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The Concept of International Law Reform and the Case of Negotiated Settlements in Foreign Bribery Matters

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Abstract

The concept of reform is present in its absence in the literature on international law-making and legal theory. The international legal system is subject to pressures for change. Its actors respond to those pressures with projects for legal improvement. Scholars comment on those malfunctions and attempted fixes, some elaborating general frameworks for appraisal, others conceiving of transnational law-making processes and yet others deconstructing the very discourse of international legal progress. However, as a group, international lawyers have baulked at the concept of reform. That aversion has been attributed to our discipline's defensive posture and the international legal system's lack of machinery for efficiently replacing outdated principles and rules. 'Reform' implies an admission of deficit and an orderly and authoritative change process that would not seem to be in keeping with typical pathways of legal change beyond the state. This article seeks to reverse that trend by proposing a two-part concept of international law reform. The procedural part of this concept enables legal scholars to discern and describe instances of quasi-legislative change in the international legal space. The substantive part prompts them to select and apply criteria for assessing the merits of a particular textual change or proposal. The resultant concept of international law reform is necessary, I argue, in a legal system that lacks centralized legislative processes and comprehensive rules for demarcating and legitimating authoritative normative developments. Through a detailed case study from international anti-corruption law, the article shows how international law reform is an essential framework for analysis.

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1 Introduction

The concept of reform has an uncertain place within the scholarship on international law-making and legal theory. On the one hand, international law is a notoriously utopian discipline, whose claims to validity rest partly on arguments that it reflects the higher principles of a liberal world order. On this view, states should use the tools of positive law to seek universal justice, progress and peace.[1] This reformist impulse is reflected in the codification movement from the time of Jeremy Bentham to the establishment of the United Nations (UN)[2] and in the more recent scholarship on 'soft' and 'informal' international law-making (soft/in-law).[3] The twin processes of fragmentation and informalization have also spawned academic calls for change in the form, *inter alia*, of the global constitutionalist movement.[4] On the other hand, the very idea of reform has long been regarded as inappropriate for the international legal system, which lacks the types of institutions that orchestrate legislative processes within states.[5] The International Law Commission (ILC) approximates some of the functions of a domestic law reform agency,[6] for example, but without a mandate for 'revision'.[7] In the 1980s and 1990s, moreover, international legal scholarship witnessed empirical and critical turns. The former trend favours the social scientific mapping of international law's effects in particular national jurisdictions;[8] the latter seeks to identify the indeterminacies and biases of an international law based on liberalism.[9] In both branches of the discipline, legal texts are but one variable in the ongoing practice of regulation. Teleology is ostensibly absent; value judgements are exposed or eschewed.[10]

The disciplinary ambivalence to reformist talk contrasts with the apparent need for legal problem-solving in contemporary international relations. Some warn that the institution of liberal international law and order may be under threat from waning US power, rising authoritarianism and anti-global populism.[11] A lesser claim is that new

1 M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005), at 59.
2 See further section 2.B.
3 See further section 2.C.
4 See further section 2.D.
5 Jennings, 'Law Reform: A New Idea for International Lawyers', 1 *European Journal of Law Reform* (1999) 3, at 4–5; see also Cassese, 'Introduction', in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012) xvii, at xix.
6 A. Boyle and C. Chinkin, *The Making of International Law* (2007), at 171.
7 Secretariat of the International Law Commission, 'Introduction', in United Nations (ed.), *Seventy Years of the International Law Commission: Drawing a Balance for the Future* (2021) 1, at 7; see also Voulgaris, 'The International Law Commission and Politics: Taking the Science out of International Law's Progressive Development', 33 *European Journal of International Law* (*EJIL*) (2022) 761, at 766–767.
8 Shaffer and Ginsburg, 'The Empirical Turn in International Legal Scholarship', 106 *American Journal of International Law* (*AJIL*) (2012) 1.
9 See generally A. Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (2016), at 136; Purvis, 'Critical Legal Studies in Public International Law', 32 *Harvard International Law Journal* (*HILJ*) (1991) 81, at 89.
10 Abebe, Chilton and Ginsburg, 'The Social Science Approach to International Law', 22 *Chicago Journal of International Law* (2021) 3, at 18–19; Purvis, *supra* note 9, at 101–102.
11 See generally Krieger and Nolte, 'The International Rule of Law – Rise or Decline?: Approaching Current Foundational Challenges', in H. Krieger, G. Nolte and A. Zimmermann (eds), *The International Rule of Law: Rise or Decline?* (2019) 3; Mearsheimer, 'Bound to Fail: The Rise and Fall of the Liberal International

political frictions, socio-economic divides and technological and environmental hazards are challenging existing approaches to international coordination and demanding (radically) new ones.[12] It would appear that at least some international institutions are seeking to uplift their legal standards and processes in response. Examples include the World Health Organization through its work to broker a treaty on pandemics,[13] the World Trade Organization through its members' attempts to circumvent the Appellate Body impasse[14] and the Organisation for Economic Co-operation and Development (OECD) with its revised recommendations on foreign bribery control.[15]

Against this background, this article asks: how should scholars study the efforts of international bodies to intentionally improve the norms they administer through new or revised legal texts? It proposes 'international law reform' as a framework for identifying, describing and appraising such legal change initiatives. The first part of that concept is about problems and processes – namely, structured attempts by competent actors to improve the legal *status quo*. The second part is about outcomes and improvements. The reform process must yield changes to legal texts that are likely, at least, to change international law for the better. Both 'outcome' and 'improvement' are narrowing conditions. However, as reflects the diversity of views on the content of the international legal system, those instruments may be hard, soft or otherwise informal, and the concept of improvement is open-ended. Researchers may apply any relevant empirical or normative measure for success and assess improvement from any methodological perspective at any place and point in international legal history.

Understanding international law reform in this way, I argue, enhances the ability of international legal scholars to perceive, describe and assess intentional legal change initiatives in the international legal space. All legal systems require a language for discerning, depicting and evaluating moments of putative normative improvement. This is also true of the international legal system, even though it lacks general rules for enacting legislation and comprehensive standards for assessing the validity of legislative acts. Indeed, the absence of such secondary rules in the international legal

Order', 43 *International Security* (2019) 7; Posner, 'Liberal Internationalism and the Populist Backlash', 49 *Arizona State Law Journal* (2017) 795.

12 Anghie, 'Rethinking International Law: A TWAIL Retrospective', 34 *EJIL* (2023) 7, at 107–111; Duvic-Paoli, 'International Law: A Discipline of Ambition', 36 *Leiden Journal of International Law* (*LJIL*) (2023) 233; Mai, 'Navigating Transformations: Climate Change and International Law', 37 *LJIL* (2024) 556.

13 'Q&A: Pandemic Prevention, Preparedness and Response Accord', *World Health Organization* (10 June 2024), available at www.who.int/news-room/questions-and-answers/item/pandemic-prevention--preparedness-and-response-accord.

14 'MC12 Briefing Note: WTO Reform – An Overview', *World Health Organization* (n.d.), available at www.wto.org/english/thewto_e/minist_e/mc12_e/briefing_notes_e/bfwtoreform_e.htm (on the 'multi-party interim appeal arrangement').

15 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2021 OECD Recommendation), Doc. OECD/LEGAL/0378, 26 November 2021; see also Recommendation of the Council of the OECD on Bribery in International Business Transactions, Doc. C(97)123/FINAL, 27 May 1994 (1994) 33 ILM 1390; Revised Recommendation of the Council on Combating Bribery in International Business Transactions (1997 OECD Recommendation), Doc. C(97)123/FINAL, 23 May 1997; Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009 OECD Recommendation), Doc. C(2009)159/REV1/FINAL, 26 November 2009.

order, and the complexity of the controversies it mediates, makes a concept of international law reform more important. While the existing scholarship contains the building blocks for that concept, it has not arranged those components in a way that serves that analytical end.

I pursue this argument in the next three sections of the article. Section 2 develops a concept of 'international law reform' from the literature on domestic law reform, international legal change and legal theory. Section 3 shows the value of that concept by applying it to the case of new OECD recommendations on negotiated settlements in foreign bribery cases. Section 4 summarizes and looks ahead, sketching the avenues for research and engagement that are facilitated by the concept of international law reform.

2 Conceptualizing International Law Reform

What is law reform, and what counts as a legal reform beyond the state? The first section of this article develops a concept of international law reform by reference to the literature on domestic law reform, international law-making and legal theory. Through a selective review of this scholarship, it lands on criteria for identifying and describing putative reform efforts in the international space and enabling their evaluation.

A *Domestic Law Reform Concepts*

Reform is a deceptively simple concept for domestic lawyers and legal academics. A core function of the rational bureaucratic state is the reasoned improvement of malfunctioning legislative and judicial precepts on an ongoing basis. Sometimes those activities are channelled through special purpose government law reform agencies or non- or quasi-governmental equivalents; more often, they are the everyday work of legislatures, administrators and courts.[16] Much legal writing claims to be about reform or presupposes a reformist project in that it identifies dysfunctions with the legal rules or institutions and proposes solutions.[17] These problems may have been present in the standards that were created or they may have developed as the societies, their values and their technologies changed. Either way, reformist writing perceives a gap between existing legal frameworks and current social conditions; it ventures a response.[18] In general, this literature does not elaborate on the notion of beneficial

[16] See Albanesi, 'Beyond the British Model: Law Reform in New Zealand, Australia, Canada, South Africa and Israel', 6 *Theory and Practice of Legislation* (2018) 153, at 154; Barnett, 'The Process of Law Reform: Conditions for Success', 39 *Federal Law Review* (2011) 161; Freire e Almeida and Wei, 'Law Reform in Latin America', in A.H. Qureshi (ed.), *Law Reforms around the World: Perspectives from National and International Law* (2024) 79, at 81; J. Jacobsen, *Legal Reform* (2022), at 31.

[17] Jacobsen, *supra* note 16, at 20; Minnow and Barton Tobin, 'Archetypal Legal Scholarship: A Field Guide, 2nd. edition', 71 *Journal of Legal Education* (2022) 494, at 495 (discussing 'policy analysis' as a common genre of legal writing).

[18] Jacobsen, *supra* note 16, at 17; see, e.g., M. Kirby, *Reform the Law: Essays on the Renewal of the Australian Legal System* (1983), at 8.

legislative intervention that supports those general claims.[19] Rather, it assumes the common usage of 'reform' as '[t]he action or process of making changes in an institution, organization, or aspect of social or political life, so as to remove errors, abuses, or other hindrances to proper performance' as well as '[a] particular instance of this action or process; an act bringing about change of this kind; an improvement made or proposed'.[20]

Those general understandings embed at least three potential concepts of reform. The first is a change in law that results from a structured attempt at legal improvement.[21] This concept envisages that a competent (collective) actor has perceived a problem with the existing legal norms and followed a reform process to propose or adopt new rules or principles that are intended to improve on the legal *status quo*.[22] It is a formalist concept in that it focuses on the official, governmental machinery of legal change. The second concept is sociological (or legal realist) in that it presents law reform as a type of social activity through which legal norms and associated practices are modified for the good, as judged from the perspective of participants in the process. This view of law reform merges into a third pluralistic concept by which law reform encompasses all processes – intentional or unintentional, formal or informal – that reorder legally relevant behaviour.[23] In the latter two concepts, official reformers, procedures and texts may help reshape the governance of new social, technological or environmental conditions, but they are only one such mechanism of change 'for the better', however it is understood.

B *Reading the International Codification Literature through a Reformist Lens*

Understood in this way, law reform is a 'familiar stranger' in international legal scholarship. At the turn of the millennium, Robert Jennings described a disciplinary silence on the topic of reform, which he attributed to the defensive posture of international lawyers and the lack of machinery for efficiently replacing outdated international principles and rules.[24] Antonio Cassese echoed these concerns a little over a decade later,[25] as did Nico Krisch almost 10 years after him.[26] Still more recently, Asif Qureshi has called for a holistic analysis of domestic and international processes of codification and progressive development.[27] Neither he nor the earlier writers conceptualizes

[19] *Cf.* Jacobsen, *supra* note 16, at 20; see also Qureshi, 'A Holistic Approach to the Domestic and International Law Reform Systems', in Qureshi, *supra* note 16, 1, at 4.

[20] 'Reform', n. 2 and adj., *Oxford English Dictionary* (2009), paras A, B, available at www.oed.com.

[21] See further Jacobsen, *supra* note 16, at 31–32.

[22] I thank Jørn Jacobsen for this formulation. See also Jacobsen, *supra* note 16, at 30.

[23] See, e.g., MacDonald, 'Recommissioning Law Reform', 35 *Alberta Law Review* (1996) 831, at 853–856; MacDonald and Kong, 'Patchwork Law Reform: Your Idea Is Good in Practice, but It Won't Work in Theory', 44 *Osgoode Hall Law Journal* (2006) 11, at 17–29.

[24] Jennings, 'International Law Reform and Progressive Development', in G. Hafner *et al.* (eds), *Liber Amicorum: Professor Ignaz Seidl-Hohenveldern in Honour of His 80th Birthday* (1998) 325, at 325–326.

[25] Cassese, *supra* note 5, at xviii.

[26] Krisch, 'The Dynamics of International Law Redux', 74 *Current Legal Problems* (2021) 269, at 270.

[27] Qureshi, *supra* note 19, at 5.

international law reform as such; therefore, none provides a method for identifying, describing and evaluating those outcomes or practices. Yet, as most of them observe, the international legal system is subject to the same pressures for change, as well as statis, as domestic legal orders.[28] It also has channels (pathways) for development, which feature in the international law-making and legal theory literature.[29]

A review of this literature starts with the academic-*cum*-social movement to codify international law. Between the late 18th and mid-20th centuries, the term 'codification' was associated with a range of calls to change the form – and the content – of international customs.[30] Those calls were reflected in the first part of the 20th century in the establishment of the League of Nations and the UN. Superficially, the ILC has much in common with (Commonwealth) law reform bodies, with its expert commissioners, draft treaties and commentaries.[31] However, its notions of codification and progressive development were, and are, subject to contention. At one extreme, Hersch Lauterpacht defined codification as the process of 'bringing about an agreed body of rules' within the international order.[32] Along with Jennings, he argued that the codification process would improve international law by enshrining unwritten customs in treaty form and by generating new legal understandings of state obligations.[33] So contrived, codification was a technique to both express and expand the *lex lata* to enhance its claim to legality and its capacity to ensure peace through legal order.[34] Codification, in this broad sense, encompassed and eclipsed the notion of progressive development.[35] In my language, it was akin to law reform, understood both as a formal and social activity.

Others, by contrast, advanced a narrow concept of codification as the process of creating treaties that would present existing customary rules in a manner that was more precise and systematic. James Brierly, citing Cecil Hurst,[36] appeared to accept that

[28] Cassese, *supra* note 5; Krisch, *supra* note 26, at 269; Jennings, *supra* note 5, at 3.

[29] See generally Krisch and Yildiz, 'The Many Paths of Change in International Law: A Frame', in N. Krisch and E. Yildiz (eds), *The Many Paths of Change in International Law* (2023) 3.

[30] R.P. Dhokalia, *The Codification of Public International Law* (1970), part 2; M. Villiger, *Customary International Law and Treaties* (1985), at 63–70; see generally Halpérin, 'The Age of Codification and Legal Modernization in Private Law', in H. Pihlajamäki, M.D. Dubber and M. Godfrey (eds), *The Oxford Handbook of European Legal History* (2018) 907, at 908–910.

[31] See generally Commonwealth Secretariat, *Changing the Law: A Practical Guide to Law Reform* (2017), available at www.thecommonwealth-ilibrary.org/index.php/comsec/catalog/book/872.

[32] Lauterpacht, 'Codification and Development of International Law', 49 *AJIL* (1955) 16, at 22; see also Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the Purview of Article 18, Paragraph 1, of the International Law Commission – Memorandum Submitted by the Secretary-General (Survey of International Law), Doc. A/CN.4/1/Rev.1 (1949), paras 3–14.

[33] Lauterpacht, *supra* note 32, at 20, 35–39; see also Jennings, 'The Progressive Development of International Law and Its Codification', 24 *British Yearbook of International Law* (*BYIL*) (1947) 301, at 308–309; Jennings, 'Recent Developments in the International Law Commission: Its Relation to the Sources of International Law', 13 *International and Comparative Law Quarterly* (*ICLQ*) (1964) 385.

[34] Lauterpacht, *supra* note 32, at 19–20.

[35] Chen, 'Between Codification and Legislation: A Role for the International Law Commission as an Autonomous Law-Maker', in United Nations, *supra* note 7, 233, at 240–241, citing Survey of International Law, *supra* note 32.

[36] Hurst, 'A Plea for the Codification of International Law on New Lines', 32 *Transactions of the Grotius Society* (1946) 135.

codification-*qua*-restatement could enhance the logical coherence of international legal obligations and thereby improve their functioning.[37] He even acknowledged that this form of codification was desirable in a legal system that had few organic processes for change.[38] However, he opposed more ambitious concepts and mechanisms of international codification on the basis that lawyers were ill-equipped to resolve underlying disputes about policy.[39] On his view, codification would involve some 'gap filling' but was distinct from 'progressive development', quite less 'reform'.[40] It was a 'scientific exercise'.[41] Yet other early to mid-20th-century sceptics feared that codification would 'interfere with the so-called organic growth of the law through usage into custom', generate new conflicts and exacerbate the 'hair-splitting tendency' among lawyers.[42] For them, if broadly pursued, codification would not be a reform but, rather, a regression.

C *Codification Debates Applied to Soft and Informal International Sources*

The ILC's 'for convenience' definitions of codification and progressive development did not resolve arguments about the value of intentionally seeking to improve international law through agreements to clarify or gradually change custom.[43] Nor are those arguments mere historical artefacts, rendered irrelevant by moves away from treaties in international relations and away from formalism in international legal scholarship.[44] For one thing, the ILC has continued with its efforts to both codify and progressively develop international law, while also publishing non-binding but influential statements about the content of its existing agreements and associated customary rules.[45] For another, the fragmentation and informalization of international law have created more types of law-style rules and more sites of law-making-style activity.[46] Defined as 'soft law', the norms are not intended to be legally binding;[47]

37 Brierly, 'The Codification of International Law', 47 *Michigan Law Review* (1948) 2, at 9.
38 *Ibid.*, at 8–9.
39 *Ibid.*, at 4.
40 Watts, Wood and Sender, 'Codification and Progressive Development of International Law', in A. Peters and R. Wolfrum (eds), *Max Planck Encyclopedia of Public International Law* (2021), para. 24.
41 Chen, *supra* note 35, at 240; see also Brierly, *supra* note 37, at 9.
42 Brown, 'The Codification of International Law', 29 *AJIL* (1935) 25, at 34, citing L.F. Oppenheim, *International Law: A Treaties*, vol. 1 (4th edn, 1928), at 49–51; see also Baker, 'The Codification of International Law', 5 *BYIL* (1924) 38, at 48, citing L.F. Oppenheim, *International Law: A Treaties* (2nd edn, 1912), at 43; Hurst, *supra* note 36, at 151.
43 Secretariat of the International Law Commission, *supra* note 7, at 27.
44 Chen, *supra* note 35, at 252; Koskenniemi, 'International Legislation Today: Limits and Possibilities', 23 *Wisconsin International Law Journal* (2005) 61, at 75–76; Pauwelyn, Wessel and Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking', 25 *EJIL* (2014) 733, at 734–738.
45 Azaria, 'Codification by Interpretation: The International Law Commission as an Interpreter of International Law', 31 *EJIL* (2020) 171.
46 Koskenniemi, *supra* note 44; Qureshi, *supra* note 19, at 4; Watts, Wood and Sender, *supra* note 40, para. 27.
47 Boyle and Chinkin, *supra* note 6, at 212, 220–222; see also, e.g., Aust, 'The Theory and Practice of Informal International Instruments', 35 *ICLQ* (1986) 787, at 787; Baxter, 'International Law in "Her Infinite Variety"', 29 *ICLQ* (1980) 549, at 551–554; Chinkin, 'The Challenge of Soft Law: Development and Change in International Law', 38 *ICLQ* (1989) 850, at 851.

defined as 'in-law', the outputs, processes and/or actors do not conform with traditional international legal formalities.[48] These new regulatory modes are relevant to this article in two ways. First, soft/in-law norms affect the conduct of states, international organizations and other non-state actors. In this way, soft or informal norms may have the type of normative salience that makes them appropriate for law reform analysis.[49] Second, soft/in-law debates recall earlier controversies about codifying customary international law. These commonalities signal that there are recurrent issues with intentional efforts to improve international law, even if the sites and forms of law-making have shifted.

According to their defenders, soft instruments and informal processes have the potential to count as instances or acts of reform. These instruments and processes may not generate 'law' in the 'hard' sense of Article 38(1) of the Statute of the International Court of Justice, nor may they be intended to normatively order behaviour in anything more than a specific issue area (sub-regime).[50] However, informal processes may result in written rules, which are designed to change how social or technical problems are dealt with across multiple states. Moreover, the very qualities of ambiguity and informality may make soft/in-law preferable when compared to traditional modes of regulation: broad principles or standards may accommodate more diverse modes of implementation; informal processes may allow for more expert input; and open-ended outputs may enable adaption in response to future developments as well as long-term changes to actor preferences.[51] In all these ways, soft laws and informal processes may yield 'legal' rules that are (or are perceived to be) rightful sources of obligation that achieve their intended policy goals.[52]

So described, soft or informal law-making processes may enable the ongoing adaptation of international legal norms, much in the same way that Lauterpacht hoped formal codification initiatives would foster convergent legal understandings among states. For critics of soft/in-law, however, these labels are misnomers, which hide the binary nature of legal obligations[53] and the inappropriate use of non-binding norms

[48] Pauwelyn, Wessel and Wouters, 'An Introduction to Informal International Lawmaking', in J. Pauwelyn, R.A. Wessel and J. Wouters (eds), *Informal International Lawmaking* (2012) 1, at 2–3.

[49] I thank one of the anonymous reviewers for this formulation.

[50] Charter of the United Nations and Statute of the International Court of Justice 1945, UKTS 67 (1946) Cmd 7015.

[51] See, e.g., Abbott and Snidal, 'Hard and Soft Law in International Governance', 54 *International Organization* (*IO*) (2000) 421, at 434–444; Guzman and Meyer, 'International Soft Law', 2 *Journal of Legal Analysis* (2010) 171, at 187–201; Lipson, 'Why Are Some International Agreements Informal?', 45 *IO* (1991) 495, at 501, 514–520; Raustiala, 'Form and Substance in International Agreements', 99 *AJIL* (2005) 581, at 582–583; Shaffer and Pollack, 'Hard vs Soft Law: Alternatives, Complements, and Antagonists in International Governance', 94 *Minnesota Law Review* (2010) 706, at 717–721. See also Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Research Questions', in Pauwelyn, Wessel and Wouters, *Informal International Lawmaking*, *supra* note 48, 13, at 16–19.

[52] On the concept of legitimacy, see Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', 15 *EJIL* (2004) 907, at 908.

[53] See, e.g., D'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials', 19 *EJIL* (2008) 5; Klabbers, 'The Redundancy of Soft Law', 65 *Nordic Journal of International Law* (*NJIL*) (1996) 167; Weil, 'Towards Relative Normativity in International Law?', 77 *AJIL* (1983) 413, at 416–417.

to protect important legal interests.[54] Gains in effectiveness may come at the cost of approval procedures in participating states and the interests of affected others.[55] Such deficits in accountability may diminish the practical benefits of soft/in-law and its value in light of norms associated with liberal democracy and the rule of law. These objections share some common ground with Brierly's concerns that legal 'experts' were ill-equipped to resolve the political divisions that stood in the way of more ambitious efforts at codification.

Finally, from a critical perspective, soft/in-law regimes may be characterized as opaque and subtly obligatory technologies of power. These regulatory forms seek to activate subjects to participate in the governance of self and other but do so within a neo-liberal regulatory paradigm that valorizes individual choice.[56] The apparent voluntarism of soft/in-law norms may hide the extent of a regulatory change or, conversely, a failure to progress pro-social goals.

D *Law Reform through a Constitutionalist to Critical Lens*

The literature on soft/in-law is associated with three further sets of scholarly projects that engage, in various ways, with the possibilities of meaningful change in fragmented, informal and decentred legal environments. Normative, sociological and critical, these projects implicitly concern processes of reform or reformist agendas. Variously, they attempt to supplement, document and critique attempts to manage global problems with legal norms that cross borders.

The first is united by a concern to bring domestic (Western) public law principles to bear on increasingly global processes of governance.[57] These processes are perceived to suffer various weaknesses of legitimacy and effectiveness, not least the perception that the available domestic and international mechanisms of control are inadequate to protect the important individual interests that may be at stake. Into this breach, global constitutionalists advance the claim (to quote Anne Peters) 'that [certain] principles, institutions, and mechanisms can and should be used as parameters to inspire strategies for the improvement of the legitimacy of an international legal order and institutions'.[58] These 'principles, institutions, and mechanisms' are the ones typically associated with the liberal democratic state – that is, 'the rule of law, a separation of powers, fundamental rights protection, democracy and solidarity'.[59] Global

[54] Di Robilant, 'Genealogies of Soft Law', 54 *American Journal of Comparative Law* (2006) 499; Klabbers, 'The Undesirability of Soft Law', 67 *NJIL* (1998) 381; Mattei, 'Hard Code Now!', 2 *Global Jurist* (2002) 1.

[55] Lipson, *supra* note 51, at 516; Stewert, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness', 108 *AJIL* (2014) 211; see also Pauwelyn, Wessel and Wouters, 'Informal International Lawmaking: An Assessment and Template to Keep It Both Effective and Accountable', in Pauwelyn, Wessel and Wouters, *Informal International Lawmaking*, *supra* note 48, 500, at 513–514.

[56] Zerilli, 'The Rule of Soft Law: An Introduction', 56 *Focaal: Journal of Global and Historical Anthropology* (2010) 3, at 11.

[57] N. Walker, *Intimations of Global Law* (2015), at 86–87; see also Bianchi, *supra* note 9, at 44–47.

[58] Peters, 'Global Constitutionalism', in M.T. Gibbons (ed.), *The Encyclopedia of Political Thought* (2015) 1; see generally Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', 19 *LJIL* (2006) 579, at 583.

[59] Peters, 'Global Constitutionalism', *supra* note 58, at 1.

constitutionalists thus share some common cause with the international rule of law, good governance and global administrative law research/policy programmes.[60]

Second, reform is an implicit subject of inquiry within the scholarship on transnational legal ordering. Claiming a linage to American legal realists, the New Haven School and compliance studies in international relations, Harold Koh announced the Transnational Legal Process Movement as an attempt to understand the social interactions that 'make interpret, enforce, and ultimately, internalize rules of transnational law'.[61] Latterly, Terence Halliday and Gregory Shaffer have extended Koh's concept by extensively theorizing 'transnational legal orders' (TLOs). These orders they define as 'collection[s] of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions'.[62] TLO scholars do not seek to evaluate the resulting legal orders, although the character ('legitimacy, clarity, and coherence') of transnational rules or processes can affect their pull towards compliance.[63] Nonetheless, TLO studies contribute to understandings of law reform in that they seek to map the conditions for the settlement (or failure) of new legal orders within and among states in a way that draws attention to the recursivity of those interactions.[64]

Third, the possibility of meaningful reform is a point of contention among critical legal scholars, who seek to show the indeterminacies and biases of liberal international law.[65] Some critical scholars have defended the emancipatory potential of international law as a discipline and a practice[66] and, in that sense, the possibility of reform. Others have argued that international policy-makers could be encouraged to reflect on the political basis and normative implications of particular decisions.[67] But, from another critical position, the possibility of law reform is constrained by the power relations that structure international legal discourse. Many would-be reform efforts turn out to be conservative projects, which use minor adjustments to ensure the continued legitimacy of the system in its totality.[68] More fundamentally, the critical position leads to the conclusion that 'reform' is an illusory construct, given the

[60] Although the latter claims more modest and positivist ambitions. See Krisch, 'Global Administrative Law and the Constitutional Ambition', in P. Dobner and M. Loughlin (eds), *The Twilight of Constitutionalism?* (2010) 245, at 255–256; Kingsbury, Donaldson and Vallejo, 'Global Administrative Law and Deliberative Democracy', in A. Orford and F. Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (2016) 526, at 528.

[61] Koh, 'Transnational Legal Process', 75 *Nebraska Law Review* (1996) 181, at 183–184.

[62] Halliday and Shaffer, 'Researching Transnational Legal Orders', in T.C. Halliday and G. Shaffer (eds), *Transnational Legal Orders* (2015) 475, at 475.

[63] Shaffer, 'The Dimensions and Determinants of State Change', in G. Shaffer (ed.), *Transnational Legal Ordering and State Change* (2013) 23, at 34.

[64] Halliday and Shaffer, 'Transnational Legal Orders', in Halliday and Shaffer, *Transnational Legal Orders*, *supra* note 62, 3, at 38.

[65] See note 9 above.

[66] See, e.g., Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach', 8 *Melbourne Journal of International Law* (2007) 499, at 503; see also Purvis, *supra* note 9, at 125.

[67] See, e.g., Koskenniemi, *supra* note 1, at 555; see generally Bianchi, *supra* note 9, at 141–142.

[68] Presenting this feature as a virtue, see Kirby, *supra* note 18, at 8; see generally Bianchi, *supra* note 9, at 147.

difficulties of identifying objective benchmarks with which to plan or assess would-be improvements.[69]

E *Uncovering 'International Law Reform'*

This review suggests that the topic of reform has been hidden in plain sight within the international legal literature. Reform was a disputed object of the international codification movement as it coalesced around the establishment of the ILC. Latterly, academics have debated the use of soft/in-law to manage coordination problems; these scholars have incorporated and embellished arguments around codification without considering themselves as contributing to that old debate or discussing reform *per se*. The increasing informality of international law-making processes has then prompted calls to strengthen the (secondary) rules of international law along liberal constitutional lines. The transnational socio-legal scholarship eschews such demands for change but often has reform efforts as its object since it maps the social processes by which behaviour is legally ordered across national frontiers. Critical legal scholars question the possibility of 'real' improvement given the structures of the international legal system and its processes of reasoning.

Bringing the background to the foreground, this article proposes a new two-step concept of 'international law reform'. It conceives of international law reform as (i) an intentional change process among international actors that seeks to address a perceived problem with existing international legal norms, (ii) the outcomes of which change, or are likely to change, those norms for the better.[70] The two parts of the definition are cumulative: the first part provides criteria for identifying international law reform processes; if its conditions are met, the second part provides a method for gauging whether the outcomes of that process have yielded, or will yield, improvement. Defined in this way, 'international law reform' adds to existing discussions of international law-making and legal theory by focusing attention on efforts at (attempted or putative) change and enabling those initiatives to be described and evaluated against chosen external criteria. The two parts of the concept are further specified and linked to the existing literature, as follows.

1 The Concept of International Law Reform: Part 1

The first part of the concept of international law reform involves actors, problems and processes. Borrowing from mainstream notions of domestic law reform, codification and progressive development, as described in section 2.B, it supposes actors who have the competence to regulate within an extant area of international law. Because global problems are often approached as coordination issues, these actors are likely to be collectives of some sort. However, in keeping with the notions of soft/in-law discussed above, this body need not have international legal personality, it need not be an international organization and it need not consist of states. What matters is the body's de

[69] *Cf.* Purvis, *supra* note 9, at 117.
[70] *Cf.* Kirby, *supra* note 18, at 8.

facto or de jure competence (authority) to create and change relevant legal norms, as expressed in textual form.[71]

In addition, the first part of the definition assumes that the competent actor (body) has identified a difficulty with a current set of legal norms. There is no requirement that the problem have a certain form, seriousness or empirical 'reality'. What matters is that the actor (or, more likely, its organs or agents) has perceived a difficulty and sought to develop a solution through a structured process of investigation and deliberation about the desired content of the relevant legal norms. Official statements (for example, resolutions or press releases) will usually demonstrate collective intent to improve existing international legal norms. However, other evidence (for example, interviews or media reports) may serve as proof in a given case. Also, legal norms need not be formally binding; they are simply those norms that assume a 'recognisable legal form'.[72] In these senses, among others, the concept of international law reform integrates socio-legal (legal realist) perspectives.[73]

2 The Concept of International Law Reform: Part 2

The second part of international law reform concerns outcomes and improvements. The term 'outcome' is defined as a new international instrument or revision to an existing international legal text. This condition differentiates international law reform from the ad hoc development of concepts, principles or doctrines through decisions of international dispute resolution bodies, described by Nico Krisch and Ezgi Yildiz as a 'pathway' of international legal change.[74] It also helps distinguish international law reform from broader notions of legal change as a social process in the transnational legal process literature, as developed by Halliday and Shaffer.[75]

The broader effects of a textual change are captured by the notion of improvement. The notion of improvement ('change for the better') has empirical and normative dimensions. The empirical dimension may include considerations of compliance and effectiveness – that is, the degree of 'conformity or identity between an actor's behavior and [a] specified rule' and the extent to which that rule achieves 'observable, desired changes in behavior'.[76] This mode of inquiry is familiar from the soft/in-law literature as well as from the transnational socio-legal and international relations scholarship. In addition, the empirical dimension may have critical components if it sees international law reform researchers problematize the very goals of the reform process and/or the capacity of the reformed text to affect desirable changes, given the wider ideological, political and economic constraints of international society.[77]

The normative dimension is about the degree to which the outcomes of a law reform process align with relevant values. The values of textual clarity and coherence

71 Jacobsen, *supra* note 16, at 32–33.
72 Halliday and Shaffer, 'Transnational Legal Orders', *supra* note 64, at 15.
73 See section 2.D.
74 Krisch and Yildiz, *supra* note 29, at 14.
75 See especially Halliday and Shaffer, 'Researching Transnational Legal Orders', *supra* note 62.
76 Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation', 32 *Case Western Reserve Journal of International Law* (2000) 387, at 391, 394.
77 See also Qureshi, *supra* note 19, at 7–8.

feature in the literature on domestic law reform and international codification; meta-norms, like accountability and transparency, legitimacy and legality, figure in the soft/in-law and constitutionalist scholarship. Critical scholars debate law's emancipatory potential. The key point here is that the benchmarks for appraisal are not fixed. Rather, researchers are to select and defend a benchmark for appraisal having regard to the features of the policy problem, the nature of the legal change and their own skills and interests. In other words, the concept of international law reform does not posit a single perspective from which to assess alleged improvements in international law. But it does require an articulation and application of a measure for success or failure.

3 International Law Reform in Overview

Defined in this way, 'international law reform' is an analytical framework that melds formalist and normative, sociological and critical accounts of law-making and legal theory in global governance. The procedural part draws, in particular, on mainstream notions of domestic law reform, codification and progressive development. The substantive part advances concerns about the form and qualities of international legal rules, which are familiar from the constitutionalist, critical and soft/in-law literatures as well as from allied studies in international relations. The concept of international law reform adds to existing debates around international law-making and legal theory by focusing attention on efforts at change within the international legal system. It also enables the outcomes of those initiatives to be described and evaluated against chosen external criteria. That sort of legal academic lens would arguably benefit discussions of legal changes in the domestic legal space, but it is essential in the international legal system, which lacks a general legislative apparatus and agreed criteria for demarcating authoritative and legitimate normative developments.[78]

3 The 2021 OECD Recommendations on Settlements as a *Prima Facie* Case of Reform

The value of the concept of international law reform can be seen through its application to new OECD standards on corporate settlements in foreign bribery cases. During the early 2000s, settlements emerged as a popular but problematic means of resolving allegations that companies had bribed foreign public officials.[79] There were no express rules on settlements in the 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention)[80] or in

[78] Krisch and Yildiz, *supra* note 29, at 4; Weil, *supra* note 53.

[79] Organisation for Economic Co-operation and Development (OECD), Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention (2019), at 29, available at https://web-archive.oecd.org/2020-06-15/510434-resolving-foreign-bribery-cases-with-non-trial-resolutions.htm; C. Woll, *Corporate Crime and Punishment: The Politics of Negotiated Justice in Global Markets* (2023), at 39–44.

[80] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) 1997, 2802 UNTS 225.

previous versions of the OECD Recommendation.[81] Instead, the OECD Working Group on Bribery implicitly regulated domestic settlement laws and practices through its country reports.[82]

This position changed in November 2021 when the Council of the OECD revised the OECD Recommendation to include sections XVII–XVIII on non-trial resolutions (settlements). This part of the article uses sections XVII–XVIII to demonstrate the potential of international law reform as an analytical lens. It presents the problem of corporate settlements within the OECD's system of foreign bribery controls. It then describes the procedure through which the OECD developed sections XVII–XVIII, being the formal outcome of a putative reform process. The content of sections XVII–XVIII is then compared to the content of the implicit norms on settlements in the working group's prior country reports and is tentatively evaluated. The final section concludes not with approval or disapproval but, rather, with reflections on the importance of conceptualizing international law reform within and beyond the OECD case.

A *The Problem of Corporate Settlements*

The first element of the first part of the concept of international law reform is a perceived problem with extant international legal standards. For that reason, I begin the case study with a brief description of the OECD system of foreign bribery control and the apparent problem of settlements within that system. The OECD is not the oldest, but it is one of the most important, international forums for corruption control. Its Anti-Bribery Convention was a pet project of the USA in its 'golden years' of post-Cold War hegemony.[83] The treaty contains a small number of mainly mandatory obligations on foreign bribery,[84] which are complemented and supplemented by the non-binding ('soft') standards in the OECD Recommendation.[85] Countries that participate fully in the OECD's Working Group on Bribery may accede to the convention; the working group includes many (though not all) industrialized and emerging economies as members.[86]

Settlements with legal persons have an awkward place within the OECD's system of foreign bribery control. The Anti-Bribery Convention prioritizes the use of the

[81] 2021 OECD Recommendation, *supra* note 15.

[82] Ivory and Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases', 69 *ICLQ* (2020) 945.

[83] See generally Villarino, 'International Anticorruption Law, Revisited', 63 *HILJ* 343, at 350–351; see also Mearsheimer, *supra* note 11, at 10.

[84] M. Lohaus, *Towards a Global Consensus against Corruption* (2019), at 10.

[85] A. Jakobi, *Common Goods and Evils? The Formation of Global Crime Governance* (2013), at 143; Pieth, 'Introduction', in M. Pieth, L.A. Low and N. Bonucci (eds), *The OECD Convention on Bribery: A Commentary* (2014) 28, at 26–27; C. Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (2015), at 19–20.

[86] Anti-Bribery Convention, *supra* note 80, Art. 13(2). Neither China nor India are parties to the OECD Anti-Bribery Convention or Recommendation, and Russia, while a party, has had its participation in OECD bodies suspended. OECD, The OECD Working Group on Bribery in International Business Transactions: 2022 Annual Report (2023), at 7–8, available at www.oecd.org/daf/anti-bribery/oecd-working-group-on-bribery-2022-annual-report.pdf.

criminal law to prevent and suppress foreign bribery. Its first two articles mandate the criminalization of foreign bribery and the criminal liability of corporations for that offence, if possible, in national law.[87] Article 3 says that states must punish corporate bribe payers with 'effective, proportionate and dissuasive criminal penalties' as a rule.[88] Then, having asserted jurisdiction in such matters, governments must ensure that their agents investigate and prosecute alleged offenders without regard to 'considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved' under Article 5. State parties must also cooperate with each other in foreign bribery matters under Articles 9 and 10.

However, since the early 2000s, settlements have been a leading means for resolving foreign bribery cases within the USA,[89] which is a key state sponsor of the working group. In fact, OECD research on the period between February 1999 and June 2018 found that most cases within the scope of the Anti-Bribery Convention had been resolved through 'agreement[s] between a legal or natural person and an enforcement authority to resolve foreign bribery cases without a full trial on the merits'.[90] Across the 44 parties to the convention, non-trial resolutions were used in 78 per cent of cases; for legal persons, '91% of the resolutions … did not involve a trial'.[91] At least 27 of the parties to the Anti-Bribery Convention recognized some type of non-trial resolution procedure in national law and 'a substantial majority (74%) had several applicable systems' for natural and/or legal persons.[92] The study identified several types of settlement procedure, including US-style non- and deferred prosecution agreements, Italian *patteggiamento*, Spanish *conformidad* and other types of plea bargains.[93]

Corporate settlements are as problematic as they are popular. Law and economics research suggests that settlements can enhance the efficiency of enforcement actions if they incentivize company managers to have their organizations self-report misconduct, cooperate in investigations and undertake compliance reforms, along with other remedial measures.[94] Other claimed benefits of negotiated outcomes include the avoidance of lengthy and costly trials,[95] adverse publicity[96] and, if deals do not involve conviction, debarment.[97] That said, settlements may undermine deterrence if

[87] Anti-Bribery Convention, *supra* note 80, Arts 1(1), 2.
[88] *Ibid.*, Arts 3(1)–(2).
[89] See generally B.L. Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (2014), at 6–7.
[90] OECD, *supra* note 79, at 13.
[91] *Ibid.*, at 13, 22–23.
[92] *Ibid.*, at 12. Only 27 state parties were eligible to, and did, participate in the study. It is possible that others had one or more settlement mechanisms but did not respond to the questionnaire.
[93] *Ibid.*, at 46–59.
[94] Arlen, 'The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.', in T. Søreide and A. Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (2020) 156, at 169–171; *Cf.* T. Søreide, *Corruption and Criminal Justice: Bridging Economic and Legal Perspectives* (2016), at 189–190.
[95] OECD, *supra* note 79, at 83–84.
[96] *Ibid.*, at 86–87; see also C. King and N. Lord, *Negotiated Justice and Corporate Crime: The Legitimacy of Civil Recovery Orders and Deferred Prosecution Agreements* (2018), at 75.
[97] An administrative sanction that prevents convicted entities or individuals from tendering to sell goods or services to public sector entities. OECD, *supra* note 79, at 86–89, 123–124; *cf.* Markoff, 'Arthur Andersen

they reward corporations too much or too little for cooperation or 'self-cleansing'.[98] Further, by facilitating negotiations for leniency between prosecutors and firms, settlement systems may allow corporate offenders to ratchet down regulatory expectations of adequate bribery prevention measures.[99] Settlements may also conflict with due process norms due to weak judicial review procedures[100] and incentives for managers to coerce employees into cooperation or to forfeit the corporation's own fair trial rights.[101] Finally, settlements may have an imperial aspect if they preclude enforcement actions in other states and/or do not lead to the sharing of settlement sums with the countries whose officials were bribed.[102]

Settlements were not expressly addressed in the Anti-Bribery Convention, however.[103] The negotiations to the convention contemplated the need to 'co-ordinate the use of [the] … practice [of plea bargaining] in foreign bribery cases' and 'to give [the] issue [of prosecutorial discretion] adequate attention in the follow-up procedure' to the convention.[104] But, as adopted, Articles 2 and 3 only require parties to introduce criminal or equivalent non-criminal forms of liability for legal persons and to ensure that punishments for corporate foreign bribery are 'effective, proportionate and dissuasive'.[105] Similarly, while Article 5 seeks to exclude certain economic and political considerations from enforcement decisions, it also 'recognises the fundamental nature of national regimes of prosecutorial discretion'.[106] Previous versions of the OECD Recommendation were likewise silent on settlements, though they addressed related matters – for example, the resourcing of prosecutors,[107] the conditions for

and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century', 15 *University of Pennsylvania Journal of Business Law* (2013) 797.

98 Arlen, *supra* note 94, at 158–160; King and Lord, 'Deferred Prosecution Agreements in England and Wales: Castles Made of Sand?', *Public Law* (2020) 307, at 317–318; Lord, 'Prosecution Deferred, Prosecution Exempt: On the Interests of (In)Justice in the Non-Trial Resolution of Transnational Corporate Bribery', 63 *British Journal of Criminology* (2023) 848.

99 Hock and David-Barrett, 'The Compliance Game: Legal Endogeneity in Anti-Bribery Settlement Negotiations', 71 *International Journal of Law, Crime and Justice* (2022) 1; see generally L. Edleman, *Working Law: Courts, Compliance, and Symbolic Civil Rights* (2016).

100 Garrett, *supra* note 89, at 190–191, 195, 283–285.

101 Søreide and Vagle, 'Settlements in Corporate Bribery Cases: An Illusion of Choice?', 53 *European Journal of Law and Economics* (2022) 261, at 281–282; Ridge and Baird, 'The Pendulum Swings Back: Revisiting Corporate Criminality and the Rise of Deferred Prosecution Agreements', 33 *University of Dayton Law Review* (2008) 187, at 195–197; Garrett, *supra* note 89, at 88–95, discussing *United States v Stein (Stein I)*, 435 F. Supp. (2d) 330, at 336, 381 (SDNY 2006).

102 K.E. Davis, *Between Impunity and Imperialism: The Regulation of Transnational Bribery* (2019), at 196; OECD, *supra* note 79, at 165–173; J.A. Oduor *et al.*, *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (2014).

103 Ivory and Søreide, *supra* note 82, at 954–958.

104 OECD Working Group on Bribery (OECD-WGB), OECD Actions to Fight Corruption, Doc. DAFFE/IME/BR(97)14, 24 October 1997, at 22–23.

105 Anti-Bribery Convention, *supra* note 80, Arts 2, 3, read with OECD, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention Commentaries), 21 November 1997, paras 20–21.

106 Anti-Bribery Convention, *supra* note 80, Art. 5, read with Anti-Bribery Convention Commentaries, *supra* note 105, para. 27.

107 1997 OECD Recommendation, *supra* note 15, para. 6, Annex; see also 2009 OECD Recommendation, *supra* note 15, para. D, Annex I.

corporate criminal attribution[108] and the design of bribery prevention and detection measures.[109]

In the absence of express rules, the Working Group on Bribery implicitly regulated domestic settlement laws and practices through its country reports.[110] The working group is a subsidiary body of the Council of the OECD that also functions as a standing conference of the parties to the Anti-Bribery Convention.[111] The group's overarching goal is to:

> help countries Party to the OECD Anti-Bribery Convention ('Member countries') combat [foreign bribery] by pursuing the full implementation of the [Convention and 2009 OECD Recommendation] through an ongoing programme of systematic follow-up and monitoring, establishing high standards for foreign bribery legislation and enforcement, engaging in dialogue with business and civil society, and, as appropriate, with non-Member countries identified by the Working Group.[112]

The working group achieves that objective, in part, through a peer review process and other activities to 'share best practice … by examining prevailing trends, issues and counter-measures in foreign bribery'.[113] During the now four phases of review, member countries complete questionnaires about their systems for foreign bribery control.[114] They also host on-site visits from evaluation teams, which consist of staff from the secretariat of the working group and experts from the member countries who are acting as 'lead examiners' for that peer.[115] With input from the examiners, the secretariat prepares a report on the evaluated country's progress in implementing the convention and recommendation.[116] This report is voted on by all working group members except the state under review and, once adopted, published online.[117]

In previous research with Tina Søreide, I found that the Working Group on Bribery used its country reports to issue a qualified endorsement of domestic settlement laws and practices. On the one hand, the reports praised settlements, calling at times on member states to keep or adopt that kind of process within their legal systems.[118] On the other hand, reports suggested that some domestic settlement laws and practices may not comply with Articles 3 and 5 of the Anti-Bribery Convention and/or fall short when assessed according to the principles of transparency and accountability,

[108] 2009 OECD Recommendation, *supra* note 15, paras B, C, Annex I.
[109] *Ibid.*, Annex II.
[110] Ivory and Søreide, *supra* note 82, at 960–967.
[111] Bonucci, 'Article 12: Monitoring and Follow-Up', in M. Pieth, L.A. Low and N. Bonucci (eds), *The OECD Convention on Bribery: A Commentary* (2014) 534, at 539.
[112] OECD, Draft Resolution of the Council Revising the Mandate of the Working Group on Bribery in International Business Transactions Adopted by the Council at Its 1257th Session, Doc. C(2012)36, 22 March 2012, para. I(1), Annex.
[113] *Ibid.*, para. 5.
[114] See, e.g., OECD, 'Monitoring Implementation of the OECD Anti-Bribery Convention: Phase 4 Evaluation Procedure, December 2023', in OECD, OECD Anti-Bribery Convention: Phase 4 Monitoring Guide (2023), para. 16, available at https://www.oecd.org/daf/anti-bribery/phase-4-guide-2023.pdf.
[115] *Ibid.*, paras 18, 21–22.
[116] *Ibid.*, paras 8, 39.
[117] *Ibid.*, para. 61.
[118] Ivory and Søreide, *supra* note 82, at 960–962.

predictability and consistency.[119] These principles were asserted rather than justified.[120] Overall, we concluded that the working group provided an implicit regulatory limit to deal making but insufficient guidance to states as to the preventive effect and cost of settlements, much less their impact on the capacity of a legal system to ensure procedural fairness, equal treatment and legal certainty in (quasi-)criminal procedures.[121] The implicit norms on settlements were also hard to ascertain, being spread across multiple country reports and being expressed not as general recommendations but, rather, as suggestions to particular member countries.[122] Therefore, rather ironically, the OECD 'fail[ed] to clearly articulate [its] expectations on settlements, while calling for transparent, effective, and predictable domestic settlement rules'.[123]

B *The Process of Revision and the Outcome of That Process*

The deficient regulation of corporate settlements was part of the context in which the OECD Working Group on Bribery launched a process to improve the 2009 OECD Recommendation. The first limb of the concept of international law reform highlights the intentional qualities of that process of revision and the aspirations behind sections XVII–XVIII as the textual outcome.

Between the time of its creation in 1994 and its last revision in 2021, the OECD Recommendation was reviewed twice. The next-to-last version was adopted in 2009.[124] Intending to mark that 10-year anniversary with a new revision,[125] the Working Group on Bribery 'agreed to open discussion on a review of the 2009 Anti-Bribery Recommendation in March 2018'.[126] 'Following a survey to identify priorities areas', it 'engaged in an extensive review process',[127] the aim of which was 'to take stock of … new developments, explore areas where the Anti-Bribery Recommendation could be revised and OECD anti-bribery standards thereby further strengthened, and possibly consider areas for future work'.[128] This process included 'a stocktaking exercise of ten years of implementation of the 2009 Anti-Bribery Recommendation, multiple written member country consultations, and eight dedicated meetings of Working Group on Bribery members', as well as consultations with 'other relevant bodies, groups and stakeholders' within and outside the OECD.[129] Submissions on settlements were received by the UNCAC coalition of non-governmental organizations (NGOs)[130]

[119] *Ibid.*, at 962–967.
[120] *Ibid.*, at 969.
[121] *Ibid.*, at 974–977.
[122] *Ibid.*, at 973.
[123] *Ibid.*, at 945.
[124] See note 15 above.
[125] OECD-WGB, Public Consultation Document: Review of the 2009 OECD Anti-Bribery Recommendation, 22 March–30 April 2019, at 4–5, available at www.oecd.org/corruption/anti-bribery/Public-Consultation-Review-OECD-Anti-Bribery-Recommendation.pdf.
[126] 2021 OECD Recommendation, *supra* note 15, at 3.
[127] *Ibid.*, at 4.
[128] OECD-WGB, *supra* note 125, at 5.
[129] 2021 OECD Recommendation, *supra* note 15, at 3.
[130] Corruption Watch *et al.*, Principles for the Use of Non-Trial Resolutions in Foreign Bribery Cases (Letter to Mr Angel Gurria, Secretary General OECD), 6 December 2018, available at https://uncaccoalition.org/

and the so-called 'Recommendation 6 Network' of 'academics, lawyers, corporate officers, NGOs and others'.[131]

In March and April 2019, moreover, the Working Group on Bribery conducted a public consultation, as a part of which it asked: 'What recommendation could be envisaged to address non-trial resolutions in the enforcement of the foreign bribery offence?'[132] It explained this 'suggested question' by counterposing the lack of regulation of settlements in the OECD instruments and their frequent use by member countries. It also mentioned the potential utility of settlements in 'driv[ing] … enforcement and … leverag[ing] corporate compliance' as well as their potential deficits in 'transparency and accountability' as used.[133] The OECD received more than 30 submissions from individual 'legal experts', NGOs, multilateral bodies and business organizations on the settlement question and others.[134]

The outcome of these efforts was a further revised OECD recommendation that included two sections on 'non-trial resolutions'. These were defined as 'mechanisms developed and used to resolve matters without a full court or administrative proceeding, based on a negotiated agreement with a natural or legal person and a prosecuting or other authority'.[135] The new section XVII suggests that countries 'consider' resolving foreign bribery cases in a variety of ways, including via 'non-trial resolutions' with individuals and legal persons.[136] The new section XVIII qualifies that call to action by urging states to 'ensure that non-trial resolutions used to resolve cases related to offences under the OECD Anti-Bribery Convention follow the principles of due process, transparency, and accountability'. This recommendation is illustrated with the eight desirable measures in section XVIII(i)–(viii). The revised recommendation was adopted by the Council of the OECD in November 2021 and, as adopted, is presented as a means of 'updat[ing] and expand[ing] upon the 2009 OECD Recommendation … by reflecting recent trends and challenges in the foreign bribery field, thereby ensuring that the Recommendation remains relevant and effective'.[137] Non-trial resolutions are described as one of the 'key topics … [to have] emerged or significantly evolved in the anticorruption area since 2009'.[138]

files/CSO-Letter-to-OECD.pdf. 'UNCAC' stands for United Nations Convention against Corruption 2003, 2349 UNTS 41.

131 International Guidelines for Non-Trial Resolutions of Foreign Bribery Cases: Recommendation Regarding Non-Trial Resolutions (or Negotiated Settlements) of Cases Involving Foreign Bribery (2018), available at www.nhh.no/en/departments/accounting-auditing-and-law/guidelines-for-non-trial-resolutions. I was a member of the Recommendation 6 Network.

132 OECD-WGB, *supra* note 125, question 14; see also questions 8–9, 17, 31.

133 *Ibid.*, at 10.

134 OECD-WGB, Public Comments: Review of the 2009 Anti-Bribery Recommendation (2019), available at web-archive.oecd.org/2020-10-19/528111-Public-Comments-Review-OECD-Anti-Bribery-Recommendation.pdf.

135 2021 OECD Recommendation, *supra* note 15, s. XVII.

136 *Ibid.*

137 *Ibid.*, at 3.

138 *Ibid.*, at 4.

C *The Degree of Change between the OECD Reports and Sections XVII–XVIII*

The 2021 OECD Recommendation is the product of an intentional legal chance process per Part 1 of the concept of international law reform. The Council of the OECD, working with and through the Working Group on Bribery, is also the competent body for soft law-making on settlements within the OECD's anti-corruption system. Therefore, the 2021 OECD Recommendation is a *prima facie* example of an international law reform. But, as concerns settlement, how does this document perform under the second substantive part of my law reform concept? This question drives the next two sections of this case study.

An initial challenge is to determine whether, and if so how, the 2021 OECD Recommendation changes the organization's existing approach to corporate settlements. Krisch and Yildiz define 'legal change' as the 'modification of the burden of argument for a particular position on the content of the law', as evidenced by a shift in 'the scope of possible interpretations or the weight of a particular position in legal discourses'.[139] Their definition is empirical in that it focuses on the perceived content of the law as it evolves through communication within a discursive community. Adopting this definition, I consider the extent to which the 2021 OECD Recommendation modifies the OECD's prior approach to domestic corporate settlement laws and practices. Put simply, I ask how the express recommendations on settlements differ from the prior implicit rules in the working group's pre-November 2021 country reports.

The short answer is that the two express recommendations on corporate settlements closely track the Working Group on Bribery's previous report-based approach to settlements. Sections XVII–XVIII do not offer a radically different set of norms for controlling how member states negotiate the conclusion of foreign bribery cases with suspect legal persons. Instead, they reflect the same general policy of condoning the use of corporate settlements subject to compliance with the Anti-Bribery Convention and (related) procedural norms. Overall, the sections express and elaborate the Working Group on Bribery's approach to settlements in the prior country reports. Sections XVII–XVIII are thus akin to a soft codification and progressive development of the working group's prior reporting practice.[140]

The longer answer begins with the observation that sections XVII–XVIII take the same basic policy stance on settlements as the working group's pre-November 2021 country reports. Like the reports, sections XVII–XVIII assume that negotiated outcomes are compatible with the Anti-Bribery Convention, provided that they comply with the convention itself and the specified values.[141] Section XVII thus calls on member countries to 'consider using a variety of forms of resolutions when resolving criminal, administrative, and civil cases with both legal and natural persons,

[139] Krisch and Yildiz, *supra* note 29, at 9–10.

[140] *Cf.* Kaufmann-Kohler, 'Soft Law in International Arbitration: Codification and Normativity', 1 *Journal of International Dispute Settlement* (2010) 283.

[141] Ivory and Søreide, *supra* note 82, at 962; see, e.g., OECD-WGB, Chile: Phase 4 Report, Implementing the OECD Anti Bribery Convention (2018), at 42–43.

including non-trial resolutions'.[142] In this way, the 2021 OECD Recommendation condones the use of settlements in domestic law, even if it does not describe them with the superlatives sometimes deployed in the reports.[143] Section XVIII then starts with a general recommendation to member states to ensure that 'non-trial resolutions … follow the principles of due process, transparency, and accountability'. Subsections XVIII(i)–(viii) expand on the need for transparency and clarity as well as compliance with Articles 3 and 9–10 of the Anti-Bribery Convention. Similarly, the reports had sought to cabin the use of corporate settlements by reference to transparency and accountability, predictability and consistency in addition to Articles 3 and 5.[144]

Second, when sections XVII–XVIII strike new ground, they do so by way of elaboration, rather than radical revision, of the reports' implicit norms. For example, the reports did not discuss due process rights as a general category of concern with corporate settlements, despite that being a key theme in the settlement literature. Rather, some reports queried whether states provided sufficient (judicial) supervision for governments' decisions to settle.[145] Others mentioned the risk that settlement laws could be perceived to favour elite offenders[146] or used to scapegoat workers.[147] Section XVIII builds on this position by starting with a general recommendation that states adhere to the principle of due process in settlements. It then provides that states should '(viii) ensure that non-trial resolutions are subject to appropriate oversight, such as by a judicial, independent public, or other relevant competent authority, including law enforcement authorities'. Equal treatment and judicial review are not recommended explicitly in section XVIII, however.[148]

Third, there are statements in the country reports that are not matched in section XVIII but are captured, more generally, in other sections of the 2021 OECD Recommendation. For instance, while section XVIII does not mention Article 5 and its irrelevant considerations, Annex I to the 2021 Recommendation – a 'Good Practice Guidance on Implementing Specific Articles of the Convention' – reiterates the need for 'vigilen[ce] in ensuring that investigations and prosecutions … are not influenced by [Article 5 factors]'.[149] Similarly, section XVIII does not address the problem of

[142] 2021 OECD Recommendation, *supra* note 15, s. XVII.

[143] *Cf.* Ivory and Søreide, *supra* note 82, at 961.

[144] *Ibid.*, at 962.

[145] OECD-WGB, Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Netherlands (2020), at 65–66, paras 182–183, 189–193; *cf.* OECD-WGB, Implementing the OECD Anti-Bribery Convention, Phase 4: United States (2020), at 75, paras 273–275; see also OECD-WGB, Phase 4 Report: Australia, Implementing the OECD Anti-Bribery Convention (2017), para. 155.

[146] OECD-WGB, *supra* note 141, at 43, paras 131–132; OECD-WGB, Phase 4 Report: Switzerland, Implementing the OECD Anti-Bribery Convention (2018), para. 83.

[147] OECD-WGB, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in France (2012), para. 101 (discussing, without endorsing, interviewee concerns that the French *comparution sur reconnaissance préalable de culpabilité procedure* compromised prosecutorial independence and 'would be used only for individuals and ultimately would serve only to "make the underdog pay"'). See generally Ivory and Søreide, *supra* note 82, at 966–967.

[148] On access to justice, see OECD-WGB, *supra* note 141, at 43, paras 131–132; OECD-WGB, Switzerland, *supra* note 146, para. 83.

[149] 2021 OECD Recommendation, *supra* note 15, Annex I(D)(1).

whether, and if so how, the Working Group on Bribery's member states should 'share' settlement sums with the countries whose officials were bribed.[150] Rather, section XVIII(vii) provides 'that the conclusion of a non-trial resolution … [should be] without prejudice … to an enforcement action against other relevant natural or legal persons, where appropriate'. This provision is complemented by section XIX, which suggests that member states of the Working Group should consult and otherwise cooperate with other countries in foreign bribery investigations and proceedings, including on the 'recovery of the proceeds of bribery'.

D *The New Corporate Settlement Rules as a Change for the Better?*

To repeat, the 2021 OECD Recommendation explicates and elaborates the OECD's implicit approach to corporate settlements as per the prior Working Group on Bribery's country reports. But it is not alteration so much as improvement that is the essence of Part 2 of the concept of international law reform. Do sections XVII–XVIII change (or are they likely to change) international anti-corruption law for the better? I do not answer this question conclusively here. Rather, I use sections XVII–XVIII to illustrate that evaluative questions complement descriptive ones in studies of international law reforms. The discussion shows how multiple perspectives on international law-making and legal theory can be brought to bear on a single putative reform and how a benchmark for assessment can be set.

1 Legal Certainty as the Standard for Appraisal in the OECD Case

Given that sections XVII–XVIII expressed and elaborated the OECD's rules on settlements, it is appropriate to apply the standard of legal certainty to the assessment of that putative reform. I understand legal certainty to be the proposition that legal norms should be accessible, foreseeable and consistently applied.[151] Legal certainty entails relative clarity and precision in drafting as well as the proclamation of rules before their enforcement and the limitation of resulting discretions.[152] Certain rules have the benefit of being more law-like than uncertain ones because they have greater capacity to guide behaviour.[153] In addition, certainty may have instrumental strengths. Not only are actors more likely to follow rules that they understand,[154] but they are more likely to view clear and clearly enacted rules as a legitimate restriction on their behaviour.[155] Rules that induce compliance may be more effective (presuming that

[150] See note 102 above and associated text; see further section 4.B.

[151] European Commission for Democracy through Law (Venice Commission), Report on the Rule of Law, Doc. CDL-AD(2011)003rev (2011), para. 44; see also J. Brunnée and S. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (2010), at 67–69, 96–97; L. Fuller, *The Morality of the Law* (1969), at 63–65; Kurzon, 'Clarity and Word Order in Legislation', 5 *Oxford Journal of Legal* Studies (1985) 269; European Court of Human Rights, Guide on Article 7 of the European Convention on Human Rights (2023), para. 28, available at https://ks.echr.coe.int/documents/d/echr-ks/guide_art_7_eng.

[152] Venice Commission, *supra* note 151, at 45–46.

[153] J. Raz, *The Authority of Law: Essays on Law and Morality* (1979), at 223–226, cited and discussed in Brunnée and Toope, *supra* note 151, at 28.

[154] Chayes and Chayes, 'On Compliance', 47 *IO* (1993) 175, at 188–192.

[155] Brunnée and Toope, *supra* note 151, at 38–39; T. Franck, *The Power of Legitimacy among Nations* (1990), at 53–54.

the compliant conduct is consistent with the outcome that the rule-maker intended). Legal certainty also conceptually correlates with greater accountability,[156] defined as 'a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences'.[157] The clearer the standard, the easier it should be for the forum to question, judge and, thereafter, sanction.

2 Sections XVII–XVIII as a Gain for Legal Certainty

Sections XVII–XVIII are a gain for legal certainty insofar as they express the OECD's implicit approach to corporate settlements in the 2021 OECD Recommendation. A principal criticism of the report-based approach to corporate settlements was its opacity: the Working Group on Bribery's stance on settlements was not encapsulated in an obvious regulatory document, like the Anti-Bribery Convention or the OECD Recommendation, but it had to be deduced, through a content analysis from multiple country reports. Sections XVII–XVIII function as a promulgation of the norms on how member states should design and implement their settlement regulations. Promulgated rules should be easier for state parties to the convention to implement and for the working group's secretariat and lead examiners to identify and apply.

Insofar as sections XVII–XVIII are a gain for legal certainty, they are also a gain for accountability, compliance and effectiveness. As for accountability, the formalization of the rules on settlement enhances the capacity of member states, non-member states and non-state actors 'to pose questions and pass judgment' about the OECD's approach to settlement, even if those promulgated standards are soft laws. These questions and judgments may lead to consequences for the OECD as an organization, the Working Group on Bribery as a body and/or the participating countries in their individual capacities. These consequences are likely to take the form of public criticism, enhanced reporting requirements and diplomatic objection procedures.[158] As for effects on behaviour, the working group's member states are arguably better able to follow clearer rules on settlement; they may be more willing to do so since the recommendations are more law-like than the working group's implicit rules on settlement. In other word, sections XVII–XVIII may do better at prompting compliance with the OECD's rules on settlement and have more potential to achieve the member states' goals *vis-à-vis* corporate non-trial resolutions.

Another plus is that the OECD has secured these potential gains with minimal risk of legal ossification. Early critics of continental-style codification efforts argued that they would foster legalism and limit the organic development of customary international law due to their rigidity.[159] The new, regulatory and experimental governance

[156] Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies, UN Doc. S/2004/616 (2004), para. 6.

[157] Bovens, 'Analysing and Assessing Public Accountability: A Conceptual Framework', 13 *European Public Law Review* (2007) 447, at 450, cited in Pauwelyn, *supra* note 51, at 23.

[158] Though Cecily Rose cites media reports to the effect that a past working group chair described blacklisting as a potential consequence for member states who failed to enforce their corporate foreign bribery laws. Rose, *supra* note 85, at 87–92.

[159] See, e.g., Brown citing Oppenheim, *supra* note 42.

literature shares this worry in that it advocates flexible approaches to the transnational problems. Indeed, advocates of regulatory approaches suggest that principles may 'deliver more consistency' than bright-line rules when applied to complex problems.[160] Whereas rules invite legal challenges by wealthy repeat players, like corporations, principles are less amenable to challenge and better able to foster convergent understandings about compliance among participants in regulatory games.[161] In these ways, sections XVII–XVIII may be well suited to managing the problem of domestic settlement laws and practices. These sections propose overarching values in advisory language; they are subject to peer, rather than judicial, review; and, given that the OECD Recommendation has been revised three times already,[162] it is reasonable to expect that it would be subject to further revision.

3 Sections XVII–XVIII as a Source of New Ambiguity

Equally, as a soft codification and progressive development of soft norms, the 2021 OECD Recommendation on settlement remains ambiguous, and this ambiguity may create problems of accountability, compliance and effectiveness. A first concern is the uncertain aims of the new settlement standards. Criminologists have long described the difficulty of assessing the performance of corporate crime laws given the under-reporting of corporate offences and the lack of clarity about their regulatory goals.[163] In a manner that recalls this lament, the 2021 OECD Recommendation leaves open the benchmark for assessing the effectiveness of domestic settlement laws and practices. Section XVIII(v) indicates that states should use settlements to achieve punishment-orientated objectives or, at least, that settlements should not undermine a punishment goal. However, section XVIII(ii)–(iii) signals that settlements may also be a device for affording leniency to suspects or offenders and to activating corporations as agents of crime prevention.

A second problem is that of cheating: the open texture of the 2021 OECD Recommendation leaves room for member states to depart from the spirit of sections XVII–XVIII and still to argue that they are compliant therewith and to be judged as such by their peers. Of course, the Working Group on Bribery could seek to limit this potential by calling out questionable domestic settlement laws and practices in its country reports, enhancing the review of non-compliant states or lobbying for change via diplomatic routes.[164] This said, other members of the working group may be reluctant to condemn cheating because, by ignoring transgressions, they may preserve their own

[160] Braithwaite, 'Rules and Principles: A Theory of Legal Certainty', 48 *Australian Journal of Legal Philosophy* (2002) 47.
[161] *Ibid.*, at 54.
[162] See note 15.
[163] See, e.g., Lord and Levi, 'Determining the Adequate Enforcement of White-Collar and Corporate Crimes in Europe', in J. van Erp, W. Huisman and G. Vande Walle (eds), *The Routledge Handbook of White-Collar and Corporate Crime in Europe* (2015) 39; T. Halliday, M. Levi and P. Reuter, *Global Surveillance of Dirty Money: Assessing Assessments of Regimes to Control Money Laundering and Combat the Financing of Terrorism* (2014).
[164] See note 157 above and associated text.

discretion to adopt laws and practices that protect important exporters in future cases. The incentives for the working group's member countries to 'look the other way' may increase with challenges to the political and economic power of the USA.

A third possibility is that the Working Group on Bribery or its member states will interpret the ambiguities in sections XVII–XVIII in order to align with the preferences of powerful states and non-state actors, regardless of whether those interpretations achieve the optimum form of corruption control. As mentioned above, the USA has had a leading role in regularizing the use of settlements in corporate crime cases;[165] it has been an important, if not exclusive, model for corporate settlement laws in common law allies, like Canada and Australia.[166] This does not mean that the USA does better than other countries at controlling corporate crime or that US-style approaches to settlement can be reproduced with effect in other legal systems.[167] But it does raise the possibility that the promulgation of sections XVII–XVIII will further the diffusion of US-style settlement laws and practices. Perhaps tellingly, the US settlement system fared well in the Working Group on Bribery's fourth round of peer reviews, the lead examiners 'welcom[ing] the recent trend to see more cases also resolved at trial', but:

> acknowledg[ing] that non-trial resolutions are an important contributory factor to the U.S. high volume of concluded cases through the better detection of foreign bribery and because it allows the U.S. authorities to address enforcement challenges, in particular complex investigation and statute of limitations. They commend the United States for the pragmatic development – including with the recent declinations with disgorgement – and use of these instruments, which have been instrumental in the resolution of prominent multi-jurisdictional cases in which the United States have played a leading role.[168]

With respect to non-state actors, there is a risk that the ambiguity of sections XVII–XVIII will be interpreted in ways that increase, rather than constrain, corporate impunity in foreign bribery cases. I have already noted the potential for compliance standards to be gradually reinterpreted in accordance with business goals and corporate practices.[169] This process (known as legal endogeneity) is more likely to result in business-friendly constructions when statutory language is vague and the underlying concepts are (politically) contested.[170] Following this logic, sections XVII–XVIII may encourage the type of corporate-regulator engagements that lead to symbolic compliance because the steps they require and the principles they reference – transparency, accountability and due process – are all broad.[171] From a critical perspective, it could

[165] See also Lüth, 'Corporate Non-Prosecution Agreements as *Transnational Human Problems*: Transnational Law and the Study of Domestic Criminal Justice Reforms in a Globalised World', 12 *Transnational Legal Theory* (2021) 315, at 317–318.

[166] Acorn, 'Behind the SNC-Lavalin Scandal: The Transnational Diffusion of Corporate Diversion', 54 *Canadian Journal of Political Science* (2021) 892; Ivory, 'Transnational Criminal Law or the Transnational Legal Ordering of Corruption? Theorizing Australian Corporate Foreign Bribery Reforms', in G. Shaffer and E. Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (2020) 84.

[167] The classic critique is Garrett, *supra* note 89; see also Arlen, *supra* note 94, at 157–158.

[168] OECD-WGB, United States, *supra* note 145, at 75.

[169] Hock and David-Barrett, *supra* note 99.

[170] Edelman, *supra* note 99, at 29.

[171] See, e.g., Bianchi, 'On Power and Illusion: The Concept of Transparency in International Law', in A. Bianchi and A. Peters (eds), *Transparency in International Law* (2013) 1; Hovell, 'Due Process in the United Nations', 110 *AJIL* (2016) 1.

also be said that the OECD recommendations on corporate settlements increase the discursive power of corporations by reinforcing a perception that compliant firms are legitimate global actors.[172]

In addition, the use of soft law to express and elaborate the OECD's approach to settlements may affect the sites and agents of corporate crime control in unpredictable, if not necessarily unwelcome, ways. Abraham Newman and Elliot Posner demonstrate the second-order effects of soft law via a study of global financial regulation after the Cold War. As they show, reformist factions within the European Union cited 'written, advisory prescriptions' from international bodies to bolster the legitimacy of their calls for harmony within the common market and with US-style standards.[173] Financial industry bodies then reorientated their goals and activities to achieve influence in the transnational arenas in which the soft law had been negotiated.[174] Time will tell whether the promulgation of sections XVII–XVIII has likewise helped to entrench the OECD (its Working Group on Bribery) as an arena for standard setting about corporate crime governance as well as how the recommendation review process has affected the identities and agendas of stakeholders in this regulatory space.

Finally, the ambiguity of the 2021 OECD Recommendation may be exacerbated by, and contribute to, the ambiguity of other instruments of transnational anti-corruption and anti-money laundering law. The international layer of this regime or order comprises more than a dozen 'suppression conventions'[175] and a myriad of informal rules, which are drafted, monitored and periodically changed by networks of governmental experts.[176] Some states publish guidelines on the steps that companies should take to avoid liability,[177] reduce prospective sentences[178] and/or be eligible for a settlement.[179] These administrative standards complement the substantive and procedural criminal law. The OECD 2021 Recommendation may inform how these other standards on corporate crime are (re)written or read. In the best case, sections XVII–XVIII may lead to a convergence of understandings on what is necessary to reduce the risk of corporate impunity through settlements. Alternatively, the OECD 2021 Recommendation may give ambiguous prompts to the lawmakers, adjudicators and administrators who create, apply or oversee those standards. Through a recursive process of transnational

[172] See generally G. Baars, *The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy* (2019) at 2–3, 13; see also S. Tombs and D. Whyte, *The Corporate Criminal: Why Corporations Must Be Abolished* (2015).

[173] A.L. Newman and E. Posner, *Voluntary Disruptions: International Soft Law, Finance, and Power* (2018), at 64–65, 72.

[174] *Ibid.*, at 98–100, 115–117.

[175] Boister, '"Transnational Criminal Law"?', 14 *EJIL* (2003) 953, at 955.

[176] See, e.g., Financial Action Task Force, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations, 16 February 2012, updated November 2023, available at www.fatf-gafi.org; 'G20 Anti-Corruption Resources', *UNODC*, available at https://www.unodc.org/corruption/en/tools-and-services/g20-anti-corruption-resources/by-thematic-area.html.

[177] Ministry of Justice, The Bribery Act 2010: Guidance about Procedures which Relevant Commercial Organisations can put into Place to Prevent Persons Associated with them from Bribing (2011).

[178] United States Sentencing Commission, *Guidelines Manual* (2023), ch. 8, para. 3E1.1.

[179] US Department of Justice, *Justice Manual* (2018), title 9-28.000.

legal change,[180] these new rules or understandings may then affect interpretations of sections XVII–XVIII. The result would be the regulatory equivalent of a house of mirrors, in which a series of broad and soft standards reference each other in their substance and/or their claims to authority but in which none is clear and none is clearly authoritative.

E *The OECD Recommendations on Corporate Settlements as an International Law Reform*

Section 3 of this article – the case study – does not end with a verdict on the success or failure of the 2021 OECD Recommendation as it covers settlements. That verdict depends on further empirical and normative studies as well as more time: when the research for this article was finalized in mid-2023, sections XVII–XVIII were only about two-and-a-half years old. Instead, the goal of this section was to illustrate how the concept of international law reform helps researchers to identify, describe and evaluate intentional legal change initiatives beyond the state as well as the directions in which this concept could take researchers. There are three key messages.

First, the discussion has shown how the concept of international law reform can draw attention to attempts by international bodies to improve their legal frameworks in response to apparent problems. In the above scenario, the concept served to highlight the OECD's effort to fashion express recommendations on domestic settlement laws and practices so as to better its anti-corruption system. Such a development could easily be missed in discussions of international law-making if there was no focus on intentional legal improvement initiatives.

Second, the case study showed how the concept of international law reform prompts scholars to analyse new international legal texts in relative, as well as absolute, terms. Sections XVII–XVIII of the 2021 OECD Recommendation were thus compared to the statements on settlements in the Working Group on Bribery's prior country reports. From this comparison, it emerged that the 2021 OECD Recommendation explicated and elaborated the OECD's prior implicit approach to settlements rather than offering a radically new approach. This sort of comparative analysis would not have followed from a simple, point-in-time description of sections XVII–XVIII.

Third, the concept of international law reform requires the articulation and application of standards for appraising changed legal texts. I applied the criterion of legal certainty to sections XVII–XVIII, finding that they were both a gain for the international rule of law and an invitation for further obfuscation. I did not conclude on whether the 2021 OECD Recommendation improved international anti-corruption law on balance. However, I did use a range of potential benefits and risks to show the importance of considering the impacts of adjustments to international legal texts. The concept of international law reform highlighted this need without discouraging or discounting those projects for improvement. It links normative and empirical studies

[180] See further Halliday and Shaffer, 'Transnational Legal Orders', *supra* note 64, at 37–39.

to descriptive or analytical accounts of the shifting content of international law and the apparently good intentions of international actors.

4 Conclusion

This article has sought to articulate a new concept of legal improvement beyond the state. To this end, section 2 scanned the literature on (international) legal change and legal theory for discussions of law reform, express or implicit. Extending those accounts, it then conceived of international law reform in two steps. International law reform first concerns an intentional change process among international actors that seeks to address a perceived problem with existing international legal norms. Second, it involves the outcomes of such processes that change, or are likely to change, those norms for the better. Defined in this way, 'international law reform' is an analytical framework that melds formalist and normative, sociological and critical accounts of law-making and legal theory in global governance. This sort of structured analysis is arguably important for understanding intentional legal change initiatives in domestic legal systems. But it is crucial in the international legal system where the secondary rules on law-making are neither clear nor comprehensive and the existing processes for normative development are highly fragmented, decentralized and often informal.

Having thus defined and defended international law reform as a concept, the article then illustrated its utility with a case from international anti-corruption law. Section 3 found that there was a match between sections XVII–XVIII of the OECD 2021 Recommendation and the procedural part of the concept of international law reform. The recommendation also clarified and augmented the soft law on settlements in that it expressed and extended the OECD's prior implicit approach to non-trial resolutions as gleaned from country reports. However, sections XVII–XVIII also may have created new ambiguities and opportunities for stakeholder influence within the OECD's system of foreign bribery control. In this article, it was neither necessary nor possible to decide whether sections XVII–XVIII did improve the OECD's approach to settlements on balance. The point was to demonstrate how identification, description and critique are sequential and essential steps for their analysis.

Looking ahead, the OECD case study has shown how the concept of international law reform may enable discussion about legal change within and beyond the international legal academy. First, the concept of international law reform provides a common language for identifying and describing putative law reform initiatives within and across domains of international relations. Future research could use this concept as a framework for comparison between initiatives in different substantive fields. Second, the concept of international law reform entails appraisal but permits researchers to choose criteria that reflect their interests, disciplines and cases. In this way, the concept of international law reform is both structured and inclusive. It could frame inter-/multidisciplinary studies in particular areas of international law or of a particular case. Third, by including but separating intentions and effects in the

analysis, the concept of international law reform enables academics to both validate the impulse for improvement and critique the resultant intervention. The concept of international law reform thereby facilitates engagement between international legal researchers and policy-makers and, through that engagement, the contribution of international law academics to the reform process in a wider sense.