

## CORRUPTION IN LATIN AMERICA

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SUMMARY: I. *Introduction*. II. *The Corrupción: Concept and Classifications*. III. *Corruption at a Transnational Level, International Instruments and Conventions Against Corruption, Transparency International*. IV. *Corruption in Latin America*.

### I. INTRODUCTION

Carl J. Friedrich in his classic work on “Democracy as a political form and as a way of life”,<sup>1</sup> warns us that “corruption is not an exclusive vice of democracy, but of all forms of government and all political order” and “... that corruption is as inevitable as dirt at home. Therefore, it is a state of things that is always repeated and that derives from its nature, against which there is no better curative remedy than the constant struggle with different means for each form of government.

In this line of thought, this problem can be linked to that of the very nature of the human condition. And even without being able to deepen

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<sup>1</sup> Friedrich, Carl J., “La democracia desde el punto de vista histórico y comparativo: dominio y cooperación”, *La democracia como forma política y como forma de vida*, Madrid, Tecnos, 1961, p. 16.

a topic of moral philosophy, which exceeds this work, we cannot ignore the opinion of great figures of thought who meditated on it. Already from Greek thought, through Thucydides, Socrates, Plato, and Aristotle,<sup>2</sup> the very complex characteristics and contradictions of the human condition were pointed out. Likewise, norms and institutions were established to fight against corruption in the Constitutions.<sup>3</sup> Likewise, norms and institutions were established to fight against corruption in the Constitutions.<sup>4</sup> Human goodness and evil were specially analyzed by Machiavelli, Hobbes, Locke, Montesquieu, and Rousseau in their classic works.<sup>5</sup>

These conceptions were present at the time of the sanction of the first republican and federal Constitution in Philadelphia in 1787. That is why Alexander Hamilton argued in Federalist No. 6 that men are “ambitious, vindictive and rapacious”<sup>6</sup> and Madison wrote in Federalist No. 10 about the danger of factions and human passions, and in No. 51 he asked: “But what is government if not the greatest reproach to human nature? If men were angels, the government would not be necessary”.<sup>7</sup>

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<sup>2</sup> In their respective classic works “The Peloponnesian War” by Thucydides, the various dialogues, where the thought of Socrates and the Republic of Plato and the Politics of Aristotle are exposed. See analysis by Philip Pettit, “Republicanism: a theory of freedom and government”, Oxford University Press, 1997, Ch. 1.

<sup>3</sup> See Olsen A. Ghirardi, “La Constitución de los atenienses” —Los obstáculos contra la corrupción—, on the website of the National Academy of Law and Social Sciences of Córdoba, [www.acadenc.org.ar](http://www.acadenc.org.ar). The institutions among which he mentions: 1. The annuity of the magistracies, 2. The bail, 3. The rendering of accounts, 4. The draw of the charges, 5. The exam, 6. The oath, 7. The ostracism, 8. The action of illegality (la graphe paranomos) and 9. The antidote or change of fortunes or property. This institute was a judgment that could be raised by the rich who received some monetary obligation and who could point to others who were in a better position to do so. Examples of these obligations were the assembly of a trireme and the payment of its crew for a year. The author indicates that there were few cases, mentioning the process that Megaclides successfully initiated against Isocrates in the year 356 BC, for the payment of a warship. Ghirardi attributes the greatness of Athens to the values and spirit of the Athenians and the care of their magistracies.

<sup>4</sup> In his classic works such as “Treaty of the Republic” and “Tusculan issues”.

<sup>5</sup> Machiavelli’s “The Prince” and “Discourses on the First Decade of Titus Livy”, Hobbes’s “Leviathan”, Locke’s “Second Treatise on Civil Government”, Montesquieu’s “On the Spirit of the Laws” and “The Social Contract” and Rousseau’s “Emile”, respectively.

<sup>6</sup> Hamilton, Alexander *et al.*, “The Federalist”, translation and prologue by Gustavo Velazco, 2a. Reprint of the 2a. ed., Mexico, Fondo de Cultura Económica, 2006, núm. 6, Hamilton, p. 19.

<sup>7</sup> *Ibidem*, núm. 10, Madison, p. 36 y núm. 51 Madison, p. 220. Human evil is masterfully described by Shakespeare in the characters of his classic works and by Dostoyevski in “The Demons”, among other masters of universal literature.

This vision of man justified and required a republic based on the division and balance of powers - both horizontally and vertically - to achieve the great and perennial objectives of constitutionalism: to ensure the rights of man and avoid the concentration of power.<sup>8</sup>

Subsequent history and current global, regional, and national, with a permanent presence of acts of corruption, indicates the correctness of this republican conception and the need to deepen the controls.<sup>9</sup>

We maintain that for the integral consideration of this phenomenon, the analysis of its ethical, moral, historical, legal, political, sociological, and economic philosophical aspects is required, with an interdisciplinary methodology, which exceeds the scope and purposes of this work. For this reason, we will develop this problem in more specific relation to political corruption in the Latin American reality, and, particularly, in Argentina.

We consider it necessary to refer initially to the concept and classifications of corruption, wherein the complexity of the subject will be confirmed. Subsequently, we will observe the data and realities in the different spheres, which will include the actions of international organizations, such as the United Nations and the Organization of American States, which have signed treaties and conventions on the matter. Likewise, it is necessary to dwell on the task of an outstanding non-governmental organization such as Transparency International.

Then we will address the analysis of this issue in our country and finally, we will refer to the various proposals to fight corruption, considering its very serious consequences, especially for democracies.

## II. THE CORRUPCIÓN: CONCEPT AND CLASSIFICATIONS

The Dictionary of the Spanish Language indicates that the word “Corruption” comes from the Latin *corruptio* and means “Action and effect of corrupt-

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<sup>8</sup> See Hernández, Antonio María (Dir.), “Derecho Constitucional”, vol. 1, Ch. 1 “Teoría constitucional”, La Ley, Buenos Aires, 2012 and “Estudios de federalismo comparado: Argentina, Estados Unidos y México”, Buenos Aires, Rubinzal Culzoni Editores, 2018, chh. II on item 1.4 “El pensamiento y diseño constitucional de Madison y Hamilton sobre el federalismo”, pp. 67-74.

<sup>9</sup> Also remember the well-known phrase of Lord Acton: “Power tends to corrupt, but absolute power corrupts absolutely”, which has been corroborated historically and today, with a vast majority of authoritarian or totalitarian political systems, and with a high degree of corruption.

In this regard, see the indexes on democracy and corruption of various specialized institutions, which we will cite later. Constitutional democracy, the rule of law and the division of powers, the result of the republican tradition, have tried to prevent the power of the state from being used for private ends.

ing” and “Corrupting” comes from the Latin *corrupte* and has 7 meanings, of which we will quote the first 5: 1. “Alter and reverse the shape of something”; 2. “To spoil, deprave, damage”; 3. “Bribe someone with gifts or otherwise”; 4. “Pervert or seduce a person”; 5. “Spoil, vitiate. Corrupt customs, speech, literature”.<sup>10</sup> The plurality of meanings warns us that it is polysemy, and from there, it will be possible to understand the complexity and depth of the subject under analysis.

First, as expressed by Malem Seña following Peter Euben, the “conceptual history of corruption is uncertain, because although the etymological origin is clear, its use has not been so throughout history”.<sup>11</sup> And in this sense, he mentions the historical use of the word with two meanings, one which is general, linked to destruction, adulteration, degeneration, debasement, illegality, illegitimacy, or immorality, which encompasses any qualification of corruption, whether political, economic, or social.<sup>12</sup> But over time there have been numerous definitions that have modified its original meaning. The author groups the definitions into three large models: the first

emphasizes the duties of a public official and the singularization of the public function. The second, in aspects concerning the demand, supply, and exchange of corrupt actions, notions that should be interpreted in the light of modern economic theory. Finally, the third model defines corruption in the public interest.<sup>13</sup>

For the purposes of this work and given that many existing definitions in the doctrine and jurisprudence<sup>14</sup> exhibit conceptual difficulties in this mat-

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<sup>10</sup> Royal Spanish Academy, “Diccionario de la Lengua Española”, Twenty-first Edition, Madrid, Espasa Calpe S. A., 1992, p. 410.

<sup>11</sup> Malem Seña, Jorge F., “La corrupción”, Barcelona, Gedisa Editorial, 2002, p. 22.

<sup>12</sup> Malem Seña expresses that Peter Euben has assimilated corruption with these meanings in his article “Corruption”, in the work “Political innovation and conceptual change”, T. Ball, I. Farr and R. Hanson (comps.), Cambridge University Press, Cambridge, 1989, p. 223.

<sup>13</sup> *Ibidem*, p. 22. Regarding the latest model, Dennis F. Thompson expresses: “Officials commit immoralities out of greed, desire for power or loyalty to their family and friends. But there is a kind of immorality typical of the public function that paradoxically shows a more noble appearance, since it is not committed to satisfy personal objectives but in search of the common good. The problem of “dirty hands” belongs to the politician who violates moral principles in the name of the public interest. In Thompson, Dennis F., “Political Ethics and Public Office”, Spanish version, Barcelona, Gedisa Editorial, 1999, Ch. 1, p. 25.

<sup>14</sup> The analysis and debate on this issue in North American doctrine and jurisprudence is very broad and profound. Among many authors, see especially the contributions of Yale Professor, Susan Rose-Ackerman, and in particular in her book “Corruption and Government: Causes, Consequences and Reform”, Spanish version, Madrid, Ed. Siglo XXI, 2000

ter, we will limit ourselves to presenting the opinion of Malem Seña. Regarding his notion of corruption, he maintains that

corrupt acts are those that meet the following characteristics: 1... They imply the violation of a positional duty (causes the transgression of any of the rules that govern the position they hold or the function they perform)<sup>15</sup>... 2... There must be a normative system that serves as a reference (corruption can have an economic, political, legal, or ethical nature, or participate in these different levels at the same time)... 3... It does not always entail a criminally unlawful action (corruption and illegality criminal are, in this sense, independent terms)... 4... They are always linked to the expectation of obtaining an extra positional benefit (this benefit doesn't need to constitute an economic gain, it can be political, professional, sexual, etc.)... 5... They tend to be carried out in secret or, at least, in a discreet framework (the corrupt person will always try to make their actions go as unnoticed as possible).<sup>16</sup>

And so, it defines acts of corruption as “those that constitute the violation, active or passive, of a positional duty or the breach of some specific function carried out within a framework of discretion to obtain an extra positional benefit, whatever its nature”.<sup>17</sup>

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and Harvard Professor, Dennis F. Thompson, in particular in his book “Political Ethics and Public Office”, Spanish version, Barcelona, Gedisa Editorial, 1999. We also add these articles: Rose-Ackerman, Susan, “Corruption and Democracy”, Proc. Ann. Meeting Am. Soc’y Int’l L., vol. 90, 1996, p. 83 and “Corruption: Greed, Culture and the State”, The Yale Law Journal Forum, vol. 120, November 10 2010; Stark, Andrew, “Beyond Quid Pro Quo: What’s Wrong with Private Gain from Public Office?”, American Journal of Political Science, vol. 91, 1997, p. 108; Hellman, Deborah, “Defining Corruption and Constitutionalizing Democracy”, *Michigan Law Review*, vol. 111, 2013, p. 1385; Issacharoff, Samuel, “On Political Corruption”, *Harvard Law Review*, vol. 124, 2010, p. 118; Warren, Mark. E., “Democracy and Deceit: Regulating Appearances of Corruption”, *American Journal of Political Science*, vol. 50, 2006, p. 160; Thompson, Dennis F., “Two Concepts of Corruption: Making Campaigns Safe for Democracy”, *The George Washington Law Review*, vol. 73, 2005, p. 1035 y Teachout, Zephyr, “The Anti-Corruption Principle”, *Cornell Law Review*, vol. 94, 2009, p. 341.

<sup>15</sup> Malem Seña, on p. 32, specifies that the positional in no way means “that the presence of a public official is necessary for there to be a case of corruption. Corruption is also possible between private agents”. And that is why he rejects in Note 21 of said page, the definitions of corruption of Susan Rose-Ackerman and the World Bank that maintain that corruption “is the use of public office for private benefit”. *Cf.*: Rose-Ackerman, Susan, “Corruption and Government...”, *cit.*, p. 125.

<sup>16</sup> *Ibidem*, pp. 32-35. For a more detailed analysis of the concept of corruption in its philosophical aspects, see Garzón Valdés, Ernesto, “Acerca del concepto de corrupción”, in F. Laporta y S. Álvarez (comp.), “La corrupción política”, Madrid, Alianza Editorial, 1997.

<sup>17</sup> *Ibidem*, p. 35. The author indicates that said definition essentially coincides with the one proposed by Ernesto Garzón Valdés in the work mentioned in the previous note. Previ-

Regarding the classifications of corruption, we also consider it pertinent to point out only some of them, which seem useful to us for this work. As we saw earlier, there is political,<sup>18</sup> economic, social, trade union, sports corruption, etc., according to the respective area in which it occurs.<sup>19</sup> We already

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ously Malem Seña mentions what corruption is not and lists in that sense, on pp. 23-31, which we summarize below: 1. Corruption should not be confused with state measures of a promotional nature (such as tax incentive laws, although this will also depend on the moment in which it is carried out, because if it is done prior to an electoral act can be corrupting of the political system). 2. Nor can it be confused with a misguided exercise of power (since, in some cases, this will not necessarily be the case if there is no positional benefit for the authority in question). 3. Corruption and political clientelism should not be assimilated since there are some conceptual differences. 4. Although the receipt of gifts and financial or other compensation by public officials, politicians, or an individual by virtue of the performance of their work has been considered as generic acts of corruption, it considers that in some cases it may establish a demarcation line between those practices and certain corrupt acts. In this sense, he compares these gifts with bribery and mentions the differences, following John Noonan Jr., in his work “Bribes”, New York, Macmillan Publ., 1984, p. 697. 5. It is convenient to distinguish between acts of corruption and receiving, offering, and giving tips. 6. Whoever participates in an act of corruption cannot be confused with a social reformer, such as those who argue that corruption performs functions similar to those performed by economic or bureaucratic reforms in systems of excessive bureaucracy that impedes economic development. And he says “Whoever participates in corruption is not interested in modifying the reference normative system, be it legal, social or political. Nor, of course, the current moral system. And he goes on to quote this opinion of Samuel Huntington: “...Corruption itself can be a substitute for reform, and both corruption and reform a substitute for revolution. Corruption serves to reduce the groups that press for changes in policy, just as reform serves to reduce the classes that press for structural changes”. “Modernization and corruption”, in the work Heidenheimer, Arnold *et al.* (comps.), “Political corruption. A handbook”, 3a. ed., London, Transaction Publ., p. 381.

<sup>18</sup> That “consists of the violation of a positional duty of a political nature, in the breach of a function of the same tenor or is carried out in response to political interests”. *Ibidem*, p. 37.

<sup>19</sup> “There can be public and private corruption” —says Malem Seña— “And although little attention has been paid to the latter, it should be said not only that it is conceptually possible, but also that from an empirical point of view it is more frequent than it seems at first glance. These two types of corruption occur in international trade. However, practically all the analyzes and measures proposed to deal with it are designed as if corruption were fundamentally of a state or public nature. Corruption would be a problem that would arise from the intersection of public and private interests. Perhaps for this reason the State has traditionally been considered the source of all corruption. And among the most notorious causes of the increase in corruption has been pointed out the fact that the Welfare State has assumed powers in economic matters that in the police state were reserved for private agents”... “But the proposal to abandon the Welfare State by the privatizing state to eradicate corruption has not been an adequate strategy”. Malem Seña, *op. cit.*, p. 214. And the author further refers that “In another place I explained, in some detail, the branches to which the privatized companies belonged, the privatization procedures used, the lack of controls of these processes and the enormous number of resources transferred from the public

know that corruption does not only operate with the presence of public officials. It is a problem that affects both society and the State, beyond the deep interrelationships between these last two terms. That is why later we will refer to countries with a true “Corruption Culture”.

Corruption can also be classified in the Public Administration, in the Legislative Power,<sup>20</sup> in the Judicial Power, in the financing of politics, and international trade.<sup>21</sup>

Likewise, one can distinguish between common or ordinary corruption and grand corruption, as Rose-Ackerman does. The author refers that:<sup>22</sup>

Corruption occurs in people’s daily lives and routine business activities as people navigate their relationship with the state. However, of particular importance is the corruption at the top of the state hierarchy that involves political leaders and their close associates and concerns the award of important contracts, concessions, and the privatization of state-owned companies. Such “Grand Corruption” imposes huge costs on ordinary people by siphoning off funds to top political leaders in exchange for “sweetheart” deals with big foreign and domestic companies.

Another classification, from Arnold Heidenheimer,<sup>23</sup> considers the perception that the elites and public opinion of a country have of certain corrupt acts, and thus black, gray, and white corruption is distinguished. The first is when there is consensus about the reproach and the need for its punishment. The second is when the elites and public opinion have an ambig-

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sector to the private sector. I also pointed out then the social costs that all this produced, and the enormous corrupt fees paid by businessmen to take over public companies, some of them in full swing” (p. 216 and note 4, where he refers to another of his works: “Globalization, international trade and corruption”, pp. 1139 *et seq.*). He then quotes Rose-Ackerman in her work on “Corruption and Governments”, who argues that even a decline in state activity can leave the current pattern and levels of corruption intact (p. 217).

<sup>20</sup> See Thompson, Dennis F., “La ética política y el ejercicio de cargos públicos”, *cit.*, in its Chap. 4: “Legislative Ethics”, pp. 145 *et seq.*

<sup>21</sup> See Chaps. 2, 3, 4 and 5 of the cited work of Malem Seña.

<sup>22</sup> Ackerman-Rose, Susan, “Corruption: Greed, Culture and the State...”, *cit.*: “Corruption occurs in people’s day-to-day lives and in routine business activities as people navigate their relationship to the state. However, of particular important is corruption at the top of the state hierarchy that involves political leaders and their close associates and concerns the award of major contracts, concessions and the privatization of state enterprises. Such “Grand corruption” imposes large costs on ordinary people by diverting funds to top political leaders in exchange for sweetheart deals with big foreign and domestic businesses”.

<sup>23</sup> “Perspectives on the perception of Corruption”, in “Heidenheimer, Arnold *et al.* (comps.), *op. cit.*, pp. 161 *et seq.*

ous opinion about the need to penalize the acts. And the third, white, is when acts of corruption are tolerable and their criminalization is not vigorously supported.<sup>24</sup>

Finally, we mention the distinction between national corruption and transnational corruption, depending on whether national borders are crossed, and the presence of corporations and international anti-corruption legislation is observed.<sup>25</sup>

### III. CORRUPTION AT A TRANSNATIONAL LEVEL, INTERNATIONAL INSTRUMENTS AND CONVENTIONS AGAINST CORRUPTION, TRANSPARENCY INTERNATIONAL

Corruption is everywhere. In the rich industrialized countries and the poor regions, in the North and the South, in the East and the West. At first glance, the report on corruption is depressing. Everywhere, corruption seems impossible to eradicate and you might think that we at Transparency International have set ourselves a herculean task. Every day new variants of fraud and bribery appear, such as the heads of the mythological Hydra, which grew back every time they were cut off.<sup>26</sup>

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<sup>24</sup> *Cfr.* Malem Seña, *op. cit.*, p. 37. In reference to classifications of corruption in North American doctrine, see the article by Yasmin Dawood, “Classifying corruption”, *Duke Journal Constitutional Law and Public Policy*, 9, Annual 2014, p. 103. There the author maintains that: “Scholars have categorized various types of corruption. Thomas Burke has distinguished three types of corruption: quid pro quo, monetary influence, and distortion. Zephyr Teachout has identified five categories: criminal bribery, inequality, voices drowned out or silenced, public discouraged, and lack of integrity. Deborah Hellman has described three main types of corruption: corruption as the distortion of judgment, corruption as the distortion of influence, and corruption as the selling of favors. Although there are various approaches in the literature to classify corruption, I argue that there are two general approaches to conceptualizing the “evil” of corruption. The first approach is that corruption amounts to an abuse of power. The second approach is that corruption violates the principle of political equality. This part also considers Lawrence Lessig’s dependency theory of corruption, which offers an alternative approach to understanding corruption. On the other hand, in said article Dawood analyzes the different concepts and classifications that arise from the jurisprudence of the Supreme Court of Justice of the United States, in relation to corruption, especially in political campaigns.

<sup>25</sup> For an analysis of transnational corruption, see Delaney, Patrick X., “Transnational corruption. Regulation across borders”, *The Australian National University, Asia Pacifica School of Economics and Government, Policy and Governance. Discussion Papers*, 2005, [www.apseg.anu.edu.au](http://www.apseg.anu.edu.au).

<sup>26</sup> Peter Eigen, “Las redes de la corrupción”, Spanish versión, Colombia, Planeta, 2003, p. 302.

This is the conclusion of Peter Eigen, founder of the aforementioned institution, who nevertheless points to the progress made at the international level in the fight against corruption, in addition to the installation of the issue on the world agenda.<sup>27</sup>

In this sense, we consider it necessary to refer to the different Treaties and Conventions that were established to ensure international cooperation in the fight against corruption.

In this process, the importance of a law enacted in the United States in 1977, the Foreign Corrupt Practices Act (FCPA), which criminalized commercial bribery of foreign public officials by issuers of domestic securities and companies. To implement the prohibitions against commercial corruption contained in the Act, substantial internal control and accounting requirements were imposed on issuers of securities. Congress subsequently substantially amended the Act in 1988 to include a provision requiring the president to seek international cooperation to suppress such commercial bribery. This Law would be the precedent of the multilateral anti-corruption conventions, at the international and regional levels, adopted in 1996 by the Organization of American States (OAS) and in 1997 by the Organization for Economic Cooperation and Development (OECD). Due to the signing of this last Convention by the United States, a new modification was made in the text of the Foreign Corrupt Practices Act, in 1998, for the adaptation of the respective legal texts. Said Conventions differ in their members and characteristics.<sup>28</sup> Likewise, the United Nations Convention against Transnational Organized Crime, adopted in 2000, and the OECD Convention to Combat Bribery of Foreign Public Officials in International Business Transactions should be mentioned.<sup>29</sup>

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<sup>27</sup> The work is an account of his international experience at the World Bank and his retirement in 1993 to create Transparency International, which is a non-governmental organization with national sections in more than 100 countries and which has developed a remarkable fight against corruption. Among other activities that we will mention, this institution is responsible for the well-known Global Corruption Perception Index, which began to be published in 2001. The work refers to corruption in developed countries such as his native Germany and Spain, as well as in Latin American and African countries.

<sup>28</sup> *Cfr.* Arms, Brian C., “Holding public officials accountable in the international realm: A new multi-layered strategy to combat corruption”, *Cornell International Law Journal*, vol. 33, 2000, p. 159.

<sup>29</sup> See Alfonso Santiago’s article, “La cláusula ética del art. 36. Normatividad jurídica, normalidad social y la necesidad de un cambio de cultura política”, in “A veinte años de la reforma constitucional de 1994”, *Número Especial de Jurisprudencia Argentina*, August, 20 2014, Abeledo-Perrot, pp. 38 et seq., where the four Conventions just mentioned are analyzed, and which, as we will see later, were approved by our country.

Brian C. Harms maintains<sup>30</sup> that:

The OAS, OECD, and EU Conventions adopt, albeit in variously modified forms, the FCPA principle of extraterritoriality and the criminalization of commercial bribery from home countries, foreign officials of reception and officials of international public organizations. Almost all nations historically prohibited bribery of their officials, although such demand-side regulation was patently ineffective in preventing bribery and extortion in many countries; and it is commonplace, if not universal, to prohibit commercial corruption as well.

And it adds that:

An impressive array of other multilateral entities, including the United Nations (UN), the International Chamber of Commerce (ICC), the Council of Europe, the World Bank, and the International Monetary Fund (IMF), have adopted resolutions or efforts directed towards the reduction and definitive elimination of international commercial corruption. In particular, the United Nations Declaration against Corruption and Bribery in International Business Transactions and the United Nations Draft Code of Conduct on Transnational Corporations, together indicate a global recognition that commercial bribery is wrong.<sup>31</sup>

And later he adds this reflection: “A global anti-corruption regime implies, in part, what can be considered a plausible moral principle, namely, that bribery and extortion are ethically unacceptable, even if they are economically and politically tolerable. Therefore, norms can arise as a result of moral principles”.<sup>32</sup>

Years later, the United Nations Convention Against Corruption would be adopted, on a global scale, of special relevance in this matter, which was adopted by the General Assembly in New York, through Resolution 58/4 of October 31, 2003. And that at the beginning of the Preamble it expresses in a notable summary, the concern of the States Parties, “...for the seriousness of the problems and threats that corruption poses for the stability and security of societies by undermining the institutions and values of democracy, ethics, and justice and by compromising sustainable development and the rule of law”.

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<sup>30</sup> *Idem.*

<sup>31</sup> *Idem.*

<sup>32</sup> *Idem.* He then makes interesting reflections on the relationship between globalism and local realities, which present special cultural peculiarities around corruption.

The Convention consists of the Preamble, 8 Chapters, and 71 articles, which comprehensively and systematically regulate the fight against corruption and the required international cooperation. Ch. I is entitled “General Provisions”, II “Preventive Measures”, III “Penalization and Law Enforcement”, IV “International Cooperation”, V “Asset Recovery”, VI “Technical Assistance and Exchange of Information”, VII “Application Mechanisms” and VIII “Final Provisions”.

Later we will revise again this universal Convention and the American regional one when analyzing the legislation of our country.

The importance of the fight against corruption carried out by Transparency International (TI) cannot be ignored. As we anticipated, the international non-governmental institution, based in Berlin, Germany, was created at the initiative of Peter Eigen, who was elected as its first president in 1993. Very soon the National Societies and subsidiaries were established, which currently exceed the number of 100 countries.<sup>33</sup> And the intellectual task of developing anti-corruption instruments began. In the first place, the publication of the Source Book or Reference Book includes methods, examples, and means to confront corruption through a system of integrity in laws and institutions. This was followed by the Corruption Perceptions Survey,<sup>34</sup> which began publication in 1995, to great acclaim. In 1999, the Bribe Payers Index was released,<sup>35</sup> showing countries and companies paying bribes in developing countries. In 2000, the Institution helped create the Wolfsberg Principles, by which the world’s large banks commit to preventing corruption and money laundering. And from 2001 the Global Report on Corruption is made public.<sup>36</sup>

Other proposals of the Institution were the Integrity Pact and the Code of Conduct for Companies. The first, intended for governments and companies involved in awarding contracts to commit to competition without corrupt methods and with the supervision of independent entities, such as national TI sections. And the second is to ensure the validity of ethical principles in the operation of private companies within the global economy, with the concept of sustainable development.<sup>37</sup>

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<sup>33</sup> See *Cfr.* Peter Eigen, “Las redes de la corrupción”, *op. cit.* In 1994 the non-governmental organization *Poder Ciudadano of Argentina* joined Transparency International, as the first non-governmental organization. Currently, TI is chaired by the prominent Argentine jurist and political scientist, Delia Ferreira Rubio, which distinguishes our country, and who also chaired *Poder Ciudadano* for two terms.

<sup>34</sup> *Ibidem*, Ch. 12 “El índice de percepción de corrupción”, pp. 111-118.

<sup>35</sup> *Ibidem*, Ch. 13 “El índice de fuentes de soborno”, pp. 119-122.

<sup>36</sup> *Ibidem*, Ch. 5 “Crecimiento de la organización”, pp. 49-57.

<sup>37</sup> *Ibidem*, Ch. 8 “El Pacto de integridad” and 9, “Cómo deben proceder las empresas”, p. 75.

The tools for fighting corruption must be added to this where, in addition to the Source Book or Reference Book, the Tools for Citizen Control of Corruption were developed. While the Book pursues the objective of establishing integrity systems, the Tools are practical experiences on the matter to be used in day-to-day action against corruption at the local level.<sup>38</sup>

We also mention the TI Integrity Award, which is given in recognition of the courage of people committed to the fight against corruption.<sup>39</sup>

Finally, we refer to the Global Corruption Perception Index for the year 2020, published in Berlin on January 28, 2021, by TI, which shows Denmark and New Zealand in first place with 88 points, followed by Finland, Singapore, Sweden, and Switzerland with 85 points, while South Sudan and Somalia appear in the last positions with 12 points, followed by Syria with 14, Yemen and Venezuela with 15 points.<sup>40</sup> The general average is 43 points and by region the European Union and Western Europe rank first with 66 points and Africa last with 32 points, followed by Eastern Europe and Central Asia with 36. More than 2/3 of the 180 countries included in the study have less than 50 points.

The Report concludes that there is an inability of countries to control corruption, which contributes to a crisis of democracy worldwide. A direct correlation can be seen in this regard since countries with full democracies<sup>41</sup> have an average of 75 points, imperfect or weak democracies an average

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<sup>38</sup> *Ibidem*, Ch. 10: “Herramientas para combatir la corrupción”, pp. 95-102.

<sup>39</sup> *Ibidem*, Ch. 14: “El premio a la integridad de TI, una protección para los whistleblowers”, pp. 123-132. For the author, it is about rewarding those who blow the alarm whistle and denounce corruption, which implies taking serious risks. And there are indicated the different winners from 2001, which include people from very different countries. The first was Mustafá Adib, Captain of the Moroccan Army, who uncovered a case of corruption and ended up in jail. The work includes three very important chapters on corruption in Spain (Chap. 15) and in Germany (Chaps. 16 and 17), pp. 133-193. The Epilogue by Hans Kung entitled “La lucha contra la corrupción requiere un marco ético”, which begins with these statements: “It is clear that the fight against corruption must be undertaken with all legal means. And it will only succeed if the guilty are held accountable, regardless of their position, and in this way, justice is enforced. But this is not enough. Often there is no political will to fight corruption because there is no ethical will behind it; and many legal provisions against corruption are not applied in practice due to the lack of an awareness of injustice, since elementary ethical guidelines have been lost, both in the population in general and in the elites. The reform of a State is usually very difficult because an ethical basis is lacking” (p. 251).

<sup>40</sup> Keep in mind that 100 points means the maximum of transparency and 0 points, the maximum of corruption.

<sup>41</sup> According to the classification of The Economist Intelligence Unit, dedicated to measuring the quality of democracy worldwide. According to the last report of 2018, there are only 19 countries with full democracies, corresponding to only one country in Latin America that location, which is Uruguay. Chile dropped out of that group, just as it has dropped its

of 49 points, hybrid regimes (with authoritarian elements) an average of 35 points, and authoritarian regimes, with the worst average of 30 points. The entity's Executive Director, Patricia Moreira, expresses in this regard:

Corruption undermines democracy and generates a vicious circle that causes the deterioration of democratic institutions, which progressively lose their ability to control corruption.” “With so many democratic institutions under threat around the world —often with authoritarian or populist leaders— further work is needed to strengthen checks and balances and protect citizens' rights.<sup>42</sup>

We end this point with the expert opinion of Susan Rose-Ackerman:

Much has been done recently on efforts to control corruption through international treaties and civil society initiatives, such as those spearheaded by Transparency International (TI) and the Extractive Industries Transparency Initiative (EITI). The G20 in its June 2010 statement recognized that corruption is a global problem. This international concern is a positive development that can complement and reward efforts within recipient countries, especially to combat grand corruption by multinational companies. However, the existing initiatives have little real validity as Hard Law (hard law). Its impact depends on the change in customs and the bad publicity that corruption has... These international efforts, laudable as they are, cannot substitute domestic reform.<sup>43</sup>

#### IV. CORRUPTION IN LATIN AMERICA

On the current situation of this issue in our region, it is expressed in the “Report of the Advisory Group of Experts on anti-corruption, transparency, and integrity for Latin America and the Caribbean” of the IDB:<sup>44</sup>

Against the backdrop of a series of scandals of unprecedented scope in Latin America and the Caribbean (LAC), it is clear that corruption threatens to erode the foundations of much of the region's economic well-being and political stability, as well as the state of Law. Fed up with corruption and impunity,

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ratings on the Global Corruption Index. These questions are considered later in the following point on Latin America.

<sup>42</sup> See “El Índice de Percepción de la corrupción muestra un estancamiento de la lucha contra la corrupción en la mayoría de los países”, Transparency International, Surveys, January 29 2019, [www.transparency.org](http://www.transparency.org)

<sup>43</sup> *Cfr.* Rose-Ackerman, Susan, “Corruption: Greed, Culture and the State”, *cit.*

<sup>44</sup> Authored by Eduardo Engel, Delia Ferreira Rubio, Daniel Kaufmann, Armando Lara Yaffar, Jorge Londoño Saldarriaga, Beth Simone Noveck, Mark Pieth and Susan Rose-Ackerman, IDB, 2018, Publication Code IDB-MG-677, Washington, [www.iadb.org](http://www.iadb.org)

taking concrete and effective action to stop this cancer is one of the priorities of voters and many of the candidates in the numerous elections in the region in 2018 and probably also in the coming years. It is time to take a hard look at what has happened in the region and around the world, and the lessons we have learned from it, as well as what this means for upcoming initiatives to control corruption and improve the prospects of the 650 million of inhabitants of the region...

This work is urgent and necessary. Corruption has managed to penetrate the highest levels of government, society, and the economy. It is linked to the pernicious capture of the state by elites in much of the region and, as the Lava Jato case illustrates, operates across borders. In general terms, the data shows that in the last two decades there have been no significant improvements in the region in key governance indicators, or even worse, with a few exceptions, the region has maintained a poor performance in the implementation of the Rule of Law and the control of corruption. The distorting impact of money on politics in the region is associated with policies and practices that benefit a small elite that, with failed reforms, undermines public confidence in the government and democratic institutions.

Noting that globalization and technology provide unprecedented opportunities to hide the proceeds of crime and corruption, it is stated that: “In most LAC countries, corruption and state capture are systemic. The interconnectedness between networks of political and economic elites often undermines sound policymaking and the rule of law, entrenching impunity and diverting public resources and investment from the common good”.

The clarity, precision, and crudeness of this Summary of such renowned experts exempt us from other comments on the matter.

Coinciding with the previous analysis, the view of Daniel Zovatto, Regional Director for Latin America of International IDEA, who, in his insightful study on the state of democracies in Latin America, points out among the threats and challenges for the region the high levels of corruption and opacity along with others such as the weakness of democratic institutions, excessive presidentialism, re-election fever, high rates of citizen insecurity and attacks on the independence of Justice and freedom of expression.<sup>45</sup> He maintains that corruption “has been a historical constant in most of the countries of the region and everything indicates that this scourge is one of

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<sup>45</sup> “Zovatto, Daniel, “El estado de las democracias en América Latina: a 35 años del juicio de la Tercera Ola Democrática”, Cátedra Democracia Perú, Domingo García Rada, Lima, Jurado Nacional de Elecciones-Fondo Electoral-Escuela Electoral y de Gobernabilidad, 2014, Democracy Chair Series, núm. 1, pp. 38-49.

the most serious and persistent problems in Latin America”. He indicates that this has produced a lack of confidence in the institutions, which affects the political parties, the powers of the State —and among them, the Judiciary—, in addition to the police.<sup>46</sup> And he affirms that

...corruption is not an exclusive problem of politics or State entities. The privatization wave, which to a greater or lesser extent, has swept the region in the last two decades seems to contribute to the perception of citizens about corruption. The low levels of confidence shown by large private companies in various surveys in the region are an indication of this. Almost 45% of Latin American respondents say that the business sector in their countries is “corrupt” or “very corrupt.”<sup>47</sup>

For us, there is no doubt that corruption has a decisive impact on the characteristics and qualifications of medium and low democratic quality that are presented in general in our region, beyond its heterogeneity.<sup>48</sup>

However, one cannot fail to point out the extraordinary importance that the so-called Lava Jato process in Brazil has had in this area, which has meant a notable change in the actions of the Judiciary in the fight against corruption, and which has had an enormous impact throughout the region.

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<sup>46</sup> With data from Transparency International’s 2013 Global Corruption Barometer.

<sup>47</sup> Keep in mind that this opinion and these data were prior to the *Lava Jato* process.

<sup>48</sup> See Zovatto’s analysis, *op. cit.*, pp. 28-37. He cites the following definition by Morlino in this regard: “quality democracy is a stable institutional structure that allows citizens to achieve freedom and equality through the legitimate and correct functioning of institutions and mechanisms” (p. 28). To measure the democratic quality of the region, Zovatto uses 3 indices: that of Freedom House, that of Democratic Development of the Konrad Adenauer Foundation and that of Democracy, of the Intelligence Unit of The Economist. In this last index he distinguishes between full democracies, imperfect democracies, hybrid regimes and authoritarian regimes. According to the 2012 index, only Uruguay and Costa Rica were in the first group, while Argentina, Brazil, Chile, Colombia, El Salvador, Mexico, Panama, Paraguay, Peru, and the Dominican Republic were in the second. They were cataloged as hybrid regimes: Bolivia, Ecuador, Guatemala, Honduras, Nicaragua, and Venezuela and only Cuba as an authoritarian regime (p. 35). The author concludes that “...the 3 indices show the high degree of heterogeneity of Latin American democracies, which can be structured into three large groups, in addition to the special situation of Cuba: 1. A first group formed by Uruguay, Costa Rica and Chile, characterized by having the highest rates of democracy in Latin America; 2. A second group of countries with high to medium democracy indices but with important differences between them: Argentina, Brazil, Colombia, El Salvador, Mexico, Panama, Peru, the Dominican Republic and Paraguay; 3. A third group formed by the countries that have the lowest rates of democracy, made up of Bolivia, Ecuador, Guatemala, Honduras, Nicaragua and Venezuela and 4. The particular situation of Cuba (p. 37). We believe that currently both Venezuela and Nicaragua make up the last group of authoritarian countries along with Cuba.

Although the topic will be developed in detail by my distinguished colleague Prof. Marcelo Figueiredo, it is necessary to make some references in this regard. As well as the “Mani pulite” process<sup>49</sup> implied a before and after in the matter and with profound effects on the Italian political system,<sup>50</sup> the same can be said of what is ongoing in Lava Jato, in Brazil, but with special implications in other countries —especially in the region— since it involved transnational corruption.<sup>51</sup>

Lava Jato means car wash in Spanish since, in one located in Curitiba, there was the office of the exchange operator Alberto Youssef, who was arrested by the Federal Police by order of the Federal Judge of said city Sergio Moro, in an investigation on money laundering and tax evasion. This occurred on March 17, 2014, in what was called the first phase of the operation.<sup>52</sup> Subsequently, a former Director of Petrobras, Paulo Roberto Costa, linked to Youssef, was arrested, who also ended up implicating the most powerful construction companies in the country such as Odebrecht, Camargo Correa, OAS, and Mendes Junior, who were contractors of the state company, in what which was established as the most important judicial process against corruption in Brazil. Through the firmness of the investigation, using the rewarded denunciation and special knowledge of the Mani Pulite case, Judge Moro and the prosecutors led by Deltan Dallagnol advanced to

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<sup>49</sup> “Manos limpias” in Spanish. The opposite of “Dirty Hands”, the title of the well-known play by Jean Paul Sartre. In relation to this, see Dennis F. Thompson in his cited work “Political ethics and the exercise of public office”, in Chap. 1 “Democratic dirty hands”, which begins with what is stated in note 13, on the infringement of moral principles for the public interest.

<sup>50</sup> The process began on February 17, 1992, with the arrest ordered by the Milan Public Prosecutor Antonio di Pietro of the Socialist Party leader Mario Chiesa, at the time he was receiving a bribe from the businessman Luca Magni, to gain access to a construction concession. public. The latter had informed the Prosecutor of the facts, which gave rise to an investigation that covered the entire country, since the political system was completely corrupted through public works by bribes, extortion and illegal financing of politics. The mechanics was called “tangentopoli”, from tangent, bribery. In a few years, 1,233 politicians, officials and businessmen were sentenced. In an interview granted to Clarín in Buenos Aires, di Pietro pointed out that corruption was a cultural problem, and that in addition to the action of the Judiciary, the accompaniment of society in the fight against corruption was essential, with special emphasis on the importance of Education (“Las lecciones de Mani Pulite”, *Clarín*, Opinión, Buenos Aires, August 12, 2018).

<sup>51</sup> Since the Odebrecht company bribed officials from many countries to obtain important public works concessions.

<sup>52</sup> Phase 54 is currently being developed, according to what was stated by the journalist Marcio Resende, in a conference at the Faculty of Law of the National University of Córdoba, on October 2, 2018. He also said that the Odebrecht company came to pay salaries to 60 Argentine journalists.

convict more than 120 politicians and businessmen, including among the latter the most important in the country like Marcelo Odebrecht and Leo Pinheiro,<sup>53</sup> in addition to Ministers, Legislators —including the former President of the Chamber of Deputies Eduardo Cunha— and even the former President of the Republic, Luiz I. Lula da Silva.<sup>54</sup> It should be borne in mind that the first instance sentences were confirmed by the Courts of Appeal and there were also appeals before the Federal Supreme Court, which indicates that the Judiciary in its various instances has been responsible for this extraordinary anti-corruption process, which will have great popular support.

But since Brazilian companies, and especially Odebrecht, obtained construction concessions in other countries, such as Argentina, Peru, Colombia, Ecuador, Venezuela, Panama, Guatemala, the Dominican Republic, Angola, and Mozambique, among others, the bribery method was also used there,<sup>55</sup> which gave rise to two legal proceedings. Some of them with enormous political implications, since the last 4 former Presidents of Peru: Humala, Toledo, García and Kuczynski face criminal investigations for this reason. In Ecuador, Jorge Glas, who is serving a sentence for company bribery, had to leave the Vice Presidency.

In the case of our country, Justice is acting very slowly, even though, according to data from the United States Department of Justice, the Odebrecht company has recognized the payment here of 35 million dollars. In this sense, the Federal Judge Casanello has ruled the prosecution of the former Minister De Vido, the former officials Baratta and López, and the businessmen Roggio, Walker, Biagini, and Rodríguez, in addition to the former directors of the Aysa company, for the water treatment works and treatment plant in Tigre and Berazategui, respectively.<sup>56</sup>

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<sup>53</sup> Marcelo Odebrecht was sentenced by Judge Sergio Moro to 19 years in prison in just over 2 years of proceedings. As of March 2018, 188 convictions had been handed down against 123 politicians, officials, and businessmen. Cf. Agencia Efe, Rio de Janeiro, March 17, 2018.

<sup>54</sup> He also received a sentence of 12 years and 11 months in prison for another case of corruption by Federal Judge Gabriela Hart, who replaced Sergio Moro, who later became Minister of Justice of Brazil. In this case, it was proven that he was benefited by the OAS and Odebrecht companies for works carried out on a rural property that he frequented, near the municipality of Atibaia, in the State of São Paulo. Cf. *La Voz del interior*, Córdoba, p. 18, under the title “New conviction of Lula for corruption”.

<sup>55</sup> That, as reported by the United States Securities Commission in 2016, reached a total of 788 million dollars in the countries. For an analysis of what happened in each of the countries involved, see the *CNN Español* report on the web entitled “The Odebrecht bribery scandal: this is the case of each affected Latin American country”, February 10 2017, [www.cnn.espanol.cnn.com](http://www.cnn.espanol.cnn.com).

<sup>56</sup> According to information published in separate and successive articles in *La Nación*, *Clarín*, *La Voz del Interior*, etc.

We refer next to the Global Index of Perception of Corruption in Latin America, of 2020. There it appears in the first position of the Uruguay region with 71 points and position 21 in the Global Index, followed by Chile with 67 and 25 in the Global Index, and, in the last position, Venezuela with only 15 points and in position 176 out of 179 countries. Very close, Haiti with 18 points and in position 170 of the Global Index and somewhat further are Nicaragua with 22 points, Honduras with 24 and Honduras with 25, in positions 159, 157, and 149 of the Global Index. Paraguay and the Dominican Republic reach 28 points and position 137 in the Global Index. Mexico and Bolivia have 31 points and position 124 in the Global Index. Then there are Panama and El Salvador with 35 and 36 points and global positions 111 and 104. Brazil and Peru with 38 points are in position 94 globally and Ecuador and Colombia reach 39 points and position 92. Argentina with 42 points is in position 78. Jamaica has 44 points and position 69 and Cuba with 47 points in position 63. Finally, Costa Rica with 57 points is in global position 42.<sup>57</sup>

In the Americas, the average is 44 points and the stagnation in that figure during the last 5 years is highlighted, in addition to the advance of populism. Canada and Uruguay achieved the best results with 77 and 71 points, while Nicaragua, Haiti, and Venezuela were the worst with scores of 22, 18, and 15, respectively. It is argued that, in a region characterized by weak government institutions, Covid-19 has highlighted deep social and economic inequalities, with their disproportionate effects on vulnerable populations. Likewise, it is indicated that the applied emergency institutes restricted human rights, weakened institutional checks and balances, and reduced the space of civil society. They also highlight the irregularities and cases of corruption associated with acquisitions related to Covid-19.

We conclude this point by referring to the measures proposed to fight corruption in the IDB Expert Group Report cited above. In this regard, it is argued that this is the time for a systemic transformation:

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<sup>57</sup> The FBI announced the installation of an office in Miami to receive complaints of bribery and money laundering, as a result of the advance of corruption in Latin America and after the Petrobras and Oderbrecht cases. It was the director of the Transnational Corruption Section, Leslie Backschie, who announced it in Washington, referring to the need to comply with the Corrupt Practices Act abroad (*Cfr.*: “El FBI investigará el dinero de la corrupción en Sudamérica”, Internacionales, *La Voz del interior*, Córdoba, p. 18, 6/3/2019, where the report by Michel Balsamo and Erick Tucker of the AP Agency is cited). The note makes references to the fines paid in the United States for these illicit activities, Petrobras, in September 2018, for bribes in Brazil for 853 million dollars and Oderbrecht in December 2016, for more than 3,500 million dollars, for bribery in many countries.

Recent scandals clearly show that corruption must be countered with political, institutional and legal reform that increases deterrence and ends impunity for people with political connections. Although some countries in the region, together with the IDB, have initiated some anti-corruption reforms during the last decade, these have been uneven and partial, and have focused more on enacting laws and regulations than on their application and more on principles and procedures than on concrete practices. Fighting corruption requires a bolder approach that involves public servants, companies, civil society, and individuals to generate the necessary systemic shock that overcomes the crisis of trust between citizens and investors and strengthens the democratic culture. Governments need to respond to citizen discontent and investor anxiety through structural reforms in public procurement and campaign finance. Greater transparency in government contracts, public budgets and conflicts of interest, and the use of innovative information technology tools can go a long way” ... “As well as a proactive approach to information disclosure information, the criminal justice system needs reform that addresses and prevents state capture by political elites and high-level decision-makers, as well as illegal conduct by the business sector in general. Countries could explore innovative plea bargain solutions, including plea bargaining and transnational cooperation, which can help speed the resolution of cases. Any one of these reforms alone would be a step in the right direction. However, without an integrated approach and a systemic shock would be insufficient to produce sustainable change” ... “Reforms must reach both the supply and demand of acts of corruption and have the participation of the public and private sectors. Any meaningful plan must incorporate “grand” corruption (including state capture by elites with powerful vested interests and corruption in politics), such as the usual payments required from ordinary citizens and small businesses.<sup>58</sup>

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<sup>58</sup> Report of the Advisory Group of Experts on anti-corruption..., already cited. In the following point 5, the Report establishes “The four pillars for a systemic reform agreement”, for the organization of the main actors and interested parties of each country and that consist of 1. regional and global initiatives, 2. national initiatives, 3. participation of the private sector and civil society and 4. the support of the IDB and other international organizations. Likewise, another important international document with OECD anti-corruption measures can be observed, entitled “Recommendation of the OECD Council on Public Integrity”- A Strategy against Corruption”, in which we cannot stop for reasons of extension of this document. job. There it is stated that between 10 and 30% of public investment can be lost due to mismanagement and corruption and proposals are made explicit in the different aspects. see [www.oecd.org/gov/ethics](http://www.oecd.org/gov/ethics). Regarding the economic impacts of corruption, see also Chap. 2 of the Report of the Expert Advisory Group cited above: “La corrupción y sus costos en América Latina y el Caribe”. Consequently, it is very evident that there are clear, precise, and extensive recommendations and proposals to fight against corruption, from the international order, but what is lacking is the political will to apply them.