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International Regulation of Law Enforcement

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INTERNATIONAL REGULATION OF LAW ENFORCEMENT

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ABSTRACT

Treaties aimed at preventing cross-border harm frequently regulate states' law enforcement practices. The interpretation of these "enforcement obligations" can be challenging because the relevant provisions tend to be vague and heterogeneous. This article offers a theory of both why states agree to enforcement obligations and how those obligations ought to be interpreted. The thesis is that states are primarily concerned about under-enforcement, discriminatory enforcement or concealed enforcement and so enforcement obligations contained in treaties should, with careful attention to textual evidence of the parties' specific purposes, be interpreted to address those concerns. These claims are illustrated through a case study of the enforcement obligations found in the OECD Anti-Bribery Convention, which, among other things, prohibit consideration of "national economic interests" in the course of investigation or prosecution of foreign bribery. The case study includes a discussion of whether Canada's handling of the SNC-Lavalin case violated the Convention.

INTRODUCTION

In 2019, Canada was consumed by a corruption scandal. At the center of the scandal was a large engineering and construction company called SNC-Lavalin, which had paid bribes in Libya over the course of more than a decade. The scandal, however, was not the bribery. Nor was there a cover-up. SNC-Lavalin was duly charged and brought to justice. The issues were the penalty and the legal process. The Prime Minister of Canada, Justin Trudeau, put pressure on his Attorney General to

* Beller Family Professor of Business Law, New York University School of Law. I am grateful to Alexandre Abitbol for research assistance, to Elizabeth Acorn, Julian Arato, Rachel Brewster, Daniele Duryea, Robert Howse, Pierre-Hugues Verdier, Edward Iacobucci, Stratos Pahis, Cecily Rose and members of the audience at Boston University and the annual meetings of the Brazilian Association of Law and Economics and the American Law and Economics Association for comments, and to the Filomen D'Agostino and Max E. Greenberg Faculty Research Fund at NYU School of Law for financial support.

negotiate a resolution of the matter that would allow SNC-Lavalin to avoid a criminal conviction, moved by fears that a conviction for foreign bribery would automatically lead to a bar on government contracting that would threaten thousands of jobs. The problem was that the applicable legislation dictated that decisions about negotiated resolutions were not to be influenced by "considerations of national economic interest." The Prime Minister's attempts to circumvent that legislative constraint led to a scandal that almost resulted in the fall of his government.

The legislation that tripped up the Trudeau government was intended to implement Canada's obligations under a treaty, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business ("OECD Anti-Bribery Convention").[1] The Canadian legislation tracked the Convention's requirement that "investigation and prosecution" of foreign bribery "shall not be influenced by considerations of national economic interest."[2] The import of this language is far from clear. Does it prevent economic considerations from influencing how a prosecution is resolved? Does even-handed consideration of both foreign and domestic job losses qualify as consideration of "national" economic interests"? Is it permissible to consider economic consequences that exceed a certain magnitude? As the SNC-Lavalin affair demonstrated, answering these interpretive questions can involve high economic and political stakes.

This article attempts to shed light on the purpose and meaning of treaty provisions like the one at the heart of the SNC-Lavalin affair. International law frequently obligates states to regulate the conduct of private actors.[3] Those obligations may require states not only to enact the appropriate legal prohibitions but also to enforce their laws in specific ways. International obligations that fall into this last category ("enforcement obligations") often are formulated in terms that are open to multiple

[1] 37 I.L.M. 4 (1998).
[2] *Id.*, Art. 5.
[3] Melissa Durkee refers to treaties of this kind as "persuasion treaties." See Melissa J. Durkee, *Persuasion Treaties*, 99 VA. L. REV. 63 (2013).

interpretations. This article focuses on enforcement obligations found in treaties whose main purpose is to avoid cross-border harm.[4]

The interpretation of enforcement obligations presents a challenge that is familiar to modern international economic law.[5] Legal constraints on states' regulatory activities have the potential to enhance overall wellbeing by preventing activities that cause easily avoidable harm to foreigners or which create non-tariff barriers to international trade and investment. At the same time, it is difficult to limit the scope of such constraints in advance to ensure that they do not affect regulatory strategies that are deeply important to local interests. And constraints formulated in open-ended terms leave room for disagreement about whether the benefits of overriding states' regulatory choices outweigh the costs in any given case.

This article highlights these tensions in the course of examining both why states make commitments regarding law enforcement and how the commitments they make ought to be interpreted. The general theory offered here contrasts with existing treatments in the literature, which tend to focus on enforcement obligations in specific contexts and, perhaps as a consequence, do not analyze the significance of variations in their substance and form.[6] The analysis here draws on a key

[4] Enforcement obligations contained in human rights instruments are beyond the scope of this analysis because their purpose is typically to protect the interests of actors within the enforcing state.

[5] Robert Howse, *From Politics to Technocracy-and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L L. 94 (2002).

[6] See, e.g., Billy Melo Araujo, *Labour Provisions in EU and US Mega-Regional Trade Agreements: Rhetoric and Reality*, 67 INT'L & COMP. L.Q. 233, 238-239 (2018) (discussing interpretation of enforcement obligations relating to labor law in free trade agreements); Peter K. Yu, *TRIPs and Its Achilles' Heel*, 18 J. INTELL. PROP. L. 479 (2011) (explaining why enforcement obligations in the TRIPs agreement have been ineffective); Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L L. 665, 680-90 (2004) (discussing compliance with commitments to enforce prohibitions on foreign bribery); Kal Raustiala, *The Political Implications of the Enforcement Provisions of the NAFTA Environmental Side Agreement: The CEC as a Model for Future Accords*, 25 ENVT'L. L. 31 (1995) (arguing that enforcement obligations in NAFTA environmental side agreement unduly infringe upon U.S. sovereignty and might lead to weakening of environmental standards). Broude & Teichman offer a general treatment of enforcement obligations contained in international agreements, but they do not discuss variations in such agreements. Tomer Broude & Doron Teichman, *Outsourcing and Insourcing Crime: The Political Economy of Globalized Criminal Activity*, 62 VAND. L. REV. 795, 836-8, 841-4 (2009); Maggie Gardner, *Channeling Unilateralism*, 56 HARV. INT'L L.J. 297 (2015).

insight from the literature on the drafting of ordinary contracts, namely, that the design of agreements often can be explained as a rational response to the costs of drafting provisions designed to deal with a wide variety of contingencies, as well as the costs of observing and verifying compliance.[7]

The analysis begins in Part I with examples of different types of enforcement obligations. They can be found not only in customary international law but also in many treaties. A review of enforcement obligations found in prominent international instruments such as the European Union's General Data Protection Regulation (GDPR),[8] the *United Nations Convention Against Transnational Organized Crime*,[9] and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP")[10] reveals that they generally entail commitments to effectiveness, non-discrimination or transparency. At the same time, there is tremendous heterogeneity in the wording of the relevant provisions and they generally are drafted in vague terms.

Part II offers a functional explanation for both the existence and form of enforcement obligations in international agreements aimed at avoiding cross-border harm. Their existence is explained by the fact that they serve as commitments to abandon self-interested enforcement strategies that prejudice foreign actors. Sometimes the prejudice involves failing to sanction domestic conduct that causes transboundary harm (under-enforcement). In other cases, it involves imposing sanctions that place

[7] This insight is the foundation of the literature on incomplete contracts. See, Oliver Hart and John Moore, *Incomplete contracts and renegotiation*, 56 Econometrica 755, 755-756 (1988); Oliver Hart, *Incomplete Contracts*, *in* ALLOCATION, INFORMATION AND MARKETS 163 (John Eatwell, Murray Milgate and Peter Newman eds., 1988). For applications to ordinary contracts see, e.g., Robert E. Scott & George G. Triantis, *Incomplete Contracts and the Theory of Contract Design*, 56 CASE W. RES. L. REV. 187 (2005) (suggesting that parties will design agreements that balance drafting costs and potential litigation costs); Steven Shavell, *On the Writing and Interpretation of Contracts*, 22 J. LAW ECON. & ORG. 289 (2006) (focusing on implications of drafting costs for contract interpretation).

[8] Regulation 2016/679, of the European Parliament and the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC, 2016 O.J. (L 119) 1 [hereinafter GDPR].

[9] UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME, S. TREATY DOC. NO. 108-16, 2225 U.N.T.S. 209 [hereinafter Palermo Convention].

[10] COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP, Mar. 8, 2018, GOV'T CAN., https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/cptpp-ptpgp.aspx?lang=eng [hereinafter CPTPP].

foreign firms at a competitive disadvantage (discriminatory enforcement). In many cases, the prejudice is exacerbated by a lack of transparency (concealed enforcement). States make commitments to refrain from enforcement practices associated with these kinds of prejudicial effects in response to rewards or coercion from other states.

The functional approach also helps to explain the form of enforcement obligations. Concerns about under-enforcement, discriminatory enforcement and concealed enforcement give rise to corresponding commitments to effective, non-discriminatory and transparent enforcement. However, because states vary in terms of their reasons and ability to commit to enforcement strategies, these broad categories of enforcement obligations encompass considerable variation. At the same time, enforcement obligations tend to be drafted in rather vague terms because it is hard to specify enforcement strategies in advance.

The fact that enforcement obligations often are formulated in language that is neither standardized nor precise makes them open to multiple interpretations. Part III argues that the functional approach can be used to shed light on the interpretation that best promotes the objects and purposes of the parties. It goes on to demonstrate the implications of this interpretive approach by showing how it can help to resolve ambiguities in the enforcement obligations found in the OECD Anti-Bribery Convention, using the SNC-Lavalin affair as an illustration. The article concludes with a reflection on the challenges inherent in giving meaning to commitments that aim to regulate an activity as complex, context-specific and contestable as law enforcement.

I. EXAMPLES OF NFORCEMENT OBLIGATIONS

Enforcement obligations can be found in many areas of international law concerned with cross-border harm. They are formulated in a variety of ways and in varying degrees of detail and are interpreted and applied by a variety of institutions.

A. Obligations of Result versus Obligations of Conduct

Sometimes an international enforcement obligation takes the form of an obligation of result, that is to say, an obligation for a state to prevent a particular event from occurring without specifying the regulatory means by which that is to be accomplished.[11] For instance, in the famous *Trail Smelter* arbitration the tribunal adopted the proposition that "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."[12] Taken literally, this passage seems to contemplate an obligation of result. If so, it is a rare and possibly outdated example. To begin, it is unclear whether the quoted language represents an accurate statement of current law regarding transboundary pollution, much less other types of transboundary harm.[13] The current position seems to be that states only have a duty to "take all appropriate measures" to prevent transboundary environmental harm, although there is still support for the idea that there is a duty to mitigate harm caused by particularly hazardous activities.[14] On balance, this seems more like an obligation of conduct than an obligation of result.

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[11] While there is scholarly recognition that the civil law distinction between obligations of conduct and obligations of result has conceptual and practical utility in international law, the ILC Articles declined to recognize related distinctions proposed by Special Rapporteur Roberto Ago. *See, e.g.*, Constantin P. Economides, *Content of the Obligation: Obligations of Means and Obligations of Result*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY (James Crawford, Alain Pellet, Simon Olleson & Kate Parlett, eds., 2010) (arguing for the traditional, civil law distinction's continued utility and relevance in international law and suggesting its absence from the ILC Articles was due to Ago's complicated proposal); Pierre-Marie Dupuy, *Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, 10 EUR. J. INT'L L. 371 (1999) (arguing that Ago's proposed distinctions distorted the civil law distinction, which continues to have application in international law). In the context of treaties, the distinction between obligations of conduct and obligations of result appears to correspond to Melissa Durkee's distinction between "effort" and "benchmark" treaties. See Durkee, *supra* note 3, 94-97.

[12] *Trail Smelter Case* (United States v. Canada) 3 U.N.R.I.A.A. 1907, 1965 (1941).

[13] Jaye Ellis, *Has International Law Outgrown Trail Smelter*?, in TRANSBOUNDARY HARMS IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION 56 (Rebecca Bratspies and Russell Miller, eds., 2006).

[14] International Law Commission, *Draft articles on Prevention of Transboundary Harm from Hazardous Activities*, Art. 3 (2001) (requiring states to "take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof") and *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities* (2006) (providing that states generally have a duty to provide compensation for, physical transboundary harm, such as air pollution, caused by intrinsically hazardous activities).

More generally, under modern customary international law a state's obligation to prevent its territory from being used in ways that cause injury to other states usually is regarded as a duty to take reasonable preventive measures, which is clearly an obligation of conduct.[15] This invariably entails a duty to enact appropriate legislation and to create an institutional framework that enables enforcement.[16] It also may include a duty to warn other states of known dangers.[17] However, customary international law has little to say about appropriate enforcement.[18] If we assume that customary international law embodies practices which have been voluntarily accepted by states then this state of affairs is consistent with the idea that states are unlikely to be satisfied with a universal standard for enforcement.

International legal instruments which require states to prevent specific types of conduct that may cause transboundary harm often deal with the question of enforcement through explicit obligations of conduct, but with varying degrees of specificity. At one end of the spectrum is the GDPR, the main instrument governing privacy regulation for residents of the European Union. The GDPR raises concerns about cross-border enforcement because it requires states to adopt certain legal prohibitions and explicitly contemplates that states will sanction local firms for practices that affect individuals in other jurisdictions.[19] Curiously, the GDPR does not specify rules which states must abide by in law

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[15] Int'l Law Comm'n, REPORT OF THE INTERNATIONAL LAW COMMISSION, at 43, U.N. Doc. A/56/10 (2001), available at http://www.un.org/documents/ga/docs/56/a5610.pdf [hereinafter ILC Articles] (Draft Articles on the Responsibility of States for Internationally Wrongful Acts), Art. 14, cmt. 14 ("Obligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur.").

[16] Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of International State Responsibility*, 35 GERMAN YB INT'L L 9 (1993) (describing how state's duties of prevention and punishment entail possessing legal and administrative apparatuses for enforcement).

[17] *Corfu Channel* (*United Kingdom v Albania*), Judgment, [1949] ICJ Rep 1.

[18] Pierre-Marie Dupuy, *The International Law of State Responsibility: Revolution or Evolution?*, 11 MICH. J. INT'L L. 105 (1989) (describing how liability for the harmful use of a state's territory "depends very much upon the entire factual and normative context in which it is undertaken. While it may be legal today, in certain circumstances, and in certain legal conditions, it could be illegal tomorrow, or be in the process of becoming illegal, if the concrete situation or the law applicable to it is changing").

[19] GDPR, *supra* note 8, Art. 56 (giving competence to deal with cases to the public authority in the state in which the targeted actor has its main establishment or single establishment).

enforcement. Instead, the GDPR contains an exceptionally vague obligation of conduct – it merely requires states to "contribute to the consistent application of the Regulation throughout the Union" and to "cooperate with each other."[20] In the event of a dispute, other states bound by the GDPR may request an opinion from a Board charged with ensuring the consistent application of the GDPR.[21]

B. Commitments to Effectiveness, Non-discrimination and Transparency

Voluntarily assumed enforcement obligations found in international agreements often contain more detailed enforcement obligations than the GDPR. Those obligations are almost invariably obligations of conduct and typically can be classified as commitments to either *effectiveness*, *non-discrimination* or *transparency*. However, there is considerable variation within these broad categories.

A good example of a commitment to effectiveness can be found in Article 11.2 of the United Nations Convention Against Transnational Organized Crime (also known as the Palermo Convention):

> 2. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences covered by this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.[22]

Other treaties concerned with the suppression of criminal conduct (a.k.a. "suppression conventions") contain a variety of enforcement obligations.[23] For example, some of the narcotics conventions require the parties to take "all practicable measures" for the prevention of drug abuse.[24]

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[20] *Id.* Arts. 51(2), 60, 63.
[21] *Id.* Arts. 64, 70.
[22] Palermo Convention, *supra* note 9, at Art. 11.2.
[23] For an extensive listing see Jacob Katz Cogan, *The Regulatory Turn in International Law*, 52 HARV. INT'L L.J. 321, 332n (2011).
[24] Single Convention on Narcotic Drugs, March 30, 1961, 18 U.S.T 1407, 520 U.N.T.S. 204, Art. 38; Convention on Psychotropic Substances, 1971, Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175, Art. 20. See also, International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. 11081, 1316 U.N.T.S. 205,

Meanwhile, the terrorism conventions contain relatively unqualified obligations to take specific measures, such as to investigate and either prosecute or extradite alleged offenders, subject to limitations imposed by domestic law.[25] Though not a treaty, the Financial Action Task Force's International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, contain obligations (albeit phrased as "recommendations") to establish dedicated units to monitor suspicious transactions, to authorize a wide range of investigative techniques, and, generally, to ensure that their measures to combat illicit financial transactions "are commensurate with the risks identified."[26] (The unusually vague and ambiguous provisions found in the OECD Anti-Bribery Convention will be discussed in Part III.)

Treaties concerned with economic regulation, as opposed to hard-core crimes, also contain enforcement obligations. The WTO agreements contain many examples of enforcement obligations, but for present purposes it is convenient to refer to the more recent formulations found in the CPTPP, perhaps the most comprehensive trade and investment agreement in existence. Each of the CPTPP's

Art. 4(a) (requiring all practicable measures to prevent preparations in their respective territories for the commission of prescribed offenses).

[25] International Convention for the Suppression of the Financing of Terrorism, Dec. 9 1999, T.I.A.S. 13075, 2178 U.N.T.S. 197, Art. 9, 10; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, T.I.A.S. 02-726, 2149, U.N.T.S. 256, Arts. 7, 8. The set of Security Council Resolutions administered by the Counter-Terrorism Committee includes an extensive set of enforcement obligations. See generally, *Technical guide to the implementation of Security Council resolution 1373 (2001) and other relevant resolutions*, S/2017/716.

[26] FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (2020), http://www.fatf-gafi.org/home/, Recommendations 1 (measures commensurate with risk), 26-32 (powers of regulatory and enforcement authorities).

chapters on competition,[27] intellectual property,[28] labor,[29] the environment[30] and sanitary and phytosanitary measures[31] contains its own set of provisions on enforcement. Those provisions (whose language often tracks that of the corresponding WTO agreements) include commitments – all obligations of conduct – not only to effectiveness but also to non-discrimination and transparency in enforcement of various laws that might affect the relative competitiveness of parties' firms.

A striking feature of the CPTPP's enforcement obligations is that they are worded quite differently in each chapter, presumably not by accident. This lack of standardization is evident among the provisions that can be described broadly as being concerned with effective enforcement. The competition chapter requires "appropriate action" in response to anti-competitive conduct.[32] The chapter on intellectual property requires enforcement procedures–many of which contemplate initiation by private actors—that permit "effective action."[33] By contrast, the labor and environmental chapters only condemn failure to enforce laws "through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the parties."[34] In addition, the intellectual

[27] CPTPP, *supra* note 10, Arts. 16.1, 16.7. It is important to note that none of the commitments in the competition chapter can be enforced through the CPTPP's dispute resolution provisions. *Id.* Art. 16.9.
[28] *Id.* Arts. 18.71 (enforcement procedures must permit effective action and "be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse"), 18.73 (publication of judicial and administrative rulings as well as data on enforcement practices).
[29] *Id.* Arts. 19.5 (commitment not to fail to enforce labor laws "through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the parties"), 19.8(1) (public awareness of labor laws and enforcement and compliance procedures).
[30] *Id.* Arts. 20.3(4) (commitment not to fail to enforce environmental laws "through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the parties"), 20.7 (public awareness of environmental laws and policies, including enforcement and compliance procedures).
[31] *Id.* 7.10 (audits), 7.11 (import checks), 7.13 (transparency).
[32] *Id.* Art. 16.1.
[33] *Id.* Art. 18.71. This language is based on 41(1) of TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).
[34] CPTPP, *supra* note 10, at Arts. 18.71, 19.5. On the interpretation of this provision see, Final Report of the Panel in the Matter of Guatemala – Issues Relating to the Obligations under Article 16.2.1(a) of the CAFTA-DR, 14 June 2017, https://www.trade.gov/sites/default/files/2020-09/Guatemala%20%E2%80%93%20Obligations%20Under%20Article%2016-2-1%28a%29%20of%20the%20CAFTA-DR%20%20June%2014%202017_1_0.pdf at paras. 107-197.

property chapter contains a proviso that it does not create any obligation to create a separate judicial system for the enforcement of intellectual property rights or "with respect to the distribution of resources between the enforcement of intellectual property rights and the enforcement of law in general."[35] Meanwhile the labor and environmental chapters contain provisos that reserve to states "reasonable" discretion in relation to enforcement decisions and "bona fide" discretion over the allocation of enforcement resources across matters.[36] The proviso in the labor chapter is in turn qualified, however, by a statement that "[I]f a Party fails to comply with an obligation under this Chapter, a decision made by that Party on the provision of enforcement resources shall not excuse that failure."[37]

The CPTPP's treatment of discriminatory enforcement varies even more dramatically across different areas of law. The chapter on competition law explicitly proscribes discrimination on the basis of nationality.[38] The intellectual property chapter requires each party to ensure that its enforcement of intellectual property rights accords foreigners no less favorable treatment than nationals,[39] and that its enforcement procedures "are applied in such a manner as to avoid the creation of barriers to legitimate trade"[40] and are "fair and equitable."[41] By contrast, the chapters on enforcement of labor and environmental laws do not explicitly bar discrimination in enforcement. However, in those contexts discriminatory enforcement strategies that involve enforcement against foreign actors combined with non-enforcement against domestic actors may run afoul of the prohibitions on failing to enforce laws "in a manner affecting trade or investment."

[35] *Id.* Art. 18.71(4).
[36] *Id.* Arts. 19.5(2), 20.3(5).
[37] *Id.* Art. 19.5(2).
[38] *Id.* Art. 16.1.3
[39] *Id.* Art. 18.8(1) (regarding protection—defined in a footnote to include enforcement—of intellectual property rights).
[40] *Id.* Art. 18.71(1).
[41] *Id.* Art. 18.71(3).

By contrast, the CPTPP's transparency provisions are fairly uniform. They all basically require publication of "public" information about enforcement practices and policies, along with legal instruments and decisions.[42] The commitments in the chapter on sanitary and phytosanitary measures go a bit further and require states to permit other parties to monitor enforcement. Specifically, exporting parties must permit audits by importing parties designed to check the effectiveness of regulatory controls.[43]

C. Application of Enforcement Obligations

A variety of international and national bodies interpret the kinds of enforcement obligations surveyed above. The suppression conventions typically provide for disputes to be resolved through arbitration or a reference to the International Court of Justice.[44] Similarly, enforcement obligations contained in the CPTPP and other trade agreements are typically designed to be applied by the same international tribunals charged with resolving disputes about the agreements' other provisions.[45] It is worth noting, however, that formally established tribunals are not the only kinds of international bodies that may play a role in interpreting enforcement obligations. For instance, under the United States–Mexico–Canada Agreement, an international commission must investigate allegations that a state party is failing to effectively enforce its environmental laws before a party can call for the establishment of a panel.[46] Implementation of the FATF's recommendations is assessed through a peer review system.[47] Meanwhile, the U.N. Security Council's Counter Terrorism Committee, supported by its Executive

[42] *Id.* 7.13 (sanitary and phytosanitary), 16.7(3) (competition) 18.9 (intellectual property), 19.8(1) & (4)(b)(iii) (labor), 20.7(1) (environment).
[43] *Id.* Art. 7.10.
[44] Palermo Convention, *supra* note 9, Art. 35.
[45] CPTPP, Chapter 28. However, violations of the obligations in the competition chapter are not subject to the dispute resolution provisions. *Id.*, Art. 16.9.
[46] Office of the U.S. Trade Rep., Exec. Office of the President, Agreement between the United States of America, the United Mexican States, and Canada 05/30/19 Text (2018), Art. 24.27-24.32.
[47] FATF, *Methodology for Assessing Technical Compliance With the FATF Recommendations and the Effectiveness of AML/CFT Systems* (2020), http://www.fatf-gafi.org/home/.

Directorate, provides guidance on the interpretation of enforcement obligations set out in Security Council resolutions administered by the CTC.[48] More generally, even if they only formally bind states, enforcement obligations typically also will be interpreted by the national enforcement agencies responsible for implementing them, national authorities responsible for overseeing those agencies, and private actors who anticipate being the targets of enforcement.[49]

II. EXPLAINING INTERNATIONAL REGULATION OF ENFORCEMENT

There is a simple functional explanation for why international law might be concerned with how states enforce their laws: states' desire to discourage self-interested enforcement that has negative effects on foreign actors.[50] While this basic insight explains the existence of many enforcement obligations in international law, it does not explain their heterogeneity.[51] Variations in the substance and form of enforcement obligations can be explained by the different ways in which self-interested law enforcement can prejudice foreign actors together with the costs of specifying and applying enforcement obligations.

A. The Purposes Behind International Regulation of Enforcement

In general, law enforcement imposes costs on the enforcing state and the actors targeted for enforcement with the aim of inducing the targets to change their behavior in ways that benefit, or at

[48] *Technical guide to the implementation of Security Council resolution 1373 (2001) and other relevant resolutions*, *supra* note 25, 6.

[49] Robert Howse and Ruti G. Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 GLOB'L POLICY 127, 131-132 (2010) (explaining why international norms can prompt interpretation by a range of public and private actors).

[50] For a general discussion of the problems posed by self-interested enforcement in the absence of international agreements regarding crime control, including illustrations, see, Broude & Teichman, *supra* note 6, 810-831; Mariano-Florentino Cuéllar, *The Mismatch Between State Power and State Capacity in Transnational Law Enforcement*, 22 BERKELEY J. INT'L L. 15, 27-28 (2004).

[51] Concern about cross-border harm does not explain the existence of all enforcement obligations. For instance, obligations to enforce human rights norms appear to be based on concerns about upholding human rights regardless of any cross-border effects. Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, 174, 175 (1988); see also Godinez Cruz v. Honduras, Inter-Am. Ct. H.R. (set. C) No. 5, 1 175 (1989) (holding that "States must prevent, investigate and punish any violation of the rights recognized by the Convention").

least reduce harm to, other actors. These costs and benefits will not necessarily be distributed equally across domestic and foreign actors.[52] By definition, states will have a limited interest in pursuing enforcement strategies that create net benefits for foreign actors but net costs for domestic actors. Correlatively, they will have an interest in strategies that generate net costs for foreign actors but net benefits for domestic actors. It should be stressed that for these purposes whether an actor qualifies as foreign or domestic in relation to a particular state does not turn on the actor's nationality or location, but rather on the more elusive question of whether the state has an interest in promoting the actor's welfare.

Foreign actors who are prejudiced by a state's self-interested enforcement strategies have an interest in persuading the state to commit itself to more other-regarding strategies, commitments that might be embodied in international legal obligations such as treaties.[53] The question then becomes: how might a state be persuaded to assume international obligations that require them to refrain from setting enforcement strategy based purely on self-interest?[54] The simplest reason why a state might agree to refrain from self-interested law enforcement is to induce other states to make reciprocal commitments. For instance, imagine two states that derive no direct benefit from sanctioning cross-border fraud committed by actors based in their territory—and in fact find it costly—but will each benefit from the other state's cross-border enforcement efforts. Self-interest, narrowly defined, dictates that each state refrain from sanctioning cross-border fraud. However, it is easy to see that the two states may find it mutually beneficial to commit themselves to sanctioning frauds that affect the

[52] Broude & Teichman, *supra* note 6, 813-4 (observing that activity considered criminal in some jurisdictions may be tolerated elsewhere because it supports the local economy or powerful local actors); Gardner, *supra* note 6, 316.

[53] Broude & Teichman, *supra* note 6, 836-838, 841-843 (suggesting that states can benefit by entering into agreements on maximum and minimum levels of enforcement); Gardner *supra* note 6, 306-308 (states which cannot assert jurisdiction over conduct that occurs beyond its borders have an interest in inducing other states to increase their domestic law enforcement efforts).

[54] Yu discusses the potential for using the strategies identified below to induce enforcement of intellectual property rights. See Yu, *supra* note 6, 523-527.

other state. In return for undertaking costly enforcement, each state will reap the benefit of the other state's enforcement effort.

Promises of reciprocity will not always be sufficient to induce states to abandon self-interested enforcement. A state which finds it unusually costly to undertake enforcement that yields benefits for other states, or which derives relatively little benefit from other states' enforcement efforts, will not be strongly moved to abandon self-interested enforcement by promises of reciprocity. In this case, other states, or perhaps even non-state actors, may have to sweeten the pot with other benefits in order to induce enforcement. Alternatively, they may resort to coercion—i.e., threats to impose costs—in order to extract commitments to enforcement.[55]

B. Functions of Specific Types of Enforcement Obligations

As we have seen, to the extent they involve obligations of conduct, treaties' enforcement obligations often are implemented through provisions that require effectiveness, non-discrimination or transparency. Each of these types of provisions responds to a distinct reason why foreigners might be concerned about a particular state's enforcement strategy.

First, states might fail to take actions that would diminish the welfare of domestic actors but enhance the welfare of foreigners. We can call this practice *under-enforcement*.[56] Provisions that demand effective enforcement seem to respond to this concern. In principle, states also can prejudice foreigners by taking affirmative steps to enforce their laws, as in the case where they enforce so

[55] Broude & Teichman, *supra* note 6, 843-845 (suggesting states may use both positive and negative incentives to induce other states to cooperate in crime control); Gardner *supra* note 6, 308-309 (states may rely on coercion to induce states to increase enforcement against transnational crime); Cuéllar, *supra* note 50, 42 (same); Tarullo, *supra* note 6, 691 (discussing obstacles to and costs of using penalties or rewards to induce prosecution of foreign bribery). See also, Anu Bradford, and Omri Ben-Shahar, "Efficient Enforcement in International Law," 12 *Chi. J. Int'l L.* 375 (2012) (discussing use of rewards and sanctions to influence states' behavior in a variety of contexts).

[56] Gardner, *supra* note 6, 314.

vigorously that they drive criminals to other countries.[57] Interestingly though, it is difficult to find examples of international obligations designed to discourage this kind of *over-enforcement*.[58]

A second concern is that states will take actions which diminish the welfare of foreign actors but enhance the welfare of domestic actors. In competitive settings the most straightforward way to impose costs on foreign actors while simultaneously benefiting domestic actors is to systematically impose greater regulatory burdens on foreign actors than on their domestic competitors. Accordingly, we can call this practice *discriminatory enforcement*. In multilateral settings the concept of discriminatory enforcement includes practices that impose greater regulatory burdens on some foreign actors than on others, thereby placing the burdened actors at a competitive disadvantage. A binding commitment to refrain from discriminatory enforcement has the direct effect of improving the welfare of actors who otherwise would be discriminated against. It also has the indirect effect of discouraging parties who fear discrimination from entering into costly and potentially futile competition to secure favorable treatment through rewards or coercion. Of course, a state which abides by such a commitment will have to incur the costs of ignoring credible rewards or threats. These various forms of discriminatory enforcement are addressed by non-discrimination provisions.

There is a third reason why foreigners might be concerned about a state's enforcement practices. States that practice under-enforcement or discriminatory enforcement sometimes will have an incentive to conceal their behavior from the affected foreign actors—in other words, to engage in *concealed enforcement*. Incentives for concealed enforcement arise in at least two scenarios. First, consider the situation of a state which has been promised a reward in exchange for a commitment to refrain from these practices. One way to capture the reward is to honor its commitment. An even better option is to pretend to honor its commitment and claim the reward without incurring the costs of

[57] Broude & Teichman, *supra* note 6, 811-2, 835.
[58] *Id.*, 836-837.

abandoning self-interested enforcement.[59] Second, consider the situation of a state which benefits from self-interested enforcement but fears that the harmful spillovers will provoke a powerful foreign actor, or a state which represents it, to resort to coercion. This is another situation in which a state considering enforcement will have an interest in surreptitious self-interested enforcement. Transparency provisions respond to concerns about concealed enforcement. These benefits of transparency will, however, have to be weighed against the costs. The most obvious costs of transparency are the direct costs of compiling and publishing information. Transparency in law enforcement also risks giving wrongdoers a strategic advantage, by making it easier for them to calculate how to avoid sanctions.

C. Costs of Alternative Formulations

States must choose whether to formulate their enforcement obligations as obligations of result or obligations of conduct, or something in between. They also must decide which results or types of conduct to provide for. Consistent with the literature on how parties draft ordinary contracts, we can hypothesize that these decisions will be based in part on the costs of successfully drafting and applying different formulations.[60]

Obligations of result are relatively easy to draft, but it typically is difficult to determine whether they have been fulfilled, primarily because the results of law enforcement often are difficult to observe and verify. Regulated actors typically try to conceal prohibited activities such as drug trafficking, fraud,

[59] Gardner, *supra* note 6, 316-317 (states may delay implementation of treaties because of calculation that non-action is in their self-interest).

[60] See sources cited in note 7 *supra*. For applications to treaties see, Vincy Fon & Francesco Parisi, *The Formation of International Treaties*, 3 REV. L. & ECON. 37, 44 (2007) (presenting model of treaty design that includes drafting costs). The literature on rational treaty design does not appear to have focused on how drafting costs and enforcement costs might influence the choice between obligations of result and obligations of conduct. For examples of that literature see generally, ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984) and Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001).

anti-competitive conduct, counterfeiting, pollution or violations of labor rights, and the effects of those kinds of activities may not be easy to observe, particularly when they are felt across borders. An additional concern about obligations of result is that the connection between actions and results is often uncertain and so states that make commitments to achieve specific results take on the potentially undesirable risk of being held liable for poor results for reasons beyond their control.

As for obligations of conduct, drafting is complicated by the fact that it is difficult to specify the conduct required of enforcement officials in advance because enforcement is an extremely complex activity and the appropriate conduct varies depending on the circumstances, including the reactions of the targets of enforcement.[61] Imagine trying to specify everything a state ought to do to enforce its competition laws: the number of investigators, their qualifications, how much time they should devote to investigations in each industry, what penalties they should seek in each case, etc. The amount of detail involved would make the exercise prohibitively costly. And any static set of prescriptions would be vulnerable to strategic avoidance by wrongdoers, which would be particularly costly in the context of a treaty obligation since those are often difficult to revise. As a result, obligations of conduct are often drafted in vague terms.

There are several ways of formulating obligations of conduct that avoid the need for detailed ex ante specification. For example, some enforcement obligations define the required conduct in terms of the results it is likely to achieve. An example is the Palermo Convention's obligation to undertake "effective" enforcement. The effectiveness criterion is easy to specify but can be difficult to apply. People who disagree about causal relationships between enforcement strategies and results may disagree about whether a given enforcement strategy fulfills a commitment to aim at a particular result.

[61] Tarullo, *supra* note 6, 689, 691, 695-6 (citing difficulty of identifying instances of failure to prosecute foreign bribery).

Disagreement of this kind is commonplace.[62] For instance, social scientists disagree about whether and how individuals and firms respond to the fear of state-imposed sanctions, social sanctions, social norms or perceptions of legitimacy. They also disagree about how states' actions shape beliefs about sanctions and the other determinants of compliance with laws.[63] These disagreements relate to how enforcement strategies influence firms' and individuals' decisions not only to comply with the law, but also to monitor investigate, report or conceal the misconduct or potential misconduct of other actors. So, for example, a strategy of granting leniency to firms that have made efforts to investigate and report misconduct and which cooperate with investigations might be perceived in some quarters as ineffective because it undermines incentives to prevent misconduct. Meanwhile, in other quarters the same strategy may be seen as effective because it bolsters firms' incentives to investigate, report and cooperate, facilitates prosecution of individuals, and bolsters the overall legitimacy of the system.[64]

Another way to avoid the need for detailed specification is to define the required enforcement strategy by reference to a strategy employed by either another state or the same state in a different context, hoping that the reference strategy will be reasonably effective in the new context. A simple way to adopt a reference strategy is to copy enforcement obligations from another instrument.[65] Another approach is to specify a benchmark enforcement strategy, for instance by making a commitment to non-discrimination, such as an agreement that cases involving foreign actors (whether as subjects or victims) will receive equal treatment to cases that involve domestic actors. It is easy to specify a benchmark enforcement strategy in this way, but it may not be easy to determine whether a state has deviated from the benchmark. This is another ramification of the fact that enforcement

[62] KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY (2019), 237-240 (grounds for disagreement about regulation of transnational bribery).
[63] *Id.* 176-182.
[64] *Id.* 148.
[65] This kind of copying is sometimes called "functional emulation" in the literature on institutional diffusion. See, Tanja A. Börzel and Thomas Risse, *From Europeanization to Diffusion: Introduction*, 35 WEST EUROPEAN POLITICS 1, 9-10 (2012).

strategies are often complex and context-sensitive. For example, suppose that the foreign firms operating in a country are typically, relative to domestic firms, larger, more likely to comply with consumer protection laws, and less likely to be managed by their owners. In this scenario it might be appropriate for the state to devote fewer enforcement resources to monitoring foreign firms, because they are less likely to engage in misconduct, but to impose higher penalties upon foreign firms because the penalties in cases involving domestic firms are aimed at the owners rather than the firms. Has the state treated foreign firms unequally? The answer depends on whether they have been subjected to the same enforcement strategy as large, relatively compliant, widely-held domestic firms. This is a complex inquiry, and it may involve a great deal of speculation if no domestic firms are comparable to foreign firms along the relevant dimensions.

Finally, some enforcement obligations regulate the process by which enforcement strategies are developed rather than attempting to regulate the content of the strategies. This includes obligations that bar states from considering certain factors when making discretionary enforcement decisions. These kinds of enforcement obligations can serve to impose liability on states whose enforcement authorities knowingly or deliberately seek to achieve a competitive advantage for domestic firms. Evidence of intention to cause a prohibited result (under-enforcement or discriminatory enforcement) can be a useful proxy for more direct evidence. Obligations to exercise enforcement discretion in good faith or in a non-arbitrary way also can serve to impose liability upon states whose decisions are not based on legitimate considerations. A drawback of these more open-ended obligations is that they may place the onus upon states to incur the cost of articulating the reasons for their enforcement decisions. As noted above, this kind of transparency can be costly.

D. Why Do Enforcement Obligations Vary Across States and Areas of Law?

States are likely to vary in terms of whether they are able or willing to commit to any given enforcement strategy. First, binding constitutional or resource constraints might rule out certain types of commitments for certain states. Constitutional prohibitions upon specific investigative techniques or upon excessive or disproportionate sanctions may limit the state's ability to detect and sanction misconduct, and the obstacles to amendment of the relevant provisions often will be insurmountable. At the same time, shortages of skilled prosecutors, investigators or judges may limit the number of cases a state can detect or prosecute. Second, when resources are available but scarce, the costs and benefits of redeploying those resources to focus on activities that harm foreigners will vary across states depending on the nature of the resources and the levels of purely domestic misconduct.[66] For instance, the costs and benefits of deploying a state's financial investigators to investigate corruption rather than the laundering of proceeds of foreign crimes will depend on both the qualifications of the investigators and the society's level of corruption. Third, the same enforcement strategy might yield different benefits in different states because of differences in either societal values or the substantive norms being enforced.[67] For example, a state with relatively high environmental standards generally will find it much more costly to comply with an obligation to "effectively enforce" its laws than a state with weaker standards.[68] Fourth, states also may vary in terms of the rewards or threats they have received from other states, or the value they assign to those rewards or threats. For all these reasons the commitments states are willing to make regarding enforcement practices are likely to vary, both across states and areas of law.

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[66] See e.g., Yu, *supra* note 6, 487-491 (suggesting that developing countries might find it relatively challenging to raise the resources required to enhance intellectual property enforcement).
[67] Broude & Teichman, *supra* note 6, 813 (considering case "when communities in different jurisdictions differ with the respect to the definition of undesirable activity").
[68] Raustalia, *supra* note 6 (arguing that effects of enforcement of U.S. environmental law cannot be analyzed in isolation from the legislation being enforced).

III. FUNCTIONAL INTERPRETATION OF ENFORCEMENT OBLIGATIONS: THE CASE OF THE OECD ANTI-BRIBERY CONVENTION

A. Functional Interpretation of Enforcement Obligations

Understanding why states assume enforcement obligations is an important step toward understanding how those obligations ought to be interpreted. This step from positive to normative analysis is possible because, as is well known, Article 31 of the Vienna Convention on the Law of Treaties ("VCLT") provides that, "[A] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[69] The claim here is simply that the object and purpose of many treaties that contain enforcement obligations is to limit the cross-border effects of self-interested enforcement, including through prevention of under-enforcement, discriminatory enforcement and concealed enforcement.

Interpreting enforcement obligations in light of a treaty's object and purpose typically will entail paying close attention to the text states have adopted to express their commitments.[70] As we have seen, states' purposes in assuming enforcement obligations are likely to vary across states and contexts. In order to enable states to make the widest possible variety of commitments they should be given a verbal palette that allows them to convey as many different shades of meaning as possible. In practice this means that interpretation should involve close attention to the text of each obligation, as well as the surrounding context, without any presumption that similar but slightly different texts were meant to be interpreted uniformly. However, when the meaning of the text is indeterminate, which, is likely to be a common occurrence given the obstacles to specification detailed above, choices between alternative interpretations should be guided by the insight that enforcement obligations are generally

[69] Vienna Convention on the Law of Treaties, May 3, 1969, 1155 U.N.T.S. 331.

[70] Cf. Joost Pauwelyn & Manfred Elsig, *The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals in*, INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART (Jeffrey Dunoff & Mark A. Pollack, eds., 2012), 445 (suggesting differences between interpretive approaches that rely on text, intent and purpose).

intended to mitigate the cross-border effects of self-interested enforcement by preventing under-enforcement, discriminatory enforcement or concealed enforcement.

B. Overview of the OECD Anti-Bribery Convention

The functional approach can be illustrated by reference to the set of enforcement obligations contained in the OECD Anti-Bribery Convention, which happen to be not only vague but also exceptionally ambiguous. The relevant provisions were designed to be interpreted primarily by an international body, the OECD Working Group on Bribery in International Business Transactions (the "Working Group"). However, as we shall see, they also have been interpreted by domestic actors.

The main substantive provisions of the OECD Anti-Bribery Convention require parties to criminalize the bribery of foreign public officials (as well as related forms of improper accounting and, in certain circumstances, money laundering).[71] The adoption of the Convention in 1997 followed years of lobbying and, eventually, coercion, from the United States, which had criminalized foreign bribery and related offenses many years earlier, under the Foreign Corrupt Practices Act of 1977 ("FCPA").[72]

The fact that the United States enacted and enforced the FCPA unilaterally suggests that there are certain situations in which prosecution of foreign bribery is consistent with a state's self-interest. The United States adopted the FCPA in order to make a moral statement to the rest of the world in the aftermath of the Watergate scandal, to avoid rewarding inefficient and unethical US companies, and, perhaps in part, to give its companies an excuse to resist demands for paying bribes for official favors that officials might be willing to provide anyway.[73] In later years the U.S. government came to embrace

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[71] OECD Anti-Bribery Convention, *supra* note 1, at Arts. 1 (offence of foreign bribery), 7 (money laundering), 8 (accounting).
[72] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78a, 78dd-1, 78dd-2, 78ff, 78m, 78o (2006). Tarullo, *supra* note 6, 677-679 (2004) (describing how, beginning in fall 1993, U.S. officials pressured other OECD countries to adopt the Anti-Bribery Convention).
[73] Kevin E. Davis, *Why does the United States Regulate Foreign Bribery: Moralism, Self-Interest of Altruism*?, 67 NYU ANN. SURV. AM. L. 497 (2012).

the FCPA as a way of promoting the United States' enlightened self-interest in combating corruption in foreign countries so as to promote democracy, the rule of law and economic development.[74] The United States regularly enforced the FCPA after its enactment, but the level of enforcement jumped dramatically after the adoption of the OECD Convention.[75]

Although, as the history of the FCPA suggests, enforcement of prohibitions of foreign bribery laws generates some purely domestic costs and benefits, it frequently has differential effects on foreign actors. First, to the extent the targets of enforcement are domestic actors, many of the costs of enforcement are borne domestically. In recent years, substantial penalties—ranging up to over a billion dollars—have been imposed in FCPA cases, and some defendants have been brought to the brink of failure. Domestic actors exposed to this kind of liability are at a competitive disadvantage to foreign actors that do not face similar legal risk. Second, to the extent that it targets foreign rather than domestic actors a state can use enforcement of foreign bribery laws to place the targeted foreign firms at a competitive disadvantage. Third, many of the benefits of enforcement, such as promotion of the rule of law and economic development, accrue to the foreign state represented by the foreign official implicated in the bribery. Not all enforcing states will be sufficiently enlightened to equate fighting corruption in a foreign country with their own self-interest. Fourth, some of the costs of enforcement, specifically, those which flow from deterrence of investment in jurisdictions where it is difficult to do business without bribing public officials, are borne by foreign actors in those high-risk jurisdictions.

The first three factors listed above give states incentives to engage in under-enforcement or discriminatory enforcement of their foreign bribery laws, at least from the perspective of other states interested in stamping out corruption or maintaining a level competitive playing field. That seems like

[74] *Id.*

[75] DAVIS, *supra* note 62, at 47 (depicting the increase in FCPA enforcement actions using data from Stanford Law School's FCPA Clearinghouse Database); Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611 (2017).

an apt characterization of the interests of the parties to the OECD Anti-Bribery Convention.[76] Accordingly, those states had interests in making reciprocal commitments to refrain from under-enforcement and discriminatory enforcement.[77] The last factor listed above actually creates incentives for what high-risk jurisdictions interested in attracting investment would regard as over-enforcement. However, none of the original parties to the OECD Anti-Bribery Convention fit that description and so it would not be surprising if the Convention omitted constraints on over-enforcement.[78] Therefore, in what follows we will assume that the parties intended the Convention's enforcement obligations to be interpreted to constrain under-enforcement and discriminatory enforcement.

C. Enforcement Obligations in the OECD Anti-Bribery Convention

The enforcement obligations in the OECD Anti-Bribery Convention are found in Article 3.1 and Article 5 and read as follows:

> Article 3
>
> Sanctions
>
> 1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties

[76] The first paragraph of the Preamble to the Convention provides:

> Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions;

For further discussion of the motivations behind the adoption of the OECD Anti-Bribery Convention see, Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight Against Corruption*, 31 J. LEGAL STUD. S141 (2002) (arguing that the interplay between the interests discussed here and normative values explain the adoption of the OECD Convention in its particular form); Tarullo, *supra* note 6, at 669-674, 687-688 (2004) (explaining that OECD member governments whose companies had been profiting from bribery had no incentive to adopt enforcement policies that would discourage bribery).

[77] Cullen and Pieth say bluntly, "The fundamental objective of the Convention is to prevent trade advantages being unfairly gained by bribery." Peter J. Cullen and Mark Pieth, *Article 5*, *in* THE OECD CONVENTION: A COMMENTARY 378 (Mark Pieth, Lucinda A. Low & Nicola Bonucci eds., 2d Ed. 2014). See also Mathis Lohaus, TOWARDS A GLOBAL CONSENSUS AGAINST CORRUPTION: INTERNATIONAL AGREEMENTS AS PRODUCTS OF DIFFUSION AND SIGNALS OF COMMITMENT (2019), 70-71.

[78] For a critique of the under-inclusiveness of the OECD Convention see Davis, *supra* note 62, 244.

> shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.
>
> …
>
> Article 5
>
> Enforcement
>
> Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

The parties to the OECD Anti-Bribery Convention adopted it simultaneously with an official set of Commentaries. The Commentary on Article 5 reads as follows:

> 27. Article 5 recognises the fundamental nature of national regimes of prosecutorial discretion. It recognises as well that, in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature. Article 5 is complemented by paragraph 6 of the Annex to the 1997 OECD Revised Recommendation on Combating Bribery in International Business Transactions, C(97)123/FINAL (hereinafter, "1997 OECD Recommendation"), which recommends, inter alia, that complaints of bribery of foreign public officials should be seriously investigated by competent authorities and that adequate resources should be provided by national governments to permit effective prosecution of such bribery. Parties will have accepted this Recommendation, including its monitoring and follow-up arrangements.

In 2009 the parties to the Convention adopted a Recommendation (which was subsequently amended and expanded) that recommended that parties be "vigilant" about ensuring compliance with Article 5 and then went on to provide:

> Complaints of bribery of foreign public officials should be seriously investigated and credible allegations assessed by competent authorities.
>
> Member countries should provide adequate resources to law enforcement authorities so as to permit effective investigation and prosecution of bribery of foreign public officials in international

> business transactions, taking into consideration Commentary 27 to the OECD Anti Bribery Convention.[79]

The OECD Anti-Bribery Convention also includes an important transparency provision, Article 12, which provides for monitoring and follow-up by the Working Group. The Working Group has interpreted its mandate boldly, most notably by developing an elaborate peer review system which results in periodic reports which assess various aspects of parties' compliance with the Convention, including enforcement efforts.[80] Each round of peer reviews is known as a "Phase." Beginning with Phase 3, which was completed in 2014, the process has focused on enforcement.[81] Some scholars believe that since the onset of Phase 3 the peer review system has played a meaningful role in motivating countries to improve their enforcement, primarily by mobilizing the fear of public embarrassment.[82]

As we shall see, the OECD Anti-Bribery Convention's provisions are unclear along several dimensions. In these situations the VCLT recommends that interpreters refer to a treaty's context for guidance.[83] Here that means taking into account, in addition to the text, the OECD Anti-Bribery

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[79] OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (November 25, 2009); OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (November 25, 2009, as amended on November 25, 2021), Recommendations VI-X.

[80] The Working Group also hosts biannual meetings of law enforcement officials, which include reviews of open enforcement actions, and collects and publishes data on parties' enforcement efforts. Davis, *supra* note 62, at 43, 49.

[81] OECD, OECD ANTI-BRIBERY CONVENTION PHASE 3 MONITORING INFORMATION RESOURCES, available online at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Phase3InformationResourcesManualENG.pdf (accessed July 9, 2020).

[82] Nathan M. Jensen and Edmund J. Malesky, Nonstate Actors and Compliance with International Agreements: An Empirical Analysis of the OECD Anti-Bribery Convention, 72 INT'L ORG. 33 (2018) (finding that after the onset of Phase 3 peer reviews, firms from countries that signed the OECD Convention reduced the frequency of bribery in Vietnam compared to nonsignatories); Matthew Stephenson, Expansion of the OECD Anti-Bribery Convention: A Skeptical View, Global Anticorruption Blog, March 25, 2014, https://globalanticorruptionblog.com/2014/03/25/expansion-of-the-oecd-anti-bribery-convention-a-skeptical-view/ (claiming that "lots of well-informed people" believe that the OECD Convention has had "a big effect" on anticorruption laws and enforcement patterns, "primarily because of its rigorous peer review system").

[83] *Supra* note 69.

Convention, contemporaneous instruments such as the Commentaries, and subsequent agreements and practices of the parties.[84] Since all of the parties to the Convention are members of the Working Group its recommendations and statements can be regarded as evidence of 'subsequent agreements and practices of the parties.' However, the Convention does not provide any mechanism for resolving disputes about its interpretation or application, and the parties' agreements and practices provide limited guidance in those areas. Accordingly, it will be helpful to refer to the Convention's object and purpose.

The ambiguities in the OECD Anti-Bribery Convention's enforcement provisions begin with the first sentence of Article 5: "[I]nvestigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party." Does this provision permit a state to deviate from domestic standards in a foreign bribery case? For example, what if prosecutors in foreign bribery cases abandon a standard practice of granting leniency to first-time corporate offenders? Taken literally, the text of Article 5 seems to prohibit enforcement strategies that deviate from the domestic benchmark, even if they promise to be more effective. But there is no obvious reason why the parties would want to prohibit one another from investigating and prosecuting foreign bribery more effectively than they investigate or prosecute domestic bribery, at least when the target is a domestic firm. In other words, it is implausible that the domestic benchmark defines an upper bound on the permissible effectiveness of enforcement. Two alternative interpretations seem more plausible, taking into account both the commentary on Article 5 and the reasons why treaties typically include commitments regarding law enforcement. First, states are not required (but are permitted) to adopt enforcement strategies precluded by internal legal norms of general application, such as constitutional limitations on investigative practices. Second, states are required to investigate and prosecute foreign bribery at least as effectively as comparable domestic cases. The first of these

[84] *Id.*

interpretations treats domestic standards as a safe harbor against claims of under-enforcement rather than the benchmark for an affirmative obligation. The second interpretation creates a commitment not to discriminate between foreign bribery cases and other cases. Both of these purposive interpretations of Article 5 seem preferable to the more literal interpretation.

Turning to the second sentence of Article 5, the reference in the first clause to "national economic interest" is both ambiguous and vague. The ambiguity lies in the fact that the concept of "national economic interest" admits at least three distinct interpretations. First, the prohibition on being influenced by considerations of "national economic interest" could reasonably mean that enforcement agencies are permitted to consider only foreign economic interests.[85] This would permit a state to treat a firm leniently in order to, say, preserve foreign jobs, but not to preserve domestic jobs. A second interpretation would avoid this odd result by reading the clause to bar consideration of any economic interests, foreign or domestic. This reading might be consistent with the moralistic notion that bribery is so reprehensible that it ought to be condemned at all costs but would require ignoring the provision's explicit reference to "national" economic interest. Alternatively, a third possibility is that while states are barred from considering exclusively national economic interests they are permitted to consider 'national and foreign economic interests.' Or to put it another way, states are barred from considering 'nationalistic' economic interests. Under this last interpretation a state could treat a firm leniently in order to preserve domestic jobs so long as it would grant the same leniency in order to preserve foreign

[85] Cullen and Pieth appear to favor this interpretation and offer a detailed analysis of what count as "national" interests.

> The term 'national' refers to the domestic interests of the state Party concerned, where the state Party itself is involved in the transaction, for example, as a seller or exporter. It clearly also encompasses the economic activities of private undertakings and corporations incorporated under that state Party's laws and operating from its territory. Multinational corporations are also covered by this definition, in so far as their closest association is with a particular state Party. They are a major target of the OECD Convention, as their activities are likely to be global and export oriented.

Cullen and Pieth, *supra* note 77, at 380.

jobs. In other words, the clause could be read as a commitment not to discriminate in favor of domestic economic interests.

Standard interpretive doctrines provide little guidance on whether this clause bars all consideration of national economic interest or only prohibits exclusive consideration of national economic interests. Unlike the moralistic reading, both interpretations are consistent with the ordinary meaning of the Convention's terms. The Commentary is of little assistance because it says that the intention was to rule out 'unprofessional', 'improper' and 'political' considerations, but it is unclear whether those include economic interests simpliciter.

To resolve this interpretive dilemma it is helpful to reflect on the reasons why states typically make commitments regarding law enforcement. Both interpretations provide protection against the most important forms of discriminatory enforcement, namely, those aimed at promoting domestic economic interests. The difference is that where foreign economic interests are not in play, the bar on all consideration of national economic interests would also serve as a crude way of restricting under-enforcement. For instance, it would bar a country from protecting a national champion simply to protect local jobs regardless of whether there is evidence that a firm with weaker local ties would have been treated differently. It is unlikely that the parties to the OECD Convention intended for Article 5 to target under-enforcement with such a sweeping prohibition. While there is considerable evidence that they were interested in discouraging patterns of enforcement that would give some parties' firms advantages over others (i.e. discriminatory enforcement), it is not clear that they were committed to incurring substantial economic costs to prosecute foreign bribery.[86] More specifically, nothing in the text signals that the parties intended to commit themselves to incurring unlimited economic costs to prosecute bribery. A more plausible conclusion is that Article 5 was not intended to regulate under-enforcement at all. Rather, the parties addressed under-enforcement in the Commentary and the 2009

[86] *Id.*

Recommendation by making commitments to take complaints "seriously" and to provide "adequate" resources to ensure "effective" investigation and prosecution.[87]

Interpretation of Article 5's prohibition on consideration of "national economic interest" is complicated by vagueness as well as ambiguity. The text does not specify either what counts as an economic interest or when the economic interest of a firm or an individual counts as a "national" interest. A purposive interpretation suggests, however, that the parties intended to include any economic considerations that might lead a state to enforce its laws in a way likely to prejudice foreign actors. Wealthy democratic states like the members of the OECD are typically motivated by a range of economic considerations. They are likely to be sensitive to economic benefits that flow directly to the state, such as revenues from state-owned enterprises or taxes collected from firms and individuals in the jurisdiction. They also are likely to respond to changes in the economic fortunes of potential voters or donors. Consequently, national economic interests should be interpreted broadly to include not only the interests of state-owned enterprises or government agencies, but also the economic welfare of citizens as well as firms with ties to the state.[88]

Article 5's second sentence condemns states whose investigation or prosecution of foreign bribery is influenced by "the potential effect upon relations with another State." The purpose of this provision is relatively clear. It seems to apply whenever a state's enforcement is influenced by threats or offers, or the expectation of retaliation or rewards, from another state.[89] Banning this form of discrimination

[87] OECD, *supra* note 81.
[88] Cullen and Pieth, *supra* note 77, 380 (favoring a similarly broad interpretation of the term national economic interest). *Cf.* Canada, Parliament, House of Commons Standing Committee on Justice and Human Rights, *Evidence*, 42 Parl. 1st Sess., No. 133 (25 February 2019, 17:13-17:25) (Kenneth Jull) https://www.ourcommons.ca/DocumentViewer/en/42-1/JUST/meeting-133/evidence; Donald Johnston, "Was SNC-Lavalin Denied a Deal All Because of Three Simple but Misunderstood Words?", *Financial Post* (22 March 2019), online: <business.financialpost.com/opinion/was-snc-lavalin-denied-a-deal-all-because-ofthree-simple-but-misunderstood-words> (arguing that the term economic interest did not include the interest in preserving jobs).
[89] *Id.* at 382-3.

presumably is meant to both encourage states to maintain a high level of enforcement and to discourage unproductive competition for favorable treatment. Ironically, this is the only part of Article 5 that has received substantial amounts of judicial attention. In December 2006, the United Kingdom closed a foreign bribery investigation aimed at BAE, a major British defense contractor, in response to a threat from Saudi Arabia to terminate cooperation in counter-terrorism and other matters.[90] The government was convinced that as a result of the Saudis' threat "British lives on British streets were at risk."[91] There is little doubt that the decision to terminate the investigation amounted to a violation of Article 5, at least if the text is given its ordinary meaning.[92] There were, however, reasonable arguments that i) it was inappropriate for the British courts to enforce the commitment, ii) there was no violation because the provision should be interpreted in light of the object of the parties to the Convention, and if they had turned their minds to the issue the parties would have excused compliance in a case where it would cause such hardship or iii) compliance was such a hardship that it should have been excused under the doctrines of necessity or distress.[93] When the UK government announced that it was terminating its investigation of BAE, the OECD Working Group expressed "serious

[90] *R (On The Application of Corner House Research & Ors) v The Serious Fraud Office* [2008] UKHL 60, [¶22] (appeal taken from EWHC) ["Corner House Research"].
[91] *Id.* ¶14.
[92] Susan Rose-Ackerman and Benjamin S. Billa, *Treaties and National Security*, 40 NYU J. INT'L L. & POL. 437, 458 (2013).
[93] The first argument was adopted by the court of first instance as well as by Lord Brown of Eaton-Under-Heywood in the House of Lords. *R (On The Application of Corner House Research & Campaign Against Arms Trade) v. Serious Fraud Office* [2008] EWHC 714 (Admin), [¶ 106]; Corner House Research, [¶65]-[¶68]. The second argument was adopted by the UK's Attorney-General, who said in Parliament on February 1, 2007:

> "I do not believe that the Convention does, or was ever intended to, prevent national authorities from taking decisions on the basis of such fundamental considerations of national and international security. I do not believe that we would have signed up to it if we had thought that we were abandoning any ability to have regard to something as fundamental as national security, and I do not believe that any other country would have signed up either."

HL Debates, Hansard, col 378, quoted in Corner House Research, ¶46. The third argument is discussed in Rose-Ackerman and Billa, *supra* note 92, 446-451.

concerns as to whether the decision was consistent with the OECD Anti-Bribery Convention."[94] After the U.K.'s next full peer review the Working Group said, "The lead examiners are disappointed that the UK did not consider re-opening the Al Yamamah investigation."[95]

The final clause of Article 5 is a bit mysterious. It bars states from being influenced in investigation or prosecution by "the identity of the natural or legal persons involved." A person's identity is a subset of attributes—name, size, location, national origins, social ties, age, etc.—that serves to distinguish that person from other persons. This language was clearly intended to bar states from considering some identifying attributes in the course of decisions about investigation or prosecution, but it is unclear which ones. The commentary to Article 5 suggests that the purpose of this provision is to rule out "improper" "political" influences. Unfortunately, neither of these terms is self-defining. It also is unclear which persons are considered to be "involved" in an investigation or prosecution. Is it improper to consider the identity of just the target or is consideration of the identity of the victim also proscribed? The ambiguity of this provision is problematic because states might have strong reasons for adopting enforcement strategies that discriminate on the basis of some identifying attributes. For example, it may be appropriate to treat large consumer products firms differently when it comes to initiation of criminal proceedings on the grounds that the stigma associated with criminal proceedings is relatively damaging for them. Therefore, a state could reasonably argue that differential treatment along this dimension is necessary to ensure that consumer firms are exposed to the same regulatory burdens as other firms. The purposive approach to interpretation allows room for consideration of these arguments.

[94] Press Release, OECD, OECD to Conduct a Further Examination of UK Efforts Against Bribery (March 3, 2007), available at https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/oecdtoconductafurtherexaminationofukeffortsagainstbribery.htm.
[95] OECD Working Grp., *Phase 3 Report on Implementing The OECD Anti-Bribery Convention* [Phase 3 Report] *in the United Kingdom*, 39 (March 2012).

A review of the OECD Working Group's monitoring and reporting suggests that its members are deeply interested in regulating one another's enforcement activities.[96] The Working Group is particularly active in monitoring for under-enforcement. Its peer review reports occasionally criticize countries for imposing low financial penalties on corporate defendants.[97] They also regularly compare the number of foreign bribery cases investigated or prosecuted to the reviewers' perceptions of the number of cases that could have been investigated or prosecuted.[98] The reports explicitly indicate that perceptions of the number of potential investigations or prosecutions are based on the size of the country's economy and its economic ties to high-risk countries and sectors.[99] The Working Group's peer review reports also routinely evaluate the resources and expertise of bodies charged with enforcement, often concluding that they are inadequate.[100] Data on prosecutions for domestic bribery are sometimes used to assess either a country's relative commitment to sanctioning foreign bribery or its overall commitment to enforcement of anti-corruption laws.[101]

The Working Group's monitoring also captures discriminatory enforcement, or at least factors that might enable it. The peer review reports frequently call out institutional arrangements that might permit improper considerations to influence enforcement—usually ones which permit elected officials

[96] See generally, Rachel Brewster and Christine Dryden, Building Multilateral Anticorruption Enforcement: Analogies between International Trade & Anti-Bribery Law, 57 VA. J. INT'L L. 221 (2018), 240-242 (describing discussion of enforcement in peer review reports). For a systematic review of the OECD Working Group's monitoring of parties' settlements with corporate defendants see, Radha Ivory and Tina Søreide, *The International Endorsement of Corporate Settlements in Foreign Bribery Cases*, 69 INT'L & COMP. L. Q. 945 (2020).

[97] *E.g.*, OECD Working Grp., *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada*, 22 (March 2011); OECD Working Grp., *Phase 2 Report on Implementing the OECD Anti-Bribery Convention in Latvia*, 70 (October 2015). See generally, Ivory and Søreide, *supra* note 96, 963.

[98] *E.g.*, OECD Working Grp., *Phase 3 Report on the Netherlands*, 9-11 (Dec. 2012); OECD Working Grp., *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Japan*, 10-12 (Dec. 2011).

[99] *E.g.*, OECD Working Grp., *Phase 3 Report on France*, 11 (Oct. 2012); OECD Working Grp., *Phase 3 Report in Turkey*, 15 (Oct. 2014).

[100] *E.g.*, OECD Working Grp., *Phase 3 Report on Belgium*, 32 (Oct. 2013) (reporting a "flagrant lack of resources"); OECD Working Grp., *Phase 3 Report on Finland*, 21 (Oct. 2010) (reporting a lack of specialized training and guidance on prosecuting and investigation foreign bribery).

[101] *E.g.*, OECD Working Group, *Phase 2 Report on Mexico,* 43 (Sept. 2004) and *Phase 3 Report on Mexico*, 21-23 (Oct. 2011).

or Cabinet ministers to influence prosecutorial decisions.[102] The reports occasionally raise concerns about the handling of specific cases and whether they may have been improperly influenced by "Article 5 factors."[103] Strikingly though, only a handful of reports—in particular, the Phase 3 reports on Argentina, Portugal and South Africa—refer to specific improper considerations.[104] Accordingly, although the Working Group's practices make it clear that the parties are concerned about under-enforcement and discriminatory enforcement, they shed little light on the meaning of the Convention's most ambiguous provisions. The Working Group's general reluctance to invoke the provisions on specific improper considerations also may be a sign that the language of those provisions is not particularly helpful.

D. SNC-Lavalin

The potential significance of Article 5 of the OECD Anti-Bribery Convention and its ambiguities were dramatically illustrated in the course of Canada's SNC-Lavalin affair.

SNC-Lavalin Group Inc. ("SNC-Lavalin") is a large engineering and construction company headquartered in Montreal. On February 19, 2015, the Royal Canadian Mounted Police (the "RCMP") charged SNC-Lavalin and two related companies, with bribery of foreign public officials and fraud.[105] The foreign bribery charges stemmed from allegations that SNC-Lavalin had paid bribes to Libyan

[102] *E.g.*, OECD Working Grp., *Phase 3 Report on Austria*, 31-32 (Dec. 2012) (taking issue with the authority and practice of the Minister of Justice ordering further investigative steps at the end of an investigation); OECD Working Grp., *Phase 3 Report on Bulgaria*, 12 (Mar. 2011) (taking issue with the lack of safeguards to preventing prosecutors from considering Article 5 factors).

[103] This occurred in the Phase 3 reports for Argentina, Australia, Chile, Denmark, Greece, Portugal, Spain, South Africa and the United Kingdom. See also, Ivory and Søreide, *supra* note 96, 962.

[104] OECD Working Grp., *Phase 3 Report on Argentina*, 33-34 (Dec. 2014) (government officials contacting judges and prosecutors to exercise political influence during the course of an investigation); OECD Working Grp., *Phase 3 Report in Portugal*, 27-29 (June 2013) (considering economic and diplomatic ties to other countries); OECD Working Grp., *Phase 3 Report on South Africa*, 34-42 (Mar. 2014) (considering economic and political influence).

[105] Royal Canadian Mounted Police, *RCMP Charges SNC-Lavalin* (February 19, 2015), http://www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2015/0219-lavalin-eng.htm

public officials between 2001 and 2011. If convicted of foreign bribery the companies would be barred from contracting with the government of Canada for 10 years and the government would be entitled to cancel existing contracts.[106] At the time, SNC-Lavalin held several substantial contracts with the federal government.[107]

By 2016, SNC-Lavalin had begun to lobby several cabinet ministers, including Prime Minister Justin Trudeau, for favorable treatment. As a first step, the company pressed the government to enact legislation that would permit organizations charged with certain offences, including foreign bribery, to avoid a criminal trial and conviction by negotiating a "remediation agreement." Several other countries, including the United States and the United Kingdom, permitted these kinds of arrangements, often known as "deferred prosecution agreements", and by 2016 the U.S. Department of Justice had begun to rely upon them extensively in enforcement of the FCPA.[108] In 2018, after a period of consultation, the Trudeau government introduced and passed legislation amending the Criminal Code to provide for remediation agreements.[109] The amendments were included in an omnibus budget bill, a sign that the government wished to have them enacted quickly.[110]

One of the stated objectives of the amendments was "to reduce the negative consequences of the wrongdoing for persons – employees, customers, pensioners and others – who did not engage in the

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[106] Government of Canada, *Ineligibility and Suspension Policy* Part C(2)(b), C(3)(e), D(I)(2) and (3) (effective as of July 3, 2015), available at https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-2015-07-03-eng.html.
[107] Mario Dion, TRUDEAU II REPORT (2019), ¶28.
[108] OECD, RESOLVING FOREIGN BRIBERY CASES WITH NON-TRIAL RESOLUTIONS: SETTLEMENTS AND NON-TRIAL AGREEMENTS BY PARTIES TO THE ANTI-BRIBERY CONVENTION 13 (2019) www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm (Fifteen members of the OECD convention have used non-trial resolution mechanisms to resolve a foreign bribery case against at least one natural or legal person.); NEGOTIATED SETTLEMENTS IN BRIBERY CASES: A PRINCIPLED APPROACH (Tina Søreide & Abiola Makinwa eds., 2020); Brandon Garrett, *The Path of FCPA Settlements*, *in* NEGOTIATED SETTLEMENTS IN BRIBERY CASES, *supra* note 25.
[109] Government of Canada, EXPANDING CANADA'S TOOLKIT TO ADDRESS CORPORATE WRONGDOING: WHAT WE HEARD (February 2018), https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/documents/rapport-report-eng.pdf; *Budget Implementation Act, 2018, No. 1*, S.C. 2018, c. 12, s. 404.
[110] TRUDEAU II REPORT, *supra* note 107, ¶¶ 41, 44, 254, 255.

wrongdoing, while holding responsible those individuals who did engage in that wrongdoing."[111] A remediation agreement would have the effect of staying charges against the firm while providing for an admission of wrongdoing, penalties, reparations, cooperation with enforcement authorities and, where appropriate, adoption of specified compliance measures and appointment of an independent monitor.[112] Crucially, a firm that entered into a remediation agreement would avoid a criminal conviction and so would not be automatically barred from government contracting.

The new provisions permitted a prosecutor to negotiate a remediation agreement with an organization accused of foreign bribery and other specified offences if certain conditions were met. The conditions included the consent of the relevant Attorney General and that the prosecutor be "of the opinion that negotiating the agreement is in the public interest and appropriate in the circumstances."[113] The prosecutor was required to consider a long list of factors for the purposes of forming this opinion. More importantly for present purposes, the legislation provided that for organizations accused of foreign bribery, "the prosecutor must not consider the national economic interest, the potential effect on relations with a state other than Canada or the identity of the organization or individual involved."[114] This provision was clearly designed to track the language of Article 5 of the OECD Anti-Bribery Convention and similar language in the Code of Practice for deferred prosecution agreements issued by the U.K. enforcement authorities.[115] The legislation provides no indication how to reconcile the explicit prohibition on considering the national economic interest with its stated objective of protecting innocent employees, customers and pensioners.

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[111] Criminal Code, s. 715.31(f).
[112] *Id.* ss. 715.3(1) ("remediation agreement"), 715.34.
[113] *Id.* s. 715.32(1).
[114] *Id.* s. 715.32(3).
[115] Serious Fraud Office and Crown Prosecution Service, DEFERRED PROSECUTION AGREEMENTS CODE OF PRACTICE CRIME AND COURTS ACT 2013 (2014), ¶ 2.7.

SNC-Lavalin's hopes of benefitting from a remediation agreement were dashed by the Director Public Prosecutions (the "DPP"), the head of Canada's prosecution service, who, at the beginning of September 2018, decided not to negotiate a remediation agreement with the company.[116] The Attorney General at the time refused to overrule this decision, citing the principle of prosecutorial independence.[117] In the Canadian tradition, the Attorney General was an elected member of Parliament appointed to her cabinet position by the Prime Minister. The applicable quasi-constitutional principles provided that the Attorney General was solely responsible for decisions on whether to authorize criminal prosecutions. She was entitled to consult other members of the government but was not to be put "under pressure" by them.[118]

After being informed of the DPP's decision, SNC-Lavalin redoubled its lobbying efforts. It led the Prime Minister to believe that if it was convicted and barred from federal contracting it would be compelled to reduce its operations in Canada, at the cost of approximately 9,000 Canadian jobs.[119] The Prime Minister and other members of his cabinet feared that this would have broad economic repercussions, especially in Quebec where the job losses would be concentrated. They also worried about the political ramifications, at both the federal and provincial levels of government. They were concerned that a negative economic shock of this kind could affect the upcoming provincial election in Quebec. It was also significant that the Prime Minister's own riding was in Montreal, in close proximity to SNC-Lavalin's headquarters.[120] Over the course of several months, the Prime Minister and other cabinet ministers, with the support of SNC-Lavalin's lobbyists, attempted to persuade the Attorney-General to reconsider her decision, but to no avail.[121] In January 2019, the Prime Minister

[116] TRUDEAU II REPORT, *supra* note 107, ¶ 55.
[117] *Id.* ¶ 65-85.
[118] *Id.* ¶¶ 321-324 (citing the so-called Shawcross doctrine and Krieger v. Law Society of Alberta, [2002] 3 S.C.R. 372).
[119] *Id.* ¶ 307.
[120] *Id.* ¶¶ 88, 99, 104, 106,160, 266, 331
[121] *Id.* ¶¶ 86-223, 252-286.

moved the Attorney General to another ministry. She eventually resigned from the Cabinet and was expelled from the governing Liberal Party's caucus.

The following month, news of the lobbying effort was reported in the media.[122] The next day, at the request of opposition politicians, Canada's Conflict of Interest and Ethics Commissioner opened an investigation into whether Prime Minister Trudeau had violated conflict of interest legislation by seeking to influence the Attorney General "to improperly further another person's private interests."[123] A Parliamentary committee also launched an inquiry and held a series of high-profile hearings.[124] The OECD Working Group issued a press release saying that it was "concerned" about the allegations and would monitor the proceedings.[125] In August 2019, the Conflict of Interest and Ethics Commissioner issued a report concluding that the Prime Minister had broken the law.[126] The next month the government called an election. In October, Trudeau's Liberal Party lost its Parliamentary majority but managed to form a minority government. The scandal was widely perceived to have caused substantial political harm to the Liberal Party.[127]

In December 2019, two months after the election, a subsidiary of SNC-Lavalin pleaded guilty to a single count of fraud. It paid a fine of Canadian $280 million, by far the largest corporate penalty for

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[122] Robert Fife, Steven Chase, *Sean Fine, PMO pressed Wilson-Raybould to abandon prosecution of SNC-Lavalin*, The Globe and Mail (February 7, 2019).
[123] TRUDEAU II REPORT, *supra* note 107, ¶¶ 1-4.
[124] Canada, Parliament, House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 42nd Parl, 1st Sess, No 129 (13 February 2019), https://www.ourcommons.ca/DocumentViewer/en/42-1/JUST/meeting-129/evidence (passing a motion to begin inquiry and hearings on government discussions with the Attorney General about the SNC-Lavalin prosecution).
[125] OECD, *OECD Will Follow Canadian Proceedings Addressing Allegations of Political Interference in Foreign Bribery Prosecution* (March 11, 2019), https://www.oecd.org/newsroom/oecd-will-follow-canadian-proceedings-addressing-allegations-of-political-interference-in-foreign-bribery-prosecution.htm
[126] TRUDEAU II REPORT, *supra* note 107.
[127] *E.g.*, Ian Austen, *Corruption Case That Tarnished Trudeau Ends With SNC-Lavalin's Guilty Plea*, N.Y. TIMES, Dec. 18. 2019, https://www.nytimes.com/2019/12/18/world/canada/snc-lavalin-guilty-trudeau.html ("Mr. Trudeau won re-election in October, but without a voting majority for his Liberal Party in the House of Commons, which analysts attributed to the fallout from the SNC-Lavalin case."); John Ibbitson, *Liberals' Hopes of Containing SNC-Lavalin Scandal Fail, as Trudeau Becomes Focus*, GLOBE & MAIL, https://www.theglobeandmail.com/politics/article-liberals-hopes-of-containing-snc-lavalin-scandal-fail-as-trudeau/ (discussing the political fallout from the SNC-Lavalin scandal for the Liberal Party).

fraud or foreign bribery in Canadian history, and was subjected to a three-year probation order.[128] SNC-Lavalin issued a press release stating that it did not expect the sanction to affect its ability to bid on any future projects.[129] A few days before the company's guilty plea, a jury convicted one of its former senior executives on related charges of fraud and corruption. He was sentenced to a term of imprisonment of eight years and six months, which was also of record severity for Canada.[130]

Was the OECD Working Group right to be concerned about whether the Trudeau government's handling of the SNC-Lavalin affair was compatible with Article 5? Was it appropriate for the DPP and the Attorney-General to refuse to consider evidence of potential job losses in interpreting the Canadian legislation based on Article 5? Perhaps. The functional approach to interpretation suggests that the key issue is whether there was evidence of either under-enforcement or discriminatory enforcement.

The evidence of under-enforcement is not equivocal. On the one hand, the facts that liability was imposed on a subsidiary rather than the parent company and that the company was allowed to avoid the stigma of being convicted of bribery certainly reduced the impact of the Canadian government's sanctions.[131] On the other hand, the fact that the case against SNC-Lavalin ultimately ended with the

[128] John Boscariol, Robert A. Glasgow & Andrew Matheson, *SNC-Lavalin Pleads Guilty in Canada's Most Significant Foreign Corruption Case to Date*, MCCARTHY TETRAULT: TERMES DE L'ECHANGE (Dec. 20, 2019) https://www.mccarthy.ca/fr/node/61561?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration (noting SNC's penalty as the largest for fraud or foreign bribery in Canadian history); Press Release, Public Prosecution Service of Canada, SNC Lavalin Inc. Pleads Guilty to Fraud (Dec. 18, 2019), https://ppsc-sppc.gc.ca/eng/nws-nvs/2019/18_12_19.html.

[129] SNC-Lavalin, *SNC-Lavalin Group Settles Federal Charges*, December 18, 2019, available at https://www.snclavalin.com/en/media/press-releases/2019/18-12-2019.

[130] Lawrence E. Ritchie, Stéphane Eljarrat, Malcolm Aboud & Chelsea Rubin, *Turning the Page? SNC Pleads Guilty to Fraud Relating to Libya Work; Former Executive Sentenced for Fraud, Corruption*, OSLER: RISK MGMT. & CRISIS RESPONSE BLOG (Jan. 17, 2020), https://www.osler.com/en/blogs/risk/january-2020/turning-the-page-snc-pleads-guilty-to-fraud-relating-to-libya-work-former-executive-sentenced-for#:~:text=Bebawi%20Conviction,the%20company's%20activities%20in%20Libya.

[131] Steven Bittle & Jennifer Quaid, *Captured or Complicit? SNC-Lavalin and the Normalization of Corruption in Canada*, in REGULATORY-LEGISLATIVE-POLICY CAPTURE: ROLLING BACK CORPORATE POWER, RESTORING PUBLIC INTEREST AND DEMOCRACY (Bruce Campbell ed., 2021), 142.

imposition of record-breaking penalties makes it difficult to find a basis for concern about under-enforcement.

The mere fact that a prosecutor seeks a negotiated resolution instead of a conviction does not necessarily mean that the level of enforcement has been reduced in any meaningful sense. In principle, a negotiated resolution can have the same deterrent and rehabilitative effects as a criminal conviction, but with less harm to innocent parties. There is no reason to believe that the parties to the OECD Anti-Bribery Convention intended to rule out this kind of win-win option. Potential victims of bribery also should have no objection. All the parties to the Convention as well as potential victims have an interest in permitting prosecutors to pursue the objective of discouraging foreign bribery at the lowest cost to innocent parties. It is implausible that they would prefer an interpretation of Article 5's prohibition on consideration of national economic interest that rules out such an approach simply because the innocent parties happen to be in the same country as the enforcement agency. Or to put it another way, no other party to the Convention would have an interest in offering Canada inducements to substitute convictions for negotiated resolutions.

It is worth noting that a contrary conclusion would call into question enforcement practices in the United States, which is by far the most active enforcer of prohibitions on foreign bribery and which pioneered the use of negotiated resolutions in foreign bribery cases. U.S. federal prosecutors' internal guidelines explicitly instruct them to consider the adverse impact of a criminal conviction upon innocent parties when deciding whether to seek a conviction or a negotiated resolution.[132]

A more difficult question is whether the SNC-Lavalin affair involved discriminatory enforcement. It is impossible to know for sure without being able to compare the handling of this case to the handling of an identical case involving a foreign firm. Although the Prime Minister's lawyers argued

[132] United States Department of Justice, JUSTICE MANUAL, 9-28.300, 9-28.1100, available at https://www.justice.gov/jm/justice-manual.

to the contrary, consideration of potential job losses ought to qualify as consideration of economic interests.[133] However, the fact that the Trudeau government tried to take economic interests into account when deciding how to prosecute SNC-Lavalin is not dispositive. A prosecutor who learns that 9,000 jobs will be lost if she obtains a conviction against a firm can take that into consideration and decide to negotiate an alternative resolution of the case without discriminating between foreign and domestic firms. So long as the prosecutor gives the same consideration to jobs at risk in Canada and jobs that might be lost elsewhere then there is no discrimination against foreign interests. To be clear though, non-discrimination in this context implies that economic gains as well as losses should be weighed without regard to national interest. This might be relevant if a conviction will cause the firm to shut down its operations in one part of Canada but to reopen them in another location. Our hypothetical Canadian prosecutor may wish to consider whether economic losses from conviction are offset by economic gains. If she does, then the offset should be applied without regard to whether those gains accrue to Canadians or foreign interests, especially if those foreigners are based in states which are party to the Convention.

All of this suggests that Article 5's prohibition on being influenced by consideration of national economic interest should not necessarily have been an obstacle to offering SNC-Lavalin a remediation agreement. That language should have been interpreted to bar consideration of exclusively national economic interests, but not of all economic interests. It follows that any domestic legislation intended to implement this aspect of Article 5 should have been interpreted in the same way.

The Trudeau government may, however, have violated other provisions of Article 5. Recall that the opening sentence states that "[I]nvestigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party." If this provision imposes an affirmative obligation (as opposed to creating a safe harbor for states that abide by standard

[133] TRUDEAU II REPORT, *supra* note 107, ¶¶ 241, 310-313.

practices), then to the extent the Trudeau government violated Canadian norms of prosecutorial independence—which it did, according to the Conflicts of Interest and Ethics Commissioner—it violated Article 5. This is especially true if the violation was motivated by partisan political reasons, since the Commentary on Article 5 indicates that it is intended to protect prosecutorial independence against influences by "concerns of a political nature." Similarly, if the government was motivated by the desire to protect SNC Lavalin in particular, and would not have been equally solicitous of another firm, then it might have violated Article 5's bar on being influenced by "the identity of the natural or legal persons involved". These kinds of deviations from standard decision-making processes represent at least circumstantial evidence of discrimination or under-enforcement. Accordingly, it is not difficult to understand why parties to the OECD Anti-Bribery Convention would want to prohibit these kinds of behavior.

CONCLUSION

This article offers a theory of both why states make commitments to one another regarding enforcement of laws with cross-border effects and how those commitments ought to be interpreted. The thesis can be stated simply: states are primarily concerned about under-enforcement, discriminatory enforcement or concealed enforcement and so enforcement obligations contained in treaties should, with careful attention to details that can be gleaned from the text about the parties' specific purposes, be interpreted to address those concerns.

The simplicity of this formulation is misleading. The range of possible enforcement strategies is so broad, their effects are so uncertain, and the factors that might induce states to make commitments to deviate from self-interested enforcement strategies are so diverse, that it often will be difficult either to reduce commitments to clear terms in advance or to ascertain the parties' objectives after a dispute has arisen. Nonetheless, the discussion of Article 5 of the OECD Convention reveals at least a few

situations in which the suggested interpretive approach makes some legal conclusions more plausible than others.