Nudging anti-corruption norms:

The role of anti-corruption clauses in the petroleum sector

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This thesis is dedicated to the 176 Victims of Flight PS752.

May their memory be a beacon of light, guiding us towards a safer and more accountable world.

Abstract

Despite the global rise in anti-corruption movements and the proliferation of anti-corruption laws, corruption remains prevalent in many regions, with countries struggling to translate laws into effective action. If corruption is viewed as a de facto institution, it becomes evident that there is a need for institutional change supported by political will to combat it effectively. However, resistance from political and economic elites in most countries to anti-corruption reforms prompts the engagement of external actors, such as other states, international organizations, and transnational actors. Acknowledging the limitations of state-centric anti-corruption efforts, this thesis argues that Transnational Corporations (TNCs), as non-traditional sources of international law, can nudge both states and other companies to comply with anti-corruption norms while negotiating agreements and incorporating preferred standards in contracts. Among the arsenal of anti-corruption tools at TNCs' disposal, contractual anti-corruption clauses emerge as a mechanism to mitigate corruption risks in dealings with immediate contractual partners and other associated entities. These clauses allow parties to establish a commitment to refrain from corrupt practices throughout the agreement's duration, including negotiation and implementation stages. However, there have been limited efforts to examine the role of anti-corruption clauses in combatting corruption. Therefore, this thesis aims to fill this gap by examining anti-corruption clauses with a focus on the petroleum industry, where corrupt practices are widespread and deeply entrenched.

This thesis adopts an interdisciplinary theoretical approach and conducts both library-based and empirical research. It begins by analyzing prevalent forms of corruption in the petroleum sector and the underlying factors contributing to its persistence. This includes discussing resource curse theory and the role of good enough governance institutions in managing petroleum resources. Subsequently, the study conducts a historical examination of the development of anti-corruption as an evolving transnational norm and identifies current anti-corruption mechanisms within the transnational anti-corruption regime. It then explores the motives behind TNCs' compliance with anti-corruption norms, along with their traditional anti-corruption strategies in the petroleum sector. Lastly, the core inquiry of the study focuses on contractual anti-corruption clauses as a recent corporate mechanism designed to mitigate the risk of corrupt practices among contracting parties.

In the empirical phase, the thesis identifies the current status of anti-corruption clauses in petroleum contracts. Through a review of 1,164 contracts between TNCs and oil or gas-producing countries, the study assesses the frequency of such clauses. This quantitative assessment reveals that while parties have begun to include anti-corruption clauses, there is a need for their broader adoption as an industry standard. Moreover, from the review of these contracts, the thesis proposes a taxonomy of anti-corruption clauses based on commitment types and introduces a standard clause as a key recommendation. Furthermore, the study conducts 27 in-depth interviews with individuals knowledgeable about anti-corruption in the petroleum industry. This qualitative analysis evaluates the capacity of anti-corruption clauses to address corruption risks within the sector. The findings suggest that although considered soft law instrument, non-binding, and self-regulatory, these clauses are viewed

as a positive step toward ethical operations in the petroleum industry. These voluntary clauses are expected to gradually induce behavioral change among actors by increasing corruption costs. The study concludes with recommendations for the improvement of anti-corruption clauses.

Resumé

Malgré la montée mondiale des mouvements anti-corruption et la prolifération des lois anti-corruption, la corruption reste répandue dans de nombreuses régions, les pays ayant du mal à traduire les lois en actions efficaces. Si la corruption est considérée comme une institution de facto, il apparaît clairement qu'un changement institutionnel soutenu par une volonté politique est nécessaire pour la combattre efficacement. Cependant, la résistance des élites politiques et économiques de la plupart des pays aux réformes anti-corruption incite à l'engagement d'acteurs externes, tels que d'autres États, des organisations internationales et des acteurs transnationaux. En reconnaissant les limites des efforts anti-corruption centrés sur l'État, cette thèse soutient que les Sociétés Transnationales (STN), en tant que source non traditionnelle de droit international, peuvent inciter les États et les autres entreprises à se conformer aux normes anti-corruption tout en négociant des accords et en incorporant des normes préférées dans les contrats. Parmi l'arsenal d'outils anti-corruption à la disposition des STN, les clauses contractuelles anti-corruption émergent comme un mécanisme pour atténuer les risques de corruption dans les transactions avec les partenaires contractuels immédiats et d'autres entités associées. Ces clauses permettent aux parties de s'engager à s'abstenir de toute pratique de corruption pendant toute la durée de l'accord, y compris les phases de négociation et de mise en œuvre. Cependant, peu d'efforts ont été déployés pour examiner le rôle des clauses anti-corruption dans la lutte contre la corruption. Cette thèse vise donc à combler cette lacune en examinant les clauses anti-corruption en mettant l'accent sur l'industrie pétrolière, où les pratiques de corruption sont répandues et profondément enracinées.

Cette thèse adopte une approche théorique interdisciplinaire et mène des recherches à la fois basées sur la littérature et empiriques. Elle commence par analyser les formes répandues de corruption dans le secteur pétrolier et les facteurs sous-jacents contribuant à sa persistance. Cela inclut une discussion sur la théorie de la malédiction des ressources et le rôle des institutions de gouvernance suffisantes dans la gestion des ressources pétrolières. Ensuite, l'étude procède à un examen historique du développement de la lutte contre la corruption en tant que norme transnationale en évolution et identifie les mécanismes anti-corruption actuels dans le régime transnational de lutte contre la corruption. Elle explore ensuite les motivations derrière la conformité des STN aux normes anticorruption, ainsi que leurs stratégies anti-corruption traditionnelles dans le secteur pétrolier. Enfin, l'enquête centrale de l'étude se concentre sur les clauses contractuelles anti-corruption en tant que mécanisme d'entreprise récent conçu pour atténuer le risque de pratiques corruptives parmi les parties contractantes.

Dans la phase empirique, la thèse identifie l'état actuel des clauses anti-corruption dans les contrats pétroliers. À travers l'examen de 1 164 contrats entre les STN et des pays producteurs de pétrole ou de gaz, l'étude évalue la fréquence de ces clauses. Cette évaluation quantitative révèle bien que les parties ont commencé à inclure des clauses anti-corruption, il est nécessaire de les adopter plus largement en tant que norme industrielle. De plus, à partir de l'examen de ces contrats, la thèse propose une taxonomie des clauses anti-corruption selon les types d'engagements et introduit une clause standard comme recommandation clé. En outre, l'étude mène 27 entretiens approfondis avec des personnes compétentes en matière de lutte contre la corruption dans l'industrie pétrolière. Cette analyse qualitative évalue la

capacité des clauses anti-corruption à répondre aux risques de corruption dans le secteur. Les résultats suggèrent que bien qu'elles soient considérées comme des instruments de droit souple, non contraignants et d'autorégulation, ces clauses sont considérées comme une étape positive vers des opérations éthiques dans l'industrie pétrolière. Ces clauses volontaires sont censées induire progressivement un changement de comportement des acteurs en augmentant les coûts de la corruption. L'étude se termine par des recommandations visant à améliorer les clauses anti-corruption.

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ABC	Anti-Bribery and Corruption Compliance
ACCP	Anti-Corruption Compliance Program
ADB	Asian Development Bank
AFDB	African Development Bank
BPI	Bribe Payers Index
CFPOA	Canadian Corruption of Public Officials Act
CISG	Convention on Contracts for the International Sale of Goods
CoC	Code of Conduct
COE	Council of Europe
CPI	Corruption Perception Index
CSR	Corporate Social Responsibility
EBRD	European Bank for Reconstruction and Development
ESC	Economic and Social Council
EITI	Extractive International Transparency Initiative
ESG	Environmental, Social, and Governance
ESTMA	Extractive Sector Transparency Measures Act
EU	European Union
FATF	Financial Action Task Force
FCPA	Foreign Corrupt Practices Act
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GDPR	General Data Protection Regulation
GGNPSP	Good Governance of the National Petroleum Sector Project
GW	Global Witness
HSE	Health, Safety, and Environment
IADB	Inter-American Development Bank
IBRD	International Bank for Reconstruction and Development
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes

IDA	International Development Association
IFC	International Finance Corporation
IFI	International Financial Institution
IMF	International Monetary Fund
JV	Joint Venture
KYC	Know Your Customer
MIGA	Multilateral Investment Guarantee Agency
NGO	Non-Governmental Organization
NOC	National Oil Company
OAS	Organization of American States
OECD	Organization for Economic and Co-Operation Development
PEP	Politically Exposed Person
PSA	Production Sharing Agreement
PWYP	Publish What You Pay
SEC	Securities and Exchange Commission
SFO	Serious Fraud Office
SME	Small and Medium-Sized Enterprise
TI	Transparency International
TNC	Transnational Corporation
TNO	Transnational Organization
TNOC	Transnational Oil Corporation
UCC	Uniform Commercial Code
UK	United Kingdom
UKBA	United Kingdom Bribery Act
UN	United Nations
UNCAC	United Nations Convention Against Corruption
UNGC	United Nations Global Compact
UNSC	United Nations Security Council
USA	United States of America
WB	World Bank
WBG	World Bank Group

WEF World Economic Forum

WGB Working Group on Bribery in International Business Transactions

WTO World Trade Organization

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Chapter 1 – The Prelude

The only thing necessary for the triumph of evil, is for good people to do nothing. So, don't be inactive!

Alexey Navalny, Navalny (Film)

It's important to talk about anti-corruption. I sometimes joke [that] we should indoctrinate people to do this stuff, but I don't mean it quite like that, obviously. But it is important that people are encouraged to pick up this fight. I think we don't really have a choice.

Alpha, Interviewee

1. Where It Began …

When we look at the Watergate Scandal and its subsequent investigation, it is easy to assume that such corruption scandals have lost their relevance in a world that appears to have moved past corruption through enactment of rigorous anti-corruption legislation and development of different tools against it. However, a quick moment of reflection brings us back to reality and reminds us that corruption schemes with substantial impacts are still occurring, as evidenced by recent events such as Lava Jato, the Car Wash Operation, which unfolded just a few years ago.[1] The case, recognized as one of the largest and most successful corruption investigation ever seen in the world, turned into a Netflix series, "The Mechanism," exposing how major Brazilian corporations funneled back millions of dollars to high-level businesspeople, politicians, and officials of Petrobras, Brazil's state-owned oil company, in exchange for contracts with Petrobras. While the Watergate Scandal was more characterized by high-level political corruption, with power being abused to interfere with political and judicial processes, cases like the Car Wash Scandal indicate the networked nature of corruption, where it operates as an entrenched *institution* within society as a whole.

This broader perspective on corruption resonates with my personal journey. The seed of this doctoral project was planted long ago, around 2006, when the United Nations Security Council (UNSC), alongside many other states, initiated universal and collective economic sanctions against my country of origin, Iran. Blessed, or perhaps cursed, as we later discuss in this study, with the second-largest gas reserves and the fourth-largest oil reserves, Iran had long grappled with the challenges of pervasive corruption over oil and gas revenues even before the imposition of

[1] See e.g. Paulo Sotero, "Petrobras scandal" (last visited 24 March 2024), online: *Encyclopedia Britannica* <www.britannica.com/event/Petrobras-scandal>.

sanctions. I was merely sixteen when these sanctions began affecting the lives of my fellow Iranians. While neither most Iranians nor I fully understand the nuclear program, the impacts of sanctions were keenly felt. Prices soared, vulnerable groups struggled to afford essential goods, and a substantial number of middle-class families were thrust into poverty. Simultaneously, sanctions provided an opportunity for unscrupulous actors to exploit the circumstances through hoarding, overpricing, and engaging in corrupt practices. The more sanctions were imposed, the wealthier these opportunistic individuals became. On the other hand, sanctions led to many transnational companies halting their operations and business activities, leaving the economy in the hands of black markets, smuggling channels, and corrupt dealers and intermediaries. Witnessing the corruption inflicted on my homeland not only became a turning point for a high-school student choosing law as her educational and career path but also fueled a growing aspiration to develop a deeper understanding of the complex and multidimensional nature of corruption, which is recognized as one of the drivers of inequality.

My journey into the anti-corruption world began with a master's project studying the influence of sanctions on corruption levels. As I transitioned into my doctoral research, I looked for a broader and more impactful perspective. My goal was to explore how a nation could effectively combat corruption and transform the *oil curse* into a blessing, even in the absence of political will for change. In this pursuit, my focus shifted to transnational corporations (TNCs).[2] Despite the negative perceptions of TNCs regarding their track record on the environment and human rights, I, having observed the consequence of the absence of these companies in my country's history,

[2] In this study, the specific term of art, Transnational Corporations, is selected over similar interchangeably used terms such as "multinational corporations," "foreign companies," or "multi-national enterprises," as preferred by United Nations bodies, subsidiaries, and agencies. See e.g. Theodore H Moran, "The United Nations and transnational corporations: a review and a perspective" (2009) 18:2 Transnational Corporations 91 at 94.

was eager to view the glass as half full and find their potential positive role. I envisioned these corporations, operating across borders, as capable of nudging states and companies to comply with transnational norms, including anti-corruption standards. It was during this exploration that I came across the underappreciated world of anti-corruption clauses in contracts and chose to shine a spotlight on them as the star of my doctoral project. These clauses symbolize a commitment, embraced by both companies and states, to refrain from participating in corrupt practices.

The rationale behind my choice to focus my research on the petroleum sector was undoubtedly influenced by my Iranian roots, but it was also driven by the sector's significance in the national economy and the monstrous impact of oil revenues on socio-economic dynamics. Some may question this focus, especially amidst the prevailing global discourse on transitioning to green energy. However, I want to emphasize that such a transition should not mean turning a blind eye to the petroleum sector. Despite events such as the global economic crisis in the late 2000s and the 2020 coronavirus pandemic, oil production has consistently increased every year over the past two decades, peaking at nearly 95 million barrels per day in 2019.[3] As one of my interviewees, Psi, pointed out "because of the climate crisis, a lot of people, a lot of the organizations, who have been working on holding companies account, are not able to do that anymore because … you do [not] want to be seen as pro-fossil fuel."[4] Nonetheless, there is still much unfolding within this industry, and the buzzword of the "energy transition" should not overshadow accountability in the petroleum industry. Rather than dismissing the petroleum sector outright, I believe that the lessons we uncover today in the petroleum sector can inform the future of the green energy sector.

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[3] "Oil production worldwide from 1998 to 2022" (4 October 2023), online: *Statista* <www.statista.com/statistics/265203/global-oil-production-in-barrels-per-day/>.
[4] Interview of Psi (2 March 2023), Transcript at 7.

After discussing this brief explanation about the choice of the subject, the subsequent sections will provide a general overview of the entire thesis. Section (2) will explore the historical background, identify the problem statement, and articulate the thesis statement that guides the research. Section (3) will provide a theoretical framework for the analysis of corruption and discuss how it is understood through the lens of institutionalism. Section (4) will detail research methodologies, and finally, Section (5) will explore the dissertation's structure while highlighting their contributions and limitations.

2. Setting the Stage: Background, Problem, and Thesis

In the ongoing global fight against corruption, my dissertation aims to address the challenges faced by anti-corruption norms as they confront resistance in transitioning from international and national standards to practical implementation. This challenge is particularly pronounced in many countries where political and economic elites, often beneficiaries of existing corruption, resist anti-corruption reforms. In situations where internal actors lack the motivation for such initiatives, external actors enter the scene by offering incentives and disincentives to mitigate the allure of corrupt practices for internal actors. Examples of influential external actors include international organizations such as the World Trade Organization (WTO), regional organizations such as the European Union (EU), intergovernmental bodies such as the Financial Action Task Force (FATF), international financial institutions (IFIs) such as World Bank Group (WBG), global civil societies exemplified by Transparency International (TI), private transnational actors such as TNCs, and hegemonic states such as the United States of America (USA). As integral members of international society, these actors can denounce corrupt practices on the global stage and establish

anti-corruption norms as universal standards.[5] They further wield economic influence over business and political elites in the global market and incentivize compliance with anti-corruption standards by increasing the costs associated with engaging in corrupt practices.[6] These actors promote the adoption and enforcement of anti-corruption measures by offering inducements such as entry into free trade zones, inclusion in regional trade agreements, or making mutually advantageous business relationships.

One specific anti-corruption measure that external actors may employ is integrating anti-corruption provisions into agreements and encouraging states to adhere to them. These provisions, designed to prevent corrupt practices among involved parties, can be offered in exchange for economic benefits. Instruments at the international and intergovernmental levels, such as trade and investment agreements, have the capacity to advocate for anti-corruption norms and insist that countries comply with these standards as part of their agreement.[7] Nevertheless, resistance may emerge in states that perceive such provisions as a threat to their sovereignty by other states.[8] In such circumstances, non-state actors, particularly private transnational actors, have more leverage in persuading states to accept anti-corruption norms.

Among private transnational actors, TNCs, acting as non-traditional actors in international law, assume an essential role in global affairs by entering agreements with governments and including

[5] See Wayne Sandholtz & Mark M Gray, "International Integration and National Corruption" (2003) 57 Intl Organization 761 at 764.
[6] *Ibid*.
[7] See e.g. Alina Mungiu-Pippidi et al, "Anti-Corruption Provisions in EU Free Trade and Investment Agreements: Delivering on clean trade" (28 March 2018), online (pdf): *European Parliament Think Tank* <www.europarl.europa.eu/RegData/etudes/STUD/2018/603867/EXPO_STU(2018)603867_EN.pdf> [Mungiu-Pippidi, "Anti-Corruption Provisions"]. See also Joost Pauwelyn, "Different Means, Same End: The Contribution of Trade and Investment Treaties to Anti-Corruption Policy" in Paul D Carrington & Susan Rose-Ackerman, eds, *Anti-Corruption Policy: Can International Actors Play a Constructive Role* (North Carolina: Carolina Academic Press, 2013) 16.
[8] See Mungiu-Pippidi, "Anti-Corruption Provisions", *supra* note 7 at 16.

their preferential standards into these contracts.[9] From a spectrum of standards, TNCs may choose to adhere to the transnational anti-corruption legal regime to mitigate the costs associated with non-compliance to anti-corruption laws. In such cases, TNCs make a strategic choice to strengthen their anti-corruption compliance measures, especially as they expand into new overseas markets. Consequently, TNCs have developed a comprehensive anti-corruption toolkit, which consists of a set of mechanisms designed to assist in preventing, detecting, and responding to corrupt behavior among their employees and third-party agents. This toolkit is particularly tailored to better address the challenges posed by corruption, including mitigating the threat of non-compliance sanctions with anti-corruption laws and safeguarding the societal image of companies. The decision of TNCs to comply with anti-corruption standards and the development of anti-corruption tools has the effect of extending anti-corruption standards among their employees, third-party agents, and within their projects worldwide.

In addition to examining the traditional anti-corruption toolkit, my dissertation particularly explores a more recent and innovative corporate mechanism that companies can embrace to mitigate the risk of corrupt practices in their business relationships: *contractual anti-corruption clauses*. Operating as an additional due diligence tool, these clauses aim to reduce potential risks associated with corrupt conduct involving contracting parties, third-party intermediaries, and subcontractors. More particularly, my dissertation will assess the current status of anti-corruption clauses incorporated in petroleum contracts among TNCs and countries, and evaluate whether they are as fruitful as they had been promised.

[9] Adefolake O Adeyeye, *Corporate Social Responsibility of Multinational Corporations in Developing Countries: Perspectives on Anti-Corruption* (Cambridge: Cambridge University Press, 2012) at 18.

I begin with the hypothesis that, *beyond mere exchanges of products and capitals, TNCs exert influence on norms and standards among states, thus having the potential to nudge states to adopt anti-corruption norms and practices.* Although the inclusion of anti-corruption clauses in contracts is considered a soft law instrument—non-binding and self-regulatory—these voluntary clauses are expected to gradually induce a change in state behavior by increasing the cost of corruption. When faced with a choice regarding anti-corruption, elites carefully weigh the benefits and costs to determine whether to comply with anti-corruption standards or obstruct anti-corruption reforms. If elites are convinced that TNCs deliver on their promises of economic benefits, they are more likely to honor their anti-corruption commitments. As a result, TNCs contribute to reshaping corruption-related norms and improving normative frameworks for anti-corruption reforms. Furthermore, through the incorporation of anti-corruption clauses, TNCs generate "trickle-up effects"[10] on the practices and behaviors of states, leading to what is understood as *good enough governance*.[11] Indeed, states, in their efforts to attract business and investment from TNCs, seek to signal clean practices and may borrow anti-corruption tools and policies from TNCs' toolkit, amongst others, anti-corruption clauses. This adoption contributes to the quality of governance institutions, including the rule of law, transparency, and accountability.

[10] See David Wo, Marshall Schminke & Maureen L Ambrose "Trickle-Down, Trickle-Out, Trickle-Up, Trickle-In, and Trickle-Around Effects: An Integrative Perspective on Indirect Social Influence Phenomena" (2019) 45 J Management 2263.
[11] Merilee S Grindle, "Good Enough Governance: Poverty Reduction and Reform in Developing Countries" (2004) 17:4 Governance 525.

3. Theoretical Framework: Understanding Corruption Through an Institutionalism Lens

In anti-corruption studies, two distinct approaches prevail in explaining corruption: one views it as *deviant behavior*, but the other considers it as *an institution*. The conventional perspective defines corruption as a deviation from societal norms. According to this approach, corruption occurs when individuals fail to adhere to specific norms and standards condemning corrupt practices. Researchers and scholars have employed different criteria to establish the source of these principles. Some focus on moral standards or ethics to describe corruption as a form of immoral behavior or wrongdoing.[12] Among those who concentrate on legal standards, American political scientist Joseph Nye emphasizes the "formal duties of a public role,"[13] while international anti-corruption expert Michael Johnston employs "formal-legal norms"[14] to link corruption to illegal practices.[15] Another strand of literature explores the relationship between principals and their agents in public offices and uses organizational or public office rules to explain corrupt behavior. Susan Rose-Ackerman, an expert in political corruption and development, attributes corrupt acts to the violation of public office standards and explains that although a public official is an agent acting on behalf of a principal (a public office), the official may prioritize self-interest and breach office rules.[16] Similarly, leading international corruption expert Robert Klitgaard proposes a

[12] See e.g. Ana Isabel Eiras, "Ethics, corruption and economic freedom" (Lecture delivered at the Ethical Foundations of the Economy in Krakow, Poland, 14 October 2003), (Washington DC: The Heritage Foundation, 2003); Celia Moore, "Moral disengagement in processes of organizational corruption" (2008) 80:1 J Bus Ethics 129; Ronald Wraith & Edgar Simpkins, *Corruption in developing countries* (London: Routledge, 2010) at 17.
[13] Joseph Nye, "Corruption and Political Development: A Cost-Benefit Analysis" (1967) 61:2 Am Political Science Rev 417 at 417–19.
[14] Michael Johnston, "The political consequences of corruption: A reassessment" (1986) 18 Comp Politics 459 at 460.
[15] See also Nathaniel H Leff, "Economic Development Through Bureaucratic Corruption" (1964) 8:3 Am Behavioral Scientist 8; James Bryce, *Modern Democracies* (London: Macmillan, 1921) at 121.
[16] Susan Rose-Ackerman, *Corruption: A Study in Political Economy* (New York: Academic Press, 2013) at 6–10.

formula: "corruption = monopoly + discretion – accountability."[17] This formula suggests that corruption occurs when public officials with monopolistic power and discretion over their official duties lack accountability for their actions.[18] All these explanations assume that norms and values collectively condemn corrupt practices, and that only certain individuals, on an exceptional basis, may choose to engage in corrupt practices.

On the other hand, an emerging body of literature on corruption holds that corrupt behavior is more than just an exception or deviation in society; rather, it argues that corruption itself constitutes a societal norm. Drawing on institutionalism theories, this approach regards corruption as an informal and de facto institution. Institutions are defined as "the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction."[19] Those who adopt the institutional approach to studying corruption focus on the operational mechanisms driving corrupt behavior rather than on the phenomenon of corruption itself. From their standpoint, corruption, as an institution, not only influences but also determines social behaviors, prescribes social roles, and constrains the social activities of individuals.

The following subsections aim to explain corruption as an institution—a framework adopted for this dissertation—and further introduce the concept of nudges, another theory underpinning the

[17] Robert E Klitgaard, *Controlling Corruption* (Berkeley, California: University of California Press, 1988) at 75 (in his view, a combination of three circumstances results in corruption: (1) existence of monopoly, which means a system restricts economic activities and feeds opportunities for rent-seeking through a significant number of laws and orders; (2) presence of discretion, which is associated with the large amount of freedom that authorities have and thereby can decide cases on their own preference; and (3) lack of accountability, which is related to the absence of any institutions or procedures to hold authorities responsible for their actions).

[18] See also Jens Chr Andvig & Karl Ove Moene, "How Corruption May Corrupt" (1990) 13:1 J Econ Behavior & Organization 63 at 64.

[19] Douglass C North, *Institutions, Institutional Change, and Economic Performance* (Cambridge: Cambridge University Press, 1990) at 4.

dissertation. Nudges are presented as a tool for gradually initiating institutional change in anti-corruption efforts.

A. Corruption as an Informal and de Facto Institution

In his examination of forest management in India, Paul Robbins, an expert in environmental studies, describes corruption as "a system of normalized rules, transformed from legal authority, patterned around existing inequalities, and cemented through cooperation and trust."[20] Similarly, Jan Theorell, the Principal Investigator for Varieties of Democracy, describes corruption as an informal set of rules that defines and regulates societal behavior.[21] Moreover, according to Alina Mungiu-Pippidi, the chair of the European Research Centre for Anti-Corruption and State-Building, a corrupt country is one where corruption forms a pattern of social practices, not merely individual corrupt practices.[22] In her studies of Afghanistan, Nigeria, Egypt, Uzbekistan, and Tunisia, Sarah Chayes, a leading expert in systemic corruption research, demonstrates how corruption, as an institution, penetrates all sectors of society, from politics to business relations.[23] According to these scholars, corruption, when perceived as an institution, constitutes a set of rules of the game governing individuals' behavior, deeply embedded in the cultural fabric of a society and interwoven into daily routines.

The conceptual framework employed in this dissertation adopts a similar perspective, viewing corruption as an informal and de facto institution. From one perspective, corruption is socially constructed as an *informal institution*, distinct from formal institutions. Formal institutions consist

[20] Paul Robbins, "The rotten institution: corruption in natural resource management" (2000) 19:4 Political Geography 423 at 424.
[21] Jan Teorell, "Corruption as an Institution: Rethinking the Nature and Origins of the Grabbing Hand" (2007) Quality of Government Working Paper No 2007/5 at 9.
[22] Alina Mungiu-Pippidi, *Transitions to Good Governance* (Northampton: Edward Elgar Publishing, 2017) at 4.
[23] Sarah Chayes, *Thieves of state: Why corruption threatens global security* (New York: WW Norton & Company, 2015).

of codified rules established through official rulemaking processes, such as statutory laws created by legislatures or executives, common law shaped by judiciaries, and administrative policies and by-laws.[24] On the flip side, informal institutions emerge from unwritten social practices developed through unofficial channels and evolving over time. These informal rules constitute "shared expectations" rooted in a society's culture and comprise values, beliefs, customs, and traditions.[25] Examples range from paying tips and respectfully treating the elderly to customary law and verbal agreements between parties, as well as practices in black markets. The absence of codification in informal institutions does not diminish their legitimacy or implementation; instead, they represent socially accepted norms that are often more deeply institutionalized than formal rules.

Corruption as an informal institution implies the existence of specific established rules and norms in society that compel individuals to engage in corrupt acts to meet their everyday needs.[26] These corruption patterns originate and operate outside the official state but become a shared expectation deeply rooted in people's values and experiences. Especially prevalent in countries with a high incidence of corruption, individuals learn to emulate corrupt behavior by observing widespread practices within their social networks.[27] In both public and private sectors, individuals witness a tendency to favor relatives and friends.[28] Officials are noted to solicit bribes, either for performing illegal favors or merely executing their duties. Similarly, individuals perceive that people frequently offer bribes to officials to act in their favor. Therefore, individuals learn to behave

[24] See e.g. Jack Knight, *Institutions and Social Conflict* (Cambridge: Cambridge University Press, 1992) ch 2; North, *supra* note 19, ch 6.
[25] See e.g. Gretchen Helmke & Steven Levitsky, "Informal Institutions and Comparative Politics: A Research Agenda" (2004) 2:4 Perspectives on Politics 725 at 727.
[26] See generally Keith Darden, "Graft and governance: Corruption as an informal mechanism of state control" (2002), Leitner Working Paper No 2002-02.
[27] See generally, José Atilano Pena López & José Manuel Sánchez Santos, "Does corruption have social roots? The role of culture and social capital" (2014) 122:4 J Bus Ethics 697.
[28] See e.g. Daniel Jordan Smith, *A culture of corruption: Everyday deception and popular discontent in Nigeria* (Princeton: Princeton University Press, 2008) ch 2.

corruptly in all life aspects, deeming corrupt channels as the only means to serve their purposes. When corruption is perceived as a common feature of social relations, the decision to engage in a corrupt act is partly out of their hands. On the opposite, choosing not to participate in corruption or reporting corrupt acts to authorities is viewed as abnormal from society's viewpoint and often results in unfair treatment, sometimes leading to the victimization or even death of whistleblowers.[29] In environments shaped by corruption, everyone becomes involved in some corrupt behavior sooner or later, as corruption molds their expectations of others.

The presence of corruption as an informal institution does not necessarily negate the existence of anti-corruption rules as formal institutions. However, the informal institution of corruption operates "parasitically,"[30] which infiltrates formal institutions for its own benefit. In societies with high corruption incidences, corruption exerts external power over anti-corruption laws, potentially leading to their complete abolition. In such societies, while the state prohibits corrupt acts in their legislation, corrupt behaviors are shared expectations among public officials and citizens, and resisting and refusing to engage in corrupt practices may result in more social disapproval and punishments than state sanctions for corrupt practices.[31] In fact, corrupt practices often compensate for the inefficiency of formal institutions by "greasing the wheel."[32] A case study conducted by Italian political scientists Donatella Della Porta and Alberto Vannucci on postwar Italy shows the dominance of corruption norms in the illicit market, which often held more sway than state anti-corruption rules, and where violating illegal norms led to more severe punishments than non-

[29] See e.g. Vijay Kumar Singh, "Whistle Blowers Policy Challenges and Solutions for India with Special Reference to Corporate Governance" (2009) 3:2 GNLU J L Development & Politics 5. See also David Bruce, "A Provincial Concern? Political Killings in South Africa" (2013) 45 South African Crime Q 13 at 16.
[30] Hans-Joachim Lauth, "Formal and informal institutions: On structuring their mutual co-existence" (2004) 1 Romanian J Political Sciences 66 at 74.
[31] See e.g. Helmke & Levitsky, *supra* note 26 at 727.
[32] Pierre-Guillaume Méon & Khalid Sekkat, "Does Corruption Grease or Sand the Wheels of Growth?" (2005) 122: 1/2 Public Choice 69.

compliance with official laws.[33] The inefficiency of anti-corruption rules may stem from weak institutionalization or low enforcement and authority.[34] Authorities may reinforce informal corrupt rules by rewarding corrupt practices or turning a blind eye to their occurrence in society.[35] Another contributing factor is the lack of transparency inherent in the institution of corruption due to its informal nature, which enables beneficiaries of corrupt acts, or elites, to preserve their status and power.[36]

From another perspective, corruption can be viewed as a *de facto institution*. Within this dimension, institutions are classified into two distinct categories: de jure and de facto institutions. While the formal and informal institutions explain the formation of rules and norms, the de jure and de facto categories consider the actual implementation of these rules and norms in society. The term "de jure institution" refers to a state of affairs that aligns with the law.[37] For example, in almost all countries, bribery is criminalized by laws. In these counties, the anti-bribery law represents a de jure institution, regardless of whether bribery is widespread or rare in practice. On the other hand, de facto institutions are a state of affairs that exists in practice, even if it lacks official or formal recognition.[38] An illustrative example of a de facto institution is the use of a

[33] Donatella Della Porta & Alberto Vannucci, *Corrupt Exchanges: Actors, Resources, and Mechanisms of Political Corruption* (London: Routledge, 2017) at 15.
[34] See e.g. Mushtaq Husain Khan & Hazel Gray, "State Weakness in Developing Countries and Strategies of Institutional Reform: operational implications for anti-corruption policy and a case study of Tanzania" (2006) Department for International Development Working Paper.
[35] See e.g. Division of Enforcement in US Securities and Exchange Commission, "Speech by SEC Staff: Statement delivered at News Conference Announcing Siemens AG Settlement" (15 December 2008), online: *US Securities and Exchange Commission* <www.sec.gov/news/speech/2008/spch121508lct.htm> (referring to the Siemens Scandal, stating "[t]he scope of the bribery scheme is astonishing, and the tone set at the top at Siemens was a corporate culture in which bribery was tolerated and even rewarded at the highest levels of the company.").
[36] See Lauth, *supra* note 31 at 65.
[37] See e.g. Jacek Lewkowicz & Katarzyna Metelska-Szaniawska, "De jure and de facto institutions–disentangling the interrelationships" (2016) 2:2 Latin Am & Iberian JL & Econs 1 at 5.
[38] See generally Stefan Voigt, "How (not) to measure institutions" (2013) 9:1 J Institutional Econs 1.

specific currency in a region, which may not be the official currency but is widely accepted and used by the local population for transactions.[39]

Considering corruption as a de facto institution implies that corruption refers to the practical reality and operational effectiveness of corrupt practices that exist regardless of legal recognition. The de facto nature of corruption reflects the social system and socialization processes. In countries with a high level of corruption, individuals are raised and socialized in environments where corrupt practices form part of everyday routines and are followed by everyone. Corrupt behavior pervades everywhere, influencing behaviors and decisions, and individuals observe corrupt practices among their family members, friends, teachers, bosses, and public officials in different social situations. Everyone becomes involved in corrupt acts, from matters such as fake diplomas and traffic violations to more complex contexts such as hiring decisions, income distribution, and governance of the state. These routinized corrupt practices, which fill functional needs, can further contribute to the establishment of an entirely corrupt system where a single hidden rule governs society—the rule of corruption.[40] In such a society, elites often choose to embrace corruption, even constructing legal frameworks to protect their corrupt practices rather than rejecting corruption outright.[41]

B. Institutional Change and Anti-Corruption Agents: Leveraging Nudges through Contracts

The informal and de facto institution of corruption can sustain itself and continue to operate as long as corrupt practices find acceptance and fulfill a function within society. When "institutional corruption [is seen] as a system of (unjust) reward,"[42] individuals gain little or nothing by

[39] See e.g. Edgar L Feige, "Dynamics of currency substitution, asset substitution and de facto dollarisation and euroisation in transition countries" (2003) 45 Comp Econ Studies 358 (explaining the dynamics of dollarization and euroization in 25 transition countries.)
[40] See Lauth, *supra* note 31 at 61.
[41] See generally Daniel Kaufmann & Pedro C Vicente, "Legal corruption" (2011) 23:2 Econs & Politics 195 at 200.
[42] David Otieno Ngira, "Understanding Corruption in Governance and Regulatory Institutions through the Institutional Theory Approach" 2019 East Afr LJ 163 at 167.

refraining from corrupt behaviors. Therefore, corruption maintains its efficiency as individuals perceive that the immediate advantages derived from engaging in corrupt acts outweigh their potential long-term costs.[43]

As Mungiu-Pippidi suggests, a country can be deemed successful in controlling corruption when it shifts from a condition where corruption is the norm to a scenario where it becomes the exception.[44] However, simply increasing legal constraints against corrupt acts proves insufficient to transform the norm into an exception, as the informal nature of corruption lacks a distinct core that can be readily targeted. Importing and transplanting anti-corruption policies from nations where corruption is an exception also does not provide a solution, as the normalization of corrupt practices generates resistance to anti-corruption reform.[45] Instead, there is a need for a new institutional logic for society that replaces existing corrupt norms, values, identities, and roles with anti-corruption norms, practices, and habits in daily routines.[46]

Transforming institutions, especially those deeply rooted in societal norms and essential for societal functioning, is often perceived as challenging. However, even long-standing institutions can experience shifts under specific circumstances. *Critical junctures*, representing historical events or exceptional moments in history, can instigate institutional changes and impact both formal and informal norms.[47] Critical junctures that usually come during the disruptions of the

[43] See Anna Persson, Bo Rothstein & Jan Teorell, "Why anticorruption reforms fail—systemic corruption as a collective action problem" (2013) 26:3 Governance 449 at 450, 457, 464.
[44] Alina Mungiu-Pippidi, *Contextual Choices in Fighting Corruption: Lessons Learned* (Oslo: Norwegian Agency for Development Cooperation, 2011) at 7 [Mungiu-Pippidi, *Contextual Choices*].
[45] See e.g., Vinay Kumar Bhargava & Emil P Bolongaita, *Challenging Corruption in Asia: Case Studies and a Framework for Action* (Washington DC: World Bank, 2004) at 52.
[46] See Robert D Benford & David A Snow, "Framing Processes and Social Movements: An Overview and Assessment" (2000) 26:1 Annual Rev Sociology 611 at 615.
[47] Giovanni Capoccia, "Critical junctures" in Karl Orfeo Fioretos, Tulia Gabriela Falleti, Adam D Sheingate, eds, *The Oxford handbook of historical institutionalism* (Oxford: Oxford University Press, 2016) 89 at 89.

status quo create circumstances that strategically manipulate the decisions and preferences of key actors and crucial social groups.[48] They can reshape the incentives of key societal players by providing opportunities for specific institutional options. Once key actors make decisions among the available options, their choices impact the institutional setting, determining the trajectory of change that endure for a considerable period. An important example of critical junctures is the discovery of oil, which triggers a rapid economic transformation. In oil-rich countries, the reliance on economic rents generated by oil exports leads to political realignments among elites, accompanied by social impacts and environmental considerations as well.[49]

Not of the same magnitude as critical junctures, *nudges* can nonetheless initiate institutional changes by influencing individuals' decisions and preferences. Originating from the field of behavioral economics, nudges are subtle interventions designed to guide individuals toward specific behavior.[50] An example of a nudge is placing healthy food options at eye level in a cafeteria to promote healthier eating habits among patrons.[51] Thus, nudges can shape the decision-making of individuals and steer them towards specific options.

In the context of anti-corruption, nudges can be employed to influence individuals' compliance with anti-corruption norms. For example, a nudge could involve displaying information about the negative consequences of corruption in certain spaces to influence people's perceptions and behaviors. However, given the prolonged influence of corruption, where it is perceived as commonplace and advantageous, identifying individuals willing to initiate the first steps in

[48] Giovanni Capoccia, "Critical Junctures and Institutional Change" in J Mahoney & K Thelen Advances, eds, in *Comparative Historical Analysis in the Social Sciences* (Cambridge: Cambridge University Press, 2015) 147 at 148.
[49] For more discussion on the oil discovery as the critical juncture, see Terry Lynn Karl, *The paradox of plenty: Oil booms and petro-states* (Berkeley: University of California Press, 1997).
[50] Richard Thaler & Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New Haven: Yale University Press, 2008) at 6.
[51] *Ibid* at 80.

implementing nudges is not straightforward.[52] State-centered anti-corruption programs face limitations, as corrupt norms often govern states and empower economic and political elites to resist such reforms. On the other hand, external actors, equipped with the ability to offer economic incentives and disincentives, can nudge individuals toward adopting anti-corruption norms. These agents of change may include other countries or non-state actors.

A practical tool for implementing nudges in anti-corruption is the integration of clauses in contracts. By explicitly prohibiting corruption and outlining consequences for non-compliance, these anti-corruption clauses can establish non-corrupt behavior as the default expectation. These clauses, while prohibiting corrupt practices throughout the contract duration, offer benefits to the compliant party, such as access to skills, technologies, services, goods, or funds. Nudges through anti-corruption clauses aim to alter individuals' perceptions and expectations regarding corrupt practices. When parties are aware that ethical conduct is the expected norm, they may be more inclined to comply with anti-corruption policies to avoid deviating from this established ethical standard. As more contracts incorporate these clauses, a shift occurs in the perceived social norm, making corruption less acceptable.

4. Behind the Scenes: Research Methodologies

First, it is necessary to explain why the focus on the petroleum[53] sector in this study. The study recognizes that each sector and country has its own unique types and norms of corruption, and one-size-fits-all anti-corruption remedies cannot be universally successful across all sectors and countries. Therefore, adopting a sector-based or country-based approach can help to select and

[52] See Mungiu-Pippidi, *Contextual Choices*, *supra* note 45 at 10–17.
[53] The terms "petroleum", "hydrocarbon," "oil," "oil and gas," "natural resources," and "extractive," while not having exact meanings, might be used interchangeably in this study to refer to the oil and gas resources.

adopt appropriate anti-corruption remedies. The decision to zero in on the petroleum sector as the primary subject arises from a deliberate choice to investigate an industry characterized by pervasive and endemic corruption. This emphasis on the petroleum sector is grounded in the recognition that corruption within the governance and management systems of resource-rich countries is an inherent feature of this industry.[54] While corruption risks present across different business sectors, the extractive sector stands out as one of the largest contributors to transnational bribery, with one in five cases occurring in this sector.[55] The oil and gas sector, in particular, poses one of the highest risks in terms of violating the Foreign Corrupt Practices Act (FCPA),[56] with companies in this sector, closely followed by those in construction, utilities, and real estate, often being expected to engage in bribery.[57] The complexity of projects and substantial investments within this sector creates opportunities for individuals to exploit public funds for private gains through different forms of corruption across different stages of the industry, as will be explained in detail in Chapter Two. In resource-rich countries, where economic stability and national security depend on the extractive industries, governments usually exercise control over oil and gas resources and maintain a monopoly in awarding contracts, permits, licenses, and exploration rights.[58] Moreover, the presence of numerous TNCs in the petroleum sector adds another layer of

[54] See generally OECD, *Corruption in the Extractive Value Chain: Typology of Risks, Mitigation Measures and Incentives* (Paris: OECD Publishing, 2016), online: OECD <doi.org/10.1787/9789264256569-en> [OECD, *Corruption in the Extractive*].

[55] OECD, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* (Paris: OECD Publishing, 2014) at 21, online: *OECD* <read.oecd-ilibrary.org/governance/oecd-foreign-bribery-report_9789264226616-en#page1> [OECD, *Foreign Bribery*].

[56] *Foreign Corrupt Practices Act of 1977*, 15 USC §§ 78a et seq (1977) [*FCPA*]; FCPA Clearinghouse, "Industry Classifications of FCPA Matters" (last visited 30 March 2024), online: *Stanford FCPA Clearinghouse* <fcpa.stanford.edu/statistics-analytics.html?tab=9>.

[57] Transparency International, *Bribe Payers Index 2011* (Berlin: Transparency International, 2011) at 18, online: *Transparency International* <issuu.com/transparencyinternational/docs/bribe_payers_index_2011?mode=window&backgroundColor=%232222 22> [TI, *Bribe Payers Index*].

[58] See U4 Anti-Corruption Resource Center, "Basic guide to corruption and anti-corruption in oil, gas, and mining sectors" (last visited 8 April 2024), online: *U4* <www.u4.no/topics/oil-gas-and-mining/basics>.

complexity. For example, reports indicate significant financial investments made by major oil companies (ExxonMobil, Royal Dutch Shell, Chevron, BP, and Total) in strategies that involve misleading climate-related branding and lobbying.[59] Collectively, these factors transform the petroleum sector into a fertile ground for various types of corrupt practices, making it an appropriate subject for research on corruption and anti-corruption measures.

Now that the rationale behind the selection of petroleum sector is explained, attention shifts to the methodologies employed in this study. Both library-based and empirical research have been applied to explore the role of contractual anti-corruption clauses in the petroleum sector. The overarching approach is best described as an interdisciplinary analysis that employs different approaches and methods across disciplines. Each chapter adopts distinct methodological choices and rely on different frameworks, including doctrinal, socio-legal, and both quantitative and qualitative empirical analyses. By providing a transparent window into the research process, this section forms the foundation for the forthcoming presentation of findings in the subsequent chapters.

A. Library-Based Research: Browsing the Corridors of Corruption and Anti-Corruption in the Petroleum Sector

A doctrinal analysis is conducted to identify existing anti-corruption legal frameworks, which involves a descriptive examination of international and transnational anti-corruption instruments, including international conventions, regional treaties, and national laws. The objective is to establish a foundation for understanding the legal frameworks addressing corruption. Moreover, a

[59] Influence Map, "Big Oil's Real Agenda on Climate Change 2022" (September 2022) at 3, online: *InfluenceMap* <influencemap.org/report/Big-Oil-s-Agenda-on-Climate-Change-2022-19585>.

historical analysis is employed to trace the development of transnational legal regime against corruption.

Recognizing corruption as a complex phenomenon that transcends legal boundaries, this study adopts a multidimensional approach. Benefitting from other disciplines, socio-legal research methods come to the forefront to borrow theories and concepts from economics and social sciences to explain the issue of corruption in the petroleum sector. This method is also used to explore the interactions between the institution of corruption and the institutions of good governance. Lastly, the scope of library-based research extends to an exploration of TNCs' decision to participate in the global fight against corruption.

B. The Empirical Terrain of Anti-Corruption Clauses in the Petroleum Sector

This subsection provides an in-depth exploration of the data collection process during the empirical phase of this research, which includes both quantitative and qualitative analyses. The quantitative dimension involves collecting and examining data regarding the presence of anti-corruption clauses in actual petroleum contracts. In parallel, the qualitative analysis centers around extracting insights from industry experts. The following will address each dimension individually and discuss the specific challenges encountered in each phase.

i. A quest into anti-corruption clauses in actual petroleum contracts

Chapter Five of this study engages in a quantitative assessment of anti-corruption clauses in petroleum contracts in order to introduce, classify, and analyze their prevalence and types in actual contracts. This quantitative analysis requires an exploration of the dataset and the methodology employed by the study to analyze anti-corruption clauses.

Examining actual petroleum contracts helps document the prevalence, adoption, and variation of anti-corruption clauses. The inclusion or absence of these clauses can act as indicators of adherence to anti-corruption standards. Moreover, the diversity in petroleum contracts across different jurisdictions may result in the implementation of different types of anti-corruption clauses. Hence, this study used a multi-step quantitative methodology to not only identify the existence of these clauses in petroleum contracts but also systematically categorize them.

One major challenge encountered was the confidentiality clauses present in many petroleum contracts, which restrict public access to their terms and conditions. However, in line with the Extractive International Transparency Initiative (EITI), as detailed in Chapter Three, certain companies and states have begun to publish contracts on an online repository, known as the *ResourceContracts*.[60] As of March 2024, this portal has published 1,816 petroleum contracts categorized as "hydrocarbons."[61] From this pool, 1,000 original contracts were selected for examination, comprising 81 model contracts and 919 actual contracts, along with their 164 amendments. Thus, a total of 1,164 petroleum contracts underwent through analysis in this study. The selection process involved studying hydrocarbon contracts from all countries with published contracts, except those from Tunisia, totaling 258, and about one-third of Colombian contracts (113 contracts) due to potential impacts on result accuracy, given their disproportionately large number compared to contracts published in other jurisdictions. Table 1 provides detailed information about the number of contracts reviewed based on their geographical locations. This table includes both the host state where performance occurs and the home state of contracting

[60] ResourceContracts, "About the site" (last visited 31 March 2024), online: *ResourceContracts* <resourcecontracts.org/about>.
[61] See ResourceContracts, "Hydrocarbons" (last visited 31 March 2024), online: *ResourceContracts* <resourcecontracts.org/resource/Hydrocarbons>.

parties. It also includes overseas territories that serve as the home state of the companies in the studied contracts.[62] Despite not being sovereign countries, these territories enjoy a certain level of autonomy concerning the laws and regulations governing companies registered under their jurisdictions. Regarding contract language, 640 contracts were in English (either in the original version or with an English translation), 375 contracts in Spanish, 136 contracts in French, 11 contracts in Portuguese, and two contracts in Polish. For contracts not in English or French, relevant provisions and clauses were reviewed using Google Translate.

Another challenge emerged due to the lengthy nature of petroleum contracts, with some documents extending beyond 100 pages. To address this issue, the study used a Python code, a computer programming language often used to build websites and software but also proven to be useful for data analysis. A specific list of keywords, including terms like corruption, bribery, gift, and ethics, alongside with their equivalents in other languages, was compiled for the code.[63] The code scanned the text of the contracts for these keywords, and if any were found, it displayed their repetition numbers. Upon identification of any specified key-word, a detailed review of relevant clauses was conducted. In addition to keywords, specific clauses in all contracts, covering aspects such as compliance, assignment, guarantees, audits, training, terminations, and breaches, were thoroughly examined.

[62] These territories are Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Gibraltar, Guernsey, Hong Kong, Isle of Man, Jersey, and Turks and Caicos Islands.

[63] The keywords used in the code were: "corrupt," "bribe," "fraud," "misrepresent," "misuse," "conflict," "prohibit," "false," "illicit," "illegal," "abuse," "fault," "launder," "facilitat(e/tion)," "transparency," "donat(e/tion)," "contribution," "gift," "social responsibility," "ethics," "economic order," "culpa," "soborn," "soudoyer," "dolo," "éticos," "responsabilidad social," "detournement," "potde," "blanchiment," "cadeau," "train," "formation," "formação," "entrenamiento," "capacitación," "formación," "audit," "inspect," "account," "contabildad," "surveil," "verification," "third party," "assign," "transfer," "cession," "sous-traitant," "sub-contract," "breach," "termination," "cancel," "material breach," "défaillance," "penalty," "terminacion," "resiliation," "applicable law," "laws and regulations," "compl(y/iance)," "diligen(ce/t)," "governing law," "industry practice," "cumpla," "cumpr," "buenas prácticas," "eis applicável" "loi/ley applicable," and "droit applicable."

Country	Home State	Host State	Country	Home State	Host State	Country	Home State	Host State
Afghanistan	2	2	Gibraltar	1	0	Peru	4	0
Albania	11	16	Greece	4	4	Philippines	3	3
Algeria	1	1	Guatemala	1	1	Poland	5	2
Angola	11	11	Guernsey	1	0	Portugal	3	9
Anguilla	13	0	Guinea	0	6	Qatar	0	1
Argentina	17	5	Guyana	4	10	Romania	1	0
Australia	20	10	Hong Kong	4	0	Russia	5	3
Austria	15	0	Iceland	3	3	Sao Tome and Principe	8	21
Azerbaijan	14	14	India	14	12	Saudi Arabia	2	0
Bahamas	33	0	Indonesia	5	5	Senegal	16	16
Bangladesh	0	1	Iran	1	0	Scotland	5	0
Barbados	26	0	Iraq	7	79	Seychelles	1	1
Belize	9	20	Ireland	7	3	Sierra Leone	0	1
Benin	2	2	Isle of Man	20	0	Singapore	6	0
Bermuda	67	0	Italy	8	0	Somalia	0	6
Bolivia	44	43	Japan	6	0	South Africa	0	1
Brazil	10	11	Jersey	16	0	South Korea	9	0
British Virgin Islands	62	0	Jordan	0	1	Spain	16	0
Brunei	1	1	Kazakhstan	7	8	Sudan	1	0
Burkina Faso	0	1	Kenya	5	14	Suriname	5	5
Cambodia	0	1	Lebanon	2	2	Switzerland	9	0
Cameron	1	5	Liberia	21	15	Syria	2	2
Canada	40	0	Libya	3	5	Taiwan	1	0
Cayman Islands	165	0	Luxembourg	1	0	Tajikistan	0	1
Central African Republic	0	1	Madagascar	0	1	Tanzania	8	8
Chad	8	38	Malawi	0	3	Thailand	3	3
Chile	4	2	Malaysia	7	3	Timor-Leste	7	17
China	23	17	Marshal Islands	1	0	Trindade and Tobago	0	2
Colombia	172	169	Mauritania	6	32	Tunisia	1	0
Congo	43	46	Mauritius	2	0	Turkey	13	0
Cote D'Ivoire	9	9	Mexico	135	135	Turkmenistan	0	1
Cyprus	17	0	Mongolia	0	3	Turks & Caicos Islands	2	0
Ecuador	16	20	Morocco	0	9	Uganda	3	5
Egypt	15	15	Mozambique	11	13	Ukraine	2	2
Equatorial Guinea	6	35	Myanmar	1	1	United Arab Emirates	8	0
Eritrea	0	1	Namibia	3	4	United Kingdom	187	128
Ethiopia	0	4	Netherlands	44	0	United States	98	1
France	27	0	Nevis	1	0	Uzbekistan	1	1
Gabon	1	5	Nigeria	26	9	Venezuela	9	1
Gambia	0	2	Norway	38	1	Vietnam	1	0
Georgia	4	4	Pakistan	0	1	Yemen	3	5
Germany	6	0	Panama	23	0			
Ghana	40	31	Paraguay	1	4			

Table 1 – Geographical Distribution of Studied Petroleum Contracts

All identified anti-corruption clauses were compiled into an Excel sheet and initially categorized. A second review was undertaken to ensure the accuracy and consistency in categorization across all 1,164 contracts. Once all identified clauses were double-checked, an analysis was conducted on these clauses, considering multiple factors, including geographical locations, contracts types, and conclusion dates. Accordingly, their analysis is included in Chapter Five, where statistics are present in a number of figures and tables, and a proposed classification of anti-corruption clauses is developed based on their types of commitment.

ii. A journey through interviews: Exploring expert perspectives on anti-corruption clauses

To better understand the practice and effectiveness of anti-corruption clauses in petroleum contracts, a series of 27 interviews were carried out with individuals possessing extensive knowledge in anti-corruption practices within the petroleum sector. The discussion here engages with the qualitative empirical journey undertaken in this study and outlines the methodology employed for conducting these interviews, as the primary method of data collection for Chapter Four and Chapter Six, along with their subsequent analysis. It provides a comprehensive exploration of the interview process, including the identification and contacting of potential participants, the challenges encountered, and the outcomes achieved in participant recruitment and engagement.

Seeking voices: The participant identification journey

After obtaining the necessary ethical approvals from McGill University's Research Ethics Board 3, the initial stage of this qualitative research involved identifying potential interview participants. The objective was to recruit individuals with expertise in anti-corruption practices within the petroleum sector, particularly those affiliated with Transnational Oil Corporations (TNOCs) and international or transnational organizations in the field. Although the initial plan was to limit the

geographical scope to specific countries or regions, challenges encountered during participant recruitment led to an adjustment. The adjustment involved including individuals from different geographic regions, which also contributed to incorporating a broader range of perspectives in the results.

The selection of interviewees followed a purposeful sampling approach which targeted individuals whose insights held data-rich value for the study. Initial efforts to identify individuals within TNOCs were conducted by searching their official websites. However, given the limited availability of information, particularly regarding compliance departments, a strategic shift became necessary: the search was transitioned to the professional networking platform, LinkedIn.[64] Specific keywords such as "anti-corruption," "oil and gas," "energy," "ethics," and "compliance" were used to identify potential participants responsible for compliance and legal departments within target companies, such as compliance officers and legal managers. Furthermore, individuals who had participated in relevant conferences were identified as potential participants due to their demonstrated interest in the subject matter. To further increase the diversity of perspectives and cross-verify findings from companies, the research also sought input from representatives of law and consulting firms, as well as individuals within inter-governmental and non-governmental organizations (NGOs), who were categorized as Transnational Organizations (TNOs). The search for TNO participants was conducted through the official websites of these organizations. Efforts were also made to contact government bodies involved in the field, using information sourced from their respective government websites.

[64] LinkedIn, online: *LinkedIn* <www.linkedin.com>.

One notable challenge encountered during the participant recruitment process was the limited availability of contact information on LinkedIn for individuals employed in TNOCs. Many of these individuals had not shared their contact details on the platform, and without a prior connection, direct messages could not be sent. To address this challenge, several online directories were employed to obtain their contact information. However, this approach did not consistently produce success, as some email addresses were found to be invalid or outdated. In contrast, contacting individuals working within TNOs was generally more straightforward, as their information was readily accessible on the respective organizations' websites.

Gathering voices: The participant recruitment journey

Once potential participants were identified, unsolicited email invitations were sent via email to introduce the research project and request their participation in interviews. These invitations outlined the research's purpose and the potential benefits of their involvement. Due to the post-Covid circumstances and to reduce travel-related costs, interview requests specified online interviews conducted via Microsoft Teams. In order to maximize response rates, multiple contact attempts were made, and approximately two weeks after the initial invitation, a follow-up email was sent with the intention of gently reminding those who had not yet replied. This follow-up often resulted in increased response rates, as some participants were more inclined to respond after receiving a follow-up, probably due to increased confidence in the study's legitimacy.

Regrettably, not all responses from potential participants were affirmative. Some individuals replied unprofessionally or raised concerns about potential fraudulent activities. In such instances, these responses were handled with professionalism, and efforts were made to provide further explanations of the research's purpose and methods in order to alleviate concerns about potential scams or unethical practices. In one instance, a participant requested the signing of a confidentiality

agreement to ensure that sensitive information shared during the interview would not be published or disclosed.

Accordingly, a total of 203 interview requests were sent to individuals from whom contact information was successfully obtained. However, 10 email addresses were found to be invalid. Out of the delivered invitations, responses were received from 62 individuals. Of these, 18 individuals declined participation, citing reasons such as busy schedules, a lack of expertise, retirement, or company policy restrictions. An overview of this process is provided in Figure 1.

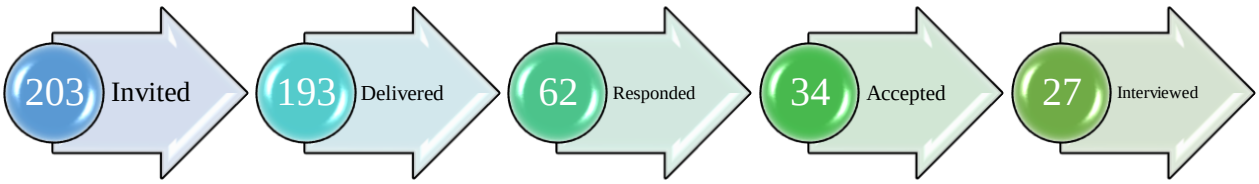

Figure 1 – Overview of Interview Participant Recruitment Process

Types of voices: Profiles of interviewed participants

Out of the 34 individuals who initially agreed to participate in interviews, seven did not respond further, resulting in a final sample size of 27 completed interviews. Therefore, the interview response rate stood at 13.30%, which indicates that many individuals were hesitant to engage in discussions on anti-corruption topics. Interestingly, those who did participate mostly came from companies actively engaged in documented anti-corruption efforts.

The interviewees came from different backgrounds, including 10 individuals from TNOCs working in the compliance department, seven from TNOs specializing in anti-corruption within the extractive industry, four government officials, and six law practitioners advising clients on anti-corruption, many of whom had prior experience with TNOCs or National Oil Companies (NOCs). Figure 2 offers an overview of the types of institutions represented by each interviewee.

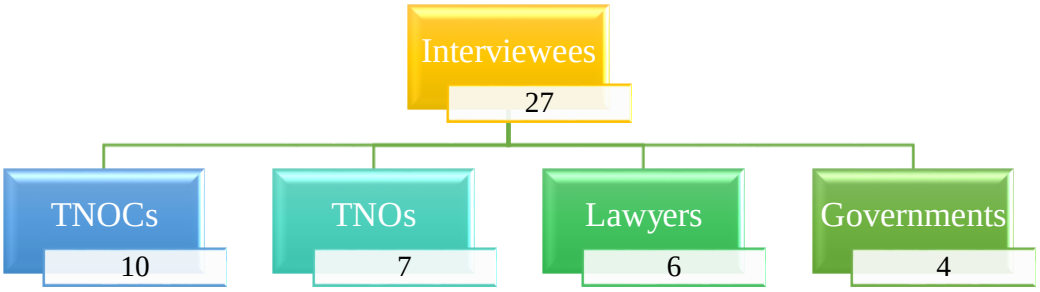

Figure 2 – Institutional Diversity of Interviewees

Geographically, the interviewees were spread across 14 different countries spanning five continents. All interviewees were affiliated with companies in the petroleum sector or organizations involved in the extractive sector, which sometimes included mining alongside oil and gas. All individuals from TNOCs represented companies engaged in transnational business operations. The details of the study participants are presented in Table 2, with their names and institution's names pseudonymized to protect their confidentiality. To facilitate clarity when referring to them in the subsequent chapters, each interviewee was assigned a Greek alphabet identifier.

Pseudonymized Name	**Type of institution**	**Country**	**Interview Date**	**Interview Type**
Alpha	TNO	UK	29-Aug-22	Online Interview (recorded)
Beta	TNO	Norway	21-Sep-22	Online Interview (recorded)
Gamma	Government	Canada	26-Sep-22	Online Interview (recorded)
Delta	TNOC	Romania	27-Sep-22	Online Interview (not recorded)
Epsilon	TNO	Norway	3-Oct-22	Online Interview (recorded)
Zeta	Government	Trinidad & Tobago	3-Oct-22	Online Interview (recorded)
Eta	Lawyer/former NOC	Azerbaijan	25-Oct-22	Online Interview (not recorded)
Theta	Lawyer/former TNOC	Canada	26-Oct-22	Online Interview (recorded)
Iota	TNOC	USA	9-Nov-22	Online Interview (recorded)
Kappa	TNO	France	14-Nov-22	Online Interview (recorded)
Lambda	Government	Canada	16-Nov-22	Online Interview (recorded)
Mu	Government	Canada	16-Nov-22	Online Interview (recorded)
Nu	Lawyer/former TNOC	Canada	8-Dec-22	Online Interview (not recorded)
Xi	TNOC	USA	9-Dec-22	Online Interview (recorded)
Omicron	TNOC	UK	18-Jan-23	Online Interview (recorded) + Email Exchange
Pi	TNOC	Indonesia	20-Jan-23	Online Interview (recorded)
Rho	Former TNOC	Philippines	26-Jan-23	Online Interview (recorded)
Sigma	TNOC	Singapore	2-Feb-23	Online Interview (not recorded)
Tau	Lawyer/former TNOC	UK	16-Feb-23	Online Interview (recorded)
Upsilon	Lawyer	USA	16-Feb-23	Online Interview (recorded)
Phi	Former TNOC	Nigeria	28-Feb-23	Online Interview (recorded)
Chi	TNOC	Indonesia	28-Feb-23	Online Interview (recorded)
Psi	TNO	Kenya	2-Mar-23	Online Interview (recorded)
Omega	Lawyer/ University Professor	USA	2-Mar-23	Online Interview (recorded)
Alpha₂	TNO	UK	10-Mar-23	Online Interview (recorded)
Beta₂	TNOC	USA	10-Mar-23	Online Interview (recorded)
Gamma₂	TNO	USA	26-Apr-23	Online Interview (recorded)

Table 2 – Profiles of Study Participants

Echoes of voices: In-depth conversations on anti-corruption

Once participants agreed to be interviewed, the interviews were scheduled at their convenience through Microsoft Teams. Before each interview, a general consent form outlining the research objectives and interview process was sent to all participants (see Appendix I). The consent form included information about the confidentiality of the interviewee's identity and their company's

identity, along with the assurance that any information provided would be used exclusively for the analysis of general trends. This information was also verbally reiterated at the beginning of each interview. Moreover, for interviewees located in the European Union, an additional consent form, General Data Protection Regulation (GDPR) Notice was also provided (see Appendix II). Each interviewee signed and dated the consent forms before the interview session. Five interviewees requested the questionnaire in advance to prepare for the questions. One interviewee, identified as Omicron, provided answers to the questionnaire via email prior to the interview, and follow-up questions were asked during the interview based on their initial answers.

Between August 2022 to April 2023, a total of 27 interviews were conducted. Each interview took place in a single appointment, and participation in the study was entirely voluntary. The interview durations ranged from 30 to 90 minutes. To facilitate the transcription process, the majority of interviewees (23 in total) consented to having their sessions video recorded. These recorded sessions, conducted through Microsoft Teams, also included subtitle options, which were subsequently used for transcriptions. For the four interviews that were not recorded, detailed notes were taken during the sessions. To protect confidentiality, all names were codified using the Greek alphabet, and all personal data was removed from the texts. The interview process followed a semi-structured format, carefully designed to gather in-depth insights into the participants' experiences and perspectives. A list of questions was prepared as part of the ethics approval application. Open-ended questions were used, with prompts when necessary, to engage participants in discussions on various subjects related to anti-corruption and compliance in the petroleum sector, with a specific focus on anti-corruption clauses.

Each interview began with an introduction to the research project and its objectives. Before diving into the questions, a comprehensive consent form was reviewed to ensure that participants fully

understood and willingly agreed to take part. Moreover, interviewees were asked for their consent to be recorded. The interview questions were organized to follow a logical progression:

1. General experience questions: The interviews initiated with general questions designed to help participants ease into the interview process. These questions covered each interviewee's experiences within the petroleum industry, the institution(s) they had worked for, and the extent of their involvement in transnational operations.
2. Preventive anti-corruption tools: The conversation then shifted towards an exploration of the different preventive anti-corruption tools available within the sector. Those affiliated with TNOCs or NOCs were also asked about the specific preventive measures their company was undertaking to mitigate corruption risks, including inquiries about the development of anti-corruption policies, procedures, and controls. Participants were also encouraged to share their insights on the effectiveness of these tools.
3. Anti-corruption clauses: The discussions then delved into the heart of each interview, a detailed examination of anti-corruption clauses incorporated in contracts and their practical implications. Participants were asked if they had encountered such clauses in contracts, and for further insights, details about the language and other characteristics of these clauses were sought. They were also asked whether they had witnessed any contracts being terminated or remediated due to violations of these clauses. Furthermore, they were prompted to share their perspectives on the overall effectiveness of these clauses in the fight against corruption in the petroleum sector.
4. Effectiveness of anti-corruption policies: As the interviews neared their conclusion, participants were invited to share their opinions on the overall effectiveness of anti-

corruption policies within the petroleum sector. Moreover, their perspectives on existing corruption-related norms and regulations in the sector were sought.

A concluding question was also posed to allow participants to share any additional information they believed would be useful. The list of interview questions customized for different stakeholders is included in Appendix III.

Voices unveiled: Data analysis and outcome formulation

Upon completion of all interviewees, both video recordings and notes were transcribed into verbatim Word documents. The transcripts typically ranged from six to 20 single-spaced pages, totaling approximately 272 pages. To protect the confidentiality of each interviewee, a Greek alphabet code was assigned for reference within the transcripts. Furthermore, diligent efforts were taken to ensure that their identity could not be deducted from non-confidential information included in this thesis.

The subsequent phase involved a systematic analysis of the interviews, aimed at extracting meaningful insights and identifying recurring patterns within the collected data. Thus, all transcripts were imported into NVivo qualitative data analysis software for thematic analysis. This software facilitated the identification of recurrent themes and enabled the systematic coding of the transcripts. These themes and codes emerged from the content of the interviews through a line-by-line conceptualization process. For example, Table 3 provides an overview of the initial codes identified for themes related to anti-corruption clauses.

Codes for Anti-Corruption Clauses	Interviewees	References
Challenges	4	5
Efficiency	23	52
Emergence	6	6
Improvement	14	21
Language	17	28
Practical utilization	17	28
Risk-based approach	9	12
Sanctions/Remedies	18	34
Substitute clauses	8	11
Support/Resistance	16	29
Time coverage	13	17

Table 3 – Initial Codes Identified for Anti-Corruption Clauses in NVivo Software

Once all the themes and subthemes were identified, segments from the transcripts sharing similar codes were compiled for more detailed coding and analysis. Excerpts related to each theme were carefully examined to define and identify units of meaning. These units were then organized to uncover relationships and contradictions between concepts. Once these connections were identified, the core themes were selected to draft more comprehensive explanations for each theme. Based on these core themes extracted from the systematic analysis of interviews, the results and outcomes were documented. These findings, informed by the diverse voices and perspectives shared by the interviewees, were compiled to provide a holistic understanding of anti-corruption tools within the petroleum sector, with a particular focus on anti-corruption clauses. The core themes served as a guiding framework and illuminated the different dimensions and implications of these clauses. The results regarding anti-corruption clauses have been integrated into the fabric of Chapter Six, while insights related to other explored anti-corruption tools have been thoughtfully incorporated into Chapter Four.

5. Exploring Dissertation Horizons: Chapters' Structure, Contributions, and Limitations

Apart from this introductory chapter and concluding remarks in Chapter Seven, this dissertation is structured into five main chapters, each contributing uniquely to the exploration and analysis of anti-corruption clauses in the petroleum sector. This section provides an individual overview of each chapter, while discussing their distinct contributions and limitations.

Chapter Two – Unveiling the Darker Side of the Petroleum Sector

This chapter places the study within the broader context of corruption challenges faced by the petroleum sector. It provides an understanding of the existing forms of corruption across the sector and the underlying factors that sustain it. Such an approach is instrumental for the subsequent analysis of anti-corruption clauses in petroleum contracts to assess whether these clauses provide well-informed response mechanisms to the specific risks and vulnerabilities unique to the sector.

The initial section examines different types of corruption in the petroleum sector, while the second section focuses on governance issues within the sector. In Section (1), the doctrinal research in Subsection (A) explores forms of corruption cited in major international and transnational anti-corruption instruments. Subsection (B) then proceeds to examine key actors, risk areas, and common types of corruption in the petroleum sector, including bribery, embezzlement, conflicts of interest, different types of favoritism, fraud, and money laundering. Section (2) shifts the discussion to institutional and political-economic dynamics in natural resources-rich countries. Subsection (A) explores the resource curse theory and its transitional mechanisms while redirecting the attention to the role of good enough governance institutions in managing oil and gas resources. Subsection (B) analyzes the relationship between certain good governance

institutions—namely the rule of law, accountability, and transparency—and corruption in the petroleum sector.

Limitations: This chapter deliberately avoids an exhaustive exploration of definitions and different types of corruption, as such an in-depth analysis could exceed the intended scope and divert the study's focus. Instead, this information is readily available in cited anti-corruption conventions and protocols, or other studies in the literature. Moreover, while the chapter attempts to address the prevalent forms of corruption in the petroleum sector, there is a possibility of generalizing the nature of corruption and overlooking contextual variations across different countries and regions. Furthermore, the discussion of good governance in this chapter is intentionally focused on a narrow branch—the rule of law, accountability, and transparency. This selective approach, guided by the theory of good enough governance, may not include the full spectrum of good governance components relevant to corruption prevention.

Chapter Three – The Evolution of Transnational Anti-Corruption Standards: From Norms to Regime

This chapter conducts a historical and critical examination of the development of anti-corruption as both a transnational norm and a transnational regime. It presents an overview of the transnational legal framework and its key actors. This groundwork sets the stage for the subsequent exploration of the role of TNCs within such a regime, to be addressed in the forthcoming chapter.

Section (1) initiates a discussion on the status and development of anti-corruption as a transnational norm and regime. Subsection (A) introduces a three-stage model that explains the formation of a transnational norm: increased global awareness, formalization through transnational instruments, and transnational internalization and enforcement. It argues that while anti-corruption has made significant strides in achieving increased global awareness and formalization, it has not yet been

fully internalized and implemented globally. At its best, anti-corruption is envisioned as a de jure norm universally adopted, but its de facto existence remains a challenge. Following this, Subsection (B) introduces anti-corruption as a transnational regime. Section (2) explores the contributions of both states and non-state actors to this regime. It presents the regime's key actors as (i) international and intergovernmental organizations, (ii) leading states with extraterritorial domestic anti-corruption laws, (iii) IFIs, (iv) NGOs, and (v) TNCs. Section (2) outlines anti-corruption standards and remedies developed by the first four groups while reserving a detailed examination of TNCs for the next chapter. When picturing the regime, specific attention is devoted to the petroleum sector. The chapter concludes that international and transnational actors have established de jure norms against corruption, but their true efficacy lies in translating these norms into de facto practices and persuading society to adhere to such standards.

Limitations: The discussion on the status of anti-corruption as a transnational norm in this chapter risks oversimplifying the different developments and variations across different regions or countries. The norm's status can vary significantly from one country to another, with some countries making substantial progress while others continue to deal with deeply entrenched corruption. Moreover, while this study acknowledges the involvement of a myriad of actors in the transnational anti-corruption regime, their representation may not be entirely inclusive and complete within this chapter. Each group of actors merit a separate in-depth study; however, in this chapter, the focus is on discussing selected actors, which does not negate the role of others in the regime.

Chapter Four – Corporate Compass in the Transnational Anti-Corruption Regime

This chapter discusses the evolving role of TNCs within the previously described transnational anti-corruption regime. This exploration includes analyzing TNCs' compliance motives and the anti-corruption toolbox they employ to manage and mitigate corruption risks in their business activities within the petroleum sector. This chapter paves the way for the subsequent analysis of a more recent corporate mechanism in the fight against corruption—anti-corruption clauses in contracts.

Section (1) explores TNCs' role as non-traditional actors in the globalized world. Subsection (A) begins by explaining how TNCs can construct their own quasi-regime framework to govern internal activities, thereby contributing to broader regimes established by state actors to address transnational challenges. Subsection (B) then considers the factors influencing TNCs' decision to engage in the transnational anti-corruption regime and adopt anti-corruption compliance. Subsection (C) further examines how TNCs contribute to the internalization of anti-corruption norms through both trickle-down and trickle-up effects. Building on insights from interviewees, Section (2) introduces the main anti-corruption tools within the corporate toolbox, specifically tailored to the petroleum sector. Based on interviewees' real-world experiences in the sector, the chapter particularly examines codes of conduct, training, due diligence, oversight mechanisms, and corporate culture, while reserving the examination of anti-corruption clauses for subsequent chapters of the dissertation.

Limitations: While acknowledging that, in some instances, TNCs themselves may contribute to corruption, this chapter primarily focuses on their role in anti-corruption efforts for the purpose of the study. Therefore, although this approach deepens the understanding of TNCs' anti-corruption

initiatives, it may not present a complete representation of TNCs in their entirety. Furthermore, despite the increased number of studies and research on corporate anti-corruption tools, this chapter deliberately concentrates on those discussed by interviewees to have a better understanding of real-world experiences within the petroleum sector. However, this emphasis on the tools highlighted by interviewees may restrict the generalizability of findings. The limited sample size and the specific demographic of interviewees may not fully cover the diverse array of practices prevalent in the sector. Moreover, relying solely on interviewees' perspectives introduces the potential for bias, as responses may be influenced by individual roles, experiences, or organizational affiliations.

Chapter Five – Anti-Corruption Clauses in Transnational Petroleum Contracts

This chapter, complementing the discussion on the traditional anti-corruption toolkit in the previous chapter, addresses the core inquiry of this study. It explores contractual anti-corruption clauses as a more recent corporate mechanism designed to mitigate the risk of corrupt practices among contracting parties as well as third parties. By examining anti-corruption clauses within 1,164 petroleum contracts, the chapter not only provides a taxonomy for different types of such clauses but also evaluates their frequency and utilization in practice.

Section (1) introduces anti-corruption clauses and explores their different types. Subsection (A) traces the origins and dynamics of these clauses, while Subsection (B) examines their endorsement in key domestic anti-corruption laws and international anti-corruption standards. Subsection (C) proposes a classification system based on the types of commitment embodied in clauses after examining 1,164 petroleum contracts. In general, it categorizes clauses into two major groups: direct anti-corruption clauses and indirect anti-corruption clauses, providing further details on their

sub-categories and associated characteristics. It also introduces a standard clause from an actual contract that includes nearly all types of anti-corruption clauses discussed. Section (2) conducts a quantitative assessment of the anti-corruption clauses incorporated in these contracts. Using data-driven insights obtained during the contracts review, this section evaluates their number and distribution according to various criteria, including contract types, conclusion dates, and geographical distribution. While deferring the assessment of the real-world effectiveness of anti-corruption clauses to the next chapter, this chapter concludes that although parties have initiated the incorporation of these clauses into their contracts, there is a need for their more widespread adoption as a standard industry practice.

Limitations: The findings and classifications proposed in this chapter are based on the examination of a limited sample of 1,164 petroleum contracts, which may impact the generalizability of the results to the entire petroleum industry. Moreover, the uneven availability of contracts in the database results in a disproportionate representation of certain countries with more published contracts. Despite efforts to mitigate this by excluding the country with the largest available contracts and limiting contracts for the second largest one, the examination may still introduce a degree of bias. Furthermore, in the absence of prior research or comparative studies on contractual anti-corruption clauses, the classification process may involve an element of subjective interpretation. However, the study aims to address this concern by including comments and opinions from interviewees in the forthcoming chapter.

Chapter Six – Evidence into the Practice and Impact of Anti-Corruption Clauses

Continuing the exploration initiated by the quantitative assessment of anti-corruption clauses in petroleum contracts in the previous chapter, this chapter engages in qualitative research to examine

the real-world experiences and impact of such clauses within the petroleum sector. The primary focus of this chapter lies in the findings derived from 27 in-depth interviews conducted with individuals having considerable knowledge of corruption and anti-corruption dynamics within the petroleum industry. The chapter critically evaluates the capacity of anti-corruption clauses in realizing their intended objectives and addressing corruption risks within the petroleum sector.

This chapter commenced with a summary of key findings extracted from the interviews in Section (1). Following this, Section (2) examines interviewees' perspectives on specific features of anti-corruption clauses, including language nuances, the application of risk assessments, temporal coverage, available sanctions and remedies, and the use of substitute clauses in the absence of direct anti-corruption clauses. Moving forward, Section (3) investigates the practical implementation of anti-corruption clauses in the petroleum sector, exploring their reception, real-world usage, overall effectiveness, encountered challenges, and potential suggestions for improvement. Based on the interviewees' testimonies, which provide tangible evidence of implementation and enforcement of anti-corruption clauses in real-world scenarios, albeit limited in number, this chapter concludes that if adopted as a standard practice, these clauses can complement other anti-corruption tools in safeguarding business relationships from corruption and contribute to the establishment of an anti-corruption culture in the business environment.

Limitations: This chapter primarily relies on insights from 27 individuals in 14 different countries; therefore, this limited sample size may not fully represent the diverse experiences of anti-corruption clauses within the global petroleum sector. The participant recruitment rate indicates hesitancy among many individuals to engage in discussions on anti-corruption topics. Consequently, there is a possibility that the interviewees represent companies actively engaged in anti-corruption efforts, which could limit the results to those with already established anti-

corruption measures. Moreover, the study's finite time frame may not capture the long-term impact of anti-corruption clauses and their evolving nature over time. While this study serves as a starting point, future research is necessary to thoroughly investigate the realm of anti-corruption clauses and their efficacy, particularly within a broader spectrum of countries.

Chapter 2 – Unveiling the Darker Side of the Petroleum Sector

Oil creates the illusion of a completely changed life, life without work, life for free. Oil is a resource that anaesthetises thought, blurs vision, corrupts.

Ryszard Kapuściński, Shah of Shahs

Oil and gas industry is a criminal enterprise, [with] the brain of the beast … essentially that of a mafia operator.

Alpha, Interviewee

Among extractive natural resources, petroleum has long been revered as a precious commodity for centuries. While the modern history of the petroleum industry traces back to the mid-eighteenth century, known as the era of "the Seven Sisters,"[65] humans have been using this "black gold" for various purposes for over two thousand years.[66] However, the discovery of petroleum reserves marked a critical juncture in oil-rich countries, where their economies became heavily reliant on economic rents generated by oil exports. Presently, the petroleum sector stands as a significant contributor to the revenue of many economies worldwide. Although oil accounts for about 2.7% of the world's Gross Domestic Product (GDP),[67] it remains a critical commodity in global trade, with petroleum derivatives being integral components in countless products. Fluctuations in oil prices have a substantial impact on financial markets and contribute to inflation or deflation in countries, as evidenced during the Covid-19 era and the recent conflicts involving Russia and Ukraine.[68] Despite the ongoing energy transition, many nations and industries continue to heavily rely on oil.

Given the global influence of oil, particularly in the context of crude oil trading, corruption within the petroleum sector carries far-reaching implications that impact different countries, corporations, and international transactions. Juan Pablo Perez Alfonso famously described oil as the "devil's

[65] The Seven Sisters consisted of Standard Oil of New Jersey and Standard Oil Company of New York (now ExxonMobil), Standard Oil of California, Gulf Oil and Texaco (now Chevron), Royal Dutch Shell, and Anglo-Persian Oil Company (now BP). For further detail on the history of these companies, see generally Tarja Ketola, "The seven sisters: Snow Whites, dwarfs or evil queens? A comparison of the official environmental policies of the largest oil corporations in the world" (1993) 2:3 Bus Strategy & Envt 22.

[66] Umar Ali, "The history of the oil and gas industry from 347 AD to today" (7 March 2019), online: *Offshore Technology* <www.offshore-technology.com/comment/history-oil-gas/> (stating that "[o]il and gas had already been used in some capacity, such as in lamps or as a material for construction, for thousands of years before the modern era, with the earliest known oil wells being drilled in China in 347 AD").

[67] The data represents the average for the year 2021, see Global Economy, "Oil Revenue - Country rankings" (last visited 3 April 2024), online: *GlobalEconomy* <www.theglobaleconomy.com/rankings/Oil_revenue/>.

[68] For further insights into the importance of oil price for the global economy, see Amy White, "Why do oil prices matter to the global economy? An expert explains" (16 February 2022), online: *World Economic Forum* <www.weforum.org/agenda/2022/02/why-oil-prices-matter-to-global-economy-expert-explains/>.

excrement" while highlighting the challenges associated with the abundance of resources.[69] Sinead Hunt further emphasized that oil often leads to "corruption that plagues many oil-rich countries."[70] The complexity and substantial investments in petroleum projects, exacerbated by a lack of transparency and accountability, result in corruption risks that pervade the entire industry and manifest in different forms.[71]

This dissertation aims to investigate the status and role of anti-corruption clauses in petroleum contracts, but to provide an understanding of the specific challenges associated with corruption in the sector, this chapter will draw attention to the specific nature of corruption in the petroleum sector. Section (1) will provide an overview of prevalent corrupt acts in the sector. In Subsection (A), a doctrinal research will explore different types of corruption cited in major international and transnational anti-corruption instruments. The goal is to determine if the forms of corruption identified by these conventions align with those prevalent in the petroleum sector, as introduced later in the chapter. Subsection (B) will begin by describing the key actors in the petroleum sector and explaining the prevailing circumstances that lead to the proliferation of corruption in the industry. Drawing from sources beyond law, it will then offer a taxonomy of corruption in the petroleum sector, namely bribery, embezzlement, conflicts of interest, different types of favoritism, fraud, and money laundering. This exploration will identify risk areas at different

[69] See David Jacques, "Oil is the devil's excrement" (28 September 2017), online (blog): *Philosophasters* <philosophasters.org/articles/2017/9/25/oil-is-the-devils-excrement> (quoting Juan Pablo Perez Alfonso's speech in 1975).
[70] Sinead Hunt, "Refining Black Gold: The Dodd-Frank Act and Corruption in the Oil Industry" (2011) 16:1 UCLA J Intl L & Foreign Aff 41 at 43. See also Hossein Mahdavy, "Patterns and Problems of Economic Development in Rentier States: The Case of Iran" in Michael A Cook, ed, *Studies in Economic History of the Middle East* (London: Oxford University Press, 1970) 428; Hazem Beblawi & Giacomo Luciani, eds, *The Rentier State* (London: Croom Helm, 1987).
[71] See Adeyeye, *supra* note 9 at 15.

stages in the industry prone to corrupt behavior, supplemented by some real-world examples from the sector.

On the other hand, governance institutions are central when addressing corruption in the management of natural resources, as countries abundant in resources are often vulnerable to specific governance challenges. Several studies in the field of development economics assert that the abundance of natural resources has contributed to the *resource curse* phenomenon in these countries.[72] Therefore, Section (2) will discuss the institutional setting and political-economic dynamics present in oil-rich countries that lead to the proliferation of corruption. Subsection (A) will portray the resource curse theory, which, in turn, gives rise to governance challenges for oil-rich countries seeking to derive benefits from their resources. However, it argues that the presence of oil does not necessarily signify a curse but can be a *blessing* if proper governance institutions govern oil-rich countries. Among the several components of good governance, this study will argue that the rule of law, accountability, and transparency are critical for the effective management of the oil and gas resources. Therefore, Subsection (B) will discuss these institutions separately and explore their relationship with corruption in the petroleum sector. This analysis will be useful for comparing oil-rich countries with strong good governance institutions and those where corruption prevails. In this regard, an examination of the case of Norway, presented as a successful example of good governance institutions reversing the resource curse and channeling oil revenue into development, will be included in Appendix IV.

[72] See e.g. Halvor Mehlum, Karl Moene & Ragnar Torvik, "Institutions and the Resource Curse" (2006) 116:508 Econ J 1 (explaining how poor governance and weak institutions contribute to the resource curse); Stella Tsani, "Natural resources, governance and institutional quality: the role of resource funds" (2013) 38:2 Resources Pol'y 181.

1. The Many Faces of Corruption in the Petroleum Sector

In order to understand corrupt practices in the petroleum sector, one must unpack the term "corruption" by identifying the prevalent types intricately woven into the web of this industry. Thus, this section provides a taxonomy of corruption within the petroleum sector. However, before proceeding to discuss the manifestations of corruption, which will be discussed in Subsection (B), Subsection (A) examines anti-corruption conventions and protocols that address different forms of corrupt practices. This preliminary review not only helps to establish a global standard for defining corruption but also provides a broader picture of the collaborative efforts undertaken at both international and transnational levels to combat corrupt practices, a topic further explored in Chapter Three.

A. Decoding the Term "Corruption" in Anti-Corruption Conventions and Protocols

Because one can attribute corrupt behavior to a diverse range of human actions within and across countries, many laws and studies employ the term corruption as a general descriptor. Rather than treating corruption as a uniform act, these sources attempt to establish a taxonomy for corruption, listing different types of corrupt behavior. Here, this subsection undertakes a review of anti-corruption conventions and protocols that address corruption and provide legal frameworks for its prohibition. This review aims to assess later whether these sources have incorporated the prevalent types of corruption in the petroleum sector.

Table 4 offers a general overview of the definition and types of corruption specified within anti-corruption conventions and protocols:

	Protection Convention (1995)	*Inter-American Convention (1996)*	*First Protocol to the Protection Convention (1996)*	*Fight Against Corruption Convention (1997)*	*Second Protocol to the Protection Convention (1997)*	*OECD Convention (1997)*	*Criminal Law Convention (1999)*
Definition of corruption	—	—	Arts 2-3: the definitions of passive and active corruption are exclusively limited to the act of bribery.	Arts 2-3: the definitions of passive and active corruption are exclusively limited to the act of bribery.	Arts 1(c): the definitions of passive and active corruption are exclusively limited to the act of bribery.	—	—
Bribery	—	♦ Art 6: bribery ♦ Art 17: transnational bribery	—	♦ Art 2: passive bribery ♦ Art 3: active bribery	—	Art 1	♦ Art 2-3: bribery of domestic public officials ♦ Art 4: bribery of members of domestic public assemblies ♦ Art 5: bribery of foreign public officials ♦ Art 6: bribery of members of foreign public assemblies ♦ Art 7-8: bribery of the private sector ♦ Art 9: bribery of officials of international organizations ♦ Art 10: bribery of members of international parliamentary assemblies ♦ Art 11: bribery of judges and officials of international courts
Embezzlement	—	Art 11 (d)	—	—	—	—	—
Trading in influence	—	—	—	—	—	—	Art 12
Abuse of functions	—	Art 11 (a-b)	—	—	—	—	—
Illicit enrichment	—	Art 9	—	—	—	—	—
Money Laundering	—	—	—	Art 6	Art 1(e)	Art 17	Art 13
Fraud	Art 1	—	—	—	Art 3	—	—

	Civil Law Convention (1999)	*Transnational Organized Crimes Convention (2001)*	*SADC Protocol (2001)*	*Protocol to the Fight Against Corruption Convention (2001)*	*Additional Protocol to the Criminal Law Convention (2003)*	*African Union Convention (2003)*	*UNCAC (2003)*	*Arab Anti-Corruption Convention (2010)*
Definition of corruption	Art 2: the definition of corruption is exclusively limited to the act of bribery.	Art 8: the definition of corruption is exclusively limited to the act of bribery.	Art 1: "corruption means any act referred to in Article III and includes bribery or any other behavior in relation to persons entrusted with responsibilities in the public and private sectors which violates their duties as public officials."	—	—	Art 1: "the acts and practices including related offenses proscribed in this Convention."	—	—
Bribery	Art 2	Art 8	♦ Art 3-a: passive bribery ♦ Art 3-b: active bribery ♦ Art 3-e: bribery in the private sector	♦ Art 6-1(a): passive bribery ♦ Art 6-1(b): active bribery ♦ Art 6-1(c): bribery in the private sector	♦ Art 2-3: bribery of domestic arbitrators ♦ Art 4: bribery of foreign arbitrators ♦ Art 5: bribery of domestic jurors ♦ Art 6: bribery of foreign jurors	Art 4	♦ Art 15: bribery of national public officials ♦ Art 16: bribery of foreign public officials and officials of public international organization ♦ Art 21: bribery of the private sector	Art 4: ♦ bribery of national public officials ♦ bribery of private sector ♦ bribery of foreign public officials and officials of public international organization
Embezzlement	—	—	Art 3-d	Art 6-1(e)	—	Art 4	♦ Art 17: Public officials ♦ Art 17: The private sector	Art 4
Trading in influence	—	—	Art 3-f	Art 6-3	—	—	Art 18	Art 4
Abuse of functions	—	—	—	Art 6-5	—	—	Art 19	Art 4
Illicit enrichment	—	—	Art 3-c	Art 6-1(d)	—	Art 8	Art 20	Art 4
Money laundering	—	—	—	Art 7	—	Art 6	Art 23	Art 4
Fraud	—	—	—	—	—	—	—	—

Table 4 – Definition of Corruption and Corrupt Practices Specified within Anti-Corruption Conventions And Protocols[73]

[73] *Convention on the Protection of the European Communities' Financial Interests*, European Union, 27 November 1995 (entered into force 17 October 2002), art 1 [*Protection Convention*]; *Inter-American Convention Against*

As the table indicates, the majority of anti-corruption conventions and protocols refrain from providing a specific definition for corruption. For example, United Nations Convention Against Corruption (UNCAC) in Article 2 clarifies the Convention's use of terms but does not explicitly outline the term corruption.[74] Nor does its second chapter on Preventive Measures define the term corruption while explaining preventive anti-corruption policies and practices.[75] Some conventions do define the term; however, they often limit the definition to the act of bribery. For example, Article 2 of the Civil Law Convention on Corruption states, "[f]or the purpose of this Convention, 'corruption' means requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof."[76] This definition, while specific, highlights the emphasis on bribery as the primary form of corruption, but it overlooks other corrupt practices that do not directly involve bribes.

Corruption, Organization of American States, 29 March 1996 (entered into force 6 March 1997) [*Inter-American Convention*], arts 6, 9, 11, 17; *Protocol to the Convention on the Protection of the European Communities' Financial Interests*, European Union, 23 October 1996 (entered into force 17 October 2002), arts 2–3 [*First Protocol to the Convention on the Protection*]; *Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union*, Council of the European Union, 26 May 1997 (entered into force 28 September 2005) arts 2–3, 6 [*Fight Against Corruption Convention*]; *Second Protocol to the Convention on the Protection of the European Communities' Financial Interests*, European Union, 19 June 1997 arts 1, 3 [*First Protocol to the Convention on the Protection*]; *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Organization for Economic Co-Operation and Development, 17 December 1997 (entered into force 15 February 1999), art 1, 17 [*OECD Convention*]; *Criminal Law Convention on Corruption*, Council of Europe, 27 January 1999 (entered into force 1 July 2002) arts 2–13, [*Criminal Law Convention*]; *Civil Law Convention on Corruption*, Council of Europe, 4 November 1999 (entered into force 1 November 2003) art 2 [*Civil Law Convention*]; *Transnational Organized Crimes Convention*, UN General Assembly, 8 January 2001 (entered into force 29 September 2003) art 8 [*Transnational Organized Crimes Convention*]; *Protocol Against Corruption*, Southern African Development Community, 14 August 2001 (entered into force 6 July 2005) arts 1, 3 [*SADC Protocol*]; *Protocol on the Fight Against Corruption*, Economic Community of West African States, 21 December 2001, arts 6–7 [*Protocol to the Fight Against Corruption*]; *Additional Protocol to the Criminal Law Convention on Corruption*, Council of Europe, 15 May 2003 (entered into force 1 February 2005) arts 2–6 [*Protocol to the Criminal Law Convention on Corruption*]; *Convention on Preventing and Combating Corruption*, African Union, 11 July 2003 (entered into force 5 August 2006), arts 1, 4, 6, 8 [*African Union Convention*]; *United Nations Convention Against Corruption*, UN General Assembly, 31 October 2003 (entered into force 14 December 2005), arts 15–21, 23 [*UNCAC*]; *Arab Anti-Corruption Convention*, League of Arab, 21 December 2010 (entered into force June 2013), art 4.

[74] *UNCAC*, *supra* note 75, art 2.

[75] *Ibid*, ch 2.

[76] *Civil Law Convention*, *supra* note 75.

Instead of providing a singular definition for the term "corruption," anti-corruption conventions and protocols enumerate a range of corrupt practices. For example, the UNCAC, in its third chapter on Criminalization and Law Enforcement, includes specific articles criminalizing different corruption acts. These acts cover bribery of national public officials, bribery of foreign public officials and officials of public international organizations, bribery in the private sector, embezzlement, misappropriation or other diversions of property by a public official, embezzlement of property in the private sector, trading in influence, abuse of functions, illicit enrichment, and laundering of proceeds of crime.[77] Similarly, the African Convention on Preventing and Combating Corruption, in Article 1, defines corruption as "the acts and practices including related offenses proscribed in this Convention."[78] Article 4 of this Convention provides a list of specific corruption acts, namely bribery, the diversion of public properties, and illicit enrichment.[79] The table also shows that bribery is the most frequently referenced act among several corrupt practices established by anti-corruption conventions and protocols.

After examining different corrupt acts outlined in these international and regional instruments, the next subsection is now set to redirect the focus to the petroleum sector. It will look into specific forms of corruption more likely to occur within the sector, considering the involved parties, motivations, and institutional structures. The aim is to explore whether the types of corruption identified in anti-corruption instruments align or diverge with the dominant forms of corruption inherent in the petroleum industry. This transition bridges the gap between theoretical frameworks and the real-world manifestations of corruption within the petroleum sector.

[77] *UNCAC*, *supra* note 75, arts 7, 16–21, 23.
[78] *African Union Convention*, *supra* note 75, art 1.
[79] *Ibid*, art 4.

B. Prevalent Forms of Corruption in the Petroleum Sector

The petroleum industry involves different parties, each motivated by distinct incentives that can lead to various types of corruption. These parties are usually categorized into three groups: (1) host state authorities, including the government, the oil ministry, the NOC, politicians, legislators, and other public officials; (2) TNOCs, private local companies, and venture partners; and (3) third parties, including consultants, sales and marketing agents, suppliers, distributors, brokers, operators, contractors, and subcontractors in construction, engineering, or procurement companies.[80] External actors, such as the home country of TNOCs, international organizations, banks, financial institutions, and NGOs, are also part of this dynamic.[81] The goals of the first group, centered on maximizing oil revenues, clash with the second group's interest, which also revolves around expanding profits.[82] Meanwhile, the third group and external actors may influence the relationship between the first two groups. The second group often forms the supply side of corruption, while players in the first group represent the demand side. In addition to direct involvement in corrupt practices, the third group may indirectly participate in corruption as a conduit for the schemes pursued by the first two groups.

The petroleum sector exhibits a number of factors that contribute to the prevalence of corruption. A well-established body of literature shows a positive correlation between a country's natural wealth and its susceptibility to corruption.[83] Scholars in development economics and political

[80] This classification is taken from a U4 working paper with some modifications; see Farouk Al-Kasim, Tina Søreide & Aled Williams, "Grand corruption in the regulation of oil" (2008) U4 Issue working paper No 2008.2 at 16–17 [Al-Kasim, Søreide & Williams, "Grand corruption"].
[81] *Ibid*.
[82] See Kirsten Bindemann, *Production - Sharing Agreements: An Economic Analysis* (Oxford: Oxford Institute for Energy Studies, 1999) at 5.
[83] See e.g. Robbins, *supra* note 20; Carlos Leite & Jens Weidmann, "Does mother nature corrupt? Natural resources, corruption, and economic growth" (1999) International Monetary Fund Working Paper No 99/85; Erwin Bulte & Richard Damania, "Resources for sale: corruption, democracy and the natural resource curse" (2008) 8:1 BE J Econ Analysis & Pol'y 1.

economics have extensively explored the notion of the *resource curse*.[84] This theory, to be discussed in detail in Section (2), explains that countries endowed with abundant natural resources often experience poorer economic performance than those with limited or no such resources. However, beyond the inherent abundance of petroleum resources in oil and gas-rich countries, specific characteristics and circumstances within the petroleum sector contribute to its heightened vulnerability to high-profile corruption cases compared to other industries.

First and foremost, hydrocarbon exploration and production, including both oil and natural gas, is a multi-stage process extending from the wellhead to different end-use applications, such as fueling gas stations. The sector comprises different phases, where the complexity escalates the risk of corrupt behavior within each. In the "upstream stage," hydrocarbons are explored, drilled, and produced, while in the "downstream stage," the extracted resources undergo transportation, refining, and petrochemical processing.[85] Simply put, whether in an onshore or offshore location, once a hydrocarbon reservoir is explored, the resources are drilled and extracted from the ground or waterbed. Subsequently, pipelines transfer the crude oil or natural gas from the wells or rigs to production facilities.[86] Following measurement and examination, the produced hydrocarbons can be transported nationally or internationally through pipelines and tankers, stored in storage tanks, or processed at refineries where raw resources are transformed into different products, such as gasoline, kerosene, or other refined products depending on the specific hydrocarbon involved.[87]

[84] See e.g. Julien Topal & Perrine Toledano, "Why the extractive industry should support mandatory transparency: a shared value approach" (2013) 118:3 Bus & Society Rev 271 at 272; Colin C Corrigan, "Breaking the resource curse: Transparency in the natural resource sector and the extractive industries transparency initiative" (2014) 40 Resources Pol'y 17; Jeffrey D Sachs & Andrew M Warner, "Natural Resource Abundance and Economic Growth" (1995) National Bureau of Economic Research Working Paper No 5398.

[85] See e.g. Seon Tae Kim & Bongseok Choi, "Price risk management and capital structure of oil and gas project companies: Difference between upstream and downstream industries" (2019) 83 Energy Econs 361.

[86] For further details on the production of oil and gas, see Martin S Raymond & William L Leffler, *Oil and Gas Production in Nontechnical Language* (Tulsa: PennWell Corporation, 2017).

[87] See e.g. Henrik Johnsen, *Oil and Gas, from Reservoir to Refinery* (Hovik: Norwegian Petroleum Academy, 2010).

Each stage demands substantial capital investment, particularly in the exploration phase, where the availability of resources is uncertain in terms of both quantity and quality. Therefore, exploitable resources and the potential for significant financial returns create a lucrative nature for these projects, diverting incentives from productive economic activities to unproductive rent-seeking behavior.[88] Furthermore, the complexity of projects and the high expenditure levels in this sector dictate the involvement of several third parties, which, in turn, enhances the risk of corrupt behavior. Moreover, the likelihood of engaging in improper practices is higher when companies have remote operations in other countries, limiting their monitoring capabilities over employees and third parties based overseas.

The different phases of hydrocarbon operations necessitate a highly regulated industry, involving various types of contracts among states and companies, as well as government authorizations and permits.[89] In many oil and gas-rich countries where the economy and national security depend on these resources, the state, often through the NOC, preserves ownership and distribution control over petroleum resources. Seeking financial sources and technical skills, the state may grant exploration and production rights to foreign investors and TNOCs through petroleum contracts in return for tax and royalty revenues. These contracts, detailed in Chapter Five, are complex in both financial and technical aspects. Given this complexity, corruption can emerge through the contracts themselves, as they involve intricate financial arrangements and technical stipulations. Moreover, given the essential income source provided by these resources, the state, often through oil and gas ministries, exercises exclusionary control over signing contracts and conferring permits

[88] See Michael J Trebilcock & Mariana Mota Prado, *What Makes Poor Countries Poor? Institutional Determinants of Development* (Cheltenham: Edward Elgar Publishing, 2011) at 33; see also Toke S Aidt, "Corruption and Sustainable Development" in Susan Rose-Ackerman & Tina Søreide, eds, *International Handbook on the Economics of Corruption* (Cheltenham: Edward Elgar Publishing, 2011) 3 at 11.
[89] See Al-Kasim, Søreide & Williams, "Grand corruption", *supra* note 82 at 9.

and licenses.[90] Excessive discretion and bureaucracy in these arrangements increase interactions with high-ranking officials. These officials usually wield considerable authority in contract and permit decisions, which creates a window of opportunity to demand rents for the allocation of rights.[91] There is also a possibility that officials interpret, modify, alter, or revoke laws and regulations, sometimes supplementing them with their own rules, with the purpose of extracting rents to ease burdensome procedures. [92] Lack of accountability mechanisms for these decision-making processes further compounds the issue. The roles of political and economic elites in the sector, along with power constellations competing for control, will be explored further in Section (2).

On the other hand, the scarcity of petroleum resources, both in quantity and strategic geographical importance, intensifies the competition among TNOCs. Leveraging their technical and financial advantages, TNOCs strive to outcompete each other in gaining privileges over these resources.[93] They engage in negotiations and bidding processes with host states to secure contracts, licenses, and permits across different stages of the industry. These invaluable contracts and permits contribute to an environment susceptible to corrupt practices.[94] Furthermore, host states and TNOCs often conclude the contracts, revenues declarations, and tax documents behind the scene, confidentially and selectively,[95] which prevents scrutiny by citizens and the media. This secrecy

[90] See U4 Anti-Corruption Resource Center, *supra* note 59; see also Karl, *supra* note 50 at 3.
[91] See e.g. Mark Robinson, "Corruption and Development: An Introduction" in Mark Robinson, ed, *Corruption and Development* (London: Routledge, 2004) 1 at 20–21.
[92] See e.g. U Myint, "Corruption: Causes, consequences and cures" (2000) 7:2 Asia Pacific Development J 33 at 35; Abhijit V Banerjee, "A Theory of Misgovernance" (1997) 112:4 Econs 1289 (referring to "red tapes," which are "completely pointless bureaucratic procedures that one has to endure in dealing with bureaucracies" at 1292).
[93] See e.g. Jenic Radon, "How to Negotiate an Oil Agreement" in Macartan Humphreys, Jeffrey D Sachs & Joseph E Stiglitz, eds, *Escaping the Resource Curse* (New York: Columbia University Press, 2007) 89 at 89–91.
[94] See e.g. Leon Moller, "The Governance of Oil and Gas Operations in Hostile but Attractive Regions: West Africa" (2010) 4 Intl Energy L Rev 110.
[95] See e.g. Andreanna M Truelove, "Oil, Diamonds, and Sunlight: Fostering Human Rights through Transparency in Revenues from Natural Resources" (2003) 35:1 Geo J Intl L 207.

leads to information asymmetries and results in further rent-seeking behavior. This is why transparency initiatives, such as the EITI, emphasize the importance of publishing of contracts and government payments to address these issues, as will be discussed further in Chapter Three.

Another reason for the proliferation of corruption in the petroleum sector is linked to the location of oil and gas reserves and the market, predominantly situated in low and middle-income countries, such as the Middle East and countries in Africa and Latin America.[96] Petroleum projects in these countries are susceptible to the influence of policies and economies characterized by higher corruption rates. The quality of governance institutions in these regions often falls short of those in high-income countries, a point that will be explored further in Section (2).[97] Factors such as political instability, non-transparent rules, a weak rule of law and accountability, opaque contracts, the absence of practical legislation, and inadequate infrastructure in emerging markets can collectively create a risky environment conducive to corrupt practices within petroleum projects.[98]

Now that the key players and factors contributing to the proliferation of corruption in the petroleum sector have been identified, the following provides a typology of corruption at various stages within the industry. This exploration aims to identify risk areas at different stages prone to prevalent forms of corruption in the sector, including bribery, embezzlement, conflicts of interest,

[96] See Dev Kar & Brian LeBlanc, *Illicit financial flows from developing countries: 2002-2011* (Washington, DC: Global Financial Integrity, 2013) (finding that "the MENA region registered the fastest trend rate of growth in illicit outflows over the period studied (31.5 percent per annum) followed by Africa (20.2 percent), developing Europe (13.6 percent), Asia (7.5 percent), and Latin America (3.1 percent)" at 15).

[97] See e.g. Marie Chêne, "Transparency and governance of natural resource management: A literature review" (2017), online (pdf): *Transparency International* <knowledgehub.transparency.org/assets/uploads/helpdesk/transparency-and-governance-of-natural-resource-management-2017.pdf >.

[98] See e.g. Paolo Mauro, "Corruption and Growth" (1995) 110:3 Q J Econs 681; Philip Keefer & Stephen Knack, "Why Don't Poor Countries Catch Up? A Cross-National Test of an Institutional Explanation" (1997) 35:3 Econ Inquiry 590; Susan Rose-Ackerman & Bonnie J Palifka, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge: Cambridge University Press, 2016) at 29–32.

different types of favoritism, fraud, and money laundering.[99] It should be noted that some acts may be interpreted in ways that cover different corrupt practices, which shows the complex and overlapping nature of corruption in this sector.

i. Exposing the veiled reality of bribery in the petroleum sector

The petroleum sector stands out as a high-risk industry for bribery opportunities, with bribery being the most frequently reported corrupt practice within this sector. This pattern aligns with the predominant form of corruption emphasized in the studied anti-corruption instruments in Subsection (A). While pinpointing an exact estimate of bribery frequency in the petroleum industry remains challenging, available statistics indicate that bribery does heavily influence the industry. A study examining 427 cases of foreign bribery spanning from 1999 to 2014, outlined in the Organization for Economic and Co-Operation Development (OECD) Foreign Bribery Report 2014, reveals that 19% of foreign bribery incidents occurred in the extractive sector, including the petroleum sector among others.[100] Moreover, the latest report from the Bribe Payers Index (BPI) positions the petroleum industry as the fourth most likely sector among 19 sectors to engage in bribery activities, which confirms that companies in this industry often exhibit a higher propensity to pay bribes compared to their counterparts in other sectors.[101]

Studying bribery in the petroleum sector requires consideration of the involved actors, including who is bribing, who is being bribed, and the purposes or payoffs involved. Given the clandestine nature of bribe dealings, the initiator of bribery is not always clear; it could be officials or politicians seeking bribes for granting rights to TNOCs, or TNOCs attempting to secure exclusive

[99] The categorization mostly comes from a OECD' work on corruption in the extractive sector and a U4 working paper with some modifications. See OECD, *Corruption in the Extractive*, *supra* note 55; Al-Kasim, Søreide & Williams, "Grand corruption", *supra* note 82.
[100] OECD, *Foreign Bribery*, *supra* note 56.
[101] TI, *Bribe Payers Index*, *supra* note 58.

rights by offering bribes. Both parties engage in a continuous interaction involving the willingness to offer and accept bribes, with the maximization of competitive benefits serving as the motivation behind the bribery. The intense competition among TNOCs may drive them to offer bribes to officials with discretionary decision-making authority to obtain concessions, licenses, or service contracts at favorable terms.[102] Large sums of bribes are also prevalent in lucrative contracts, such as long-term Production Sharing Agreements (PSAs) and concessions, and TNOCs may also resort to bribery to secure a larger share in PSAs and Joint Venture (JV) agreements.[103] Moreover, TNOCs operating in countries where bribe-taking is socially acceptable may find it necessary to use bribes to gain access to resources. TNOCs' frequent interactions with low-level state officials to obtain licenses and operational permits increase the demand for facilitation payments, aimed at easing or expediting bureaucratic processes.[104] Another aspect that warrants attention is related to countries where the culture of gift-giving is prevalent, and individuals in both the public and private sectors may expect to receive gifts in their professional relations. For example, the Nigerian Oil and Gas Industry Content Development Act permits Board officials to accept gifts from oil and gas companies under specific circumstances.[105] The differences in each jurisdiction's laws regulating gift-giving policies increase the petroleum sector's vulnerability concerning bribery.

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[102] See e.g. Olivier Compte, Ariane Lambert-Mogiliansky & Thierry Verdier, "Corruption and competition in procurement auctions" (2005) 36:1 Rand J Econs 1.

[103] See OECD, *Corruption in the Extractive*, *supra* note 55 at 69–70.

[104] See e.g. Alexandra Wrage & Kerry Mandernach, "Facilitation payments" in Birgit Errath, ed, *Business Against Corruption: Case Stories and Examples* (New York: United Nations Global Compact Office, 2006) 69 at 77.

[105] The Act provides:

> (1) The Board may accept gifts of money, land or other property on such terms and conditions, if any, as may be specified by the person or organization making the gift.
>
> (2) The Board shall not accept any gift if the conditions attached thereto are inconsistent with the functions of the Board under this Act.

Nigerian Oil and Gas Industry Content Development Act (2010), art 92. See also Chilenye Nwapi, "Corruption vulnerabilities in local content policies in the extractive sector: An examination of the Nigerian Oil and Gas Industry Content Development Act, 2010" (2015) 46:2 Resources Pol'y 92.

Both host state officials and TNOCs employ different methods and means to disguise bribe transactions and proceeds, as well as obfuscate their identities. These methods include, but are not limited to, the use of intermediaries, sub-contractors, shell companies, private financial entities, false documents, layered or off-the-books transactions, or offshore accounts and locations. A notable example illustrating these tactics is the bribery case involving PetroTiger, a British Virgin Islands company, and Ecopetrol SA, a Colombian state-run petroleum company. In 2014, investigations conducted by both Colombian and US authorities revealed that in 2009 and 2010, three former executives of PetroTiger paid bribes to an official in Ecopetrol SA to secure service agreements.[106] These bribes were facilitated through several undocumented transactions conducted via the company's US bank account. According to investigations, bribe recipient transferred the illicit funds to his wife's business, a hair salon and spa, and disguised under the title of business consulting services provided by the company.[107]

Moreover, opportunities for bribery exist across different phases and stages of the petroleum industry, ranging from the decision to extract oil and gas to the awarding of extractive rights, and from the operation of extractions to the collection and expenditure of revenues.[108] Meanwhile, the relative bargaining power of parties varies between countries and may change during different phases. The following aims to explore different bribery schemes across three key stages: pre-contract, exploration and exploitation, and revenue collection and procurement. It is important to note that some examples discussed here may also be categorized as *trading in influence*, as per the

[106] *United States v Joseph Sigelman*, Court Docket Number: 14-CR-00263-JEI; see also Amy Novak Fuentes, "How Free Trade Agreements Can Improve Anti-Corruption Enforcement: A Case Study of the United States and Colombia" (2016) 45:3 Pub Cont LJ 479; EFE, "Colombia 'working with US' in Ecopetrol corruption case", *ColombiaReports* (10 February 2015), online: <colombiareports.com/colombia-working-us-ecopetrol-corruption-case/>.
[107] *United States v Knut Hammarskjold*, Court Docket Number: 14-Cr-00065-JEI.
[108] See OECD, *Corruption in the Extractive*, *supra* note 55 at 15.

studied anti-corruption instruments in Subsection (1).[109] Trading in influence is considered a less direct form of bribery and revolves around the improper use of influence or position of power to gain advantages. However, this study recognizes bribery as a broad category, including both direct exchanges and other form of arrangements, such as trading in influence.

Bribery schemes in the awarding of rights and contracts

A spectrum of bribery opportunities unfolds in the awarding rights and contracts, from preliminary resource evaluation, rights allocation, bidding, to negotiation. During the initial assessment of petroleum resources, although the risk of bribery is relatively low, opportunities arise for "diplomatic quid pro quos" between host and home states to secure exclusive rights.[110] In a well-known example, China provided development and infrastructure loans to Angola in 2004, resulting in Angola exclusively granting oil licenses and contracts to Chinese TNOCs while rejecting the participation of TNOCs from other countries in its projects.[111] Another study reveals that TNOCs lobbied states in Sub-Saharan African countries for long-term petroleum licenses.[112] Moreover, diplomats can participate discreetly in bilateral political negotiations for major contracts. For example, in 2013, Griffiths Energy International Inc., a Canadian TNOC based in Calgary, admitted to making an improper payment of CAD 2 million in cash to the Chadian ambassador to Canada and his wife to secure a petroleum contract in Chad.[113] Therefore, bribing politicians and regulators can significantly influence decisions made on behalf of the host state in managing

[109] See e.g. *UNCAC*, *supra* note 75, art 18.
[110] See e.g. Al-Kasim, Søreide & Williams, "Grand corruption", *supra* note 82 at 9, 20.
[111] See Michelle Chan-Fishel & Roxanne Lawson, "Quid Pro Quo? China's Investment-For-Resource Swaps in Africa" (2007) 50:3 Development 63 (the authors also discuss other cases in Nigeria, Uganda, and Zimbabwe).
[112] See Ans Kolk & François Lenfant, "MNC reporting on CSR and conflict in Central Africa" (2010) 93:2 J Bus Ethics 241.
[113] *R v Griffiths Energy International*, 2013 ABQB 412, para 7; see also "Judge approves $10.35 M fine for Griffiths Energy in Chad bribery case", *Financial Post* (25 January 2013), online: <business.financialpost.com/commodities/energy/judge-approves-10-35m-fine-for-griffiths-energy-in-chad-bribery-case>.

petroleum recourses and securing rights in different aspects, such as pipelines, public services, technology, ports, and equipment ownership.[114]

In the process of acquiring exploration and production rights, bribery schemes can emerge during contract negotiations, permit issuance, and approval processes. Officials may prioritize awarding contracts based on the highest bribe offer rather than considering fair competition and merit.[115] TNOCs seeking petroleum contracts may engage in bribery of high-level officials, often referred to as "politically exposed persons" (PEPs) according to FATF Guidance.[116] These individuals hold prominent public positions, including heads of state, presidents, senior politicians, and judicial or military officials, and especially petroleum ministers who exert dominant control over petroleum resources.[117] TNOCs commonly employ intermediaries with connections within the state to influence officials through bribes in exchange for a share in the profits accrued from the finalized deal.[118] The SBM Offshore case is an illustrative example, where a Netherlands-based TNOC was found guilty of bribing Iraqi officials to secure contracts through an intermediary company, Unaoil, a Monaco-based TNOC.[119] TNOCs may also make bribe payments through their subsidiaries. For example, in April 2020, the US Securities and Exchange Commission (SEC) charged Eni SpA, an Italian TNOC, in a bribery scheme, wherein one of its subsidiaries, Saipem, paid approximately 198 million Euros to an intermediary between 2007 and 2010 to secure seven contracts from an

[114] See e.g. Al-Kasim, Søreide & Williams, "Grand corruption", *supra* note 82 at 20.
[115] See e.g. Roberto Burguet, Juan José Ganuza & José Garcia Montalvo, "The microeconomics of corruption. A review of thirty years of research" (2016) Barcelona GSE Working Paper Series Working Paper No 908, at 22–23; Tina Søreide, "Beaten by bribery: why not blow the whistle?" (2008) 164:3 J Institutional & Theoretical Econs 407.
[116] FATF, *FATF Guidance: Politically Exposed Persons (Recommendations 12 and 22)* (Paris: FATF, 2013) [FATF, *PEPs*].
[117] See Al-Kasim, Søreide & Williams, "Grand corruption", *supra* note 82 at 19.
[118] See George K Foster, "Managing expropriation risks in the energy sector: Steps for foreign investors to minimise their exposure and maximise prospects for recovery when takings occur" (2005) 23:1 J Energy & Natural Resources L 36 at 45.
[119] SFO, News Release, "Former Unaoil executives guilty of giving corrupt payments for oil contracts in post-occupation Iraq" (13 July 2020), online: *SFO* <www.sfo.gov.uk/2020/07/13/former-unaoil-executives-guilty-of-giving-corrupt-payments-for-oil-contracts-in-post-occupation-iraq>.

Algerian NOC.[120] Another avenue for bribery at this stage involves TNOCs offering bribes to officials in return for an "exclusive monopoly" to operate in the petroleum market.[121] A historical example is seen in John Rockefeller, an American industrialist and founder of the Standard Oil Company, who bribed Pennsylvania's legislators in 1874 to establish his oil monopoly.[122] Therefore, politicians and legislators may alter oil regulations in exchange for party contributions.

During the bidding stage for petroleum contracts, bidders may bribe officials to obtain confidential information about bids or selection criteria, which allows them to tailor their proposals accordingly.[123] Bribery schemes can also influence the design of tenders to favor certain bidders by manipulating specifications and conditions. Simultaneously, officials may extort bribes to either assist the company's participation or hinder other companies in the bidding process.[124] Such situations may result in a "single bidding," where only one company participates and wins the contract because other companies, aware of the predetermined winner, choose not to participate in a seemingly rigged contest.[125] Bribes can further impact bid evaluations and decisions regarding the selection of applicants and the winning bidder; for example, contracts may be awarded to high-cost bidders in non-competitive tendering.[126] The Petrobras case in the Carwash Scandal

[120] US, Securities and Exchange Commission, *Report of the Commission in the Matter of Eni S.P.A., Respondent,* Administrative Proceeding File No. 3-19751 (Washington, DC: US Government Printing Office, 2020).
[121] See OECD, *The Detection of Foreign Bribery* (Paris: OECD, 2017) at 121 [OECD, *Detection*]; see also Marie Chêne, "The linkage between corruption and violations of competition laws" (2016), online (pdf): *Transparency International* <knowledgehub.transparency.org/helpdesk/the-linkages-between-corruption-and-violations-of-competition-laws>.
[122] See Ida M Tarbell & David M Chalmers, *The history of the Standard Oil Company: briefer version* (New York: Dover Publication, 2003) (asserting that Rockefeller and his associates "fought their way to control by rebate and drawback, bribe and blackmail, espionage and price cutting, and perhaps even more important, by ruthless, never slothful efficiency of organization and production" at xiii).
[123] See Al-Kasim, Søreide & Williams, "Grand corruption", *supra* note 82 at 23.
[124] *Ibid.*
[125] See Alina Mungiu-Pippidi, "Corruption: Good governance powers innovation" (2015) 518:7539 Nature News 295 at 297.
[126] See generally Roberto Burguet & Martin K Perry, "Bribery and Favoritism by Auctioneers in Sealed-Bid Auctions" (2007) 7:1 BE J Theoretical Econs.

exemplifies the different schemes and means involved in bid rigging. In this case, corrupt executives ensured cartel companies' participation and contracts securing by providing inside information, manipulating the bidding process, approving non-compliant contracts, and influencing decisions to favor specific companies within the cartel as well as inflating the cost of Petrobras projects.[127]

In negotiations and contracting, bribery may be employed to influence decisions on crucial issues, including, but not limited to, recovery rates, profit sharing, exploitation point selection, production rate and duration, exemption rules, and compliance with commitments or regulations such as environmental laws and operational reports.[128] An example of bribery in rate determination is illustrated by Jorge Alvarado, the head of Bolivian Yacimientos Petroliferos Fiscales Bolivianos, who faced allegations of fraud and bribery in a 2006 deal with a Brazilian company, wherein he purportedly received US $4.5 million to substitute diesel for crude oil at a lower-than-market price.[129] A pertinent case involving bribery to violate regulations is Niko Resources Ltd., a Canadian oil and gas company. In 2005, an explosion occurred in one of Niko's fields in Bangladesh, resulting in substantial environmental and local damages.[130] In 2011, Niko admitted that, at the time of the explosion, the company offered a luxury SUV and a trip to Calgary, New York, and Chicago to the Bangladeshi Minister of Energy to influence his decision regarding

[127] US, Securities and Exchange Commission, *Report of the Commission in the Matter of Petróleo Brasileiro S.A. – Petrobras,* Administrative Proceeding File No. 3-18843 (Washington, DC: US Government Printing Office, 2020) at 17 [SEC, *Petróleo Brasileiro*].
[128] See Al-Kasim, Søreide & Williams, "Grand corruption", *supra* note 82 at 22.
[129] "Bolivia's Morales replaces head of state oil firm" cited in Al-Kasim, Søreide & Williams, "Grand corruption", *supra* note 82 at 26.
[130] Peter Bowal & Joshua Beckie, "International Corporate Political Corruption: the Case of Niko Resources Ltd" (1 July 2012)**,** online: *Lawnow* <www.lawnow.org/international-corporate-political-corruption-the-case-of-niko-resources-ltd/>.

Niko's repatriation and ongoing business dealings.[131] Finally, TNOCs may resort to offering bribes to bypass environmental laws, illicitly obtain environmental permits, or mitigate environmental penalties.[132]

Bribery schemes in the oil and gas exploration and production

In the petroleum exploration and production phase, bribery schemes involve influencing contract inspections, overlooking breaches, and impacting contract performance. Attempts to exceed authorized resource production or extract resources from unauthorized locations may be fueled by bribery.[133] Another motivation for bribery at this stage is expediting the issuance of licenses or obtaining permits, reflecting the adage "time is money" [134] due to financial implications and loan considerations.[135] TNOCs, recognizing of time's importance, may use bribes to expedite administrative processes, while officials, aware of this, may intentionally create "bottleneck situations" to extort bribes for acceleration.[136] This may include deliberate delays in permit issuance or customs clearance in order to demand bribes from TNOCs in need of specific license or equipment such as drilling.[137] Regarding tax regulations, TNOCs may offer bribes to tax authorities in exchange for conducting the tax or duty assessments at lower rates. For example, in 2014, SEC charged Layne Christensen Company, a US-based construction and drilling company

[131] Blaney McMurtry LLP, "The Niko Resources Anti-Bribery Case" (1 June 2013), online: *Blaney McMurtry LLP* <www.blaney.com/articles/the-niko-resources-anti-bribery-case>.
[132] See e.g. Henry O Akaeze, "Distortions in oil contract allocation and environmental damage in the presence of corruption" (2020) 24:1 Rev Development Econs 188; see also OECD, *Corruption in the Extractive*, *supra* note 55 at 60–61.
[133] See OECD, *Corruption in the Extractive*, *supra* note 55 at 61. See also Al-Kasim, Søreide & Williams, "Grand corruption", *supra* note 82 at 23.
[134] Ian E Marshall, "A survey of corruption issues in the mining and mineral sector" (2001) 15 Intl Inst for Envt & Development 3 at 10.
[135] See OECD, *Corruption in the Extractive*, *supra* note 55 at 60–61.
[136] Al-Kasim, Søreide & Williams, "Grand corruption", *supra* note 82 at 19. See also EY, *Managing bribery and corruption risks in the oil and gas industry* (London: EY, 2016) at 7.
[137] See e.g. EY, *supra* note 139 at 8.

in energy resources, with offering bribes to foreign officials in different African countries to lower its tax liabilities.[138]

In the operational stage, one potential area for bribery is in renegotiations or amendments to contracts. Due to the extended timeframe of petroleum projects, there may be a need to modify terms and conditions between the initial negotiation and production. Companies may resort to "gifts or facilitation payments to influence political decisions and deter the government in place from renegotiating or changing the rules of the game (e.g., increasing the price of resources sold by the state)."[139] Bribery can sway revisions in contractual terms, such as taxes, annual fees, exemptions, or contract extensions.[140]

Bribery schemes in the procurement activities

Bribery schemes in the procurement phase pose particular risks, especially given the substantial expenditures involved in petroleum projects. Instances of bribery may be evident in the awarding of procurement contracts to local third parties, a practice often mandated by host states to require TNOCs to engage local suppliers or specific vendors and providers.[141] Such policies make procurement contracts lucrative while intensifying competition among local companies and prompting them to offer bribes to TNOCs in hopes of securing contract awards. For example, in Kazakhstan, a high-level official in an NOC reported that the average bribe amount for awarding procurement contracts in the petroleum sector is approximately 10% of the contract value.[142]

[138] US, Securities and Exchange Commission, *Report of the Commission in the Matter of Layne Christensen Company*, Administrative Proceeding File No. 3-16216 (Washington, DC: US Government Printing Office, 2014) at 9–27.
[139] OECD, *Corruption in the Extractive*, *supra* note 55 at 38.
[140] See Al-Kasim, Søreide & Williams, "Grand corruption", *supra* note 82 at 25–26.
[141] See e.g. Peter Arthur & Emmanuel Arthur, "Local content and private sector participation in Ghana's oil industry: an economic and strategic imperative" (2014) 61:2 Africa Today 57; see also EY, *supra* note 139 at 7.
[142] See Heiko Pleines & Ronja Wöstheinrich, "The international–domestic nexus in anti-corruption policy making: The case of Caspian oil and gas states" (2016) 68:2 Europe-Asia Studies 291 at 302.

Another scenario involves bribery arrangements between state officials and TNOCs, where TNOCs engage local third-party companies to facilitate bribe payments through corrupt sub-contract arrangements. For example, in a case in Azerbaijan, the oil ministry and the NOC, SOCAR, used sub-contractors indirectly controlled by them while executing bribery sub-contract arrangements.[143] Moreover, due to differing cultural norms and business standards, local employees or companies may perceive paying bribes or facilitation payments to officials as routine and legitimate in conducting business.[144] Research conducted on procurement bribery on 11,000 companies in 125 countries reveals that JVs with local headquarters often face higher bribery expenses compared to subsidiaries of foreign corporations.[145] This discrepancy is attributed to the stronger connections of JVs with domestic partners, whereas subsidiaries tend to adhere more closely to the anti-corruption regulations and laws of their home country.[146]

ii. Unmasking embezzlement in petroleum pilferage

Embezzlement or the misappropriation of funds, which is also acknowledged as a form of corruption in the studied anti-corruption instruments in the Subsection (1), remains a persistent challenge in the management of oil and gas resources. This illicit practice occurs when individuals divert these resources or redirect the generated revenues abroad or into their personal coffers.[147] In certain cases, embezzlement may result in *illicit enrichment*,[148] another cited corrupt act that

[143] "Corruption and oil in Azerbaijan", *OBCT* (13 January 2013), online: <www.balcanicaucaso.org/eng/Areas/Azerbaijan/Corruption-and-oil-in-Azerbaijan-109421>.
[144] See generally Vijay S Sampath & Noushi Rahman, "Bribery in MNEs: The dynamics of corruption culture distance and organizational distance to core values" (2019) 159:3 J Bus Ethics 817. See also Matt A Vega, "The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees" (2009) 46:2 Harv J on Legis 425; EY, *supra* note 139 at 10.
[145] Anna D'Souza & Daniel Kaufmann, "Who bribes in public contracting and why: worldwide evidence from firms" (2013) 14:4 Econs Governance 333 at 337.
[146] *Ibid*.
[147] See e.g. Dawit Kiros Fantaye, "Fighting Corruption and Embezzlement in Third World Countries" (2004) 68:2 J Crim L 170 at 173.
[148] See e.g. *UNCAC*, *supra* note 75, art 20.

refers to a substantial and unexplained increase in the individual's personal wealth. The following explores all these opportunities for the misappropriation of funds at various levels within the petroleum sector. Furthermore, in some instances, embezzlement resembles the *abuse of functions*,[149] another corrupt act addressed in the anti-corruption instruments under study. Abuse of functions occurs when someone performs or neglects their duties to gain an undue advantage.[150]

Embezzlement can manifest as the pilfering of oil barrels and gas pipelines for later unauthorized sales. Commonly referred to as "oil theft," this form of embezzlement is widespread in certain oil-rich states; for example, Nigeria lost more than 120,000 barrels per day to this illicit activity in the first half of 2019.[151] Oil theft varies from small-scale pilfering in local refineries to large-scale operations in repositories or export terminals.[152] An example of the former is individuals in Mexico stealing oil from the Mexican NOC, PEMEX, resulting in approximately 1,145 truckloads of oil being siphoned off the pipelines daily.[153] On the other hand, large-scale oil theft was exposed in the UN Oil-for-Food scandal in Iraq. Originally intended to allow Iraq to sell limited oil for providing food to its civilians suffering under UNSC sanctions, the program provided the Iraqi government with opportunities to smuggle the oil and sell it for their own gains.[154]

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[149] See e.g. *ibid*, art 19.

[150] The study acknowledges that illicit enrichment and abuse of functions are distinct forms of corruption that can also result from behaviors such as bribery, favoritism, and conflicts of interest. However, in the petroleum sector, they frequently coincide with embezzlement. This interconnectedness arises from the numerous opportunities within the sector to exploit positions or roles for financial advantage. Therefore, for the sake of conciseness, the study categorizes these two practices under the broader umbrella of embezzlement.

[151] "Oil theft cost Nigeria 22 million barrels in first half-NNPC", *Reuters* (1 August 2018), online: <www.reuters.com/article/world/oil-theft-cost-nigeria-22-million-barrels-in-first-half-nnpc-idUSL5N25Q46J/>.

[152] See Christina Katsouris & Aaron Sayne, *Nigeria's criminal crude: International options to combat the export of stolen oil* (London: Chatham House, 2013) at 2–5; Goddey Wilson, "The Nigerian state and oil theft in the Niger Delta region of Nigeria" (2014) 16:1 J Sustainable Development in Africa 69 at 73–74.

[153] Prasanta Kumar Dey & Oscar Rodriguez-Espindola, "Mexico is being held to ransom by oil thieves and systemic corruption" (26 February 2019), online: *the Conversation* <theconversation.com/mexico-is-being-held-to-ransom-by-oil-thieves-and-systemic-corruption-111118>.

[154] See e.g. Don Liddick, "The United Nations Oil-for-Food Program: Corruption, Bribery and International Relations in the Serious Crime Community" in Frank Bovenkerk & Michael Levi, eds, *The Organized Crime Community* (New York: Springer, 2007) 59.

In NOCs, it is not uncommon for officials to engage in the unauthorized sale of national oil and gas to reap personal benefits. An illustrative case of embezzlement in petroleum revenues involves the Venezuelan NOC, PDVSA, where Venezuelan politicians and state officials embezzled over $1 billion from 2014 to 2018, resulting in the exploitation of Venezuela's foreign exchange system.[155] Moreover, revenues from petroleum contracts, including the sale of oil and gas, royalties, bonuses, or payments for licenses and permits, may be directly funneled into the officials' pockets.[156] In 2003, an eight-year investigation revealed that from 1989 to 1993, about 40 former officials in Elf Aquitaine, a state-own French company, and several intermediaries embezzled about US $400 million through secret deals in different countries, particularly in Africa.[157] Furthermore, in the collection stage of taxes and duties, officials may divert the remittances to their personal bank accounts instead of the state's treasury.[158] For example, the low tax revenues in Sub-Saharan African countries are associated with the fact that authorities embezzle tax revenues from the extractive sector.[159] These cases indicate the misuse of entrusted discretionary power by officials, who falsely claim ownership of resources for personal benefit rather than the state's welfare.

[155] See e.g. Giulia Saudelli, "How millions of 'dirty dollars' were laundered out of Venezuela", *Deutsche Welle* (13 March 2019), online: <www.dw.com/en/how-millions-of-dirty-dollars-were-laundered-out-of-venezuela/a-47867313>.

[156] See e.g. US, Senate Committee on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations of the Committee on Governmental Affairs United States Senate, 108th Cong, *Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act* (Washington, DC: US Government Printing Office, 2004) (revealing that "[o]il companies operating in Equatorial Guinea may have contributed to corrupt practices in that country by making substantial payments to … individual [Equatorial Guinea] officials, their family members, or entities they control" at 6).

[157] Global Witness, "Elf trial throws spotlight on oil and corruption" (17 March 2003), online: *Global Witness* <www.globalwitness.org/en/archive/elf-trial-throws-spotlight-oil-and-corruption>. See also Suzanne Daley, "8-Year Investigation of Corruption at French Oil Company Ends", *The New York Times* (5 February 2002), online: <www.nytimes.com/2002/02/05/world/8-year-investigation-of-corruption-at-french-oil-company-ends.html>.

[158] See OECD, *Corruption in the Extractive*, *supra* note 55 at 9.

[159] See Martin Stürmer, "Let the good times roll? Raising tax revenues from the extractive sector in sub-Saharan Africa during the commodity price boom" (2010) Leibniz Information Centre for Economics Working Paper No 7/2010 at 20.

In addition to oil and gas resources, petroleum projects include invaluable assets and equipment that are at the risk of misappropriation. Individuals may use these assets for personal gain or sell them to others. The case of the missing Fortuna Oil Rig offers an illustrative example, involving an undelivered oil drilling rig that Iran purchased in 2011.[160] Due to sanctions, the Iranian government faced challenges in renting oil rigs which prompted them to engage a mediator to procure an oil rig on their behalf. While the mediator received $87 million from the government, he embezzled the funds and invested them elsewhere for personal benefit.[161]

Another area susceptible to the risks of misappropriation is business and travel expenses. Individuals may exploit state or TNOC funds for personal benefits, such as purchasing unnecessary expensive meals or indulging in luxury entertainment while conducting businesses. A related case is that of Diezani Alison-Madueke, a former Nigerian oil minister. An investigation revealed that in 2011, during her tenure, she used state funds to purchase a US $37.5 million apartment complex in one of Lagos's most expensive areas.[162]

One more fertile ground prone to the occurrence of embezzlement is aid program funds, such as development aids or national and international loans intended for major projects or equipment purchases.[163] When it comes to budget expenditures, individuals with access to such funds may divert significant amounts to their own pockets. This misappropriation can take the form of

[160] Bozorgmehr Sharafedin, "Broker says he's innocent in missing iran oil rig case", *Reuters* (4 September 2015), online: <www.reuters.com/article/us-iran-oil-scandal-idUSKCN0R41I920150904>. See also "Indictments in the 'Missing' Oil Rigs case", *Radio Farda* (8 August 2017), online: <en.radiofarda.com/a/iran-indicts-six-for-missing-oil-rigs/28665679.html>.

[161] See "Poul-e Dakal-e Nafti-e Iran dar Camp-e Tablighiee' Trump" [Iranian Oil Rig's Money in Trump's Presidential Campaign], *Ghanoon* (21 May 2018), online: <www.ghanoondaily.ir/fa/news/detail/78877/> [translated by author].

[162] Yomi Kazeem, "Nigeria has seized a $37.5 million luxury apartment complex from its ex-oil minister", *Quartz Africa* (8 August 2017), online: <qz.com/africa/1049026/diezani-alison-madueke-corruption-nigeria-has-seized-a-37-5-million-luxury-apartment-complex-from-its-ex-oil-minister>.

[163] See e.g. Thompson Ayodele, Temba A Nolutshungu & Charles K Sunwabe, "African perspectives on aid: Foreign assistance will not pull Africa out of poverty" (2005), online: *CATO Institute* <www.cato.org/publications/economic-development-bulletin/african-perspectives-aid-foreign-assistance-will-not-pull-africa-out-poverty>.

investing money in white elephant projects or acquiring non-essential items, overpricing them, and pocketing the surplus. The example here is also the case of SOCAR in 2003 when it engaged an intermediary company, Baku Factory of Deepwater Constructions, and misappropriated the development funds provided by the European Bank for Reconstruction and Development, a World Bank (WB) branch, and the International Finance Corporation for the Azeri-Chirag-Guneshli project.[164] Instead of advancing the project, the funds transferred to sub-contractors controlled by SOCAR, serving as a payment for their overpriced maintenance.[165]

iii. Conflicts of interest: When loyalty and self-interest collide

Another prevalent type of corruption is conflicts of interest, although it is not explicitly mentioned in the studied anti-corruption instruments as a distinct type of corrupt practice. A conflict of interest arises when an individual's personal interests, or those of their family members and friends, influence their decisions and performance in their professional roles. In the petroleum sector, conflicts of interest can manifest in different phases and levels of projects. Among petroleum contracts, JVs are particularly susceptible to conflicts of interest.[166] Given the competitive relationship among JV partners, whether private or state-owned companies, conflicts of interest can manifest in "self-dealing, corporate opportunities, and disclosure."[167]

At the highest level, personal interests can influence the performance of politicians and state officials in their respective positions. Opportunistic politicians may exploit their positions to pass or alter laws and regulations to support projects that offer personal benefits. Some politicians may

[164] See Elina Konstantinidou, *A study of the Extractive Industries Transparency Initiative using Azerbaijan as a case study* (PhD Dissertation, University of Surrey School of Law, 2015) at 107–08 [unpublished].
[165] *Ibid*.
[166] See e.g. D A MacWilliam, "Fiduciary Relationships in Oil and Gas Joint Ventures" (1970) 8:2 Alta L Rev 233.
[167] Zenichi Shishido, "Conflicts of Interest and Fiduciary Duties in the Operation of a Joint Venture" (1987) 39:1 Hastings LJ 63.

hold dual roles, serving both in the state and a petroleum company simultaneously.[168] For example, a parliament member tasked with approving petroleum projects might also be a stakeholder in the assigned company or its sub-contractor. In 1998, Nigeria's oil minister granted oil discovery rights to Malabu, a petroleum company in which he held about 30 percent ownership.[169] These situations result in "corruption and inefficient regulation [becoming] two sides of the same coin," reinforcing each other.[170] Conflicts of interest may also arise among state-officials who hold different roles and stakes that create challenges between their personal and professional interests.[171] For example, an inspector responsible for assessing a company may also be a shareholder in that same company.

In procurement, a potential area of concern for conflicts of interest arises due to the substantial expenditures involved in petroleum projects. States may require TNOCs to engage local intermediates or enter into deals with specific vendors and providers, often because they share personal benefits with these third parties.[172] For example, an OECD report in 2016 revealed that a state-owned company president provided consultation services to private businesses regarding information about the state company and charged fees through third parties.[173] Moreover, NOCs may employ sub-contractors that they indirectly control, acting as conduits to divert funds into their own pockets.[174] Furthermore, NOCs might exclusively enter into procurement contracts with

[168] OECD, *Corruption in the Extractive*, *supra* note 55 at 39.
[169] Global Witness, "Shell and Eni's Misadventures in Nigeria" (17 November 2015), online: *Global Witness* <www.globalwitness.org/en/campaigns/oil-gas-and-mining/shell-and-enis-misadventures-nigeria/>.
[170] Aidt, *supra* note 90 at 274.
[171] See Aaron Sayne, Alexandra Gillies & Andrew Watkins, *Twelve Red Flags: Corruption Risks in the Award of Extractive Sector Licenses and Contracts* (New York: Resource Governance, 2017) at 27.
[172] See e.g. Oladeji Olaore & Rick Stapenhurst, "Parliamentary Oversight of Extractive Industries" (2018) 2:1 J Anti-Corruption L 1 at 2–3.
[173] OECD, *Corruption in the Extractive*, *supra* note 55 at 39.
[174] GIACC, "How Corruption Occurs/Examples of Corruption" (last modified 8 April 2024), online: *GIACC* <giaccentre.org/how-corruption-occurs/>.

a particular supplier company because, for instance, a board member holds an administrative or financial position in that private company.[175]

Conflicts of interest may also emerge in the context of international aid and funds within the petroleum sector. Sometimes, other countries provide development funds to oil and gas-producing countries.[176] While these international donors claim that the funds aim to improve governance institutions in recipient countries, they often conceal their actual commercial interests, which could involve expediting oil production or securing market access for their national companies.[177] Moreover, the countries receiving such funds may divert the money from its initial objectives. The challenges faced in an initiative related to the Chad-Cameroon pipeline project provide an illustrative example of such a scenario. A consortium of oil companies, in collaboration with the Chadian government and the WBG, initiated a Revenue Management Plan for the benefit of the Chadian people.[178] However, in 2005, the WBG suspended its contributions upon realizing that the Chadian government allocated oil revenues to security concerns instead of the development programs outlined in the original plan.[179]

iv. Favoritism: Exploring the shadows of clientelism and nepotism in the petroleum sector

Favoritism, a prevalent form of corruption in the petroleum sector, although not explicitly mentioned in the studied anti-corruption instruments in Subsection (A), involves showing unfair preference to specific individuals or groups. Favoritism takes different forms depending on the selected group. Clientelism, for example, occurs when certain benefits are provided to a group in

[175] OECD, *Corruption in the Extractive*, *supra* note 55 at 39.
[176] See e.g. Al-Kasim, Søreide & Williams, "Grand corruption", *supra* note 82 at 11, 27–28.
[177] *Ibid*.
[178] FESS, *Oil and Gas and Conflict Development Challenges and Policy Approaches*" (Atlanta: Fess, 2006), online (pdf): <www.fess-global.org/files/OilandGas.pdf> at 19.
[179] *Ibid*.

exchange for their support.[180] Within clientelism, patronage involves appointing individuals to positions based on affiliations or connections rather than qualifications.[181] On one hand, cronyism entails awarding benefits or positions to friends or associates without considering their qualifications.[182] On the other hand, favoring relatives in professional and political matters constitutes nepotism.[183] Despite its diverse manifestations, favoritism generally refers to the act of selecting, recruiting, paying, and promoting individuals or entities based on factors other than merit and qualifications, often at the expense of others.

In the petroleum sector, favoritism indicates a scenario where factors beyond the competence of individuals and companies influence access to industry rights. Given officials' considerable discretionary power in awarding these rights, different forms of favoritism can dominate this sector. The substantial wealth generated from resource revenues may intensify and prolong patron–client relationships, particularly when states use oil rents as a reward for loyalty to their supporters.[184] Favoritism may also extend to a host state's relationships with other countries and their NOCs. For example, during the Hugo Chavez regime, the Venezuelan government showed favoritism toward Chinese oil companies in their projects.[185]

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[180] See e.g. Susan C Stokes, et al, *Brokers, voters, and clientelism: The puzzle of distributive politics* (Cambridge: Cambridge University Press, 2013) at 13.

[181] See e.g. Transparency International, "Patronage" (last visited 9 April 2024), online: *Transparency International* <www.transparency.org/en/corruptionary/patronage>; see also Bo Rothstein & Aiysha Varraich, "Corruption and Patronage" in Bo Rothstein & Aiysha Varraich, eds, *Making Sense of Corruptio*n (Cambridge: Cambridge University Press, 2017) (defining patronage as "a particularistic exchange that takes place between patron and client, where the object of exchange is that of public office; that is, the patron offers public office to the client in exchange for electoral support/political allegiance/etc, [which] is more simply understood as appointments to positions in the state" at 80) .

[182] See e.g. Naresh Khatri, Eric WK Tsang & Thomas M Begley, "Cronyism: A cross-cultural analysis" (2006) 37:1 J Intl Bus Studies 61.

[183] See generally, Tatu Vanhanen, "Domestic ethnic conflict and ethnic nepotism: A comparative analysis" (1999) 36:1 J Peace Res 55.

[184] See Pleines & Wöstheinrich, *supra* note 145 at 301.

[185] See Wenyuan Wu, *Chinese Oil Enterprises in Latin America* (London: Palgrave Macmillan, 2019) ch 2.

Favoritism in the petroleum sector may involve discriminatory practices among companies. For example, a host state may favor its national companies by granting them benefits and exemptions, while imposing stricter regulations on TNOCs,[186] either to secure support from local elites or to retain revenue within the country.[187] Treatment of local companies can also vary, with TNOCs sometimes required to form JVs with local partners, potentially favoring companies owned by officials.[188] In certain cases, TNOCs may be "advised" to choose specific local suppliers with close ties to public officials for favorable business outcomes.[189] An example is an oil consortium formed by Cobalt International Energy, a US-based TNOC, and two Angolan local companies, one of which was later revealed to be owned by a former chairman of Sonangol, the Angolan NOC, and a minister of state.[190] Another area prone to favoritism is procurement activities, where a company might unduly favor a supplier over other competitors for reasons unrelated to market-based considerations in the selection of companies for procurement.

The revenue management stage is also susceptible to favoritism, as transactions involving oil and gas revenue funds may circumvent budgetary control and become sources of patronage and nepotism. In funds such as the Angola Sovereign Fund, Iran's National Development Fund, and Russia's National Wealth Fund, oil revenues serve as channels for discretionary distribution among the political elite.[191] Investment decisions related to the revenue may be tainted by favoritism and clientelist practices. These funds might finance companies owned by well-

[186] See Al-Kasim, Søreide & Williams, "Grand corruption", *supra* note 82 at 20.
[187] See generally Silvana Tordo, "National oil companies and value creation" (2011) World Bank Working Paper No 218.
[188] OECD, *Corruption in the Extractive*, *supra* note 55 at 43–44.
[189] *Ibid* at 56.
[190] Tom Burgis and Cynthia O'Murchu, "Spotlight falls on Cobalt's Angola partner", *Financial Times* (15 April 2015), online: <www.ft.com/content/1225e3de-854d-11e1-a394-00144feab49a?_i_location>.
[191] Andrew Bauer, *Managing the public trust: How to make natural resource funds work for citizens* (New York: Natural Resource Governance Institute, 2013) at 5.

connected elites or projects aligned with the state's political goals.[192] An OECD report highlights a case where a manager in a national natural resource fund hired a foreign bank, his former employer, as an external manager of fund's assets.[193] Moreover, a state may discretionarily redistribute petroleum revenues among its government divisions, expecting political loyalties in return.[194]

Moreover, the transfer and sale of licenses and concessions create another fertile ground for favoritism. Contracts may be awarded to individuals and companies with close ties to high-level public officials. An OECD report cites a "grabbing and flipping" case in which, in an oil concession, assets were originally transferred to shell companies owned by an individual affiliated with a high-ranking official at a price lower than the market.[195] The person further sold the assets to some TNOCs at market price. This type of favoritism is more common in the privatization of state-owned companies and their bidding processes.[196] During the pre-privatization stage, asset evaluators and consultants may be selected based on their close connections to public officials.[197] These assessors may manipulate the value of assets to favor certain bidders or reveal confidential information to potential bidders.[198] Lastly, bidding contests may also exhibit favoritism, as seen in criteria changes designed to benefit specific bidders.[199]

[192] *Ibid* at 23.
[193] OECD, *Corruption in the Extractive*, *supra* note 55 at 93.
[194] Michael Warner & Kyle Alexander, "Sub-National Implementation of the Extractive Industries Transparency Initiative (EITI)" (2006) Overseas Development Institute Issue Paper, at 20.
[195] OECD, *Corruption in the Extractive*, *supra* note 55 at 69.
[196] See e.g. Marie Chene, *Corruption in natural resource management in Mongolia* (Bergen: U4, 2012).
[197] See OECD, *Corruption in the Extractive*, *supra* note 55 at 72.
[198] *Ibid*.
[199] *Ibid* at 44.

v. Fraudulent practices: Deceit and deception in the petroleum sector

Fraud, characterized by intentional deceit or misrepresentation to gain undue advantages, is often recognized as a distinct criminal offense than corruption. However, given its intersection with corrupt practices, this study considers fraud as a form of corruption within the petroleum sector, as acknowledged in two studied anti-corruption instruments in Subsection (A). Throughout different phases of the petroleum industry, fraudulent activities manifest in several ways.

Most importantly, fraudulent practices can infiltrate the bidding processes for petroleum contracts, where collusion between bidders and decision-making officials manipulates the outcome of the tendering process. Such collusive actions may impact different aspects of the bids, including specifications and conditions, application selection, winner determination, and contract operation.[200] Fraudulent activities also manifest through bid-rigging schemes, where bidders conspire with each other to predetermine the winner of procurement contracts and manipulate bid prices. In such scenarios, rejected bidders may later act as subcontractors. A case in point is related to the Petrobras once again, where the SEC uncovered bid rigging by sixteen contractors between 2004 and 2012, resulting in the awarding of contracts and inflated contract costs.[201]

Fraudulent activities may occur at the operational level in petroleum projects. Before initiating oil and gas production, companies must submit a field development plan, providing key details such as production profile and cost recovery plans.[202] The production profile shows the production volume from the project's initiation to its completion and estimates the recoverable resource

[200] See OECD, *Detection*, *supra* note 124 at 133.
[201] SEC, *Petróleo Brasileiro*, *supra* note 130 at 16. See also Paul-Wais, "Behind Petrobras $1.8 Billion FCPA Settlement, An Interesting Accounting" (2 October 2018), online: *Paul-Wais* <www.paulweiss.com/practices/litigation/anti-corruption-fcpa/publications/behind-petrobras-18-billion-fcpa-settlement-an-interesting-accounting?id=27511>.
[202] See Al-Kasim, Søreide & Williams, "Grand corruption", *supra* note 82 at 143.

amount.[203] Although revisions to the production profile plan may occur legitimately due to factors such as financial market conditions and reservoir limitations, deviations from the initially estimated numbers may signal fraudulent practices.[204] Seeking larger financial figures, companies may manipulate the value and nature of costs presented in their field development plans.[205] Moreover, fraud at the operational level include other practices, such as payments to shell companies, engagement in fictitious work, duplication of payments, inflating invoices, presenting false information or inspection reports, using lower-quality materials, and causing unjustified project delays.[206] For example, in 2016, Nigeria discovered "over 23,000 ghost workers," including those in the petroleum industry, who were on the payroll but did not contribute any actual work.[207] Another case involves Joseph Hilton, where in 2012, the SEC accused him of fraudulent activities, alleging that he sold partnerships for oil drilling projects while falsely claiming that his firm had acquired oil wells from Exxon Mobile.[208]

Fraudulent activities related to taxes can distort information concerning financial transactions, payments, and money flows in tax returns, bank records, financial accounts, and accounting books.[209] Individuals and companies often fail to report bribe payments, either intentionally mislabeling them as allowable business expenses in their tax accounts or omitting them altogether. In accounting and reporting, illegal payments may be recorded under legitimate categories such as

[203] For more information on the preparation of the field development plan, see Farouk Al-Kasim, Tina Søreide & Aled Williams, "Shrinking oil: Does weak governance and corruption reduce volumes of oil produced?" (2010) U4 Issue working paper No 2010.3 at 9–10 [Al-Kasim, Søreide & Williams, "Shrinking oil"].
[204] See Al-Kasim, Søreide & Williams, "Grand corruption", *supra* note 82 at 25.
[205] *Ibid* at 24.
[206] For further details, see OECD, *Bribery in Public Procurement* (Paris: OECD, 2007) at 22–23.
[207] See "Nigeria to save about $11.5m monthly after clearing ghost workers", *Africa News* (6 August 2016), online: <www.africanews.com/2016/06/08/nigeria-to-save-about-115m-monthly-after-clearing-ghost-workers>.
[208] US, Securities and Exchange Commission, *Report of the Commission in the Matter of Joseph Hilton: A/K/A Joseph Yurkin, Respondent*, Administrative Proceeding File No. 3- 15273 (Washington, DC: US Government Printing Office, 2012) at 5–6.
[209] See generally Farok J Contractor, "Tax avoidance by multinational companies: Methods, policies, and ethics" (2016) 1:1 Rutgers Bus Rev 27. See also OECD, *Detection*, *supra* note 124 at 78–82.

consultant fees, sponsor fees, marketing and advertising expenditures, commissions, or third-party services. Transfer pricing is another mechanism employed to distribute the costs and revenues of a corporation among related companies, subsidiaries, or divisions, thereby obscuring the true value of transactions.[210] TNCs may engage in tax evasion and improper pricing practices to maximize profits and minimize costs.[211] To evade taxes, they may use tax havens,[212] shell companies, intermediaries, fictitious employees, as well as accounts belonging to close relatives or friends.[213] In addition, through supply chain accounting, companies and individuals can forge documents, and manipulate purchase bills and invoices to conceal other corrupt practices.[214] For example, a 2016 report by the International Transport Workers Federation alleged that major TNOCs, including Chevron and CNOOC, employed underground structures and tax havens for tax evasion schemes, resulting in an estimated uncollected potential tax revenue of approximately £120 billion.[215]

vi. Money laundering: Concealing dirty money in the petroleum sector

Similar to fraud, money laundering is a distinct criminal act from corruption; however, it often complements corrupt activities. Individuals, officials, and companies engaged in corrupt practices frequently resort to money laundering to obscure the origin of their earnings and create challenges for authorities in detecting and confiscating the proceeds. Money laundering, cited in the majority

[210] See generally Prem Sikka & Hugh Willmott, "The dark side of transfer pricing: Its role in tax avoidance and wealth retentiveness" (2010) 21:4 Critical Perspectives on Accounting 342.
[211] Peter Dobers & Minna Halme, "Corporate Social Responsibility and Developing Countries" 2009 16:5 Corp Soc Responsibility & Envt Management 237.
[212] Prem Sikka, "The role of offshore financial centers in globalization" (2003) 27:4 Accounting Forum 365 (claiming that tax havens constitute an integral part of globalized world).
[213] OECD, *Corruption in the Extractive*, *supra* note 55 at 15.
[214] See generally, Shuili Du & Edward T Vieira, "Striving for legitimacy through corporate social responsibility: Insights from oil companies" (2012) 110:4 J Bus Ethics 413; see also EY, *supra* note 139 at 9.
[215] "ITF accuses North Sea oil majors of secretive tax evasion schemes", *Offshore Energy* (25 August 2016), online: <www.offshore-energy.biz/itf-accuses-north-sea-oil-majors-of-secretive-tax-evasion-schemes/> (citing the report by International Transport Workers Federation).

of studied anti-corruption instruments in Subsection (A), is also addressed in other legal international frameworks, such as the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,[216] and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime.[217]

The money laundering process typically consists of three stages: placement, layering, and integration.[218] The location where a corrupt act occurs is often different from where the proceeds of corrupt acts are laundered, as individuals or companies seek to transfer funds out of the country and distance themselves from the transaction or other involved parties in corruption.[219] In some cases, individuals or companies involved in corrupt practices attempt to launder the generated proceeds in third-party countries with favorable tax regulations and unclear disclosure requirements concerning beneficial owners.[220] Offshore financial centers, often found in countries in the Caribbean region, are cited as money laundering havens that provide individuals and entities with a secure environment for laundering proceeds from corrupt activities.[221] Layering activities, particularly in countries with insufficient disclosure requirements for financial transactions, may impede states from tracking and identifying the ultimate beneficial owners, as opposed to legal owners. Bearer shares, which lack shareholder names and are transferrable without registration, exemplify a method to conceal beneficial ownership and disguise financial transactions.[222] Lastly,

[216] *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, UN General Assembly, 19 December 1988 (entered into force 11 November 1990).
[217] *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, Council of Europe, 8 November 1990, European Treaty Series 141 (entered into force 1 September 1993).
[218] Michael Levi & Peter Reuter, "Money laundering" (2006) 34:1 Crime & Justice 289 at 311.
[219] See OECD, *Detection*, *supra* note 124 at 97–98.
[220] Joseph Kahn, "15 Countries Named as Potential Money-Laundering Havens", *The New York Times* (23 June 2000), online: <www.nytimes.com/2000/06/23/world/15-countries-named-as-potential-money-laundering-havens.html>.
[221] See e.g. Donato Masciandaro, ed, *Global Financial Crime: Terrorism, Money Laundering and Offshore Centres* (New York: Routledge, 2017).
[222] See e.g. Emery Kobor, "Money Laundering Trends" (2007) 55:5 US Attorneys' Bull 14 at 18.

integration involves transforming illicit proceeds into seemingly lawful business profits through regular financial or commercial activities.[223]

In the petroleum sector, individuals and companies may employ various tactics to conceal bribes or other illicit payments gained through corrupt practices and legitimize them in their tax records. These tactics include categorizing illegal payments as legitimate expenses, such as advisory services, sponsoring fees, marketing and advertising expenditures, commissions, or third-party services. Other money laundering methods involve the use of shell companies or private financial entities, off-the-books accounts and transactions, fictitious employees, and manipulation of invoices to launder the proceeds of corruption.[224] In the Carwash Scandal, the Petrobras money-laundering scheme used intermediary companies to transfer bribes and fraud-related gains, and in particular, Alberto Youssef, a black market banker, facilitated the process across multiple financial institutions and channeled funds overseas through false contracts and fictitious imports.[225] In the final stage, funds were moved abroad via fraudulent foreign exchange contracts, and payments, including a Land Rover Evoque, were made to key figures.[226]

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Having identified prevalent forms of corruption within the petroleum sector, the chapter now shifts its focus to explore the underlying reasons for their prevalence in this industry. Section (2) aims to explain the factors contributing to the endemic nature of corrupt practices in the petroleum sector by establishing a nexus between corruption and the governance framework within the sector.

[223] Levi & Reuter, *supra* note 222.
[224] OECD, *Corruption in the Extractive*, *supra* note 55 at 15.
[225] Lucas Maragno & José Alonso Borba. "Unearthing Money Laundering at Brazilian Oil Giant Petrobras" (2019) 22:2 J Money Laundering Control 400 at 403–4.
[226] *Ibid*.

2. The Challenges of Governance in the Petroleum Sector

Why do natural resources appear as a curse in some countries and a blessing in others? Why can certain resource-rich countries control corrupt practices within their petroleum sector while many cannot? Is the answer related to their governance? This section aims to answer these questions while discussing governance in oil-rich countries. The assumption, substantiated by evidence, is that good enough governance institutions, meaning a transparent and accountable governance system with the strong rule of law, are essential preconditions for preventing the negative consequences of resource abundance.

While Section (1) has presented different types and examples of corrupt practices along the petroleum value chain, this section attempts to explain why most oil-rich countries experience challenges with resource abundance and suffer from severe governance shortfalls. Historical factors such as colonialism, the emergence of autocratic leaders following colonies' independence, and Cold War competitions have usually left behind a legacy of dysfunctional governance systems in resource-rich countries.[227] Despite these historical grounds, when examining governance in the extractive sector, many scholars have invoked the notion of the *resource curse* to explain why resource-rich countries struggle to fully capitalize on their valuable resources.[228] Hence, Subsection (A) begins by elaborating on the resource curse theory, referencing some of its mechanisms—namely, Dutch Disease, rent-seeking behavior, and poor governance institutions. Among these, this study claims that, the quality of governance determines whether natural resources present as a curse or blessing in countries endowed with such resources.

[227] See Patrícia Galvão Ferreira, *Breaking the Weak Governance Curse: Global Regulation and Governance Reform in Resource-Rich Developing Countries* (Doctor of Juridical Science, University of Toronto Faculty of Law, 2012) at 87 [unpublished].
[228] The term "resource curse" was originally introduced by Richard Auty in 1993; see Richard Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (New York: Routledge, 1993).

Within the field of law and development scholarship, a rich body of literature has been devoted to *governance matters* and the concept of *good governance*.[229] Good governance is related to the quality and effectiveness of the government in executing its governing functions. In the petroleum sector, governance is defined as the "system for making and implementing decisions" with respect to the discovery and exploitation of oil and gas resources within a country, including relevant organizations, processes, formal and informal institutions, and practices conducted by both state and non-state actors.[230] Among the different components of good governance, this study argues that the rule of law, accountability, and transparency are essential indicators in the petroleum sector. Consequently, Subsection (B) discusses these good enough governance institutions while explaining their relevance to the nature of corruption in the petroleum sector.

A. Exploring the Resource Curse: A Question of Governance and Natural Resources

Paul Engberg-Pedersen, the Director-General of the Norwegian Agency for Development Cooperation, asserts that"[t]he so-called resource curse and specific petroleum industry dynamics make the oil and gas sector particularly prone to corruption, from the first speculation about potential oil in the ground through all stages ending in the spending (or misspending) of oil revenues."[231] The resource curse theory explains the connection between a state's wealth in natural resources and its consequent detrimental impact on both economy and governance. It refers to a blend of economic, political, and social circumstances that lead to the mismanagement of abundant natural resources in countries endowed with them. The heavy reliance on these resources

[229] See generally Daniel Kaufmann, Aart Kraay & Pablo Zoido, "Governance matters" (1999) World Bank policy research Working Paper No 2196; Brian Clive Smith, *Good Governance and Development* (New York: Macmillan International Higher Education, 2007); Thomas G Weiss, "Governance, good governance and global governance: conceptual and actual challenges" (2000) 21:5 Third World Q 795.
[230] Glada Lahn et al, *Good Governance of The National Petroleum Sector* (London: Chatham House, 2007) at 5.
[231] Charles McPherson & Stephen MacSearraigh, "Corruption in the petroleum sector" in J Edgardo Campos & Sanjay Pradhan, eds, *The Many Faces of Corruption* (Washington, DC: The World Bank, 2007) 191 at 191 (citing Paul Engberg-Pedersen's speech).

transforms their economies into environments vulnerable to external shocks and injects uncertainty into long-term economic policies. Pioneering scholars such as Jeffrey Sachs and Andrew Warner offer empirical supporting for the negative correlation between natural resource wealth and governance, particularly in terms of economic performance. Their comparative study of 95 countries form 1975 to 1995 reveals slower economic growth in countries with substantial natural resources compared to their resource-scarce counterparts.[232] Another empirical research suggests that while natural resources may temporarily boost income, their prolonged use triggers a "crowding-out effect on knowledge creation," which provides longer-term sustainability challenges.[233] Moreover, an International Monetary Fund (IMF) report identifies 47 resource-rich countries as resource-dependent between 2006 and 2010.[234]

At first glance, an abundance of petroleum may seem to promise substantial income for a resource-rich country, creating opportunities for economic growth and socio-economic development. In an ideal model, a resource-rich country manages its petroleum sector in a manner where revenues contribute to the enhancement of welfare and improvements in political, social, and economic conditions. However, this optimistic vision rarely aligns with reality, as not all petroleum revenues find their way into development strategies in these countries.[235] As noted by Iain Gary and Terry Karl, "[c]ountries that depend upon oil-exports, over time, are amongst the most economically

[232] Sachs & Warner, *supra* note 86.
[233] Elissaios Papyrakis & Reyer Gerlagh, "Resource windfalls, investment, and long-term income" (2006) 31:2 Resources Pol'y 117.
[234] Marcos Poplawski-Ribeiro et al, *Fiscal frameworks for resource rich developing countries* (Washington, DC: IMF, 2012) (considering "an indicative threshold for revenue dependency could be in the range of 20 to 25 percent of total fiscal revenue" Appendix I at 6).
[235] For the relationship between oil revenues and development consequences, see e.g. Erwin H Bulte, Richard Damania & Robert T Deacon "Resource intensity, institutions and development" (2005) 33:7 World Development 1029; Paul Collier & Benedikt Goderis, *Commodity Prices, Growth and the Natural Resource Curse: Reconciling a Conundrum* (Oxford: Oxford University, 2007).

troubled, the most authoritarian, and the most conflict-ridden states in the world today."[236] The work of Farouk Al-Kasim et al further shows how poor governance and corruption impact the quantity of produced oil and explain that only revenues derived from legally extracted, traded, and taxed oil can fund developmental projects.[237] This subsection addresses the mechanisms behind the resource curse, namely Dutch Disease, rent-seeking behavior, and weak governance institutions, in order to provide a comprehensive understanding of why natural resources, particularly oil in this case, may not always contribute to the development of countries endowed with such resources.

i. Oil boom and Dutch Disease

Dutch Disease describes the paradoxical economic phenomenon whereby a large inflow of revenue from natural resource exports, such as oil, leads to adverse effects on a country's broader economy.[238] The term originated during the Netherlands' experience in the 1960s when the discovery of natural gas reserves led to significant economic challenges. Various adverse effects arise from the abundance of oil in the economy.

The reliance on oil exploitation and production, in the absence of effective revenue management policies, detrimentally impacts other productive industries in oil-rich countries.[239] Most notably, following oil production, the upswing in oil revenues and exports results in the overvaluation of the national currency, influencing other tradable exports. Given the currency appreciation,

[236] Ian Gary & Terry Lynn Karl, *Bottom of the Barrel: Africa's Oil Boom and the Poor* (Maryland: Catholic Relief Services, 2003) at 18.
[237] See generally Al-Kasim, Søreide & Williams, "Shrinking oil", *supra* note 206.
[238] For the first time, in explaining the economy of the Netherlands after the discovery of large natural gas reserves in the North Sea, The Economist magazine dubbed this paradoxical situation "Dutch disease," see "The Dutch Disease", *The Economist* (26 November 1977) at 82-83.
[239] See generally W Max Corden & J Peter Neary, "Booming Sector and De-industrialization in a Small Open Economy" (1982) 92:386 Econ J 825.

agricultural or manufactured goods produced domestically become more expensive for foreign buyers, reducing demand for these goods abroad. At the same time, in the oil-rich country, imports become cheaper than domestic production, and this shift in favor of imports affects the competitiveness of non-oil exports. The prioritization of imported products reduces the demand for domestic goods, which in turn, impacts local manufacturing and causes a trade deficit in the economy. Ultimately, the expansion of the oil sector lowers the competitiveness of other sectors in international markets.[240] This is in addition to the instability caused by volatility in the oil market, where any changes in oil demand or supply greatly impact oil prices. In the long term, Dutch Disease also contributes to unemployment as the oil sector absorbs the labor force from other industries.

ii. Rent-seeking behavior: Rentier state and the role of the elite

The prevalence of resource rents in resource-rich countries also gives rise to the emergence of rent-seeking behavior. *Economic rent* refers to the money derived from a resource that exceeds the costs of its production. In the context of the oil industry, oil rent is the surplus income or profit earned from the production and sale of oil.[241] This amount is often substantial due to oil scarcity which allows its owners to demand higher prices. In oil-rich countries, where a significant proportion of revenues comes from oil rents, there is a tendency for rent-seeking behavior to emerge. Terry Karl notes, "the pursuit of oil rents by both domestic and international actors has produced an 'oil trap'—one that threatens not only the economic and political stability of petro-states but also the health of the international economy and the prospects for a more peaceful

[240] See e.g. Mahvash Saeed Qureshi, "Africa's Oil Abundance and External Competitiveness Do Institutions Matter?" (2008) International Monetary Fund Working Paper No 2008/172 (studying the impact of oil discovery in Sub-Saharan African countries, the authors suggests that "on average oil-rich countries trade less than non-oil-rich countries" at 25).

[241] For details on the amount of oil rents in the world and different countries, see e.g. World Bank, "Oil Rents (% Of GDP)" (last visited 10 April 2024), Online: *World Bank* <data.worldbank.org/indicator/NY.GDP.PETR.RT.ZS>.

world."[242] Rent-seeking behavior thus corresponds to attempts to increase wealth without generating new wealth and may further lead to pervasive corrupt practices affecting oil regulations, revenue management, state spending, and welfare benefits.[243]

Enormous natural resource rents can shape an oil-rich country into a *rentier state*, where the state regularly receives substantial economic rents from the export of natural resources.[244] Traditionally, in oil-rich countries, the state owns and regulates oil resources, and its primary wealth and revenues are contingent upon the fortuitous condition of having oil resources. Consequently, the rentier state relies on oil rents to secure its budget rather than establishing systems that require people and other economic sectors to pay taxes.[245] This situation puts citizens at a disadvantage in pressuring the state to provide entitled public services. The absence of effective checks on the state weakens the quality of governance institutions in the rentier state, leading to low expectations of transparency and accountability, and contributing to an increase in corrupt practices.[246] For example, Leonard Wantchekon's examination of 141 countries from 1950 to 1990 shows that a one percent growth in natural resource dependency may lead to an approximately eight percent increase in political authoritarianism.[247]

[242] Terry Lynn Karl, "Ensuring Fairness: The Case for a Transparent Fiscal Social Contract" in Humphreys, Sachs & Stiglitz, *supra* note 96, 256 at 257.
[243] See e.g. Al-Kasim, Søreide & Williams, "Shrinking oil", *supra* note 206 at 5–7.
[244] Mahdavy, *supra* note 72 at 428.
[245] See e.g. Beblawi & Luciani, *supra* note 72 at 10 (referring to the weakness in the taxation systems in the Arab world).
[246] See e.g. Hootan Shambayati, "The Rentier State, Interest Groups, and the Paradox of Autonomy: State Business in Turkey and Iran" (1994) 26:3 Comp Politics 307; Kiren A Chaudry, "Economic Liberalization and the Lineages of the Rentier State" (1994) 27:1 Comp Politics 25.
[247] Leonard Wantchekon, "Why do resource dependent countries have authoritarian governments?" (2002) 5:2 J African Finance & Econ Development 57; see also Michael L Ross, "Does oil Hinder Democracy?" (2001) 53:3 World Politics 325.

In a rentier state, rent-seeking behavior extends beyond the state itself, and other actors are also incentivized to capture rents "through unproductive and even corrupt means."[248] The primary beneficiaries of these rents are the ruling *elite*, a select group of political and economic actors holding disproportionate wealth, privilege, and political power in society.[249] This elite engages in fierce competition for control of oil resources, driven by the desire to augment their personal wealth.[250] This competition perpetuates rent-seeking behavior within the oil sector, as political actors, initially forming as an interest group, exploit the environment to invest in projects securing political support.[251] Rather than investing in a competitive economy, they channel oil rents through inefficient bureaucracies and unproductive industries. In addition, the elite establishes a patronage system to use resources for their political gain by hiring individuals who support them.[252] They shape a legal framework favoring corrupt practices and sidestepping formal anti-corruption norms and institutions.[253] The oil wealth further reinforces the elite's grip on power, leading to greater resistance against policy changes. Due to the incentives created by rents, the elite vehemently oppose institutional reforms that may threaten their interests, while simultaneously lacking the political will to change their status quo and address the harmful effects of oil dependency.[254] Consequently, despite the potential of substantial oil revenues to empower socio-economic

[248] Gary & Karl, *supra* note 240 at 19.
[249] See Richard M Auty, "Authoritarian Rentier States in a Broader Development Context" in Michael Dauderstedt & Arne Schildberg, eds, *Dead Ends of Transition: Rentier Economies and Protectorates* (Frankfurt: Campus Verlag, 2006) 36 at 43–44.
[250] See e.g. Al-Kasim, Søreide & Williams, "Shrinking oil", *supra* note 206 at 1–12.
[251] See You Jong-Sung & Sanjeev Khagram, "A Comparative Study of Inequality and Corruption" (2205) 70:3 Am Sociological Rev 539. See also Miguel Urrutia & Setsuo Yukawa, *Economic Development in Resource-Rich Countries* (Tokyo: United Nations University, 1988); William Asher, *Why Governments Waste Natural Resources: Policy Failures in Developing Countries* (Baltimore: Johns Hopkins University Press, 1999); James A Robinson, Ragnar Torvik & Thierry Verdier, "Political Foundations of the Resource Curse" (2002) 79:2 J Development Econs 447; Wright C Mills & Alan Wolfe, *The Power Elite* (Oxford: Oxford University Press, 2000).
[252] Kaufmann & Vicente, *supra* note 42 at 196.
[253] See Pleines & Wöstheinrich, *supra* note 145 at 301.
[254] See Persson, Rothstein & Teorell, *supra* note 44 at 452.

development and diversify the economy, rent-seeking behavior negatively impacts economic growth and development and increases poverty and inequality.[255]

Nigeria stands out as a classic example of an oil-rich country dealing with the challenges of a rentier state. With the tenth-largest oil reserves globally and a daily oil production of about two million barrels, Nigeria has witnessed a significant increase in its GDP since the discovery of oil.[256] In 2014, the country reached its GDP peak at $574.18 billion US, a notable rise from $4.2 billion US in 1960 when oil exploitation began.[257] Despite this economic growth, Nigeria ranks 161 out of 193 countries on the United Nation (UN)'s 2022 Human Development Index.[258] Before the discovery of oil, Nigeria's government heavily relied on agriculture as the primary productive sector. However, the extractive industry now accounts for 65% of the government's revenue,[259] indicating the presence of Dutch Disease in its economy. The Nigerian ruling elite, predominantly comprised of military and authoritarian regimes resistant to trade liberalization, have seized and controlled oil wealth. Intense competition among the elite for oil rents, coupled with weak governance institutions, has led to accountability issues regarding excessive budget spending.[260] Subsequently, rent-seeking behavior has become a "prominent activity,"[261] which transforms the

[255] See generally Connor Bildfell, "The Extractive Sector Transparency Measures Act: Critical Perspectives" (2016) 12:2 JSDLP 231 at 237; Mehlum, Moene & Torvik, *supra* note 74; Leonard Wantchekon & Nathan Jensen, "Resource Wealth and Political Regimes in Africa" (2004) 37:7 Comp Political Studies 816.
[256] Worldometer, "Nigeria oil" (last visited 11 April 2024), online: *Worldometer* <www.worldometers.info/oil/nigeria-oil/#google_vignette>.
[257] World Bank, "The World Bank Data, GDP - Nigeria" (last visited 11 April 2024), online: *World Bank* <data.worldbank.org/indicator/NY.GDP.MKTP.CD?end=2019&locations=NG&start=1960&view=chart>.
[258] UNDP, "Human Development Insights" (last visited 11 April 2024), online: *UNDP* <hdr.undp.org/data-center/country-insights#/ranks>.
[259] See EITI, "Nigeria" (last visited 11 April 2024), online: *EITI* <eiti.org/countries/nigeria>.
[260] See e.g. Rabah Arezki & Markus Brückner, "Oil rents, corruption, and state stability: evidence from panel data regressions" (2011) 55:7 European Econ Rev 955 (showing that from 1992 to 2005, oil rents in 30 oil-exporting countries influenced corruption and state stability); see also Paul G Adogamhe, "Reforming the Rentier State: The Challenges of Governance Reforms in Nigeria" (2008) 34:1/2 J Energy & Development 227; Kenneth Omeje, "The rentier state: Oil-related legislation and conflict in the Niger Delta, Nigeria: Analysis" (2006) 6:2 Conflict, Security & Development 211.
[261] Fidelis O Ogwumike & Eric K Ogunleye, "Resource-led development: An illustrative example from Nigeria" (2008) 20:2 African Development Rev 200 at 215.

political and administrative system into an "institutional patronage"[262] with little interest in allocating oil rents to productive industries. The elite's misappropriation of oil rents has deprived Nigerians of potential investments in income enhancement, education, health, and overall quality of life. It is estimated that since the 1970s, around $217.7 billion US has been stolen from the state's oil revenues through corrupt behavior and illegal practices.[263] This mismanagement has led to a significant increase in the poverty rate, soaring from 15% in 1960, the time of Nigerian independence, to 50% in 2021.[264] Rent-seeking behavior in Nigeria is not solely attributed to the elite; young people, seeking a share of the "national cake," have migrated from villages to cities, leaving behind farms with the older generation and contributing to the complex socio-economic challenges.[265]

iii. The impact of poor governance on petroleum sector management

Another part of the literature on the resource curse emphasizes the connection between governance institutions and resource abundance. The core assertation of this perspective suggests that existing weaknesses in governance institutions, regulations, and mechanisms for accountability can turn resource abundance into a curse in countries rich in natural resources.[266] For example, a study covering 124 countries between 1980 and 2004 concludes that "resource rents increase corruption if and only if the quality of the democratic institutions is below a certain threshold level."[267] Paul

[262] Ali Elwerfelli & JKA Benhin, "Oil a blessing or curse: A comparative assessment of Nigeria, Norway and the United Arab Emirates" (2018) 8 Theoretical Econs Letters 1136 at 1143.
[263] *Ibid*.
[264] Sanya Adejokun, "61 Years After Independence, Nigerians Poorer Now Than Ever", *Nigerian Tribune* (27 September 2021), online: <tribuneonlineng.com/61-years-after-independence-nigerians-poorer-now-than-ever/>.
[265] Ogwumike & Ogunleye, *supra* note 265.
[266] See Ivar Kolstad, Arne Wiig & Aled Williams, "Mission improbable: Does petroleum-related aid address the resource curse?" (2009) 37:3 Energy Pol'y 954 (stating "the negative impact of resources is conditional on governance [and countries] with good institutions are generally better able to deal with resource curse problems than countries with weak institutions" at 956).
[267] Sambit Bhattacharyya & Ronald Hodler, "Natural resources, democracy and corruption" (2010) 54:4 European Econ Rev 608 at 619; see also Rabah Arezki & Thorvaldur Gylfason, "Resource rents, democracy, corruption and conflict: evidence from Sub- Saharan Africa" (2013) 22:4 J African Economies 552; Anne D Boschini, Jan Pettersson

Collier, in *The Plundered Planet*, affirms that "[t]he resource curse is confined to countries with weak governance"[268] and explains how weak governance institutions poorly manage resource wealth and revenues. In resource-rich countries, rent-seeking behavior is more about the ownership of resources and control of extractive revenues than the mere existence of natural resources.[269] This phenomenon is attributed by the observation that natural resource abundance does not always result in the resource curse. Countries like Norway are examples for resource-rich countries that have effectively managed and regulated their natural resources while mitigating negative consequences. Norwegian oil sector is a classic example showing the importance of good governance in resource management.[270] Countries that successfully steer their resources for socio-economic development are labelled as "resource-abundant" rather than "resource-dependent."[271] These countries hold strong governance institutions, a powerful rule of law, and an active civil society.[272] Within these countries, the state executes appropriate policies and regulations to manage natural resources and revenues and address the negative impacts of resource abundance.[273] Appendix IV further describes the case of Norway to show that how a state can overcome the challenges associated with resource management.

& Jesper Roine, "Resource curse or not: A question of appropriability" (2007) 109:3 Scandinavian J Econs 593 (claiming that natural resources can be bad or good depending on their type and institutional settings).

[268] Paul Collier, *The plundered planet: Why we must--and how we can--manage nature for global prosperity* (Oxford: Oxford University Press, 2010) at 46.

[269] See generally Pauline Jones Luong & Erika Weinthal, "Rethinking the Resource Curse: Ownership Structure, Institutional Capacity, and Domestic Constraints" (2006) 9:1 Annual Rev Political Science 241.

[270] Another illustrative example of a resource-abundant country is Botswana, which overcame the negative impacts of the abundance of diamonds while having a stable and robust growth rate over the last decades. See generally Maria Sarraf & Moortaza Jiwanji, "Beating the Resource Curse: The Case of Botswana" (2001) World Bank's Environment Department Working Paper No 83.

[271] See Hunt, *supra* note 72 at 44.

[272] US, Senate Committee on Foreign Relations, 110th Cong, *The Petroleum and Poverty Paradox: Assessing U.S. and International Community Efforts to Fight the Resource Curse* (Washington, DC: US Government Printing Office, 2008) at 11. See also Frederick Van der Ploeg, "Natural resources: curse or blessing?" (2011) 49:2 J Econ Literature 366.

[273] See generally World Bank, "Striking A Better Balance: Volume 5. Final Workshop Report and Stakeholders Submissions or Comments. Extractive industries review" (Washington, DC: World Bank, 2003).

In brief, whether resource abundance manifests as a curse or a blessing lies not solely on the presence of natural resources but rather on the quality of governance, as evidenced by outcomes observed in specific resource-rich countries, such as Norway. Furthermore, the prevalence or absence of rent-seeking behavior within resource abundance is closely tied to the effectiveness of governance institutions managing these resources. Hence, it is essential to explore the individual components of governance, particularly those aligned with good governance principles in the petroleum sector in order to understand the dynamics of industry management. Subsection (B) will examine the correlation between corruption with good enough governance institutions of the rule of law, accountability, and transparency.

B. Breaking the Weak Governance Curse: Which Institutions Matter?

The preceding subsection briefly explains the mechanisms underlying the adverse impacts of natural resources, whereas this subsection seeks to demonstrate that *good enough governance* can diminish the negative consequences of oil wealth, thereby transforming it into a blessing. Revisiting the question of why oil acts as a resource curse for some oil-rich countries but a blessing for others underscores the key role of good governance institutions.[274] In other words, it is the management of resources that determines the extent of benefits derived from resource revenues.

The concept of good governance have systemic, political, and administrative dimensions.[275] Systemic dimension refers to the "regime" governing political and socio-economic relations,

[274] See generally Mohammed Akacem, Dennis Dixon Miller & John Leonard Faulkner, *Oil, Institutions and Sustainability in MENA: A Radical Approach through the Empowerment of Citizens* (New York: Springer, 2020). See also Michael Alexeev & Robert Conrad "The elusive curse of oil" (2009) 91:3 Rev Econ & Statistics 586; Erling Røed Larsen, "Escaping the resource curse and the Dutch disease?" (2006) 65:3 Am J Econs & Sociology 605 (emphasizing the role of "deliberate macroeconomic policy, the arrangement of political and economic institutions, a strong judicial system, and social norms" in managing resources).

[275] Adrian Leftwich, "Governance, Democracy and Development in the Third World" 1993 14:3 Third World Q 605 at 611.

which includes the role of government and other actors in promoting economic growth and human development for citizens.[276] Political dimension is characterized by a legitimate and authoritative state structure with a separation of legislative, executive, and judicial powers.[277] On the other hand, the administrative aspect of good governance involves an "efficient, open, accountable and audited public service which has the bureaucratic competence to help design and implement appropriate policies and manage whatever public sector there is."[278] Unlike the political and systemic dimensions, administrative governance centers on the execution of power and bureaucratic procedures within public administration. This form of good governance consists of rules, mechanisms, and institutions, whether formal or informal, that help the government in performing functions and implementing policies. While the first two dimensions are frequently linked to democratic principles, the administrative dimension is considered the baseline for good governance, or as Grindle calls it, "good enough governance."[279] A resource-rich country may not necessarily adhere to democratic ideals but can still demonstrate transparent and accountable administrative governance with a strong emphasis on the rule of law. This administrative aspect of governance is evident in *pockets of effectiveness*, a phenomenon found in countries with poor governance, where some exceptional governmental organizations operate and deliver public goods and services relatively effectively within an overall system that is corrupt, chaotic, and dysfunctional.[280] In this respect, interviewee Alpha$_2$ cited specific NOCs as examples of such

[276] *Ibid*.
[277] Some associate the political aspect of good governance with the tenets of liberal democracy, asserting that principles such as the rule of law, accountability, participation, and control of corruption are interconnected with democratic ideals. See e.g. Carlos Santiso, "Good governance and aid effectiveness: The World Bank and conditionality" (2001) 7:1 Georgetown Pub Poli'y Rev 1 (arguing that "[n]either democracy nor good governance is sustainable without the other" at 1).
[278] Leftwich, *supra* note 279.
[279] Grindle, *supra* note 11.
[280] See generally Michael Roll, ed, *The politics of public sector performance: Pockets of effectiveness in developing countries* (Abingdon: Routledge, 2014).

pockets, including Staatsolie in Surinam, Lebanese Petroleum Administration in Lebanon, and Aramco in Saudi Arabia.[281]

In addition to these dimensions, good governance has a large set of indicators. Among these, which elements have a key role in lifting the resource curse? A study of 82 resource-rich countries suggests that "institutions are decisive for the resource curse,"[282] determining whether resource abundance becomes a curse or a blessing. The research claims that the resource curse materializes in countries with "grabber-friendly institutions" but not in those with "producer-friendly institutions."[283] Producer-friendly institutions denote a context where rent-seeking behavior and production complement each other, whereas grabber-friendly institutions involve situations where rent-seeking behavior and production are in competition.[284] Grabber-friendly institutions may involve weak rule of law, insufficient protection of property rights, and limited transparency, leading to the proliferation of corrupt practices.[285] While this circumstance is unfavorable for producers competing with rent-seekers, producer-friendly institutions incentivize effective rent-seekers to also engage in productive activities.

In addressing the question of which producer-friendly institutions can effectively reduce rent-seeking behavior in an oil-rich country, the Good Governance of the National Petroleum Sector Project (GGNPSP) puts forth a set of common guidelines for good governance. Developed by decision-makers from 23 oil-producing countries, the GGNPSP outlines five universal principles deemed necessary for good governance in the petroleum sector: "clarity of goals, roles and responsibilities; sustainable development for future generations; enablement to carry out the role

[281] Interview of Alpha$_2$ (10 March 2023), Transcript at 3–4.
[282] Mehlum, Moene & Torvik, *supra* note 74 at 1.
[283] *Ibid* at 2.
[284] *Ibid* at 1.
[285] *Ibid*.

assigned; accountability of decision-making and performance; and transparency and accuracy of information."[286] Acknowledging the multifaceted nature of good governance, this study argues that the core tenets within the administrative aspect of good governance, namely the rule of law, accountability, and transparency, constitute good enough governance institutions in turning the resource curse into a blessing for oil-rich countries. The following will discuss these good enough governance institutions, examine their interplay with corruption, and explore their impacts on the petroleum sector.

i. The rule of law and corruption: Clash of institutions

The rule of law forms a key element of good governance, particularly in its administrative aspect, given the theoretical and practical interconnections between both concepts. The interpretation of the term "rule of law" varies depending on individuals' perspectives, influenced by the context and purpose for which the rule of law is under consideration. Approaches to the rule of law can be situated along a continuum, ranging from a narrow to a more comprehensive conception.[287]

At the narrow end of this continuum are definitions that limit the rule of law to its formal conception and focus on the state's role in law-making processes and law enforcement.[288] At its most basic level, the rule of law stipulates that everyone is bound by the law, or *treating like cases alike*, echoing Aristotle's principle. This minimalistic approach requires both citizens and government officials to be bound by and adhere to the law.[289] Moving along the continuum, more comprehensive criteria for the rule of law demanded. Fuller, in *The Morality of Law*, introduces

[286] Lahn et al, *supra* note 234 at 8.
[287] See Nandini Ramanujam, Mara Verna & Julia Betts, *Rule of Law and Economic Development: A Comparative Analysis of Approaches to Economic Development Across the BRIC Countries* (Montreal: McGill University, 2012).
[288] See e.g. Thomas Carothers, "The Rule-of-Law Revival" in Thomas Carothers, ed, *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, DC: Carnegie Endowment for International Peace, 2006) at 5.
[289] Brian Z Tamanaha, "The history and elements of the rule of law" (2012) Sing JLS 232 at 233.

"the inner morality of law," consisting of eight instrumental principles for the legality of the rule of law: generality, publicity, non-retroactivity, clarity, the absence of contradiction, feasibility, constancy, and congruity.[290] Joseph Raz expands these principles by incorporating the judiciary's guaranteed independence, principles of procedural justice, judicial review, and access to justice, viewing the rule of law as a reflection of the quality of legal systems.[291] At the far end of the continuum, definitions of the rule of law call for advanced requirements alongside formal criteria in law-making processes. This thicker approach considers additional prerequisites for the content of the law, including standards such as democracy and human rights.[292] For example, Trevor Alan, emphasizing substantive and procedural fairness, attributes an "intrinsic moral value" to the rule of law, which includes equality, dignity, and autonomy of individuals.[293] In this broader perspective, substantive law must align with moral principles such as dignity, justice, equality, and individual rights, including property rights and contract laws.[294] Considering all approaches, the rule of law involves an administrative state with a strong legal framework and an independent judicial system, carrying freedom from undue pressures.[295]

From any perspective, and even within the thinnest approach to the rule of law, corruption tarnishes its foundational principles. The World Justice Project Rule of Law Index, recognized as the most

[290] Lon L Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964) at 39.
[291] Joseph Raz, "The rule of law and its virtue" in Aileen Kavanagh & Jogn Oberdiek, eds, *Arguing About Law* (New York: Routledge, 2009) 181 (stating that procedural justice covers the right to independent counsel, a fair hearing by an independent and impartial judiciary, and appeal, at 183–86).
[292] Ramanujam, Verna & Betts, *supra* note 291 at 2; see also Guillermo O'donnell, "The quality of democracy: Why the rule of law matters" (2004) 15:4 J Democracy 32; José María Maravall & Adam Przeworski, *Democracy and the Rule of Law* (Cambridge: Cambridge University Press, 2003).
[293] Trevor RS Allan, *Constitutional justice: A liberal theory of the rule of law* (Oxford: Oxford University Press, 2003) at 67.
[294] See generally Ronald Dworkin, *Taking rights seriously* (London: Bloomsbury, 1977); Kaufmann, Kraay & Zoido-Lobaton, *supra* note 233. See also Stephen Riley, "Human Dignity and the Rule of Law" (2015) 11:2 Utrecht L Rev 91; Randy E Barnett, *The structure of liberty: Justice and the rule of law* (Oxford: Oxford University Press, 2014); Paul Gowder, "The rule of law and equality" (2013) 32:5 L & Philosophy 565.
[295] See Rachel Kleinfeld, *Advancing the rule of law abroad: Next generation reform* (Washington DC: Carnegie Endowment, 2012).

comprehensive rule of law index, includes the absence of corruption as a distinct dimension for evaluating the quality of the rule of law.[296] Corruption not only weakens the enforcement of laws but also develops a culture of noncompliance with legal norms.[297] While the rule of law centers on the clarity and stability of laws, in a society marked by a strong institution of corruption, it becomes unpredictable where and when laws will be enforced. In agreements, corruption introduces uncertainty, as parties cannot be certain whether the other party will fulfill their side of the bargain in the absence of enforcement of corrupt deals.[298] Moreover, corruption impacts the security of property rights, increases the risk of expropriation, and undermines the reliability of contract enforcement.[299] Furthermore, corruption disrupts the equal treatment of every individual before the law prescribed in the rule of law, as corrupt practices do not offer equal and fair opportunities for everyone. The situation worsens when corruption becomes a prevailing norm, with most individuals and entities resorting to corrupt practices in their daily routines. In such an environment, individuals rationalize and justify their corrupt behavior by claiming that everyone is engaged in similar practices. In a society dominated by such beliefs, the rule of corruption eventually replaces the rule of law.[300]

In an oil-rich country where rent-seeking behavior prevails, upholding the rule of law poses a significant challenge for the state. The GGNPSP incorporates the rule of law standard in its first principle: "the clarity of goals, roles, responsibility."[301] Effective management of petroleum

[296] For further information on the project and its nine indicators, see Juan Carlos Botero & Alejandro Ponce, "Measuring the rule of law" (2011) The World Justice Project Working Paper No. 001.
[297] Ngira, *supra* note 43 at 179.
[298] See Alvaro Cuervo-Cazurra, "Corruption in International Business" (2016) 51:1 J World Bus 35 at 44.
[299] Reyes Calderón, José Luis Álvarez-Arce & Silvia Mayoral, "Corporation as a crucial ally against corruption" (2009) 87:1 J Bus Ethics 319 at 321.
[300] See e.g. Simeon Igbinedion, "Workability of the Norms of Transparency and Accountability against Corruption in Nigeria" (2014) 3 J Sustainable Dev L & Poly 149 at 152–53.
[301] Lahn et al, *supra* note 234 at 9–11.

resources and revenues requires a strong regulatory framework with precise rules that define the roles and responsibilities of individuals and departments involved in decision-making and operational procedures. Clarity in the delegation of responsibilities for decision-making, approval, implementation, and monitoring reduces the likelihood of corrupt behavior.[302] Both formal processes, such as regulations and bylaws, and informal processes, including training and practices, reinforce the clarity of rules and responsibilities.[303] Moreover, an independent judiciary acts as a check on the government and safeguards property rights and contract enforcement. Through these mechanisms, the rule of law acts as a deterrent to the arbitrary use of power, thereby reducing opportunities for corrupt behavior. However, bringing about such changes and strengthening the rule of law requires willingness from the state and its ruling elite. It should be noted that existing literature suggests that, beyond the state, the market also plays a role in reinforcing the rule of law, especially in protecting contract enforcement and property rights.[304] This perspective will be further addressed in Chapter Four when discussing the role of TNCs in the anti-corruption regime.

ii. The accountability quandary in the corrupt corridors of the petroleum sector

Accountability is another cornerstone of good governance which is tied to the effectiveness of government in fulfilling its governing responsibilities. In its basic meaning, accountability involves holding individuals and entities responsible for their actions and decisions. Applicable to both public and private sectors, accountability mechanisms mandate responsiveness to the needs of the people they serve. This principle is broken down into two key components: *answerability*, which requires individuals and entities to provide the public with information and justification for

[302] *Ibid* at 8–10.
[303] *Ibid* at 9.
[304] See e.g. Adeyeye, *supra* note 9.

their decisions and actions; and *enforcement*, which grants the public the authority to hold them accountable and impose sanctions in cases of violation.[305]

Individuals and entities exercise accountability through different relations. *Horizontal accountability* involves the legislative and judicial branches overseeing and curbing abuses within other public agencies, whereas *vertical accountability* refers to citizens' capacity to hold the government accountable for its actions.[306] Examples of horizontal accountability in anti-corruption include the presence of independent anti-corruption agencies and audit organizations acting as watchdogs. Elections play a key role in the vertical accountability through which citizens and political parties hold officials accountable for their past actions, including corrupt practices. On the other hand, *diagonal accountability* pertains to the direct engagement of citizens in horizontal accountability mechanisms through non-formal political institutions such as media and civil society organizations.[307] An independent media serves as a watchdog overseeing all three branches of the government.

In an alternative classification, accountability is divided into political, legal, and social categories. Political accountability signifies the legislature's ability to control the executive branch, while legal accountability is associated with the judicial branch's oversight of the executive branch.[308] Social accountability involves citizens or civil society organizations monitoring government actions.[309] Good governance extends beyond the government itself; it requires the participation of

[305] See generally Anne Marie Goetz & Rob Jenkins, *Reinventing Accountability: Making Democracy Work for Human Development* (London: Palgrave Macmillan, 2005) at 9.
[306] See e.g. Anna Lührmann, Kyle L Marquardt & Valeriya Mechkova, "Constraining governments: New indices of vertical, horizontal, and diagonal accountability" (2020) 114:3 Am Political Science Rev 811 at 813.
[307] *Ibid*.
[308] Rick Stapenhurst & Mitchell O'Brien, *Accountability in Governance* (Washington, DC: World Bank) at 2.
[309] *Ibid* at 3.

individuals and interest groups in society.[310] Social accountability provides individuals and civil society organizations with opportunities to hold the state accountable for its actions, acting as additional checks and balances. Civil society's involvement in anti-corruption means that any person has the right to expose and report corruption matters to the relevant authorities. Strong accountability mechanisms, such as whistleblowing protection laws, empower and encourage civil society and the media to investigate corruption cases.

Low accountability and a deficient monitoring system create opportunities for individuals to partake in corrupt practices. When rational actors perceive that their corrupt actions are likely to go unpunished and the prospects of inspection and control are minimal, they exploit these openings.[311] Corruption may also permeate all three arms of the government due to the absence of a monitoring system within and between them. Legislators, usually elected to oversee the executive branch on behalf of citizens, may, in certain cases, collaborate with the executive, paving a legal pathway for corrupt behavior. This scenario is evident in societies where legislatures manipulate laws in exchange for financial or non-financial support from the elite. Moreover, when the judiciary is dysfunctional in addressing corruption, officials in other branches, assuming a low likelihood of facing consequences, may engage in corrupt practices without hindrance.

Many resource-rich countries, however, lack effective accountability mechanisms, primarily due to their governance structure. Oil wealth often diminishes the state's accountability to its citizens, especially in authoritarian regimes that control national resources.[312] In such countries, the

[310] See generally Michael Johnston, *Good governance: Rule of law, transparency, and accountability* (New York: United Nations Public Administration Network, 2006) (suggesting that "good governance, the rule of law, transparency, and accountability embody partnerships between state and society, and among citizens" at 1).
[311] Tomas Brytting, Richard Minogue & Veronica Morino, *The Anatomy of Fraud and Corruption: Organisational causes and remedies* (Burlington: Gower Publishers, 2011) at 48–53.
[312] See e.g. Wantchekon, *supra* note 251.

situation mirrors a model of *no representation without taxation,* where low taxation leads to the state's autonomy from its population.[313] Relying on oil rents eliminates the need or incentive for these states to establish tax systems for different economic sectors to fund their budgets. Instead, oil revenues finance the state's expenditure, enabling it to perform governing functions and deliver public goods and services. The weak tax system, in turn, restricts citizens from exerting social and political pressures on the state for its misdeeds.[314] As the state becomes less dependent on its citizens for funding, citizens lose the right to demand accountability for resource allocation decisions.[315] Moreover, the insufficient control over political behavior increases the likelihood of inefficient public investments.[316] Substantial control over resources allows the state to allocate large budgets to defense, suppressing citizens and opposition parties that might question its decisions or actions.[317] The state may also dedicate a large portion of oil production to energy subsidies in an attempt to secure citizens' support.[318] Furthermore, in these countries, public officials are usually appointed rather than elected, which can develop a culture where most officials share similar political alliances, thereby reinforcing the existing system.[319] These factors collectively diminish accountability within resource-rich states and provide it with more opportunities to commit corrupt practices and the mismanagement of revenues.

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[313] Camilla Sandbakken, "The limits to democracy posed by oil rentier states: The cases of Algeria, Nigeria and Libya" (2006) 13:1 Democratisation 135 at 137. See also Michael Herb, "No representation without taxation? Rents, development, and democracy" (2005) 37:3 Comp Politics 297.

[314] See generally Daron Acemoglu & James A Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (New York: Crown Publishing Group, 2012).

[315] See UNDP, *The Arab Human Development Report* (New York: UNDP, 2005) (explaining that in the Arab states, "as long as the rent continues to flow, there is no need for citizens to finance government and thus expect it to be accountable to them, [but] when the flow of rent depends on the good will of influential outside forces, as in the case of some Arab countries, the right of accountability passes to those who control the flow of rent, instead of remaining with citizens, who are turned into subjects" at 152).

[316] Kolstad, Wiig & Williams, *supra* note 270 at 21.

[317] See Ross, *supra* note 251 (explaining the "repression effect" in oil-rich countries).

[318] See Akacem, Miller & Faulkner, *supra* note 278 at 7 (studying the effects of oil abundance on the governments in the MENA region).

[319] Shirley Smith, Derek Shepherd & Peter Dorward, "Perspectives on community representation within the Extractive Industries Transparency Initiative: Experiences from south-east Madagascar" (2012) 37:2 Resources Pol'y 241.

In the petroleum sector, the GGNPSP places the "accountability of decision-making and performance" as the third universal principle for good governance.[320] In this framework, accountability implies that companies are "accountable to their shareholders," and the government is "accountable to society,"[321] especially when an NOC is entrusted with resource management. The latter also entails the state's responsiveness to its citizens regarding the allocation of petroleum rights and revenue management. Social accountability and civil society participation in the sector also refer to citizens' involvement at different value chain stages, such as monitoring contracts and licenses, operations, revenue distribution, and tax collection.[322] These checks and balances target not only the government but also companies in the industry. Initiatives such as the EITI, discussed in detail in the next chapter, promote citizens' active participation in resource management.

iii. Transparency: An antidote to corruption

Transparency is considered a key prerequisite for good governance.[323] It refers to openness and the right to access information, including decisions, processes, rules, and practices. Corruption stand at the polar opposite of transparency, as it thrives on confidentiality, secrecy, and deception. Transparency is defined as "a culture, a condition, a technique, an instrument, a structure that makes relevant information accessible."[324] It can be categorized into two types: "agent-controlled transparency," where the agent discloses information about its activities under freedom of

[320] Lahn et al, *supra* note 234 at 10.
[321] *Ibid* at 11.
[322] See generally Katherine Heller et al, *Integrating Social Accountability Approaches into Extractive Industries Projects: A Guidance Note* (Washington DC: World Bank, 2016) at 6.
[323] See e.g. Friedl Weiss & Silke Steiner, "Transparency as an element of good governance in the practice of the EU and the WTO: Overview and comparison" (2006) 30 Fordham Intl LJ 1545.
[324] Carmen Perez Gonzalez, "On Transparency, Good Governance and the Fight against Corruption: Some Lessons (and Questions) from an International Law Perspective" (2015) 19 SYIL 143 at 144.

information laws, and "non-agent controlled transparency," where a third party, such as the free media, releases the agent's information.[325]

In the petroleum sector, obtaining information has been a critical challenge, with all relevant financial, contractual, and technical data normally treated as confidential. Non-transparent practices, in particular, may lead to contract awards and bidder selections that overlook adequate financial and technical competencies.[326] The degree of transparency also impacts international economic development, as foreign countries and TNCs prefer environments characterized by openness. This preference arises from the fact that corrupt practices, such as bribery, are unpredictable, contributing to increased business costs in countries with high levels of corruption.[327]

The GGNPSP names the fourth universal principle of good governance in the petroleum sector as the "transparency of information."[328] In this context, transparency refers to both "internal transparency," which is an openness among departments and individuals involved in petroleum governance, and "external transparency," which entails making information accessible to the public.[329] Transparent procedures in competitive bidding, licensing processes, and procurement activities allow citizens to monitor these mechanisms.[330] Consequently, civil society should have access to information about state budgets and expenditures and the capacity to monitor resource allocation processes in order to build effective shields against corruption. Several anti-corruption initiatives advocate for transparent negotiations in awarding petroleum contracts. These initiatives

[325] Catharina Lindstedt & Daniel Naurin, "Transparency is not Enough: Making Transparency Effective in Reducing Corruption" (2010) 31: 3 Intl Political Science Rev 301.
[326] For further detail on the issue of transparency in the extractive industry, see Ivar Kolstad & Arne Wiig, "Is transparency the key to reducing corruption in resource-rich countries?" (2009) 37:3 World development 521.
[327] See e.g. Andrzej Cieślik & Łukasz Goczek, "Control of corruption, international investment, and economic growth–Evidence from panel data" (2018) 103 World Development 323.
[328] Lahn et al, *supra* note 234 at 11.
[329] *Ibid* at 13.
[330] Al-Kasim, Søreide & Williams, "Shrinking oil", *supra* note 206 at 9.

encourage both countries and companies to disclose their contracts and payments made to governments, a topic further explored in the next chapter, which focuses on the EITI.

3. Concluding Reflections on Corruption in the Petroleum Sector: Towards Good Enough Governance

This chapter has paved the way for the upcoming analysis of anti-corruption clauses in petroleum contracts by exploring the prevailing forms of corruption in the sector and the underlying factors that sustain it. The contextual understanding and detailed examination of the specific types and dynamics fueling corruption can later assist in evaluating whether anti-corruption clauses are targeted and well-informed in addressing the specific risks and vulnerabilities present in the sector.

As observed in Section (1), international and transnational anti-corruption conventions and protocols enumerate a list of corruption types, many of which are prevalent in the petroleum sector. However, the sector's unique context gives rise to additional forms of corruption. The complexity of projects and substantial investments create opportunities for individuals to misuse funds for personal gains while behaving corruptly. Corruption can occur at different stages in the petroleum industry, ranging from the decision to extract oil to the awarding of extractive rights, and from operating extractions to managing the revenue. More importantly, the petroleum sector creates a fertile ground for individuals to engage in bribery and embezzlement. Besides, individuals and companies in the petroleum industry may employ different mechanisms for fraud, including the use of shell companies and intermediaries, mispricing, and distorting reports or accounts. Furthermore, non-transparent procedures within the sector create an ideal setting for illicit financial flows and money-laundering. Moreover, as the government's monopoly and substantial discretion over resources impact competition in the market, corruption may take other forms not

explicitly mentioned in the studied anti-corruption instruments, including conflicts of interest and various types of favoritism such as clientelism, nepotism, and patronage. In resource-rich countries, corrupt practices outlined in this section often dominate the overall system governing the exploration and production of oil and gas reserves, leading to the presence of corrupt norms as informal and de facto institutions in the sector.

The existing literature has claimed that oil revenues act as a curse in resource-rich countries, rather than being a catalyst for socio-economic development. However, Section (2) argues that oil resources alone play a minor role; instead, good governance institutions and sound policies can prevent an economy from over-reliance on oil resources and limit the emergence of rent-seeking behavior. This section specifically discusses a narrow branch of good governance, focusing on components related to the petroleum governance. It introduces the rule of law, accountability, and transparency as indicators of good enough governance while explaining their relevance in the petroleum sector. Appendix IV provides further insight into the history of the Norwegian oil sector to show the role of good governance institutions in resource management.

The endemic nature of corruption in the petroleum sector has severe impacts on the institutions of good governance in oil and gas-producing countries. This study, in general, advocates for the improvement of good governance institutions to mitigate the negative consequences of resource abundance. However, given that such institutions may not already be established in all resource-rich countries, external models like the Norwegian one, where good governance predates oil discovery, cannot serve as replicable blueprints to avoid the resource curse. The lack of political will and the elite's resistance to improving good governance fortify their corrupt institutions. When internal actors lack the motivation to weaken the institution of corruption, external actors play a more significant role as they can provide incentives and deterrents to make corrupt practices less

appealing. External actors, such as foreign states, international or regional organizations, and transnational bodies, can initiate a change in these countries and catalyze reforms toward good governance. As members of the international community, these actors can condemn corrupt practices in international relations and establish anti-corruption norms as international and transnational standards. Accordingly, Chapter Three will explain how a transnational anti-corruption regime has emerged through the actions of international organizations, states, IFIs, and NGOs.

In addition to these actors, the contemporary world witnesses the proliferation of private non-state actors that can influence matters that were once primarily within the purview of states. No one can deny the increased role of non-state actors, particularly TNCs, in the petroleum sector. So, what role do they play in this anti-corruption regime? Chapter Four will explore how TNCs can influence the quality of oil governance and explain their role in complying with anti-corruption regulations and their contribution to the expansion of the transnational anti-corruption regime.

Chapter 3 – The Evolution of Transnational Anti-Corruption Standards: From Norms to Regime

Everybody knows that the dice are loaded
Everybody rolls with their fingers crossed
Everybody knows the war is over
Everybody knows the good guys lost
Everybody knows the fight was fixed
The poor stay poor, the rich get rich
That's how it goes
Everybody knows

Leonard Cohen, Everybody Knows

It's not just the US enforcing its bribery laws, … the UK and Switzerland and France, other countries have like woken up and realized they have anti-bribery laws in place. … That's helped, kind of increased the pressure a little bit.

Gamma$_2$, Interviewee

Economic globalization has reshaped the dynamics of national economies and global commercial flows and interactions. Since the end of World War II, the world has witnessed a surge in the integration of national economies into the global economic framework. In 1960, the world's average trade openness stood at 52.44%,[331] with trade constituting around 25% of countries' GDP.[332] Moving ahead to 2018, the world's average trade openness escalated to 92.44%,[333] with trade forming a substantial 63% of GDP in 2022.[334] Beyond the expansion of business activities and economic players, globalization has introduced several challenges to the world market. An important repercussion of globalization is the transformation of corruption from a domestic concern to an international focal point. In this interconnected world, corruption no longer remains confined within the national boundaries of countries. As corruption increases the costs of international business activities and hampers global economic competitiveness, its rapid dissemination has implications on worldwide economic growth and development.

Since the 1990s, the condemnation of corrupt practices has evolved from a mere moral impurity into a transnational regulatory directive, drawing increased policy attention on a global scale. While states continue to play a central role in shaping and enforcing anti-corruption policies, the international community has become an equally important participant in developing legal instruments to combat corruption. This transnational framework consists of a broad range of international and regional conventions, national legislations with extraterritorial reach, regulations from IFIs, and initiatives devised by NGOs, and TNCs. These different stakeholders have

[331] Global Economy, "Trade openness - Country rankings" (last visited 11 April 2025), online: *Global Economy* <www.theglobaleconomy.com/rankings/trade_openness/>.
[332] World Bank, "Trade (% of GDP)" (last visited 11 April 2025), online: *World Bank* <data.worldbank.org/indicator/NE.TRD.GNFS.ZS> [WB, "Trade"].
[333] See Global Economy, *supra* note 335 (the most recent data available is for 2018).
[334] See WB, "Trade", *supra* note 336.

collectively attempted to elevate global awareness of the costs of corruption and properly address corrupt practices within their policy agendas.

While the preceding chapter has explored different forms of corruption within the petroleum sector and their connection with petroleum governance, the current chapter seeks to set the stage for the central inquiry of this study: the role of TNCs in anti-corruption efforts. However, before addressing this question, there is a need to consider the whole picture of the transnational anti-corruption framework to understand the complementary and interconnected role of TNCs. This chapter argues that state and non-state actors have instituted transnational de jure norms against corruption through the formulation of regional and international regulations, including both hard law rules and soft law instruments. Nevertheless, it contends that the mere establishment of de jure anti-corruption norms falls short in altering the de facto power dynamics of corruption. Instead, the chapter suggests that the effectiveness of transnational anti-corruption laws depends significantly on their ability to translate these de jure norms into de facto practices and persuade society to adhere to such norms.

Section (1) will initially explain the evolving status of anti-corruption as a transnational norm. Subsection (A) will demonstrate that despite increased global awareness and formalization through anti-corruption instruments and international cooperation, the anti-corruption norm has not yet achieved complete internalization and effective global implementation. Subsection (B) will then introduce the transnational anti-corruption regime as a network of rules and standards guiding the conduct of actors with the aim of eradicating corrupt practices. Accordingly, Section (2) will examine the contributions of both states and non-state actors to the formation and development of this regime. To this end, the section will identify dominant actors within the regime and outline their standards and regulatory remedies. Subsection (A) will provide a brief discussion of

international and regional intergovernmental organizations and their developed anti-corruption tools, with additional details provided in Appendix V. Subsection (B) will then explore prominent states with domestic anti-corruption laws featuring exterritorial application, while offering further details on the anti-corruption laws of the USA, United Kingdom (UK), and Canada in Appendix VI. Subsection (C) will briefly address the role of IFIs, with more details in Appendix VII. Finally, Subsection (D) will explore the role of NGOs in the fight against corruption, with a focus on three key players in the extractive sector, i.e., Global Witness (GW), TI, and the EITI. The subsequent chapter will explore the role of TNCs in this regime. By considering the legislations and instruments developed by different transnational actors, the study concludes that a transnational regime has emerged concerning anti-corruption.

1. Building a Global Stance Against Corruption: Tracing the Formation of a Transnational Anti-Corruption Regime

What significance does it hold for anti-corruption to be designated as a transnational norm? How does such a norm establish itself and gain recognition on a global scale? On the other hand, what does the term "transnational anti-corruption regime" imply? This section seeks to address these questions to explain the processes that contribute to the establishment and widespread acceptance of anti-corruption norms across international boundaries, insofar as they contribute to the development of a transnational regime.

A. Anti-Corruption as a Transnational Norm

Norms, defined as shared expectations of appropriate behavior in a given situation, shape the behavior of actors through institutionalization processes.[335] The evolution of a norm as a transnational norm involves three stages: increased global awareness, formalization through the development of transnational legal instruments, and the transnational adoption and enforcement of such a norm.[336] Jennifer McGoy and Heather Heckel have analyzed the development of anti-corruption standards as a transnational norm across these three stages.[337] While their analysis may be dated, it remains relevant as the situation has not undergone significant changes over time, given the persisting patterns of corrupt practices.

In the initial stage, "norm entrepreneurs" strategically direct global attention toward an issue with a global scope and the imperative to address it.[338] These entrepreneurs, including "international legal scholars, religious groups, and other moral entrepreneurs" redefine the problem "as an evil"[339] and seek to persuade states to adopt a new norm, often through "organizational platforms."[340] Concerning anti-corruption, the absence of a transnational anti-corruption norm persisted in the international community until half a century ago. However, from the 1970s onward, the emergence of corruption scandals worldwide and scholarly research on transnational dimensions of corruption contributed to increased public awareness of corrupt practices and their

[335] See e.g. Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 Intl Organization 887 (authors differentiating between norms and institutions, stating that "the norm definition isolates single standards of behavior, whereas institutions emphasize the way in which behavioral rules are structured together and interrelate (a 'collection of practices and rules')" at 891).
[336] See *ibid* at 898.
[337] See Jennifer L McCoy & Heather Heckel, "The emergence of a global anti-corruption norm" (2001) 38:1 Intl Politics 65.
[338] *Ibid* at 893.
[339] Ethan A Nadelmann, "Global prohibition regimes: The evolution of norms in international society" (1990) 44:4 Intl Organization 479 at 485.
[340] Finnemore & Sikkink, *supra* note 339 at 899.

destructive effects.[341] Pioneering states, such as the USA, have worked to elevate the issue of corruption to the global agenda. Moreover, international and regional organizations, such as the UN and the Organization of American States (OAS), have promoted awareness of corruption among their member states. In addition, IFIs, such as the WBG, and transnational civil society organizations, such as TI, have played critical roles in raising public awareness regarding corruption.

The second stage in the formation of a transnational norm refers to the formalization of a transnational matter through a set of rules institutionalized by international and transnational actors.[342] These actors officially endorse a de jure standard through "multiple forums including official policies, laws, treaties or agreements."[343] Once a large number of states, specially "critical states,"[344] embrace the norm, it reaches a "tipping point."[345] In the context of anti-corruption, different actors have developed both hard law and soft law instruments to combat corruption. International and regional organizations, such as the UN, "play a coordinating role"[346] through the adoption of several conventions, protocols, resolutions, and declarations aimed at combating corruption. Moreover, the long arm of national anti-corruption and anti-bribery legislation, such as the FCPA,[347] the UK Bribery Act (UKBA),[348] and the Canadian Corruption of Public Officials Act (CFPOA),[349] tends to escalate the legal and financial costs associated with engaging in corrupt

[341] See McCoy & Heckel, *supra* note 341 at 70.
[342] *Ibid* at 67.
[343] Mona Lena Krook & Jacqui True, "Rethinking the life cycles of international norms: The United Nations and the global promotion of gender equality" (2012) 18:1 European J Intl Relations 103 at 104.
[344] Finnemore & Sikkink, *supra* note 339 (defining critical states as "those without which the achievement of the substantive norm goal is compromised" at 901).
[345] *Ibid* (proposing that "norm tipping rarely occurs before one-third of the total states in the system adopt the norm" at 901).
[346] Nadelman, *supra* note 343.
[347] *FCPA*, *supra* note 57.
[348] *Bribery Act 2010* (UK), c 23 [*UKBA*].
[349] *Corruption of Foreign Public Officials Act*, SC 1998, c 34 [*CFPOA*].

practices. Furthermore, IFIs have spearheaded numerous anti-corruption efforts, urging member states to adopt and enforce anti-corruption measures in exchange for specific benefits, such as financial aid. In addition, international NGOs have increasingly launched anti-corruption movements, calling on states and international organizations to develop anti-corruption policies. Lastly, the anti-corruption measures taken by TNCs, such as corporate codes of conduct, should also be considered.

The third stage is associated with norm internalization, where individuals and entities accept and comply with the norm. This stage, known as the "norms cascade," witnesses "norm breakers ... become norm followers."[350] This stage involves more states and non-state actors adopting and adhering to the norm due to peer pressure.[351] This transformative phase requires states to not only adopt the norm but also empower their individuals and entities to integrate it into their perspectives.[352] However, concerning anti-corruption, while progress has been made in the initial two stages, the norm has not yet completed its third stage of norm development.[353] As corruption is still on the rise in many places,[354] the effective implementation of the norm remains a challenge. Currently, the transnational anti-corruption norm faces domestic oppositions in fully internalizing within states, as the shift from formal acceptance to genuine compliance is contingent on societal and institutional factors. The mere formal acceptance of transnational anti-corruption norms and regulating symbolic anti-corruption laws on paper are inadequate. For example, Bryane Michael

[350] Finnemore & Sikkink, *supra* note 339 at 902.
[351] *Ibid* at 903.
[352] See Pleines & Wöstheinrich, *supra* note 145 at 299.
[353] McCoy & Heckel, *supra* note 341 at 83–84.
[354] In the Corruption Perception Index 2023, conducted by Transparency International to assess the perceived level of corruption on a scale from 0 to 100, the average score among 180 countries was 43, and the majority of states showed minimal or no progress in their efforts to combat corruption over the past few years, see Transparency International, "Corruption Perceptions Index 2023" (January 2024), online: *Transparency International* <www.transparency.org/en/cpi/2023> [TI, "Corruption Perceptions Index"].

and Natalya Mishyna show in their case study of Azerbaijan that an undue focus on legislative anti-corruption policies may prevent the proper translation of these norms into practice.[355] Therefore, the global community is yet to witness the complete norm internalization that would mark the transition of anti-corruption standards from de jure norms to their de facto enforcement. To complete such a transition, state and non-state actors can exert additional peer pressure for the internalization and effective implementation of anti-corruption standards in those countries with lower acceptance. For that reason, the Subsection (B) will discuss the available mechanisms within the anti-corruption regime to encourage states to internalize their anti-corruption policies.

B. Anti-Corruption as a Transnational Regime

A regime can be defined as "social institutions consisting of agreed upon principles, norms, rules, procedures and programs that govern the interactions of actors in specific issue areas."[356] These institutions, comprising both formal and informal ones, have the potential to shape the behavior of states and their subjects. The effectiveness of a regime highly depends on how its actors align their actions with these institutions to achieve the set objectives.[357] Accordingly, an anti-corruption regime can be defined as networks of anti-corruption rules and norms regulating the behavior of

[355] Bryane Michael & Natalya Mishyna, "Anti-Corruption Law: Lessons for Former Soviet Countries from Azerbaijan" (2007) 1:2/3 J Eurasian L at 28–32.

[356] Marc A Levy, Oran R Young & Michael Zürn, "The study of international regimes" (1995) 1:3 European J Intl Relations 267 at 274. See also Stephen D Krasner, "Structural Causes and Regime Consequences: Regimes As Intervening Variables" (1982) 36:2 Intl Organization 185 (defining regime as "implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations" at 186). But see John Gerard Ruggie, "International Responses to Technology: Concepts and Trends" (1975) 29:3 Intl Organization 557 (offering a state-centric definition for regime: "a set of mutual expectations, rules and regulations, plans, organizational energies and financial commitments, which have been accepted by a group of states" at 570).

[357] Andreas Hasenclever, Peter Mayer & Volker Rittberger, "Interests, Power, Knowledge: The Study of International Regimes" 1996 40:2 Mershon Intl Studies Rev 177 (explaining "Regime *effectiveness* comprises two overlapping ideas … to the extent that its members abide by its norms and rules [and] to the extent that it achieves the objectives or purposes for which it was intended" at 178).

actors, with the goal of eradicating corrupt practices. The subsequent question pertains to the formation of a transnational anti-corruption regime. Then, if it exists, how does it come into being?

Leading international relations theories assign great importance to the role of state power and interests in the formation and development of transnational regimes. Viewed from this perspective, the transnational anti-corruption regime emerges as states become members of regional and international organizations, where great powers either encourage or compel other members to adopt their preferred standards.[358] Wayne Sandhotz and Mark Gray argue that a country can reduce its corruption levels by integrating into international networks, influenced in part by the economic impacts of international interactions.[359] Universal-membership in inter-governmental organizations with strong enforcement mechanisms empowers great powers to apply "a mixture of cajoling and coercion" to export the anti-corruption standards to other member states.[360] Economic incentives change the costs and benefits associated with engaging in corrupt practices, influencing states' decisions about on adopting anti-corruption norms while anticipating economic outcomes.[361] Beyond this economic dimension, a socio-cultural aspect of international integration exists, which refers to the proposition that "the more a country is involved in international organizations, the more likely its elites are to have absorbed some of the anti-corruption norms, and the lower the level of corruption should be."[362] In other words, states exchange international social norms, such as anti-corruption norms, through international integration. Studies assert that a state's membership in anti-corruption international and regional organizations improves the integration of anti-corruption norms within that state. For example, Harry Broadman shows this

[358] See generally Daniel W Drezner, *All Politics Is Global* (Princeton: Princeton University Press, 2008) (referring to such standards as "club standards" at 75–78) [Drezner, *All Politics*].
[359] Sandholtz & Gray, *supra* note 5 at 762.
[360] Drezner, *All Politics*, *supra* note 362 at 75, 77.
[361] Sandholtz & Gray, *supra* note 5 at 764.
[362] *Ibid* at 767.

relationship by examining trade patterns in East European and Former Soviet Union countries and suggests that increased international integration heightens competition, improves governance, and thereby reduces corruption opportunities.[363] However, these theories predominantly focus on the role of states and tend to overlook the contribution of other transnational actors. In the transnational anti-corruption regime, the initiatives taken by civil society organizations, such as TI, and TNCs, such as US businesses in lobbying the US government to internationalize anti-corruption standards, cannot be dismissed.

An institutionalist theory of international relations, on the other hand, can explain why different actors choose to participate in a transnational regime. Both state and non-state actors can share certain common problems and interests, leading to the formation of institutions designed to serve the collective good.[364] The regime, operating as a social institution comprising norms, facilitates cooperation among actors and enables them to address collective problems by providing information and reducing transactions costs. From this perspective, actors converge on anti-corruption norms as accepted behavior in the global market in order to increase overall efficiency. Consequently, each actor joins the anti-corruption regime if it perceives that the benefits outweigh the costs.[365] Such a regime standardizes collaboration among actors with shared corruption concerns, and if this mutual interest is powerful enough, they can mutually hold each other accountable.[366]

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[363] Harry G Broadman, *From Disintegration to Reintegration: Eastern Europe and the Former Soviet Union in International Trade* (Washington DC: The World Bank, 2006) at 15.
[364] Robert O Keohane & Lisa L Martin, "The promise of institutionalist theory" (1995) 20:1 Intl Security 39 at 41–42.
[365] Robert O Keohane, "The demand for international regimes" (1982) 36:2 Intl Organization 325 (explaining "[r]egimes are more like contracts, when these involve actors with long-term objectives who seek to structure their relationships in stable and mutually beneficial ways" at 331).
[366] See David A Detomasi, "International Regimes: The Case of Western Corporate Governance" (2006) 8:2 Intl Studies Rev 225 (explaining that when conditions of "shared norms and principles, an agreement on the procedures by which such norms and principles are carried out, a significant commitment on the part of major international actors

Beginning in the 1990s, the international community started recognizing corruption as a shared concern, influenced by different social, political, and economic factors and involving various actors. These factors include the end of the Cold War, corruption scandals all around the world, the rise in global business and investments, the growth of scholarly research on corruption, and the engagement of low and middle-income countries, civil society, IFIs, and TNCs in anti-corruption initiatives.[367] This confluence of circumstances created an environment for the emergence of a transnational institutional framework aimed at governing transnational corruption. The development of international and transnational anti-corruption instruments became necessary, as no individual state had sufficient power and resources to fight transnational corruption effectively.[368] Once the transnational anti-corruption regime was established by certain actors, others reinforced the system by creating their own instruments. Although these instruments may lack the power to enforce anti-corruption standards, they contribute to promoting such norms as acceptable behavior in transnational business practices. Accordingly, Section (2) traces the historical and contextual patterns that laid the foundation for the development of a transnational anti-corruption regime and outlines the role of different actors involved in the regime.

to maintaining the regime, and the focus on a well-defined and limited issue area … are fulfilled, regimes can provide 'governance without government' by establishing expected patterns of behavior" at 231).

[367] For a complete list of factors and historical events leading to the emergence of shared interest in the issue of corruption, see Melanie Dyan Reed, *The International Business Community and Evolving Norms Regarding Foreign Bribery* (PhD Dissertation, The Fletcher School of Law and Diplomacy, 2017) at 35–38 [unpublished].

[368] Nadelmann calls this type of regimes as international prohibition regimes; see Nadelmann, *supra* note 343 (explaining that "[t]he most important inducement to the creation of international prohibition regimes is the inadequacy of unilateral and bilateral law enforcement measures in the face of criminal activities that transcend national borders" at 481).

2. Joining Forces in the Fight against Corruption: Mapping the Role of International and Transnational Actors

A considerable number of state and non-state actors have acknowledged the harmful consequences of corrupt practices and the necessity for adopting anti-corruption policies. Beyond raising global awareness of the costs associated with corruption, they have developed a comprehensive toolbox known as the "anti-corruption industry."[369] This toolkit consists of different conventions, regulations, initiatives, and policies, alongside training, monitoring, and advisory programs. In addition to traditional international actors, newer participants, including NGOs and TNCs, have contributed to increasing awareness and shaping policies within the anti-corruption legal framework.

Understanding the dynamics of the transnational anti-corruption regime involves examining its historical formation in light of significant events and their outcomes. This section aims to portray the evolution of the transnational anti-corruption norm, particularly in its initial two stages: the global recognition of the corruption issue and the establishment of de jure anti-corruption norms. While picturing the transnational anti-corruption regime, specific attention is given to the extractive sector to investigate existing anti-corruption legal framework and initiatives in the petroleum industry. The review of current anti-corruption frameworks begins with international and regional intergovernmental organizations, followed by prominent national anti-corruption legislation with extraterritorial jurisdiction, IFIs, and international NGOs. For each group, this section outlines the contributions of key players to the formation of transnational anti-corruption

[369] Sampson Steven, "The anti-corruption industry: from movement to institution" (2010) 11:2 Global Crime 261 at 262.

norms, providing a broad overview, with detailed information available in appendices. The subsequent chapter will thoroughly explore the role of TNCs within this regime.

A. International and Regional Intergovernmental Organizations: From Recognition to Adoption of Anti-Corruption Norms

One form of international integration into the transnational anti-corruption regime occurs through membership in international and regional conventions and organizations.[370] Globalization has encouraged interdependence among states, requiring multilateral coordination to manage domestic affairs.[371] Since the 1990s, several global and regional conventions and protocols have been introduced to establish transnational anti-corruption standards. International organizations have sought to raise awareness, establish legally binding anti-corruption norms, and coordinate anti-corruption measures within their member states. Furthermore, regional organizations have endorsed international conventions that criminalize corrupt practices while requiring states to institute anti-corruption agencies and regulations. These anti-corruption procedures formally transmit anti-corruption norms as either hard law (binding international treaties or resolutions of international and regional organizations) or soft law (recommendations and informal practices). Intergovernmental organizations, compiling good practices of their members in anti-corruption measures, usually recommend anti-corruption policies to other member states.

Through participation in anti-corruption conventions, member states formally acknowledge anti-corruption rules as transnational norms. In his study of European and Eurasian Post-Communist States, Templeman Holmes argues that states integrated into the EU generally perform better in

[370] See generally Sandholtz & Gray, *supra* note 5.
[371] See Daniel W Drezner, *Locating the Proper Authorities: The Interaction of Domestic and International Institutions* (Michigan: University of Michigan Press, 2003) at 9 [Drezner, *Locating*].

reducing their corruption levels.[372] With the proliferation of anti-corruption treaties, more and more states have adopted and internalized anti-corruption regulations. Today, almost all states criminalize the most common types of corruption. Moreover, integration into international and regional conventions has led to the establishment of "anti-corruption agencies" in many countries.[373] Furthermore, these conventions provide a legal platform for countries to cooperate in the cross-border investigation of corruption and the implementation of domestic anti-corruption laws.

Table 5 summarizes key anti-corruption legal measures implemented by leading intergovernmental organizations on both international and regional levels in the fight against corruption. These organizations have sought to increase global awareness of corruption and establish transnational anti-corruption laws. While the table does not provide a complete and inclusive list of all organizations involved in anti-corruption efforts, it aims to highlight key global and local regulations introduced by intergovernmental organizations. In addition, the table indicates whether these legal measures constitute hard law tools, highlighted in blue, or soft law instruments, highlighted in green. A more detailed summary of the evolution and development of the international anti-corruption legal framework adopted by international and regional intergovernmental organizations can be found in Appendix V.

[372] Leslie Templeman Holmes, "International Anti-Corruption Regimes and Corruption Levels in European and Eurasian Post-Communist States" in Diana Schmidt-Pfister S & Sebastian Wolf, eds, *International Anti-Corruption Regimes in Europe, Between Corruption, Integration and Culture* (Baden-Baden: Nomos Verlagsgesellschaft, 2010) 23.

[373] Sergio Marco Gemperle, "Comparing anti-corruption agencies: A new cross-national index" (2018) 23:3 Intl Rev Pub Administration 156 (defining anti-corruption agencies as "a permanent legal state body with a specific mission and corresponding preventive and/or law-enforcing functions to counter corruption and its underlying structures" at 159).

International and Regional Inter-Governmental Organizations	
Organization of American States	- Inter-American Convention (1996)
	- Resolution 154: Behavior of Transnational Enterprises Operating in the Region and Need for a Code of Conduct to be Observed by Such Enterprises (1975) - Resolution 1159: Corrupt International Trade Practices (1992) - Model Laws and Legislative Guidelines
Organization for Economic Cooperation and Development	- OECD Convention (1997)
	- Declaration on International Investment and Multinational Enterprises (1976) - Recommendation of the Council on Bribery in International Business Transactions (1994) - OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials (1996) - Recommendation on Anti-Corruption Proposals for Bilateral Aid Procurement (1996) - Revised Recommendation of the Council on Bribery in International Business Transactions (1997) - Recommendation of the Council on Bribery and Officially Supported Export Credits (2006) - Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009) - Recommendation of the Council on Tax Measures for Further Combating and Bribery of Foreign Public Officials in International Business Transactions (2009) - Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption (2016) - Recommendation of the Council on Bribery and Officially Supported Export Credits (2019)
United Nations	- Convention against Transnational Organized Crime (2000) - UNCAC (2003)
	- General Assembly Resolution on Measures against corrupt practices of transnational and other corporations, their intermediaries and others involved (1975) - United Nations Declaration against Corruption and Bribery in International Commercial Transactions (1996) - UN Global Compact (2000)
European Union	- Protection Convention (1995) and two additional Protocols - Convention on fighting corruption involving officials of the EU or officials of Member States (1997) - Council Framework Decision on Combating Corruption in the Private Sector (2003) - Lisbon Treaty, art 83 (2007) - Amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, European Union (2014) - Preventing the Use of the Financial System for Money Laundering or Terrorist Financing (2015) - Directive on the fight against fraud to the Union's financial interests by means of criminal law (2019)
	- EU Anti-Corruption Report (2014)

Council of Europe	- Council of Europe Programme of Action Against Corruption (1996) - Resolution on the Twenty Guiding Principles against Corruption (1997) - Criminal Law Convention (1999) and its Additional Protocol (2003) - Civil Law Convention (1999)
	- Recommendation of the Committee of Ministers to Member States On Economic Crime (1981) - Recommendation on Codes of Conduct for Public Officials (2000) - Recommendation on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns (2003)
African Union	- African Union Convention (2003)
League of Arab States	- Arab Anti-Corruption Convention (2010)
Financial Action Task Force	- FATF Recommendations (1990) and its revisions
World Trade Organization	- Revised Government Procurement: Agreement on Government Procurement, art IV (2012)

Table 5 – Anti-Corruption Measures Taken by International and Regional Intergovernmental Organizations[374]

The rise in anti-corruption regulatory measures devised by inter-governmental organizations since the 1990s, as illustrated in Table 5, suggests an increasing global awareness of corruption and its destructive consequences. This trend, marked by the proliferation of international and regional anti-corruption regulations through conventions, declarations, and recommendations, indicates an emerging universal consensus on corruption as a global issue. Alongside recognizing corruption, these intergovernmental organizations urge their member states to adopt harmonized and uniform measures in criminalizing corruption.

International and regional organizations employ diverse strategies to shape the domestic policies of member states in adopting anti-corruption norms, employing three distinct mechanisms. The first, known as "contracting," involves states voluntarily join non-domestic organizations based on self-interest, where incentives, not fear of punishment, guide decision-making.[375] For example, states may join anti-corruption conventions mentioned in Table 5 to align their interests voluntarily

[374] The full citations for these anti-corruption instruments are provided in the relevant sections in Appendix V.
[375] Drezner, *Locating*, *supra* note 375 at 11–12.

and benefit from multilateral assistance while retaining policy-making autonomy.[376] The second method uses coercive practices, where organizations penalize states violating agreements, through measures such as sanctions or naming and shaming.[377] An example is the FATF Public Statements, which blacklist jurisdictions with deficiencies in anti-money laundering and terrorist financing, calling on other members to apply greater due diligence and counter-measures to protect the international financial system.[378] The third mechanism, "persuasion," involves introducing states to new values and concepts, aiming to modify their perceptions and preferences.[379] In the anti-corruption organizations, this method includes publishing recommendations, researches, or reports, and holding conferences, which are classified as soft law instruments in Table 5.

Each international or regional intergovernmental organization has contributed to shaping de jure anti-corruption norms. Each instrument has developed such norms at different times, through different means, and with a focus on specific types of corruption. Moreover, each regulatory measure may present different prospects and limitations. Empirical data suggest that regional conventions prove more effective than international instruments. For example, a TI report demonstrates that the Inter-American Convention has been more successful than other international conventions in Latin American countries.[380] The Convention, adopted in 1996 as the first binding regional anti-corruption agreement, was innovative at the time for its inclusion of different corrupt practices and its call for cooperation among state parties. A unique aspect of the

[376] *Ibid*.
[377] *Ibid*, 12–13; see also Tanja A Börzel, Andreas Stahn & Yasemin Pamuk, "The European Union and the fight against corruption in its near abroad: Can it make a difference?" (2010) 11:2 Global Crime 122 at 130–31.
[378] For more information on this process, see FATF, "High-risk and other monitored jurisdictions" (last visited 12 April 2024), online: *FATF* <www.fatf-gafi.org/en/topics/high-risk-and-other-monitored-jurisdictions.html> [FATF, "High-risk"].
[379] Drezner, *Locating*, *supra* note 375 at 14–15.
[380] See Florencia Guerzovich, *Effectiveness of International Anticorruption Conventions on Domestic Policy Changes in Latin America* (New York: Open Society Foundations, 2011).

Inter-American Convention is that it not only seeks to prevent and punish corrupt practices but also emphasizes the need for strong democratic institutions within the state parties. The Convention urges member states to develop "[m]echanisms to encourage participation by civil society and non-governmental organizations in efforts to prevent corruption"[381] and to create "measures and systems requiring government officials to report to appropriate authorities acts of corruption in the performance of public functions."[382] Some argue that these standards aim to address authoritarian regimes in the state-parties.[383] While the Inter-American Convention did not initially propose any enforcement mechanism, its adoption signaled a shift in attitudes towards corruption. However, in 2002, the Follow-Up Mechanism for the Implementation of the Inter-American Convention against Corruption was established to review the legal frameworks and institutions of state parties in light of the Convention.[384]

The OECD Convention, furthermore, aims to fortify transnational anti-bribery norms and provides a transnational legal foundation for criminalizing transnational bribery of foreign officials among its state parties, employing both binding and non-binding instruments. Apart from criminalizing transnational bribery, the Convention specifies a mechanism in its monitoring system to hold state parties accountable for their anti-bribery commitments, which surpasses other anti-corruption conventions in transparency and public disclosure.[385] To date, all OECD member states and eight non-OECD states have ratified the Convention.[386] These state parties have enacted anti-bribery

[381] *Inter-American Convention*, *supra* note 75, Art III (11).
[382] *Ibid*, Art III (1).
[383] See Guerzovich, *supra* note 384 at 9.
[384] For more information on the Mechanism, see OAS, "Anticorruption Portal of the Americas – MESICIC" (last visited 19 July 2024), online: *OAS* <www.oas.org/en/sla/dlc/mesicic/>.
[385] *OECD Convention*, *supra* note 75, art 12. For a further detail on the monitoring system, see Appendix V.
[386] See OECD, "OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions" (last visited 11 April 2024), online: *OECD* <www.oecd.org/corruption/oecdantibriberyconvention.htm> [OECD, "Convention"]. State parties represent 81% of global outbound foreign direct investment stocks and over 66% of the world's exports, and they are home to 95 of the

laws to eradicate the supply of bribes globally and extend the Convention's influence worldwide. Reports indicate that many state parties have actively taken legal action against individuals and entities for foreign bribery, along with related offenses such as embezzlement and money laundering, employing criminal, administrative, or civil proceedings.[387] Moreover, despite their soft-law nature, OECD recommendations and guidelines have induced changes in the national legal systems of state parties.[388] Non-binding recommendations have addressed issues omitted in the original Convention while modifying its scope. For example, concerning facilitation payments, although the OECD Commentary excluded such payments from the scope of bribes,[389] the 2009 Recommendation encourages states and companies to prohibit such payments.[390] This non-binding recommendation prompted at least one member, Canada, to eliminate the exception for facilitation payments from its domestic laws in 2017.[391] This case highlights the effectiveness of non-binding soft law, sometimes equaling the impact of legally binding instruments in addressing corruption issues.

The UNCAC distinguishes itself from its predecessors in several key aspects. One distinction lies in its incorporation of preventive measures for both the public and private sectors, international cooperation, and asset recovery. State parties are urged to establish a preventive anti-corruption agency and improve different aspects, such as the hiring system, codes of conduct, procurement,

largest 100 non-financial multinational enterprises; see OECD, *Fighting the Crime of Foreign Bribery* (Paris: OECD, 2018).

[387] For the latest report, see OECD Working Group on Bribery, *2021 Enforcement of the Anti-Bribery Convention Investigations, Proceedings, and Sanction* (Paris: OECD, 2022) [WGB, *2021 Enforcement*].

[388] For further details on the anti-corruption efforts by OECD, see Cecily Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford: Oxford University Press, 2015) ch 2.

[389] OECD, *Commentaries on the OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions* (Paris: OECD, 1997) para 9 [OECD, *Commentaries*].

[390] OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, 159/Rev1/FINAL (Paris: OECD, 2009), para VI [OECD, *Further Recommendation*].

[391] For further information, see Global Affairs Canada, "Canada repeals facilitation payments exception in Corruption of Foreign Public Officials Act" (30 October 2017), online: *Government of Canada* <www.canada.ca/en/global-affairs/news/2017/10/canada_repeals_facilitationpaymentsexceptionincorruptionofforeig.html>.

transparency, accounting standards, and civil society participation.[392] An innovative approach is found in Article 34, which requires state parties to address the consequences of corruption in agreements and suggests remedies such as contract annulment, rescission, or concession withdrawal.[393] Moreover, Article 35 empowers individuals suffering damage due to corruption to seek compensation through private civil litigation against those responsible.[394] However, these articles lack clarity in specifying the required "measures" to address the consequences and compensation of corrupt acts.[395] Despite the UNCAC's binding nature and expanded coverage of corrupt practices, many criminalization provisions remain non-binding. For example, language calling for the criminalization of passive transnational bribery of public officials, trading in influence, abuse of functions, illicit enrichment, bribery in the private sector, and embezzlement in the private sector does not impose mandatory obligations on states.[396] More importantly, Article 4 guarantees the protection of states' sovereignty in fulfilling UNCAC obligations.[397]

While international and regional conventions employ different strategies to shape anti-corruption norms, the development of a de jure norm through these instruments does not guarantee the de facto functioning of the anti-corruption norm within all national jurisdictions of member states. Despite the signature and ratification of conventions, states may change their policies at will, neglecting the development of a proper monitoring and sanctioning system. For example, among 46 OECD state parties, 16 states have never prosecuted a single case.[398] Even when states fully

[392] *UNCAC*, *supra* note 75, arts 6–10, 12–13.
[393] *Ibid*, art 34.
[394] *Ibid*, art 35.
[395] For further discussion on the non-mandatory language of the UNCAC, see Rose, *supra* note 392, ch 3.
[396] *UNCAC*, *supra* note 75, arts 16 (2), 18–22.
[397] Article 4 states that "States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States;" *ibid*, art 4.
[398] WGB, *2021 Enforcement*, *supra* note 391.

adopt and implement anti-corruption conventions, such measures would be unproductive if they lack societal support. Studies suggest that many anti-corruption initiatives proposed by international organizations over the last decades have failed.[399] This proposition is evident when observing that corrupt practices still occur on a large scale in specific regions and countries. Reports from the Global Corruption Barometer, measuring citizens' opinions and corruption experiences, indicate that corruption is on the rise in different regions.[400] For example, its most recent MENA surveys revealed that 65% of citizens believed that corruption escalated in their countries throughout the previous year.[401] The surveys also showed that more than half of Africans (55%) and Latin Americans (53%) thought corruption worsened in the previous year.[402]

The ineffectiveness of international and regional anti-corruption conventions or recommendations often results from their excessive generality that overlooks local settings and needs.[403] Richard Heeks and Harald Mathisen argue that most anti-corruption projects fail in developing countries due to a significant "mismatch between the expectations built into their design as compared to on-the-ground realities in the context of their implementation."[404] These regulatory measures advocate for a harmonized anti-corruption norm while neglecting the influence of cultural norms in defining corruption. These external designers tend to disregard the diverse nature of corrupt practices in

[399] See e.g. Alina Mungiu-Pippidi, "The time has come for evidence-based anticorruption" (2017) 1 Nature Human Behaviour 11 [Mungiu-Pippidi, "evidence"]; Luca Tacconi & David Aled Williams, "Corruption and Anti-Corruption in Environmental and Resource Management" (2020) 45 Annual Rev Envt & Resources 305 at 309.
[400] For further information on the methodology and reports of Global Corruption Barometer, see Transparency International, "Global Corruption Barometer" (last visited 12 April 2024), online: *Transparency International* <www.transparency.org/en/gcb>.
[401] Roberto Martinez, B Kukutschka & Jon Vrushi, *Global Corruption Barometer Middle East & North Africa 2019* (Berlin: Transparency International, 2019) at 9.
[402] Coralie Pring & Jon Vrushi, *Global Corruption Barometer Africa 2019* (Berlin: Transparency International, 2019) at 9; Coralie Pring & Jon Vrushi, *Global Corruption Barometer Latin America & the Caribbean 2019* (Berlin: Transparency International, 2019) at 9.
[403] See generally Mungiu-Pippidi, "evidence", *supra* note 403 at 2.
[404] Richard Heeks & Harald Mathisen, "Understanding success and failure of anti-corruption initiatives" (2012) 58:5 Crime L & Soc Change 533 at 533.

different countries and prescribe a one-size-fits-all solution for member states. Moreover, corruption may function as a potent de facto institution in some societies, resisting formal anti-corruption laws on paper. For example, anti-corruption conventions recommend member states to enact whistleblower protection legislation. While such policies might be effective in Western democratic countries with accountable states, they may prove futile in authoritarian states where speaking out about the corrupt acts of leaders is met with severe consequences, even if the entire nation is aware of the corruption.

Another concern is that the predominant focus of these international and transnational instruments has been on combatting bribery and money laundering, as outlined in Table 4 in Chapter Two, providing an overview of corrupt practices mentioned in these regulations. However, certain corrupt practices, particularly in the petroleum sector, such as favoritism and fraud, have received less attention, which reveals a gap in their coverage. Moreover, as of April 2024, there has not been a specific international or regional convention exclusively addressing corruption in the extractive sector. Nevertheless, intergovernmental organizations have issued specific guidelines and recommendations to address corruption risks in the extractive sector, including petroleum. An example is the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, which provides practical guidance to mining, oil and gas companies in addressing challenges related to stakeholder engagement, including corruption.[405] These guidelines are characterized as soft law, asking states and companies to undertake anti-corruption measures.

[405] OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (Paris: OECD, 2017) [OECD, *Due Diligence*].

Due to their generic approach, global and regional anti-corruption regulations may inadequately address corruption in different regions and states. This deficiency can be addressed by other actors who play a more active role in translating de jure anti-corruption norms into de facto enforcement. Moreover, similar to any other international regulation, there is no global or regional system with the capability to sanction transnational corrupt practices.[406] It is still the states that monitor and sanction corrupt practices occurring within their borders. This presents an enforcement challenge in cases where states formally accept anti-corruption rules through membership in these organizations but lack the political will to implement such norms. Soft law instruments can be useful when there is no global government to enforce anti-corruption laws.[407] Accordingly, Subsection (B) and (C) will discuss the role of states and IFIs in the transnational anti-corruption regime, while Subsection (D) will address the role of some anti-corruption initiatives adopted by civil society organizations as soft law instruments.

B. Leading Domestic Anti-Corruption Laws: Pioneering Efforts and Exterritorial Reach

In the contemporary world, thanks to the adoption of different international and regional anti-corruption treaties, many states have enacted laws and regulations criminalizing foreign bribery and, possibly, other corrupt acts. These legal frameworks empower states to hold individuals and entities accountable for engaging in corrupt practices abroad. Nevertheless, the prohibition of corrupt foreign practices was relatively uncommon before the 2000s. Certain countries assumed a crucial role in establishing the transnational anti-corruption regime by raising the global awareness

[406] Efforts to establish an International Anti-Corruption Court (IACC) are underway in response to the global challenge of grand corruption. Despite growing support from world leaders and official endorsements, as of 2024, the IACC has not yet been formed. For more details on IACC, see Integrity Initiatives International, "An International Anti-Corruption Court" (last visited 12 April 2024), online: *Integrity Initiatives International* <integrityinitiatives.org/about-the-iacc>.
[407] See e.g. Neil Walker, "The Shaping of global law" (2017) 8:3 Transnational Leg Theory 360.

of corruption through "publicity, activism, and foreign policy pressure."[408] These trailblazers introduced specific legislation, granting their governments the authority to investigate corruption cases involving companies and individuals beyond their national jurisdictions.

In one theory, the genesis of the transnational anti-corruption regime is credited to the dominant influence of the USA in the 1970s.[409] As a hegemon, the USA began persuading other states to adopt anti-corruption norms.[410] During this period, the Watergate scandal and subsequent investigations by the SEC revealed that over 400 US corporations, including major TNOCs such as ExxonMobil and Gulf Oil, had engaged in bribery not only in the presidential campaign but also with foreign nationals worldwide.[411] Amidst the Cold War, these transnational corrupt practices raised financial and national security concerns for the US government.[412] Accordingly, the USA enacted the FCPA to criminalize US companies' transnational bribery of foreign officials. While US inquiries spurred investigations in other countries, such as Japan, Italy, Australia, Belgium, Colombia, Netherlands, Turkey, and Germany, only the USA took concrete steps to prohibit transnational bribery.[413] Thus, in 1977, the USA stood alone in the criminalization of transnational bribery, at a time when anti-corruption norms did not constitute a component of the international policy platform.

[408] McCoy & Heckel, *supra* note 341 at 79.
[409] *Ibid* at 70–72.
[410] See Reed, *supra* note 371 at 25–32.
[411] See e.g. John Ashcroft & John Ratcliffe, "The Recent and Unusual Evolution of an Expanding FCPA" (2012) 26:1 Notre Dame JL Ethics & Pub Pol'y 25.
[412] For more detail, see US, Senate Committee on Banking, Housing and Urban Affairs, 94th Cong, *Corrupt Overseas Payments by U.S. Business Enterprises* (Report No 94-1031) (Washington, DC: US Government Printing Office, 1976) at 3–4.
[413] For further details about the post-Watergate investigations in other countries, see Victor LeVine, "Transnational Aspects of Political Corruption" in Arnold Heidenheimer, Michael Johnston & Victor LeVine, eds, *Political Corruption: A Handbook* (New Brunswick, NJ: Transaction Publishers, 1989).

The inception of the transnational anti-corruption regime might be seen as a hegemonic effort by the USA, yet this theory fails to explain why it still faced challenges in influencing the global community until around two decades later when the OECD Convention was adopted.[414] Regardless of whether the US efforts to internationalize anti-corruption standards are considered hegemonic acts, its anti-corruption stance prompted changes in other states and non-state actors. Initially, when the FCPA was enacted, US companies resisted, arguing that its enforcement disadvantaged American businesses, as companies in other countries could still engage in bribery and gain advantages in the global market.[415] These companies warned that the failure to protect their economic interests would diminish US power globally. However, once the FCPA was enacted, reverting became challenging. This dilemma left US companies with the only viable option: lobbying the government to extend the FCPA's regulations globally. In response to their plea for a level playing field, the US government sought to internationalize the FCPA's anti-bribery laws.[416] Some US politicians and business leaders endeavored to promote anti-bribery norms worldwide.[417] Beyond the moral imperative, they believed international anti-corruption norms could eliminate the unproductive costs of bribery affecting competitive free markets. It could be argued that the US enactment of the FCPA anti-bribery provisions was a response to the strong informal institution of corruption in other countries. Legislators reasoned that US companies

[414] See McCoy & Heckel, *supra* note 341 at 66.
[415] See Martine Boersma, *Corruption: A Violation of Human Rights and a Crime under International Law?* (Cambridge, UK: Intersentia, 2012) at 56–58; see also Daniel K Tarullo, "The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention" (2004) 44:3 Va J Intl L 665 (explaining "the United States sought the imposition of penalties for overseas bribery on non-U.S. companies that would change their calculus of the payoff structure so as to match the calculus of U.S. companies" at 675).
[416] See e.g. Lloyd Cutler & Daniel Drory, "Toward an International Code on Illicit Payments" in Seymour Rubin & Gary Clyde Hufbauer, eds, *Emerging Standards of International Trade and Investment: Multinational Codes and Corporate Conduct* (Maryland: Rowman & Allanheld, 1984) at 35.
[417] See Elizabeth K Spahn, "Implementing Global anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD anti-Bribery Convention to the U.N. Convention against Corruption" (2013) 23:1 Ind Intl & Comp L Rev 1 at 5.

dealing with those countries were forced to comply with their corrupt norms. By expanding the anti-corruption institution within the FCPA framework, the US aimed to weaken the de facto institution of corruption in other countries, despite the disadvantages brought to US companies by the FCPA.

Following US efforts to globalize the FCPA, the OECD Convention was adopted, albeit 20 years later than the FCPA's enactment, and the UNCAC was adopted in 2003. Subsequently, several countries aimed to establish their anti-corruption frameworks similar to the FCPA. Sean Griffith and Thomas Lee argue that the FCPA's focus on foreign companies and TNCs has triggered "a domino effect in the enforcement of national foreign anti-corruption laws."[418] The risk of FCPA enforcement has disadvantaged TNCs in capital-exporting countries, such as Germany, the UK, Brazil, and France, in global business transactions. Consequently, TNCs from these countries advocated for stricter enactment and enforcement of national anti-corruption laws in their home states.[419]

Among different countries, the jurisdictional reach of US and UK anti-corruption laws generally surpasses that of other jurisdictions, and these countries assert jurisdiction over the actions of TNCs, regardless of where corrupt activities occur. This dominance is primarily due to the global presence of numerous TNCs headquartered in these countries, with many companies or their subsidiaries operating in these two countries or being listed on their stock exchanges.[420] A review of the FCPA's Location of Misconduct Alleged in FCPA-Related Enforcement Actions reveals

[418] Sean J Griffith & Thomas H Lee, "Toward an Interest Group Theory of Foreign Anti-Corruption Laws" (2019) 2019:4 U Ill L Rev 1227 at 1266.
[419] *Ibid* at 1260.
[420] See e.g. Kathleen Harris et al, "The Extraterritorial Reach of the FCPA and the UK Bribery Act: Implications for International Business" (March 2012), online (pdf): Arnold & Porter LLP <www.arnoldporter.com/-/media/files/perspectives/publications/2012/03/the-extraterritorial-reach-of-the-fcpa-and-the-u__/files/newsletter-item/fileattachment/advisory-extraterritorial_reach_fcpa_and_uk_brib__.pdf>.

enforcement actions against a large number of foreign-based companies.[421] The UKBA's specific provisions even extend the anti-corruption laws beyond the FCPA's reach.[422] Given their significance, many transnational and national corporations incorporate the standards of the US and UK into their anti-corruption strategies.[423] Complying with these standards often requires companies to establish two separate compliance programs.

Appendix VI provides a concise exploration of the historical evolution of domestic anti-corruption legislation and the corresponding regulations in three leading states: the USA, the UK, and Canada. The reason to study Canadian anti-corruption law is that in addition to the USA and the UK, Canada serve as the home countries for major capital markets in the petroleum sector and many TNOCs. Table 6 details the domestic anti-corruption legislations of these countries with long-arm provisions. Beyond addressing domestic bribery, these laws also criminalize bribery acts outside their borders with a nexus to their jurisdictions or involving foreign nationals. Such unilateral measures signify an enhanced collaboration in the establishment of a transnational anti-corruption regime.

Concerning the petroleum sector, this study has not identified any specific domestic anti-corruption regulations with extraterritorial extension, apart from these general anti-corruption laws that apply extraterritorially to companies in the sector. However, learning from the experiences of countries with advanced anti-corruption regulations, oil-producing countries can improve and update their legal frameworks related to the petroleum sector. For example, in their study, Olusola

[421] FCPA Clearinghouse, "Location of Misconduct Alleged in FCPA-Related Enforcement Actions" (last visited 12 April 2024), online: *Stanford FCPA Clearinghouse* <fcpa.stanford.edu/statistics-analytics.html?tab=8>.
[422] Compared to the FCPA's jurisdiction, the UKBA has a larger jurisdiction than the FCPA, covering both public and private sector bribery, prohibiting facilitation payments, and extending to companies that fail to prevent bribes, regardless of where the bribery occurs; see *UKBA*, *supra* note 352, s 6–7.
[423] See EY, *supra* note 139 at 4.

Olujobi and Oluwatosin Olujobi explain how Nigeria can glean lessons from the anti-corruption laws of the UK, the USA, and Norway.[424] The authors deliberately select oil-rich countries with advanced anti-corruption mechanisms to address corrupt practices in the Nigerian oil sector. Nevertheless, as discussed in Chapter Two, implementing such reforms requires political will on the part of the states and the populace. Or, as Paul Stevens et al put it, "the only way [Norwegian] experience can be replicated is to start with 4.5 million Norwegians."[425]

Prominent Domestic Anti-Corruption Legislations with Extraterritorial Application	
USA	- Foreign Corrupt Practices Act (1977) - Crimes and Criminal Procedure, Section 1956 - Internal Revenue Code, Section 162. - Sarbanes–Oxley Act (2002) - Dodd-Frank Wall Street Reform and Consumer Protection Act (Securities Exchanges, Section 78) - Disclosure of Payments by Resource Extraction Issuers, Section 240 (2016) - Russia and Moldova Jackson–Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act (2012)
UK	- Anti-Terrorism, Crime and Security Act, Section 109 (2001) - Bribery Act (2010)
Canada	- Corruption of Foreign Public Officials Act (1998) - Criminal Code, Chapter 46 - Income Tax Act, Chapter 1 - Justice for Victims of Corrupt Foreign Officials Act (2017)

Table 6 – Anti-Corruption Laws with Extraterritorial Application Enacted by Leading States[426]

While possessing anti-corruption laws with extraterritorial jurisdiction is important, their effective enforcement is paramount. The TI's Exporting Corruption 2022 report assesses foreign bribery enforcement in 47 countries from 2018 to 2022.[427] In this report, the USA leads in active enforcement of foreign bribery laws.[428] In addition, a study examining FCPA enforcement actions against corporations from 1977 to 2017 found that the increase in FCPA enforcement in the mid-

[424] Olusola Joshua Olujobi & Oluwatosin Michael Olujobi, "Comparative Appraisal of Anti-Corruption Laws: Lessons Nigeria Can Learn from Norway, United Kingdom and United States' Anti-Corruption Strategies" (2020) 11:7 Intl J Management 338.
[425] Paul Stevens, Glada Lahn & Jaakko Kooroshy, *The Resource Curse Revisited* (London: Chatham House for the Royal Institute of International Affairs, 2015) at 12.
[426] The full citations for these anti-corruption legislations are provided in the relevant sections in Appendix VI.
[427] Transparency International, *Exporting Corruption 2022* (Berlin: Transparency International, 2022) [TI, *Exporting*].
[428] *Ibid* at 87.

2000s impacted foreign direct investment in countries with high corruption levels.[429] This increased enforcement not only influenced US-based companies but also prompted non-US companies to improve their compliance with FCPA provisions due to the increased penalties.[430] Another study suggests that companies with ties to the USA were more likely to adopt anti-bribery standards.[431] On the other hand, in the TI's report, the UK has not displayed significant enforcement of foreign bribery laws and is categorized as a "moderate enforcer,"[432] while Canada is designated as a "limited enforcer" of foreign bribery laws.[433] Therefore, the effectiveness of extraterritorial anti-corruption laws extends beyond their mere existence, as active enforcement contributes to the de facto institution of anti-corruption.

On a different note, the extraterritorial jurisdiction of domestic anti-corruption laws usually targets individuals and entities with some mutual business links, thereby limiting their impact on countries with sparse relations or insufficient TNC activities. Moreover, these laws predominantly focus on the prohibition of foreign bribery which leaves autogenic corrupt practices such as embezzlement inadequately addressed across jurisdictions. This loophole creates an escape route for money launderers and embezzlers, allowing them to evade prosecution by seeking refuge in countries where they are not subject to legal consequences.[434]

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[429] Hans Bonde Christensen, Mark G Maffett & Thomas Rauter, "Policeman for the World: The Impact of Extraterritorial FCPA Enforcement on Foreign Investment and Internal Controls" (2020) 97:5 Accounting Rev 11.
[430] See Lucinda A Low, Thomas K Sprange & Milos Barutciski, "Global anti-corruption standard and enforcement: Implications for energy companies" (2010) 3:2 J World Energy L & Bus 166 at 209.
[431] Reed, *supra* note 371 at 100-01.
[432] See TI, *Exporting*, *supra* note 431 at 85; see also Transparency International UK, "UK No Longer An Active Enforcer Of Foreign Bribery As Global Enforcement Hits Historic Low" (11 October 2020), online: *Transparency International UK* <www.transparency.org.uk/uk-foreign-bribery-enforcement-exporting-corruption>.
[433] See TI, *Exporting*, *supra* note 431 at 36.
[434] See e.g. Peter M German, *Dirty Money – Part 2* (Victoria: Province of British Columbia, Ministry of the Attorney General, 2019) (the report indicating how "Greater Vancouver has also acted as a laundromat for foreign organized crime, including a Mexican cartel, Iranian and Mainland Chinese organized crime, all seeking a safe and effective locale in which to wash their proceeds of crime" at 12).

C. International Financial Institutions: The Delayed Fight against Corruption

Another influential group in the transnational anti-corruption legal regime comprises IFIs, which have the authority to enforce anti-corruption standards in projects they finance. IFIs primarily target governance systems in middle and low-income countries to facilitate long-term development through the provision of direct development loans and aid. In return for their financial support, IFIs can set conditions, with the improvement of anti-corruption policies and transparency being primary among them. Apart from financial assistance, IFIs deliver capacity building, policy advice, including recommendations on good governance and corruption, as well as technical assistance to improve operations vulnerable to corrupt practices.[435] This section briefly introduces the main IFIs and their role in the transnational anti-corruption regime, with further details to be provided in Appendix VII.

Before the 1990s, the Bretton-Woods institutions, namely the WB and IMF, did not prioritize the issue of corruption. Corruption was treated as a "taboo" or "C-word," often perceived solely as a political or sovereignty problem.[436] However, with the increasing global awareness and recognition of the importance of anti-corruption measures in the international financial system, these institutions underwent a transformation in the 1990s. In 1996, the president of the WBG[437] opened the annual meeting, declaring, "[i]f the new compact is to succeed, we must tackle the issue of economic and financial efficiency. But we also need to address transparency,

[435] Benjamin S Buckland, *Global Anti-Corruption Efforts: The Role of Non-Governmental Organizations* (Geneva: CASIAN, 2007) at 9.
[436] See e.g. John Brademas & Fritz Heimann, "Tackling International Corruption: No Longer Taboo" (1998) 77:5 Foreign Affairs 17.
[437] The WBG consists of five organizations: International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ISCID). IDA and IBRD organizations together are called WB.

accountability, and institutional capacity. And let's not mince words: we need to deal with the *cancer of corruption*."[438]

Since then, WBG has consistently stressed the obligation to prevent corruption and fraud in its financial aid and loan programs. Anti-corruption rules are integrated into different processes, such as procurement, expenditure, fiscal reports, supervision, and auditing.[439] Given the prevalence of corruption in procurement, the WB has implemented specific measures to mitigate corruption risks in these programs. For example, the WB Procurement Regulations for Investment Project Financing require the application of anti-corruption standards to projects' procurement.[440] In cases where a bidder is found involved in corrupt practices or fraud, the WB disbars the bidder from further projects. Moreover, if the WB uncovers the involvement of a financial aid recipient in corrupt or fraudulent acts, it declares "misprocurement" and cancels any remaining fund.[441] The Anti-Corruption Guidelines further require borrowers to include an anti-corruption provision in contracts with third parties to allocate WB funds.[442] Through this clause, contractors and sub-contractors commit to complying with the Anti-Corruption Guidelines. Additional details on anti-corruption measures adopted by other WBG members are provided in Appendix VII.

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[438] World Bank, "James David Wolfensohn" (last visited 12 April 2024), online: *World Bank* <www.worldbank.org/en/about/archives/history/past-presidents/james-david-wolfensohn> (citing James David Wolfensohn speech in 1996 WB's annual meeting) [emphasis added].

[439] See World Bank, *Helping countries combat corruption: the role of the World Bank* (Washington, DC: World Bank, 1997) at 25 [WB, *Helping*].

[440] World Bank, *World Bank Procurement Regulations for Investment Project Financing* (Washington, DC: World Bank, 2016) (Annex IV mandates that "[t]he Bank requires that Borrowers (including beneficiaries of Bank financing); bidders (applicants/proposers), consultants, contractors and suppliers; any sub-contractors, sub-consultants, service providers or suppliers; any agents (whether declared or not); and any of their personnel, observe the highest standard of ethics during the procurement process, selection and contract execution of Bank-financed contracts, and refrain from Fraud and Corruption" para 2.2 (a)).

[441] *Ibid*, para 2.2 (c).

[442] World Bank, *Guidelines on Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants*, (Washington, DC: World Bank, last revised 2016) para 9(d) [WB, *Anti-Corruption Guidelines*].

The IMF, the other Bretton-Woods institution with 190 member states, focuses on preserving the stability of the international monetary system. In the 1990s, it shifted its focus on corruption from a political matter to recognizing it as both a social and economic issue.[443] The 1996 Declaration on Partnership for Sustainable Growth emphasized the importance of fighting corruption for promoting good governance.[444] The 1997 Guidance Note on the Role of IMF in Governance Issues urges member states to take a "more proactive approach in advocating policies and the development of institutions and administrative systems that eliminate the opportunity for bribery, corruption, and fraudulent activity in the management of public resources,"[445] which grants the IMF the authority to suspend loans if a state fails to implement proper anti-corruption measures.[446] Moreover, the IMF Fiscal Transparency Code, established in 1998 and revised in 2007, 2014, and 2019, acts as an international standard for public financial disclosure.[447] It outlines principles and practices, with a particular focus on addressing natural resource management in resource-rich states. Article IV specifically addresses risks associated with natural resource stocks and flows and outlines principles and practices for an "open and transparent" resource revenue management in ownership and rights, revenue mobilization and utilization, and resource activity disclosure.[448]

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[443] See James D Wolfensohn, "Remarks at A Global Forum on Fighting Corruption" (Lecture delivered at the World Bank in Washington DC, 24 February 1999), online (pdf): *World Bank* <documents1.worldbank.org/curated/en/619341468197364318/pdf/99963-WP-Box393210B-PUBLIC-1999-02-24-JDW-Remarks-at-A-Global-Forum-on-Fighting-Corruption.pdf> (explaining the change in the approach toward corruption taken by both the WB and IMF, "I decided in 1996 that I would redefine the "C" word not as a political issue but as something social and economic. That got me in under the wire of the Articles of the Bretton Woods institutions and, simultaneously, my friend Michel Camdessus did the same on the side of the International Monetary Fund."

[444] International Monetary Fund, *Partnership for Sustainable Global Growth: Interim Committee Declaration* (Washington DC: International Monetary Fund, 1996).

[445] International Monetary Fund Executive Board, *The Role of the IMF in Governance Issues: Guidance Note* (25 July 1997) [*Guidance Note*].

[446] For example, in 1998, the IMF suspended a $220 million loan to Kenya; see Jim Hoagland, "Kenya, Corruption and the IMF", *Associated Press* (16 August 1997), online: <www.washingtonpost.com/archive/opinions/1997/08/17/kenya-corruption-and-the-imf/544c46c4-ecaf-4b94-bc97-5f235ea97e7c/>.

[447] International Monetary Fund, *Fiscal Transparency Code* (Washington, DC: International Monetary Fund, last modified 2019).

[448] *Ibid*, art IV.

Since the 1990s, alongside Bretton-Woods institutions, regional development banks, such as the African Development Bank (AFDB), the Asian Development Bank (ADB), the European Bank for Reconstruction and Development (EBRD), and the Inter-American Development Bank (IADB), have followed the trend set by the WBG in adopting anti-corruption measures in their financed projects and procurement contracts. In return for financial support, these IFIs require borrower states to adhere to anti-corruption rules in their projects and operations, detailed in Appendix VII. More importantly, in 2006, the AFDB, ADB, EBRD, the European Investment Bank Group, IMF, IADB, and the WBG collaborated to establish a Joint International Financial Institution Anti-Corruption Task Force.[449] Acknowledging the detrimental effects of corruption, the Task Force underlines that:

> [e]ach of the member institutions of the IFI Task Force has a distinct mechanism for addressing and sanctioning violations of its respective anti-corruption policies. The IFI Task Force recognizes that mutual recognition of these enforcement actions would substantially assist in deterring and preventing corrupt practices. … As an immediate step, the IFI Task Force recommends that each member institution should seek to require all bidders, sponsors, or other firms or individuals participating in activities financed by a member institution to disclose any sanction imposed on that firm or individual by a member institution.[450]

This mutual recognition develops a harmonized strategy to combat corruption in financed projects' activities and operations. The Task Force introduces standardized definitions, common principles, and guidelines for corruption investigations. Moreover, these IFIs have also adopted the Agreement for Mutual Enforcement of Debarment Decisions to streamline the enforcement of participating institutions' debarment decisions.[451] This cross-debarment regime improves the

[449] African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, European Investment Bank, International Monetary Fund, Inter-American Development Bank, World Bank, *International Financial Institution Anti-Corruption Task Force* (2006).
[450] *Ibid*, para 5.
[451] African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, European Investment Bank, International Monetary Fund, Inter-American Development Bank, World Bank *Agreement for Mutual Enforcement of Debarment Decisions* (2010).

efficiency of sanctions imposed by each institution, enhancing their overall enforcement capabilities.[452]

Table 7 presents a brief portray of anti-corruption measures implemented by key IFIs, while Appendix VII offers a more exploration of the anti-corruption measures adopted by WBG and regional development banks. In general, the anti-corruption policies adopted by IFIs reflect an increased awareness of corruption and its consequences across different regions, leading to the proliferation of anti-corruption measures in international and regional lending institutions. A common and distinctive feature of these IFIs' anti-corruption regulatory measures is the use of financial sanctions as a mechanism to compel countries to adhere to anti-corruption norms. Consequently, borrowers and contractors are incentivized to adhere to such policies to safeguard their business opportunities. A quick look at the WBG's list of ineligible firms and individuals reveals that it actively updates those who have been sanctioned by the Bank itself and through cross-debarment processes.[453] This observation implies that anti-corruption efforts extend beyond de jure norms in the operations of IFIs.

[452] For further detail on the work of regional development banks, see Stuart H Deming, "Anti-Corruption Policies: Eligibility and Debarment Practices at the World Bank and Regional Development Banks" (2010) 44:2 Intl Lawyer 871.
[453] World Bank, "Procurement - World Bank Listing of Ineligible Firms and Individuals" (last visited 12 April 2024), online: *World Bank* <www.worldbank.org/en/projects-operations/procurement/debarred-firms>.

International Financial Institutions	
WBG	- Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1966), art 52 - Guidelines on Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants (2006) - Multilateral Investment Guarantee Agency Anti-corruption Guidelines (2013) - World Bank Procurement Regulations for Investment Project Financing, Annex IV (2016)
IMF	- The Role of the IMF in Governance Issues: Guidance Note (1997) - IMF Fiscal Transparency Code (1998) - Review of 1997 Guidance Note on Governance - A Proposed Framework for Enhanced Fund Engagement (2018)
Regional Development Banks	- International Financial Institution Anti-Corruption Task Force (2006) - AFDB's Rules and Procedures for Procurement of Goods and Works (2008) - AFDB's Rules and Procedures for the Use of Consultants (2008) - IADB's Action Plan for Supporting Countries' Efforts to Combat Corruption and Foster Accountability (2009) - Agreement for Mutual Enforcement of Debarment Decisions (2010) - IADB's Procurement of Goods and Works Financed by the Inter-American Development (2011) - IADB's Policies for the Selection and Contracting of Consultants Financed by the Inter-American Development (2011) - ADB's Guidelines on the Use of Consultants by ADB and Its Borrowers (2013)ADB's Integrity Principles and Guidelines (2015) - ADB's Procurement Guidelines (2015) - EBRD's Enforcement Policy and Procedures (2017) - EBRD's Anti-corruption statement (2018) - IADB's Sanctions Procedures (2020)

Table 7 – Anti-Corruption Measures Taken by International Financial Institutions

Despite these anti-corruption efforts, certain studies not only question the efficacy of IFIs in combatting corruption but also argue that these institutions may inadvertently contribute to the occurrence of corrupt practices in their projects.[454] According to a WBG report analyzing 19 countries as case studies, "anti-corruption measures are too often proposed by the Bank without considerations of the political economy and without clear strategies to win the support of a critical

[454] See e.g. Sue Hawley, "Exporting Corruption: Privatisation, Multinationals and Bribery" (2000), online: *The Corner House* <www.thecornerhouse.org.uk/resource/exporting-corruption-0> (stating that "[d]onor governments and multilateral agencies such as the World Bank and International Monetary Fund frequently put forward anti-poverty and 'good governance' agendas, but their other actions send a different signal about where their priorities lie" at 25).

mass of key leaders who would help overcome the inevitable opposition of vested interests."[455] Other studies assert that IFIs provide loans to states with high levels of corruption, while lacking the capability to properly investigate and sanction companies and individuals involved in corrupt acts.[456] A case study of a WBG-financed dam in Thailand reveals that "the harmful (or illegal) activity associated with the crimes of international financial institutions occurs within the context of productive, legal activity."[457] The authors demonstrate how the WBG's operations and policies tended to favor the capital interests of special groups over the needs of the people. Moreover, some studies suggest that neoliberal structural adjustment policies demanded by IFIs may facilitate corrupt practices.[458] For example, Daw Rothe argues that when IFIs require privatization and decentralization of state-owned industries as loan conditions, local elites may exploit such privatization by acquiring those industries at low prices.[459] In light of this, Subsection (D) will concentrate on the role of NGOs and civil society organizations while examining their efforts to incorporate local and sectoral considerations into their anti-corruption initiatives.

D. Non-Governmental Organizations: New Warriors in the Fight Against Corruption

While the state remains a primary actor in global governance, its dominance is not consistent across all situations and time, which prompts it to delegate power to non-state actors, including NGOs and civil society organizations.[460] Since the 1990s, transnational advocacy movements, prominently spearheaded by NGOs, have put the accent on corruption and sought to exert pressure

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[455] Odd-Helge Fjeldstad & Jan Isaksen, *Anti-Corruption Reforms: Challenges, Effects and Limits of World Bank Support* (Washington, DC: The World Bank, 2008) at 71.
[456] See e.g. David O Friedrichs & Jessica Friedrichs, "The World Bank and crimes of globalization: a case study" (2002) 29:1/2 Soc Justice 1; Robert Klitgaard, *Addressing corruption in Haiti* (Washington, DC: American Enterprise Institute, 2010).
[457] Friedrichs & Friedrichs, *supra* note 460 at 25.
[458] See generally Dawn L Rothe, "Facilitating corruption and human rights violations: the role of international financial institutions" (2010) 53 Crime L & Soc Change 457.
[459] *Ibid* at 460.
[460] See Detomasi, *supra* note 370 at 226.

on states and international organizations to embrace anti-corruption measures. However, in certain countries, the state's structural constraints and political pressures block the formation of an independent civil society, particularly evident in oil-rich nations where domestic civil society tends to lack the strength to scrutinize and challenge ruling elites.[461] In response, transnational advocacy organizations may intervene to initiate domestic anti-corruption movements, providing financial support to strengthen their influence on political change.[462]

The rise and spread of organizations advocating for anti-corruption signal a departure from conventional binding instruments towards soft-law approaches in anti-corruption policies. Civil society takes on an increasingly prominent role in anti-corruption measures, with its engagements internalizing de jure anti-corruption laws established through formal channels. Civil society provides societal support for anti-corruption measures and transform them into de facto protection. This subsection, thus, aims to briefly characterize and evaluate the contributions of leading transnational NGOs, namely TI, GB, and EITI, among others, in raising the global awareness of corruption in the extractive sector.

Transparency International, founded by former WBG officials, was the inaugural organization with a primary focus on raising awareness of corruption. In defining its mission, TI specifies the chief goal as "to stop corruption and promote transparency, accountability and integrity at all levels and across all sectors of society."[463] The organization encourages countries to establish and enforce effective anti-corruption policies and laws. Operating in over 100 countries, the TI has established

[461] See e.g. Pleines & Wöstheinrich, *supra* note 145 at 303 (discussing the position of civil society organizations in Turkmenistan).
[462] See Diana Schmidt-Pfister, "Civil society between the stools" in Diana Schmidt-Pfister & Holger Moroff, eds, *Fighting Corruption in Eastern Europe: A Multilevel Perspective* (New York: Routledge, 2013) 173 at 173–75.
[463] Transparency International, "Mission, Vision, Values" (last visited 12 April 2024), online: *Transparency International* <www.transparency.org/en/the-organisation/mission-vision-values>.

national chapters, local independent organizations in different countries, aiming to raise public awareness of corruption and advocate for the enhancement of good governance institutions in those states.[464] These national chapters exemplify how transnational civil society organizations support domestic civil society. TI has taken a leading role in projects such as the Corruption Perception Index (CPI) and Global Corruption Barometer projects, developing methodologies and tools to measure the prevalence of corruption worldwide.[465] These tools have been widely used by policymakers, researchers, companies, and other stakeholders in discussions and policies on anti-corruption.

Within TI's array of programs and initiatives, specific emphasis has been placed on anti-corruption within the extractive sector. Since 2007, in partnership with the Revenue Watch Institute and with the support of Publish What You Pay (PWYP), TI has undertaken the Promoting Revenue Transparency project.[466] This initiative seeks to develop transparency and accountability in natural resource management. The 2011 report of Revenue Transparency of Oil and Gas Companies measures and evaluates the level of revenue transparency among selected companies.[467] It provides rankings for 44 prominent oil and gas companies, including both TNOCs and NOCs, based on their reporting on anti-corruption programs, disclosure of revenues, and country-level disclosure of relevant information to international operations.[468] Furthermore, the report formulates key policy recommendations for companies, countries, and investor communities.[469] Moreover, TI

[464] For more information on TI's national chapters, see Transparency International, "Our National Chapters" (last visited 12 April 2024), online: *Transparency International* <www.transparency.org/en/our-national-chapters>.
[465] For more information on these projects, see Transparency International, "Research" (last visited 12 April 2024), online: *Transparency International* <www.transparency.org/en/research>.
[466] Transparency International, *Promoting Revenue Transparency* (Berlin: Transparency International, 2008).
[467] See Barbara Kowalczyk-Hoye, *Promoting Revenue Transparency: 2011 Report on Oil and Gas Companies* (Berlin: Transparency International, 2011).
[468] *Ibid* at 12–51.
[469] *Ibid* at 8–10.

initiated the Business Principles for Countering Bribery, a multi-stakeholder initiative that equips companies with a framework for developing their anti-bribery and compliance program.[470] Importantly, major TNOCs such as Shell and BP have not only endorsed but actively participated in the initiative's Steering Committee comprised of corporate members.

TI has successfully raised awareness about corruption, strengthened the capacity to combat corruption, and engaged many stakeholders in its anti-corruption initiatives.[471] While its projects and programs targeting the culture of corruption and have achieved global successes, it is important to recognize that TI primarily seeks to bring international attention to corruption and its consequences through collaborations with other international organizations and states.[472] Due to TI's focus on formal channels, its initiatives still face challenges in states where ruling elites resist the adoption of anti-corruption remedies.[473]

Since its establishment in 1993, *Global Witness* has emerged as a pioneering NGO dedicated to exploring the relationship between natural resources, corruption, and human rights and environmental abuses.[474] This organization has employed different investigative techniques, including secret filming, satellite imagery, drone footage, and data analysis, to uncover instances of corruption, human rights violations, and environmental abuses.[475] Through its investigations in several resource-rich countries, GW demonstrates how the secrecy in the extractive industry

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[470] See Transparency International, *Business Principles for Countering Bribery* (Berlin: Transparency International, 2013) [TI, *Business Principles*].
[471] See Samuel Kimeu, "Corruption as a challenge to global ethics: the role of Transparency International" (2014) 10:2 J Global Ethics 231 at 236. For a list of recent TI's successes, see Transparency International, "Our Impact" (last visited 12 April 2024), online: *Transparency International* <www.transparency.org/en/our-impact>.
[472] For a list of TI's relationships with other organizations, see Transparency International, "Our Institutional Relationships" (last visited 12 April 2024), online: *Transparency International* <www.transparency.org/en/the-organisation/our-institutional-relationships>.
[473] See Schmidt-Pfister, *supra* note 466 at 179.
[474] Global Witness, "About us" (last visited 12 April 2024), online: *Global Witness* <www.globalwitness.org/en/about-us/>.
[475] *Ibid*.

contributes to the proliferation of corruption. In a significant development in 2002, GW co-founded PWYP, a civil society movement committed to improving transparency and accountability in the extractive sector.[476] This coalition advocates for governments and companies to publicly disclose their payments and revenues related to oil, gas, and mining contracts. GB, with its proactive initiatives and advocacy, stands as a trailblazing organization that paved the way for subsequent transparency initiatives.

The *Extractive Industries Transparency Initiative* is a global standard designed to lessen the adverse impacts of natural resource abundance on resource revenues and governance within extractive industries.[477] The EITI, originating from the 2002 World Summit on Sustainable Development in Johannesburg, was a response to extensive academic literature on the complex governance of extractive industries and the calls from civil societies such as PWYP and TNOCs such as BP and Chevron.[478] The EITI calls upon member states, corporate entities, investors, and NGOs to champion transparency and accountability within the extractive sector.[479] It advocates for the full disclosure of information throughout the extractive industry value chain, covering aspects such as revenues, procedures for allocating exploration and exploitation rights, procurement, social and economic expenditures, rules for appointments and promotions, accounting and auditing mechanisms, and details about payments and budget processes.[480] More importantly, the EITI Standard 2019 mandates implementing countries to "disclose any contracts and licenses that are granted, entered into or amended after 1 January 2021."[481]

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[476] Publish What You Pay, "About" (last visited 12 April 2024), online: *Publish What You Pay* <www.pwyp.org>.
[477] See e.g. Corrigan, *supra* note 86.
[478] See EITI, "History of the EITI" (last visited 12 April 2024), online: *EITI* <eiti.org/history>.
[479] EITI, *The EITI Standard 2023* (Oslo: EITI, 2023).
[480] For a complete list of transparency requirements, see EITI, "The EITI Requirements" (last visited 12 April 2024) online: *EITI* <eiti.org/eiti-requirements>.
[481] *Ibid*, requirement 2.4. For further details, see EITI, "Contract Transparency" (last visited 12 April 2024), online: *EITI* <eiti.org/contract-transparency>.

The EITI employs a written standard with a multi-stakeholder approach, involving governmental, corporate, and societal levels, to govern disclosures within the extractive sector.[482] This standard operates at both global and country levels. At the global level, EITI monitors government compliance through a process called "validation," evaluating adherence to the standard over a specified period.[483] This process involves observing required disclosures, examining systematically disclosed information on government websites, and conducting interviews with officials, civil society, and companies.[484] Countries receive rankings based on their performance, with potential suspension for non-compliance, requiring corrective actions.[485] At the country level, EITI operates as a multi-stakeholder organization, involving government, civil society, and company representatives.[486] The collaborative efforts of these three stakeholders lead to the formation of a national multi-stakeholder group responsible for developing an EITI work plan, including annual reports and recommendations to enhance governance in the extractive sector.[487] According to interviewee Epsilon, "if there [is] an issue with the government, this group will oversee that, [providing] the public and companies a chance to also have their views. [Therefore, it makes it] more difficult for the government to just make a decision without vetting them through this multi-stakeholder group."[488] Thus, this two-level structure employed by the EITI ensures accountability and creates checks and balances to enhance transparency in the extractive sector.

The EITI has successfully attracted participation from different oil-rich countries and major TNOCs globally. Countries voluntarily adopt the EITI standard, becoming candidates and

[482] EITI, *supra* note 483, requirement 1.1, 1.2, 1.3.
[483] Interview of Epsilon (3 October 2022), Transcript at 2. See also EITI, "Validation" (last visited 12 April 2024), online: *EITI* <eiti.org/validation>.
[484] Epsilon, *supra* note 487.
[485] *Ibid.*
[486] *Ibid* at 3.
[487] EITI, *supra* note 483, requirement 1.4.
[488] Epsilon, *supra* note 487 at 3.

reporting under its guidelines. As of April 2024, 58 countries implement the standard, requiring companies under their jurisdiction to disclose taxes, project-specific payments to governments, beneficial ownership information, and contracts with the state, leading to the public disclosure of government revenues totaling $2.95 trillion.[489] Significant oil-rich nations are part of this initiative, with Azerbaijan, one of the world's oldest oil-rich countries, being the inaugural EITI state-member in 2007, although it withdrew from the initiative in 2017.[490] Moreover, there are EITI supporting companies, with 63 oil companies as of April 2024 voluntarily joining the EITI process and disclosing payments made to governments.[491] Major TNOCs, including BP, a founding member of EITI, have been supporting the initiative since 2007.[492] These companies provide financial contributions and pledge to meet a set of expectations for transparency, which applies globally regardless of their operating country.[493]

In evaluating the impact of EITI on corruption levels, consideration must be given to whether achieving EITI compliant status has resulted in improvements in a state's anti-corruption indicators. Several studies have sought to assess the effectiveness of EITI in resource-rich countries. Dilan Osler, for example, argues that EITI has not effectively reduced the CPI in member states.[494] Similarly, a separate study that investigated EITI membership and transparency and corruption levels between 2006 and 2013 indicates that, despite EITI's success in enhancing

[489] See EITI, "Countries: Global Implementation of the EITI Standard" (last visited 12 April 2024), online: *EITI* <eiti.org/countries> [EITI, "Countries"].
[490] See EITI, "Status of Azerbaijan" (last visited 12 April 2024), online: *EITI* <eiti.org/azerbaijan>.
[491] EITI, "Oil and gas companies" (last visited 12 April 2024), online: *EITI* <eiti.org/oil-and-gas-companies>.
[492] EITI, "BP" (last visited 12 April 2024), online: *EITI* <eiti.org/supporters/bp#:~:text=Through%20the%20EITI%2C%20bp%20works,local%20fiscal%20and%20legal%20regimes>.
[493] Epsilon, *supra* note 487.
[494] Dilan Osler, "Extracting the Maximum from the EITI" (2009) OECD Development Centre Working Paper No 276.

data disclosure, corruption perceptions showed no improvement.[495] This study attributes this outcome to the limited definition of transparency as defined by EITI and recommends a more extensive reform in transparency policies. Another study, using the control of corruption index in the worldwide governance indicators, finds that EITI membership did not address corruption levels in member states and concludes that focusing solely on transparency is insufficient for addressing corruption in resource-rich countries.[496] The voluntary nature of EITI, especially in states where political power relies on rent-seeking behavior, may explain these outcomes, as EITI lacks coercive power and may mainly contribute to the formal acceptance of anti-corruption norms. Another gap within EITI is related to the absence of data regarding the final destination of resource revenues and government expenditures. While EITI requires the release of payments made to governments, it does not mandate the disclosure of how governments allocate and spend such revenues.[497] The EITI refrain from enforcing the disclosure of this information, possibly anticipating that government resistance would lead to their nonparticipation in the initiative.

It is worth noting that the EITI requirements functions as means, not ends, in establishing a transparent and accountable environment within the extractive industries. These standards, at a minimum, act as preventive measures, deterring the exacerbation of existing issues. In this context, a relevant study suggests that EITI membership operates as a "shielding mechanism" for resource-rich countries, evidenced by the absence of increased corruption levels among EITI members

[495] Öge Kerem, "Which transparency matters? Compliance with anti-corruption efforts in extractive industries" (2016) 49 Resources Pol'y 41.
[496] Elizabeth Kasekende, Charles Abuka & Mare Sarr, "Extractive industries and corruption: Investigating the effectiveness of EITI as a scrutiny mechanism" (2016) 48 Resource Pol'y 117. See also Kweku Adams, Bhabani Shankar Nayak & Serge Koukpaki "Critical perspectives on 'manufactured' risks arising from Eurocentric business practices in Africa" (2018) 14 Critical Perspectives on Intl Bus 210 (investigating the role of EITI membership and petroleum revenue management policies in 222 cases from 18 main petroleum stakeholders in Ghana); Corrigan, *supra* note 86 (examining the relationship between the effects of EITI on economic development and quality of governance).
[497] For further information, see Kolstad & Wiig, *supra* note 330.

between 2002 and 2011, in contrast to their non-EITI counterparts.[498] As highlighted by interviewee Epsilon, "the more information that companies are disclosing and can disclose, the harder it will be to hide corrupt practices."[499] Consequently, EITI requirements represent an initial step toward creating a non-corrupt culture in the financial transactions between corporations and governments. This rationale underlies Chapter Five's consideration of any transparency requirement in contracts as an anti-corruption clause. Lastly, it is important to acknowledge that transparency initiatives constitute an ongoing process and require additional time and further research for an effective evaluation of their definitive outcomes.

In addition to GW, TI, and EITI, several other civil society initiatives and organizations advocate for anti-corruption measures in the extractive sector.[500] Several studies assert that influential NGOs have the capability to combat corruption.[501] NGOs can monitor states' administrative decisions, raise awareness during corruption scandals, and thereby enhance accountability.[502] They mostly prescribe the implementation of freedom of information in their anti-corruption policies. These policies aim to increase the transparency of decision-making procedures and administrative decisions made by public officials, with independent anti-corruption agencies holding them accountable. This approach may prove effective in specific sectors, such as extractive industries, where secrecy laws and a lack of transparency contribute to increased corruption levels. Through

[498] Elissaios Papyrakis, Matthias Rieger & Emma Gilberthorpe, "Corruption and the extractive industries transparency initiative" (2017) 53:2 J Development Studies 295.
[499] Epsilon, *supra* note 487 at 8.
[500] Among others, one can refer to Revenue Watch Institute, PWYP, Natural Resource Governance Institute, Open Oil, Oil Change, and Accountability Lab.
[501] See e.g. Tacconi & Williams, *supra* note 403 at 320.
[502] See e.g. Ivar Kolstad & Tina Søreide, "Corruption in natural resource management: Implications for policy makers" (2009) 34:4 Resources Pol'y 214.

collaboration with states, international organizations, and IFIs, NGOs can amplify the enforcement of anti-corruption laws and improve good governance institutions.[503]

One last consideration is that while transnational civil society has successfully raised global awareness about corruption and contributed to the formalization and internalization of transnational anti-corruption norms, there is the potential for many NGOs, similar to intergovernmental organizations, to face challenges in aligning their perspectives, which may inherently carry Western biases, with the local and cultural realities concerning corrupt practices in various regions of the world.[504]

3. Concluding Reflections on the Transnational Anti-Corruption Regime: Bridging Norms to Practices

This chapter presents the evolution of a transnational anti-corruption regime and its role in shaping and disseminating norms to combat corruption. This chapter begins by introducing a three-stage model that describes the formation of a transnational norm: increased global awareness, formalization through transnational instruments, and transnational internalization and enforcement. This model is then applied to trace the development of anti-corruption as a transnational norm. The chapter affirms that anti-corruption norms have successfully progressed through and completed the second stage of development. Over the past four decades, the acceptable standards of conduct in global business have undergone changes concerning corruption. Currently, de jure anti-corruption norms have crystallized through the global acknowledgement of the costs

[503] See e.g. Alina Mungiu-Pippidi, "The quest for good governance: Learning from virtuous circles" (2016) 27:1 J Democracy 95.
[504] See generally Kalin S Ivanov, "The limits of a global campaign against corruption" in Sarah Bracking, ed, *Corruption and development* (London: Palgrave Macmillan, 2007) 28.

associated with corruption, along with the adoption of hard and soft law remedies devised by international and regional organizations, leading states, IFIs, NGOs, and TNCs.

The effectiveness of the transnational anti-corruption regime is contingent upon the norm reaching its third stage. This means that anti-corruption truly becomes transnational norm when states can effectively enforce de jure norms and when individuals internalize these norms in their practices. Without such enforcement and internalization, a proliferation of laws alone is insufficient to make the world less corrupt. This study argues that, despite the widespread adoption and enforcement of anti-corruption regulatory remedies at various levels, de jure anti-corruption norms are not fully enforced in practice. Even among states with enacted anti-corruption laws, a considerably smaller number effectively implements and enforces these laws, with evidence suggesting that corruption continues to rise. Perception-based indexes, such as the CPI and BPI, confirm the prevalence of corruption. An OECD report indicates that while certain countries have reduced their corruption levels, complete success in eradicating corruption remains elusive.[505] Interestingly, improvements in anti-corruption efforts in countries such as Colombia, Georgia, and Indonesia have been linked to the emergence of new administrations strongly opposed to corruption and the establishment of truly powerful anti-corruption agencies.[506] These examples underscore that the effectiveness of anti-corruption laws and initiatives relies on the existence of some degree of political will at the heart of anti-corruption movements to enforce and impose anti-corruption norms. However, the transnational anti-corruption regime is still grappling with challenges, including "deviant states refuse to conform to its mandate, weak states that formally accede to its mandate but are unable or

[505] Robert Klitgaard, *Addressing Corruption Together* (Paris: OECD, 2015) at 31–35.
[506] *Ibid*.

unwilling to crack down on violators within their territory, and dissident individuals and criminal organizations that elude enforcement efforts and continue to engage in [corrupt] activity."[507]

As discussed in Chapter Two, the abundance of natural resources often amplifies opportunities for corrupt practices, particularly evident in the discovery of oil resources, which makes a country's economy and political system more prone to widespread corruption. Consequently, many international and transnational actors, such as the GW and EITI, have directed their attention to addressing corruption in this sector. In response, oil-rich countries, such as Norway, may fully embrace transnational anti-corruption initiatives and regulations, while others, such as Azerbaijan (a former EITI member), can be selective in their compliance. Meanwhile, countries such as Sudan and Nigeria may outright decline to participate in the transnational anti-corruption regime.[508] Dependency on oil rents complicates the integration of these countries into the transnational anti-corruption regime.[509] Due to their wealth and energy security, oil-rich states often exhibit significant resistance to complying with the transnational anti-corruption regime. This resistance is driven, in part, by the influence of ruling elites, whose acceptance of transnational anti-corruption norms is closely tied to perceived threats to their financial interests and political survival.[510] Unwilling to adopt policies that challenge the status quo, ruling elites abstain from institutionalizing anti-corruption norms when their interests are at risk. Alternatively, they may symbolically support international anti-corruption rules without genuine intentions to comply.[511] Therefore, transforming the financial incentives perceived by ruling elites is one way to influence the integration of oil-rich countries into the transnational anti-corruption regime. In this context,

[507] Nadelman, *supra* note 343.
[508] U4 Anti-Corruption Resource Center, *supra* note 59.
[509] See Poplawski-Ribeiro et al, *supra* note 238 (according to the report, 32 oil-rich countries are considered as oil dependent between 2006 and 2010, at 6).
[510] See generally Pleines & Wöstheinrich, *supra* note 145 at 295.
[511] See Tarullo, *supra* note 419 at 709.

the extent of pressure exerted by external actors becomes necessary.[512] For example, external actors may demand compliance with anti-corruption norms from oil-rich countries in exchange for foreign investment or trade.[513] In this dynamic, the role of non-state actors, such as TNCs, should not be overstated, as they can offer states incentives for the adoption and enforcement of anti-corruption norms in return for their operational presence. Hence, the forthcoming chapter will primarily focus on the role of TNCs and their contributions to the transnational anti-corruption regime.

[512] See Pleines & Wöstheinrich, *supra* note 145 at 297.
[513] See Thomas Risse & Kathryn Sikkink, "The socialization of international human rights norms into domestic practices: Introduction" in Thomas Risse, Stephen Ropp & Kathryn Sikkink, eds, *The Power of Human Rights* (Cambridge: Cambridge University Press, 1999) (discussing the conditions in which international norms can influence the states' acts and domestic practices).

Chapter 4 – Corporate Compass in the Transnational Anti-Corruption Regime

It is our choices, Harry, that show what we truly are, far more than our abilities.

J.K. Rowling,
Harry Potter and the Chamber of Secrets

We need academics looking at the corporate space because most academics look at the NGOs, look at the governments. … If you're not dealing with private corporations and [not] making it less comfortable [for them] to do the right thing than to do the wrong thing, you're missing more than half the battle. Governments are important, and NGOs are important, [but,] man(!), private industry chain runs the world, and so, private industry is the place to go to shift the norms to make it not happen.

Upsilon, Interviewee

Despite the proliferation of anti-corruption regulatory measures and the widespread adoption of anti-corruption standards by most states, the full enforcement of these measures in practice remains incomplete. When states and inter-governmental organizations prove incapable of adequately addressing corruption, the influence of other actors becomes increasingly prominent due to their position and impact on both states and individuals. In the transnational anti-corruption regime, the power of private transnational actors is often underestimated. The private sector, particularly self-policing entities, plays an important role in shaping and circulating standards across countries.

Among the private transnational actors, the power of TNCs in the contemporary business world is unquestionable, given their substantial influence on global trends. This influence can be attributed, in part, to the remarkable growth of international economic activities since the 1950s, which has increased the economic power of TNCs and their impact on domestic policies.[514] For example, in 2021, the combined revenues of the top 100 TNCs exceeded $11 trillion, a figure comparable to the collective GDP of Germany, France, Italy, and Spain.[515] According to a 2018 OECD report, in 2014 alone, TNCs constituted nearly 33% of global production, accounted for over half of global exports, contributed about 28% to the world's GDP, and generated approximately 23% of global employment.[516] In the petroleum sector, TNOCs explore, exploit, and distribute billions of barrels of petroleum products every day to fuel transportation and industrial activities. Among the leading players in the petroleum industry, ExxonMobil and Shell stand out as two major giants, both

[514] See Esteban Ortiz-Ospina, Diana Beltekian & Max Roser "Trade and Globalization" (last modified October 2018), online: *Our World in Data* <ourworldindata.org/trade-and-globalization> (showing that "[a]fter the Second World War, trade started growing again [which is a] new – and ongoing – wave of globalization has seen international trade grow faster than ever before [, and today] the sum of exports and imports across nations amounts to more than 50% of the value of total global output").
[515] Graham Pilgrim & Anna Wahlgren, "Unlocking new insights into multinational enterprises with the power of open-source data", online (blog): *OECD Statistics* <oecdstatistics.blog/2023/05/10/unlocking-new-insights-into-multinational-enterprises-with-the-power-of-open-source-data/>.
[516] OECD, *Multinational enterprises in the global economy* (Paris: OECD, 2018).

ranking among the most lucrative companies globally.[517] Moreover, top offshore oil and gas industry operations and technology companies manage an average of approximately 130.2 subsidiaries each worldwide.[518]

Acknowledging the undeniable role and power of TNCs in the global market, many states strive to attract a high volume of business activity from these corporations with the aim of accessing larger markets and resources, boosting economic growth, and improving employment rates. As states compete to entice TNCs to initiate business or invest within their borders, the TNCs, in turn, can wield influence over the rules of the game in host countries. In such engagements, TNCs can provide states and the ruling elite with economic incentives and deterrents to comply with anti-corruption norms. Therefore, TNCs not only can play a part in the expansion of the transnational legal framework against corruption but also have the potential to promote an anti-corruption culture alongside their global business relations.

Thus far, this study has closely examined corrupt practices within the petroleum sector and their impact on governance in Chapter Two, while Chapter Three has further presented an overview of the formation and evolution of the current transnational anti-corruption regime, a product of collaborative efforts involving international organizations, states, IFIs, and NGOs. This chapter now turns its focus to the primary theme of the study: the role of TNCs within the transnational anti-corruption regime. The underlying assumption is that, through effective corporate self-regulation and sound anti-corruption compliance programs, TNCs can impede the involvement of their employees and third-party agents in corrupt practices. These policies may also contribute to

[517] Sunny Nagpaul, "Fortune 500 list: The Top 10 companies dominating business" (8 March 2024), online: *Fortune* <fortune.com/article/fortune-500-list-top-companies/>.
[518] See Georges Corbineau, "Exclusive database of multinational oil and gas companies and their subsidiaries" (30 June 2021), online: *Offshore Technology* <www.offshore-technology.com/features/database-multinational-oil-gas-offshore-operations-technologies-companies/>.

the development of an anti-corruption culture within host states by nudging them to embrace anti-corruption norms.

Accordingly, Section (1) will commence with a brief exploration of the role of TNCs in shaping global norms in Subsection (A). Subsection (B) will then discuss two scenarios wherein TNCs deliberate on whether to engage in corrupt practices or not, further explaining how, through a cost-benefit analysis, they may opt to participate in the transnational anti-corruption regime and embrace compliance mechanisms. In Subsection (C), the discussion will transition to TNCs' contribution to the transnational anti-corruption regime, examining their dual impact of trickle-down and trickle-up effects. Moreover, drawing from insights provided by interviewees, Section (2) will offer a succinct overview of the traditional anti-corruption toolkit used by TNCs in the petroleum sector. This toolkit comprises a set of mechanisms designed to aid companies in preventing and detecting corrupt behavior among their employees and third-party agents. Subsection (A) will introduce Codes of Conduct (CoC) and explain specific characteristics they should embody, alongside discussions on their development, revision, successes, and challenges. Subsection (B) will further explore the role of anti-corruption training in educating employees about different forms of corruption and appropriate responses. Due diligence activities will be examined in Subsection (C) for identifying and mitigating corruption risks prior to entering into contracts with potential third parties. In Subsection (D), the discussion will shift to oversight and monitoring mechanisms, touching upon audit procedures, whistle-blowing systems, investigation, and sanctioning measures. Subsection (E) will also address the influence of corporate culture in maintaining an anti-corruption environment. Lastly, Subsection (F) will briefly allude to other tools within anti-corruption compliance programs, as described by interviewees. The subsequent

chapters will examine a more recent and creative corporate mechanism aimed at mitigating the risk of corrupt practices within business relations—anti-corruption contractual clauses.

1. Transnational Corporations: Emerging Forces in Global Governance

TNCs are companies that operate through subsidiaries or affiliates while conducting business in more than one country.[519] Virginia Haufler defines TNCs as "large hierarchical organizations that govern their employees, suppliers, and distributors on a transnational basis."[520] When a local or national company grows into a TNC and enters the global market, it moved beyond its home state's limitations and is no longer solely bound by domestic norms and regulations. Instead, it enters a competitive arena with unique norms and standards. This paradigm shift can result in a transformation of incentives and practices for the company. For instance, a study observes that TNCs within the same sectors tend to adopt similar corporate social responsibility (CSR) programs, irrespective of their country of origin.[521] In other words, the global operations of TNCs reflect the dynamic interplay between corporate strategies and transnational contexts.

Accordingly, this section will initially explore the role of TNCs in today's world in Subsection (A), placing a particular emphasis on their impact on the transnational anti-corruption regime. Subsequently, Subsection (B) will discuss that, following a cost-benefit analysis, a TNC may choose to adopt a zero-tolerance approach toward corrupt practices and develop anti-corruption compliance measures to mitigate associated risks, including financial, legal, and reputational sanctions. Lastly, Subsection (C) will demonstrate that TNCs are also engaged in a transnational

[519] See e.g. Peter T Muchlinski, *Multinational Enterprises and the Law* (Oxford: Oxford University Press, 2007) at 5.
[520] Virginia Haufler, "Corporations in zones of conflict: Issues, actors, and institutions" in Deborah D Avant Martha Finnemore & Susan K Sell, eds, *Who Governs the Globe?* (Cambridge: Cambridge University Press, 2010) at 106.
[521] Dana Brown & Jette Steen Knudsen, "Domestic Institutions and Market Pressures as Drivers of Corporate Social Responsibility: Company Initiatives in Denmark and the UK" (2015) 63:1 Political Studies 181 at 197.

norm-making process by disseminating anti-corruption norms through both trickle-down and trickle-up effects.

A. TNCs as Non-Traditional Participants in the International Regime

TNCs wield a significant influence in shaping global affairs, and their operations impact the governance processes of states. In contrast to earlier international theories that focused on the role of states in forming international norms, contemporary perspectives acknowledge that TNCs actions affect the decisions of different actors, including states, competitors, and civil society.[522] As illustrated in Chapter Three, the response to the plea from US companies for a level playing field in the global market led the US government to seek the internationalization of anti-bribery rules endorsed by the FCPA, through initiatives such as the OECD Convention and the UNCAC.[523] The push for international instruments against corruption was not exclusive to US companies, as businesses from other countries also advocated for similar measures.[524]

Moreover, one cannot overlook the immense economic influence of TNCs and their leverage on states when entering into agreements with them.[525] TNCs can incorporate their preferential

[522] See e.g. Andreas Georg Scherer, Guido Palazzo & Dorothée, "Global Rules and Private Actors: Toward a New Role of the Transnational Corporation in Global Governance" (2006) 16:4 Bus Ethics Q 505 at 506.
[523] See US, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Congressional: Hearings Before the Senate Foreign Relations Committee by Stuart E. Eizenstat, Under Secretary of State for Economic, Business and Agricultural Affairs,* 105th Cong (Washington, DC: US Government Printing Office, 1998) (citing the testimony of E Eizenstat, "[t]he business community strongly supports our efforts to ratify the Convention as soon as possible, [and the] U.S. Council for International Business, the National Association of Manufacturers, the National Foreign Trade Council and other business groups have publicly endorsed the Convention"); see also Cutler & Drory, *supra* note 420 (explaining "U.S. corporations were attracted to this view because they were competing with firms of other nations for contracts with the country whose officials were accepting or seeking bribes, and because of the widespread belief that their competitors were offering such payments" at 35).
[524] See e.g. Transparency International, "Business Leaders Call on OECD Ministers to 'Act Against International Corruption'" (20 May 1997), online: *Transparency International* <www.transparency.org/en/press/business-leaders-call-on-oecd-ministers-to-act-against-international-corrup> (reporting that "European business leaders [representing companies of Coopers & Lybrand, Robert Bosch GmbH, France Telecom, Petrofina, Société Générale de Belgique, Grupo Gas Natural, Siemens AG, Haas Consult, Solvay S.A., Asea Brown Boveri AG, Daimler Benz AG, Hartmann & Braun, Krone AG, Industrie Pininfarina SpA, Pirelli SpA, and Metallgesellschaft AG] have called on European governments to criminalise international corruption and to end tax-deductibility of bribes paid to officials abroad").
[525] Adeyeye, *supra* note 9 at 18.

standards into these contracts while requesting states to adhere to them in exchange for access to the global economy, essential goods supply, and job creation opportunities.[526] In such circumstances, states, seeking economic opportunities, have no alternative but to comply with the terms set by TNCs and provide a favorable environment for their day-to-day business operations.

On the other hand, in recent decades, TNCs have faced mounting criticism for violating sustainable development goals. Critics argue that TNCs' operations in other countries undermine social values and worsen social issues, pointing to instances of human rights abuse, child labor exploitation, and environmental harm, among other concerns.[527] Responding to the efforts of civil society, the international community has launched several initiatives urging companies to adopt CSR and take social accountability for their actions concerning employees, the public, and the environment. The United Nations Global Compact (UNGC), the world's largest corporate sustainability initiative, is an illustrative example of such initiatives.[528] As of April 2024, around 24,419 companies have voluntarily joined the initiative to align their policies and operations with international standards on human rights, labor, environment, and anti-corruption.[529] The UN Guiding Principles on Business and Human Rights also emphasizes the recognition of "[t]he role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights."[530] Consequently, corporations are now directly subjected to human rights standards and responsibilities.

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[526] See e.g. Farida Jorubova, "Analysis of the Influence of TNCs on the Economy of Developing Countries and Countries with Economies in Transition" (2020) 3 Rev Bus & Econs Studies 34.
[527] See generally John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: Norton global ethics series, 2013) ch 1.
[528] UNGC, "The Ten Principles of the UN Global Compact" (last visited 13 April 2024), online: *UNGC* <www.unglobalcompact.org/what-is-gc/mission/principles>.
[529] UNGC, "United Nations Global Compact" (last visited 13 April 2024), online: *UNGC* <www.unglobalcompact.org>.
[530] UN Human Rights Council, *Report of The Special Representative of The Secretary-General on The Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, on Guiding Principles on*

CSR involves integrating activities that account for the costs associated with external impacts resulting from directly or indirectly from a company's actions, and it is driven by a recognized sense of moral or ethical responsibility to society that goes beyond just the company's owners or shareholders.[531] With the growing importance of CSR in the corporate world, more TNCs today are now adopting non-business-related policies and human rights-based standards within their agendas, such as those aspects related to the environment, labor rights, health, and security. Consequently, TNCs may play a role in the development of transnational regimes advocating international and transnational standards, alongside states, inter-governmental organizations, IFIs, and NGOs.[532]

Anti-corruption stands out as another transnational standard that has gained prominence in both national and transnational policies, as detailed in Chapter Three. UNGC's Principle Ten emphasizes that "[b]usinesses should work against corruption in all its forms, including extortion and bribery."[533] The UNGC encourages corporations to promote anti-corruption strategies within their operations, urging them to "join peers, governments, UN agencies and civil society to realize a more transparent global economy."[534] TNCs, therefore, may voluntarily partake in anti-corruption initiatives, where they can contribute to the establishment of rules, standards, and norms

Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Doc UN doc A/HRC/17/31 (2011) at 6.

[531] See Gerlinde Berger-Walliser & Inara Scott, "Redefining corporate social responsibility in an era of globalization and regulatory hardening" (2018) 55:1 AM Bus LJ 167 at 214–15.

[532] See David L Levy & Aseem Prakash, "Bargains old and new: Multinational corporations in global governance" (2003) 5:2 Bus & Politics 131 (explaining "[e]ven in the absence of a supranational authority, negotiations among governments, firms and NGOs are leading to the establishment of regimes—rules, norms, codes of conduct, and standards—that constrain, facilitate, and shape [TNCs'] market behaviors" at 132). See also Duane Windsor, "The development of international business norms" (2004) 14:4 Bus Ethics Q 729 (claiming "[c]orporations may exert moral leadership in regime-building processes" at 742).

[533] UN Global Compact, "Principle Ten: Anti-Corruption" (last visited 13 April 2024), online: *UN Global Compact* <unglobalcompact.org/what-is-gc/mission/principles/principle-10>.

[534] UN Global Compact, "Eliminate Corruption to Build Sustainable, Inclusive and Transparent Societies" (last visited 13 April 2024), online: *UN Global Compact* <www.unglobalcompact.org/what-is-gc/our-work/governance/anti-corruption>.

governing their global practices.[535] A relevant example is the voluntary participation of corporations in the EITI, extensively discussed in Chapter Three. However, despite these efforts and the establishment of various anti-corruption frameworks, statistics reveal that corrupt practices persist within and between private businesses and in their dealings with clients and third parties in different countries.[536] This ongoing issue underscores the challenge for TNCs when negotiating contracts in environments with high corruption risks; they must decide "whether to participate actively, quietly refuse to deal, or report the corruption."[537] The question then arises: why and under what circumstances do TNCs choose to participate in the transnational anti-corruption regime?

B. TNCs as a Double-Edged Sword: Cooperation or Challenge in the Fight against Corruption?

Establishing an effective transnational anti-corruption regime requires not only the adherence of states to anti-corruption norms but also the commitment of businesses and individuals to refrain from corrupt practices. Thus, there is a need to explore why TNCs choose to embrace these standards and assess whether they adopt anti-corruption norms as a "standard for their appropriate behavior" or resist such adherence.[538] The answer lies in each TNC being a rational actor driven by a unique cost-benefit analysis.[539] In other words, the participation of TNCs in the transnational anti-corruption regime highly depends on the financial benefits or motivations they perceive,

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[535] See Haufler, *supra* note 524 at 107.

[536] For example, an OECD's examination of 427 closed foreign bribery cases from 1999 to 2014 uncovered a continuous flow of illicit financial transactions between TNCs and public officials in various countries, see OECD, *Foreign Bribery*, *supra* note 56 at 9.

[537] Philippa Webb, "The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?" 2005 8:1 J Intl Econ L 191 at 213.

[538] See Annegret Flohr et al, *The Role of Business in Global Governance: Corporations As Norm-Entrepreneurs* (Houndmills: Palgrave Macmillan, 2010) at 21.

[539] See Arild Underdal, "Explaining Compliance and Defection: Three Models" (1998) 4:1 European J Intl Relations 5 (explaining how a rational decision-maker calculates compliance with an agreement, at 7–12).

although it will be later discussed that financial incentives are not the sole determining factor. Accordingly, TNCs may choose one of two paths: either profiting from corrupt deals or taking a stand against corrupt practices.

In the first scenario, a TNC, acting as a "corruption stabilizer,"[540] fuels the spread of corrupt practices by yielding to corrupt demands in foreign countries. Disregarding transnational anti-corruption norms, the TNC opts to engage in the host state's corruption and support a corrupt system, driven by material interests such as securing contracts, services, or other advantages.[541] This decision may arise from the TNC's perceived lack of market power, leading it to resort to corrupt practices to compensate for business deficiencies. On top of that, companies might be more inclined to adopt corrupt practices when observing inadequate enforcement of anti-corruption laws by states.[542] Consequently, if a large number of TNCs embrace corrupt practices, it may create a norm where other companies see such conduct as acceptable. In this context, the TNC assesses that the risks of prosecution and sanctions are lower than the costs of losing business opportunities to competitors, prompting its reluctance to participate in the anti-corruption regime. However, while obtaining illegal benefits may offer specific advantages to the TNC compared to its competitors, it can result in legal, financial, or reputational costs for the company, as well as its directors and employees. For example, in 2011, Griffiths Energy International Inc., a Canadian junior oil company, bribed Chadian officials to secure oil rights in Chad.[543] The use of the US

[540] See Birthe Eriksen & Tina Søreide, "Zero-Tolerance to Corruption? Norway's Role in Petroleum-Related Corruption Internationally" in Aled Williams & Philippe Le Billon, eds, *Corruption, Natural Resources and Development: From Resource Curse to Political Ecology* (Cheltenham: Edward Elgar Publishing, 2017) at 29.
[541] See generally, Gregg Barak, *Unchecked Corporate Power: Why the Crimes of Multinational Corporations Are Routinized Away and What We Can Do About It* (London: Routledge, 2017) ch 1.
[542] See generally Douglas Kimemia, "Multinational Corporations as Supplier of Corruption in Africa" (2018) 48:2 Africa Insight 25 at 31.
[543] See "U.S. confirms charges against Chad officials in Calgary-based Griffiths Energy corruption case", *CBC* (25 May 2021), online: <www.cbc.ca/news/canada/calgary/chad-officials-griffiths-energy-calgary-1.6039790>.

financial system to launder the bribes led to an investigation and prosecution by the DOJ. In 2013, Griffiths Energy pleaded guilty and agreed to pay $10.35 million CAD in fines in a Canadian court.[544] The company's co-founder, charged with arranging the bribe, was arrested in New York in 2019 and pleaded guilty to conspiracy to violate the FCPA, agreeing to forfeit criminal proceeds of about $27 million US.[545] This case illustrates a stark reminder that the allure of illegal gains for TNCs, despite potential advantages, comes with significant and far-reaching consequences, impacting not only its bottom line but also the livelihoods of its directors and employees.

On the contrary, the second scenario depicts a TNC choosing to embrace anti-corruption efforts due to its perception that the costs of non-compliance with the anti-corruption regime are surpassed by the potential costs of compliance. The TNC's decision is substantially influenced by potential investigations and prosecutions, as non-compliance with anti-corruption regulations in both home states and host states could lead to a "highly adversarial relationship between enforcement agencies and firms," resulting in significant fines, imprisonment, and civil or administrative penalties.[546] For example, the most recent OECD enforcement report (1999-2021) reveals that OECD member states sanctioned and convicted 264 companies through criminal proceedings and 121 companies through civil or administrative proceedings for corrupt practices.[547] Such consequences can adversely impact the TNC's reputation and its eligibility for future public contracts.[548] Furthermore, beyond direct consequences on the TNC itself, in certain instances, directors and

[544] *Ibid*.
[545] Trace, "Griffiths Energy International, Inc." (last visited 13 April 2024), online: *Trace Compendium* <www.traceinternational.org/TraceCompendium/Detail/408?class=casename_searchresult&type=1>.
[546] Steven Salbu, "Mitigating the Harshness of FCPA Enforcement Through a Qualifying Good-Faith Compliance Defense" (2018) 55:3 AM Bus LJ 475 at 475.
[547] WGB, *2021 Enforcement*, *supra* note 391.
[548] See generally Philip M Nichols, "The Business Case for Complying with Bribery Laws: The Business Case for Complying with Bribery Laws" (2012) 49:2 Am Bus LJ 325 (discussing "direct and indirect costs of paying bribes and the effect of corruption on potential relationship").

shareholders may also be held accountable and subject to fines and imprisonment. For example, in cases where companies are used as "vehicles of fraud," individuals cannot shield behind the corporate entity, and the corporate veil can be pierced.[549] Accordingly, the TNC complies with anti-corruption regulations and participates in anti-corruption initiatives to mitigate enforcement actions, potential penalties, and financial losses.[550]

Beyond mere cost avoidance, TNCs implementing self-monitoring, self-investigating, and self-reporting procedures may receive more lenient sanctions.[551] For example, the United States Sentencing Commission incentivizes companies to establish an "effective compliance and ethics program."[552] Similarly, in Norway, laws consider imposing penalties based on preventive measures taken, such as "guidelines, instruction, training, control or other measures."[553] These laws encourage TNCs to adopt preventive practices, helping them evade prosecution and enforcement. Furthermore, in gray areas of corruption where the government imposes no prohibition, such as facilitation payments in the USA, self-regulation allows TNCs to establish their own standards before potential government involvement.[554] TNCs, therefore, conclude that

[549] See e.g. *642947 Ontario Ltd v Fleischer*, 2001 CarswellOnt 4296, 56 O.R. (3d) 417 at para 68. For more details on piercing the corporate veil, see Aquib Rouf, "The Holistic and Modern Approach of Lifting the Corporate Veil and Its Judicial Interpretation in Present Day Scenario" (2021) 4 Intl JL Management & Human 1440.
[550] See Petter Gottschalk, *Corporate Social Responsibility, Governance and Corporate Reputation* (Singapore: World Scientific, 2011) at 108–09 (considering corporate responsibility as an "insurance-like protection" against potential costs).
[551] See Rachel Brewster & Samuel W Buell, "The Market for Global Anticorruption Enforcement" 2017 80:1 Law & Contemp Probs 193 (explaining "the government allows firms to settle criminal matters before indictment and prosecution and on somewhat more lenient terms, [so firms] trade self-policing and self-reporting for lower sanctions" at 210–11). For further detail on the self-regulation, see Flohr et al, *supra* note 542 (explaining "[t]he empirical findings on both aspects of structural autonomy indicate that corporate norm-entrepreneurship is more likely to occur in self-regulatory initiatives that preserve corporate autonomy" at 135).
[552] See United States Sentencing Commission, *US Sentencing Guidelines Manual* (Washington, DC: US Government Printing Office, 2018) at para 8C2.5(f). The UKBA also takes a similar approach, see Ministry of Justice, *The Bribery Act 2010: Guidance to Help Commercial Organisations Prevent Bribery* (London: The stationary Office, 2011) at para 12 [Ministry of Justice, *Guidance to Help*].
[553] *General Civil Penal Code* (1902), § 48(b) (Norway) [*General Civil Penal Code*].
[554] Gerald F Cavanagh, "Global Business Ethics: Regulation, Code, or Self-Restraint" (2004) 14:4 Bus Ethics Q 625 at 637.

adopting a compliance program is in their legal and monetary interests and participate in the anti-corruption regime and recognize that the potential costs of investigations and prosecutions outweigh the costs of compliance with anti-corruption norms.[555]

Besides direct costs, a TNC may choose to embrace anti-corruption standards when it perceives them as a potential benefit or an investment in future business opportunities.[556] TNCs often favor a business environment devoid of corruption, as literature consistently attributes negative consequences to corrupt practices in the business market, including increased inefficiencies, reduced productivity, impaired exports, and diminished innovation.[557] Studies indicate that engaging in corrupt practices not only prolongs negotiation time[558] but also increases uncertainty in business dealings.[559] Moreover, the prevalence of corruption within a TNC can contribute to the propagation of unethical behavior among its employees, which can negatively impact efficiency over time.[560] Thus, by adhering to anti-corruption norms, a TNC can enhance its business interests, while minimizing economic losses.

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[555] Fritz Heimann also refers to "unpleasant aftereffects" of corrupt practices, such as blackmail threats from employees and third parties involved in corrupt practices, as an additional cost; see Fritz Heimann, "Combatting International Corruption: The Role of the Business Community" in Kimberly Ann Elliott, ed, *Corruption and the Global Economy* (Washington DC: Institute for International Economics, 1997) at 156.

[556] See generally Abagail McWilliams & Donald Siegel, "Corporate social responsibility: A theory of the firm perspective" (2001) 26:1 Academy Management Rev 117 at 119.

[557] See e.g. Ernesto Dal Bó & Martín A Rossi, "Corruption and inefficiency: Theory and evidence from electric utilities" (2007) 91:5/6 J Pub Econs 962 (showing that "more corruption in the country is strongly associated with more inefficient firms" at 962); see also Daphne Athanasouli & Antoine Goujard, "Corruption and management practices: Firm level evidence" (2015) 43:4 J Comp Econs 1014.

[558] See Daniel Kaufmann & Shang-Jin Wei, "Does 'Grease Money' Speed up the Wheels of Commerce?" (1999) National Bureau of Economic Research Working Paper No 7093 (finding that "firms that report to have paid more bribes also have more management time spent negotiating with the bureaucracies, which is inconsistent with the beneficial grease hypothesis" at 12).

[559] Cuervo-Cazurra, *supra* note 302 (explaining companies "cannot know whether the government official that asks for the bribe is the right person to bribe, or whether another government official will appear and ask for another bribe after the manager has already paid one to the first government official, [and they] cannot be sure whether the government official will fulfill his or her side of the bargain once he has been paid a bribe, because the there is no legal way to enforce an implicit bribery contract in the courts" at 44).

[560] See Nichols, *supra* note 552 (explaining that "[r]ule-breaking behavior by managers ... creates a workplace environment in which employees consider self-serving behaviors acceptable" at 343).

Meanwhile, reputation serves as a powerful impetus for TNCs to adopt anti-corruption measures. Corruption investigations and prosecutions, coupled with financial costs, create reputational burdens for TNCs,[561] as business partners and employees may refuse to collaborate with companies perceived as corrupt. On the other hand, taking a consistent stand against corruption improves the TNC's "social image,"[562] builds trust with clients, and opens up new business opportunities. The accrued "reputational capital" attracts investments and contracts while positioning the company for preferential treatment by other business partners and states.[563] This explains why TNCs emphasize their anti-corruption efforts on their company websites, seeking to improve their image in the global market.[564] Furthermore, TNCs adopting anti-corruption norms can leverage financial benefits provided by state-owned institutions in their home state. For example, export credit agencies offer loans, financing, or insurance to TNCs conducting business abroad, often requiring compliance with anti-corruption policies and monitoring of anti-corruption procedures.[565]

In considering either scenario in deciding whether to engage in or stand against corruption, it should be noted that TNCs' cost-benefit analysis does not occur in a vacuum; the decision is influenced by certain internal and external factors. First and foremost, the decision is shaped by

[561] See e.g. Fritz Heimann & Mathias Hirsch, "How International Business Combats Extortion and Bribery: Anti-corruption Efforts by the International Chamber of Commerce" in *No Longer Business as Usual: Fighting Bribery and Corruption* (Paris: OECD, 2000) (stating that "[i]f corrupt practices become publicly known, the impact on a company's reputation is incalculable" at 170).
[562] George Emmanuel Iatridis, "Corporate philanthropy in the US stock market: Evidence on corporate governance, value relevance and earnings manipulation" (2015) 39 Intl Rev Financial Analysis 113 (showing that "the improvement of the firm's social image has favorable implications for the firm in the long-run" at 121).
[563] Alberto Martinelli & Atle Midttun, "Globalization and governance for sustainability" (2010) 10:1 Corp Governance 6 at 12.
[564] For further detail on the public disclosure of anti-corruption policies, see Guillermo Jorge & Fernando Felipe Basch, "How has the private sector reacted to the international standard against transnational bribery? Evidence from corporate anticorruption compliance programs in Argentina" (2013) 60:2 Crime L & Soc Change 165.
[565] See e.g. Transparency International, *Export Credit Agency Anti-Bribery Practices 2010* (Berlin: Transparency International, 2010).

their home state's norms and practices, including both formal institutions (laws and government structures) and informal ones (unwritten social traditions).[566] For example, a TNC situated in a country with high corruption risks may be more willing to partake in corrupt foreign practices than one from a state with lower corruption levels.[567] Additionally, the TNC's likelihood of participating in initiatives such as the UNGC is influenced by the democratic nature and UN-friendliness of its home state.[568] Unquestionably, the development and enforcement of anti-corruption laws in both home and host states significantly impacts the TNC's rational decision-making, with studies suggesting that "American investors are somewhat more reluctant to form joint ventures in more corrupt countries, possibly because of the [FCPA]."[569] In addition, the constant scrutiny of TNCs for corrupt practices, driven by regional and international anti-corruption regulations and extraterritorial enforcement of national laws, as discussed in Chapter Three, further shapes TNCs' decisions regarding engagement in the anti-corruption regime. Finally, the position of a TNC relative to other TNCs is also important, as business partners may seek to influence their peers to adhere to specific anti-corruption standards when dealing with officials.[570]

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[566] See John L Campbell, "Why Would Corporations Behave in Socially Responsible Ways? An Institutional Theory of Corporate Social Responsibility" (2007) 32:3 Academy Management Rev 946 (explaining "firms are embedded in a broad set of political and economic institutions that affect their behavior" at 948).

[567] See Alvaro Cuervo-Cazurra, "Who Cares About Corruption?" (2006) 37:6 J Intl Bus Studies 807 (explaining "some FDI comes from countries with high levels of corruption … where the payment of bribes is a normal way of doing business, [and so,] they are likely to have developed experience on how best to engage in bribery to be able to operate in their home country, [and] when these investors internationalize, they may not be deterred by host-country corruption, unlike other investors, and they may even be attracted by it" at 810).

[568] Lynn Bennie, Patrick Bernhagen & Neil J Mitchell, "The logic of transnational action: The good corporation and the Global Compact" (2007) 55:4 Political Studies 733.

[569] Beata S Javorcik & Shang-Jin Wei, "Corruption and cross-border investment in emerging markets: Firm-level evidence" (2009) 28:4 J Intl Money & Finance 605 at 622.

[570] For further details on the rational decision of TNCs in adopting anti-corruption measures, see Reed, *supra* note 371 (explaining that "[e]ach firm on the international market faces a unique set of incentives, based on factors such as its size, enforcement and reputational risk, position and power in its supply chain, and home country context" at 5).

While acknowledging both the potential for TNCs to involve themselves in or oppose corrupt practices, this study primarily focuses on situations where TNCs choose to adhere to transnational anti-corruption norms. There is evidence indicating an increased participation of TNCs in transnational anti-corruption initiatives. For example, driven by reputational concerns, some TNOCs played a significant role in the development of the EITI to promote transparency as a transnational norm.[571] Moreover, private businesses contribute useful insights to the OECD Working Group on Bribery through regular consultations and participation in the evaluation of governments' enforcement of anti-corruption laws.[572] This is in addition to the Business and Industry Advisory Committee, a voice of business at OECD that provides recommendations and guidelines on anti-corruption.[573] Subsequently, the following subsection will discuss how TNCs' decision to avoid corrupt practices contributes to the transnational anti-corruption regime.

C. Competence of TNCs in Anti-Corruption: Trickle-Down and Trickle-Up Effects

Once TNCs decide to participate in the transnational anti-corruption regime, they exert influence over anti-corruption efforts within their organizations on a broader scale. This interaction can inspire other individuals, companies, and entities to embrace anti-corruption standards through both trickle-down and trickle-up effects.[574] Trickle-down effects entail TNCs' engagement in and endorsement of measures influencing the involvement of their employees, third parties, business partners and associates, and small and medium-sized enterprises (SMEs) in anti-corruption initiatives. On the other hand, trickle-up effects involve the transmission of anti-corruption

[571] Alexandra Gillies, "Reputational Concerns and the Emergence of Oil Sector Transparency as an International Norm" (2010) 54:1 Intl Studies Q 103.
[572] See e.g. OECD Working Group on Bribery, *Annual Report 2014* (Paris: OECD, 2014) at 43 [WGB, *Report 2014*].
[573] For the recent committee's activity update, see Business at OECD, *Annual Activity Update 2022* (Paris: OECD 2022).
[574] The terms are borrowed from the field of management (trickle-down and trickle-up effects with higher and lower management), see e.g. Ans Kolk, Marlene Vock & Willemijn van Dolen, "Microfoundations of partnerships: Exploring the role of employees in trickle effects" (2016) 135:1 J Bus Ethics 19.

standards from TNCs to other international and transnational actors, including states and organizations. In other words, through trickle-down effects, TNCs form an anti-corruption culture within their organizational structure or business network, while the trickle-up influence of TNCs contributes to normative change as transnational anti-corruption standards are formally supported through participation in transnational initiatives and informally disseminated throughout host states.[575] These effects are further detailed in the subsequent discussion.

Through the trickle-down mechanism, TNCs contribute to the circulation of anti-corruption norms within the internal dimensions of their organization and across their different businesses and projects. Their commitment to anti-corruption permeates through different levels within the organization, including employees, executives, and other entities directly affiliated with the TNC. The next section will provide an in-depth discussion of different available tools in this regard. TNCs can also extend their scrutiny to all stages and activities within their supply chain, mandating compliance with their anti-corruption standards. In this regard, TNCs may encourage their local partners and supply chain members situated in jurisdictions with low enforcement of anti-corruption laws to align with the anti-corruption regime.[576] This may involve requiring these third parties to adopt anti-corruption measures as prerequisites for bidding or contracting. Alternatively, in their due diligence activities, which will be discussed in detail in the next section, TNCs may favor third-party companies that have already adhered to anti-corruption practices. Moreover, TNCs can share their model anti-corruption practices; for example, parent companies can

[575] See Gregory Shaffer, "Transnational legal process and state change" (2012) 37:2 L & Soc Inquiry 229 at 229–30; see also Tanja A Börzel, "Non-state Actors and the Provision of Common Goods: Compliance with International Institutions" in Adrienne Windhoff-Héritier, ed, *Common Goods: Reinventing European Integration Governance* (Lanham, Md: Rowman & Littlefield Publishers, 2002) 159 at 168.
[576] See generally Pleines & Wöstheinrich, *supra* note 145 at 292.

disseminate their anti-corruption tools, such as CoCs, anti-corruption training materials, or model contracts, among their subsidiaries.

Furthermore, when a TNC promotes anti-corruption standards internally within its own operations, this commitment can be extended to different entities they collaborate with during their business operations. As Susan Rose-Ackerman states, "firms that are leaders in their industries or that are major international actors have an especially strong obligation to take a public anti-corruption stand [which may initiate] a benevolent spiral in which their refusal in engage in corruption encourages others to copy them."[577] In addition, TNCs may disseminate anti-corruption commitments by announcing their anti-corruption policies at industry conferences and workshops where their business associates are present. In particular, TNCs can exert significant influence over SMEs that partner with or supply to them, as these SMEs often lack adequate skills or resources to design and implement anti-corruption measures. Unlike TNCs, SMEs may not initially have an incentive to comply with anti-corruption standards, given their limited connections to jurisdictions actively enforcing anti-corruption laws and their perception of little threat to investigation and prosecution for their corrupt practices. TNCs, using their economic and normative power in business relations, can guide SMEs toward adopting anti-corruption norms while providing them with the impetus to enforce anti-corruption standards.[578] "[W]hen cognitively challenged from the outside,"[579] SMEs will ultimately embrace anti-corruption standards, meeting their peers' demands and aiming to gain business opportunities, such as concluding contracts with them.[580] TNCs may

[577] Susan Rose-Ackerman, "'Grand' corruption and the ethics of global business" (2002) 26:9 J Banking & Finance 1889 at 1905.
[578] DiMaggio and Powell call these TNCs as "convenient source of practices" for other companies, see Paul J DiMaggio & Walter W Powell, "The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields" (1983) 48:2 Am Sociological Rev 147 at 151.
[579] Flohr, et al, *supra* note 542 at 44.
[580] See Reed, *supra* note 371 at 11.

even implement naming and shaming policies for peer companies that do not endorse their anti-corruption strategies.[581] Over time, similar companies in a specific sector progress with anti-corruption compliance and accept such standards as a professional norm in doing business. As a result, anti-corruption gradually becomes an accepted standard, or the rule of the game, leading to the homogeneity of anti-corruption practices in that specific sector.[582]

In addition to the trickle-down dissemination of anti-corruption norms within businesses and industries, through trickle-up effects, TNCs may instigate a norm change in the behavior of other international and transnational actors. In this context, Virginia Haufler characterizes TNCs as companies "in constant interaction with a wide range of organizations and individuals, engaging in a kind of modern corporate diplomacy on a global scale."[583] TNCs can involve themselves in both domestic and transnational collective actions against corruption, urging states to adopt a stronger position against corruption. For example, over 500 TNCs have endorsed the UNGC's Anti-Corruption Call to Action and urged states to improve governance and anti-corruption initiatives.[584]

TNCs further exert important influence over the behavior of governments in both home and host states. Leveraging their economic power, TNCs can lobby their home state governments or apply political pressure to encourage the adoption of more rigorous anti-corruption regulations and active

[581] See Börzel, *supra* note 580 at 168.
[582] DiMaggio and Powell, *supra* note 583. Moreover, Melanie Reed describes this process as a "domino effect", see Reed, *supra* note 371 (explaining that "[e]nforcement of the law that implements the international standard leads to actions based on fear of enforcement [leading] to further actions along the supply chain" at 99–100).
[583] Haufler, *supra* note 524 at 106.
[584] UN Global Compact, "Call to Action from Business to Government on the 20th Anniversary of UNCAC" (last visited 13 April 2024), online: *UN Global Compact* <www.unglobalcompact.org/take-action/action/anti-corruption-call-to-action>.

participation in anti-corruption initiatives.[585] An illustrative example of this influence is evident in the lobbying efforts of US businesses, urging the government to extend the reach of FCPA regulations to other jurisdictions, as previously mentioned.

In host states, TNCs may directly address local conditions by advocating for the adoption of anti-corruption laws and the development of transparent rules.[586] Alternatively, they may indirectly oppose such conditions by supporting civil society movements against corruption.[587] This is because, beyond contributing capital and technology, TNCs safeguard their reputations and maintain a "deep-seated desire not to engage in activities that could besmirch their public image"[588] across the world. In particular, in states and communities where corruption is culturally accepted or widespread, TNCs can act as agents of change. For example, when TNCs abstain from participating in corrupt practices, it eliminates opportunities for public officials to accept bribes, compelling them to explore alternative ways of conducting business in the global market.[589] This mechanism, functioning as de facto enforcement of anti-corruption standards, can influence officials' behavior in their interactions with other companies and individuals. Furthermore, TNCs can team up with each other to deter corrupt behavior, collectively refusing to pay bribes when certain officials demand them.[590] As a last resort, TNCs may opt not to conduct business in states

[585] See e.g. Yorgos A Rizopoulos & Dimitrios E Sergakis, "MNEs and policy networks: Institutional embeddedness and strategic choice" (2010) 45:3 J World Bus 250 (showing that "some links do exist between the [TNC]'s potential to influence home policies and its strategic approach towards host countries" at 251); see also Kathleen A Getz, "Selecting corporate political tactics" (1991) 1 Academy Management Proceedings (categorizing corporate political tactics into "lobbying; reporting research results; reporting survey results; testimony; legal actions; personal service; and constituency building" at 326).
[586] See Windsor, *supra* note 536 at 733.
[587] See e.g. Bart Édes, Nicola Ehlermann-Cache & Frédéric Wehrle, "Sharing Anti-Corruption Values" in *No Longer Business as Usual: Fighting Bribery and Corruption* (Paris: OECD, 2000) 149.
[588] Debora Spar, "Foreign Investment and Human Rights" (1999) 42:1 Challenge 55 at 75.
[589] *Ibid.*
[590] See Reed, *supra* note 371 (referring to a number of companies which intended to renew their concession contracts in a specific industry and decided together to refuse paying, and consequently, all were able to acquire their renewals without involving in bribery, at 126).

with inadequate anti-corruption measures. Studies indicate that states with higher levels of corruption or lower transparency tend to attract smaller amounts of foreign direct investment.[591] Therefore, a decline in TNCs' participation in an economy may prompt the state to reassess its approach to corruption, in an effort to attract these influential entities.

In brief, TNCs, in their role as "norm entrepreneurs,"[592] contribute to the transnational anti-corruption regime. The dual impact of trickle-down and trickle-up effects empowers TNCs to drive normative changes that go beyond their immediate influence within their organizational structures and business networks, ultimately reaching governments in both home and host states. This role of TNCs sets the stage for the upcoming discussion on the different anti-corruption strategies and policies devised and implemented by TNCs in their commitment to anti-corruption objectives. The next section, informed by experiences shared by interviewees, will introduce certain best practices employed by TNCs to combat corrupt practices in the petroleum sector, often yielding trickle-down effects. Subsequent chapters will then focus on a more specific strategy, contractual anti-corruption clauses, distinguished by their dual impact with both trickle-down and trickle-up effect.

2. The Blueprint of Anti-Corruption Compliance Programs for TNCs

When TNCs decide to endorse anti-corruption norms, they commit, on behalf of directors, managers, employees, and third-party agents, to refrain from engaging in corrupt practices. Executing this commitment requires adjustments to policies, strategies, and procedures to align

[591] See e.g. Peter A Voyer & Paul W Beamish, "The effect of corruption on Japanese foreign direct investment" (2004) 50:3 J Bus Ethics 211. See also Zdenek Drabek & Warren Payne, "The impact of transparency on foreign direct investment" (2002) 17:4 J Econ Integration 777.

[592] Finnemore & Sikkink, *supra* note 339 (explaining that "[m]any international norms began as domestic norms and become international through the efforts of entrepreneurs of various kinds" at 893); see also Flohr, *supra* note 542 (stating "[e]ven after a norm has reached a certain level of acceptance and institutionalization a corporation can still be a norm-entrepreneur through norm development activities, for example, by engaging within governing bodies of initiatives or organizations supporting the norm or by participating in revision processes and thus further specifying a broader norm's exact content and implied requirements" at 19).

with accepted norms. As an initial step, a company may articulate a clear corporate policy explicitly prohibiting corrupt practices, prominently featured on its website.[593] This anti-corruption policy usually defines specific types of prohibited corrupt behavior and outlines their applicability to employees, directors, or third-party agents.[594] Establishing such a policy removes the defense of ignorance of the law, as everyone is informed and cannot later claim innocence.[595] However, there is a risk that such a policy might exist solely for reputational purposes. Therefore, as part of their general compliance program, TNCs must design and implement detailed anti-corruption policies, while laying out both written and unwritten rules to internalize anti-corruption norms within the corporate culture.[596] These programs should also incorporate internal mechanisms to prevent, detect, and sanction corrupt behavior of the company's directors, employees, and third-party agents.[597] Understanding the role of TNCs in the transnational anti-corruption regime requires reflection on their adopted anti-corruption strategies and tools.

The shift towards a greater focus on compliance and business ethics has resulted in the development of specialized anti-corruption compliance programs. Based on their business activities, perceived risks, and resources, each TNC formulate and implement a unique anti-corruption compliance program, tailored across different businesses and sectors. In particular, TNOCs must customize their compliance programs to address the inherent nature and extent of

[593] OECD, *Good Practice Guidance on Internal Controls, Ethics, and Compliance* (Paris: OECD, 2010) at para A (2) [OECD, *Good Practice*].
[594] See OECD, *Corporate Anti-Corruption Compliance Drivers, Mechanisms, and Ideas for Change* (Paris: OECD, 2020) at 38 [OECD, *Corporate Compliance*].
[595] Psi, *supra* note 4 at 5.
[596] See Flohr et al, *supra* note 542 at 22.
[597] For example, the UK Serious Fraud Office (SFO) defines compliance program as "an organisation's internal systems and procedures for helping to ensure that the organisation – and those working there – comply with legal requirements and internal policies and procedures"; see Serious Fraud Office, "Evaluating a Compliance Programme" (last visited 13 April 2024), online: *SFO* <www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/evaluating-a-compliance-programme/>.

corruption risks in the petroleum value chain. TNOCs often face limited flexibility in choosing activity locations and usually concentrate core operations in regions abundant with oil and gas reserves—frequently countries with elevated corruption risks, as discussed in Chapter Two. Moreover, TNOCs, as big-name companies in a major industry, face increased public scrutiny for their involvement in corrupt practices.[598] The substantial monetary values, records, and witnesses, especially employees with awareness of potential corrupt practices, make TNOCs more prone to investigation and prosecution.[599] Consequently, TNOCs have a vested interest in designing specific compliance program to identify and address corruption risks while minimizing their liability in case corruption occurs within their projects.

The adoption of anti-corruption compliance programs has primarily been perceived as a voluntary action for companies, especially in the absence of legal mandates before 2017.[600] In most jurisdictions, governments entrust companies with the responsibility of preventing corrupt practices, relying on their self-regulation.[601] Meanwhile, some jurisdictions have introduced strong incentives to encourage companies to adopt such programs.[602] In specific jurisdictions such as the UK, corporations that implement "adequate procedures" are offered a compliance defense against corruption allegations.[603] Alternatively, in jurisdictions such as the US, compliance programs serve as mitigating factors in investigations and prosecutions.[604] For example, the FCPA Resource Guide emphasizes that "the DOJ and SEC also consider the adequacy and effectiveness of a company's

[598] See Brown & Knudsen, *supra* note 525 at 187.
[599] For further discussion on the relationship between the size of a company and its possible consequences of non-compliance, see Reed, *supra* note 371 at 84–88.
[600] See Jorge & Basch, *supra* note 569 at 169.
[601] See Donato Vozza, "Exploring Voluntary and Mandatory Compliance Programmes in the Field of Anti-Corruption" in Stefano Manacorda & Francesco Centonze, eds, *Corporate Compliance on a Global Scale: Legitimacy and Effectiveness* (Cham: Springer, 2022) 313 at 333.
[602] *Ibid* at 326.
[603] *UKBA*, *supra* note 352, s 7(2).
[604] Vozza, *supra* note 607.

compliance program at the time of the misconduct and at the time of the resolution when deciding what, if any, action to take."[605] The United States Sentencing Guidelines also consider the presence of an effective compliance program when determining organizational criminal fines.[606] These practical considerations, whether through a compliance defense or as a mitigatory factor, drove many companies to voluntarily implement compliance programs that align with the anti-corruption requirements of their operating jurisdictions.

However, since 2017, France has taken a proactive step beyond its predecessors, the FCPA and UKBA, with the enactment of Sapin II. This French regulation mandates the adoption of an anti-corruption compliance program for "a company employing at least five hundred employees, or belonging to a group of companies whose parent company has its head office in France and whose workforce includes at least five hundred employees, and whose turnover or consolidated turnover is greater than 100 million euros."[607] Moreover, the French Anti-Corruption Agency is empowered to monitor compliance with this requirement.[608] This legislative step signals a potential shift in governments' skepticism towards TNCs in addressing corruption, with a move towards imposing mandatory requirements to ensure compliance with anti-corruption regulations.[609] More

[605] Criminal Division of the US Department of Justice and the Enforcement Division of the US Securities and Exchange Commission, *A Resource Guide to the US Foreign Corrupt Practices Act*, 2nd ed (Washington, DC: US Government Printing Office, 2020) at 57 [DOJ & SEC, *FCPA Resource Guide*].
[606] United States Sentencing Commission, *supra* note 556, at paras 8B2.1, 8C2.5(f), and 8C2.8(11).
[607] The Article further provides that "[t]his obligation also applies to: 1. The chairmen and general managers of public industrial and commercial establishments employing at least five hundred employees, or belonging to a public group whose workforce includes at least five hundred employees, and whose turnover or consolidated turnover exceeds 100 million euros; 2. Depending on the powers they exercise, to members of the management board of public limited companies governed by Article L. 225-57 of the French Commercial Code and employing at least five hundred employees, or belonging to a group of companies with a workforce of at least five hundred employees, and whose turnover or consolidated turnover exceeds 100 million euros." Ordonnance no 2001-766 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, JO, 10 December 2016, art 17, s I [Sapin II] [translated by author].
[608] *Ibid*, s III.
[609] For further details on the advantages and disadvantages of both voluntary and mandatory approaches, see Vozza, *supra* note 607.

governments should follow the example set by Sapin II and make the adoption of compliance programs mandatory to create a level playing field for business competitiveness and establish a universal standard applicable to all. As interviewee Gamma explained, without mandatory requirements, "being a good actor can be detrimental because all of that takes time and money, and if other companies are [not] putting in that time or money in order to do a good job, … there [is] a competitive disadvantage [when] compliance is voluntary."[610] Thus, transitioning from a voluntary to a mandatory approach regarding anti-corruption compliance programs is necessary; otherwise, a few of the monitored companies might be placed at a disadvantage.

Previously, the responsibility for ethics and compliance primarily rested with lawyers in the legal team, who often lacked the time, experience, or inclination to fully dedicate themselves to the subject.[611] However, recognizing the growing complexity of regulations, particularly for TNCs, compliance and business ethics are gaining more importance each passing year, and today, most reasonably-sized companies boast stand-alone compliance departments.[612] This paradigm shift has made specialized roles, such as compliance lawyers, compliance officers, and compliance managers, viable career options, with candidates from the legal profession and auditors often having the required skill sets for these roles.[613] Accordingly, anti-corruption compliance programs now require a specialized compliance team, including legal, auditing, and accounting experts, tasked with designing and enforcing anti-corruption standards. This involves adjusting the system in line with regulatory requirements, employing risk assessments of third parties, and conducting periodic reviews of processes and procedures. In this respect, Interviewee Gamma$_2$ emphasized

[610] Interview of Gamma (26 September 2022), Transcript at 9.
[611] Interview of Omicron (18 January 2023), Transcript at 5.
[612] Interview of Sigma (2 February 2023), Notes at 3.
[613] Omicron, *supra* note 617.

the importance of establishing a dedicated committee within the board of directors specifically focused on compliance issues, with the head of compliance having a direct line of communication with the board.[614]

In the pursuit of an effective anti-corruption compliance program, former chief compliance officer, interviewee Xi, challenged the idea of their department as the sole corruption prevention unit. According to them, "building a system that prevents corruption would require one-to-one redundancy of people … meaning every single person has a shadow or 100% surveillance."[615] Xi argued that achieving real-time analytics on every keystroke is unfeasible due to the individuals finding ways to circumvent compliance checks.[616] Instead, they advocated for a multifaceted control system with "having the right people in the right leadership spots."[617] Xi further emphasized that while compliance professionals may view their role as "the police officers of the company," they should become "more of a friend [and] open conduit" for employees to share information about any wrongdoings.[618]

Developing a comprehensive and effective anti-corruption program usually demands an outlay of financial resources.[619] In contrast to SMEs, TNCs possess the "means, motive, and opportunity"[620] to design and enforce a dedicated compliance program. However, resource constraints may limit the ability of smaller companies to implement a "first-class extensive program."[621] These

[614] Interview of $Gamma_2$ (26 April 2023), Transcript at 13.
[615] Interview of Xi (9 December 2022), Transcript at 3.
[616] *Ibid* at 4.
[617] *Ibid*.
[618] *Ibid* at 2.
[619] See generally Marc Orlitzky, Franj L Schmidt & Sara L Rynes, "Corporate Social and Financial Performance: A Meta-Analysis" (2003) 24:3 Organization Studies 403 at 423 (demonstrating that there is a "universally positive relationship" between corporate social/environmental performance and corporate financial performance).
[620] The term is borrowed from the US criminal law and procedures where the presence of the three elements is needed to convince a jury of guilt.
[621] Interview of Nu (8 December 2022), Notes at 2.

companies often lack a clear separation between compliance and legal departments, with the legal department handling all compliance matters.[622] Operating on a more limited budget might force these companies to adopt a risk-based approach to ethics and compliance while focusing on areas within their organization where they perceive the highest risks.[623] One interesting point, shared by Interviewee Nu regarding these smaller companies, is that despite lacking "all the bells and whistles" in procedural measures, they operate based on "the philosophy of core principles," such as honesty, which is guided by leaders who set the right compliance tone.[624]

Furthermore, several printed and online sample compliance programs and guidebooks assist companies in designing a proper and efficient compliance program.[625] There is guidance available on an ideal compliance program, such as those published by the DOJ[626] and the SFO.[627] In this regard, interviewee Omicron identified seven key strategies and mechanisms for companies' anti-corruption measures: (1) policies and procedures, (2) chief compliance officer/compliance committee, (3) education and training, (4) reporting, (5) monitoring and auditing, (6) enforcement, and (7) responding to issues. Omicron further emphasized that many of these strategies are inter-linked, and the success of one depends on the implementation of another.[628] For example, having policies and procedures is ineffective if the company does not enforce them or if there are no consequences for breaching them.[629]

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[622] Sigma, *supra* note 618 at 1.
[623] Omicron, *supra* note 617 at 7.
[624] Nu, *supra* note 627.
[625] See e.g. Martin T Biegelman & Daniel R Biegelman, *Foreign Corrupt Practices Act Compliance Guidebook: Protecting Your Organization from Bribery and Corruption* (New Jersey: Wiely, 2010). See also TI, *Business Principles*, *supra* note 474 at 8–12; OECD, *Corporate Compliance*, *supra* note 600 at 34–48, see also United States Department Of Justice, *Justice Manual* (Washington, DC: US Government Printing Office, 2019) at para 9-28.800.
[626] United States Department Of Justice, *Evaluation of Corporate Compliance Programs* (Washington, DC: US Government Printing Office, 2023) [DOJ, *Evaluation*].
[627] Serious Fraud Office, *supra* note 603.
[628] Omicron, *supra* note 617.
[629] *Ibid*.

While there is no set formula for anti-corruption compliance programs, and they may vary among companies, these programs often involve a combination of anti-corruption policies. The following subsections attempt to examine some of the most commonly adopted anti-corruption mechanisms in the petroleum sector based on comments shared by interviewees. Figure 3 provides an overview of these tools, along with the number of interviewees who specifically cited them. Chapters Five and Six subsequently introduce and examine a more specific anti-corruption instrument developed by TNCs: anti-corruption clauses.

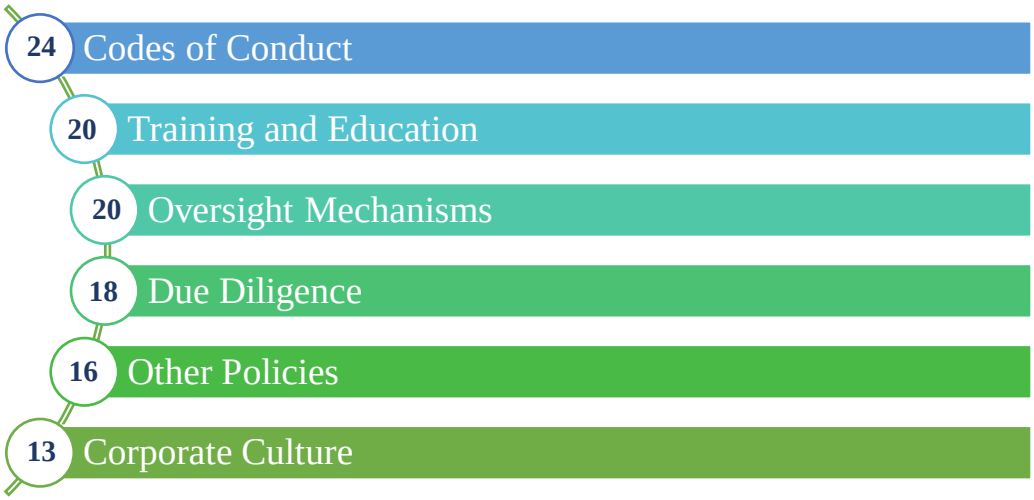

Figure 3 – Distribution of Cited Anti-Corruption Tools for TNCs among Interviewees

A. Codes of Conduct: Ethical Guidelines for Anti-Corruption Practices

CoC is a comprehensive document wherein a company outlines guidelines for employees and stakeholders regarding ethical behavior, professional conduct, and compliance with laws and regulations. By formulating a CoC, a company not only establishes a value system but also demonstrates its sustained commitment to ethical business practices. As noted by Omicron, each company defines its "unique core values" as the basis in their CoC.[630] Therefore, a CoC is

[630] Omicron, *supra* note 617 at 8.

considered a self-regulatory instrument that allows a company to articulate its guiding principles, missions, and ethical expectations.[631]

Companies normally incorporate anti-corruption obligations into their CoCs, requiring employees, and sometimes third parties, to adhere to these principles. For example, BP's CoC explicitly prohibits any acts of corruption and bribery, stating:

> We do not tolerate bribery and corruption in any of its forms in our business.
> - Comply with anti-bribery and corruption laws and regulations and support efforts to eliminate bribery and corruption worldwide. We work to make sure that our business partners share our commitment.
> - Do not offer or accept bribes, kickbacks or any other kind of improper payment including facilitation payments.
> - Keep accurate books and records so that payments are honestly described and company funds are not used for unlawful purposes.
> - Know who you are doing business with by following our counterparty due diligence procedures.[632]

However, a CoC does not solely include anti-corruption policies as its subject matter. As highlighted by Omicron, CoCs have evolved to include a wider range of related topics, including competition law, slavery, human trafficking, human rights, HSE (Health, Safety, and Environment), and ESG (Environmental, Social, and Governance).[633] Similarly, Sigma, who reviewed and revised the CoCs, observed that, in addition to addressing HSE issues, and sustainability, a CoC also covers compliance matters related to bribery, conflicts of interest, facilitating payments, trade sanctions, as well as guidelines governing gifts and entertainment.[634] Therefore, the CoC serves as a more general tool rather than being exclusively an anti-corruption instrument.

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[631] See generally S Prakash Sethi, "Self-regulation through voluntary codes of conduct" in S Prakash Sethi *ed, Globalization and Self-Regulation* (New York: Palgrave Macmillan, 2011) 3.
[632] BP, "Our Code Our Responsibility" (last modified July 2014) at 20, online (pdf): *BP* <www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/who-we-are/our-code-our-responsibility.pdf>.
[633] Omicron, *supra* note 617 at 7.
[634] Sigma, *supra* note 618 at 9.

Different views surfaced among interviewees on the prevalence of CoCs among companies. For example, while Omicron stated that "it is rare to find a company nowadays that does not have a written code of conduct,"[635] Upsilon held the view that "maturity levels are radically different," explaining that not every company has a CoC.[636] According to Upsilon, more "forward-thinking companies" are likely to adopt CoCs.[637] In a specific project, Upsilon examined companies' CoCs, which revealed that a lot of companies, including large companies, did not have them accessible online.[638]

Within the corporate world, alongside the CoC, there are similar self-regulation instruments outlining anti-corruption considerations. An example is the Code of Ethics; while the CoC governs a company's actions, the Code of Ethics is a broader instrument that addresses the ethical aspects of a company's decision-making, such as honesty and respect.[639] According to Delta, both the CoC and the Code of Ethics declare the company's "zero tolerance on any form of forbidden corruption."[640] Moreover, Manuals of Delegations or Manuals for Authorities specify the level of authority and approval processes required for specific company decisions. For example, the Manual may delineate that a managing director or executive vice president can sign all contracts, while others may have authority limited to signing contracts up to a specified amount.[641] Rho explained that although the CoC expresses a general stance against bribery and corruption, the Manual of Delegation offers detailed step-by-step guidance.[642] As an example, Rho mentioned that

[635] Omicron, *supra* note 617 at 7.
[636] Interview of Upsilon (16 February 2023), Transcript at 5.
[637] *Ibid*.
[638] *Ibid*.
[639] See Amanda Nieweler, "Code of conduct vs code of ethics: what's the difference?" (19 April 2017), online (blog): WhistleBlower Security <blog.whistleblowersecurity.com/blog/code-of-ethics-and-code-of-conduct-whats-the-difference>.
[640] Interview of Delta (27 September 2022), Notes at 2.
[641] Interview of Rho (26 January 2023), Transcript at 11.
[642] *Ibid*.

the Manual could specify that, during contract negotiations, due diligence must be conducted to verify ownership and leadership to ensure that "they [are] not politically exposed people and that they [are] not people that are currently being prosecuted for bribery and corruption."[643] In addition to these instruments, there are specific CoCs tailored for targeted groups. For example, Omicron mentioned observing separate supplier CoCs with country-specific supplements, citing Malaysia as an example where guidelines on dress code are included in the supplement.[644]

The following will focus on the specific details shared by interviewees regarding CoCs. It starts by examining the language and specific characteristics that a CoC should embody while discussing the importance of simplicity and maintaining an appropriate size. The exploration then extends to the processes involved in developing and revising CoCs, while also addressing both their successes and challenges. The subsection concludes by presenting strategies for improving the effectiveness of CoCs.

i. The verbiage and substance of codes of conduct

First and foremost, a CoC must be easily comprehensible for all employees within a company. The significance of maintaining simplicity in CoC language was discussed by six interviewees. Omega stressed the need for "plain language,"[645] while $Beta_2$ elaborated on the rationale behind it, highlighting the diverse workforce at an oil company.[646] $Beta_2$ added, "you got people with … PhDs and advanced degrees, all down to people who maybe did [not] even graduate from high school. … They all work for your company, and they all expose your company to the same risk."[647] Therefore, keeping the CoC simple ensures that everyone, regardless of their position in the

[643] *Ibid*.
[644] Omicron, *supra* note 617 at 12.
[645] Interview of Omega (2 March 2023), Transcript at 3.
[646] Interview of $Beta_2$ (10 March 2023), Transcript at 4.
[647] *Ibid*.

company, can comprehend and adhere to the rules. In addition, Xi discussed the importance of targeting a lower reading level and minimizing the use of "legalistic words."[648] They further advocated for employing straightforward language, incorporating "call-out bubbles," and integrating "social media-like type of communication" within the CoC.[649] Given employees' modern reading habits, characterized by "snippets and tweets," Xi emphasized the need to extract essential concepts and present them in a format that is easily digestible for skimmers.[650]

Among others, four interviewees highlighted the challenge posed by the complexity of legal language. Rho emphasized "the ongoing battle" of balancing legal precision with practical usability in the CoC.[651] They explained that "lawyers speak a different English, basically legalese, … but if you have somebody drilling a well, or fixing a pipeline, or … recruiting staff, that [is] not what they want to, and they cannot work with the document. It [is] a completely different mentality, different language, and marrying those two sides is very difficult."[652] As a compliance officer, Rho emphasized the interpretative aspect of their job, translating "strict legal jargon" into "common language" to ensure comprehension and usability.[653] They warned against relying solely on lawyers for drafting, as the CoC may "disappear in the top drawer."[654] Likewise, Sigma pointed out the difference in reading proficiency between lawyers, who are trained to understand complex documents thoroughly, and average employees, particularly field engineers with high school and technical certifications and no legal backgrounds.[655] Sigma further differentiated between "complicated" and "comprehensive" in CoC language, citing their company's CoC as an example

[648] Xi, *supra* note 621 at 5.
[649] *Ibid*.
[650] *Ibid*.
[651] Rho, *supra* note 647 at 3–4.
[652] *Ibid* at 3.
[653] *Ibid*.
[654] *Ibid*.
[655] Sigma, *supra* note 618 at 6.

of straightforward yet comprehensive language: "We do not bribe, full stop," or "We do not give facilitating payments, or try to solicit business in an improper manner, full stop."[656] They added that this approach has become "an industry standard," with many companies, especially NOCs, adopting a similar style and drafting their codes in a simple yet comprehensive manner to address different aspects.[657] Similarly, as a lawyer, Omicron preferred documents with certainty and detailed information to "know everything about what was exactly meant," and therefore, favored a longer CoC with examples and lists of unacceptable behaviors.[658] However, they clarified that because not everyone is a lawyer, the CoC has to "be understandable, relatable, and accessible to everyone."[659] Upsilon also emphasized that "the more usable, readable, comprehensible [a CoC is, and] the less legal language [it contains,] the more likely people are to follow it, [but] lawyers get so tripped up on this."[660]

Shifting the focus to the appropriate size of a CoC, companies adopt varied approaches. As clarified by Omicron, "some companies favor lengthy, detailed Codes of Conduct which address specific behaviors, dos and don'ts, while containing scenarios and examples."[661] On the other hand, Omicron explained that some prefer "a more succinct approach," outlining "high-level principles only and/ or referencing relevant pieces of relevant legislation," such as the FCPA and UKBA or international conventions, such as the OECD Convention.[662] Two interviewees advocated for shorter CoCs over extensive versions. Xi implemented "a word page limit" during their CoC's development.[663] $Beta_2$ highlighted the tendency for people to avoid reading lengthy

[656] *Ibid*.
[657] *Ibid*.
[658] Omicron, *supra* note 617 at 9.
[659] *Ibid*.
[660] Upsilon, *supra* note 642 at 6.
[661] Omicron, *supra* note 617 at 7.
[662] *Ibid* at 7–8.
[663] Xi, *supra* note 621 at 5.

documents by citing a major TNOC's struggle with readership challenges of a 90-page revised CoC.[664] Despite CEO inquiries, employees admitted to not reading it, which resulted in a request for a condensed version of no more than 25 pages.[665]

Three others recommended finding a middle ground that would be comprehensive enough. Omega argued against making the CoC "overly short."[666] They believed in striking a balance in the CoC's length and highlighted that it should neither be "hundreds of pages" nor "a few paragraphs of generalities."[667] According to Omega, the CoC should contain substantive information, including specific rules on bribery, gifts, harassment, and red flags related to violations of export rules, to provide employees with a clear roadmap and guidance.[668] Sigma also noted that while most companies have comprehensive CoCs, about 20% opt for minimal content as a formality.[669] They suggested that while some CoCs are only 3 to 4 pages long, the best ones usually range from 20 to 40 pages.[670] Similarly, Omicron acknowledged the size dilemma and asserted that excessive detail in a CoC might deter people from reading it, deeming it "too much to plow through."[671] They advocated for a "middle-ground approach" to cater to most employees.[672] Omicron emphasized that even a 1000-page CoC would not cover every scenario and further clarified that many CoCs include a "get out of jail free card" disclaimer at the top, indicating that the Code is not exhaustive but serves as a guideline.[673]

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[664] $Beta_2$, *supra* note 652.
[665] *Ibid*.
[666] Omega, *supra* note 651.
[667] *Ibid*.
[668] *Ibid*.
[669] Sigma, *supra* note 618 at 5–6.
[670] *Ibid* at 6.
[671] Omicron, *supra* note 617 at 9.
[672] *Ibid*.
[673] *Ibid*.

A relevant characteristic of a CoC, as described by the interviewees, is its dynamism. Omicron, while in the process of refreshing their own CoC at the time of the interview, noted that their existing code was "very, very plain," and they were taking steps to make the new code look "more alive" and "engaging as a document."[674] Furthermore, Upsilon stated that the recent trend in CoCs is a shift away from "those horrid 60-page, 10-point font, picture-heavy, just unreadable codes that are omnibus," to "more streamlined" versions.[675] They believed that modern CoCs focus on the company's values, use bullet points, and reference linked policies and procedures to create a user-friendly document that is more likely to be read.[676] Upsilon also emphasized that people respond well to "graphic representations."[677] They shared one of their clients' strategies called the "skinny," a one-page flipping infographic, which presents red flags for corrupt practices, the compliance department's contact information, and details related to specific issues such as hospitality limits, all in one easily accessible format.[678]

Another challenge highlighted by Rho concerns the translation of CoCs, particularly for TNCs operating in different regions around the world. They shared their company's goal of making the CoC comprehensible in "common English" and translating it into 20-30 different languages.[679] They recounted an incident where a professional translation into Chinese was found to be inaccurate by a native speaker.[680] Rho also mentioned the difficulty in translating concepts such as "corruption," as their meanings can differ between Russian or Chinese law or culture and the

[674] Omicron, *supra* note 617 at 8.
[675] Upsilon, *supra* note 642.
[676] *Ibid*.
[677] *Ibid* at 6.
[678] *Ibid*.
[679] Rho, *supra* note 647 at 4.
[680] *Ibid*.

FCPA or UKBA.[681] These examples show the potential difficulties arising from linguistic nuances in CoCs.

ii. Crafting and revising codes of conduct

When creating new CoCs, do companies start from scratch, or do they draw inspiration from existing models? The following explores insights shared by interviewees regarding the CoC creation process. Some companies enlist the assistance of professional firms specialized in drafting CoCs, while others draw inspiration from model CoCs as they craft their own.

There are external companies specialized in drafting CoCs and anti-corruption policies across different business sectors and industries. According to Omicron, these firms are adept at identifying prevalent "trends in content, or format, or style" across different industries.[682] Three interviewees with expertise in such firms unanimously shared the importance of customization in crafting CoCs to avoid a one-size-fits-all approach. Omega asserted that CoCs must be modified for each industry and cited examples such as the need for environmental components and compliance with Occupational Safety and Health Administration regulations in oil production companies.[683] Moreover, Tau mentioned that clients often have existing CoCs in place when seeking assistance, and thus, they have never had to create one from scratch.[684] They highlighted the need to tailor CoCs for each client, as ethics can vary greatly depending on the company's activities.[685] Tau described a process involving initial meetings with top management to understand their ethical philosophy and adapt it to the company's activities.[686] Similarly, Upsilon,

[681] *Ibid*.
[682] Omicron, *supra* note 617 at 8.
[683] Omega, *supra* note 651.
[684] Interview of Tau (16 February 2023), Transcript at 3.
[685] *Ibid*.
[686] *Ibid*.

with experience in drafting and revising CoCs, suggested an "initial committee" approach involving key stakeholders to collaboratively identify topics and information for inclusion in CoCs.[687] Upsilon explained the iterative process of drafting CoCs, starting with committee discussions to develop initial drafts, which are then refined through feedback loops with clients.[688] The final version undergoes scrutiny for clarity and user-friendliness, with a focus on aligning with the company's values and using features such as bullet points and linked references to policies and procedures.[689]

Some companies use models in creating and revising their CoCs. Kappa highlighted that model CoCs are "extremely valuable" as they provide guidance and a framework to share industry best practices.[690] However, as noted by Nu, it is important to recognize that "there is no one-size-fits-all approach."[691] As discussed above, customization matters to allow companies to tailor their CoCs to align with their unique contexts and requirements. Different models are available for companies to consider.

National anti-corruption regulations often recommend policies regarding anti-corruption within CoCs. For example, Tau mentioned using the template provided by the SEC.[692] Similarly, Eta advised their clients to prioritize the DOJ guidelines, as they offer the most comprehensive and up-to-date insights into operationalizing compliance programs.[693] Eta clarified that these "statutory guidelines" are instrumental in assessing and identifying deficiencies in compliance programs.[694]

[687] Upsilon, *supra* note 642.
[688] *Ibid*.
[689] *Ibid*.
[690] Interview of Kappa (14 November 2022), Transcript at 3.
[691] Nu, *supra* note 627 at 3.
[692] Tau, *supra* note 690.
[693] Interview of Eta (25 October 2022), Notes at 2.
[694] *Ibid*.

Eta also referred to the Resource Guide for the FCPA, and outside the USA, mentioned the Bribery Act 2010 Ministry of Justice guidance as valuable resources.[695] Nu further explained that the latter provides detailed explanations of what constitutes good compliance and what aspects should be addressed.[696]

In addition to national regulations, certain organizations provide models for anti-corruption and CoCs. For example, Eta mentioned the WB sanctions regulations and regulations from other multilateral banks, which address corruption, fraud, collusion, and other prohibited practices.[697] Nu also referred to OECD materials outlining effective anti-bribery processes.[698] Likewise, Theta cited OECD policies and recommendations on anti-corruption compliances and shared that their company's CoC policies were basically based on these principles.[699]

Three interviewees also mentioned drawing inspiration from peers when developing CoCs. Tau recommended studying the CoCs of major companies available online to understand their approaches.[700] Omicron shared that they often review peer CoCs not for content duplication, but for inspiration on aspects such as visual presentation, language tone (formal vs. engaging), and format elements like photographs, examples, or Q&A sections.[701] Nu also mentioned that part of the process of redrafting CoCs within the companies they worked for involved examining the CoC of their peers.[702]

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[695] *Ibid*.
[696] Nu, *supra* note 627 at 3.
[697] Eta, *supra* note 699.
[698] Nu, *supra* note 627 at 3.
[699] Interview of Theta (26 October 2022), Transcript at 2.
[700] Tau, *supra* note 690.
[701] Omicron, *supra* note 617 at 8.
[702] Nu, *supra* note 627 at 3.

iii. Achievements and obstacles in implementing codes of conduct

Implementing a well-defined CoC and ensuring the effective application of its anti-corruption standards empower a TNC to protect the business against corrupt practices committed by its employees. Rho regarded CoCs as important documents, stating that without them, it is impossible to understand what is occurring within the organization or address any potential problems.[703] Rho viewed the CoC as a set of "basic checks" that employees must internalize and understand its principles "between the ears" to either refrain from acts contrary to the CoC or to know how to pose the right questions.[704] Xi, too, recognized the value of CoCs and shared their experience with a CoC refresh at a previous company. They deliberated over whether to invest in creating a "flashy document" that reflected the same principles as their previous code or those of their competitors and industry standards.[705] Ultimately, they concluded that the investment was worthwhile. Xi emphasized that the CoC's value extends beyond the words on the page and noted that creating a unique, company-specific document is essential not only for compliance but also for marketing purposes to show a commitment to ethical behavior to "customers, the public, and shareholders."[706]

CoCs also provide a platform to prohibit certain grey and ambiguous practices that may not be illegal under home and/or host state laws. For example, facilitation payments, legal in specific jurisdictions, can be addressed in the CoC. Beta$_2$ highlighted this, stating, "if the law is different in one place and might allow some things, like the USA allows facilitation payments, but in many other jurisdictions they are not allowed," companies can specify facilitation payments in the CoC

[703] Rho, *supra* note 647 at 2.
[704] *Ibid* at 2–3.
[705] Xi, *supra* note 621 at 4–5.
[706] *Ibid* at 5.

alongside their commitment to anti-bribery and corruption.[707] Similarly, Omicron shared their company's previous allowance of facilitation payments under certain circumstances in their anti-corruption policy in line with the FCPA.[708] However, they realized that this approach was "out of step with other companies" and inconsistent with industry norms.[709] After receiving customer inquiries about their policy on facilitation payments, which required an affirmative response and alerted their customers, the company revised their CoC to prohibit such payments, aligning with common standards, practices, and customer expectations.[710] Omicron noted that despite legal permissibility, most companies choose to ban such practices in their CoC.[711] Another example pertains to gift policies. In that context, Pi shared gift policies from two companies they worked for, both of which were outlined in their CoCs. One company enforced a strict "no gift at all" policy, regardless of value, even returning "a jar of cookies" during religious holidays.[712] The other company set a threshold for acceptable gifts but required employees to declare them to the compliance officer, with Pi logging every gift, including items as minor as calendars.[713]

Having a CoC is particularly important within the petroleum sector, as emphasized by Upsilon, who pointed out the prevalence of "a huge amount of scandals" in the industry.[714] Upsilon emphasized that "anybody who is in that industry should and probably does have a code of conduct … because the industry demands it based on regulatory pressure."[715] This importance is even more pronounced for companies operating abroad, where employees often make decisions

[707] Beta$_2$, *supra* note 652.
[708] Omicron, *supra* note 617 at 17.
[709] *Ibid*.
[710] *Ibid*.
[711] *Ibid*.
[712] Interview of Pi (20 January 2023), Transcript at 2.
[713] *Ibid* at 2–3.
[714] Upsilon, *supra* note 642.
[715] *Ibid*.

independently without direct company consultation or supervision. Omicron illustrated this concern with an example from Nigeria, where officials were seen engaging in corrupt practices to supplement their income; despite modest salaries, they drove expensive cars, lived in large houses, and took luxurious foreign vacations.[716] However, Omicron noted a positive shift, observing that public officials now face more resistance. They added that "companies and the people who work for them now have a little bit more in the weaponry," as they take a stand and declare such actions are prohibited by law and their CoCs.[717] Consequently, employees are becoming less willing to risk their jobs for unethical practices.

On the other hand, some interviewees expressed skepticism about the effectiveness of CoCs. Gamma$_2$ suggested that merely having a CoC in place does not inherently hold much weight, stating, "it [is] not that they are pointless, [but it] all depends on whether they [are] enforced [and] how they [are] used."[718] They pointed out that even oil companies found guilty of bribery under the FCPA may have existing CoCs.[719] Similarly, Beta$_2$ mentioned Glencore as an example of a company with anti-corruption policies in its CoC but still faced "big fines around bribery and corruption, around market manipulation."[720] They added that, "it takes a long time to weed out those people and clean up that culture in the company."[721] This prompts the upcoming discussion for exploring ways companies can improve the effectiveness of their CoCs.

[716] Omicron, *supra* note 617 at 18.
[717] *Ibid*.
[718] Gamma$_2$, *supra* note 620 at 3.
[719] *Ibid*.
[720] Beta$_2$, *supra* note 652 at 2.
[721] *Ibid*.

iv. Improving codes of conduct for greater effectiveness

CoCs constitute a foundational element of effective compliance programs.[722] Despite being perceived as voluntary, how can CoCs be encouraged for adoption by more companies, particularly in corruption-prone sectors such as petroleum? Moreover, even if companies have CoCs in place, how can companies ensure that they are not merely symbolic but integrated into organizational culture and upheld by employees, supply chains, and third-party agents? Alongside their formulation, companies must pass the CoC throughout their organization to increase commitment to compliance standards.[723] Here, this section first examines approaches to mandating CoCs and then explores supplementary strategies for reinforcing them.

Different strategies exist to make CoCs mandatory for companies. Sometime, governments have the authority to enforce such mandates. For example, Beta, working in an organization focused on anti-corruption efforts, shared a successful example of a model CoC developed for addressing corruption in environmental and social impact assessments in a specific country.[724] They explained that in that specific country, private companies and individual consultants delivering these assessments to public authorities for specific projects, such as dams or roads, sometimes manipulated outcomes through bribery or corruption.[725] Such a practice undermined the credibility and integrity of the assessment process, as they might not have accurately reflected the true environmental impact of the projects. Beta's team was invited to provide guidance on addressing corruption issues in that process, and they conducted a thorough analysis of the system and

[722] DOJ & SEC, *FCPA Resource Guide*, *supra* note 611 at 59.
[723] See generally Jane Collier & Rafael Esteban, "Corporate social responsibility and employee commitment" (2007) 16:1 Bus Ethics European Rev 19.
[724] Interview of Beta (21 September 2022), Transcript at 4.
[725] *Ibid*.

contributed to a new CoC for these consultants.[726] The initiative was supported by the government and public authorities, and any consultant conducting such assessments was required to sign it for eligibility for public contracts.[727] This example, although not related to the petroleum sector, showcases that how governments can promote CoC adoption in a specific context. However, there are cases where governments may lack the authority to mandate companies to adopt a CoC unless required by legislation. Mu, working in the government, pointed out that "we cannot force someone to have a proper code of conduct. From their point of view, it has a pretty long arm."[728] Nonetheless, Lambda, also working in the government, shared that governments can encourage CoC implementation through "compliance review programs," where companies undergo risk-rating based on their anti-corruption policies, including the existence of a CoC.[729] Lambda explained that, although not mandatory, the resource-intensive and time-consuming nature of compliance reviews often incentivizes companies to implement CoCs as best practices.[730]

Another method to mandate CoCs is through companies with greater leverage, often based on their size and influence. Eta described a situation where larger companies, as counterparties, can demand that smaller companies without compliance documents, often SMEs, adopt the larger companies' internal documents, such as their CoC or anti-corruption policies, as attachments to contracts.[731] Pi also shared a similar approach, stating, "during integrity due diligence or … ABC questionnaires, we request venders to submit copies of their code of conduct, business ethics, anti-corruption, anti-bribery, anti-monopoly, anti-money laundering, especially if the contract has a

[726] *Ibid*.
[727] *Ibid*.
[728] Interview of Mu (16 November 2022), Transcript at 4.
[729] Interview of Lambda (16 November 2022), Transcript at 3–4.
[730] *Ibid* at 4.
[731] Eta, *supra* note 699 at 4.

high integrity risk."[732] They further explained that in their "tender documents," from the very beginning of the bidding process, they provide the link to the company's CoC to every bidder participating in the tender and they must sign a declaration or certification that they will comply with the CoC.[733] Enforcing the adoption of a CoC by NOCs can be challenging due to their larger leverage. However, compliance with stock exchange listing requirements can be helpful. Eta, who previously worked in an NOC, revealed that until 2012, the NOC had no "classical compliance documents."[734] They explained that the turning point came with the placement of its bonds on the European stock exchange, which triggered compliance with the stock exchange's requirements to adopt anti-corruption policies and a CoC.[735]

More important than merely having a CoC is its integration into the corporate culture. Some interviewees emphasized the necessity of actively discussing and sharing CoCs among employees. Xi emphasized that the abstract concepts in the CoC should not simply be "put out as a piece of paper and expecting everybody to read it" but should be translated and "fitted into the corporate culture."[736] For Beta$_2$, maintaining "a consistent reinforced message from the top all the way down" was important.[737] They explained that for an effective CoC, employees should not hear this message "once a year in training" but through different channels and meetings.[738] Beta$_2$ added that the best practice involves sharing the CoC to suppliers and conveying expectations regarding their

[732] Pi, *supra* note 718 at 7.
[733] *Ibid* at 6.
[734] Eta, *supra* note 699.
[735] *Ibid* at 4.
[736] Xi, *supra* note 621 at 4.
[737] Beta$_2$, *supra* note 652 at 3–4.
[738] *Ibid* at 4.

behavior.[739] Similarly, Theta emphasized that the CoC needs to be "well-distributed to staff [and] contractors."[740]

In addition to integrating the CoC into a company's culture through education and sharing, it is important to establish procedures for monitoring and sanctioning violations against its principles, as discussed by four interviewees. $Beta_2$ emphasized the significance of having "the right protections in place" to ensure adherence to those Codes.[741] Chi pointed out that merely having a CoC is insufficient; companies must implement "a series of elements, starting from … prevention, detection, response, and collective actions … to keep pushing the agenda on anti-corruption."[742] Likewise, Beta acknowledged that while a CoC is a positive step, "it does not replace the need for public regulation and monitoring of behaviors of private sector actors."[743] They further suggested that infringements to the CoC should be followed up and potentially sanctioned under regulatory or legal provisions.[744] Omicron also highlighted that disciplinary action for CoC breaches "sends a strong message to other employees."[745]

B. Education and Training: Strengthening defenses in anti-corruption

In corporate compliance, a proactive strategy prioritizes prevention over reaction because relying mainly on response programs can be insufficient due to the belated nature of their intervention, especially when corrupt incidents are already underway. Beta believed that "education is sometimes an underappreciated part of the anti-corruption agenda" and highlighted the relationship

[739] *Ibid*.
[740] Theta, *supra* note 705.
[741] $Beta_2$, *supra* note 652.
[742] Interview of Chi (28 February 2023), Transcript at 4.
[743] Beta, *supra* note 730.
[744] *Ibid*.
[745] Omicron, *supra* note 617 at 13.

between a company's education level and the accountability of decision-makers.[746] They argued that highly educated employees are more likely to "think critically, ask questions, and raise issues when things are not going well."[747] Therefore, companies need to ensure that their anti-corruption policy is visible and available to all employees and agents,[748] especially when considering that the team in charge of anti-corruption is not the one negotiating contracts and making deals in the field.[749] Accordingly, compliance departments should inform employees of their anti-corruption responsibilities to "create and maintain a trust-based and inclusive internal culture."[750] A key aspect of this approach involves systematically training employees in ethical conduct to distinguish the right courses of action and explaining the consequences of deviating from them. According to Omicron, companies with the time and budget for regular trainings are "very fortunate" and "ahead of the curve in terms of the preventative measures."[751] This subsection, therefore, based on interviewees' comments, discusses the types of training and the adoption of a risk-based approach tailored to the specific needs of anti-corruption education. It also introduces methods for improving the effectiveness of these programs and explores avenues for creating an open environment wherein employees feel encouraged to pose questions. It should be noted that trainings are not limited to anti-corruption; they may also cover other topics, such as harassment, antitrust, data privacy, modern slavery, and human rights.

Education on anti-corruption takes two main forms: online and in-person or live training sessions. Online training courses are often purchased from service providers to require employees to

[746] Beta, *supra* note 730 at 2.
[747] *Ibid*.
[748] OECD, *Good Practice*, *supra* note 599.
[749] Gamma$_2$, *supra* note 620 at 3.
[750] Asia-Pacific Economic Cooperation, *APEC Anti-Corruption Code of Conduct for Businesses* (Singapore: APEC, 2007).
[751] Omicron, *supra* note 617 at 6.

complete them.[752] These courses usually present different scenarios of corruption and outline the necessary steps to be taken in each situation.[753] Xi discussed the foundational role of online training in anti-corruption education but acknowledged its limited effectiveness, estimated at only 10%.[754] They noted that the challenge lies in the generic nature of these courses, which may not directly apply to specific businesses, and stated that "the cost of amending them to apply to your business really outweighs the efficacy of the training."[755] Xi further added that in their company, they designed an "extremely difficult test" for employees seeking to opt out of online training, giving them two attempts to pass and be "exempted from certain portions of the online training modules."[756] They described the test as "another learning opportunity" on corruption that generates discussions about the answers, even in the case of failure.[757]

Upsilon's company adopted an innovative approach to online training by developing a challenging scenario-based game. This facilitated e-learning experience involves compliance officers collaborating with employees in different teams to address multiple compliance issues.[758] Unlike traditional training, the game presents situations without a clear-cut answers and requires participants to act as "protagonists" and navigate scenarios where mistakes have already occurred, such as failing to perform due diligence or skipping over certain requirements.[759] Performance is evaluated through an aggregate score, which assesses participants' mistakes based on fines, revenue, and stock price changes, serving as proxies for reputation.[760] Moreover, post-game

[752] Xi, *supra* note 621 at 6–7.
[753] Sigma, *supra* note 618 at 4.
[754] Xi, *supra* note 621 at 7.
[755] *Ibid*.
[756] *Ibid*.
[757] *Ibid*.
[758] Upsilon, *supra* note 642 at 6.
[759] *Ibid*.
[760] *Ibid*.

discussions with facilitators help participants understand ideal responses and identify red flags.[761] These initiatives suggest a more engaging approach to compliance education that goes beyond conventional methods and leaves a lasting impact on employees' understanding of anti-corruption measures.

On the other hand, live training consists of periodic sessions where a dedicated compliance counsel or legal expert delivers anti-corruption information directly to employees.[762] The content covered in these live sessions can vary widely. Some interviewees explained that the primary objective during such trainings is to create a sense of awareness and responsibility among employees regarding the applicable anti-corruption laws and international conventions. For example, Theta emphasized that their training consistently refers to the OECD Convention to clarify the concept of corruption.[763] Moreover, Tau highlighted that employees might wonder why certain foreign anti-corruption laws apply to them, so they explain theoretical concepts.[764] The training content also covers the historical and rationale aspects of anti-corruption legislation. Iota, for example, shared that in their trainings, they elaborate on the history of the FCPA enactment and the passage and ratification of OECD Convention, which followed the Watergate Scandal, and they discuss how, subsequently, countries worldwide initiated the implementation of their own anti-bribery laws.[765] Similarly, Sigma noted that they usually commence their training by providing information about the FCPA, the DOJ, and the SEC, because, as they put it, "I want them to understand that fear."[766]

[761] *Ibid*.
[762] Sigma, *supra* note 618 at 4.
[763] Theta, *supra* note 705.
[764] Tau, *supra* note 690 at 2.
[765] Interview of Iota (9 November 2022), Transcript at 9.
[766] Sigma, *supra* note 618 at 7.

In training sessions, the emphasis is not merely on conveying the applicable anti-corruption laws but rather on teaching the skills to identify different forms and types of corruption, along with the ability to recognize red flags in business dealings. Upsilon emphasized the challenge of understanding nuances, stating, "people generally know [they are] not supposed to give somebody suitcases of cash, ... but when it comes to things like gifts and hospitality policies, it [is] not always obvious why that could be seen as bribery and all kinds of nuance around that."[767] Thus, when an "educational component" is needed, trainings should incorporate detailed information on what constitutes bribery or any other corrupt act.[768] Training should also provide clear guidance on whom employees should contact to promptly report any observed red flags.[769] For example, Tau shared experiences where parties in certain operating countries suggested handling issues informally, which poses the challenge of interpreting vague suggestions such as "Just deal with it!"[770] In addressing such situations, Tau stressed the importance of training staff to carefully consider the limitations on giving notes or cash and fully understand the implications.[771] Likewise, Theta emphasized a commitment to educating staff about the severe consequences associated with any involvement in corrupt activities, which could result not only in job loss but also imprisonment.[772] Moreover, Kappa also referred to the use of FAQs, which are smaller, more informal documents written in clear language to support the day-to-day implementation of anti-corruption guidance within businesses.[773]

[767] Upsilon, *supra* note 642 at 4.
[768] Nu, *supra* note 627 at 4.
[769] Iota, *supra* note 771 at 7.
[770] Tau, *supra* note 690 at 8.
[771] *Ibid* at 9.
[772] Theta, *supra* note 705 at 5.
[773] Kappa, *supra* note 696 at 1–2.

Moreover, training sessions can also convey the contents of CoCs to employees by reiterating expectations and providing updates. The company's periodic training sessions for employees are designed to increase their understanding of the CoC and ensure compliance with the company's guidelines.[774] Omicron emphasized that the "enforcement of any code of conduct starts with training and education of employees," and they added that maintaining an ongoing dialogue and constant reminders within the supply chain about CoC expectations is considered the "absolute best defense."[775] Similarly, Iota shared that their company kept their annual training on the CoC engaging; for example, in a recent session, their Chief Compliance Officer organized executive speakers to address specific portions of the CoC through recorded segments, and afterward, employees completed a short quiz to ensure their understanding of the discussed topics.[776] Sigma also shared that their live training sessions were generally based on the components of their CoC.[777]

Including real examples of corruption cases in training sessions is another method to help employees understand the repercussions of engaging in corrupt activities in the real world. Corruption scandals, with their lasting legacy, evolve into cautionary tales discussed among peers and competitors.[778] During their training sessions, Omicron used stories of other companies facing significant fines as examples, while telling their employees, "I do [not] want my company to become a training story that some other company uses."[779] Similarly, Sigma, Iota, and Xi shared a common practice in their training approach: they used stories form the top ten FCPA settlements and other DOJ and SEC enforcement actions to showcase mistakes made by other companies and

[774] Interview of Phi (28 February 2023), Transcript at 5.
[775] Omicron, *supra* note 617 at 6.
[776] Iota, *supra* note 771 at 5.
[777] Sigma, *supra* note 618 at 6.
[778] Omicron, *supra* note 617 at 4.
[779] *Ibid*.

explain how behaviors can be amended or focused on the right to avoid similar pitfalls.[780] Xi further elaborated on another initiative, where they identified compliance champions globally and invited them to roundtable discussions with their team, reasoning, "they were deputized to go spread the compliance and anti-corruption gospel."[781] Tau encouraged open discussions among employees using real examples as "case studies" to facilitate an idea exchange and experience sharing.[782] They emphasized the value of sharing such cases, as it helps individuals realize they are not alone in facing similar challenges and also contributes to a consistent response from the company, particularly when dealing with government officials who seek bribes from different individuals within the same company.[783] Lastly, Upsilon used real scenarios from TI data to ask employees to identify countries based on the likelihood of bribery and discuss potential issues and red flags when conducting business in those regions.[784]

An effective approach to determining the content of a training session is conducting a risk assessment of employees' positions to identify their exposure to corruption risks and tailoring the material accordingly. Maintaining the "relevance" of content is important because if training is unrelated to employees' scope of work, they might become disengaged and lose track of the educational objectives.[785] While certain topics, such as general anti-bribery policies, are essential for everyone, specific employees, based on the nature of their work, may require more in-depth knowledge, such as understanding when a gift becomes a bribe.[786] In this respect, Beta$_2$ expressed the viewpoint that individuals in office roles, such as those dealing with engineering reports, could

[780] Sigma, *supra* note 618 at 6; Iota, *supra* note 771; Xi, *supra* note 621 at 7.
[781] Xi, *supra* note 621 at 7.
[782] Tau, *supra* note 690 at 4.
[783] *Ibid*.
[784] Upsilon, *supra* note 642 at 7.
[785] Beta$_2$, *supra* note 652 at 7; Eta, *supra* note 699 at 3.
[786] Omega, *supra* note 651 at 2.

likely suffice with online training, but "face-to-face" sessions should be particularly tailored for those "on the front line," who operate in high-risk environments and negotiating with foreign agents or government officials.[787] According to Beta$_2$, such training should be more frequent and go deeper into red flags, such as charity donations or dealings involving family members.[788] Similarly, Theta believed that training should be specifically customized for "people in operational areas [and] people who have relationship and actually walk with government officials."[789] Moreover, in their training approach, Eta usually conducted random checks on employees' awareness of anti-corruption requirements through a brief questionnaire, and then organized tailored training sessions for employees dealing with a higher risk of corruption.[790] Sigma also shared that the dynamic nature of their anti-corruption trainings: while covering general topics for the entire population, such as bribery, facilitation payments, conflicts of interest, gifts, entertainment, and travel, they may choose not to discuss topics such as due diligence and intermediaries for everyone, especially for field employees or mechanics.[791] They reasoned that intermediaries tend to be "a very specialized topic," and usually, only individuals dealing directly with vendors or requiring specialized services will need to be familiar with it.[792] Sigma also referred to "specific targeted groups" in training based on the types of projects they are working on or the regions they are in.[793]

Different approaches exist to make anti-corruption trainings mandatory. At the country level, international organizations such as the OECD evaluate governments' efforts in promoting the

[787] Beta$_2$, *supra* note 652 at 7.
[788] *Ibid* at 5.
[789] Theta, *supra* note 705.
[790] Eta, *supra* note 699 at 3.
[791] Sigma, *supra* note 618 at 6.
[792] *Ibid*.
[793] *Ibid*.

implementation of anti-corruption measures, which could involve organizing training initiatives.[794] At the company level, influential companies can mandate anti-corruption training for specific groups of employees within counterparties, including aid recipients and commercial partners.[795] This requirement can be explicitly incorporated in contracts, a topic to be further explored in subsequent chapters. Lastly, within the company, management can offer incentives, including monetary rewards, to encourage employee participation in training. For example, Iota disclosed that their company's bonus structure partly depends on the "ESG scorecard," which includes a component linked to the completion of anti-corruption training.[796]

While conducting training sessions is important, monitoring the effectiveness of knowledge transfer to employees is equally critical. There is a possibility that employees may not actively participate in live sessions or take online training seriously. Thus, follow-ups are necessary, as Omicron emphasized that "the monitoring and reporting of training statistics are one of many checks and balances."[797] Nu believed that at least having "98% of the staff" undergoing training and completing quizzes to verify their understanding is a good data point for training effectiveness.[798] On a different note, there is a need for budget monitoring to prevent the amount allocated for training from becoming another potential source of corruption. In this respect, Alpha$_2$ mentioned that NOCs usually have a budget for the capacity development and training of nationals, and they cited the example of the National Company of Liberia, which spent $54,000 per employee on training annually.[799] In such scenario, Alpha$_2$ believed that there should be a data comparison

[794] Kappa, *supra* note 696.
[795] Eta, *supra* note 699 at 4.
[796] Iota, *supra* note 771 at 5.
[797] Omicron, *supra* note 617 at 13.
[798] Nu, *supra* note 627 at 8–9.
[799] Alpha$_2$, *supra* note 285 at 10.

to interpret the numbers and determine what constitutes a reasonable budget.[800] The comparison requires answering questions such as the number of people being trained, the cost per trained person, the impact of the training, and comparing with other companies' spending per employee or per national.[801]

C. Oversight Mechanisms: Detecting and Responding to Corruption

Beyond prevention mechanisms, companies must have procedures in place for identifying corruption cases and establishing a chain of accountability to address any irregularities.[802] While the preceding subsections mainly focused on corruption prevention, this subsection discusses oversight mechanisms, while categorizing them into audit procedures, whistleblowing mechanisms, and investigation and enforcement mechanisms.

i. Audit procedures for anti-corruption vigilance

Compliance should originate from the top and extend throughout the organization by incorporating checks and balances.[803] The design and maintenance of audit procedures contribute to "an architecture of control" over the company[804] and guarantee that the company's transactions, records, and accounts remain untainted by corrupt practices.[805] Moreover, the implementation of audits procedures, coupled with "the feeling that vigilant eyes are overseeing everything," is essential for instilling accountability in every employee decision-making process.[806] As emphasized by Omicron, "audits of suppliers and locations [are necessary] to test the waters and

[800] *Ibid*.
[801] *Ibid*.
[802] *Ibid* at 5.
[803] Epsilon, *supra* note 487 at 5.
[804] Alpha$_2$, *supra* note 285 at 5.
[805] OECD, *Good Practice*, *supra* note 599 at para 7.
[806] Alpha$_2$, *supra* note 285 at 8.

see what is happening in real terms." [807] Audit reports can be presented periodically in meetings with compliance departments and executive board members.[808] The findings and recommendations generated from such reports represent learning opportunities and allow gaps to be closed.[809]

Although anti-corruption audits can take different forms, they can generally be categorized into two primary types: operational and financial audits. In the former, auditors visit company sites to assess the compliance of operations with anti-corruption policies. However, more important than operational audits are audits focusing on transactions, contracts, and statistics to verify adherence to anti-corruption rules. For an oil company, maintaining effective monitoring and visibility of financial flows and operational measures is paramount to identify red flags and abnormalities.[810] Similar to technical audits such as "monitoring methane leaks throughout pipelines," financial audits should oversee the flow of oil through pipelines, daily trading volume, barrel price, actual funds deposited into the internal accounts, and regular payments to employees and suppliers.[811]

Moreover, companies should screen budgets and plans in projects and their related financial transactions, especially those involving government officials.[812] Audit teams also need to periodically ensure the compliance of third parties and operations with all the terms of the contract,[813] including conducting adverse media reviews, especially for medium and high-risk parties.[814] In some states, regulations make third-party audits mandatory. For example, Chi shared

[807] Omicron, *supra* note 617 at 13.
[808] Delta, *supra* note 646.
[809] Omicron, *supra* note 617 at 13.
[810] Alpha$_2$, *supra* note 285 at 5.
[811] *Ibid* at 7.
[812] Theta, *supra* note 705 at 1.
[813] *Ibid* at 4.
[814] Upsilon, *supra* note 642 at 11.

that in Indonesia, government regulators require a "vender anti-bribery and corruption audit," which mandates companies to audit the compliance of all suppliers and contractors with the FCPA, UKBA, and Indonesia anti-corruption laws.[815] Moreover, basic checks on hospitalities, especially for individuals holding official roles, guarantee compliance with regulations regarding permissible entertainment expenditures.[816] In addition, audits should be conducted for employees or third parties with names similar to those on trade sanctions lists. For example, Pi shared an experience of receiving regular requests from the trade sanction control office, which conducted random audits, suspecting names associated with Al Qaeda organizations.[817] In response, Pi had to provide evidence confirming that their unit's contracts were not linked to that organization.[818]

ii. Whistleblowing and anonymous reporting

One essential element of an effective oversight mechanism is the presence of an anonymous and confidential reporting system. Such a system, also known as a hotline, help-line, or speak-up, offers an open space for individuals, whether employees, customers, the general public, or other stakeholders in companies or NGOs, to blow the whistle and report any information or observations about issues they believe are not in line with company values and procedures, including corruption violations.[819] The mechanism encourages insiders to provide information—even in the absence of evidence—without fear, about issues that "would not be detected or available through the company's internal control system."[820] In particular, the whistleblowing system functions as the "eyes and ears on the ground" for compliance departments in TNCs with

[815] Chi, *supra* note 748 at 6.
[816] Rho, *supra* note 647 at 2.
[817] Pi, *supra* note 718 at 5.
[818] *Ibid*.
[819] Rho, *supra* note 647 at 2.
[820] United Nations Office on Drugs and Crime, *An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide* (New York: United Nations, 2013) at 82.

projects worldwide, which are unable to consistently monitor operations.[821] In Psi's view, whistleblowing system helps especially in addressing petty corruption aspects,[822] and Delta shared that most fraud cases were detected through whistleblowing tips.[823]

Whistleblowing mechanisms can be implemented through both internal and external channels. Internally, all stakeholders, including employees, contractors, and business partners, can use a hotline within the company to report violations. Companies should offer multiple contact options, including telephone, e-mail, WhatsApp, and other media, in every country of operation and in all relevant languages.[824] In addition, whistleblowers should have the choice to report concerns and incidents anonymously,[825] as they risk jeopardizing their jobs and even their lives by "sticking out their neck."[826] On the other hand, external service companies, such as Deloitte, Ethic Points, and Red Flag Group, also provide third-party report mechanisms to guarantee the confidentiality of submitted complaints.[827] Through these external channels, the public or anyone with information can blow the whistle and file a complaint about a company, alleging issues such as failure to report required information or unauthorized payments.[828] External whistleblowing is also endorsed in the new EU directive on whistleblowing, which aims to establish uniform minimum protection standards for whistleblowers across the EU.[829]

[821] Sigma, *supra* note 618 at 5.
[822] Psi, *supra* note 4 at 5.
[823] Delta, *supra* note 646 at 4.
[824] Chi, *supra* note 748 at 5.
[825] *Ibid*.
[826] Rho, *supra* note 647 at 2.
[827] Chi, *supra* note 748 at 5; Tau, *supra* note 690 at 4.
[828] Lambda, *supra* note 735 at 4.
[829] Delta, *supra* note 646 at 4; see *Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law* (2019) PE/78/2019/REV/1, ch III.

Companies must maintain a continuous awareness and communication program to create a culture of speaking-up. Iota shared that their company organized an annual "speak-up campaign," during which they promote their whistleblowing system and encourage employees to report any unethical behavior against the CoC.[830] Moreover, $Beta_2$, as a compliance officer, shared that due to their strong connections with employees, many individuals directly bring issues to the compliance department without resorting the whistleblowing system.[831] Delta highlighted the challenges, especially in "former communist European countries, where there is a stigma around whistleblowing and speaking-up."[832] In some jurisdictions such as the USA, whistleblowers are awarded financial incentives for successful whistleblowing.[833] However, Rho mentioned that "paying for information to whistleblowers" may be effective in countries like the USA but may not be universally applicable due to cultural nuances.[834]

Merely having a whistleblowing mechanism is not sufficient; companies also need to monitor the system and extract reports from it. The whistleblowing mechanism can be a "barometer" that triggers more focused training for a particular group of employees, in a specific geographic area, or on particular topics.[835] The number and nature of cases reported is a "window into what is happening within the organization," as they offer a "snapshot in time" and help to identify "unwelcome trends."[836] Compliance departments must "keep their finger on the pulse" of these trends.[837] If there is a drop-off in reporting, it should prompt investigation to determine whether

[830] Iota, *supra* note 771 at 4.
[831] $Beta_2$, *supra* note 652 at 5.
[832] Delta, *supra* note 646 at 3.
[833] Under the Dodd-Frank Wall-Street Reform and Consumer Protection Act, the whistleblower is entitled to receive between 10 and 30 percent of the amount recovered by the government; see *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, 124 Stat. 1376 § 922 (2010).
[834] Rho, *supra* note 647 at 6.
[835] Omicron, *supra* note 617 at 13.
[836] *Ibid*.
[837] $Beta_2$, *supra* note 652 at 5.

there are actually no issues or if problems exist are going unreported.[838] Unfortunately, Tau, who audited the whistle-blowing policies of companies by simulating the role of a whistleblower to test the system, shared that many times, the results were disappointing, and the system did not work as intended.[839]

iii. Investigating and addressing anti-corruption violations

Conducting audits and receiving reports from whistleblowers merely highlight issues for compliance departments; however, those problems should be investigated, and responsive measures should be implemented concerning any employees or agents who have violated the company's anti-corruption policies. Xi mentioned that many companies have an "ad hoc process" for addressing serious allegations, but they should strive to avoid being in a "reactive situation."[840] After conducting the investigations and adopting appropriate measures, compliance departments should also establish a "feedback loop" and continuously apply the lessons learned back into the organization.[841] But, what does an investigation entail?

Following the detection of a corruption-related matter, the initial step is to conduct an internal investigation. Before any formal investigation begins, reports should undergo professional validation to ensure their accuracy.[842] Once initially confirmed, the investigation proceeds by obtaining essential facts and information, such as details about the involved parties, the location and duration of the incidents, and anyone who may be aware of the situation.[843] Xi explained that their approach is to "gather as many facts as possible without talking to anybody … outside of the

[838] *Ibid*.
[839] Tau, *supra* note 690 at 4.
[840] Xi, *supra* note 621 at 5.
[841] Sigma, *supra* note 618 at 5.
[842] Chi, *supra* note 748 at 5.
[843] Omicron, *supra* note 617 at 6.

investigation."[844] Evidence is then collected through interviews with witnesses, whether affiliated with the company or not, and a thorough review of relevant documents, such as contracts, purchase orders, and technical documents like service tickets, bills, and invoices.[845] Due to their sensitive nature, investigations should be conducted confidentiality. If people become aware of an ongoing investigation, it may impact the integrity of the process, and there is a risk of evidence being created or disappearing.[846] Therefore, preserving documentation without notifying people is important, and many companies implement a "legal hold notice" where they notify specific individuals to save relevant documents. The subsequent step is developing an interview strategy to confront the accused individuals with evidence and seek their explanations.[847] The investigation should also trace the chain of responsibility and identify those who noticed red flags, took necessary actions, reported the issues, and ensured that required measures were implemented, as well as those who ignored these steps.[848] Given this comprehensive and lengthy process, companies often set an internal closure dates from the submission date to effectively manage and complete the investigative process.[849]

Given that investigations are a highly specialized field and require fairness and impartiality, companies may involve professionals beyond the compliance department, including legal teams and human resources, and even external investigators.[850] Larger companies typically have a fraud investigation team whose members are trained in conducting thorough investigations.[851] Moreover, companies need to carefully consider whether to engage external counsel, especially if

[844] Xi, *supra* note 621 at 6.
[845] Sigma, *supra* note 618 at 12.
[846] Rho, *supra* note 647 at 5.
[847] Xi, *supra* note 621 at 6.
[848] Alpha$_2$, *supra* note 285 at 7.
[849] Sigma, *supra* note 618 at 12.
[850] Omicron, *supra* note 617 at 6.
[851] Beta$_2$, *supra* note 652 at 6.

there is a possibility that the investigation might lead to prosecution.[852] In such cases, all information and documents related to investigation will be covered by legal privilege. While, investigations led by a lawyer in common law jurisdictions would protect privilege, in other jurisdictions, an in-house-lawyer-led investigation might not provide the same privilege protection.[853] The collection of evidence should also be carried out by professionals, as the uncovered evidence may be used by law enforcement and prosecution later if a person has violated the law.[854] For example, consideration should be given to involving external data analytics when there is an anticipation of providing governments with data production to ensure that everything is captured through e-discovery.[855]

Following the completion of investigations, necessary measures should be taken, ranging from adopting disciplinary measures against employees who breach the anti-corruption policy to withdrawing from the project or the country in question, up to reporting the case to law enforcement in home or host states.[856] The CoC's violations should potentially be sanctioned under regulatory or legal provisions,[857] as they send a strong message to other employees that "the bosses are serious about the rules."[858] The imposition of sanctions is managed through the HR process and may include measures such as termination of employment and withholding future references. Rho noted the challenges in some countries where legal restrictions make employment termination difficult and shared experiences where alternative actions, such as asking the person to resign while maintaining benefits, were taken.[859]

[852] Xi, *supra* note 621 at 6.
[853] *Ibid*.
[854] Rho, *supra* note 647 at 5.
[855] Xi, *supra* note 621 at 6.
[856] For further detail, see OECD, *Corporate Compliance*, *supra* note 600 at 46–47.
[857] Beta, *supra* note 730.
[858] Rho, *supra* note 647 at 5.
[859] *Ibid* at 6.

Companies also face the decision of involving prosecutors and public authorities if the matter involves criminal conduct. Some companies may hesitate due to the public exposure, often described as "airing their dirty laundry in public," as well as the costs associated with external lawyers and court fees.[860] The self-reporting of corruption-related matters to government regulators is considered "a business decision," akin to a "nuclear bomb" for the company.[861] However, Omicron emphasized that in such cases, companies have no choice but to report it to the authorities, especially considering that self-disclosure and cooperation with the authorities in providing all necessary information, can result in a lesser fine and fewer consequences.[862]

D. Due Diligence: Third-Party Monitoring and Ensuring Compliance

The tools discussed thus far primarily address anti-corruption within a company's internal structure. However, as detailed in Chapter Two, most bribery schemes involve third parties and intermediaries. Under the FCPA and UKBA, companies can be held accountable for the actions of their contractors and third-party agents engaging in corrupt practices.[863] Therefore, companies should place a significant focus on scrutinizing them. Through due diligence activities, parties can collect information about these agents to verify their legitimacy, reputation, ethical standards, and the business justification for their involvement.[864] This subsection, based on insights from interviewees, discusses the specifics of due diligence activities in the petroleum sector. It describes the types of activities companies need to monitor, methods to obtain relevant information, and the appropriate courses of action in the presence of red flags.

[860] Omicron, *supra* note 617 at 6–7.
[861] Xi, *supra* note 621 at 6.
[862] Omicron, *supra* note 617 at 7.
[863] Rho, *supra* note 647 at 7.
[864] Iota, *supra* note 771 at 1.

When initiating third-party due diligence activities, the foremost question is: what types of information should be obtained? According to Sigma, adopting a comprehensive approach is a dual process due diligence, incorporating both internal and external facets.[865] The internal due diligence phase entails securing "internal clearance" to proceed with the investigation.[866] This step guarantees that there is a legitimate and justified requirement for the involvement of a third party, rooted not solely in a specific agent's need but driven by a commercially reasonable necessity.[867] Subsequently, the external due diligence phase centers on conducting reputational checks and integrity due diligence of a third party.[868] Through this stage, companies evaluates the risk profile of prospective business partners through an examination of their anti-corruption policies and their alignment with the company's standards and values.[869] This process investigates whether appropriate anti-corruption measures are in place, including the identification and response to instances of corruption, presence of a whistleblower mechanism, collaboration with law enforcement authorities, disciplinary actions against employees, the existence of anti-corruption principles in the CoC along with relevant training, and adherence to the EITI.[870]

As part of integrity due diligence, there is an examination of the beneficial owner of the company and its leadership.[871] Companies, in particular, seek assurance that no PEPs, such as government officials or individuals with significant political influence, are involved with the company.[872] This scrutiny extends to verifying that local governors, presidential family members, or leaders of political parties are not affiliated with the company or "using the company as a scheme" for illicit

[865] Sigma, *supra* note 618 at 7–8.
[866] *Ibid*.
[867] *Ibid* at 8.
[868] Pi, *supra* note 718 at 3.
[869] Theta, *supra* note 705 at 3.
[870] Kappa, *supra* note 696 at 5; Rho, *supra* note 647 at 7.
[871] Pi, *supra* note 718 at 3.
[872] Rho, *supra* note 647 at 7.

activities.[873] The evaluation also includes checking whether the companies' directors and managers are currently facing prosecution for bribery and corruption.[874] Moreover, due diligence investigates whether the beneficial owner is associated with individuals, organizations, or companies established and domiciled in countries subject to trade sanctions to avoid engaging in business with them.[875] Xi emphasized that an investigation is also undertaken to ensure that they are not under Magnitsky sanctions targeting non-state actors engaged in corruption and subject to sanctions.[876]

The due diligence investigation often is conducted before signing a contract and entering into a partnership with any potential contractors, whether they are public entities or private companies.[877] According to Kappa, beyond focusing on "immediate business relationships," due diligence activities should extend to the supply chain.[878] They believed companies must "map out the entire supply chain, … not just the tier-one relationships, but also the tier-2,3,4,5 up to tier-20 relationships" to control and prevent corruption.[879] Moreover, recognizing that different third parties have varying risk profiles, companies can adopt a risk-based approach in conducting their due diligence activities. They can focus on key areas with greater risk and exposure for the company.[880] In Xi's experience, while some third parties may not require a formalized due diligence process other than "boss approval," there exists "a continuum of diligence where the higher risk associated with a third party, the more diligence needs to be done; the more touch

[873] Theta, *supra* note 705 at 3; *ibid*.
[874] Rho, *supra* note 647 at 2.
[875] Pi, *supra* note 718 at 7.
[876] Xi, *supra* note 621 at 13; see *Russia and Moldova Jackson–Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012*, 8 USC § 1101 (2012) [US *Magnitsky Act*]; see also *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* SC 2017, c 21 [*Canadian Magnitsky Act*].
[877] Delta, *supra* note 646 at 3.
[878] Kappa, *supra* note 696 at 4.
[879] *Ibid*.
[880] Chi, *supra* note 748 at 3.

points, the more people who need to be involved."[881] This approach guarantees that every single point of failure and contact is thoroughly addressed in those situations.[882]

One important factor to consider in a risk-based approach due diligence is the geographical location of third-parties. In this context, the CPI score, released by TI, triggers the implementation of extra due diligence on third parties.[883] For example, in Omicron's company, if a third-party company operates in a country with a CPI score of 40 or less, an additional phase of due diligence is incorporated into the onboarding process.[884] Moreover, conducting yearly due diligence on high-risk third parties and business partners will uncover any involvement in any corrupt activities that could influence a company's decision to maintain business relationships with them.[885] Rho also recommended that companies categorize third parties into high-risk, medium-risk, and low-risk based on the CPI score when conducting due diligence.[886] Moreover, if a supplier or contractor is domiciled in countries subject to trade sanctions, this also necessitates further due diligence.[887]

In addition to assessing risks on a country level, companies can conduct a more detailed risk analysis focusing on areas exposed to corruption. For example, specific high-risk industries such as manufacturing, import, export, and suppliers are known for corruption within a country.[888] Moreover, due diligence should be especially focused on during procurement and bidding processes, as well as mergers, acquisitions, farming down, and joint ventures, due to their substantial capital investments, which are susceptible to corruption.[889] Another risk factor is the

[881] Xi, *supra* note 621 at 10.
[882] *Ibid*.
[883] Chi, *supra* note 748 at 8.
[884] Omicron, *supra* note 617 at 11.
[885] *Ibid* at 13.
[886] Rho, *supra* note 647 at 7.
[887] Pi, *supra* note 718 at 7.
[888] Omicron, *supra* note 617 at 11.
[889] Pi, *supra* note 718 at 4; Epsilon, *supra* note 487 at 4.

scope of contracts, not only for contracts with larger values but also if they involve interactions with public officials, such as tax authorities, or individuals issuing licenses and permits.[890]

But how can companies gather information about potential third parties before entering into a contract with them? Initially, compliance departments can conduct a basic search by checking the internet and performing targeted searches to look for any available adverse information about the other parties.[891] Further due diligence is then carried out through questionnaires and/or external background reports to assess and recommend a third party for approval. Depending on the company's structure and policies, approvals can be made by the Chief Compliance Officer or at the regional compliance level.[892]

Detailed due diligence questionnaires, also known as ABC (Anti-Bribery and Corruption Compliance) or KYC (Know Your Customer) questionnaires, are usually sent by compliance departments to third parties to be signed and certified by their principals.[893] These questionnaires cover different aspects, including basic information such as the services provided, offered compensation, and duration in business, as well as corruption-related inquiries such as previous violations of anti-money laundering, fraud, or bribery laws and their disposition.[894] In responding, third parties must certify that they have not been found guilty of any violations or disclose any infractions within a specified timeframe.[895] Upsilon emphasized that these questionnaires are "the place to address past issues" and explain remedial actions taken, especially considering that many third parties have been "indicted at some point for bribery."[896] As part of the questionnaire,

[890] Pi, *supra* note 718 at 7.
[891] Nu, *supra* note 627 at 5.
[892] Sigma, *supra* note 618 at 8.
[893] Omega, *supra* note 651.
[894] Sigma, *supra* note 618 at 11; Iota, *supra* note 771 at 7.
[895] Sigma, *supra* note 618 at11.
[896] Upsilon, *supra* note 642 at 11.

companies also collect beneficial ownership information on their contractors and suppliers by asking them to identify the natural persons who own or control the company.[897] The questionnaire may also request copies of the third parties' anti-corruption policies and CoC.[898] However, Upsilon highlighted that these requests must be "proportionate, intelligent, and risk-based" for effective risk management.[899] Upsilon recounted a situation where a partner company demanded three months of the personal CEO's bank statements, which was considered outrageous, and Upsilon, as a compliance officer, refused to comply and challenged the necessity and legality of such a request.[900] Apart from questionnaire submissions, Xi stressed that the due diligence process should involve engaging compliance personnel, lawyers, and business representatives with the third parties on a "personal level" to establish rapport and pose challenging anti-corruption questions.[901]

In addition to or instead of using questionnaires, some companies may opt for external services to gather information about third parties. Advancements in technology have given rise to the development of software options that enable companies to conduct relatively accurate due diligence on their counterparts.[902] These tools allow for checking any involvement in court decisions or past incidents related to corruption.[903] Furthermore, several service companies, such as PwC, Deloitte, Navex, or Steele, specialize in running detailed due diligence background reports for companies.[904] Moreover, the Natural Resource Governance Institute has also developed a

[897] Epsilon, *supra* note 487 at 4.
[898] Pi, *supra* note 718 at 7.
[899] Upsilon, *supra* note 642 at 10.
[900] *Ibid*.
[901] Xi, *supra* note 621 at 10.
[902] For examples of due diligence software applications, see e.g. Data Room, "Due diligence software definition, use cases, and top 7 solutions to use in 2024" (20 February 2024), online: *Data Room* <dataroom-providers.org/blog/best-due-diligence-software-solutions/>.
[903] Eta, *supra* note 699 at 6; Upsilon, *supra* note 642 at 7.
[904] Sigma, *supra* note 618 at 8.

diagnostic tool designed to assess corruption risks in a specific extractive sector.[905] For example, if a company is deciding to enter a particular country, they can use this tool for an in-depth analysis of corruption risks in their oil sector.

Different concerns may surface during the due diligence process, where the compliance or legal department must carefully monitor and make decisions regarding these "yellow and red flags."[906] If a flag emerges, the third party is usually contacted to address and "deconflict the issue."[907] For example, in cases where companies request the third party's anti-corruption policies and none exists, companies may insist that the third party to create an anti-corruption policy or adopt their own.[908] However, if it proves impossible to resolve these flags, the company should decide to either implement mitigation mechanisms to avoid corruption risks or "seize the relationship in the first stage," before concluding a contract.[909] An example relates to where the information reveals a PEP.[910] Pi shared an experience during their company's farm-out process, where one of the interested company, a local company, had the top owner identified as the governor of the province.[911] Upon discovering this information through a background check, Pi's company decided to decline the association.[912] Moreover, if the third party refuses to provide necessary information, it is considered a "huge red flag," which signals that the company should reconsider doing business with them.[913]

[905] For more information on the tool, see Susannah Fitzgerald et al, "Diagnosing Corruption in the Extractive Sector: A Tool for Research and Action" (19 December 2023), online: *Natural Resource Governance Institute* <resourcegovernance.org/publications/diagnosing-corruption-extractive-sector-tool>.
[906] Sigma, *supra* note 618 at 8.
[907] *Ibid*.
[908] Pi, *supra* note 718 at 7.
[909] Sigma, *supra* note 618 at 8.
[910] Epsilon, *supra* note 487 at 4.
[911] Pi, *supra* note 718 at 4.
[912] *Ibid*.
[913] Epsilon, *supra* note 487 at 4.

Due diligence activities are highly important as they represent ethical conduct and address matters during "the pre-contract age."[914] However, they are not without challenges particularly in acquiring relevant information. Firstly, the process is time-consuming and costly, which can pose particular difficulties for SMEs with limited budgets when conducting extensive background checks. To address this, Tau proposed a "holistic approach" in which companies can conduct one due diligence covering all activities and subsidiaries of a given third party.[915] Even if other subsidiaries in different countries and engaged in distinct activities do not currently require vetting for a specific project, this holistic view provides future benefits by revealing the third party's presence in different countries and the services provided in each.[916] Apart from cost and time considerations, the size of companies also matters in determining the leverage they have over third parties, as SMEs often find it more challenging to dictate conditions to larger companies.[917]

Even if a company has sufficient budgets for conducting due diligence, there are additional challenges associated with acquiring the necessary information. In certain countries, company data is either not publicly accessible or restricted to specific entities. For example, Pi referred to the case of Indonesia, where shareholder information is only accessible to notaries, and companies must engage with them to access such data.[918] Another challenge arises in longer-term partnerships, where one party's attempt at due diligence may be perceived as offensive by the other, which can jeopardize trust.[919] In Upsilon's view, "legacy third-party contracts are nightmares [with] objections from the business tending to be loud and angry," and there is a risk that the other party may argue that "years of business together are due diligence enough; … how

[914] Sigma, *supra* note 618 at 11.
[915] Tau, *supra* note 690 at 7.
[916] *Ibid*.
[917] Eta, *supra* note 699 at 3.
[918] Pi, *supra* note 718 at 4.
[919] Rho, *supra* note 647 at 7.

dare you question my integrity?"[920] This concern is particularly pronounced in regions such as China and the Middle East.[921] Furthermore, the reliability of answers in questionnaires presents another challenge. Upsilon cautioned against over-reliance on the questionnaire, stating, depending solely on responses without thorough scrutiny is akin to "hallucinating because everyone just signed."[922] While acknowledging the importance of due diligence mechanisms, Upsilon recommended an intelligent assessment regarding their credibility.[923]

Despite conducting due diligence checks, registering as a legal entity in certain countries poses specific challenges for companies. Companies often need to seek local shareholders as operational partners and leverage their established infrastructure, on-site presence, connections, and required business licenses. However, complications may arise, particularly when the chosen local shareholder is state-owned or owned by a government official, a critical detail that must be disclosed during due diligence.[924] Omicron explained the risks associated with local partnerships and emphasized that companies must "place a lot of faith in another entity" to align with the CoC and adhere to its requirements.[925] Despite conducting background checks, "at the end of the day, they are an unknown entity that you have to get into bed with."[926] Omicron further referred to another challenge faced when entering new markets and shared an example from their company's efforts to establish a presence in a specific country's market. In this case, the government mandated companies to contribute to an ESG community projects fund based on company size and profitability.[927] Omicron's company was assigned to fund a project amounting to $75,000, but they

[920] Upsilon, *supra* note 642 at 13.
[921] *Ibid*.
[922] *Ibid* at 8.
[923] *Ibid*.
[924] Tau, *supra* note 690 at 5.
[925] Omicron, *supra* note 617 at 2.
[926] *Ibid*.
[927] *Ibid*.

faced challenges in ensuring transparency in fund utilization, the legitimacy of the assigned project, the handling of financial transactions, and the actual progress and impact of the initiative.[928] They were particularly concerned about the existence of the project and guaranteeing that the funds would not end up in some government officials' pockets.[929]

E. Corporate Culture: Infusing Anti-Corruption Values into Practices

The safeguards discussed so far are intended to assist companies in preventing, detecting, and responding to corrupt practices. However, these measures risk becoming mere procedural formalities, a "check the box" exercise, unless anti-corruption principles are embedded within the corporate culture.[930] In other words, the strength of the compliance program depends on the corporate culture, where the board and directors deliberate on whether they want the company to be recognized for its "clean and ethical image."[931] This choice is not solely guided by potential fines and consequences but rooted in the belief that "it is the right thing to do."[932] Such a culture proves beneficial even during investigations, as a specific inquiry might focus on "whether the company has established policies and procedures that incorporate the culture of compliance into its day-to-day operations."[933]

The primary driver for establishing a culture of compliance is the tone set by top leadership, which permeates throughout the entire company.[934] Upsilon believed that without "strong, committed

[928] *Ibid*.
[929] *Ibid*.
[930] Nu, *supra* note 627.
[931] $Beta_2$, *supra* note 652 at 2.
[932] Rho, *supra* note 647 at 1.
[933] The DOJ in evaluating culture of compliance considers "How often and how does the company measure its culture of compliance? How does the company's hiring and incentive structure reinforce its commitment to ethical culture? Does the company seek input from all levels of employees to determine whether they perceive senior and middle management's commitment to compliance? What steps has the company taken in response to its measurement of the compliance culture?"; see DOJ, *Evaluation*, *supra* note 632 at 16.
[934] *Ibid* at 9.

leadership," the company is essentially "dead in the water."[935] Leadership, including the board of directors and executives, should send a consistent message on anti-corruption, establish expectations, and enforce consequences for non-compliance.[936] Achieving a unified anti-corruption message requires leaders to express genuine commitment to ethical standards and make sincere efforts to support employees in upholding them.[937] Iota emphasized that the CEO should hammer the importance of ethics and an anti-corruption culture through direct engagement with employees.[938] This dialogue should not be a one-time occurrence during annual training but should be reiterated in various forums such as town halls, quarterly meetings or updates, deal approvals, and other important business meetings.[939] Beyond effective communication, leadership must be ready to face the consequences of avoiding corrupt practices, which may include potential impacts on earnings, delays in permit acquisition, or extended customs processing times.[940]

Another aspect of a culture of compliance is the recruitment of "frontline people" or employees.[941] A strong compliance culture takes root in a company where individuals sense a familial atmosphere, and there is reciprocal trust between management and the workforce in both directions.[942] Thus, companies should seek out ethical individuals who take pride in working for a company dedicated to maintaining anti-corruption rules, as they serve to "form the cultural glue."[943] Furthermore, companies should translate abstract concepts, such as the different nuances surrounding corruption, into their corporate culture.[944] In this regard, compliance departments

[935] Upsilon, *supra* note 642 at 4.
[936] Alpha$_2$, *supra* note 285 at 8.
[937] Nu, *supra* note 627 at 3.
[938] Iota, *supra* note 771 at 10.
[939] Beta$_2$, *supra* note 652.
[940] Upsilon, *supra* note 642 at 4.
[941] Beta$_2$, *supra* note 652 at 3.
[942] Rho, *supra* note 647 at 1.
[943] *Ibid*.
[944] Xi, *supra* note 621 at 5.

should not limit the opportunity for employees to ask questions solely to training sessions. Instead, they should build a "culture of openness" where individuals feel comfortable posing questions and engaging in dialogue with compliance officers, who should be readily available to answer questions related to ethics.[945] The compliance department should not be viewed merely as a routine, operational unit but as a knowledgeable resource with "an open-door policy" to guide individuals appropriately when facing problems.[946] Lastly, Omicron highlighted that employees do not "all need to be experts in anti-bribery and corruption."[947] Instead, they should understand the company's expectations regarding their conduct and know that "if they face any gray area in between the dos and the don'ts, come and ask."[948]

F. Additional Measures and Practices in the Anti-Corruption Toolbox

While the tools discussed in preceding sections are widely recognized as corporate strategies for addressing corruption risks, interviewees suggested additional measures to fortify anti-corruption compliance programs. This section provides a concise overview of these supplementary tools, while the following chapters will introduce and analyze anti-corruption clauses in greater detail.

EITI and Transparency: According to the EITI perspective, data transparency is incredibly important because the more information companies disclose, the harder it will be to conceal corrupt practices and actors.[949] In Epsilon's view, "cutting out secretive mechanisms and making sure that companies disclose the data will force them in the right direction."[950] Alpha, involved in EITI development, emphasized the need of national adoption of EITI standards, stating, "you [cannot]

[945] *Ibid* at 2; Rho, *supra* note 647 at 3; Iota, *supra* note 771 at 1.
[946] Tau, *supra* note 690 at 2.
[947] Omicron, *supra* note 617 at 4.
[948] *Ibid*.
[949] Epsilon, *supra* note 487 at 8.
[950] *Ibid*.

deal with this problem [of corruption] as some kind of outsider parachutist."[951] They argued that addressing corruption requires local engagement and understanding, as sustainable solutions must involve local stakeholders who understand the context and complexities of the situation.[952]

As detailed in Chapter Three, an important aspect of EITI revolves around disclosure policies and guidance that urge companies to reveal payments to governments—a point emphasized by seven interviewees—while also encouraging countries to publish their receipts.[953] This standard facilitates tracking payments to their intended destinations, whether to the national treasury or sub-national governments.[954] Such transparency enables authorities and the public to "detect leakages in the system"[955] and empower citizens to hold both their governments and resource-exploiting companies accountable.[956] Lambda elaborated on the Canadian implementation of EITI and highlighted that companies are mandated by legislation to report payments, with such disclosures compiled in a publicly accessible database portal organized by countries, companies, and years.[957] In their view, this database can be a deterrent against corruption, as different stakeholders, including academia, civil society, the Canadian public, and the international community, can use the data to hold companies accountable.[958] Moreover, Zeta outlined that in Trinidad and Tobago, companies are required to complete government-provided templates containing pertinent information on their activities, financial data, operational details, or environmental impact assessments.[959] These templates are usually signed off by the CEO to verify the accuracy of the

[951] Interview of Alpha (29 August 2022), Transcript at 8.
[952] *Ibid*.
[953] Gamma$_2$, *supra* note 620 at 4; Kappa, *supra* note 696; Psi, *supra* note 4 at 3; Epsilon, *supra* note 487 at 4–5; Alpha, *supra* note 958 at 7–8; Lambda, *supra* note 735 at 3; Interview of Zeta (3 October 2022), Transcript at 3.
[954] Psi, *supra* note 4 at 3.
[955] Epsilon, *supra* note 487 at 8.
[956] Alpha, *supra* note 958 at 7–8; Psi, *supra* note 4 at 3.
[957] Lambda, *supra* note 735 at 5.
[958] *Ibid*.
[959] Zeta, *supra* note 960.

provided information and to attest to the absence of misrepresentation.[960] Subsequently, the completed templates undergo scrutiny by an independent audit firm for reconciliation.[961]

A recent requirement imposed by the EITI is the publication of contracts, a point also highlighted by five interviewees.[962] Mu noted that the EITI aims to increase transparency by pushing for the publication of more contracts between companies and governments, rather than keeping them hidden as "black boxes," a problem that often surrounds NOCs.[963] Epsilon argued that "by making deals as transparent as possible, it will root out the easy corruption at least."[964] They explained that exposing unfavorable deals entered into for personal gain would become more challenging once made public.[965] Alpha$_2$, referring to open tendering in procurement practices, emphasized the importance of "shedding light on how different suppliers are selected."[966] They further stated, "the more transparent and institutionalized it is, the more you reduce the scope for individual decision-making to conduct corrupt practices" in procurement and recruitment, thus mitigating nepotism or favoritism.[967]

Another transparency requirement pertains to beneficial ownership, as explained in the due diligence section earlier and emphasized by three interviewees.[968] According to Epsilon, companies should collect, use, and analyze beneficial ownership information on their contractors and suppliers, as it can help root out corruption by preventing "self-dealing or kickbacks to

[960] *Ibid*.
[961] *Ibid*.
[962] Gamma$_2$, *supra* note 620 at 7; Psi, *supra* note 4 at 6–7; Epsilon, *supra* note 487 at 7; Mu, *supra* note 734 at 2; Alpha$_2$, *supra* note 285 at 3.
[963] Mu, *supra* note 734 at 2.
[964] Epsilon, *supra* note 487 at 7.
[965] *Ibid*.
[966] Alpha$_2$, *supra* note 285 at 3.
[967] *Ibid*.
[968] Epsilon, *supra* note 487 at 4; Gamma$_2$, *supra* note 620 at 4; Mu, *supra* note 734 at 6.

politically exposed persons."[969] Epsilon further added that such information is particularly important for "companies domiciled in secrecy jurisdictions, such as Bermuda or elsewhere in the Caribbean."[970]

Annual Certification: Companies may require certain high-risk third parties to complete an annual certificate of compliance or attestation to demonstrate adherence to anti-corruption standards.[971] Eta mentioned tax compliance practices where they have the authority to demand anti-corruption compliance as annual obligations.[972] In this scenario, counterparties must affirm that they have had no compliance incidents and have adhered to anti-corruption requirements throughout the year as a prerequisite for renewing their engagement.[973]

ISO 37001: The anti-bribery management system, or ISO 37001, is an international standard published by the International Organization for Standardization in 2016.[974] Obtaining this standard mandates a company to adopt certain measures to comply with anti-corruption standards. Chi discussed that while the FCPA and UKBA are local anti-corruption laws with limited application for companies in other jurisdictions, adopting an international standard such as ISO 37001 "demonstrate[s] assurance, not only for the board but also for investors, [and] for a wider [range of] stakeholders," both domestically and internationally.[975] Upsilon shared that their team holds audit certificates to review ISO 37001 compliance for companies and has assisted many companies in obtaining their certification.[976]

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[969] Epsilon, *supra* note 487 at 4.
[970] *Ibid* at 7.
[971] Omicron, *supra* note 617 at 13; Upsilon, *supra* note 642 at 8.
[972] Eta, *supra* note 699 at 4.
[973] *Ibid*.
[974] See ISO, "ISO 3700 Anti-Bribery Management Systems" (last visited 14 April 2024), online: *ISO* <www.iso.org/iso-37001-anti-bribery-management.html>.
[975] Chi, *supra* note 748 at 2.
[976] Upsilon, *supra* note 642 at 2.

Cascade Anti-Corruption Measures: Companies can disseminate their anti-corruption requirements throughout their supply and value chain. This entails integrating these requirements with subcontractors and their suppliers to ensure that each tier down the chain adheres to anti-corruption standards.[977]

Collective Actions: Companies can collaborate with other companies, universities, and institutions to advance the agenda on anti-corruption.[978] Chi explained that collective actions in the private sector can create more opportunities, as "one, two, or even ten companies" alone are not sufficient to combat the corruption.[979]

3. Concluding Reflections on Forging Partnerships Between TNCs and the Transnational Anti-Corruption Regime

This chapter has highlighted the increasingly important role of TNCs in the globalized world and their complementary influence within the transnational anti-corruption regime in Section (1). Subsection (A) has described how TNCs can establish their own regulatory frameworks to govern internal activities, thereby contributing to the broader regimes instituted by state actors to address transnational issues. Acknowledging the potential for TNCs to participate in corrupt practices, Subsection (B) has underscored that they may choose to adhere to the transnational anti-corruption regime to mitigate the costs associated with non-compliance. It has further explored the factors influencing TNCs' decisions to engage with the transnational anti-corruption regime, including the threat of sanctions and the societal image of companies. Furthermore, Subsection (C) has explored how TNCs' commitment to reinforcing anti-corruption compliance may lead to trickle-

[977] Eta, *supra* note 699 at 4–5.
[978] Chi, *supra* note 748.
[979] *Ibid*.

down effects that spread anti-corruption norms among their employees and third-party agents. It has also demonstrated that as they expand into new foreign markets, these agents of change can bring anti-corruption standards as souvenirs within their cross-border projects, which can influence the behavior of states.

Section (2) has provided a brief overview of the corporate governance policies that TNCs adopt to uphold anti-corruption norms. It has acknowledged that, although having an anti-corruption compliance program is not mandatory in most jurisdictions, many companies voluntarily implement these programs to address corruption risks. Subsequently, based on interviews with 27 individuals in the field of anti-corruption and petroleum, the section has brought concrete insights into the anti-corruption toolkit adopted by companies to address the challenges posed by corruption. It has primarily elaborated on CoCs, anti-corruption training, oversight mechanisms, due diligence activities, and anti-corruption corporate culture. The tools discussed in this section predominantly have trickle-down effects which spread anti-corruption norms among employees. Among them, CoCs often include broad and sometimes aspirational policies, while requiring implementation and monitoring mechanisms. Due diligence activities extend anti-corruption standards to third parties, primarily conducted during the pre-contractual phase. On the other hand, anti-corruption clauses, which will be discussed in detail in the next two chapters, may have both trickle-up and trickle-down effects. Through their trickle-down effects, TNCs can create a zero-tolerance environment for corruption within their organizational structures and across business networks. Meanwhile, through their trickle-up effects, TNCs leverage their economic and normative power to influence governments in host states to adopt anti-corruption measures.

Chapter 5 – Anti-Corruption Clauses in Transnational Petroleum Contracts

One must wash eyes
Look differently to things
Words must be washed
The word must be wind itself
The word must be the rain itself

Sohrab Sepehri, The Footsteps of Water

Anti-corruption clause is a must; it's like a barrier which can protect the company itself from illegal practices, from continuing its relationship with other company practicing illegal practices, and as well as from law enforcement bodies, such as those related to the United States, UK, and Canada.

Eta, Interviewee

Previous chapter has examined the role of TNCs within the transnational anti-corruption regime and explained why TNCs might opt to implement anti-corruption compliance measures. It also provided an overview of the anti-corruption toolkit employed by TNCs, which consists of a set of mechanisms designed to assist companies in preventing and detecting corrupt behavior among their employees and third-party agents. In addition to the traditional anti-corruption toolkit, this chapter explores a more recent and innovative corporate mechanism that companies can embrace to mitigate the risk of corrupt practices in their business relationships: *contractual anti-corruption clauses*. These clauses function as an additional due diligence tool for the contracting parties in order to reduce potential risks associated with corrupt conduct involving the other party, third-party intermediaries, and sub-contractors.

Despite the growing prevalence of anti-corruption clauses in contracts, there have been few attempts to study them.[980] Therefore, this chapter seeks to address this gap by examining anti-corruption clauses in the specific context of transnational petroleum contracts and proposing a taxonomy of such clauses based on the review of actual contracts. This investigation and the resultant taxonomy provide a holistic comprehension of how anti-corruption commitments are integrated into contractual contracts within the petroleum industry, which further allows for the identification of patterns, trends, and variations in the language and structure of these clauses. The chapter concludes that parties did, in fact, begin incorporating these clauses into their contracts. Nevertheless, it suggests that there is a need for their more extensive inclusion and the adoption of a more comprehensive clause as a standard industry practice in the future. The chapter argues that such a practice is essential since anti-corruption clauses become an emergent feature of contracting

[980] See generally Jeffrey R Boles, "The Contract as Anti-Corruption Platform for the Global Corporate Sector" (2019) 21:4 U Pa J Bus L 807.

activity and have the potential to nudge other actors to abide by anti-corruption measures, and consequently, encourage a norm shift on corruption.

Section (1) will begin with an overview of the most common types of contracts in the petroleum sector in Subsection (A), which generally fall under PSAs, concessions, service contracts, licenses, and JV agreements. Following this, Subsection (B) will introduce anti-corruption clauses by exploring their origins and dynamics, citing their endorsement in key domestic anti-corruption laws and international anti-corruption standards. Then, based on the review of 1,164 actual petroleum contracts, Subsection (C) will propose a taxonomy of anti-corruption clauses based on their types of commitment, accompanied by examples for each sub-category drawn directly from existing petroleum contracts. Initially, the clauses will be categorized into two major groups: direct and indirect anti-corruption clauses. It will then proceed to detail the sub-categories and characteristics associated with each. It further introduces a standard clause from an actual contract that includes nearly all types of anti-corruption clauses discussed. Lastly, Subsection (D) outlines the remedies that are available if these clauses are breached. On the other hand, Section (2) will present an empirical analysis, a quantitative assessment, of the anti-corruption clauses integrated into transnational petroleum contracts. It will provide data-driven insights obtained from the studied contracts and evaluate their number and distribution according to various criteria, including contract types, conclusion dates, and geographical distribution. Subsequently, Chapter Six will be dedicated to evaluating the real-world effectiveness and enforcement of anti-corruption clauses through a qualitative review, which involves conducting interviews with individuals with in-depth knowledge of anti-corruption in the petroleum industry.

1. Using Contract Law for Anti-Corruption Compliance and Due Diligence

As previously discussed in Chapter Two, the large presence of third parties in the operations and business activities of TNCs increases the liability risks linked to compliance with anti-corruption laws.[981] These third-party affiliates usually serve a TNC's business partners, including consultants, sales and marketing agents, lawyers, suppliers, distributors, brokers, as well as contractors and sub-contractors. Statistics from reported FCPA cases as of April 2024 show that approximately 90% of FCPA-related enforcement actions (296 out of 332 cases) were connected to the involvement of third parties and intermediaries.[982]

Given the widespread occurrence of corruption among third-party agents, the FCPA, the UKBA, and the CFPOA all mandate that companies establish internal control policies to prevent corruption among their agents and intermediaries, as discussed in Chapter Four. For example, the Resource Guide to the US Foreign Corrupt Practices Act specifies that a company bears responsibility "when its directors, officers, employees, or agents, acting within the scope of their employment, commit FCPA violations intended, at least in part, to benefit the company."[983] The UKBA further introduces a new form of corporate liability for commercial organizations concerning their failure to prevent bribery of "associated individuals," including their employees and third-party agents.[984]

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[981] See e.g. David Hess & Thomas W Dunfee, "Fighting corruption: A principled approach: The C^2 principles (combating corruption)" (2000) 33:3 Cornell Intl LJ 593 (stating that "[a]gents, particularly those assisting with sales and marketing, often have been the conduits through which firms have made payments" at 622).

[982] See FCPA Clearinghouse, "Third-Party Intermediaries" (last visited 14 April 2024), online: *Stanford FCPA Clearinghouse* <fcpa.stanford.edu/statistics-analytics.html?tab=4>.

[983] DOJ & SEC, *FCPA Resource Guide*, *supra* note 611 at 28–29.

[984] The complete cited section from UKBA is stated below:

> A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending—
> (a) to obtain or retain business for C, or
> (b) to obtain or retain an advantage in the conduct of business for C.

See *UKBA*, *supra* note 352, s 7 (the Act further defines the "associated persons" in its section (8); for further information on the corporate liability for commercial organizations, see F Joseph Warin, Charles Falconer & Michael

In addition to these domestic regulations, several international and transnational organizations recommend that companies establish effective anti-corruption compliance programs to oversee the activities of their third-party agents.[985] Consequently, TNCs should conduct due diligence when engaging third parties and regularly conduct thorough examinations of their business partners to mitigate the risks associated with third-party corruption.[986]

The previous chapter discussed the anti-corruption compliance toolbox available to companies for addressing and mitigating corruption risks. While CoCs and other tools can usually help TNCs to hold their employees to anti-corruption standards, these tools cannot guarantee that contracting partners and third-party agents will conduct their business activities without engaging in corrupt practices. Due diligence activities can be used to mitigate corruption risks associated with third parties, but they are often employed primarily for pre-contractual terms. As a result, TNCs are consistently exposed to liability risks regarding the corrupt behavior of other individuals or businesses with whom they enter into contracts, as well as the corrupt behavior of their third-party agents when conducting activities on their behalf abroad. In such situations, contract law offers a viable solution as a risk reduction strategy, in the form of a *contractual anti-corruption clause*. In other words, TNCs can ensure that anti-corruption safeguards govern their contractual relationships by incorporating anti-corruption commitments into their contract terms with business partners and third-party agents.

This section, therefore, introduces the use of anti-corruption clauses as a method for addressing third party corruption risks. Subsection (A) begins by examining common types of transnational

S Diamant, "The British are coming: Britain changes its law on foreign bribery and joins the international fight against corruption" (2010) 1 Tex Intl LJ 46 at 27–28.

[985] For a non-exhaustive list of these instruments, see Asia-Pacific Economic Cooperation, *supra* note 756 at 27–29.

[986] OECD, *Good Practice*, *supra* note 599 at para 6.

contracts in the petroleum sector. The discussion in Subsection (B) then extends to the examination of the origins and dynamics of these clauses, referencing their endorsement in key domestic anti-corruption laws and international anti-corruption standards. Building upon the forthcoming review of actual petroleum contracts in the next section, Subsection (C) proposes a taxonomy for these clauses according to their level of commitment. It primarily categorizes anti-corruption clauses into two broad groups: direct and indirect anti-corruption clauses. Within each category, it specifies further subcategories along with their distinct characteristics, while providing examples of existing clauses discovered within petroleum contracts. The Subsection also presents a standard clause from a real contract that encompasses nearly all the types of anti-corruption clauses discussed. To conclude, Subsection (D) addresses the available remedies in the event of a breach of these clauses.

A. Exploring Common Types of Contracts in the Petroleum Sector

The common forms of transnational contracts that govern oil and gas exploration and production include PSAs, licenses, concessions, service contracts, and JV agreements. While each contract may share common purposes, distinctions arise regarding the level of control and participation of TNOCs, ownership for produced oil and gas structures, and remuneration arrangements.[987] Host states usually allocate contracts through a bidding process and select the most qualified TNOC for oil exploration, production, or other services.

In *Production-Sharing Agreements*, a host state grants exploration and production rights of its oil reserves to a TNOC with sufficient financial resources and technical expertise.[988] Typically, a representative of the host state, such as a government head, minister, or NOC, negotiates on its behalf. The other contracting party can be an individual TNOC, a JV of companies, or a

[987] See Bindemann, *supra* note 84 at 9.
[988] See generally *ibid*.

consortium.[989] Within PSAs, the host state retains ownership of the produced oil, while the contracting company generally assumes the risks and costs associated with exploration and production.[990] Concurrently, the host state shoulders specific responsibilities, including providing the TNOC with requisite geological and technical information and facilitating necessary documents such as licenses, customs permits, and visas for the TNOC's operations within its borders.[991] Financial considerations in PSAs determine each party's rights and responsibilities, including royalty, cost oil, profit oil, and income tax. Royalty constitutes a pre-determined percentage of produced oil given by the TNOC to the host state for conducting explorations and operations.[992] In return, the TNOC is granted cost oil, a predetermined percentage of produced oil designed to recover its expenses.[993] Profit oil, the oil produced after deducting royalty and cost oil, is shared between parties based on rates specified in the PSAs' sharing provisions.[994] Income tax denotes the amount payed by the TNOC to the host state, with the tax rate usually determined in the PSA.[995] Another financial consideration in PSAs includes signature, discovery, and production bonuses that the TNOC may pay to the host state.[996]

[989] See Nutavoot Pongsiri, "Partnerships in Oil and Gas Production-Sharing Contracts" (2004) 17:5 Intl J Pub Sector Management 431 at 432.
[990] *Ibid*.
[991] See Konstantinidou, *supra* note 158 at 167.
[992] See generally HT Gowharzad & MH Al-Harthy, "Production royalty sliding scales" (2011) 6:1 Energy Sources, Part B: Econs, Planning & Pol'y 53. See also CA Rae, "Royalty Clauses in Oil and Gas Leases" (1965) 4:2 Alta L Rev 323.
[993] See Bindemann, *supra* note 84 at 13–25. See also Vijay Gupta & Ignacio E Grossmann, "Multistage stochastic programming approach for offshore oilfield infrastructure planning under production sharing agreements and endogenous uncertainties" (2014) 124 J Petroleum Science & Engineering 180 at 184.
[994] See Bindemann, *supra* note 84 at 13–25; see also Gupta & Grossmann, *supra* note 1000.
[995] See e.g. Mingming Liu, et al, "Production sharing contract: An analysis based on an oil price stochastic process" (2012) 9:3 Petroleum Science 408 at 409, 411–13. See also Bindemann, *supra* note 84 at 13–25.
[996] For further details, see Bindemann, *supra* note 84 at 16.

The *Concession* stands as the oldest agreement type between host states and TNOCs, particularly prominent in formerly colonized countries.[997] In contrast to PSAs, where the produced oil belongs to the host state, concessions grant the TNOC proprietary rights and full ownership of the produced oil, in exchange for the payments of royalties and taxes.[998] Within this contractual arrangement, the host state has limited control over its produced oil, and its financial compensation is determined based on the volume of produced oil at a fixed rate, rather than the prevailing oil market price.[999] On the other hand, the TNOC enjoys substantial privileges, including the right to access extensive areas within the host state, whether onshore or offshore.[1000] Due to the imbalance in rights between the parties, concessions have waned in popularity, and their nature has evolved over time. Modern concessions, recognized today as oil licenses or oil leases, transform the dynamics of the contract from an unequal bargaining relationship to a partnership by limiting TNOC privileges.[1001] In this type of contract, the host state grants the TNOC rights to explore, develop, produce, market, or transport oil reserves for a definite period.[1002] These licenses vary based on contract terms related to control and ownership of the produced oil, agreement duration, and revenue shares. This type of oil contract is popular in countries where the host state prefers not to bear the full cost of exploration, especially when there is limited knowledge about the existence, quantity, and quality of oil reserves.[1003]

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[997] See Catalina Georgeta Dinu, "The Legal Framework for the Oil and Mining Concession in Different Countries" (2014) Challenges Knowledge Society 279 at 279.
[998] World Bank Institute Governance for Extractive Industries Programme, *Guide to Extractive Industries Documents–Oil & Ga*s (New York: Allen & Overy, 2013) at 5.
[999] See Ernest E Smith, "From concessions to service contracts" (1991) 27:4 Tulsa LJ 493 at 509–13.
[1000] See e.g. Michael Likosky, "Contracting and Regulatory Issues in the Oil and Gas and Metallic Minerals Industries" (2009) 18:1 Transnational Corporations 1 at 2–3.
[1001] *Ibid* at 7–8.
[1002] See e.g. Jenik Radon, "The ABCs of petroleum contracts: license-concession agreements, joint ventures, and production-sharing agreements" in Svetlana Tsalik & Anya Schiffrin, eds, *Covering Oil: A Reporter's Guide to Energy and Development* (New York: Open Society Institute, 2005) 61 at 63.
[1003] *Ibid* at 65.

In a *Joint Venture,* both the TNOC and the host state collaboratively engage in oil exploration and production.[1004] This collaboration can take the form of equity, where both parties hold a certain percentage of a joint-stock company. Alternatively, a joint venture is formed through a Joint Operating Agreement, also known as consortium agreement, where the parties jointly possess the produced oil and share the profits.[1005] Generally, in a JV agreement, an NOC acts on behalf of the host state.[1006] Negotiations over terms and conditions can be time-consuming due to potential conflicting interests and goals between the host states and TNOCs.

The *Service Contract* is another type of oil agreement wherein the host state engages a TNOC to provide technical services for oil exploration and production over a specified period at a fixed rate.[1007] In this contract, the produced oil belongs to the host state under service contracts, and it maintains full control over the oil operations.

In addition to these common types, there are other agreements in the petroleum sector. A *Farm-Out* or *Farm-In Agreement* represents a document involving the transfer of ownership interest in a specific petroleum project from the owner(s) in exchange for performing certain work obligations.[1008] Another legal agreement is the *Reconnaissance Contract,* applicable in certain jurisdictions such as India. This contract allows a company to conduct initial surveys and studies in a designated area at the preliminary stage before entering a PSA to assess its petroleum

[1004] See generally Hadi Sahebi, Stefan Nickel & Jalal Ashayeri, "Joint venture formation and partner selection in upstream crude oil section: goal programming application" (2015) 53:10 Intl J Production Research 3047.
[1005] See Bindemann, *supra* note 84 at 9.
[1006] See Radon, *supra* note 1009 at 65–67.
[1007] See generally Abbas Ghandi & C-Y Cynthia Lin, "Oil and gas service contracts around the world: A review" (2014) 3 Energy Strategy Rev 63.
[1008] See Kimberley Wood and Norton Rose Fulbright, "Farm-Out Agreement (Oil and Gas)" (last visited 14 April 2024), online: *Thompson Reuters Practical Law* <uk.practicallaw.thomsonreuters.com/w-028-0401?transitionType=Default&contextData=(sc.Default)&firstPage=true>.

potential.[1009] Lastly, *Purchase or Sale Contracts* involve agreements concerning the buying and selling of petroleum products and assets.[1010]

With the identification of different types of petroleum contracts, the next subsection will explore the advantages that contractual parties can derive from the incorporation of anti-corruption clauses incorporated into these agreements.

B. How Contractual Clauses Mitigate Corruption Risks?

Anti-corruption clauses offer protection to TNCs against the involvement of business partners and third-party agents in corrupt practices and further promote global anti-corruption standards among businesses. These clauses allow parties to establish a contractual commitment to exclude corrupt practices throughout the agreement, including all phases from negotiation to post-conclusion.[1011] As a result, such clauses equip companies with a mechanism to minimize the risk of potential corruption in their interactions with other parties, while also acting as a shield against criminal, civil, and administrative liabilities.[1012] This subsection briefly discusses the identified anti-corruption clauses proposed by different initiatives and also highlights key jurisdictions that endorse their incorporation in contracts, explaining how these mechanisms can mitigate corruption risks.

[1009] See e.g. Ministry of Petroleum and Natural Gas, "Hydrocarbon Exploration and Licensing Policy (HELP) – A Win-Win approach" (last visited 14 February 2024), online: *Government of India* <mopng.gov.in/en/exp-and-prod/help>.
[1010] See Margaret Welsh et al, *Purchase and Sale Agreement Commentary: Oil & Gas* (Toronto: Thompson Reuters 2021).
[1011] See e.g. Hess & Dunfee, *supra* note 988 (their C^2 principles include that companies need "[t]o require all agents of the firm to affirm that they have neither made nor will make any improper payments in any business venture or contract to which the firm is a party, and [t]o require all suppliers of the firm to affirm that they have neither made nor will make any improper payments in any business venture or contract to which the firm is a party" at 621).
[1012] Boles, *supra* note 987 at 810.

The inclusion of anti-corruption clauses in contracts is a recent, yet important, development in the anti-corruption toolkit.[1013] While international law lacks a standardized approach to such clauses, the International Chamber of Commerce (ICC) introduced a model anti-corruption clause in 2012, which is available for adoption by companies of all sizes.[1014] This model provides parties with three options for incorporating the clause into their contracts:

i. Referring to Part I of the ICC Rules on Combating Corruption in the contract;
ii. Incorporating the text of Part I of the ICC Rules into the contract; or
iii. Referring to a corporate anti-corruption compliance program, as described in Article 10 of the ICC Rules.[1015]

The first two options require a commitment from the parties, their employees, and third parties under their control or influence to refrain from participating in any corrupt practices detailed in Part I of the ICC Rules,[1016] both during the contract term and after.[1017] Part I of the ICC Rules advises companies to prohibit unconditionally corrupt practices in all circumstances and types and further defines these practices to "include Commercial or Public Bribery, Extortion or Solicitation, Trading in Influence and Laundering the proceeds of these practices."[1018] Alternatively, the third option obliges parties to implement a corporate anti-corruption compliance program, as outlined in Article 11 of the ICC Rules,[1019] throughout the contract's term. These proposed clauses also address instances of non-compliance: should one party become aware of the other party's failure to comply with Part I of the ICC Rules or identify material deficiencies in their compliance anti-

[1013] Nicola Bonucci, Philippe Bouchez El Ghozi & Nicolas Faguer, "Anti-Corruption and Contractual Relations: Beyond Words, Legal Consequences" (22 May 2020), online: *Paul Hastngs* <www.paulhastings.com/insights/client-alerts/anti-corruption-and-contractual-relations-beyond-words-legal-consequences>.
[1014] ICC Commission on Corporate Responsibility and Anti-Corruption and the Commission on Commercial Law and Practice, *ICC Anti-Corruption Clause* (Paris: ICC, 2012) [ICC, *ICC Anti-Corruption Clause*].
[1015] *Ibid*, options I–III.
[1016] The Rules were first published in 1977, and were updated in 2011 and 2023; ICC Corporate Responsibility and Anti-Corruption, *ICC Rules on Combating Corruption* (Paris: ICC, 2023).
[1017] The ICC designed the second option because, in certain jurisdictions, incorporation by reference alone does not produce legal effects.
[1018] ICC Corporate Responsibility and Anti-Corruption, *supra* note 1023 at 5.
[1019] The article further provides a list of measures from which a company can take to ensure a proper prevention against corruption in its specific circumstances. See *ibid*, art 11.

corruption program, they are required to notify the non-compliant party promptly. This notification provides the party accused of violating the clause with an opportunity to remedy the situation.[1020] Failure to take the necessary remedial measures in all three scenarios provides the other party with the right to suspend or terminate the contract.[1021]

In addition to the ICC, the World Economic Forum's 2004 Partnering Against Corruption Principles for Countering Bribery suggest that "the agent, adviser or other intermediary should contractually agree in writing to comply with the enterprise's [anti-corruption compliance] Programme," with non-compliance granting the company the "right of termination."[1022] Similarly, the OECD's Good Practice Guidance recommends that companies inform other parties of their commitments to comply with anti-corruption standards and request "reciprocal commitments" from third parties.[1023] Moreover, in its Anti-Corruption Programme for Organisations, the Global Infrastructure Anti-Corruption Centre (GIACC) advises companies to include anti-corruption policies in their contract terms.[1024] The GIACC offers two contractual options: a simple anti-corruption prohibition or a more comprehensive set of anti-corruption provisions. The former suggests a minimum requirement that "as far as is reasonable, all contracts between the organization and the business associate should contain a prohibition of corruption."[1025] On the other hand, the latter option allows companies to integrate more inclusive anti-corruption terms, such as training, audit, investigation, and indemnification, into their contracts.[1026] Moreover,

[1020] ICC, *ICC Anti-Corruption Clause*, *supra* note 1021, options I(3), II(3), III(2).
[1021] *Ibid*.
[1022] World Economic Forum, Transparency International and the Basel Institute on Governance, *Partnering Against Corruption Principles for Countering Bribery* (World Economic Forum: Cologny, 2004) at 31.
[1023] OECD, *Good Practice*, *supra* note 599 at para 6.
[1024] GIACC, "Anti-Corruption Programme for Organisations" (last modified 10 April 2020), online: *GIACC* <giaccentre.org/programme-organisations/>.
[1025] GIACC, *Contract Terms* (Buckinghamshire: GIACC, 2020).
[1026] These obligations will be elaborated upon in greater detail later. For a complete list of suggested provisions, see *ibid*.

Transparency International has introduced a distinct, yet conceptually, related tool for preventing corruption in public contracting since the 1990s. This instrument, known as an Integrity Pact, is "both a signed document and an approach to public contracting which commits a contracting authority and bidders to comply with best practices and maximum transparency."[1027] Usually, a third party, often a civil society organization, oversees this process and the commitments made by all involved parties.

Beyond these voluntary initiatives, only one state, Indonesia, has been identified in this study as mandating the inclusion of anti-corruption clauses in contracts within its petroleum sector, which is Indonesia. According to interviewees Pi and Chi, the Indonesian Government enforces "the right to audit clause" in procurement contracts that requires subcontractors to adhere to anti-corruption laws.[1028] This approach originated in 2014 when the Indonesian Special Task Force for Upstream Oil and Gas Business Activities took steps to rebuild its reputation following the arrest of its former chairman on corruption charges.[1029] The new chairman introduced measures to enhance transparency and accountability within the sector, including granting SKK Migas and contractors the authority to conduct audits on vendors to ensure compliance with the FCPA, UKBA, and the Indonesian Corruption Eradication Act.[1030] In other words, rights-holders are given the right to audit their subcontractors to ensure compliance with transnational anti-corruption norms, while

[1027] Transparency International, "Integrity Pacts" (last visited 29 July 2024), online: *Transparency International* <www.transparency.org/en/tool-integrity-pacts>.
[1028] Pi, *supra* note 718 at 6; Chi, *supra* note 748 at 6.
[1029] Michael Buehler, "Try to Be More like Norway on a Sunny Day! Regulatory Capitalism and the Challenges of Combatting Corruption in Indonesia's Upstream Oil and Gas Sector Supply Chains" (2020) 4 Oil & Gas LR at 15–16.
[1030] *Law No 31 of 1999 on Corruption Eradication* (Indonesia). See Tempo, "Amien Sunaryadi: Contractors had to pay fees right from the start" (19 October 2018), online: *Tempo* <en.tempo.co/read/634634/amien-sunaryadi-contractors-had-to-pay-fees-right-from-the-start>.

requiring contractors and vendors to consent to such audits and allowing the company to appoint independent auditors if suspicions arise.[1031]

In addition to this mandatory approach, several jurisdictions endorse the inclusion of anti-corruption clauses in contracts. In the USA, for example, the Resource Guide to FCPA, which provides guidance on successor liability, recommends measures such as requiring third-party distributors and agents to "complete training, and sign new contracts that incorporate FCPA and anti-corruption representations and warranties and audit rights."[1032] In another section, when addressing risk management in the context of hiring consultants, the Guide suggests that companies should ensure, among other measures, "training Consultant on the FCPA and other anti-corruption laws; requiring Consultant to represent that he will abide by the FCPA and other anti-corruption laws; including audit rights in the contract (and exercising those rights)."[1033] Furthermore, the DOJ, in its Opinion Procedure Releases[1034] and Deferred Prosecution Agreements,[1035] calls upon companies to incorporate anti-corruption provisions into third-party contracts as part of their anti-corruption compliance program.

Beyond mere endorsement, the incorporation of anti-corruption clauses into contracts can function as a "mitigating factor" when aligned with a company's anti-corruption compliance program.[1036]

[1031] *Ibid*.
[1032] DOJ & SEC, *FCPA Resource Guide*, *supra* note 611 at 33.
[1033] *Ibid* at 63–64.
[1034] See e.g. United States Department of Justice, *FCPA Opinion Procedure Release 2008-02* (Washington, DC: US Government Printing Office, 2008). The first reference of DOJ to anti-corruption clauses is related to the Consent & Undertaking of Metcalf & Eddy, Inc., in *United States v Metcalf Eddy, Inc.*, No 99-cv-12566 (Mass D 1999) (stating that the compliance program shall include "in all contracts and contract renewals ... with agents, consultants, and other representative ... that no payments of money or anything of value will be offered, promised or paid" at para 4(i)).
[1035] See e.g. Deferred Prosecution Agreement in *United States v Panalpina World Transport (Holding) Ltd.*, No. 4:10-cr-00769 (Southern D Tex 2010) (stating that "[w]here necessary and appropriate, Panalpina will include standard provisions in agreements, contracts, and renewals thereof with all agents and business partners that are reasonably calculated to prevent violations of the anti-corruption laws, which may, depending upon the circumstances, include: (a) anti-corruption representations and undertakings relating to compliance with the anti-corruption laws" at para 12).
[1036] See generally Vozza, *supra* note 607 at 326.

If TNCs can demonstrate that these clauses are appropriately inserted, enforced, and compliant with relevant regulations and guidelines in their contracts with third parties, such clauses can influence the assessment of third-party liability.[1037] For example, in the USA, the Principles of Federal Prosecution of Business Organizations in the Justice Manual provide prosecutors with guidelines for investigating corporations, considering charges, and negotiating agreements.[1038] These principles emphasize the importance of the adequacy and effectiveness of corporation's compliance program at the time of the offense and charging decision, as well as the corporation's remedial efforts to enhance their compliance program, which may be evidenced by the presence of contractual anti-corruption clauses.[1039] Moreover, as part of third-party management in the DOJ's Evaluation of Corporate Compliance Programs, designed to assist prosecutors in assessing the effectiveness of a corporation's compliance program at the time of the offense, the document advises prosecutors to evaluate the company's:

> **Appropriate Controls** – How does the company ensure there is an appropriate business rationale for the use of third parties? If third parties were involved in the underlying misconduct, what was the business rationale for using those third parties? What mechanisms exist to ensure that the contract terms specifically describe the services to be performed, that the payment terms are appropriate, that the described contractual work is performed, and that compensation is commensurate with the services rendered?
> **Management of Relationships** – How has the company considered and analyzed the compensation and incentive structures for third parties against compliance risks? How does the company monitor its third parties? Does the company have audit rights to analyze the books and accounts of third parties, and has the company exercised those rights in the past? How does the company train its third-party relationship managers about compliance risks and how to manage them? How does the company incentivize compliance and ethical behavior by third parties? Does the company engage in risk management of third parties throughout the lifespan of the relationship, or primarily during the onboarding process?[1040]

[1037] Gordon Kaiser, "Corruption in the Energy Sector: Criminal Fines, Civil Judgments, and Lost Arbitrations" (2013) 34:1 Energy LJ 193 (stating that "[a]ccording to the DOJ and the SEC, contractual provisions that are reasonably calculated to prevent anti-corruption violations may be important in assessing the company's liability" at 210).
[1038] *United Stated Justice Manual*, § 9-28.100.
[1039] *Ibid*, § 9-28.800.
[1040] DOJ, *Evaluation*, *supra* note 632 at 6–7.

Accordingly, policies are deemed necessary to document the company's effective management of third parties, as emphasized by interviewee Sigma. According to them, the presence of contractual anti-corruption clauses as a documented commitment serves as crucial evidence in case of inquiries from a DOJ officer who might inquire, "so, where [is] your anti-corruption standard? Where [is] your anti-corruption business practice?"[1041] Having contractual anti-corruption clauses readily available as documents can significantly influence the DOJ's decision when prosecuting corrupt actions. Another interviewee, Xi, similarly noted that "some government agencies are very in favor of the parties contracting around this [anti-corruption], that they [are] being obligations," and emphasized that the DOJ scrutinizes obligations related to anti-corruption and those imposed on third parties as one of the initial aspects in the event of a corruption incident on a project.[1042]

In some jurisdictions, while anti-corruption clauses may not absolve TNCs of criminal liability, they can shift liability risks to third parties. For example, the UKBA imposes strict liability on companies for bribery committed by their "associated" persons,[1043] which may include third-party agents.[1044] However, the Act offers a complete defense if companies can demonstrate that they "had in place *adequate procedures* designed to prevent persons associated with [the company] from undertaking such conduct."[1045] The UKBA Guidance offers insights into these "adequate procedures" that commercial organizations can implement to prevent individuals associated with them from engaging in bribery.[1046] In supply chains and projects involving a prime contractor and multiple sub-contractors, commercial organizations are advised to address bribery risks by

[1041] Sigma, *supra* note 618 at 4.
[1042] Xi, *supra* note 621 at 11–12.
[1043] *UKBA*, *supra* note 352, s 7(1).
[1044] See generally Ejike Ekwueme, "Decelerating corruption and money laundering: distilling the positive impact of UKBA 2010 from a holistic perspective" (2022) 29:1 J Financial Crime 128 at 132–33.
[1045] *UKBA*, *supra* note 352, s 7(2) [emphasis added].
[1046] Ministry of Justice, *Guidance to Help*, *supra* note 556 [emphasis added].

implementing different anti-bribery measures, such as "risk-based due diligence and *the use of anti-bribery terms and conditions*," in their interactions with contractual counterparts, and by requesting that counterparties to "adopt a similar approach with the next party in the chain."[1047] As confirmed by one of the interviewees, Omicron, the adoption of an anti-corruption clause can be viewed as a step toward meeting these requirements for adequate anti-corruption procedures.[1048]

Thus far, the role and significance of anti-corruption clauses in contracts, along with their impact on addressing corruption-related risks, have been established, whether as a mandatory requirement or recommendation, and whether they are considered as a mitigating factor or defense strategy. The next subsection will introduce the various types of such clauses that are incorporated in petroleum contracts, as well as the remedies that should be taken in response to their violations.

C. Unpacking the Spectrum of Anti-Corruption Clauses in Petroleum Contracts

Contractual anti-corruption clauses may vary in the degree to which they commit the contracting party to specific anti-corruption measures. This offers the parties a broad range of options to select from when integrating preferred clauses into their contracts. Depending on their due diligence policies, parties may choose to incorporate these clauses in all contracts, contracts exceeding a specific value threshold, or contracts involving businesses and individuals categorized into distinct risk levels.[1049] Some parties prefer to adopt anti-corruption clauses following a risk-based approach, as it can prevent unnecessary costs and potential burdens in relationships with partners

[1047] *Ibid* at para 39.
[1048] Omicron, *supra* note 617 at 15.
[1049] See Boles, *supra* note 987 (explaining that through a specific model of risk assessment companies categorize "agents into risk bands by reference to specific objective criteria and [apply] different levels of due diligence and internal controls to such agents according to the criteria" at 835).

categorized as having low corruption risks.[1050] Tailoring clauses for different parties requires risk assessment procedures to classify business partners into low, medium, and high potential corruption risk groups, with each group having its own customized anti-corruption clauses, ranging from minimal to comprehensive.[1051] On the other hand, others advocate including anti-corruption clauses "wherever possible" as a universal standard of behavior, recognizing that corruption risks might not always align with a straightforward risk assessment.[1052] Further details will be discussed in the next chapter, under the subject of "Adopting Risk Assessment in Customizing Anti-Corruption Clauses."

Furthermore, anti-corruption clauses can encompass different phases in the life of a contract: the pre-contractual phase, the execution phase, the post-implementation phase, or all three stages. While anti-corruption clauses often cover the execution and implementation phase of contracts, some extends the anti-corruption commitment to the period preceding the contract conclusion. For example, in a PSA concluded between the Agencia Nacional do Petroleo de Sao Tome e Principe and ERHC Energy EEZ LDA, Article 29 provides that:

> 29.1 Each Party represents and warrants that *it did not engage* any person, firm or company as a commission agent for purposes of this Contract and that *it has not given or offered to give nor will it give or offer to give to or to* accept from (directly or indirectly) any person any bribe, gift, gratuity, commission or other thing of significant value …

[1050] See *ibid* at 836; see also Neil McInnes, "Addressing the Bribery Act in your contracts: a tiered approach" (13 June 2012), online (blog): *Construction Blog* <constructionblog.practicallaw.com/addressing-the-bribery-act-in-your-contracts-a-tiered-approach/>.

[1051] An example of low-risk partners can be those individuals and companies with anti-corruption compliance programs. On the other hand, long-term contracts, complex contracts, acquisition contracts, or those companies with operational activities in countries with high levels of corruption are usually identified as high-risk partners. See McInnes, *supra* note 1058. For further detail on the risk assessment, see GIACC, "Business Associate Corruption Risk Assessment" (last modified 10 April 2020), online: *GIACC* <giaccentre.org/risk-assessment-business-associate/>.

[1052] Boles, *supra* note 987 at 836; Colin R Jennings, "Avoiding Criminal Liability for Corrupt Practices Abroad Through Effective Corporate Compliance" in *Intonational White Collar Enforcement: Leading Lawyers on Cooperating With Enforcement Agencies, Understanding New Laws, and Constructing Compliance Programs*, 12th ed (Toronto: Thomson Reuters, 2011).

> 29.2 The Contractor further represents and warrants that *no loan, reward, offer, advantage or benefit of any kind has been given* to any public official or any person for the benefit of such public official or person or third parties …[1053]

This clause extends the anti-corruption commitment to the pre-contract phase with the goal of preventing corruption during the contract negotiation period, including the bidding or proposal process. Such requirements generally call for the disclosure of any past or present relationships that could result in conflicts of interest or jeopardize the fairness and ethical standards of the contract negotiations. Moreover, parties are often reluctant to engage with companies that have been involved in corrupt practices in the past due to concerns about recurring patterns of behavior and the potential liabilities such associations may bring. However, most anti-corruption clauses, aiming to prevent ambiguity by delineating the boundaries of the parties' contractual obligations, restrict the prohibition of corrupt practices to the contract period to ensure that all contracting parties are aware of their obligations to comply with anti-corruption laws and regulations. For example, a PSA between ExxonMobil Mozambique Exploration and Production, Limitada RN Zambezi South PTE Ltd., and Empresa Nacional de Hidrocarbonetos, E.P., states that:

> 32.2 No offer, gift, payments or benefit of any kind, which constitutes an illegal or corrupt practice pursuant to applicable law of the Republic of Mozambique, shall be given or accepted, either directly or indirectly, as an inducement or reward *for the execution of this EPCC* or for doing or not doing any action or making any decision in relation to this EPCC.[1054]

Finally, certain clauses further extend the commitment to the post-contract period. For example, in a concession agreement between the Société Nationale des Pétroles du Congo and Congo Iron

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[1053] *Production Sharing Contract Between the Democratic Republic of Sao Tome and Principe Represented by Agencia Nacional Do Petroleo De Sao Tome and ERHC Energy EEZ, LDA for Block "11"*, 23 July 2014, art 29, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-3122094392/view#/pdf> [Block 11 Contract] [emphasis added].

[1054] *Petroleum Exploration and Production Concession Contract, Z5C EPCC, Between Mozambique and ExxonMobil Mozambique Exploration and Production, Limitada, RN Zambezi South PTE. Ltd. and Empresa Nacional de Hidrocarbonetos, E.P.*, October 2018, art 32.2, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-3738262397/view#/pdf> [*Z5C EPCC Contract*] [emphasis added].

S.A, Article 34.8, representing the anti-corruption clause in the contract, stipulates that "[t]he obligations resulting from this Article *shall continue to have effect following the expiration of this Agreement*."[1055] This post-contract requirement obliges the parties to maintain compliance with anti-corruption standards even after the conclusion of the contract to ensure the timely identification and resolution of any issues or concerns. In summary, parties can include anti-corruption clauses at various stages of a contract, including before, during, and after the contract, to prevent corrupt practices. Additional details will be addressed in the next chapter under the title of "Understanding the Temporal Scope of Anti-Corruption Clauses."

Furthermore, when it comes to incorporating anti-corruption clauses into contracts, parties have a wide range of options regarding the types of anti-corruption commitments. Although there is no universally accepted standardized anti-corruption clause tailored specifically for the petroleum sector, some states and relevant stakeholders have introduced template anti-corruption clauses in their publicly available contract templates. For example, Offshore Energies UK, as mentioned by interviewee Omicron, developed a series of industry-standard contracts known as Leading Oil and Gas Industry Competitiveness (LOGIC) to streamline contract negotiations in the UK.[1056] In LOGIC's Onshore Offshore Contracts Template Edition, dated 2019, the anti-corruption clause is as follows:

> **28. ANTI-BRIBERY AND CORRUPTION**
> 28.1 Each PARTY warrants and represents that in negotiating and concluding the CONTRACT it has complied, and in performing its obligations under the CONTRACT it has complied and shall comply, with all APPLICABLE ANTI-BRIBERY LAWS.
> 28.2 The CONTRACTOR warrants that it has an ABC PROGRAMME setting out adequate procedures to comply with APPLICABLE ANTI-BRIBERY LAWS and

[1055] *Convention d'Exploitation Miniere Relative au Gisement de Fer du Mont Entre la République du Congo et Congo Iron S.A.*, 29 April 2016, art 34.8, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-2949159236/view#/pdf> [translated by author] [emphasis added].
[1056] Omicron, *supra* note 617 at 9.

> that it will comply with such ABC PROGRAMME in respect of the CONTRACT.[1057]

The LOGIC anti-corruption clause falls short of the comprehensive coverage expected for a standard clause, as it may not address different types of corruption and potential scenarios where they could occur, nor does it outline the commitments parties could make to prevent corruption. On the other hand, in the analysis of 1,164 petroleum contracts conducted for this study, a JV agreement between Tullow Ghana Limited, Kosmos Energy Ghana HC, Anadarko WCTP Company, Sabre Oil & Gas Holdings Limited, and EO Group Limited (the Jubilee Agreement),[1058] has stood out for its exceptionally comprehensive anti-corruption clause, detailed in Appendix VIII. This study designates the clause as the *standard clause* moving forward and will refer to it as a model when explaining different types of anti-corruption clauses.

This subsection aims to explain how contractual anti-corruption commitments and obligations are integrated and vary from one contract to another. Drawing insights from the review of actual petroleum contracts, which is described in detail in the Methodology section of Chapter One, this study introduces a taxonomy of anti-corruption clauses based on the nature of the commitment required from one or both parties concerning anti-corruption. Accordingly, this subsection categorizes these clauses into two primary groups: *direct anti-corruption clauses* and *indirect anti-corruption clauses*, while further dividing each into a number of subcategories. The Subsection includes examples of existing clauses from actual petroleum contracts are also included within each subcategory, along with relevant paragraphs from the standard clause. The comprehensive

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[1057] LOGIC, *General Conditions of Contract (Including Guidance Notes) for Services On-and Off-Shore*, 4th ed (Aberdeen: LOGIC, 2019) at 22.

[1058] *Unitization and Unit Operating Agreement, Ghana National Petroleum Corporation (1), Tullow Ghana Limited (2), Kosmos Energy Ghana HC (3), Anadarko WCTP Company (4), Sabre Oil & Gas Holdings Limited (5), EO Group Limited (6), Covering: The Jubilee Field Unit Located Offshore The Republic Of Ghana,* 13 July 2009, arts 21.1–21.4, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-0771447862/view#/pdf> [*Jubilee Agreement*].

scale of this taxonomy is depicted in Figure 4 below, with each of its subdivisions being explored in corresponding categories. Overall, this subsection argues that, although direct anti-corruption clauses impose a clear commitment on parties to adhere to anti-corruption standards, indirect anti-corruption clauses enable parties can use to enforce anti-corruption commitments in the absence of direct clauses. The Subsection concludes by discussing the methods for addressing violations of these clauses and specifying the available sanctions and remedies.

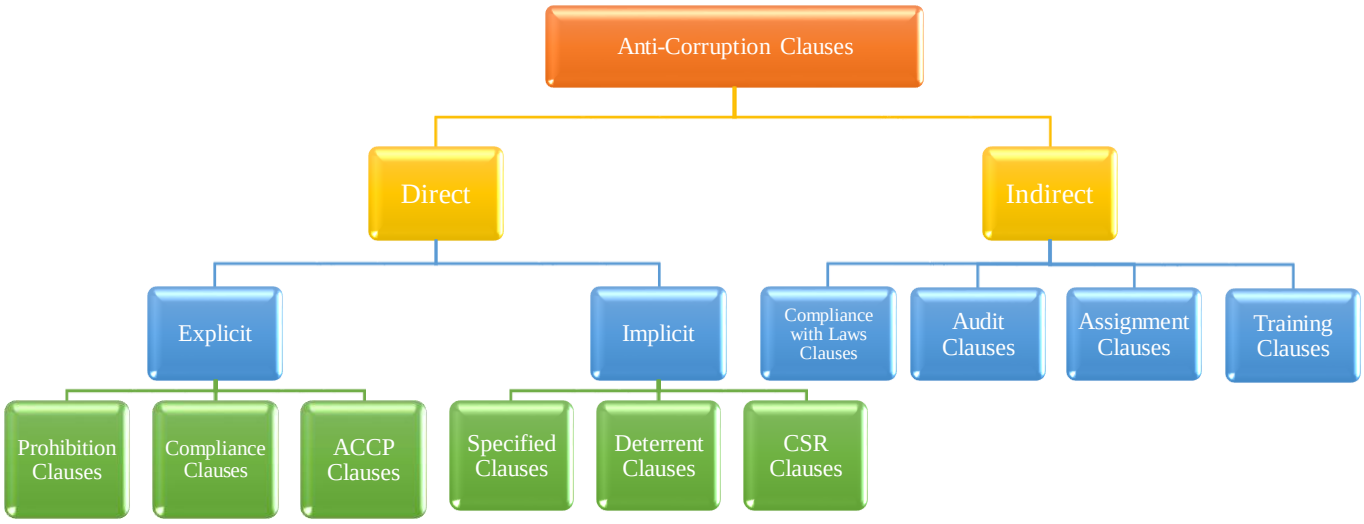

Figure 4 – Taxonomy of Anti-Corruption Clauses in Studied Petroleum Contracts

i. Direct anti-corruption clauses

Direct anti-corruption clauses are contractual clauses that establish specific anti-corruption obligations or conditions for one or both parties involved. These clauses can either clearly refer to (anti-)corruption matters or leave room for interpretation by the parties. Direct clauses are further categorized into two types: *explicit direct clauses* and *implicit direct clauses*. The distinction serves to provide a more nuanced understanding of how these clauses operate within contracts and the different ways in which anti-corruption obligations are established or addressed in contractual agreements. Explicit direct clauses impose clear anti-corruption obligations on parties by either

prohibiting corruption in a broad sense, mandating compliance with specific anti-corruption laws, or requiring the implementation of anti-corruption measures. By contrast, implicit direct anti-corruption clauses may address specific forms of corruption, encourage the adoption of measures to prevent corrupt practices, or emphasize corporate social responsibilities. The extensive study of petroleum contracts underpinning the findings suggests that explicit anti-corruption clauses have a more pronounced role in imposing anti-corruption commitments. This is because they consistently require a clearer anti-corruption commitment when compared with implicit clauses, which may not always be subject to consistent interpretation by the parties for anti-corruption purposes.

Explicit anti-corruption clauses

Explicit direct anti-corruption clauses are contractual clauses that straightforwardly mention (anti-)corruption within their language when imposing anti-corruption commitment on one or both parties. These explicit clauses are categorized into three main types: Prohibition Clauses, Compliance Clauses, and clauses requiring the adoption of anti-corruption compliance programs (ACCP Clauses). The following will describe each of these types.

- Clauses with a ban on corruption (Prohibition Clauses)

The first type of explicit direct clause is a standalone anti-corruption clause that visibly prohibits corrupt practices and imposes direct obligations on one or both parties not to engage in corrupt practices. Within these clauses, parties require guarantees from each other, certifying that they themselves or their associated individuals have not been involved in corrupt practices and/or that they will not engage in such practices in the future. The purpose of these clauses is to establish a corruption-free environment in matters related to the contract. These clauses can be drafted in various formats.

At a basic level, parties may include a straightforward clause that prohibits corruption between themselves, their employees, and third parties. For example, in a PSA between the Government of the Republic of Mozambique, Sasol Petroleum Mozambique Exploration, Lda., and Empresa Nacional de Hidrocarbonetos, Article 36 states that "[t]he Government of the Republic of Mozambique and the Concessionaire agree to cooperate in *preventing acts of corruption*."[1059] This clause broadly requires the parties to take effective measures against corruption while outlining a general obligation to fulfil this commitment. Some Prohibition Clauses may go a step further by, after prohibiting corruption, providing a precise definition or scope of corruption or describing acts that could be considered corruption. For example, in a service contract between Petrobell Inc. and Grantmining SA, Article 34.6 prohibits corruption while also describing specific actions that constitute corrupt behavior:

> 34.6 Commitment against Corruption
> The Contractor declares and assures that it has not made or offered and that it undertakes not to make or offer payments, loans or gifts of money or valuables, directly or indirectly to (i) an official of authority any competent public or employees of the Secretariat or the Ministry; (ii) a political movement or party or member thereof; (iii) any other person, when the Party knows or has had reason to know that any part of said payment, loan or gift will be delivered or paid directly or indirectly to any public official or employee, candidate, political party or member thereof; or (iv) to any other Person or entity, when such payment would violate the laws of any relevant jurisdiction.[1060]

By defining corruption, these clauses aim to provide clarity and consistency in understanding or interpreting what constitutes corrupt behavior. Such clarification can be crucial, especially in

[1059] *Contrato de Concessão Para Pesquisa e Produção Entre O Governo da República de Moçambique e Sasol Petroleum Mozambique Exploration Limitada e Empresa Nacional de Hidrocarbonetos, Empresa Pública Para OS Blocos 16 & 19*, 1 June 2005, art 36, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-1495612293/view#/pdf> [translated by author] [emphesis added].

[1060] *Contrato Modificatorio a Contrato de Prestación de Servicios para la Exploración y Explotación de Hidrocarburos (Petroleo Crudo), en el Bloque Tivacuno de la Región Amazónia*, 22 January 2011, art 34.6, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-9671561394/view#/pdf> [translated by author].

transnational contracts where the definition of corruption may differ among the jurisdictions of the contracting parties.

Lastly, Prohibition Clauses may also include clauses that specifically prohibit the act of bribery rather than addressing corruption in general. As discussed in Chapter Two, corruption and bribery are distinct concepts, but they are often used interchangeably. This interchangeability arises because bribery constitutes the most common form of corruption and is the most frequently cited corrupt practice in international and regional anti-corruption conventions, as well as in national anti-corruption regulations, as illustrated in Table 4 in Chapter Two. For example, the OECD Convention primarily focuses on the criminalization of bribery.[1061] Accordingly, some parties incorporate clauses in their contracts that forbid employees or contractors from offering, soliciting, or accepting bribes. An example of this can be found in a PSA between the Government of the United Republic of Tanzania, Songas Limited, PAE Panafrican Energy Corporation, and CDC Group PLC.:

> CDCPLC represents that *it has not paid or received, or undertaken to pay or receive, any bribe, pay-off, kick-back, or unlawful commission and has not in any other way or manner paid any sums,* whether in Tanzanian Shillings or foreign currency and whether in Tanzania or abroad, given or offered to pay any gifts and presents in Tanzania or abroad, to any Person to procure this Agreement … .[1062]

This clause contains a warranty from one party to the other that it has not been involved in any actions that could be construed as bribery.

In the *standard clause*, Article 21.1, paragraph (A) addresses Public Anti-Corruption Provisions and outlines the expected conduct of the parties involved in the agreement, with a primary focus

[1061] *OECD Convention*, *supra* note 75.
[1062] *Amended and Restated Implementation Agreement Relating to the Songo Gas-To-Electricity Project Dares Salaam, Tanzania Between the Government of the United Republic of Tanzania, Songas Limited, PAE Panafrican Energy Corporation and CDC Group PLC.*, 30 April 2003, art 4.3 (g), online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-3212507685/view#/pdf> [*Songo Agreement*] [emphasis added].

on anti-corruption measures when dealing with government officials (see Appendix VIII). However, the clause does not stop here; Article 21.3 on Private Anti-Corruption Provisions goes further, establishing a commitment from each party and its affiliates to refrain from participating in any corrupt behavior between the contracting parties and their affiliates (see Appendix VIII). Thus, the clause prohibits both public and private corruption by providing a comprehensive definition of corruption, including its various types and purposes. It further requires parties to warrant that they have not engaged in, and will abstain from, any form of corrupt behavior.

- Clauses requiring compliance with anti-corruption laws (Compliance Clauses)

The second type of explicit direct anti-corruption clause requires parties to respect and comply with anti-corruption standards by specifically referring to particular anti-corruption laws. Some clauses demand that parties comply with certain regional or international anti-corruption laws. For example, in a service agreement between Yacimientos Petroliferos Fiscales Bolivianos, Total E&P Bolivie S.A., and Tecpetrol de Bolivia S.A., the parties are obligated to comply with the UNCAC and the Inter-American Convention.[1063] Integrating international anti-corruption laws into the contract framework provides a foundation for addressing cross-border corruption, which ensures that companies and individuals operating across different jurisdictions adhere to consistent anti-corruption standards.

Anti-corruption clauses may also reference specific national anti-corruption laws, including those of the host state and/or home state, or the anti-corruption laws of other countries, often the FCPA and UKBA. An example of clauses mandating compliance with the host and home states' laws can

[1063] *Republica de Bolivia Contrato de Operacion Entre Yacimientos Petroliferos, Fiscales Bolivianos, Total E&P Bolivie (Sucursal Bolivia), Y Tecpetrol De Bolivia S.A. Aquio,* 28 October 2006, clause 27.2, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-5978990122/view#/pdf>.

be found in a PSA concluded between Eni East Africa S.P.A. and Empresa Nacional de Hidrocarbonetos. Here, the parties are obligated to prevent corruption that contravenes:

> (i) the applicable laws of the Republic of Mozambique;
> (ii) the laws of the country of formation of the Concessionaire or of its ultimate parent company (or its principal place of business); or,
> (iii) the principles described in the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed in Paris on December 17, 1997, which entered into force on February 15, 1999, and the Convention's Commentaries.[1064]

In this example, the first item relates to the anti-corruption laws of the host state, whereas the second item refers to the anti-corruption regulations of the home state. An example of anti-corruption clauses that necessitate parties to adhere to domestic laws extending beyond their respective jurisdictions is found in a PSA between the Kurdistan Regional Government of Iraq and Westernzagros Limited:

> Corrupt Practices Laws means, assuming the following are applicable to each CONTRACTOR Entity, whether or not actually applicable or in effect:
>
> > (a) the Kurdistan Region Laws and of the Laws of Iraq in respect of bribery, kickbacks, and corrupt business practices;
> > (b) the *Foreign Corrupt Practices Act of 1997 of the United States of America* (Pub. L. No. 95-213 §§ 101-104 et seq), as amended;
> > (c) the *Corruption of Foreign Public Officials Act of Canada*;
> > (d) the OECD Convention on combating Bribery of Foreign Public Officials in International Business Transactions, signed in Paris on 17 December 1997, which entered into force on 15 February 1999, and the Convention's Commentaries;
> > (e) the *Bribery Act 2010*; and
> > (f) any other Law of general applicability relating to bribery, kickbacks, and corrupt business practices.[1065]

[1064] *Exploration and Production Concession Contract Between the Government of the Republic of Mozambique and Eni East Africa S.P.A. and Empresa Nacional de Hidrocarbonetos, E.P. for Area 4 Offshore Of The Rovuma Block*, December 2006, art 31.2, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-2561344209/view#/pdf>.

[1065] *Production Sharing Contract Garmian Block Kurdistan Region between the Kurdistan Regional Government of Iraq and Westernzagros Limited*, 25 July 2011, art 1.1, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-9205170350/view#/pdf> [*Garmian Contract*] [emphasis added].

Here, the clause requires the parties to comply with the US, UK, and Canadian anti-corruption laws, regardless of whether these laws are "actually applicable or in effect" for the contracting party, which, in this case, is a Cypriot company operating in Iraq.[1066]

Finally, some clauses go further by mandating parties to comply with *all applicable anti-corruption laws*. For example, in the Z5C EPCC Contract, in addition to requiring parties to adhere to the host state's applicable laws, the laws of the country of incorporation or principal location of the parent company and subcontractors, and the OECD Convention, the anti-corruption clause also obliges the parties to follow "any other applicable anti-corruption laws."[1067] Such a requirement is intended to reinforce compliance with all relevant national, regional, or international laws.

The *standard clause* integrates a Compliance Clause by making a number of references to "Anti-Corruption Legislation" and the "OECD Anti-bribery Principles" within the clause itself, while it provides detailed definitions for these terms in its Article 1 Definitions (see Appendix VIII). This definition not only covers the national laws of both the host and home countries but also references international and foreign laws such as the OECD Convention, the UKBA, and the FCPA, as well as any other implementing legislation.

- Clauses requiring the adoption of anti-corruption compliance programs (ACCP Clauses)

When adopting a more rigorous approach, the anti-corruption clause, in addition to prohibiting acts of corruption, can include more comprehensive contractual terms that mandate the parties to implement additional anti-corruption measures, thereby consolidating their commitment to anti-corruption efforts. An example of ACCP Clauses can be found in a JV agreement between Pemex Exploration and Production and Cepsa E.P. México. Within this agreement, the clause not only

[1066] *Ibid*.
[1067] *Z5C EPCC Contract*, *supra* note 1063, art 32.3(c).

prohibits corruption and mandates compliance with any applicable anti-corruption laws but also requires the parties to "create and maintain adequate internal controls for compliance with the provisions of this Clause."[1068] This type of explicit clause specifically calls for the implementation of a corporate anti-corruption compliance program, as discussed in detail in the previous chapter, to ensure the company's adherence to applicable anti-corruption laws.[1069]

With respect to the ACCP Clause, the *standard clause* prompts parties to adopt further measures to reinforce their anti-corruption commitments (see Appendix VIII). Articles 21.1 (C), 21.1(D), and 21.1(F) require the implementation of control and audit procedures regarding the actions of the parties, their affiliates, and their subcontractors. Paragraph (E) further mandates the completion of annual certifications, wherein the parties regularly affirm their dedication to anti-corruption, confirm that they have not engaged in corrupt practices, and verify that they have no knowledge of any corrupt practices conducted by their employees.[1070]

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Figure 5 summarizes different types of explicit anti-corruption clauses and their various forms identified in the studied contracts. Among the three types of explicit clauses, the ACCP Clause

[1068] *Contrato para la Exploración y Extracción de Hidrocarburos Bajo la Modalidad de Producción Compartida en Aguas Someras entre Comisión Nacional de Hidrocarburos y Pemex Exploración y Cepsa E.P. México, S. de R.L. de C.V., S.A. de C.V. 27 De Junio De 2018 Área Contractual G-Tmv-04, Tampico-Misantla-Veracruz,* 27 June 2018, clause 33.2, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-5375757628/view#/pdf> [translated by author]; see also *Agreement on the Exploration, Development and Production Sharing for the Ashrafi-Dan Ulduzuaypara Area in the Azerbaijan Sector of the Caspian Sea*, between Azerbaijan, Statoil Azerbaijan Ashrafi Dan Ulduzu Aypara BV and Socar Oil Affiliate, 30 May 2018, art 3.5(b), online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-5535899866/view#/pdf> [*Ashrafi-Dan Agreement*] (requiring each party to warrant that "it and its Affiliates have adopted policies, procedures and control systems aimed at conducting activities in compliance with Anti-Bribery Laws" at 12).

[1069] See e.g. ICC, *ICC Anti-Corruption Clause*, *supra* note 1021, art (C).

[1070] See also Angela M Xenakis, "Contracting with Third-Party Reps: FCPA Risks" (1 August 2012), online: *Law360* <www.law360.com/articles/361944/contracting-with-third-party-reps-fcpa-risks> (providing a template for annual certification clauses*:* "[r]equire an annual certification to be signed by the third-party representative stating it is aware of its obligations under the FCPA, that it has not engaged in any conduct that would violate the FCPA, and that it is not aware of any such conduct by its officers or employees").

imposes more extensive anti-corruption commitments on the parties as it requests the adoption of measures in practice, in addition to the anti-corruption commitments. While there is no fixed order of priority between the other two types, one can argue that Compliance Clauses are more legally recognized as they include some references to specific anti-corruption laws. On the other hand, some may argue that Prohibition Clauses impose a general ban on corrupt practices, including those not explicitly prohibited by anti-corruption laws in specific jurisdictions. The next chapter will discuss the preferences of interviewees regarding general corruption prohibitions versus specific references to anti-corruption laws.

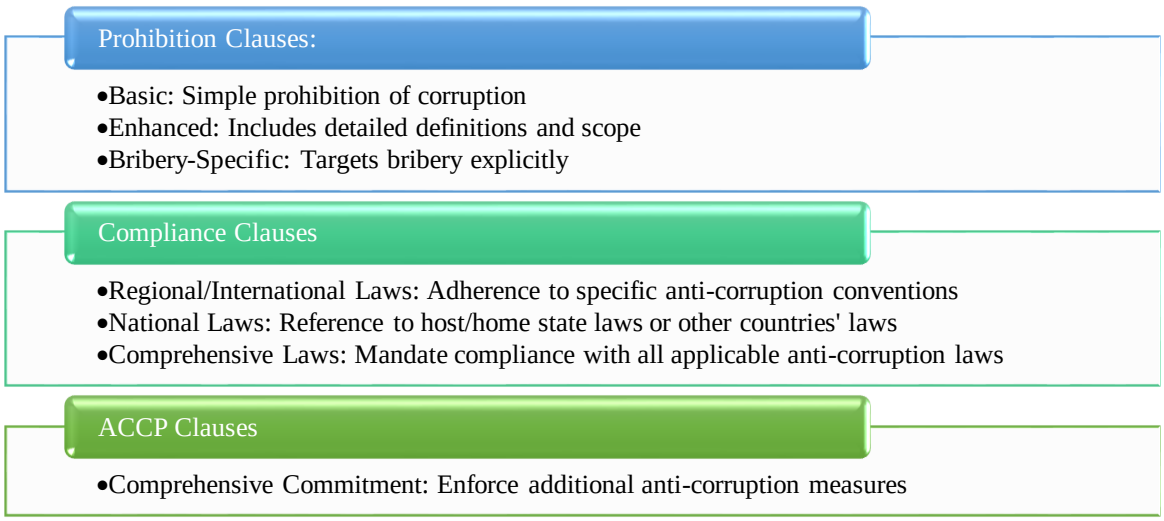

Figure 5 – Classification of Explicit Direct Anti-Corruption Clauses in Studied Petroleum Contracts

Implicit Anti-Corruption Clauses

Implicit direct anti-corruption clauses establish an obligation regarding anti-corruption for one or both parties without explicitly mentioning the term (anti-)corruption in the exact wording of the clause. Indeed, while anti-corruption commitments are not explicitly stated in such clauses, they are implied by the expectations of the involved parties. Based on its review of the studied contracts, this study proposes to categorize further three types of clauses that include implicit contractual

obligations regarding anti-corruption: Specified Clauses, Deterrent Clauses, and Corporate Social Responsibility Clauses).

- Clauses prohibiting a form of corruption (Specified Clauses)

The first category of implicit clauses includes those that describe corrupt practices without explicitly employing the terms "corruption" and "bribe(ry)" or that name another specific type of corruption, such as conflicts of interest or fraud. An illustrative example of the clauses describing a form of corruption can be found in Article 27.2 of a service contract between Bolivia and Empresa Petrolera Andina S.A., which states:

> Parties declares and guarantees to the other Parties that neither it nor any of its employees, agents or representatives, directly or indirectly, has offered, promised, authorized, paid or given money or anything of value to any public official for the purpose of influencing their actions or decisions, or gaining undue advantage, in connection with this Agreement or any of the activities to be carried out under it and for the term of the Agreement undertakes not to offer, promise, authorize, pay or give money or anything of value to any public official in order to influence their acts or decisions, or to gain undue advantages, in connection with this Contract or with any of the activities that will be carried out according to it.[1071]

In this example, the clause describes the act of bribery without explicitly using the term "bribery." Using broader language instead of precise terms such as "corruption" or "bribery" can be an effective strategy to ensure that the clause covers a wide range of potentially corrupt behavior. Such an approach proves particularly advantageous in situations where different cultural or linguistic interpretations may affect the understanding or usage of these terms. For example, the aforementioned clause could also be interpreted to prohibit facilitation payments, in addition to bribery, even in jurisdictions where such payments are permitted, such as the USA.

[1071] *Republica De Bolivia Contrato De Operacion Entre Yacimientos Petroliferos Fiscales Bolivianos, Y Empresa Petrolera Andina S.A. Campo Yapacani*, 28 October 2006, art 27.2, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-3967759096/view#/pdf> [translated by author].

Among the clauses that prohibit specific types of corrupt practices, reference can be made to those addressing conflicts of interest in contracts. An example is a JV agreement signed between Perenco Oil and Gas (Cameroon) Ltd., Kosmos Energy Cameroon HC, and Societe Nationale des Hydrocarbures, which stipulates, "Operator undertakes that it shall avoid any conflict of interest between its own interests (including the interests of Affiliates) and the interests of the other Parties in dealing with suppliers, customers and all other organisations or individuals doing or seeking to do business with the Parties in connection with activities contemplated under this Agreement."[1072] As explained in Chapter Two, a conflict of interest occurs when an individual or company has competing interests that could impact their decisions or actions in a specific situation. Conflicts of interest are considered to be a form of corruption if they are not properly disclosed and managed.[1073] These clauses may also require companies to disclose any potential conflicts of interest and take steps to avoid or mitigate them. For example, a PSA concluded between Total E&P Liban SAL, Eni Lebanon B.V., and NOVATEK Lebanon SAL states:

> A Right Holder shall notify the Petroleum Administration and the other Right Holders of any arrangement or agreement to be entered into in connection with the Petroleum Activities contemplated or conducted pursuant to applicable Lebanese law and this EPA in which such Right Holder or its Affiliate has a direct or indirect interest which could reasonably be expected to conflict with the interests of the State.[1074]

Incorporating of clauses that address the disclosure and management of conflicts of interest into contracts can help companies prevent these situations from leading to other corrupt behaviors,

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[1072] *Agreement on the Management of Petroleum Operations (JOA) Covering the Kombe-Nsepe Permit,* between Perenco Oil and Gas (Cameroon) Ltd., Kosmos Energy Cameroon HC and Societe Nationale des Hydrocarbures, 3 July 2008, art 19.2, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-5424836511/view#/pdf>.

[1073] World Bank, OECD & the UNODC, *Preventing and Managing Conflicts of Interest in the Public Sector: Good Practices Guide* (Washington, DC: World Bank Group, 2020) at 3.

[1074] *Exploration and Production Agreement for Petroleum Activities in Block 9,* between Total E&P Liban SAL, Eni Lebanon B.V., and NOVATEK Lebanon SAL, 29 January 2018, art 42, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-1121032259/view#/pdf> [*Lebanon Block 9 Agreement*].

ensure that transactions are conducted fairly and transparently, and that all parties act in the best interests of the contractual relationship.

The other type of clauses that prohibit certain types of corrupt practices are those that bar parties from engaging in fraudulent behavior. For example, in a farm-out agreement between ERHC Energy Kenya Limited and Cepsa Kenya Limited, both farmor and farmee are held liable for losses "as a direct result of or arising out of, resulting from, attributable to, or connected with … any event of fraud by the [either farmor or farmee] in connection with the transaction."[1075] Likewise, a PSA signed between the State Oil Company of the Republic of Azerbaijan, SOCAR Oil Affiliate, and BP Exploration prohibits tax fraud, which it defines as "any illegitimate and repeated action or omission of the Contractor Party expressed in deliberate, intended and premeditated cases of failures for the purpose of evasion from Taxes by means of concealing information on Taxes or prevention of submission or collection thereof."[1076] These anti-fraud clauses are designed to ensure that parties act in good faith and prevent them from engaging in deceitful actions, particularly considering that corruption often thrives in environments where practices such as falsifying financial statements to conceal bribes or securing contracts through deceptive means go unchecked.

As the *standard clause* explicitly names "corruption" and "bribery" within its wordings, it does not include a Specified Clause that describes corruption. However, it does contain a Specified Clause that names a specific type of corruption: conflicts of interest. Article 23.4 establishes the

[1075] *Farmout Agreement Between ERHC Energy Kenya Limited and Cepsa Kenya Limited Relating to Block 11A, Kenya*, 7 October 2013, clause 6.7, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-1934720031/view#/pdf>.
[1076] *Agreement on the Exploration, Development and Production Sharing for the Shafag-Asiman Offshore Block in the Azerbaijan Sector of the Caspian Sea between the State Oil Company of the Republic of Azerbaijan, BP Exploration (Azerbaijan) Limited and SOCAR Oil Affiliate*, 7 October 2010, clause 19.2, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-1835848694/view#/pdf> [*Shafag-Asiman Agreement*].

obligation of each party to avoid conflicts of interest in dealings with suppliers, customers, and other entities (see Appendix VIII).

- Clauses with deterrent effects on corrupt behavior (Deterrent Clauses)

Implicit clauses with deterrent effects on corrupt behavior aim to discourage corrupt practices in contractual relationships while promoting ethical business conduct.[1077] One type of such clauses prohibits improper payments in business dealings to prevent bribery or other unethical practices that could confer a business advantage. For example, in a PSA between Myanmar Oil and Gas Enterprise and Total Myanmar Exploration and Production, Article 27.4 states that, "[t]he CONTRACTOR warrants that no gift or reward has been made, nor will be made, to any officials or employees of the Government of the Union of Myanmar."[1078] Another example is Annex-I of the PSA between the government of Belize and Spartan Petroleum Corporation, where Article 1.10 stipulates that:

> The following expenditures shall not be included in Petroleum Operations Expenditures:
> …
> (c) contributions and donations, except those approved by the Government,
> (d) gifts or rebates to suppliers, and gifts or commissions to intermediaries arranging service or supply contracts.[1079]

These restrictions on the exchange of gifts, donations, commissions, and similar payments are intended to deter potential corrupt behavior, such as bribery, conflicts of interest, and undue influence, in contractual relationships.

[1077] For more details on business ethics, see e.g. John Nkeobuna Nnah Ugoani, "Business ethics" in R Brinkmann ed, *The Palgrave Handbook of Global Sustainability* (Cham: Springer International Publishing, 2023) 1763.

[1078] *Production Sharing Contract for Appraisal Development and Production of Petroleum in the Moattama Area between Myanmar Oil and Gas Enterprise and Total Myanmar Exploration and Production*, 14 July 1992, art 27.4, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-6716589315/view#/pdf>.

[1079] *Spartan Petroleum Corporation Production Sharing Agreement*, between the Government of Belize and Spartan Petroleum Corporation, 2 June 2006, Annex-I, art 1.10, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-9582550876/view#/pdf>.

Another category of Deterrent Clauses includes clauses that prohibit the inclusion of false statements in contracts. Although distinct from corruption, false statements or misrepresentation could serve as a means for parties to involve themselves in corrupt practices. Thus, these clauses are incorporated to ensure the accuracy and truthfulness of information exchanged between parties in the course of business and to prevent deceptive practices that could potentially lead to corrupt behavior. For example, a PSA executed among Sociedade Nacional de Combustíveis de Angola, Empresa Pública, Vaalco Angola, Inc., Sonangol Pesquisa E Produção, SA, and Interoil Exploration and Production ASA states that "Sonangol may terminate this Contract if Contractor Group: … (c) intentionally submits false information to the Executive Power or to Sonangol."[1080] In most cases, deliberate misrepresentation in a contract constitutes a material breach of the agreement, giving the aggrieved party the right to terminate the contract.[1081]

Finally, specific Deterrent Clauses mandate parties to uphold transparency requirements within the contract. As explained in Chapter Three while discussing the EITI, which is a global standard promoting transparency and accountability in the extractive sector, and further affirmed by interviewee $Gamma_2$, the inclusion of a transparency clause in a contract that requires the disclosure of information related to payments, contracts, and subcontracting serves as an anti-corruption measure that can deter corrupt practices.[1082] These requirements guarantee that parties disclose all relevant information and that there is no hidden or undisclosed influence, favoritism,

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[1080] *Production Sharing Agreement between Sociedade Nacional de Combustíveis de Angola¬ Empresa Pública (Sonangol, E.P.) and Vaalco Angola (Kwanza), Inc. Sonangol Pesquisa e Produção, SA; Interoil Exploration and Production ASA in the Area of Block 5/06*, 1 November 2006, art 39.1, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-3664745125/view#/pdf>.

[1081] See e.g. *Model Gas Service Development and Production Contract for Gas Field Between North Oil Company of the Republic of Iraq and X*, 23 April 2009, art 8.1(a), online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-4049230261/view#/pdf> (stating that "NOC may terminate this Contract … if Contractor commits a breach of a material obligation of this Contract, including but not limited to (i) Contractor knowingly submits a false statement to NOC which is of material consideration for the execution of this Contract") [*Iraqi Model Contract*].

[1082] $Gamma_2$, *supra* note 620 at 7.

or conflict of interest regarding the contract. For example, a PSA between the National Oil Company of Liberia and Anadarko Liberia Block 10 Company stipulates that "[t]he Parties agree that all payments made under this Contract shall be made in accordance with protocols laid down by the [EITI]."[1083] Similarly, the Garmian Contract asserts that "[p]arties affirm their ongoing commitment and adherence to the Principles and Criteria of the [EITI]."[1084] The disclosure of payments and contracts under EITI not only facilitates the detection and deterrence of corrupt payments but also establishes clear decision-making and monitoring processes.

Articles 21.1(A) and 21.3 of the *standard clause* includes Deterrent Clauses multiple times by forbidding parties from making improper payments or offering gifts, loans, fees, rewards, travel, entertainment, or any other transfer of value (see Appendix VIII). By prohibiting improper payments and other transfers of value, the clause sets clear boundaries and expectations, aiming to prevent behaviors that could lead to corruption. Moreover, the Article 21.1 (C) emphasizes transparency by stating, "[e]ach Party shall be entitled to rely … on the adequacy of full disclosure of the facts, and transactions and of financial and other data regarding Unit Operations and any other activity undertaken under this Agreement."

- Clauses referring to corporate social responsibility (CSR Clauses)

The final category of implicit anti-corruption clauses is linked to clauses within the framework of corporate social responsibility. As detailed in Chapter Four, CSR standards have a range of public objectives and address different social issues, ranging from human rights and labor rights to public health, environmental protection, and the fight against corruption. Today, the rejection of

[1083] *Production Sharing Contract for Block LB-10 Signed between the National Oil Company of Liberia (NOCOL) on Behalf of the Republic of Liberia and Anadarko Liberia Block 10 Company*, 23 July 2009, art 19.5, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-3001376476/view#/pdf>.
[1084] *Garmian Contract*, *supra* note 1074, at 5.

corruption is integral to any company's CSR, as corruption is seen as incompatible with sustainable development due to the social, economic, and environmental damages associated with corrupt practices.[1085] Studies show that a company with strong CSR commitments is more likely to implement robust anti-corruption measures.[1086]

Through a CSR Clause, the parties obligate or encourage each other to adhere to CSR standards, including anti-corruption measures. These clauses can either broadly refer to CSR as a general term or delineate responsibilities within its purview. For example, a concession agreement between Colombian National Hydrocarbons Agency and Unión Temporal Repsol Ecopetrol states that "the Contractor undertakes to maintain during the execution of this contract, the legal, financial, economic, technical, operational, environmental and *corporate social responsibility* capacities, accredited for the signing of this Contract."[1087] By contrast, a PSA between the Government of the Republic of Malawi and RAK Gas MB45 Limited provides detailed information, spanning about one-page, on the content and implementation of the CSR plan.[1088]

Some CSR Clauses may also invoke the Principles of Good Corporate Citizenship and request the parties to adhere to these principles. Such Principles entail a company's overall responsibility to act ethically and in the best interests of society, which also include compliance with CSR.[1089] An example is the Garmian Contract, which states that "[t]he CONTRACTOR has … represented that

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[1085] Manuel Castelo Branco & Catarina Delgado, "Business, social responsibility, and corruption" (2012) 12:4 J Public Affairs 357 at 357.

[1086] See e.g. Indira Carr & Opi Outhwaite "Controlling Corruption through Corporate Social Responsibility and Corporate Governance: Theory and Practice" (2011) 11:2 J Corporate L Studies 299.

[1087] *Contrato de Exploración y Producción de Hidrocarburos No. 05 Área Costa Afuera Gua Off-L Entre Agencia Nacional de Hidrocarburos y Unión Temporal Repsol Ecopetrol*, 2 April 2019, at 3, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-1092840377/view#/pdf> [translated by author] [emphasis added].

[1088] *Production Sharing Agreement, Republic of Malawi, Block 4,* between the Government of the Republic of Malawi and RAK Gas MB45 Limited, 12 May 2014, clause 35, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-6422560237/view#/pdf>.

[1089] See Samuel KB Asante, "The Concept of the Good Corporate Citizen in International Business" in Fiona Beveridge, ed, *Globalization and International Investment* (London: Routledge, 2005) 139 at 154–5.

it has a record of compliance with *the principles of good corporate citizenship*."[1090] Here, the term "record" refers to a company's documented history of ethical and socially responsible business practices adopted to promote social and environmental responsibility, including anti-corruption measures.

Finally, some contracts include ethics clauses, which oblige the parties to act in accordance with certain ethical standards or principles.[1091] Although these ethics clauses may not specifically address corrupt practices, they can be interpreted to require parties to refrain from engaging in corrupt practices. An example of an ethics clause is included in the Lebanon Block 9 Agreement, where Article 41 begins by stating that "[t]he Right Holders, their Affiliates and their respective personnel shall act, at all times, in a manner which is consistent with the highest *ethical standards*" and then proceeds to list other anti-corruption commitments.[1092]

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Figure 6 provides an overview of implicit direct anti-corruption clauses and their different types as explained thus far. Although these clauses do not explicitly mention anti-corruption commitments, their inclusion in contracts signifies a commitment to preventing certain forms of corruption and promoting responsible business conduct. Among these clauses, Specified Clauses have a more pronounced anti-corruption focus, as they either describe or name prohibited acts that fall under the corruption umbrella. In the second place, Deterrent Clauses have more room to be interpreted as anti-corruption commitments compared to CSR Clauses, which serve broader purposes.

[1090] *Garmian Contract*, *supra* note 1074 at 6 [emphasis added].
[1091] See e.g. Louise Vytopil, "Contractual control and labour-related CSR norms in the supply chain: Dutch best practices" (2012) 8 Utrecht L Rev 155 at 167.
[1092] *Lebanon Block 9 Agreement, supra* note 1083 at 119 [emphasis added].

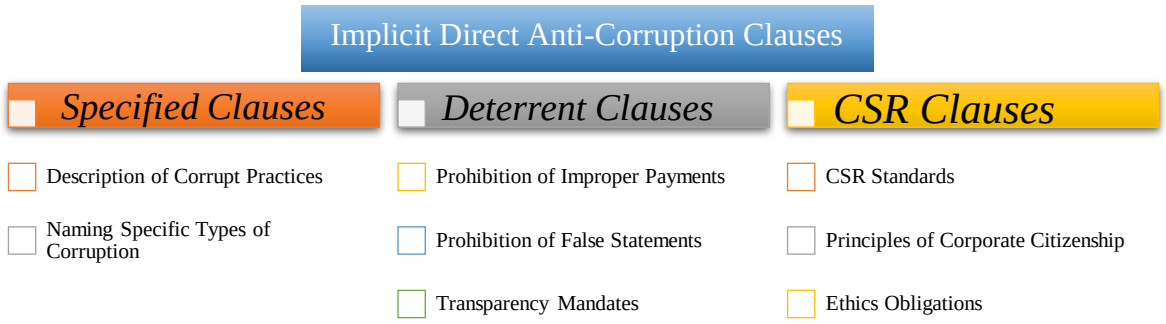

Figure 6 – Overview of Implicit Direct Anti-Corruption Clauses in Studied Petroleum Contracts

ii. Indirect anti-corruption clauses

There is a possibility that contracts, especially those predating contemporary anti-corruption awareness, may lack clauses specifically addressing corruption. In such instances, parties might resort to alternative clauses in contracts to impose anti-corruption commitments, even if these commitments are not explicitly stated or implied in the contract's language. This study argues that, in the absence of direct anti-corruption clauses, parties can use clauses related to compliance with certain laws, audit rights, assignment or sub-contracting requirements, and training programs to impose anti-corruption commitments on each other. These clauses, which will be referred to as "indirect anti-corruption clauses," differ from direct clauses in that they were not originally intended for anti-corruption commitments or designed to target corrupt practices. Nevertheless, the parties can interpret and apply them to enforce anti-corruption requirements on each other. The use of these indirect anti-corruption clauses allows parties to exercise additional due diligence with respect to the other contracting parties and their associated persons. This argument will be further explored in the next chapter, under the section "Beyond Direct Anti-Corruption Clauses: Alternative Paths to Enforcing Anti-Corruption Commitments," when interviewees' opinions on the capability of these indirect clauses for anti-corruption purposes are discussed. Accordingly, the following introduces and provides examples of compliance with certain laws clauses, audit

clauses, assignment or sub-contracting clauses, and training clauses, all within the context of anti-corruption goals.

Compliance with laws clauses

Many contracts include compliance with laws clauses that oblige parties to be bound by the laws of the jurisdiction specified in the clause and to carry out their operations in accordance with such laws, whether they are national or international. For example, in an Indonesian model PSA, it is stipulated that "CONTRACTOR shall … [c]omply with all applicable laws of Indonesia. It is also understood that the execution of the Work Program shall be exercised so as not to conflict with obligations imposed on the Government of the Republic of Indonesia by international laws."[1093] This broad obligation to comply with both domestic and international laws can be interpreted to include anti-corruption laws. This interpretation is grounded in the fact that today, almost all states have anti-corruption regulations in place, criminalizing common types of corrupt practices in their domestic laws.[1094] Given that anti-corruption laws are considered integral to the legal framework of many countries and jurisdictions, clauses requiring compliance with applicable domestic laws can generally be construed to encompasses anti-corruption laws. In addition, as demonstrated in Chapter Three, anti-corruption standards form part of an transnational legal framework through the emergence of conventions and treaties to address corruption on a global state.

[1093] *Indonesian Model PSC Bilingual Production Sharing Contract General Terms* (2013), art 5.2.19, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-4388317328/view#/pdf>.

[1094] See Rachel Brewster, "Interesting Legal Spaces: International Trade Law and Anti-Corruption Law", in Carol J Greenhouse & Christina L Davis, eds. *Landscapes of Law: Practicing Sovereignty in Transnational Terrain* (Philadelphia: University of Pennsylvania Press, 2020) 37 (explaining that "[a]lmost all states have agreed—in principle—to adopt domestic anticorruption rules (from the UNCAC), and several states have a binding obligation to adopt these rules (from the OECD Anti-Bribery Convention)" at 55).

Compliance with laws clauses are sometimes drafted within a broader *applicable law clause*, also known as the "governing law clause," "choice of law clause," or "law of the contract clause."[1095] For example, a PSA between the National Oil Company of Liberia and Oranto Petroleum Limited Block LB-11, in its Applicable Law article, states that "[t]he laws and regulations in force in the Republic of Liberia and the provisions of international law as may be applicable to international oil and gas activities shall apply to the Contractor, to this Contract and to the Operations which are the purpose thereof, unless otherwise provided by the Contract."[1096] In their own right, applicable law clauses determine the law applicable to the parties' contractual obligations, which can impact the parties' rights and obligations in relation to corrupt practices depending on the legal regime chosen.[1097] Moreover, if the parties opt for arbitration, they might even refer directly to transnational legal regimes such as anti-corruption frameworks. One such regime is lex petrolea, a body of legal principles and practices specific to the international oil and gas industry, which may include relevant anti-corruption obligations.[1098]

Finally, many contracts include clauses requiring parties to align their operations with *universally accepted practices in the petroleum industry*, also commonly referred to as "good oilfield practices" or "best international petroleum industry practices."[1099] For example, a PSA between

[1095] For further details on governing law or choice of law clauses in petroleum contracts, see Carmen Otero García-Castrillón, "Reflections on the law applicable to international oil contracts" (2013) 6:2 J World Energy L & Bus 129.
[1096] *Production Sharing Contract Signed Between the National Oil Company of Liberia (NOCOL) on Behalf of The Republic of Liberia and Oranto Petroleum Limited Block LB-11*, 16 April 2007, art 23, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-3922793692/view#/pdf>.
[1097] For example, if the parties have elected the contract to be governed by English law, the contract is voidable if it was procured through an act of corruption by the election of the innocent party, see *Honeywell International Middle East Ltd v Meydan Group LLC* (2014) EWHC 1344 (TCC).
[1098] See García-Castrillón, *supra* note 1104 at 135–140. See also Deeksha Malik & Geetanjali Kamat, "Corruption in International Commercial Arbitration: Arbitrability, Admissibility & Adjudication" (2018) 5:1 The Arbitration Brief, 2 at 14–15.
[1099] See generally Alex Wawryk, "Petroleum regulation in an international context: the universality of petroleum regulation and the concept of lex petrolea" in Tina Hunter, ed., *Regulation of the Upstream Petroleum Sector* (Edward Elgar Publishing, 2015) 3 at 20.

Verenex Energy Area 47 Libya Limited and Medco International Ventures Limited specifies that "Operator shall have the following obligations: (a) to conduct Petroleum Operations in the Contract Area in a manner consistent with Good Oilfield Practices."[1100] These practices represent widely recognized standards that advocate for the safe and efficient exploration, production, and transportation of petroleum resources. Through such clauses, parties can introduce anti-corruption commitments into their agreements, as anti-corruption measures are integral components of good oil field practices. This connection is substantiated by industry standards and regulations requiring petroleum companies to establish effective anti-corruption policies and procedures. For example, as detailed in Chapter Three, the EITI, a global standard promoting transparency and accountability in the extractive sector, mandates participating countries and companies to disclose information on payments and contracts within the petroleum industry.[1101] Likewise, the International Petroleum Industry Environmental Conservation Association, a global industry association for the petroleum sector, has formulated guidelines to address corruption risks in the industry. These guidelines offer practical counsel to petroleum companies on creating effective anti-corruption policies and procedures, including conducting risk assessments, training employees and contractors, and monitoring compliance.[1102]

In the Jubilee Agreement, alongside the *standard clause*, there are additional provisions mandating compliance with laws. The agreement includes a compliance with laws clause,[1103] an applicable

[1100] *Exploration and Production Sharing Agreement between National Oil Corporation and Verenex Energy Area 47 Libya Limited and Medco International Ventures Limited Contract Area 47*, 12 March 2005, art 5.5, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-5545997817/view#/pdf>.
[1101] For further details on the role of EITI in fighting corruption, see Alexandra Gillies, *The EITI's Role in Addressing Corruption* (Oslo: EITI, 2019).
[1102] See IPIECA, *Preventing corruption: promoting transparent business practices* (London: IPIECA, 2012).
[1103] *Jubilee Agreement*, *supra* note 1067, art 20.1.

law clause,[1104] and a clause on universally accepted practices in the petroleum industry.[1105] Therefore, the Agreement indirectly addresses anti-corruption matters by emphasizing legal compliance and aligning with industry best practices that inherently include anti-corruption considerations.

Audit rights clauses

The inclusion of audit rights clauses, also referred to as "monitoring clauses," serves as a potent anti-corruption tool which allows parties to monitor each other's compliance with anti-corruption measures.[1106] While the specifics of audits procedures are detailed in Chapter Four, contractual audit clauses establish a framework for parties to ensure that their counterparts keep accurate financial records and books and maintain an effective internal control mechanism.[1107] According to the Resource Guide to FCPA, audit rights are identified as a form of "ongoing monitoring of third-party relationships."[1108] Audits enable parties to identify discrepancies or red flags in the other party's financial records and detect potential corruption issues.

While general audit rights clauses are standard in most contracts, as verified in the subsequent section of this chapter, parties can incorporate audit rights that explicitly address corruption issues. For example, GIACC, in its "Sample Anti-Corruption Contract Commitments," provides a

[1104] *Ibid*, art 20.2.
[1105] *Ibid*, art 7.2(B).
[1106] See Boles, *supra* note 987 at 829–30.
[1107] See Daniel J Grimm, "Traversing the Minefield: Joint Ventures and the Foreign Corrupt Practices Act" (2014) 9:1 Va L & Bus Rev 91 at 147.
[1108] DOJ & SEC, *FCPA Resource Guide*, *supra* note 611 at 90. See also US Department of Justice, *FCPA Opinion Procedure Release 2004-02* (Washington, DC: US Government Printing Office, 2004) (acknowledging "[t]he inclusion in all agreements, contracts, and renewals thereof with all Agents and Business Partners of provisions: allowing for internal and independent audits of the books and records of the Agent or Business Partner to ensure compliance with the foregoing; and ... [i]ndependent audits by outside counsel and auditors ... to ensure that the Compliance Code, including its anti-corruption provisions, are implemented in an effective manner."); see also Ministry of Justice, *Guidance to Help*, *supra* note 556 at 39; Xenakis, *supra* note 1079 (explaining that the SEC and DOJ "will expect companies to exercise [audit] rights and will look unfavorably on companies that have included audit rights but not exercised them when there are red flags").

template for audit rights clauses specifically tailored to address corruption concerns: "[t]he purpose of the audit will be for [organisation]'s auditor to confirm, as far as practicable, that any payments made by [organisation] to the [business associate] under this agreement have not been used corruptly."[1109]

The *standard clause* also includes an audit rights clause specifically addressing corruption. In Article 21.1(C) requires the parties to maintain a "system of internal controls and record keeping" accessible to all parties, while Paragraph D grants the parties the right to audit those records and transactions (see Appendix VIII). The review and verification of financial records and transactions facilitate the identification of potential instances of corruption or financial impropriety.

Sub-contracting and assignment clauses

Another category of clauses through which parties can impose anti-corruption clauses on each other pertains to sub-contracting and assignment clauses. Sub-contracting clauses outline the conditions for delegating parties' obligations to third parties, while assignment clauses allow parties to transfer their contractual rights, obligations, or ownership to another contracting party, specifying the conditions for such transfers.[1110] These clauses may contain contractual restrictions on the use of sub-contractors or the delegation of obligations to third parties.[1111] Within these clauses, parties can stipulate the need for the other party's approval when hiring a third-party agent

[1109] GIACC, *Sample Anti-Corruption Contract Commitments* (Buckinghamshire: GIACC, 2020), arts 4–8.
[1110] See e.g. Hall Ellis Solicitors, "Subcontracting clauses (delegation of contractual obligations to third parties)" (last visited 4 August 2024), online: *Hall Ellis Solicitors* <hallellis.co.uk/subcontracting-clause-delegation/>.
[1111] See Michael Volkov, "Contracts and Anti-Corruption Compliance" (17 July 2011), online (blog): *Volkov Law Group* <blog.volkovlaw.com/2011/07/contracts-and-anti-corruption-compliance/> (providing a template clause for use of sub-contractors: "No Sub-Vendors (without approval): The foreign business partner must agree that it will not hire an agent, subcontractor or consultant without the company's prior written consent (to be based on adequate due diligence)"; Xenakis, *supra* note 1079 (providing a similar sample: "*Approval of Subcontractors*: Prohibit the third-party representative from hiring subcontractors without the company's written consent. Written consent should be contingent on either the third-party representative or the company conducting proper due diligence on the proposed subcontractor").

or entity, ensuring that the other party verifies the third party's compliance with anti-corruption matters.

While many contracts include general sub-contracting or assignment clauses, parties can explicitly refer to compliance with anti-corruption laws in such clauses. For example, in a PSA between the Kurdistan Regional Government of Iraq and Repsol YPF Oriente Medio S.A., "Procurement Procedures," clause 22.3.1 states that "[e]ach contract with Subcontractors must include a provision that obligates such Subcontractor to comply with Corrupt Practices Laws in the Subcontractor's performance at the contract."[1112] The PSA imposes additional obligations in its assignment clauses:

> 39.7 A Contractor Entity proposing to Assign all or any part of its rights, obligations, and interests under this Contract shall request the consent of the Government and the other Contractor Entities, and accompany such request with: …
>
> (b) a letter of representations and warranties from the proposed assignee in form and content acceptable to the Government including *a representation that the proposed assignment will not to the knowledge of such Contractor Entity after reasonably diligent investigation violate any Corrupt Practices Laws applicable to the Contractor Entity*; and
>
> (c) a letter of representations from the assignor in form and content satisfactory to the Government, including *a representation that the proposed assignment will not to the knowledge of such Contractor Entity after reasonably diligent investigation violate any Corrupt Practices laws applicable to the Contractor Entity*.[1113]

By including additional requirements in sub-contracting and assignment clauses, the contract ensures that all parties involved in the contract exercise due diligence in selecting third parties and comply with anti-corruption laws.

[1112] *Production Sharing Contract Between the Kurdistan Regional Government of Iraq and Repsol YPF Oriente Medio S.A. (Piramagrun Block)*, 26 July 2011, art 22.3.1, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-6998213818/view#/pdf>.
[1113] *Ibid*, art 39.7 [emphasis added].

The *standard clause* also explicitly addresses the compliance of sub-contractors with anti-corruption matters in article 21..1(F) (see Appendix VIII). Furthermore, Article 21.6 of the Jubilee Agreement mandates the contract's obligations on successors and assignees, stating "[s]ubject to the limitations on Transfer and Encumbrances contained in Article 14, this Agreement shall inure to the benefit of and be binding upon the successors and assigns of the Parties."[1114]

Training clauses

Lastly, anti-corruption commitments can also be incorporated into personnel training clauses. Such clauses may obligate parties to implement training programs for their staff, aiming to improve their knowledge and professional qualifications in relevant aspects of the industry.[1115] Anti-corruption training, as discussed in the previous chapter, can equip personnel to understand what constitutes corruption and the consequences of engaging in corrupt practices. It also offers employees the opportunity to develop skills to recognize and respond appropriately to corrupt requests. Contracts can explicitly address anti-corruption in these clauses. For example, the GIACC, in its Sample Anti-Corruption Contract Commitments, offers a template for anti-corruption training clauses: "The [business associate] will be required to undertake any relevant anti-corruption training which [organisation] reasonably requires."[1116] Although contracts do not typically include specific training anti-corruption clauses, they often incorporate general training clauses, as demonstrated in the next section, providing the parties an opportunity to integrate anti-corruption elements into their training programs. For example, a PSA signed between Staatsolie Maatschappij Suriname N.V. and Kosmos Energy Suriname provides that:

> During each phase of the Exploration Period and up to first production in the Contract Area, Contractor shall allocate … per Calendar Year to train

[1114] *Jubilee Agreement*, *supra* note 1067 at 103.
[1115] See Boles, *supra* note 987 at 833.
[1116] GIACC*, supra* note 1119, art 3.

> representatives of Staatsolie or to provide programs of social responsibility. During each Calendar Year after the Exploration Period, Contractor shall allocate … per Calendar Year to train representatives of Staatsolie or to provide programs of corporate social responsibility. The training programs shall be in any of Staatsolie's operations. The programs of corporate social responsibility shall support community-based development in areas like environment, health, education, culture and sports.[1117]

Through this clause, the parties may include anti-corruption training as part of their CSR training program.

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Figure 7 presents an overview of the types of indirect anti-corruption clauses described above. In this figure, the arrangement of the indirect clauses reflects their respective capacity to uphold anti-corruption commitments. The argument is that compliance with laws clauses offer greater flexibility for interpreting and integrating anti-corruption commitments into the contract, considering that the corruption is prohibited in almost all states. This perspective is further supported by insights from certain interviewees, which will be explored in more detail in the next chapter. Moving to the next tier, audit rights clauses are perceived as more powerful tools than assignment clauses and training clauses for enforcing anti-corruption commitments because audit rights can provide a legally enforceable and objective mechanism for verifying compliance, allowing parties to take immediate action in the case of non-compliance by the other party.[1118] In contrast, the parties' leverage in cases of sub-contracting and assignment is limited to third parties and may not always be effective for all instances of corruption. Lastly, the study suggests that,

[1117] *Production Sharing Contract for Petroleum Exploration, Development and Production Relating to Block 42 Offshore Suriname*, between Staatsolie Maatschappij Suriname N.V. and Kosmos Energy Suriname, 13 December 2011, art 32.1.1, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-6931392961/view#/pdf>.

[1118] Nick Cooper & Kate McNally, "I Want It All: The Contractual Effect of Audit Clauses" (2016) 68:5 Governance Directions 288 (stating "[a]n audit clause can impose a significant compliance burden [and its] scope may also be much broader than it initially appears" at 289).

although training clauses play a key role in creating a culture of compliance and increasing awareness, their influence is limited when compared with other indirect clauses that provide more immediate and enforceable mechanisms for compliance with anti-corruption laws.

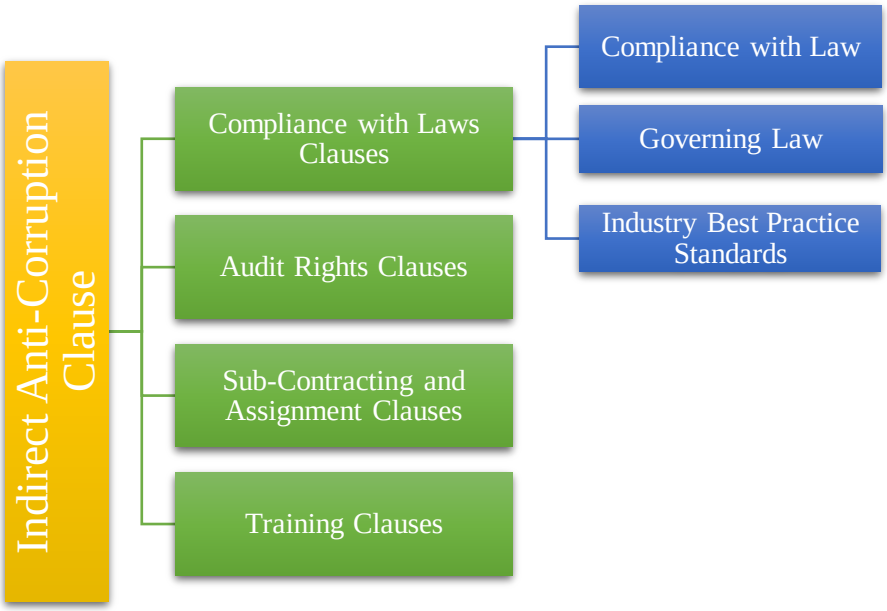

Figure 7 – Indirect Anti-Corruption Clauses in Petroleum Contracts and Their Order of Capability in Imposing Anti-Corruption Commitments (From Top to Bottom)

Now that different types of anti-corruption clauses have been identified and explained, the next subsection shifts the focus to the available sanctions and remedies that parties may employ in cases of violations.

D. Contractual Remedies for Violations of Anti-Corruption Clauses

What legal ramifications arise from the violation of an anti-corruption clause? How do such breaches affect the contract, proceeds, and other gains tainted by corrupt practices? Based on an examination of 1,164 petroleum contracts, this subsection asserts that corrupt practices can trigger different sanctions or remedies outlined within the contractual framework.

Before exploring the repercussions of violating anti-corruption clauses, it is important to note that contracts may impose specific obligations regarding the disclosure of corrupt practices. These obligations require parties to promptly notify each other if they become aware of or suspect any corrupt acts related to the contract, or if an investigation is initiated by competent authorities concerning corruption. An illustrative example can be found in the LOGIC's Onshore Offshore Contracts Template:

> 28.4 Where it is legally able to do so, and subject to a request by a COMPETENT AUTHORITY not to notify, each PARTY shall notify the other in writing immediately upon whichever is the earlier of:
> (a) becoming aware of any investigation or proceedings initiated by a COMPETENT AUTHORITY relating to an alleged breach of APPLICABLE ANTI-BRIBERY LAWS by either PARTY or any member of its GROUP in connection with the CONTRACT; or
> (b) having a reasonable belief that either PARTY or any member of its GROUP may have breached APPLICABLE ANTI-BRIBERY LAWS in connection with the CONTRACT.
> The affected PARTY shall use reasonable efforts to keep the other PARTY informed as to the progress and findings of such investigation or proceedings, the details of any measures being undertaken by the affected PARTY to respond to the alleged or potential breach and the remedial measures that are being or will be implemented to prevent such conduct in the future.[1119]

Similarly, the anti-corruption clause in a Tanzanian Model PSA states that "[e]ach Party shall as soon as possible notify and keep informed the other Parties of any investigation or proceeding initiated by a governmental authority relating to an alleged violation of the Law and other applicable anti-corruption laws and obligations to such Party."[1120] Being informed of any investigation is essential for other parties whose performance or interests may be potentially impacted by such proceedings.

[1119] LOGIC, *supra* note 1066 at 22.
[1120] *Model Production Sharing Agreement Between the Government of the United Republic of Tanzania and Tanzania Petroleum Development Corporation and ABC Ltd For Any Area*, 2013, art 34(e), online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-8006566420/view#/pdf>.

Beyond the notification and cooperation prerequisites, the study identifies several options available in the studied contracts for addressing breaches of anti-corruption clauses. These options include contract voidance, termination, indemnification, financial penalties, as well as legal and disciplinary actions. Contracts may explicitly address violations within the anti-corruption clause or incorporate them into their general breach clauses. Chapter Six will further explore interviewees' perspectives on the most effective approaches in such situations.

i. Voidance

In some cases, contracts may include a clause stating that involvement in corrupt practices renders the contract void ab initio, which treats the contract as if it had never existed from its inception. For example, Block 11 Contract includes the following provision:

> The Contractor further represents and warrants that no loan, reward, offer, advantage or benefit of any kind has been given to any public official or any person for the benefit of such public official or person or third parties, as consideration for an act or omission by such public official in connection with the performance of such person's duties or functions or to induce such public official to use his or her position to influence any act or decisions of the Administration with respect to this Contract. Any breach of this representation shall cause this Contract to be declared *invalid and voidable* by the State Administration.[1121]

Another example is found in a PSA signed between Norbest, Korea National Oil Corporation, and the Kurdistan Exploration and Production Company, where the Application of Anti-Corruption Laws clause states that "[i]f this Agreement is reasonably proven to have been obtained in violation of Kurdistan Region Law or the laws of Iraq concerning corruption, this Agreement shall be deemed void ab initio."[1122] According to this clause, if the contract, itself, is established through

[1121] *Block 11 Contract*, *supra* note 1062, art 29.2 [emphasis added].
[1122] *Production Sharing Contract, Hawler Area, Kurdistan Region Between the Kurdistan Regional Government of Iraq and Norbest Limited*, 10 November 2007, art 46.1, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-1834156729/view#/pdf>.

corrupt means, it is considered void ab initio, implying that the parties cannot enforce the contractual terms or claim damages.

ii. Termination

The violation of an anti-corruption clause by one party may grant the other party the right to unilaterally terminate the contract.[1123] The specific terms outlined in the contract sometimes confer such a right. In certain cases, the language used in the anti-corruption clause explicitly allows termination for the breach of anti-corruption commitments. For example, a PSA entered into between the Kurdistan Regional Government Of Iraq and Talisman (Block K39) B.V. states that "[e]ach CONTRACTOR Entity agrees that if it is, at any time, reasonably proves to be in breach of Kurdistan Region Law concerning corruption any CONTRACTOR Entity or the GOVERNMENT may terminate this Contract in respect of the defaulting CONTRACTOR Entity."[1124] Similarly, a PSA signed between Nigerian Petroleum Development Company Limited and Septa Energy Nigeria Limited grants the other party an immediate right of termination in the event of bribery: "[i]f SEPTA or any of their personnel, representatives, agents or sub-contractors gives or offers to give (directly or indirectly) to any person any such inducement or reward or anything of value, the other Party may terminate this Agreement immediately without prior notification."[1125] Contracts may describe termination rights for anti-corruption violations using

[1123] See Boles, *supra* note 987 at 831.
[1124] *Production Sharing Contract Between the Kurdistan Regional Government of Iraq and Talisman (Block K39) B.V.*, 19 August 2011, art 46, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-9316251017/view#/pdf>.
[1125] *Strategic Alliance Agreement Between Nigerian Petroleum Development Company Limited and Septa Energy Nigeria Limited for the Development and Production of OMLS 4, 38 and 41*, 2010, art 26.9, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-3157711052/view#/pdf>.

terms other than termination, such as "power to cancel,"[1126] "the right to abrogate," [1127] "non-automatic termination,"[1128] and "revocation."[1129]

Contracts can also address a breach of anti-corruption commitments by including a specific provision indicating that corruption or certain corrupt practices constitute a *material breach* of the contract and specifying the corresponding sanctions.[1130] For example, an escrow agreement signed as part of the concession agreement between Ghana National Petroleum Corporation, Cola Natural Resources Ghana Limited, and Medea Development Limited provides that "[b]reach of any of the provisions in this [anti-corruption] clause or of any Applicable Anti-Bribery Law is a *material breach* of this Agreement and, without prejudice to any other right, relief or remedy, entitles Barclays to terminate this Agreement immediately."[1131]

If the contract does not explicitly address the legal consequences of non-compliance with anti-corruption commitments, the parties may refer to the general provisions related to breach of agreement, grounds for termination, or similar clauses dealing with the infringement of contract terms. For example, although the Ashrafi-Dan Agreement includes an explicit direct anti-

[1126] See e.g. *Model Production Sharing Agreement: A Contract for Exploration, Appraisal, Development and Production of Petroleum in Jordan*, 2009, art 32, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-0976678795/view#/pdf>.
[1127] See e.g. *Contract for the Exploration, Development and Production of Petroleum on the Offshore Block #1 Between the Government of the Syrian Arab Republic and General Petroleum Corporation and Loon Energy, Inc.*, 20 September 2007, art 21.1, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-1212784561/view#/pdf>.
[1128] See e.g. *Contract for Operations of Petroleum Exploitation Number SXX Hyphen Ninety Three (6-93) Executed Between the Ministry of Energy and Mines and Pentagon Petroleum, Inc.*, 15 October 1993, art 26.2, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-5133948327/view#/pdf>.
[1129] See e.g. *The Afghan-Tajik Basin Phase I Tender Exploration and Production Sharing Contract for Hydrocarbons Exploration, Development and Production in Mazar-I-Sharif Block*, 8 October 2013, art 25, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-8263306148/view#/pdf> [*Mazar Contract*].
[1130] Xenakis, *supra* note 1079.
[1131] *Petroleum Agreement by and Among Government of the Republic of Ghana, Ghana National Petroleum Corporation GNPC Exploration and Production Company Limited, Cola Natural Resources Ghana Limited, Medea Development Limited in Respect of East Cape Three Points Contract Area*, September 2013, Annex 5, art 31(c), online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-6688383797/view#/pdf>; see also *Model Iraqi Model Contract*, *supra* note 1090.

corruption clause, it lacks specific details for addressing breaches of this clause. However, its termination clause provides that:

> 29.1 Termination by either Party
> This Agreement may be terminated at any time:
> (a) by SOCAR if Contractor commits, or
> (b) by Contractor if SOCAR or any Governmental Authority commits a Material Breach of its obligations under this Agreement or the Government Guarantee …[1132]

In this case, if a party violates the anti-corruption clause, the other party may interpret the violation as a material breach of the contract and terminate the contract under the general termination clause.

iii. Legal and disciplinary actions

In some cases, a violation of the anti-corruption clause may empower the parties to pursue legal action against individuals or companies who violate the contractual terms.[1133] For example, Z5C EPCC Contract states that "[t]he Parties undertake to take administrative disciplinary actions and rapid legal measures in their respective responsibilities to stop, investigate and prosecute in accordance with national law any person suspected of corruption or other intentional resource misuse."[1134] Contracts may also detail procedures for enforcing disciplinary sanctions in cases of anti-corruption violations. For instance, in a PSA signed between Dragon Oil (Mazar-i-Sharif) Limited, TP Afghanistan Limited, and Ghazanfar Investment Ltd, following the termination of the contract for the violation of the anti-corruption clause, "the rights and privileges granted to the Contractor shall be revoked, and the Contract Area shall be forfeited as well as the financial Guarantee in accordance with its terms."[1135]

[1132] *Ashrafi-Dan Agreement*, *supra* note 1077, art 29.1.
[1133] See Boles, *supra* note 987 at 823.
[1134] *Z5C EPCC Contract*, *supra* note 1063, art 32.1.
[1135] *Mazar Contract*, *supra* note 1142, art 25.4(c).

iv. Financial penalties

Violation of anti-corruption clauses can also lead to fines and other penalties. While courts and regulatory agencies usually determine these penalties, they may sometimes be specified or implied within the contract itself. For example, the Ecuadorian service agreement for Development, Production and Upgrading of Crude Oil in Block 20 stipulates that: "breach of any provisions in this Contract will give PETROPRODUCCION the right to charge CONTRACTOR a penalty equivalent to 0.01% over the portion not performed in the development plan approved for the corresponding fiscal year."[1136] Although this clause may primarily address production non-compliance, parties can interpret it to impose a financial penalty on the party that violates anti-corruption commitments by considering the broader implications of breaching any provisions of the contract. Since the contract includes an anti-corruption clause, its violation could be construed as a breach of contract. Therefore, when the contract provides that the party has the right to charge the other a penalty for any breach of provisions, it implies that the penalty could apply to violations related to the anti-corruption clause as well. Besides financial fines, contracts may also specify other penalties for anti-corruption violations. For example, the Lebanon Block 9 Agreement calls for forced assignment in the event of violation of the anti-corruption clause:

> Each Right Holder and its Affiliates shall acknowledge that the above stated representations and warranties are fundamental to the basis of good faith under this EPA and any breach of the above shall entitle the State to require the Right Holder in breach to make a Forced Assignment pursuant to Article 36 of this EPA with immediate effect, and in the event of such Forced Assignment, the Right Holder and its Affiliates shall not be entitled to any compensation and shall have no claims.[1137]

[1136] *Specific Services Contract for Development, Production and Upgrading of Crude Oil in Block 20, Including the Pungarayacu Oil Field in the Ecuadorian Amazon Region*, 8 October 2008, art 9.4, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-2742639589/view#/pdf>.
[1137] *Lebanon Block 9 Agreement*, *supra* note 1083, art 41.3.

Imposing financial penalties may raise the cost of engaging in corrupt activities for the parties, which can deter potential violations.

v. Indemnification

Contracts may also insert indemnification rights into their anti-corruption clauses and require the breaching party to compensate for all damages, expenses, and fines resulting from a violation.[1138] For example, the *standard clause*, immediately following its general anti-corruption clause, outlines indemnification rights (See Appendix VIII). Likewise, a JV agreement between Pirity Hidroearburos S.R.L. and President Energy Paraguay, within its anti-corruption clause, grants similar rights to the parties and extends them beyond the contract terms, stating that " Each Party shall defend, indemnify and hold the other Parties harmless from and against any and all claims, damages, losses, penalties, costs and expenses arising from or related to, any breach by such first Party of such warranty. Such indemnity obligation shall survive termination or expiration of this Agreement."[1139] These indemnification rights can mitigate corruption risks and encourage compliance with anti-corruption laws, while shielding parties from the financial and legal consequences of corrupt activities.

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Figure 8 presents an overview of different sanctions and remedies available in the studied petroleum contracts to address breaches of anti-corruption clauses.

[1138] See Hunton Kurth, "Anti-Corruption Provisions and Upstream Joint Ventures-Boilerplate or Bespoke?" (20 April 2015), online: *National Law Review* <www.natlawreview.com/article/anti-corruption-provisions-and-upstream-joint-ventures-boilerplate-or-bespoke>.

[1139] *International Operating Agreement President Energy Paraguay S-A. and Pirity Hidrocarburos S.R.L.*, 29 October 2012, art 19.1(A), online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-3316958152/view#/pdf>.

Figure 8 – Sanctions and Remedies in Petroleum Contracts for Anti-Corruption Clause Violations

The sequence of identified sanctions and remedies in this figure indicates the severity in addressing violations: if corruption occurs, voidance treats the contract as if it never existed, while indemnification simply grants parties the right to seek compensation for losses. However, it is important to consider that these are the available remedies specified in the explicit terms outlined in the contract. However, some contracts do not specify sanctions or remedies for breaches at all.

In cases where neither the anti-corruption clause nor the contract explicitly address the breach of the anti-corruption clause, there are alternatives to secure the termination rights of the aggrieved party. For contracts governed by English laws, the *English doctrine of material breach* is relevant as a recourse. According to this doctrine, in cases of breach, "the other party cannot cancel the contract unless the breach is material."[1140] When a material breach occurs, the innocent party is generally relieved from their contractual obligations and has the right to terminate the contract and seek compensation for any resultant losses. While corruption may not be explicitly identified as

[1140] Ian Ayres & Gregory Klass, *Studies in Contract Law - Casebook Plus*. Eighth ed, (St. Paul: Foundation Press, 2016) at 935.

grounds for material breach under this doctrine, its ramifications, which substantially undermine the contract, can be considered a potential trigger for such a breach.[1141]

For contracts governed by US contract law, the Uniform Commercial Code (UCC), adopted by all 50 states, can be relevant. UCC Article 2, dealing with the sale of goods, establishes the *perfect tender rule*, which allows buyers to expect strict performance and reject defective deliveries.[1142] Furthermore, Section 2-612 permits buyers to reject an installment "if the non-conformity substantially impairs the value of that installment."[1143] Corruption in contracts, such as bribery influencing supplier selection or compromising material quality, can result in non-conformity and diminish the value of installments. In such cases, Section 2-612 provides grounds for the buyer to reject the delivery or installment, potentially leading to contract termination if the non-conformity persists. Furthermore, Section 2-609 requires each party to ensure the other's expectation of due performance "will not be impaired."[1144] If there are "reasonable grounds for insecurity with respect to the performance of either party," the other party can demand "adequate assurance of performance" and suspend performance until such assurance is provided.[1145] Failure to provide adequate assurance within 30 days constitutes "a repudiation of the contract."[1146] In this context, violation of the anti-corruption clause could be interpreted as "substantial impairment" to the contract's purpose, and if the other party cannot provide adequate assurance of performance, it can be grounds for termination.[1147] In addition to the perfect tender rule and substantial impairment,

[1141] For further discussion on the doctrine of material breach, see Steven J Burton & Eric G Andersen "The World of a Contract" (1989) 75: 4 Iowa L Rev 861.
[1142] *Uniform Commercial Code* § 2 (1995).
[1143] *Ibid*, § 2-612 (1995).
[1144] *Ibid*, § 2-609 (1995).
[1145] *Ibid*.
[1146] *Ibid*.
[1147] For further discussion on the perfect tender rule, see Jeffrey M Dressler, "Good Faith Rejection of Goods in a Falling Market" (2009) 42:2 Conn L Rev 611.

principles such as "illegality," "public policy," and "the doctrine of unclean hands" are also relevant in cases where bribery or the potential violations of fiduciary duty taint a contract.[1148]

At the international level, the UN Convention on Contracts for the International Sale of Goods (CISG) may be relevant for terminating contracts tainted by corruption. Article 25 of CISG introduces the concept of a *fundamental breach*:

> A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.[1149]

Article 49 further allows the buyer to declare the contract avoided if the seller's failure to perform any obligations amounts to a fundamental breach.[1150] In this context, corruption can be considered a "substantial detriment," thereby enabling the innocent party to declare the contract avoided under these provisions.[1151]

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Thus far, this chapter has introduced different anti-corruption clauses identified in the examined petroleum contracts and explored the available remedies and sanctions for their violation. The next

[1148] For further details on the application of these principles, see Padideh Ala'I, "The United States' multidimensional approach to combatting corruption" in Michael Joachim Bonell & Olaf Meyer, eds, *The impact of corruption on international commercial contracts* (New York: Springer, 2015) 411 at 432–24.
[1149] *United Nations Convention on Contracts for the International Sale of Goods*, reprinted in 19 I.L.M. 668 (1980) art 25.
[1150] *Ibid*, art 49.
[1151] Further research is required to determine whether the breach of anti-corruption clauses qualifies as a "material breach" under English Law, a "substantial impairment" according to the UCC, or a "fundamental breach" under the CISG, as such analysis falls outside the scope of this dissertation's inquiry. In this regard, Michael Joachim Bonell & Olaf Meyer compile different national reports on the enforceability of contracts affected by corruption based on domestic laws; see Michael Joachim Bonell & Olaf Meyer, eds, *The impact of corruption on international commercial contracts* (New York: Springer, 2015).

section shifts focus to the prevalence and trends of these clauses in the studied contracts to providee a better understanding of their real-world usage.

2. Current Status of Anti-Corruption Clauses in Actual Petroleum Contracts

A comprehensive understanding of anti-corruption clauses and their impact requires an in-depth analysis of their prevalence, trends over time, and geographical distribution. This section employs a quantitative approach to examine anti-corruption clauses within publicly available transnational petroleum contracts. By analyzing 1,164 contracts and building on the taxonomy described in the previous section, the study investigates the presence and the overall patterns of these clauses. In addition to assessing the number and concentration of these clauses based on commitment types, this section also showcases their distribution across countries, time periods, different types of petroleum contracts, and their targeting of corruption risks within the sector. The subsequent chapter then provides a qualitative analysis, drawing on findings from 27 interviews with industry stakeholders to evaluate the effectiveness of these clauses in achieving their intended goals and addressing corruption risks.

Starting with general data on the types and locations of the analyzed petroleum contracts, the section offers detailed information about both the direct and indirect clauses identified in the examined contracts, along with their respective subcategories. The section concludes by examining the prescribed sanctions and remedies for breaches of these clauses within the reviewed contracts.

A. The Type and Location of Studied Petroleum Contracts

As discussed earlier, petroleum contracts are legal agreements that govern the exploration and production of oil and gas resources. Transnational petroleum contracts involve companies from

different countries, including both NOCs and TNOCs. The exact number of existing transnational petroleum contracts is not available, partly due to confidentiality clauses that prevent parties from disclosing terms and conditions. The diversity of contracts examined in this study is reflected in Table 9. As evident from this table, the majority of the studied contracts were PSAs, reflecting their prevalent use in real-world practices.[1152]

Types of Contract	Number
Production Sharing Agreements	509
Concession Agreements	254
License Contracts	241
Service Contracts	100
Joint Venture Agreements	48
Other Contracts[1153]	12

Table 8 – Types of Studied Petroleum Contracts

Table 1 in Chapter One provides detailed information about the number of contracts reviewed based on their geographical locations. Here, Figure 9 and Figure 10 offer visual representations of the data presented in Table 1 and depict the global distribution of the contracts under study. Figure 9 displays the distribution of contracts according to host states, whereas Figure 10 shows the distribution of contracts by home states.

[1152] See e.g. Peter D Cameron, *International Energy Investment Law: The Pursuit of Stability* (Oxford: University Press, 2015) (stating that the "PSA is the most common form of agreement between host states and oil companies in the international petroleum industry" at 37).
[1153] The other contracts include five sales agreements, three farm-out agreements, three participation agreements, and one reconnaissance contract.

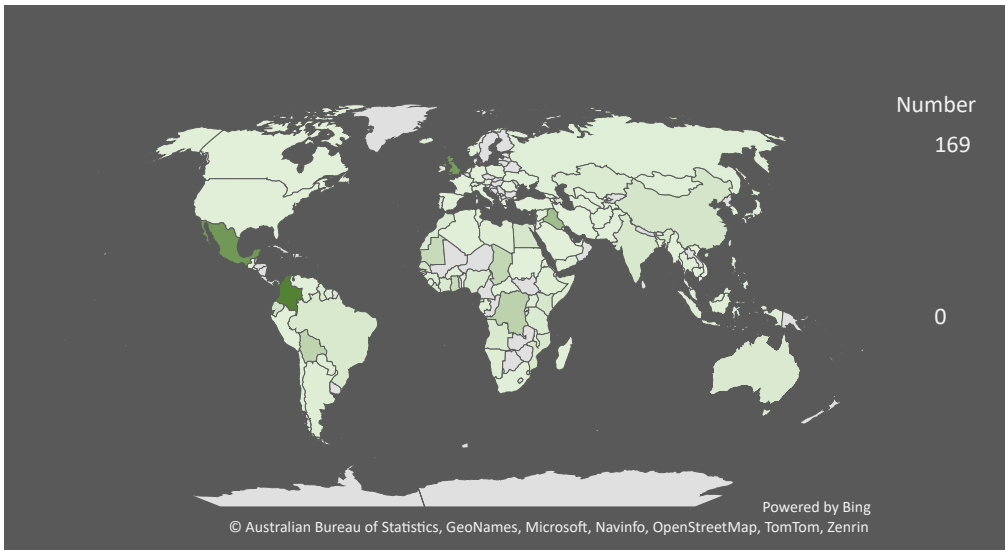

Figure 9 – Geographical Distribution of Studied Petroleum Contracts according to the Host States

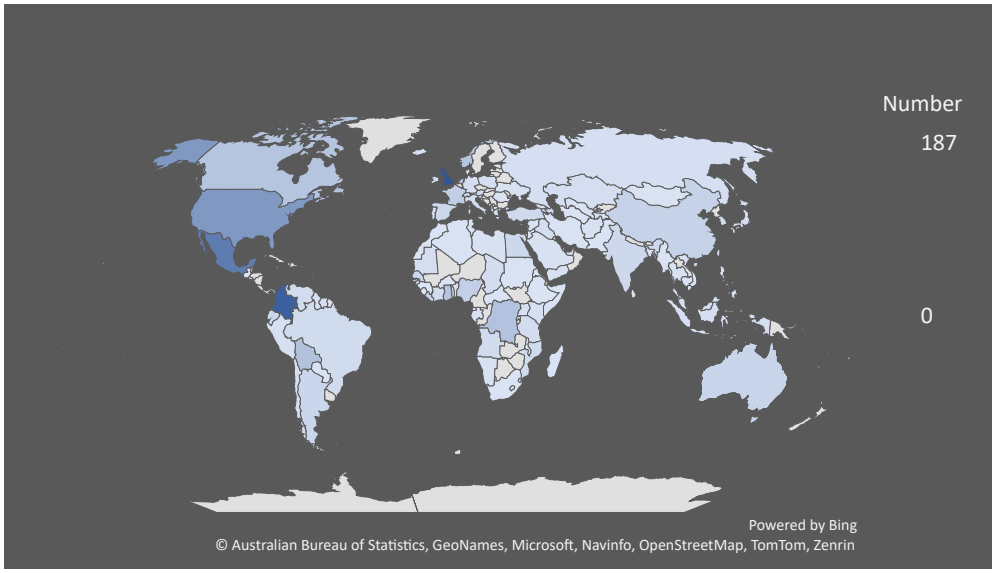

Figure 10 – Geographical Distribution of Studied Petroleum Contracts according to the Home States

The data presented in these figures reveals that petroleum contracts pertaining to Columbia, Mexico, and the UK outnumber those of other countries, with these countries serving as both home and host states. This trend is consistent with information available on the EITI website and reports. Columbia, a country abundant in oil and gas reserves, has been rated as "High/Satisfactory" for

EITI compliance, including contract disclosure.[1154] Moreover, the EITI Guidance Note cited Mexico, another oil-rich nation, as an exemplary country that has successfully fulfilled the final step of the contract disclosure requirement.[1155] Finally, the UK, recognized as "a prime mover behind the establishment of the EITI,"[1156] has consistently upheld its standards. Moreover, Figure 10 highlights a significant number of contracts associated with the USA, primarily as a home state. Despite the USA's withdrawal from EITI in 2017 under President Trump's administration,[1157] this high number suggests the substantial involvement of US private sector companies in global petroleum activities.

Regrettably, these figures reveal a low number of published contracts for certain countries that are recognized for their efforts to promote transparency in the petroleum sector. For example, Norway, an EITI member and global leader in improving transparency in the petroleum sector, has yet to fulfill the contract disclosure requirement. Moreover, Canada, a supporting member of the EITI, is renowned for its transparency efforts in the extractive sector.[1158] In particular, responding to international commitments to increase transparency and deter corruption in the extractive sector under the EITI, Canada enacted the Extractive Sector Transparency Measures Act (ESTMA), which came into effect on 1 June 2015.[1159] This legislation requires that companies operating in Canada or listed on a Canadian stock exchange to disclose payments to governments in Canada and abroad. However, Canada falls short of its obligation to disclose petroleum contracts as required by the EITI.

[1154] EITI, "Countries", *supra* note 493.
[1155] EITI, "Guidance Note: Contracts, EITI Requirement 2.4" (May 2021), online: *EITI* <eiti.org/guidance-notes/contracts>.
[1156] EITI, "United Kingdom" (last visited 9 August 2024), online: *EITI* <eiti.org/countries/united-kingdom>.
[1157] EITI, "United States of America" (last visited 9 August 2024), online: *EITI* <eiti.org/countries/united-states-america>.
[1158] EITI, "Canada" (last visited 9 August 2024), online: *EITI* <eiti.org/supporters/canada>.
[1159] *Extractive Sector Transparency Measures Act*, S.C. 2014, c 39, s 376.

During discussions about Canada's stance on this issue, interviewee Mu argued against the necessity of disclosing the fine print of contracts, citing the transparency mechanisms provided by ESTMA within the Canadian petroleum industry.[1160] They noted that in Canada, most companies are publicly traded, which inherently ensures transparency through their audited financial statements.[1161] Mu emphasized that ESTMA guarantees transparency on royalties and taxes, which are often undisclosed in other countries, and highlighted the availability of clear information on provincial websites regarding royalty rates and corporate taxes.[1162] Similarly, interviewee Lambda underscored that contract contents are subject to ESTMA, allowing the government to scrutinize them from a compliance perspective.[1163] However, Lambda also noted challenges in expanding transparency to include detailed contract information. They observed that "a lot of times these contracts do have provisions that they [are] not supposed to be shared as well."[1164] Lambda further referred to additional factors contributing to Canada's reluctance to mandate the disclosure of petroleum contracts. Firstly, they noted insufficient international discourse on increasing transparency in contracts.[1165] In their view, if Canada were to independently demand additional information, it might create an "imbalance in administrative burden" on its industry compared to others, potentially resulting in a competitive disadvantage.[1166] They warned that companies could decide to relocate operations, asserting, "you guys are asking too much."[1167] Secondly, Lambda emphasized the extensive consultation required from various stakeholders for legislative changes.[1168] They noted that "while civil society would love more contracts to be made public, the

[1160] *Ibid*.
[1161] Mu, *supra* note 734 at 2.
[1162] *Ibid* at 3.
[1163] Lambda, *supra* note 735 at 2.
[1164] *Ibid*.
[1165] *Ibid*.
[1166] *Ibid*.
[1167] *Ibid*.
[1168] *Ibid*.

parties that are part of these contracts might not want information for various reasons."[1169] They explained that such resistance is due to the sheer volume of contracts held by some big companies.[1170] Lambda concluded that achieving widespread contract disclosure would be challenging without an international push where all parties collectively agree that "we [are] going to ask for contracts for all of us, and we [are] all going to implement it."[1171]

Despite these challenges, the participation of countries like the USA, Norway, and Canada in the contract transparency initiative could significantly influence the practices of other countries. By voluntarily disclosing their petroleum contracts, these countries can set a powerful precedent and establish contract disclosure as a best practice in the petroleum industry.

B. The Frequency of Direct Anti-Corruption Clauses in the Studied Petroleum Contracts

Figure 11 summarizes the number of identified direct clauses in the 1,164 transnational petroleum contracts analyzed in this study, along with their different subcategories.

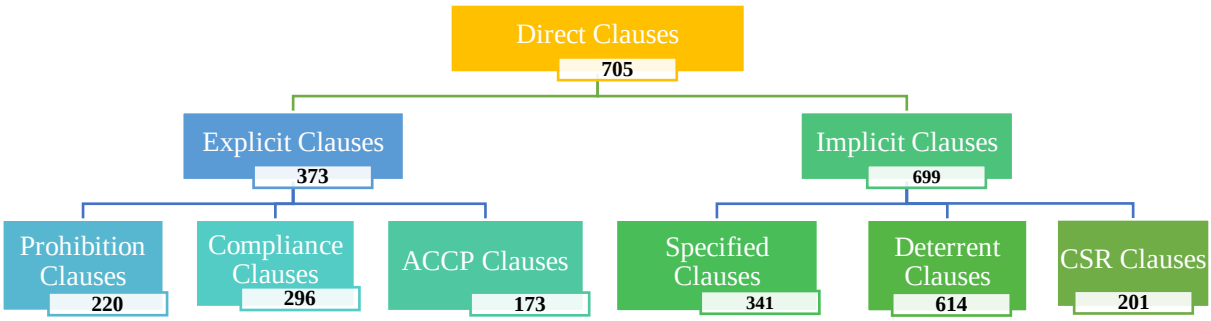

Figure 11 – Identified Direct Anti-Corruption Clauses in Studied Petroleum Contracts

[1169] *Ibid.*
[1170] *Ibid.*
[1171] *Ibid.*

As depicted in this figure, out of the 1,164 contracts, 705 included at least one direct anti-corruption clause. This number represents three-fifths of all contracts studied, as illustrated in Figure 12.

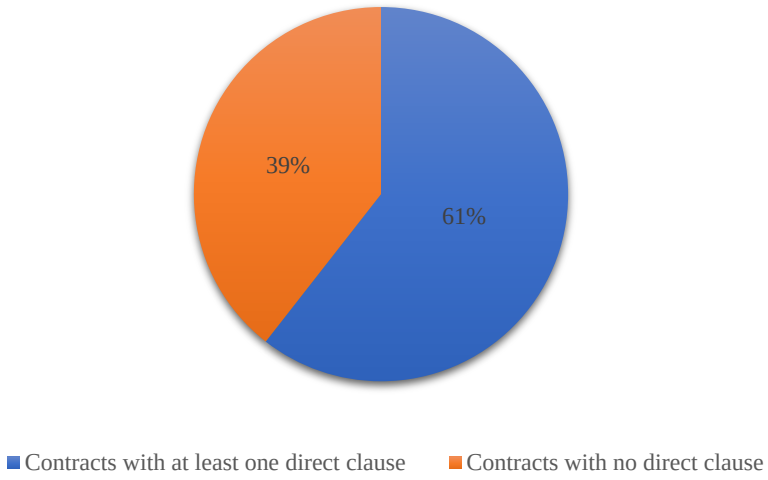

Figure 12 – Studied Petroleum Contracts with and without Direct Anti-Corruption Clauses

Out of these 705 contracts with direct clauses, each contained one or more relevant clauses, whether explicit, implicit, or both. Specifically, 699 contracts included at least one implicit direct clause, and 373 contracts featured at least one explicit clause. Notably, 367 contracts contained both at least one implicit and one explicit direct anti-corruption clause. The percentages for the different types of direct anti-corruption clauses identified in the contracts are illustrated in Figure 13.

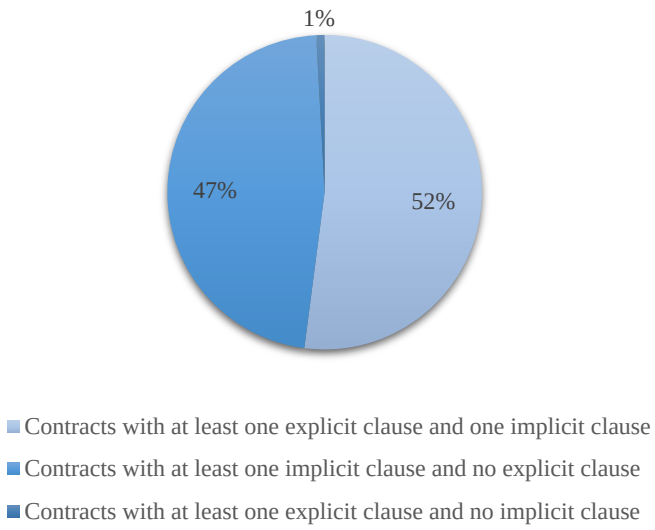

Figure 13 – Identified Direct Anti-Corruption Clauses in Studied Petroleum Contracts and Their Types

While this figure shows that a large number of contracts with direct clauses included only implicit provisions, it also suggests that more than half of the contracts with identified direct anti-corruption clauses contained both explicit and implicit clauses. In addition, a small number of contracts featured explicit clauses without any implicit ones. These findings imply that, in most cases, contracts with explicit direct clauses also incorporated implicit direct clauses to mitigate corruption risks. The following will further explore the different categories of explicit and implicit clauses identified in the petroleum contracts, as well as their trends and patterns.

i. Explicit anti-corruption clauses

Among the 705 contracts identified with direct anti-corruption clauses, 373 contracts incorporated one or more clauses explicitly mentioning (anti-)corruption or (anti-)bribery in their wordings. This number indicates that just over half of the contracts with direct anti-corruption clauses contained specific anti-corruption language. Of the 373 explicit anti-corruption clauses, 220 clauses were Prohibition Clauses (195 with a general ban on corruption and 25 with a ban on bribery). In addition, 296 clauses required parties to comply with at least one anti-corruption or

anti-bribery law, i.e., Compliance Clauses, and 173 clauses mandated the creation or adoption additional measures to strengthen anti-corruption commitments, (ACCP Clauses). Figure 14 illustrates the distribution of these 373 contracts according to the types of explicit anti-corruption clauses.

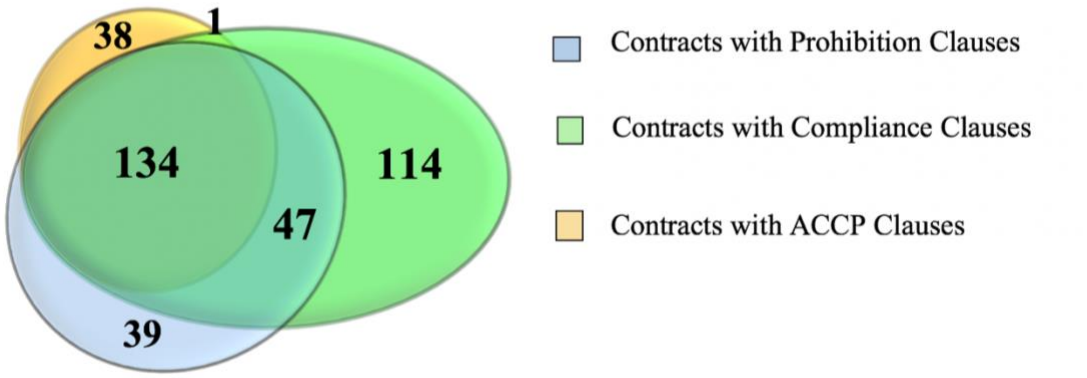

Figure 14 – Studied Petroleum Contracts with Different Types of Explicit Anti-Corruption Clauses

This figure suggests that Compliance Clauses were the most commonly incorporated type of explicit direct anti-corruption clauses. Another significant observation is that explicit anti-corruption clauses generally addressed prohibition, compliance, and adoption simultaneously. This indicates that contract parties usually employed a multifaceted approach to prevent corruption and incorporated measures not only to prohibit corruption but also to encourage compliance with relevant laws and regulations.

Another important aspect worth considering is to examine the different types of anti-corruption laws referenced in the Compliance Clauses. Figure 15 illustrates the distribution of explicit anti-corruption clauses requiring compliance, categorized by types of anti-corruption laws.

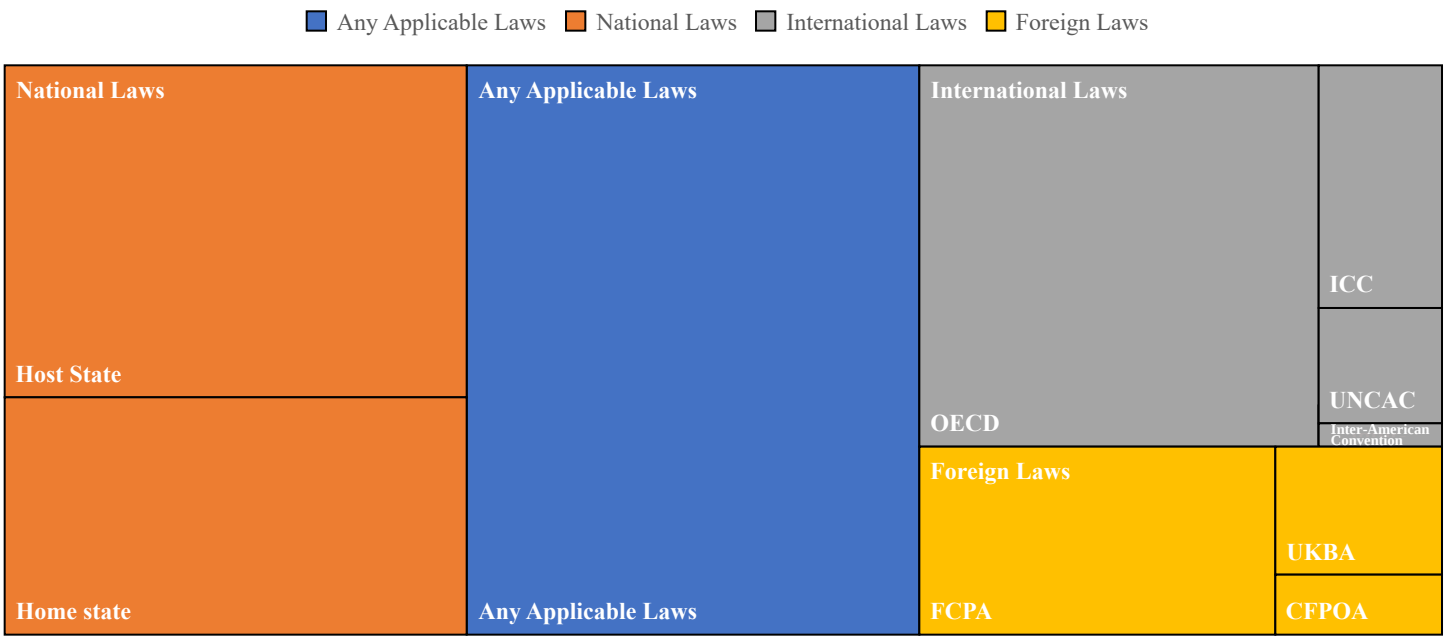

Figure 15 – Studied Petroleum Contracts with Explicit Anti-Corruption Clauses Requiring to Comply with Anti-Corruption Laws

Out of the 296 contracts that required parties to comply with anti-corruption laws, 108 contracts specified adherence to the host state's domestic anti-corruption laws, while 77 contracts mandated compliance with the home state's domestic anti-corruption laws. In addition, 181 contracts adopted a rigorous approach and required compliance with all applicable anti-corruption laws relevant to the contract. Regarding international anti-corruption laws, 107 contracts referenced the OECD Convention, 21 contracts referred to the ICC Rules, ten contracts referred to the UNCAC, and two contracts cited the Inter-American Convention. Moreover, certain contracts made references to national laws other than those of the home state or host state of the contracting parties: 47 contracts mentioned the FCPA, 15 contracts referred to the UKBA, and seven contracts cited the CFPOA.

ii. Implicit anti-corruption clauses

Among the 705 contracts identified with direct anti-corruption clauses, 699 included one or more types of implicit anti-corruption clauses. Among them, 341 contracts described corruption or referenced it in some form, i.e., Specified Clauses: 219 contracts described corruption or bribery,

174 referenced conflicts of interest, and 168 imposed a ban on fraudulent acts. In addition, 614 contracts included measures with deterrent effects on corrupt behavior, i.e., Deterrent Clauses: 297 contracts prohibited improper payments, such as donations, gifts, and similar payments in the course of conducting business; 236 contracts allowed termination for false statements, and 69 contracts required transparency measures. Lastly, 201 contracts required the adoption of corporate social responsibility or ethical standards, i.e., CSR Clauses. Figure 16 presents a summary of these number.

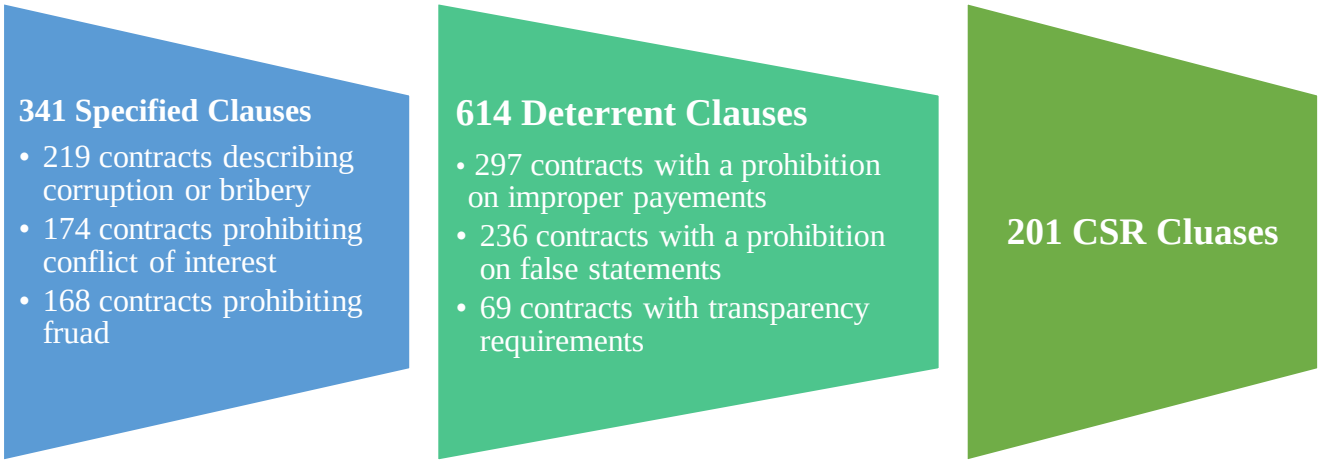

Figure 16 – *Identified contracts with Implicit Direct Anti-Corruption Clauses*

iii. Key trends in incorporation of direct anti-corruption clauses

Understanding direct anti-corruption clauses further requires an exploration of additional factors influencing their incorporation into contracts. Depending on the contract types, parties may adopt different practices when integrating such clauses into their contractual terms. In addition, geographic concentration is important consideration, as different regions may include distinct anti-corruption commitments in their contracts. It is also important to compare the types of corruption specified in these clauses with those identified in the Chapter Two, as cited in international conventions and described as the most prevalent types of corruption in the petroleum sector, to

assess whether they align with transnational anti-corruption regime and meet the specific needs of the sector. Finally, examining the timing of contracts helps identify any trends or shifts in the overall application of these clauses over time.

Direct anti-corruption clauses in different petroleum contracts

The frequency of identified direct anti-corruption clauses varied among the petroleum contracts. Table 10 provides a visual representation of the percentage of direct clauses incorporated in the different types of contracts being analyzed.

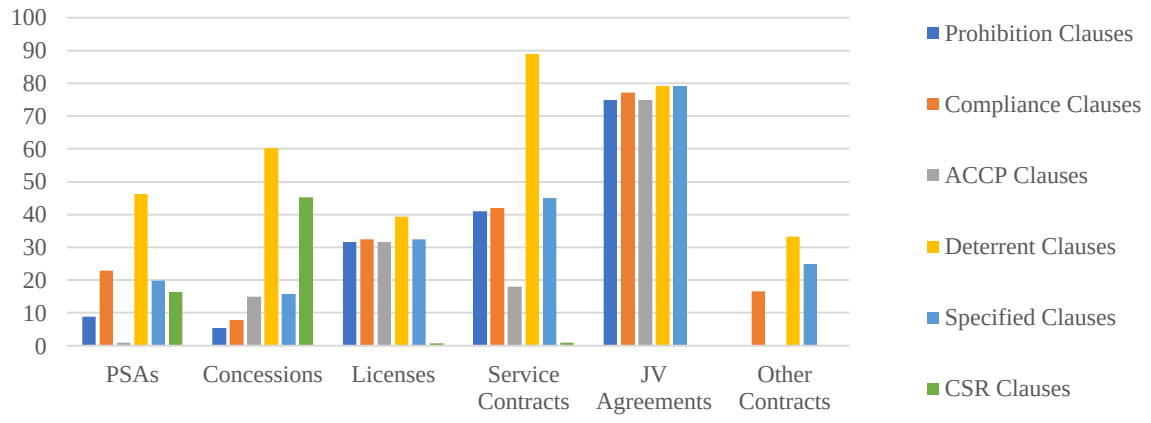

Table 9 – Incorporation Percentage of Direct Anti-Corruption Clauses in Different Types of Studied Petroleum Contracts

As shown in Table 10, notable differences exist in how direct anti-corruption clauses are incorporated into different petroleum contracts. JV agreements particularly stand out, with a higher frequency of incorporating all types of direct clauses, except for CSR Clauses. This suggests that parties perceive a heightened risk of corruption in these agreements, prompting them to include more anti-corruption commitments to mitigate such concerns. Moreover, licenses and JV agreements demonstrated a consistent approach and included different types of direct anti-corruption clauses, whether explicit or implicit, to a similar extent. In contrast, PSAs exhibited a less cohesive approach, with a higher frequency of Deterrent Clauses compared to other types.

These observations indicate that parties may perceive varying levels of corruption risk or prioritize different anti-corruption measures depending on the agreement type. The table also reveals that, among implicit clauses, CSR Clauses are more prevalent in concessions, while Deterrent Clauses were more commonly found in service contracts. This reaffirms that different types of petroleum contracts employ distinct approaches to addressing corruption risks through explicit and implicit clauses.

Geographical distribution of direct anti-corruption clauses

Table 11 presents the distribution of examined petroleum contracts that incorporate direct anti-corruption clauses, while categorizing them based on the location of the involved parties—designated as the host state, home state, or both. The table further provides numerical data corresponding to the types of direct clauses included in these contracts. To better understanding the data presented in this table, Figure 17 illustrates the percentage of direct clause incorporation in the total number of contracts associated with each country, whether acting as a host state, home state, or both.

Country	Contracts		Explicit Clauses			Implicit Clauses		
	Total Number	*Direct Clauses*	*Prohibition Clauses*	*Compliance Clauses*	*ACCP Clauses*	*Deterrent Clauses*	*Specified Clauses*	*CSR Clauses*
Afghanistan	11	11	0	2	0	2	0	1
Albania	16	8	0	0	0	4	0	0
Algeria	1	0	0	0	0	0	0	0
Angola	11	10	0	0	0	10	0	0
Anguilla	13	13	0	12	0	13	12	12
Argentina	17	12	1	1	10	12	0	9
Australia	17	9	0	0	0	9	0	1
Austria	13	12	0	12	0	12	12	11
Azerbaijan	14	14	4	4	4	14	0	4
Bahamas	33	25	5	5	2	23	5	5
Bangladesh	1	0	0	0	0	0	0	0
Barbados	23	23	2	4	1	14	4	15
Belize	20	5	0	0	0	3	0	0
Benin	2	0	0	0	0	0	0	0
Bermuda	67	41	4	16	4	5	13	36
Bolivia	44	43	0	2	0	43	43	0
Brazil	11	3	0	0	1	2	0	2
British Virgin Islands	61	36	6	15	1	35	17	11
Brunei	1	1	0	1	0	1	1	0
Burkina Faso	1	0	0	0	0	0	0	0
Cambodia	1	0	0	0	0	0	0	0
Cameron	5	1	0	0	0	1	1	0
Canada	40	26	1	0	0	18	1	8
Cayman Islands	156	111	18	27	8	51	5	41
Central African Republic	1	0	0	0	0	0	0	0
Chad	42	11	0	0	0	6	0	0
Chile	5	3	3	3	3	3	0	0
China	24	7	3	3	3	6	0	0
Colombia	169	164	2	2	40	101	20	113
Congo	46	4	4	6	0	4	0	0
Cote D'Ivoire	9	0	0	0	0	0	0	0
Cyprus	18	14	0	14	0	14	11	8
Ecuador	20	19	0	0	0	0	0	0
Egypt	16	16	1	1	0	15	0	0
Equatorial Guinea	35	22	0	0	0	6	6	0
Eritrea	1	0	0	0	0	0	0	0
Ethiopia	4	0	0	0	0	0	0	0
France	27	23	0	4	8	23	8	8
Gabon	6	0	0	0	0	0	0	0
Gambia	2	2	0	0	0	0	0	0
Georgia	4	0	0	0	0	0	0	0
Germany	6	4	0	0	0	2	2	2
Ghana	31	31	13	19	0	30	19	0
Gibraltar	1	1	0	0	0	1	0	0
Greece	4	4	0	0	0	4	0	0
Guatemala	1	1	0	0	0	1	0	0
Guernsey	1	0	0	0	0	0	0	0
Guinea	4	0	0	0	0	0	0	0
Guyana	10	9	0	0	0	4	0	0
Hong Kong	4	1	0	0	0	1	0	0
Iceland	3	0	0	0	0	0	0	0
India	17	17	2	2	3	14	0	3
Indonesia	5	0	0	0	0	0	0	0
Iran	1	1	0	0	0	1	0	0
Iraq	79	77	0	7	0	3	3	7
Ireland	9	2	0	0	0	2	0	0
Isle of Man	20	14	0	3	1	11	12	1
Italy	8	8	1	6	0	8	5	0
Japan	6	4	2	2	2	3	0	2
Jersey	16	9	1	4	1	9	4	0
Jordan	1	1	0	0	0	0	0	0
Kazakhstan	8	1	0	0	0	1	0	0
Kenya	14	3	0	1	0	1	1	0
Lebanon	2	2	0	2	0	2	2	2
Liberia	17	10	0	2	0	1	1	2
Libya	3	0	0	0	0	0	0	0

Luxembourg	1	0	0	0	0	0	0	0
Madagascar	1	0	0	0	0	0	0	0
Malawi	3	3	0	0	0	0	0	0
Malaysia	7	2	0	1	0	1	0	1
Marshal Islands	1	1	0	0	0	1	0	0
Mauritania	32	0	0	0	0	0	0	0
Mauritius	2	2	2	1	0	2	0	0
Mexico	135	134	134	132	111	134	111	0
Mongolia	3	0	0	0	0	0	0	0
Morocco	9	1	0	0	0	0	0	0
Mozambique	13	13	11	10	10	11	1	0
Myanmar	1	1	0	0	0	1	0	0
Namibia	4	4	0	0	0	3	0	0
Netherlands	40	29	1	13	1	29	12	15
Nevis	1	1	0	1	0	1	1	1
Nigeria	26	12	4	0	0	10	2	2
Norway	39	19	4	12	4	17	7	11
Pakistan	1	0	0	0	0	0	0	0
Panama	23	20	6	6	6	17	1	2
Paraguay	4	1	0	1	0	1	1	0
Peru	4	4	0	0	0	4	0	0
Philippines	3	0	0	0	0	0	0	0
Poland	4	3	0	0	0	3	0	0
Portugal	9	0	0	0	0	0	0	0
Qatar	1	1	0	0	0	0	0	0
Romania	1	0	0	0	0	0	0	0
Russia	5	2	0	0	0	1	0	0
Sao Tome and Principe	21	17	5	0	0	5	5	0
Saudi Arabia	2	0	0	0	0	0	0	0
Senegal	16	2	0	2	0	2	2	0
Scotland	5	4	1	0	0	4	1	0
Seychelles	2	1	0	0	0	1	0	1
Sierra Leone	1	1	0	0	0	0	0	0
Singapore	6	6	3	4	0	6	2	0
Somalia	6	6	0	0	0	0	0	0
South Africa	1	0	0	0	0	0	0	0
South Korea	9	9	0	4	0	6	3	5
Spain	16	12	2	4	2	11	1	3
Sudan	1	0	0	0	0	0	0	0
Suriname	5	5	0	3	0	3	3	5
Switzerland	9	6	0	0	0	4	0	2
Syria	2	2	0	0	0	2	0	0
Taiwan	3	3	0	0	0	3	0	0
Tajikistan	1	0	0	0	0	0	0	0
Tanzania	8	7	1	1	1	7	2	0
Thailand	3	3	0	0	0	3	0	0
Timor-Leste	17	13	0	6	0	7	6	0
Trindade and Tobago	2	0	0	0	0	0	0	0
Tunisia	1	0	0	0	0	0	0	0
Turkey	11	10	7	10	2	7	5	10
Turkmenistan	1	1	0	0	0	0	0	0
Turks & Caicos Islands	2	2	0	0	0	2	0	0
Uganda	5	1	0	0	0	0	0	0
Ukraine	1	0	0	0	0	0	0	0
United Arab Emirates	8	8	0	7	0	8	7	7
United Kingdom	190	27	6	6	4	26	3	7
United States	98	41	4	7	7	32	2	11
Uzbekistan	1	0	0	0	0	0	0	0
Venezuela	9	9	0	0	0	6	0	3
Vietnam	1	0	0	0	0	0	0	0
Yemen	5	5	0	0	0	3	0	0

Table 10 – Geographical Distribution of Studied Petroleum Contracts with Direct Anti-Corruption Clauses

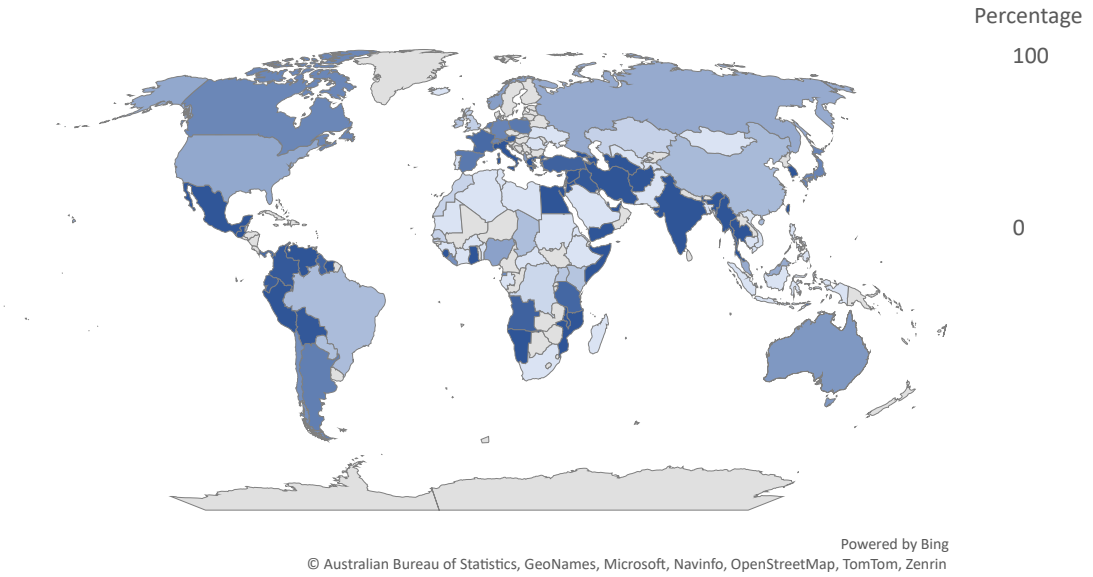

Figure 17 – Geographical Distribution of Transnational Petroleum Contracts with Direct Anti-Corruption Clauses

This figure shows the global distribution of direct anti-corruption clauses within the examined petroleum contracts. It is evident that the incorporation of these clauses varied significantly across different regions worldwide. For example, regions such as Latin America, Western Europe, the Middle East, India, and Southeast Asia demonstrated a higher prevalence of direct clauses in petroleum contracts. On the other hand, Central Asia generally showed lower usage of such clauses. Similarly, the use of these clauses in Africa tended to be relatively low, with some exceptions in Southern Africa. These discrepancies may be attributed to different cultural norms or different industry practices that govern the petroleum sector in different regions and countries.

Interestingly, despite countries such as the USA, UK, Canada, and Australia having stringent anti-corruption laws and regulations, their use of direct clauses in petroleum contracts was comparatively lower. In contrast, regions commonly associated with higher corruption risks, such as the Middle East and Latin America, demonstrated a more frequent use of these clauses. This observation suggests that companies operating in jurisdictions with well-established anti-

corruption legal frameworks may rely more on existing anti-corruption laws and enforcement mechanisms to address corruption risks, rather than directly stipulating them in contracts. Instead, companies operating in regions perceived to have higher corruption risks or with weaker enforcement of anti-corruption laws may prioritize the inclusion of anti-corruption clauses as part of their risk management strategy.

Direct anti-corruption clauses and the prevalent forms of corruption

Chapter Two explores the most prevalent forms of corruption in the petroleum sector, along with those cited in major international and transnational conventions and protocols. Now, it is important to assess whether the identified direct anti-corruption clauses examined in this chapter referenced these corrupt practices in their wordings. Table 12 provides an overview of the direct clauses with the inclusion of such corrupt practices.

Prohibited Act in the Direct Anti-Corruption Clause	Number of Identified Clauses	Cited in the International and Transnational Conventions
Corruption in general	193	Yes
Bribery	235	Yes
Embezzlement	0	Yes
Trading in influence[1172]	214	Yes
Abuse of functions[1173]	2	Yes
Illicit enrichment	0	Yes
Money laundering	5	Yes
Fraud	264	Yes
Conflict of interest	157	No
Favoritism	0	No

Table 11 – The Number of the Cited Types of Corruption in the Direct Anti-Corruption Clauses

[1172] The complete term "trading in influence" was found in only one anti-corruption clause. However, the number specified here indicates those clauses containing the term "influence."

[1173] No clause specified the full term "abuse of functions," but two clauses contained the term "abuse" in their wordings.

The numerical data provided in this table reveals a similarity between the approach taken by international and transnational conventions and that adopted by the studied petroleum contracts in addressing corrupt practices. While some contracts opt for a general prohibition of corruption, akin to certain international instruments, a large proportion bans bribery, equating it with corruption. However, the table also highlights a gap in the anti-corruption clauses, as certain prevalent forms of corruption in the sector such as embezzlement and favoritism are not referenced at all. It is possible that these clauses aim to cover a broader spectrum of corrupt practices under the general term "corruption." The subsequent chapter, within the discussion titled "Choosing the Right Words in Crafting Effective Language for Anti-Corruption Clauses," will explore this matter further by examining the viewpoints of interviewees regarding whether these clauses should exclusively prohibit corruption in broad terms or enumerate specific corrupt practices.

Evolution of direct anti-corruption clauses over time

Finally, it is important to examine the evolution of incorporating direct anti-corruption clauses since their inception. To this end, Figure 18 portrays the general trend of incorporating both explicit and implicit direct anti-corruption clauses over the last five decades, juxtaposed with the total number of contracts concluded each year, based on the contract conclusion date.

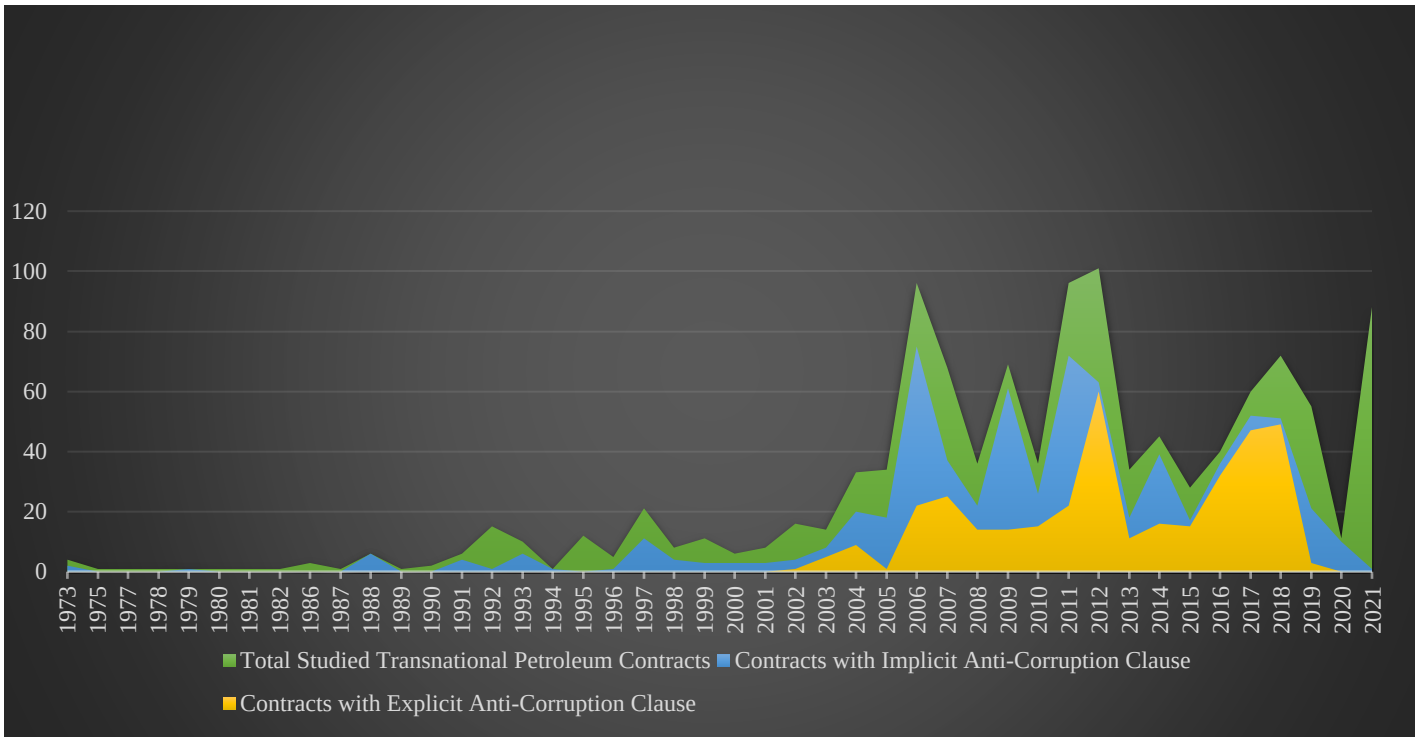

Figure 18 – Distribution of Identified Direct Anti-Corruption Clauses Over Time

This figure unveils a number of important patterns in the incorporation of direct anti-corruption clauses into petroleum contracts over time. As evident, some of the earliest published contracts, dating back to the 1970s, contained implicit clauses. This trend continued with minimal variation through the 1980s and 1990s. However, starting in the 2000s, more than half of all published contracts consistently included implicit clauses in their terms. Moreover, it was not until the 2000s that the first explicit clauses emerged. The increased use of implicit clauses and the introduction of explicit clauses during this decade can be attributed to the adoption of the UNCAC and other anti-corruption conventions in that period.

Another important aspect to consider when assessing the overall trend of incorporating explicit clauses in petroleum contracts is their correlation with the enforcement of the FCPA by the SEC and DOJ. Analysis of the data presented in Figure 19, which displays the DOJ and SEC

enforcement actions per year, reveals a clear parallel between the use of explicit clauses and the patterns in FCPA enforcement.

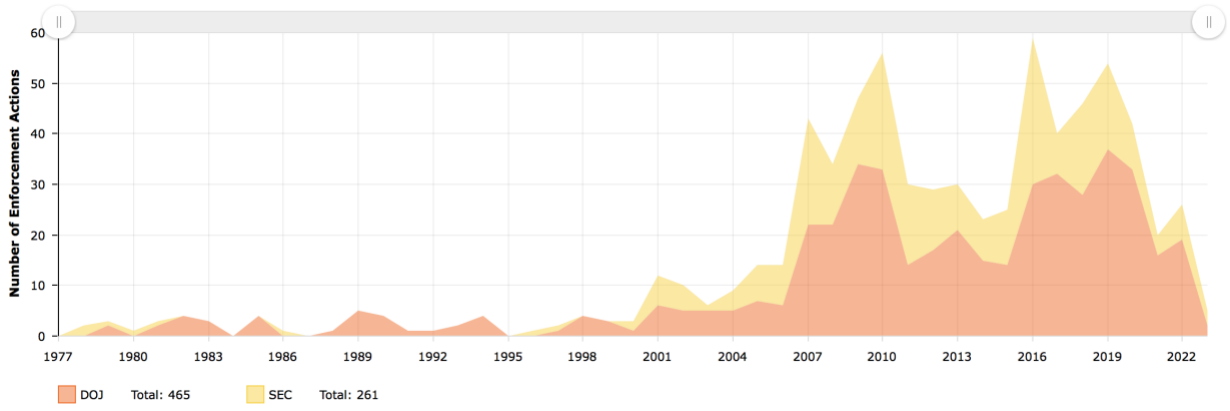

Figure 19 - DOJ and SEC Enforcement Actions per Year[1174]

In particular, during periods characterized by intensified FCPA enforcement, such as between 2006-2008 and 2015-2019, there was a simultaneous increase in the use of explicit clauses in contracts. This suggests that companies exhibited greater diligence in adopting anti-corruption measures during phases of stricter FCPA enforcement, which led to the incorporation of more explicit language in their anti-corruption clauses.

In addition, the substantial increase observed in the period after 2010 in the use of explicit clauses can also be attributed to the introduction and enforcement of the UKBA. The Act, which imposes strict liability on organizations that fail to prevent bribery of their associated persons, prompted more companies to incorporate explicit anti-corruption language into their contracts to implement adequate anti-corruption measures and secure complete defense against such liability. Moreover,

[1174] This figure is adopted from FCPA Clearinghouse, providing insight into the DOJ and SEC enforcement actions per year. See FCPA Clearinghouse, "DOJ and SEC Enforcement Actions per Year" (last visited 9 August 2024), online: *Stanford FCPA Clearinghouse* <fcpa.stanford.edu/statistics-analytics.html>.

the introduction of the ICC anti-corruption clause in 2012 may have also played an important role in the upsurge of explicit anti-corruption clauses during that period.

Lastly, the discrepancies in the data from 2019 onwards may be attributed to the fact that not all contracts have yet been published by the relevant countries or companies for this period. Furthermore, the recent increase in the number of published contracts without direct clauses is ascribed to the UK's release of a large number of its 2021 service contracts without such clauses.

Figure 20 further shows the temporal distribution of different types of direct clauses to capture their evolving patterns in contracts over time. Regarding implicit clauses, the earliest Deterrent Clause dates back to 1973,[1175] followed by the introduction of the first Specified Clause in 1997,[1176] and the inception of the first CSR Clause in 2002.[1177] Among explicit clauses, the first Compliance Clause was introduced in 2002,[1178] the first Prohibition Clause was included in 2003,[1179] and the first ACCP Clause emerged in 2009.[1180]

[1175] *Petroleum Agreement Between Government of Arab Republic of Egypt and Egyptian General Petroleum Corporation and Transworld Petroleum Corporation*, August 1973, art XIX(a)(1), online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-4530655807/view#/pdf>.
[1176] *Production Sharing Contract Between the Republic of Equatorial Guinea and Triton Equatorial Guinea, Inc. for Block F*, March 1997, art 18.1, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-7317531109/view#/pdf>.
[1177] *Model Development & Production Sharing Agreement Of 2002 Between The Government of Qatar and* Contractor, 2002, art 39.13, online: *ResourceContracts* <resourcecontracts.org/contract/ocds-591adf-6349675951/view#/pdf>.
[1178] *Ibid*.
[1179] *Songo Agreement*, *supra* note 1071, art 4.3(g).
[1180] *Jubilee Agreement*, *supra* note 1067, art 21.1 (C)–(F).

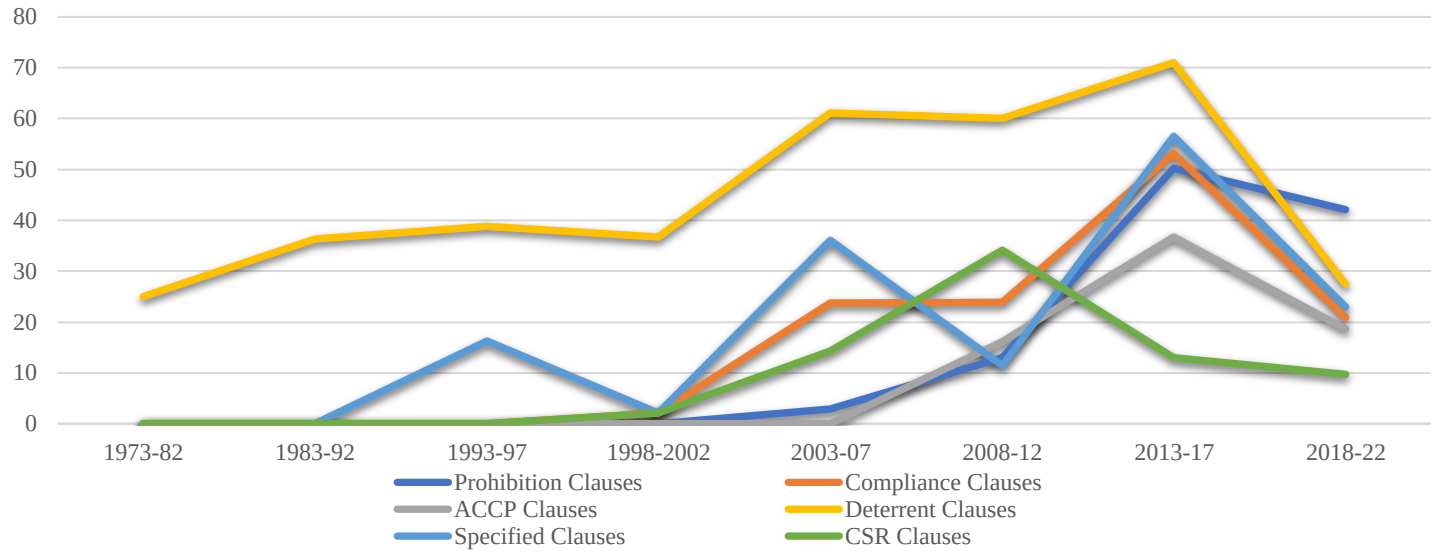

Figure 20 – Different Types of Direct Anti-Corruption Clauses Over Time as a Percentage of Total Contracts

Moreover, the figure reveals an upward trend in the utilization of most types of direct clauses in the contracts over time. Among the explicit clauses, Compliance Clauses were introduced earlier than Prohibition Clauses, which may suggest that companies initially viewed anti-corruption as a regulatory requirement rather than actively prohibiting corruption within their corporate culture. A similar trend is observed for ACCP Clauses: while earlier contracts mainly focused on mentioning (anti-)corruption in their wording, later contracts recognized the importance of implementing anti-corruption measures in practice to effectively mitigate corruption risks. Moreover, the delay in implementing CSR Clauses among implicit clauses may be attributed to their recognition and expansion in the 2000s.[1181] All these trends indicate a shift in anti-corruption clauses from solely relying on contractual language to adopting a more proactive approach in fighting corruption.

[1181] See e.g. Latapí Agudelo et al, "A literature review of the history and evolution of corporate social responsibility" (2019) 4.1 Intl J Corporate Soc Responsibility 1.

Overall, there has been a significant transformation in the development of direct anti-corruption clauses within petroleum contracts over the years. In the past, these clauses were often vague, limited in scope, and primarily focused on bribery of government officials while neglecting other forms of corruption. As time has progressed, more countries and companies have recognized the importance of incorporating anti-corruption clauses into their contracts. Contemporary anti-corruption clauses now cover a broad range of corrupt practices, such as conflicts of interest, fraud, and even facilitation payments. They also broaden their scope to cover corrupt practices by a wider range of individuals, including employees, contractors, and suppliers, beyond just government officials. The evolution of these clauses is marked by their increasing length, with a substantial rise in details and specifications. There has been also a shift from predominantly implicit to explicit clauses in newer contracts, where (anti-)corruption is clearly named and even defined. Over time, a diverse range of explicit and implicit clauses has become commonplace in petroleum contracts, moving away from reliance on a singular type of anti-corruption clause. Furthermore, there has been an increase in references to anti-corruption laws, including both national and international regulations.

C. The Frequency of Indirect Anti-Corruption Clauses in the Studied Petroleum Contracts

As detailed in the preceding section, apart from direct anti-corruption clauses, certain contractual terms can indirectly impose anti-corruption commitments on the parties involved, even if these clauses were not originally intended for anti-corruption purposes. Figure 21 shows the percentage of studied contracts with audit rights, while Figure 22 illustrates the percentage of contracts with assignment and sub-contractor clauses. Moreover, Figure 23 indicates the presence of personnel training clauses in these contracts, and Figure 24 portrays the percentage of contracts requiring compliance with specific territorial or provincial laws and regulations.

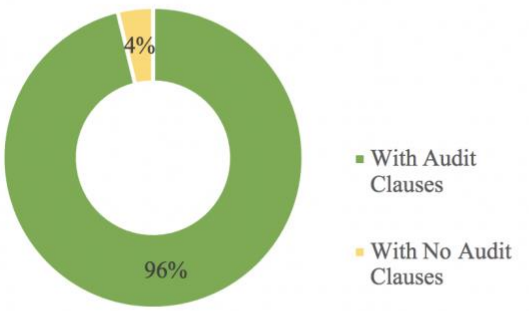

Figure 21 – Identified Audit Clauses in Studied Petroleum Contracts

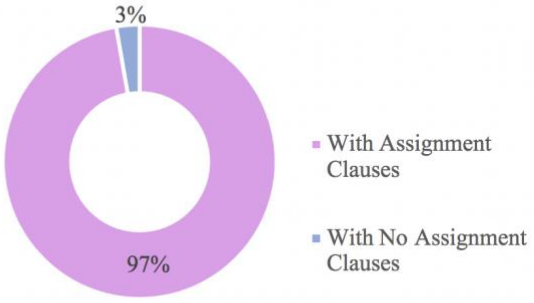

Figure 22 – Identified Assignment Clauses in Studied Petroleum Contracts

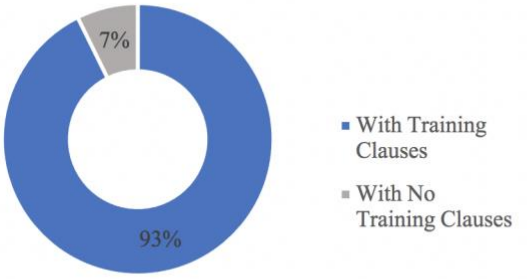

Figure 23 – Identified Training Clauses in Studied Petroleum Contracts

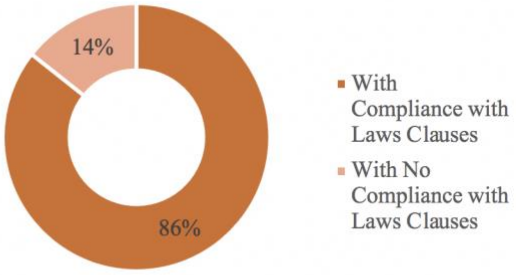

Figure 24 – Identified Compliance with Laws Clauses in Studied Petroleum Contracts

These figures suggest that most petroleum contracts included indirect terms, allowing parties to impose anti-corruption commitments even in the absence of direct anti-corruption clauses. Moreover, Figure 25 illustrates the specific types of laws and standards that parties were required to comply with under compliance clauses.

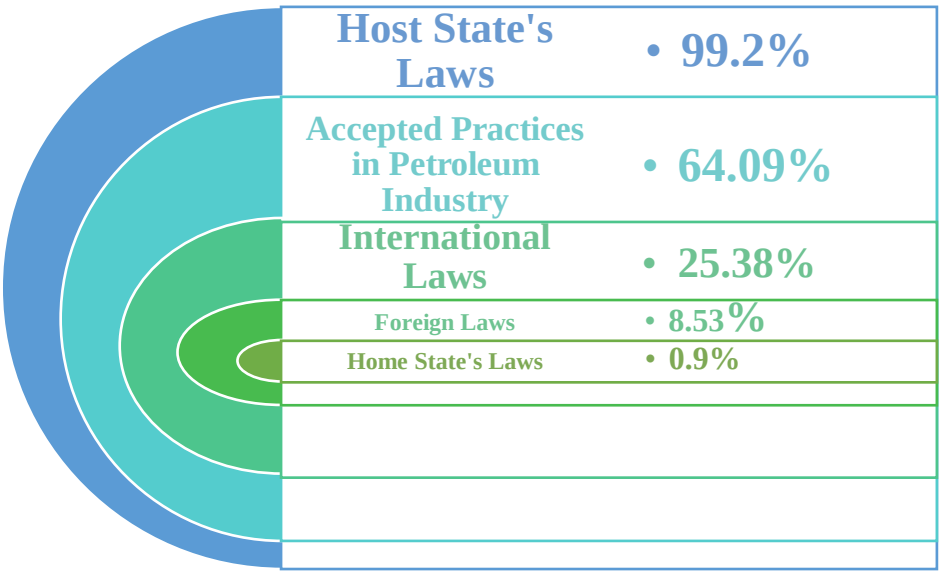

Figure 25 – Types of Laws in the Compliance with Laws Clauses

As previously explained, the laws and standards outlined in the compliance clauses are not explicitly related to anti-corruption. However, these laws and practices likely encompass anti-corruption rules. For example, in host state laws and regulations, which were the most frequently cited type in these clauses, parties are obligated to adhere to national anti-corruption laws, as most countries have such regulations in place. In addition, over half of the contracts mandated adherence to universally accepted practices in the international petroleum industry, which inherently include anti-corruption principles advocated by initiatives like the EITI. Moreover, about a quarter of the contracts required compliance with international laws, which may include anti-corruption commitments outlined in various anti-corruption conventions, such as the UNCAC, ratified by over 180 countries. Regarding foreign laws, the contracts referred to laws such as English law, laws of different US states, Canadian provincial laws, and Swedish laws.

Interestingly, the least frequently cited laws in these clauses were those of the home states. This suggests that companies may prioritize compliance with the laws and regulations of the host

country or region where the operations are based, as non-compliance with local regulations may lead to immediate and direct operational consequences affecting their day-to-day activities. For example, companies may perceive a greater risk of legal repercussions, such as reputational damage, operational disruptions, or confiscation, arising from non-compliance with local regulations issues compared to home state laws.

D. Violation of Contractual Anti-Corruption Clauses in the Studied Petroleum Contracts

The analysis of petroleum contracts reveals different approaches to addressing violations of anti-corruption clauses. Figure 26 illustrates these various approaches and demonstrates how contracts handled corruption violations.

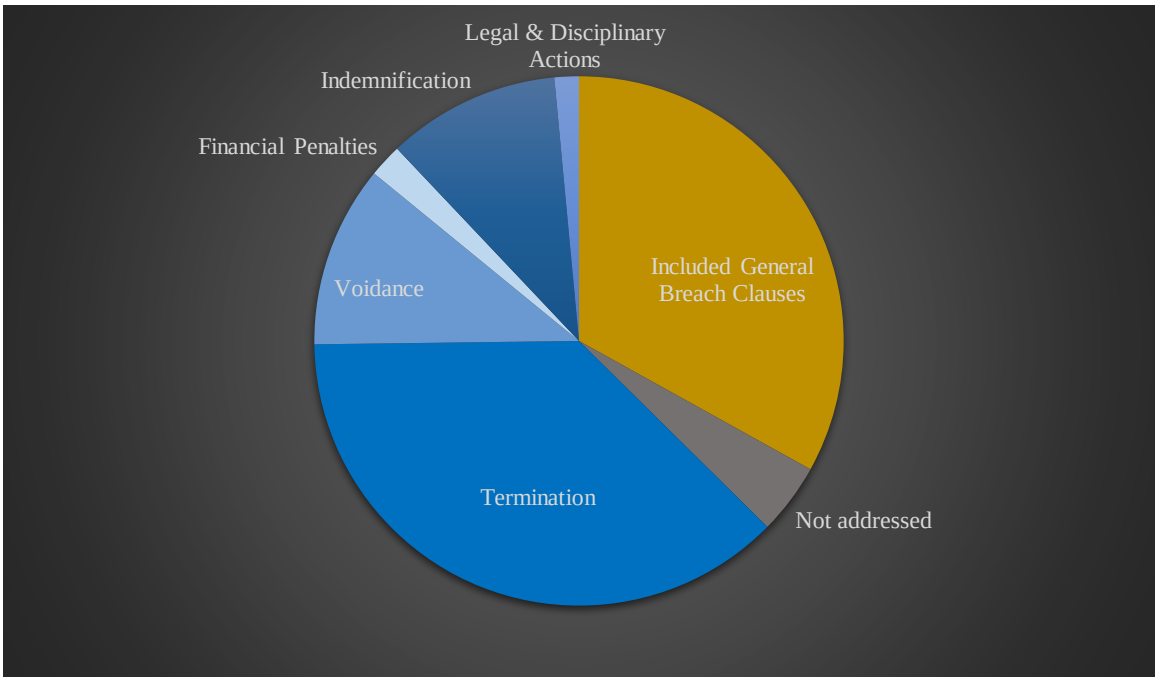

Figure 26 – Breach of Direct Anti-Corruption Clauses in Studied Petroleum Contracts

Out of the 705 contracts identified with direct anti-corruption clauses, 429 contracts addressed breaches within the clause, suggesting that around 60% of contracts took a proactive approach to deter and punish corrupt behavior. Among these contracts, the majority (276 contracts) granted the parties the right of termination in the event of a violation, which indicates that termination was

deemed as an effective solution to address corruption violations. However, it should be noted that 126 contracts with termination rights were less comprehensive and granted such a right only in cases of misrepresentation or fraudulent activity by the other party. In addition, 82 contracts stated that the contract would be void ab initio in the event of a corruption violation, further demonstrating the parties' strong stance against corruption. Moreover, some contracts sought additional protection against corruption-related losses: 78 contracts provided for indemnification rights, 15 contracts required legal and disciplinary sanctions, and 11 contracts imposed financial penalties.

It is concerning that about 40% of the contracts with anti-corruption clauses did not specifically address breaches within the clause. Nevertheless, 244 of these contracts did include general breach clauses that could be invoked if corrupt practices were deemed a material breach, allowing for contract termination or the imposition of sanctions. The absence of direct provisions addressing breaches within anti-corruption clauses might be attributed to considerations mentioned by some interviewees in the subsequent chapter. According to their insights, termination may not be perceived as the most suitable response in every instance of violation. This perspective is grounded in the understanding that contracts involve substantial financial implications, and parties may be reluctant to terminate an agreement that represents significant monetary investments. Thus, parties may prefer relying on general breach clauses that provide flexibility in responding to various types of violations, including those related to corruption, without mandating an immediate termination. However, 32 contracts lacked any general termination clause, which raises questions about the overall effectiveness of anti-corruption clauses and leaving parties to seek alternative avenues for termination, as discussed in the previous section.

3. Concluding Reflections on the Quantitative Analysis of Anti-Corruption Clauses: Advocating for Broader Industry Adoption

This chapter addresses the question at the heart of this study: the role of contractual anti-corruption clauses within the transnational anti-corruption regime. Among different instruments, anti-corruption clauses have emerged as a novel approach in international commercial agreements to fight corruption. Despite their significance, there has been a paucity of studies examining their role and influence. To fill this void, the chapter conducts a quantitative assessment of anti-corruption clauses within the petroleum industry—a sector notorious for widespread corruption. Section (1) introduces the different types of anti-corruption clauses present in petroleum contracts and categorizes them into two primary groups: direct anti-corruption clauses and indirect anti-corruption clauses. While direct anti-corruption clauses straightforwardly impose a commitment on parties to adhere to anti-corruption standards, indirect anti-corruption clauses serve as mechanisms for enforcing anti-corruption commitments in the absence of direct clauses. Furthermore, the chapter explores the sub-categories and characteristics associated with each type of these clauses. Following this taxonomy, Section (2) examines anti-corruption clauses found in 1,164 petroleum contracts and analyzes their overall pattern in terms of timelines, geographic locations, and developmental trends. The analysis reveals that while parties did indeed start incorporating these clauses into their contracts, there is a need for their more extensive adoption as a standard industry practice in the future. Moreover, the analysis shows that the existing clauses do not address all prevalent forms of corruption in the petroleum sector and advocates for their greater inclusivity in addressing corrupt practices.

The chapter also introduces a *standard clause* as a model that includes almost all types of anti-corruption clauses. This clause, included in Appendix VIII and referenced several times when

explaining different types of anti-corruption clauses, is borrowed from an actual petroleum contract, Jubilee Agreement. This comprehensive clause, spanning four lengthy pages, goes beyond standard definitions and prohibitions of corruption under national and international laws. It requires parties to provide warranties against corrupt practices and calls for additional measures to strengthen their anti-corruption commitments. These supplementary measures include implementing control and audit procedures on the actions of the parties, their affiliates, and subcontractors. Moreover, the clause also addresses conflicts of interest, with operators obliged to avoid situations where their interests conflict with those of other parties. Most importantly, all these requirements extend to subcontractors. Therefore, this *standard clause* includes nearly all the explicit and implicit clauses. This is why the study uses this clause to present it as a best practice for drafting an anti-corruption clause. It also serves as a useful guidance on the key elements that should be included in clause wordings, such as anti-corruption commitments, compliance with anti-corruption laws, addressing different types of corrupt practices, and supplementary measures. This standard example further demonstrates the adaptation of anti-corruption measures to the unique needs of petroleum sector in alignment with its legal requirements.

This study argues that anti-corruption clauses can induce normative alteration by gradually altering the practical modes of conducting business. However, their mere incorporation is not sufficient; companies must also fully enforce these clauses and integrate them into their anti-corruption compliance programs. As a segue, the next chapter will conduct a qualitative analysis of these anti-corruption clauses to explore how real-world experiences gauge their performance in everyday practice and enforcement.

Chapter 6 – Evidence into the Practice and Impact of Anti-Corruption Clauses

Do I dare
Disturb the universe?
In a minute there is time
For decisions and revisions which a minute will reverse.

T.S. Elliot,
The Love Song of J. Alfred Prufrock

I think [anti-corruption clauses] are effective, especially from multinational companies who are very, very powerful. They are powerful, not just with the contractors, but they are so powerful with host countries. And they're across all over the world. So, if they require this on their contractors or their staff, because of the leverage they have, they're able to enforce those clauses and also those policies on [anti-corruption].

Theta, Interviewee

The preceding chapter has introduced and presented a quantitative assessment of anti-corruption clauses identified in 1,164 petroleum contracts. In contrast, the purpose of this chapter is to integrate insights from interviews conducted with professionals working in and knowledgeable about anti-corruption clauses in the petroleum sector. It seeks to explore how real-world experiences measure the performance of anti-corruption provisions in everyday practice and enforcement. This chapter places its primary focus on the findings from the qualitative aspect of this study, which involves 27 interviews with individuals from 14 different countries who have in-depth knowledge of corruption and anti-corruption matters within the petroleum industry. Drawing from the interview findings, this chapter evaluates the capacity of anti-corruption clauses to achieve their intended goals and mitigate corruption risks in the petroleum sector.

The chapter opens with a summary of key findings derived from the interviews in Section (1). Subsequently, it conducts a qualitative analysis of anti-corruption clauses to explore different dimensions of these clauses, from their linguistic characteristics to their practical effectiveness. The primary objective is to compile and analyze responses from interviewees that offer insight into the core characteristics, prevailing trends, and the actual deterrent effectiveness of these clauses within the petroleum sector. Accordingly, Section (2) addresses the architecture of anti-corruption clauses and examines interviewees' observations and opinions on specific characteristics of anti-corruption clauses, such as the language employed, application of risk assessment, temporal coverage, range of sanctions and remedies available, as well as the presence of substitute clauses in the absence of direct anti-corruption clauses. The narrative then transitions to an exploration of the implementation of anti-corruption clauses in real-world scenarios. Section (3) discusses their reception within the petroleum sector, their practical utility, and their overall

impact, as well as the challenges faced by these clauses. Concluding the chapter, the study proposes recommendations based on the insights gathered throughout the chapter.

This qualitative effort complements and reinforces the preceding quantitative analysis, which has examined petroleum contracts to assess the prevalence of anti-corruption clauses and categorize their commitments. By exploring the nuanced perspectives provided by interviewees, this chapter deepens comprehension of the dynamics and real-world influence of anti-corruption clauses. The conclusion drawn is that these clauses have the capacity to shield business relationships from corruption, and if adopted as a standard practice in the petroleum sector, they can contribute to the establishment of an anti-corruption culture in the business environment. This empirical legal analysis, by revealing the actual practice of anti-corruption clauses, provides valuable insights to improve their effectiveness as deterrents.

1. Beneath the Surface of Anti-Corruption Clauses: Key Findings from Interviews

Emergence of anti-corruption clauses

- The interview data on the emergence of direct anti-corruption clauses in petroleum contracts aligns with the trend observed in the contract review in Chapter Five. Both sets of data show a significant increase after 2010, which can be attributed to factors such as increased FCPA enforcement post-2008, the introduction of the UKBA in 2010, and the emergence of ICC anti-corruption clause in 2012.

Language of anti-corruption clauses

- The interviewees demonstrated a diverse approach to the language of anti-corruption clauses. While some advocated for clauses solely prohibiting general corruption due to the

impracticality of listing all forms, the majority favored detailed specifications. These specifications included listing corrupt practices, providing definitions, and referencing anti-corruption laws—whether international standards, national laws, or applicable laws. In addition, certain interviewees supported a combined approach, which included a general prohibition of corruption alongside some specifications.

- The diversity of perspectives among interviewees regarding clause language was also reflected in the analysis of anti-corruption clauses within the contracts studied in the previous chapter, which exhibited a range of approaches.

Risk-based approach in choosing the language of anti-corruption clauses

- While two interviewees advocated for a standard clause applicable to all counterparties, the majority of interviewees reached a consensus that adopting a risk-based approach with different clauses for various parties is more effective in addressing corruption risks.
- Interviewees emphasized the customization of anti-corruption clauses based on different risk factors, including parties' history of corruption, location or jurisdiction of parties, types of clients, and the size and complexity of contracts.

Time coverage of anti-corruption clauses

- Interviewees expressed different perspectives on the interpretation of the timeframes of anti-corruption clauses. Two interviewees advocated for a restricted application of anti-corruption commitments limited to the contract's duration. While the majority believed that these commitments extend into the post-contract period, there was less consensus regarding the governance of such clauses before the initiation of the contract.

- Most interviewees argued against extending these clauses to the period before the contract's inception. Among them, some reasoned that pre-contract anti-corruption commitments are usually addressed during pre-relationship due diligence procedures.

Appropriate sanctions and remedies for violations of anti-corruption clauses

- Interviewees held varying perspectives on the appropriate courses of action when one party discovers a violation of anti-corruption clauses by the other party. Seventeen interviewees advocated for termination. Among them, ten favored absolute and immediate termination, while seven preferred a conditional termination.
- In addition to termination, interviewees suggested several supplementary measures for responding to violations. These included communication, indemnification, audit and investigation, reporting, dispute resolution, suspension of payments, and refraining from future contracts.

Alternative contractual clauses for enforcing anti-corruption commitments

- In the absence of direct, explicit anti-corruption clauses, the majority of interviewees indicated that parties can rely on other clauses within contracts to enforce anti-corruption commitments.
- Compliance with laws clauses emerged as the most commonly cited alternative contractual clauses when exploring ways to enforce anti-corruption commitments. Interviewees also mentioned other clauses, including those related to audits, assignments, and transparency, as potential mechanisms for promoting anti-corruption efforts.

Support for anti-corruption clauses in real-world practice

- Interviewees expressed different opinions on the practical acceptance or rejection of anti-corruption clauses by companies and governments: complete refusal, negotiations over specific details, and consistent support.

- Several interviewees confirmed encountering resistance when parties attempting to incorporate anti-corruption clauses. This resistance was often observed with NOCs, larger companies, those influenced by cultural considerations, and those unwilling to be bound by foreign laws.
- Another set of interviewees witnessed some cases of parties negotiating specific details within anti-corruption clauses. These discussions covered remedies for violations, consideration of pre-contract corruption history, compliance with complicated foreign laws, the treatment of facilitation payments, the need for clear definitions, and addressing PEPs.
- On the other hand, another group of interviewees observed consistent support for anti-corruption clauses and attributed this support to the role of governments and external pressures. External pressures included the influence of ESG initiatives, support from transnational organizations, media attention, and peer pressure within the industry.

<u>The real-world practice of anti-corruption clauses</u>

- Some interviewees found it challenging to provide a straightforward answer to whether companies leverage anti-corruption clauses while referring to difficulties associated with proving corruption as grounds for termination.
- While two interviewees stated that they had no observations of termination, four testified to its infrequent occurrence. However, nine interviewees witnessed some cases of termination, and three observed other remedies taken in response to their violations. Based on these experiences and testimonies, it is evident that there have indeed been real-world practices in applying and enforcing anti-corruption clauses to some extent.

Effectiveness of anti-corruption clauses

- Interviewees expressed a spectrum of viewpoints on the effectiveness of anti-corruption clauses, ranging from skepticism about their actual impact to optimism about their potential in the ongoing fight against corruption.
- Among those who doubted their effectiveness, three believed in their zero or little effect, while three asserted that they are helpful but not sufficient in combating corruption.
- Seven interviewees believed in the conditional effectiveness of anti-corruption clauses and discussed the role of the corporate culture and contextual factors in shaping their impact.
- Respondents with a more optimistic perspective highlighted the critical and valuable roles of these clauses in supporting other anti-corruption tools, addressing corruption post-discovery, signaling a company's stance on corruption, enforcing anti-corruption measures, contributing to a company's reputation, and helping to establish an industry standard.

Challenges faced by anti-corruption clauses

- Several interviewees expressed the belief that anti-corruption clauses alone are insufficient and emphasized the need for complementary actions to support these clauses. Among them, six interviewees discussed the role of legal liabilities and enforcement mechanisms in addressing clause violations, four interviewees underscored the importance of cultivating a corporate culture aligned with anti-corruption commitments, and three interviewees advocated for effective monitoring procedures to reinforce anti-corruption clauses.
- Among other challenges, three interviewees highlighted concerns about the one-sided implementation of anti-corruption clauses, three interviewees emphasized the issue of contracts often going unread, two interviewees discussed the complexities associated with proving corruption, one interviewee recognized the absence of specific legal mandates

requiring the inclusion of anti-corruption clauses within contracts between parties, and another interviewee highlighted the communication challenges related to anti-corruption clauses.

2. The Architecture of Anti-Corruption Clauses

This section presents a range of viewpoints on the linguistic and other characteristics of anti-corruption clauses, based on interviews with 27 individuals. All interviewees exhibited strong familiarity with anti-corruption clauses. Their shared awareness, drawn from diverse professional backgrounds in TNOCs, governments, TNOs, and legal professionals advising on anti-corruption matters, provided a solid foundation for in-depth discussions on their experiences in the field.

Of the 11 interviewees with experience in TNOCs or NOCs, eight provided information on when anti-corruption clauses were introduced into their companies' policies. One of the earliest adoptions was reported by Rho, whose company incorporated these clauses around 2010.[1182] Delta similarly noted that their company implemented such clauses around the same time.[1183] Moreover, Eta revealed that the inclusion of anti-corruption clauses became part of their company's compliance document in 2012, following recommendations from major consulting firms and guidelines from the DOJ.[1184] However, they acknowledged that some other TNCs had implemented this practice even earlier.[1185] In addition, Iota stated that the anti-corruption clause had been in place since they started at the company in 2014.[1186] Theta also believed that these clauses were already integrated into their company's policies before 2015.[1187]

[1182] Rho, *supra* note 647 at 8.
[1183] Delta, *supra* note 646 at 3.
[1184] Eta, *supra* note 699 at 4.
[1185] *Ibid*.
[1186] Iota, *supra* note 771 at 6.
[1187] Theta, *supra* note 705 at 3.

Three interviewees provided more detailed information regarding the emergence of the clauses in their respective countries. Omicron explained that a legal drafting committee operating under the auspices of the Offshore Energies UK drafted the first anti-bribery and corruption clauses for inclusion in the suite of LOGIC contracts, which are industry-standard template contracts for use in the UK's oil and gas industry.[1188] Omicron stated that the initial appearance of such clauses in templates was in 2014, and before that, LOGIC contracts only had a brief business ethics clause referring to key principles. Omicron clarified that "this is not to say that companies were not including such clauses in their own contracts prior to 2014, it merely indicates when such clauses came to be included in industry-standard contracts."[1189] On the other hand, Pi and Chi shared that since 2014, the Indonesian government has imposed a mandatory right to audit for all petroleum contracts.[1190] This audit requirement includes an anti-corruption clause which obliges parties to adhere to the FCPA, the UKBA, and Indonesian Corruption Eradication Law.[1191] The specifics of this audit right have been thoroughly discussed in the previous chapter.

The data shared by interviewees regarding the emergence of anti-corruption clauses aligns with the trend observed in the inclusion of direct anti-corruption clauses in the petroleum contracts analyzed in the previous chapter. While the initial appearance of explicit anti-corruption clauses can be traced back to the early 2000s, their prevalence remained relatively low. However, a notable increase in their integration into contracts began after 2010. As detailed in the previous chapter, this increase can be attributed to several factors, including the heightened enforcement of the FCPA by the SEC and DOJ after 2008, the introduction and enforcement of the UKBA in 2010,

[1188] Omicron, *supra* note 617 at 10; for more information, see LOGIC, "Suite of Standard Contracts" (last visited 10 August 2024), online: *LOGIC* <app.logic-energy.org/standard-contracts/documents>.
[1189] Omicron, *supra* note 617 at 10.
[1190] Pi, *supra* note 718 at 6; Chi, *supra* note 748 at 6.
[1191] *Eradication of the Criminal Act of Corruption*, Law No 31/1999 (Indonesia).

and the introduction of the ICC anti-corruption clause in 2012. Figure 27 illustrates the convergence between the years reported by interviewees for the adoption of anti-corruption clauses within their companies and the trend of incorporating explicit anti-corruption clauses in the contracts studied after 2000.

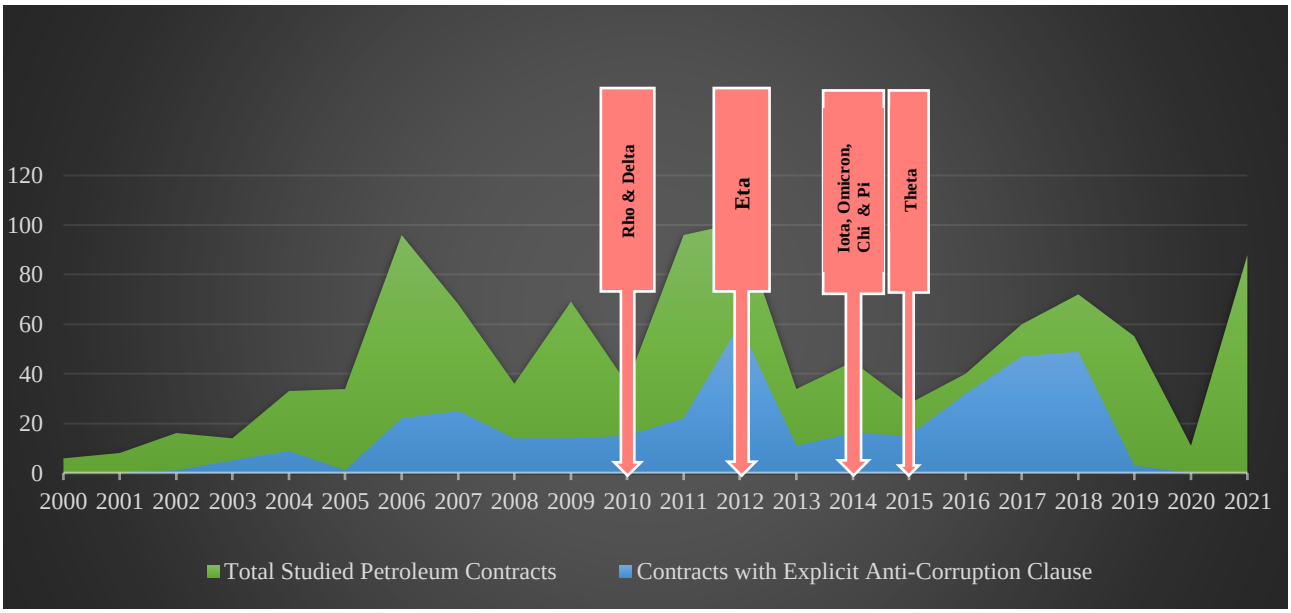

Figure 27 – Correlation between Company Adoption and Contract Trends of Explicit Anti-Corruption Clauses (2000 & Beyond)

Following subsections revolve around the comments provided by the interviewees regarding the specific attributes of anti-corruption clauses within the contract. In Subsection (A), the discussion explores the interviewees' responses concerning the language and specific characteristics of these clauses, along with the key elements believed to be worthy of incorporation. In Subsection (B), consideration is given to whether a risk-based approach should be adopted by anti-corruption clauses in their language, with an examination of the perspectives on tailoring these clauses to the unique circumstances of each contract. In Subsection (C), an investigation is undertaken regarding the time coverage of these clauses to explore the interviewees' perspectives on when and for how long such clauses should be maintained in effect. Subsection (D) addresses the topic of appropriate sanctions and remedies in cases of violations, based on the interviewees' recommendations for

managing breaches of anti-corruption clauses. Finally, Subsection (E) examines the interviewees' perspectives on how parties can use alternative contractual clauses to enforce anti-corruption commitments when direct anti-corruption clauses are absent. Each subsection concludes with an attempt to recommend the best approach.

A. Choosing the Right Words in Crafting Effective Language for Anti-Corruption Clauses

What should the language of anti-corruption clauses include? Should they solely prohibit corruption in broad terms, enumerate specific corrupt practices to be prohibited, or make explicit references to existing anti-corruption laws? The implications of these choices for the language of the contract are far from trivial. Lambda pointed out that the wording of a contractual clause often allows for "wiggle room" in interpretation, with "a lot of ways for people to put wording in their clauses," each open to diverse interpretations.[1192] Rho also emphasized the importance of clause language, especially in jurisdictions governed by a common law legal system, where "the letter of contract" carries more weight than the parties' intentions.[1193] Hence, in their view, legal clauses "need to be adjusted for the legal system and environment in which the contract is executed."[1194] Clarity is equally important, as highlighted by Omega, who insisted that clauses "need to be in very plain language so people understand them."[1195] The selection of the appropriate wording is, therefore, a crucial step in ensuring that anti-corruption commitments are not merely symbolic on paper but possess both legal authority and practical effectiveness. This subsection reveals that while some interviewees advocated for anti-corruption clauses solely prohibiting general corruption, the majority preferred detailed specifications. These specifications included listing

[1192] Lambda, *supra* note 735 at 5.
[1193] Rho, *supra* note 647 at 10.
[1194] *Ibid*, at 11.
[1195] Omega, *supra* note 651 at 4.

corrupt practices, providing definitions, or referencing anti-corruption laws—whether international standards or applicable laws. Lastly, a number of interviewees favored a combined approach, which includes a prohibition of corruption in general while also incorporating some specifications. These comments are further elaborated below.

Two interviewees argued that anti-corruption clauses should adopt a more general language considering the impracticality of listing all the myriad forms of corruption. For example, Theta described their company's approach, which involves incorporating a broad policy on anti-bribery and corruption in contracts and requesting the other party's compliance with that policy.[1196] Likewise, $Beta_2$ emphasized that a general prohibition is preferable to specific examples. They explained that by listing specific examples, there is a risk that if an act not covered in the examples occurs, individuals might argue that "well, see, it [is] not here; so, we did [not] violate the contract!"[1197] They believed that broadness should take precedence over specification, as a broad clause can "catch all" and enable the addressing of unforeseen corrupt activities, whereas specific examples might inadvertently miss something crucial.[1198]

On the other hand, the majority of interviewees favored specificity in the language of anti-corruption clauses. According to Rho, parties "can achieve much more by building a relationship with the underlying contract."[1199] They believe that sometimes, it is necessary to "go down to specific details, [such as] what clause 6.2, subsection A say."[1200] Rho explained that the level of detail in the contract depends on the company's objectives.[1201]

[1196] Theta, *supra* note 705 at 1.
[1197] $Beta_2$, *supra* note 652 at 7.
[1198] *Ibid*.
[1199] Rho, *supra* note 647.
[1200] *Ibid*.
[1201] *Ibid*.

A common strategy for achieving specificity involves enumerating different corrupt practices within anti-corruption clauses. For example, Delta emphasized that their company's clause extends beyond "generic anti-corruption and business ethics" and is instead detailed, including references to bribes, gifts, hospitality, discrimination, fair procedures, and more.[1202] Similarly, Phi pointed out that these clauses should address different types of corruption and red flags within contractual agreements, covering "every form of bribery [and] fraudulent activities … carried out by individuals or third parties," regardless of whether they involve monetary transactions, but rather aim to influence parties or create conflicts of interest.[1203] Moreover, Nu criticized the historical focus of clauses primarily on bribery and argued that in today's world, there is "a bigger tent of corrupt practices" that should be included within the clause.[1204] Upsilon further highlighted the limitations of clauses that simply state "you will comply with our policy" and illustrated this inadequacy with a scenario where the contract requires the recording of gifts and hospitality in an internal register inaccessible to the other party.[1205] To bridge this gap between policy and practical implementation, Upsilon recommended using explicit, detailed language, such as spelling out that "gifts and hospitality should not be provided to government officials on behalf of or related to the project."[1206] They also suggested including examples directly relevant to the expected relationship; for example, parties can explicitly prohibit the "hiring of third-party consultants without permission," as they are often "conduits for bribery."[1207]

Different cultural contexts can lead to variations in the specification of corrupt practices across different contracts. Zeta pointed out that contracts originating from different countries may exhibit

[1202] Delta, *supra* note 646 at 4.
[1203] Phi, *supra* note 780 at 6.
[1204] Nu, *supra* note 627 at 4.
[1205] *Ibid*.
[1206] *Ibid*.
[1207] *Ibid*.

differing levels of detail regarding anti-corruption measures and prohibited practices.[1208] Eta shared a similar perspective, noting that certain actions might be considered corruption in some contexts but different crimes in others, such as money-laundering, fraud, and coercion.[1209] They suggested that, to prevent confusion among parties about what constitutes corruption, "specific forms of corruption, like bribery, embezzlement, or kickbacks," should be explicitly listed.[1210] Tau also referred to situational considerations, especially concerning the involvement of PEPs, and suggested that some contracts should include "a general clause saying that no government official has an interest in the company" when necessary.[1211]

Another approach, one with more specificity, involves including explicit definitions for corrupt practices within anti-corruption clauses. For example, in Iota's company, these clauses contained detailed definitions for acts such as bribery and trade in influence.[1212] Nu also advocated for incorporating detailed definitions, especially when an educational component is necessary.[1213] They argued that certain concepts may not be understood by all parties, and providing clear definitions can facilitate compliance.[1214] Moreover, Xi endorsed the idea of specifying what constitutes a corrupt act. They illustrated the problem with a scenario where a customer fails to clearly define bribery and instead states "the counterparties shall not make any bribe payments."[1215] Xi emphasized the inadequacy of such a vague clause, stating, "well, what the hell is a bribe payment? … Bribery is not just showing up with the Manila envelope full of cash."[1216]

[1208] Zeta, *supra* note 960 at 6.
[1209] Eta, *supra* note 699 at 5.
[1210] *Ibid*.
[1211] Tau, *supra* note 690 at 5.
[1212] Iota, *supra* note 771 at 6.
[1213] Nu, *supra* note 627 at 4.
[1214] *Ibid*.
[1215] Xi, *supra* note 621 at 8–9.
[1216] *Ibid* at 9.

They further emphasized that parties also need to address concepts related to conflicts of interest and extortion risks, which are often overlooked and considered as "a big blind spot for some companies."[1217] Nevertheless, Xi believed that definitions within anti-corruption clauses should align with well-established anti-corruption acts rather than allowing parties to create their own interpretations. They expressed concern about customers creating their own definitions of bribery.[1218] In such cases, they usually attempted to bring that definition back in line with the precise wording of the FCPA because they consider the FCPA to be the "shining star" guiding their company, and they build their program around its compliance.[1219]

An alternative method for achieving specificity in anti-corruption clauses is referencing specific anti-corruption standards or laws. For example, Omega advised against listing specific examples in such clauses, particularly when dealing with sophisticated companies, as providing examples could lead to misinterpretation and the risk of ambiguous responses.[1220] Instead, they suggested referring to corrupt practices as part of "the code of conduct or citing the statute."[1221] This approach helps avoid ambiguity by explicitly stating that parties must comply with specific statutes, while placing the responsibility on the parties to research and understand the details.[1222] Xi supported this approach, stating that it is "definitely better to specify," and by specifying, they meant saying "the party shall abide by the FCPA or the OECD."[1223] They explained that this level of specificity in a contract is sufficient because the law itself provides interpretation and clarity regarding its terms and elements.[1224] In addition, Chi mentioned that in Indonesia, the government mandates all

[1217] *Ibid*.
[1218] *Ibid* at 8.
[1219] *Ibid*.
[1220] Omega, *supra* note 651 at 4.
[1221] *Ibid*.
[1222] *Ibid*.
[1223] Xi, *supra* note 621 at 8.
[1224] *Ibid*.

procurement companies in the petroleum sector to include an anti-corruption clause in their contracts, where "all suppliers and contractors should comply with the FCPA, UKBA and Indonesian anti-corruption law."[1225] Moreover, Tau noted a shift from the FCPA to the UKBA after its enactment in 2010.[1226] They observed that now all companies often include the UKBA in their anti-corruption clauses as a standard practice.[1227]

Some companies may choose to adopt specific international standards. For example, Delta mentioned that their company aimed to adhere to the UNGC.[1228] On the other hand, Upsilon expressed skepticism about instructing companies to comply with voluntary, non-binding international standards, such as the voluntary obligations in the OECD convention or the anti-corruption principle of the UNGC.[1229] They voiced concerns, especially regarding the OECD Convention, as it primarily focuses on government behavior and may not be directly applicable to private entities.[1230]

Alternatively, parties may choose to include the term *applicable anti-corruption laws* within their anti-corruption clauses. For example, $Beta_2$ proposed a general clause stating, "we will not tolerate bribing and corruption," while committing to adhere to "all applicable laws, which might include the FCPA, the Brazil Clean Companies Act, UK Bribery Act," depending on the company's applicability.[1231] Similarly, Upsilon argued for the effectiveness of using a broad term such as "all anti-corruption laws," as it includes different legislation such as "the UKBA, FCPA, Sapin II Act,

[1225] Chi, *supra* note 748 at 6.
[1226] Tau, *supra* note 690 at 5.
[1227] *Ibid*.
[1228] Delta, *supra* note 646 at 3.
[1229] Upsilon, *supra* note 642 at 9.
[1230] *Ibid*.
[1231] $Beta_2$, *supra* note 652 at 6–7.

Brazil Clean Companies Act," among others.[1232] They added that specifying particular anti-corruption laws becomes relevant only when a company is not subject to those laws.[1233] Moreover, Iota shared their company's template clause, which calls for compliance with the "principles enshrined in the pertinent international and regional conventions on combating corruption," along with adherence to "all applicable anti-corruption laws, including, but not limited to, the [FCPA and UKBA]."[1234] Likewise, Eta mentioned that in their former company's anti-corruption clauses, both the company and its counter-agents committed to complying with all anti-corruption rules, including "national and overseas regulations."[1235] Moreover, Omicron clarified that their company's clause does not specify any particular behaviors or actions but instead refers to activities which would be "in breach of applicable anti-bribery laws (as defined in the contract)."[1236] They also mentioned that when dealing with companies from different jurisdictions, the contract may include an annex detailing that country's specific anti-corruption requirements to ensure awareness of "domestic legislation as well as the usual suspects, the FCPA and the UK[BA]."[1237] On the other hand, Upsilon further advised parties to exercise caution in choosing the wording of their clauses when referring to anti-corruption laws. For example, they warned against including phrases such as "we are familiar with and understand the FCPA," as expecting parties to become fully familiar with the FCPA is deemed unreasonable.[1238]

Two interviewees recommended adopting a combined approach. Tau stated that including both a general prohibition and a list of different acts is preferable because it caters to varying levels of

[1232] Upsilon, *supra* note 642 at 9.
[1233] *Ibid*.
[1234] Iota, *supra* note 771 at 6.
[1235] Eta, *supra* note 699 at 3.
[1236] Omicron, *supra* note 617 at 10.
[1237] *Ibid* at 12.
[1238] Upsilon, *supra* note 642 at 9.

knowledge among parties regarding corruption and compliance.[1239] They noted that not everyone is familiar with concepts such as conflicts of interest or the involvement of government officials.[1240] Similarly, Nu suggested that when requesting compliance with anti-corruption laws, providing specific details can be advantageous.[1241] In such cases, the clause can explicitly prohibit corruption while also citing common examples where compliance issues might arise. They emphasized that the level of detail should be adjusted according to the risk assessment of the counterparty.[1242] This approach will be discussed in greater detail in the next subsection.

While most interviewees favored specificity in anti-corruption clauses, two held a less optimistic view and doubted the significant impact of specificity on real-world outcomes. Beta argued that due to the inherently political nature of the extractive industry, "the way that power is abused in those situations cannot really be controlled by any kind of legalese in a contract or a document."[1243] They emphasized that those involved in such situations are often "the actors who themselves are producing the documentation."[1244] In their view, "it is possible to have nice wording that everyone signs," but it does not reflect the reality of the situation.[1245] Moreover, Nu expressed concerns about the lengthiness of some anti-corruption clauses, stating that some companies draft clauses spanning five to seven pages, yet the reality is that not many people actually read the contract in its entirety.[1246] They clarified that these clauses are primarily included to address problems when they arise, but they have limited reach as educational or awareness tools.[1247]

[1239] Tau, *supra* note 690 at 6.
[1240] *Ibid*.
[1241] Nu, *supra* note 627 at 4.
[1242] *Ibid*.
[1243] Beta, *supra* note 730 at 5.
[1244] *Ibid*.
[1245] *Ibid*.
[1246] Nu, *supra* note 627 at 7.
[1247] *Ibid*.

Figure 28 summarizes the different opinions of interviewees regarding the language of anti-corruption clauses. Similar diversity of perspectives was observed in the analysis of anti-corruption clauses within the petroleum contracts examined in the previous chapter. These contracts also displayed a range of approaches, including explicit anti-corruption clauses that either prohibit corruption broadly, require compliance with specific anti-corruption laws, or mandate the adoption and execution of anti-corruption compliance programs. Remarkably, many contracts followed a combined approach and incorporated clauses that both prohibit corruption and provide specific examples, all while referring to relevant anti-corruption laws.

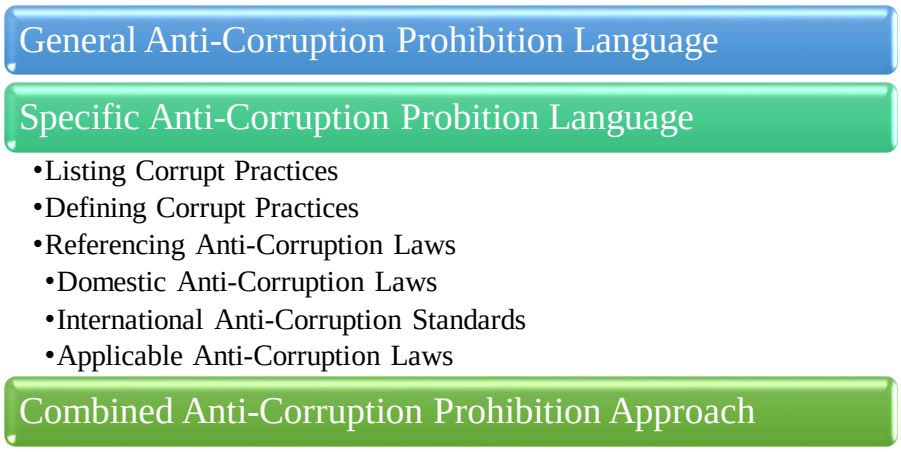

Figure 28 – Perspectives of Interviewees on the Language of Anti-Corruption Clauses

Considering these diverse perspectives, what would be the most effective approach to crafting an anti-corruption clause that incorporates all the comments mentioned above? An ideal anti-corruption clause would start with a general prohibition that explicitly prohibit corruption, applying to all parties and covering any potential corrupt acts regardless of time or location. Next, the compliance department, guided by due diligence (discussed further in the next subsection), should propose examples tailored to counterparties' risk profiles. When listing examples, parties must explicitly state that the list is *non-exhaustive* to prevent claims of uncovered acts.

Furthermore, parties should mandate compliance with *all applicable laws*, specifying key national and international laws, including both soft and hard law. Definitions also play a crucial role, especially for non-lawyers who may not be familiar with complex terms such as facilitation payment. Therefore, contracts should clearly define relevant concepts using widely recognized laws such as the FCPA or UNCAC. These definitions can be included within either the anti-corruption clause or in a dedicated definitions section of the contract. Finally, the clause should require the adoption of anti-corruption compliance programs and instruct the compliance department to ensure that all employees and third-party agents are well-informed through training sessions to readily identify red flags. This comprehensive approach may result in slightly longer contracts. However, considering that petroleum contracts are already extensive documents, the addition of extra verbiage and pages would not significantly impact their overall length. Ultimately, the responsibility for implementation rests with the compliance department, which is tasked with reviewing contract terms and guaranteeing that all parties, including employees and third parties, are adequately briefed.

B. Adopting Risk Assessment in Customizing Anti-Corruption Clauses

Should anti-corruption clauses be selected based on a risk-centric approach? In other words, should parties employ a one-size-fits-all clause for all their contracts, or should they tailor individualized clauses based on the specific corruption risks inherent in each contract? The consensus among most interviewees was that adopting a risk-oriented approach is more appropriate for addressing corruption risks. Interviewees also suggested that anti-corruption clauses could be customized based on different risk factors, including the parties' history of corruption, location or jurisdiction of parties, types of clients, and the size and complexity of contracts.

Before exploring the factors influencing risk assessment in customizing anti-corruption clauses, it should be highlighted that two interviewees argued for the practicality of incorporating a standard clause applicable to all parties, citing challenges in adopting a risk-based approach and implementing different clauses. Iota mentioned their company's use of a uniform, standardized clause in all contracts.[1248] Moreover, Omicron noted that while they observed some variations in anti-corruption clauses, "it [is] not the norm," and the standard practice is to use uniform clauses "regardless of who the contractor is."[1249] They argued that "the onus is always on the contractor" and that modifying the clause's wording is cumbersome for operators or customers.[1250] In their perspective, there is little incentive for conducting additional risk assessments solely for clause purposes, and if a company is deemed risky to do business with, they are unlikely to engage with them at all.[1251] Instead, Omicron suggested requiring high-risk parties to submit an annual compliance certificate, in which they affirm their adherence to the anti-corruption clause.[1252] In alignment with that, they proposed conducting annual due diligence on high-risk partners to uncover any involvement in corrupt activities that could affect the business relationship.[1253]

Here, the discussion shifts towards the specific factors that parties should consider when selecting the anti-corruption clause for their contracts. Four interviewees recommended tailoring anti-corruption clauses when there are concerns about the other party's history of corruption. For example, Omega mentioned that while they generally use a standard anti-corruption clause, they prefer a more detailed one with additional requirements "when dealing with a known problematic

[1248] Iota, *supra* note 771 at 7.
[1249] Omicron, *supra* note 617 at 12.
[1250] *Ibid*.
[1251] *Ibid*.
[1252] *Ibid* at 13.
[1253] *Ibid*.

client with a history of issues."[1254] Moreover, Tau advised their clients to adopt anti-corruption clauses with "a holistic view of their suppliers."[1255] Eta also shared their approach to advising clients on adopting customized anti-corruption clauses. They explained that their process involves an initial assessment of the client's relationship with their contractual partner, considering factors such as the client's influence, leverage, the duration of their relationship, and the operational environments.[1256] Based on these factors, they recommend one of the patterns commonly applied in international practice.[1257] Upsilon supported this risk-based approach and advocated for its adoption as "an industry standard."[1258] They further explained that clauses for higher-risk third parties should undergo thorough due diligence and include audit rights, termination, and notification requirements to prevent potential legal issues.[1259]

Expanding on the idea of tailoring anti-corruption clauses to address different risk factors, three interviewees further suggested assessing the location or jurisdiction where the involved parties are based. Beta$_2$, for instance, endorsed a risk-based approach, particularly in high-risk jurisdictions, where the inclusion of clear and specific clauses becomes essential in conveying a strong anti-corruption stance.[1260] They also emphasized the importance of adaptability and relevance to the specific situation; for example, they suggested that for individuals who engage in frontline interactions with government officials might require more in-depth, detailed clauses to address unique risks.[1261] However, they cautioned against employing "overly broad" clauses and cited

[1254] Omega, *supra* note 651 at 4.
[1255] Tau, *supra* note 690 at 7.
[1256] Eta, *supra* note 699 at 4.
[1257] *Ibid*.
[1258] Upsilon, *supra* note 642 at 8.
[1259] *Ibid*.
[1260] Beta$_2$, *supra* note 652 at 7.
[1261] *Ibid*.

potential complications when dealing with businesses beyond their control.[1262] Similarly, Xi highlighted the need for customized clauses when dealing with high-risk vendors and business partners within the supply-chain.[1263] They provided an example involving an intermediary agent assisting with their business development strategy in a high corruption-risk country. They recommended that, for an agent of that type, "it is absolutely and most certainly important" to explicitly state in the clause that the agent has never committed corruption, bribed anyone, or will do so in the future, and specify that the violation of these commitments would lead to contract termination.[1264]

Meanwhile, Rho emphasized the role of legal systems, stating that "legal clauses in contracts need to be adjusted for the legal system and environment in which the contract […] is executed."[1265] They highlighted the differing approaches within various legal jurisdictions and noted that in countries such as the USA or UK, precise contract terms and concepts, known as "the letter of the contract," are important, whereas continental Europe places less emphasis on such specifics.[1266] Moreover, Omicron observed that contracts sometimes include country-specific provisions to ensure that parties are "aware of the domestic legislation, as well as the usual suspects, the FCPA and the UK[BA]."[1267] They cited the common practice of incorporating annexes in Malaysian contracts to outline Malaysia-specific anti-bribery requirements.[1268]

Sigma further highlighted the importance of categorizing anti-corruption clauses based on the type of client while arguing that a risk-based approach is far more effective than a one-size-fits-all

[1262] *Ibid* at 8.
[1263] Xi, *supra* note 621 at 10.
[1264] *Ibid*.
[1265] Rho, *supra* note 647.
[1266] *Ibid* at 10.
[1267] Omicron, *supra* note 617 at 12.
[1268] *Ibid*.

strategy. They detailed how their company employs different categories of anti-corruption clauses adapted to different counterparties: concise clauses for customers, moderate clauses for vendors, and comprehensive clauses for intermediaries.[1269] They clarified that customer clauses tend to be very brief, primarily because customers, particularly NOCs, are often reluctant to accept multiple clauses.[1270] They explained that these companies usually assert that they already have their anti-corruption provisions and therefore do not need to adhere to external clauses since they operate under their own jurisdiction.[1271] On the other hand, they noted that intermediaries, including commercial intermediaries such as sales channel partners, or service-based intermediaries, such as lawyers representing clients in courts, customs brokers, or companies representing clients before tax authorities, pose higher risks for companies, hence their clauses are usually extensive.[1272] They explained that their clauses can span as much as three to four pages and cover various aspects such as anti-corruption, unauthorized trade compliance, modern slavery, audit rights, information undertakings, and more.[1273] While Sigma acknowledged that a nuanced risk-based approach is theoretically better for compliance clauses, they also recognized the practical challenges associated with its implementation, which will be further discussed in Subsection (A) of the next section. Sigma concluded that a risk-based approach tends to yield greater effectiveness in "Western countries, among US companies and Western European companies," who demonstrate a better understanding of their anti-corruption obligations.[1274]

Lastly, Nu argued that the size and complexity of the contract should dictate the choice between shorter or more comprehensive clauses. They explained that in the companies they have worked

[1269] Sigma, *supra* note 618 at 8–10.
[1270] *Ibid* at 9.
[1271] *Ibid*.
[1272] *Ibid*.
[1273] *Ibid*.
[1274] *Ibid*.

for, the compliance program included internal policies specifying that when entering into contracts, except for certain minor and irrelevant ones, a business ethics clause must incorporated.[1275] They further clarified that the nature of the contract matters in choosing the proper anti-corruption clauses; for example, there should be different clauses for procuring a piece of equipment for $5,000 and building a converted ship in Southeast Asia or Africa or India. Nu also believed that parties should assess the risk profiles associated with the contracting parties and adjust the clauses accordingly.[1276] For high-risk parties, Nu suggested that the clause should begin with a conceptual overview and then delve into specific details when requiring compliance with anti-corruption laws.[1277]

Figure 29 summarizes the different perspectives provided by interviewees on whether to have standard or different anti-corruption clauses for different parties, while outlining the risk factors that should be taken into account.

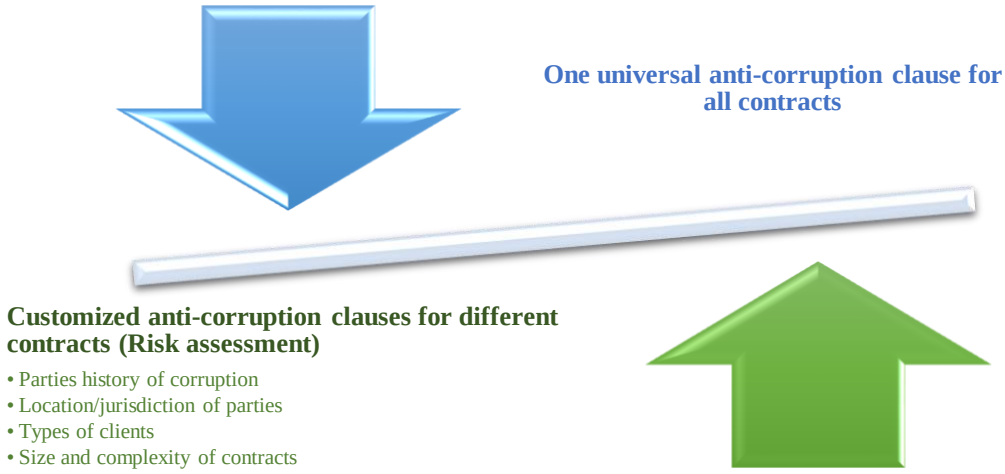

Figure 29 – Balancing Universal and Customized Anti-Corruption Clauses

[1275] Nu, *supra* note 627 at 4.
[1276] *Ibid*.
[1277] *Ibid* at 5.

Upon examining petroleum contracts in the previous chapter, it became evident that contracts within a specific country often employed a uniform anti-corruption clause with identical language for different parties. The minor variations in the language of these clauses primarily stemmed from the evolution of anti-corruption laws and standards, resulting in increased length and comprehensiveness over time. However, considering all the comments discussed above, a more effective approach involves initially adopting a standard anti-corruption clause that is sufficiently comprehensive and inclusive in contract templates. Subsequently, after the compliance department conducts due diligence procedures on a specific party and creates a risk profile, they can recommend additional details and commitments if needed. This may include specifying prohibited acts and incorporating further sanctions for violations. As Principle 1 of the Bribery Act 2010-Guidance states, "[a] commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities."[1278] Therefore, adopting a tailored anti-corruption clause aligns with the principle of applying "proportionate measures" to the associated risks.

C. Understanding the Temporal Scope of Anti-Corruption Clauses

Time coverage of anti-corruption clauses refers to the period during which the commitments articulated in the clause remain enforceable. This timeframe can cover several phases: parties are mandated to provide assurances and representations that they have not engaged in any corrupt activities in the past, during pre-contract negotiations, throughout contract execution, and sometimes, for a specified period after the contract ends. However, the majority of anti-corruption

[1278] UK, Ministry of Justice, *Bribery Act 2010-Guidance* (London, 2011) at 21.

clauses avoid explicitly specifying temporal parameters. Instead, they rely on different verb tenses, such as "have not," "do not," "will not," or combinations thereof, as indicated by the analysis of petroleum contracts in the previous chapter. This highlights the need to investigate real-world practices to determine the implied timeframes and establish the most appropriate approach in line with prevailing anti-corruption standards. In this regard, interviewees held varying perspectives on the interpretation of these timeframes. Two interviewees advocated for a restricted application of anti-corruption commitments limited to the contract's duration. For periods beyond the contract's duration, although the majority believed that anti-corruption commitments extend throughout the duration of the contract and the post-contract period, there was less consensus regarding the governance of such clauses before the initiation of the contract. Further details on the interviewees' opinions on this matter are discussed below.

Two interviewees leaned towards a more restricted application of anti-corruption commitments and argued for their exclusive scope to the contract's duration. Upsilon strongly advocated for initiating these commitments from "the origin of the contract."[1279] Their rationale was grounded in the reality that most third parties have faced bribery indictments in the past, which made it challenging for them to claim a clean history.[1280] Similarly, Xi advocated for a more limited approach in applying anti-corruption clauses and believed that parties should strictly focus on conducts directly linked to the contract. They argued that "the commitments in the contract are specific to the contract."[1281] In their view, if there is any representation related to past conduct, such a representation should not automatically grant the customer the right to terminate the

[1279] Upsilon, *supra* note 642 at 11.
[1280] *Ibid*.
[1281] Xi, *supra* note 621 at 9.

contract.[1282] Moreover, in their belief, historical corruption issues that come to light during the pendency of the current contract should not impact the ongoing contract.[1283] Especially, Xi expressed concerns about the limited knowledge of "current leadership in most companies" and noted that they have not been there decades ago to be aware of everything that has happened in the past.[1284] Xi was particularly concerned about the potential emergence of legacy issues that could trigger "a waterfall effect of contract breaches across all operating contracts."[1285] However, later in the interview, Xi adjusted their perspective and endorsed a risk-based approach: they explained that when dealing with high-risk vendors or business partners, they "would most definitely want representations going to the past and going into the future, not just associated with [the current] contract."[1286] To illustrate, they provided an example involving their company's efforts to secure a contract with an NOC. In this scenario, a business development agent received two and half percent of revenue for each contract entered into with the NOC.[1287] Xi stressed out that for such agents, it was absolutely imperative to include commitments like "you [have] never committed a corrupt corruption event, you [have] never bribed anyone, and you never will bribe anyone."[1288]

The disagreement among the interviewees primarily centered on the timeframe preceding the commencement of a contract. When discussing the applicability of clause commitments to the period before the contract's initiation, most interviewees argued against extending such clauses to the time before the contract's inception. Omega, for example, underscored the importance of "clarity" and argued that extending the commitments to the period before a contract came into

[1282] *Ibid*.
[1283] *Ibid*.
[1284] *Ibid*.
[1285] *Ibid*.
[1286] *Ibid* at 10.
[1287] *Ibid*.
[1288] *Ibid*.

existence would introduce "ambiguity."[1289] Tau further conveyed that they never encountered a clause that cover the period before the contract, stating, "[it is] fair for this clause to apply during the execution or performance of operation, [but] I do [not] see why it should apply after or before?"[1290] Instead of extending the application of the commitments to the time before the contract commencement, seven interviewees, including Tau, argued that pre-contract anti-corruption commitments are often addressed during pre-relationship due diligence procedures.[1291] They argued that during these procedures, the parties investigate whether the other party has been involved in or prosecuted for any corrupt activities before. Moreover, Theta, emphasizing that the terms within these contracts primarily pertain to the performance of that contract itself and outline what can and cannot be done, stated that before a contractor is officially registered, "there [are] no contracts here."[1292] In these instances, Theta listed these candidates as potential contractors, pending investigation to verify alignment with the company's business standards, and only after this evaluation process can a contract be finalized.[1293] Pi also pointed out that in the procurement and government bidding regulations, this is "the job of the procurement officer to do the check" for any prior violations.[1294] Lastly, Rho highlighted that the pre-contract investigation should be conducted so that the parties "base their decisions partly on that information."[1295]

Among others, three interviewees emphasized the importance of due diligence questionnaires that parties are required to complete before formalizing a contract. For example, Iota explained that these questionnaires often inquire about whether the company has violated any anti-money

[1289] Omega, *supra* note 651 at 4.
[1290] Tau, *supra* note 690 at 6.
[1291] *Ibid*.
[1292] Theta, *supra* note 705 at 3.
[1293] *Ibid*.
[1294] Pi, *supra* note 718 at 6.
[1295] Rho, *supra* note 647 at 8.

laundering, fraud-related, or bribery-related laws, and if so, when and what the disposition was.[1296] Upsilon also regarded the due diligence questionnaire as "the stronger place" for posing such inquiries because it enables companies to candidly address past issues and demonstrate remedial actions taken.[1297] Sigma also viewed these questionnaires as a "representation of ethical conduct," which requires parties to certify their non-involvement in violations within a specified timeframe, often the last five or ten years.[1298] However, in practice, Sigma disclosed infractions that exceeded the defined timeframe to ensure full transparency.[1299] Thus, this group of interviewees believed that the due diligence questionnaire offers an opportunity to address and clarify any previous corruption-related incidents that have since been resolved.

On the contrary, the other group of interviewees strongly advocated for anti-corruption commitments with retrospective implications that cover all phases of the contract, even preceding the formalization of the agreement between the parties. Within this group, three interviewees extended the application of these commitments to include the negotiation phase. Omicron, for example, emphasized that the parties involved expect "assurances that, in securing that contract, you have not engaged in any bribery and corruption."[1300] Eta introduced a nuanced perspective within the pre-contract timeline and distinguished whether it falls within the procurement stage or not.[1301] They argued that major companies extend these commitments to cover the procurement phase, as this approach is legally straightforward, given that such commitments only become obligatory upon entering an actual contractual relationship, not beforehand.[1302] Nu similarly

[1296] Iota, *supra* note 771 at 7.
[1297] Upsilon, *supra* note 642 at 11.
[1298] Sigma, *supra* note 618 at 11.
[1299] *Ibid*.
[1300] Omicron, *supra* note 617 at 11.
[1301] Eta, *supra* note 699 at 11.
[1302] *Ibid*.

stressed the importance of retrospective effects for the clause, particularly when the pre-contractual relationship bears relevance to the contract.[1303] They believed that parties should check for any corrupt acts, even those unrelated to the contract, during their due diligence before entering into a contract with a company.[1304]

Less disagreement emerged among the interviewees concerning the application of commitments after the conclusion of the contract. In nearly unanimous consensus, they believed that these commitments should remain in effect even after the formal end of the contract. Nu highlighted that an effective clause often takes the form of "a party represents that it has not engaged in bribery and will not engage in bribery in connection with the contract."[1305] Tau even mentioned encountering the anti-corruption clause included as part of a survival clause.[1306] Similarly, Delta pointed out that if there is a breach after the termination of a contract, there are specific circumstances under which the other party could be held responsible.[1307] Omicron also advocated for extending the commitments to the period after contract termination, as "there are always warranty periods" for work that has been performed under a contract.[1308] Rho shared the view that these commitments "transcend the end of the contract" and argued that "corruption investigations, especially international ones, … take years [to] surface."[1309] Therefore, the discovery of corrupt practices long after the contract's conclusion does not diminish their significance, as these actions occurred while the contract was in force.[1310] Pi shed light on a common practice during the bidding process, where tenderers sign a statement committing that if they are awarded the contract, they

[1303] Nu, *supra* note 627 at 5.
[1304] *Ibid*.
[1305] *Ibid*.
[1306] Tau, *supra* note 690 at 6.
[1307] Delta, *supra* note 646 at 4.
[1308] Omicron, *supra* note 617 at 11.
[1309] Rho, *supra* note 647 at 8.
[1310] *Ibid*.

remain subject to an audit related to anti-corruption throughout the contract and for a specified years after its conclusion.[1311]

Figure 30 illustrates the different phases of a contract where an anti-corruption clause can be applicable, alongside the areas where the interviewees have differing levels of agreement on such coverage. It is also worth noting that Delta suggested examining the general civil law principles in each jurisdiction to interpret the application of the clause,[1312] while Omega recommended that parties incorporate compliance requirements from specific statutes into their clauses and thoroughly review how each statute deals with the issue of time coverage.[1313]

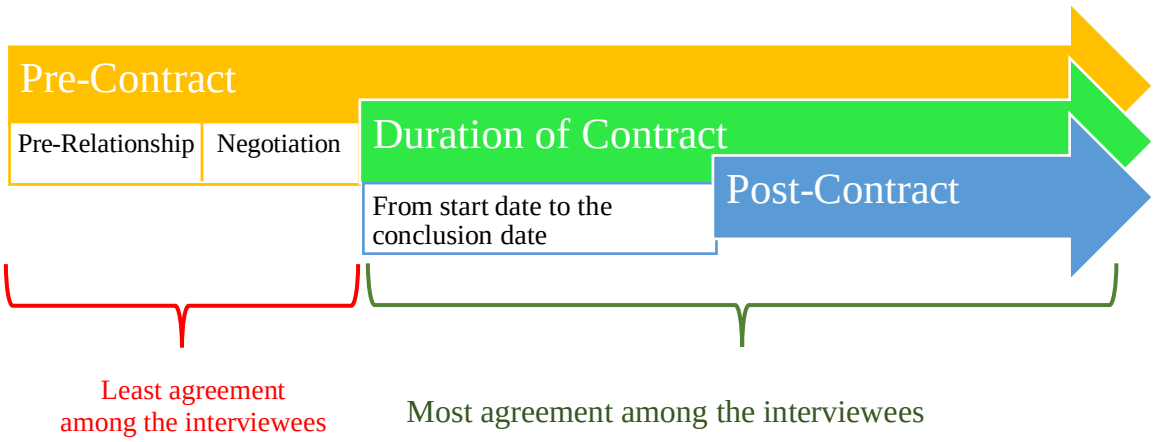

Figure 30 – Interviewees' Perspectives on the Time Coverage of Anti-Corruption Clauses

In light of the discussion above, the optimal approach that emerges is for anti-corruption commitments specified in an anti-corruption clause to govern every phase of a contract. Aligned with anti-corruption standards, these commitments should extend to the pre-contract, negotiation, duration, and post-conclusion stages. As emphasized by Omicron, it is customary for parties to

[1311] Pi, *supra* note 718 at 6.
[1312] Delta, *supra* note 646 at 4.
[1313] Omega, *supra* note 651 at 4.

expect that anti-corruption provisions apply throughout the entire lifecycle of a contract, from the earliest to the latest phases.[1314] While extending these commitments to cover the period preceding the formal existence of a contract may present legal challenges, parties should, at the very least, establish a reporting requirement. Though this may introduce some ambiguity into the commitments, a zero-tolerance policy against corruption should take into account the other party's historical record regarding corruption. When parties have the option to choose among prospective contract partners, they can make more informed decisions by considering the other party's ethical history. Opting for partners with a clean record regarding corruption acts as an additional deterrent to prompt individuals to weigh the potential loss of future deals with reputable partners when contemplating engaging in corrupt activities.

While the majority of contracts analyzed in the previous chapter did not specify the timeframe for applying the anti-corruption clauses, it is advisable for parties to expressly stipulate that anti-corruption clauses are applicable throughout all phases of the contract, both preceding and following its conclusion. Furthermore, anti-corruption clauses should be explicitly designated as survival clauses to ensure their continued effectiveness beyond the conclusion of the contracts. In cases where the clauses lack specific language, a prudent interpretation should dictate that they govern all stages of a contract.

D. Appropriate Sanctions and Remedies in Cases of Anti-Corruption Clause Violations

What should be the appropriate response when an anti-corruption clause is breached? Is immediate contract termination the only available option, or should alternative measures and remedies be explored before considering termination? This decision carries important weight, especially when

[1314] Omicron, *supra* note 617 at 11.

the violation is discovered by one of the parties and has not yet been made public or reported to authorities. Beta$_2$ believed in the need for a case-specific approach, stating, "at that point, you would have to make a decision: Do you want to continue forward with this company?"[1315] They emphasized that the decision to proceed should be contingent upon the severity of the breach.[1316] Chi added that the appropriate course of action primarily depends on the contracting party and can be escalated to regulators when necessary, but many companies aim to "manage the issues internally."[1317] Rho shared a similar perspective and noted that the decision hinges on the preferences of the company, as some may opt for settlement instead of pursuing litigation.[1318] This is why anti-corruption clauses should clearly address the protocol for determining subsequent steps in the event of a breach. As highlighted by Upsilon, in the event of a violation, "I then have a leg to stand on in terms of what I [am] going to do next based on what my contract says."[1319] Similarly, Gamma argued that mandatory legislation punishing violations is necessary, especially "if there is a flagrant contravention of a commitment or a law, there needs to be a meaningful consequence," as that is the most effective means to deter such behavior in the future."[1320]

However, in cases where the clause is silent on remedies, the question arises: should parties automatically consider it a material breach and proceed with termination, or should they first explore alternative remedies? Interviewees presented different perspectives on the best course of action upon discovering a breach of anti-corruption clauses by one party. Seventeen interviewees advocated for termination, with ten favoring absolute and immediate termination, while seven opting for conditional termination. In addition to termination, interviewees mentioned

[1315] Beta$_2$, *supra* note 652 at 7.
[1316] *Ibid*.
[1317] Chi, *supra* note 748 at 7.
[1318] Rho, *supra* note 647.
[1319] Upsilon, *supra* note 642 at 11.
[1320] Gamma, *supra* note 616.

supplementary measures, such as communication, indemnification, audit and investigation, reporting, dispute resolution, suspension of payments, and refraining from future contracts. Further details are discussed below.

Out of the 27 interviewees, ten expressed the belief that immediate termination is the most appropriate course of action in response to violations of anti-corruption clauses. Delta explicitly advocated for termination,[1321] while Sigma considered it "probably the least draconian measure."[1322] Beta mentioned that anti-corruption clauses should always include termination as a "last-resort sanction."[1323] They pointed out that "the law and the credibility of enforcement has to … always be there to guard against [situations where] things do not go well and to provide a possibility to sanction wrongdoing."[1324]

In addition, Eta recounted their former company's anti-corruption clause, which allowed for "the right of instant termination" upon the detection of any violation, regardless of court rulings or other regulatory involvement.[1325] Theta highlighted that non-compliance leads to the enforcement of sanctions and emphasized that it is not "a no-biting treat; it is not just there for fun."[1326] They argued that, because the burden falls on them in cases of non-compliance, "it is merely in [their best] interest to terminate the contract immediately" to preempt issues such as investigations by relevant authorities and damage to their reputation.[1327] $Beta_2$ also believed that if, in a JV, when parties become aware of another party's violation, there is a need to replace them in the project.[1328]

[1321] Delta, *supra* note 646 at 4.
[1322] Sigma, *supra* note 618 at 11.
[1323] Beta, *supra* note 730 at 6.
[1324] *Ibid*.
[1325] Eta, *supra* note 699 at 11.
[1326] Theta, *supra* note 705 at 4.
[1327] *Ibid*.
[1328] $Beta_2$, *supra* note 652 at 7.

Among others, three interviewees asserted that the violation of an anti-corruption clause should be regarded as a material breach of the contractual terms and result in its termination. Nu believed that the contract should explicitly state that "breach of the business ethics clauses is a material breach, giving rise to termination rights," because in cases of an ongoing breach, the innocent party would not want to continue the contract and risk implicating themselves in the wrongdoing.[1329] Pi also mentioned that in all five different companies for which they worked, "when there is a default in the contract [or] breach of the law, the contract shall be terminated immediately."[1330] While not advocating for the termination of contracts in all cases, Xi mentioned that they would prefer to see clauses specifying that "if there is a material breach and a material corruption event, there should be some sort of obligation or a right for the aggrieved party to terminate the contract," with the term "material" potentially left undefined for courts to decide.[1331]

The other two interviewees believed that termination extends beyond the mere contract. Iota mentioned that in cases of violation, parties should "terminate the employment of the employees involved, [and] the business relationship with the intermediaries that are involved."[1332] Moreover, Phi noted that, apart from contract suspension, "usually multinational companies have stricter rules and regulations in respect of their operations."[1333] They also cited their former company as an example, where failure to strictly adhere to established rules or engage in activities outside the prescribed guidelines leads to immediate termination of employment and contract applications.[1334]

[1329] Nu, *supra* note 627 at 5.
[1330] Pi, *supra* note 718 at 7.
[1331] Xi, *supra* note 621 at 11.
[1332] Iota, *supra* note 771 at 8.
[1333] Phi, *supra* note 780.
[1334] *Ibid*.

On the other hand, seven interviewees believed that termination, while important, is not always the most appropriate response to all instances of violations. Among them, three interviewees supported termination, but their stance depends on the situation. Kappa described their organization's approach, which advises companies that "disengagement should be the last resort," even in high-risk contexts, in order to promote sustainable engagement and economic development.[1335] Kappa recommended using "the threat of disengagement" without actual termination if the company demonstrates behavioral change and risk mitigation.[1336] They suggested employing such a threat to compel necessary adjustments, particularly if a company fails to disclose EITI requirements, penalize employees, or conduct internal anti-corruption training.[1337] Kappa concluded, "disengage only if that company is not showing any measurable improvement."[1338] Moreover, Omega stated, "there has to be teeth, so, if someone violates it and gets in trouble for it, they have to be [held] responsible."[1339] However, they noted that termination should be determined based on the clarity of the violation; if wrongdoing is evident and cooperation lacking, termination is necessary, but if uncertainty exists, an investigation is conducted, and termination may follow refusal to cooperate.[1340] Similarly, Chi mentioned that if a party fails to fulfill their obligations, including compliance, consequences ensue, depending on the severity of the incident, while in cases of serious incidents, it may lead to contract termination.[1341]

Two other interviewees believed that while the violation of anti-corruption clauses should generally result in termination, some exceptional situations are exempt from such a consequence.

[1335] Kappa, *supra* note 696 at 6.
[1336] *Ibid*.
[1337] *Ibid*.
[1338] *Ibid*.
[1339] Omega, *supra* note 651 at 4.
[1340] *Ibid* at 4–5.
[1341] Chi, *supra* note 748 at 6–7.

Upsilon emphasized that "contract clauses, when violated, should have teeth, and there should be consequences for violations of them."[1342] They proposed that clauses should clearly state, "we have strong stance against bribery, and every violation will be investigated, and appropriate sanctions will be applied, up to and including termination."[1343] However, upsilon believed that in some cases, there is no need for termination; for example, if the parties violate policies regarding gifts and hospitality or facilitation payments.[1344] They explained that these cases are different from situations where, for example, "a freaking lobbyist is buying off a politician."[1345] Therefore, they suggested implementing "remediation plans" where it is appropriate and termination when no resolution is possible.[1346] Likewise, Xi advocated for "a right to cure" and referred to "anti-corruption hiccups" such as facilitating payments, which are legal under the FCPA.[1347] They believed that such issues should undergo thorough examination to determine the possibility of addressing and rectifying the situation.[1348]

Moreover, two interviewees suggested that when considering termination for violations, parties should differentiate between companies. Upsilon pointed out sometimes companies may prefer not to pursue immediate termination.[1349] They explained, "if it [is] a critical supplier, sometimes it [is] better to try to work [on] remediation than to proceed with immediate termination."[1350] Omicron provided further clarification on this matter. Initially, they believed that violations should result in the suspension of the work and termination of the contract; "otherwise, there is no point

[1342] Upsilon, *supra* note 642 at 12.
[1343] *Ibid*.
[1344] *Ibid*.
[1345] *Ibid*.
[1346] *Ibid*.
[1347] Xi, *supra* note 621 at 8.
[1348] *Ibid*.
[1349] Upsilon, *supra* note 642 at 14.
[1350] *Ibid* at 11.

in including the clause if there are no consequences for breach."[1351] However, Omicron made an important distinction between a company with adequate anti-corruption procedures in place and a company where systemic bribery and corruption are routinely practiced and supported. They explained that bribery and corruption are often committed by people within an organization, not by the company as a whole, stating, "just because you have one bad actor or a couple of bad actors in an organization does [not] mean that the whole company is corrupt."[1352] They believed that if companies have identified and addressed the issue, paid fines, and implemented corrective measures to prevent it from happening again, it should not be grounds for contract termination.[1353]

In addition to contract termination, anti-corruption clauses can impose additional requirements for addressing and remediating breach cases. Nu explained that while historically, many clauses simply stated, "if you violate, we terminate," contemporary contracts are adopting a more nuanced approach.[1354] A new type of breach clause is emerging, stating, "upon reasonable suspicion, we can take the following actions," and offering a range of possible responses to such suspicion.[1355] The following discussion explores the supplementary measures proposed by interviewees to be included in these clauses.

Seven interviewees made reference to the communication requirements in cases of violations, including notification and cooperation with the other party. Tau highlighted that upon discovering a violation, "the first thing is to talk to the other party and their compliance department."[1356] Nu noted an increasing number of modern contracts containing clauses that require parties to report

[1351] Omicron, *supra* note 617 at 14.
[1352] *Ibid* at 15.
[1353] *Ibid*.
[1354] Nu, *supra* note 627 at 6.
[1355] *Ibid*.
[1356] Tau, *supra* note 690 at 7.

suspicious activities to each other, cooperate in internal investigations initiated by the other party, and share documents, except where legal privilege applies.[1357] Upsilon also advocated for a disclosure requirement in cases of indictment or investigation.[1358] Iota also recommended that anti-corruption clauses should request parties to notify the counterparty if they "become aware of any bribery related to the work that contract encompasses."[1359] $Beta_2$ recommended that for less severe violations, parties should ensure that "the issue is raised with the appropriate people," while clearly expressing their intolerance for such behavior and suggesting personnel changes when necessary.[1360]

Expanding on the communication requirements, Tau explained that proactive communication involves a commitment by parties to promptly report any irregularities in their records or any instances where they have been approached for improper payments during their business operations.[1361] They further added that parties need to ensure that all employees are well-informed about these standards while maintaining open and transparent communication with clients.[1362] Tau further highlighted specific scenarios where the disclosure of PEPs is necessary, particularly when setting up a company in foreign countries where local shareholders, often government officials, are involved.[1363] Lastly, Xi proposed the inclusion of a "notice period" when imposing the obligation of notification and cooperation on parties in cases of uncovering a corruption event in their project.[1364] During this specific period, "the parties collaborate together to figure out what

[1357] Nu, *supra* note 627 at 5.
[1358] Upsilon, *supra* note 642 at 11.
[1359] Iota, *supra* note 771 at 7.
[1360] $Beta_2$, *supra* note 652 at 7.
[1361] Tau, *supra* note 690 at 5.
[1362] *Ibid*.
[1363] *Ibid*.
[1364] Xi, *supra* note 621 at 10.

happened and are obligated to share information to the extent they can, without breaching privilege."[1365]

Moreover, six interviewees discussed the pursuit of compensation for damages resulting from violations of anti-corruption clauses. Omega emphasized the need for "indemnification,"[1366] while Omicron mentioned the "recovery of money … paid under the contract."[1367] Eta stated that in the event of violations, their company has the right to claim full compensation,[1368] and similarly, Nu suggested that the breach should grant the parties the right to "indemnity for any losses arising from the breach."[1369] On the other hand, Delta proposed that companies should seek damages or penalties through legal means and court procedures.[1370] Xi highlighted the importance of "seeking compensation for losses associated with the breach, [including] consequential damages," and recommended "seeking indemnification to [cover] direct losses on the part of the aggrieved party."[1371] They highlighted reputational issues as one of the consequential damages at stake, noting that "if a super major [company] is found to be working with a corrupt contractor," there are quantifiable reputational damages that can be recovered.[1372]

Furthermore, five interviewees discussed the matter of audit and investigation concerning violations of anti-corruption clause. Omega suggested that when there is uncertainty about a violation, an investigation should be conducted, and if a party under suspicion refuses to cooperate,

[1365] *Ibid* at 10–11.
[1366] Omega, *supra* note 651 at 4.
[1367] Omicron, *supra* note 617 at 13.
[1368] Eta, *supra* note 699 at 3.
[1369] Nu, *supra* note 627 at 5.
[1370] Delta, *supra* note 646 at 4.
[1371] Xi, *supra* note 621 at 11. The examples of consequential damages include reputational damage, loss of anticipated profits, and loss of goodwill; see generally, Richard A Epstein, "Beyond Foreseeability: Consequential Damages in the Law of Contract" (1989) 18:1 J Leg Stud 105.
[1372] *Ibid*.

termination is an appropriate course of action.[1373] Nu recommended including compliance with anti-corruption standards within the audit clause of the contract, so that each company has the right to conduct an audit of the other to identify any potential misconduct.[1374] Upsilon also emphasized that "audit rights are very powerful" in this context.[1375] Both Pi and Chi mentioned that in Indonesia, the government-required anti-corruption clause includes a "vender anti-bribery and corruption audit."[1376]

In addition, five interviewees believed that incidents of corruption should be reported to the relevant authorities as a form of self-disclosure. Upsilon suggested consulting the company's legal team "to see if you need to self-disclose, and if that [is] in your beneficial interest."[1377] Similarly, Omicron discussed "the option to report the infringing behavior to the authorities, so they may determine whether or not to prosecute the offending company or individual."[1378] $Beta_2$ also suggested that it might necessary to report violations to the appropriate officials to "avoid getting wrapped up in legal issues."[1379] Likewise, Chi mentioned that "if necessary, [it] can be escalated to … the regulator."[1380] Sigma similarly recommended reporting the violation to relevant authorities in each jurisdiction, stating that if there is a violation of anti-corruption laws, regulators should become involved.[1381] They further explained that ethical companies should voluntarily disclose such issues to the DOJ in the US, and in other countries, they should approach the respective regulator to report the issue.[1382]

[1373] Omega, *supra* note 651at 4–5.
[1374] Nu, *supra* note 627 at 6.
[1375] Upsilon, *supra* note 642 at 14.
[1376] Pi, *supra* note 718 at 6; Chi, *supra* note 748 at 6.
[1377] Upsilon, *supra* note 642 at 11.
[1378] Omicron, *supra* note 617 at 13–14.
[1379] $Beta_2$, *supra* note 652 at 7.
[1380] Chi, *supra* note 748 at 7.
[1381] Sigma, *supra* note 618 at 11–12.
[1382] *Ibid*.

Additionally, four interviewees discussed dispute resolution in cases involving violations of anti-corruption clauses. Phi emphasized the importance of legal action against employees or third parties implicated in violations.[1383] Chi suggested that elevating "severe situations" to litigation and beyond.[1384] On the other hand, Rho favored arbitration over the court system for its practicality and efficiency. They explained that many contracts, especially major contracts and JV agreements, are often "subject to arbitration for termination."[1385] In their view, this choice is made because arbitration involves "well-trained lawyers and businessmen who provide different perspectives," which makes arbitration a more straightforward system than legal proceedings, which can be time-consuming.[1386] Sigma echoed the benefits of arbitration over court proceedings and clarified that the choice depends on the context and the global locations of the parties involved.[1387] They explained that contracts always include arbitration clauses to maintain commercial relationships without risking reputation damage from court proceedings.[1388]

Also, three interviewees emphasized that when an anti-corruption clause is violated, parties should refrain from entering into any future contracts with the offending party. Rho suggested that upon discovering another party's violation, they could at least initiate a conversation with the violators and let them know that "they [have] been naughty, and they will not get another contract."[1389] Moreover, Omicron advised that a common remedy is implementing a blacklisting policy, which involves "removing the offending supplier from an approved vendors list."[1390] They explained that this removal clearly demonstrates the consequences of breaching an anti-corruption clause in a

[1383] Phi, *supra* note 780 at 6.
[1384] Chi, *supra* note 748 at 7.
[1385] Rho, *supra* note 647.
[1386] *Ibid*.
[1387] Sigma, *supra* note 618 at 13.
[1388] *Ibid*.
[1389] Rho, *supra* note 647 at 12.
[1390] Omicron, *supra* note 617 at 13.

contract.[1391] Similarly, Theta mentioned that non-compliance could result in being blacklisted, which means not receiving business from the company due to its reputation as a corrupt entity.[1392] They further explained that companies implement this blacklisting to prevent future incidents where their business principles may not be respected.[1393] In their view, companies usually strive to avoid being blacklisted and losing opportunities, and therefore, they adhere to the other company's business principles and anti-corruption policy.[1394]

Lastly, three interviewees proposed suspending payments to the other party when a violation of anti-corruption clauses is discovered. Rho suggested "withholding funds under the contract,"[1395] while Tau acknowledged that halting payments may appear to be a reasonable remedy from the client's perspective but cannot be employed as a remedy for the supplier.[1396] Besides, Eta pointed out that some companies use anti-corruption clauses as leverage to stop payments instead of terminating contracts.[1397]

Figure 31 summarizes the interviewees' perspectives on the appropriate courses of action when one party discovers a violation of anti-corruption clauses by the other party. It should be noted that the absence of reference to certain remedies by some interviewees does not imply that their disbelief in them; rather, the interview questions focused on determining the most proper course of actions. These varied perspectives from interviewees are consistent with the findings from the previous chapter, where petroleum contracts were analyzed to understand how they addressed violations in terms of sanctions and remedies. Among the 60% of studied contracts that specified

[1391] *Ibid*.
[1392] Theta, *supra* note 705 at 4.
[1393] *Ibid* at 5.
[1394] *Ibid*.
[1395] Rho, *supra* note 647.
[1396] Tau, *supra* note 690 at 7.
[1397] Eta, *supra* note 699 at 7.

sanctions, 276 included the right to termination. Surprisingly, another 82 contracts declared the contract as "void ab initio," a remedy not mentioned by any of the interviewees. As explained in the previous chapter, this remedy essentially wipes out the contractual relationship entirely, as if it had no legal effect from the outset. Therefore, the interviewees may not refer to it, as they cannot claim for damages and exercise indemnification rights in cases where contracts become completely void. In terms of further protective provisions, several contracts incorporate indemnification rights, as well as legal and disciplinary sanctions, along with financial penalties.

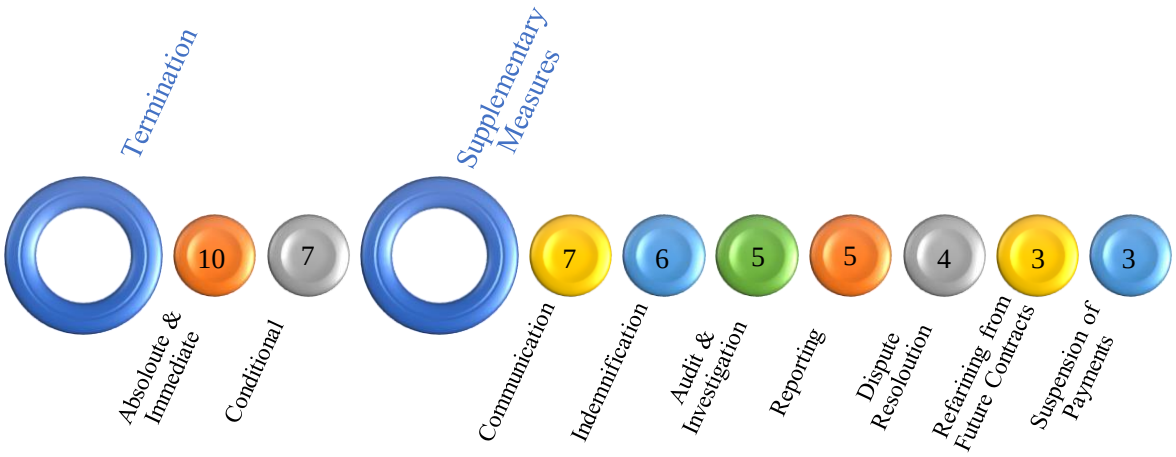

Figure 31 – Contractual Responses to Anti-Corruption Clause Violations, with the Number of Interviewees Citing Them

Taking into account all the comments provided by the interviewees above regarding potential sanctions and remedies, what should an optimal anti-corruption clause include? Before addressing this question, an important consideration is the interaction between government-established anti-corruption legislation and a company's response to it. While governments enact anti-corruption laws to criminalize violations, which may lead to fines and imprisonment, companies respond by incorporating contractual language that redefines breaches as civil matters governed by contract law. Therefore, the criminal dimension is the responsibility of the government for prosecution, with companies having the ability to contribute by bringing the matter to the attention of relevant

authorities. On the other hand, managing the civil aspects falls under the purview of the contracting parties, who address them through contractual remedies such as termination and suspension of payments.

Now to answer the question above and effectively implement anti-corruption clauses, companies should embrace a zero tolerance approach to all forms of corruption, regardless of the parties involved. This approach dictates that any indication of corruption warrants contract termination and immediate reporting to the relevant authorities. Such a strict stance acts as a powerful deterrent, leaving no room for exceptions. There should be no distinction between companies with strong ethical cultures and those with questionable practices, nor should be any differentiation between cases involving gifts, facilitation payments, and outright bribery. Within this approach, anti-corruption clauses should explicitly state that any violation of the clause constitutes a *material breach*, resulting in immediate contract termination. In addition, the termination section of the contract should specify non-compliance with the anti-corruption clause and anti-corruption laws as grounds for termination. In cases where sanctions and remedies are not mentioned in the contract text, the previous chapter has explored the possibility that parties can consider the violation of anti-corruption clauses as a "material breach" in English Law, a "substantial impairment" in the UCC, or a "fundamental breach" in the CISG.

Alongside termination, any discovery of corrupt acts should be reported to the relevant authorities within host and home countries. While some interviewees favored arbitration due to its low impact on reputation, it is important to recognize that failing to report corruption may imply complicity, which can damage a company's reputation and credibility, especially if the corruption becomes public knowledge later. Therefore, it is advisable for companies to prioritize reporting of corruption to the relevant authorities, even when opting for arbitration over court proceedings.

Self-disclosure, while potentially involving some degree of reputational and financial damage to the non-violating party, as well as risks such as legal challenges or retaliation, can help in adverting additional financial penalties during investigations, as authorities may view such action as a mitigating or defensive measure.

In addition to contract termination and mandatory reporting to the relevant authorities, an anti-corruption clause should include other measures, such as requirements for effective communication, internal investigation, and indemnification rights. The practice of debarment or blacklisting, as emphasized by the interviewees, emerges as another effective mechanism. A good example is the WBG's debarment system, which operates according to its own set of proof standards. As explained in Chapter Three, when there is sufficient evidence of misconduct, the WBG adds the offending company to a blacklist and imposes sanctions without requiring court decisions or any other judgments.[1398] A similar system could be adopted on a global scale: if a party is definitively proven to have breached anti-corruption clauses, their inclusion on a shared list would alert other stakeholders to such misconduct. This mechanism can enhance transparency and facilitate due diligence practices within the industry.

E. Beyond Direct Anti-Corruption Clauses: Alternative Paths to Enforcing Anti-Corruption Commitments

In cases where petroleum contracts lack specific anti-corruption clauses, particularly in older contracts that remain in effect, an important question arises: can parties rely on alternative clauses to uphold anti-corruption commitments? Answering this question is particularly important, as

[1398] For further details on the work of Office of Suspension and Debarment, see World Bank, "Office of Suspension and Debarment" (last visited 22 July 2024), online: *World Bank* <www.worldbank.org/en/about/unit/sanctions-system/osd> [WB, "Suspension"].

renegotiating contracts to introduce anti-corruption clauses can be a complex and challenging process. While the straightforward solution might appear to involve sending an addendum and seeking signatures, the reality is often more complicated. As highlighted by Upsilon, both legal teams and business stakeholders often approach contract renegotiation with hesitation.[1399] Upsilon noted that parties may either reject such requests, become "offended," or insist on "renegotiating the whole thing," which can create "a bit of a nightmare" for the other party.[1400] Instead, parties can achieve anti-corruption objectives by resorting to substitute clauses that may serve a similar function as direct anti-corruption clauses. When presented with the question of alternative clauses, the majority of interviewees expressed the belief that parties can turn to other clauses within contracts to enforce anti-corruption commitments. Specifically, they mentioned clauses related to compliance with laws, audits, assignments, and transparency, which will be further discussed below.

Among interviewees, Omega, firmly held the belief that only a dedicated anti-corruption clause could effectively fulfill this purpose and that it cannot be substituted with any other contractual clauses.[1401] In contrast, others argued that in the absence of anti-corruption clauses, parties may turn to alternative clauses within the contract to compel each other to adhere to anti-corruption standards. For example, Beta$_2$ affirmed the usefulness of such a clause in specific cases, stating "it is better than nothing," while stressing the importance of having a dedicated anti-corruption clause in high-risk jurisdictions to explicitly outline expectations and enforce zero-tolerance policies against corrupt behavior.[1402]

[1399] Upsilon, *supra* note 642 at 13.
[1400] *Ibid*.
[1401] Omega, *supra* note 651 at 5.
[1402] Beta$_2$, *supra* note 652 at 8.

When exploring alternative contractual clauses, those related to compliance with the laws clauses stood out as the most commonly cited by the interviewees. As discussed in the previous chapter, these clauses were present in 86% of the petroleum contracts studied. Regarding the use of such clauses for anti-corruption purposes, Omicron emphasized that when parties seek the other party's adherence to anti-corruption laws, they often resort to the compliance with laws clause or the governing law clause.[1403] These clauses, as explained by Omicron, bind the parties to abide by all the laws of the respective country; for example, if a company were to breach the UKBA, even in the absence of specific mention in the contract, the compliance clause could still be invoked.[1404] Similarly, Nu pointed out that in the absence of direct anti-corruption clauses, parties often incorporate a more general commitment stating "I will comply with applicable laws."[1405] They clarified that this broader clause includes business ethics laws as a subset of applicable law, which offers a means to address anti-corruption standards.[1406] Likewise, Tau referred to the presence of a standard clause mandating compliance with all legislation, particularly in contracts governed by English law, which inherently includes the UKBA.[1407] However, Omega held a differing view: while advocating for the inclusion of a separate and distinct anti-corruption clause, they argued that a generic compliance with laws clause is excessively broad and could potentially lead to misunderstandings or disputes regarding its interpretation.[1408]

Sub-contracting and assignment clauses represent another avenue for parties to enforce anti-corruption commitments. As delineated in the previous chapter, nearly 97% of the studied petroleum contracts incorporated such clauses. According to Nu, these clauses often dictate that

[1403] Omicron, *supra* note 617 at 12–13.
[1404] *Ibid* at 13.
[1405] Nu, *supra* note 627 at 6.
[1406] *Ibid*.
[1407] Tau, *supra* note 690 at 8.
[1408] Omega, *supra* note 651 at 5.

any subcontracts must include anti-corruption or business ethics requirements, with subcontractors being subject to compliance review.[1409] Nu further asserted that termination remedies may be included in such clauses if the counterparty fail to meet the subcontracting requirements.[1410] Kappa also highlighted the role of assignment clauses in reinforcing anti-corruption commitments. They observed that within these clauses, parties can compel their suppliers to include anti-corruption clauses in their respective supplying contracts.[1411] Beta$_2$ also recommended a proactive approach, suggesting that the best practice is to share CoCs with subcontractors and clearly communicate the company's expectations regarding ethical behavior.[1412]

Another useful contractual clause to consider is the audit and monitoring clauses. As demonstrated in the preceding chapter, a substantial majority of the reviewed petroleum contracts, approximately 96 percent, integrated at least one clause containing audit or monitoring clauses. According to Nu, petroleum contracts often include audit clauses that explicitly address compliance issues to grant each party the right to conduct audits of the other party's operations and investigate potential wrongdoing, including corruption matters.[1413] However, a notable challenge associated with exercising such rights lies in the practical implementation of these clauses for anti-corruption purposes. In this respect, Rho observed that while audit clauses "can be very powerful," they also pose certain challenges.[1414] Specifically, when working for a company serving multiple clients, audits may be restricted to scrutinizing transactions directly associated with the contracted work, and companies usually only permit parties to examine transactions related to their contract, while

[1409] Nu, *supra* note 627 at 6.
[1410] *Ibid*.
[1411] Kappa, *supra* note 696 at 5.
[1412] Beta$_2$, *supra* note 652 at 8.
[1413] Nu, *supra* note 627 at 6.
[1414] Rho, *supra* note 647 at 10.

withholding access to transactions involving other companies.[1415] Omicron further asserted that audit rights primarily involve the examination of books and records to ensure the accuracy of transactional processes, which includes verifying the precision of invoice processing, detecting and rectifying any anomalies, and maintaining health and safety records.[1416] They added that audit rights are not commonly extended to assess the "companies' compliance with anti-bribery laws."[1417]

Finally, Gamma$_2$ noted that "if there [is] a transparency clause in a contract that is an anti-corruption clause."[1418] They believed that mandating the public disclosure of any information, such as payments, contracts, and subcontracts, could act as a deterrent to corruption.[1419] When parties are obligated to disclose such details, it becomes more difficult to engage in corrupt practices without detection. For example, if all payments made under a contract must be publicly disclosed, it becomes challenging for parties to engage in bribery schemes without raising red flags. Figure 32 provides a summary of alternative contractual clauses suggested by the interviewees for situations where direct anti-corruption clauses are not included in the contract.

[1415] *Ibid*.
[1416] Omicron, *supra* note 617 at 13.
[1417] *Ibid*.
[1418] Gamma$_2$, *supra* note 620 at 7–8.
[1419] *Ibid* at 7.

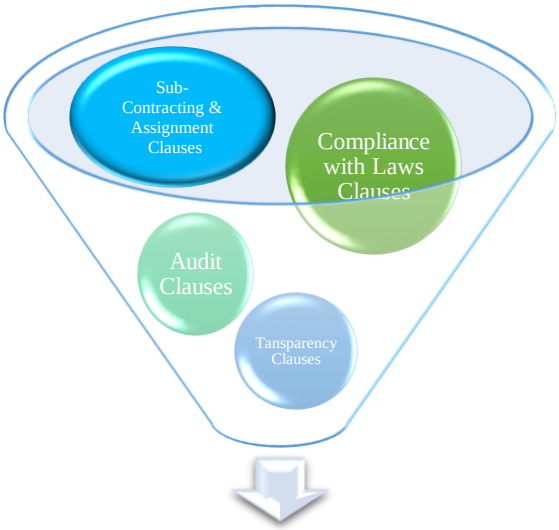

Figure 32 – Alternative Contractual Clauses for Anti-Corruption Commitments, Suggested by the Interviewees

When weighing all the factors discussed above, it becomes evident that the best approach, in line with anti-corruption standards, is for parties to employ every available means to ensure the inclusion of anti-corruption commitments in their contracts. In cases where these clauses are expressly absent, renegotiating the contract and introducing addendums containing anti-corruption clauses may be necessary. However, as mentioned earlier, parties often hesitate to initiate contract renegotiations due to the potential impacts on various aspects of the agreement, including pricing. Nonetheless, alternative paths exist to fortify anti-corruption commitments. Parties can strategically leverage existing contract clauses by interpreting them in a manner that includes anti-corruption commitments. As highlighted in the previous chapter, although not all examined petroleum contracts contained direct anti-corruption clauses, the majority did include indirect clauses, such as training, audit, assignment, and compliance with laws. These indirect clauses present opportunities for enforcing anti-corruption commitments in the absence of direct, explicit anti-corruption clauses. For example, training clauses provide a powerful mechanism for disseminating anti-corruption principles among staff, employees, agents, and third parties.

Similarly, audit clauses stand as another tool for monitoring the other party's compliance with anti-corruption obligations. While this practice may not be widely adopted, as indicated by the interviewees, influential companies, whether TNOCs or NOCs, that embrace this progressive approach can set new industry standards. Their actions serve as guiding beacons, inspiring others within the sector to follow suit. Sub-contracting and assignment clauses should not be overlooked, as they offer an avenue for due diligence concerning the ethical conduct of third parties engaged in the contract. Lastly, compliance with applicable laws clauses can be used to incorporate anti-corruption commitments, given that almost all national legal systems now feature anti-corruption legislation. This is in addition to several international and regional conventions that have established anti-corruption standards.

3. Real-World Impact and Challenges: The Path to Perfecting Anti-Corruption Clauses

In this section, the focus shifts to the practical effectiveness and integrity of anti-corruption clauses in the eyes of the interviewees. Subsection (A) examines whether these clauses receive support in practice. Next, Subsection (B) investigates the interviewees' observations regarding the application of these clauses in real-world scenarios, while Subsection (C) evaluates their actual impact on corruption levels. The section comes to a close with Subsection (D) exploring the challenges faced by these clauses in practice, along with the interviewees' suggestions for improving their effectiveness.

A. Embracing or Rejecting: Corporate and Government Reception of Anti-Corruption Clauses

In the complex world of petroleum contracts, does every party wholeheartedly endorse the inclusion of anti-corruption clauses, or are there subtle currents against it? If resistance does exist,

what are its origins, and what factors come into play? Is it because of the other party's insistence on their own anti-corruption clauses, or is there sometimes a complete reluctance to include them altogether? This subsection brings together the perspectives shared by the interviewees to provide a thorough understanding of the real-world acceptance of anti-corruption clauses.

Interviewees expressed varying opinions on the practical acceptance or rejection of anti-corruption clauses. Some noted a complete refusal of such clauses, pointing to NOCs, larger companies, those influenced by cultural considerations, and those unwilling to be bound by foreign laws as primary reasons. Another set of interviewees witnessed negotiations over specific details within anti-corruption clauses. These discussions included considerations for remedies for violations, pre-contract corruption history, compliance with complicated foreign laws, the treatment of facilitation payments, the need for clear definitions, and addressing PEPs. On the other hand, some interviewees observed consistent support for anti-corruption clauses and attributed this support to the role of governments and external pressures. These external pressures stem from ESG initiatives, transnational organizations, media attention, and peer pressure within the industry. The discussion below provides further details about these different perspectives.

Several interviewees confirmed the presence of resistance when parties attempt to incorporate anti-corruption clauses. Iota, for example, pointed out that these clauses often face two distinct levels of pushback.[1420] The first level involves resistance regarding the specific details within the anti-corruption clause. Iota noted that companies often "get into some of the nuances of the provisions, [such as] what is available remedy under this provision?"[1421] They viewed this resistance as a common aspect of contract negotiation and risk management, which does not necessarily indicate

[1420] Iota, *supra* note 771 at 8.
[1421] *Ibid*.

disagreement with the clause itself; rather, it aims to minimize potential liabilities as much as possible.[1422] On the other hand, the second type of resistance involves a complete refusal of the clause. Iota observed instances where "people flat out refuse to accept an anti-bribery provision," particularly in certain countries or regions with specific patterns.[1423] They regarded this type of objection as more blatant and unjustified, especially considering that "the bare minimum" they can do is including an anti-corruption clause in the contract, with parties not taking significant action beyond "throwing some words on a piece of paper."[1424]

As per Theta's remarks, resistance sometimes was tied to negotiations that focus on the specific details of the anti-corruption clause rather than the clause as a whole. In this context, Xi shared their company's exceptions to agreeing with the other party's clauses. They explained objections arise when there are "representations to past conduct," particularly if a customer can terminate a contract due to "historical conduct comes to light during the execution of what we [are] signing up to today."[1425] Xi argued that these two aspects are unrelated and should not mutually impact each other.[1426] They also mentioned exceptions related to representations requiring compliance with legislation in countries with complex regulatory frameworks for corruption issues, such as Russia.[1427] Another exception in Xi's company concerns facilitation payments: considering them legal under the FCPA, they believe that such payments should not "trigger a termination right from the client."[1428] Lastly, Xi added that they would also object to clauses where a customer introduced their own definition of bribery, and they would "usually try to get away from that or bring that

[1422] *Ibid*.
[1423] *Ibid*.
[1424] *Ibid*.
[1425] Xi, *supra* note 621 at 8.
[1426] *Ibid*.
[1427] *Ibid*.
[1428] *Ibid*.

definition back to the same exact words used in the FCPA."[1429] In addition to Xi, Tau discussed a scenario where contracts contain a general clause stating that "you have no government official who has an interest in your company."[1430] They pointed out that in some countries, parties are required to have local shareholders when establishing a company.[1431] Therefore, in such cases, parties must not only disclose these individuals during their due diligence process but also carefully scrutinize that specific clause, as failing to do so might lead to unintentionally committing in the contract that they have no government officials involved.[1432] They suggested adding a condition to the clause such as "unless disclosed in the due diligence."[1433]

On the other hand, resistance can be observed in connection to the entire clause. Six interviewees noted that resistance is often observed when dealing with NOCs. Delta, for example, explained that this resistance is more common when their company engages with state-owned enterprises in a new country for a new project, as public authorities issue licenses and permits.[1434] Xi shared a similar experience from their company, indicating that NOC clients, like Qatari customers, would not agree to comply with the FCPA but would adhere to their own regulations, such as the Qatari anti-corruption law, which Xi's company found acceptable.[1435] Eta, who previously worked in an NOC, confirmed that in their interactions with aid recipients or promotion beneficiaries, the NOC defines its own internal documents.[1436] Moreover, Sigma explained the challenges that arise when NOCs refuse to include their company's anti-corruption clauses in the contract. They noted that their company usually employs short clauses for their NOC customers, given their reluctance to

[1429] *Ibid*.
[1430] Tau, *supra* note 690 at 5.
[1431] *Ibid*.
[1432] *Ibid*.
[1433] *Ibid*.
[1434] Delta, *supra* note 646 at 4–5.
[1435] Xi, *supra* note 621 at 12.
[1436] Eta, *supra* note 699 at 3.

accept their company's clauses.[1437] They observed that major NOCs often reject their company's compliance clauses while arguing that they have their own anti-corruption regulations in place and do not find it necessary to adopt another company's anti-corruption clauses or subject themselves to another jurisdiction.[1438]

Alpha$_2$ provided further insight into NOCs' approach and stated that NOCs' decision to accept or resist the incorporation of anti-corruption clauses depends on potential liabilities.[1439] According to Alpha$_2$, some NOCs accept such clauses without hesitation, and they explained this behavior by referring to the concept of "the pocket of effectiveness."[1440] This concept describes a situation where certain organizations can operate at a very high ethical level, with excellent processes and governance, "even within a corrupt, chaotic, and dysfunctional system."[1441] They cited Staatsolie in Suriname, the Lebanese Petroleum Administration, and Saudi Aramco as NOCs with such characteristics.[1442]

Interestingly, in Gamma$_2$'s perspective, the oil price can act as a determining factor in whether NOCs push back against anti-corruption clauses. They stated that "if the oil price is low, then, the companies can push for any provisions they want to be added" in the contracts with government and NOCs.[1443] They reasoned that when oil prices are low, companies tend to increase their investments, and investors gain more leverage.[1444] On the other hand, when oil prices are high, the

[1437] Sigma, *supra* note 618 at 10.
[1438] *Ibid* at 11.
[1439] Alpha$_2$, *supra* note 285 at 6.
[1440] *Ibid* at 3.
[1441] *Ibid*.
[1442] *Ibid* at 3–4. For further discussion on pockets of effectiveness, see generally Roll, *supra* note 284.
[1443] Gamma$_2$, *supra* note 620 at 5.
[1444] *Ibid*.

governments have more leverage, and few NOCs "go out of their way to have stricter clauses in their contracts."[1445]

Beyond NOCs, six interviewees referred to a company's size as a critical factor in determining whether companies accept or reject the other party's anti-corruption clause. Tau noted that the incorporation of anti-corruption clauses is "always one-sided; it is always the company that asks the contractor [to be] compliant with the anti-bribery and corruption legislation or convention."[1446] Upsilon also believed that insisting on "all third parties need to accept our terms and conditions" is often impractical, as larger and more influential third parties may refuse to be bound by the terms of a smaller company.[1447]

Delta further explained that, in general, there are discussions and negotiations among the parties concerning risk clauses, including anti-corruption clauses. They shared their company's mixed experiences: smaller contractors or partners tend to accept their clauses, while larger companies do not.[1448] Delta elaborated that, as a larger company, it is easier for them to impose their terms and conditions, including business ethics clauses, on their partners, and in their view, anyone interested in doing business with them, especially SMEs, accepts these clauses.[1449] Delta added that for larger TNCs with their own business ethics and anti-corruption policies, there is some interest in negotiating these clauses, but they have not encountered a situation where a company outright rejected their clauses or a specific anti-corruption clause.[1450] However, Delta acknowledged that when one company attempts to compel the other party to adhere to its CoC and

[1445] *Ibid*.
[1446] Tau, *supra* note 690 at 5.
[1447] Upsilon, *supra* note 642 at 10.
[1448] Delta, *supra* note 646 at 3.
[1449] *Ibid* at 5.
[1450] *Ibid*.

rules, negotiations can pose practical challenges, particularly in terms of communicating internal rules to the other party's employees.[1451] They further noted that, in recent cases, a compromise has been reached with these types of partners: rather than trying to convey each other's internal rules, both parties focus on a common understanding through international initiatives such as the UNGC.[1452]

On the other hand, the remaining three interviewees viewed the capacity of larger companies to impose their policies as a positive aspect in the context of anti-corruption standards. Sigma viewed the dissemination of anti-corruption clauses as a "top-down approach" with favorable outcomes.[1453] They emphasized that in the petroleum industry, whatever the NOC or TNOC says is regarded akin to "God" or "Bible," authoritative and unquestionable, and other companies often adhere to these standards without hesitation, responding with a "yes, Sir."[1454] Sigma found this practice beneficial, stating that mandating anti-corruption obligations by these companies allows others to conform their own standards with anti-corruption expectations and further enforce similar standards with others.[1455] Sigma further explained that it is always the customers who flow these clauses down to the contractors, and the contractors, in turn, pass down these requirements to their vendors.[1456] They believed that these interactions with contractors and vendors can result in the establishment of an industry-wide standard for anti-corruption.[1457] However, Sigma also noted that smaller companies may, at times, decline to accept the clauses of larger companies. They provided an example: smaller vendors, such as those responsible for handling radioactive waste in a specific

[1451] *Ibid* at 3.
[1452] *Ibid*.
[1453] Sigma, *supra* note 618 at 13.
[1454] *Ibid*.
[1455] *Ibid*.
[1456] *Ibid*.
[1457] *Ibid*.

region, might refuse to include their company's anti-corruption clause.[1458] They explained that while these smaller vendors may operate in a limited area compared to larger companies, they may be "the king" in that specific region and may choose not to accept certain clauses.[1459]

Similarly, Theta pointed out that a TNOC, due to its size, has "the leverage to enforce all the terms of its contract" and uses noncompliance as grounds for blacklisting.[1460] They explained that other parties and contractors, "keen on preserving business opportunities," tend to accept the TNOC's contractual terms, including anti-corruption policies.[1461] Eta also referred to the size and the influence wielded by larger companies and underscored the difficulty for SMEs to negotiate terms, as larger companies often impose their policies unilaterally.[1462] In contrast, larger companies can easily dictate terms to SMEs seeking procurement or contractual relationships.[1463] They further added that larger companies can employ mechanisms beyond anti-corruption clauses to enforce anti-corruption commitments, such as conducting audits and providing anti-corruption training to specific employees groups within their organization.[1464] They further explained that SMEs lacking compliance documents may be obliged by larger companies to adopt their internal documents, such as CoC or anti-corruption policies, as contractual attachments.[1465] Eta further discussed the "cascading" approach adopted by major TNOCs such as BP to disseminate requirements throughout their supply and value chain.[1466] Under this approach, the company mandates

[1458] *Ibid* at 10.
[1459] *Ibid*.
[1460] Theta, *supra* note 705 at 6.
[1461] *Ibid*.
[1462] Eta, *supra* note 699 at 3.
[1463] *Ibid*.
[1464] *Ibid*.
[1465] *Ibid* at 4.
[1466] *Ibid* at 4–5.

counterparties to adhere to anti-corruption standards and extends this obligation to sub-vendors, subcontractors, and the entire chain.[1467]

Moreover, two interviewees highlighted the impact of culture on a company's approach to including anti-corruption clauses. Nu observed that while most companies generally recognize the necessity of these clauses in business contracts, occasional instances of pushback may arise.[1468] They shared experiences of some companies that, every once in a while, hesitated to accept a business ethics clause.[1469] Nu believed that these occurrences were often influenced by cultural or regional differences, as the level of awareness regarding regulatory requirements can vary depending on a company's background.[1470] Pi, having worked across different countries, contrasted corporate cultures between their former and current companies. In their previous role, they observed the commonplace acceptance of gifts in the procurement department, including items such as laptops or Harley-Davidson motorbikes from tenderers.[1471] They reasoned that in that company, there was a lack of "strong anti-corruption language in the contract," and intentional avoidance of detailing the scope of work allowed flexibility in manipulating contract amounts."[1472] However, Pi's experiences shifted upon joining a new company in a different country. They described how in this new environment, not only were anti-corruption measures integrated into vender contracts during procurement, but also a comprehensive CoC was instituted and enforced among employees.[1473]

[1467] *Ibid*.
[1468] Nu, *supra* note 627 at 6.
[1469] *Ibid*.
[1470] *Ibid*.
[1471] Pi, *supra* note 718.
[1472] *Ibid*.
[1473] *Ibid*.

Furthermore, Xi encountered resistance from third parties who were reluctant to abide by the laws of another country and observed "not so much resistance by governments, but resistance by third parties to agree to US legal frameworks in remote jurisdictions."[1474] They provided examples of subcontractors in Saudi Arabia and Azeri companies, which were unwilling to comply with the FCPA.[1475] In such cases, Xi explained that they had to break down the specifics and clarify, for example, "this is what bribery means, this is what facilitating payment means, [and] this is what … we want to prevent."[1476] Once they understood, many foreign companies were willing to agree to those principles, even if they hesitated to explicitly commit to "I will abide by the [FCPA]."[1477] Xi explained that there seemed to be a misconception that agreeing to comply with the FCPA in a contract would subject them to US jurisdiction, which is not the case.[1478]

In addition, three interviewees recommended that encountering resistance from the other party regarding the anti-corruption clause should be seen as a clear signal not to engage in business with them. Nu emphasized that facing pushback is a "known red flag," closely tied to their overall compliance program, which raises questions about whether "this party is too risky to do business with."[1479] Iota also emphasized that the refusal to accept an anti-corruption clause reflects poorly on company's business ethics, stating, "if you [are] not even willing to bother to put a provision that says 'your counterparty [will not] engage in bribery,' then, that [is] a pretty bad sign."[1480] Omega expressed a similar view, stating, "if I see resistance, that means there is a problem."[1481]

[1474] Xi, *supra* note 621 at 12.
[1475] *Ibid*.
[1476] *Ibid*.
[1477] *Ibid*.
[1478] *Ibid*.
[1479] Nu, *supra* note 627 at 6–7.
[1480] Iota, *supra* note 771 at 8.
[1481] Omega, *supra* note 651 at 5.

On the other hand, a group of interviewees reported that parties are usually in favor of incorporating anti-corruption clauses in contracts. For example, according to Zeta, for extractive companies, especially the major players listed on stock exchanges, anti-corruption clauses are integrated into their internal policies, thus suggesting there should be no resistance to such clauses.[1482] Moreover, Omicron stated, "generally, most companies will be happy to see the clauses there, and they recognize the protections that it brings for both parties."[1483] However, Omicron emphasized that the real concern is not whether there will be resistance to including the wording, but "the invisible issue is whether people will continue the [corrupt] behaviors regardless."[1484]

Two interviewees, while acknowledging some exceptions, generally believed that anti-corruption clauses enjoy support from parties. Delta commented that such clauses are generally accepted by all types of partners, including companies or public authorities.[1485] Xi further noted that, in their experience, anti-corruption clauses are usually not negotiated, stating, "out of all the clauses in a commercial contract, the anti-corruption clause was probably the least thought about."[1486] Xi argued that the absence of negotiation regarding anti-corruption clauses is not due to a lack of concern about anti-corruption, but rather arises from concerns about modifying a customer's anti-corruption language.[1487] They noted that altering the wording of a contract for anti-corruption might lead the customer to suspect "they have something to hide."[1488] Therefore, there must be a justified reason for parties to make exceptions to the wording and terms of an anti-corruption clause, as discussed earlier.

[1482] Zeta, *supra* note 960 at 6.
[1483] Omicron, *supra* note 617 at 15.
[1484] *Ibid*.
[1485] Delta, *supra* note 646 at 4.
[1486] Xi, *supra* note 621 at 7–8.
[1487] *Ibid* at 8.
[1488] *Ibid*.

Among other factors, seven interviewees referred to the role of governments in supporting anti-corruption clauses. For example, Omicron believed that anti-corruption clauses cannot be viewed negatively by governments since "governments create legislation, … and the inclusion of such clauses is a public demonstration of a company's commitment to the legislation."[1489] Xi added that certain governments or government agencies strongly support parties obligating and contracting around anti-corruption.[1490] They cited examples of countries such as the US, Brazil, and European countries that endorse these clauses.[1491] They further explained that, in the event of a corruption incident in a project, anti-corruption clauses are typically among the first things scrutinized by the DOJ when assessing the parties' obligations and their expectations from third parties regarding anti-corruption measures.[1492]

Moreover, $Beta_2$ referred to the fear of prosecution, which drives support for anti-corruption clauses as a means to evade massive fines imposed by governments for violations of laws such as the FCPA, UKBA, EU regulations, Brazil Clean Company Act, and other national laws prohibiting bribery and corruption.[1493] They observed a growing prevalence of such clauses and suggested they are becoming "a standard practice."[1494] Zeta also emphasized the increasing standardization of anti-corruption policies and clauses on the government side, while witnessing the integration of anti-corruption policies into laws such as the Integrity in Public Life Act in Trinidad and Tobago, which binds Ministers of Energy to strict adherence.[1495] Moreover, Beta drew a parallel between

[1489] Omicron, *supra* note 617 at 16.
[1490] Xi, *supra* note 621 at 11. The act does not mandate anti-corruption clauses in contracts, but it does impose certain anti-corruption and transparency requirements for the government; see *Integrity in Public Life Act* (2000) Act 83, ch 22:01 (Trinidad and Tobago).
[1491] *Ibid* at 12.
[1492] *Ibid*.
[1493] $Beta_2$, *supra* note 652 at 8.
[1494] *Ibid* at 8–9.
[1495] Zeta, *supra* note 960 at 6.

these clauses and the Integrity Pacts initiative by TI, where companies collaborate with public authorities to enter into an integrity pact and commit to avoiding corrupt practices during the tender processes or bidding.[1496]

Most importantly, Chi and Pi referred to the mandatory nature of anti-corruption clauses in Indonesia, which serves as a standard template within oil and gas procurement.[1497] According to Chi, the oil and gas industry in Indonesia is regulated by "SKK Migas," which acts as the regulatory authority for issuing various policies and procedures, and one important policy under its jurisdiction is the PTK Indonesia 007 policy, governing all aspects related to supply chain management.[1498] This policy mandates vendor anti-bribery and corruption audits and requires companies to ensure that all supplier contractors adhere to the provisions of the FCPA, UKBA, and Indonesia's anti-corruption laws.[1499] Chi explained that because this clause is an established standard set forth by the government, compliance is obligatory for all relevant companies.[1500]

Among other factors, three interviewees highlighted the role of external pressure in the adoption of anti-corruption clauses. Delta referred to the growing scrutiny of different ESG aspects by investment funds, particularly in the oil and gas industry.[1501] They explained that business ethics, among these aspects, is particularly important, as companies often undergo annual surveys conducted by ESG auditors to assess their compliance.[1502] Delta elaborated that to facilitate easier access to funds, these companies are encouraged to establish and adhere to more rigorous business

[1496] Beta, *supra* note 730 at 5.
[1497] Pi, *supra* note 718 at 6; Chi, *supra* note 748 at 6.
[1498] Chi, *supra* note 748 at 6.
[1499] *Ibid*.
[1500] *Ibid*.
[1501] Delta, *supra* note 646 at 6.
[1502] *Ibid*.

ethics and anti-corruption policies, including anti-corruption clauses.[1503] Delta concluded that there is "a huge external pressure" on companies to implement and strictly observe these types of requirements.[1504] Moreover, Theta emphasized the role of OECD and the media in the adoption of anti-corruption clauses. They attributed an important role to the OECD in "establishing anti-corruption standards as a global body, [with individual] countries domesticating those policies as part of their laws," which require all their citizens and corporates to comply.[1505] Theta believed that, in addition to enacting anti-corruption laws, governments should actively endorse anti-corruption clauses in contracts as a means of enforcing these laws.[1506] Theta further explained that OECD member countries aim to uphold their own laws because they seek positive perceptions from their citizens, driven by "media exposure," which can uncover corruption issues.[1507]

Omicron emphasized the role of peer pressure in driving the incorporation of anti-corruption clauses. They pointed out that despite the extensive global reach of the petroleum industry, it operates as "a very small community," where insiders can easily identify trends and developments aligned with industry dynamics and its key stakeholders.[1508] Omicron argued that within this closely-knit context, "peer pressure is one of the greatest influencing factors" that guides companies' actions, both among operators and service company contractors.[1509] They observed this pattern of peer pressure "time and time again," particularly coinciding with "the introduction of the anti-bribery clauses in their contracts."[1510] Omicron explained that if major players like Shell and BP introduced such clauses, it was expected that other companies, including Total, would

[1503] *Ibid*.
[1504] *Ibid*.
[1505] Theta, *supra* note 705 at 5.
[1506] *Ibid* at 6.
[1507] *Ibid*.
[1508] Omicron, *supra* note 617 at 4.
[1509] *Ibid* at 3.
[1510] *Ibid*.

likely follow suit, as "they [are] never very out of step with one another."[1511] They further noted that this peer pressure originates from the top levels and permeates down through the supply chain, while compelling contractors and service companies to embrace these clauses to avoid appearing "out of step [or] going against the tide."[1512]

Omicron provided two concrete examples of how peer pressure influences the adoption and contents of anti-corruption clauses. First, they discussed changes made to their company's anti-corruption policy regarding facilitation payments. Omicron explained that, initially, their policy allowed such payments under certain circumstances, in line with the FCPA.[1513] However, realizing that their policy was "out of step with industry standards and norms," and prompted by customer inquiries and pressure from other companies, Omicron's company updated it to prohibit facilitation payments.[1514] As a second example, Omicron highlighted the impact of peer pressure on corporate hospitality, gifts, and entertainment.[1515] They noted that before the introduction of the UKBA in 2010, corporate hospitality practices differed greatly from today, but over the subsequent 13 years, "companies have significantly scaled back their corporate hospitality programs in terms of frequency and spending."[1516] They explained that during this period, there was widespread implementation of policies and procedures governing gifts and entertainment, with companies imposed restrictions and mandatory reporting, with gifts registers now considered standard practice.[1517] Omicron concluded that while corporate hospitality still plays a role in business

[1511] *Ibid*.
[1512] *Ibid*.
[1513] *Ibid* at 17.
[1514] *Ibid*.
[1515] *Ibid* at 16.
[1516] *Ibid*.
[1517] *Ibid*.

development or sales plans, "people are far more sensitive now to what is appropriate and what is not," which is influenced by the practice of other companies in the industry.[1518]

Figure 33 summarizes interviewees' perspectives on the overall attitudes of companies and governments toward the inclusion of anti-corruption clauses. It categorizes these views into complete refusal, negotiations over details, and support, while listing different factors suggested by interviewees that influence these positions.

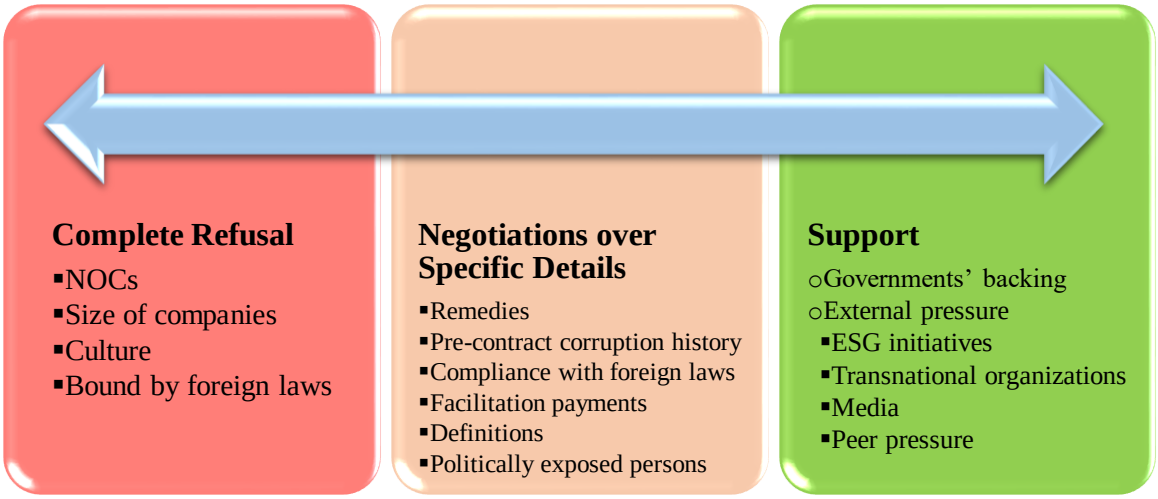

Figure 33 – Factors Influencing Anti-Corruption Clauses' Acceptance, as Viewed by Interviewees

As highlighted by many interviewees, the predominant trend favors support rather than resistance in the integration of anti-corruption clauses into contracts. While instances of resistance have been observed, they usually do not involve outright rejection of the entire clause. Instead, larger companies, whether they are NOCs or TNOCs, often seek to exert their influence by advocating for the inclusion of their own anti-corruption clauses as the governing provisions. This approach is not inherently negative, as long as both parties are bound by established anti-corruption standards. Larger companies, with their substantial leverage, have the potential to establish anti-corruption clauses as a standard practice within the industry. In cases where mutual agreement

[1518] *Ibid.*

cannot be reached, reference to internationally recognized standards, such as the UNGC, the UNCAC, the OECD Convention, or the ICC, can provide a framework for resolution.

In regions where resistance to anti-corruption clauses is more pronounced, the influence of TNOCs becomes more apparent. Theta emphasized that these companies are "very, very powerful globally; they are powerful, not just with the contractors, but they are so powerful with host countries, and they [are] across all over the world."[1519] The fear of job loss acts as a powerful motivator for individuals working with these influential companies to comply with these standards.[1520] Due to their widespread presence and influence on corporations worldwide, TNOCs have significant leverage in mandating adherence to anti-corruption clauses and policies among contractors and their employees.[1521] Expanding on Theta's perspective, viewing corruption as a de facto institution necessitates institutional change to bring about meaningful anti-corruption reform. However, initiating such change through state-centric anti-corruption programs in countries with high levels of corruption often proves challenging, as corrupt norms tend to govern the states and empower economic and political elites resistant to anti-corruption reforms. As catalysts for reshaping norms related to corruption, TNOCs can urge governments to align with TNOCs' regulations, including anti-corruption standards, in exchange for access to the global economy and associated financial gains. In other words, TNOCs have the capacity to steer smaller companies and state-owned enterprises toward embracing and adhering to anti-corruption norms through gentle yet persuasive nudging.

[1519] Theta, *supra* note 705 at 5.
[1520] *Ibid*.
[1521] *Ibid*.

B. From Verbiage to Action: Real-World Experiences with Anti-Corruption Clauses

Do anti-corruption clauses translate into practical application in real-world scenarios, or do they remain as mere contractual formalities? In other words, do parties actively use these clauses to enforce anti-corruption commitments in practice? This subsection explores the insights provided by interviewees regarding whether parties have ever exercised anti-corruption clauses, either through termination or other remedies, to address instances of corruption. In response to this question, two interviewees reported no instances of termination, while four indicated rare occurrences. On the other hand, nine interviewees witnessed some cases of termination, and three observed the application of alternative remedies. These testimonies provide a window into the challenges and successes that parties face as they seek to leverage the power of these clauses to combat corrupt activities.

Some interviewees found it difficult to provide a straightforward answer regarding whether TNOCs leverage such clauses. Gamma$_2$, for instance, referred to the delicacy of the issue, stating, "it [is] so sensitive that I just do [not] think you would ever see an oil company openly admit to [such actions]."[1522] Four interviewees highlighted the difficulties associated with proving corruption as grounds for termination. Nu observed that considerable time can elapse between suspicions arising and actual termination, with companies rarely stating, "I am 100% sure you are guilty of something and I am terminating."[1523] They believed that investigations usually span weeks or even months before any definitive action is taken.[1524] Eta similarly pointed out the same difficulty and argued that corruption is a "very hidden" and "very difficult-to-prove" crime.[1525]

[1522] Gamma$_2$, *supra* note 620 at 6.
[1523] Nu, *supra* note 627 at 5.
[1524] *Ibid*.
[1525] Eta, *supra* note 699 at 8.

They also noted that long-established, mutually beneficial contractual are not easily terminated based solely on suspicion; without court decisions, WBG debarment, or prosecution by national, foreign, or local enforcement bodies, declaring corruption and terminating the contract becomes a challenging task.[1526]

Sigma also mentioned that they had not heard of any contract being terminated due to anti-corruption issues. They explained that this was primarily because of the relatively short duration of their contracts: most of their contracts were master service agreements, usually spanning five or ten years.[1527] They believed that by the time corruption issues were discovered and investigation began, often several years had passed, and the contracts had already concluded.[1528] Sigma further elaborated on the lengthy nature of corruption investigations. They revealed that their company aimed to close investigations within three months from the submission date, but this was not always feasible due to the complexity of the process.[1529] They explained that investigations involved tasks such as interviewing witnesses, including their own employees or those from other companies, and reviewing different types of documents, which includes not only contracts and purchase orders but also technical documents like service tickets, bills, and invoices.[1530] This comprehensive review, while necessary for a thorough investigation, often extends the duration of typical investigations well beyond the conclusion of the contracts. Likewise, Xi explained that termination cases are "few and far between" because the challenge lies in the fact that parties do not discover bribery events until after a project is completed.[1531] They clarified that it is rare that "during an ongoing project, something happens, [like] you find out about a bribery event, and the

[1526] *Ibid* at 6.
[1527] Sigma, *supra* note 618 at 12.
[1528] *Ibid*.
[1529] *Ibid*.
[1530] *Ibid*.
[1531] Xi, *supra* note 621 at 11.

investigation takes place during the execution of a project."[1532] They further noted that even in the case of major corruption events, the DOJ is alerted by a whistleblower often years after the issue initially occurred.[1533]

Among other interviewees, two responded that they had not ever heard of the use of such clauses. For example, $Beta_2$ shared that they had not come across instances where these clauses were exercised to halt a project and suggested that "proactive measures" might be the reason.[1534] They explained that companies anticipate potential issues "before they become something big," and they "put the right safeguards in place," such as monitoring payments before they are made to agents for permits or to government agencies.[1535] Pi also mentioned that despite the contract language in their five different companies, which asks for immediate termination for anti-corruption breaches, they had never experienced a contract being terminated due to a violation of anti-corruption law.[1536] They also noted that in major TNOCs, they have never heard of a contract being terminated due to a vendor breaching anti-corruption laws, not even from their colleagues working in other companies over the past decade.[1537]

Another group of interviewees mentioned they had heard of the usage of such clauses, albeit relatively rarely. Eta had been involved in one such instance, which led to a termination, but they could not disclose further details due to confidentiality constraints.[1538] Similarly, Tau mentioned being aware of one contract termination.[1539] Xi, drawing from their 15-16 years of experience,

[1532] *Ibid*.
[1533] *Ibid*.
[1534] $Beta_2$, *supra* note 652 at 6.
[1535] *Ibid*.
[1536] Pi, *supra* note 718 at 7.
[1537] *Ibid*.
[1538] Eta, *supra* note 699 at 6.
[1539] Tau, *supra* note 690 at 8.

shared knowledge of two incidents: one where their company terminated a contract with a business development agent in a high-risk jurisdiction due to a conflict of interest issue, and the other, where their company terminated the employment of another agent for a different reason.[1540]

Furthermore, Omicron mentioned that "the biggest sanction that can be imposed [is] to terminate a contract, and it has happened in the oil and gas industry."[1541] They added that termination, though not common, has certainly occurred "on more than a handful of occasions."[1542] They explained that this infrequency is due to the distinction made between individual misconduct and systemic corruption within companies. In their view, bribery and corruption are generally committed by individuals, not by the entire company as a whole, and parties distinguish between companies that have adequate procedures in place, where just a single individual may act improperly, and companies where systemic bribery and corruption are routinely practiced and endorsed.[1543] Omicron concluded that termination are rare because companies tend to view corruption as the behavior of "one rogue person," and the whole company is not corrupt."[1544] In another context, Omicron added that terminating a contract, especially for large ongoing projects, is "a big, big consideration" for operators due to the potential disruptions it may cause, so they approach it with careful consideration.[1545]

On the other hand, nine interviewees responded that they had heard about the usage of anti-corruption clauses either within their company or from other companies. Chi, a member of their country's committee for compliance in the petroleum sector, mentioned that fellow committee

[1540] Xi, *supra* note 621 at 11.
[1541] Omicron, *supra* note 617 at 14.
[1542] *Ibid*.
[1543] *Ibid* at 15.
[1544] *Ibid*.
[1545] *Ibid* at 14.

members had shared such experiences.[1546] Moreover, Iota stated, "I cannot think of any examples off the top of my head, but … I would bet a lot of money that has happened."[1547] Similarly, Nu mentioned that they were certain such cases existed, although they had not personally witnessed them.[1548] Likewise, Theta, while not having heard about such cases during their work experience, was sure that "noncompliance always leads to termination."[1549] Gamma$_2$ also added, "anecdotally, I [have] definitely had companies talk to me about deals they [have] walked away from."[1550] They explained that service contracts were particularly susceptible to termination, with service companies sometimes cutting ties due to contractors failing to meet basic reporting standards.[1551] They also added that some partnerships have ended because "the corruption risks just became too high."[1552] Rho also strongly confirmed their use and provided an example from their former company. They referred to a JV agreement with a local company in a large country, which was canceled due to concerns about its riskiness.[1553] Rho emphasized that, sometimes, contracts are terminated not necessarily due to bribery but because the involved party failed to take adequate measures to prevent bribery.[1554]

Among others, three interviewees, while acknowledging the confidentiality of the matter, confirmed the practice of anti-corruption clauses. Kappa mentioned hearing about several situations, stating "I know for sure that these clauses are being used to potentially terminate agreements with uncooperative suppliers, ... but I cannot speak to any of them specifically because

[1546] Chi, *supra* note 748 at 7.
[1547] Iota, *supra* note 771 at 7.
[1548] Nu, *supra* note 627 at 5.
[1549] Theta, *supra* note 705 at 4.
[1550] Gamma$_2$, *supra* note 620 at 5.
[1551] *Ibid* at 6.
[1552] *Ibid*.
[1553] Rho, *supra* note 647 at 9.
[1554] *Ibid* at 10.

these are bilateral, confidential conversations we have with companies."[1555] Delta also confirmed having seen the use of such clauses, but they could not provide further information due to the issue's confidentiality.[1556] Upsilon, who advised clients on anti-corruption compliance, stated, "I do [not] have specific examples because that would be very client-specific [and] discussions under privilege or with internal legal teams."[1557] However, they did confirm that contracts were terminated due to corruption concerns, as during ISO certificate assessments for their clients, they inquire about "whether contracts have been terminated or not initiated because of corruption concerns?"[1558] They further explained that for reputable companies, the answer is "absolutely yes;" however, if a company responded negatively, it could raise concerns among auditors about whether the company is diligently addressing corruption issues.[1559] If there is no evidence of the third-party contract ever being refused or terminated, companies may not obtain their ISO certification.

Moreover, three interviewees observed that the violation of anti-corruption clauses can lead to outcomes other than termination. Tau explained that in most cases, companies cease ordering from the violating party which causes "the contract dies on its own" and naturally expires.[1560] Nu also mentioned encountering threats of termination and the leverage these fears created to encourage cooperation from the accused party.[1561] Furthermore, Eta made a distinction based on when corruption is discovered—whether it is before or after the contract concludes. When corruption is detected before the conclusion, it usually does not lead to termination but instead initiates a "seizing of relationship" during the first stage.[1562] They also pointed out that many companies use

[1555] Kappa, *supra* note 696 at 5–6.
[1556] Delta, *supra* note 646 at 5.
[1557] Upsilon, *supra* note 642 at 12.
[1558] *Ibid*.
[1559] *Ibid*.
[1560] Tau, *supra* note 690 at 8.
[1561] Nu, *supra* note 627 at 5.
[1562] Eta, *supra* note 699 at 6.

the clause not for immediate termination but to "stop payments."[1563] They shared an example from their client's experience, where a major TNOC suspended payments to their client until a compliance incident was mitigated.[1564] On the other hand, after contracts were concluded, instead of termination, they heard about more instances of mitigation measures, such as developing an action plan, addressing concerns raised by the DOJ, removing individuals from managerial positions, or reinstating certain conditions.[1565] They reasoned that parties choose to mitigate the matter because determining whether there is corruption on one side is not always straightforward; it usually revolves around "suspicions of corruption" or potential conflicts of interest.[1566]

Figure 34 summarizes the interviewees' perspectives on the real-world application of anti-corruption clauses, highlighting instances observed of contract termination and other remedies used by the parties.

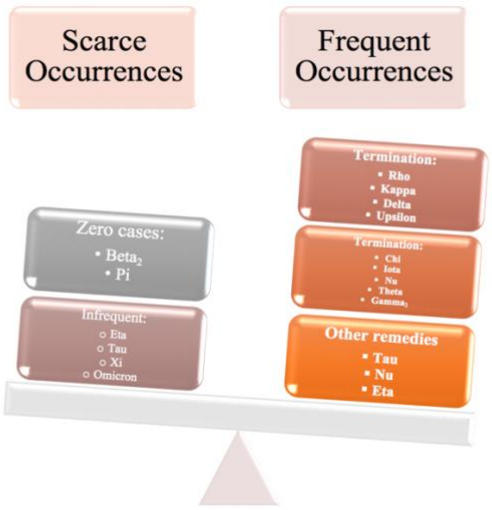

Figure 34 – Real-World Application of Anti-Corruption Clauses: Observations from Interviewees

[1563] *Ibid* at 7.
[1564] *Ibid* at 8.
[1565] *Ibid* at 6.
[1566] *Ibid*.

Based on the experiences and testimonies of the interviewees, it is evident that there have been instances of applying and enforcing anti-corruption clauses in real-world scenarios. However, the relatively low number of reported incidents by the interviewees does not necessarily indicate a decrease in corruption violations, as statistics and news often portray a different scenario. On the other hand, it should be acknowledged that contractual anti-corruption clauses are still in their early stages of development, having emerged only around a decade and a half ago. Therefore, their validity and enforcement remain relatively untested.[1567] While this study aims to assess their practical application, it is important to recognize that a single attempt cannot comprehensively represent their overall utilization. Further research is needed to evaluate their practical implication thoroughly.

C. The Power of Anti-Corruption Clauses: Perspectives on Their Effectiveness

In this subsection, the focus shifts to the overarching issue: the efficacy of anti-corruption clauses. The question of whether the clauses are delivering on the promises of their effectiveness was posed to all interviewees, which revealed a spectrum of viewpoints, ranging from skepticism about their actual impact to optimism about their potential in the ongoing fight against corruption. Among those who doubted the effectiveness, three believed in their zero or little effect, and three asserted that they are helpful but not sufficient. Seven interviewees believed in their conditional effectiveness, depending on the corporate culture and context. Interviewees with a more optimistic view regarded the clauses as valuable tools, while emphasizing their capacity to support other anti-corruption tools, address corruption after its discovery, signal a company's stance on corruption,

[1567] See Ben Allen, "Contracting Out of Corruption: can it be done?" (3 March 2015), online: *LinkedIn* <www.linkedin.com/pulse/contracting-out-corruption-can-done-ben-allen?trk=portfolio_article-card_title>.

enforce anti-corruption measures, contribute to a company's reputation, and serve as an industry-standard. Further details about these different approaches are now provided.

Two interviewees referred to challenges in evaluating the effectiveness of anti-corruption clauses. Omega highlighted the difficulty in attributing non-violation cases directly to these clauses. They provided an example: "if I applied the clause in twelve contracts and no legal violations occurred, and operations proceed smoothly without any reports of corruption;" it is difficult to determine if the clause influenced the outcome or if parties "had no intention of breaking the law in the first place."[1568] Moreover, without concrete evidence, it is challenging to ascertain whether parties have adhered to the law or simply have not been caught.[1569] Gamma$_2$ expanded on this challenge and noted that in the field of anti-corruption, "prevention is very difficult to observe" since it involves detecting "non-events," which are inherently elusive.[1570] They further clarified, "we only see when things go wrong," which makes it more difficult to identify instances where corruption was successfully prevented due to a contract clause.[1571] They noted that one might examine corruption cases within the petroleum sector and deduce that contract protections failed because corruption still occurred.[1572] However, they explained that "this could be interpreted in two ways: either the provisions were insufficient or were present but ignored."[1573]

A group of interviewees expressed pessimism regarding the effectiveness of anti-corruption clauses and considered their impact as minimal, if not virtually nonexistent. Alpha, for example, perceived these policies as superficial compliance measures, a mere "deliberate box-ticking

[1568] Omega, *supra* note 651 at 5.
[1569] *Ibid*.
[1570] Gamma$_2$, *supra* note 620 at 5.
[1571] *Ibid*.
[1572] *Ibid*.
[1573] *Ibid*.

exercise."[1574] Psi questioned the overall efficiency of such clauses and stated that there is "no silver bullet to corruption;" while the anti-corruption clause may act as "a deterrent just by being there," people find "innovative ways" to subvert it.[1575] For example, instead of straightforward, upfront bribes at the contract signing stage, people find alternative methods to "sanitize the deals," such as pushing companies to make donations to controlled foundations or awarding contracts to locally connected or politically affiliated contractors.[1576] Similarly, Phi noted that the clauses have temporary success but observed a recurring pattern in the fight against corruption. They described it as a cycle: "you fight, you clean up, two, three years later, [when] you come back, you start seeing elements of what had been cleaned up in the past coming up again."[1577] Phi believed that while the clauses are initially effective in fighting corruption, over time, people tend to revert to their old ways.

Delta, Beta, and Omicron all believed that anti-corruption clauses, while helpful, are insufficient on their own to effectively fight corruption. Delta expressed the opinion that while these clauses are necessary, they alone cannot prevent corruption in all its forms.[1578] They believed that, based on their experience with companies, due diligence activities play a more crucial role in managing corruption risks posed by third parties' than the clauses themselves.[1579] Moreover, Beta expressed concern that relying solely on voluntary efforts such as these clauses can perpetuate ongoing corruption, as wrongdoers could circumvent sanctions.[1580] In their view, these voluntary initiatives should be seen as "icing on the cake, rather than the cake itself."[1581]

[1574] Alpha, *supra* note 958 at 12.
[1575] Psi, *supra* note 4 at 4–5.
[1576] *Ibid*.
[1577] Phi, *supra* note 780 at 7.
[1578] Delta, *supra* note 646 at 6.
[1579] *Ibid*.
[1580] Beta, *supra* note 730 at 5.
[1581] *Ibid*.

Omicron recognized the value of anti-corruption clauses and noted that their inclusion has brought "the subject of bribery and corruption to the forefront" and expanded awareness among a broader audience.[1582] They believed that these clauses have fulfilled their objectives by making it "challenging for a company to claim ignorance of relevant anti-corruption laws," their obligations, or the severe consequences of breaching them.[1583] Nevertheless, Omicron also acknowledged that determined parties intent on engaging in corrupt behavior may disregard such clauses, as well as other policies, procedures, or employee training.[1584] They clarified that this acknowledgement did not imply that "the clauses are ineffective or worth the paper they [are] written on," but rather recognized the possibility that persistent individuals may bypass them.[1585] Omicron reasoned that corruption typically involves individuals rather than the entire company, noting that "there are always people within any organization who do [not] understand the nuances [of anti-corruption efforts]" and who may discover ways to circumvent these measures," often with the assistance of others who stand to benefit.[1586] Despite the importance of including anti-corruption clauses in contracts to establish a focus for obligations, Omicron concluded that these clauses are not the primary tools influencing the level of corrupt activities among third parties.[1587]

Moreover, six interviewees emphasized the role of a company's culture in determining the effectiveness of these clauses. Delta highlighted the importance of adhering to anti-corruption laws within a company's culture and acknowledged that the effectiveness of clauses can vary from one case to another.[1588] Based on their experience with different companies, they noted that while

[1582] Omicron, *supra* note 617 at 16.
[1583] *Ibid*.
[1584] *Ibid*.
[1585] *Ibid* at 15.
[1586] *Ibid* at 16.
[1587] *Ibid* at 15.
[1588] Delta, *supra* note 646 at 6.

companies are expected to comply with legal requirements, there can be differences in understanding, culture, and the implementation of these measures.[1589] Lambda also emphasized that the wording in these clauses can be subject to various understandings for parties, and, based on their experience working with companies, they observed that there is "a lot of wiggle room" for interpretation within anti-corruption clauses.[1590]

Sigma contributed to the discussion by highlighting the role of culture within commercial relationships. They pointed out that even though contracts may contain "exacting standards on anti-corruption," the true challenge lies in establishing a culture of compliance where all employees believe in and adhere to such clauses.[1591] Sigma expressed optimism that, with time, these standards would evolve into industry norms.[1592] Similarly, Chi highlighted that despite the Indonesian government's requirement for companies to adopt such clauses, different companies may interpret and implement this mandated clause differently.[1593] They observed that the petroleum industry comprises numerous companies, each with its unique approach and level of commitment to adopting such clauses.[1594] They believed this diversity in application depends on factors such as the commitment of top leaders, the systems in place, available resources, and the maturity of business ethics and compliance.[1595]

In their discussion on the influence of culture on the effectiveness of anti-corruption clauses, Omicron outlined two types of company cultures: those with established, adequate procedures and ethical behaviors, and those where systemic corruption is "routinely engaged in, known about,

[1589] *Ibid*.
[1590] Lambda, *supra* note 735 at 5.
[1591] Sigma, *supra* note 618 at 14.
[1592] *Ibid*.
[1593] Chi, *supra* note 748 at 7.
[1594] *Ibid*.
[1595] *Ibid*.

supported, endorsed, [and] encouraged."[1596] They highlighted "a different kettle of fish" between corruption incidents in the first group, where it typically involves "a rogue actor, a bad actor who [has] gone off on a limb and done their own thing," and the systemic corruption occurring in the second group.[1597] In this regard, Omicron cited an ethics mantra used in their training: "Ethical dilemmas often arise as the unintentional consequences of well-intentioned actions and not from unethical motives."[1598] They explained that such a dynamic creates "blind spots" that can only be addressed proactively.[1599] Omicron further compared anti-corruption clauses to HSE incidents, where unsafe situations can result from unintended consequences of well-intentioned actions too, such as bypassing safety procedures to save time.[1600] However, they observed employees' embrace of HSE culture but reluctance towards ethics and compliance, as they view ethics as "a high-level concept that does [not] apply to them in their day-to-day activities, or as being a complex subject, with rules and regulations that are difficult to understand and follow, with too many nuances and grey areas."[1601] Omicron acknowledged that addressing this "cultural anomaly" remains an ongoing challenge for companies.[1602]

Beta$_2$ was another interviewee who discussed the significance of a company's culture in shaping the effectiveness of these clauses. They viewed these clauses as part of a broader anti-corruption policy, which "put people on notice that we are not going to tolerate this."[1603] However, Beta$_2$ noted that despite becoming standard practice, merely including such clauses in contracts does not guarantee compliance, stating that "it [is] not just about the laws in the language, [but also about]

[1596] Omicron, *supra* note 617 at 15.
[1597] *Ibid*.
[1598] *Ibid* at 16.
[1599] *Ibid*.
[1600] *Ibid*.
[1601] *Ibid* at 16–17.
[1602] *Ibid* at 17.
[1603] Beta$_2$, *supra* note 652 at 6.

the culture, and policies, and procedures that you have in place to prevent corruption."[1604] They further referred to the necessity of "backing up these clauses with action" through a unified culture within the company, extending from the CEO and the board down through the organizational hierarchy, with everyone adhering to the same principles.[1605] Beta$_2$ exemplified this dedication with an anecdote involving the recruitment of agents in countries known for corruption. During a meeting with one of these agents, Beta$_2$ firmly communicated a zero-tolerance message against corruption and assured the agent of support if they felt uncomfortable.[1606] Beta$_2$ noted that, upon being informed of the company's strict policy, "[the agent's] demeanor changed."[1607] They added that while other companies may profess similar policies, there is often an unspoken expectation for agents to resort to bribery "to get things done."[1608] This example highlighted the influence of a strong corporate culture on the perception of anti-corruption clauses.

Furthermore, Beta emphasized the context-dependent nature of anti-corruption clauses while adopting a macro perspective in understanding their effects. They explained that while anti-corruption clauses are an important component of the required legal and public regulations for certain sectors, their effectiveness is more evident in addressing "lower-level public administration corruption" rather than "grand transnational corruption."[1609] In their view, a contract with impressive wording and ceremonial signings may not accurately represent reality, as extractive industries are usually governed "at the very highest political level in a country," where business is often conducted informally, with subtle forms of influence affecting decision-making

[1604] *Ibid* at 2, 9.
[1605] *Ibid* at 3.
[1606] *Ibid* at 2.
[1607] *Ibid* at 3.
[1608] *Ibid*.
[1609] Beta, *supra* note 730 at 6.

processes.[1610] In this scenario, "the way that power is abused … cannot really be controlled by any kind of legalese in a contract or a document," as it relates to the "exercise or abuse of power between interests on the economic side and on the political side."[1611] With these actors generating their own documentation, money can still flow through "a complex web of tax havens and back channels" and end up, for example, "providing a scholarship fund to the school of the president's daughter."[1612]

The other group of interviewees took a more optimistic view regarding anti-corruption clauses. Three interviewees recognized that while these clauses may have limitations, they still play an essential role in anti-corruption efforts. Gamma$_2$ believed that although an anti-corruption clause is not "a perfect guarantee, it matters a great deal."[1613] Upsilon also expressed confidence in the effectiveness of these clauses and acknowledged that while they are not "fail-safe," as nothing can prevent all instances of corruption due to human nature, "the clauses are one of our best tools."[1614] Nu further characterized anti-corruption clauses as "low-hanging fruit," explaining that they are among the simplest yet most important measures to adopt.[1615] They believed that these clauses serve the purpose of raising awareness and providing remedies in case of problems.[1616]

Moreover, two interviewees pointed out the use of anti-corruption clauses as complementary to other anti-corruption tools. Eta stated that having these clauses is far better than having none at all and explained that companies include them in contracts to secure the right to request specific records related to anti-corruption compliance, demand reports on aid expenditure, and conduct

[1610] *Ibid* at 5.
[1611] *Ibid*.
[1612] *Ibid* at 5–6.
[1613] Gamma$_2$, *supra* note 620 at 4.
[1614] Upsilon, *supra* note 642 at 14.
[1615] Nu, *supra* note 627 at 4.
[1616] *Ibid* at 7.

audits, whether independently or with the involvement of external auditors.[1617] They believed that major TNOCs can also leverage such rights in their relationships with aid recipients and commercial agents to conduct audits and provide anti-corruption training for certain groups of employees.[1618] Delta also discussed how their company used these clauses to perform "spot-check audits" on partners operating in the market for several years to ensure their ongoing compliance with anti-corruption standards and to check for any recent breach investigations or settlements.[1619]

In addition, two interviewees discussed the role of anti-corruption clauses after corruption has been discovered. Epsilon expressed uncertainty regarding their effectiveness in preventing corruption but suggested that they may have "implications on the back end," stating that "if something goes wrong, there may be legal recourse through the contract to prosecute the government or the company."[1620] They also believed that such clauses can reduce liability for the party that did not violate the clause.[1621] Moreover, Delta emphasized that, for their company, the most crucial impact of such clauses is the ability to seek recovery through legal recourse in cases of damage or prejudice.[1622] The benefits of these clauses as mitigating and defensive factors were previously discussed in Chapter Five.

Furthermore, three interviewees believed that anti-corruption clauses, at the very least, serve as signals of the company's stance on anti-corruption measures. Rho stated that these clauses act as "a serious warning signal to the contractor," which indicates certain boundaries that must not be crossed.[1623] Lambda, though somewhat skeptical about their impact, acknowledged that these

[1617] Eta, *supra* note 699 at 3.
[1618] *Ibid* at 3–4.
[1619] Delta, *supra* note 646 at 3.
[1620] Epsilon, *supra* note 487 at 6.
[1621] *Ibid*.
[1622] Delta, *supra* note 646 at 6.
[1623] Rho, *supra* note 647.

clauses are "better than nothing, in showing that at least [the parties] are trying or care about [anti-corruption]."[1624] According to Nu, including such clauses in the contracts not only satisfies regulatory requirements but also broadcasts the company's resolute commitment to their ethical values and priorities.[1625]

Among others, two interviewees placed great emphasis on the effectiveness of anti-corruption clauses in instructing and pushing other parties to resist corrupt demands. Upsilon referred to the contract termination capability of these clauses, especially in cases involving higher-risk third parties. They noted that contracts serve as a critical leverage point because they are "where the financial stakes are highest [and] where the money is," and parties may realize that if their contract can be terminated for corruption, "it may not be worth it."[1626] Therefore, parties can use contract termination as a tool to educate and persuade these counterparts to adhere to anti-corruption policies. Upsilon further highlighted that parties are actively employing these clauses in their dealings with high-risk counterparties because maintaining such relationships becomes too risky, both from a financial and compliance standpoint.[1627] Similarly, Gamma$_2$ believed that including standardized clauses in contracts is advantageous during negotiations and can act as a reference point for the involved parties while enabling them to resist corrupt pressures.[1628] For example, parties can refer to the contract language and respond by saying, "oh, sorry, we [cannot] do this; it [is] in the contract."[1629] The presence of such language in the contract serves as a deterrent against corruption and eases the pressure to engage in corrupt practices.

[1624] Lambda, *supra* note 735 at 5.
[1625] Nu, *supra* note 627 at 4.
[1626] Upsilon, *supra* note 642 at 14.
[1627] *Ibid* at 13.
[1628] Gamma$_2$, *supra* note 620 at 6.
[1629] *Ibid*.

Moreover, three interviewees discussed the effects of adopting anti-corruption clauses on a company's reputation. Zeta stressed that a company's "license to operate" contains more than just "what is written on paper" and includes their "image" and the type of company they aim to portray while operating in the local environment, which "should be optimal."[1630] Delta also mentioned that on a voluntarily basis, their company implements these requirements to safeguard its reputation and to align with the expectations of law enforcement bodies.[1631] Pi further noted that companies have no alternative but to follow and implement them; otherwise, "the company might face big impact, especially with the reputational damage."[1632] They explained that international companies are particularly concerned about their reputation because it can affect their shares on the stock exchange. They explained that is why these clauses are included "not only in the procurement contract, but also in the gas sale contracts or the crude oil [sale contracts], the farm-in and farm-out contracts, or even in the confidentiality agreements, [or any other] template contracts provided by the [Association of International Energy Negotiators]."[1633]

Furthermore, four interviewees strongly advocated for the integration of anti-corruption clauses as standard industry practice. Zeta, in particular, insisted that such clauses should be standard when parties sign a contract in attempt to demonstrate that they "act in as good faith as possible."[1634] They argued that such clauses are necessary in petroleum contracts because the government and the contracting parties represent the interests of citizens in developing such resources, and without these clauses, "the door is left open for corruption to take root."[1635] In explaining the standardization of anti-corruption clauses in petroleum contracts, Gamma drew a parallel with

[1630] Zeta, *supra* note 960 at 6.
[1631] Delta, *supra* note 646 at 1–2.
[1632] Pi, *supra* note 718 at 5.
[1633] *Ibid*.
[1634] Zeta, *supra* note 960 at 5.
[1635] *Ibid* at 6

environmental clauses in such agreements from the early 1990s and explained that at the time, the focus was merely on inclusion without a strong emphasis on operationalizing these clauses.[1636] However, as time passed, there was a shift towards the development of regulations and increased attention directed at their effective implementation.[1637] Gamma emphasized that similar efforts are needed for anti-corruption clauses to go beyond mere intentions and become fully operationalized.

The other two interviewees highlighted the effectiveness of these clauses due to their soft law and voluntarily nature. Beta, in particular, asserted that "there [is] definitely a role for soft law… to play in these clauses."[1638] They expressed their belief in the gradual integration of these clauses as good practice within the sector and their ongoing progress.[1639] In this context, Beta pointed to the historical acceptance of bribes in many countries: bribery used to be widely recognized and even supported by the governments, but the contemporary world has witnessed a significant shift in this regard.[1640] Lambda likewise stated that "any voluntary clause [is] a step in the right direction" and emphasized that the inclusion of such clauses reflects parties' commitments to addressing the issue of corruption.[1641]

On the other hand, four interviewees were of the opinion that anti-corruption clauses have already become an industry standard. Eta pointed out that in the past, the inclusion of anti-corruption clauses was virtually absent in contracts, but now, it has become customary, marking "a positive step forward."[1642] They emphasized that such clauses serve compliance purposes for third parties' actions, stating, "an anti-corruption clause is a must," as it is "a protective shield" for companies

[1636] Gamma, *supra* note 616 at 10.
[1637] *Ibid*.
[1638] Beta, *supra* note 730 at 5.
[1639] *Ibid* at 6.
[1640] *Ibid*.
[1641] Lambda, *supra* note 735 at 4.
[1642] Eta, *supra* note 699 at 7.

against illegal practices and ensures the maintenance of relationships with other companies committed to legal and ethical conduct.[1643] Iota also added that these clauses represent "a statement [of] a culture of compliance, which are "almost standard, fair to have, and … expected in the industry."[1644] Sigma agreed with the notion that using these clauses has become "an industry practice."[1645] Although Sigma perceived the mechanism as a "top-down approach," where customers impose clauses on contractors, and contractors, in turn, extend them to vendors, they acknowledged the benefits of this practice as it enables companies to align their obligations with others in the industry.[1646] Moreover, Delta referred to the growing prevalence of anti-corruption clauses as a "general practice," a trend that has gained momentum in recent years.[1647] They noted that these clauses are now widely accepted by different partners, companies, and public authorities, and therefore, they definitely have a deterrent effect.[1648] Delta added that while measuring the precise extent of this effect remains challenging, their overall context influences individuals' behavior within companies.[1649] While acknowledging that anti-corruption legislation and enforcement efforts have a more substantial impact on company conduct than specific clauses, Delta observed that certain TNOCs subject to the FCPA, UKBA, or Sapin II have voluntarily reported corruption cases within their activities to prosecutors.[1650]

Figure 35 provides an overview of the interviewees' perspectives on the effectiveness of anti-corruption clauses, showcasing the relevant factors alongside the corresponding number of interviewees who referenced these concepts.

[1643] *Ibid* at 6.
[1644] Iota, *supra* note 771 at 8.
[1645] Sigma, *supra* note 618 at 6.
[1646] *Ibid* at 13.
[1647] Delta, *supra* note 646 at 4.
[1648] *Ibid*.
[1649] *Ibid*.
[1650] *Ibid* at 5.

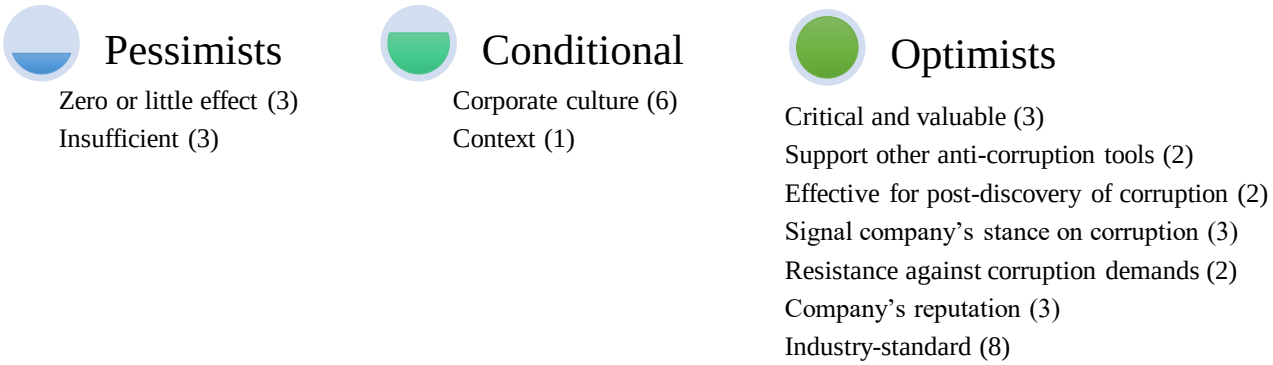

Figure 35 – Effectiveness of Anti-Corruption Clauses: Interviewee Insights and Frequency Distribution

The various perspectives discussed above provide a glimpse to the complex task of evaluating the true effectiveness of anti-corruption clauses. The debate persists, with some citing the absence of terminations as evidence of their success, while others question their efficacy in the face of ongoing corruption cases. However, taking a broader perspective suggests that these clauses should be regarded as one tool among many in a toolbox, which adds another layer to strengthen companies' anti-corruption compliance programs. These clauses function as supplementary deterrents for those tempted by corrupt practices. At the very least, they nudge individuals and entities to adhere to established anti-corruption standards by reminding them of their prior commitments. The inclusion of these clauses in contracts sends a clear signal that the company is fully committed to fighting corrupt practices. Acting as a mechanism for monitoring and opposing corruption, these clauses raise the cost associated with engaging in such practices. Besides their preventive role, these clauses offer tangible advantages, such as protecting a company's reputation, reducing legal liabilities, and mitigating potential damages in cases of violations.

D. Navigating Challenges and Forging Advancements in Anti-Corruption Clauses

The chapter thus far demonstrates that within the constantly evolving realm of anti-corruption efforts, anti-corruption clauses are of central importance, yet they are not without challenges. Several interviewees expressed the belief that relying solely on anti-corruption clauses is

insufficient and highlighted the need for complementary actions to reinforce them. These actions include establishing legal liabilities and enforcement mechanisms to address violations of the clause, cultivating a corporate culture in alignment with anti-corruption commitments, and implementing effective monitoring procedures. In addition, challenges such as one-sided implementation, contracts often remaining unread, complexities in proving corruption, the lack of specific legal mandates, and communication obstacles concerning these clauses were discussed. This subsection explores the interviewees' perspectives on these challenges and presents their proposed solutions.

Several interviewees expressed the view that anti-corruption clauses alone are insufficient, and complementary actions are needed to support them. Among them, six interviewees discussed the role of legal liabilities and enforcement mechanisms in addressing violations. Alpha$_2$ voiced skepticism about the practical effectiveness of anti-corruption clauses unless they are "backed up by legal liability."[1651] They argued that without such backing, these clauses "are not extremely helpful, enforceable, or practical," as "the multimillion or multibillion dollar relationship" between TNOCs and NOCs or the host government "trumps" over these clauses.[1652] Xi similarly noted that clauses alone do not shape behavior; rather, behavior is influenced by "DOJ worldwide enforcement and international agencies' enforcement."[1653] They concluded that these enforcement actions, coupled with relationship-building with third parties, are "the real kicker drive."[1654] Lambda, drawing from their career experience in government legislation and policy, highlighted that having several anti-corruption clauses alone is insufficient if "no one makes sure that they

[1651] Alpha$_2$, *supra* note 285 at 6.
[1652] *Ibid*.
[1653] Xi, *supra* note 621 at 12.
[1654] *Ibid*.

[are] being lived up to," and unless they are enforced or regulated, "they do [not] have that much weight."[1655]

Concerning legal liabilities, two interviewees elaborated on the reasons why sanctions should be implemented for violations. Beta emphasized the need to complement voluntary initiatives with strong monitoring and legal enforcement measures, stating, "one always has to take the voluntary initiatives with a pinch of salt, and they always have to be backed up by actual monitoring and legal enforcement measures."[1656] In Gamma's view, accountability and transparency are key in reinforcing such clauses.[1657] They pointed out that relying solely on a commitment to refrain from corrupt practices can be a mere "check-the-box" measure.[1658] According to them, a clause presents "a good starting point" because it directs people's attention and prompts them to consider the right actions they should be taking, "but it [is] not enough in and of itself."[1659] In other words, while the clause identifies the problem and sets an intention, it remains "a statement;" its intention, however, must be "operationalized."[1660] Gamma placed particular emphasis on practical steps such as follow-up procedures, providing evidentiary proof of adherence to anti-corruption policies, and maintaining transparency in implementation.[1661] Also, in their view, there is a need to identify and address various corruption risks in foreign countries to establish a framework for responding to any breaches that may arise.[1662]

[1655] Lambda, *supra* note 735 at 5.
[1656] Beta, *supra* note 730 at 5.
[1657] Gamma, *supra* note 616 at 8.
[1658] *Ibid*.
[1659] *Ibid* at 10.
[1660] *Ibid* at 9–10.
[1661] *Ibid* at 8.
[1662] *Ibid*.

Expanding on the discussion, Psi raised concerns regarding the issues of corporate veil and government immunity in holding individuals accountable for any involvement in corruption. They noted that in many jurisdictions, individuals who sign petroleum contracts often enjoy immunity and are protected from legal action, "either through the corporate veil for the company or as government officials … in performing their day-to-day duties."[1663] Thus, Psi emphasized that these anti-corruption clauses should explicitly address the accountability of both public and company officials.

In addition to ensuring effective enforcement, four interviewees emphasized that maintaining a corporate culture aligned with anti-corruption commitments is more important than merely including these clauses. Sigma noted that the real challenge lies in shaping the organizational culture: it is not just about having the clauses, but also implementing regular training to educate employees to ensure that anti-corruption standards are not only present in the petroleum contract but also genuinely embraced by all employees.[1664] Moreover, Phi pointed out that companies are always supportive of anti-corruption activities, and "you see when one is swimming against the tide."[1665] They highlighted that despite the companies' endorsement of these clauses, employees and third parties may engage in these "fruitless activities," while finding "a way of fighting back and using whatever means they can to lay hands upon the system."[1666] Similarly, Gamma$_2$ emphasized the need to embed these clauses in the corporate culture and stated that it is important that these clauses are "passed down too."[1667]

[1663] Psi, *supra* note 4 at 8.
[1664] Sigma, *supra* note 618 at 14.
[1665] Phi, *supra* note 780 at 7.
[1666] *Ibid*.
[1667] Gamma$_2$, *supra* note 620 at 4.

Providing further explanation, Beta$_2$ referred to the need to support anti-corruption clauses with actions and establish a consistent organizational culture with a consistent message from top leadership down to all levels of the company.[1668] They compared anti-corruption clauses to safety protocols and cited an example of a refinery explosion from their previous company. Beta$_2$ explained that despite affirming the importance of safety from the leadership, insufficient investment in safety equipment led to the incident, which highlighted the disconnect between leadership's messages and operational actions.[1669] They argued that the same principle applies to anti-corruption efforts and emphasized that the company's CoC and executives' messages against corruption should lead to practical changes in attitudes from the top down and throughout the organization.[1670] Beta$_2$ further discussed that companies should hire ethical individuals who share the company's values and are committed rejecting corrupt practices.[1671] They provided an example of a JV in another country where local consultants and agents recommended family members for positions which raised concerns of favoritism.[1672] In response, Beta$_2$'s team chose to collaborate with individuals aligned with the company's values and committed to ethical conduct.[1673]

Among other supportive measures, three interviewees discussed that anti-corruption clauses should be backed with effective monitoring procedures. Iota argued that merely inserting the clause in contracts is insufficient, likening it to "putting words on a piece of paper without genuine action."[1674] They acknowledged that for these clauses to be truly effective, they should be reinforced with comprehensive due diligence and monitoring processes.[1675] Kappa also

[1668] Beta$_2$, *supra* note 652 at 3.
[1669] *Ibid*.
[1670] *Ibid*.
[1671] *Ibid*.
[1672] *Ibid*.
[1673] *Ibid*.
[1674] Iota, *supra* note 771 at 8.
[1675] *Ibid*.

emphasized that the anti-corruption clause is "an important depth in preventing corruption," particularly "a good mechanism for disengaging from a supplier if they fail to meet anti-corruption standards."[1676] However, they cautioned that it cannot prevent corruption "on its own in a vacuum" and believed that its utility is limited when not accompanied by "follow-up measures."[1677] In their view, parties should verify each other's compliance with the clause and "take extra steps to make sure that they are actually doing what they [are] signing up to do."[1678] Moreover, Rho added that while contracts may contain well-crafted clauses specifying different rights, including audits, if these rights are not exercised, "the real power of the contract is lost."[1679]

Finally, three interviewees mentioned additional measures that can enhance compliance with anti-corruption clauses. Omicron suggested that "requiring high-risk suppliers to complete an annual certificate of compliance" is another way of demonstrating that the clauses have not been breached.[1680] They further explained that conducting annual due diligence on high-risk suppliers and business partners can uncover any involvement in corrupt activities that might affect a company's decision to continue doing business with them.[1681] Eta also referred to the role of audits, training, and annual undertakings in supporting the clauses.[1682] Upsilon noted that checking other parties' compliance often involves conducting an "adverse media review" for at least medium and high-risk partners to identify any potential issues in adverse media reports.[1683]

[1676] Kappa, *supra* note 696 at 5.
[1677] *Ibid*.
[1678] *Ibid*.
[1679] Rho, *supra* note 647 at 7.
[1680] Omicron, *supra* note 617 at 13.
[1681] *Ibid*.
[1682] Eta, *supra* note 699 at 3–4.
[1683] Upsilon, *supra* note 642 at 11.

In addition to the challenge of the insufficiency of anti-corruption clauses as a mere tool to combat corruption, three interviewees highlighted concerns about the one-sided implementation of these clauses. Tau noted that anti-corruption clauses are always "one-sided," with the company placing the responsibly of compliance solely on the contractor without a shared commitment.[1684] They suggested that, similar to confidential clauses, anti-corruption clauses should be mutual and apply in both directions because when a supplier closely works with a client, any issues the client faces can also impact the supplier.[1685] Similarly, Eta argued that such clauses should extend to all parties and be implemented throughout the value chain, as corruption often occurs within the supply chain or is committed by third parties, such as agents and sub-vendors.[1686] However, Eta acknowledged that achieving mutual commitment, especially from sub-vendors and subcontractors, can be challenging, as there is often no reciprocal obligation.[1687] Moreover, Sigma highlighted the imbalance created when NOCs refuse to include the company's anti-corruption clauses in the contract and insist that they follow their own anti-corruption regulations.[1688] Sigma clarified that while the NOC's anti-corruption clause may benefit the company's side as it requires its compliance with anti-corruption laws, it means that the NOC itself is not bound by any anti-corruption or ethical business obligations specified in the contract.[1689] Instead, the NOC's anti-corruption obligations are defined by their board or their country's anti-corruption regulator.[1690]

Among other challenges, three interviewees highlighted the issue of contracts often going unread, while parties need to raise awareness about anti-corruption commitments. Nu pointed out that

[1684] Tau, *supra* note 690.
[1685] *Ibid*.
[1686] Eta, *supra* note 699 at 7.
[1687] *Ibid*.
[1688] Sigma, *supra* note 618 at 10.
[1689] *Ibid*.
[1690] *Ibid*.

although some companies include detailed, explicit clauses in their contracts, the reality is that beyond lawyers and compliance professionals, not everyone dedicates much time to thoroughly reviewing and understanding the terms and conditions.[1691] They explained that these clauses serve as educational or awareness tools for only "a pretty small audience."[1692] For a broader audience, Nu prioritized training and awareness programs as essential components of a compliance program.[1693] Rho shared a similar perspective, stating that "what [is] in the contract is legalese that most people do not know, [and] nobody ever looks at a good contract; they only look at the contract when it goes wrong"[1694] They argued that clear communication of expectations through day-to-day management practices holds greater weight than the contract's content itself.[1695] In addition, Xi asserted that anti-corruption clauses are "words on paper," with the true influence lying in the relationships maintained with third parties.[1696] Drawing a parallel to general consumer terms and conditions, which are rarely read or negotiated at the point of signature, Xi underscored that for many third parties, especially international ones, "the contract is really a secondary thing; the relationship is the most important."[1697] They argued that building strong relationships and impressing upon third parties the significance of anti-corruption compliance are key factors in driving real change.[1698]

Among other challenges, two interviewees discussed the complexities associated with proving corruption. Eta suggested adopting a broader and more thorough method of determining what counts as evidence of corruption within the context of anti-corruption clauses. In terms of

[1691] Nu, *supra* note 627 at 7.
[1692] *Ibid*.
[1693] *Ibid* at 8.
[1694] Rho, *supra* note 647 at 9.
[1695] *Ibid*.
[1696] Xi, *supra* note 621 at 12.
[1697] *Ibid*.
[1698] *Ibid*.

establishing proof of corruption for contract termination, Eta suggested that different entities such as courts, law enforcement bodies, commercial arbitration, WBG debarment, or prosecution-initiated settlements for companies could play a role in confirming corruption.[1699] By drawing similarities with practices used in trade sanctions regimes, Eta acknowledged that such decisions could help eliminate future discrepancies and differing opinions regarding what constitutes corruption.[1700] Regarding proof of corruption, Eta argued that there is a need to identify both the "clear indicators of proof types" and "patterns in proof" related to corruption.[1701] For patterns, Eta referred to the "burden-shifting standards of proof" in commercial arbitration, where a mediator or expert can consider "red flags" of corrupt conduct rather than requiring direct evidence to determine whether an investment was obtained through corruption.[1702] In this scenario, once prima facie evidence of corruption is established, the burden of proof shifts to the allegedly corrupt party to explain their conduct and disprove the allegations. Failure to provide a satisfactory response may lead to a presumption of corruption and the right to terminate the contract.[1703] Alpha$_2$, on the other hand, acknowledged the concerns related to "raising the alarm bells for corruption" and referred to the challenges faced by TNOCs in addressing corruption issues, such as discomfort and strain on relationships when confronting corruption.[1704]

[1699] Eta, *supra* note 699 at 6.
[1700] *Ibid* at 6–7. For further information on the role of TNCs in trade sanctions regime, see Mahan Ashouri, "The Role of Transnational Private Actors in Ukraine International Flight 752 Crash in Iran under Economic Sanctions Pressure" (2021) 11:3 J National Security L & Pol'y 655.
[1701] *Ibid* at 8.
[1702] *Ibid*.
[1703] For more information on burden shifting rules in commercial arbitration, see Marek Pivoda & Kateřina Zabloudilová, *Proving Corruption: International Arbitration Perspective: COFOLA International 2018 Conference Proceedings* (Brno: Publications of the Masaryk University, 2018) 60; see also *Penwell Business v* Kyrgyz Republic, *PCA CASE No 2017-31, Final Award of 8 October 2017*, 2017 at paras 319–34.
[1704] Alpha$_2$, *supra* note 285 at 6.

Highlighting another challenge, Eta pointed out the absence of specific legal mandates in national anti-corruption laws that require the inclusion of anti-corruption clauses in contracts between parties.[1705] They suggested that this gap in legal requirements may arise from the state's effort to strike a balance and avoid overstepping into the activities of the commercial sector.[1706] Nonetheless, they firmly believed that governments should inherently prohibit illegal behavior by implementing measures such as mandating these clauses.[1707] Eta acknowledged that future developments could align more with law enforcement bodies to establish these clauses as a universal practice. Otherwise, in cases where certain jurisdictions impose such a requirement while others do not, it can be perceived as a competitive advantage for compliance approaches that do not impose these clauses.[1708] This issue was previously discussed in Chapter Five, explaining that the government of Indonesia mandates such clauses for the contracts in the petroleum sector.

Finally, Tau discussed the communication challenges related to anti-corruption clauses and stated that "it is very difficult to have feedback from clients regarding their ethical situation."[1709] They shared an example from their own experience, recounting a major TNOC where a breach occurred in another project within a certain country. When attempting to contact the compliance department to understand the issue's impact on their operations, it took several months for Tau to establish communication.[1710] Tau emphasized that "[such communication] should not be a lengthy process."[1711]

[1705] Eta, *supra* note 699 at 7.
[1706] *Ibid*.
[1707] *Ibid*.
[1708] *Ibid*.
[1709] Tau, *supra* note 690 at 8.
[1710] *Ibid*.
[1711] *Ibid*.

4. Concluding Reflections on the Qualitative Analysis of Anti-Corruption Clauses: Paving the Way Forward

This chapter has conducted a qualitative analysis of anti-corruption clauses while exploring the perspectives of interviewees regarding their primary attributes, prevalent trends, and deterrent capacity in the petroleum sector. The analysis began by exploring the interviewees' perspectives on specific features of anti-corruption clauses, including language nuances, the application of risk assessments, temporal coverage, available sanctions and remedies, and the use of substitute clauses in the absence of direct anti-corruption clauses. The narrative then transitioned into an examination of the practical implementation of anti-corruption clauses in real-world contexts and included discussions on their reception, practical utilization, and overall effectiveness within the petroleum sector. Finally, by identifying challenges and proposing enhancements, this empirical legal analysis has contributed to improving the deterrent effectiveness of these clauses.

Based on the experiences and testimonies of the interviewees, this chapter demonstrates that tangible instances of implementing and enforcing anti-corruption clauses have occurred in real-world scenarios. Despite the relatively low number of termination incidents reported by interviewees, it is important to recognize that contractual anti-corruption clauses are still in their early stages of development, having emerged only about two decades ago. Due to the recent introduction of anti-corruption clauses in contracts, their validity and enforceability remain relatively untested. While this study has sought to evaluate their practical application, a singular research cannot fully encapsulate their overall usage. Further research is needed to comprehensively assess their implications.

All in all, similar to other anti-corruption measures, anti-corruption clauses are not without their challenges. Taking into account the responses shared by interviewees throughout the chapter, Table 13 presents a list of recommendations for improving the effectiveness and enforcement of these clauses:

Recommendations for Strengthening the Language of Anti-Corruption Clauses
Adoption of a combined approach with detailed specifications: Anti-corruption clauses should employ a combined approach, incorporating a general prohibition of corruption alongside specifications wherever feasible. **The recommended framework for drafting anti-corruption clauses:** - General prohibition: Begin with a broad prohibition on corruption that applies to all parties involved. - List of corrupt practices: Include common examples based on guidance from the compliance department and due diligence, tailoring them to the counterparties' risk profiles. State that the list is *non-exhaustive* to cover unmentioned acts. - Reference to anti-corruption laws: Require compliance with *all applicable laws*, explicitly naming key national and international regulations, including both soft law and hard law - Clear definitions: Define relevant concepts using widely recognized laws such as the FCPA or UNCAC, either within the anti-corruption clause or in a dedicated definitions section - Adoption of compliance programs**:** Require the adoption of anti-corruption compliance programs to reinforce anti-corruption measures. **Promoting employee awareness:** Conduct training sessions to ensure all employees are well-informed about the clauses and capable of identifying potential red flags.
Recommendations for Adopting a Risk-Based Approach
Adoption of a two-tiered approach: Companies should consider implementing a two-tiered approach: - A standard comprehensive clause: Initially, adopt a standard anti-corruption clause in contract templates that is sufficiently comprehensive and inclusive. - Customization according to risk profiles: Following the standard clause, empower the compliance department to conduct due diligence on each party and create risk profiles. Based on this assessment, the compliance department can recommend additional details and commitments to include in the clause, such as specifying prohibited acts and incorporating further sanctions for violations.
Recommendations for Time-Coverage of Anti-Corruption Clauses
Comprehensive application across all phases: Anti-corruption commitments specified in a clause should govern every phase of a contract, extending to the pre-contract, negotiation, duration, and post-conclusion stages. **Express specification of timeframe in the clause:** Contracts should expressly stipulate that anti-corruption clauses apply throughout all phases of the contract, both preceding and following its conclusion. In addition, these clauses should be explicitly designated as survival clauses to ensure their continued efficiency beyond the conclusion of the contracts. **Interpretation of time-frame:** Interpret the clause to govern all stages of a contract in cases where clauses lack specific language.
Recommendations for Taking Appropriate Measures in Cases of Violations
Zero tolerance approach: Any indication of corruption should result in immediate contract termination and prompt reporting to the relevant authorities. **Express specification of termination:** Anti-corruption clauses should explicitly state that any violation constitutes a *material breach*, leading to immediate contract termination. In addition, the termination section of the contract should specifically identify non-compliance with the anti-corruption clause and relevant laws as grounds for termination. **Alternative approaches for unspecified termination:** In cases where there is no prescribed termination in the contract, parties can consider treating the violation of anti-corruption clauses as a *material breach* in English Law, a *substantial impairment* in the UCC, or a *fundamental breach* in the CISG. **Self-disclosure:** Any discovered corrupt acts should be reported to the relevant authorities in both host and home countries.

Supplementary measures: Alongside termination, an anti-corruption clause should list other supplementary measures, including requirements for effective communication, internal investigation, and indemnification rights.
Recommendations for Alternative Contractual Clauses in the Absence of Direct Anti-Corruption Clauses
Comprehensive approach to anti-corruption commitments: Parties should proactively incorporate anti-corruption commitments into their contracts using all available means. **Renegotiation and addendums:** In cases where direct anti-corruption clauses are absent, parties should consider renegotiating contracts and introducing addendums that explicitly include direct anti-corruption clauses. **Strategic leverage of existing clauses:** Parties should strategically interpret existing contract clauses to impose anti-corruption commitments, using various clauses for distinct purposes: - Compliance with laws clauses: Parties should use these clauses to incorporate anti-corruption commitments, given that almost all national legal systems now include anti-corruption legislation. - Audit clauses: Parties should leverage these clauses as a tool for monitoring the other party's compliance with anti-corruption obligations. - Sub-contracting and assignment clauses: Parties should employ these clauses for due diligence concerning the ethical conduct of third parties engaged in the contract. - Training clauses: Parties should use these clauses to disseminate anti-corruption principles among staff, employees, agents, and third parties.
Recommendations for Addressing Resistance to Incorporating Anti-Corruption Clauses
Reference to internationally recognized standards: In cases where mutual agreement cannot be reached among parties, referring to internationally recognized standards, such as the UNGC, the UNCAC, the OECD Convention, or the ICC, can provide a framework for resolution. **Non-engagement:** Outright rejection from the other party regarding the incorporation of anti-corruption clauses should be considered as a clear signal not to engage in business with them.
Recommendations for Strengthening Anti-Corruption Enforcement and Accountability
Strict enforcement with strong sanctions: Apply legal liabilities and enforcement mechanisms rigorously to address anti-corruption clause violations and impose strong sanctions for non-compliance, including termination and reporting to the relevant authorities. **Addressing the issue of corporate veil and government immunity:** Explicitly state in contracts that engagement in corrupt activities by individuals, regardless of their position or affiliation, will result in legal action against those involved. **Corporate culture:** Cultivate a corporate culture aligned with anti-corruption commitments to develop a strong ethical framework within organizations. **Monitoring procedures:** Support anti-corruption clauses with effective monitoring procedures to ensure their implementation and enforcement. **Annual certifications:** Require each party to complete an annual certificate of compliance to demonstrate adherence to anti-corruption clauses. **Adverse media review:** Conduct adverse media reviews for partners to identify potential corruption-related issues. **Mutual commitment:** Ensure that anti-corruption clauses are mutual and applied in both directions to establish a shared commitment to ethical practices. **A unified message along the value chain:** Extend anti-corruption clauses to all parties involved and implement them throughout the entire value chain. **Legal mandate for anti-corruption clauses:** Make anti-corruption clauses a legal requirement within regulations governing the petroleum sector, requiring every company operating within the sector to include such clauses in their contracts. **Incorporation of anti-corruption clauses in settlement agreements:** Regulatory authorities, such as the DOJ, should consider including anti-corruption clauses as a mandatory component when reaching settlements with companies involved in corruption cases. **Inclusion in "adequate procedures" for legal compliance under the UKBA:** Officially recognize anti-corruption clauses as a critical element of "adequate procedures" under the UKBA, which provides a valid defense against charges of breaching anti-corruption legislation. **Financial institutions' involvement:** Make it obligatory for financial institutions and banks offering loans to businesses operating in the petroleum sector to incorporate anti-corruption clauses in loan agreements.

Table 12 – Recommendations for Improving Anti-Corruption Clauses

Chapter 7 – Connecting the Dots

You may say I'm a dreamer
But I'm not the only one.
I hope someday you'll join us.
And the world will live as one.

John Lennon, Imagine

I believe there is a challenge inherent in human nature; no matter what one does, it's quite hard to bring about a complete change. However, during my time in the business, I've observed a growing awareness, recognition, and understanding of the importance of anti-corruption activities. Although there is still a long way to go, with many individuals treating it as a mere 'tick the box' exercise and not truly believing in the underlying objectives, I remain optimistic. Overall, I think the regulatory efforts aimed at promoting enhancements in compliance programs do yield positive results.

Nu, Interviewee

This dissertation embarks on a journey by acknowledging that despite the proliferation of anti-corruption laws and movements, corrupt practices remain prevalent in the petroleum sector. The central inquiry of this thesis revolves around the role of contractual anti-corruption clauses in explaining how TNCs can contribute to the transnational anti-corruption regime in their capacity as "norm entrepreneurs."[1712] The foundational argument presented in the introductory chapter suggests that TNCs, through the introduction and implementation of anti-corruption clauses, can nudge individuals to comply with anti-corruption standards. With this objective in mind, the thesis explores different subjects, including the nature of corruption in the petroleum sector, the role of good governance institutions in natural resource management, the dynamics of the transnational anti-corruption regime, and the specific role and contribution of TNCs, with a particular focus on contractual anti-corruption clauses. Throughout the dissertation, empirical research has been conducted to ensure that the findings are grounded in real-world evidence, and that the recommendations proposed hold broader applicability. In this final chapter, the structure and findings of each chapter are outlined to explain their individual contributions and their relevance to the overarching theme of the study. Finally, afterthoughts are provided to elaborate on their implications and to suggest avenues for further research.

Chapter Two focuses on the nature of corruption within the petroleum sector. Section (1) is dedicated to mapping out different types of corruption prevalent in the petroleum industry, while acknowledging the inherent challenge of covering all facets within a single definition. The exploration begins with a doctrinal research phase in Subsection (A), which investigates various forms of corruption outlined in major international and transnational anti-corruption instruments. Continuing the investigation, Subsection (B) explores distinct corruption types within the

[1712] Finnemore & Sikkink, *supra* note 339.

petroleum sector, namely bribery, embezzlement, conflicts of interest, different types of favoritism, fraud, and money laundering. It further identifies areas of exposure to these practices along the petroleum value chain. The comparative analysis reveals that while international and transnational anti-corruption instruments list different types of corruption, many of which are indeed prevalent in the petroleum sector, the unique context of the sector gives rise to additional forms of corruption. This exploration is necessary for assessing later whether anti-corruption clauses in petroleum contracts constitute well-informed response mechanisms to the specific risks and vulnerabilities unique to the sector. This section suggests that policymakers and industry stakeholders should be equipped with a thorough understanding of the corruption challenges in the sector to tailor contractual anti-corruption clauses that address these specific risks and vulnerabilities.

Section (2) explores the interplay between corruption and governance within the petroleum sector. It begins by addressing the resource curse theory in Subsection (A), explaining why countries abundant in oil and gas often fall prey to corruption. It argues that good enough governance institutions can mitigate the resource curse phenomenon, thereby rendering the mere presence of oil inconsequential when paired with proper governance institutions. With a specific focus on the administrative aspect of good governance, the study cites instances of "pockets of effectiveness"—exceptional governmental organizations that function relatively effectively despite operating within a corrupt, chaotic, and dysfunctional system. This subsection contends that the catalyst for change in anti-corruption norms lies within these select NOCs and local companies, and in the pursuit of promoting relations with TNC partners, these actors can lead anti-corruption reforms and propagate ethical norms. Subsection (B) further narrows its focus to a specific branch of good governance and examines the components of the rule of law, accountability, and transparency in

managing oil and gas resources. This discussion holds importance within the context of anti-corruption clauses, as their enforcement contributes to the rule of law by establishing generality—a universal prohibition of corruption for all—and by introducing clarity through specified commitments. The clauses also promote accountability, as adherence to indicated procedures improves answerability. Their enforcement increases legal accountability, and reporting requirements specified in the clauses, along with the practice of whistleblowing, contribute to social accountability. In a unique twist, the clauses incentivize companies to monitor each other, which can improve horizontal accountability mechanisms. Moreover, anti-corruption clauses requiring the release of information lead to increased transparency in the petroleum sector.

Chapter Three begins by underlining how economic globalization has drawn worldwide attention to the adverse consequences of corrupt practices. The chapter then conducts a historical and critical examination of the transnational legal framework, key actors, and the evolution of anti-corruption as both a norm and regime. This contextual understanding sets the stage for subsequent chapters to understand the expectations and frameworks guiding TNCs in their anti-corruption efforts. Subsection (A) explores the status of anti-corruption as a transnational norm, employing a three-stage model to explain its formation. The argument posits that despite increased global awareness and formalization through anti-corruption instruments and international cooperation, the anti-corruption norm has yet to achieve complete internalization and effective global implementation. The study emphasizes the need of transforming de jure anti-corruption norms into de facto practices. This emphasis on implementation aligns with the broader theme of understanding how TNCs can fulfill a complementary and interconnected role by translating de jure anti-corruption norms into practical measures through the adoption of strategies such as training, auditing, and in particular, the incorporation of specific contractual clauses.

Section (2) illustrates the transnational anti-corruption regime and explores the contributions of dominant actors to its formation and development. It provides a brief overview of anti-corruption standards and remedies developed by international and regional organizations, leading states, IFIs, and NGOs. While the section does not discuss the specifics of TNCs, this brief overview paves the way for a more detailed examination of their role in forthcoming chapters. Furthermore, the focus on the petroleum sector establishes a connection between the general anti-corruption regime and industry-specific considerations that may influence the inclusion of certain clauses in contracts.

Chapter Four centers on the critical and complementary role of TNCs in the transnational anti-corruption regime. Section (1) initiates with Subsection (A), examining the role of these non-traditional actors in developing their own regime-like framework to govern internal activities. This autonomy empowers TNCs to contribute to the standards set by state actors to address transnational issues. Subsection (B) then elaborates on how TNCs, seeking to reduce corruption costs, opt to adhere to anti-corruption standards. It underscores several factors influencing the cost-benefit analysis of such decisions, particularly emphasizing the threat of sanctions and the societal image of companies. While acknowledging the possibility of TNCs engaging in corruption, the study, starting from this chapter onward, focuses on their decision to abstain from such practices. Furthermore, Subsection (C) explores how this choice impacts the transnational regime with a discussion on how TNCs can act as agents of change. It explains that through trickle-down effects, TNCs instill anti-corruption within their organizational structures and exert peer pressure across their business networks. Simultaneously, through trickle-up effects, TNCs endorse transnational anti-corruption initiatives and leverage their economic and normative influence to encourage governments to adopt anti-corruption measures. The discussion on trickle-up effects is particularly important, as states, acting as rational actors and influenced by the power of TNCs, may opt to

align themselves with the transnational anti-corruption regime. This decision could catalyze meaningful changes within TNCs' business environments, which may, in turn, increase the quality of anti-corruption and good governance institutions in those states.

Section (2) delves into the details of the anti-corruption compliance program. It acknowledges that while not mandatory, having an anti-corruption compliance program serves as a mitigatory or defensive factor in most jurisdictions, which drives many companies to voluntarily implement these programs to address corruption risks globally. Moreover, the mandatory nature of anti-corruption compliance programs under Sapin II indicates a potential shift from the current voluntary status of anti-corruption clauses to mandatory adoption in the near future. The section then explores the traditional anti-corruption toolkit discussed by interviewees to tackle corruption risks in the petroleum sector, covering CoCs, anti-corruption training, due diligence activities, oversight mechanism, and corporate culture. CoCs were deemed to be a broader anti-corruption tool compared to anti-corruption clauses. Furthermore, the importance of maintaining simplicity in their language is highlighted as relevant to the effectiveness of language in anti-corruption clauses. Interviewees' perspectives on incorporating the Code's concepts into regular meetings suggest a nudging effect, where increased exposure to anti-corruption messaging leads to deeper integration into corporate culture. Moreover, training and audit requirements are later recognized as indirect anti-corruption clauses in the subsequent chapter, while the discussion on oversight mechanisms contributes to their enforcement. The section further discusses the significance of due diligence as a tool for pre-contract anti-corruption commitments, contrasting with anti-corruption clauses often designed for the duration of and beyond the contracts. The factors discussed regarding due diligence activities could also apply to a risk-based approach towards anti-corruption, customizing them according to the risk profiles of the other parties. Finally, the

discussion on corporate culture shows that in its absence, other anti-corruption tools, including the clauses, lose their effectiveness. The section concludes that these specified anti-corruption tools primarily exert trickle-down effects by spreading norms among employees and third party agents. Subsequent analysis of anti-corruption clauses suggests that this corporate mechanism can have both trickle-up and trickle-down effects, especially when dealing with NOCs and states.

Chapter Five addresses the question at the heart of this study: the critical and complementary role of contractual anti-corruption clauses in the transnational anti-corruption regime. Drawing from an analysis of 1,164 petroleum contracts, the chapter introduces these clauses as tools to mitigate potential corruption risks among contractors, third parties, intermediaries, and sub-agents. Section (1) begins with an overview of anti-corruption clauses, tracing their origins and dynamics in Subsection (A), and proceeds to their endorsement in key domestic anti-corruption laws and international standards in Subsection (B). Then, Subsection (C) provides a taxonomy of anti-corruption clauses to offer industry-standard guidance. In the first place, the analysis categorizes the studied clauses into two major groups: direct clauses, which specifically address anti-corruption, and indirect clauses, which are not originally designed for anti-corruption purposes. Next, direct clauses are further subcategorized into explicit direct clauses, which clearly refer to (anti-)corruption, and implicit direct clauses, which allow room for interpretation by the parties for anti-corruption purposes. Explicit clauses are further divided into Prohibition Clauses, Compliance Clauses, and clauses requiring the adoption of anti-corruption compliance programs. Implicit clauses, on the other hand, are classified into Specified Clauses, Deterrent Clauses, and CSR Clauses. The subsection also discusses available sanctions and remedies for addressing clause violations. Moreover, the section introduces a standard clause, included in Appendix VIII, which encompasses nearly all explicit and implicit types, to be adopted as an industry-standard practice

in contracts. The study advocates for parties to include direct clauses that straightforwardly commit each other to anti-corruption measures. Among direct clauses, explicit clauses are recommended over implicit clauses because they expressly prohibit corruption. On the other hand, indirect anti-corruption clauses provide a means for parties to enforce anti-corruption commitments in the absence of direct clauses. The study suggests that in such situations, parties can interpret clauses related to compliance with laws, audit rights, sub-contracting or assignment, and training to impose anti-corruption commitments on each other.

For a comprehensive understanding of anti-corruption clauses and their effectiveness, Section (2) presents a quantitative analysis of anti-corruption clauses while exploring their key characteristics and trends in the petroleum sector. After presenting general data concerning the type and location of the analyzed contracts in Subsection (A), the section offers detailed information about both direct and indirect clauses found in the examined contracts. Subsection (B) analyses the overall pattern of direct clauses, considering timelines, geographic locations, and developmental trends, while Subsection (C) illustrates the percentage of studied contracts with different indirect clauses. Lastly, Subsection (D) offers insights into the violation of anti-corruption clauses within the studied contracts. Based on these data-driven insights derived from the contract review, the section argues that while parties have started to incorporate these clauses into their contracts, there is a pressing need for their wider adoption as a standard industry practice. The study emphasizes that anti-corruption clauses can clearly demonstrate the potential for normative alteration by gradually reshaping the practical modes of conducting business. However, merely incorporating such clauses is not sufficient; companies must fully enforce these clauses and integrate them into their corporate culture. These conclusions pave the way for the final chapter to examine the real-world impact of these clauses and provide suggestions to improve their effectiveness.

Finally, *Chapter Six* shifts to a qualitative assessment of anti-corruption clauses by integrating insights from interviews with 27 experts in the field of anti-corruption and petroleum. This qualitative approach aims to examine the real-world practice and impact of these clauses. Section (1) explores the interviewees' viewpoints on the distinct attributes of anti-corruption clauses to compare and contrast them with the findings from the clause review in the preceding chapter. Each discussion also provides recommendations for the best approach based on these findings. Initially, Subsection (A) explores the interviewees' comments on the appropriate language and specific characteristics of these clauses and reveals that the diversity of perspectives among interviewees mirrored the analysis of clauses in the studied contracts. Subsection (B) then examines the possibility of adopting a risk-based approach, with most interviewees favoring tailoring these clauses to the unique risk profile of each party. The discussion is followed by Subsection (C), which explores the time coverage of these clauses. Most interviewees believed that these commitments extend into the post-contract period, but there was less consensus regarding the governance of such clauses before the initiation of the contract. Subsection (D) presents interviewees' opinions on appropriate sanctions and available remedies in cases of violations and reveals that about two-thirds of interviewees advocated for termination, supplemented by additional measures. Lastly, Subsection (E) demonstrates interviewees' opinions on the use of alternative contractual clauses for enforcing anti-corruption commitments in the absence of direct anti-corruption clauses. The discussion confirms the categorization of indirect anti-corruption clauses in the previous chapter.

Section (2) then shifts its focus to the practical effectiveness and integrity policies of anti-corruption clauses from the perspectives of interviewees. Subsection (A) explores the interviewees' opinions on the overall acceptance or rejection of these clauses by companies and

states. Varied views emerged, with some noting outright rejection, others observing negotiations over specific details, and some expressing consistent support. Subsequently, Subsection (B) examines interviewees' expert insights on the real-world application of these clauses and their impact on corruption levels. In cases of violations, while some reported no instances of terminations, others observed occasional cases, indicating the practical application and enforcement of these clauses. Subsection (C) illustrates that interviewees expressed diverse opinions on the effectiveness of anti-corruption clauses, ranging from skepticism to optimism. While some doubted their impact or viewed them as insufficient, others considered them critical tools supporting anti-corruption efforts. Finally, Subsection (D) addresses the challenges faced by these clauses and proposes potential suggestions for their improvement. Several interviewees stressed that anti-corruption clauses alone are inadequate and highlighted the need for additional measures. Other challenges cited include one-sided implementation, unread contracts, complexities in proving corruption, absence of legal mandates, and communication difficulties. Some interviewees suggested legal liabilities and enforcement mechanisms, while other emphasized a compliant corporate culture and effective monitoring implementation. The chapter concludes by incorporating recommendations for improving anti-corruption clauses based on the interview findings.

***

In Chapter Three, it is discussed that despite increased global awareness and formalization, achieving complete internalization and global implementation of anti-corruption standards remain challenging. In an optimistic scenario, anti-corruption is imagined as a universally adopted de jure norm, yet its de facto realization faces many obstacles. Nonetheless, this study argues that by leveraging their normative and economic influence, TNCs can translate de jure anti-corruption

norms into de facto practices and persuade individuals to adhere to such norms. In addition to their trickle-down effects, which necessitate compliance with anti-corruption standards among their employees and third-party agents, TNCs can shape the behavior and practices of states concerning anti-corruption norms. These trickle-up effects can further improve good enough governance institutions within host states. In particular, through the inclusion of anti-corruption clauses in contracts, TNCs play an indispensable role in promoting the "formal legality" inherent in the rule of law.[1713] These formal and procedural requirements ensure the establishment of clear and widely recognized laws, specific instruments for enforcing regulations, and accountability for any violations.[1714] While nearly all countries have legal provisions against corrupt practices, some struggle with the absence of effective mechanisms for implementing anti-corruption regulations. In such cases, TNCs can help bridge the gap by incorporating anti-corruption clauses in their contracts, thus promoting the recognition of anti-corruption standards in practice and establishing procedures for addressing breaches. Moreover, these clauses contribute to a culture of transparency and accountability within businesses.[1715]

Furthermore, characterized as fast-moving institutions, TNCs interact with slow-moving institutions, such as culture, including social norms and values.[1716] This interaction triggers a shift in norms regarding how corruption is perceived and addressed, particularly in resource-rich countries. As discussed in Chapter Two, many oil-rich countries suffer rather than benefit from their oil resources, often due to a ruling elite driven by rent-seeking behavior. TNOCs have the leverage to introduce anti-corruption measures upon entering these markets. They can restructure

[1713] Tamanaha, *supra* note 293 at 240.
[1714] *Ibid*.
[1715] See Boles, *supra* note 987 at 834.
[1716] See Gérard Roland, "Understanding institutional change: Fast-moving and slow-moving institutions" (2004) 38 Studies in Comp Int'l Development 109.

behavioral standards in these countries where established corrupt norms exist as informal and de facto institutions, and where there may be no strict obligation to comply with transnational anti-corruption norms. In exchange for their technology and expertise in oil extraction and production to maximize revenues, TNOCs can push these countries to comply with anti-corruption measures through the inclusion of anti-corruption clauses. When adopting anti-corruption measures becomes a viable option, elites in these countries weigh the benefits and costs of compliance against their resistance to reforms. If TNOCs can demonstrate the economic advantages they offer, elites are more likely to embrace anti-corruption commitments, including those in contractual clauses. Meanwhile, the enforcement of substantive sanctions for breaches of anti-corruption obligations further increases compliance with these clauses. By converting corruption-related norms into anti-corruption standards and catalyzing reforms, the anti-corruption clauses adopted by TNOCs contribute to advancing the transnational anti-corruption regime discussed in Chapter Three.

Anti-corruption clauses can nudge parties towards compliance with anti-corruption policies by establishing non-corrupt behavior as the default expectation in contractual relations.[1717] Put simply, when parties acknowledge that anti-corruption is the expected behavior, they are more likely to adhere to such policies to avoid deviating from the established standard. Explicitly stating in contracts that corruption is prohibited and extending this prohibition to every phase of a contract, while also outlining the consequences for non-compliance, nudges parties to carefully consider the risks and potential negative outcomes associated with engaging in corrupt practices. Moreover, the presence of standardized anti-corruption clauses in contracts provides a clear reference point for negotiations and enables parties to resist corrupt pressures. By citing the contractual language, parties can confidently reject corrupt demands and reduce the pressure to engage in activities that

[1717] See Thaler & Sunstein, *supra* note 51.

do not conform to established standards. Furthermore, highlighting the potential damage to parties' reputations in the event of non-compliance can be a powerful nudge, as companies are often sensitive to their public image. By considering the ethical track record of prospective contract partners during the selection process, individuals are nudged to consider the potential repercussions, such as the loss of future deals and the risk of being blacklisted by reputable partners.

Meanwhile, implicit anti-corruption clauses, such as transparency requirements in Deterrent Clauses or Specified Clauses that discourage fraudulent activities, act as nudges to promote openness and disincentivize behaviors that thrive in secrecy. Beyond that, interpreting indirect clauses to impose ani-corruption commitments, such as audits and training clauses, introduces additional nudges toward compliance by providing external mechanisms for accountability. Furthermore, including whistleblower protection mechanisms that incentivize reporting suspected corrupt activities creates a nudge, as the promise of reward or protection encourages employees and stakeholders to come forward with information. Finally, including clauses that permit contract termination in case of violations acts as a strong deterrent, as parties are more inclined to adhere to anti-corruption if they know that violations could result in the termination of the contractual relationship. Consequently, the sustained behavioral change facilitated by these clauses can shift the normative framework regarding corruption. However, for these efforts to materialize, anti-corruption clauses must be prominently displayed "at eye level," as not everyone reads contracts.[1718] It is the responsibility of compliance departments to educate and remind everyone about such commitments through training sessions, meetings, website displays, employee

[1718] *Ibid* at 80.

contracts, and other means. Displaying specifications on walls and billboards within companies can further add to their effectiveness.

The quantitative analysis conducted in this thesis reveals a deficiency in current petroleum contracts regarding anti-corruption clauses. Among the sample contracts representing the petroleum sector, approximately 61% incorporated at least one direct anti-corruption clause, with less than one-third of the total contracts containing at least one explicit anti-corruption clause (373 out of 1,164 contracts). However, there has been a gradual increase in the inclusion of direct anti-corruption clauses in recent years, as illustrated by Figure 18 in Chapter Five. Given the rising cost of corruption in cross-border projects, it is expected that TNCs will accelerate the incorporation of more explicit anti-corruption clauses. Therefore, this thesis advocates for expediting the incorporation of more direct anti-corruption clauses in contracts, while also proposing a standard clause that include nearly all types of explicit and implicit clauses. At the same time, parties should leverage indirect clauses—i.e., audit rights, assignment or sub-contracting requirements, training, and compliance with laws—to impose additional anti-corruption commitments on each other, especially in contracts that lack direct clauses.

Looking ahead, the future of anti-corruption clauses seems promising. Even when non-binding and self-regulatory, these clauses can exert significant soft law influence. While the voluntary incorporation of clauses is expected to gradually promote a shift away from corrupt behavior on a global scale, governments should consider mandating such clauses as a legal requirement within regulations governing the petroleum sector. As reiterated by many interviewees, these clauses have nearly become a standard industry practice, encouraging individuals to align with the transnational anti-corruption regime. The evolution of anti-corruption clauses from a top-down approach to becoming an industry practice signifies their growing importance in shaping behavior at all levels.

As emphasized by many interviewees, the ultimate key to success lies in advancing a corporate culture that places a high priority on anti-corruption measures.

While this study provides a starting point and suggests ways to improve anti-corruption clauses, future research is needed to thoroughly explore these clauses and their efficacy, particularly across a broader range of countries. Further research can focus on cases related to the petroleum industry that have been brought forth by relevant enforcement authorities, including the DOJ and SEC in the USA, the SFO in the UK, and the Royal Canadian Mounted Police in Canada. The primary objective would be to evaluate the presence and role of anti-corruption clauses in these cases and their subsequent impact. Exploring these issues within legal proceedings can offer valuable insights into the extent to which contractual clauses are given due consideration in court. Moreover, a comprehensive analysis of recent corruption scandals in the petroleum sector could reveal whether the inclusion of an anti-corruption clause in relevant contracts could have made a significant difference in preventing or addressing these corrupt activities. Ideal cases for investigation would involve discussions with individuals who were engaged in settlements from the outset, with a perfect scenario being one where a company proactively identified a corrupt scheme within its operations, self-reported the violation, and cooperated with the relevant authorities. Another valuable resource for research is the annual reports published by some TNOCs. In these reports, companies include their annual data related to their hotline process, CoC violations, and employees terminations. For example, the Shell Annual Report 2022 reveals the following statistics:

> In 2022, there were 1,790 entries to the Shell Global Helpline: 1,381 allegations and 409 enquiries. …. Internal investigations confirmed 183 substantiated breaches of the Code of Conduct in 2022. Disciplinary action was taken against 216 group employees and

> contractors, including 53 contract terminations. In 2022, most violations of our Code concerned the categories of Harassment, Conflict of Interest and Protection of Assets.[1719]

While these reports may provide limited insights into violations of anti-corruption clauses by other parties and the subsequent termination of contracts, such statistics can provide valuable indications about a company's commitment to enforcing ethical standards within the organization.

[1719] Shell plc, *Powering Progress* (London: Shell, 2022) at 119.

Appendices

Appendix I – General Consent Form

Participant Consent Form

Researcher: Azar Mahmoudi, Doctor of Civil Law candidate, Faculty of Law, McGill University
Email: azar.mahmoudi@mail.mcgill.ca
Tel: +1(514) 501-0131

Supervisor: Nandini Ramanujam, Professor, Faculty of Law, McGill University and Co-Director of Centre for Human Rights and Legal Pluralism, Faculty of Law, McGill University
Email: nandini.ramanujam@mcgill.ca

Title of Project: Nudging Anti-Corruption Norms: The Role of Private Transnational Actors

Purpose of the Study:
As a person with considerable knowledge of the anti-corruption/oil industry, you are invited to take part in a study about preventive anti-corruption measures. The study aims to identify the role of transnational corporations in preventive anti-corruption efforts, and more specifically, to examine the current status and future directions of preventive anti-corruption clauses concluded by transnational corporations in contracts, to explore that whether such clauses are included in the real-world practices, and if yes, what influences they may have. The study has identified experts across the world and aims to understand the varying perspectives, before making its own recommendations. My name is Azar Mahmoudi, and I conduct this study in pursuance of doctoral studies at the Faculty of Law, McGill University.

Study Procedures:
Your participation in the study will involve answering open-ended questions during an in-person interview of around one hour in length. The discussion will revolve around your perspectives as an anti-corruption/oil industry expert as well as that of your company/home country/organization. We will agree on a convenient time and location for the interview. If an in-person interview proves impossible to organize, a video call via Microsoft Teams will be arranged. You may keep your camera turned off, should you wish. Despite precautions, information shared over Microsoft Teams could be intercepted by third parties.
The interview will be audio-recorded, unless you elect otherwise. This will enable the production of a complete transcript of the interview by me for subsequent analysis. I will also take written notes during the interview.
All identifiable data will be pseudonymized and confidential. To do so, I will assign a random numeric code to your name and an alpha code to your company/home country/organization.
In the special case, you think that before responding to this study, you need permission from your institution or country, please let me know. The interview will be proceeded with only after such permission is received.

Voluntary Participation:
Participation in this study is completely voluntary. You are free to decline to participate, to end participation at any time for any reason, or to refuse to answer any individual question. If you decide to withdraw after the interview is conducted, any potential recording will be deleted and all other notes of the interview destroyed, unless you give permission otherwise.

Potential Risks:
Your perspectives will be used to understand the situation of preventive anti-corruption measures. However, the study findings and conclusions might differ from the perspectives you provide.

Potential Benefits:
It is hoped that by participating in this study, you will help in identifying the best ways to improve preventive anti-corruption efforts among both private and global transnational actors. Your views will contribute to understanding the current status and future directions of preventive anti-corruption clauses and have valuable insights into the design and implementation of anti-corruption reforms and programming.

Confidentiality:
All information allowing to identify you directly will remain confidential. I will moreover do my best efforts to ensure that your identity cannot be inferred from other information included in published materials. I alone will have access to the audio recording of the interview and the interview transcript. All working documents containing confidential personal information will be stored in encrypted files on a laptop computer and personal external hard drive, both protected by a password.

Data Destruction:
Data may be destroyed upon withdrawal up to the point of publication. Following first publication it will be retained for 7 years, but it will be removed from further use.

Questions:
You may contact me or my supervisor (see contact details above) with any questions or requests for clarifications about the project.
If you have any ethical concerns or complaints about your participation in this study, and want to speak with someone not on the research team, please contact the Associate Director, Research Ethics at 514-398-6831 or lynda.mcneil@mcgill.ca.

Please sign below if you have read the above information and consent to participate in this study. Agreeing to participate in this study does not waive any of your rights or release the researchers from their responsibilities. A copy of this consent form will be given to you and I will also keep a copy.

I have read and understood the above information, and I consent to participate in this study by signing below.

Do you consent to being recorded for the purposes of participating in this interview?
YES NO

Participant's Name: (please print): _____

Participant's Signature: _____ Date: _____

Please save or print a copy of this document to keep for your own reference.

Appendix II – General Data Protection Regulation (GDPR) Notice

GDPR NOTICE for participants physically located in the EU/EEA

McGill University aims to conduct research to the highest standards of research integrity. The research is underpinned by policies and procedures that ensure researches comply with regulations and legislation that govern the conduct of research. You are receiving this notice in connection with your participation in the following research study:

Title of Study: Nudging Anti-Corruption Norms: The Role of Private Transnational Actors

Principal Investigator: Azar Mahmoudi (Doctor of Civil Law candidate, Faculty of Law, McGill University); the research is supervised by Prof. Nandini Ramanujam (Professor of Law, Faculty of Law, McGill University

The above-named research study involves the collection of *personal data* that can identify you. The General Data Protection Regulation ("GDPR") requires researchers to provide this notice to you when we collect and use research data about people located within the European Union (EU) or the European Economic Area (EEA). This notice outlines what personal data we will collect, how we intend to use and protect this information, and your rights with respect to your personal data for purposes of GDPR.

NOTE: The GDPR may apply to *personal data* that you provide while physically located in the EU/EEA. It does not apply to information provided while located outside of the EU/EEA (e.g., while in Canada). GDPR data protection requirements do not apply to your personal data that is rendered anonymous such that you are not identifiable or can no longer be identified.

Personal data – what we will collect

As part of this research study, the researcher will create and obtain information related to your participation in the study from you or from publicly available sources such as company/organization/government's websites, so that we can conduct this research. Research study data will include personal data– such as a name and title, location data, name of country or institution, work experience, number of years working in the oil/anti-corruption industry or related work–professional opinions with respect to the preventive anti-corruption measures,
records of communications and interactions, and generally information about the responses to the research questions.

NOTE: You are not legally or contractually obliged to supply us with personal data for research purposes.

How we will use your Personal Data

The personal data you provide will be used for the following purposes:

- To invite you to participate in the Study;
- To fulfill study objectives as described within the Study Informed Consent Form
- To confirm the accuracy of the Study;
- To comply with legal and regulatory requirements, including requirements to share data with regulatory agencies overseeing the research
- To confirm proper conduct of the study and research integrity

Your personal data will be transferred to Canada. In 2001, the EU recognized Canada's *Personal Information Protection and Electronic Documents Act* as providing adequate protection.
Canada's adequacy status ensures that data processed in accordance with the GDPR can be subsequently transferred from the EU to Canada without requiring additional data protection safeguards (for example, standard contractual rules) or authorization to transfer the data. In addition, the researcher is committed to protecting the confidentiality of the personal data you give them. The researcher commits to keeping your personal information secure and respect the confidentiality of the personal information that participants in the research provide. The *Study Informed Consent form* further describes the protections in place to protect the confidentiality of your personal data. Any keys to research participants, that is, a list of the research participants and a unique identifier used to de-identify individuals within a research data set will be kept separately from that research dataset while the research is ongoing and destroyed prior to deposit. Transfer and use of your personal data is on the basis of your consent.

Retention of your personal data

I may retain your personal data for as long as necessary to fulfill the objectives of the research and to ensure the integrity of the research. The researcher will delete your personal data when it is no longer needed for the study or if you withdraw your consent provided such deletion does not render impossible or seriously impair the achievement of the objectives of the research project. However, your information will be retained as necessary to comply with legal or regulatory requirements. Following first publication it will be retained for 7 years, but it will be removed from further use.

Your rights with respect to your personal data

If you participate in this study within the EU/EEA, the GDPR affords you certain rights with respect to your personal data, including the right to:

- Access to your personal data free of charge;
- Correct, withdraw, or in some cases to erase your personal data; however, the researcher may need to keep your personal data as long as it is necessary to achieve the purpose of this research;
- Move, copy, or transfer your personal data to another organization;
- Restrict the types of activities the researcher can do with your personal data;
- Object to using your personal data for specific types of activities;
- File a complaint with the Data Protection Authority; or
- Withdraw your consent to use your personal data for the purposes outlined in the *Study Informed Consent form* and in this document. (However, this withdrawal will only apply to new personal data not yet collected or created. Personal data already collected or created may continue to be used as outlined in the *Study Informed Consent form* and this document.)

To exercise your rights, please use the contact information below to submit a request. However, please note that research participants' rights to access, change or move your personal data are limited, as need to manage your information in specific ways in order for the research to be reliable and accurate. If you withdraw from the study, the researcher will keep the information about you that they have already obtained.

Where to address your questions or concerns about your personal data

If you want to exercise any of the rights described above or if you have any concerns about how your personal data is being handled, please contact:

Researcher: Azar Mahmoudi, Doctor of Civil Law candidate
Faculty of Law, McGill University,
New Chancellor Day Hall, 3644 Peel St, Montreal, Quebec, Canada H3A 1W9
Email: azar.mahmoudi@mail.mcgill.ca
Tel: 5145010131

Supervisor: Nandini Ramanujam, Professor,
Faculty of Law, McGill University and Co-Director of Centre for Human Rights and Legal Pluralism, Faculty of Law, McGill University
New Chancellor Day Hall, 3644 Peel St, Montreal, Quebec, Canada H3A 1W9
Email: nandini.ramanujam@mcgill.ca
Tel: 514-398-3577

You may also contact the University McGill's Associate Director, Research Ethics at 514-398-6831 or lynda.mcneil@mcgill.ca.

Your Consent

Your consent is entirely voluntary. You may withdraw any consent you provide on this form at any time. If you withdraw your consent, this will not affect the lawfulness or the researcher's collecting, use, and sharing of your personal data up to the point in time that you withdraw your consent. Even if you withdraw your consent, we may still use or maintain your personal data that identifies you to comply with our legal and regulatory requirements.

In signing this document, you indicate that you have read and understood how your personal data will be processed, your related rights, and that you consent to the processing of your data as provided in this document. In addition, you agree this information was explained to you, your questions have been answered to your satisfaction, and that you wish to continue participating in the study. If any new questions arise, you can contact the researcher using the information provided above.

Participant's Name (printed) _____

_____ _____

Participant's Signature Date

You may print a copy of this form for your files.

Appendix III – Interview Questions

Interview questions for participants working in companies and lawyers

Questionnaire for interviewees in companies

Theme #1 - Identity & general company information

Can you introduce yourself? Feel free to mention any personal features that you deem important to understand your contribution today.

Theme #2 - General preventive anti-corruption policies

1. Based on your experiences, what are the strongest motivations for companies to undertake preventive anti-corruption measures?
2. Based on your experiences, in general, what strategies and mechanisms have companies adopted in terms of anti- preventive corruption and corporate social responsibility?
3. Based on your experiences, are there any internal controls and safeguards implemented to minimize their employees' risk of corrupt activities?
4. Based on your experiences, do companies have a written code of conduct? If yes, what corrupt conduct do the codes prohibit?

Theme #3 - Third-party due diligence and anti-corruption cluases

1. Based on your experiences, do companies incorporate preventive anti-corruption clauses, or any other preventive anti-corruption language, in contracts with third-parties?
   - If yes to the above,
     a) Since when have companies incorporated such clauses in their contracts with third parties?
     b) What corrupt conducts does the clause prohibit?
     c) What period of time does the preventive anti-corruption clause cover?
     d) Does the preventive anti-corruption clause ask for implementing of a corporate anti-corruption compliance program?
     e) Does the preventive anti-corruption clause demand third parties adopt additional measures to solidify preventive anti-corruption commitments?
     f) In choosing the language of the clause, do companies perform a risk assessment process for each third party?

Theme #4 - Enforcement

1. In your opinion, how a code of conduct should be implemented and enforced at a practical level including how the board of directors, audit committee, and internal audit gain assurance that it is being complied with?
2. In your opinion, how a preventive anti-corruption contractual clause should be implemented and enforced at a practical level including how the board of directors, audit committee and internal audit gain assurance that it is being complied with?
3. In your opinion, if a company finds that a preventive anti-corruption clause is breached, how a company should deal with such an infringement?
4. In your opinion, should the infringement of the preventive anti-corruption clause by the other party, result in any sanctions or remedies?

Theme #5 - Effect

1. From your experience, do you feel that in general, the incorporation of preventive anti-corruption clauses in contracts can influence the level of corrupt activities among third parties?
2. Do you feel that whether there has been a shift in corruption-related norms and practices given the incorporation of preventive anti-corruption clauses?
3. Do you feel that in general, governments support the incorporation of the preventive anti-corruption clause in guarding against corruption risks?
4. Based on your experiences, to what extent have the preventive anti-corruption clauses successfully met their objectives? What are the challenges faced now and in the future?

Interview questions for participants working in anti-corruption organizations

Questionnaire for Individuals in Organizations Working on Anti-Corruption

Theme #1 - Identity & general organization information

1. Can you introduce yourself?
2. What types of interactions does your organization have with transnational oil companies and the governments that are home or host to the transnational oil companies?
3. What comes to your mind when you hear of preventive anti-corruption tools in the oil industry?

Theme #2 - General preventive anti-corruption policies

1. How does your organization engage with transnational oil companies and their home/host states on preventive anti-corruption measures?
2. In general, what strategies and mechanisms has your organization recommended to companies and states in terms of preventive anti-corruption and corporate social responsibility?
3. Does your organization recommend a specific code of conduct? If yes, what corrupt conduct does the code prohibit?

Theme #3 - Third-party due diligence

1. Does your organization suggest internal controls and safeguards recommend to minimize the risk of corrupt activities within the third-party agents?
2. Does your organization suggest preventive anti-corruption clauses, or any other preventive anti-corruption language, to be incorporated in contracts with third-party companies?

Theme #4 - Enforcement

1. How your suggested code of conduct, if any, has been implemented and enforced at a practical level within transnational oil companies and states?
2. How your suggested preventive anti-corruption contractual clause, if any, has been implemented and enforced at a practical level within transnational oil companies and states?
3. If any, does the infringement of the preventive anti-corruption clause by either party, result in any sanctions or remedies recommended by your organization?

Theme #5 - Effects

1. To the extent you know, what are the strengths and shortcomings of oil companies'/governments' efforts to fight corruption in connection with the oil industry and steps they might take to improve their efforts?
2. If any, whether there was a time when you recall that a preventive anti-corruption clause was breached? If yes, was there any sanction or remedy?
3. Do you feel that whether there has been a shift in corruption-related norms and practices given the incorporation of preventive anti-corruption clauses?
4. From your experience, do you feel that in general, the incorporation of preventive anti-corruption clauses in contracts can influence the level of corrupt activities among third parties?
5. Do you feel that transnational oil companies/governments support the incorporation of the preventive anti-corruption clause in guarding against corruption risks?
6. Based on your experiences, to what extent has the preventive anti-corruption been successful in meeting its objectives? What are the challenges faced now and in the future?

1 of 1

Interview questions for participants working in governments

Questionnaire for interviewees working in the state departments

Theme #1 - General information

1. Can you introduce yourself? Feel free to mention any personal features that you deem important to understand your contribution today.
2. What types of interactions does your department/country have with transnational oil companies operating in your country/abroad?

Theme #2 - General preventive anti-corruption policies

1. What actions has your country/department taken to deal with risks of corruption in the oil and gas industry?
2. In general, what strategies and mechanisms has your country/department adopted in terms of corporate social responsibility for oil companies operating in your country/abroad?
3. What are the ways your government agencies support transnational oil companies operating in your country/abroad to avoid corruption risks?

Theme #3 - Third-party due diligence

1. To the extent you know, what has been the attitude of your country/department towards adopting preventive anti-corruption measures to minimize the risk of corrupt activities within the third-party agents?
2. Does your country/department incorporate preventive anti-corruption clauses, or any other preventive anti-corruption language, in contracts with transnational oil companies operating in your country?
   - If yes to the above,
     a) Since when have such clauses been incorporated in contracts?
     b) What corrupt conducts does the clause prohibit?
     c) What period of time does the preventive anti-corruption clause cover?
     d) Does the preventive anti-corruption clause ask for implementing a corporate preventive anti-corruption compliance program?
     e) Does the preventive anti-corruption clause demand third parties adopt additional measures to solidify preventive anti-corruption commitments?
     f) Does your country/department perform a risk assessment process for each company (in terms of size, ownership structure, location, etc.) in choosing the language of the clause?

Theme #4 - Enforcement

1. In your opinion, how a code of conduct should be implemented and enforced at a practical level including how the board of directors, audit committee, and internal audit gain assurance that it is being complied with?
2. In your opinion, how a preventive anti-corruption contractual clause should be implemented and enforced at a practical level including how the board of directors, audit committee and internal audit gain assurance that it is being complied with?

3. In your opinion, if a company finds that a preventive anti-corruption clause is breached, how a company should deal with such an infringement?
4. In your opinion, should the infringement of the preventive anti-corruption clause by the other party, result in any sanctions or remedies?

Theme #5 - Effect

1. In your opinion, what are the strengths and shortcomings of efforts conducted by home countries of transnational oil companies in fighting foreign corruption in the oil sector?
2. From your experience, do you feel that in general, the incorporation of preventive anti-corruption clauses in contracts can influence the level of corrupt activities among third parties?
3. Do you feel that whether there has been a shift in corruption-related norms and practices given the incorporation of preventive anti-corruption clauses?
4. Do you feel that oil companies support the incorporation of the preventive anti-corruption clause in guarding against corruption risks?
5. Based on your experiences, to what extent has been the preventive anti-corruption successful in meeting its objectives? What are the challenges faced now and in the future?

Appendix IV – Norway: Beating the Resource Curse

Chapter Two argues that in oil-rich countries, weaknesses in governance institutions results in the inefficient management of oil resources and negative impacts on the economy and society. To further substantiate this argument, this appendix uses Norway as a successful example of an oil-rich country with an efficient regulatory framework and practices that have transformed the resource curse into a blessing. Despite the abundance of oil resources in Norway, this country has exemplified low levels of corruption in its oil sector. The argument here is that powerful institutions of good governance, such as the rule of law, transparency, and accountability, have benefitted Norway and its populace as a whole.

Norway's Oil Background

Among the few oil-rich countries that have successfully reversed the resource curse into a blessing and benefited from their oil wealth, Norway stands out as a classic example. Despite its small size, Norway ranks as the seventh-largest exporter of crude oil in 2023,[1720] with its oil companies operating globally. The discovery of oil in the late 1960s propelled the Norwegian economy, which was previously unfamiliar with the oil market and relatively immature in oil-related policies and technologies, to focus more on governance within the oil sector. Before the discovery of oil, Norway's key industries included fishing, forestry, hydropower, and mining, but today, oil revenues also contribute to the state's income through taxation and exportation.[1721] However, this contribution remains limited to one-third, which preserves the diversification of the Norwegian economy. In comparison to similar countries in the region, Norway has witnessed significant

[1720] Daniel Workman, "Crude Oil Exports by Country" (last visited 15 July 2024), online: *World's Top Exports* <www.worldstopexports.com/worlds-top-oil-exports-country/>.
[1721] See Eriksen & Søreide, *supra* note 544 at 28.

economic growth over recent decades due to oil discovery and exportation.[1722] In 2024, the oil sector contributed 20% to Norway's GDP, 31% to the state's revenue, and 44% to total exports.[1723] Despite the increased risk of corrupt practices in the oil sector, Norway ranks among the countries with the lowest levels of corruption in the CPI.[1724] Moreover, Norway has successfully managed to mitigate Dutch Disease and job losses in other sectors by supporting non-oil productive industries while "leaving the oil underground."[1725] Even today, only 1 out of 9 jobs is related to the oil industry, again underscoring the diversified nature of the Norwegian economy.[1726] Furthermore, Norway's longstanding position as the top-ranked country in the Human Development Index reflects the high living standards enjoyed by Norwegians.[1727] All these factors collectively indicate that Norway has not only escaped the resource curse but also managed to turn it into a blessing.

Why and how does Norway stand out as one of the exceptional cases of successful management of oil resources among oil-rich countries? One could argue that their success in oil management heavily relies on the pre-existing presence of traditions of good governance in the country.[1728] In 1969, when Phillips Petroleum Company discovered an undersea oil and gas field in Ekofisk in the North Sea, Norway already benefitted from firmly established good governance institutions, low levels of corruption, meritocratic and egalitarian social structures, as well as a diversified

[1722] See Erling Røed Larsen, "Are rich countries immune to the resource curse? Evidence from Norway's management of its oil riches" (2005) 30:2 Resources Pol'y 75.
[1723] Norwegian Petroleum, "The Government's Revenue" (last modified 16 May 2024), online: *Norwegian Petroleum* <www.norskpetroleum.no/en/economy/governments-revenues/>.
[1724] TI, "Corruption Perceptions Index", *supra* note 358.
[1725] Elwerfelli & Benhin, *supra* note 266 at 1148.
[1726] *Ibid* at 1147.
[1727] UNDP, *Human Development Index: Norway* (last modified 13 March 2024), online: *UNDP* <hdr.undp.org/data-center/specific-country-data#/countries/NOR >.
[1728] See e.g. Larsen, *supra* note 1739.

economy.[1729] In this regard, Erik Solheim, the Former Norwegian Minister of International Development, states, "[w]hen [Norwegians] found oil off Norway, [they] could benefit from substantial technical expertise with hydropower and other industry, an honest bureaucracy and a stable democracy."[1730] Given that the Norwegian government did not initially anticipate the country to have significant oil resources,[1731] other productive Norwegian sectors were developing in parallel with oil discovery activities. Therefore, the sudden discovery of oil and the increase in oil revenues did not completely transform the entire economic structure of Norway, unlike what occurred in many other oil-rich countries lacking good governance institutions at the time of their oil discovery. This is not to say that Norway did not face any economic challenges; in fact, Norway initially experienced some economic inflation due to the large oil income, the rise in public expenditure, and the boom in consumption.[1732] However, the mechanisms behind its already existing good governance institutions enabled Norway to withstand the resource curse.

Norwegian Oil Model

Since the oil discovery in Norway, the management of oil production and exportation has been overseen by the *Norwegian Oil Model*, an extensive body of expertise including policies, institutional organizations, and regulatory structures governing the oil sector. One of the most notable elements of this model is the "10 Oil Commandments" of 1971, a foundational declaration of principles guiding Norwegian oil policy.[1733] This political platform advocated for an

[1729] Gøril Havro & Javier Santiso, "To Benefit from Plenty: Lessons from Chile and Norway" (Paris: OECD, 2008) at 18.
[1730] Erik Solheim's statement is cited in Ina Gundersen, "Oiling a better life" (21 December 2006), online: *Norwegian Petroleum Directorate* <www.npd.no/en/facts/news/general-news/2006/Oiling-a-better-life--/>.
[1731] See Svein S Andersen, *The struggle over North Sea oil and gas* (Oxford: Oxford University Press, 1993) at 57–58.
[1732] See Karl, *supra* note 50 at 214.
[1733] See Trude Meland, "The 10 oil commandments" (last visited 15 July 2024), online: *Industrial heritage Statfjord* <statfjord.industriminne.no/en/2018/07/09/the-10-oil-commandments/>.

interventionist state alongside the market while emphasizing Norwegian participation and expertise in managing the oil sector. The Norwegian model proposes a clear separation of functions among key entities: the Ministry of Petroleum and Energy, serving as an independent regulatory body and issuer of licenses; the Norwegian Petroleum Directorate, functioning as a coordinator of technical and administrative matters; and Statoil, acting as a state-owned oil company responsible for implementing state policies and managing commercial operations.[1734] This structural division between regulatory and commercial functions has effectively prevented the emergence of rent-seeking behavior across the oil value chain.[1735] Furthermore, the Norwegian Petroleum Directorate protects public interests and monitors Norwegian oil activities conducted by both TNOCs and NOCs, even in countries with heightened corruption risks, to ensure their compliance with health, safety, and environmental standards.[1736] This organizational model has resulted in the development of producer-friendly institutions rather than grabber-friendly institutions in the Norwegian oil sector.[1737]

Norway's fiscal and financial policies in managing oil revenues have also played an essential role in reversing the negative link between oil resources and economic development. In general, Norway's oil income has facilitated the country's development into a welfare state. Norwegian oil policies are deeply influenced by their belief that natural resources belong to the nation as a whole, including both the present population and future generations. Companies operating in Norway are generally subject to a corporate tax of 22%, but oil companies bear an additional special tax of

[1734] Per Heum, "Local content development: experiences from oil and gas activities in Norway" (2008) SNF Working Paper No 2008:2 at 5.
[1735] Farouk Al-Kasim, *Managing Petroleum Resources: The 'Norwegian Model' In a Broad Perspective* (Oxford: Oxford Institute for Energy Studies, 2006) at 174-75.
[1736] *Ibid* at 180.
[1737] See Mehlum, Moene & Torvik, *supra* note 74 at 2.

56%, reflecting their income from oil rent.[1738] The high taxation levels ensure that citizens hold the state accountable, as the state remains reliant on taxes paid by both companies and individuals. Moreover, Norwegian long-term welfare policies are further manifested in the fiscal policies of the Petroleum Pension Fund and Sovereign Wealth Fund. Established in 1990, the Petroleum Pension Fund serves as a financial reserve for investing surplus oil revenues for public spending.[1739] As a commitment by political parties, the government's annual fund usage was limited to about 4% of the expected real gain from the Pension Fund, which was reduced to 3% in 2017.[1740] Accordingly, the remaining oil revenue must be deposited in investment funds to guarantee that temporary and volatile oil revenues are transformed into a more stable income for the government, as well as pensions for the aging population and future generations.[1741] In addition, the Norwegian central bank, in a highly transparent manner, manages the Sovereign Wealth Fund and invests oil revenues abroad to enhance the stability of the exchange rate and shield the economy from the impacts of oil volatility.[1742] The Fund, the largest wealth fund globally, earned the second-highest return in 2021, holding the equivalent of $244,000 US for every Norwegian person.[1743]

[1738] See EY, "Norwegian Government proposes changes in petroleum taxation" (8 September 2021), online: *EY* <www.ey.com/en_gl/tax-alerts/norwegian-government-proposes-changes-in-petroleum-taxation>.

[1739] For more information on the Petroleum Pension Fund, see Norges Bank Investment Management, "About the fund" (last modified 27 February 2019), online: *Norges Bank Investment Management* <www.nbim.no/en/the-fund/about-the-fund/>.

[1740] Norway Ministry of Finance, "The Norwegian Fiscal Policy Framework" (last modified 7 October 2022), online: *Norway Ministry of Finance* <www.regjeringen.no/en/topics/the-economy/economic-policy/economic-policy/id418083/>.

[1741] Elwerfelli & Benhin, *supra* note 266 at 1149.

[1742] See Mehmet Caner & Thomas Grennes, "Performance And Transparency of The Norwegian Sovereign Wealth Fund" (2009) Revue d'économie financière 119 (stating that "[t]he Norwegian sovereign wealth fund (SWF) is widely acknowledged to be one of the most transparent funds of its type" at 119).

[1743] Victoria Klesty, "Norway wealth fund earns second-highest return in 2021" (27 January 2022), online: *Reuters* <www.reuters.com/business/finance/norway-wealth-fund-earns-177-bln-2021-2022-01-27/>.

More importantly, adopted anti-corruption regulations have helped Norway prevent the oil sector from becoming a fertile ground for rent-seeking behavior. The Norwegian government enacted anti-corruption laws criminalizing transnational corruption to ensure that its TNCs' activities mitigate corruption risks in other countries. Since 1997, companies can be held criminally liable for the infringement of anti-corruption laws.[1744] In 2003, Norway broadly amended its national Criminal Code to criminalize acts of bribery, private-to-private corruption, and trading in influence. Whether such an act occurred in Norway or abroad, this applies to Norwegian citizens and residents, Norwegian companies, and foreign companies residing in Norway.[1745] In this matter, Økokrim, the Norwegian National Authority for the Investigation and Prosecution of Economic and Environmental Crime, bears the main responsibility for examining corruption cases.[1746] Norway is also a state-party to the OECD Convention, UNCAC, Criminal Law Convention, and Civil Law Convention. There is evidence that Norway strongly enforces its anti-corruption laws. For example, a 2018 OECD report states that "Norway has addressed all of the known potential foreign bribery cases that have arisen since ... 1999."[1747]

Lastly, Norway has been active in promoting CSR for both state-owned and private companies in several ways. In 2004, for example, the Norwegian Government Pension Fund Global developed ethical standards for observing and excluding violators from investing in the Fund.[1748] In addition,

[1744] *General Civil Penal Code*, *supra* note 557, § 48(a).
[1745] *Penal Code* (2005), arts 387–89 (Norway). Earlier, in 1999, Norway added the phrase "foreign public servant" in its definition of the crime of bribery to criminalize the offence of foreign bribery, but the term was not defined until its 2003 amendments. See OECD, *Norway: Review of Implementation of the Convention and 1997 Recommendation* (Paris: OECD, 1999) at 1.
[1746] For further detail on the work of Økokrim, see Økokrim , "Økokrim" (last visited 15 July 2024), online: *Økokrim* <www.okokrim.no/?cat=547175>.
[1747] OECD, *Norway's Phase 4 Monitoring Report* (Paris: OECD, 2018) at 9.
[1748] Norges Bank, "Ethical Exclusions" (last modified 7 January 2024), online: *NORGES Bank* <www.nbim.no/en/responsible-investment/ethical-exclusions/>.

in 2009, the Ministry of Foreign Affairs outlined the responsibilities of the state and private sector regarding CSR.[1749] Presently, large enterprises are mandated to report on their CSR activities.[1750]

Understanding Good Governance within the Norwegian Petroleum Sector

How does the Norwegian oil sector perceive good governance? How are the key components of good governance implemented within this sector? In general, Norway is recognized as a leader in resource governance. The 2017 Resource Governance Index awarded Norway a high score of 97 out of 100, ranking it the first among 81 countries.[1751] In Norway, good governance is not only seen as a means to economic development but also an inherent goal in itself.

The World Justice Project Rule of Law Index ranked Norway second among 142 countries in 2023.[1752] As discussed in Chapter Two, an administrative state with a strong legal framework guarantees the rule of law, while the division of responsibilities in managing the sector assures that officials are bound by law. It is evident that the strong rule of law is reflected in Norway's clear rules within the oil industry and its sound and efficient administration. Distinct roles and responsibilities are allocated within separate organizations: the Ministry of Petroleum and Energy is tasked with oil policymaking, the Norwegian Petroleum Directorate handles regulatory functions, and lastly, Statoil manages commercial operations. Overall, these exceptionally strong legal requirements enable Norway to effectively mitigate the negative impacts of oil wealth and enforce oil regulations and policies.

[1749] Norwegian Ministry of Foreign Affairs, "Corporate Social Responsibility in a Global Economy" (29 January 2009), online: *Norwegian Ministry of Foreign Affairs* <www.regjeringen.no/en/dokumenter/csrreport_short/id582764/>.
[1750] *Act on auditing and audits (2020)*, § 3-3a (Norway).
[1751] Natural Resource Governance Institute, "Norway" (2017), online: *Natural Resource Governance Institute* <resourcegovernanceindex.org/country-profiles/NOR/oil-gas?years=2017>.
[1752] WJP Rule of Law Index, *World Justice Project Rule of Law 2023* (Washington, DC: WJP Rule of Law Index 2023) at 11.

With respect to accountability, in 2022, Norway ranked first in executive accountability, according to the Sustainable Governance Indicators.[1753] Even before the discovery of oil, Norway had established accountability traditions, including special courts and ombudspersons.[1754] Constraints on government powers have long been in place, and the authority of the executive branch has been effectively limited by the legislature, judiciary bodies, and independent auditing. Members of Parliament, audit offices, political parties, and civil society organizations hold oversight powers regarding the state's actions,[1755] and in cases of misconduct, government officials face appropriate sanctions.[1756] Moreover, high taxation empowers citizens to exert social and political pressures on the state in response to its wrongdoings.

Lastly, transparency is evident in the Norwegian revenue management, including the tax regime, openness regarding payments, and savings management. Norway operates within an open government framework, where data and information are readily accessible to citizens, media outlets, and research institutions. Ministries, governmental bodies, and public agencies routinely publish their reports and financial statements.[1757] On the international stage, Norway has been a staunch supporter of initiatives led by NGOs aimed at increasing financial transparency.[1758] For example, Norway is an EITI member and has complied with its transparency requirements, such as requiring companies to disclose taxes and other payments made to foreign governments. However, it should be noted that Norway's performance in disclosing contracts and financial

[1753] Sustainable Governance Indicators, "Norway: Executive Accountability" (last visited 15 July 2024), online: *Sustainable Governance Indicators* <www.sgi-network.org/2022/Norway/Executive_Accountability>.
[1754] See Karl, *supra* note 50 at 217.
[1755] Sustainable Governance Indicators, "Norway: Key Findings" (last visited 15 July 2024), online: *Sustainable Governance Indicators* <www.sgi-network.org/2022/Norway/Key_Findings>.
[1756] World Justice Project, "Norway: Constraints on Government Powers" (last visited 15 July 2024), online: *WJP Rule of Law Index* <worldjusticeproject.org/rule-of-law-index/country/2021/Norway/Constraints%20on%20Government%20Powers/>.
[1757] Sustainable Governance Indicators, *supra* note 1772.
[1758] see Eriksen & Søreide, *supra* note 544 at 34.

interests has been lacking, particularly concerning the release of information about contracts, post-licensing, taxation, JVs, and subsidiaries.[1759]

All in all, sound oil policies, coupled with the strong rule of law and elevated levels of transparency and accountability, have enabled Norway to avoid the resource curse. Today, the Norwegian experience is regarded as a model for other oil-rich countries. Since 2005, Norway has spearheaded an aid program, called Oil for Development, to assist other countries in managing their oil resources.[1760]

[1759] Natural Resource Governance Institute, *supra* note 1768.
[1760] For further detail, see NORAD, "About NORAD" (last visited 15 July 2024), online: *Norad* <www.norad.no/en/front/about-norad/>.

Appendix V – Anti-Corruption Measures Taken by Inter-Governmental Organizations

a. Organization of American States

The OAS is the oldest regional organization, comprising 35 American states.[1761] In 1975, the OAS addressed bribery concerning TNCs for the first time, issuing a resolution on the Behavior of Transnational Enterprises Operating in the Region and Need for a Code of Conduct to be Observed by Such Enterprises.[1762] The Resolution urged member states to "condemn in the most emphatic terms any act of bribery, illegal payment or offer of payment by any transnational enterprise; any demand for or acceptance of improper payments by any public or private person … ."[1763] In 1992, the OAS issued another resolution acknowledging the impact of corruption on free trade and urging members to consider anti-corruption mechanisms.[1764]

In March 1996, the OAS finalized the first binding international agreement on anti-corruption, known as the Inter-American Convention against Corruption, adopted in Caracas, Venezuela.[1765] This Convention came into force in March 1997, and to date, all OAS member states, with the exception of Cuba, have ratified it.[1766]

The Inter-American Convention requires its state parties to criminalize both active and passive acts of bribery, regardless of whether it occurs domestically or transnationally.[1767] It also mandates

[1761] For further information on the history and structure of the OAS, see OAS, "Who we are" (last visited 17 July 2024), online: *OAS* <www.oas.org/en/about/who_we_are.asp>.
[1762] OAS, Permanent Council, *Behavior of Transnational Enterprises Operating in the Region and Need for a Code of Conduct to be Observed by Such Enterprises*, OR OEA/Ser.3, CP/RES. 154 (167/75) (1975).
[1763] *Ibid* at para 3 (I).
[1764] OAS, General Assembly, 22nd Sess, *Corrupt International Trade Practices*, OR OEA AG/RES.1159 (1992).
[1765] *Inter-American Convention*, *supra* note 75.
[1766] OAS, "Inter-American Convention against Corruption: Signatories and Ratifications" (last visited 11 April 2024), online: *OAS* <www.oas.org/en/sla/dil/inter_american_treaties_B-58_against_Corruption_signatories.asp>.
[1767] *Inter-American Convention*, *supra* note 75, arts VI–VII.

state parties to establish illicit enrichment as an offense in their domestic laws and addresses optional offenses such as abuse of functions and embezzlement.[1768] Furthermore, the Convention includes non-mandatory provisions aimed at increasing transparency and openness concerning the financial records of specific public positions, government hiring, and procurement.[1769] Moreover, it restricts member states from using bank secrecy laws as a justification for non-cooperation.[1770]

Although the Inter-American Convention lacks a mechanism for reviewing its implementation, in 2001, state parties established the Mechanism for Monitoring the Implementation of the Convention.[1771] This mechanism, among other tasks, has published model laws and legislative guidelines for state-parties to use when drafting their own anti-corruption laws.[1772] Moreover, its standards for increased civil society participation have improved transparency and acknowledged the role of civil society in anti-corruption policies.[1773]

In the petroleum sector, between 2009 and 2011, the OAS passed three resolutions inviting OAS member states with abundant natural resources to participate in the EITI.[1774] As of April 2024, twelve OAS member states have become part of this initiative.[1775]

[1768] *Ibid*, arts IX, XI.
[1769] *Ibid*, art III.
[1770] *Ibid*, art XVI.
[1771] For further information regarding the mechanism, see OAS, "FACT SHEET: The Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC)", (last visited 7 September 2019), online: *OAS* <www.oas.org/en/media_center/press_release.asp?sCodigo=S-026/17>.
[1772] The OAS model laws cover "Declaration of Income, Assets and Liabilities" and "Protection of Whistleblowers." The legislative guidelines include "Conflict of Interest," "Public Resources," "Obligation to Report Corrupt Acts," "Disclosure of Assets," "Oversight Bodies," "Access to Information," "Consultation Mechanisms," "Participation in Public Affairs," "Monitoring of Public Affairs," "Assistance and Cooperation," "Government Hiring," and "Whistleblower Protection." For the text of model laws and legislative guidelines, see OAS, "Model Laws and Legislative Guidelines" (last visited 7 July 2024), online: *OAS* <www.oas.org/en/sla/dlc/mesicic/leyes.html>.
[1773] See Guerzovich*, supra* note 384.
[1774] OAS, General Assembly, 39th Sess, *Promotion of Corporate Social Responsibility in the Hemisphere*, OR OEA AG/RES. 2483 (2009), para 4; OAS, General Assembly, 40 Sess, *Promotion of Corporate Social Responsibility in the Hemisphere*, OR OEA AG/RES. 2554 (2010) para 7; OAS, General Assembly, 41st Sess, *Promotion of Corporate Social Responsibility in the Hemisphere*, OR OEA AG/RES. 2687 (2011) para 9.
[1775] Argentina, Colombia, Dominican Republic, Ecuador, Guatemala, Guyana, Honduras, Mexico, Peru, Suriname, and Trinidad and Tobago are the EITI members. See EITI, "Countries", *supra* note 493.

b. Organization for Economic and Co-Operation Development

The OECD acknowledged the need to fight corruption in its 1976 Declaration on International Investment and Multinational Enterprises,[1776] prompted by a US request to include an anti-bribery provision within the Guideline for Multinational Enterprises.[1777] However, it was not until 1989 that the OECD initiated action by establishing an ad hoc working group to review and compare domestic legislation in member states, with a specific focus on illicit payments.[1778]

In 1994, the OECD Council adopted the Recommendation of the Council on Bribery in International Business Transactions,[1779] advising member states to "to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions."[1780] This Recommendation led to the establishment of the Working Group on Bribery in International Business Transactions (WGB) to review member states' implementation and examine bribery issues.[1781] In 1996, the OECD Council further adopted the Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials, urging member states to disallow tax deduction for bribers to foreign public officials.[1782] In May 1997, the OECD revised the Recommendation on Combating Bribery in International Business Transactions,[1783] later transforming it into binding law the same year. In December 1997, the OECD Convention was concluded, entering into force

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[1776] OECD, Investment Committee, *Declaration on International Investment and Multinational Enterprises*, OECD/LEGAL/0144, (Paris: OECD, 1976).
[1777] *Ibid*, Annex 1, para 8. For further information on the OECD declaration, see Cutler & Drory, *supra* note 420 at 36.
[1778] See WGB, *Report 2014*, *supra* note 577 at 12.
[1779] OECD, *Recommendation of the Council on Bribery in International Business Transactions* OECD/LEGAL/0290 ((Paris: OECD, 1994).
[1780] *Ibid*, para II.
[1781] *Ibid*, para VIII.
[1782] OECD, *OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials* OECD/LEGAL/0371 **(**(Paris: OECD, 1996).
[1783] OECD, *Council Revised Recommendation c(97)123/Final on Combating Bribery in International Business Transactions Recommendation of the Council on Bribery in International Business Transactions*, OECD/LEGAL/0290 (Paris: OECD, 1997).

in February 1999.[1784] Currently, all 38 OECD member states, along with eight non-OECD states, have ratified the Convention.[1785] Accompanying the Convention is a Commentary providing additional guidance and suggestions for state-parties regarding its implementation.[1786]

The OECD Convention comprises 17 articles focusing on criminalizing transnational bribery and related offenses, as well as increasing cooperation among state-parties in legal assistance and crime investigation. It mandates state-parties to enact national legislation criminalizing active transnational bribery in the public sector, with Article 7 especially addressing legislation on money laundering.[1787] Sanctions for bribery of foreign officials must be "effective, proportionate and dissuasive, … comparable to [those] applicable to the bribery of the Party's own public officials."[1788] Non-criminal sanctions, including monetary sanctions, are also required for "legal persons."[1789] The commentary outlines civil or administrative penalties for legal persons, such as "exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities, placing under judicial supervision, and a judicial winding-up order."[1790] Lastly, the Convention tasks the WGB with establishing a peer review mechanism to monitor its implementation in state-parties.[1791]

In 2009, the OECD introduces two important recommendations: the Recommendation of the Council on Tax Measures for Further Combating and Bribery of Foreign Public Officials in

[1784] *OECD Convention*, *supra* note 75.
[1785] See OECD, "Convention", *supra* note 390.
[1786] OECD, *Commentaries*, *supra* note 393 para 24..
[1787] *OECD Convention*, *supra* note 75, arts 1, 7.
[1788] *Ibid*, art 3(1).
[1789] *Ibid*, art 3(2). The reason is due to the fact that some states, such as Japan, do not extend criminal responsibility to corporations.
[1790] OECD, *Commentaries*, *supra* note 393 para 24.
[1791] *OECD Convention*, *supra* note 75, art 12.

International Business Transactions[1792] and the Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.[1793] The former advises member states to eliminate tax deductions for transnational bribe, a measure not explicitly mandated by the OECD Convention.[1794] The latter includes the "Good Practice Guidance on Implementing Specific Articles of the OECD Convention"[1795] and the "Good Practice Guidance on Internal Controls, Ethics and Compliance"[1796] for companies' compliance programs.

In 2016, the OECD Council issued the Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption.[1797] This recommendation urges international development agencies of member states to address corrupt practices effectively within funded projects. It expands its focus beyond procurement, replacing the 1996 Development Assistance Committee Recommendation on Anti-Corruption Proposals for Bilateral Aid Procurement.[1798] This earlier recommendation encouraged member states to include anti-corruption clauses in their bilateral aid-funded procurement and ensure their appropriate enforcement.[1799]

In 2019, the OECD Council approved the Working Party's proposal on Export Credits and Credit Guarantees and released the Recommendation of the Council on Bribery and Officially Supported

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[1792] OECD, *Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, C(2009)64 (Paris: OECD, 2009) [OECD, *Recommendation on Tax Measures*].
[1793] OECD, *Further Recommendation*, *supra* note 394.
[1794] OECD, *Recommendation on Tax Measures*, *supra* note 1809. For further details on OECD member states' compliance with the criminalization of bribes' tax deductibility, see Rose, *supra* note 392 at 71–72.
[1795] OECD, *Further Recommendation*, *supra* note 394, Annex I.
[1796] *Ibid*, Annex II.
[1797] OECD, *Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption*, OECD/LEGAL/0431 (Paris: OECD, 2016).
[1798] OECD, Development Assistance Committee, *Recommendation on Anti-Corruption Proposals for Bilateral Aid Procurement*, Development Cooperation Directorate, DCD/DAC(96)11/FINAL (Paris: OECD, 1996).
[1799] *Ibid*.

Export Credits.[1800] This recommendation replaces the 2006 Recommendation of the Council on Bribery and Officially Supported Export Credits[1801] and urges member states to implement proper measures for detecting and preventing bribery in their export transactions.

Moreover, the OECD Guidelines for Multinational Enterprises, established in 1976 and last updated in 2023, offer recommendations for TNCs operating within member states.[1802] These guidelines provide non-binding standards for responsible business conduct. Section VII of the Guidelines, titled "Combating Bribery and Other Forms of Corruption," prohibit enterprises from engaging in bribery and similar practices.[1803] Furthermore, the OECD Principles on Corporate Governance, which addresses bribery, urge companies to develop "internal programmes and procedures to promote compliance with applicable laws, regulations and standards," including those criminalizing bribery of foreign officials, and to implement measures aimed at controlling other forms of bribery and corruption.[1804]

In addition to the legally binding OECD Convention and other soft law instruments, the WGB serves as a non-binding enforcement authority. Through four phases, the WGB monitors the implementation of the OECD Convention in member states via an independent and peer review evaluation process involving other state parties to the Convention.[1805] Using a consensus minus one approach, the final report cannot be vetoed by the state party. The WGB releases monitoring

[1800] OECD, *Recommendation of the Council on Bribery and Officially Supported Export Credits*, OECD/Legal/0447 (Paris: OECD, 2019).
[1801] OECD, *Recommendation of the Council on Bribery and Officially Supported Export Credits*, OECD/Legal/0248 (Paris: OECD, 2006).
[1802] OECD, *OECD Guidelines for Multinational Enterprises* (Paris: OECD, 2023).
[1803] *Ibid*, section VII.
[1804] OECD, *OECD Principles on Corporate Governance* (Paris: OECD, 2015) at 50.
[1805] Country monitoring takes place in several phases: For further information on the WGB's work and phases, see OECD, "Country monitoring of the OECD Anti-Bribery Convention" (last visited 17 July 2024), online: *OECD* <www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm>.

reports detailing investigations, proceedings, and sanctions related to transnational bribery, along with recommendations from peer-review examiners. These reports expose cases of bribery involving foreign officials in each country and, where applicable, reveal deficiencies in legal frameworks and enforcement systems. Moreover, the WGB has established regional networks in Africa, the Asia-Pacific, Eastern Europe and Central Asia, and Latin America to improve their ability to tackle corruption.[1806] For example, the Anti-Corruption Network for Eastern Europe and Central Asia, founded in 1998, aims to assist member states in implementing anti-corruption reforms and sharing best practices.[1807] In 2003, the Network initiated the Istanbul Anti-corruption Action Plan, a sub-regional program that supports anti-corruption reforms through peer reviews and policy recommendations.[1808]

To address corruption in the extractive sector, the OECD has issued several reports and guidelines aimed at states, enterprises, and other stakeholders. For example, the report on Corruption in the Extractive Value Chain assesses potential risks, mitigation strategies, and incentives for corrupt behavior in the sector to aid states and stakeholders in strengthening their preventive measures.[1809] Moreover, the OECD has released the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, which urges enterprises to establish policies on stakeholder engagement, with a zero-tolerance approach to illegal activities such as bribery. [1810] Furthermore, the Guiding Principles for Durable Extractive Contracts, developed in collaboration with the

[1806] For further information on the WGB's regional networks, see WGB, *Report 2014*, *supra* note 577 at 32–40.
[1807] See OECD, "Anti-Corruption Network: About the Network" (last visited 17 July 2024), online: *OECD* <www.oecd.org/corruption/acn/aboutthenetwork/>.
[1808] OECD, "Anti-Corruption Network: Istanbul Action Plan" (last visited 17 July 2024), online: *OECD* <www.oecd.org/en/about/projects/acn-istanbul-anti-corruption-action-plan.html>.
[1809] OECD, *Corruption in the Extractive*, *supra* note 55.
[1810] OECD, *Due Diligence*, *supra* note 409 at 29.

Policy Dialogue on Natural Resource-based Development,[1811] highlights the importance of addressing corruption risks during contract negotiations in the extractive industries.[1812]

c. United Nations

Since 1974, the UN has been engaged in anti-corruption efforts and established several commissions and workgroups dedicated to addressing corruption. The UN Economic and Social Council (ESC) founded the Commission on Transnational Corporations and UN Center on Transnational Corporations in 1974, aiming to address corporate responsibility and formulate a code of conduct for TNCs.[1813] Despite the Commission's drafting of the code, negotiations failed due to opposition from states and businesses.[1814] The Center was dissolved in 1992, and the Commission's responsibilities were transferred to the United Nations Conference on Trade and Development and its Division of Technology, Investment and Enterprise Development. In 1975, the UN took further steps to address corruption internationally by adopting Resolution 3514, Measures against Corrupt Practices of Transnational and Other Corporations, Their Intermediaries and Others Involved.[1815] In 1991, ECOSOC established the Commission on Crime Prevention and Criminal Justice, acting as the UN's primary policymaking body in fighting national and transnational crimes, including corruption and money laundering.[1816]

[1811] For learning more about this development center, see OECD, "Policy Dialogue on Natural Resource-based Development" (last visited 17 July 2024), online: *OECD* <www.oecd.org/en/about/programmes/oecd-policy-dialogue-on-natural-resource-based-development.html>.
[1812] OECD, *Guiding Principles for Durable Extractive Contracts* (Paris: OECD, 2019) at 2.
[1813] *Programme of Action on the Establishment of a New International Economic Order*, GA Res 3202, UNGAOR, 6th Special Sess, UNDoc A/RES/S-6/3202 (1974).
[1814] For further information, see Tagi Sagafi-nejad & John H Dunning, *The UN and Transnational Corporations: From Code of Conduct to Global Compact* (Bloomington, Indiana: Indiana University Press, 2008) ch 6. For the drafted code, see *United Nations Commission on Transnational Corporations: Draft U.N. Code of Conduct on Transnational Corporations*, UNESCOR, 1st session, UNDoc E/RES/1989/24 (1983).
[1815] *Measures against Corrupt Practices of Transnational and Other Corporations, Their Intermediaries and Others Involved*, GA Res 3514, UNGAOR, 30th Sess, UNDoc A/RES/3514 (1975).
[1816] *Creation of an Effective United Nations Crime Prevention and Criminal Justice Programme*, UNSCOR, 46th Sess, UN Doc A/RES/46/152 (1991).

In 1996, the UN General Assembly endorsed the United Nations Declaration against Corruption and Bribery in International Commercial Transactions, following a recommendation from ESC.[1817] While these resolutions lacked legal binding, their adoption underscored the importance of criminalizing corrupt practices and ending their tax deductibility. Moreover, in 2000, the UN adopted the Transnational Organized Crimes Convention, urging states to criminalize domestic bribery and consider extending criminalization to transnational bribery and money laundering.[1818]

However, it was not until 2003 that the UN adopted the first globally instrument against corruption, the UNCAC, which entered into force on 14 December 2005,[1819] following the General Assembly's expression of the "desirability of an international instrument against corruption."[1820] Presently, the Convention boasts 190 parties and has garnered significant interest from countries such as China, Russia, or Brazil, which have not ratified other anti-corruption treaties.[1821] Consequently, the UNCAC stands out as the most extensively ratified anti-corruption pact, establishing corruption as a universally acknowledged crime.

The UNCAC, comprising 71 articles, surpasses both the Inter-American Convention, with 28 articles, and the OECD Convection, with 17 articles, in terms of comprehensiveness. Its breadth extends beyond mere article count; it mandates state-parties to criminalize additional corrupt behaviors within their domestic laws. These offenses include not only national and transnational bribery of public officials but also embezzlement and money-laundering.[1822] Moreover, the

[1817] *United Nations Declaration against Corruption and Bribery in International Commercial Transactions*, GA Res 51/191, UNGAOR, 51st Sess, UN Doc A/RES/51/191 (1996).
[1818] *Transnational Organized Crimes Convention*, *supra* note 75, arts 7–9.
[1819] *UNCAC*, *supra* note 75.
[1820] *Resolution Adopted by the General Assembly [on the report of the Third Committee (A/54/596)] 54/128. Action against corruption*, GA Res 54/128, UNGAOR, 54th Sess, UNDoc A/RES/54/128 (2000), para 6.
[1821] UNODC, "United Nations Convention against Corruption" (last visited 11 April 2024), online: *UNCAC* <www.unodc.org/unodc/en/corruption/uncac.html>.
[1822] *UNCAC*, *supra* note 75, arts 15–17, 23.

UNCAC includes optional provisions for the criminalization of passive transnational bribery of public officials, trading in influence, abuse of functions, illicit enrichment, bribery in the private sector, and embezzlement in the private sector.[1823]

The UNCAC's Article 63 established the Conference of the States Parties to the Convention as a mechanism for implementing its objectives among member states.[1824] During its third session in 2009, the Conference developed a distinct Implementation Review Mechanism, resembling the OECD's peer-review mechanism.[1825] The first cycle of this Review Mechanism, launched in 2010, focused on reviewing criminalization, law enforcement, and international cooperation. The second cycle, began in 2015 and extended until June 2024 at the time of this study, aims to assess preventive measures and asset recovery within member states.[1826] In each cycle, peer reviewers prepare a confidential report for each state, with the state under review retaining the right to decide whether to release it publicly.[1827]

In addition to the UNCAC and other UN anti-corruption initiatives, in 2000, the UN integrated anti-corruption principles into the UNGC, a major corporate sustainability initiative.[1828] The UNGC urges all businesses to uphold its ten principles, which include promoting societal goals. Among these principles, the tenth specifically addresses anti-corruption efforts, calling for action "against corruption in all its forms, including extortion and bribery."[1829] Moreover, the UNGC

[1823] *Ibid*, arts 16 (2), 18–22.
[1824] *UNCAC*, *supra* note 75, art 63.
[1825] *Review mechanism*, the Conference of the States Parties to the United Nations Convention against Corruption, 3rd Sess, Res 3/1 (2009).
[1826] For further information on the work and reports of Implementation Review Mechanism, see UNODC, "Implementation Review Mechanism" (last visited 17 July 2024), online: *UNODC* <www.unodc.org/unodc/en/corruption/implementation-review-mechanism.html>.
[1827] For the countries' reports, see UNODC, "Country Profiles" (last visited 17 July 2024), online: *UNODC* <www.unodc.org/unodc/en/corruption/country-profile/index.html>.
[1828] UNGC, *supra* note 533.
[1829] UNGC, "Principle Ten: Anti-Corruption" (last visited 17 July 2024), online: *UNGC* <www.unglobalcompact.org/what-is-gc/mission/principles/principle-10>.

acknowledges the legal risks corruption poses and highlighted that while corrupt practices may not be illegal in all jurisdictions, they can be prosecuted in the company's home-country. Recognizing the detrimental effects of corruption on businesses, including reputational damage and loss of trust, the UNGC urges companies to develop internal and external anti-corruption strategies. It encourages collective actions and invites companies to sign the "Anti-Corruption Call to Action."[1830]

In 2012, the UN Interagency Framework Team for Preventive Action released a guideline on Extractive Industries and Conflict.[1831] The guideline targets corruption and fund diversion in the extractive sector and advises resource-rich states to promote transparency by participating in anti-corruption initiatives, such as the GC and EITI.[1832]

d. European Union

The EU has implemented different measures to combat corruption. For the first time, in 1993, the EU adopted the Protection Convention to address fraud affecting its financial interests while establishing a common approach among the European communities.[1833] The EU further adopted the Convention on Fighting Corruption Involving Officials of the EU or Officials of Member States[1834] in 1997 and the Council Framework Decision on Combating Corruption in the Private Sector[1835] in 2003 in order to criminalize bribery in both public and private sectors among member

[1830] UNGC, "Anti-Corruption Call to Action" (last visited 17 July 2024), online: *UNGC* <www.unglobalcompact.org/take-action/action/anti-corruption-call-to-action>.
[1831] UN Interagency Framework Team for Preventive Action, *Extractive Industries and Conflict* (New York: UN, 2012).
[1832] *Ibid* at 39.
[1833] *Protection Convention*, *supra* note 75. The EU further adopted two protocols to the Convention in 1996 and 1997; see *First Protocol to the Protection Convention*, *supra* note 75; *Second Protocol to the Protection*, *supra* note 75.
[1834] *Convention on Fighting Corruption Involving Officials of the EU or Officials of Member States*, European Union, 26 May 1997 (entered into force 28 September 2005).
[1835] *Council Framework Decision on Combating Corruption in the Private Sector*, European Union, 2003/568/JHA, 22 July 2003 (entered into force 31 July 2003).

states. Amendments to the Treaty on European Union[1836] and the Treaty on the Functioning of the European Union[1837] in 2007 aimed to enhance efforts to combat corruption affecting the EU's financial interests.[1838] The Lisbon Treaty, among other provisions, recognizes corruption as a "serious crime with a cross-border dimension,"[1839] and grants the EU legislative authority to enact anti-corruption laws and policies.[1840]

Furthermore, in a 2014 Directive, certain large public-interest companies are mandated to publish non-financial statements, disclosing information about the "development, performance, position and impact" of their activities, including "anti-corruption and bribery matters."[1841] Moreover, in 2019, the EU adopted a Directive on the Fight Against Fraud to the Union's Financial Interests by means of Criminal Law, aiming to harmonize definitions and prosecutions of illegal activities affecting the EU's financial interests through criminal law.[1842]

Moreover, in 2014, the EU Anti-Corruption Report offered an overview of anti-corruption regulations and policies in member countries to share best anti-corruption practices among EU states.[1843] In 2015, the Anti-Corruption Experience-Sharing Programme was initiated to address challenges identifies in the report and to encourage states, NGOs, and stakeholders to improve

[1836] *Treaty on European Union*, European Union, 7 February 1992 (entered into force 1 November 1993).
[1837] *Treaty on the Functioning of the European Union*, European Union, 25 March 1957 (entered into force 1 January 1958).
[1838] *Treaty on the Functioning of the European Union*, European Union, 13 December 2007 (entered into force 1 December 2009) [*Lisbon Treaty*].
[1839] *Ibid*, art 83.
[1840] *Ibid* (Article 83 states that "[t]he European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis").
[1841] *Amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups*, European Union, 2014/95, 22 October 2014, art 19a.
[1842] *Directive on the fight against fraud to the Union's financial interests by means of criminal law*, European Union, 2017/1371, 5 July 2017 (entered into force 6 July 2019).
[1843] European Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, European Union, 3 February 2014.

anti-corruption laws and policies.[1844] Furthermore, the EU has integrated anti-corruption provisions into legislations concerning public procurement[1845] and money-laundering.[1846] Besides, the EU Commission monitors member states' implementation of anti-corruption regulations through annual European Semester country reports[1847] and provides recommendations via Country-Specific Recommendations.[1848] In addition, the European Anti-Fraud Office investigates corrupt acts involving EU funds or revenue and serious misconduct by EU officials and staff.[1849]

In addressing corruption in the extractive industry, the EU Commission adopted a Council Directive in 2013, requiring companies listed on EU exchanges and involved in the extractive industry to join the EITI and disclose payments exceeding €100,000 made to governments.[1850]

e. Council of Europe

In 1981, the Council of Europe (COE) recommended measures against economic crimes, including fraud and bribery, for the first time.[1851] In 1994, the COE's Committee of Ministers recognized

[1844] European Commission, "EU Network against Corruption" (last visited 18 July 2024), online: *European Commission* < https://home-affairs.ec.europa.eu/networks/eu-network-against-corruption_en#paragraph_3782>.

[1845] See Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, "Limiting the temptation for corruption in public procurement" (14 December 2015), online: *European Commission* <single-market-economy.ec.europa.eu/news/limiting-temptation-corruption-public-procurement-2015-12-14_en>.

[1846] See e.g. *Preventing the Use of the Financial System for Money Laundering or Terrorist Financing*, European Union Council Directive 2015/849 (2015).

[1847] For 2024 Country Reports, see Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, "2024 European Semester: Country Reports" (19 June 2024), online: *European Commission* <economy-finance.ec.europa.eu/publications/2024-european-semester-country-reports_en>.

[1848] For the most recent Country Specific Recommendations, see Secretariat General, "2024 European Semester: Country Specific Recommendations/Commission Recommendations" (19 June 2024), online: *European Commission* <commission.europa.eu/publications/2024-european-semester-country-specific-recommendations-commission-recommendations_en>.

[1849] *Treaty establishing the European Community (Amsterdam consolidated version)*, 2 October 1997 (entered into force 1 May 1999), art 280. *Lisbon Treaty* also provides the EU with a legal basis for fighting any corrupt or illegal activities, see *Lisbon Treaty*, *supra* note 1859, art 325 (1).

[1850] *Directive 2013/34/EU of the European Parliament and of the Council*, European Union Council Directive 2013/34/EU (2013).

[1851] Council of Europe, Committee of Ministers, *Recommendation R(81)12 of the Committee of Ministers to Member States On Economic Crime* (1981).

corruption as an issue to be addressed at the European level, leading to the establishment of the Multidisciplinary Group on Corruption in 1995, which was tasked with drafting legal instruments to combat corruption.[1852] In 1996, the COE's Committee of Ministers adopted the Council of Europe Programme of Action Against Corruption, urging member states to criminalize corrupt practices domestically and internationally.[1853] The Action also addressed corruption through civil and administrative laws.[1854] Subsequently, in 1999, the COE formed the Group of States against Corruption to monitor member states' compliance with anti-corruption rules via a peer assessment process.[1855]

Moreover, the COE's Economic Crime and Cooperation Division assists countries in implementing policies and reforms related to corruption, conflicts of interest, and money laundering.[1856] In 1997, the COE introduced a Resolution outlining Twenty Guiding Principles against Corruption aimed at preventing and combating corruption effectively.[1857] Furthermore, in 2000, the COE adopted a Recommendation on Codes of Conduct for Public Officials,[1858] followed by the Recommendation on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns in 2003.[1859]

[1852] For further historical background to the Multidisciplinary Group on Corruption, see Council of Europe, "About GRECO: Histocrical Background" (last visited 18 July 2024), online: *Council of Europe* <www.coe.int/en/web/greco/about-us/background>.
[1853] Council of Europe, Committee of Ministers, *Council of Europe Programme of Action Against Corruption* (1996) at 28–33.
[1854] *Ibid* at 36–40, 43.
[1855] Council of Europe, *supra* note 1873; for further information on the monitoring and evaluation process, see Council of Europe, "How does GRECO work?" (last visited 18 July 2024), online: *Council of Europe* <www.coe.int/en/web/greco/about-greco/how-does-greco-work>.
[1856] For further information, see Council of Europe, "Welcome to the Economic Crime and Cooperation Division" (last visited 18 July 2024), online: *Council of Europe* <www.coe.int/en/web/corruption>.
[1857] Council of Europe, Committee of Ministers, 101th Sess, *Resolution 97(24) of the Committee of Ministers on the Twenty Guiding Principles against Corruption* (1997).
[1858] Council of Europe, Committee of Ministers, 106th Sess, *Recommendation R(2000)10 of the Committee of Ministers to Member States on Codes of Conduct for Public Officials* (2000).
[1859] Council of Europe, Committee of Ministers, 835th Sess, *Recommendation R(2003)4 of the Committee of Ministers to Member States on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns* (2003).

In 1999, the COE adopted two conventions targeting transnational corruption, the Criminal Law Convention[1860] and the Civil Law Convention.[1861] The Criminal Law Convention, entered into force on 1 July 2002, mandates states to criminalize different forms of bribery, including domestic an transnational bribery in both public and private sectors,[1862] trading in influence, and money-laundering.[1863] It also outlines legal liability for legal persons involved in corrupt practices.[1864] Moreover, an Additional Protocol was adopted in 2003, extending the Convention's scope to include arbitrators and jurors.[1865] On the other hand, the Civil Law Convention, entered into force on 11 January 2003, requires member states to establish "effective remedies" for individuals harmed by corruption and enable them to "defend their rights and interests," and seek "compensation" under domestic legislation.[1866]

Concerning corruption in the extractive sector, in 2017, the COE's Conference of International Non-Governmental Organizations issued a recommendation, addressing human rights violations by European TNCs investing "in Africa, Asia and Latin America," for their regional development, industrial expansion, and natural resources exploitation.[1867] The recommendation urges member states to demand "a high level of financial, economic and accounting transparency from these companies as regards their activities and operations"[1868] in other countries, highlighting the need to improve business transparency and accountability.

[1860] *Criminal Law Convention*, *supra* note 75.
[1861] *Civil Law Convention*, *supra* note 75.
[1862] *Criminal Law Convention*, *supra* note 75, arts 2–9, 10.
[1863] *Ibid*, arts 12–13.
[1864] *Ibid*, art 18.
[1865] *Additional Protocol to the Criminal Law Convention on Corruption*, *supra* note 75.
[1866] *Civil Law Convention*, *supra* note 75, art 1.
[1867] Council of Europe, The Conference of International Non-Governmental Organisations, *Recommendation on Business and Human Rights*, CONF/PLE(2017)REC2 (2017).
[1868] *Ibid*, para 6.

f. African Union

In response to the growing global awareness of corruption, Africa also embarked on the development of an anti-corruption. In 1998, the Heads of State and Government of the Organization of African Unity declared their commitment to combatting corruption.[1869] This led to the adoption of the African Convention in 2003.[1870] The Convention entered into force in 2006, with 49 countries signing it and 48 countries ratifying it by 2023.[1871] The Convention, comprising 28 articles, include mandatory measures for member states. These measures include criminalizing corrupt practices, establishing independent anti-corruption agencies, implementing control mechanisms, enacting whistleblower protections, and promoting education and media to raise public awareness.[1872] Article 4 defines corrupt acts to include passive and active bribery, embezzlement, and illicit enrichment.[1873] Article 22 establishes a follow-up mechanism by forming an Advisory Board on Corruption within the African Union.[1874] Created in 2009, this board is charged with promoting of anti-corruption measures in Africa and monitoring states' compliance with the Convention.[1875]

[1869] Assembly of Heads of State and Government, *Annual Activities of the African Commission on Human and Peoples' Rights*, 34th Sess, AHG/Dec. 126 (XXXIV) (1998), para 6.
[1870] *African Union Convention*, *supra* note 75.
[1871] See African Union, "List of Countries which Have Signed, Ratified/Acceded to the African Union Convention on Preventing and Combating Corruption" (14 February 2023), online (pdf): *African Union* <au.int/sites/default/files/treaties/36382-sl-AFRICAN_UNION_CONVENTION_ON_PREVENTING_AND_COMBATING_CORRUPTION.pdf>.
[1872] *African Union Convention*, *supra* note 75, art 8.
[1873] *Ibid*, art 4.
[1874] *Ibid*, art 22.
[1875] For further information on the Board's activities and mandates, see African Union Advisory Board on Corruption, "Mission and Vision of the Board" (last visited 18 July 2024), online: *African Union Advisory Board on Corruption* <auanticorruption.org/auac/about/category/aboutus>.

g. The League of Arab States

In 2010, the League of Arab States, consisting of 23 countries, adopted the Arab Anti-Corruption Convention.[1876] Currently, 21 Arab countries have signed, and 12 countries have ratified the convention.[1877] Importantly, some signatories, like Saudi Arabia and Syria, were not signatories to UNCAC at the time. While rooted in Islamic Sharia principles, the Convention also acknowledges the role of international and regional anti-corruption conventions, including UNCAC. Article 4 mandates state-parties to criminalize thirteen acts, including different types of bribery, influence-peddling (or trading in influence), illicit enrichment, and money-laundering.[1878] Furthermore, Article 33 establishes the Conference of the Parties to monitor implementation.[1879]

Moreover, the Convention sets standards to advance good governance institutions that uphold democratic ideals, particularly in the aftermath of the Arab Spring. It acknowledges the role of citizens and civil society organizations in combatting corruption, alongside governments.[1880] Moreover, it urges state-parties to implement measures improving transparency, accountability, and the rule of law.[1881] In addition, the Convention holds significance due to its endorsement by predominantly oil-rich states. Nonetheless, studies suggest that the Convention still suffers from the insufficient political will of member states to fulfill its directives.[1882]

[1876] *Arab Anti-Corruption Convention*, *supra* note 75.
[1877] Jorum Duri, "Arab Anti-Corruption Convention" (9 June 2021), *Transparency International* <knowledgehub.transparency.org/guide/international-anti-corruption-commitments/8014>.
[1878] *Arab Anti-Corruption Convention*, *supra* note 75, art 4.
[1879] *Ibid*, art 33.
[1880] *Ibid*, preamble, arts 2, 11.
[1881] *Ibid*, preamble, arts 2, 10.
[1882] See e.g. Fabian Teichmann, Marie-Christin Falker & Bruno S Sergi, "Corruption and the circumvention of financial sanctions via the extractive industries in Dubai" (2020) 7:3 Extractive Industries & Society 1022 at 1025. See also The Jordan Transparency Center, "Jordan: Steps in the fight against corruption still too small" (12 December 2014), online (blog): *World Bank* <blogs.worldbank.org/arabvoices/jordan-steps-fight-against-corruption-still-too-small>.

h. Financial Action Task Force

In 1989, the G-7[1883] established the FATF during its 15th Summit, to address threats to banking and financial institutions.[1884] The FATF is an intergovernmental organization tasked with studying money laundering techniques and methods, evaluating anti-money-laundering measures, and recommending strategies to combat money laundering.[1885] It develops standards to monitor and prevent money-laundering, terrorist financing, and other risks to the international financial system.

Since 1990, the FATF has been issuing recommendations known as the International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation. The 2012 update expanded its scope to include combatting the financing of weapons of mass destruction and promoting transparency in the international financial system.[1886] The recent 2023 update also involves law enforcement, financial intelligence units, prosecutors, other asset recovery practitioners, and competent authorities.[1887] These recommendations require member states to criminalize money-laundering and apply it to all "serious offenses," including corrupt practices.[1888] Currently, more than 200 states and jurisdictions have committed to implementing FATF recommendations,[1889] although each country determines the crimes constituting money-

[1883] The Group of Seven is an intergovernmental organization, comprising of Canada, France, Germany, Italy, Japan, the US, and the UK. For further information of G-7, see James Chen, "Group of Seven (G-7)" (last modified 20 October 2021), online: *Investopedia* <www.investopedia.com/terms/g/g7.asp>.
[1884] *Economic Declaration*, *G7 Summit*, 16 July 1989, para 53.
[1885] For further details on the history of FATF, see FATF, "The FATF" **(**last visited 18 July 2024), online: *FATF* <www.fatf-gafi.org/en/the-fatf.html>.
[1886] FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (Paris: FATF, 2012).
[1887] FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, 3rd ed (Paris: FATF, 2023) [FATF, *Standards*].
[1888] *Ibid* (the recommendations ask Countries to "apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences" at 9).
[1889] See FATF, "Who we are" (last visited 12 April 2024), online: *FATF* <www.fatf-gafi.org/en/the-fatf/who-we-are.html>.

laundering, including corrupt practices.[1890] The FATF's International Cooperation Review Group identifies and monitors jurisdictions with deficiencies in anti-money laundering and terrorist financing. If high-risk jurisdictions fail to take effective measures, the FATF issues a Public Statement, urging members to increase due diligence and counter-measures to protect the international financial system from these jurisdictions.[1891]

In particular, FATF Recommendation 12 addresses PEP, individuals who hold or have held "a prominent public function."[1892] In the context of the extractive sector, FATF Guidance for the Recommendation 12 advises financial institutions to consider whether PEPs are involved in sectors prone to corruption, such as natural resources, oil, and gas. [1893]

i. World Trade Organization

Until 2012, anti-corruption rules within the WTO legal framework mainly focued on transparency and predictability in trade policies. The oldest rule, Article X of the 1947 General Agreement on Tariffs and Trade (GATT),[1894] requires states to publish trade-related information transparently, a principle carried over into the 1994 General Agreement on Tariffs and Trade.[1895] Other agreements and mechanisms within the WTO, such as Article III of the General Agreement on Trade in

[1890] FATF, *Standards*, *supra* note 1908 (the recommendations state, "[w]hen deciding on the range of offences to be covered as predicate offences under each of the categories listed above, each country may decide, in accordance with its domestic law, how it will define those offences and the nature of any particular elements of those offences that make them serious offences" at 116).
[1891] For more information on this process, see FATF, "High-risk", *supra* note 382.
[1892] FATF, *Standards*, *supra* note 1908, recommendation 12.
[1893] FATF, *PEPs*, *supra* note 119, para 96.
[1894] GATT, *General Agreement on Tariffs and Trade* (30 October 1947), art X (1).
[1895] GATT, *General Agreement on Tariffs and Trade-Marrakesh Agreement Establishing the World Trade Organization* (15 April 1994), Annex 1A.

Services,[1896] Article 63 of the Agreement on Trade-Related Aspects of Intellectual Property Rights,[1897] and the Trade Policy Review Mechanism,[1898] also include transparency obligations.

In 2012, the WTO made its first explicit mention of combatting corruption during the revision of the Government Procurement Agreement. Its preamble acknowledges the UNCAC and underscores transparent government procurement as essential for corruption prevention.[1899] More importantly, the revised Agreement mandates that "[a] procuring entity shall conduct covered procurement in a transparent and impartial manner that … prevents corrupt practices."[1900]

In addition to the WTO legal texts, transparency requirements are evident in Protocols of Accession to the WTO, such as the Accession Protocol of the People's Republic of China.[1901] Moreover, in a recent case, Colombia – Textiles, the Appellate Body stated that WTO members, fighting against corruption and money-laundering can justify trade restrictions on other countries by withdrawing exceptions outlined in Article XX of the GATT.[1902]

[1896] *Ibid*, Annex 1B, Article III (1).
[1897] *Ibid*, Annex 1C, Article 63 (1).
[1898] Unlike the other agreements, the language here is voluntary. *Ibid* Annex 2, at para B.
[1899] WTO, *Government Procurement: Agreement on Government Procurement* (30 March 2012).
[1900] *Ibid*, art IV (4).
[1901] WTO, *Accession of the People's Republic of China* (23 November 2001) WT/L/432 at part 1, para 2(C).
[1902] WTO, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, Report of the Appellate Body, AB-2016-1 (2016) at 5.40. For further information on the recent anti-corruption measures taken by the WTO, see Luciana Dutra De Oliveira Silveira, "Can the WTO Bring More Teeth to the Global Anticorruption Agenda?" (2019) 53:1 J World Trade 129.

Appendix VI – Domestic Anti-Corruption Laws with Exterritorial Jurisdictions

a. The US Anti-Corruption Law: Battling Corruption Worldwide

The USA has been a key player in fighting corruption globally through its domestic anti-corruption laws. Even before ratifying international treaties such as the UNCAC, OECD Convention, and Inter-American Convention, the USA had established its transnational anti-corruption regulations. These laws criminalize active bribery on an international scale and have been in place for approximately five decades, making the US a pioneer in this aspect of anti-corruption efforts.

Foreign Corrupt Practices Act: The backbone of US anti-corruption efforts

The FCPA was groundbreaking as the first regulation to outlaw corruption occurring beyond American national jurisdiction.[1903] At the time of enactment, while many countries had laws against corruption within their borders, transnational corruption was not addressed within those regulations. The FCPA marked a shift and turned anti-bribery norm into a law, allowing for prosecution of nationals engaging in corruption abroad.

The FCPA comprises two main provisions: accounting and anti-bribery provisions. The accounting provisions mandate companies to maintain accurate records[1904] and adequate internal accounting controls for all transactions, including those conducted domestically and abroad.[1905] This requirement ensures that books, records, and accounts accurately reflect asset transactions

[1903] *FCPA*, *supra* note 57.
[1904] *Ibid*, § 78(m). The only exception is related to situations where an issuer keeps "50 per centum or less of the voting power with respect to a domestic or foreign firm," the FCPA requires that the company "proceed[s] in good faith to use its influence … to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls" § 78(m)(b)(6).
[1905] *Ibid*, § 78(m)(b)(2)(A).

and dispositions. On the other hand, the internal accounting control requirement under FCPA asks companies to establish and maintain controls ensuring authorized transactions, accurate recording, restricted access to assets, and periodic assessment of asset records.[1906] These requirements aim to prevent money-laundering and off-book transactions that could council bribes or improper payments to foreign officials. These provisions apply to all US and foreign companies registered in US securities markets.[1907]

The FCPA anti-bribery provisions prohibit using any means or instruments of "interstate commerce" corruptly to offer, promise, or authorize payments or gifts to foreign officials and political parties to "obtain business."[1908] This prohibition applies to issuers (US and non-US companies with shares registered on the US), domestic concerns (US citizens, residents, and entities with US principal place of business or organized under US laws), and individuals and entities acting within US territory.[1909] Moreover, non-US individuals or subsidiaries involved in improper payments can be also prosecuted if their actions further bribery, even if they lack direct ties to the US.[1910] Finally, US individuals and entities aware of improper payments by their non-US agents, partners, or subsidiaries can face prosecution to prevent "willful blindness" to FCPA violations.[1911] Therefore, the FCPA anti-bribery have broad jurisdictional reach, applying to both US and non-US individuals or companies engaging in corrupt practices, even beyond US

[1906] *Ibid,* § 78(m)(b)(2)(B).
[1907] *Ibid,* § 78(m).
[1908] *Ibid,* §§ 78(dd)(1)(a), 78(dd)(2)(a), 78(dd)(3)(a).
[1909] *Ibid*, §§ 78(dd)(1), 78(dd)(2), 78(dd)(3).
[1910] *Ibid*, § 78(dd)(1)(a). See Daniel Margolis & James Wheaton, "Non-US Companies May Also Be Subject to the FCPA" (2009) 1:1 Financial Fraud L Report 168.
[1911] See US, HR, *Omnibus Trade and Competitiveness Act of 1988*, HR Conf Rep No 100-576, 100th Congress (Washington, DC: US Government Printing Office, 1988) at 919–20. See also DOJ & SEC, *FCPA Resource Guide*, *supra* note 611 (stating "a company is liable when its directors, officers, employees, or agents, acting within the scope of their employment, commit FCPA violations intended, at least in part, to benefit the company" at 28–29).

territories.[1912] US and foreign companies may be held legally and financially accountable for conducting transnational bribery, provided there are territorial links connecting the corrupt activities to the USA. The FCPA's jurisdictional reach help prevent companies from engaging in corrupt practices, even in regions where corruption is prevalent. It allows US authorities to target foreign companies and individuals involved in corrupt practices related to their overseas business operations. Facilitation payments in "routine governmental actions"[1913] represent the sole exception to anti-bribery provisions.[1914] These are small payments made to foreign officials to expedite processing licenses, permits, or other similar documents. However, this exception is at odds with emerging international standards that condemn all types of facilitation payments.

The FCPA provisions extend beyond the formal stage of business activities to cover operations and even the termination of such activities.[1915] A wide range of activities by TNOCs in host countries, including contract negotiations, sub-contracting, procurement, dealing with state officials or third parties, are considered part of "obtaining business."[1916] These activities usually involve direct interactions between US companies and local officials, increasing the risk of FCPA violations.[1917] In JVs, partners can be subject to the FCPA if they conduct business in the US or are aware of or allow improper actions by their partners abroad.[1918] Moreover, in mergers and acquisitions involving oil companies, successors may inherit liabilities for improper acts that occurred before or during the transaction.[1919]

[1912] *FCPA, supra* note 57, §§ 78(dd)(1)(g), 78(dd)(2)(i).
[1913] *Ibid*, § 78(dd)(3)(f)(4).
[1914] *Ibid*, §§ 78(dd)(1)(b), 78(dd)(2)(b), 78(dd)(3)(b).
[1915] Low, Sprange & Barutciski, *supra* note 434 at 177.
[1916] *FCPA, supra* note 57, § 78(dd)(1)(a).
[1917] Low, Sprange & Barutciski, *supra* note 434, at 177.
[1918] *Ibid*.
[1919] *Ibid*.

Critics argue that the FCPA anti-bribery provisions lack clarity, leading to uncertainty regarding what actions constitute a violation.[1920] As a remedy, the FCPA established the FCPA Opinion Procedure, allowing individuals and companies to seek guidelines on potential violations.[1921] However, these guidelines have not fully resolved the ambiguity.[1922] For example, the definition of "obtaining business" remains vague, causing confusion about its scope.[1923] Moreover, most FCPA disputes, particularly those involving corporations, are settled with the DOJ and SEC rather than proceeding to court, which results in a lack of litigation and precedent and uncertainty about the interpretation and application of the FCPA anti-bribery provisions.[1924]

The SEC and DOJ are responsible for enforcing the FCPA and investigating violations. Enforcement efforts have targeted both grand corruption, such as procurement, and petty corruption, including immigration, tax, and customs issues.[1925] In 2016, a peak year for the FCPA matters, 32 cases were initiated, resulting in prosecutions against 24 companies and eight individuals.[1926] The increase in enforcement actions and investigations is partly attributed to the growing number of voluntary disclosures by companies seeking reduced penalties.[1927]

[1920] See e.g. Sonila Themeli, "FCPA Enforcement and the Need for Judicial Intervention" (2014) 56:2 S Tex L Rev 387 at 389.
[1921] *FCPA, supra* note 57, § 78(dd)(1)(e) (1). For FCPA Opinion Procedure releases, see DOJ, "FCPA Opinions" (last visited 19 July 2024), online: *US Department of Justice* <www.justice.gov/criminal-fraud/fcpa-opinions>.
[1922] Low, Sprange & Barutciski, *supra* note 434, at 182.
[1923] The issue has been challenged for several times in US courts. See e.g. *United States v Kay*, 200 F Supp (2d) 681 (SD Tex 2002); *United States v Kay*, 359 F (3d) 738, 756 (5th Cir 2004); *United States v Kay*, 513 F (3d) 423 (5th Cir 2007), cert denied, 129 S Ct 42 (2008).
[1924] For further detail, see Low, Sprange & Barutciski, *supra* note 434 at 182, 188.
[1925] *Ibid* at 166.
[1926] FCPA Clearinghouse, *supra* note 1189.
[1927] See Peter R Reilly, "Incentivizing corporate America to eradicate transnational bribery worldwide: federal transparency and voluntary disclosure under the foreign corrupt practices act" (2015) 67:1 Fla L Rev 1683. But see Stephen J Choi & Kevin E Davis, "Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act" (2014) 11:3 J Empirical Leg Stud 409 (finding "no evidence to support the hypothesis that voluntary disclosure correlates with reduced total monetary penalties" at 422).

Approximately one-fifth of all FCPA matters involve the oil and gas sector, totaling 94 cases out of 482 initiated since the FCPA enactment.[1928] These cases involve companies operating in or providing goods and services to the oil and gas industry. Violations of anti-bribery and accounting provisions in this sector result in significant fines, imprisonment, and civil and administrative penalties for both individuals and companies.[1929] For example, the Petrobras case resulted in a $1.78 billion settlement with the SEC and DOJ in 2018, ranking as the third-largest FCPA monetary sanction.[1930]

Other regulations: Extending the scope of US anti-corruption laws

Apart from the FCPA, the USA has additional codes and regulations targeting transnational bribery and other corrupt practices. The Crimes and Criminal Procedure includes laws addressing the laundering of monetary instruments.[1931] This Code criminalizes individuals or entities involved in financial transactions using proceeds from specified unlawful activities.[1932] The definition of "financial transaction" covers any transaction affecting interstate or foreign commerce.[1933] Specified unlawful activities include acts such as fraud, bribery, misappropriation, and embezzlement of public funds.[1934] The Act extends its jurisdiction to foreign persons if they are involved in a financial transaction that occurs in the USA, or convert property for their own use,

[1928] FCPA Clearinghouse, "Charts & Graphics: Industry" (last visited 12 April 2024), online: *Stanford FCPA Clearinghouse* <fcpa.stanford.edu/statistics-analytics.html?tab=9>; FCPA Clearinghouse, "Heat Maps of Related Enforcement Actions: Industry" (last visited 12 April 2024), online: *Stanford FCPA Clearinghouse* <fcpa.stanford.edu/industry.html>.
[1929] See *FCPA*, *supra* note 57, §§ 78(dd)(2)(g), 78(dd)(3)(e), 78(ff)(a), 78(ff)(c); *Crimes and Criminal Procedure*, 18 USC § 357 [*Criminal Procedure*].
[1930] SEC, *Petróleo Brasileiro*, *supra* note 130. For top ten monetary sanctions, see FCPA Clearinghouse, "Largest U.S. Monetary Sanctions By Entity Group" (last visited 19 July 2024), online: *Stanford FCPA Clearinghouse* <fcpa.stanford.edu/statistics-top-ten.html>.
[1931] *Criminal Procedure*, *supra* note 1957 § 1956.
[1932] *Ibid*, § 1956 (a).
[1933] *Ibid*, § 1956 (c)(4).
[1934] *Ibid*, § 1956(c)(7)(B).

in which the USA has an ownership interest due to a court-ordered forfeiture, as well as financial institutions with a bank account at a US financial institution.[1935]

Furthermore, the Internal Revenue Code prohibits tax deduction for bribes or illegal payments made to government officials or employees in the course of conducting trade or business.[1936] Moreover, the Sarbanes-Oxley legislation of 2002 imposes additional requirements on all US public companies and some rules for private companies.[1937] The Act has prompted US companies to develop their compliance and ethics programs and increase their internal controls and auditing.[1938] Moreover, through the Russia and Moldova Jackson–Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, known as Magnitsky Act, the USA imposes sanctions against foreign nationals engaged in acts of corruption.[1939] Regarding the oil and gas sector, Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires resource extraction issuers to disclose in their annual reports any payments made to foreign governments or the Federal Government for the purpose of commercial development of oil, natural gas, or minerals.[1940] However, some studies suggest that many companies have failed to meet the Act's requirement due to the absence of a proper enforcement mechanism.[1941]

[1935] *Ibid*, § 1956 (b)(2).
[1936] *Internal Revenue Code*, 26 USC § 162(c)(1).
[1937] *Sarbanes–Oxley Act of 2002*, Pub L No 107-204, 116 Stat 745 (2002).
[1938] For further information, see Evelyn R Patterson & J Reed Smith, "The effects of Sarbanes-Oxley on auditing and internal control strength" (2007) 82:2 Accounting Rev 427; Alix Valenti, "The Sarbanes-Oxley Act of 2002: has it brought about changes in the boards of large US corporations?" (2008) 81:2 J Bus Ethics 401.
[1939] US *Magnitsky* Act, *supra* note 883.
[1940] *Securities Exchanges*, 15 USC § 78m(q)(2)(A). See also *Disclosure of Payments by Resource Extraction Issuers*, 17 CFR 240(13)(q)(1) (2016). For further implications on the Act, see Daniel M Firger, "Transparency and the Natural Resource Curse: Examining the New Extraterritorial Information Forcing Rules in the DODD-Frank Wall Street Reform Act of 2010" (2010) 41:4 Geo J Intl L 1043.
[1941] See e.g. Global Witness, *Digging for Transparency: How Us Companies Are Only Scratching the Surface of Conflict Minerals Reporting* (2015), online (pdf): *Global Witness* <www.globalwitness.org/documents/17915/Digging_for_Transparency_hi_res.pdf> (claiming that about "80 percent of companies who filed these inaugural reports failed to do the minimum required by the law" at 2).

b. The United Kingdom: Stepping Up the Fight Against Transnational Corruption

UK domestic anti-bribery laws have evolved from both common law and statutes. The Redcliffe-Maud Committee initiated anti-bribery efforts in 1973 in response to the Poulson scandal, where a businessman had bribed multiple public officials.[1942] Subsequent to this, the Salmon Commission in 1975 further examined conflicts of interest and other corrupt practices within the government.[1943] In 1994, the Cash-for-Questions scandal[1944] prompted the formation of the Committee on Standards in Public Life, tasked with ensuring "the highest standards of propriety in public life."[1945] This Committee sought the Law Commission's review of existing corruption laws, including the Public Bodies Corrupt Practices Act 1889,[1946] Prevention of Corruption Act 1916,[1947] and Prevention of Corruption Act 1906,[1948] along with several common-law offenses.[1949] The Law Commission's 1998 review identified inconsistencies in the existing legislation and recommended a "modern statute" to replace both "the common law offence of bribery and statutory offences of corruption."[1950] This report led to the government drafting a new Corruption Bill aimed at consolidating all existing anti-bribery laws into a single legislation. However, disagreements

[1942] See Nick Kochan & Robin Goodyear, *Corruption* (London: Palgrave Macmillan, 2011) at 58. See also Gavin Drewry, "Corruption: The Salmon Report" (1977) 48:1 Political Q 87 at 87; see also John Calder, "Obituary: John Poulson" *Independent* (4 February 1993), online <www.independent.co.uk/news/people/obituary-john-poulson-1470735.html>.
[1943] See Drewry, *supra* note 1970.
[1944] See generally Alan Doig, "Cash for Questions: Parliament's Response to the Offence that Dare Not Speak its Name" (1998) 51:1 *Parliamentary Affairs* 36.
[1945] UK, Law Commission, *Legislating the Criminal Code: Corruption* (Consultation Paper No 145) para 3.13 (London: The Stationery Office, 1997).
[1946] *Public Bodies Corrupt Practices Act 1889* (UK) 52 & 53 Vict, c 69, s 1.
[1947] *Prevention of Corruption Act 1906* (UK) 6 Edw VII, c 34.
[1948] *Prevention of Corruption Act 1916* (UK) 6 & 7 Geo V, c 64.
[1949] In common law, the bribery entails "the receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity." William Oldnall Russell & J W Cecil Turner, *Russell on Crime*, 12th ed (London: Sweet & Maxwell, 1986) at 381.
[1950] UK, Law Commission, *supra* note 1973, paras 1.2, 2.33.

postponed its enactment until 2010.[1951] During the interval between the drafting and enactment of the Corruption Bill, the Anti-Terrorism, Crime and Security Act 2001 was introduced, which marked the first time that UK courts were granted jurisdiction over offenses committed abroad by UK nationals or entities, including the bribery of foreign public officials.[1952]

In 2010, the UK enacted the UKBA,[1953] considered "one of the most far-reaching anti-bribery laws of any country or international organization."[1954] The UKBA has a larger jurisdiction than the FCPA, covering both public and private sector bribery, regardless of where the bribery occurs and also prohibits facilitation payments.[1955] The Act introduces a unique offense for commercial organizations failing to prevent bribery by associated individuals.[1956] Penalties include both fines and imprisonments for individuals.[1957] While both individuals and entities can be convicted, entities are only liable if specific individuals within them are found responsible for the offense; rather than the entity itself.[1958] The SFO is the UK government authority responsible for investigating and prosecuting cases of foreign bribery and corruption.[1959]

[1951] Legislation.Gov.UK, "Bribery Act 2010: Background" (last visited 20 July 2024), paras 7–8, online: *Legislation.Gov.UK* <www.legislation.gov.uk/ukpga/2010/23/notes/division/3?type=en>.

[1952] Section 109 provides that:

> This section applies if—
> (a) a national of the United Kingdom or a body incorporated under the law of any part of the United Kingdom does anything in a country or territory outside the United Kingdom, and
> (b) the act would, if done in the United Kingdom, constitute a corruption offence.

Anti-terrorism, Crime and Security Act 2001 (UK) c 24, s 109(1).

[1953] *UKBA*, *supra* note 352.

[1954] Rahul Kohli, "Foreign Corrupt Practices Act" (2018) 55 Am Crim L Rev 1269 at 1307.

[1955] *UKBA*, *supra* note 352, s 6–7.

[1956] Section 7 provides that:

> A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending—
> (a) to obtain or retain business for C, or
> (b) to obtain or retain an advantage in the conduct of business for C.

Ibid, s 7.

[1957] *Ibid*, s 11.

[1958] Low, Sprange & Barutciski, *supra* note 434 at 199. For further details, see *Denning LJ in H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159 at 172.

[1959] For further details on the SFO's responsibilities and works, see Serious Fraud Office, "About us" (last visited 20 July 2024), online: *SFO* <www.sfo.gov.uk/about-us/>.

c. Canada: Combating Corruption Beyond its Borders

Canada is a party to several anti-corruption treaties, including the UNCAC, OECD Convention, and Inter-American Convention. In 1998, Canada enacted the CFPOA[1960] to meet the standards set by the OECD Convention and Inter-American Convention.

The CFPOA criminalizes the bribery of foreign public officials using a framework similar to domestic bribery laws.[1961] Section 3 of the CFPOA provides that offering or giving any benefit to a foreign public official to gain a business advantage is an offense, including bribes given for the official's acts or omissions related to their duties or to influence their decisions.[1962] The CFPOA does not require proof of the official's acceptance of the bribe or any successful outcome. The Act also addresses indirect offers or payments, implying the liability of intermediaries and preventing companies from claiming ignorance of their subsidiaries' or subcontractors' actions.

The anti-bribery provisions of CFPOA, like the FCPA, cover a vast range of activities, including contract negotiations, operations, and tax and customs matters. In terms of jurisdiction, the Canadian Supreme Court has established a "real and substantial link" to the country and ruled that for an offence to fall under the CFPOA's jurisdiction, "a significant portion" of the illegal activities must occur in Canada.[1963] In 2013, the CFPOA was amended to expand its jurisdiction based on nationality: if Canadian citizens, permanent residents, and "public body, corporation, society, company, firm or partnership that is incorporated, formed or otherwise organized under the laws of Canada or a province" can be prosecuted for bribery committed abroad under the CFPOA.[1964]

[1960] *CFPOA, supra* note 353.
[1961] *Criminal Code,* RSC 1985, c 46 s 121(1) [*Criminal Code*].
[1962] *CFPOA, supra* note 353, s 3(1).
[1963] *Libman v The Queen*, [1985] 2 SCR 178.
[1964] *CFPOA, supra* note 353, s 5(1).

Initially, the CFPOA focused solely on anti-bribery provisions without accounting provisions. However, the 2013 amendments introduced a new offense related to maintaining accurate books and records, including actions such as keeping off-the-books accounts, failing to record transactions accurately, recording nonexistent expenses, misidentifying liabilities, using false documents, or prematurely destroying accounting records.[1965] Moreover, the amendments eliminated the exception for facilitation payments, but they retained two other exceptions to the bribery offense. The first exception covers payments that are legally permitted by foreign laws,[1966] while the second pertains to situations where foreign public officials incur reasonable payments in good faith.[1967]

At first, the CFPOA lacked a dedicated government department for investigation and monitoring, which led to minimal prosecutions, only one case, during its early years.[1968] In 2007, the Canadian government established the International Anti-Corruption Team within the Royal Canadian Mounted Police to handle CFPOA bribery cases.[1969] For example, from August 2022 to August 2023, there were 19 active investigations, six convictions, and two cases with laid charges pending conclusion, and one remediation agreement.[1970]

In addition to the CFPOA, Canada's Criminal Code and Income Tax Act also address bribery involving foreign public officials. The Criminal Code criminalizes "secret commissions," similar

[1965] *Ibid*, s 4(1).
[1966] *Ibid*, s 3(a).
[1967] The CFPOA specifies that the payments need to be in relation to either "the promotion, demonstration or explanation of the person's products and services" or "the execution or performance of a contract between the person and the foreign state for which the official performs duties or functions." *Ibid*, s 3(b).
[1968] See *R v Hydro-Kleen Group Inc*, [2005] AJ No 568.
[1969] See Royal Canadian Mounted Police, "Sensitive and International Investigation" (last modified 3 December 2019), online: *Royal Canadian Mounted Police* <www.rcmp-grc.gc.ca/en/sensitive-and-international-investigations>.
[1970] Global Affairs Canada, *Canada's Fight against Foreign Bribery: Twenty-Fourth Annual Report to Parliament* (Ottawa: Global Affairs, 2024).

to bribery,[1971] with cases such as R v Garcia.[1972] Moreover, Section 462.31 of the Criminal Code covers laundering proceeds from "a designated offence," including foreign bribery.[1973] Possessing proceeds from foreign bribery in Canada is also an offense.[1974] The Income Tax Act disallows deductions for illegal expense under the CFPOA and the Criminal Code.[1975] Lastly, the Justice for Victims of Corrupt Foreign Officials Act, or Sergei Magnitsky Law, allows Canada to impose sanctions on foreign nationals involved in corruption.[1976]

[1971] *Criminal Code*, *supra* note 1990, s 426(1).
[1972] The Court sentenced that a foreign individual residing in Canada on a work visa is convicted of corruptly accepting secret commissions; *see R v Garcia*, 2002 ABPC 156.
[1973] *Criminal Code, supra* note 1990, s 462(31).
[1974] *Ibid*, s 354(1).
[1975] *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 67.5 (1).
[1976] *Canadian Magnitsky Act*, *supra* note 883.

Appendix VII – Anti-Corruption Measures Taken by International Financial Institutions

a. World Bank Group

Chapter Three explains that in 2006, the WB, which includes the IDA and the IBRD, introduced anti-corruption and anti-fraud guidelines.[1977] These guidelines were updated in 2011 to prevent corruption and fraud in projects founded by IBRD loans and IDA credits and grants. In addition to the WB, the IFC, another WBG member and the world's largest IFI, focuses on supporting the private sector in middle and low-income countries. Before investing in a project, the IFC conducts thorough due-diligence, examines all parties involved, and requires disclosure of primary businesses, third-party identities, and contractual commitments.[1978] The IFC avoids investing in projects that does not meet their standards, such as unexplained price discrepancies or lack of contract transparency.[1979] After investing, the IFC monitors its projects with on-site representatives to prevent corruption and ensure compliance.[1980] Moreover, the MIGA, another WBG member, supports middle and low-income countries by offering guarantees and technical assistance to encourage foreign investment. In 2013, MIGA introduced its Anti-corruption Guidelines to manage corruption and fraud risks in projects it supports.[1981] If MIGA detects corrupt or fraudulent activities, it can terminate guarantee coverage or refuse compensation payments.[1982]

[1977] WB, *Anti-Corruption Guidelines*, *supra* note 446.
[1978] See WB, *Helping*, *supra* note 443 at 66–67.
[1979] *Ibid*, at 67.
[1980] *Ibid*, at 67–68.
[1981] *MIGA's Anti-Corruption Guidelines* (Washington, DC: World Bank, 2006).
[1982] For further details on the anti-corruption policies in the MIGA, see MIGA,"Integrity" (last visited 22 July 2024), online: *MIGA* <www.miga.org/integrity>.

More importantly, the WB, along with IFC and MIGA, established a sanctions system to address corruption and fraud in their development projects.[1983] This two-tier administrative process allows the WBG to impose sanctions on individuals and companies involved in corrupt practices related to WBG funds. Sanctions can range from public reprimands to debarment and restitution.[1984] The Integrity Vice Presidency investigates alleged corruption,[1985] and cases with sufficient evidence are forwarded to the Office of Suspension and Debarment for review.[1986] If contested, the WBG Sanctions Board makes the final decision.[1987]

Finally, the ICSID, another WBG member, handles international investment disputes through conciliation and arbitration. The ICSID Convention allows for the annulment of awards if there is evidence of corruption by a member of the Tribunal, as stated in Article 52.[1988] While proving corruption can be challenging, arbitral tribunals have addressed several corruption allegations in investment disputes.[1989]

b. Regional Development Banks

Since the 1990s, following the WBG trends in the adoption of anti-corruption measures, regional development banks, the AFDB, ADB, EBRD, and IADB have implemented anti-corruption measures in their financed projects and procurement contracts. These IFIs require borrowing states

[1983] See World Bank, "Sanctions System: About Us" (last visited 22 July 2024), online: *World Bank* <www.worldbank.org/en/about/unit/sanctions-system#2>.
[1984] *Ibid*.
[1985] For further details on the work of Integrity Vice Presidency, see World Bank, "Integrity Vice Presidency" (last visited 22 July 2024), online: *World Bank* <www.worldbank.org/en/about/unit/integrity-vice-presidency#1>.
[1986] For further details on the work of Office of Suspension and Debarment, see WB, "Suspension", *supra* note 1415.
[1987] For further details on the work of Sanctions Board, see World Bank, "World Bank Group Sanctions Board" (last visited 22 July 2024), online: *World Bank* <www.worldbank.org/en/about/unit/sanctions-system/sanctions-board>.
[1988] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, UNTS 8359 (entered into force 14 October 1966), art 52.
[1989] See e.g. *World Duty Free Company v Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006; *Metal-Tech Ltd v Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award, 4 October 2013.

to adhere to anti-corruption as a condition for receiving financial support. The ADB adopted its anti-corruption policy in 1998 and has since updated it four times.[1990] The ADB's Integrity Principles and Guidelines specifically address corrupt practices in procurement.[1991] ADB also provides detailed anti-corruption policies in its Procurement Guidelines[1992] and Guidelines on the Use of Consultants for ADB-financed activities.[1993] Similarly, the AFDB incorporates anti-corruption measures in its procurement through the Rules and Procedures for Procurement of Goods and Works[1994] and the Rules and Procedures for the Use of Consultants.[1995] The AFDB requires borrowers and consultants to include anti-corruption provisions in bidding documents and contracts.[1996]

Since 2006, the EBRD has annually published its Integrity and Anti-Corruption Reports, where it outlines its strategies and actions against fraud and corruption.[1997] In 2018, the EBRD reaffirmed its commitment with an anti-corruption statement, emphasizing its ongoing efforts to take anti-corruption measures in all financed projects to promote sustainable market economies.[1998]

[1990] For the text of ADB's Anti-corruption Policy and its updates, see Asian Development Bank, *Anticorruption Policy* (last visited 22 July 2024), online: *ADB* <www.adb.org/documents/anticorruption-policy>.
[1991] Asian Development Bank, *Integrity Principles and Guidelines* (Manila: Asian Development Bank, 2015).
[1992] Asian Development Bank, *Procurement Guidelines* (Manila: Asian Development Bank, 2015), para 1.14.
[1993] Asian Development Bank, *Guidelines on the Use of Consultants by ADB and Its Borrowers* (Manila: Asian Development Bank, 2013), para 1.23.
[1994] African Development Bank, *Rules and Procedures for Procurement of Goods and Works* (Abidjan: African Development Bank, 2008), para 2.12.
[1995] African Development Bank, *Rules and Procedures for the Use of Consultants* (Abidjan: African Development Bank, 2008), para 1.22.
[1996] While the AFDB has not published its procedures related to its sanctions procedures, the AFDB declares its mandate and strategy in its website. See African Development Bank, "Integrity and Anti-Corruption" (last visited 22 July 2024), online: *African Development Bank* <www.afdb.org/en/about-us/organisational-structure/integrity-and-anti-corruption>.
[1997] For annual reports, see European Bank for Reconstruction and Development, "Integrity and compliance" (last visited 22 July 2024), online: *European Bank for Reconstruction and Development* <www.ebrd.com/integrity-and-compliance.html>.
[1998] European Bank for Reconstruction and Development, *Anti-Corruption Statement* (London: European Bank for Reconstruction and Development, 2018).

Moreover, the EBRD's Enforcement Policy and Procedures detail the processes for investigating and penalizing corrupt practices in projects financed by the EBRD.[1999]

Finally, in 2009, the IADB adopted the Action Plan for Supporting Countries' Efforts to Combat Corruption and Foster Transparency, laying out a strategic framework to prevent, monitor, and sanction corruption.[2000] The IADB integrates its anti-corruption policies into procurement through its Policies for the Procurement of Goods and Works Financed by the Inter-American Development[2001] and the Policies for the Selection and Contracting of Consultants Financed by the Inter-American Development.[2002] Moreover, the IADB's Sanctions Procedures outline the steps for addressing allegations in projects financed by the bank.[2003]

[1999] European Bank for Reconstruction and Development, *Enforcement Policy and Procedures* (London: European Bank for Reconstruction and Development, 2017).
[2000] Inter-American Development Bank, *Action Plan for Supporting Countries' Efforts to Combat Corruption and Foster Accountability,* GN-2540 (Washington DC: Inter-American Development Bank, 2009).
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Appendix VIII – Standard Clause[2004]

Article 1 - Definitions:

1.16 Anticorruption Legislation means (1) the applicable laws of Ghana; (2) with respect to each Party, the anti-corruption laws of any Home Country Governmental Authority with respect to such Party or any Affiliate of such Party including, as applicable to such Party or its Affiliates, the United Kingdom's anti-corruption legislation, including the AntiTerrorism Crime & Security Act 2001, and the U.S. Foreign Corrupt Practices Act; (3) the OECD Anti-bribery Principles; or (4) with respect to each Party, any other implementing legislation with respect to (1), (2) and (3) above.

1.116 OECD Anti-bribery Principles means the following principles, which are based on the principles set forth in Article 1.1 and 1.2 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed in Paris on 17 December 1997, and entered into force on 15 February 1999, and the Convention's Commentaries, namely, that:

(a) It is unlawful for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business; and

(b) Complicity in, including incitement, aiding and abetting, or authorization of an act of bribery of a foreign public official shall be unlawful. Furthermore, attempt and conspiracy to bribe a foreign public official of a country that is not a Party's Home Country Governmental Authority shall be unlawful to the same extent as attempt and conspiracy to bribe a public official of a country that is a Party's Home Country Governmental Authority.

Article 21 – General Provisions

21.1 Conduct of the parties

(A) Public Anti-Corruption Provisions.

(1) No Party to this Agreement shall knowingly permit or allow, by act or omission, the paying, making, offering, promising, authorizing or causing to pay, make, offer, give, promise or authorize, either directly or indirectly, by it or any of its Affiliates, of any bribe, commission, money, payment, gift (other than promotional and marketing gifts of nominal value), loan, fee, reward, travel, entertainment or transfer of anything of value, to or for the use or benefit of any Official, of a nature and cost which is not permitted under the Anticorruption Legislation, in connection with this Agreement or the operations associated therewith.

(2) Furthermore and without prejudice to the above, each Party, in recognition of the OECD Anti-bribery Principles represents and warrants that it and its Affiliates have not knowingly, either directly or indirectly, paid, made, offered, given,

[2004] The *standard clause* is adopted from Jubilee Agreement, see Jubilee Agreement, *supra* note 1067.

promised, or authorized and will not knowingly pay, make, offer, give, promise or authorize, in connection with this Agreement or the operations associated therewith, any commissions, money, payment, gift (other than promotional and marketing gifts of nominal value), loan, fee, reward, travel, entertainment or transfer anything of value, to or for the use or benefit of any Official for the purposes of:

(a) influencing any act, omission or decision on the part of any such Official, in his or her official capacity;

(b) securing any improper advantage from such Official; or

(c) inducing any such Official to use his or her influence with another Official or Governmental Authority to affect or influence any official act or to direct business to any Person, or to obtain or retain business related to this Agreement;

where such commission, money, payment, gift (other than promotional and marketing gifts of nominal value), loan, fee, reward, travel, entertainment or transfer of anything of value would violate the Anticorruption Legislation applicable to it.

(3) Each Party further represents and warrants that it and its Affiliates have not either directly or indirectly paid, made, offered, given, promised or authorized, and will not pay, make, offer, give, promise or authorize, in connection with this Agreement or the operations associated therewith, to or for the use or benefit of any other Person, any commissions, money, payment, gift (other than promotional and marketing gifts of nominal value), loan, fee, reward, travel, entertainment or anything of value, if the Party or Affiliate knows, has a firm belief or is aware that there is a high probability that the other Person would use the commissions, money, payment, gift (other than promotional and marketing gifts of nominal value), loan, fee, reward, travel, entertainment or anything of value for any of the purposes prohibited by Article 21.1(A)(2).

(4) Each Party further represents and warrants that it and its Affiliates have not either directly or indirectly taken or authorized, and will not take or authorize, any act in connection with this Agreement or the operations associated therewith that could give rise to either civil or criminal liability for any Original Party under any Anticorruption Legislation applicable to such Original Party.

(B) Indemnity. Each Party shall defend, indemnify and hold the other Parties harmless from and against any and all claims, damages, losses, penalties, costs and expenses arising from or related to, any breach by such first Party of such warranties or covenants under Article 21.1(A) (excluding any Consequential Loss or punitive, multiple or other exemplary damages in accordance with Article 20.3(C)(14)). Such indemnity obligation shall survive termination or expiration of this Agreement.

(C) Internal Controls. Each Party agrees, in connection with this Agreement or the operations associated therewith, to (1) maintain adequate internal controls; (2) properly record and report all transactions; and (3) comply with the Anticorruption Legislation applicable to it. Each Party shall be entitled to rely on the other Parties' system of

internal controls and record keeping, and on the adequacy of full disclosure of the facts, and transactions and of financial and other data regarding Unit Operations and any other activity undertaken under this Agreement. No Party is in any way authorized to take any action on behalf of another Party that would result in an inadequate or inaccurate recording and reporting of assets, liabilities or any other transaction, or which would put such Party in violation of its obligations under the Anticorruption Legislation or any other laws applicable in connection with this Agreement or the operations associated therewith.

(D) Audit Rights. During the term of this Agreement and for a period of five (5) years thereafter, each Party shall in a timely manner:

(1) respond in reasonable detail as to itself and its Affiliates after reasonable inquiry and investigation to any notice from any other Party reasonably connected with the representations, warranties and covenants set forth in Article 21.1(A) and Article 21.3;

(2) furnish relevant documentary support for such response upon request from such other Party; and

(3) in general, cooperate in good faith with such other Party in determining whether a breach of the representations and warranties has occurred.

(E) Annual Certification. Each Party shall complete an annual certification attesting that, to its knowledge after reasonable inquiry and investigation, neither such Party nor its Affiliates has breached the terms of Article 21.1(A) or Article 21.3 or committed to any act prohibited by the Anticorruption Legislation in connection with this Agreement or the matters which are the subject of this Agreement.

(F) Subcontractors. Unit Operator and each Technical Operator, shall obtain express anticorruption provisions, including where appropriate in the contracting party's opinion, applicable anticorruption legislation provisions, audit rights, termination provisions, and requirements that each Subcontractor obtain similar provisions in any contracts with its subcontractors, in a written agreement with each of its respective Subcontractors retained for the Unit Account.

21.3 Private Anti-Corruption Provisions

Each Party agrees that neither it, nor its Affiliates nor their respective directors, officers and employees or individual contractors or consultants (natural persons) fulfilling a staff role in such Party's organization, will knowingly, whether directly or indirectly, pay, make, offer, give, promise or authorize, or accept, in connection with this Agreement or the operations associated herewith, any bribe, commission, money, payment, gift (other than promotional and marketing gifts of nominal value), loan, fee, reward, travel, entertainment or transfer of anything of value, to or for the use of any directors, officers and employees or individual contractors or consultants (natural persons) fulfilling a staff role, of any other Party, or any of its Affiliates, or any subcontractor of any tier, for the purpose of:

(A) improperly influencing any act, omission or decision on the part of any such other Party, or its Affiliates, or any such subcontractor of any tier, in connection with this Agreement and the operations associated herewith; or

(B) securing any improper advantage from such other Party, or its Affiliates, or any subcontractor of any tier, in connection with this Agreement or the operations associated herewith.

23.4 Conflicts of Interest

(A) Each Operator undertakes that it shall avoid any conflict of interest between its own interests (including the interests of Affiliates) and the interests of the other Parties in dealing with suppliers, customers and all other organizations or individuals seeking to provide goods or services to the Parties in connection with Unit Operations.

(B) The provisions of the preceding paragraph regarding each Operator shall not apply to: (1) such Operator's performance which is in accordance with the written local preference laws or policies of the Government; (2) such Operator's acquisition of products or services from an Affiliate, or the sale thereof to an Affiliate, made in accordance with the terms of this Agreement; or (3) such Operator's acquisition of goods and services for the benefit of any Tract for which it is Tract Operator.

(C) Unless otherwise agreed by the Parties in writing, the Parties and their Affiliates are free to engage or invest (directly or indirectly) in an unlimited number of activities or businesses, any one or more of which may be related to or in competition with the business activities contemplated under this Agreement, without having or incurring any obligation to the other Parties, including any obligation to offer any interest in such business activities to any Party.

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