem*, 296.

<sup>228</sup> Moiseienko, Anton, 'The Ownership of Confiscated Proceeds of Corruption under the UN Convention against Corruption' (n 140), 679.

<sup>229</sup> Ölçer, 585. Rose, Cecily. "Human Rights Law and the Return of Stolen Assets." (n 193), 299.

<sup>230</sup> Biondi, Michael J., 'Building Trust(s): Rethinking Asset Return in Kleptocracy Forfeitures' (n 193), 1106. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 395.

<sup>231</sup> Brun, 518, 570, 573, 577.

<sup>232</sup> *Ibidem*, 570, 571.

it back.<sup>233</sup> This acts as a deterrent for would-be corrupt officials (knowing they may not get to keep their spoils) and helps heal the financial wounds inflicted on societies.<sup>234</sup> The return of assets thus carries symbolic weight and has a material restorative impact, affirming that the international community stands with the victims of corruption and providing resources for reconstruction and development.<sup>235</sup>

In my view, restorative justice via asset recovery also respects the dignity and sovereignty of victim states. Being able to reclaim one's stolen patrimony is a matter of national pride and moral justice. UNCAC gave states previously pillaged by corruption a legal tool to demand restoration of both.<sup>236</sup> In doing so, it acknowledges a history of exploitation; the funds of developing nations were often given safe haven in the banks of wealthier nations.<sup>237</sup> UNCAC seeks to correct this history. This naturally leads to the broader notion of global justice, the idea that asset recovery is about more than individual victims or states. It is also a way to rectify systemic inequities in the international system that have allowed corruption to flourish at the expense of the poor.

### 1.3 Asset Recovery as an Instrument of Structural Global Justice

UNCAC situates asset recovery in the context of global justice.<sup>238</sup> What does this mean? It means that returning stolen assets is seen not only as a matter of enforcing the law

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<sup>233</sup> *Ibidem*, 573.

<sup>234</sup> Webb, Philippa. "The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?" (n 70), 206. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10) 7.

<sup>235</sup> . Vlastic, Mark V. and Noell, Jenae N., 'Fighting Corruption to Improve Global Security: An Analysis of International Asset Recovery Systems' (n 188), 117. Biondi, Michael J., 'Building Trust(s): Rethinking Asset Return in Kleptocracy Forfeitures' (n 193), 1089. Gray, Larissa et al. *Few and Far: The Hard Facts on Stolen Asset Recovery*, Washington, DC: World Bank and OECD, 2014, 56. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 390.

<sup>236</sup> Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13), 177,178, 181. Claman, 336. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 7, 8.

<sup>237</sup> Claman, 334, 335. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 7. Webb, Philippa. "The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?" (n 70), 206.

<sup>238</sup> Claman, 335.

or compensating a victim, but as part of a larger effort to rebalance global economic disparities and power asymmetries exacerbated by corruption.<sup>239</sup> Asset recovery under UNCAC can be viewed as a tool to correct structural injustices. It helps transfer wealth back from the global profiteers of corruption (often politically powerful individuals in collusion with complicit financial systems) to the communities that were deprived.<sup>240</sup> In this way, the convention's asset recovery framework becomes an engine for a kind of redistributive justice among nations, especially between developed financial havens and developing states whose resources have been plundered.<sup>241</sup>

Historically, the global financial system has often enabled corrupt officials from poorer states to hide billions in richer states' banks or properties.<sup>242</sup> This flow of illicit capital from South to North (or from the public sector to private offshore accounts) has entrenched global inequality; the rich got richer (through investment of stolen funds, fees, etc.), while victim states were denied funds for development.<sup>243</sup> UNCAC's Chapter V confronts this pattern head-on. By establishing a clear obligation to repatriate assets to their state of origin, the convention implicitly endorses a principle of reparative economic justice.<sup>244</sup> Article 57 makes UNCAC the first international treaty to require asset return. This is profound. It recognises that holding onto another

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<sup>239</sup> Biondi, Michael J., 'Building Trust(s): Rethinking Asset Return in Kleptocracy Forfeitures' (n 193), 1082. Mugarura, Norman. "The War against Corruption Is a Lost Cause without Robust Measures to Repatriate Stolen Assets to States of Origin." *Journal of Anti-Corruption Law* 1 (2017), 55. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9 ), 390, 491.

<sup>240</sup> Ivory, Radha. *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys*. (n 10), 28.

<sup>241</sup> *Ibidem*, 386, 387. Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13), 111, 364.

<sup>242</sup> Palifka, Bonnie J., and Rose-Ackerman, Susan, 'Corruption and Government: Causes, Consequences, and Reform' (n 130), 519. Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9)150. Brun, Jean Pierre, et al. "Unexplained Wealth Orders: Toward a New Frontier in Asset Recovery." (n 163), 215. Stephenson, Kevin M., et al. *Barriers to Asset Recovery: Barriers and Recommendations*, (n 196), 12. Elena Blanco and Miguel Jose Arjona Sanchez, *Corruption, Integrity and the Law: Global Regulatory Challenges*, New York: Routledge, 187. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9 ), 310.

<sup>243</sup> Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9), 94. Lohaus, Mathis. *Towards a Global Consensus Against Corruption: International Agreements as Products of Diffusion*, (n 156), 125. Pieth, 4. Lugon-Moulin, Anne. Asset recovery: concrete challenges for development assistance, In Pieth, Mark (ed). *Recovering Stolen Assets*, Bern: Peter Lang, 2008, 297, 298.

<sup>244</sup> Claman, 336. Ölçer, 570, 571. Moiseienko, Anton, 'The Ownership of Confiscated Proceeds of Corruption under the UN Convention against Corruption' (n 140), 684.

nation's wealth (even if acquired through enforcement actions) is unjust when that wealth was illicitly taken.<sup>245</sup> In other words, UNCAC elevates the moral stance that no state should serve as a safe haven for the ill-gotten funds of foreign officials.<sup>246</sup> In my view, this is more than a crime-fighting measure. It is a normative stance about fairness between nations.

The question here can be phrased as follows: Does UNCAC help rectify the inequitable structures that allowed capital flight and safe havens for the corrupt? The answer is that it takes significant steps in that direction. Article 51's pronouncement that asset return is a fundamental principle of the convention was a diplomatic victory for the Global South.<sup>247</sup> Many wealthier nations had resisted mandatory returns, perhaps fearing these would infringe on their legal sovereignty or confidentiality within their financial sectors, or simply because they had benefited from the capital inflows.<sup>248</sup> The inclusion of Chapter V's provisions despite this resistance was recognition of a global injustice: for decades, kleptocrats from some of the world's poorest states had enriched themselves and stashed wealth abroad, while their populations suffered.<sup>249</sup> By codifying the duty to give that wealth back, UNCAC attempts to correct a systemic wrong and prevent such exploitation in the future.<sup>250</sup> It essentially says to financial centres, you must cooperate in undoing the harm facilitated by your banking systems, even if unintentionally.

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<sup>245</sup> Ölçer, 570, 571. Moiseienko, Anton, 'The Ownership of Confiscated Proceeds of Corruption under the UN Convention against Corruption' (n 140), 683.

<sup>246</sup> Ivory, Radha. *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys*. (n 10), 101. Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13), 111. Wouters, Jan, Ryngaert, Cedric and Cloots, Ann Sofie. *The Fight Against Corruption in International Law* (n 62), 62.

<sup>247</sup> Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 97. Kingah, Stephen. "Measures for Asset Recovery: A Multiactor Global Fund for Recovered Stolen Assets." (n 177), 461.

<sup>248</sup> Webb, Philippa. "The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?" (n 70), 210, 211, 217. Olaniyan, Kolawole. "*Ownership of Proceeds of Corruption in International Law*." (n 9) 295.

<sup>249</sup> Olaniyan, Kolawole. "*Ownership of Proceeds of Corruption in International Law*." (n 9), 294. Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13) 144, 155. Ölçer, 571.

<sup>250</sup> Ölçer, 570, 571. Webb, Philippa. "The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?" (n 70), 206. Claman, 335.

The notion of ‘denying safe haven’ to the proceeds of corruption is a recurring theme in global forums and is explicitly reflected in UNCAC.<sup>251</sup> This phrase captures the essence of structural justice in asset recovery. It implies a world in which it is structurally impossible (or at least extremely risky and difficult) for corrupt actors to stash their stolen money abroad. If all jurisdictions faithfully implement UNCAC, there would be no convenient jurisdiction in which money could be hidden with impunity. Ill-gotten gains would always be exposed to confiscation and return. Achieving this is a tall order, but UNCAC created the necessary legal scaffolding and tied various national legal systems to a common commitment.<sup>252</sup> The structural change brought about by UNCAC concerns the expectations of international cooperation. Instead of a patchwork where some states could opt out or drag their feet on asset recovery, UNCAC aspires to be a universal regime in which every state is both obligated and entitled to help in that effort.<sup>253</sup> It weaves a global safety net to catch stolen assets.

However, there is a need for critical reflection on the idea of asset recovery as structural global justice: Has UNCAC equalised the playing field, or does it inadvertently reinforce some inequalities? While the convention formally places all states parties on equal footing with reciprocal duties, in practice, significant asymmetries remain. Wealthy states typically have the resources and expertise to handle complex asset-recovery cases, whereas developing states are often ill-equipped to prepare requests that meet the demanding standards of foreign courts.<sup>254</sup>

UNCAC did not fully resolve these gaps in capacity. One might argue that formal justice (equal legal obligations for all) is not the same as substantive justice. There is a

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<sup>251</sup> Wouters, Jan, Ryngaert, Cedric and Cloots, Ann Sofie. *The Fight Against Corruption in International Law* (n 62), 62. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, ( n 10 ), 7. Ivory, Radha. *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys*. (n 10), 4.

<sup>252</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, ( n 10 ), 7. Olaniyan, Kolawole. “Ownership of Proceeds of Corruption in International Law.” ( n 9 ) 210, 291,292.

<sup>253</sup> Olaniyan, Kolawole. “Ownership of Proceeds of Corruption in International Law.” ( n 9 ), 292. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9 ), 417,418.

<sup>254</sup> Lugon-Moulin, 299.

risk of procedural inequality resulting under the guise of formal equality. All states are held to the same evidentiary and procedural standards in asset recovery, but not every state has the means to satisfy those.<sup>255</sup> In effect, a well-resourced financial centre might insist on strict proof and extensive legal processes before returning funds, something that a weaker state might struggle to provide or navigate. In my view, while UNCAC set out to promote solidarity, it may leave the global power imbalance in place if not carefully implemented. Powerful states still determine whether cooperation happens swiftly or at all. For UNCAC's promise of structural justice to be fully realised, the international community must also invest in levelling up capacities (through, for example, training and technical assistance) and develop mechanisms to monitor and put pressure on recalcitrant states.

Despite these implementation challenges, the norm shift represented by UNCAC advances global justice. It altered the expectations of state behaviour. States known as destinations for illicit wealth must now justify any refusal to cooperate.<sup>256</sup> The convention's peer review mechanism, conferences of states parties, and global initiatives (like the Stolen Asset Recovery Initiative and the Global Forum on Asset Recovery) have all reinforced a new ethic: Facilitating corruption is globally condemned, and returning stolen assets is globally demanded.<sup>257</sup> This peer pressure has led to some notable unilateral actions that promote global justice. For instance, certain jurisdictions have passed laws allowing the freezing or confiscation of corrupt assets even in the absence of a request, or simplifying the return of assets in cases of foreign political upheaval (to prevent stolen funds from being held indefinitely due to

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<sup>255</sup> Fenner Zinkernagel, Gretta, and Roth, Anja. "Practical Hurdles to Effective International Recovery of Stolen Assets." *Opinio Juris* 11, Nr. 1 (2012), 92. Brun, Jean Pierre, et al. "Unexplained Wealth Orders: Toward a New Frontier in Asset Recovery." (n 163), 47. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 386.

<sup>256</sup> Vlassis, Dimitri and Gottwald, Dorothee, 368.

<sup>257</sup> *Ibidem*, 9. Heimann, Fritz, and Pieth, Mark, 'Confronting Corruption: Past Concerns, Present Challenges, and Future Strategies' (n 132) 134. Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9) 185. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 7. Falconi, Felipe Freitas, et al. "Victims of Corruption: Back for Payback." (n 40) 18.

the lack of a functioning requesting government).<sup>258</sup> These moves reflect an understanding that holding stolen wealth undermines the credibility of the international rule of law and perpetuates suffering in victim states.

UNCAC's asset-recovery framework functions as an instrument of global justice by institutionalising the principle of cross-border restitution. It envisions a world where justice is not confined within national boundaries. If corruption is a crime against a nation's populace, then all other nations have a responsibility to remedy that crime. This is a profound shift towards globalising the concept of justice. Just as human rights law made a state's treatment of its citizens a matter of international concern, UNCAC makes the recovery of a state's stolen assets a matter of international concern and cooperation. Each successful asset return under UNCAC not only benefits the direct victim state but also reinforces the idea that international law can serve as a levelling force by constraining the powerful (corrupt elites and their financial enablers) and empowering the previously powerless (the citizens of victimised nations) by restoring to them what is rightfully theirs.

#### **1.4 Imperative Language and Architecture of Cooperation**

How does UNCAC's architecture support these ideals in practice? And what role does its imperative language play in ensuring states act? The answers lie in the carefully constructed network of obligations and mechanisms spread across Chapter V and related provisions. UNCAC's drafters created an architecture that combines preventive measures, investigative cooperation, legal harmonisation, and return procedures to make asset recovery feasible. Throughout, these provisions use strong, directive language ('shall', 'must', 'obliges'), reflecting the intent of states to hard-wire a cooperative ethos into domestic law.

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<sup>258</sup> Borlini, Leonardo, and Rose, Cecily. "The Normative Development of Laws on Asset Preservation and Confiscation: An Examination of Emerging Best Practices." *International Journal of Constitutional Law* 22 (2024), 521,522,523. Pavlidis, George. "Asset Recovery: A Swiss Leap Forward?" *Journal of Money Laundering Control* 20, Nr. 2 (2017), 4. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 401, 402.

At the structural level, Chapter V is a comprehensive blueprint for cross-border asset recovery. Articles 52 to 54 tackle upstream issues, such as preventing the concealment of assets and ensuring cooperation among legal systems.<sup>259</sup> Article 52 imposes preventive obligations, such as enhanced scrutiny by financial institutions for the accounts of ‘politically exposed persons’.<sup>260</sup> This is a crucial structural element of UNCAC. If banks must identify and monitor the accounts of foreign officials and report suspicious transactions, it becomes harder for corrupt leaders to quietly move money into secretive jurisdictions.<sup>261</sup> Article 52’s requirements (customer identification, beneficial owner verification, record-keeping, and informing authorities about foreign public officials’ accounts) use mandatory terms, effectively forcing states to adjust the norms of bank secrecy.<sup>262</sup> Banks can no longer cite client confidentiality to shield dubious funds. They are required to know their customers and cooperate with oversight institutions.<sup>263</sup> The imperative language here (‘shall...implement measures’) underscores that financial secrecy cannot trump international anti-corruption goals. Article 52 further encourages states to require their own public officials to declare if they have assets abroad, increasing transparency and accountability.<sup>264</sup>

The convention’s architecture also strengthens MLAs concluded to trace and freeze assets.<sup>265</sup> Articles 54 and 55 work in tandem to ensure that if one state identifies stolen

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<sup>259</sup> Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 400, 402, 415.

<sup>260</sup> *Ibidem*, 350. Banna, 525. Ivory, Radha. *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys*. (n 10), 24. Claman, 339.

<sup>261</sup> Pieth, 5. Banna, 525, 526. Oliver Landwehr. article 40 In Cecily, Rose, Kubiciel, Michael and Landwehr, Oliver (eds.). *The United Nations Convention Against Corruption: A Commentary*, Oxford: Oxford University Press, 2019, 396.

<sup>262</sup> Banna, 157. Landwehr, 396, 399. Banna, 529,533.

<sup>263</sup> Banna, 154. Kubiciel, Michael. Article 15 In Cecily, Rose, Kubiciel, Michael and Landwehr, Oliver (eds.). *The United Nations Convention Against Corruption: A Commentary*, Oxford: Oxford University Press, 2019, 171. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 334. Meier, Henri B. et al. *Swiss Finance: Banking, Finance, and Digitalization*, Cham: Palgrave Macmillan, 2023, 86, 87, 171.

<sup>264</sup> Banna, 533. Claman, 341.

<sup>265</sup> Chrysikos, Dimosthenis. Article 46 In Cecily, Rose, Kubiciel, Michael, Landwehr, Oliver (eds.). *The United Nations Convention Against Corruption: A Commentary*, Oxford: Oxford University Press, 2019, 453. Ivory 561. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 508. Wouters, Jan, Ryngaert, Cedric and Cloots, Ann Sofie. *The Fight Against Corruption in International Law* (n 62), 17, 18.

assets in another, those can be promptly frozen and eventually confiscated.<sup>266</sup> Article 54 obliges states to recognise and enforce foreign freezing and confiscation orders.<sup>267</sup> It urges states to ensure that assets can be frozen upon a foreign request in the absence of a domestic order, provided there is a credible basis for the action to avoid delay while awaiting a formal order.<sup>268</sup> The text is, again, imperative: states must have the appropriate procedures in place. Complementing this provision, Article 55 requires that states ‘take measures to identify, trace, freeze, or seize’ proceeds of corruption at the request of another state, and to do so quickly.<sup>269</sup> The clear intent is to prevent bureaucratic or legal delays from thwarting recovery. Speed is of the essence to ensure that corrupt actors do not shift assets elsewhere when they become aware of an investigation.

A key feature of UNCAC architecture is the provision for overriding bank secrecy laws and loosening rigid legal barriers.<sup>270</sup> Article 46(8), which is in Chapter IV on MLA, but is essential for the operation of Chapter V, provides that states parties cannot refuse mutual legal assistance on the grounds of bank secrecy alone.<sup>271</sup> In other words, if State A asks State B for bank records of a suspect account, State B cannot reply, ‘Our laws prohibit sharing bank information.’ UNCAC elevates the fight against corruption above those domestic secrecy laws.<sup>272</sup> The language here is strong and unconditional (‘shall not decline assistance on the ground of bank secrecy’). In parallel, Article 40 of UNCAC requires each state to ensure it has domestic mechanisms in place to overcome bank secrecy in its investigations, allowing domestic prosecutors and investigators to

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<sup>266</sup> Spörl, Cornelia. *article 2* In Rose, Cecily, Kubiciel, Michael and Landwehr, Oliver (eds.). *The United Nations Convention Against Corruption: A Commentary*, Oxford: Oxford University Press, 2019, 31. Ivory, 561. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9 ), 418, 419. Olaniyan, Kolawole. “*Ownership of Proceeds of Corruption in International Law.*” ( n 9) 137. Tort, Camila Florencia, *The search for synergies: The utopian ideal of cooperation between international anti-corruption mechanisms* In *The Transnationalization of Anti-Corruption Law*, New York: Routledge, 518.

<sup>267</sup> Ivory, 551, 556.

<sup>268</sup> Olaniyan, Kolawole. “*Ownership of Proceeds of Corruption in International Law.*” ( n 9), 136, 520. Ivory, 556, 557. Tort, Camila Florencia, *The search for synergies: The utopian ideal of cooperation between international anti-corruption mechanisms* (n 266), 518,520.

<sup>269</sup> Rose, Kubiciel, Landwehr, 11. Ivory, 550.

<sup>270</sup> Landwehr, 396. Chrysikos, 461. Ivory, 561.

<sup>271</sup> Chrysikos, 452.

<sup>272</sup> *Ibidem*, 461. Landwehr, 396. Ivory, 561.

obtain bank information despite confidentiality laws.<sup>273</sup> Taken together, these provisions weaken the traditional shield of financial opacity on which corrupted officials have relied. They send the message that, as far as corruption enquiries are concerned, the states shall cooperate.<sup>274</sup> In the hierarchy of interests, accountability and transparency trump confidentiality.

Another barrier addressed by UNCAC is dual criminality and onerous evidentiary requirements.<sup>275</sup> Dual criminality is the principle that a state assists only with an investigation or enforcement if the conduct is criminal in both states.<sup>276</sup> Strict dual criminality was a significant obstacle to corruption cases because laws varied across jurisdictions. For instance, 'illicit enrichment' might be a crime in one jurisdiction but not in another, or certain acts of bribery might not be covered by the laws of the requested state.<sup>277</sup> By listing a wide range of offences that states must criminalise, UNCAC seeks to harmonise the concept of corruption across jurisdictions. It also encourages flexibility. Article 46(9)(b) suggests that a request for assistance should not be refused for lack of dual criminality if it does not involve coercive actions.<sup>278</sup> Even in the case of freezing or confiscation (which are coercive), the convention's spirit (as reflected in Article 51 and elsewhere) is that states should minimise technical hurdles. For example, Articles 54 and 55 encourage states to accept reasonable evidence from a state requesting a provisional freeze rather than requiring a full trial.<sup>279</sup> The phrase

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<sup>273</sup> Rose, Kubiciel, Landwehr, 8.

<sup>274</sup> Jorge, Guillermo. article 31 In Cecily, Rose, Kubiciel, Michael and Landwehr, Oliver (eds.). *The United Nations Convention Against Corruption: A Commentary*, Oxford: Oxford University Press, 2019, 324. We can take on example on Switzerland, it has amended their laws over the years to provide for information in criminal matters. Based on current legislation, it appears more difficult for a criminal to deposit his ill-gotten gains in Switzerland today and to be guaranteed confidentiality in the event that he is indicted or prosecuted in another country. (Swiss Federal Act on International Mutual Assistance in Criminal Matters (IMAC) – Arts. 63–67 (especially Art. 63) Allows Swiss authorities to transmit bank records and financial information to foreign states in criminal investigations. Bank secrecy cannot be invoked to refuse cooperation.

<sup>275</sup> Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 529.

<sup>276</sup> Currie, Robert J. "When (and Where) Is a Crime a Crime? 'Double Criminality' as a Principle of Fundamental Justice." Vortrag auf der 47th Annual Conference des Canadian Institute for the Administration of Justice, Ottawa, Oktober 2023, 4, 14, 26.

<sup>277</sup> Bacio Terracino, Julio. *The International Legal Framework against Corruption: States' Obligations to Prevent and Repress Corruption* (n 9), 192.

<sup>278</sup> *Ibidem*, 236.

<sup>279</sup> *Ibidem*, 451,550,552,560.

‘widest measure of cooperation’ also implies that if a requesting state has sufficient evidence to show probable cause or a reasonable belief that assets are dirty, the requested state should act, even if its own evidentiary threshold for domestic cases might be higher.<sup>280</sup>

All these measures, due diligence regarding politically exposed persons, lifting bank secrecy, flexible MLA, and enforcement of foreign orders, are parts of an integrated architecture aimed at one result: tracing and returning corrupt money no matter where it has been hidden.<sup>281</sup> The imperative language is the glue holding this architecture together. UNCAC could have used soft phrasing like ‘states should consider cooperating’ or ‘may provide assistance’. Instead, it uses commanding language such as ‘states shall cooperate,’ ‘shall adopt measures,’ ‘shall not refuse.’ This was necessary to signal a binding commitment and to drive domestic implementation. The treaty’s mandatory language provided political leverage for reformers within those states to say, ‘We have no choice, international law obliges us.’

In practice, the UNCAC architecture has been used to build institutions and processes. For example, Article 58 of UNCAC requires the establishment of financial intelligence units (FIUs) to collect and share information on suspicious transactions.<sup>282</sup> Article 59 encourages states to enter into bilateral or multilateral agreements to enhance cooperation. Since UNCAC entered into force, numerous memoranda of understanding and treaties have specifically addressed asset sharing or streamlined recovery.<sup>283</sup> The convention essentially laid the foundation and said, ‘You shall cooperate and here are the tools, now build practical bridges.’

Yet, even with an elaborate architecture and imperative language, the effectiveness of UNCAC’s system depends on political will and good-faith compliance.<sup>284</sup> As noted

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<sup>280</sup> *Ibidem*, 10, 445.

<sup>281</sup> *Ibidem*, 153, 519, 523, 534, 548.

<sup>282</sup> *Ibidem*, 587.

<sup>283</sup> *Ibidem*, 601.

<sup>284</sup> Passas, Nikos. UNCAC, technical assistance and development efforts. In Pieth, Mark (ed). *Recovering Stolen Assets*, Bern: Peter Lang, 2008, 293.

above, the convention's drafters had to balance rigidity with flexibility. This means some provisions include built-in loopholes, for example, that obligations will be fulfilled 'in accordance with domestic law' or 'where appropriate.' Such clauses ensure respect for national legal principles (for instance, protecting the rights of third parties or due process for the accused). However, they can be misused by reluctant states to slow-walk cooperation.<sup>285</sup> The architecture is only as strong as the use made of it. A state that is politically unwilling to assist can invoke procedural pretexts or simply fail to prioritise an incoming request.<sup>286</sup> UNCAC has no mechanism to punish non-cooperation aside from peer pressure and reputational consequences.<sup>287</sup> That said, by formalising cooperation, UNCAC has changed the baseline expectations. Even a reluctant state now typically feels compelled to appear compliant. This is an advance from when it could flatly refuse, citing domestic secrecy or the lack of a treaty.

UNCAC's architecture for asset recovery, underpinned by imperative language, creates a legal environment in which cooperation is the norm and legal obstacles are systematically reduced. It brings multiple components (prevention, enforcement, cooperation, and return) together into a cohesive scheme. The strong language in the treaty text serves legal and symbolic functions. Legally, it commits states to action, symbolically, it communicates the seriousness of purpose and the primacy of justice over narrow interests. This dual effect is crucial in compelling change. The architecture is not perfect, but it provides the necessary pathways for an agile, victim-focused, and globally coordinated asset-recovery process. The onus then falls on states to traverse those pathways in good faith.

### **1.5 Confronting Secrecy and Impunity: UNCAC's Challenge to Safe Havens**

UNCAC's asset recovery framework directly targets the twin pillars that have historically upheld transnational impunity for the corrupt: financial secrecy and the

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<sup>285</sup> Pippan, 44.

<sup>286</sup> *Ibidem*, 44, 45. Maguchu, Prosper, and Ghazi, Ahmad. "The Role of Civil Society Organisations in Asset Recovery." *Indonesian Journal of International Law* 19 (2022), 333, 334.

<sup>287</sup> Lohaus, Mathis. *Towards a Global Consensus Against Corruption: International Agreements as Products of Diffusion*, (n 156), 15.

lack of cross-border accountability.<sup>288</sup> Before UNCAC, a corrupt official could often count on bank secrecy laws, shell companies, and fragmented national laws to hide money with minimal fear of exposure or repatriation, affording de facto impunity within the system.<sup>289</sup> A core analytical question, then, is how UNCAC's legal regime disrupts these entrenched shelters of illicit wealth? The convention addresses the issue on multiple fronts to dismantle safe havens for stolen assets.

First, as discussed, UNCAC side-steps the wall of bank secrecy. In the world of grand corruption, bank secrecy was the oxygen allowing criminally acquired wealth to grow offshore.<sup>290</sup> By compelling states to lift bank secrecy when cooperating with other states (and even within domestic inquiries), UNCAC turns off this oxygen supply. The inclusion of an article denying bank secrecy as grounds for complicating cooperation was a clear challenge to long-standing practices in certain banking centres.<sup>291</sup> It establishes that the fight against corruption is a higher interest than the protection of financial privacy in corruption cases.<sup>292</sup> States known for their strict bank confidentiality (some with centuries-old traditions of secrecy) had to reconcile that stance with their UNCAC obligations.<sup>293</sup> In effect, UNCAC normalised the idea that transparency and the exchange of information are the new international standard

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<sup>288</sup> Rose, Kubiciel, Landwehr, 10. Landwehr, 396. Chrysikos, 461. Ivory, 551, 560, 561.

<sup>289</sup> Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13) 88, 91, 173. Sharman, Jason C. *The Despot's Guide to Wealth Management: On the International Campaign against Grand Corruption*, (n 10) 80,81.

<sup>290</sup> Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13), 88, 89, 91, 173.

<sup>291</sup> *Ibidem*, 173, 176. Ivory, Radha. *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys*. (n 10) 128. Sharman, Jason C. *The Despot's Guide to Wealth Management: On the International Campaign against Grand Corruption*, (n 10), 89.

<sup>292</sup> Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13) 176. Ivory, Radha, *Corruption, Asset Recovery and the Protection of Property in Public International Law: The Human Rights of Bad Guys* (Cambridge University Press 2014) 128. Wouters, Jan, Ryngaert, Cedric and Cloots, Ann Sofie. *The Fight Against Corruption in International Law* (n 62), 17.

<sup>293</sup> Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13), 176. Wouters, Jan, Ryngaert, Cedric and Cloots, Ann Sofie. *The Fight Against Corruption in International Law* (n 62), 17. Ivory, Radha. *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys*. ( n 10), 128. Lohaus, Mathis. *Towards a Global Consensus Against Corruption: International Agreements as Products of Diffusion*, (n 156), 174, 175.

when illicit funds are at issue.<sup>294</sup> This reduces impunity by making it far more likely that hidden accounts will be revealed to investigators.

Second, UNCAC tackles the opacity of corporate vehicles and complex transactions that facilitate the hiding of assets.<sup>295</sup> While not a corporate-transparency treaty per se, Article 52's call to identify beneficial owners and monitor the accounts of politically exposed persons indirectly pressures states to crack down on anonymous shell companies and trusts that obscure ownership.<sup>296</sup> Moreover, Article 14 of UNCAC (in the preventive chapter) urges states to take measures against money-laundering in a broad sense, which includes customer due diligence and record-keeping across the financial system.<sup>297</sup>

When states implement these measures, it becomes harder for corrupt actors to use labyrinthine corporate structures to launder money without leaving a trail. The convention also encourages spontaneous international information sharing (Article 56). Therefore, even without a formal request, a state can tip off another if it discovers suspicious assets connected to that other state.<sup>298</sup> This is a powerful tool against impunity. It means, for example, that if Bank X in State B flags an account with seven-figure deposits belonging to a former minister from State A, State B's FIU or law enforcement can alert State A to the possibility that these are proceeds of corruption.<sup>299</sup> Such proactive cooperation was once rare, but UNCAC provides the required

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<sup>294</sup> *Ibidem*, 180. Sarkar, Rumu, *International Development Law: Rule of Law, Human Rights & Global Finance*, Cham: Springer, 2<sup>nd</sup> ed. 2009, 390. Rose, Cecily, 'International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems' (n 79), 36.

<sup>295</sup> Banna, 157, 158, 526, 529. Jorge, 323.

<sup>296</sup> Claman, 339. Vlassis, Dimitri and Gottwald, Dorothee. Implementing the asset recovery provision of the UNCAC, In Pieth, Mark (ed). *Recovering Stolen Assets*, Bern: Peter Lang, 2008, 359. Passas, Nikos, 'Financial Regulation, International Cooperation and Economic Crime Prevention' In *European Yearbook of International Economic Law 2011* (Springer 2011), 102. Ivory, Radha, *Corruption, Asset Recovery and the Protection of Property in Public International Law: The Human Rights of Bad Guys* (n 292) 24.

<sup>297</sup> Passas, Nikos 'Financial Regulation, International Cooperation and Economic Crime Prevention' (n 296), 102. Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13) 83.

<sup>298</sup> Claman, 348. Vlassis and Gottwald, 359. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, ( n 10 ), 13.

<sup>299</sup> Banna, 525, 533, 566, 568. Ölçer, 591.

legitimacy and impetus. Each piece of shared information can crack open a secret and lead to accountability where none would have existed.

Third, UNCAC's mechanisms for swift freezing and confiscation reduced impunity by denying corrupt individuals the time and opportunity to move assets beyond reach.<sup>300</sup> Impunity was often effected through delay and procedural wrangling. By the time an international request wended its way through courts, the money might have vanished to another haven or dissipated. UNCAC tries to outpace these tactics. By obliging quick interim measures (freezes on a reasonable basis) and by allowing enforcement of foreign orders, it reduces the window of opportunity for asset flight.<sup>301</sup>

Additionally, the convention's push for non-conviction-based confiscation (NCB) in appropriate cases is a direct challenge to impunity. Corrupt leaders frequently enjoy de jure or de facto immunity at home. They might never be convicted in their own state due to political influence or because they fled and remain fugitives.<sup>302</sup> In the past, if there was no conviction, many jurisdictions would either hold the assets frozen indefinitely or eventually release them back to the corrupt owner.<sup>303</sup> UNCAC's Article 54(1)(c) urges states to allow confiscation without a criminal conviction when necessary (such as in the case of the death or flight of the offender).<sup>304</sup> This is a game-changer for transnational impunity. It means a kleptocrat cannot protect their loot simply by avoiding a conviction. States can use civil court processes or other legal means to forfeit the assets in the absence of a criminal verdict.<sup>305</sup> Several states (including the UK and Switzerland) have developed legal provisions for such NCB

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<sup>300</sup> Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9) 136.

<sup>301</sup> Brun, 520. Ivory, 556.

<sup>302</sup> Kubiciel, 176. Coventry, 309. Slingerland, 370. Ölçer, 579.

<sup>303</sup> Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13) 148. Daniel, Tim and Maton, James. Civil proceedings to recover corruptly acquired assets of public officials, In Pieth, Mark (ed). *Recovering Stolen Assets*, Bern: Peter Lang, 2008, 243.

<sup>304</sup> *Ibidem*, 347. Manea Alexandra and Smith Jamieson, in search of tailored approach to anti-corruption sanctions in the international development context: Financial remedies by the multilateral development banks, (n 266), 528.

<sup>305</sup> Daniel and Maton, 248. Cassella, D Stefan, The American Perspective on Recovering Criminal Proceeds in Criminal and Non-Conviction Based Proceedings In *Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU* (n 23) 260, 261. Wouters, Jan, Ryngaert, Cedric and Cloots, Ann Sofie. *The Fight Against Corruption in International Law* (n 62), 61.

confiscation, inspired or bolstered by UNCAC.<sup>306</sup> While not universally adopted, there is a trend toward fewer places where ‘no conviction’ equals no consequence.<sup>307</sup> By promoting NCB confiscation, UNCAC addresses the reality that the crime of grand corruption often goes unpunished in a criminal court, but its financial fruits should not be untouchable as a result.

Fourth, UNCAC fosters a culture of coordinated enforcement that chips away at impunity.<sup>308</sup> It encourages practices like joint investigations (Article 49), with law enforcement officials from multiple states working together on a corruption case.<sup>309</sup> This is important because complex corruption schemes might involve actors and assets in numerous jurisdictions.<sup>310</sup> Joint investigative teams can share intelligence in real time and mount parallel actions, preventing suspects from exploiting one state’s ignorance of what another is doing.<sup>311</sup> Similarly, the convention’s emphasis on each state designating a central authority for MLA and simplifying procedures streamlines what was previously a cumbersome process.<sup>312</sup> The more agile and well-coordinated the international response, the less room corrupt individuals have to manoeuvre. In effect, UNCAC tries to replace the formerly fragmented enforcement landscape with a more seamless web of cooperation, so that a perpetrator cannot easily slip through the cracks.<sup>313</sup>

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<sup>306</sup> Muzila, Lindy, et al. *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*, Washington, DC: World Bank Publications, 2012, 36. Tort, Camila Florencia, The search for synergies: The utopian ideal of cooperation between international anti-corruption mechanisms (n 266), 516,521,527.

<sup>307</sup> Maguchu, Prosper, and Ghazi, Ahmad. “The Role of Civil Society Organisations in Asset Recovery.” (n 286), 327.

<sup>308</sup> Banna, 567, 601.

<sup>309</sup> Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13) 177. Rose, Cecily, ‘International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems’ (n 79), 103. Hock, Branislav. *Extraterritoriality and International Bribery: A Collective Action Perspective*. London: Routledge, 2020, 104.

<sup>310</sup> Zimmermann, Frank. Article 49 In Rose, Cecily, Kubiciel, Michael and Landwehr, Oliver (eds.). *The United Nations Convention Against Corruption: A Commentary*, Oxford: Oxford University Press, 2019, 497, 498.

<sup>311</sup> Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13) 177.

<sup>312</sup> Ivory, Radha. *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys*. (n 10), 128. Claman, 342. Olaniyan, Kolawole. “Ownership of Proceeds of Corruption in International Law.” (n 9) 85.

<sup>313</sup> Passas, 290, 337.

Despite these robust measures, impunity has not vanished overnight. Some entrenched interests and structural issues persist. Financial secrecy, for instance, has not disappeared entirely; rather, the norm against secrecy in corruption cases must constantly be enforced and verified.<sup>314</sup> Some jurisdictions continue to rely on bank secrecy, data protection, and related legal restrictions in ways that limit the transnational flow of evidence and may hinder effective anti-corruption enforcement.<sup>315</sup> The use of complex corporate structures has also evolved. The corrupt adapt by using ever more obscure ownership chains or moving into less regulated sectors (like luxury real estate or crypto assets) that might not be covered by traditional AML measures.<sup>316</sup>

UNCAC, while comprehensive, could not foresee every new method of hiding wealth. It created a framework that is sufficiently flexible to incorporate new norms (for example, it encourages updating AML laws as standards evolve), but vigilance and updates are needed.<sup>317</sup> Furthermore, certain high-level individuals are politically shielded and still evade justice. UNCAC does not directly solve the problem of political will within a state to go after its own elites.<sup>318</sup> What it does is enable other states to act with respect to assets and encourage peer pressure. If State A refuses to prosecute its corrupt leader, State B can still freeze and confiscate that leader's mansion on its soil and, under UNCAC principles, work to return its value to State A's people.<sup>319</sup> Such actions serve notice that kleptocrats cannot assume their money is safe anywhere.

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<sup>314</sup> Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13) 88.

<sup>315</sup> Stephane Bonifassi and Caroline Gousse, The impact of blocking statutes on the enforcement of anti-corruption laws In *Transnationalization of Anti-Corruption Law*, New York: Routledge, 2021, 500.

<sup>316</sup> Gnaldi Michela, Del Sarto Simone, Falcone Matteo, Troia Matteo. *Measuring Corruption*, Cham/Perugia: Springer, 2021, 58. Kiepe, 189. Esoimeme, E. E. "Institutionalising the War Against Corruption: New Approaches to Assets Tracing and Recovery." *Journal of Financial Crime* 27, Nr. 1 (2020), 224.

<sup>317</sup> Sharman, Jason C. *The Despot's Guide to Wealth Management: On the International Campaign against Grand Corruption*, (n 10), 147. Czarnecki, Jacek, Digital Currencies and the Anti-money Laundering/Counter-terrorism Financing Regulations in the EU: Imaginary Risk or Real Challenge? In *Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU* (n 23) 303, 304.

<sup>318</sup> Helfer, Laurence R., Rose, Cecily and Brewster Rachel. "Flexible Institution Building in the International Anti-Corruption Regime: Proposing a Transnational Asset Recovery Mechanism." (n 1), 562. Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13) 172, 182.

<sup>319</sup> Ivory, 556.

In a broader sense, UNCAC's challenge to secrecy and impunity is part of a moral and legal shift. It delegitimises the use of sovereignty and banking confidentiality to shield wrongdoing. The convention reframes non-cooperation in corruption cases as a breach of international obligation and even a tacit endorsement of corruption.<sup>320</sup> This helps erode the impunity enjoyed by the corrupt, because it isolates those who would protect them. Bankers, lawyers, and officials who help hide wealth now risk international opprobrium and legal consequences. While corruption has not disappeared, its perpetrators now face a much less hospitable international environment.

UNCAC confronts financial secrecy by mandating transparency and information exchange, and it confronts transnational impunity by creating channels to hold corrupt actors accountable, even across borders. It systematically dismantles the safe havens that once made grand corruption a low-risk, high-reward enterprise. By ensuring that stolen assets are more likely to be traced and seized, and eventually returned to those harmed, UNCAC drastically alters the calculus for officials tempted to loot public funds. The probability of exposure and loss is significantly higher than it was before 2005.<sup>321</sup> Perhaps one of UNCAC's greatest contributions is the shift to an increasingly interconnected enforcement regime where hiding is difficult and keeping ill-gotten gains is even harder.

## **1.6 Interim Conclusion**

UNCAC fundamentally reconfigures asset recovery as a central and enforceable element of international anti-corruption law. Through its imperative language and comprehensive structure, the convention establishes a legal duty for states to trace, freeze, confiscate, and return stolen assets, moving well beyond the discretionary or

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<sup>320</sup> Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9) 233, 234, 254. Ivory, Radha, 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* (n 23) 200.

<sup>321</sup> Helfer, Laurence R., Rose, Cecily and Brewster Rachel. "Flexible Institution Building in the International Anti-Corruption Regime: Proposing a Transnational Asset Recovery Mechanism." (n 1), 567. Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13) 111.

bilateral models that previously dominated. Chapter V elevates asset recovery, treating it not only as an enforcement tool but as a moral imperative tied to justice for victims. The convention embraces a restorative justice framework, affirming that those harmed by corruption, including entire populations, deserve material redress. Beyond this, UNCAC positions asset recovery as a form of structural global justice, challenging historical patterns of impunity, secrecy, and wealth extraction that disproportionately disadvantaged developing states.

UNCAC's legal architecture addresses key obstacles such as bank secrecy, dual criminality, and procedural delays, and its language compels broad cooperation and mutual assistance. Though flexibility remains in parts of the convention to accommodate legal diversity, the default expectation has shifted; asset return is now a norm, not a favour. UNCAC's transformative contribution lies in dismantling the foundations of safe havens, delegitimising impunity, and constructing a legal order in which illicit wealth can no longer escape accountability. This chapter has shown that UNCAC is a treaty that goes beyond obligations to further justice and reverse the material and symbolic consequences of grand corruption.

## **2. Mechanisms of Asset Recovery**

This chapter explores the legal mechanisms available for recovering assets under the UNCAC. It emphasises the importance of a diversified approach to match the complexity of transnational corruption. Unlike earlier frameworks, UNCAC recognises that asset recovery cannot rely on traditional criminal processes. Instead, it legitimises and encourages the use of criminal, civil, and administrative pathways, reflecting a pragmatic and inclusive strategy. This chapter asks how UNCAC's multi-mechanism framework enables more effective asset recovery, and what the strengths and limits of each approach are. Through a doctrinal and functional analysis, the chapter outlines the legal foundations, procedural tools, and practical applications of each mechanism, and highlights how these interact and complement each other in recovery efforts.

## 2.1 Criminal, Civil, and Administrative Pathways

UNCAC's framework recognises different avenues for asset recovery.<sup>322</sup> In fact, a strength of the convention is its acknowledgement that one size does not fit all. Depending on the case, various mechanisms (criminal, civil, administrative) can and should be employed to recover assets.<sup>323</sup> To fully understand the UNCAC regime (and to lay a foundation for focusing on criminal asset recovery), it is important to distinguish and define these mechanisms and consider their interplay and limitations.

### 2.1.1 Criminal Asset Recovery

The traditional and most straightforward route is to recover assets through the criminal justice process. In practice, this means identifying the corrupt conduct, prosecuting and convicting the offender, and then obtaining a court order to confiscate the proceeds of the crime.<sup>324</sup> As observed above, under UNCAC, states parties are required to criminalise a broad range of corruption offences (bribery, embezzlement, money laundering, etc.) and to empower their national courts to confiscate the proceeds of those crimes upon conviction; Article 31 of UNCAC outlines the basics of domestic confiscation.<sup>325</sup> Criminal asset recovery requires that guilt be proven beyond a reasonable doubt (in most systems) and that specific assets are linked to the crime.<sup>326</sup> Its strengths lie in its clear procedural safeguards and moral force, a conviction that

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<sup>322</sup> Brun, Jean Pierre, et al. "Unexplained Wealth Orders: Toward a New Frontier in Asset Recovery." Washington, DC: International Bank for Reconstruction and Development/World Bank, 2023, 18. Moiseienko, Anton, 'The Ownership of Confiscated Proceeds of Corruption under the UN Convention against Corruption' (n 140), 674. Claman, 343.

<sup>323</sup> Claman, 341, 343. Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9) 212.

<sup>324</sup> *Ibidem*, 135, 136. Ivory, Radha. *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys*. (n 10), 100. Trinchera, Tommaso. "Confiscation and Asset Recovery: Better Tools to Fight Bribery and Corruption Crime." (n 22) 63.

<sup>325</sup> Llamzon, Aloysius P. State Responsibility for Corruption: A Return to Regular Order. In *European Yearbook of International Economic Law 2020*, Cham: Springer, 2021, 136. Moiseienko, Anton, 'The Ownership of Confiscated Proceeds of Corruption under the UN Convention against Corruption' (n 140), 676.

<sup>326</sup> Karas Ivičević Elizabeta and Vidlička Sunčana Roksandić, The Relevance of Asset Recovery Policies in Transitional Societies: The Croatian Perspective, *Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU* (n 23) 248, 250. Trinchera, Tommaso. "Confiscation and Asset Recovery: Better Tools to Fight Bribery and Corruption Crime." (n 22) 60.

conclusively labels the conduct as criminal and justifies the state confiscating the ill-gotten gains as a punishment and deterrence.<sup>327</sup>

UNCAC's cooperation provisions, MLA, extradition and the like are largely built around facilitating these criminal processes across borders, for example, in relation to obtaining evidence or freezing assets while a prosecution is underway.<sup>328</sup> The limitations of criminal asset recovery are significant. It is often time-consuming and complex to investigate transnational corruption at the level needed for conviction, and high-value corruption cases may involve powerful defendants who can obstruct or delay proceedings. The criminal route reaches a dead end if the offender cannot be tried (because they have fled, are hiding, or enjoy political immunity). Additionally, as discussed with reference to dual criminality, differences in states' criminal law can impede cooperation.<sup>329</sup> Criminal asset recovery is the cornerstone of UNCAC, and the convention assumes that states will prosecute offenders and use those prosecutions as the basis for confiscation and return. But it also explicitly provides fallbacks and supplements, knowing that the criminal process might fail or be insufficient in many scenarios.

### **2.1.2 Civil Asset Recovery (Including Non-Conviction Based Forfeiture)**

Civil asset recovery refers to the use of non-criminal legal proceedings to recover stolen assets.<sup>330</sup> There are two main forms this can take, both of which UNCAC contemplates. The first is non-conviction-based confiscation (NCB forfeiture), which is often a civil (or administrative) proceeding in rem (against the property).<sup>331</sup> In NCB

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<sup>327</sup> Tromme, Mat. "Waging War against Corruption in Developing States: How Asset Recovery Can Be Compliant with the Rule of Law." (n 173), 176, 177.

<sup>328</sup> Rose, Kubiciel, Landwehr, 9. Chrysikos, 466, 467. Kingah, Stephen. "Measures for Asset Recovery: A Multiactor Global Fund for Recovered Stolen Assets." (n 177), 462.

<sup>329</sup> Boister, Neil. Article 44, In Cecily, Rose, Kubiciel, Michael, Landwehr, Oliver (eds.). *The United Nations Convention Against Corruption: A Commentary*, Oxford: Oxford University Press, 2019, 434. Chrysikos, 461, 464. Zimmermann, 501.

<sup>330</sup> Simonato, Michele. "Directive 2014/42/EU and Non-Conviction Based Confiscation: A Step Forward on Asset Recovery." *New Journal of European Criminal Law* 6 (2015), 218. an der Does de Willebois, Emile & Brun, Jean-Pierre, 'Using Civil Remedies in Corruption and Asset Recovery Cases' (2013) 45 *Case Western Reserve Journal of International Law*, 619. 620. Tromme, Mat. "Waging War against Corruption in Developing States: How Asset Recovery Can Be Compliant with the Rule of Law." (n 173), 165, 179.

<sup>331</sup> Ivory, 555.

forfeiture, the state (or in some cases, an agency) brings a case alleging that certain assets are the proceeds or instrumentalities of corruption, and it seeks a court order to confiscate them without a criminal conviction of a specific person being necessary.<sup>332</sup> The standard of proof is usually lower than in criminal proceedings, requiring, in many cases, that there is clear and convincing evidence or, on a balance of probabilities, the assets are linked to unlawful conduct.<sup>333</sup> Article 54(1)(c) of UNCAC strongly encourages states parties to permit this kind of action, especially where pursuing the criminal route is impossible (because of death or the flight of the perpetrator).<sup>334</sup>

Civil litigation by states or victims to recover assets represents the second form of non-criminal action. Article 53 of UNCAC requires states to allow others to initiate civil lawsuits in their domestic courts to claim ownership of assets acquired through corruption.<sup>335</sup> For example, if funds from State A were stolen and are found in State B, State A's government should have legal standing in State B's courts to sue either the holders of those assets or assert ownership and recover them. In civil litigation, a foreign state can act as plaintiff and prove that it is the rightful beneficiary of funds in a bank account (because it was embezzled public money). Civil litigation usually has

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<sup>332</sup> Dornbierer, Andrew. *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth*. Basel: Basel Institute on Governance, 2021, 137. King, Colin, Civil Forfeiture in Ireland: Two Decades of the Proceeds of Crime Act and the Criminal Assets Bureau and Cassella, D Stefan, The American Perspective on Recovering Criminal Proceeds in Criminal and Non-Conviction Based Proceedings In *Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU* (n 23), 82, 263. Biondi, Michael J., 'Building Trust(s): Rethinking Asset Return in Kleptocracy Forfeitures' (n 193), 1083.

<sup>333</sup> Tromme, Mat. "Waging War against Corruption in Developing States: How Asset Recovery Can Be Compliant with the Rule of Law." (n 173), 176. Simonato, Michele. "Directive 2014/42/EU and Non-Conviction Based Confiscation: A Step Forward on Asset Recovery." (n 330), 176, 219. an der Does de Willebois, Emile & Brun, Jean-Pierre, 'Using Civil Remedies in Corruption and Asset Recovery Cases' (n 330), 642. Trinchera, Tommaso. "Confiscation and Asset Recovery: Better Tools to Fight Bribery and Corruption Crime." (n 22), 64, 65.

<sup>334</sup> Ivory, Radha. *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys*. (n 10), 105, 106. Manea, Alexandra and Smith, Jamieson, In search of a tailored approach to anti-corruption sanctions in the international development context Financial remedies by the multilateral development banks (n 266), 528.

<sup>335</sup> Ivory, Radha, 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* (n 23) 183, 184. Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9), 132.

a lower burden of proof than criminal trials.<sup>336</sup> Other benefits of civil mechanisms for asset recovery are that they can be more flexible and expedient than criminal proceedings.<sup>337</sup> There is no need to obtain a criminal conviction, which is critical when the wrongdoer is out of reach or unknown. The mechanism can also be adapted to different jurisdictions – some states might be unwilling to extradite or prosecute a foreign leader, but are willing to support a civil claim for assets.<sup>338</sup> Civil proceedings often allow more creative use of evidence (e.g., financial records can be used even if they would not meet the strict admissibility rules of criminal court).<sup>339</sup> UNCAC's inclusion of these mechanisms underscores that the goal of the convention is the return of assets, not necessarily to imprison every offender in a foreign jail.

There are also potential due process concerns. For example, NCB confiscation has been criticised by some as undermining the presumption of innocence or property rights if not carefully executed.<sup>340</sup> There is also variability across jurisdictions. Not all states have embraced NCB confiscation, citing constitutional issues. As a result, if a requesting state secures an NCB forfeiture order domestically, some requested states might refuse to enforce it if their law does not recognise the concept of civil forfeiture.<sup>341</sup> Similarly, civil lawsuits can be drawn out and expensive, and for the plaintiff state to gather sufficient evidence to prevail often requires cooperation and access to information. In UNCAC's framework, civil mechanisms are complementary to criminal proceedings.<sup>342</sup> The convention does not mandate these mechanisms as the

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<sup>336</sup> Brun, 542. an der Does de Willebois, Emile & Brun, Jean-Pierre, 'Using Civil Remedies in Corruption and Asset Recovery Cases' (n 330), 620, 642.

<sup>337</sup> Dornbierer, Andrew. "Asset Recovery Legislation – Best Practices." *Quick Guide Series* 30. Basel: Basel Institute on Governance, 2024, 2.

<sup>338</sup> Brun, Jean Pierre, et al. "Unexplained Wealth Orders: Toward a New Frontier in Asset Recovery." (n 322), 16.

<sup>339</sup> *Ibidem*, 20. Horder, Jeremy, and Alldridge, Peter (eds.). *Modern Bribery Law: Comparative Perspectives*, (n 211), 245.

<sup>340</sup> Trinchera, Tommaso. "Confiscation and Asset Recovery: Better Tools to Fight Bribery and Corruption Crime." (n 22), 72. Brun, Jean Pierre, et al. "Unexplained Wealth Orders: Toward a New Frontier in Asset Recovery." (n 322), 92,93.

<sup>341</sup> Trinchera, Tommaso. "Confiscation and Asset Recovery: Better Tools to Fight Bribery and Corruption Crime." (n 22), 66. Goldbarsht, Doron, and de Koker, Louis (eds.). *Financial Crime, Law and Governance: Navigating Challenges in Different Contexts*, Cham: Springer Nature Switzerland, 2024, 27.

<sup>342</sup> Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9), 301. Ivory, Radha, *Asset Recovery in Four Dimensions: Returning Wealth to Victim Countries as a Challenge for*

primary route but clearly envisions them as essential tools to fill the gaps left by the criminal law.

### 2.1.3 Administrative Asset Recovery

Generally, in this context, the term “administrative” refers to asset-recovery measures that are neither classic criminal prosecutions nor purely civil court actions. Rather, the term refers to actions taken by administrative or executive authorities and covers a range of practices.<sup>343</sup> For example, Ireland provides an example of administrative seizure subject to subsequent judicial review (see Proceeds of Crime (Amendment) Act 2016).<sup>344</sup> Under the Proceeds of Crime (Amendment) Act 2016, a Criminal Assets Bureau officer may seize and detain property above a statutory threshold without prior judicial authorisation, with detention subject to later court challenge and compensation mechanisms.<sup>345</sup>

As noted above, diplomatic negotiations and agreements for asset return can also be considered a type of administrative mechanism. They are executive-to-executive deals rather than outcomes of a judicial procedure. Article 57(5) of UNCAC acknowledges these by allowing agreements for disposing of confiscated assets (for instance, agreeing that a portion of recovered assets will fund a joint development project).<sup>346</sup> Administrative asset recovery also includes preventive freezing powers.<sup>347</sup> For

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Global Governance In *Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU* (n 23), 183,184.

<sup>343</sup> Ivory, 554, 555.

<sup>344</sup> Proceeds of Crime (Amendment) Act 2016 (Act 8 of 2016) (Ireland)

<https://www.irishstatutebook.ie/eli/2016/act/8/enacted/en/html> accessed 5 March 2025.

<sup>345</sup> King, Colin, Civil Forfeiture in Ireland: Two Decades of the Proceeds of Crime Act and the Criminal Assets Bureau In *Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU* (n 23 ) 99.

<sup>346</sup> Morier, Pierre-Yves. Is automous confiscation the acme of asset recovery? In Pieth, Mark (ed). *Recovering Stolen Assets*, Bern: Peter Lang, 2008, 270.

<sup>347</sup> For example ireland’s Criminal Assets Bureau can itself “seize and detain” property for a short, pre-judicial period (King, Colin, Civil Forfeiture in Ireland: Two Decades of the Proceeds of Crime Act and the Criminal Assets Bureau In *Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU* (n 23 ) 99. Greece’s Financial Intelligence Unit may issue an asset-freezing order without prior court proceedings, with a right of appeal. UNCAC Article 54(2)(c) (as explained in Radha Ivory’s commentary) expressly contemplates “temporary administrative freeze” powers before any mutual-legal-assistance request. ( Ivory, 557).

instance, a financial intelligence unit or anti-corruption agency might have the power to briefly freeze assets without a court order where they are suspected to be related to corruption to prevent flight, with judicial confirmation required after a certain time.<sup>348</sup>

The advantage of administrative mechanisms is their speed and adaptability.<sup>349</sup> They may be quicker than courts and can be tailored to unique situations (such as a fragile state requesting quick repatriation of assets to stabilise an economy, handled through an executive agreement). They might also allow parties to better navigate political sensitivities, and by negotiating a return, lengthy litigation can be avoided while still achieving restitution. By providing for cooperation outside of courts and by allowing agreements, UNCAC implicitly supports these non-judicial options as part of the overall toolkit.<sup>350</sup>

The limitations of these administrative actions are also clear. They must be consistent with the rule of law. Without judicial oversight, they could infringe on individual rights or be abused for political ends.<sup>351</sup> Also, it is likely that not every state will recognise an administrative act of another state. For example, a state that requires a court order might not act on a foreign administrative freeze unless it is converted into a domestic court order under an agreement for MLA.<sup>352</sup> Legitimacy is another concern since back-room diplomacy might raise questions of transparency or fairness. For example, a requested state may demand a portion of the assets as an ‘administrative fee’, and UNCAC allows the deduction of reasonable expenses, but who defines what is reasonable? Administrative measures are best viewed as part of a hybrid approach, often serving as interim or supplementary steps to formal legal processes.

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<sup>348</sup> Spörl, 31. Jorge, 324, 325.

<sup>349</sup> Jorge, 324, 325.

<sup>350</sup> Olaniyan, Kolawole. “Ownership of Proceeds of Corruption in International Law.” (n 9) 141.

<sup>351</sup> Tromme, Mat. “Waging War against Corruption in Developing States: How Asset Recovery Can Be Compliant with the Rule of Law.” (n 173), 192, 193.

<sup>352</sup> Ivory, 556.

#### 2.1.4. Interplay and Complementarity

UNCAC's philosophy is that these mechanisms should work in tandem to prevent corrupt assets slipping through the cracks.<sup>353</sup> A single case can, in fact, involve all three. Imagine a scenario where a kleptocrat flees abroad. The victim state might initiate a criminal case (to establish the crime and, ideally, obtain a conviction in absentia or at least produce a judgment of wrongdoing). They might then simultaneously pursue a civil action in a foreign jurisdiction to freeze or recover property and engage diplomatically to negotiate the return of any assets seized by foreign authorities, perhaps agreeing on monitoring of the use of funds. These approaches can be mutually reinforcing. For instance, evidence from a criminal investigation might be used in a civil suit. Similarly, an administrative freeze can hold assets long enough for a criminal court order to arrive, and a civil confiscation obtained abroad can be part of a process of negotiated repatriation. UNCAC facilitates this interplay. It requires that MLA be afforded for criminal cases *and* for civil and administrative matters related to corruption (Article 46(1) explicitly mentions assistance in civil and administrative proceedings).<sup>354</sup> This is an important recognition that securing a criminal conviction is not always possible or necessary for states to cooperate on asset recovery. As long as the proceeding at hand is intended to recover the proceeds of corruption (whatever its legal nature), UNCAC encourages states to assist one another.<sup>355</sup>

Each mechanism also addresses the limitations of the others. Criminal proceedings carry the weight of moral condemnation and can disable the offender (through imprisonment or criminal sanctions), but they are slow and uncertain. If they fail, then, without civil or administrative alternatives, the assets would remain lost.<sup>356</sup> Civil or NCB proceedings can reach assets when criminals are at large or there is no evidence

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<sup>353</sup> The UNODC's own Legislative Guide to UNCAC (2006) likewise underscores that Chapter V is not limited to criminal confiscation. (Lawry-White, 141. Currie, Robert J. Article 43 In Cecily Rose, Kubiciel, Michael, Landwehr, Oliver (eds.). *The United Nations Convention Against Corruption: A Commentary*, Oxford: Oxford University Press, 2019, 417).

<sup>354</sup> Chrysikos, 445.

<sup>355</sup> Rose, Kubiciel, Landwehr, 10.

<sup>356</sup> Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13) 9,10.

for a criminal conviction. However, they may be viewed as less legitimate by some, and there may be enforcement issues in some jurisdictions. They are most effective when backed by an established criminal case or at least by solid evidence from criminal investigations.<sup>357</sup> Administrative actions or agreements are quick and flexible. However, to avoid arbitrariness, they often rely on the factual record established by either criminal investigations or civil findings. They also work best when eventually formalised (e.g., through a memorandum of understanding that stipulates the transfer of funds once legal processes have concluded).<sup>358</sup>

In terms of limits and concerns, criminal asset recovery is limited by fair trial requirements and by sovereignty. The latter means that one state cannot prosecute the officials of another without cooperation or extraterritorial jurisdiction.<sup>359</sup> Civil asset recovery is limited by the need to find a forum and sometimes by issues under private international law (e.g., standing or jurisdiction). A civil process may recover assets but cannot jail or directly punish offenders; it addresses the money, not the person's culpability.<sup>360</sup> Administrative measures are limited by trust; states have to trust each other's executive decisions. For this reason, it is often the case that an administrative freeze will need to be confirmed by a court order to make confiscation final, and negotiated returns come with conditions for accountability (to ensure the money is not stolen again).<sup>361</sup>

Within UNCAC's normative framework, all three mechanisms ultimately serve to advance 'recovery'; that is, the identification and return of assets by the necessary

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<sup>357</sup> Daniel and Maton, 248, 249.

<sup>358</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 12.

<sup>359</sup> France, Guilherme. "Non-Conviction-Based Confiscation as an Alternative Tool to Asset Recovery: Lessons and Concerns from the Developing World." Transparency International Anti-Corruption Helpdesk, 26 January 2022 [Transparency International Knowledge Hub | Non-conviction-based...](#) (accessed 2 December 2025).

<sup>360</sup> an der Does de Willebois, Emile & Brun, Jean-Pierre, 'Using Civil Remedies in Corruption and Asset Recovery Cases' (n 330), 615. Tromme, Mat. "Waging War against Corruption in Developing States: How Asset Recovery Can Be Compliant with the Rule of Law." (n 173), 190. Brun, 541.

<sup>361</sup> Jorge, 324, 325.

lawful means.<sup>362</sup> The convention's framers were pragmatic in this regard. They knew insisting on conviction would allow many corrupt officials off the hook; some would never be convicted, especially if they controlled their home state. A degree of legal pluralism is built into the treaty, encouraging common law and civil law systems to use what tools they have (be it in rem forfeiture, foreign judgment enforcement, or administrative seizure) to achieve the end goal. The interplay is also methodological. A robust asset-recovery effort might start with administrative detection (FIU flagging a suspicious account) and move to criminal inquiry (prosecutors gather evidence, charge the official). It might incorporate civil elements (a lawsuit to freeze assets in a third state that will not extradite) and end with an administrative or diplomatic arrangement (an agreement on how the returned funds will be monitored).<sup>363</sup> UNCAC envisages and legitimises each step in this process.

Since this thesis is focused on criminal asset recovery, this systemic view is important. Criminal asset recovery does not happen in isolation. It operates in the ecosystem that UNCAC created. A researcher or practitioner focusing on the criminal side must be aware of the complementary mechanisms. Civil suits might be the best option if a conviction is impossible, or administrative freezes might allow states to secure evidence for the criminal case. Even after a successful criminal confiscation, the actual handover of assets to the victim state may be governed by administrative agreements or understandings (for example, to ensure transparency). A narrow focus on criminal law without acknowledging these connections would miss crucial elements.

Conversely, it is important to also understand the primacy given to criminal law by the convention. UNCAC largely concerns criminalisation and law enforcement cooperation, explaining why, despite alternatives, the criminal justice route remains

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<sup>362</sup> The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard." (Art. 51, quoted and discussed). Rose, Cecily, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (n 79), 103. Claman, 333.

<sup>363</sup> Marcelo, Simeon. *The long road from Zurich to Manila: The recovery of the Marcos Swiss dollar deposits*, 106. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 12.

vital. The criminal route reclaims the profits of corruption, delivers social condemnation and, ideally, deters future corruption by officials.

## **2.2 Interim Conclusion**

This chapter has shown that UNCAC's strength lies in its recognition of legal pluralism in asset recovery. It does not bind states parties to a single method. Instead, it creates a legal environment where criminal, civil, and administrative mechanisms are complementary tools in the fight against corruption. Criminal asset recovery remains the core of UNCAC, offering moral clarity and legal certainty through prosecution and conviction. However, it is often slow, vulnerable to political obstacles, and ineffective when offenders are unreachable. Civil asset recovery, including NCB forfeiture, fills this gap by providing a lower-threshold legal avenue for reclaiming stolen wealth. Administrative measures also offer speed and flexibility, especially in fragile or transitional contexts, and they can be used to facilitate diplomatic arrangements or freeze assets pre-emptively.

Importantly, UNCAC validates each mechanism individually and promotes their use together, enabling hybrid approaches that are tailored to complex, cross-border cases. The convention thus provides a dynamic legal toolkit that reflects the reality of international cases of corruption; justice often requires the use of multiple pathways simultaneously. While each approach has limitations, relating to evidentiary burdens, sovereignty concerns and due process risks, UNCAC's legal structure and provisions for mandatory cooperation are designed to overcome these challenges through coordination, mutual assistance, and shared normative commitments. Ultimately, this multi-channel architecture reinforces UNCAC's fundamental goal, ensuring that stolen assets are returned, not lost in legal limbo.

## **3. UNCAC's Ambition and the Limits of Current Asset Recovery Mechanisms**

UNCAC's conceptual framework for asset recovery, reflected in Articles 51 to 59, establishes a powerful narrative. States have a duty to ensure that corruption does not pay, and that justice, both legal and economic, is served by returning wealth to those harmed. This narrative operates on multiple levels. It is legal, creating binding

obligations where once there were none. It is moral, treating the return of stolen assets as a question of right and wrong, a matter of repairing harm and rectifying global imbalances. And it is structural, aiming to reform international practices and systems that historically enabled the corrupt to hide with impunity.

This chapter has shown that UNCAC establishes asset recovery as a binding legal duty under international law, as reflected in its mandatory language. At the same time, it grapples with the practical realities of international asset recovery through carefully crafted flexibility. This chapter has shown how UNCAC serves restorative justice, prioritising victims by seeking to make them whole and by affirming the principle of restitution at a global level. It has a clear role in structural global justice as it attempts to redistribute ill-gotten wealth back to disenfranchised communities and correct the structural conditions that have favoured the corrupt. The convention's architecture was also considered to understand how imperative language and detailed provisions work together to challenge the entrenched norms of secrecy and non-cooperation that once shielded corrupt money. Finally, the convention's various mechanisms for asset recovery – criminal, civil, and administrative – were distinguished and their unique contributions and interdependence within the UNCAC paradigm outlined.

This conceptual exposition has provided a normative foundation for a thesis focusing on criminal asset recovery. It has underlined why criminal asset recovery matters, not only to punish wrongdoers, but to fulfil an international commitment and deliver justice to victimised societies. It also highlighted how criminal asset recovery operates within a wider context, keeping in view the preventive measures that feed into criminal cases (like bank transparency), the cross-border cooperation that is essential for any criminal case to reach stolen assets abroad, and the alternatives that operate alongside criminal prosecution. Understanding UNCAC's framework ensures that scholarly inquiry into criminal asset recovery is grounded in the broader aims of the regime, ensuring that there is no safe haven for corrupt wealth and that the legal process results in the repatriation of assets to their rightful owners.

UNCAC has set a global standard and has transformed asset recovery from a diplomatic courtesy into a legal obligation grounded in principles of justice. As this analysis has shown, however, embedding a principle in law is only the start. The effectiveness and fairness of criminal asset recovery will depend on how well these UNCAC principles are implemented and reconciled with domestic legal systems. Challenges such as having to meet a heavy evidentiary burden, differences in legal frameworks, political hesitance, and capacity constraints remain significant. The convention's lofty language sometimes meets hard reality, revealing gaps between promise and practice. A critical examination of criminal asset recovery must, therefore, tackle not only doctrinal questions of law, but also questions of compliance, enforcement, and the balancing of cooperative duties with sovereign rights.

The UNCAC framework provides an invaluable reference point and impetus. It gives reformers and practitioners a common language and set of tools to press for action. It enshrines the idea that recovering stolen assets is just as important as prosecuting the initial act of corruption. Indeed, the two go hand in hand to ensure justice. For the scholar, UNCAC offers a treasure trove of legal provisions to analyse and a cautionary tale of multilateral compromise. It shows the high-water mark of consensus (all states agreeing that corruption proceeds should be returned) and the concessions made (flexible wording and conditional clauses) that temper that consensus. This duality will inform any advanced analysis of criminal asset recovery, and the binding duty and moral clarity UNCAC introduced should be celebrated, even as the residual ambiguities and persistent implementation failures remain subject to critique.

In conclusion, UNCAC's conceptualisation of asset recovery provides a cohesive, if complex, vision. Asset recovery is a duty owed to the international community and to victims. It is a means of restoring trust and resources, and it is part of a larger push toward a more just international order where crime does not pay and where law bends towards justice even across borders. This vision now guides domestic laws and international cooperation. As the focus of this thesis is on criminal asset recovery, UNCAC is a reminder that such efforts are not simply technical exercises in law

enforcement. They are part of a larger project of justice and fairness, one that demands curiosity, and a constant commitment to bridging the gap between the legal framework and the lived reality of corruption and recovery.

## **Part IV: The Rise of NTRs**

Over the past two decades NTRs have emerged as a central method of enforcing corporate anti-corruption laws. NTRs, for example, DPAs, NPAs, leniency arrangements, and similar negotiated settlements, allow corporations accused of offences to resolve criminal or administrative allegations without proceeding to a full trial and securing a conviction. The increasing use of NTRs represents a fundamental shift in the architecture of corporate accountability for bribery offences. Once largely a US-based phenomenon, NTRs have been adopted in a growing number of jurisdictions, including major economies and emerging markets. The rise of NTRs raises important questions about the balance between efficiency, deterrence, transparency, and justice in modern anti-corruption enforcement. Understanding the popularity of these mechanisms is thus essential to gaining a sense of the evolving landscape of global corporate liability and regulatory enforcement.

This part explores the historical origins, national motivations, legal frameworks, and broader implications of NTRs in the context of anti-corruption enforcement. Taking a primarily conceptual and comparative approach, it draws upon a detailed examination of enforcement trends, legal reforms, and settlement practices in common law and civil law jurisdictions. The analysis traces the bottom-up evolution of NTRs, beginning with national responses to major corporate scandals and enforcement challenges. It then turns to how specific legal frameworks (in the US, UK, France, and Switzerland) operationalise NTRs. Finally, it critically engages with normative concerns regarding fairness, international cooperation, and the prospects for harmonisation in global anti-corruption enforcement.

### **1. National Adoption of NTRs Contexts and Drivers**

This chapter examines why and how various national legal systems, in major and emerging economies, embraced NTRs without any clear international legal mandate to do so.

## 1.1 Historical Context and Catalysts

Over the past two decades NTRs have transformed how anti-corruption laws are enforced and have become a popular alternative to full trials in cases of corporate bribery.<sup>364</sup> Broadly defined, an NTR is “any agreement between a legal or natural person and an enforcement authority to resolve criminal matters without a full court proceeding, based on an agreement... (that) can also be used in administrative or civil proceedings”.<sup>365</sup> In practice, the term encompasses mechanisms like DPAs, NPAs, plea bargains, and other negotiated settlements that avert a trial on the merits. In many jurisdictions these tools were virtually unheard of until the late 20th century but by 2019 at least fifteen signatories of the OECD Anti-Bribery Convention had used some form of NTR to resolve a foreign bribery case.<sup>366</sup> The US pioneered the modern use of corporate NTRs and today resolves an estimated 96% of its foreign bribery enforcement actions through such agreements.<sup>367</sup> Other major economies have followed suit, for example, the UK and Germany have each resolved roughly 79% of their foreign bribery cases via non-trial dispositions.<sup>368</sup> Collectively, the US, UK, and Germany account for the bulk (nearly 80%) of foreign bribery enforcement actions worldwide and an even larger share (almost 90%) of all NTRs concluded since the OECD Anti-Bribery Convention came into force.<sup>369</sup>

### 1.1.1 Corporate Scandals as Catalysts for Reform

Many watershed corporate bribery scandals in the 1990s and 2000s exposed weaknesses in traditional enforcement efforts and catalysed the adoption of NTR mechanisms.<sup>370</sup> In the US, the Arthur Andersen case in 2002 (involving the firm’s

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<sup>364</sup> Arlen, Jennifer *The Potential Promise and Perils of Introducing DPAs Outside the U.S.* (2019) 1-2. Bozbayındır, *The Role of the Judge in European Plea Bargaining*, (n 36) 203.

<sup>365</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16) 11.

<sup>366</sup> *Ibidem*, 15.

<sup>367</sup> *Ibidem*, 13. Hickey, Samuel J. “Remediation in Foreign Bribery Settlements: The Foundations of a New Approach.” (n 6), 375.

<sup>368</sup> Hickey, Samuel J. “Remediation in Foreign Bribery Settlements: The Foundations of a New Approach.” (n 6).

<sup>369</sup> *Ibidem*.

<sup>370</sup> Lüth, Felix, 'Corporate Non-Prosecution Agreements as Transnational Human Problems: Transnational Law and the Study of Domestic Criminal Justice Reforms in a Globalised World' (2021) 12 *Transnat'l Legal Theory*, 317.

obstruction of justice in the Enron scandal) became a cautionary tale. The conviction of the Big Five accounting firm led to its collapse, causing thousands of job losses, before the conviction was later overturned.<sup>371</sup> This so-called ‘Arthur Andersen effect’ – the realisation that an uncompromising prosecution of a company could be the demise of a corporation – led US prosecutors to seek alternative resolution tools to punish wrongdoing without obliterating corporations.<sup>372</sup>

In the early 2000s, the US Department of Justice (DOJ) increasingly turned to DPAs and NPAs as a means to hold companies accountable while avoiding the collateral damage of a conviction.<sup>373</sup> Requiring corporate reform and imposing penalties in negotiated agreements, with prosecution resumed if terms are breached, allowed the DOJ to achieve deterrence and remediation without a public trial or formal guilty verdict.<sup>374</sup> The proliferation of US corporate DPAs after Arthur Andersen’s demise was a powerful example of the utility of NTRs in high-stakes corporate cases.<sup>375</sup>

Elsewhere, major corruption scandals spurred similar legal innovation. In the UK, the BAE Systems case (a multi-jurisdictional bribery investigation in the mid-2000s) exposed the difficulty faced by the Serious Fraud Office (SFO) in securing corporate convictions under UK law.<sup>376</sup> The eventual 2010 settlement of the BAE case was criticised for its leniency and underscored the need for a more structured settlement mechanism.<sup>377</sup> This and similar cases built momentum for the UK to adopt its own

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<sup>371</sup> Levin Center at Wayne Law, ‘Congress and the Enron Scandal’ (Levin Center) <https://levin-center.org/what-is-oversight/portraits/congress-and-the-enron-scandal/#:~:text=Enron%20CEO%20Convicted&text=Arthur%20Andersen%20was%20convicted%20by,of%20two%20years%20of%20probation> accessed 11 April 2025.

<sup>372</sup> Davis, Frederick T. “Judicial Review of Deferred Prosecution Agreements: A Comparative Study.” (n 34), 760.

<sup>373</sup> Lüth, Felix, ‘Corporate Non-Prosecution Agreements as Transnational Human Problems: Transnational Law and the Study of Domestic Criminal Justice Reforms in a Globalised World’ (n 370), 317.

<sup>374</sup> Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47), 41, 42.

<sup>375</sup> Hock, Branislav. “Policing Corporate Bribery: Negotiated Settlements and Bundling.” (n 15), 950, 957.

<sup>376</sup> Einbinder, Fred. “Borrowings and Boomerangs: A Comparative Law Perspective on Resonance in Transnational Anti-Corruption Law Enforcement.” (n 36), 137, 148, 149.

<sup>377</sup> Hickey, Sam, ‘Compensating the Victims of Foreign Bribery’ (2025) 3 *Transnational Criminal Law Review* 183, 184.

NTR regime.<sup>378</sup> In 2013, the UK Parliament introduced DPAs through the Crime and Courts Act, influenced by US practice and a desire to facilitate corporate accountability without lengthy trials.<sup>379</sup> By 2014, the UK's DPA system had become operational, filling a gap in the country's enforcement toolkit.<sup>380</sup> Notably, the first UK DPA (with ICBC Standard Bank in 2015) arose from a bribery case that likely would have been untenable to prosecute to conviction under the law existing at the time.<sup>381</sup> Essentially, a high-profile enforcement challenge directly prompted the UK's embrace of NTRs as a pragmatic solution.<sup>382</sup>

In France, a series of corporate misconduct incidents and the aggressive prosecution of French companies by US authorities were the impetus for reform.<sup>383</sup> Domestically, public outcry over political corruption (e.g. the Cahuzac scandal in 2013, involving a budget minister's secret offshore accounts) pushed the government of President François Hollande to strengthen France's anti-corruption framework.<sup>384</sup> Externally, cases like the US prosecution of Alstom (a French power company) for foreign bribery revealed 'both the weakness of French oversight and the aggressiveness of American enforcement'.<sup>385</sup> Several French multinationals, including Alstom, Total, Alcatel-Lucent, Technip, and BNP Paribas, were investigated and entered into DPAs as a form of plea agreement with US authorities, even as French prosecutors struggled to respond.<sup>386</sup> This eroded confidence in France's ability to police its own companies and

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<sup>378</sup> *Ibidem*, 149.

<sup>379</sup> Bu, Qingxiu. "The Viability of Deferred Prosecution Agreements (DPAs) in the United Kingdom: The Impact on Global Anti-Bribery Compliance." (n 50), 185.

<sup>380</sup> *Ibidem*, 174.

<sup>381</sup> Palmer, Axel and Nicholas Ryder, *Deferred prosecutions and justice: a whodunnit?* In '*Research Handbook on Plea Bargaining and Criminal Justice*' (Edward Elgar 2024), 249.

<sup>382</sup> *Ibidem*.

<sup>383</sup> Einbinder, Fred. "Borrowings and Boomerangs: A Comparative Law Perspective on Resonance in Transnational Anti-Corruption Law Enforcement." (n 36), 161. Keith, Norm, and Justine Reisler. "The New Canadian DPA Regime: An International Comparative Analysis." *Criminal Law Quarterly* 67 (2019), 330. Griffith, Sean J., and Lee, Thomas H. "Toward an Interest Group Theory of Foreign Anti-Corruption Laws." *University of Illinois Law Review* (2019), 1260.

<sup>384</sup> Einbinder, Fred. "Borrowings and Boomerangs: A Comparative Law Perspective on Resonance in Transnational Anti-Corruption Law Enforcement." (n 36), 161.

<sup>385</sup> *Ibidem*, 152, 153

<sup>386</sup> Einbinder, Fred. "Borrowings and Boomerangs: A Comparative Law Perspective on Resonance in Transnational Anti-Corruption Law Enforcement." (n 36), 151. Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 798, 799.

stirred resentment at the outsourcing of French corporate accountability to US enforcers.<sup>387</sup>

In direct reaction, France enacted the Loi Sapin II in 2016. This established the Convention Judiciaire d'Intérêt Public (CJIP), a form of DPA under French law.<sup>388</sup> Lawmakers explicitly designed the CJIP as a tool to 'reclaim enforcement' of transnational corruption cases and to 'avoid the fines from flowing to foreign authorities,' in the words of one French parliamentarian.<sup>389</sup> In short, high-profile foreign enforcement actions against French companies were a catalyst for France to introduce its own NTRs, allowing French authorities to resolve such cases at home rather than ceding the field to, for example, the US DOJ.

In emerging economies, domestic corruption scandals have likewise accelerated the adoption of NTR-like tools. A prominent example is Brazil's sweeping 'Operation Car Wash' (Lava Jato) investigation (2014–2018), which uncovered massive bribery involving the state oil company Petrobras, construction giant Odebrecht, and numerous other firms.<sup>390</sup> Brazil's legal system has historically had no tradition of plea bargaining or corporate leniency in corruption cases.<sup>391</sup> However, as Lava Jato expanded, Brazilian prosecutors embraced leniency agreements and plea deals to crack cases that would have taken years to investigate and gather evidence.<sup>392</sup> In fact, Odebrecht's eventual global settlement or plea agreement in 2016 resulted in at least USD 3.5 billion in penalties and was negotiated jointly with US and Swiss authorities,

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<sup>387</sup> Einbinder, Fred. "Borrowings and Boomerangs: A Comparative Law Perspective on Resonance in Transnational Anti-Corruption Law Enforcement." (n 36), 158.

<sup>388</sup> Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique. (Law No. 2016-1691 of 9 December 2016 on Transparency, the Fight against Corruption and the Modernisation of Economic Life). Bohnert, Jean-François. 35.

<sup>389</sup> Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47), 125.

<sup>390</sup> Einbinder, Fred. "Borrowings and Boomerangs: A Comparative Law Perspective on Resonance in Transnational Anti-Corruption Law Enforcement." (n 36), 154.

<sup>391</sup> *Ibidem*, 154. Sanchez-Badin, Michelle R., and Morosini, Fabio. "Symposium on New Directions in Anti-Corruption Law: Anticorruption in Brazil: From Transnational Legal Order to Disorder." *AJIL Unbound* 113 (2019), 328.

<sup>392</sup> Luz, Reinaldo Diogo, and Spagnolo, Giancarlo. "Leniency, Collusion, Corruption, and Whistleblowing." *Journal of Competition Law & Economics* 13 (2017), 729.

marking an unprecedented international plea deal.<sup>393</sup> Brazil received 80% of the USD 3.5 billion fine, with the US and Switzerland each taking 10%, reflecting their shared jurisdiction.<sup>394</sup> This outcome demonstrated to Brazilian officials that adopting a US-style incentives approach could yield results that had previously been unthinkable: holding companies accountable.

Brazil's 2013 Clean Company Act had already paved the way for this approach by allowing administrative leniency agreements with companies, and Lava Jato was the proving ground.<sup>395</sup> The Odebrecht and Petrobras scandals thus directly influenced Brazil to operationalise NTRs. By mirroring the US model, Brazilian prosecutors were able to 'partake in corporate prosecutions that had previously happened (only) through the extraterritorial application of US laws'.<sup>396</sup> Extraordinary corruption cases in Brazil forced rapid innovation, and plea and leniency mechanisms were imported into a legal culture that had traditionally disfavoured negotiated justice.<sup>397</sup>

In short, high-profile scandals, whether purely domestic or transnational, have prompted governments globally to consider alternatives to protracted trials. They create public pressure to strengthen enforcement and practical incentives for quicker, more cooperative resolution of corporate misconduct.

### 1.1.2 Efficiency Pressures and Enforcement Needs

Beyond individual scandals, a more systemic driver of NTRs has been the pressure to enforce anti-corruption laws more efficiently and effectively.<sup>398</sup> Traditional

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<sup>393</sup> U.S. Department of Justice, *Odebrecht and Braskem Plead Guilty and Agree to Pay at Least \$3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History* (DoJ Office of Public Affairs, 21 December 2016) <https://www.justice.gov/archives/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve> accessed 12 June 2024.

<sup>394</sup> *Ibidem*.

<sup>395</sup> Luz, Reinaldo Diogo, and Spagnolo, Giancarlo. "Leniency, Collusion, Corruption, and Whistleblowing," 745.

<sup>396</sup> Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47), 109.

<sup>397</sup> *Ibidem*, 128, 129.

<sup>398</sup> Manea, Alexandra. "International, European and National Developments in Asset Recovery." (n 181), 900, 901.

prosecutions of complex financial crimes are notoriously slow, resource-intensive, and uncertain in outcome.<sup>399</sup> By the late 2000s, mounting cases of corporate misconduct had strained the investigative and trial capacities of enforcement agencies worldwide.<sup>400</sup> NTRs were a pragmatic response to these efficiency challenges, a means to expedite cases that might otherwise be bogged down in court for years, or never be brought to trial because of insurmountable evidentiary hurdles.<sup>401</sup>

One root of this pressure was the success of international anti-bribery frameworks in ramping up scrutiny of corporate conduct. The OECD Anti-Bribery Convention (1997) and UNCAC obliged states to criminalise foreign bribery and related offences.<sup>402</sup> One hundred and ninety states have become parties to UNCAC.<sup>403</sup> However, passing laws was the easy part; enforcing them proved far more challenging.<sup>404</sup> This enforcement gap highlighted a dilemma: how to achieve more frequent and timely corporate accountability while keeping within limited budgets and reasonable timeframes.

Non-trial settlements offered a solution by allowing enforcement agencies to leverage corporate cooperation to streamline cases.<sup>405</sup> Rather than spending months or years litigating, prosecutors could encourage companies to voluntarily investigate and disclose wrongdoing. Penalties and compliance measures could then be negotiated in exchange for avoiding a trial.<sup>406</sup> In the US, this approach led to a dramatic increase in enforcement productivity, with the DOJ and SEC resolving dozens of cases per year

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<sup>399</sup> Lord, Nicholas. "Regulating Transnational Corporate Bribery: Anti-Bribery and Corruption in the UK and Germany." *Crime, Law and Social Change* 60 (2013), 134, 135.

<sup>400</sup> Hock, Branislav. "Policing Corporate Bribery: Negotiated Settlements and Bundling." (n 15), 962.

<sup>401</sup> Lord, Nicholas. "Prosecution Deferred, Prosecution Exempt: On the Interests of (In)Justice in the Non-Trial Resolution of Transnational Corporate Bribery." *British Journal of Criminology* 63, Nr. 4 (2023), 849.

<sup>402</sup> Bismuth, Régis, Dunin-Wasowicz, Jan and Nichols, Philip M., *The Transnationalization of Anti-Corruption Law: An introduction and overview*, (n 266) 14, 15.

<sup>403</sup> UNCAC (116).

<sup>404</sup> Denler, Haley Peterson. "The OECD Anti-Bribery Convention's Necessary Dual Commitments: Substance and Enforcement." *Georgetown Journal of International Law* 53 (2022), 451, 452, 545, 546. Heimann, Fritz, and Pieth, Mark, 'Confronting Corruption: Past Concerns, Present Challenges, and Future Strategies' (n 132), 103, 104, 106.

<sup>405</sup> Oded, Sharon. "Coughing Up Executives or Rolling the Dice: Individual Accountability for Corporate Corruption." *Yale Law & Policy Review* 35 (2016), 58, 59.

<sup>406</sup> *Ibidem*, 57.

via DPAs or NPAs, extracting significant fines; by contrast, full trials for foreign bribery were exceedingly rare.<sup>407</sup> The efficiency of this approach was evident. For instance, since the OECD Convention's entry into force, the US had, by 2018, imposed roughly USD 14.9 billion in fines for foreign bribery, 95% of which were obtained through out-of-court resolutions.<sup>408</sup> In short, settlement mechanisms were delivering results, resolving cases quickly, which traditional prosecution alone could not match.

The *Car Wash* case, mentioned above, offers a good example of national authorities having pragmatic reasons to emulate these resolution methods. With hundreds of targets to pursue, Brazil's prosecutors embraced plea deals and leniency accords out of sheer necessity; it would have taken many years to resolve the sprawling Petrobras/Odebrecht cases through traditional trials and with no guarantees.<sup>409</sup> The success of those deals in uncovering further evidence and securing convictions was proof that negotiated resolutions could enhance, rather than hinder, overall enforcement outcomes.

Efficiency considerations also played a role in the adoption of NTRs in Europe. The UK's decision to implement DPAs was partly driven by the recognition that its SFO was overmatched by the scale and complexity of cases of global fraud and corruption.<sup>410</sup> A 2011 public consultation noted that prosecutors often avoided charging corporations entirely because trials were so difficult under the UK's identification doctrine; a DPA regime would allow more cases to be brought and swiftly resolved in the public interest.<sup>411</sup> Similarly, France's Sapin II reforms in 2016

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<sup>407</sup> Palmer, Axel and Nicholas Ryder, *Deferred prosecutions and justice: a whodunnit?* In *Research Handbook on Plea Bargaining and Criminal Justice*, (n 381), 246.

<sup>408</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 14,15.

<sup>409</sup> Grégoire Mégevand, 'Accords hors procès avec des entreprises: La lutte contre la corruption transnationale entre concurrence et coopération' (2023) 1 *ZStrR* 81, discussing the Odebrecht/Braskem resolutions in the wider *Lava Jato* context and noting both the multiplicity of proceedings from 2014 onward and that judicial cooperation between Brazil and Switzerland was 'particulièrement intense et décisive', while coordinated settlements permitted a 'finalisation rapide et efficace' of the pending proceedings. Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47), 108, 129.

<sup>410</sup> Belch, Gordon. "An Analysis of the Efficacy of the Bribery Act 2010." *Aberdeen Student Law Review* 5 (2014), 144.

<sup>411</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 53.

responded both to external pressures and to inefficiencies in the status quo. Prior to 2016, France had difficulties convicting any major company for foreign bribery.<sup>412</sup> Investigations had dragged on interminably, with few results.<sup>413</sup> CJIPs offered a way to finally resolve cases like those involving Alstom or Société Générale within a predictable timeframe and with concrete outcomes (fines, monitored compliance) rather than uncertain trials. Indeed, within two years of Sapin II, France, in coordination with authorities in the US and UK, had concluded CJIPs with Société Générale (2018) and Airbus (2020), cases that would likely have been challenging to finalise so efficiently without the new settlement procedure.<sup>414</sup>

Multi-jurisdictional global settlements have further highlighted the efficiency of NTRs. Complex bribery schemes often implicate companies across multiple states, making coordinated enforcement essential.<sup>415</sup> The traditional model, parallel prosecutions in each state, risks duplication, inconsistent outcomes, and breaches of the principle of *ne bis in idem* (double jeopardy).<sup>416</sup> By contrast, negotiated resolutions can be coordinated ex ante among enforcement agencies to allocate responsibilities and avoid overlap. The Société Générale case in 2018 exemplifies this.<sup>417</sup> US and French prosecutors negotiated in parallel and reached common terms, resulting in the bank paying USD 585 million, split equally between France and the US. The DOJ even refrained from imposing its own compliance monitor on Société Générale, deferring to the French anti-corruption agency for remediation oversight, a concession that facilitated resolution.<sup>418</sup> Likewise, the tri-national Airbus settlement in 2020 was achieved via coordinated agreements

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<sup>412</sup> Einbinder, Fred. "Borrowings and Boomerangs: A Comparative Law Perspective on Resonance in Transnational Anti-Corruption Law Enforcement." (n 36), 150.

<sup>413</sup> *Ibidem*, 150.

<sup>414</sup> Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47), 122, 125. Igra, Daniel. "Global Spread of DPA Regimes: What They Mean for Multinationals." *International In-house Counsel Journal* 13 (2020), 4. Boakye, Derrick, Siaw, Daniel and Sarpong, David. "The Airbus Bribery Scandal: A Collective Myopia Perspective." *European Management Review* 19 (2022), 654.

<sup>415</sup> Einbinder, Fred. "Borrowings and Boomerangs: A Comparative Law Perspective on Resonance in Transnational Anti-Corruption Law Enforcement." (n 36), 154.

<sup>416</sup> Holtmeier, Jay. "Cross-Border Corruption Enforcement: A Case for Measured Coordination among Multiple Enforcement Authorities." *Fordham Law Review* 84 (2015), 522. Spahn, Elizabeth K. "Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention." (n 86), 50.

<sup>417</sup> Feeley, Matthew J. "In Search of Guiding Principles of Transnational Anti-Corruption Investigations and Resolutions." *The International Lawyer* 54 (2021), 293.

<sup>418</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16) 29, 212.

(DPAs and a CJIP), with the UK, France, and the US agreeing on their share of total penalties, eliminating the need for multiple trials in different venues.<sup>419</sup>

Such outcomes demonstrate that NTRs offer a flexible framework for multi-jurisdictional case management. Authorities can share evidence, divide jurisdiction, and settle on penalties in a cooperative manner.<sup>420</sup> This is far more efficient than each state independently prosecuting the corporation (which could result in three punishments for the same conduct or, conversely, result in companies escaping liability in some jurisdictions on legal technicalities). Coordinating the USD 3.9 billion in fines in the Airbus case across three states would have been a challenge without non-trial settlements and would likely have led to years of litigation and diplomatic friction instead.<sup>421</sup> Recognising this, many states have seen the advantage of adopting NTR frameworks to better position themselves in joint investigations and to credibly assert jurisdiction in cases of global corruption.<sup>422</sup>

Improving enforcement efficiency and effectiveness has been a key factor in the spread of NTRs.<sup>423</sup> These mechanisms allow agencies to handle a greater number of complex cases swiftly and to cooperate across borders in pursuing corporate crime. The practical impact of NTRs is most clearly visible in the volume of cases concluded through them. OECD data cited in the literature indicate that a very large proportion of foreign bribery cases have been resolved through NTRs, reflecting the increasing importance of negotiated mechanisms in the enforcement of transnational corporate corruption.<sup>424</sup> There are still concerns about the reduced role of courts, but from a

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<sup>419</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 807, 808. Einbinder, Fred. "Borrowings and Boomerangs: A Comparative Law Perspective on Resonance in Transnational Anti-Corruption Law Enforcement." (n 36), 139, 155.

<sup>420</sup> Einbinder, Fred. "Borrowings and Boomerangs: A Comparative Law Perspective on Resonance in Transnational Anti-Corruption Law Enforcement." (n 36), 154.

<sup>421</sup> *Ibidem*, 155, 156. Holtmeier, Jay. "Cross-Border Corruption Enforcement: A Case for Measured Coordination among Multiple Enforcement Authorities." (n 416), 522.

<sup>422</sup> Lüth, Felix, 'Corporate Non-Prosecution Agreements as Transnational Human Problems: Transnational Law and the Study of Domestic Criminal Justice Reforms in a Globalised World' (n 370), 318.

<sup>423</sup> *Ibidem*, 316

<sup>424</sup> Capus, 'Le tribunal pénal: un élément perturbateur dans le flux fluide du droit transnational de la lutte anticorruption?' (2025) 1 *Journal du Droit Transnational*, 14. Capus, Nadja and Martin Chipofya.

historical perspective, it is clear that many jurisdictions have adopted NTRs as a pragmatic solution to enforcement challenges and as a means to achieve credible anti-corruption outcomes despite expanding caseloads and globalised corporate misconduct.

### **1.1.3 Absence of an International Mandate and Bottom-Up Development**

Crucially, the global proliferation of NTRs has not been driven by a formal international legal mandate. There is no universal treaty or global authority that explicitly requires states to use DPAs or similar mechanisms in corruption cases. Neither the UNCAC nor the OECD Anti-Bribery Convention, the two leading international instruments in this domain, mentions or obliges the use of negotiated settlements for corporate offenders.<sup>425</sup> UNCAC does encourage states parties to consider limiting the punishments of those who cooperate with law enforcement (art 37) and to permit discretion in prosecution (art 30(7)). However, these provisions fall far short of prescribing the NTR models that have been developed.<sup>426</sup>

The OECD Convention, for its part, mandates effective and dissuasive enforcement of provisions to address foreign bribery but leaves the procedure to each state's discretion.<sup>427</sup> In fact, a core principle of the OECD Convention is that investigations and prosecutions should not be influenced by considerations of national economic interest (art 5). This implicitly assumes prosecution is the default mode of enforcement.<sup>428</sup> Early monitoring reports under the convention did not include calls for settlement procedures; if anything, they focused on ensuring states had the basic

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Prosecuting Strategic Corruption: Impact on the Integrity of Criminal Justice and Potential Risks of Non-Trial Resolutions in Sub-Saharan African States (2025) *Public Integrity*, 6.

<sup>425</sup> Ivory, Radha. "The Concept of International Law Reform and the Case of Negotiated Settlements in Foreign Bribery Matters." *European Journal of International Law* 35 (2024), 882-885. Clancy, Áine. "A Better Deal? Negotiated Responses to the Proceeds of Grand Corruption." *Criminal Law Forum* 33 (2022), 155.

<sup>426</sup> Clancy, Áine. "A Better Deal? Negotiated Responses to the Proceeds of Grand Corruption." (n 425), 155.

<sup>427</sup> Davis, Kevin E. *Between Impunity and Imperialism: The Regulation of Transnational Bribery*. New York: Oxford University Press, 2019, 27.

<sup>428</sup> Spahn, Elizabeth K. "Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention." (n 86), 26.

ability to prosecute companies (e.g., by enacting corporate liability).<sup>429</sup> Thus, there was no top-down directive for states to implement DPAs, NPAs, or other NTR formats.

Instead, the growth of NTRs has been a bottom-up, iterative process, guided by informal learning and normative diffusion among jurisdictions.<sup>430</sup> The US model has been influential in terms of enforcement practice and the extraterritorial reach of US laws like the FCPA, which other states have emulated to varying degrees.<sup>431</sup> As discussed, US enforcement actions against foreign companies created an external impetus for change in France and Brazil. US authorities also actively engaged with counterparts abroad; for example, DOJ and SEC officials have routinely shared expertise on corporate settlement practices through meetings of the OECD Working Group on Bribery and in bilateral dialogues.<sup>432</sup>

By 2019, the OECD could report that fifteen out of the forty-four parties to its Anti-Bribery Convention had employed NTR mechanisms in at least one foreign bribery case.<sup>433</sup> This represented a remarkable shift from a decade prior, when such mechanisms were rare or non-existent outside the US. States implemented NTRs via different routes, some through legislation (e.g., UK, France, Canada), others through policy or prosecutorial practice (e.g., Italy's extension of *patteggiamento* and Brazil's leniency agreements under existing law). Each adopted these agreements largely for their own practical reasons, as described above, but the cumulative trend reflects mutual influence and common problem-solving rather than coincidence.<sup>434</sup>

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<sup>429</sup> Ivory, Radha, and Søreide, Tina. "The International Endorsement of Corporate Settlements in Foreign Bribery Cases." (n 18), 954.

<sup>430</sup> Lüth, Felix, 'Corporate Non-Prosecution Agreements as Transnational Human Problems: Transnational Law and the Study of Domestic Criminal Justice Reforms in a Globalised World' (n 370), 319. Heaston, William R. "Clickbait Compliance and Transnational Corruption." *University of Dayton Law Review* 48 (2023), 10. Lord, Nicholas. "Regulating Transnational Corporate Bribery: Anti-Bribery and Corruption in the UK and Germany." (n 399), 139.

<sup>431</sup> Hickey, Samuel J. "Remediation in Foreign Bribery Settlements: The Foundations of a New Approach." (n 6), 373, 374. Rose, Cecily, 'International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems' (n 79), 65.

<sup>432</sup> Hickey, Samuel J. "Remediation in Foreign Bribery Settlements: The Foundations of a New Approach." (n 6), 78.

<sup>433</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 13.

<sup>434</sup> *Ibidem*, 4, 17-19, 231.

Soft law and international policy networks have begun to acknowledge this trend, albeit after the fact. In 2019, the OECD published a landmark study, *Resolving Foreign Bribery Cases with NTRs*, which effectively codified the emerging global practice and analysed various national approaches.<sup>435</sup> This report noted that the term NTR was itself a recent coinage, reflecting a broad category of settlement mechanisms outside of a full trial on the merits.<sup>436</sup> This report did not constitute a mandate to conclude NTRs but provided guidance and best practices, indicating a measure of international validation of NTRs. In 2021, the OECD Council revised its Anti-Bribery Recommendation to explicitly address the use of settlements, urging states to ensure transparency and consistency in their NTR practices and to consider factors like corporate compliance efforts in resolving cases.<sup>437</sup> This marked the first time an official international policy document had mentioned NTRs in the anti-corruption context. Despite these developments, international efforts lagged national innovation. Essentially, practice ran ahead of doctrine, states adopted NTRs out of necessity and opportunity, and only later did international bodies catch up to provide a surrounding framework.<sup>438</sup>

The absence of a binding international mandate for NTRs is noteworthy. It underscores that each nation's choice to introduce such mechanisms was voluntary and pragmatic and tailored to its legal system and enforcement needs. In some cases, international conventions played an indirect role by spurring tougher anti-corruption laws generally. For instance, Latin American states accessing the OECD or complying with the convention used that as political cover to overhaul their laws on corporate liability.<sup>439</sup> Even then, the inclusion of settlement procedures was a national decision.

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<sup>435</sup> *Ibidem*, 3, 4.

<sup>436</sup> *Ibidem*, 17.

<sup>437</sup> OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (adopted 26 November 2021) OECD/LEGAL/0378, Sections XVII-XVIII.

<sup>438</sup> Clancy, Áine. "A Better Deal? Negotiated Responses to the Proceeds of Grand Corruption." (n 425), 155. Lüth, Felix, 'Corporate Non-Prosecution Agreements as Transnational Human Problems: Transnational Law and the Study of Domestic Criminal Justice Reforms in a Globalised World' (n 370), 319.

<sup>439</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 13, 14.

In the case of Canada, the country had long been hesitant to allow DPAs, but it enacted a DPA regime in 2018 after consulting stakeholders and observing the global trend (and prompted by a high-profile debate over the SNC-Lavalin case).<sup>440</sup> This decision came not from any treaty obligation but from Canada's assessment of its own enforcement toolkit gaps.<sup>441</sup>

Likewise, expedited procedures have been used to resolve corporate cases in Switzerland, in the form of *ordonnances pénales* (penal orders), and Germany, in the form of administrative fines. These were built on domestic legal traditions rather than external directives.<sup>442</sup> In Switzerland, corporate criminal liability was introduced in 2003 under pressure to align with OECD standards, but the law left the procedure to be governed by the existing criminal process.<sup>443</sup> Swiss prosecutors then began using summary penalty orders of their own accord to conclude corporate bribery cases efficiently. For example, Alstom's Swiss subsidiary was subject to a CHF 2.5 million fine in 2011 and a CHF 36 million confiscation via such an order after a three-year investigation.<sup>444</sup> No international rule prescribed this. It was simply a realistic application of domestic procedure to handle a major case without a trial.

The historical evolution of NTRs in the anti-corruption field has been driven by the confluence of high-impact events (corporate scandals), practical enforcement considerations (efficiency and multi-jurisdictional management), and policy diffusion across borders, all in the absence of any explicit international legal requirement. NTRs grew from the ground up as a legal innovation. As detailed in the next section, nations

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<sup>440</sup> Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47), 122. Igra, Daniel. "Global Spread of DPA Regimes: What They Mean for Multinationals." (n 414), 5.

<sup>441</sup> Keith, Norm, and Justine Reiser. "The New Canadian DPA Regime: An International Comparative Analysis." (n 383), 309.

<sup>442</sup> Lord, Nicholas. "Responding to Transnational Corporate Bribery Using International Frameworks for Enforcement: Anti-Bribery and Corruption in the UK and Germany." *Criminology & Criminal Justice* 14 (2014), 109. Lord, Nicholas. "Regulating Transnational Corporate Bribery: Anti-Bribery and Corruption in the UK and Germany." (n 399), 134. Langer, Máximo. "Plea Bargaining, Conviction Without Trial, and the Global Administratization of Criminal Convictions." *Annual Review of Criminology* 4 (2021), 379.

<sup>443</sup> Qingxiu Bu, Chinese multinational corporations' obligations in the global anti-corruption arena: Levelling the playing field in Africa (n 266), 204.

<sup>444</sup> Götz Staehelin, Claudia, and Lembo, Saverio. 66.

adopted these tools primarily to serve national interests and better achieve their own law enforcement and policy goals in an increasingly challenging anti-corruption environment. Far from being imposed by treaty, NTRs represent a creative, sometimes ad hoc response that has coalesced into a global trend.

## **1.2 National Interests and Policy Choices**

This section examines the motivations rooted in national interests for adopting NTR mechanisms. While the process has been unique to each state, several common themes are evident. Officials have seen NTRs as a useful way to expedite justice, reduce costs, and increase enforcement impact in complex cases. They also see NTRs as tools to encourage self-policing and cooperation by corporations, which ultimately strengthens enforcement capability.<sup>445</sup> At a broader level, adopting NTRs can protect or advance certain national interests, preserving the stability of important companies (and by extension, the economy), enhancing the state's reputation for combating corruption, and allowing it to assert sovereignty over legal processes involving domestic corporations. In short, NTRs offer a strategic advantage, a 'win-win' whereby the state can enforce the law and penalise wrongdoing while mitigating some undesirable side-effects that full trials might produce.<sup>446</sup>

### **1.2.1 Expediting Resolutions and Enhancing Enforcement Outcomes**

One clear motivation for adopting NTRs was to expedite the resolution of corruption cases to deliver justice swiftly and with certainty.<sup>447</sup> Lengthy investigations and trials can undermine the credibility of enforcement efforts.<sup>448</sup> They delay sanctions, which can result in cases being overtaken by events, for example, witnesses disappearing, evidence going stale, or companies merging or dissolving. By contrast, a negotiated resolution typically concludes a case within a known timeframe, often within months rather than years, and allows authorities to announce a successful enforcement

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<sup>445</sup> Arlen, Jennifer, and Buell, Samuel W. "The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement." *Southern California Law Review* 93 (2020), 701.

<sup>446</sup> Lord, Nicholas, and King, Colin. "Negotiating Non-Contention: Civil Recovery and Deferred Prosecution". In Campbell Liz and Lord Nicholas (eds.), *Corruption in Commercial Enterprise: Law, Theory and Practice*, London/New York: Routledge, 2018, 234.

<sup>447</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16) 29.

<sup>448</sup> Lord, Nicholas. "Regulating Transnational Corporate Bribery: Anti-Bribery and Corruption in the UK and Germany." (n 399), 134, 135,

outcome relatively quickly.<sup>449</sup> This immediacy serves the public interest as offenders are dealt with and redress (fines, compensation) provided without undue delay.<sup>450</sup>

For example, in the UK, DPAs were touted as a way to bring resolution with greater speed than traditional trials, increasing the throughput of cases in the public interest.<sup>451</sup> The very first UK DPA (with Standard Bank in 2015) was finalised within a few years of the start of the investigation, an unprecedented turnaround time for a serious corruption case in that jurisdiction.<sup>452</sup> Similarly, French authorities recognised that with CJIPs, protracted criminal proceedings could be avoided. Indeed, after Sapin II, France resolved the Société Générale foreign bribery case (which had lingered since 2006) via a CJIP in 2018, achieving a result and collecting penalties in a shorter time than a trial and appeals might have taken.<sup>453</sup> In Canada, officials in 2018 highlighted that a deferred prosecution would help combat corporate wrongdoing more effectively by expediting resolution and encouraging self-disclosure.<sup>454</sup>

In terms of national interests, a quicker resolution of cases has multiple benefits. It frees up prosecutorial and judicial resources to tackle other cases, increasing overall enforcement throughput.<sup>455</sup> It could also serve a more immediate deterrent effect with respect to other companies, which would see the rapid consequences and be put on notice. For affected victims or governments (in bribery cases, the ‘victim’ may be a foreign government or the public at large), faster resolution can mean quicker reparations or the cessation of harmful conduct.

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<sup>449</sup> Holtmeier, Jay. “Cross-Border Corruption Enforcement: A Case for Measured Coordination among Multiple Enforcement Authorities.” (n 416), 522.

<sup>450</sup> Wernli, Jürg. 221, 223.

<sup>451</sup> *Ibidem*, 49.

<sup>452</sup> Serious Fraud Office, ‘SFO agrees first UK DPA with Standard Bank’ (Press Release, 30 November 2015) <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2015/sfo-agrees-first-uk-dpa-with-standard-bank.aspx> accessed 15 September 2025.

<sup>453</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16) 212.

<sup>454</sup> Public Services and Procurement Canada, ‘Canada to Enhance Its Toolkit to Address Corporate Wrongdoing’ (News Release, 27 March 2018) <https://www.canada.ca/en/public-services-procurement/news/2018/03/canada-to-enhance-its-toolkit-to-address-corporate-wrongdoing.html> accessed 19 April 2025.

<sup>455</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16) 22.

Importantly, by expediting resolution, NTRs also help avoid the enforcement failures that are risked with a trial.<sup>456</sup> A significant number of corruption prosecutions have faced challenges that have prolonged trials.<sup>457</sup> Every enforcement agency must weigh the risk of losing in court, which can set back anti-corruption efforts and embolden wrongdoers. NTRs allow authorities to secure an outcome and sanctions without rolling the dice at trial.<sup>458</sup> This certainty is very much in the state's interest. Prosecutors can impose a penalty and require reform even if they have insufficient evidence to meet the burden of proof required for conviction, or if their key evidence is inadmissible.<sup>459</sup> In common law jurisdictions, the informal prosecutorial practice that has grown out of FCPA settlements in the US illustrates this: many cases are settled on facts that were not tested in court, creating an evolving body of practice and interpretation outside formal jurisprudence.<sup>460</sup> While this raises questions regarding the application of the rule of law, in enforcement terms, it has allowed anti-bribery statutes to have a broader impact than they otherwise might have if every case went to trial. In other words, NTRs have helped governments work around legal and practical hurdles that had previously led to impunity.<sup>461</sup>

At the extreme, as noted above, avoiding a trial can prevent a catastrophic outcome (for the state and society), such as the collapse of a company. The Arthur Andersen example again looms large. In the US, it became an explicit consideration under DOJ policy to take into account the collateral consequences of charging a corporation,

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<sup>456</sup> Oded, Sharon. "Coughing Up Executives or Rolling the Dice: Individual Accountability for Corporate Corruption." (n 405), 235. Belch, Gordon. "An Analysis of the Efficacy of the Bribery Act 2010." *Aberdeen Student Law Review* 5 (2014) (n 410), 144.

<sup>457</sup> Lord, Nicholas. "Responding to Transnational Corporate Bribery Using International Frameworks for Enforcement: Anti-Bribery and Corruption in the UK and Germany." (n 442), 112. Plea bargaining as second-best criminal adjudication and the future of criminal procedure thought in global perspective In *'Research Handbook on Plea Bargaining and Criminal Justice'*(n 381), 565, 566.

<sup>458</sup> Wood, Cameron. "Sentencing Corporations for Corruption and Bribery." *Public Interest Law Journal of New Zealand* 10 (2023), 235. Oded, Sharon. "Coughing Up Executives or Rolling the Dice: Individual Accountability for Corporate Corruption." (n 405), 58.

<sup>459</sup> De Vita, Glauco, and Vozza, Donato. "The Ethics of Deferred Prosecution Agreements for MNEs Culpable of Foreign Corruption: Relativistic Pragmatism or Devil's Pact?" *Business Ethics Quarterly* 34, Nr. 4 (2024), 609.

<sup>460</sup> Hickey, Samuel J. "Remediation in Foreign Bribery Settlements: The Foundations of a New Approach." (n 6), 376.

<sup>461</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16) 21.

including potential impacts on innocent employees, shareholders, and the economy, and to mitigate those by considering resolution via DPA and NPA when appropriate.<sup>462</sup> Likewise, other states have an interest in not pushing major employers or strategically important companies into insolvency through prosecution. A deferred prosecution or the equivalent allows the company to survive (assuming it complies and implements reforms), meaning jobs are preserved, and economic disruption is minimised, all while still imposing punishment.<sup>463</sup>

For example, when Rolls-Royce plc was investigated across multiple states for systematic bribery, the UK and US authorities were cognizant of the company's importance as a defence contractor and manufacturing employer.<sup>464</sup> The coordinated settlements in 2017 imposed nearly USD 800 million in combined penalties but spared the company an indictment that could have barred it from government contracts.<sup>465</sup> This outcome arguably protected national security interests (continued supply of aerospace engines) and economic interests, while still extracting accountability. Governments have thus used NTRs as a calibrated tool to punish wrongdoing without self-harm.<sup>466</sup>

A key national interest served by the adoption of NTRs is the effective enforcement of the law. By enabling quicker, more assured resolutions, states can enforce anti-corruption statutes more consistently and broadly than previously possible, fulfilling treaty commitments and domestic policy goals to punish bribery.<sup>467</sup> It is in the interest of justice and public welfare that corrupt acts be addressed decisively. When properly used, NTRs have helped deliver that decisiveness and avoid the alternative, which was

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<sup>462</sup> Acorn, Elizabeth. "Behind the SNC-Lavalin Scandal: The Transnational Diffusion of Corporate Diversion." *Canadian Journal of Political Science* (2021), 896.

<sup>463</sup> Wood, Cameron. "Sentencing Corporations for Corruption and Bribery." (n 458), 236.

<sup>464</sup> Hickey, Sam, 'Compensating the Victims of Foreign Bribery' (n 377), 185. *Ibidem*, 238, 239.

<sup>465</sup> Mendelsohn, Mark F 'Preface' in *The Anti-Bribery and Anti-Corruption Review* In Mendelsohn Mark F. (ed.), *The Anti-Bribery and Anti-Corruption Review*, London: Dechert LLP, 7<sup>th</sup> ed. 2018, viii.

<sup>466</sup> Oded, Sharon. "Coughing Up Executives or Rolling the Dice: Individual Accountability for Corporate Corruption." (n 405), 58, 59.

<sup>467</sup> *Ibidem*. Holtmeier, Jay. "Cross-Border Corruption Enforcement: A Case for Measured Coordination among Multiple Enforcement Authorities." (n 416), 522. Belch, Gordon. "An Analysis of the Efficacy of the Bribery Act 2010." *Aberdeen Student Law Review* 5 (2014)(n 410), 144.

often years of stalemate or no action at all.<sup>468</sup> These efficiency gains translate into stronger enforcement programmes, which, in turn, bolster a state's international reputation for taking corruption seriously. For many governments, particularly those keen to shed an image of lax enforcement, adopting NTRs has been part of a broader strategy to signal a tougher stance on corporate corruption (even as the tool itself represents a compromise between full prosecution and inaction).<sup>469</sup>

### 1.2.2 Reducing Costs and Conserving Resources

A motive closely linked to, but distinct from, that dealt with above is that of reducing the financial, temporal, and opportunity costs of anti-corruption enforcement. Complex white-collar cases can consume enormous public resources.<sup>470</sup> Trials involving voluminous evidence (e.g., multi-lingual financial records, foreign witness testimony, and forensic accounting) may last for months and incur substantial expenses for courts and prosecution services.<sup>471</sup> In many states, judiciaries are already under-resourced, and dedicating a courtroom, judges, and prosecutors to a single mega-trial could mean diverting them from dozens of other cases. The risk of hung juries, appeals, or mistrials further multiplies costs. From a cost-benefit standpoint, an NTR mechanism is thus very attractive to enforcement agencies.<sup>472</sup>

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<sup>468</sup> Oded, Sharon. "Coughing Up Executives or Rolling the Dice: Individual Accountability for Corporate Corruption." (n 405), 58, 59. Holtmeier, Jay. "Cross-Border Corruption Enforcement: A Case for Measured Coordination among Multiple Enforcement Authorities." (n 416), 522.

<sup>469</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1251.

<sup>470</sup> Lord, Nicholas. "Responding to Transnational Corporate Bribery Using International Frameworks for Enforcement: Anti-Bribery and Corruption in the UK and Germany." (n 442), 112. Oded, Sharon. "Coughing Up Executives or Rolling the Dice: Individual Accountability for Corporate Corruption." (n 405), 68. Schoultz, Isabel, and Flyghed, Janne. "Performing Unbelonging in Court: Observations from a Transnational Corporate Bribery Trial – A Dramaturgical Approach." *Crime, Law and Social Change* 77 (2022), 321, 322.

<sup>471</sup> Lord, Nicholas. "Responding to Transnational Corporate Bribery Using International Frameworks for Enforcement: Anti-Bribery and Corruption in the UK and Germany." (n 442), 112.

<sup>472</sup> Buell, Samuel W. "ReStatement of Corporate Criminal Liability's Theory and Research Agenda." *Journal of Corporation Law* 47 (2022), 47 *Journal of Corporation Law*.(2022), 937, 955.

By settling a case through a DPA or similar mechanism, the state saves the costs that would otherwise have been spent on litigation.<sup>473</sup> In fact, rather than expending resources, the state usually gains resources in the form of fines and other financial penalties paid by the offending company.<sup>474</sup> These penalties can be substantial, often far exceeding the cost of the investigation, effectively turning enforcement into a net positive for the public fiscus.<sup>475</sup> For instance, the US has collected billions from corporate FCPA settlements over time, which have gone toward funding further enforcement activities.<sup>476</sup> Likewise, when Brazil secured USD 2.6 billion from Odebrecht in its leniency deal, 80% was allocated to Brazil and, controversially, a share of that was intended to support social projects and even a foundation to be managed by prosecutors.<sup>477</sup>

For developing states, these decisions may present challenges. An NTR can be understood as having offenders fund their own prosecution and reform, which is an efficient outcome.<sup>478</sup> This aligns with national interests by ensuring that anti-corruption enforcement is financially sustainable. Rather than needing vastly more judges and prosecutors to ramp up enforcement, a state can do more with the same resources by leveraging the incentive of companies to avoid trial.<sup>479</sup> One might

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<sup>473</sup> Lord, Nicholas. "Responding to Transnational Corporate Bribery Using International Frameworks for Enforcement: Anti-Bribery and Corruption in the UK and Germany." (n 442), 112. Oded, Sharon. "Coughing Up Executives or Rolling the Dice: Individual Accountability for Corporate Corruption." (n 405), 68.

<sup>474</sup> Oded, Sharon. "Coughing Up Executives or Rolling the Dice: Individual Accountability for Corporate Corruption." (n 405), 57, 58. Lord, Nicholas. "Responding to Transnational Corporate Bribery Using International Frameworks for Enforcement: Anti-Bribery and Corruption in the UK and Germany." (n 442), 112, 113.

<sup>475</sup> Griffith, Sean J., and Lee, Thomas H. "Toward an Interest Group Theory of Foreign Anti-Corruption Laws." (n 383), 1265. Hickey, Sam, 'Compensating the Victims of Foreign Bribery' (n 377), 195.

<sup>476</sup> Paul, Weiss, Rifkind, Wharton & Garrison LLP, *2024 Year in Review: FCPA Enforcement and Anti-Corruption Developments*, (2025), 6. <https://www.paulweiss.com/insights/client-memos/2024-year-in-review-fcpa-enforcement-and-anti-corruption-developments> accessed 18 June 2025.

<sup>477</sup> Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47), 109. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 40, 129,189.

<sup>478</sup> Oded, Sharon. "Coughing Up Executives or Rolling the Dice: Individual Accountability for Corporate Corruption." (n 405), 58. Lord, Nicholas. "Regulating Transnational Corporate Bribery: Anti-Bribery and Corruption in the UK and Germany." (n 399), 135.

<sup>479</sup> Oded, Sharon. "Coughing Up Executives or Rolling the Dice: Individual Accountability for Corporate Corruption." (n 405), 58. Belch, Gordon. "An Analysis of the Efficacy of the Bribery Act 2010." *Aberdeen Student Law Review* 5 (2014)(n 410), 144.

cynically note that this creates a potential moral hazard; governments could become dependent on the revenue from fines or prefer settlements for the resources they provide. However, if properly managed, enforcement can pay for itself. Some nations have directed portions of settlement proceeds toward public interest initiatives in affected states. For example, following a bribery case involving the Canadian company Griffiths Energy, the UK's Serious Fraud Office recovered illicit funds, which were then channelled through the UK's Department for International Development to support development and humanitarian projects in Chad. While this reflects a commitment to remediation, policies such as the UK's Compensation Principles have been criticized for lacking clear, principled guidance on how such funds should be allocated.<sup>480</sup>

Additionally, by conserving prosecutorial resources, NTRs allow enforcement agencies to resolve more cases overall. This serves the national interest by broadening the impact of anti-corruption laws. Instead of focusing their efforts on one or two marquee trials, agencies can handle numerous settlements. The US DOJ frequently emphasises that without DPAs or NPAs, it would lack the capacity to enforce the FCPA at the current scale. Each settlement avoids a trial that could tie up multiple attorneys for years and frees them to initiate new investigations.<sup>481</sup> Other states have seen this multiplication effect as appealing. For example, Canada's official backgrounder on DPAs notes that such agreements would reduce the burden on courts and encourage self-reporting, enabling authorities to focus their resources on the worst offenders.<sup>482</sup> France's judicial authorities have successfully encouraged French companies to use CJIPs to expedite cases and free investigatory judges to pursue additional cases rather than be tied up in lengthy trials.<sup>483</sup>

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<sup>480</sup> Hickey, Samuel J. "Remediation in Foreign Bribery Settlements: The Foundations of a New Approach." (n 6), 387.

<sup>481</sup> *Ibidem*, 376.

<sup>482</sup> Dennis, Eleanor. "Using N/DPAs to Achieve Global Settlements: Lessons for Canada." (n 33), 66.

<sup>483</sup> Davis, Frederick T. "Judicial Review of DPAs." *Columbia Journal of Transnational Law* 60 (2022), 808.

From a policy perspective, reducing enforcement costs is also politically attractive. Legislators are more willing to support anti-corruption efforts if these are not seen as an ever-expanding sink of funds. The idea that companies will bear the cost of their wrongdoing (through fines and compliance costs in settlements) is popular. In emerging economies, where public resources are especially scarce, the prospect of recovering large fines from corporate offenders (often foreign companies or multinationals) via settlements can generate the political will for enforcement that might otherwise be deemed too costly. Put simply, NTRs help address the perennial question: ‘Who pays for the fight against corruption?’ by shifting much of the cost onto the offenders, which is in keeping with fairness and national budgetary interests.<sup>484</sup>

### **1.2.3 Incentivising Corporate Cooperation and Self-Policing**

Another central motivation for adopting NTRs has been to create incentives for companies to cooperate with enforcement authorities and even to police themselves proactively.<sup>485</sup> From any state’s viewpoint, enlisting the private sector in the fight against corruption can vastly enhance detection and deterrence.<sup>486</sup> NTRs provide a mechanism to reward cooperation and remediation, which, in turn, encourage those behaviours.<sup>487</sup> This carrot-and-stick approach serves the national interest by uncovering wrongdoing that might otherwise go undetected and by fostering a culture of corporate compliance that ultimately prevents corruption.

Under a traditional prosecution model, a corporation under investigation has little reason to disclose information voluntarily. Indeed, the rational strategy is often to stonewall or even destroy evidence, since going to trial is a zero-sum game. NTR

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<sup>484</sup> Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47), 43.

<sup>485</sup> Holtmeier, Jay. “Cross-Border Corruption Enforcement: A Case for Measured Coordination among Multiple Enforcement Authorities.” (n 416), 517. Oded, Sharon. “Coughing Up Executives or Rolling the Dice: Individual Accountability for Corporate Corruption.” (n 405), 60. Igra, Daniel. “Global Spread of DPA Regimes: What They Mean for Multinationals.” (n 414), 2.

<sup>486</sup> Nichols, Philip M. Article 39 In Cecily, Rose, Kubiciel, Michael and Landwehr, Oliver (eds.). *The United Nations Convention Against Corruption: A Commentary*, Oxford: Oxford University Press, 389, 390. Banna, 525.

<sup>487</sup> Oded, Sharon. “Coughing Up Executives or Rolling the Dice: Individual Accountability for Corporate Corruption.” (n 405), 58, 59.

regimes change that calculus by offering the possibility of leniency. If a company discloses misconduct and cooperates fully, it can avoid the worst outcomes (conviction, massive fines, or debarment) and instead negotiate a more favourable settlement.<sup>488</sup>

The US formalised this through its FCPA Corporate Enforcement Policy, which essentially promises that a company that voluntarily self-reports, cooperates, and remediates will be presumed eligible for an NPA (no prosecution) or a DPA with greatly reduced penalties.<sup>489</sup> Moreover, the DOJ policy states that such a company will generally not be required to have a compliance monitor if, at the time of settlement, it has implemented an effective compliance programme.<sup>490</sup> This clearly ties the carrot (no monitor, less severe outcome) to cooperation and proactive improvement. The result has been several companies in the US self-reporting, which has allowed authorities to tackle cases that they might never have otherwise identified.<sup>491</sup>

Seeing the US example, other states built similar incentives into their NTR frameworks. The UK's DPA Code of Practice makes cooperation, including self-reporting, a key factor in the decision to offer a DPA in lieu of prosecution.<sup>492</sup> UK prosecutors have said publicly that a company must self-report to be eligible for a DPA; in practice, a few DPAs have been agreed without a prior self-report, but cooperation remains essential.<sup>493</sup> In France, official guidelines under Sapin II similarly made corporate cooperation a key requirement for a CJIP.<sup>494</sup> Brazil's leniency programme under the

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<sup>488</sup> Pimenta, Raquel and Venturini, Otavio, 'International Cooperation and Negotiated Settlements for Transnational Bribery: A Study of the Odebrecht Case' (2021) 17 *Revista Direito GV*, 4. Einbinder, Fred 'Corruption Abroad: From Conflict to Co-Operation: A Comparison of French and American Law and Practice' (2020) 3 *International Comparative, Policy & Ethics Law Review*, 693.

<sup>489</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 47.

<sup>490</sup> US Department of Justice, *FCPA Corporate Enforcement Policy*, Justice Manual §9-47.120 (updated 2019) <https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977> accessed (25 April 2025).

<sup>491</sup> Paul, Weiss, Rifkind, Wharton & Garrison LLP, *FCPA Enforcement and Anti-Corruption Developments* (n 476) 9.

<sup>492</sup> Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 586, 589. Luz, Reinaldo Diogo, and Spagnolo, Giancarlo. "Leniency, Collusion, Corruption, and Whistleblowing." (n 392), 743.

<sup>493</sup> Palmer, Axel and Nicholas Ryder, Deferred prosecutions and justice: a whodunnit? In 'Research Handbook on Plea Bargaining and Criminal Justice'(n 381), 248.

<sup>494</sup> Igra, Daniel. "Global Spread of DPA Regimes: What They Mean for Multinationals." (n 414), 1, 4.

Clean Company Act requires cooperation to earn leniency on administrative penalties.<sup>495</sup> Argentina's 2018 law establishing corporate liability for corruption allows an offending company to avoid prosecution entirely if it self-reports promptly, ceases the misconduct, and compensates for damages, a form of effective-regret defence akin to an NTR.<sup>496</sup> These provisions demonstrate a common thread: governments use the promise of a settlement as an enticement for companies to come forward, give evidence, and fix problems.

From the perspective of national enforcement objectives, this is valuable. Corporate insiders often possess evidence of complex bribery schemes that would be difficult for agencies to obtain. By encouraging companies to act as partners in investigations, or at least not as adversaries, NTR regimes help authorities cast a wider net.<sup>497</sup> Many more cases and culprits (including individuals) can be reached when a company cooperates, for example, by producing documents, facilitating interviews, or waiving their rights under secrecy laws. This was seen in the Petrobras case in Brazil. The company entered a leniency agreement in 2018 and agreed to pay billions in fines (shared with US and Brazilian authorities).<sup>498</sup> The leniency deal thus served Brazil's interest by acting as a force multiplier for the Car Wash investigation.<sup>499</sup> Similarly, in Malaysia's 1MDB scandal, the US DOJ reached a settlement with Goldman Sachs in 2020 (after Malaysia reached a similar deal) that required the company's cooperation

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<sup>495</sup> *Ibidem*, 6. Luz, Reinaldo Diogo, and Spagnolo, Giancarlo. "Leniency, Collusion, Corruption, and Whistleblowing." (n 392), 745.

<sup>496</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 815, 816.

<sup>497</sup> Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?' (n 36), 950, 951, 954. Igra, Daniel. "Global Spread of DPA Regimes: What They Mean for Multinationals." (n 414), 1, 2. Oded, Sharon. "Coughing Up Executives or Rolling the Dice: Individual Accountability for Corporate Corruption." (n 405), 66. Clancy, Áine. "A Better Deal? Negotiated Responses to the Proceeds of Grand Corruption." (n 425), 154. Brewster, Rachel. "The Rise of Global FCPA Settlements." *Texas Law Review* (forthcoming 2025/26), Duke Law School Public Law & Legal Theory Series Nr. 2025-24, 26.

<sup>498</sup> Brewster, Rachel, *The Rise of Global FCPA Settlements* (n 497), 39 Griffith, Sean J., and Lee, Thomas H. "Toward an Interest Group Theory of Foreign Anti-Corruption Laws." (n 383), 1261.

<sup>499</sup> Mota Prado, Mariana, Kerche, Fabio and Marona, Marjorie. "Corruption and Separation of Powers: Where Do Prosecutors Fit?" *Hague Journal on the Rule of Law* 16 (2024), 655. Pimenta, Raquel and Venturini, Otavio, 'International Cooperation and Negotiated Settlements for Transnational Bribery: A Study of the Odebrecht Case' (n 488), 14.

in pursuing the individuals involved. This outcome delivered accountability more effectively than a contested trial might have.<sup>500</sup>

In addition to cooperation in specific cases, NTRs incentivise compliance more generally. Most settlements require the company to implement or enhance measures for anti-corruption compliance, and the mere possibility of a future NTR leads companies to invest in prevention to strengthen their negotiating position if something goes wrong.<sup>501</sup> The OECD's 2021 Anti-Bribery Recommendation explicitly encourages states to consider compliance-programme improvements in any NTR.<sup>502</sup> The net effect is that corporations, in their own interest, adopt more robust internal controls and training to prevent bribery, which is an outcome very much aligned with the public interest in corruption prevention.

States with NTR provisions have essentially harnessed corporate self-interest to advance regulatory goals. Companies know that if they can show they have a strong compliance framework (perhaps even one that is responsible for detecting and reporting the issue), they stand a much better chance of a favourable settlement.<sup>503</sup> For instance, although Switzerland lacks a formal DPA system, Article 102 of the Swiss Criminal Code emphasises adequate organisational measures. Swiss authorities can choose not to prosecute a company (or impose only a minor fine) if the company had taken all reasonable precautions to prevent the offence. (see Chapter 3).<sup>504</sup>

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<sup>500</sup> Agbor, Guy Christian. "Prosecutorial Tools in Corporate Bribery: NPA, DPA, Jailing Executives, and Monitoring." *Social Science Research Network*, 2024, 76.

<sup>501</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, ( n 10 ), 34, 35, 42.

<sup>502</sup> da Silva Fonseca, Eugenia, and Vinokur Amiram. "The Evolution of the Incentives for Anti-Corruption Corporate Compliance Programs in the International Legal Order." *International Journal of Law, Ethics and Technology* (2024), 37.

<sup>503</sup> Warin, F. Joseph, Falconer, Charles and Diamant, Michael S.. "The British Are Coming: Britain Changes Its Law on Foreign Bribery and Joins the International Fight against Corruption." *Texas International Law Journal* 46 (2010), 48. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, ( n 10 ), 35.

<sup>504</sup> Bueno, Nicolas, 'Swiss Multinational Enterprises and Transnational Corruption: Management Matters', *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht*, 2/ 2017, 204.

The motivation of encouraging cooperation and compliance has been central to the adoption of NTRs.<sup>505</sup> Governments have realised that fighting corporate crime with a stick (punishment) and no carrot was less effective than offering tempered consequences through settlements, by which they gain allies in detection and enforcement.<sup>506</sup> This cooperative paradigm serves national interests by increasing the likelihood that corruption will be uncovered and addressed. It also fosters a shift in corporate culture towards compliance, which ideally reduces the incidence of bribery, which is a long-term public good.<sup>507</sup> In many respects, this modern approach to regulation incentivises the regulatee (companies) to help achieve regulatory goals, rather than relying on external watchdogs. DPA as incentive-based enforcement tools by encouraging corporations to cooperate with prosecutors and to implement or enhance effective compliance programmes, thereby allowing high-stakes bribery cases to be resolved in a cost-efficient manner that balances deterrence and penalty, minimises collateral and reputational consequences, avoids mandatory debarment, and preserves judicial resources.<sup>508</sup>

#### **1.2.4 Protecting Economic and Reputational Interests**

A further set of motivations relates to protecting certain national economic and reputational interests when enforcing anti-corruption laws.<sup>509</sup> While enforcement is aimed at upholding the rule of law and ethical business practices, governments must also be mindful of collateral impacts on the economy and their own standing. NTRs

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<sup>505</sup> Oded, Sharon. "Coughing Up Executives or Rolling the Dice: Individual Accountability for Corporate Corruption." (n 405), 58. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9 ), 595, 596. Wood, Cameron. "Sentencing Corporations for Corruption and Bribery." (n 458), 234, 240. Pimenta, Raquel and Venturini, Otavio, 'International Cooperation and Negotiated Settlements for Transnational Bribery: A Study of the Odebrecht Case' (n 488), 5.

<sup>506</sup> Pimenta, Raquel and Venturini, Otavio, 'International Cooperation and Negotiated Settlements for Transnational Bribery: A Study of the Odebrecht Case' (n 488), 5. Igra, Daniel. "Global Spread of DPA Regimes: What They Mean for Multinationals." (n 414), 2. Brewster, Rachel. "The Rise of Global FCPA Settlements." (n 497), 49.

<sup>507</sup> Pimenta, Raquel and Venturini, Otavio, 'International Cooperation and Negotiated Settlements for Transnational Bribery: A Study of the Odebrecht Case' (n 488), 5. Wood, Cameron. "Sentencing Corporations for Corruption and Bribery." (n 458), 240, 239, 241.

<sup>508</sup> Bu, Qingxiu. "The Viability of Deferred Prosecution Agreements (DPAs) in the United Kingdom: The Impact on Global Anti-Bribery Compliance." (n 50), 179, 180.

<sup>509</sup> Brewster, Rachel. "The Rise of Global FCPA Settlements." (n 497), 26. Einbinder, Fred 'Corruption Abroad: From Conflict to Co-Operation: A Comparison of French and American Law and Practice' (n 488), 674.

are a way to calibrate enforcement so that it does not inadvertently undermine other national interests.<sup>510</sup> Several aspects fall under this category. This will be discussed further below.

Avoiding undue harm to the economy or a specific sector is an important goal. As noted with respect to expedited resolutions, governments have an interest in not destroying valuable companies except when necessary. Particularly where firms are national champions, major employers, or providers of critical infrastructure, the fallout from a criminal conviction can extend beyond the company. For example, a conviction can trigger mandatory debarment from public contracts (per many states' procurement laws or EU directives), and this could disrupt public services or projects.<sup>511</sup> It can also prompt counterparties (banks, business partners) to cut ties, with ripple effects.<sup>512</sup>

By using an NTR, authorities can impose financial and compliance penalties without triggering these consequences.<sup>513</sup> This was an explicit concern for France, and government leaders saw how US prosecutions of companies like Alstom and Total led to massive fines that went to the US Treasury and handicapped those firms internationally.<sup>514</sup> By introducing CJIPs, France could impose its own penalties and keep the companies viable.

A further object is ensuring that the state benefits from enforcement (financially and jurisdictionally). States have a direct financial interest in securing penalties for wrongdoing within their jurisdiction.<sup>515</sup> Before NTRs were common, many states saw their companies prosecuted by the US or other active enforcers, with fines largely

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<sup>510</sup> Wood, Cameron. "Sentencing Corporations for Corruption and Bribery." (n 458), 235.

<sup>511</sup> *Ibidem*, 233. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 568,569. Lord, Nicholas. "Regulating Transnational Corporate Bribery: Anti-Bribery and Corruption in the UK and Germany." (n 399), 135, 136, 137.

<sup>512</sup> Wood, Cameron. "Sentencing Corporations for Corruption and Bribery." (n 458), 233. Ölçer, 581.

<sup>513</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, ( n 10 ), 34, 42. Lord, Nicholas. "Regulating Transnational Corporate Bribery: Anti-Bribery and Corruption in the UK and Germany." (n 399), 136.

<sup>514</sup> Arlen, Jennifer, *The Potential Promise and Perils of Introducing DPAs Outside the U.S.* (n 36), 17.

<sup>515</sup> Brewster, Rachel. "The Rise of Global FCPA Settlements." (n 497), 26.

flowing to those states' treasuries.<sup>516</sup> This was the case for years. For instance, the German company Siemens paid USD 800 million to the US in 2008. France's Alstom paid USD 772 million to the US in 2014, etc., with relatively little paid at home.<sup>517</sup> By adopting NTR mechanisms, states can assert their jurisdiction and claim a share (or the entirety) of penalties, rather than effectively outsourcing the enforcement (and revenue) to foreign authorities. French lawmakers were quite blunt on this point; they wanted to 'avoid the fines from flowing to foreign authorities' and keep the proceeds of enforcement in France.<sup>518</sup> This was a matter of sovereignty and material interest.

The same dynamic is observed in joint settlements. By cooperating through NTRs, each state can secure a cut of settlement proceeds. Brazil receiving 80% of the Odebrecht fine, and splitting other fines with the US, exemplifies how a state's adoption of settlement tools enabled it to claim the monetary penalties that might otherwise have gone to the US.<sup>519</sup> In essence, NTRs have allowed states to bring the money home, an outcome favourable to national budgets and to public perception (of course, any citizens would prefer to see wrongdoing against their state punished by that state, with benefits accruing locally, rather than all money being paid to foreign enforcers).

Beyond money, states have a jurisdictional interest in being part of the resolution since it affords them a say in the outcome and an opportunity to tailor remedies to local needs (for example, requiring compensation to local victims or institutional reforms domestically).<sup>520</sup> It avoids a scenario where a foreign authority dictates the terms and perhaps ignores harm done in the company's home state. For instance, in the BAE Systems matter (a pre-DPA case), the 2010 US plea deal left some in the UK feeling that the US regulators had effectively usurped a case in which the UK had a significant

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<sup>516</sup> Einbinder, Fred 'Corruption Abroad: From Conflict to Co-Operation: A Comparison of French and American Law and Practice' (n 488), 674.

<sup>517</sup> Bu, Qingxiu. "The Viability of Deferred Prosecution Agreements (DPAs) in the United Kingdom: The Impact on Global Anti-Bribery Compliance.", (n 50), 277.

<sup>518</sup> *Ibidem*, 288.

<sup>519</sup> Sanchez-Badin, Michelle R., and Morosini, Fabio. "Symposium on New Directions in Anti-Corruption Law: Anticorruption in Brazil: From Transnational Legal Order to Disorder." (n 391), 328, 329.

<sup>520</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 84, 85, 87.

interest.<sup>521</sup> DPAs allow the UK to ensure its interests are represented in any settlement involving its companies.

States also have a more subtle national interest in preserving their international reputation and investor confidence in governance and respect for the rule of law. Being able to demonstrate robust anti-corruption enforcement boosts a state's standing in bodies like the OECD Working Group or the UNCAC Implementation Review Mechanism. NTRs have contributed to many states, for the first time, reporting real success in their enforcement efforts.<sup>522</sup> For example, after years of criticism for not pursuing cases of foreign bribery, France's adoption of CJIPs allowed it to close multiple cases and shed its reputation of being an inactive enforcer.<sup>523</sup> While a conviction in court is arguably the gold standard, a well-publicised DPA or leniency agreement (with a hefty fine and cooperation) is often seen as a serious enforcement action and certainly better than an indefinite investigation with no outcome.<sup>524</sup> Thus, governments perceived an interest in not being seen as a weak link in global anti-bribery efforts, and NTRs provided a way to visibly enforce and settle cases, boosting states' credibility on the world stage.<sup>525</sup>

Governments must also manage the reputational fallout of enforcement actions for companies and markets. A drawn-out corruption trial can potentially damage the company's reputation and the state's attractiveness for investors if, for instance, it reveals pervasive corruption in a major state enterprise or industry. A negotiated

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<sup>521</sup> *Ibidem*, 94, 95, 109. Einbinder, Fred. "Borrowings and Boomerangs: A Comparative Law Perspective on Resonance in Transnational Anti-Corruption Law Enforcement." (n 36), 149.

<sup>522</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 46, 50. Clancy, Áine. "A Better Deal? Negotiated Responses to the Proceeds of Grand Corruption." (n 425), 154.

<sup>523</sup> OECD, *Phase 4 Report on France* (2021) 13.

<sup>524</sup> Bourton, Sam, and Ryder, Nicholas. "Corrupt Corporations and the Facilitation of Tax Crimes: A Review of the United Kingdom's Enforcement Mechanisms." *Law and Contemporary Problems* 85 (2023), 244. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 46, 50. Clancy, Áine. "A Better Deal? Negotiated Responses to the Proceeds of Grand Corruption." (n 425), 50. Oded, Sharon. "Coughing Up Executives or Rolling the Dice: Individual Accountability for Corporate Corruption." (n 405), 58, 59. Wood, Cameron. "Sentencing Corporations for Corruption and Bribery." (n 458), 59.

<sup>525</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 9.

resolution gives states more control over the narrative; there is agreement on the facts, the company often issues a public acknowledgement, and the matter is closed with a forward-looking plan for compliance. This can limit reputational damage more effectively. It signals that the issue was addressed and resolved, and avoids leaving the company under a cloud of uncertainty for a long period. Governments have an interest in maintaining market stability, and swift resolutions help in that respect. Under the leniency agreement, with changes in governance practices, Petrobras was able to continue raising capital and avoid a collapse of investor trust that would have resulted from a protracted legal battle.<sup>526</sup>

Another reason for allowing NTRs is that they strengthen judicial sovereignty and avoid foreign intervention. Adopting NTRs is a way for states to reassert sovereignty over legal processes involving their corporate citizens. As noted above, for France and Brazil, one reason for supporting NTRs was to participate in corporate prosecutions that had previously been effected through the extraterritorial application of US law.<sup>527</sup> When domestic authorities actively resolve a case, it reduces the need (or justification) for foreign enforcers to step in. This was part of the French calculus. They could retain the fines paid and prevent what they viewed as US overreach into French affairs.<sup>528</sup> The French national interest in judicial autonomy was served by having a domestic mechanism to deal with French companies. Ideally, this would make US action redundant or at least force a partnership (as happened with Société Générale and Airbus).<sup>529</sup>

In a broader sense, states want to apply their own laws to domestic actors, and NTRs make this possible in complex cross-border cases, so states no longer have to observe

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<sup>526</sup> Sanchez-Badin, Michelle R., and Morosini, Fabio. "Symposium on New Directions in Anti-Corruption Law: Anticorruption in Brazil: From Transnational Legal Order to Disorder." (n 391), 328. 330.

<sup>527</sup> *Ibidem*, 329.

<sup>528</sup> Einbinder, Fred 'Corruption Abroad: From Conflict to Co-Operation: A Comparison of French and American Law and Practice' (n 488), 778.

<sup>529</sup> *Ibidem*, 673, 674, 790. Bu, Qingxiu. "The Viability of Deferred Prosecution Agreements (DPAs) in the United Kingdom: The Impact on Global Anti-Bribery Compliance." (n 50), 283.

from the sidelines.<sup>530</sup> Retaining control of cases is also a matter of prestige and principle, as no sovereign state likes the implication that it cannot police its own companies. By empowering their national authorities with flexible settlement tools, states strengthened their positions internationally. Rolls-Royce's 2017 global settlement is a case in point, because the UK had a DPA system by then, the SFO was able to take the lead and coordinate with the US and Brazil, ensuring the UK's interests were front and centre in the outcome.<sup>531</sup> Without the benefit of DPAs, the UK might have had to rely on the US to handle the matter, as it had in some earlier cases.

### **1.3 Interim Conclusion**

The widespread adoption of NTRs for corporate misconduct across major and emerging economies is an important development of the past two decades. This chapter has shown that states have embraced NTR mechanisms, such as DPAs, NPAs, and leniency agreements, because of a combination of historical catalysts and pragmatic national motivations. Historically, high-impact corporate scandals (Enron/Arthur Andersen case in the US, Siemens in Germany, and Petrobras/Odebrecht in Brazil, among others) revealed shortcomings in traditional trial-based enforcement, prompting legal innovations to allow for negotiated settlements. These early experiments, particularly the US DOJ's success in resolving complex cases via DPAs, established a model that was emulated and adapted by other jurisdictions in the 2010s. The UK and France looked to the US example when crafting their own settlement regimes, while Brazil and Canada drew lessons from both US practice and domestic crises to justify their new frameworks.

National motivations have been significant in the convergence towards NTRs. Considerations of efficiency and effectiveness weighed heavily. Settlements allow quicker, more certain resolution of cases, and enforcement agencies can achieve results that would be difficult or impossible to obtain through trials alone. The ability to

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<sup>530</sup> Brewster, Rachel. *"The Rise of Global FCPA Settlements."* (n 497), 26.

<sup>531</sup> Bu, Qingxiu. *"The Viability of Deferred Prosecution Agreements (DPAs) in the United Kingdom: The Impact on Global Anti-Bribery Compliance."* (n 50), 282.

manage multijurisdictional cases through coordinated resolutions has spurred further adoption since global companies and cross-border crimes demand cooperative solutions rather than isolated national prosecutions. States have also seen NTRs as tools to advance their interests in encouraging corporate compliance and disclosure. By offering leniency, authorities incentivise companies to self-police and collaborate with investigators, effectively enlisting the private sector in the fight against corporate crime.

The chapter also highlighted the perceived benefits of avoiding unwarranted collateral damage. Policymakers appreciate that NTRs can punish wrongdoing without necessarily destroying valuable companies or causing massive job losses, thus balancing accountability with economic stability. A less overt but significant factor motivating the adoption of NPRs is the enforcement sovereignty and prestige they afford. Adopting a DPA or leniency regime allows a state to handle misconduct by its corporate citizens on its own terms and stand as an equal enforcer in the international arena, rather than ceding the field to foreign prosecutors. Indeed, by 2019, a substantial number of states parties to the OECD Anti-Bribery Convention (over ten) had employed NTRs in foreign bribery cases, reflecting a broad consensus that these tools, while not mandated, are now integral to effective enforcement.

The near-global embrace of NTRs has profound implications for corporate accountability. The trend marks a pragmatic evolution in legal systems; states have shown flexibility and innovation in borrowing and tailoring mechanisms that demonstrably improve enforcement outcomes. The increase in settlement mechanisms has led to an unprecedented increase in enforcement actions and penalties against corporate offenders worldwide. Billions in fines have been collected (over 95% via NTRs among OECD states) that might otherwise not have been imposed. The emphasis on corporate remediation and compliance in these mechanisms has arguably led to lasting corporate reforms, potentially reducing recidivism and improving corporate culture to the benefit of society.

However, this chapter has also invited a critical examination of the NTR model. One concern is the balance of power reflected in the model and the integrity of the justice it offers. When virtually all corporate cases are settled behind closed doors, there is a risk of diminished transparency. Under the NTR model, the courts seldom review the underlying evidence as deeply as they would in a trial. Further, as noted by commentators, an unintended prosecutorial common law of corporate wrongdoing has developed, based on settlements rather than court judgments. This raises questions about consistency and fairness. Companies may feel pressured to accept a deal even if they have a valid defence, simply because the uncertainty and risks of trial are too high. Moreover, while NTRs avoid the blunt force of convictions, critics argue that they might amount to an accommodation of corporate crime. If penalties are seen as a cost of doing business and no individuals are held accountable, the deterrent effect could be blunted. Additionally, the very flexibility that makes NTRs useful can invite misuse or public scepticism. For example, if powerful corporations are perceived as receiving 'sweetheart deals' due to their economic clout, it can erode public trust in equal justice and the rule of law.

In light of these considerations, the cross-jurisdictional adoption of NTRs appears neither entirely virtuous nor entirely problematic. It is a development that reflects the complexity of the trade-offs between ideal justice and practical enforcement. The motivations for the adoption of NTRs, as discussed in this chapter, are largely rational responses to the real-world challenges of punishing corporate crime. However, the implications of those choices must be continually assessed. More states are joining the trend and refining their frameworks, with ongoing input from organisations like the OECD, which in 2021 issued updated recommendations encouraging transparency and consistency in NTRs. As a result, a form of informal global standard may be emerging. No treaty mandates DPAs or leniency agreements, but through voluntary convergence and peer learning, they are an increasingly common approach to corporate crime.

The coming chapters will delve further into how these mechanisms operate in practice within various legal systems. These chapters also consider what safeguards or reforms might be needed to ensure that the laudable goals of NTRs (i.e., efficiency, incentivised compliance, and effective sanctions) do not come at the expense of fundamental principles of justice and deterrence. In conclusion, the national adoption of NTRs is part of a paradigm shift in corporate criminal law. These mechanisms are an attempt to reconcile the demands of globalised business with the imperative of accountability in complex cases, all while navigating the fine line between pragmatism and principle. The origins and motivations mapped out here provide essential context for understanding that shift and for critically evaluating whether these tools ultimately serve the public interest in combating corporate wrongdoing.

## **2. Legal Frameworks of NTRs in Selected Jurisdictions**

This chapter focuses on four jurisdictions, the US, the UK, France, and Switzerland, each of which has a prominent NTR framework for corporate anti-bribery enforcement. These states were chosen because they represent common law and civil law traditions and are among the leading enforcers of anti-corruption laws internationally. All four are parties to the OECD Anti-Bribery Convention and have developed mechanisms to settle foreign bribery cases through agreements rather than trials. By examining common law approaches (exemplified by the US and UK) alongside civil law approaches (France and Switzerland), this chapter reveals how different legal systems converge on the use of negotiated settlements to address corporate bribery. The cases selected enable a comparative analysis that highlights shared features of NTR frameworks while accounting for variations in legal culture and procedure.

Methodologically, the chapter consists of a descriptive and comparative analysis of the legal frameworks in the four selected jurisdictions, drawing on the statutory provisions, prosecutorial policies, and enforcement practices that govern NTRs in each state. The analysis takes a neutral position: the goal is to describe how each framework

functions and to identify common elements, without offering evaluation or critique of their effectiveness.

The chapter proceeds by examining each state's NTR mechanism in turn, focusing on its legal basis, scope, procedure, and typical terms. The chapter highlights common features, such as the emphasis on corporate cooperation, judicial oversight, and the inclusion of compliance obligations. It does so without explicitly comparing the jurisdictions in a competitive sense. The chapter concludes with a synthesis of the key commonalities observed in the US, UK, French, and Swiss approaches to resolving corporate bribery cases without trial.

## **2.1 Legal Framework and Forms in the United States**

In the US, NTR of corporate criminal cases is accomplished primarily through DPAs and NPAs.<sup>532</sup> These mechanisms have developed as a matter of prosecutorial practice rather than through specific statutes.<sup>533</sup> A DPA is a formal agreement filed in court between the DOJ and a company facing criminal charges (for example, charges under the FCPA, the US anti-bribery law).<sup>534</sup> The DOJ and the defendant jointly move for a court order to toll the time limits under the Speedy Trial Act, effectively suspending the prosecution.<sup>535</sup> The agreement sets out the conditions the company must satisfy over a defined period (often two to three years). These may include payment of a monetary penalty, improvements to internal compliance programmes, and continued cooperation with any ongoing investigations.<sup>536</sup> If the company fulfills its obligations

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<sup>532</sup> Feinstein BD, Heaston WR and de Carvalho GS, 'In-Group Favoritism as Legal Strategy: Evidence from FCPA Settlements' (2023) 60(1) *American Business Law Journal*, 18.

<sup>533</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 818. Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?" (n 15), 63.

<sup>534</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 756.

<sup>535</sup> *United States v. Fokker Services B.V.*, 818 F.3d 733 (D.C. Cir. 2016).

<sup>536</sup> Wang, Yahong. "Study on the Model of Conditional Non Prosecution in Corporate Crime Cases." *American Research Journal of Humanities & Social Science* 6, Nr. 3 (2023), 45.

within the agreed period, the DOJ will dismiss the charges at the end of the term, and no conviction will result.<sup>537</sup>

An NPA is a closely related form that also involves an agreement on conditions and penalties, but no charges are formally filed.<sup>538</sup> Instead, the company and the prosecutors enter into a private agreement that the government will refrain from prosecuting the company as long as it abides by the specified conditions.<sup>539</sup> Both DPAs and NPAs are thus tools that allow companies to avoid a criminal trial and conviction. A DPA pauses the prosecution on the condition of future good conduct and remediation, while an NPA forgoes initiating prosecution outright under similar terms.<sup>540</sup>

The US model of NTRs emerged from the broad discretionary powers afforded to US prosecutors.<sup>541</sup> No legislation was needed to authorise DPAs or NPAs. They arose from the DOJ's inherent authority to decide whether to bring charges and to negotiate settlements.<sup>542</sup> Over time, especially in the past two decades, DPAs and NPAs have become the dominant means of resolving corporate criminal cases in the US.<sup>543</sup> This is particularly true in the case of foreign bribery enforcement under the FCPA. The DOJ (often in coordination with the Securities and Exchange Commission with respect to

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<sup>537</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 66.

<sup>538</sup> Wang, Yahong. "Study on the Model of Conditional Non Prosecution in Corporate Crime Cases." (n 536), 40.

<sup>539</sup> *Ibidem*, 38. Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 758.

<sup>540</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 758.

<sup>541</sup> *Ibidem*, 818. Parker, Megan Jean and Dodge, Mary, 'An Exploratory Study of Deferred Prosecution Agreements and the Adjudication of Corporate Crime' (2023) 30(4) *Journal of Financial Crime* 943. Dennis, Eleanor. "Using N/DPAs to Achieve Global Settlements: Lessons for Canada." (n 33), 59.

<sup>542</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 818.

<sup>543</sup> Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?' (n 36), 53. Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 818, 756.

civil aspects of cases) has used DPAs and NPAs to resolve dozens of cases involving corporations accused of paying bribes abroad.<sup>544</sup>

Internal DOJ policies and guidance, such as its Principles of Federal Prosecution of Business Organizations and the FCPA Corporate Enforcement Policy, encourage prosecutors to use these agreements in appropriate cases, especially where companies voluntarily disclose misconduct, cooperate with investigators, and remediate effectively.<sup>545</sup> As a result, rather than prosecuting and convicting corporations (which can be costly and have consequences for innocent stakeholders), the DOJ frequently negotiates NTRs that achieve accountability through penalties and requirements for reform.<sup>546</sup> While individuals can, in theory, benefit from NPAs, in practice, the use of DPAs or NPAs in the US has primarily been a tool for corporate defendants.<sup>547</sup> The prevalence of NTRs reflects a policy judgment that incentivising cooperation and compliance can more effectively address corporate crime than pursuing a conviction in court.

Several common features characterise the US approach to non-trial corporate resolutions.<sup>548</sup> First, the agreements typically impose substantial monetary penalties.<sup>549</sup> A company entering into a DPA or NPA for bribery misconduct will usually pay a fine to the US Treasury and must often disgorge any profits obtained through the corrupt

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<sup>544</sup> Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?' (n 36), 53. Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 753, 818. Rose, Cecily, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (n 79), 75.

<sup>545</sup> Parker, Megan Jean and Dodge, Mary, *An Exploratory Study of Deferred Prosecution Agreements and the Adjudication of Corporate Crime*, (n 541), 942.

<sup>546</sup> Buell, Samuel W. *Corporate Crime: An Introduction to the Law and Its Enforcement*, (n 535), 10.

<sup>547</sup> Lüth, Felix, *Corporate Non-Prosecution Agreements as Transnational Human Problems: Transnational Law and the Study of Domestic Criminal Justice Reforms in a Globalised World* (n 370), 317. Lund, Dorothy S., and Sarin, Natasha. "Corporate Crime and Punishment: An Empirical Study." (n 47), 297.

<sup>548</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 758. Grenadier, Brian M., and Grenadier, Steven R. "An Equilibrium Model of Deferred Prosecution Agreements." Stanford University Graduate School of Business Research Paper Nr. 5040299, 22. November 2024, 1. St-Georges, Simon and Saint-Martin, Denis, *The global diffusion of DPAs: The not so functional remarking of the rules against business corruption* (n 266), 470.

<sup>549</sup> Grenadier, Brian M., and Grenadier, Steven R. "An Equilibrium Model of Deferred Prosecution Agreements." (n 548), 1. Lord, Nicholas. "Prosecution Deferred, Prosecution Exempt: On the Interests of (In)Justice in the Non-Trial Resolution of Transnational Corporate Bribery." (n 401), 851.

scheme.<sup>550</sup> These financial penalties are calibrated to reflect the seriousness of the offence but are negotiated as part of the settlement, sometimes with discounts applied in recognition of the company's cooperation and prompt remediation.<sup>551</sup> Second, US DPAs/NPAs almost always require the company to implement or enhance its internal compliance programme to prevent future misconduct.<sup>552</sup> The agreement may outline specific compliance measures or reference external guidelines, for example, mandating that the company invest in stronger anti-corruption controls, training, and policies.<sup>553</sup>

Third, depending on the circumstances, the DOJ may require an independent compliance monitor to be installed at the company as part of the settlement.<sup>554</sup> This is a third-party expert who oversees improvements in the company's compliance during the term of the agreement and reports to the government on its progress.<sup>555</sup> Monitoring is more likely in cases where the company's prior compliance failures were severe or where the DOJ has concerns about whether reforms will be effectively implemented.<sup>556</sup> Many FCPA DPAs have included monitors, though in recent years the DOJ has

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<sup>550</sup> Acorn, Elizabeth, 'Behind the SNC-Lavalin Scandal: The Transnational Diffusion of Corporate Diversion' (n 462), 896.

<sup>551</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 757. Hock, Boris, and Dávid-Barrett, Elizabeth. "The Compliance Game: Legal Endogeneity in Anti-Bribery Settlement Negotiations." *International Journal of Law, Crime and Justice* 71 (2022), 3. Søreide, Tina and Vagle, Kari, 'Settlements in Corporate Bribery Cases: An Illusion of Choice?' (2022) 53 *European Journal of Law and Economics*, 276.

<sup>552</sup> Parker, Megan Jean and Dodge, Mary, 'An Exploratory Study of Deferred Prosecution Agreements and the Adjudication of Corporate Crime' , (n 541), 4, 5. Acorn, Elizabeth 'Behind the SNC-Lavalin Scandal: The Transnational Diffusion of Corporate Diversion' (n 462), 49, 896. Bu, Qingxiu. "The Viability of Deferred Prosecution Agreements (DPAs) in the United Kingdom: The Impact on Global Anti-Bribery Compliance.",(n 50), 193. St-Georges, Simon and Saint-Martin, Denis, The global diffusion of DPAs: The not so functional remarking of the rules against business corruption (n 266), 470.

<sup>553</sup> Rose, Cecily, 'International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems' (n 79), 77.

<sup>554</sup> *Ibidem*, 75. Bu, Qingxiu. "The Viability of Deferred Prosecution Agreements (DPAs) in the United Kingdom: The Impact on Global Anti-Bribery Compliance.", (n 50), 195. Manacorda, Stefano, and Centonze, Francesco (eds.). *Corporate Compliance on a Global Scale: Legitimacy and Effectiveness*, (n 26), 318. Buell, Samuel W. *Corporate Crime: An Introduction to the Law and Its Enforcement*, (n 535), 47. Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 763.

<sup>555</sup> Manacorda, Stefano, and Centonze, Francesco (eds.). *Corporate Compliance on a Global Scale: Legitimacy and Effectiveness*,(n 26), 318, 352, 353.

<sup>556</sup> *Ibidem*, 318, 353. Buell, Samuel W. *Corporate Crime: An Introduction to the Law and Its Enforcement*,(n 535), 47.

indicated that it will impose these more selectively, focusing on companies that genuinely need external oversight.<sup>557</sup>

While a DPA does not result in a formal judgment of conviction, the company is almost always required to sign a Statement of Facts admitting to the underlying misconduct; these admissions serve as a powerful enforcement tool should the government resume prosecution following a breach.<sup>558</sup> In a DPA, the company will often admit to a detailed statement of facts describing the misconduct, but the agreement will explicitly state that final adjudication is deferred.<sup>559</sup> If the company meets the terms of the agreement over the period, it avoids conviction; if it materially breaches the agreement, the DOJ can resume the prosecution, using the filed charges and the company's admissions as a basis for proceeding to judgment.<sup>560</sup>

Although NPAs are technically private contracts between the DOJ and the entity, in the context of corporate crime, they are systematically made public by the DOJ to ensure transparency, accountability, and general deterrence.<sup>561</sup> In the US, judges have little involvement in this process.<sup>562</sup> For DPAs, courts play a limited formal role in the approval process, despite the fact that these agreements involve some level of judicial participation.<sup>563</sup> As a result, concerns have been raised that such negotiated agreements may proceed with minimal judicial scrutiny<sup>564</sup>

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<sup>557</sup> *Ibidem*, 318. 353. Bu, Qingxiu. "The Viability of Deferred Prosecution Agreements (DPAs) in the United Kingdom: The Impact on Global Anti-Bribery Compliance." (n 50), 195.

<sup>558</sup> The Justice Manual (9-28.1100) mandates that a DPA must include a statement of facts describing the corporation's conduct.

<sup>559</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 757.

<sup>560</sup> Buell, Samuel W. *Corporate Crime: An Introduction to the Law and Its Enforcement*, (n 535), 53. Wang, Yahong. "Study on the Model of Conditional Non Prosecution in Corporate Crime Cases." (n 536), 40, 42.

<sup>561</sup> DOJ, Office of Public Affairs, Corporate Settlement Portal.

<sup>562</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 764, 818.

<sup>563</sup> Katzarova, Elitza and Ansart, Jessica, 'The Americanization of Anti-Corruption Enforcement' In *The Transnationalization of Anti-Corruption Law*, New York: Routledge, 2021, 53, 54.

<sup>564</sup> *Ibidem*

The US has pioneered the use of negotiated settlements to resolve corporate bribery cases. The DPA or NPA framework allows companies to avoid the consequences of a conviction by undertaking specified corrective actions and paying penalties. This framework is grounded in flexibility and pragmatism. It leverages the prosecutor's ability to suspend or decline charges to enforce anti-bribery laws efficiently. It has proven to be a highly influential model, inspiring other jurisdictions to develop their own forms of NTRs for corporate crime.

## 2.2 United Kingdom

### 2.2.1 Statutory Introduction of DPAs

In the UK, legislation was adopted in 2013 to introduce NTRs for corporate misconduct.<sup>565</sup> The UK's mechanism for resolving corporate bribery cases without going to trial is the DPA, established by the Crime and Courts Act of 2013.<sup>566</sup> The act, which came into force in early 2014, created a statutory scheme for DPAs in England and Wales.<sup>567</sup> The introduction of DPAs in the UK was a deliberate policy response to the growing use of such agreements in the US and elsewhere, coupled with the recognition that British authorities lacked a flexible tool for negotiating corporate criminal settlements.<sup>568</sup> Prior to the reform, companies in the UK facing bribery charges (under the Bribery Act of 2010 or other laws) had few options short of a full guilty plea

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<sup>565</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 788, 789. Bu, Qingxiu. "The Viability of Deferred Prosecution Agreements (DPAs) in the United Kingdom: The Impact on Global Anti-Bribery Compliance.", (n 50), 185.

<sup>566</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 788. Bu, Qingxiu. "The Viability of Deferred Prosecution Agreements (DPAs) in the United Kingdom: The Impact on Global Anti-Bribery Compliance.", (n 50), 174. Søreide, Tina and Vagle, Kari, 'Settlements in Corporate Bribery Cases: An Illusion of Choice?' (n 551), 278.

<sup>567</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1251.

<sup>568</sup> Bu, Qingxiu. "The Viability of Deferred Prosecution Agreements (DPAs) in the United Kingdom: The Impact on Global Anti-Bribery Compliance.", (n 50), 174, 182, 185. St-Georges, Simon and Saint-Martin, Denis, The global diffusion of DPAs: The not so functional remarking of the rules against business corruption, 472. Palmer, Axel and Nicholas Ryder, Deferred prosecutions and justice: a whodunnit? In 'Research Handbook on Plea Bargaining and Criminal Justice' (n 381) 247, 261. Lord, Nicholas. "Prosecution Deferred, Prosecution Exempt: On the Interests of (In)Justice in the Non-Trial Resolution of Transnational Corporate Bribery." (n 401), 851.

or a trial.<sup>569</sup> The 2013 Crime and Courts Act changed this by providing a clear legal foundation for prosecutors to invite a corporation to negotiate an agreement that would suspend a prosecution on certain terms.<sup>570</sup> Importantly, the UK model reserved a significant role for the judiciary from the outset, reflecting the common law tradition of judicial oversight in the criminal process.<sup>571</sup>

Under the UK DPA regime, only organisations (such as corporations, partnerships, or unincorporated associations) are eligible; DPAs are not available to individuals.<sup>572</sup> Furthermore, DPAs can only be concluded in respect of certain offences specified in the act (in Schedule 17).<sup>573</sup> These include a range of economic crimes like fraud, money laundering, and, importantly, bribery under the Bribery Act of 2010.<sup>574</sup> This limited scope ensures that DPAs are confined to the types of complex corporate crimes for which they were designed.<sup>575</sup> The Solicitor General approved a specific DPA Code of Practice, which guides prosecutors (namely the SFO and the Crown Prosecution Service) on when and how to use DPAs. This code sets out public-interest factors to consider in determining the appropriateness of a DPA instead of a prosecution. These include the extent of a company's cooperation and whether it self-reported the misconduct.

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<sup>569</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 797. Palmer, Axel, and Ryder, Nicholas. "Deferred Prosecutions and Justice: A Whodunnit?" In Langer Máximo, McConville Mike and Marsh Luke (eds.), *Research Handbook on Plea Bargaining and Criminal Justice*, Cheltenham: Edward Elgar, 2024, 249, 261.

<sup>570</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 790. Lord, Nicholas. "Prosecution Deferred, Prosecution Exempt: On the Interests of (In)Justice in the Non-Trial Resolution of Transnational Corporate Bribery." (n 401), 851. Søreide, Tina and Vagle, Kari, 'Settlements in Corporate Bribery Cases: An Illusion of Choice?' (n 551), 279.

<sup>571</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 790, 791, 797. Bu, Qingxiu. "The Viability of Deferred Prosecution Agreements (DPAs) in the United Kingdom: The Impact on Global Anti-Bribery Compliance." (n 50), 186.

<sup>572</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 789. Palmer, Axel and Nicholas Ryder, *Deferred prosecutions and justice: a whodunnit?* In 'Research Handbook on Plea Bargaining and Criminal Justice' (n 381), 248.

<sup>573</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 28.

<sup>574</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 788.

<sup>575</sup> Bu, Qingxiu. "The Viability of Deferred Prosecution Agreements (DPAs) in the United Kingdom: The Impact on Global Anti-Bribery Compliance." (n 50), 186. Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47), 119 Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1253.

## 2.2.2 Procedure and Oversight of DPA

A defining feature of the UK's DPA framework is the requirement that court approval be obtained at two stages of the process.<sup>576</sup> First, when a prosecutor and a company reach an in-principle agreement on a DPA, they must attend a private preliminary hearing before a Crown Court judge.<sup>577</sup> At this Stage 1 hearing, The judge conducts a rigorous assessment to ensure that a DPA is not merely a 'convenient' settlement but is genuinely in the interests of justice and that its terms are fair, reasonable, and proportionate.<sup>578</sup> If the judge confirms that these criteria have been met, the parties can then finalise the agreement in a formal sense.<sup>579</sup> In the second stage, the final DPA is presented in a public hearing. The judge must again approve the DPA and make a declaration in open court that it is in the interests of justice and that its terms are fair and reasonable. The DPA is only effective upon this judicial declaration.<sup>580</sup>

This two-step approval process ensures that an independent judicial authority scrutinises the decision to settle and the contents of that settlement, adding a layer of transparency and legitimacy to what is fundamentally a negotiated outcome.<sup>581</sup> This practice stands in contrast to that in the US, where there is minimal judicial involvement; in the UK, the court is an active gatekeeper who determines the appropriateness of each agreement.<sup>582</sup> Once approved, a UK DPA typically extends over a defined period (often around 2–3 years) during which the prosecution is deferred.<sup>583</sup> The agreement must include a 'statement of facts' outlining the alleged

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<sup>576</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 790.

<sup>577</sup> *Ibidem*. Capus N and Bozinova M, 'Impression Management in Corporate Corruption Settlements: The Storied Self of the Prosecutorial Authority' (2023) 73 *International Journal of Law, Crime and Justice*, 3.

<sup>578</sup> Capus N and Bozinova M, 'Impression Management in Corporate Corruption Settlements: The Storied Self of the Prosecutorial Authority', (n 577), 3.

<sup>579</sup> Wang, Yahong. "Study on the Model of Conditional Non Prosecution in Corporate Crime Cases." (n 536), 42.

<sup>580</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 791.

<sup>581</sup> *Ibidem*, 790, 820.

<sup>582</sup> *Ibidem*, 775, 790.

<sup>583</sup> Lord, Nicholas. "Prosecution Deferred, Prosecution Exempt: On the Interests of (In)Justice in the Non-Trial Resolution of Transnational Corporate Bribery." (n 401), 851. Wang, Yahong. "Study on the Model of Conditional Non Prosecution in Corporate Crime Cases." (n 536), 41,45.

wrongdoing that the company will usually agree is an accurate summary of events.<sup>584</sup> However, the company does not formally plead guilty, and the DPA is not a criminal conviction.<sup>585</sup>

DPAs in the UK usually require the company to pay a financial penalty, which by law must be broadly comparable to any fine that the court would have imposed had the company been convicted.<sup>586</sup> While a standard guilty plea attracts a one-third discount, UK judges have established that DPAs can merit a 50% discount to reward 'extraordinary cooperation' and voluntary self-reporting.<sup>587</sup> In addition to a fine, DPAs commonly mandate disgorgement of profits gained from the wrongdoing, payment of compensation to victims if applicable, and payment of the prosecutor's costs.<sup>588</sup>

Beyond the above financial terms, UK DPAs nearly always require that the company improve its compliance procedures.<sup>589</sup> A company might be required to implement a new or enhanced anti-bribery compliance programme, sometimes under the guidance

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<sup>584</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16) 98. Palmer, Axel and Nicholas Ryder, Deferred prosecutions and justice: a whodunnit? In 'Research Handbook on Plea Bargaining and Criminal Justice' (n 381), 248. Capus N and Bozinova M, 'Impression Management in Corporate Corruption Settlements: The Storied Self of the Prosecutorial Authority', (n 577), 8.

<sup>585</sup> Lord, Nicholas. "Prosecution Deferred, Prosecution Exempt: On the Interests of (In)Justice in the Non-Trial Resolution of Transnational Corporate Bribery." (n 401), 849. Søreide, Tina and Vagle, Kari, 'Settlements in Corporate Bribery Cases: An Illusion of Choice?' (n 551), 278. Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?' (n 36), 53.

<sup>586</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1253. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16) 91. Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47) 119.

<sup>587</sup> Palmer, Axel and Nicholas Ryder, Deferred prosecutions and justice: a whodunnit? In 'Research Handbook on Plea Bargaining and Criminal Justice' (n 381), 250. Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 795. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16) 198.

<sup>588</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 52. Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1253. Lord, Nicholas. "Prosecution Deferred, Prosecution Exempt: On the Interests of (In)Justice in the Non-Trial Resolution of Transnational Corporate Bribery." (n 401), 851.

<sup>589</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1253. Manacorda, Stefano, and Centonze, Francesco (eds.). *Corporate Compliance on a Global Scale: Legitimacy and Effectiveness*, (n 26), 320. Bu, Qingxiu. "The Viability of Deferred Prosecution Agreements (DPAs) in the United Kingdom: The Impact on Global Anti-Bribery Compliance." (n 50), 195.

of an independent reviewer or monitor.<sup>590</sup> The UK legislation permits the appointment of an independent monitor to ensure compliance with the DPA's terms. However, UK authorities have so far been cautious in their use of monitors. More frequently, companies have been required to provide periodic self-reports on compliance remediation to the SFO.<sup>591</sup> The possibility of a monitor nevertheless exists as a tool in appropriate cases. If the company abides by the conditions of the DPA throughout its operation, then, at the end of the period, the deferred charges are formally discontinued, and the company avoids a criminal conviction for the matters covered by the agreement.<sup>592</sup> Conversely, if the company materially breaches the DPA, for example, by misrepresenting facts or failing to pay the fine, the prosecutor can reactivate the suspended prosecution and take the company to court on the original charges.<sup>593</sup>

Thus far, UK DPAs have generally been successful, in that the cooperating companies have complied with their terms, and none have yet been revoked for breach.<sup>594</sup> The judicial oversight mechanism, which means each agreement is published and accompanied by a reasoned judicial approval, has been credited with fostering public confidence in the use of DPAs.<sup>595</sup> Major cases of corporate bribery in the UK (such as those involving Rolls-Royce and Tesco) have been resolved through DPAs, resulting

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<sup>590</sup> Bu, Qingxiu. "The Viability of Deferred Prosecution Agreements (DPAs) in the United Kingdom: The Impact on Global Anti-Bribery Compliance." (n 50), 195. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 199. <sup>590</sup> Manacorda, Stefano, and Centonze, Francesco (eds.). *Corporate Compliance on a Global Scale: Legitimacy and Effectiveness*, (n 26), 320.

<sup>591</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 27.

<sup>592</sup> Bu, Qingxiu. "The Viability of Deferred Prosecution Agreements (DPAs) in the United Kingdom: The Impact on Global Anti-Bribery Compliance.", (n 50), 174. Lord, Nicholas. "Prosecution Deferred, Prosecution Exempt: On the Interests of (In)Justice in the Non-Trial Resolution of Transnational Corporate Bribery." (n 401), 851. Søreide, Tina and Vagle, Kari, 'Settlements in Corporate Bribery Cases: An Illusion of Choice?' (n 551), 278.

<sup>593</sup> Bu, Qingxiu. "The Viability of Deferred Prosecution Agreements (DPAs) in the United Kingdom: The Impact on Global Anti-Bribery Compliance.", (n 50), 174. Wang, Yahong. "Study on the Model of Conditional Non Prosecution in Corporate Crime Cases." (n 536), 42.

<sup>594</sup> Wang, Yahong. "Study on the Model of Conditional Non Prosecution in Corporate Crime Cases." (n 536), 46. Lord, Nicholas. "Prosecution Deferred, Prosecution Exempt: On the Interests of (In)Justice in the Non-Trial Resolution of Transnational Corporate Bribery." (n 401), 851.

<sup>595</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 791, 797. Bu, Qingxiu. "The Viability of Deferred Prosecution Agreements (DPAs) in the United Kingdom: The Impact on Global Anti-Bribery Compliance.", (n 50), 180.

in very substantial penalties and mandated reforms, but without the companies being convicted of criminal offences.<sup>596</sup>

The UK's DPA regime has many features in common with the US approach in terms of outcomes, avoidance of conviction in exchange for cooperation, payment of penalties, and remediation. However, it embeds these features in a formal legal structure with clear checks and balances.<sup>597</sup> Other commonalities include the emphasis on voluntary self-disclosure and cooperation as a condition of being invited to negotiate a DPA, provision for significant financial penalties and disgorgement of ill-gotten gains, and the requirement that companies improve compliance to prevent future misconduct.<sup>598</sup>

The US and UK models both aim to reform corporate behaviour while sanctioning past misconduct, and both see NTRs as a way to resolve cases efficiently and encourage companies to come forward with information. The distinguishing aspect of the UK framework is the strong role for the courts; by making a judge's approval and oversight central, the UK ensures that NTRs are concluded within a framework of judicial accountability, balancing the flexibility of negotiated resolutions with a commitment to the principles of transparency and judicial legitimacy. The UK's adoption of DPAs illustrates how another common law jurisdiction can incorporate a US-originated tool into its own legal tradition. What has emerged is a hybrid model

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<sup>596</sup> Lord, Nicholas. "Prosecution Deferred, Prosecution Exempt: On the Interests of (In)Justice in the Non-Trial Resolution of Transnational Corporate Bribery." (n 401), 851.

<sup>597</sup> Acorn, Elizabeth 'Behind the SNC-Lavalin Scandal: The Transnational Diffusion of Corporate Diversion' (n 462), 904. Palmer, Axel and Nicholas Ryder, Deferred prosecutions and justice: a whodunnit? In 'Research Handbook on Plea Bargaining and Criminal Justice'(n 381), 251, 252 ,253,255, 257.

<sup>598</sup> Søreide, Tina and Vagle, Kari, 'Settlements in Corporate Bribery Cases: An Illusion of Choice?' (n 551), 279. Capus N and Bozinova M, 'Impression Management in Corporate Corruption Settlements: The Storied Self of the Prosecutorial Authority', (n 577), 6. Lord, Nicholas. "Prosecution Deferred, Prosecution Exempt: On the Interests of (In)Justice in the Non-Trial Resolution of Transnational Corporate Bribery." (n 401), 851. Gottschalk, Petter. "Deferred Prosecution Agreements as Miscarriage of Justice: An Exploratory Study of Corporate Convenience." *Journal of Economic Criminology* (2024), 4. Manacorda, Stefano, and Centonze, Francesco (eds.). *Corporate Compliance on a Global Scale: Legitimacy and Effectiveness*(n 26), 320. Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?" (n 15), 69.

that differs in procedure but is aligned in purpose, facilitating the NTR of corporate bribery cases in a way that serves the public interest.

## 2.3 France

### 2.3.1 Establishment of the CJIP

Historically, France, which is a civil law jurisdiction, did not allow prosecutors to settle serious criminal cases through agreements; all crimes had to be adjudicated in court, and the concept of a negotiated outcome was viewed with scepticism under French legal principles.<sup>599</sup> This changed in the mid-2010s in response to international anti-corruption trends and a recognition that French authorities needed more adaptable tools to handle complex cases of corporate bribery, especially those with cross-border dimensions.<sup>600</sup> In 2016, France enacted a sweeping anti-corruption law known as Loi Sapin II (Law No. 2016-1691 on transparency, anti-corruption, and economic modernisation).<sup>601</sup> Among its many provisions, Sapin II introduced the CJIP, which can be translated as a ‘judicial public interest agreement.’<sup>602</sup>

The CJIP is often referred to as the French equivalent of a DPA.<sup>603</sup> It is codified in the French Code of Criminal Procedure (arts 41-1-2) as a legal mechanism for the

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<sup>599</sup> Davis, Frederick T. “Judicial Review of Deferred Prosecution Agreements: A Comparative Study.” (n 34), 801, 802. Langer, Máximo. “Plea Bargaining, Conviction Without Trial, and the Global Administratization of Criminal Convictions.” (n 442), 392. Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47), 114. Einbinder, Fred. “Borrowings and Boomerangs: A Comparative Law Perspective on Resonance in Transnational Anti-Corruption Law Enforcement.” (n 36), 161.

<sup>600</sup> Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47), 124. Davis, Frederick T. “Judicial Review of Deferred Prosecution Agreements: A Comparative Study.” (n 34), 803, 808.

<sup>601</sup> Davis, Frederick T. “Judicial Review of Deferred Prosecution Agreements: A Comparative Study.” (n 34), 800. Manacorda, Stefano, and Centonze, Francesco (eds.). *Corporate Compliance on a Global Scale: Legitimacy and Effectiveness*, (n 26), 321. Makinwa, Abiola, ‘Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?’ (n 36), 51.

<sup>602</sup> Davis, Frederick T. “Judicial Review of Deferred Prosecution Agreements: A Comparative Study.” (n 34), 803. Einbinder, Fred. “Borrowings and Boomerangs: A Comparative Law Perspective on Resonance in Transnational Anti-Corruption Law Enforcement.” (n 36), 161.

<sup>603</sup> Davis, Frederick T. “Judicial Review of Deferred Prosecution Agreements: A Comparative Study.” (n 34), 803. Fragale, Mauro, and Grilli, Valentina. “Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?” (n 15), 57.

resolution of certain corporate criminal cases without a trial or conviction.<sup>604</sup> The CJIP is available to legal persons (i.e., companies) accused of specific offences, notably corruption and influence-peddling offences, as well as related financial crimes like tax fraud and money laundering.<sup>605</sup> Under this framework, prosecutors, specifically the National Financial Prosecutor's Office (Parquet National Financier, PNF), which handles major corruption cases, may offer a CJIP to a company in lieu of proceeding with a traditional prosecution.<sup>606</sup>

The decision to propose a CJIP will depend on factors such as the company's cooperation, any remedial actions taken, and the broader public interest.<sup>607</sup> Importantly, as in the UK, individuals cannot benefit from a CJIP. If company executives or other natural persons are implicated, they remain subject to prosecution and potential trial, even if the company enters into a CJIP.<sup>608</sup> This reflects a policy choice in Sapin II to restrict NTRs to corporate entities, at least for serious offences like bribery, thereby preserving the notion that culpable individuals should face personal criminal liability.<sup>609</sup>

As regards the terms and process, a CJIP is a formal written agreement between the prosecutor and the company.<sup>610</sup> It includes a detailed statement of facts describing the

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<sup>604</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 805. Wang, Yahong. "Study on the Model of Conditional Non Prosecution in Corporate Crime Cases." (n 536), 43.

<sup>605</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 803.

<sup>606</sup> *Ibidem*, 804, 808. Dennis, Eleanor. "Using N/DPAs to Achieve Global Settlements: Lessons for Canada." (n 33), 61 Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47), 124.

<sup>607</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 806, 808. Manacorda, Stefano, and Centonze, Francesco (eds.). *Corporate Compliance on a Global Scale: Legitimacy and Effectiveness*, (n 26), 322.

<sup>608</sup> Wang, Yahong. "Study on the Model of Conditional Non Prosecution in Corporate Crime Cases." (n 536), 43. Einbinder, Fred. "Borrowings and Boomerangs: A Comparative Law Perspective on Resonance in Transnational Anti-Corruption Law Enforcement." (n 36), 162.

<sup>609</sup> Wang, Yahong. "Study on the Model of Conditional Non Prosecution in Corporate Crime Cases." (n 536), 43. Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 803, 804.

<sup>610</sup> Wang, Yahong. "Study on the Model of Conditional Non Prosecution in Corporate Crime Cases." (n 536), 42, 43.

wrongdoing (similar to the statement of facts in a DPA).<sup>611</sup> The company typically acknowledges these facts, though the CJIP procedure does not require an admission of criminal guilt.<sup>612</sup> In fact, one of the defining aspects of a CJIP is that it does not result in a conviction or a finding of guilt; it is explicitly an alternative to prosecution ‘in the public interest.’<sup>613</sup> In exchange for avoiding a trial, the company agrees to certain sanctions and measures.<sup>614</sup> Chief among these is the payment of a fine, called a public interest fine, which can be quite substantial.<sup>615</sup> Additionally, if the misconduct caused harm, the CJIP can require the company to compensate victims, though in foreign bribery cases the ‘victim’ is often a foreign government or the abstract notion of public trust, so direct compensation is less common than, say, in fraud cases with identifiable victims.<sup>616</sup>

Compliance-related obligations are another frequent component of French CJIPs.<sup>617</sup> Sapin II created a national anti-corruption agency (Agence Française Anticorruption, AFA), and CJIPs often include a requirement that the company submit to a period of monitoring by the AFA or implement an enhanced compliance programme under

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<sup>611</sup> *Ibidem*, 43. Davis, Frederick T. “Judicial Review of Deferred Prosecution Agreements: A Comparative Study.” (n 34), 806, 809.

<sup>612</sup> Davis, Frederick T. “Judicial Review of Deferred Prosecution Agreements: A Comparative Study.” (n 34), 805, 806.

<sup>613</sup> *Ibidem*, 805. Wang, Yahong. “Study on the Model of Conditional Non Prosecution in Corporate Crime Cases.” (n 536), 43. Manacorda, Stefano, and Centonze, Francesco (eds.). *Corporate Compliance on a Global Scale: Legitimacy and Effectiveness*, (n 26), 322.

<sup>614</sup> Heilbrunn, John R., *The Fight Against Corruption: The World Bank Debarment Policy In Corporate Compliance on a Global Scale: Legitimacy and Effectiveness* (n 26), 322. Davis, Frederick T. “Judicial Review of Deferred Prosecution Agreements: A Comparative Study.” (n 34), 804, 808.

<sup>615</sup> Davis, Frederick T. “Judicial Review of Deferred Prosecution Agreements: A Comparative Study.” (n 34), 806, 808. Wang, Yahong. “Study on the Model of Conditional Non Prosecution in Corporate Crime Cases.” (n 536), 44. Einbinder, Fred. “Borrowings and Boomerangs: A Comparative Law Perspective on Resonance in Transnational Anti-Corruption Law Enforcement.” (n 36), 155.

<sup>616</sup> Davis, Frederick T. “Judicial Review of Deferred Prosecution Agreements: A Comparative Study.” (n 34), 804. Manacorda, Stefano, and Centonze, Francesco (eds.). *Corporate Compliance on a Global Scale: Legitimacy and Effectiveness*, (n 26), 322. Capus, Nadja, and Brodersen, Kei Hannah. “Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements.” (n 8), 1255, 1263.

<sup>617</sup> Davis, Frederick T. “Judicial Review of Deferred Prosecution Agreements: A Comparative Study.” (n 34), 804. Capus, Nadja, and Brodersen, Kei Hannah. “Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements.” (n 8), 1253. Manacorda, Stefano, and Centonze, Francesco (eds.). *Corporate Compliance on a Global Scale: Legitimacy and Effectiveness*, (n 26), 322.

AFA supervision.<sup>618</sup> For example, a CJIP may stipulate that the company will, for a term of two or three years, allow AFA inspectors to review its anti-corruption controls and will follow any recommendations to improve its compliance procedures.<sup>619</sup> The maximum duration for an AFA-supervised compliance program under a CJIP is 3 years (Art. 41-1-2 CPP). This is effectively a compliance monitorship, though it is operated by a governmental body rather than an independent monitor. The goal is to ensure the company rectifies the deficiencies that allowed the corruption and to prevent future misconduct.

The procedure for concluding a CJIP involves judicial oversight, but the manner differs from the UK case.<sup>620</sup> In France, once prosecutors and the company have negotiated the terms of a CJIP, the agreement is submitted for approval to a judge (specifically, the president of the tribunal or a delegate judge).<sup>621</sup> There is a dedicated hearing at which the judge examines the proposed CJIP, the facts of the case, and the proportionality of the sanctions proposed.<sup>622</sup> The judicial role is strictly limited to a validation procedure (homologation). The judge verifies the regularity of the procedure, the legal basis of the charges, and the proportionality of the fine, but lacks the statutory power to modify the terms of the agreement negotiated between the PNF and the corporation.<sup>623</sup> If the judge finds that the agreement is in the public interest and the fine is appropriate,

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<sup>618</sup> Manacorda, Stefano, and Centonze, Francesco (eds.). *Corporate Compliance on a Global Scale: Legitimacy and Effectiveness*, (n 26), 322. Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 800, 804. Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47), 124.

<sup>619</sup> Manacorda, Stefano, and Centonze, Francesco (eds.). *Corporate Compliance on a Global Scale: Legitimacy and Effectiveness* (n 26), 321, 322. Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 804. Wang, Yahong. "Study on the Model of Conditional Non Prosecution in Corporate Crime Cases." (n 536), 46. Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1253.

<sup>620</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 809. Wang, Yahong. "Study on the Model of Conditional Non Prosecution in Corporate Crime Cases." (n 536), 42, 43, 44.

<sup>621</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 804.

<sup>622</sup> *Ibidem*, 804, 806. Wang, Yahong. "Study on the Model of Conditional Non Prosecution in Corporate Crime Cases." (n 536), 43. Einbinder, Fred. "Borrowings and Boomerangs: A Comparative Law Perspective on Resonance in Transnational Anti-Corruption Law Enforcement." (n 36), 161.

<sup>623</sup> Wang, Yahong. "Study on the Model of Conditional Non Prosecution in Corporate Crime Cases." (n 536), 44.

given the facts, they will approve the CJIP.<sup>624</sup> Following judicial validation, the corporation retains a statutory 10-day period to exercise a right of withdrawal. Only after this period expires does the agreement become definitive and the public prosecution suspended. The CJIP, along with the judge's approval order, is then made public, often through a published decision or press release, to ensure transparency.<sup>625</sup> If the judge were to reject the CJIP (for instance, deeming the fine insufficient or the case inappropriate for such a settlement), the prosecution would continue in the ordinary way, and the company might then face indictment and trial.<sup>626</sup> Since the introduction of CJIPs, French judges have approved the agreements presented to them, indicating that prosecutors are calibrating the terms to meet expected judicial standards.<sup>627</sup>

### 2.3.2 Impacts and Features

The CJIP has significantly changed France's enforcement landscape for corporate crime.<sup>628</sup> Large multinationals facing foreign bribery allegations, including some headline-making cases, have been able to resolve their French liability through CJIPs, paying large penalties but avoiding the stigma and uncertainty of a conviction.<sup>629</sup> For example, in recent years, companies in the aerospace, banking, and industrial sectors have entered CJIPs related to bribery or financial misconduct, and fines imposed have

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<sup>624</sup> Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?" (n 15), 57. Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 804.

<sup>625</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 805.

<sup>626</sup> Wang, Yahong. "Study on the Model of Conditional Non Prosecution in Corporate Crime Cases." (n 536), 43.

<sup>627</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 805, 806, 809. Jolly, Richard Lorren, and J. J. Prescott. "Beyond Plea Bargaining: A Theory of Criminal Settlement." *Boston College Law Review* 62 (2021), 1096.

<sup>628</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 798, 808, 809.

<sup>629</sup> *Ibidem*, 806. Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47) 125.

reached hundreds of millions of euros.<sup>630</sup> These cases demonstrate that the CJIP is suitable for handling complex, multi-jurisdictional corruption matters.

The French approach embodies features seen in other NTR systems. It incentivises voluntary disclosure and cooperation (the PNF has indicated that a company's chances of being offered a CJIP are much higher if it self-reports and assists the investigation). It also imposes monetary sanctions, demands improvements in compliance, and uses a form of oversight to verify that the agreement serves the public interest.<sup>631</sup> Unlike the US and UK, the French CJIP is firmly grounded in a statutory framework that was designed to fit France's civil law procedures.<sup>632</sup> The requirement of judicial validation and the involvement of the AFA in follow-up monitoring reflect an effort to maintain accountability and state control over the process, consistent with French legal tradition.<sup>633</sup>

France's CJIP provides a clear example of a civil law jurisdiction adapting the concept of corporate NTRs to its legal context. Born out of a broader anti-corruption reform, it shows France's commitment to meeting international standards (the reform was influenced mostly by the effectiveness of US and UK settlements and by the OECD's recommendations). While still relatively new, the CJIP has quickly become an important tool for French prosecutors to resolve bribery cases efficiently, emphasising remediation and compliance, without relinquishing judicial oversight.

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<sup>630</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 806, 808. Bu, Qingxiu. "Multijurisdictional Prosecution of Multinational Corporations: Double Jeopardy vis-à-vis Sovereign Rights in the Globalized Anti-Bribery Regime." *International Annals of Criminology* 60, Nr. 2 (2022), 278, 279. 806.

<sup>631</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 806, 808. Manacorda, Stefano, and Centonze, Francesco (eds.). *Corporate Compliance on a Global Scale: Legitimacy and Effectiveness* (n 26), 322. Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?" (n 15), 57.

<sup>632</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 803, 804. Wang, Yahong. "Study on the Model of Conditional Non Prosecution in Corporate Crime Cases." (n 536), 43. Einbinder, Fred. "Borrowings and Boomerangs: A Comparative Law Perspective on Resonance in Transnational Anti-Corruption Law Enforcement." (n 36), 161.

<sup>633</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 804. Manacorda, Stefano, and Centonze, Francesco (eds.). *Corporate Compliance on a Global Scale: Legitimacy and Effectiveness* (n 26), 321, 322.

## 2.4 Switzerland

Switzerland's approach to NTRs in cases of corporate bribery differs from the formalised DPA or CJIP models, as it has not created a single dedicated settlement instrument.<sup>634</sup> Instead, the Swiss legal system achieves similar outcomes through general provisions in its criminal law that permit prosecutors to conclude cases without a full trial in certain circumstances.<sup>635</sup> Being a civil law jurisdiction, Switzerland has traditionally emphasised prosecutorial discretion and the expedient resolution of cases, especially when the public interest in a trial is low.<sup>636</sup>

There are two key mechanisms critical to the Swiss approach: (1) the opportunity to discontinue proceedings when a company has repaired the harm, and (2) the use of summary penalty orders to impose sanctions without a trial.<sup>637</sup> The first mechanism arises under Article 53 of the Swiss Criminal Code (SCC), often referred to as the reparation article.<sup>638</sup> Article 53 SCC permits discontinuance where the offender has repaired the harm or made every reasonable effort to do so, provided that the public interest in prosecution is of little importance; in corporate foreign bribery cases, this has made the provision controversial, particularly because Swiss authorities have

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<sup>634</sup> Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?" (n 15), 58. Meinhardt, Marcel & Lenggenhager Fadri, *Global Legal Insights: Bribery & Corruption*, London: Global Legal Group, 10<sup>th</sup> ed., 2023. [https://www.lenzstaehelin.com/fileadmin/user\\_upload/publications/GLI\\_Bribery\\_and\\_Corruption\\_2023\\_10th\\_edition\\_Switzerland.pdf](https://www.lenzstaehelin.com/fileadmin/user_upload/publications/GLI_Bribery_and_Corruption_2023_10th_edition_Switzerland.pdf) (accessed 14 June 2025), 235. Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1254.

<sup>635</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1253. Brewster, Rachel. "The Rise of Global FCPA Settlements." (n 497), 34. Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?' (n 36), 51. Klein, Yves, and Daams, Claire A. "The Anti Bribery and Anti Corruption Review: Switzerland." (n 465), 299.

<sup>636</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1253, 1254, 1262. Meinhardt, Marcel & Lenggenhager, Fadri, *Global Legal Insights: Bribery & Corruption* (n 634), 235.

<sup>637</sup> Meinhardt, Marcel & Lenggenhager, Fadri, *Global Legal Insights: Bribery & Corruption*(n 634), 235. Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1253, 1254. Brewster, Rachel. "The Rise of Global FCPA Settlements." (n 497), 34. Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?' (n 36), 54.

<sup>638</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1254.

considered it difficult to reconcile with the public interest in formal enforcement.<sup>639</sup> In practical terms, this means that if a company accused of bribery or a related offence provides compensation for the damage caused by its misconduct (e.g., by paying back illicit gains, indemnifying affected parties, or making payments to charitable causes or the state), the prosecutor has the discretion to drop the case, so long as pursuing a conviction is not considered necessary in the public interest.<sup>640</sup> The rationale for this approach is that the objectives of punishment can sometimes be met by the offender's reparative actions and cooperation, obviating the need for formal charges and a trial.<sup>641</sup>

While Article 102 SCC is often cited in the context of Swiss settlements, it must be distinguished dogmatically from the Anglo-American models. Unlike the U.S. doctrine of respondeat superior, which imposes vicarious liability, the Swiss model treats organisational inadequacy as a constitutive element of the offence. This shifts the legal nature of compliance: it is not a mitigating factor for sentencing, but a substantive 'safe harbor' that negates the actus reus of corporate liability. Consequently, the burden of proof regarding the (in)adequacy of the compliance system rests solely with the prosecution, providing corporations with a more robust shield against conviction than the mere 'discount' offered by traditional DPA frameworks.<sup>642</sup> For example, several companies under investigation for bribery have agreed to pay significant amounts (sometimes to the Swiss government or to the foreign state harmed by the bribes) and, on that basis, the Swiss authorities have terminated the proceedings.<sup>643</sup> States with NTR provisions have essentially harnessed corporate self-interest to advance regulatory goals. Companies know that if they can

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<sup>639</sup> Götz Staehelin, Claudia, and Lembo, Saverio. 85. Meinhardt, Marcel & Lenggenhager, Fadri, *Global Legal Insights: Bribery & Corruption*(n 634)', 235, 236. Bueno, Nicolas, 'Swiss Multinational Enterprises and Transnational Corruption: Management Matters'(n 504), 204.

<sup>640</sup> Meinhardt, Marcel & Lenggenhager, Fadri, *Global Legal Insights: Bribery & Corruption* (n 634), 233, 235, 236. Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1263.

<sup>641</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1254.

<sup>642</sup> Article 102 SCC. Katia Villard, La compétence du juge pénal suisse à l'égard de l'infraction reprochée à l'entreprise: avec un regard particulier sur les groupes de sociétés (Schulthess 2017), 175, 186.

<sup>643</sup> Bueno, Nicolas, 'Swiss Multinational Enterprises and Transnational Corruption: Management Matters'(n 504), 205.

show they have a strong compliance framework (perhaps even one that is responsible for detecting and reporting the issue), they stand a much better chance of a favourable settlement. For instance, although Switzerland lacks a formal DPA system, Article 102 of the Swiss Criminal Code emphasises adequate organisational measures. Swiss authorities can choose not to prosecute a company (or impose only a minor fine) if the company had taken all reasonable precautions to prevent the offence.

The Swiss approach does not amount to a formal DPA or NPA regime. However, where proceedings are discontinued under art 53 SCC following reparation, the case may be closed without a conviction, an outcome the literature describes as equivalent to an acquittal.<sup>644</sup>

The second mechanism is the summary penalty order (*Strafbefehl* in German, *ordonnance pénale* in French), provided for in the Swiss Code of Criminal Procedure.<sup>645</sup> A summary penalty order involves a prosecutor unilaterally issuing a decision imposing a criminal penalty on the accused, without a trial. This option is available for cases that are relatively straightforward and where the expected sanctions do not exceed certain thresholds (for instance, a prison term of under one year or fines up to a defined limit).<sup>646</sup> In the context of corporate enforcement, summary penalty orders have become a common way to conclude cases of corporate wrongdoing, including foreign bribery.<sup>647</sup>

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<sup>644</sup> Makinwa, Abiola. Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution? (n 36), 54. Götz Staehelin, Claudia, and Lembo, Saverio. 85.

<sup>645</sup> Makinwa, Abiola. Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?(n 36), 54. Capus, Nadja, and Brodersen, Kei Hannah. Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements. (n 8), 1253.

<sup>646</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1253. Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?'(n 36), 54. Paolini, Gabriele, Kantorowicz-Reznichenko, Elena and Voigt, Stefan. "Plea Bargaining Procedures Worldwide: Drivers of Introduction and Use." ILE Working Paper Series Nr. 75. Hamburg: University of Hamburg, Institute of Law and Economics, 2023, 18.

<sup>647</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1253, 1254, 1263.

The process works as follows. If the prosecutor believes the evidence is sufficient and the company is willing to accept sanctions, the prosecutor drafts an order outlining the offence, the applicable law, and the penalties (which can include a fine and the confiscation of illicit profits).<sup>648</sup> This order is then formally issued to the company, which can choose to accept or object to the order.<sup>649</sup> If the company does not object within a short period (10 days under Swiss law), the order becomes legally binding and has the effect of a final judgment.<sup>650</sup> If the company were to object, the case would proceed to court as a standard prosecution.<sup>651</sup>

In practice, companies often do not object if the terms of the order have been discussed in advance, effectively rendering the summary penalty order a negotiated outcome.<sup>652</sup> Unlike a DPA or CJIP, the summary penalty order results in a conviction. It is technically a finding that the company is liable, but it is reached without a trial and usually with minimal publicity (though in high-profile cases, the authorities may issue a press release).<sup>653</sup>

The Swiss Office of the Attorney General, which handles federal cases including foreign bribery, has employed these tools to settle corporate bribery cases.<sup>654</sup> A notable example is the 2015 case involving the Swiss printing technology firm, KBA-NotaSys.<sup>655</sup> The company, which self-reported paying bribes to public officials in

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<sup>648</sup> *Ibidem*, 1254. Makinwa, Abiola, ‘Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?’ (n 36), 54.

<sup>649</sup> Capus, Nadja, and Brodersen, Kei Hannah. “Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements.” (n 8), 1253.

<sup>650</sup> Wernli, Jürg. 213.

<sup>651</sup> *Ibidem*. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10 ) 22. Capus, Nadja, and Brodersen, Kei Hannah. “Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements.” (n 8), 1253

<sup>652</sup> Capus, Nadja, and Brodersen, Kei Hannah. “Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements.” (n 8), 1253. Wernli, Jürg. 213, 221.

<sup>653</sup> Capus, Nadja, and Brodersen, Kei Hannah. “Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements.” (n 8), 1253, 1254. Wernli, Jürg. 222, 223, 224. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 55.

<sup>654</sup> Mendelsohn, Mark F ‘Preface’ in *The Anti-Bribery and Anti-Corruption Review*’ (n 465), 298. Götz Staehelin, Claudia, and Lembo, Saverio. 66. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10) 22. Bueno, Nicolas, ‘*Swiss Multinational Enterprises and Transnational Corruption: Management Matters*’ (n 504), 205.

<sup>655</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 55, 237. Meinhardt, Marcel & Lenggenhager, Fadri, *Global Legal Insights: Bribery & Corruption* (n 634), 233.

Nigeria to win business, reached a resolution with the Office of the Attorney General.<sup>656</sup> The company was sanctioned via a summary penalty order, which imposed a symbolic fine of 1 Swiss franc (essentially waiving punishment in exchange for cooperation) but required the disgorgement of approximately 35 million Swiss francs in profits obtained through the corrupt contracts.<sup>657</sup> KBA-NotaSys also took internal steps to remediate and cooperated fully.<sup>658</sup> Because the company did not contest the order, the case was closed without a trial.<sup>659</sup> In earlier cases, such as the 2011 Alstom matter (involving a French engineering company's Swiss subsidiary implicated in bribery), the authorities had similarly issued a penalty order with a fine and a large compensatory payment, which the company accepted to conclude the case.<sup>660</sup>

These examples illustrate how Swiss prosecutors can achieve outcomes functionally comparable to a DPA, with the company paying a fine and committing to compliance actions in return for avoiding a protracted legal process. Notably, in the Swiss system, the courts do not have the same proactive role as in the UK or French systems.<sup>661</sup> In proceedings under Article 53 SCC, the decision to drop the case is an exercise of prosecutorial discretion (though it may be subject to oversight by higher prosecutorial authorities or reviewed if challenged by an injured party).<sup>662</sup> With summary penalty orders, a court is not engaged unless the order is challenged.<sup>663</sup> There is no routine

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<sup>656</sup> *Ibidem*. CHF35 million corruption settlement for printing press firm' *Swissinfo* (24 February 2017) [https://www.swissinfo.ch/eng/business/kba-notasys\\_chf35-million-corruption-fine-for-printing-press-firm/42986930](https://www.swissinfo.ch/eng/business/kba-notasys_chf35-million-corruption-fine-for-printing-press-firm/42986930) accessed 9 July 2025.

<sup>657</sup> Götz Staehelin, Claudia, and Lembo, Saverio. 81.

<sup>658</sup> *Ibidem*. Meinhardt, Marcel & Lenggenhager, Fadri, *Global Legal Insights: Bribery & Corruption* (n 634), 233.

<sup>659</sup> Götz Staehelin, Claudia, and Lembo, Saverio. 81. Schellenberg Wittmer, 'Spotlight: Company Conduct during Criminal and Regulatory Investigations in Switzerland' *Lexology* (24 July 2023) <https://www.lexology.com/library/detail.aspx?g=d9a5d403-0687-4658-a615-d04e24b2ec6b> accessed 9 July 2025.

<sup>660</sup> Wernli, Jürg. 206. Meinhardt, Marcel & Lenggenhager, Fadri, *Global Legal Insights: Bribery & Corruption* (n 634), 236. Bueno, Nicolas, 'Swiss Multinational Enterprises and Transnational Corruption: Management Matters' (n 504), 205.

<sup>661</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1253, 1254. Wernli, Jürg. 223.

<sup>662</sup> Nadja Capus and Franziska Hohl Zürcher. 9. Götz Staehelin, Claudia, and Lembo, Saverio. 85.

<sup>663</sup> *Ibidem*, 223. Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1253. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16) 27.

public hearing or judicial approval required; the role of the judge is substituted by the requirement that conditions of the law are met, for example, that reparation is made and public interest is minimal for Article 53, or that the evidence is clear and sanctions appropriate for a penal order.<sup>664</sup> This low level of court involvement aligns with Switzerland's civil law tradition, in which prosecutorial conciliation and administrative handling of offences are acceptable for economic crimes.<sup>665</sup>

The key feature of the Swiss NTR model is that it is integrated into general legal provisions rather than existing as a standalone framework.<sup>666</sup> While the remedy lacks a catchy label like 'DPA' or 'CJIP,' in substance, it allows many corporate bribery cases to be resolved without indictment or litigation. Features shared with the US, UK, and French approaches include the reliance on cooperation and voluntary disclosure – Swiss authorities have publicised that companies can benefit from leniency if they come forward and make reparations – and the requirement that companies surrender their illicit gains and improve compliance.<sup>667</sup>

One could say that Swiss prosecutors have an informal settlement process; they discuss with the company what measures (payments, compliance steps, self-cleaning efforts) would satisfy the requirements of Article 53 or justify a lenient penalty order. If the company agrees, the resolution is implemented using the legal tools on hand. Swiss enforcement officials have broad discretion, allowing resolutions to be tailored to each case without a highly regimented procedure. Switzerland's approach is thus somewhat flexible. However, it is also less transparent than, for example, a court-approved DPA, since detailed agreements are not systematically published; many

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<sup>664</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1253, 1254. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 27, 55. Götz Staehelin, Claudia, and Lembo, Saverio. 85. Wernli, Jürg. 223.

<sup>665</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1253, 1254. Bozbayındır, AE, 'The Role of the Judge in the European Plea Bargaining Procedures: Three Models Compared' (2024) 28(3) *International Journal of Evidence & Proof*, 208, 210, 212.

<sup>666</sup> Götz Staehelin, Claudia, and Lembo, Saverio. 85. Wernli, Jürg. 207, 208. Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?' (n 36), 54.

<sup>667</sup> Götz Staehelin, Claudia, and Lembo, Saverio. 66, 81, 82.

penal orders are not publicly available, other than through occasional media coverage or academic access to redacted documents.<sup>668</sup>

Nevertheless, from a comparative perspective, Switzerland achieves the same essential result as the other jurisdictions discussed. Companies can avoid a criminal trial and conviction for bribery by reaching an agreement with authorities to pay a fine or other compensation and to take corrective action. This approach has enabled Switzerland, which is home to many international companies and financial institutions, to handle complex bribery cases (often involving foreign officials and global schemes) efficiently.<sup>669</sup> It reflects a pragmatic enforcement strategy that prioritises remediation and quick resolution in cases where a lengthy trial is considered unnecessary. In the broader context of anti-bribery enforcement, the Swiss experience demonstrates that even without a formal DPA law, a legal system can leverage existing procedural tools to accomplish negotiated corporate settlements. Thus, while the surface forms differ, a US DPA, a UK DPA, a French CJIP, or a Swiss penal order, the underlying principle across all these examples is strikingly similar: corporate wrongdoing can be addressed through agreements that impose penalties and reforms, obviating the need for a full criminal trial.

## 2.5 Interim Conclusion

Across the US, the UK, France, and Switzerland, we observe a clear trend toward resolving corporate bribery cases through non-trial mechanisms. Each jurisdiction has developed a framework allowing companies to avoid criminal conviction by entering into a settlement with authorities under defined conditions. Despite differences in the legal traditions and procedures of the four jurisdictions, the commonalities in their

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<sup>668</sup> *Ibidem*, 8,21, 223. Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1252, 1253, 1254.

<sup>669</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1251, 1263. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 114 (Concrete example of efficient handling of a multijurisdictional bribery case, would be in the Odebrecht global resolution between Brazil, Switzerland and the US the Swiss summary punishment orders imposed USD 116 million in confiscation on Odebrecht SA and its Swiss subsidiary.)

NTR frameworks are evident. In all four states, the agreements have the same fundamental purpose: to hold corporations accountable for wrongdoing through financial penalties and mandated reforms, while incentivising cooperation and avoiding the uncertainties of trial.

Companies are expected to admit the facts (if not accept legal guilt), pay sizeable fines, disgorge illicit profits, compensate where appropriate, and take measures to strengthen compliance and governance. In return, prosecutors agree to defer or discontinue the prosecution, ultimately allowing the company to emerge without a criminal conviction if it fulfils its obligations. Another shared element is the emphasis on corporate cooperation and self-reporting. The US policy, UK guidelines, French practice under Sapin II, and Swiss discretionary tradition all send a message that a company that voluntarily comes forward and actively assists the investigation will be viewed as a candidate for a more favourable resolution (such as an NPA, DPA, CJIP, or reparation-based closure) rather than a punitive trial. This dynamic has become a cornerstone of enforcement strategies globally, as authorities seek to encourage companies to police themselves and disclose misconduct early.

All four jurisdictions considered here also include compliance enhancement as a standard part of settlements, reflecting a consensus that preventing future bribery is as important as punishing past behaviour. The use of monitors or similar oversight to verify compliance improvements is also a feature of three of the systems (and available in the UK), demonstrating their recognition of the need for independent follow-up in some cases. The key differences among the frameworks include the degree of judicial involvement (extensive in the UK and France, minimal in the US and Switzerland) and whether a formal conviction is recorded (yes in a Swiss penal order, no in a DPA, CJIP, or NPA). These differences stem from each state's legal context and do not detract from the overarching similarity in approach.

The differences observed are structural choices about how to implement the concept of a negotiated resolution, rather than differences in how the concept is understood.

Notably, all four states have found it necessary to reconcile the idea of negotiated justice with their legal principles more broadly: the US relies on prosecutorial discretion and pragmatic acquiescence by the courts, the UK and France have written the practice into law with checks and balances, and Switzerland uses the latitude afforded to prosecutors under existing codes. Each option taken makes it possible to settle corporate bribery cases efficiently.

In conclusion, the USA, UK, France, and Switzerland exemplify a broader global shift toward the use of NTR frameworks in the fight against corporate bribery. These frameworks are grounded in a shared understanding that corporate misconduct is most effectively addressed through agreements that secure cooperation, impose meaningful penalties, and require future compliance, all without the delay and complexity of trial.

### **Chapter 3: The Implications of NTRs on Global Anti-Corruption Efforts**

#### **3.1 Introduction**

This chapter examines the implications of NTRs for global anti-corruption efforts, focusing on several interrelated issues. This chapter describes NTR frameworks by engaging with the normative and practical dilemmas they present. In doing so, the chapter sets the stage for a deeper inquiry into whether NTRs ultimately advance or inadvertently undermine the global fight against corruption and what reforms might be necessary to align this enforcement tool with the broader goals of justice and accountability.

#### **3.2 Challenges to Consistency and Fairness: The Problem of Divergent National Practices**

The global proliferation of NTR mechanisms has not followed a single template. Instead, states have tended to craft their own version of settlements in corruption cases, reflecting their legal traditions, institutional structures, and political priorities.<sup>670</sup>

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<sup>670</sup> O'Malley PJ, *'Directors' Duties and Corporate Anti-Corruption Compliance: The 'Good Steward' in US and UK Law and Practice'*, Massachusetts, (Edward Elgar Publishing 2020) 46-49.

This divergence in national practices creates significant challenges for consistency and fairness in global anti-corruption enforcement.<sup>671</sup> In principle, the OECD Anti-Bribery Convention and the UNCAC were efforts to establish a common front against bribery by requiring all states parties to criminalise bribery and punish it effectively.<sup>672</sup> In practice, however, there is considerable variety in how states have enforced those laws, increasingly via settlements rather than trials.<sup>673</sup> The resulting fragmentation leads to uneven outcomes for similar misconduct and perceptions of inequity in how justice is administered.<sup>674</sup>

One major axis of divergence is whether and how legal systems formally recognise NTRs. Some jurisdictions have enacted explicit settlement frameworks in law, with defined procedures and criteria.<sup>675</sup> For example, the US has long used DPAs and NPAs as part of its prosecutorial toolbox, and the UK introduced DPAs through legislation that includes judicial oversight of the process. France created the CJIP to allow companies to avoid conviction for corruption offences by fulfilling certain conditions (such as paying fines and implementing compliance programmes) and also to prosecute French companies in France.<sup>676</sup> These formal mechanisms typically require some level of transparency, often a published statement of facts or a court hearing for approval, which at least creates a record of the wrongdoing and the rationale for

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<sup>671</sup> Søreide, Tina and Vagle, Kari, 'Settlements in Corporate Bribery Cases: An Illusion of Choice?' (n 551), 273.

<sup>672</sup> Oded, Sharon, 'Multi-Jurisdictional Anti-Corruption Enforcement: Time for a Global Approach' (2020) 28 Journal of Law & Policy, 517, 518. Acorn, Elizabeth 'Twenty Years of the OECD Anti-Bribery Convention: National Implementation and Hybridization' (2018) 51 University of British Columbia Law Review, 621. Heimann, Fritz, and Pieth, Mark, 'Confronting Corruption: Past Concerns, Present Challenges, and Future Strategies' (n 132), 108. Ivory, Radha, and Søreide, Tina. "The International Endorsement of Corporate Settlements in Foreign Bribery Cases." (n 18), 955.

<sup>673</sup> Ivory, Radha, and Søreide, Tina. "The International Endorsement of Corporate Settlements in Foreign Bribery Cases." (n 18), 948. Pimenta, Raquel and Venturini, Otavio, 'International Cooperation and Negotiated Settlements for Transnational Bribery: A Study of the Odebrecht Case' (n 16), 24.

<sup>674</sup> Søreide, Tina and Vagle, Kari, 'Settlements in Corporate Bribery Cases: An Illusion of Choice?' (n 551), 271, 273.

<sup>675</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 788, 803. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 60. Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?' (n 36), 54.

<sup>676</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 51. Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 803. Bohnert, Jean-François. 38. Hilti, Martin. 146.

settlement.<sup>677</sup> In contrast, the US handles corporate bribery cases through informal or non-explicit means, relying on general prosecutorial discretion or the adaptation of existing legal provisions.<sup>678</sup>

In states with a tradition of mandatory prosecution in criminal law (under the legality principle), outright bargaining might not be codified. Prosecutors may nevertheless find creative ways to resolve cases without going to trial.<sup>679</sup> For instance, some civil law states employ procedures akin to plea agreements or invoke the 'principle of opportunity' in limited circumstances to justify dropping charges once a company consents to certain penalties.<sup>680</sup> The absence of a clear legal framework in such cases can make the process opaque. Deals may be struck in conference rooms with minimal public record and presented as a *fait accompli*, or the case may be discontinued with scant explanation.<sup>681</sup> This patchwork of explicit and implicit settlement regimes means that the degree of formality, oversight, and clarity in NTRs differs markedly from one jurisdiction to another.

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<sup>677</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 51, 98, 151, 152. Bacarese, Alan, *Negotiated Settlements for Corruption Offences: Position in the United Kingdom* (n 15), 178.

<sup>678</sup> Alexander, Cindy R. & Cohen, Mark A., '*The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*' (2015) 52 *American Criminal Law Review*, 537, 545.

<sup>679</sup> Makinwa, Abiola, *Negotiated Settlements for Corruption Offences: Wither Europe?* (n 15), 12. Oehmichen, Anna, *Negotiated Settlements for Corruption Offences: Position in Germany* (n 15), 45. Sandgren, Claes, *Negotiated Settlements for Corruption Offences: Position in Sweden* (n 15) 160, 161. Bozbayındır, AE, '*The Role of the Judge in the European Plea Bargaining Procedures: Three Models Compared*' (n 665), 223. Makinwa, Abiola, '*Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?*' (n 36), 49. Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47), 114.

<sup>680</sup> Makinwa, Abiola, *Negotiated Settlements for Corruption Offences: Wither Europe?* (n 15), 12. Van Wingerde, Karim and Smid, Gerben, *Negotiated Settlements for Corruption Offences: Position in The Netherlands* (n 15) 114. Makinwa, Abiola, '*Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?*' (n 36), 51. Langer, Máximo. "*Plea Bargaining, Conviction Without Trial, and the Global Administratization of Criminal Convictions.*" (n 442), 393. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 56.

<sup>681</sup> Van Wingerde, Karim and Smid, Gerben, *Negotiated Settlements for Corruption Offences: Position in The Netherlands* (n 15), 121. Hock, Branislav. "*Policing Corporate Bribery: Negotiated Settlements and Bundling.*" (n 15), 950. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9 ), 500. Garrett, Brandon. "*The Global Evolution of Corporate Prosecutions.*" (n 16), 59. Capus, Nadja and Hohl Zürcher, Franziska, *Revamping Anticorruption Criminal Law - The Making of (In-)Transparency* (n 26), 22. Søreide, Tina. 273 ,277.

The inconsistency in frameworks translates into inconsistency in outcomes. A fundamental fairness concern is that two companies implicated in similar bribery schemes might face very different consequences depending on where the conduct is addressed.<sup>682</sup> In one state, a corporation might negotiate a settlement that involves a significant monetary penalty but without requiring a formal admission of guilt or a criminal conviction. It can thus continue business as usual (including bidding for public contracts) after paying the fine.<sup>683</sup> In another state dealing with the same corporate misconduct, authorities might lack an NTR mechanism and proceed to prosecution, potentially resulting in a criminal conviction, a public record of the wrongdoing from the trial, and mandatory debarment or other collateral sanctions.<sup>684</sup>

Even when outcomes appear similar (for example, they involve financial penalties), the processes leading to them can vary in fairness and transparency. Some jurisdictions require a judge to review and approve the settlement to confirm that it serves the public interest and that the terms are fair and proportionate.<sup>685</sup> Other jurisdictions may conclude corporate bribery cases entirely through prosecutorial discretion without any independent check or public hearing.<sup>686</sup> In terms of the rule of law, such disparities are troubling. Fairness traditionally demands that like cases be treated alike, and that

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<sup>682</sup> Acorn, Elizabeth 'Twenty Years of the OECD Anti-Bribery Convention: National Implementation and Hybridization'(n 672), 662. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10 ), 48. Ivory, Radha, and Søreide, Tina. "The International Endorsement of Corporate Settlements in Foreign Bribery Cases." ( n 18), 952. *Ibidem*, 40.

<sup>683</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 50, 151, 183. Lap rou-Schneider, B atrice. 100.

<sup>684</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 19, 123. Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?'(n 36), 48. Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47) 37. Bu, Qingxiu. "The Viability of Deferred Prosecution Agreements (DPAs) in the United Kingdom: The Impact on Global Anti-Bribery Compliance." (n 50), 176.

<sup>685</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study."(n 34), 791, 793, 794. Reilly, Peter R. "Sweetheart Deal, Deferred Prosecution, and Making a Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts." *Arizona State Law Journal* 50 (2018), 1146. Reilly PR, 'Corporate Deferred Prosecution as Discretionary Injustice' (2017) *Utah Law Review*, 873, 878. S reide, Tina, Negotiated Settlements for Corruption Offences: Position in Norway (n 15), 144.

<sup>686</sup> de Doelder et al, Perspectives on Negotiated Settlements (n 15), 197,198. Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1254, 1263. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, ( n 10 ), 22, 26.

justice should not hinge on arbitrary factors such as the venue of prosecution.<sup>687</sup> Yet with divergent NTR practices, a company's exposure to sanctions and stigma for bribery can be as much a function of geography and jurisdictional happenstance as of the gravity of its offence.

The principle of consistency is further undermined by differing levels of transparency associated with NTRs. In some states, settlements are announced with detailed press releases or court rulings are published that lay out the facts of the corruption scheme, the reasons for agreeing to a resolution, and how the penalty was calculated.<sup>688</sup> This openness contributes to public accountability, allowing civil society, the media, and other stakeholders to scrutinise whether the punishment fits the crime and whether any special treatment was given. In other states, however, settlements remain shrouded in secrecy. Deals might be confidential, or only a bare-bones summary is released, with key details withheld, such as the identities of officials bribed or the relationship between the fine and illicit profits.<sup>689</sup> Such opacity fuels suspicions that powerful corporations could be striking sweetheart deals to bury embarrassing revelations or that prosecutors might be settling for expediency without ensuring proper justice.

The OECD's Working Group on Bribery has repeatedly emphasised the need for transparency in settlements, cautioning that secret or opaque agreements weaken public confidence in the anti-corruption enforcement regime.<sup>690</sup> When essential

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<sup>687</sup> Alexander, Cindy R. & Cohen, Mark A., 'The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements' (n 678), 557.

<sup>688</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 157. Van Wingerde, Karim and Smid, Gerben, *Negotiated Settlements for Corruption Offences: Position in The Netherlands* (n 15), 122. Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 792, 793, 794. Bu, Qingxiu. "The Viability of Deferred Prosecution Agreements (DPAs) in the United Kingdom: The Impact on Global Anti-Bribery Compliance." (n 50), 189.

<sup>689</sup> Van Wingerde, Karim and Smid, Gerben, *Negotiated Settlements for Corruption Offences: Position in The Netherlands* (n 15), 116. Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1253, 1254. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 29.

<sup>690</sup> Ivory, Radha, and Søreide, Tina. "The International Endorsement of Corporate Settlements in Foreign Bribery Cases." (n 18), 965. Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?" (n 15) 53.

elements of a settlement, such as its facts, justification, parties, and penalties, are not made public, it reduces the deterrent and educative effects of the case and leaves an accountability gap. Citizens cannot tell if a multinational that paid bribes in their state was let off lightly or appropriately sanctioned, and potential offenders do not receive a clear message about the consequences of misconduct. Uneven transparency standards across national NTR practices challenge the fairness and credibility of global anti-corruption efforts.

Another fairness issue is the degree of judicial or independent oversight in the NTR process. A traditional criminal trial is overseen by a judge, with evidence tested in court and guilt or innocence determined according to law. This process inherently provides a check on the prosecution's assertions and demands.<sup>691</sup> With negotiated resolutions, there is a risk that the prosecutor is effectively becoming the judge and jury by determining the outcome of the case through a bargain.<sup>692</sup> Some states mitigate this risk by involving judges at key stages. For example, in the UK, a DPA is approved by a judge who must be satisfied that the agreement is in the interests of justice and that its terms are fair and reasonable.<sup>693</sup> This requirement introduces a measure of independent scrutiny and helps to ensure that the settlement is not simply a product of unequal bargaining power or convenience.

Critics argue that, in the absence of such oversight, NTRs can lack legitimacy.<sup>694</sup> If a prosecutor alone decides that a corporation should pay a certain sum and avoid a conviction, how can the public be sure that they were not influenced by undue

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<sup>691</sup> Reilly PR, 'Corporate Deferred Prosecution as Discretionary Injustice' (n 685), 868. Langer, Máximo. "Plea Bargaining, Conviction Without Trial, and the Global Administratization of Criminal Convictions." (n 442), 394.

<sup>692</sup> Langer, Máximo. "Plea Bargaining, Conviction Without Trial, and the Global Administratization of Criminal Convictions." (n 442), 389,390. Bozbayındır, AE, 'The Role of the Judge in the European Plea Bargaining Procedures: Three Models Compared' (n 665), 207, 208, 209.

<sup>693</sup> Bacarese, Alan, Negotiated Settlements for Corruption Offences: Position in the United Kingdom (n 15), 178. Reilly, Peter R. "Sweetheart Deal, Deferred Prosecution, and Making a Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts." (n 685), 1147. Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study."(n 34), 791. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 144.

<sup>694</sup> Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?'(n 36), 57, 63, 67.

leniency, bias, or even corruption? The principle of legality in many civil law systems was intended to guard against arbitrary or selective enforcement by obligating prosecutors to pursue all offences that meet a certain evidentiary threshold.<sup>695</sup> NTRs represent a partial departure from the principle, injecting greater discretion into the system.<sup>696</sup> Without robust oversight and clear guidelines, this may be exercised inconsistently.<sup>697</sup> Some scholars have gone so far as to claim that broad prosecutorial leeway in structuring settlements, often with little judicial review, is fundamentally at odds with the rule of law.<sup>698</sup> They point out that when prosecutors can, in effect, negotiate justice, setting terms for changes in corporate behaviour and penalties with few external checks, the traditional balance of powers is upset.<sup>699</sup> Ensuring consistency and fairness would require either limiting such discretion or channelling it through transparent rules and oversight mechanisms that operate similarly across jurisdictions.

The divergence in approaches to NTRs has implications for the protection of rights and procedural fairness.<sup>700</sup> In a criminal trial, defendants benefit from extensive procedural safeguards, including the presumption of innocence, the right to confront evidence, the right to a public hearing, and so forth. When a corporate defendant opts for an

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<sup>695</sup> *Ibidem*, 49. Mariani, Paola, Negotiated Settlements for Corruption Offences: Position in Italy (n 15), 66. Stawicka, Karolina and Matusiak, Arkadius, Negotiated Settlements for Corruption Offences: Position in Poland, (n 15), 85.

<sup>696</sup> Sandgren, Claes, Negotiated Settlements for Corruption Offences: Position in Sweden (n 15), 165, 166. Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?' (n 36), 48.

<sup>697</sup> de Doelder et al, Perspectives on Negotiated Settlements (n 15), 197,198.

<sup>698</sup> Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?" (n 15) 64. Koehler, Mike. "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement." (n 51), 558. Ivory, Radha, and Søreide, Tina. "The International Endorsement of Corporate Settlements in Foreign Bribery Cases." (n 18), 975.

<sup>699</sup> Koehler, Mike. "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement." (n 51), 559. Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47) 41, 45. Feinstein BD, Heaston WR and de Carvalho GS, 'In-Group Favoritism as Legal Strategy: Evidence from FCPA Settlements'(n 532), 22,23. Reilly, Peter R. "Sweetheart Deal, Deferred Prosecution, and Making a Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts." (n 685), 1116. Søreide, Tina, Negotiated Settlements for Corruption Offences: Position in Norway (n 15), 144. Søreide, Tina. 274.

<sup>700</sup> Alexander, Cindy R. & Cohen, Mark A., 'The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements' (n 678), 538. Søreide, Tina and Vagle, Kari, 'Settlements in Corporate Bribery Cases: An Illusion of Choice?' (n 551), 271.

NTR, it typically waives many of these rights,<sup>701</sup> and does so voluntarily because the alternative (a protracted investigation and trial with an uncertain outcome and potentially catastrophic penalties) is far less attractive.<sup>702</sup> Yet, one must consider whether such defendants have been coerced, given the global enforcement context. Large companies understand that fighting bribery charges in court is rarely viable. The reputational damage and business disruption alone can present an existential threat, not to mention the risk of severe criminal fines or being barred from lucrative markets.<sup>703</sup> As a result, even in jurisdictions where formal plea bargaining was once taboo, companies under investigation might pressure authorities to obtain a settlement or, conversely, prosecutors might pressure companies to settle by leveraging this asymmetry of risk.<sup>704</sup>

There are two forms of fairness at issue: procedural fairness (did the company have a fair chance to assert its case or was it strong-armed into settling?) and outcome fairness (does the settlement achieve a just result in light of the harm caused?). In many negotiated resolutions, the company neither admits nor denies wrongdoing in a formal sense. Rather, it agrees to pay the required penalties and improve its compliance, a stance that blurs the moral clarity that is usually achieved through a guilty verdict.<sup>705</sup>

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<sup>701</sup> Brodowski, Dominik, Parra, Manuel, Tiedemann, Klaus and Vogel, Joachim. *Regulating Corporate Criminal Liability*, London: Springer, 2014, 204. Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 752. Reilly PR, 'Corporate Deferred Prosecution as Discretionary Injustice' (n 685), 864. Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?" (n 15) 60. Makinwa, Abiola, Negotiated Settlements for Corruption Offences: Wither Europe? (n 15), 9.

<sup>702</sup> Makinwa, Abiola, Negotiated Settlements for Corruption Offences: Wither Europe? (n 15), 9. Koehler, Mike. "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement." (n 51), 555.

<sup>703</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 760, 761. Brodowski et al., 204. Bu, Qingxiu. "The Viability of Deferred Prosecution Agreements (DPAs) in the United Kingdom: The Impact on Global Anti-Bribery Compliance." (n 50), 175, 176. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 87. Reilly, Peter R. "Sweetheart Deal, Deferred Prosecution, and Making a Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts." (n 685), 1139.

<sup>704</sup> Søreide, Tina and Vagle, Kari, 'Settlements in Corporate Bribery Cases: An Illusion of Choice?' (n 551), 272.

<sup>705</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 99. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 42. Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?" (n 15), 44.

Some worry that negotiating a settlement avoids a true reckoning with culpability, allowing offenders to escape the stigma of conviction and depriving victims of seeing justice done in open court.<sup>706</sup>

From the perspective of affected stakeholders, the fairness of NTRs is highly questionable in terms of inclusion and as a remedy. In cases of foreign bribery, the primary victims tend to be states, including those where the bribes were paid and their citizens, typically a state in the Global South whose public officials were corrupted.<sup>707</sup> Under a traditional justice model, those victim states might have a role in proceedings (for instance, as parties claiming compensation in a trial) or at least benefit from the outcome (through payment of restitution or damages). However, the voices and interests of these victims are largely absent from NRS as these are currently implemented.<sup>708</sup>

Settlements are usually negotiated between the prosecuting authority (often in a wealthy state where the company is headquartered or listed) and the company itself.<sup>709</sup> The impacted foreign state is not at the table, and there is no requirement that it even be informed of the negotiations until after a deal is struck.<sup>710</sup> In fact, prosecutors seldom inform foreign victim governments that a settlement is imminent, precisely to

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<sup>706</sup> Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?" (n 15) 48, 66 Coffee, John C., Jr. *Corporate Crime and Punishment: The Crisis of Underenforcement.* (n 48), 147 Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47) 31.

<sup>707</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1250. Olaniyan, Kolawole. *Ownership of Proceeds of Corruption in International Law.* (n 9) 12.

<sup>708</sup> Olaniyan, Kolawole. *Ownership of Proceeds of Corruption in International Law.* (n 9), 7. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery,* (n 10), 2, 49, 84.

<sup>709</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery,* (n 10), 46. Perdriel-Vaissière, Maud, *Negotiated Settlements for Corruption Offences: Position in France* (n 15), 17. Oehmichen, Anna, *Negotiated Settlements for Corruption Offences: Position in Germany* (n 15), 57. Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1262.

<sup>710</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1259. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery,* (n 10), 3.

avoid complicating the deal.<sup>711</sup> Involving an additional party, especially one that might insist on full compensation or a harsher stance, is seen as a 'disturbing factor' that could derail the swift consensus sought by prosecutors and companies.<sup>712</sup> The result of this exclusion is that settlements frequently omit any direct remedy for the victim state.

Studies have found that the vast majority of corporate bribery settlements in Switzerland, France, and elsewhere make no mention of the harmed foreign government or population, and little to no compensation has been provided to them.<sup>713</sup> Only in exceptional cases have victim states received a share of the financial penalties or restitution under these deals.<sup>714</sup> These states have been left out of the bargain, and developing states whose officials were bribed often see none of the money that companies pay to settle cases of corruption.<sup>715</sup> From a fairness standpoint, this is a glaring deficiency; it offends the basic notion that justice for corruption should include redress for those who suffered its consequences, for example, citizens deprived of honest public services or fair market competition. It also creates an imbalance in which the treasuries of rich states benefit from fines (since settlement penalties usually go to the prosecuting state) while the poorer states remain with the damage of the corruption scandal and little to show in terms of recovered funds.<sup>716</sup>

There is also an inherent fairness concern in how NTRs treat corporations versus how individuals are treated in the process. Typically, an NTR is concluded with the corporate entity. In exchange for the company's cooperation and payment of penalties,

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<sup>711</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1262, 1263.

<sup>712</sup> *Ibidem*, 1255, 1262, 1263.

<sup>713</sup> *Ibidem*, 1255.

<sup>714</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 3. Ölçer, 581.

<sup>715</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 1.

<sup>716</sup> an der Does de Willebois, Emile & Brun, Jean-Pierre, 'Using Civil Remedies in Corruption and Asset Recovery Cases' (n 330), 618.

its accountability is considered resolved.<sup>717</sup> But what of the executives or employees who orchestrated the bribes? In some cases, as part of the settlement, companies are required to identify culpable individuals and assist authorities in prosecuting them.<sup>718</sup> This is the ideal scenario from an enforcement perspective: the company cleans house, and the responsible people face consequences, preserving the principle that individuals commit crimes and should be held liable. However, reality often diverges. There are numerous instances where a corporation has entered a settlement agreement and paid a fine, but no individuals have been prosecuted thereafter, whether because of insufficient evidence once the company closes ranks or because of legal technicalities or a lack of prosecutorial will. This creates a perception of unfairness: high-level executives can indirectly buy their own impunity by having the company pay a large fine on behalf of all involved and, in so doing, avoid personal accountability.<sup>719</sup> Essentially, the corporation absorbs the blame, and its leaders move on, sometimes even keeping their positions after a brief hiatus to escape the scandal.

The disparity in the treatment of white-collar corporate offenders under NTRs and the treatment of ordinary offenders with the full rigour of criminal law can erode public trust.<sup>720</sup> The system seems to clearly favour the powerful; if a petty thief or a low-level public official who takes a bribe is almost guaranteed a trial and potentially prison, whereas a multinational firm involved in grand corruption can negotiate its way out of a conviction.<sup>721</sup> This perception undermines the moral authority of anti-corruption

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<sup>717</sup> Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?" (n 15), 43.

<sup>718</sup> MacManus, Sabha and Conroy, James, *Negotiated Justice in Transnational Corruption - A UK Perspective on Transparency* (n 26), 52, 57. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 200, 201. Coffee, John C., Jr. "Corporate Crime and Punishment: The Crisis of Underenforcement." (n 48), 46, 47.

<sup>719</sup> Coffee, John C., Jr. "Corporate Crime and Punishment: The Crisis of Underenforcement." (n 48), 9. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 49. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 632.

<sup>720</sup> St-Georges, Simon and Saint-Martin, Denis, *The global diffusion of DPAs: The not so functional remarking of the rules against business corruption* (n 266), 477, 478, 479. Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?" (n 15), 68.

<sup>721</sup> Alexander, Cindy R. & Cohen, Mark A., 'The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements' (n 678), 544.

laws and can foster cynicism: justice in grand corruption cases appears negotiable, and the law is perhaps too lenient on those with money and influence.<sup>722</sup>

Divergent national implementation of NTRs poses a serious challenge to the consistency and fairness of global anti-corruption enforcement. The fragmentation across jurisdictions means that the consequences for corruption can vary dramatically, potentially encouraging forum shopping and unequal justice.<sup>723</sup> Disparities in transparency and oversight fuel concerns about legitimacy and accountability, as does the frequent sidelining of affected victims and the uneven impact on individual wrongdoers. While NTRs have undoubtedly resolved bribery cases with efficiency, these gains may be undermined if there is a perception that settlements sidestep true accountability. In the next sections, I examine how these divergent practices influence international cooperation and competition, and whether greater alignment to address the fairness concerns is possible.

### **3.3 Impact of NTRs on International Cooperation and Competition**

The cross-border nature of corruption by multinationals often means that no single jurisdiction has a complete picture or sole stake in a major bribery case. A multinational might bribe officials in multiple states, channel funds through banks in various financial centres and be subject to the authority of its home state and the state where the bribe took place, and possibly others, if, for example, laws like the US FCPA apply extraterritorially. In this context, international cooperation among enforcement agencies is crucial for unravelling complex schemes and holding perpetrators accountable. The introduction of NTRs has added opportunities and strains to this cooperative dynamic.

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<sup>722</sup> Reilly, Peter R. "Sweetheart Deal, Deferred Prosecution, and Making a Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts." (n 685), 1136, 1169. Sean J. Griffith and Thomas H. Lee, *Toward an interest group theory of foreign anti - corruption laws* (n 266), 79. Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47) 34. Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?" (n 15) 61. Brodowski et al., 20.

<sup>723</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 14. Acorn, Elizabeth 'Twenty Years of the OECD Anti-Bribery Convention: National Implementation and Hybridization' (n 672), 669.

NTRs can facilitate cooperation by providing a flexible framework for multi-jurisdictional settlements.<sup>724</sup> When a company's misconduct spans borders, prosecutors are increasingly inclined to coordinate their investigations and, where possible, negotiate a global resolution.<sup>725</sup> Such coordination can take the form of simultaneous settlements in multiple jurisdictions, often announced on the same day.<sup>726</sup> A notable example is the coordinated resolution of the major bribery case involving a European aerospace company, which in one transaction settled with authorities in France, the UK, and the US.<sup>727</sup> In that case, investigative leads and evidence were shared among the agencies, and labour was divided to reach the settlement, with each state addressing the offences within its purview and apportioning the financial penalties in a harmonised manner.

The advantages of this cooperative approach are clear. It prevents the duplication of efforts and inconsistent outcomes. The company does not face radically different penalties in different states for the same conduct, and it avoids the problem of cumulative, perhaps crushing, fines from uncoordinated prosecutions. From the company's perspective, a one-stop global settlement brings much-desired certainty and closure. The firm can emerge knowing that all pending liabilities for the investigated conduct have been resolved. For enforcement agencies, cooperation ensures that each interested jurisdiction gains some measure of justice while also respecting the contributions of their counterparts. Ideally, it means that no crimes fall through the cracks: the company cannot escape by settling in one state to forestall action in another without the latter's involvement or consent.

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<sup>724</sup> Mégevand, Grégoire. *Accords hors procès avec des entreprises: la lutte contre la corruption transnationale entre concurrence et coopération* (n 409), 63. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 14, 37. Bu, Qingxiu. "The Viability of Deferred Prosecution Agreements (DPAs) in the United Kingdom: The Impact on Global Anti-Bribery Compliance." (n 50), 187. Makinwa, Abiola, *Negotiated Settlements for Corruption Offences: Wither Europe?* (n 15), 9.

<sup>725</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 37.

<sup>726</sup> Einbinder, Fred. "Borrowings and Boomerangs: A Comparative Law Perspective on Resonance in Transnational Anti-Corruption Law Enforcement." (n 36), 155.

<sup>727</sup> *Ibidem*, 155. Hock, Branislav. "Policing Corporate Bribery: Negotiated Settlements and Bundling." (n 15) 956.

However, this ideal cooperation does not always materialise, with a range of problems arising as a result.<sup>728</sup> In the absence of coordination, there can be a race among jurisdictions to settle first or claim priority as the place where the case should be handled. Because settlements typically require the company's agreement, a company under investigation might strategically engage with the authority it perceives as more lenient or better positioned to offer a favourable deal.<sup>729</sup> This can encourage forum shopping in anti-corruption enforcement. If multiple prosecutors are circling a bribery scandal, the company might choose to negotiate with the one willing to impose a lower penalty or conclude an NPA, in the hopes that with a settlement, other jurisdictions will either drop their case or content themselves with the outcome already achieved.<sup>730</sup>

This is rational behaviour for the company: it is seeking the most efficient resolution of liability. However, it can create a race to the bottom in global anti-corruption efforts, where jurisdictions feel pressure to offer relatively lenient terms lest the case be snatched away by another authority and resolved without their input. In effect, states could end up competing to be the preferred venue for corporate offenders to settle their cases.<sup>731</sup> Such competition is problematic because it might drive down standards – for example, lessening fines or oversight to attract cooperation – undermining deterrence. It also means that the jurisdiction with the strictest enforcement stance could be circumvented, as companies gravitate to forums where they can get a quicker or softer landing.

Even when not an overt race, a state's unilateral pursuit of NTRs can complicate the efforts of another. Consider a scenario: State A is home to a multinational that paid bribes in State B. The prosecutors of both states can claim jurisdiction: State A for the company and its officers, and State B for the government officials bribed and possibly the company, too, if it operated there. If State A quickly negotiates a settlement with

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<sup>728</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 171.

<sup>729</sup> *Ibidem*, 168.

<sup>730</sup> *Ibidem*.

<sup>731</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1262.

the company, perhaps including a clause that covers the company's corrupt conduct globally, it might implicitly or explicitly settle matters that concern State B.<sup>732</sup> The company will argue, after paying a hefty fine in State A, that it should not be punished again for the same conduct in State B, framing any further action as unfair double jeopardy or piling on.<sup>733</sup> State B's enforcement agency might then face a *fait accompli*; the main culprit has already resolved its liability elsewhere, and it is left with the option to prosecute local individuals or accept that justice was largely served by State A's actions.

This dynamic can breed resentment and reduce incentives for cooperation. State B might feel that its sovereignty was evaded and that it was deprived of the opportunity to seek accountability and compensation on its own terms.<sup>734</sup> Indeed, issues of sovereignty and equity arise: why should the prosecuting state (often an economic powerhouse) collect millions in fines for bribes that harmed another state's institutions? Ideally, State A would coordinate with State B, perhaps even share a portion of the fines or include compensation for State B. However, without a framework requiring this, such sharing is the exception rather than the norm.

There is also the question of MLA and evidence sharing in the NTR era. In the past, one state might request evidence from another to use in a prosecution that leads to a trial. Now, if that requesting state is planning to settle rather than go to trial, would the other state be as willing to provide evidence? Some states might be hesitant to expend resources for a case that will never go to court, or they might worry about how the information will be used in a negotiation.<sup>735</sup> Conversely, a state negotiating a settlement might collect evidence from others, but then, once the deal is signed, seal the case and not provide the full evidentiary record that those other jurisdictions might

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<sup>732</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 171. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, ( n 10 ), 66.

<sup>733</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 172.

<sup>734</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, ( n 10 ), 84.

<sup>735</sup> *Ibidem*, 64. Pimenta, Raquel and Venturini, Otavio, 'International Cooperation and Negotiated Settlements for Transnational Bribery: A Study of the Odebrecht Case' (n 488), 6.

need for related prosecutions.<sup>736</sup> This could hamper efforts, for example, to prosecute the bribe-taking officials (which usually falls to the affected state or a third state) because the corporate case ended in a deal and the detailed evidence never became part of a public trial record that others could easily access.<sup>737</sup> In effect, while NTRs speed up resolutions, they sacrifice the airing of facts that trials produce, leaving other states' enforcement agencies with less to work with.<sup>738</sup> International cooperation can suffer if each agency is focused on cutting its own deal rather than embarking on a collective investigative effort.

Another dimension to consider is how NTRs affect international competition in a broader sense. NTRs impact the competitive balance between companies from different jurisdictions and have implications for the market more generally. One of the original motives for international anti-bribery efforts was to level the playing field in global business, to ensure that companies compete on the merits rather than by paying bribes, and that no firm has an unfair advantage through corruption.<sup>739</sup> If enforcement of anti-bribery laws is inconsistent across states, then levelling is not possible.

For example, if State X rigorously enforces anti-corruption laws via tough settlements that impose heavy fines and compliance burdens, its companies will incur considerable costs and be deterred from engaging in bribery. If, by contrast, State Y has a more lax or forgiving settlement approach, its domestic companies might continue to behave more recklessly, knowing that, even if caught, their penalties will be mild. This creates an uneven competitive environment. Businesses from a strict-enforcement state may be at a disadvantage in highly corrupt markets compared to those from jurisdictions where enforcement is weak.

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<sup>736</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 57. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 131.

<sup>737</sup> *Ibidem*, 57. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 55, 57, 84.

<sup>738</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 3, 4. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 16, 83, 84. Koehler, Mike. "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement." (n 51), 505.

<sup>739</sup> Bacio Terracino, Julio. *The International Legal Framework against Corruption: States' Obligations to Prevent and Repress Corruption* (n 9), 42.

In theory, by spreading the practice of enforcement through NTRs to as many states as possible, the international community can eliminate safe havens and ensure that all major exporters or multinationals face a real risk of punishment for bribery.<sup>740</sup> To some extent, this has happened. More states are enforcing anti-corruption laws than before, and companies worldwide are aware that bribery is not as easily swept under the rug as it once was. But if the terms of enforcement (through settlements) differ, then the degree of risk companies face still varies. A multinational might perceive that certain jurisdictions, while they do have settlement provisions, consistently impose lower fines or require no admission of guilt. This might embolden the company to calculate that the consequences of bribery are tolerable if detected by those authorities.

One specific competitive concern is the potential for 'enforcement arbitrage'. Companies might restructure or choose listing venues based on enforcement trends. For instance, if they fear the aggressive settlements and high penalties in State A, they might limit their presence there or ensure that any potential misconduct occurs through subsidiaries in State B, where enforcement through NTRs is more lenient. While this kind of planning is constrained by the fact that major states assert jurisdiction wherever they can, it is not implausible that certain legal systems could earn a reputation as either strict or accommodating. We have seen this historically in areas like tax enforcement or financial regulation; anti-corruption efforts could be next. The reputational and economic implications are significant; jurisdictions seen as too lenient might attract investment in the short term from companies hoping for a haven, but could face international criticism and even sanctions for not holding up anti-corruption standards.<sup>741</sup> Conversely, jurisdictions seen as excessively harsh might worry about scaring away their own businesses or disadvantaging them in international bids.<sup>742</sup>

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<sup>740</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 31.

<sup>741</sup> Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13), 91. Gless, Jael Lena. "One Foot In, One Foot Out - An Accountability Analysis of the United Kingdom's and Switzerland's Regulatory Frameworks in the UNCAC Regime." (n 5), 168.

<sup>742</sup> Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9 ), 641.

Within the enforcement community, NTRs have introduced a competitive rivalry among agencies.<sup>743</sup> High-profile settlements bring large sums to national treasuries but also prestige to the agencies and states involved.<sup>744</sup> Law enforcement bodies have been known to tout their success in securing record-breaking fines or turning corporate offenders into cooperative allies through settlements.<sup>745</sup> This can incentivise agencies to seek out cases offering the prospect of a big settlement, which is positive in that it increases enforcement upward. However, it can also create overlap and tension; multiple agencies may scramble to be the first to assert jurisdiction in a global case.

A lack of clear rules on priority among jurisdictions or deconfliction means it often comes down to inter-agency negotiation between the agencies themselves. While they often manage to collaborate, there have been instances of friction.<sup>746</sup> For example, one state announcing charges or a resolution unexpectedly could catch others off guard and potentially jeopardise their parallel investigations. In extreme cases, this lack of synchronisation could let a company play agencies off against each other – Agency A already gave us credit for that issue, you should not penalise us again – resulting in less accountability overall.

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<sup>743</sup> Coffee, John C., Jr. “*Corporate Crime and Punishment: The Crisis of Underenforcement.*” (n 48), 9, 97. Einbinder, Fred. “Borrowings and Boomerangs: A Comparative Law Perspective on Resonance in Transnational Anti-Corruption Law Enforcement.” (n 36), 155. Hock, Branislav. “Policing Corporate Bribery: Negotiated Settlements and Bundling.” (n 15) 961.

<sup>744</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 14, 15. Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47), 56. Koehler, Mike. “Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement.” (n 51), 555.

<sup>745</sup> O’Malley PJ, ‘*Directors’ Duties and Corporate Anti-Corruption Compliance: The ‘Good Steward’ in US and UK Law and Practice*’(n 670), 12. Ivory, Radha, and Søreide, Tina. “The International Endorsement of Corporate Settlements in Foreign Bribery Cases.” (n 18), 949. Hock, Branislav. “Policing Corporate Bribery: Negotiated Settlements and Bundling.” (n 15) 950.

<sup>746</sup> Hock, Branislav. “Policing Corporate Bribery: Negotiated Settlements and Bundling.” (n 15), 956, 957, 961. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 38. Pimenta, Raquel and Venturini, Otavio, ‘*International Cooperation and Negotiated Settlements for Transnational Bribery: A Study of the Odebrecht Case*’(n 488), 6. Coffee, John C., Jr. “*Corporate Crime and Punishment: The Crisis of Underenforcement.*” (n 48), 96.

For states in the Global South, NTRs are a double-edged sword.<sup>747</sup> On the positive side, the willingness of major financial centres and headquarters states to enter settlements has led to some acknowledgement of wrongs that might never have been prosecuted in the states where the bribes were paid.<sup>748</sup> For example, if a European company bribes officials in an African state, and that state's own institutions are unwilling or unable to pursue the case, enforcement by the European state via settlement at least establishes that the conduct was wrongful and imposes a penalty. This has a general deterrent effect and signals that such behaviour is monitored internationally. On the negative side, as discussed above, victim states are usually left in the cold when the case is resolved.

International cooperation should ideally mean that developed and developing states work hand in hand to combat corruption, sharing evidence, jointly deciding on outcomes that include compensation, and respecting each other's interests. Yet, so far, cooperation has been more common among the enforcement bodies of developed states. Those in developing states seldom play a significant role in settlements, with a few exceptions, such as Brazil's active enforcement and cooperation with the US in certain cases or, more recently, South African authorities coordinating with the US and the UK on a case.<sup>749</sup>

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<sup>747</sup> Nadja Capus and Martin Chipofya, *Prosecuting Strategic Corruption: Impact on the Integrity of Criminal Justice and Potential Risks of Non-Trial Resolutions in Sub-Saharan African States* (n 424), 10. Pimenta, Raquel and Venturini, Otavio, *'International Cooperation and Negotiated Settlements for Transnational Bribery: A Study of the Odebrecht Case'* (n 488), 5, 7, 8, 15. Ölçer, 582. Søreide, Tina, *Negotiated Settlements for Corruption Offences: Position in Norway* (n 15), 145. Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1249.

<sup>748</sup> Organisation for Economic Co-operation and Development, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* (n 642), 9. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 97, 98. Perdriel-Vaissière, Maud, *Negotiated Settlements for Corruption Offences: Position in France* (n 15), 27.

<sup>749</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 189. Søreide, Tina. 273, 274. Pimenta, Raquel and Venturini, Otavio, *'International Cooperation and Negotiated Settlements for Transnational Bribery: A Study of the Odebrecht Case'* (n 488), 273, 274. Paul, Weiss, Rifkind, Wharton & Garrison LLP, *'2024 Year in Review: FCPA Enforcement and Anti-Corruption Developments'* (n 476), 16.

The exclusion of many Global South agencies from the negotiation table is a missed opportunity for capacity building and MLA. It also breeds mistrust; local populations may view these big overseas settlements as neo-colonial justice, with foreign powers deciding the fate of corruption cases that happened on their soil and keeping the proceeds.<sup>750</sup> There is a growing recognition that, for global anti-corruption efforts to be truly cooperative, some mechanism must be found to involve and compensate the states where the harm occurred, whether by formal inclusion in the process or through parallel agreements that address their claims.

Finally, it is important to consider the influence of NTRs on corporate behaviour, not just in individual cases, but strategically and collectively, since this affects the success of anti-corruption efforts. The availability of settlements fundamentally changes the calculus for companies deciding how to handle allegations of bribery internally.

Many multinational firms now have extensive compliance programmes designed to detect and prevent corruption.<sup>751</sup> A major driver for this investment in corporate compliance has been the promise embedded in NTR regimes that if a company can demonstrate that it has a strong compliance programme and if it self-discloses a violation promptly and cooperates fully, it stands a much better chance of receiving a deferred prosecution or other lenient settlement rather than prosecution.<sup>752</sup> This creates a strong incentive for companies to police themselves and come forward when something is amiss. This is arguably a positive development since the private sector is enlisted in the fight against corruption. Indeed, governments often portray settlements as a tool to leverage corporate resources for public ends.<sup>753</sup> Companies help to

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<sup>750</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 8. Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9), 155.

<sup>751</sup> Brodowski et al., 126, 127.

<sup>752</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 95, 96. Makinwa, Abiola, 'Public/Private Cooperation in Anti-Bribery Enforcement: NTRs as a Solution?' (n 36), 65.

<sup>753</sup> Makinwa, Abiola, *Negotiated Settlements for Corruption Offences: Wither Europe?* (n 15), 9. OECD, *The Detection of Foreign Bribery* (n 31), 25. O'Malley PJ, 'Directors' Duties and Corporate Anti-Corruption Compliance: The 'Good Steward' in US and UK Law and Practice' (n 670), 86. Ivory, Radha, and Søreide, Tina. "The International Endorsement of Corporate Settlements in Foreign Bribery Cases." (n 18), 949, 950. Hock, Branislav. "Policing Corporate Bribery: Negotiated Settlements and Bundling." (n 15) 950.

investigate their own wrongdoing and even that of others (by sharing industry information or testifying against corrupt officials), making enforcement more effective than it otherwise would be with sceptical, defensive corporate targets.<sup>754</sup>

However, there is a flip side to this incentive structure. The fact that most corporate wrongdoers can negotiate an outcome may unintentionally foster a mindset that the repercussions for corruption, if discovered, are a survivable and perhaps even manageable cost of doing business.<sup>755</sup> Top executives might take comfort from the fact that as long as the company eventually cleans up and pays a fine, they will personally avoid jail, and the company can move on.<sup>756</sup> Some economists and legal scholars caution that if the pain of settlements is not sufficiently substantial, companies will simply factor this in as a risk–reward trade-off.<sup>757</sup> In other words, if paying a settlement penalty is still cheaper than foregoing the profits gained from winning contracts through bribes, the deterrent effect is lost.

There is evidence that some corporations have been repeat offenders and have entered multiple settlements over time, which suggests that earlier resolutions did not sufficiently reform their internal culture.<sup>758</sup> This raises the question of whether NTRs

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<sup>754</sup> Hess, David. Article 12, In Cecily Rose, Kubiciel, Michael, Landwehr, Oliver (eds.). *The United Nations Convention Against Corruption: A Commentary*, Oxford: Oxford University Press, 2019, 131. OECD, *The Detection of Foreign Bribery* (n 31), 25. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 72, 73. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10 ), 53. Hess, 131.

<sup>755</sup> Fragale, Mauro, and Grilli, Valentina. “Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?” (n 15) 61. Brodowski et al., 61. Coffee, John C., Jr. “*Corporate Crime and Punishment: The Crisis of Underenforcement.*” (n 48), 9. Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47), 137.

<sup>756</sup> Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47), 39, 40. Coffee, John C., Jr. “*Corporate Crime and Punishment: The Crisis of Underenforcement.*” (n 48), 122, 123. Lund, Dorothy S., and Sarin, Natasha. “*Corporate Crime and Punishment: An Empirical Study.*” (n 47), 344.

<sup>757</sup> Lund, Dorothy S., and Sarin, Natasha. “*Corporate Crime and Punishment: An Empirical Study.*” (n 47), 340, 341. Coffee, John C., Jr. “*Corporate Crime and Punishment: The Crisis of Underenforcement.*” (n 48), 56. Søreide, Tina, Principled and Transparent Settlement-Based Enforcement of Corporate Liability (n 26), 274. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10 ), 49.

<sup>758</sup> Lund, Dorothy S., and Sarin, Natasha. “*Corporate Crime and Punishment: An Empirical Study.*” (n 47), 339. Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47), 47.

truly rehabilitate corporate behaviour or simply allow temporary mitigation of legal consequences. Furthermore, while cooperation is encouraged, the dynamic can also lead to companies over-correcting in ways that raise ethical concerns. Examples of this include waiving attorney-client privilege broadly to show transparency or terminating employees at the first whiff of an investigation to demonstrate accountability, possibly without due process for those individuals. In these cases, companies essentially become junior partners in law enforcement through settlement agreements that mandate internal reforms, monitoring, and reporting obligations.<sup>759</sup> While this can extend the reach of enforcement, it also blurs the divide between public and private roles in justice, potentially placing corporate management in an adversarial position relative to their own staff to satisfy prosecutors.

In terms of competition among businesses, one could argue that a company that is caught and settles has an odd advantage over a competitor that was not caught but engaged in similar misconduct. The settling company can often negotiate away the harshest consequences (no conviction, no debarment, sometimes even keeping the name of the offending subsidiary out of the press). After the settlement, such companies typically overhaul their compliance programme and project a reformed image.<sup>760</sup> Meanwhile, a competitor that also paid bribes but has not been exposed continues operating with that hidden liability. If enforcement is not universal, the net effect could be that companies that come clean and pay up are left on a more level field with companies that have so far escaped scrutiny. This is another reason why broad international cooperation is needed, to ensure that enforcement, even via settlements, covers as many bad actors as possible so that the competitive advantage of cheating is minimised.

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<sup>759</sup> Garrett, Brandon. "The Global Evolution of Corporate Prosecutions." (n 16), 56,57. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 139. O'Malley PJ, 'Directors' Duties and Corporate Anti-Corruption Compliance: The 'Good Steward' in US and UK Law and Practice'(n 670), 89, 90 Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 815.

<sup>760</sup> Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 625. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 88. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 42. Van Wingerde, Karim and Smid, Gerben, *Negotiated Settlements for Corruption Offences: Position in The Netherlands* (n 15), 120. Ivory, Radha, and Søreide, Tina. "The International Endorsement of Corporate Settlements in Foreign Bribery Cases." (n 18), 946.

The rise of NTRs has complex implications for international cooperation and competition. It has provided additional avenues for collaboration among enforcement agencies, making it feasible to coordinate resolutions of sprawling corruption cases.<sup>761</sup> Yet, it has also introduced strategic behaviour by states and companies that can undermine the unity of purpose. The challenge is to maximise the cooperative benefits through information sharing, joint or at least consultative settlement negotiations, and perhaps agreements on how to allocate fines and jurisdiction, while minimising the negative competitive pressures such as enforcement arbitrage and leniency races. Equally, ensuring that all relevant parties, including those from less powerful economies, have a stake in the process is essential to truly globalise anti-corruption enforcement rather than concentrating it in the hands of a few.

### **3.4 Towards a Unified Approach or Continued National Divergence?**

Given the challenges outlined, inconsistency across national practices and complications in international coordination, a pressing question arises: Should the international community strive for a more unified approach to NTRs in corruption cases, or can distinct national approaches continue to coexist? This question goes to the heart of the tension between global governance of anti-corruption norms and respect for national legal sovereignty. It also concerns the effectiveness and legitimacy of anti-corruption efforts going forward. In essence, the debate is whether there ought to be common standards guiding how NTRs are used and what they entail, so that all states adhere to certain baseline principles, or whether diversity and experimentation in national systems is acceptable or even preferable.

There is a growing chorus of experts, international organisations, and civil society calling for greater convergence in how NTRs are applied.<sup>762</sup> The motivation for a unified approach is to address the issues of fairness and consistency by ensuring that

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<sup>761</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 37, 38.

<sup>762</sup> *Ibidem*, 79, 152. Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?' (n 36), 43, 44, 67. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, ( n 10 ), 3.

every settlement, no matter where it is concluded, meets high standards of transparency, accountability, and proportionality.<sup>763</sup> For instance, principles could be agreed internationally that every NTR in a foreign bribery case should be made public (at least in its essential terms), include an agreed statement of facts detailing the wrongdoing, and impose a sanction that reflects the gravity of the offence, including disgorgement of ill-gotten gains and a punitive element to deter future misconduct. A unified approach could also stipulate that companies demonstrably improve compliance and possibly compensate victims as part of the deal. Such principles would mitigate the risk of radically different outcomes and reduce the opportunity for companies to seek out lenient jurisdictions.

Notably, the OECD Working Group on Bribery, which brings together the parties to the Anti-Bribery Convention, has increasingly focused on settlements.<sup>764</sup> Over successive rounds of state evaluations, the working group has amassed information on the various systems of resolution and informally promoted best practices.<sup>765</sup> In recent dialogues, there have been discussions about articulating common guidelines or recommendations on the use of NTRs.<sup>766</sup> For example, non-governmental organisations and academics have proposed global standards or guidelines, emphasising elements like judicial oversight, publication of agreements, avoidance of complete impunity for individuals, and ensuring the deterrent value of penalties.<sup>767</sup>

One notable effort in this direction is a set of draft principles for settlements circulated among experts. These highlight the need for legitimacy and predictability in settlement processes and include calls for processes to be as transparent as possible without jeopardising investigations, clear rules on how cooperation and self-reporting translate into penalty discounts (to eliminate arbitrary bargains), and coordination

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<sup>763</sup> Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?' (n 36), 67.

<sup>764</sup> Søreide, Tina and Vagle, Kari, 'Settlements in Corporate Bribery Cases: An Illusion of Choice?' (n 551), 263.

<sup>765</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 152.

<sup>766</sup> Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?" (n 15), 41.

<sup>767</sup> *Ibidem*, 53. Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?' (n 36), 67. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 152.

mechanisms when multiple jurisdictions are involved (to equitably share information and outcomes).

At the multilateral level, however, there has been only tentative progress toward formal harmonisation.<sup>768</sup> Neither the OECD Convention nor UNCAC explicitly addresses how states should settle corruption cases out of court.<sup>769</sup> The treaties were drafted at a time when trial-based enforcement was the norm, and they focus on obligations to criminalise bribery and punish it effectively, leaving procedural choices largely up to each state's legal system.<sup>770</sup>

This silence on procedural issues has given states flexibility to innovate with NTRs, but now that these are ubiquitous, the lack of an international reference point is conspicuous. Efforts to update these frameworks to reflect the new reality are underway, but proceeding slowly.<sup>771</sup> The OECD updated its anti-bribery recommendations (a soft-law instrument) to encourage transparency and cooperation in enforcement, implicitly covering settlements.<sup>772</sup> Similarly, UNCAC Conferences of States Parties have adopted resolutions to encourage the exchange of information on settlements and stressing that enforcement actions should not undermine the rights of other states to recover assets or prosecute related offenders.<sup>773</sup> These are small steps toward a more unified approach, but they fall short of mandating any uniform process.

One reason for caution is that states guard their sovereignty in matters of criminal justice. Legal cultures vary, and what is seen as an acceptable plea bargain in one state might be viewed as an illicit deal in another. Reaching a consensus on detailed procedures could be difficult. For example, some nations might resist imposing a

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<sup>768</sup> Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?' (n 36), 44. Sandgren, Claes Negotiated Settlements for Corruption Offences: Position in Sweden (n 15), 169.

<sup>769</sup> Ivory, Radha, and Søreide, Tina. "The International Endorsement of Corporate Settlements in Foreign Bribery Cases." ( n 18), 978.

<sup>770</sup> *Ibidem*, 957.

<sup>771</sup> *Ibidem*, 977, 978. Rose, Cecily, 'International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems' (n 79), 105.

<sup>772</sup> Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?" (n 15) 53.

<sup>773</sup> Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." ( n 9), 116.

requirement of judicial approval for settlements, interpreting it as an encroachment on prosecutorial independence or simply impractical given the capacity of their court system. Others might object to any implication that they must involve foreign victims in their national proceedings, seeing it as a slippery slope to external influence. Hence, a fully binding unified regime for NTRs is unlikely in the immediate future.

What is more feasible is a convergence around certain broad principles and the sharing of best practices that gradually raise standards everywhere. In effect, a form of soft harmonisation can occur. Through peer pressure and learning, states may voluntarily adjust their settlement practices in line with what is internationally considered proper.<sup>774</sup> Indeed, there is a clear trend evident of newer NTR adopters looking to models from other states. For example, France borrowed elements from the US and UK systems when creating its CJIP, and states like Canada and Australia, when debating the introduction of DPAs, considered the example of their peers.<sup>775</sup> This cross-pollination brings a measure of standardisation.

For a unified approach to gain traction, certain key issues must be addressed in a consistent way across the globe. One is transparency; a near-universal agreement could be reached that secrecy in settlements is unacceptable.<sup>776</sup> This might lead to a norm that all settlements must be published (with the only redactions being those strictly necessary for personal privacy or ongoing investigations), and that governments should proactively provide information on settlement outcomes.<sup>777</sup> Another issue is the proportionality of sanctions. There could be an understanding that settlements should not result in a mere slap on the wrist. International bodies could, for instance, collect data on penalties imposed and issue guidance on ranges of fines

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<sup>774</sup> Ivory, Radha, and Søreide, Tina. "The International Endorsement of Corporate Settlements in Foreign Bribery Cases." (n 18), 958.

<sup>775</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 51.

<sup>776</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10 ), 3. Oehmichen, Anna, *Negotiated Settlements for Corruption Offences: Position in Germany* (n 15), 44. Søreide, Tina, *Negotiated Settlements for Corruption Offences: Position in Norway* (n 15), 143, 144. Ivory, Radha, and Søreide, Tina. "The International Endorsement of Corporate Settlements in Foreign Bribery Cases." (n 18), 974.

<sup>777</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10 ), 3, 4, 65. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 157, 158.

relative to the benefits gained from corruption, to ensure that, rather than being viewed as a cost of doing business, penalties sting.<sup>778</sup>

A further issue is judicial or independent oversight. While not all systems will be identical, there could be a principle agreed that some independent authority must review the settlement to certify that it is in the public interest, whether it be a court, a regulatory body, or a higher official not involved in the negotiation.<sup>779</sup> This would help guard against abuse of discretion and lend greater legitimacy to the outcome. A unified approach would also encourage the inclusion of victim considerations. This would mean that the settlement of a foreign bribery case would include consideration of the harm to foreign stakeholders.<sup>780</sup> That might be through direct compensation, through an official acknowledgement of harm, or via coordination with the victim's government to handle certain aspects. Such inclusion would alleviate the justice gap currently felt by many states in the Global South and reinforce the idea that corruption is not a victimless crime or purely a state-to-state issue; it is one that impacts real communities.<sup>781</sup>

By contrast, if national divergence continues unchecked, the mosaic of enforcement practices may persist, with all the attendant issues of fragmentation. There are some arguments in favour of allowing divergence.<sup>782</sup> One is that there are benefits to legal experimentation: states trying different models might generate valuable insights into what works best. For instance, one state might succeed with a model that heavily incentivises self-reporting by guaranteeing no prosecution of the corporation if they

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<sup>778</sup> Lund, Dorothy S., and Sarin, Natasha. "Corporate Crime and Punishment: An Empirical Study." (n 47), 341. Hess, 131. OECD, *The Detection of Foreign Bribery* (n 31), 306, 307.

<sup>779</sup> Søreide, Tina, Negotiated Settlements for Corruption Offences: Position in Norway (n 15), 144. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 17. Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?' (n 36), 63.

<sup>780</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1262.

<sup>781</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1250, 1251. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 3.

<sup>782</sup> Harris, Hannah. "Experimenting with Corruption - An Analysis of the OECD Anti-Bribery Convention through the Lens of Experimentalism." *Georgetown Journal of International Law* 51 (2020), 581.

come forward (essentially a leniency programme); another might insist on an admission of guilt as a non-negotiable part of any settlement. Observing outcomes over time could result in states eventually coalescing around the most effective practices. Additionally, national legal values matter. Some divergence stems from genuine philosophical differences about the role of criminal law. In some cultures, bargaining in criminal cases is seen as inherently dubious, and any settlement mechanism must thus be accompanied by strict conditions or communicated in euphemisms to be palatable.<sup>783</sup> Forcing complete uniformity might provoke backlash or superficial compliance that masks continued divergent behaviour. A measured approach respects that some differences will remain.

If divergence persists, we can also expect certain problems to persist. Companies and their advisers will continue to exploit jurisdictional inconsistencies, and enforcement gaps might remain in places where the settlement framework is either too new or too weak to deter misconduct.<sup>784</sup> Some states might become known as relatively safe for companies engaged in corruption, not to shield them entirely, but to give them a relatively favourable resolution.<sup>785</sup> Likewise, without convergence, the full potential of international cooperation might not be realised. Cooperation on cases might continue to be ad hoc, with some states feeling sidelined, and the distribution of enforcement outcomes skewed toward a handful of active enforcers. That said, even with divergent national approaches, informal harmonisation is likely to increase simply because the community of practitioners (prosecutors, judges, investigators) engaged in anti-corruption settlements is relatively small and interconnected.<sup>786</sup> These actors

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<sup>783</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 802, 803. Søreide, Tina *Negotiated Settlements for Corruption Offences: Position in Norway* (n 15), 137, 138. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 18, 19.

<sup>784</sup> Søreide, Tina, *Principled and Transparent Settlement-Based Enforcement of Corporate Liability* (n 26), 273, 274, 275. Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?" (n 15) 61.

<sup>785</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 81, 168. Hufnagel, Saskia. Article 48 In Cecily, Rose, Kubiciel, Michael and Landwehr, Oliver (eds.). *The United Nations Convention Against Corruption: A Commentary*, Oxford: Oxford University Press, 2019, 495. Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9), 163.

<sup>786</sup> Hufnagel, 495. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 38. OECD, *The Detection of Foreign Bribery* (n 31), 146. Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 827.

frequently exchange experiences through networks, conferences, and organisations like the OECD Working Group. Peer influence can lead a state that has been overly lax or opaque in its settlements to improve after being critiqued by others, even without a formal mandate.

Normatively, many scholars argue that some convergence is necessary to preserve the legitimacy of the global anti-corruption regime.<sup>787</sup> Without it, the public perception that unfair deals are being concluded could erode support for anti-corruption efforts.<sup>788</sup> If the public comes to believe that corruption is being handled by quiet pay-offs between governments and companies, they may be cynical about the entire enterprise.<sup>789</sup> A unified approach, or at least an agreed set of high-level principles, would signal a collective commitment to holding corrupt actors to account under broadly similar standards, even if methods vary. It would also help rebut accusations of double standards or geopolitical bias (for example, the notion that some states use settlements to favour their 'national champion' companies while coming down hard on foreign companies). Uniform principles could ensure that every state's domestic companies face a similar regime at home, reducing perceptions of bias.<sup>790</sup>

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<sup>787</sup> Søreide, Tina. 282, 283. Ivory, Radha, and Søreide, Tina. "The International Endorsement of Corporate Settlements in Foreign Bribery Cases." ( n 18), 969. Rose, Cecily, 'International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems' ( n 79), 39.

<sup>788</sup> Feinstein BD, Heaston WR and de Carvalho GS, 'In-Group Favoritism as Legal Strategy: Evidence from FCPA Settlements'(n 532), 51. Reilly, Peter R. "Sweetheart Deal, Deferred Prosecution, and Making a Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts." ( n 685), 1116. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* ( n 9 ), 632.

<sup>789</sup> Makinwa, Abiola, Negotiated Settlements for Corruption Offences: Wither Europe? ( n 15), 10. Koehler, Mike. "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement." ( n 51), 526. Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study."(n 34), 827, 828. Bu, Qingxiu. "The Viability of Deferred Prosecution Agreements (DPAs) in the United Kingdom: The Impact on Global Anti-Bribery Compliance." ( n 50), 183. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, ( n 10 ), 3. Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?" ( n 15) 53. Ivory, Radha, and Søreide, Tina. "The International Endorsement of Corporate Settlements in Foreign Bribery Cases." ( n 18), 974, 975.

<sup>790</sup> Makinwa, Abiola, Negotiated Settlements for Corruption Offences: Wither Europe? ( n 15), 14, 198. Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?" ( n 15), 53. Ivory, Radha, and Søreide, Tina. "The International Endorsement of Corporate Settlements in Foreign Bribery Cases." ( n 18), 974, 975.

In recent years, there have been a few concrete proposals to encourage a more unified approach.<sup>791</sup> These include the idea of an international registry or database of settlements, where all states would log their corruption case resolutions and key terms. This would at least create transparency and allow monitoring. Another proposal is a multilateral agreement on the sharing of fines with victims; for instance, this could be a framework where a percentage of any settlement involving foreign bribery is allocated to a fund for the benefit of the state where the bribe was paid or to an international anti-corruption fund.<sup>792</sup> Such an arrangement would require unprecedented cooperation but could be mutually beneficial. It would give victim states a reason to endorse settlements concluded elsewhere and give prosecuting states the moral high ground by directly aiding anti-corruption or restitution efforts.

Ultimately, whether a unified approach prevails or national divergence continues will depend on the political will and consensus-building of major players. If the leading enforcement nations, the US, the UK, France, Switzerland, and the like, agree on a set of standards and apply them internally, this would establish a benchmark for others to follow. We have seen, for instance, convergence around the idea that bribery settlements should involve disgorgement of profits and some punitive fines. Few would now settle a case by simply warning a company without imposing monetary consequences.<sup>793</sup> This consensus emerged without a formal rule, suggesting that norms can solidify organically. The next steps might be developing a consensus on factors like compliance monitors being required in certain cases or insisting that

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<sup>791</sup> Makinwa, Abiola, *Negotiated Settlements for Corruption Offences: Wither Europe?* (n 15), 14. 73. Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?" (n 15), 53.

<sup>792</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 127. Ölçer, 582. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 10.

<sup>793</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 143. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 714, 410, 416. Sarkar, Rumu, *International Development Law: Rule of Law, Human Rights & Global Finance*,(n 294), 397.

settlements not protect culpable individuals from prosecution unless absolutely necessary.<sup>794</sup> If those norms take root, divergence will shrink.

It is also possible that we will end up with a hybrid scenario, a core set of unified principles and peripheral divergence in less critical aspects. For example, all states might adopt the principles of transparency, proportionality, and victim consideration, but they might differ in procedural details such as the exact role of judges or how they label the agreement; some might never refer to such an agreement as a plea bargain due to local sensibilities. Such a hybrid outcome seems plausible and perhaps optimal, as it balances global consistency with respect for local legal culture.

There appears to be a gradual move toward greater alignment of NTR practices out of practical necessity and normative pressure.<sup>795</sup> The problems caused by fragmentation are widely recognised, and neither companies nor enforcement agencies benefit from a chaotic system. Companies operating globally have even called for more predictability in how their voluntary disclosures and cooperation will be treated by different jurisdictions; they do not want to have to navigate radically different rules in every state.<sup>796</sup> Enforcement agencies, for their part, want to ensure that a resolution in one state will be respected and supplemented by the resolutions reached elsewhere, not undermined.<sup>797</sup> These shared interests provide momentum for a more unified approach. Yet, it must be acknowledged that complete uniformity is neither realistic in the near term nor even desirable if it means forcing identical legal procedures on diverse systems. The better aim, therefore, would be a convergence around principles,

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<sup>794</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 131, 139, 192. Bu, Qingxiu. "The Viability of Deferred Prosecution Agreements (DPAs) in the United Kingdom: The Impact on Global Anti-Bribery Compliance." (n 50), 195. Manacorda, Stefano, and Centonze, Francesco (eds.). *Corporate Compliance on a Global Scale: Legitimacy and Effectiveness* (n 26), 352, 353. Claudia Götz Staehelin and Saverio Lembo. 90.

<sup>795</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 14. Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?" (n 15), 53. Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?' (n 36), 67. Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47), 20.

<sup>796</sup> Wernli, Jürg. 209. Makinwa, Abiola, Negotiated Settlements for Corruption Offences: Wither Europe? (n 15), 13. de Doelder et al, Negotiated Settlements for Corruption Offences: Position in the United Kingdom (n 15), 197.

<sup>797</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16) 37, 38.

fairness, transparency, accountability, and international coordination that can guide the continued use of NTRs in the anti-corruption arena.

### **3.5 Interim Conclusion**

NTRs have undeniably transformed the enforcement of anti-corruption laws on a global scale. Chapter 1 traced how NTRs, in their various forms, have become both a solution and a challenge in the quest to combat bribery of public officials worldwide. On the one hand, NTRs have greatly enhanced the capacity of states to respond to complex corporate corruption. They are a tool to extract penalties and commitments from companies that might otherwise avoid conviction because of legal complexities or resource constraints. They have also spurred a more proactive culture of corporate compliance. The sheer number of cases resolved, and the quantum of fines collected over the past two decades testify to the pragmatic success of settlements as an enforcement strategy. In that respect, NTRs have strengthened global anti-corruption efforts by making enforcement more frequent and, arguably, more efficient.

On the other hand, this chapter has highlighted that the specifics of NTR implementation have significant implications for justice and the rule of law. Divergent national practices have led to inconsistency, which can undermine fairness and the credibility of enforcement. The risk is that the fight against corruption could be seen as corruptible and vulnerable to power dynamics rather than being governed by consistent legal principles. The risk to the perception of justice in the eyes of the public and affected communities is particularly acute. Trust in the anti-corruption regime and in legal institutions more broadly will falter if stakeholders believe that wealthy corporations can settle their way out of wrongdoing. Ensuring that NTRs do not become vehicles for impunity is thus essential. This means that the issues of transparency, proportionality, and inclusion that were raised above must be addressed; settlements should not be a soft option or a quiet escape, but a credible form of accountability.

The impact of NTRs on international cooperation and competition further underscores the need for careful balancing. NTRs have allowed unprecedented cooperation across borders, in many ways fulfilling the promise of collective action envisioned by international anti-bribery treaties. But they have also revealed gaps in that collective framework. Cooperation cannot rely on the goodwill of a few active enforcement agencies. It should become routine and institutionalised for states to consult and coordinate on overlapping corruption cases. Similarly, competition, whether between national authorities or among companies, should be managed to avoid jurisdictions undercutting each other and hampering enforcement. The goal should remain a level playing field, where corruption offers no competitive advantage and where no jurisdiction becomes a haven for corrupt gains. Insofar as NTRs are now the primary 'playing field' for enforcement, levelling that field requires harmonising how NTRs function.

The question of moving toward a unified approach versus continuing with national divergence is not merely of theoretical interest; it has real consequences for the efficacy of future anti-corruption efforts. This chapter has argued that greater convergence on core principles is both necessary and likely inevitable. The momentum of international discourse is leaning towards establishing common expectations for how settlements are conducted. Achieving this will require overcoming hesitations and bridging differences among legal systems. It will also require buy-in from developed and developing nations to ensure that reforms address the concerns of all parties, including those marginalised by past settlement practices. The involvement of the Global South in shaping any global principles for NTRs will be important to lend those principles legitimacy and moral force. After all, the fight against corruption is a global public good, and its governance should not be one-sided.

The implications of NTRs on global anti-corruption efforts show that the instruments are a double-edged sword. NTRs have proven to be powerful tools that can advance the cause through swift punishment and remediation. Yet they also pose risks that must be mitigated through conscious policy choices and possibly international

consensus. As Chapter 1 has shown, NTRs have strengths and their pitfalls. The integrity of the anti-corruption movement requires that stakeholders ensure that settlements are a legitimate pathway to justice, not a shortcut around it. It is critical that fairness, consistency, and cooperation are embedded in NTR frameworks. The aim of this comprehensive inquiry is to advance a principled approach to NTRs that enhances global anti-corruption efforts while rigorously guarding against their misuse or unintended consequences.

## **2. Negotiated Justice on the Rise: National Innovation Beyond International Mandates**

The story traced in Part IV is one of legal pragmatism and authorities grappling with the complexities of corporate criminality in a globalised world. The proliferation of NTRs in anti-corruption enforcement represents more than a technical adjustment in prosecutorial practice. It is a profound reimagining of the relationship between law, corporate power, and the ideal of justice. States have not merely adapted their enforcement strategies. They have redefined the architecture of accountability in response to the pressures of transnational economic crime, judicial inefficiency, and the political risks inherent in prosecuting major corporate actors.

As Chapter 1 showed, the emergence of NTRs was driven less by normative theories of justice and more by urgent historical contingencies, corporate scandals that shook public trust, enforcement gaps exposed by globalisation, and national interests in preserving economic stability while avoiding punitive excesses. It is clear from tracing the national motivations for adopting NTRs that, rather than a repudiation of the principles of criminal law, legal systems sought to render these operational in a world where the traditional trial model had become increasingly inadequate.

Chapter 2 highlighted that while national models differ in their procedural details, the underlying convergence around negotiated enforcement outcomes reflects a new, shared orthodoxy. The idea that corporate wrongdoing can, and perhaps should, be addressed without a definitive adjudication of guilt has gained widespread

acceptance, whether in the form of deferred prosecution agreements in the US, judicially supervised DPAs in the UK, CJIPs in France, or a pragmatic summary procedure, as in Switzerland. The mechanisms vary, but the philosophical shift is unmistakable; enforcement has become a managed negotiation between sovereign states and powerful economic actors, rather than a purely adjudicative imposition of sovereign will.

Chapter 3 engaged critically with the implications of this transformation. NTRs have undeniably enhanced the efficiency, reach, and financial impact of anti-corruption enforcement. Yet, it has also raised fundamental normative concerns. The divergence of national practices threatens the coherence of global anti-corruption efforts, and the opacity and variability of settlements risk eroding the public legitimacy of enforcement actions. The widespread reliance on negotiated resolutions also invites reflection on whether justice risks being commodified and reduced to a transactional bargain between state prosecutors and corporate defendants, mediated more by calculations of risk and reputation than by substantive adjudications of guilt and reparation to victims.

The evolution of NTRs thus captures a deeper tension between pragmatism and principle. NTRs offer a necessary and creative response to the limitations of traditional criminal justice in complex, transnational cases. However, they risk normalising a model of justice that privileges expedience over deliberation, settlement over truth, and economic calculus over moral condemnation. In a field such as anti-corruption, where the symbolic affirmation of public norms against private misconduct is paramount, this tension demands ongoing critical scrutiny.

The analysis in Part IV suggests that the global community is at a crossroads. Without greater convergence around standards of transparency, consistency, and victim participation, NTRs will remain vulnerable to critique. Equally, any attempt to suppress or reverse the trend toward negotiated justice would risk ignoring the real enforcement gains achieved through NTRs. The challenge, therefore, is not whether to

accept NTRs, but how to discipline their use within a framework that preserves the core values of justice, fairness, accountability, public reason-giving, and the meaningful acknowledgement of wrongdoing.

The rise of NTRs in anti-corruption enforcement speaks to the adaptive capacity of legal systems and their vulnerability. NTRs reflect the capacity of states to innovate in the pursuit of corporate accountability under difficult conditions. But they also expose the enduring fragility of legal ideals when confronted with the practical demands of power, complexity, and the need for compromise. Whether NTRs will evolve into a sustainable and principled pillar of global anti-corruption efforts, or degenerate into instruments of selective and transactional justice, remains a question for national authorities and the international community.

The stakes are high. At issue is both the effective punishment of corporate crime and the credibility of the rule of law in an era where public trust in institutions is increasingly precarious. Part IV has mapped the origins, frameworks, and implications of this phenomenon.

## **Part V: NTRs and Asset Recovery**

This part analyses whether NTRs, such as DPAs, NPAs, plea bargains, and similar mechanisms, exacerbate or facilitate the recovery of stolen assets. Building on the foundations laid in Parts II, III, and IV, this part synthesises historical, doctrinal, and practical insights to assess NTRs against the paramount goal of asset recovery. Part II revealed the shortcomings of the pre-UNCAC regime, when recovering corrupt proceeds across borders was hindered by fragmented laws and the absence of any binding duty to return funds to victim states. Part III showed how UNCAC revolutionised this landscape, embedding asset recovery as a binding international obligation grounded in restorative and global justice, an imperative that corruption should not pay and that stolen wealth should be returned to those harmed. Part IV examined the rise of NTRs in anti-corruption enforcement, highlighting their functional benefits (efficiency, incentivising corporate cooperation, and flexible enforcement). It also set out persistent normative concerns with the use of NTRs (transparency deficits, questions of accountability, and the exclusion of victims from remedies).

Part V analyses whether NTRs advance UNCAC's asset recovery mandate by expediting and increasing the return of illicit assets, or undercut it by sidestepping full accountability and depriving victim states of justice and restitution. Through doctrinal and normative analysis, Part V integrates the historical context of Part II, the legal framework of Part III, and the practical trends from Part IV to provide a comprehensive analysis of NTRs' impact on asset recovery. In doing so, the thesis engages with treaty obligations, state practice, and scholarly critiques to assess whether NTRs are compatible with the UNCAC-era vision of restorative global justice or whether they represent a regression. Part V considers whether these non-trial mechanisms facilitate asset return by making the recovery of stolen assets more effective, or whether they present an impediment to justice by undermining transparency, accountability, and the rights of victims of corruption.

## 1. NTRs in the UNCAC Era: Aligning Agreements with Asset Recovery Obligations

### 1.1 Introduction

This chapter examines the relationship between NTRs and the international legal obligation of asset recovery, as outlined in UNCAC. It considers the place of DPAs, NPAs, plea agreements, and similar tools in the post-UNCAC paradigm, which prioritises asset recovery as a core component of anti-corruption justice. The objective is to determine whether, in principle, NTRs complement or contradict the duty of states to ensure stolen assets are returned to their rightful owners.

### 1.2 NTRs and UNCAC-era

In Part III, we saw that UNCAC fundamentally reframed asset recovery as a binding duty and a matter of justice. Article 51 of UNCAC proclaims asset return a fundamental principle and obliges states parties to cooperate to recover and return illicit assets.<sup>798</sup> This represents a decisive break from the pre-UNCAC regime described in Part II, where asset recovery depended on goodwill or piecemeal bilateral deals and was often thwarted by lack of jurisdictional tools.<sup>799</sup> UNCAC's drafters recognised that insisting on a traditional criminal trial for every corrupt actor would likely fail, as corrupt officials might never be convicted (especially if they retained power at home or fled abroad), leaving their assets untouched.<sup>800</sup> UNCAC addresses this issue by endorsing a pragmatic legal pluralism, encouraging the use of any lawful means, whether criminal, civil, or administrative, to recover and return stolen wealth.<sup>801</sup>

In other words, while UNCAC established asset recovery as a clear obligation, it deliberately did not confine states to the orthodox path of criminal conviction to achieve that result.<sup>802</sup> Part III highlighted that UNCAC's Chapter V and related

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<sup>798</sup> Claman, 336. Rose, Kubiciel, Landwehr, 10. Brun, 517. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 417, 418.

<sup>799</sup> Rose, Kubiciel, Landwehr, 10. Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13), 173.

<sup>800</sup> Claman, 343, 344, 347. Ivory, 554.

<sup>801</sup> Currie, 417. Brun, 517, 518. Ivory, 554. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 403, 418. Schirber and Hydoski, 129, 130.

<sup>802</sup> Claman, 347. Currie, 417. Brun, 517. Ivory, 554. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 418.

provisions authorise innovative mechanisms like non-conviction-based confiscation and international agreements for asset return. These provisions reflect the framers' intent that justice should not be held hostage to procedure.

NTRs have emerged within this flexible UNCAC-era enforcement environment. Although UNCAC does not prescribe tools like DPAs or plea bargains, these negotiated outcomes are tacitly accommodated.<sup>803</sup> By requiring states parties to enable asset freezing, forfeiture, and return even absent a criminal conviction (for example, via foreign civil judgments or administrative proceedings), UNCAC opened the door for states to resolve cases through non-trial alternatives.<sup>804</sup> NTRs are on this continuum of alternatives. Rather than engaging in a lengthy trial to conviction, authorities may negotiate an outcome that includes admission of wrongdoing, financial penalties, and crucially, measures to relinquish illicit assets.<sup>805</sup> The underlying logic of NTRs is aligned with UNCAC's core purpose – to ensure corruption yields no benefit and that victims are made whole – while adapting to practical constraints.<sup>806</sup>

As discussed in Part IV, many states have adopted NTRs precisely to overcome impediments to resolution in complex transnational bribery cases (e.g., evidentiary burdens, corporate legal defences, trial costs) and to encourage voluntary disclosure and cooperation by offenders. In my view, this reflects a tools-over-form approach. If the goal is to disgorge ill-gotten gains and deter corruption, the method of resolution can be negotiable so long as the outcome contributes to justice. Indeed, UNCAC's requirement that states parties "afford one another the widest measure of cooperation" in asset recovery suggests that states should be empowered to strike deals that

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<sup>803</sup> Ivory, Radha, and Søreide, Tina. "The International Endorsement of Corporate Settlements in Foreign Bribery Cases." (n 18), 957, 958.

<sup>804</sup> Bacio Terracino, Julio. *The International Legal Framework against Corruption: States' Obligations to Prevent and Repress Corruption* (n 9), 182. Claman, 347. Currie, 417. Brun, 517. Ivory, 554.

<sup>805</sup> Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47), 114, 115. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 18, 70, 110, 111. Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?' (n 36), 42.

<sup>806</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1250.

facilitate cross-border returns, for instance, bilateral agreements on asset disposal or leniency arrangements conditioned on repatriation.<sup>807</sup>

### **Restorative and Structural Justice**

Important normative questions arise about the extent to which NTRs are consistent with the ideals of restorative and structural justice reflected in UNCAC (see Part III). Under UNCAC, asset recovery is intended not just as a technical process, but as restorative (repairing harm to victim states and communities) and structural global justice, correcting historical imbalances by denying safe haven for stolen wealth.<sup>808</sup> An important issue is whether settlements negotiated in prosecutorial offices behind closed doors can fully satisfy these dimensions of justice.

On the one hand, by expediting the return of assets, an NTR may directly restore funds to a victim state's treasury or to harmed parties, delivering tangible restitution more swiftly than a protracted trial might.<sup>809</sup> For example, in at least one notable case of grand corruption (perpetrated by the Abacha family), authorities used a settlement to repatriate over \$1.2 billion of looted assets to the victim state in exchange for dropping the charges. This avoided drawn-out litigation, and resources were promptly returned to the public.<sup>810</sup> Such an outcome is undeniably consistent with UNCAC's injunction that stolen assets be returned as a form of compensatory justice.

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<sup>807</sup> Heimann, Fritz, and Pieth, Mark, 'Confronting Corruption: Past Concerns, Present Challenges, and Future Strategies' (n 132), 134. Gless, Jael Lena. "One Foot In, One Foot Out – An Accountability Analysis of the United Kingdom's and Switzerland's Regulatory Frameworks in the UNCAC Regime." (n 5), 149. Ivory, Radha, and Søreide, Tina. "The International Endorsement of Corporate Settlements in Foreign Bribery Cases." (n 18), 954. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 60, 127. Rose, Cecily, 'International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems' (n 79), 104.

<sup>808</sup> Gless, Jael Lena. "One Foot In, One Foot Out – An Accountability Analysis of the United Kingdom's and Switzerland's Regulatory Frameworks in the UNCAC Regime." (n 5), 142, 149, 169. Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1250. Hickey, Samuel J. "Remediation in Foreign Bribery Settlements: The Foundations of a New Approach." (n 6), 400, 401.

<sup>809</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1260. Woll, Cornelia. *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (n 47), 114. OECD, *Resolving Foreign Bribery Cases with NTRs* (OECD Publishing 2019) 84.

<sup>810</sup> Sharman, Jason C. *The Despot's Guide to Wealth Management: On the International Campaign against Grand Corruption*, (n 10), 98.

On the other hand, if an NTR merely results in a fine paid to the prosecuting state's treasury with no involvement or benefit to the victim state, the restorative justice principle is hardly satisfied. Part IV underscored that in many of the foreign bribery settlements concluded to date, there has been no compensation or assets returned to the states where the bribes or thefts occurred. In such scenarios, the negotiated resolution may serve as a punishment of sorts and may deter future offences, but it falls short of the UNCAC ideal that the victims of corruption (often nations plundered of wealth) should be made whole.<sup>811</sup> The tension, then, is between pragmatism and principle. UNCAC permits flexible paths to asset recovery, but it also embeds a normative commitment to justice that requires giving back what was stolen.<sup>812</sup>

### **Principle of Accountability**

The principle of accountability must also be considered. UNCAC's framework does more than retrieve assets. It also reinforces the rule of law by holding corrupt actors accountable, whether through criminal convictions or other measures.<sup>813</sup> An oft-cited concern is that NTRs, by definition, allow offenders (especially corporate offenders) to avoid public adjudication of their guilt.<sup>814</sup> Does this undermine the structural dimension of global justice reflected in UNCAC, that no one is above the law? The analysis of NTR practices in Part IV suggests that there is a risk of symbolic imbalance. Corporations can pay to settle allegations without a formal conviction, whereas in many states, an ordinary citizen or lower-level official caught in corruption would face full prosecution.

Non-trial agreements being used by powerful actors to escape the stigma of criminal guilt might arguably contravene UNCAC's spirit. Even if assets are recovered, it erodes public confidence that justice is being done. That said, UNCAC does not forbid

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<sup>811</sup> Søreide, Tina, *Negotiated Settlements for Corruption Offences: Position in Norway* (n 15), 145. Ölçer, 581.

<sup>812</sup> Ölçer, 580.

<sup>813</sup> Claman, 335.

<sup>814</sup> Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?' (n 36), 53.

settlements, and, as noted above, its drafters were aware that insisting on formal convictions could, in some cases, impede asset recovery altogether.<sup>815</sup>

The challenge is ensuring that accountability and restitution go hand in hand. In theory, a well-crafted DPA or plea deal can ensure accountability (through admissions of facts, monitorships, and oversight) and yield restitution (through fines, forfeiture, and clauses requiring compensation of victims). The UNCAC ethos would favour such outcomes as a valid means to ensuring there is no safe haven for corrupt wealth.<sup>816</sup> In contrast, a secret deal that trades leniency for money without transparency or redress would appear to suffer from the very blind spots that UNCAC was designed to cure; under pre-2003 practices, a corrupt asset might be confiscated by a bank's host state and simply kept, never reaching the people from whom it was stolen, as discussed in Part II.

### **1.5 Interim Conclusion**

Conceptually, NTRs occupy an ambiguous space in the UNCAC-era legal order. They are not mandated by UNCAC but have proliferated as states have enforced anti-corruption laws influenced by the convention. Chapter 1 has shown that NTRs can, in principle, be reconciled with UNCAC's asset recovery obligations, if they are used to further the convention's core objectives to deprive offenders of illicit gains and restore those to the victims. The legal flexibility built into UNCAC (allowing any lawful means to recover assets) provides a doctrinal foundation for states to negotiate outcomes that achieve the return of assets without a trial. In that sense, NTRs are a natural extension of UNCAC's pragmatic approach to enforcement, potentially facilitating asset recovery by sidestepping legal technicalities that once shielded stolen assets.

However, this chapter also identified a fundamental normative tension. NTRs must be more than expedient bargains to align with UNCAC's principles of restorative and

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<sup>815</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10 ), 12, 13. Claman, 347. Ölçer, 580.

<sup>816</sup> Olaniyan, Kolawole. *Corruption and Human Rights Law in Africa* (n 13), 111.

structural justice. They should incorporate transparency, genuine accountability, and provisions to benefit those harmed by corruption. When they do – for example, when a settlement leads to a large sum being repatriated to a victim state or a company admitting misconduct under court supervision – NTRs vindicate UNCAC’s vision of international cooperation righting the wrongs of corruption outside the courtroom. When they do not – for example, a DPA that simply levies a fine payable to the prosecuting state while ignoring victims – NTRs risk becoming an end-run around UNCAC’s justice ideals, this repeats the old paradigm in which powerful states or actors retain confiscated assets and victims are, once again, left without remedy. This dual character of NTRs sets the stage for the deeper analysis in the next chapters.

## **2. The Potential of NTRs to Facilitate Asset Recovery**

### **2.1 Introduction**

This chapter analyses the functional benefits of NTRs and how they facilitate the recovery and return of assets derived from corruption. Building on the conceptual alignment discussed in Chapter 1, it examines the specific mechanisms through which DPAs, NPAs, plea bargains, and similar settlements contribute to UNCAC’s asset-recovery mandate. The chapter surveys examples from national and multi-jurisdictional cases, highlighting key features of NTRs that can promote asset recovery, such as incentivising voluntary disclosure of hidden assets, expediting legal processes (thus preventing asset flight or dissipation), coordinating global settlements that encompass asset return, and incorporating terms that require offenders to disgorge profits and compensate victims.

### **2.2 Corporate Self-Reporting and Cooperation with Authorities**

One of the primary ways NTRs facilitate asset recovery is by encouraging the cooperation of offenders, especially when they are corporations. As noted in Part IV,

the prospect of a negotiated settlement (rather than a potentially crippling trial) often motivates companies to self-report corruption and to assist investigators. In doing so, companies may reveal the channels through which bribe money flowed or illicit proceeds were laundered.<sup>817</sup> This cooperation can significantly aid asset tracing, where bank accounts, shell companies, and investments that would have remained concealed might be voluntarily disclosed in terms of a DPA.<sup>818</sup>

For instance, a corporation facing FCPA charges in the United States might agree in a DPA to forensic audits and full disclosure of offshore accounts used to pay bribes, on the basis of which authorities can freeze and eventually confiscate those funds.<sup>819</sup> Such proactive identification of assets is far more efficient than trying to uncover the same information through subpoenas and MLA requests in an adversarial context.<sup>820</sup> In short, by concluding an NTR, corporations trade the threat of conviction for information and access to assets, a bargain that can substantially advance the asset recovery process. In my view, this dynamic aligns with the call in UNCAC Article 52 for identifying and monitoring assets of corrupt officials (e.g., through disclosure of beneficial owners and bank records).<sup>821</sup> By cooperating under an NTR, offenders help deliver precisely that kind of financial transparency, making it easier to locate and ultimately repatriate stolen wealth.<sup>822</sup>

### **Speed and Procedural Efficiency**

NTRs also facilitate speed and procedural efficiency.<sup>823</sup> Formal criminal proceedings in multiple jurisdictions can take many years, during which time assets may be moved to a new haven jurisdiction, spent, or hidden in complex webs of transactions.<sup>824</sup> NTRs

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<sup>817</sup> OECD, *The Detection of Foreign Bribery* (n 31), 145.

<sup>818</sup> Capus N and Bozinova M, 'Impression Management in Corporate Corruption Settlements: The Storied Self of the Prosecutorial Authority', (n 577), 6.

<sup>819</sup> Garrett, Brandon. "The Global Evolution of Corporate Prosecutions." (n 16), 56, 57. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 583.

<sup>820</sup> Brun, 519.

<sup>821</sup> Claman, 339.

<sup>822</sup> OECD, *The Detection of Foreign Bribery* (n 31), 25.

<sup>823</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 83.

<sup>824</sup> Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 487.

dramatically cut that timeline by allowing cases to be resolved in a matter of months once a framework agreement is in place.<sup>825</sup> This speed can be crucial for asset recovery. Part II showed that in the past, delays and cumbersome procedures often seriously hindered asset recovery, resulting in freezing orders lapsing or stolen funds being depleted by legal challenges (see Part II).

In contrast, a coordinated settlement can swiftly convert a freeze into a forfeiture and then into a return. There is no need to wait for a final conviction that might be subject to appeal for years. Consider, for example, the case of a high-profile kleptocracy involving foreign bank accounts. If prosecutors negotiate a plea deal with the accused official to forfeit specified assets in exchange for a reduced sentence, those assets can be recovered and repatriated much faster than if the case went to trial and through endless appeals. We saw a notable illustration of this in the Sani Abacha matter. In 2014, Nigerian authorities and the Abacha family reached a settlement in terms of which Nigeria agreed to drop pending legal proceedings against Abacha's son in Switzerland in return for over \$1.2 billion in frozen funds being released and returned to Nigeria.<sup>826</sup> This negotiated resolution facilitated the swift recovery of assets that might have otherwise been tied up in court for additional years.<sup>827</sup> The Swiss government and Nigeria even formalised the agreement, with the World Bank monitoring the returned assets to ensure the funds would be used for the public good.<sup>828</sup> Such outcomes demonstrate the practical reality that NTRs can expedite justice. By avoiding protracted litigation, they reduce the risk that wealth dissipates or is locked in legal limbo. In line with UNCAC's aims, this means the people to whom the assets belong can benefit sooner; for example, a school or hospital can be built with returned funds immediately and not a decade later.

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<sup>825</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 83.

<sup>826</sup> Sharman, Jason C. *The Despot's Guide to Wealth Management: On the International Campaign against Grand Corruption*, (n 10), 98.

<sup>827</sup> Daniel, Tim and Maton, James. Recovering the proceeds of corruption: General Sani Abacha – a nation's thief, In Pieth, Mark (ed). *Recovering Stolen Assets*, Bern: Peter Lang, 2008, 67, 68.

<sup>828</sup> Paul, Gully-Harl. International asset recovery of corruption-related assets: Switzerland, In Pieth, Mark (ed). *Recovering Stolen Assets*, Bern: Peter Lang, 183. Lugon-Moulin, 304.

## Recognition of Settlement

NTRs also allow parties to reach comprehensive, global settlements regarding conduct and assets spanning multiple states.<sup>829</sup> This is a critical benefit in the modern era of transnational corruption, where a single scheme might involve actors and assets in numerous jurisdictions. As detailed in Part IV, authorities have increasingly cooperated to negotiate joint or parallel settlements with companies like Odebrecht and Airbus, which engaged in bribery in many states. In a coordinated multi-state DPA, the company might agree to make a financial settlement that reflects all its illicit profits earned worldwide, with portions allocated to each involved jurisdiction.<sup>830</sup>

From an asset recovery standpoint, one-stop global settlements can ensure that no tainted profit escapes confiscation. Rather than, say, the wealthier states penalising a company for bribes in State X (and keeping all the fines), leaving that state to separately litigate to recover its losses, a coordinated NTR can combine these efforts.<sup>831</sup> Each authority, the state where the company is based, the state where the bribes took place, and others with jurisdiction cooperate to determine an appropriate penalty and its apportionment or use.

Part IV highlighted the Airbus case as an example: France, the UK, and the US negotiated settlements simultaneously, avoiding inconsistent outcomes and preventing the company from escaping by playing one jurisdiction off against another. Airbus agreed to a massive fine (USD 3.9 billion in that case), divided among the three prosecuting states, and explicitly acknowledged wrongdoing in numerous states. While the division of penalties in such cases has sometimes been criticised (often the lion's share goes to the prosecuting home states), a joint resolution inherently facilitates asset recovery by eliminating gaps; the company cannot hide its illegal gains

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<sup>829</sup> Sharman, Jason C. *The Despot's Guide to Wealth Management: On the International Campaign against Grand Corruption*, (n 10), 50, 62. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 38, 40, 119, 40. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 20.

<sup>830</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 119. Hock, Branislav. "Policing Corporate Bribery: Negotiated Settlements and Bundling." (n 15) 951.

<sup>831</sup> Hickey, Samuel J. "Remediation in Foreign Bribery Settlements: The Foundations of a New Approach." (n 6), 381.

in jurisdictions that were not part of the deal because, ideally, all major impacted jurisdictions are at the table.

Coordinated settlements can also provide for restitution to victim states.<sup>832</sup> In the Odebrecht case (2016), the Brazilian construction firm struck a trilateral plea agreement with the US, Brazil, and Switzerland. Crucially, the global settlement provided for most of the USD 2.6 billion penalty to be paid to Brazil (the state most harmed by Odebrecht's bribery) to the benefit of the people of Brazil.<sup>833</sup> This exemplifies how NTRs can be tailored to facilitate actual repatriation of assets to the affected nation, not just asset forfeiture in the abstract. In effect, the settlement functioned as an internationally coordinated asset recovery mechanism; multiple prosecutors agreed on a penalty distribution that prioritised returning funds to the epicentre of the corruption scheme.<sup>834</sup>

### **Flexibility of Mechanisms**

Non-trial mechanisms also offer flexibility in crafting remedies that courts might not be able to impose after a trial. For example, a DPA can require a company to implement compliance measures and submit to monitoring, reducing the risk of future corruption and indirectly safeguarding public assets from being stolen in the first place.<sup>835</sup> While such compliance terms are preventive rather than about recovering past assets, they contribute to the broader UNCAC goal of preserving the integrity of public finances.

More directly related to asset return, a settlement can include creative terms and may, for example, establish a victim compensation fund, community service payments, or

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<sup>832</sup> *Ibidem*, 127.

<sup>833</sup> *Ibidem*, 129. OECD, *The Detection of Foreign Bribery* (n 31), 25. Einbinder, Fred. "Borrowings and Boomerangs: A Comparative Law Perspective on Resonance in Transnational Anti-Corruption Law Enforcement." (n 36), 154, 155.

<sup>834</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 129. Hickey, Samuel J. "Remediation in Foreign Bribery Settlements: The Foundations of a New Approach." (n 6), 388, 389.

<sup>835</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 139. de Doelder et al, *Perspectives on Negotiated Settlements* (n 15), 207. O'Malley PJ, 'Directors' Duties and Corporate Anti-Corruption Compliance: The 'Good Steward' in US and UK Law and Practice'(n 670), 48. Manacorda, Stefano, and Centonze, Francesco (eds.). *Corporate Compliance on a Global Scale: Legitimacy and Effectiveness* (n 26), 317, 318. Garrett, Brandon. "The Global Evolution of Corporate Prosecutions." (n 16 ), 56.

donations to anti-corruption causes in affected states. In one foreign bribery settlement in the UK, for instance, in addition to fines, the defendant company's DPA obligated it to pay compensation to the foreign government that had been defrauded by the corruption.<sup>836</sup> While not all jurisdictions allow the proceeds of penalties to be directed to foreign victims, where there is the political will to do so, NTRs are sufficiently flexible to achieve such outcomes. These arrangements can fill a gap often left unaddressed by the judgment of a court; that is, traditional convictions might punish the offender but have no mechanism to channel money to victims abroad, whereas a negotiated deal can explicitly provide for that channel. This reflects a restorative ethos, aligning with the intent of UNCAC Article 57 that confiscated assets be returned to their prior legitimate owners or used to compensate victims of crime.<sup>837</sup> Each inclusion of a victim-focused provision in an NTR (e.g., requiring a multinational to pay reparations to a state it harmed by bribery) is a step toward making asset recovery more routine and reliable.

### **Strengthen International Cooperation**

NTRs can strengthen international cooperation by creating a positive-sum framework.<sup>838</sup> Unlike adversarial proceedings, which can devolve into a jurisdictional battle, the negotiation of settlements can involve proactive inter-agency information sharing and trust-building.<sup>839</sup> In Part IV, I observed that in cases like the European aerospace (Airbus) settlement, investigative leads and evidence were freely shared among French, UK, and US authorities to build the case, with a clear division of labour

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<sup>836</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 128, 215. Palmer, Axel and Nicholas Ryder, *Deferred prosecutions and justice: a whodunnit?* In *Research Handbook on Plea Bargaining and Criminal Justice* (n 381), 250.

<sup>837</sup> Division for Treaty Affairs, United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (2nd rev edn, United Nations 2012), 228. Ivory, Radha. *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys*. (n 10), 126. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 12. Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9), 51. Ölçer, 572.

<sup>838</sup> Hock, Branislav. "Policing Corporate Bribery: Negotiated Settlements and Bundling." (n 15), 957, 962. Dennis, Eleanor. "Using N/DPAs to Achieve Global Settlements: Lessons for Canada." (n 33), 53, 54.

<sup>839</sup> Hock, Branislav. "Policing Corporate Bribery: Negotiated Settlements and Bundling." (n 15), 956, 962. Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 807.

to avoid duplication. This kind of cooperation is crucial for asset recovery; one state might have banking information, another might have witness testimony, and a third might have authority to freeze assets that are present in the jurisdiction. The promise of a coordinated settlement gives each state an incentive to share evidence since all stand to benefit from a collective resolution.<sup>840</sup> Moreover, negotiating a comprehensive package avoids the ‘multiple bites at the apple’ problem; this arises where uncoordinated efforts risk either under-enforcement (letting some proceeds slip through cracks) or over-enforcement (stacking penalties to the point of excess). A well-coordinated NTR ensures that all corrupt gains are accounted for once. From an asset recovery perspective, this means that the offending entity pays in full (and only once) and those funds can then be allocated appropriately, possibly by returning a portion to where the harm occurred. In the ideal scenario, NTRs serve as a vehicle for structural global justice (discussed in Part III): they redistribute ill-gotten wealth and reinforce cooperation among nations, acknowledging that corruption is a transnational problem requiring joint action.

## **2.7 Interim Conclusion**

This chapter demonstrates that NTRs, when used purposefully, can significantly facilitate asset recovery. By incentivising the cooperation of offenders, NTRs facilitate the identification of hidden assets and fast-track the confiscation process. By expediting the resolution of corruption cases, they reduce the time available for stolen assets to be squirrelled away or depleted and, in turn, increase the likelihood that there will still be assets available for recovery. The coordinated global settlements facilitated by NTRs can capture the totality of illegal proceeds in one fell swoop. They can also allocate penalties to ensure funds are returned to victim states, achieving what UNCAC envisaged: that the confiscated property shall be returned to the requesting state in corruption cases. NTRs also allow for bespoke solutions (compensation schemes, monitoring of returned funds, etc.) that might not be possible under traditional court orders, and outcomes can be tailored to maximise restorative impact.

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<sup>840</sup> Hock, Branislav. “Policing Corporate Bribery: Negotiated Settlements and Bundling.” (n 15), 962. *OECD, Resolving Foreign Bribery Cases with NTRs* (n 16) 38.

In short, this chapter has shown that NTRs can be powerful tools to advance the UNCAC asset recovery agenda. They operationalise the idea that corruption cases should conclude with restoration, the return of wealth to its rightful use and owners, rather than punishment. States with active NTR regimes (like the US and UK) have collected billions in corporate penalties, some of which have been earmarked for or transferred to affected states in cases of grand corruption. As observed above, it is telling that international policy bodies have begun encouraging the transparent and fair use of settlements, implicitly recognising that NTRs are now part of the global anti-corruption toolkit.

However, as promising as these developments are, they depend on how NTRs are designed and implemented. Their facilitative potential with respect to asset recovery is greatest when it is consciously incorporated into the settlement process by prosecutors and policymakers. If that consciousness or will is lacking, NTRs might still strip criminals of assets (via fines/forfeiture) but not deliver those to the victims or affected states. The next chapter turns to the darker side of this equation: how, in practice, NTRs have sometimes exacerbated difficulties in asset recovery or created new challenges for justice. The very flexibility and speed that make NTRs effective can also lead to shortcuts being taken and the outcomes being murky.

### **3 Risks and Challenges – Do NTRs Undermine Asset Recovery and Justice?**

#### **3.1 Introduction**

This chapter examines the persistent normative and practical challenges posed by NTRs, focusing on how they may undermine or complicate asset recovery despite the formal advances made under UNCAC. It asks whether NTRs, as currently employed, exacerbate problems of transparency, accountability, and victim restitution, impeding the full realisation of UNCAC's asset-recovery principles. The chapter builds on the concerns outlined in Part IV's critical analysis, referencing Parts II and III to illustrate how some NTR practices risk restoring the very blind spots UNCAC sought to eliminate (such as neglecting the rights and restitution of victim states).

### 3.2 Transparency Deficits

A central issue is transparency. Unlike court trials, which are public and result in reasoned judgments, NTRs are negotiated behind closed doors.<sup>841</sup> In some jurisdictions, the terms of a DPA or plea agreement become public eventually (sometimes accompanied by a statement of facts). However, the full extent of evidence is seldom revealed, and the negotiation process is typically not subject to public scrutiny.<sup>842</sup> This opacity can hinder asset recovery in several ways. First, it can breed distrust and speculation. If a settlement is reached quietly, how can the public (or authorities in other jurisdictions) be confident that all illicit assets are accounted for?

Part II showed that, historically, a lack of transparency allowed corrupt actors to hide assets and escape accountability. With NTRs, there is a parallel danger that a lack of transparency in resolving cases may allow some funds to remain hidden or some facts to remain buried.<sup>843</sup> For example, a company might settle a foreign bribery case by paying a fine, but the details of contracts and bank accounts might never be fully aired, leaving the affected foreign state with insufficient information to pursue restitution or to identify local culprits.

Part IV referenced the unintended prosecutorial practice that has emerged with patterns of settlements that define the consequences of corruption without judicial precedent. One downside of this trend is that important facts and legal reasoning reside in prosecutors' files rather than in published court decisions, which can impede

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<sup>841</sup> Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9 ), 634. Reilly, Peter R. "Sweetheart Deal, Deferred Prosecution, and Making a Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts." (n 685), 1164. Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 826. Koehler, Mike. "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement." (n 51), 505. de Doelder et al, *Perspectives on Negotiated Settlements* (n 15), 197,198.

<sup>842</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 826, 827. Koehler, Mike. "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement." (n 51), 504, 505.

<sup>843</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, ( n 10 ) 2, 3. Capus, Nadja and Hohl Zürcher, Franziska, *Revamping Anticorruption Criminal Law - The Making of (In-)Transparency*, (n 26) 21. Søreide, Tina. 276, 277.

the diffusion of knowledge that could help other asset recovery cases.<sup>844</sup> Moreover, the secrecy of settlements can result in questionable arrangements, such as a deal allowing a perpetrator to pay a fraction of the gains in exchange for not having to make an admission of guilt.<sup>845</sup> Such outcomes risk sending a message antithetical to UNCAC's norm of not providing a safe haven to illicit funds; they imply that, so long as one negotiates, corruption might still pay (at least partially), and that deals can be struck without full exposure of wrongdoing.

### 3.3 Weak Accountability Structures

Closely related is the challenge of accountability. It is implicit in the practice of NTRs that no one is formally convicted unless there is a plea to a lesser charge.<sup>846</sup> For corporations, this means no individuals are left with a criminal record (in the case of NPAs or conditional non-prosecution deals), and can mean no personal criminal record or jail time.<sup>847</sup> Part IV raised the concern that this dynamic can create a two-track justice system, one for powerful actors who can negotiate their way out of convictions, and one for everyone else. From an asset recovery perspective, the lack of formal accountability can undermine the moral authority of recovery efforts.<sup>848</sup>

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<sup>844</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 4. Reilly, Peter R. "Sweetheart Deal, Deferred Prosecution, and Making a Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts." (n 685), 1165. Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 827.

<sup>845</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 826. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 99 Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 610.

<sup>846</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 27. Koehler, Mike. "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement." (n 51), 509.

<sup>847</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 46, 50. Koehler, Mike. "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement." (n 51), 509. Davis, Frederick T. "International Double Jeopardy: U.S. Prosecutions and the Developing Law in Europe." *American University International Law Review* 31 (2016), 84. Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 751 Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 613. Makinwa, Abiola, "Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?" (n 36), 51.

<sup>848</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 3. Ivory, Radha, and Søreide, Tina. "The International Endorsement of Corporate Settlements in Foreign Bribery Cases." (n 18), 952. Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?" (n 15) 43. King, Colin, Civil Forfeiture in Ireland: Two Decades of the Proceeds of Crime Act and the Criminal Assets Bureau In *Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU* (n 23), 93.

Asset recovery is not meant to be cash-register justice; it is integral to the broader enforcement of anti-corruption norms (see Part III's discussion of moral and structural justice). If a settlement allows a company or official to quietly pay a sum and continue business as usual, it is unlikely that the condemnation or the deterrence effect is sufficient.<sup>849</sup> Indeed, some scholars and practitioners worry that certain DPAs are a cost of doing business, essentially a licence that, if you are caught, you can pay a penalty and move on, rather than face the full force of law.<sup>850</sup> This raises the problem of moral hazard; actors might not be fully dissuaded from corrupt behaviour if they believe a lenient settlement is achievable.<sup>851</sup> The individuals who masterminded the corruption may remain free (and sometimes they retain their profits if fines are not employed to fully claw back their bonuses or kickbacks). This undercuts the message that asset recovery should accompany justice.<sup>852</sup> In contrast, the vision of UNCAC (Part III) is that asset recovery is intertwined with holding perpetrators responsible. As such, stolen assets must be returned, *and* those responsible should face consequences commensurate with their wrongdoing. NTRs can facilitate the former but sometimes at the expense of the latter.

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<sup>849</sup> Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?' (n 36), 60. Acorn, Elizabeth 'Twenty Years of the OECD Anti-Bribery Convention: National Implementation and Hybridization' (n 672), 665. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16) 60. Garrett, Brandon. "The Global Evolution of Corporate Prosecutions." (n 16), 56.

<sup>850</sup> OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 81, 88. Manacorda, Stefano, and Centonze, Francesco (eds.). *Corporate Compliance on a Global Scale: Legitimacy and Effectiveness* (n 26), 332. Fragale, Mauro, and Grilli, Valentina. "Impunity for Sale: Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?" (n 15) 43, 44. Lund, Dorothy S., and Sarin, Natasha. "Corporate Crime and Punishment: An Empirical Study." (n 47), 10.

<sup>851</sup> Søreide, Tina, *Negotiated Settlements for Corruption Offences: Position in Norway* (n 15), 146. Makinwa, Abiola, 'Public/Private Co-operation in Anti-Bribery Enforcement: NTRs as a Solution?' (n 36), 60.

<sup>852</sup> Ryder, Nicholas. "Too Scared to Prosecute and Too Scared to Jail? A Critical and Comparative Analysis of Enforcement of Financial Crime Legislation against Corporations in the USA and the UK." *Journal of Criminal Law* 82, Nr. 3 (2018), 260, 262. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 113. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 2. Ölçer, 582.

### 3.4 Exclusion of Victims

Perhaps the most obvious challenge discussed in Part IV is the exclusion of victims and the failure to achieve restitution in many NTRs. As UNCAC recognised, states and societies whose resources were stolen or whose institutions were compromised by corruption are victims deserving of redress.<sup>853</sup> Yet, under NTR practice thus far, victim states have frequently been sidelined or entirely absent.<sup>854</sup> Settlements in foreign bribery cases are usually conducted between the prosecuting state (often the home state of the multinational or a third-party enforcer like the US or UK) and the offending company.<sup>855</sup> The affected foreign government, whose officials were bribed or whose treasury was indirectly defrauded, is typically not even informed until the deal is nearly done.<sup>856</sup>

Prosecutors have admitted that they avoid involving foreign states in settlement talks for fear of complicating the process.<sup>857</sup> The result is a pattern documented by the World Bank and others of victim states being left out of the bargain.<sup>858</sup> In most cases, settlements have not provided any compensation or return of assets to the states in which corruption took place.<sup>859</sup> For example, if a European company bribed officials in an African state, a settlement concluded in Europe might impose a large fine payable to the European state, with the African state receiving nothing, effectively enriching

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<sup>853</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 12. Claman, 345.

<sup>854</sup> Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9), 74.

<sup>855</sup> Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9), 116, 117. Dennis, Eleanor. "Using N/DPAs to Achieve Global Settlements: Lessons for Canada." (n 33), 48. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 2, 8, 97. Hock, Branislav. "Policing Corporate Bribery: Negotiated Settlements and Bundling." (n 15) 963.

<sup>856</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 3, 57, 97. Ölçer, 582.

Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 84. Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1259.

<sup>858</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 2, 96, 97. Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9), 500. Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9), 115.

<sup>859</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 2, 9, 98. Ölçer, 582.

the coffers of the enforcer rather than the victims.<sup>860</sup> This offends the basic principle of restorative justice outlined in Part III and Chapter 1 of this part, which requires that those harmed by corruption should receive back the stolen wealth. It also creates a perception of inequity, unfairness, and neocolonialism: wealthy states monetarily benefit from prosecuting corruption that occurred in poorer states, an outcome at odds with UNCAC's mutual partnership ethos.

The exclusion of victims is seen in non-monetary ways. By not having a voice in the process, victim states cannot advocate for terms that matter to them, be it full disgorgement of profits gained from corrupt contracts, an apology, or a specific use of returned funds (for example, to rebuild infrastructure projects tainted by bribes).<sup>861</sup> Victims are then also unable to present evidence of the impact of the corruption (e.g., how a bribe for a public contract led to shoddy goods or services being provided); doing so could inform a more just penalty.<sup>862</sup> In essence, their dignitary interest in the process is denied.<sup>863</sup> There has been mounting criticism of this exclusion. Part IV notes that international forums, including the UNCAC Conference of States Parties, have begun to discuss principles for incorporating victim compensation into settlements, precisely because the current situation cannot be sustained if global anti-corruption enforcement is to remain legitimate.

The consequences of victim exclusion are concrete. Not only do victim states fail to see assets returned, but they may also find it harder to pursue their own cases.<sup>864</sup> When

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<sup>860</sup> Ölçer, 582. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, ( n 10 ), 2, 67, 68. Hickey, Samuel J. "Remediation in Foreign Bribery Settlements: The Foundations of a New Approach." ( n 6),370. Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." ( n 9) 188, 189, 116. Organisation for Economic Co-operation and Development, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* (n 642), 18.

<sup>861</sup> Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." ( n 9), 188, 189, 116. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, ( n 10 ), 10, 49.

<sup>862</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, ( n 10 ), 10, 49. Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." ( n 8), 1259, 1262.

<sup>863</sup> Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." ( n 9), 73, 74.

<sup>864</sup> *Ibidem*, 167. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, ( n 10 ) 2, 84.

State A settles a case with a company for bribing officials in State B, that settlement might cover conduct in State B without its input. If State B later tries to prosecute the bribe-taking officials or recover damages, it might face legal and practical hurdles.<sup>865</sup> The company could claim it has resolved the issue and resist further payouts, or crucial evidence might have been sealed in State A's investigation.<sup>866</sup> As Part IV highlighted, unilateral NTRs can result in double jeopardy attaching and may raise sovereignty concerns. From State B's perspective, justice was done only in a foreign courtroom (or rather, a foreign negotiation room), and perhaps not to its benefit. This can breed resentment and reduce trust between nations, which is detrimental to the cooperative spirit needed for asset recovery. Furthermore, if evidence gathered for State A's case is not shared, which is likely if there is no trial and thus no public record, State B might lack the proof to confiscate assets from the bribe recipients or intermediaries present in its territory.<sup>867</sup>

An NTR that makes enforcement easier for one state can make it harder for another to recover assets or punish wrongdoers. In the world envisioned by UNCAC, states are supposed to help each other, not compete or undercut each other.<sup>868</sup> Yet, as was observed in Part IV, fragmented NTR practices can lead to multiple jurisdictions racing to settle first, sometimes offering more lenient terms to secure jurisdiction over the case. This race to the bottom is perilous for asset recovery. The jurisdiction that wins might impose a smaller forfeiture just to secure the settlement, meaning less money is ultimately recovered.<sup>869</sup> It might also omit to specify any sharing of penalties. Thus, competition among enforcers, fuelled by the availability of NTRs, can exacerbate the problem of incomplete asset recovery and uneven justice.

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<sup>865</sup> Capus, Nadja, and Brodersen, Kei Hannah. "Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements." (n 8), 1259.

<sup>866</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 57.

<sup>867</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, (n 10), 84.

<sup>868</sup> Claman, 336. Currie, 419. Rose, Cecily, 'International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems' (n 79), 103. Olaniyan, Kolawole. "Ownership of Proceeds of Corruption in International Law." (n 9), 300.

<sup>869</sup> Currie, 416.

Another problematic aspect is the limited judicial oversight in some NTR regimes, which can diminish checks and balances in the conclusion of settlements.<sup>870</sup> For instance, in the United States, NPAs are agreements entirely at the discretion of prosecutors, with minimal court involvement. Even DPAs, which are filed in court, are often rubber-stamped.<sup>871</sup> In contrast, states like the UK and France have introduced judicial review for their DPAs/CJIPs, a positive development for transparency. Where oversight is weak, there is a risk of deals being perceived as too lenient.<sup>872</sup> This does create an effective deterrent and may also shortchange victims in the asset-recovery process. A prosecutor might settle quickly for a fine that is lower than the total profits gained through corruption, letting the company keep some benefit.<sup>873</sup> They could also not bother pursuing further asset confiscation once a deal is struck. In a trial, by contrast, a court might order full restitution or higher penalties based on evidence. To the extent NTRs leave money on the table (for expediency or due to unequal bargaining power), they fail to achieve the UNCAC mandate to fully disgorge corrupt gains. In short, insufficient oversight can lead to suboptimal recovery outcomes.

### 3.5 Interim Conclusion

Chapter 3 has found that, despite their utility, NTRs pose serious challenges that can undermine the goal of asset recovery and the broader quest for justice in cases of

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<sup>870</sup> Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, ( n 10 ), 98. OECD, *Resolving Foreign Bribery Cases with NTRs* (n 16), 141, 143 Koehler, Mike. "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement." (n 51), 505. Reilly PR, 'Corporate Deferred Prosecution as Discretionary Injustice' (n 685), 882. Reilly, Peter R. "Sweetheart Deal, Deferred Prosecution, and Making a Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts." (n 685), 1169.

<sup>871</sup> Koehler, Mike. "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement." (n 51), 505. Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 764.

<sup>872</sup> Davis, Frederick T. "Judicial Review of Deferred Prosecution Agreements: A Comparative Study." (n 34), 764. Koehler, Mike. "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement." (n 51), 506. OECD, *Resolving Foreign Bribery Cases with NTRs*, 47.

<sup>873</sup> Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (n 9 ), 610. Oduor, Jacinta A., et al. *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, ( n 10 ), 47. Coffee, John C., Jr. "Corporate Crime and Punishment: The Crisis of Underenforcement." (n 48), 68. Trinchera, Tommaso. "Confiscation and Asset Recovery: Better Tools to Fight Bribery and Corruption Crime." (n 22), 58.

corruption. The key normative deficiencies identified are a lack of transparency, inadequate accountability, and the marginalisation of victims, all of which echo the pre-UNCAC shortcomings discussed in Part II. While UNCAC established asset recovery as a legal duty and a point of principle, NTR practices have not uniformly internalised those values. Instead, there is often a gap between the formal promise of UNCAC and the operational reality of settlements. The secrecy surrounding many settlements and the avoidance of public trials mean that the full story of corruption is seldom told, and, without full disclosure, affected communities may doubt that justice was done.

Avoiding convictions, while pragmatically justifiable in some cases, raises the worry that some wrongdoers can purchase impunity, eroding the rule of law. Most glaringly, the failure to compensate or include victim states in most NTRs is a direct affront to the restorative-justice ideal that stolen assets be returned to those harmed. Instead, as this chapter has recounted, settlement money often stays in the coffers of already wealthy nations and risks reinforcing global inequities rather than correcting them. In these ways, poorly implemented NTRs can exacerbate the very problems UNCAC sought to fix. They can leave victims without remedy, allow some corruption proceeds to escape recovery, and sow mistrust among international partners.

The critique in this chapter does not imply that NTRs are inherently pernicious, but rather that current practices need to be reformed and safeguards implemented to ensure NTRs serve the ends of justice. There are encouraging signs. Some jurisdictions now require judicial approval of settlements (enhancing transparency), and international bodies (OECD, UNCAC COSP) are developing soft guidelines to improve consistency. These include recommendations to share fines with victims or to coordinate multi-state settlements to avoid states undercutting each other. If NTRs can be implemented more fairly by including victim voices, ensuring full disgorgement of illicit gains, and maintaining oversight, many of the concerns identified can be mitigated. In the absence of such measures, however, NTRs will continue to be criticised as a second-best form of justice, prone to abuse or inequitable outcomes.

#### **4 Facilitating or Undermining Asset Recovery? The Double-Edged Nature of NTRs**

The analysis from Chapters 1, 2, and 3 and the thesis's earlier parts together offer a nuanced evaluation of NTRs in the context of asset recovery. The core question posed was whether NTRs exacerbate or facilitate the restitution of corrupt proceeds. This part has shown that there is no black-and-white answer; NTRs have a dual nature. They are powerful tools that, if wielded with integrity and foresight, can significantly facilitate asset recovery. However, they have often been implemented in ways that raise legitimate concerns of asset recovery and justice being impeded or distorted.

On the one hand, NTRs have proven to be pragmatic solutions to many of the problems that had plagued asset-recovery efforts (as detailed in Part II). They circumvent the procedural and jurisdictional quagmires that had historically allowed kleptocrats and bribe-paying companies to stall or avoid the return of stolen wealth. Through cooperation incentives and expedited resolutions, NTRs make it easier to identify, freeze, and forfeit assets, achieving in practice what UNCAC mandated in principle: corruption should not pay, and ill-gotten gains should be returned.

Chapter 2 illustrated the potential of NPRs seen in several high-value asset returns accomplished via settlements, like the coordinated Odebrecht and Airbus resolutions and the Abacha-linked repatriations, rather than trials. In these instances, non-trial approaches were both compatible with asset recovery and, arguably, essential to its success, forging outcomes that would likely not have been attainable through traditional litigation. Moreover, NTRs reflect the flexible enforcement philosophy embedded in UNCAC. They are in line with the treaty's acceptance of alternative measures (civil, administrative, diplomatic) to accomplish asset return when criminal convictions are problematic. In that respect, NTRs are an innovative extension of the global anti-corruption regime's commitment to effectiveness over form. They have increased the volume of enforcement, with more cases being resolved and more penalties (hence assets) collected than before, which is a non-trivial achievement after

decades of impunity. If the story ended here, one could conclude that NTRs indeed facilitate asset recovery by turning anti-corruption commitments into tangible results, ensuring money flows back to coffers from which it was illicitly taken.

However, the analysis in Part V also reveals a more troubling side. NTRs, as practiced, have not fully delivered on the promise of restorative justice and, in some respects, risk replicating old patterns of injustice. The critiques outlined in Chapter 3 make it clear that, without reforms, NTRs can exacerbate certain problems. Chief among these is the failure to consistently return assets to victim states or to involve them in the justice process. Too often, settlements have resulted in substantial payments to prosecuting states (generally wealthier financial centres) with negligible or no compensation to the states in which corruption occurred. This has left societies without redress, contrary to UNCAC's fundamental tenet of restitution, and can also undermine the legitimacy of international anti-corruption efforts. The resulting scenario is reminiscent of the pre-UNCAC era (Part II), where powerful nations retained confiscated assets by default, and victims were an afterthought.

Arguably, such outcomes exacerbate global inequities. Instead of levelling the playing field, as states intended with the adoption of UNCAC, they may reinforce the imbalance, with rich states profiting from penalties while poorer ones bear the original harm of corruption. Additionally, NTRs can sometimes prevent comprehensive accountability. By allowing corporations, and, indirectly, executives, to avoid trials, they can create a perception of a 'privileged escape,' a light form of justice that, if abused, erodes trust in the system and potentially dampens the moral momentum for asset recovery. As one observer put it, if people believe that grand corruption is settled in backroom deals where the perpetrators simply pay for allegations to disappear, public faith in the principle that corruption should not pay is weakened. In extreme cases, this could reduce cooperation from victim states (why assist in an investigation

if you expect to be excluded from the outcome?) and from the public (why report corruption if it ends in a quiet settlement?).

Thus, the verdict on the impact of NTRs is two-sided. They are neither a panacea, automatically realising UNCAC's lofty goals, nor are they an irredeemable compromise that betrays those goals. The critical factor is how NTRs are structured and integrated into the asset recovery regime. Properly regulated and executed with an eye to transparency, fairness, and inclusivity, NTRs can be engines of asset recovery and international justice, as several cases show. Poorly managed, they risk becoming a shortcut that delivers an expedient outcome for enforcers and offenders at the expense of deeper justice for victims and societies.

This analysis has important implications for policy and scholarship. It suggests that the future of asset recovery will likely involve NTRs, but that there is a pressing need for normative frameworks and best practices. As noted, there have already been calls to formalise principles, for example, by requiring victim compensation in every settlement, enhancing judicial review and public disclosure of settlement terms to bolster transparency, encouraging or mandating cross-border consultation before finalising deals affecting other jurisdictions (to prevent undercutting or exclusion of victims' interests) and calibrating penalties to disgorge all profit and add meaningful punitive sums, so that no settlement leaves the perpetrator better off than if they had never been caught.

These measures, if adopted widely, could tilt NTR practice more consistently toward asset recovery *and* justice, rather than creating a trade-off between the two. In essence, the challenge ahead is to ensure NTRs are an expression of UNCAC to infuse these national legal tools with the same commitments to restitution, integrity, and cooperation that UNCAC represents. There is growing recognition of this need. The 2019 OECD Anti-Bribery Recommendation, for example, dealt with settlements explicitly, urging transparency and attention to compensation of foreign victims. The UNCAC Conference of States Parties has also debated resolutions on the use of

settlements in corruption cases, reflecting a collective awareness that this enforcement trend must be harnessed for the global good and not just national advantage.

Part V's exploration leads to the following key finding. NTRs are a double-edged sword for asset recovery. They facilitate asset recovery to the extent that they provide a flexible, efficient means to enforce anti-corruption laws and recover proceeds that might otherwise remain out of reach. NTRs capture the problem-solving spirit of UNCAC's drafters, who sought practical ways to ensure corruption no longer pays.

Yet, they also exacerbate existing challenges to the extent that they fall short of UNCAC's justice ideals, when they lack transparency, bypass the participation of victim states, or allow offenders to settle for a price that does not truly reflect reparative justice. The task for the international community, scholars, and practitioners is to maximise the former and minimise the latter. This means refining the practice of NTRs so that speed and flexibility do not come at the cost of accountability and equity. In the grand scheme, the rise of NTRs represents a transformative moment in the fight against corruption (as Part IV argued).

The contribution of Part V is to clarify that this transformation will only be positive if anchored in the principle that is the lodestar of anti-corruption law over the last two decades: stolen assets must be returned, and justice must be done. If NTRs can consistently serve that principle by efficiently bringing money back for the public benefit and vindicating the rights of those harmed, they will prove an invaluable innovation, complementing the UNCAC regime. If not, they risk echoing the failures of the past, an outcome that states, having come this far in the struggle against corruption, must avoid. The ultimate measure of NTRs will be whether they ensure that corruption truly does not pay, by coupling enforcement efficiency with the unwavering commitment to return wealth to its rightful owners and to uphold the public interest. The findings in this part underscore the promise and peril of NTRs, aiming to inform a path forward that aligns practice with principle in the ongoing quest for a more just global order.

## **Part VI: General Conclusion**

This thesis set out to investigate a central question: do NTRs strengthen or undermine the effectiveness of asset recovery in international anti-corruption law? The question arose from a structural tension within contemporary anti-corruption governance. The UNCAC elevated asset recovery to the status of a binding international obligation and a core principle of global anti-corruption law, but states have increasingly turned to negotiated forms of justice such as DPAs, CJIP, and summary penalty orders. The purpose of the thesis was to clarify this tension, assess its doctrinal and practical implications, and evaluate whether these emerging national practices support or endanger the asset-recovery goals of the international community.

Part II of the thesis provided the historical context for this enquiry. It showed how early anti-corruption conventions – the Inter-American Convention (1996), the OECD Anti-Bribery Convention (1997), the CoE Conventions (1999), and the UN Convention against Transnational Organized Crime (2000) – advanced important standards but largely ignored asset recovery. Institutions like multilateral development banks and financial centres have contributed to enforcement but have not produced a coherent framework. Only with the adoption of UNCAC in 2003 did asset recovery emerge as a central principle of international law. It was enshrined in a dedicated chapter (Chapter V UNCAC) that introduced the idea of a binding duty of restitution. The historical analysis thus revealed both the fragmentation of earlier approaches and the transformative ambition of UNCAC.

Part III turned to the doctrinal content of asset recovery under current international law. It demonstrated that UNCAC frames asset recovery as more than a technical mechanism for enforcement: it is a legal duty, a form of restorative justice, and an instrument of structural global justice. The convention uses the language of ‘shall’ to underscore the binding nature of cooperation. At the same time, the analysis highlighted the convention’s significant limitations. Asset recovery mechanisms include criminal confiscation, civil recovery (including non-conviction-based forfeiture), and administrative measures, but enforcement remains uneven. Safe

havens and secrecy jurisdictions continue to pose formidable obstacles. This part concluded that while UNCAC has created an unprecedented normative framework, the practical effectiveness of asset recovery remains fragile.

Part IV explored the rise of NTRs in anti-corruption law at the national level. UNCAC does not provide for negotiated settlements, but states nevertheless developed these mechanisms independently, responding to high-profile scandals, efficiency pressures, and resource constraints. The comparative analysis addressed the different models that have been seen in practice: in the United States, DPAs and NPAs have become central enforcement tools; in the United Kingdom, DPAs were introduced by statute with significant judicial oversight; in France, the CJIP is a civil law adaptation influenced by international debates; and, in Switzerland, corporate criminal liability is the legal basis for settlements, though without a formal statutory NTR regime. Across jurisdictions, NTRs aim to expedite enforcement, reduce costs, and incentivise the cooperation of corporations. However, the analysis also revealed divergences in oversight, transparency, and victim participation, raising questions of fairness and consistency in the global anti-corruption order.

Part V critically assessed the interaction between NTRs and asset recovery. It identified the potential benefits: NTRs can facilitate self-reporting, speed proceedings, and create flexible settlements that include provisions for restitution. Properly designed, they may serve as pragmatic tools for advancing asset recovery, especially where criminal trials are impractical. Yet, the risks are significant. NTRs may undermine transparency, weaken accountability, exclude victims, and reduce judicial scrutiny. In practice, provisions for asset recovery in settlements are often limited, discretionary, or absent altogether. The analysis in this part concluded that NTRs are a double-edged sword: they hold potential to support asset recovery but also create new pathways for impunity if not embedded in robust legal frameworks.

Drawing these findings together, the thesis offers the following answer: NTRs neither automatically strengthen nor inevitably undermine asset recovery. Their impact

depends on how they are designed, implemented, and integrated into the broader framework of international anti-corruption law. Where NTRs include binding restitution clauses, ensure judicial oversight, and allow for victim participation, they can advance the objectives of UNCAC and the return of stolen assets. Conversely, where settlements are opaque, negotiated behind closed doors, or designed to protect corporate interests, they risk eroding the very principles of accountability and cooperation that UNCAC is intended to promote.

The conclusion, therefore, is nuanced. NTRs are not inherently incompatible with asset recovery, but their legitimacy depends on whether states' efforts are aligned with UNCAC's core obligations of transparency, cooperation, and justice. This thesis makes four main contributions. First, it provides a historical synthesis that traces the fragmented development of anti-corruption conventions and highlights UNCAC as a qualitative shift that elevates asset recovery to a binding principle. Second, it offers a doctrinal analysis of asset recovery under current international law, highlighting its many dimensions as a legal duty and a form of restorative and structural justice, and clarifying its normative force.

Third, it delivers a comparative study of NTRs in four jurisdictions, situating the convergent and divergent practices within the broader international anti-corruption order. Fourth, it offers a critical evaluation of the relationship between NTRs and asset recovery, showing that this can be either facilitated or undermined by negotiated justice, depending on its design and the safeguards included. This contribution is both doctrinal (clarifying compatibility with UNCAC) and normative (assessing legitimacy and justice implications).

The thesis also has certain limitations. It focuses on four jurisdictions and cannot claim to provide a comprehensive global picture. An analysis that includes other important jurisdictions such as Brazil, Germany, or China may generate additional insights. As a doctrinal and normative analysis, it does not include extensive empirical data on how

many assets have been returned through NTRs. Finally, the rapid evolution of NTR practices means that the findings reflect a legal landscape still in flux.

Future research could address these gaps. Empirical studies are needed to measure the actual asset-recovery outcomes of settlements. Comparative research should expand to include developing states and weak governance contexts, where the risks of abuse are particularly acute. International guidelines on NTRs and asset recovery should be developed and critically assessed. Further work is also needed on the role of victims, particularly on how compensation and restitution can be systematically included in settlements.

At its core, this thesis has shown that the future of asset recovery in international anti-corruption law depends on the ability to reconcile two powerful trends: the recognition of restitution as a binding international duty (as reflected in UNCAC), and the rise of negotiated justice, which responds to practical enforcement needs but risks diluting accountability.

The challenge for the international community is not to reject NTRs outright, nor to embrace them uncritically. Rather, they should be regulated to safeguard transparency, accountability, and victim rights. If this balance can be achieved, NTRs may evolve from contested national innovations into legitimate tools that strengthen, rather than weaken, the global fight against corruption.

The broader lesson of this research is that asset recovery is not a mere technical mechanism but a question of justice, legitimacy, and global equity. Ensuring that stolen assets are returned to their rightful owners and that justice is seen to be done remains both a legal duty and a moral imperative.