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EU-China FTA: Enhanced Enforcement and Umbrella Coverage of Anticorruption

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I. Introduction

A 2018 Report for the European Parliament's Committee on International Trade concluded:

Corruption perception indexes [show] that in most of the world corruption is the rule rather than the exception. The report finds evidence that international trade agreements have the potential to act as the exogenous factor breaking the vicious circle of corruption in economies based on privileged connections rather than fair competition....¹

The European Commission reported that corruption costs the EU at least €120bn per annum—almost as much as the EU's annual budget, and a

1. Alina Mungui-Pippidi, *Anti-Corruption Provisions in EU Free Trade and Investment Agreements: Delivering on Clean*, EUR. PARL. DOC. 10.2861/203713 at 5 (Apr. 2018), [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/603867/EXPO_STU\(2018\)603867_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/603867/EXPO_STU(2018)603867_EN.pdf) ("They increase competition in the removal of tariffs and so diminish the power of rentier companies which influence domestic regulation in their favor. They also contribute to a fairer business environment through their transparency provisions."). See also Alina Mungui-Pippidi, *Fostering Good Governance through Trade Agreements*, EUR. RES. CTR. FOR ANTI-CORRUPTION AND STATE-BUILDING (Jan. 24, 2018), <https://www.againstcorruption.eu/events/anti-corruption-provisions-in-eu-free-trade-and-investment-agreements-delivering-on-clean-trade/> (The options offered are between good governance package, a firm anticorruption language but unenforceable provisions even in EU countries.).

2016 study commissioned by the European Parliament found the cost of corruption across every EU member state could actually be as high as €990 billion—eight times higher than previous estimates.²

Clearly, corruption hurts competition, raises prices, negates fair trade, and has social consequences;³ it is one of the most pervasive and financially damaging crimes in the world, costing the global economy an estimated \$2.6 trillion every year, or 5 percent of the world's gross domestic product.⁴

In China, a 2018 report concludes a partial accounting of corruption showed Chinese-listed firms suffered an aggregate loss of USD \$30 billion in firm value due to corruption.⁵ Chinese President Xi Jinping has called “corruption, the ruling Communist Party's biggest threat and vowed a ‘sweeping victory’ over the problem.”⁶

The widespread corruption involved in Chinese (often state-owned) companies' overseas activities has become a growing international problem. In the latest BPI [Business Performance Indicator], China ranked 27 out of

2. Ruth Green, *Fighting Corruption Remains a Low Priority for the EU*, INT'L BAR ASS'N (Mar. 19, 2018), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=8ab9996b-5454-4a7d-a38a-6e376aa310f3>. See generally *Costs of Corruption Across the EU*, THE GREENS/EFA IN THE EUR. PARL. (Dec. 7, 2018), <https://www.greens-efa.eu/files/doc/docs/e46449daadbfebc325a0b408bbf5ab1d.pdf>. (“At a national level, the damage done by corruption to the GDP of EU Member States ranges from 15% in Romania (€38.6 billion) to 0.76% in the Netherlands (still adding up however to over €4.4 billion). Italy breaks the record in absolute terms, losing €236.8 billion each year to corruption. France comes second, losing €120.2 billion each year to corruption, whilst Germany takes a hit to GDP of over €104 billion every single year.”). Of course, all bribery does not involve cross-border transactions; rather it is a reminder of the pervasiveness of corruption.

3. Elvin Mirzayev, *How Corruption Affects Emerging Economies*, INVESTOPEDIA (May 19, 2019), <https://www.investopedia.com/articles/investing/012215/how-corruption-affects-emerging-economies.asp>.

4. U.N. Security Council, *Global Cost of Corruption at Least 5 Per Cent of World Gross Domestic Product*, Secretary-General Tells Security Council, Citing World Economic Forum Data (Sept. 10, 2018), <https://www.un.org/press/en/2018/sc13493.doc.htm>.

5. Daniel S. Kim, Yun Li & Domenico Tarzia, *Value of Corruption in China: Evidence from Anti-Corruption Investigation*, ELSEVIER: ECON. LETTERS (Jan. 31, 2018), <https://www.sciencedirect.com/science/article/pii/S0165176518300296?via%3Dihub>; <https://doi.org/10.1016/j.econlet.2018.01.021>. See also *China Corruption Rank*, TRADING ECON., <https://tradingeconomics.com/china/corruption-rank> (China is the 87th least corrupt nation out of 175 countries, according to the 2018 Corruption Perceptions Index.). Ralph Jennings, *Bad for Business? China's Corruption Isn't Getting Any Better Despite Government Crackdown*, FORBES (Mar. 15, 2018, 5:00 AM), <https://www.forbes.com/sites/ralphjennings/2018/03/15/corruption-in-china-gets-stuck-half-way-between-the-worlds-best-and-worst/#720e34c673d1> (Some experts observe, foreign companies prefer to operate in China's 14 special trade zones “because they're relatively free of corruption.”).

6. Jennings, *Bad for Business? China's Corruption Isn't Getting Any Better Despite Government Crackdown*, *supra* note 5.

28 major global economies, with only Russian companies being even more likely to pay bribes abroad.⁷

On the global level, in the last two decades Regional Free Trade Agreements (RTAs) have attempted to curb corruption through treaty provisions. ... corruption was identified as a major hindrance to free trade and a vast enterprise was begun to build a legal framework against international anticorruption. Its target is both national corruption—abuse of authority for private benefit, as it is defined by most international organizations—and international corruption, focusing in particular on transnational bribery.⁸ ... That then led to the common tendency of modern RTAs to address regulatory areas such as transparency and anticorruption provisions alongside environmental and labor standards with more than 40 per cent of RTAs concluded since the millennium incorporating anticorruption and anti-bribery commitments, which have no precedent under the WTO regime.⁹

This paper discusses the domestic and international standards and regulation of corruption and assesses whether an EU-China FTA with anticorruption and transparency provisions on trade and investment can facilitate a diminishing of the corruption. Specifically, it examines the anticorruption standards at the international level (OECD; UN; WTO; EU's GRECO), and at the domestic level with China, EU, and selected EU member states, with some reference to the FCPA of the U.S. Issues include how corruption is defined, whether private and public persons are covered, whether there is an extra-territorial reach of domestic laws, what is the administrative enforcement, what are the penalties: civil and/or criminal, and what is the effectiveness of such regulatory measures? It will then compare

7. Bertram Lang, *China and Global Integrity-Building: Challenges and Prospects for Engagement*, U4 ANTI-CORRUPTION RESOURCE CTR. at 3 (2019), <https://www.u4.no/publications/china-and-global-integrity-building-challenges-and-prospects-for-engagement.pdf>. See also Nieves Zúñiga, *China: Overview of Corruption and Anti-Corruption*, TRANSPARENCY INT'L (Apr. 10, 2018), <https://knowledgehub.transparency.org/assets/uploads/helpdesk/Country-profile-China-2018.pdf> (“According to a survey conducted by Charney Research in 2015, 35 per cent of companies in China confirmed that they had to pay bribes or give gifts to officials to operate ... [and] corruption at the border in China is one of the most problematic factors for importers Respondents to the Executive Opinion Survey 2017 (World Economic Forum 2017) situate corruption as the fourth most problematic factor for doing business in China after access to financing, inefficient government bureaucracy, inflation and policy instability.”).

8. Mungiu-Pippidi, *supra* note 1.

9. *Id.* at 16-17. See also Matthew Jenkins, *Anti-Corruption and Transparency Provisions in Trade Agreements*, TRANSPARENCY INT'L (Feb. 6, 2017), https://www.transparency.org/files/content/corruptionqas/Anti-corruption_and_transparency_provisions_in_trade_agreements_2017.pdf.

and assess how EU-China FTA provisions could enhance the enforcement of anticorruption regulation where domestic laws are inadequate.

II. Corruption and Assessment of Remedial Effectiveness

Corruption Defined

There is no single globally accepted definition of corruption. Transparency International, the leading international NGO seeking to curb corruption, defines it as “the abuse of entrusted power for personal gain. The main forms of corruption are bribery, embezzlement, fraud and extortion.”¹⁰ It can arise either as *active* bribery (the act of promising or giving the bribe), as opposed to the act of receiving a bribe (*passive* bribery).¹¹ It can encompass domestic bribery (private to public and public to private); corruption of foreign officials (international); facilitation payments; compliance programs; jurisdictional issues to prosecute corruption; exemptions; and remedies.¹²

Rampant: Globally and with EU and China

There seems to be no country free of corruption in trade.¹³ The U.S. anticorruption law, the FCPA, shows its top enforcement actions may come from the “cleanest” countries doing business in corrupt ones.¹⁴

10. *Corruption Dictionary*, GAN BUS. ANTI-CORRUPTION PORTAL, <https://www.ganintegrity.com/portal/corruption-dictionary/>. See also *What is Corruption?*, TRANSPARENCY INT’L, <https://www.transparency.org/what-is-corruption#define>.

11. *Glossary*, U4 ANTI-CORRUPTION RESOURCE CTR., <https://www.u4.no/terms>.

12. Mungiu-Pippidi, *supra* note 1, at 10 (“Typical examples of corruption encountered by foreigners are the solicitation of bribes to obtain foreign exchange, import, export, investment or production licenses or to avoid paying tax, although for international investors that sort of extortion amounts to an extra tax.”).

13. Index of Pub. Integrity, <https://integrity-index.org>. See Alina Mungiu-Pippidi, *Fostering Good Governance Through Trade Agreements: An evidence-based review for the workshop ‘EU anticorruption chapters in EU free trade and investment agreements’*, EUR. RES. CTR FOR ANTI-CORRUPTION AND STATE-BUILDING at 5 (Jan. 24, 2018), <http://www.ro.maniacurata.ro/wp-content/uploads/2018/02/INTA-CORRUPTION-SEMINAR-AMP-SLIDES-FOR-POSTING.pdf>.

14. Lisa Thompson, *A new No. 1: Petrobras agrees to biggest FCPA settlement*, BIZBLOG (Oct. 5, 2018), https://www.lexisnexis.com/communities/lexisnexis_biz/b/bizblog/archive/2018/10/05/a-new-no-1-petrobras-agrees-to-biggest-fcpa-settlement.aspx (The top ten FCPA settlements involved: 1. Brazil; 2. Sweden; 3. Germany; 4. Netherlands; 5 and 6. France; 7 and 8. U.S.; 9. Israel).

Corruption remains endemic, and government leaders have failed to make fundamental reforms.¹⁵

What is missing is active enforcement. Transparency International's new report, *Exporting Corruption*, finds that only 11 major exporting countries—accounting for about a third of world exports—have active or moderate law enforcement against companies bribing abroad in order to gain mining rights, contracts for major construction projects, purchases of planes and other deals.¹⁶

Regulatory Approaches Affecting EU and China

There are a variety of regulatory approaches used to combat corruption, including: explicitly prohibiting corruption (criminal and civil), requiring transactional transparency, good government (government integrity) by international standards, self-standing conventions implemented by the members, and free trade agreement provisions.

International Standards of Organizations and Conventions

While Global standards are often merely aspirational, they promote and occasionally require action by their terms. China is covered by WBO and UN “obligations” and the EU is covered by those and also OECD and EU conventions, discussed below.

WTO and Anticorruption

There are no explicit provisions in WTO treaties that prohibit corruption in trade, rather they rely on nondiscrimination and transparency requirements.¹⁷ Besides tariffs, the elimination of quantitative, and other non-tariff barriers to trade, there are a number of corruption deterrence instruments in three treaties regulating the procedures governing certain stages or types of trade, the General Agreement on Tariffs and Trade (GATT 1994), the General Agreement on Trade in Services (GATS), and to a lesser

15. Mungiu-Pippidi, *Fostering Good Governance Through Trade Agreements: An evidence-based review for the workshop 'EU anticorruption chapters in EU free trade and investment agreements'*, *supra* note 13.

16. *Id.* See also *China*, 2019 INDEX OF ECON. FREEDOM, <https://www.heritage.org/index/country/china>.

17. Padideh Ala'i, *The WTO and the Anti-Corruption Movement*, 6 LOY. U. CHI. INT'L L. REV. 259, 259-278 (2008), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1060&context=facsch_lawrev.

extent in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

All those agreements aim to reduce administrative discretion and, under the rubric of ‘transparency,’ to provide for members to ensure that their responsible officials will be unable to hide behind secretive processes to grant government contracts or licenses on the basis of particularistic considerations, whether protectionist or corrupt.¹⁸

There are additional WTO provisions which serve to deter corruption, for example, the Government Procurement Act (GPA)¹⁹ and the Trade Facilitation Agreement.²⁰

GPA asks all participating countries to open up their markets and establish independent “domestic review systems” which means mechanisms to review complaints to which both foreign and domestic suppliers may apply for correction of procedural errors. GPA also establishes additional external oversight by making national procurement systems subject to scrutiny by the WTO Committee on Government Procurement, and through the WTO’s binding dispute settlement system.²¹

18. Mungui-Pippidi, *Fostering Good Governance through Trade Agreements*, *supra* note 1, at 18 (“Recently the introduction of a monitoring mechanism was proposed and innovative proposals on e-procurement are included.”).

19. *Id.* at 17. See GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Art. X:1, Art. X:2, Art. X:3(a), Art. X:3(b), 1867 U.N.T.S. 187, (1994); see also GATS: General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Art. III:1, Art. VI:1, Art. VI:2, 1869 U.N.T.S. 183 (1994); and see TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Art. 41:4, Art. 63:1, 1869 U.N.T.S. 299 (1994).

20. *The Trade Facilitation Agreement*, World Trade Organization, <https://www.wto.org/trade-facilitation-agreement-facility> (“Traders from both developing and developed countries have long pointed to the vast amount of ‘red tape’ that still exists in moving goods across borders, and ... [the] TFA contains provisions for expediting the movement, release and clearance of goods, including goods in transit.... The Agreement will help improve transparency, increase possibilities to participate in global value chains, and reduce the scope for corruption.”).

21. Mungui-Pippidi, *Fostering Good Governance through Trade Agreements*, *supra* note 1, at 17-18 (The Agreement on Government Procurement (GPA) is the most direct instrument to counter corruption among WTO Member governments. A multilateral treaty, the GPA applies only to those Members which have accepted its provisions ... “The Preamble to the GPA sets out the three main goals of the parties regarding procurement. First, GPA opens the market for government purchases to suppliers from all party territories. A second, related goal of the GPA is non-discrimination in the procurement process. The parties ‘recognize’ that government procurement laws should not and should not aim to discriminate in favor of national suppliers nor to the advantage of one country’s suppliers over those of another. The third goal of the Government Procurement Agreement is to enhance the

United Nations

There are two UN conventions relevant to the global fight against corruption. The first is the United Nations Convention against Corruption (UNCAC).²² It is the only legally binding, universal anticorruption instrument.²³ The actual implementation of the Convention into domestic law by States is evaluated through a peer-review process, the Implementation Review Mechanism, where assistance is provided to identify deficiencies in a country's regulatory process, but there is no direct enforcement mechanism.²⁴

The second convention is the United Nations Convention against Transnational Organized Crime and the Protocols Thereto (UNTOC).²⁵ This is the main international instrument in the fight against transnational organized crime and includes protocols against human trafficking, smuggling migrants, and illicit manufacturing and trafficking in firearms.²⁶

OECD²⁷

The OECD was founded in 1961 to stimulate economic progress and world trade. In 1999, its AntiBribery Convention on Combating Bribery of Foreign Public Officials in International Business Transactions came into force that requires its signatories to criminalize the bribery of foreign public officials in international business transactions.²⁸ Its global track record of

'transparency of laws, regulations, procedures and practices regarding government procurement' and to provide for 'fair' procedures to ensure that the rules on procurement are effective.').

22. United Nations Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41.

23. United Nations Convention Against Corruption, *supra* note 22. ("The Convention covers five main areas: preventive measures, criminalization and law enforcement, international cooperation, asset recovery, and technical assistance and information exchange. The Convention covers many different forms of corruption, such as bribery, trading in influence, abuse of functions, and various acts of corruption in the private sector.').

24. *Implementation Review Mechanism*, UNODC, <https://www.unodc.org/unodc/en/corruption/implementation-review-mechanism.html>.

25. United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209.

26. *Id.*

27. *Where: Global Reach*, OECD, <https://www.oecd.org/about/members-and-partners/> (The 36 OECD countries have adopted this Convention.).

28. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents, Dec. 17, 1997, OECD.

enforcement is annually updated.²⁹ A monitoring mechanism exists, based on peer-review; but the OECD has no sanctions itself within its authority.

Group of States Against Corruption

The Group of States against Corruption (GRECO)³⁰ was established in 1999 by the Council of Europe to monitor State compliance with the organization's anticorruption standards.³¹ Its members include countries outside Europe and its objective is to improve the capacity of its members to fight corruption by monitoring their compliance with its anticorruption standards through a process of mutual evaluation and peer pressure.

In sum, the two UN conventions and GRECO all address matters of corruption control with the focus on procedures. Countries are directed to create anticorruption agencies and adopt legislation. The OECD focuses more on enforcement; but like the others, it too is based on peer review and lacks sanctions

European Union

29. OECD Working Group on Bribery, *2017 Enforcement of the Anti-Bribery Convention*, OECD at 1 (Nov. 2018), <https://www.oecd.org/daf/anti-bribery/OECD-WGB-Enforcement-Data-2018-ENG.pdf> (Highlights from the 2017 data. Three countries adopted law reforms designed to support more effective anti-bribery law enforcement. Reforms include the lengthening the statute of limitations (Italy), creating corporate liability for corruption (Argentina) and reinforcing laws on anti-money laundering laws and confiscation of the proceeds of foreign bribery (Japan). Three Parties joined the list of jurisdictions that are known to have sanctioned foreign bribery: Brazil, Spain and Australia. This brings to 23 the total number of Parties to the Convention that have sanctioned foreign bribery at least once, but it also means that 21 Parties have never sanctioned foreign bribery.).

30. *Members and Observers/Etats Membres et Observateurs*, COUNCIL OF EUR., <https://www.coe.int/en/web/greco/structure/member-and-observers> (Currently, GRECO comprises 49 member States (48 European States and the United States of America.).

31. GRECO, *What is GRECO?*, <https://www.coe.int/en/web/greco/about-greco/what-is-greco>. ("It helps to identify deficiencies in national anti-corruption policies, prompting the necessary legislative, institutional and practical reforms. GRECO also provides a platform for the sharing of best practice in the prevention and detection of corruption. GRECO. Membership in GRECO, which is an enlarged agreement, is not limited to Council of Europe member States. Moreover, any State which becomes Party to the Criminal or Civil Law Conventions on Corruption automatically accedes to GRECO and its evaluation procedures. Legal instruments adopted by the Council of Europe: Criminal Law Convention on Corruption (ETS 173), Civil Law Convention on Corruption (ETS 174). Additional Protocol to the Criminal Law Convention on Corruption (ETS 191), Twenty Guiding Principles against Corruption (Resolution (97) 24), Recommendation on Codes of Conduct for Public Officials (Recommendation No. R(2000)10), Recommendation on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns (Recommendation Rec(2003)4).").

The EU Convention Against Corruption Involving Officials became effective in 1997 to fight corruption involving European officials or national officials of Member States of the European Union (EU).³² Members are required to take measures to ensure that passive or active corruption by officials is a punishable criminal offense and that the laws include jurisdiction.³³

Perhaps the anticorruption standards with the most substantial global impact is the Federal Corrupt Practices Act (FCPA) of the U.S.³⁴

The U.S. Foreign Corrupt Practices Act (FCPA) of 1977 is the first major piece of national legislation aimed at combating bribery and the first to introduce corporate liability, responsibility for third parties and extra-territoriality for corruption offenses. Prohibition of bribery payments is limited to foreign officials, and the FCPA includes a limited exception for facilitation payments. With nearly global jurisdiction, the FCPA is widely enforced, and the current trend points towards increased enforcement actions, fines and imprisonment.³⁵

Its jurisdictional presence is felt around the world and its recent practice of seeking claims on behalf of other countries promises more cooperation in the future.³⁶ Its anticorruption approach is two-fold: One that addresses accounting transparency requirements under the Securities Exchange Act of 1934 and another concerning bribery of foreign officials. The law has penalties, civil and criminal, and a track record of successes in prosecution.³⁷

32. Convention Drawn Up on the Basis of Article K.3 (2) (c) of the Treaty on European Union on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, June 25, 1997, 1997 O.J. (C 195) 2.

33. *Id.* (Jurisdiction must cover the following cases. "... when the offence is committed in whole or in part within its territory; when the offender is one of its nationals or one of its officials; when the offence is committed against European or national officials or against a member of the EU institutions who is also one of its nationals; when the offender is a European official working for a European Community institution, agency or body that has its headquarters in the Member State in question.").

34. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 (2004).

35. *FCPA Compliance Guide*, Compliance Guides, GAN BUS. ANTI-CORRUPTION PORTAL, <https://www.ganintegrity.com/portal/compliance-quick-guides/united-states/>.

36. Mungiu-Pippidi, *supra* note 1, at 25.

37. *Identify FCPA Foreign Corruption Anti-Bribery Risks and Prevent Violations*, Regulations, VISUAL OFAC, <https://www.visualofac.com/regulations/fcpa-violations-penalties/> (Civil and criminal penalties for FCPA Anti-bribery and Books and Records violations are significant.). See also *Foreign Corrupt Practices Act of 1977*, Fraud Section Home, THE U.S. DEP'T OF JUST., <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act>.

Another evolving alternative to government enforcement in the U.S. is the individual filing of derivative lawsuits through which shareholders can sue a company's directors and officers for breaching their fiduciary duties to that company.³⁸

Free Trade Agreements 'Anticorruption Provisions

International trade agreements are reported to help in the control of corruption in two ways: "by increasing competition directly, due to removal of tariffs thereby diminishing the power of rentier companies which influence regulation in their favor and by contributing to a fairer business environment through transparency provisions."³⁹

... the expansion of trade across the most diverse governance regimes has meant that non-tariff measures (NTMs) began to weigh considerably, so needing an approach to achieve a degree of regulatory coherence across jurisdictions. That then led to the common tendency of modern RTAs to address regulatory areas such as transparency and anti-corruption provisions....⁴⁰

This need for regional coherency has led to nearly half of the RTAs incorporating anticorruption and antibribery commitments.⁴¹

The provisions come in different forms; for example, anticorruption, transparency, and good government (government integrity) provisions that

38. Mungiu-Pippidi, *supra* note 1, at 26 ("For instance, in *In Re Petrobras Securities Litigation* a group of shareholders allege that Petrobras issued 'materially false and misleading' financial statements and 'false and misleading statements regarding the integrity of its management and the effectiveness of its financial control.'").

39. *Id.* at 16 ("For over half a century non-discrimination and transparency have been basic principles of agreements governing world trade, with the goal of ensuring a level playing field for foreign businesses.... Dedicated anti-corruption provisions are of more recent date, although their goal of equal treatment of businesses regardless of country of origin remains the same.").

40. *Id.* at 16-17. See also Jenkins, *Anti-Corruption and Transparency Provisions in Trade Agreements*, TRANSPARENCY INT'L (Feb. 6, 2017), *supra* note 9. Stefan Mbiyavanga, *Improving domestic governance through international investment law: Should bilateral investment treaties learn from international anti-corruption conventions?*, 2017 OED GLOBAL ANTI-CORRUPTION & INTEGRITY FORUM (Mar. 31, 2017), <http://iffodatabase.trustafrica.org/iff/Integrity-Forum-2017-Mbiyavanga-international-investment-law.pdf>.

41. Mungui-Pippidi, *Fostering Good Governance through Trade Agreements*, *supra* note 1, at 17.

aim to keep transactions open and thus more likely to be non-corrupt.⁴² A “model” anti-bribery clause has been suggested, modeled after OECD obligations.⁴³ Some trade agreements like the CPTPP and the EU-Canada CETA provide protections that allow investors to seek restitution outside the host state’s judicial system through an arbitration tribunal, where that state has not complied with its treaty obligations.

However, it has been noted, what happens if a country lacks the “proper institutions for the desired implementation; for instance, judicial independence? Mechanisms might exist in trade agreements but have no impact if further development of enforcement structures is not pursued.”⁴⁴ As reforms may proceed, international arbitration is increasingly used to provide remedies. Over time, investor-state arbitration has proved to be an emerging space for enforcement of international norms—including transparency and anticorruption.⁴⁵

Regulatory Variables

The relevant laws and their effectiveness will be assessed based on the following variables.⁴⁶

III. Legal International Obligations and Sanctions

International standards and conventions, such as from WBO, UN, OECD, OECD Anti-Corruption Convention,⁴⁷ GRECO, and the EU

42. Augusto Lopez-Claros, *Six Strategies to Fight Corruption*, WORLD BANK BLOGS, <https://web.worldbank.org/archive/website01605/WEB/2042.HTM>.

43. Mbiyavanga, *supra* note 40.

44. Mungui-Pippidi, *Fostering Good Governance through Trade Agreements*, *supra* note 1, at 25. See also Matt Reeder, *State Corruption in ICSID BIT Arbitration: Can it be Estopped?*, KLUWER ARBITRATION BLOG (Mar. 9, 2017), <http://arbitrationblog.kluwerarbitration.com/2017/03/09/state-corruption-in-icsid-bit-arbitration/>, for a discussion on the use of corruption as a bar to arbitration.

45. Mungui-Pippidi, *Fostering Good Governance through Trade Agreements*, *supra* note 1, at 25.

46. Not assessed is the relevant status of individual country’s rule of law—which is indispensable to effective enforcement of the laws at the domestic level.

47. OECD, *Ratification Status as of May 2018*, OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUB. OFFICIALS IN INT’L BUS. TRANSACTIONS (May 2018), <https://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf> (The states ratifying the OECD Anti-Corruption Convention include Albania, Andorra, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco,

Convention Against Corruption Involving Officials, require a state's commitment to its legislative obligations and having enforcement provisions in place.⁴⁸ The EU, selected EU Members,⁴⁹ and China⁵⁰ have agreed to adhere to the following:

	WTO	UN	OECD	OECD Anticorruption Convention	GRECO	EU AntiCorruption Convention Involving Officials
EU	X	X				

Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, and the United States of America. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Ratification Status as of May 2017.)

48. United Nations Convention Against Corruption, *supra* note 22 (EU and China are parties in in WTO and both UN instruments.). United Nations Convention Against Transnational Organized Crime, *supra* note 25. *Where: Global Reach*, *supra* note 27 (But they are not members of OECD or GRECO.). *Members and Observers/Etats Membres et Observateurs*, *supra* note 30. OECD, *Implementation of the Anti-Corruption Action Plan*, ADB/OECD ANTI-CORRUPTION INITIATIVE, <https://www.oecd.org/site/adboecdanti-corruptioninitiative/implementationoftheanti-corruptionactionplan.htm> (China has endorsed the ADB/OECD Anti-Corruption Initiative for Asia-Pacific Plan. Though it has no enforcement mechanism, it does provide for possible technical support and advising. Implementation of the Anti-Corruption Action Plan. "By endorsing the Anti-Corruption Action Plan for Asia-Pacific, the Initiative's member countries have committed to undertake meaningful reform to bolster their safeguards against corruption. Under the Action Plan's implementation mechanism, countries have committed to "endeavor, in consultation with the Secretariat of the Initiative, to identify priority reform areas which would fall under any of the three pillars and aim to implement these in a workable timeframe.").

49. UK, Germany, France, Spain, Italy, and Netherlands.

50. Gillian Dell & Andrew McDevitt, *Exporting Corruption – Progress Report 2018: Assessing Enforcement of the OECD Anti-Bribery Convention*, TRANSPARENCY INT'L at 23 (October 2018), https://www.transparency.org/files/content/publication/Download_a_short_version_of_the_report.pdf ("In 2014-2017, China's average share of world exports of goods and services was 10.8 per cent, compared with the United States' 9.9 per cent. As the world's leading exporter, China has a special responsibility with respect to the practices of its companies and business people abroad, as they have a significant impact on trade practices. China's performance regarding international anticorruption standards influences attitudes and behavior in other major exporting countries. Likewise, other major exporters such as Hong Kong, India and Singapore, covered in this report but not to date party to the OECD Convention, have a responsibility to contribute to tackling corruption in the supply side of international trade.")

Selected EU	X	X	X	X	X	X
China	X	X				

The primary role of these international organizations is to gain the domestic adoption of the standards and the monitoring thereafter with actual enforcement left to each state.⁵¹ The shortcoming of the above “obligations” is that the method of their implementation and ultimate enforcement are left to the states and their domestic laws. “Monitoring mechanisms and collective sanctions are mentioned as enforcement means, but seldom implemented. Relying on peer-review evaluations the UN conventions, GRECO and the OECD completely lack any sanctions mechanism.”⁵²

On the other hand, though the OECD, itself, has no sanctions within its authority, its Anti-Bribery Convention on Combating Bribery of Foreign Public Officials in International Business Transactions has had some impact and success.⁵³ Its global track record of enforcement/implementation by the signatories is annually updated, with the latest 2017 figures below. The Convention has a monitoring mechanism, based on peer-review; 560 individuals and 184 entities have received criminal sanctions for foreign bribery between the time the Convention entered into force in 1999 and the end of 2017.

At least 125 of the sanctioned individuals have been sentenced to prison for foreign bribery, including at least 11 for prison terms exceeding 5 years.

For the 97 individuals for whom information is available on the length of (non-suspended) prison terms, 11 were for more than 5 years, 41 were in the 2-5-year range, 26 in the 1-2-year range and 19 were less than 1 year.

Over 500 investigations are ongoing in 30 Parties.

51. Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, *supra* note 32 (Art. 12 of the Convention stipulates “that any dispute will in an initial stage be examined by the Council in accordance with the procedure set out in Title VI of the Treaty on European Union with a view to reaching a solution. If no solution is found within six months, a Member State party or the Member States parties to the dispute may refer the dispute to the Court of Justice for a ruling.”).

52. Mungui-Pippidi, *Fostering Good Governance through Trade Agreements*, *supra* note 1, at 26. See also *Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End?*, OECD (2018), <http://www.oecd.org/corruption/Foreign-Bribery-Enforcement-What-Happens-to-the-Public-Officials-on-the-Receiving-End.pdf>.

53. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents, *supra* note 28.

At least 155 criminal proceedings (against 146 individuals and 9 entities) are ongoing for foreign bribery in 11 Parties.⁵⁴

Some critics observe that the impact has been minimal, as only Germany, the UK and US actually implement the convention.⁵⁵ Furthermore, according to a 2018 OECD report, public officials accepting bribes from OECD-based companies are said to run little risk of being punished,

The report looks at what happened to the public officials in a set of 55 concluded cases between 2008 and 2013 where OECD-based companies were punished for bribing foreign public officials. Of the 55 concluded foreign bribery cases, in only one-fifth were formal sanctions imposed on one or more public officials. This is particularly striking because it is for cases in which both sides of the bribe transaction—the briber and the public official on the receiving end—were subject to the jurisdiction of Parties to the OECD Anti-Bribery Convention, a group of countries that have relatively advanced law enforcement and public sector management capabilities.⁵⁶

Still others conclude, “the most significant achievement of the OECD is that it all member states had effective legislation in place for liability of legal persons and expanded their jurisdictional scope to reach extraterritorial activities of companies. All 43 state parties to the OECD

Anti-Bribery Convention now recognize the liability of legal persons for foreign bribery.”⁵⁷

State Laws

China

54. OECD Working Group on Bribery, *supra* note 29 (Highlights from the 2017 data: “Three countries adopted law reforms designed to support more effective anti-bribery law enforcement. Reforms include the lengthening the statute of limitations (Italy), creating corporate liability for corruption (Argentina) and reinforcing laws on anti-money laundering laws and confiscation of the proceeds of foreign bribery (Japan). Three Parties joined the list of jurisdictions that are known to have sanctioned foreign bribery: Brazil, Spain and Australia. This brings to 23 the total number of Parties to the Convention that have sanctioned foreign bribery at least once, but it also means that 21 Parties have never sanctioned foreign bribery.”).

55. Seunghyun Nam, *Domestic Impact of the Management Process Under the OECD Anti-Bribery Convention*, 39 U. PA. J. INT’L L. 955, 970 (2018).

56. *Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End?*, *supra* note 52.

57. Mungui-Pippidi, *Fostering Good Governance through Trade Agreements*, *supra* note 1, at 23.

China is the “world’s largest exporter, with over 10 per cent of global exports and it is failing to enforce its own laws on *foreign* [*emphasis added*] bribery.”⁵⁸

Although China is attractive for FDI, multi-nationals must know with whom they do business and be aware of the inherent risks of corruption. Transparency International’s 2013 Corruption Perceptions Index (CPI) ranks China a relatively poor 40th.⁵⁹ A 2018 report, *Exporting Corruption 2018*, “assesses country enforcement against foreign bribery in line with obligations in the OECD Anti-Bribery Convention. It classifies 44 countries into four bands of enforcement based on the data available regarding how much they investigate and prosecute companies that pay bribes to win business abroad; China is in the fourth and bottom band of 22 countries with little or no enforcement.”⁶⁰

Although China is not a signatory to the OECD Convention on Corruption, China, under President Xi Jinping, has actively pursued domestic anticorruption policies.⁶¹ China now “offers a comprehensive legal framework in both the public and private sectors to criminalize several corrupt practices such as facilitation payments, money laundering, active and

58. Gillian Dell, *Time for China to Step Up to Global Anti-Corruption Responsibilities*, MEDIUM (Oct. 19, 2018), <https://voices.transparency.org/time-for-china-to-step-up-to-global-anti-corruption-responsibilities-fffb80d565be>. See also Mungui-Pippidi, *Fostering Good Governance through Trade Agreements*, *supra* note 1. Dell & McDevitt, *supra* note 50 (“In 2014-2017, China’s average share of world exports of goods and services was 10.8 per cent, compared with the United States’ 9.9 per cent. As the world’s leading exporter, China has a special responsibility with respect to the practices of its companies and business people abroad, as they have a significant impact on trade practices. China’s performance regarding international anti-corruption standards influences attitudes and behavior in other major exporting countries.”).

59. Mark Jenkins, Sunny Chu & Christopher Meadors, *FCPA compliance in China*, FRAUD MAG. (Mar. 2014), <https://www.fraud-magazine.com/article.aspx?id=4294982094>.

60. Dell, *supra* note 58.

61. Li Hui, *In Chinese Corruption Cases, Who’s Taking What?*, SIXTH TONE (Dec. 4, 2018), <https://www.sixthtone.com/news/1003273/in-chinese-corruption-cases%2C-whos-taking-what%3F#> (It is argued that “the scale of China’s ongoing anti-corruption campaign defies simple description. Over the past six years, more than 1.5 million officials have been sanctioned as part of the crackdown, ranging from village committee members to some of the country’s most powerful bureaucrats.”). *China Corruption Report*, GAN BUS. ANTI-CORRUPTION PORTAL, <https://www.ganintegrity.com/portal/country-profiles/china/> (“It has been alleged that the anti-corruption campaign is at least partly politically motivated. Companies are likely to experience bribery, political interference or facilitation payments when acquiring public services and dealing with the judicial system. The common practice of *guanxi* is a custom for building connections and relationships based on gifts, banqueting, or small favors. Guanxi-related gifts can be considered bribery by foreign companies and by national and international anti-corruption laws. Companies are advised to carefully consider the type and value of gifts, the occasion, and the nature of the business relation.”).

passive bribery, and gifts in the public and in the private sector with the Anti-Unfair Competition Law focusing on commercial bribery.”⁶²

The Criminal Code establishes the penalties for those bribing (active) and those bribed (passive), ranging from life imprisonment for the former and 10 years’ imprisonment for the latter. Private bribery is regulated by the Criminal Code and the PRC Anti-Unfair Competition Law (AUCL).⁶³

“Bribery’ under the Criminal Law means “giving money or property to an incumbent or former public official, or the person related to the public official (i.e., a close relative or any other person closely related to the incumbent or former public official) for the purpose of securing illegitimate benefits.”⁶⁴ Public officials are broadly defined and include personnel in public service, state-owned enterprises, institutions, and organizations.⁶⁵

Private bribery is regulated by the Criminal Code and the PRC Anti-Unfair Competition Law (AUCL). Under Article 164 of the Criminal Code, “private bribery” means “giving money or property to any employee of a company, enterprise or other entity for the purpose of seeking improper interests and benefits. Penalties for violation are up to 10 years’ imprisonment.”⁶⁶

62. *China Corruption Report*, *supra* note 61 (While China has criminalized the bribery of foreign public officials, in line with obligations under the UN Convention against Corruption, there has been no known enforcement by China against foreign corrupt practices by its companies, citizens or residents.).

63. Mini vandePol, Simon Hui, & Vivian Wu, *Anti-Corruption in China*, GLOBAL COMPLIANCE NEWS, <https://globalcompliancencews.com/anti-corruption/handbook/anti-corruption-in-china/>. Dell & McDevitt, *supra* note 50 (“While China has criminalized the bribery of foreign public officials, in line with obligations under the UN Convention against Corruption, there has been no known enforcement by China against foreign corrupt practices by its companies, citizens or residents.”).

64. *Criminal Law of the People’s Republic of China*, INT’L LABOUR ORG. (Mar. 14, 1997), <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/5375/108071/F-78796243/CHN5375%20Eng3.pdf> (Criminal Code, Articles 389, 390, 390A, and 393). vandePol, Hui, & Wu, *supra* note 63.

65. vandePol, Hui, & Wu, *supra* note 63. Jenkins, Chu, & Meadors, *supra* note 59 (Under the U.S. law, FCPA, the “definition of a ‘foreign official’ in China can be more problematic than in other countries. The DOJ and SEC broadly interpret it to include all Communist Party of China (CPC) members—a large population. The CPC runs parallel to the People’s Republic of China (PRC) in structure and membership. The two entities are difficult to separate and appear to be indistinguishable. (Refer to the PDF, Daniel Chow, China Under the Foreign Corrupt Practices Act 587.)). *China Corruption Report*, *supra* note 61 (CPC members may have businesses in the private sector, and if a multinational does business with or acquires a CPC-owned company or CPC employee, that CPC member may use political connections/favors to obtain business.).

66. vandePol, Hui, & Wu, *supra* note 63 (“The Interim Provisions on Prohibition of Commercial Bribery also describe the forms of private bribery under the AUCL, which include any money or property provided to the business counterparty or its employee for

Article 8 of the AUCL, “private bribery” means giving money or property, or secret and off-the-book kickbacks to a business counterparty or its employee or using other means to bribe a business counterparty or its employee for selling or purchasing goods.”⁶⁷

On January 1, 2018, a revised AUCL took effect.⁶⁸ Compared with the previous version of the AUCL, the current AUCL clarifies the definition of commercial bribery by listing three categories of entities or individuals who could be the recipients of bribes; “(1) an employee of the other party to a transaction; (2) the entity or individual authorized by the other party to a transaction to handle relevant affairs; and (3) an entity or an individual that uses power or influence to affect a transaction.”⁶⁹

A significant change in the current AUCL, compared to the previous version of the AUCL, is that the transaction counterparty itself has been excluded from the categories of potential bribe recipients, which effectively narrows the scope of commercial bribery. It is particularly notable that while individual employees of transaction counterparties are included in the categories of potential bribe recipients, transaction counterparties themselves are excluded. On this basis, one of the potential interpretations could be that beneficial payments made between the two transactional parties, such as transactional rebates, may be excluded from the scope of commercial bribery.⁷⁰

There are three levels of penalties provided by the current AUCL. Where a noncriminal administrative offense of commercial bribery is found,

promotion, publicity, sponsorship, scientific research, labor, consultancy, commission, reimbursement, or any other benefits such as trips or visits.”).

67. *Law Against Unfair Competition of the People's Republic of China*, WIPO (Sept. 2, 1993), <https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn011en.pdf>. vandePol, Hui, & Wu, *supra* note 63.

68. Hui Xu, Catherine Palmer, Tina Wang, & Sean Wu, *China's Newly Amended Anti-Unfair Changes the Rules of the Game*, LATHAM & WATKINS LLP (2018), <https://www.lw.com/thoughtLeadership/china-newly-amended-anti-unfair-competition-law-latham> (“November 4, 2017, the 30th Session of the Standing Committee of the Twelfth National People's Congress passed the revised AUCL, went into effect 2018.”).

69. Hui Xu, Sean Wu, & Catherine Palmer, *Bribery & Corruption 2019 China*, GLI, <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/china>.

70. Xu, Wu, & Palmer, *supra* note 69 (“The current AUCL retains the safe harbor provisions which allow a business to explicitly pay a discount to the other party to the transaction, or pay a commission to an intermediary, as long as both parties faithfully make a record in their accountancy book. It is important to note that under the Law of the PRC on Donations for Public Welfare (the ‘Donation Law’), donations are to be made voluntarily and gratis. Any monetary or goods contributions that are made as donations but with the commercial purpose of seeking economic benefits or transaction opportunities will be seen as commercial bribes.”).

the authorities will confiscate illegal gains, and, depending on the severity of the conduct, impose a fine of between RMB 100,000 and RMB 3,000,000.⁷¹ In China, both private and public bribery are illegal. It is a crime to bribe a public official regardless of the amount, while private bribes must be over RMB 60,000 to be a crime.⁷²

In China, anticorruption enforcement is not centralized, with many different government agencies tasked with fighting corruption. The Supreme People's Procuratorates are the prosecutors but investigations are conducted by the General Administration for Combating Embezzlement and Bribery and the National Bureau of Corruption Prevention. Penalties include imprisonment up to 10 years and fines that are at the discretion of the PRC.⁷³ Additionally, at the CCP level the CPC Central Commission for Discipline Inspection, investigates and disciplines cadres that violate the law.⁷⁴

In its March 2018 meeting, China's National People's Congress (NPC) approved a constitutional amendment creating a super-sized anticorruption body [emphasis added] called the National Supervision Commission and adopted a Supervision Law to govern its operations. A massive institutional restructuring plan subsequently issued by the Chinese Communist Party (CCP) makes clear the Commission will be co-located with—and integrate its anticorruption functions with—the CCP's own powerful anti-graft body, the Central Commission for Discipline Inspection (CCDI) But the Law fails to subject anticorruption work to the due process requirements of China's criminal justice and administrative law systems. Instead, its stipulations appear to be enforceable only by the state supervisors it purports to regulate and by the CCDI.⁷⁵

71. See *Law Against Unfair Competition of the People's Republic of China*, *supra* note 67 (Authorities may also revoke the business license of the business operator in question if the situation is sufficiently serious.). See also Xu, Wu, & Palmer, *supra* note 69.

72. Xu, Wu, & Palmer, *supra* note 69.

73. *Business ethics and anti-corruption laws: China*, NORTON ROSE FULBRIGHT (June 2016), <https://www.nortonrosefulbright.com/en/knowledge/publications/406af5db/business-ethics-and-anti-corruption-laws-china>.

74. *Id.*

75. Jamie P. Horsley, *What's so controversial about China's new anti-corruption body?*, BOOKINGS (May 30, 2018), <https://www.brookings.edu/opinions/whats-so-controversial-about-chinas-new-anti-corruption-body/> ("This arrangement makes the National Supervision Commission ultimately accountable only to the CCP, threatening both to undermine efforts to establish law-based governance and to complicate China's global anti-corruption campaign. ... Foreign governments may have concerns about certain aspects of international legal cooperation with China. The National Supervision Commission may take over a leading role in coordinating with foreign governments in areas such as anti-corruption law enforcement, extradition, judicial assistance, custody transfer of sentenced persons, asset recovery, and information exchanges.").

China has extraterritorial jurisdiction. In China, in accordance with Articles 6 and 7 of the PRC Criminal Law, anticorruption laws apply to Chinese nationals both within and outside China, and to all companies incorporated in China (and their managers) which carry on business overseas.⁷⁶ Under Article 30 of the PRC Criminal Law, corporations can be held liable for the acts of their employees, directors and officers under criminal, administrative and civil regulations.⁷⁷

European Union

In addition to the initiative of each state to create anticorruption legislation, the EU Convention Against Corruption Involving Officials 1997 obligates each Member State, including the selected EU Members discussed below, to take the necessary measures to ensure that conduct constituting an act of passive corruption or active corruption *by officials* is a punishable criminal offense and ensures that conduct constituting an act of passive or active corruption, as well as participating in and instigating these acts, is punishable by criminal penalties.⁷⁸

76. *Criminal Law of the People's Republic of China*, *supra* note 64, at Art. 6-7.

77. *Id.* at Art. 30.

78. Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, *supra* note 32. *European Anti-Corruption Conventions*, Anti-Corruption Legislation, GAN BUS. ANTI-CORRUPTION PORTAL, <https://www.ganintegrity.com/portal/anti-corruption-legislation/european-anti-corruption-conventions/> (There are also a number of other anticorruption European convention. "Council of Europe Criminal Law Convention on Corruption (COE Criminal Law Convention). The COE Criminal Law Convention aims to coordinate the criminalization of corrupt practices, provide complementary criminal law measures and improve cooperation for the prosecution of offences. It entered into force in 2002, and compliance is monitored by the Group of States against Corruption (GRECO). Council of Europe Civil Law Convention on Corruption (COE Civil Law Convention) The COE Civil Law Convention aims to define common international rules of civil law and corruption. Parties are required to compensate persons who have suffered damage as a result of corruption. It entered into force in 2003, and compliance is monitored by the Group of States against Corruption (GRECO). European Union Convention against Corruption Involving Officials (EU Convention against Corruption). The EU Convention against Corruption aims to fight corruption involving EU or Member States' officials. Member States must ensure that passive or active corruption by officials is a criminal offence. Heads of businesses are to be declared criminally liable for active corruption by a person under their authority acting on behalf of the company. European Union Convention on the Protection of the European Communities' Financial Interests (EU Convention on Financial Interests). The EU Convention on Financial Interests aims to create a common legal basis for the criminal protection of the EC's financial interests. Fraud affecting expenditure and revenue must be punishable by criminal penalties.").

Selected EU Members⁷⁹

In the summary below (including China) followed by a chart of the laws, the variables of Selected EU Member State's anticorruption laws⁸⁰ are highlighted;⁸¹ but the question always remains—is there effective enforcement?

Domestic Laws Laws and Coverage⁸²

Although the Members use different terminology, the basic concept of a bribe is common to each of the Selected EU Members' domestic law: “a

79. These Members are UK, Germany, France, Netherlands, Spain, and Italy.

80. The anticorruption laws of the Selected EU States follow. UK: *Bribery Act 2010*, LEGISLATION.GOV.UK (2010), <https://www.legislation.gov.uk/ukpga/2010/23/contents>. Germany: *Gesetz zur Bekämpfung der Korruption*, BUNDESANZEIGER VERLAG (Nov. 2015), https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&start=//%255B@attr_id=%27bgbl115s2025.pdf%27%255D#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl115s2025.pdf%27%5D_1464341755722%20/. France: *Sapin II* (2016), https://www.cjoint.com/doc/16_12/FLknuHuFltM_loisapin2.pdf. Spain: *Criminal Code Art. 286 & 419-38*, MINISTERIO DE JUSTICIA (2013), https://www.legislationline.org/download/id/6443/file/Spain_CC_am2013_en.pdf. Italy: *Codice penale Art. 318-322*, ALTALEX.COM (2020), <https://www.altalex.com/documents/codici-altalex/2014/10/30/codice-penale>. Netherlands: *Wetboek van Strafrech 177-178*, SHERLOC UNODC (Aug. 27, 2014), https://sherloc.unodc.org/res/cld/document/nld/1881/penal-code-of-the-netherlands_html/. Netherlands Penal Code_1881_as_amd_2014.pdf. Also included is China: Hui Xu, Sean Wu, & Catherine Palmer, *Bribery & Corruption 2020|China*, GLI, <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/china>. See generally Mungiu-Pippidi, *supra* note 1.

81. For an overview description of each law, see as follows. Germany: Thomas Helck, *Bribery & Corruption 2020|Germany*, GLI, <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/germany#chaptercontent1>. Spain: Rafael Jimenez-Gusi, Cecilia Pastor, & Diego Pol, *Anti-Corruption in Spain*, GLOBAL COMPLIANCE NEWS, <https://globalcompliancenews.com/anti-corruption/anti-corruption-in-spain/>. UK: Jonathan Pickworth & Jo Dimmock, *Bribery & Corruption 2020|United Kingdom*, GLI, <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/united-kingdom#chaptercontent1>. France: Eric Lasry, Sara Koski, & Clotilde Guyot-Rechard, *Anti-Corruption in France*, GLOBAL COMPLIANCE NEWS, <https://globalcompliancenews.com/anti-corruption/handbook/anti-corruption-in-france/>. Italy: Riccardo Ovidi, *Italy's New Anti-Corruption Law*, GLOBAL COMPLIANCE NEWS (Mar. 15, 2019), <https://globalcompliancenews.com/italys-new-anti-corruption-law-20190228/>.

82. See Bonelli E. Pappalardo et al., *Complying with Bribery Laws in Key European Jurisdictions*, De Brauw Blackstone Westbroek (2012), <https://www.debrauw.com/wp-content/uploads/NEWS%20-%20PUBLICATIONS/European-Bribery-Memo.pdf> (for more on EU member bribery laws).

benefit, or something of value, given to someone to affect their behavior for the benefit of the offender or someone he represents or favors.”⁸³ All Selected EU Members expressly (or effectively) treat rewarding *after* the event as bribery.⁸⁴ The bribery of domestic or foreign officials is also an offense in each of the Member States.⁸⁵

The UK, Germany, and France criminalize private to private bribery the same as private to public.⁸⁶ In Italy, in the private sector, only certain key corporate officers face criminal liability for bribery; and then only if their actions are against the interests of their company.⁸⁷ Spain criminalizes private sector bribery if it infringes the relevant person’s obligations in the acquisition or sale of goods or the hiring of professional services.⁸⁸ In the Netherlands, private sector bribery is criminalized if the bribed person conceals his gift or promise from his employer in breach of the requirement to act in good faith.⁸⁹

The laws of the Selected EU Members broadly criminalize bribery by public officials (or their acceptance of bribes) at home or abroad and the bribery in the private sector; however, they take slightly different approaches to so-called “facilitation payments.”⁹⁰

The definitions of “public official” vary between the Selected EU Members, but all have a “wide spectrum, generally presenting non-exclusive examples, extending to EU and other supra-national or international functionaries and key decision makers (such as judges).”⁹¹ In each of the Member States, the term may extend to executives of foreign nationalized industries.⁹²

Remedies and Enforcement Agencies

83. *Id.* at 1.

84. *See* Selected EU Member laws, *supra* note 80.

85. *Id.*

86. *See* Selected EU Member laws: UK, Germany, and France, *supra* note 80.

87. *Codice penale Art. 318-322*, ALTALEX.COM (2020), <https://www.altalex.com/documents/codici-altalex/2014/10/30/codice-penale>.

88. *Criminal Code Art. 286 & 419-38*, MINISTERIO DE JUSTICIA (2013), https://www.legislationline.org/download/id/6443/file/Spain_CC_am2013_en.pdf.

89. *Wetboek van Strafrech 177-178*, SHERLOC UNODC (Aug. 27, 2014), https://sherloc.unodc.org/res/cld/document/nld/1881/penal-code-of-thenetherlands_html/Netherlands_Penal_Code_1881_as_amd_2014.pdf.

90. *See generally* Selected EU Member laws, *supra* note 80. *See also* Bonelli E. Pappalardo et al., *supra* note 82.

91. *See also* Bonelli E. Pappalardo et al., *supra* note 82, at 2.

92. *See* Selected EU Member laws, *supra* note 80.

All Selected EU Members impose serious penalties on offenders. These include confiscation of the benefits of the bribery, substantial fines, and prison terms.⁹³ All provide some form of penalties for legal entities.⁹⁴ In Germany, Italy, Spain, and the UK, violating corporations can be banned from public contracting.⁹⁵ “Other potential penalties include withdrawal of public subsidies or funding (Germany, Italy, Spain), disqualification from carrying on the business in which the bribery occurred (France, Italy, Spain), withdrawal of licenses (Germany, Italy), court supervision (France, Italy) and liquidation (France, Italy, Spain).”⁹⁶ The UK, Germany, France, and Italy may sentence violators up to ten years in prison while in Spain and the Netherlands the max is six years. Each nation has a different cap on fines, ranging from €600,000 to an unlimited amount.⁹⁷

The Selected EU Members have two different approaches to enforcement infrastructure. The UK, Spain, France, and Italy have separate departments established to prosecute corruption cases.⁹⁸ While, Germany and the Netherlands put the task to the state prosecutor’s office.⁹⁹

Extra-territorial Jurisdiction and Corporate Liability

The laws of all Selected EU Members have some extraterritorial effect. All criminalize the bribery of domestic officials (by anyone) and of foreign officials by their own nationals, or legal entities established or carrying on business in their territories, even if the bribery occurs overseas provided it is also illegal where it occurs.¹⁰⁰ In the UK, an act committed overseas which would be considered bribery in the UK, may be criminalized unless it is

93. *Id.*

94. *See* Selected EU Member laws, *supra* note 80.

95. Selected EU Member laws: Germany, Spain, and Italy, *supra* note 80.

96. Westbrook, *supra* note 82, at 3.

97. *See*, Selected EU Member laws; Bribery Act (U.K., 2010, 23). Law on the Fight Against Corruption (Ger., 2019, 2). Sapin II (Fr., 2017). Criminal Code (Spain, 2013, 286 & 419-38). Criminal Code (It., 2015, 318-22). Criminal Code (Neth., 2012, 177-78). *See also*, Westbrook *supra* note 82.

98. Spain: Spanish Anti-Corruption Prosecution Office, <https://www.mjusticia.gob.es/cs/Satellite/Portal/es/inicio>. UK: Serious Fraud Office, <https://www.sfo.gov.uk/>. France: French Anti-Corruption Agency, <https://www.economie.gouv.fr/>. Italy: Italian Anticorruption Authority, <https://www.anticorruzione.it/portal/public/classic/MenuServizio/ENG/Aboutus>.

99. Germany: <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/germany#chaptercontent1>; Netherlands: <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/netherlands>.

100. *See* Selected EU Member laws: UK, Germany, and France, *supra* note 80.

expressly permitted by local written law, and a corporation can incur liability on account of acts of bribery by associated persons outside the jurisdiction.¹⁰¹ Similarly, in the Netherlands, bribery of public officials by Dutch corporates or Dutch nationals is criminalized irrespective of whether it is illegal where the bribery occurs, however, some part of the improper conduct must occur within its borders.¹⁰² Italy subjects companies carrying on business within its borders to its worldwide jurisdiction where the bribery concerns public officials if some part of the improper conduct (including its mere conception and/or planning) has been carried out in Italy.¹⁰³ In France, Germany, and Spain, persons and businesses are liable for any act of bribery as long as it is illegal in the location the act was committed.¹⁰⁴ Additionally, in Spain any bribery of a foreign public official is illegal.¹⁰⁵

Summary Chart

Country	Laws and Coverage	Extraterritorial	Remedies	Corporate Liability	Enforcement Agency
United Kingdom	Both private and public Illegal	Any bribe that isn't expressly permitted by foreign law	Up to 10 years in prison. Fine Unlimited	May be liable for acts by "associated persons".	Serious Fraud Office

101. *Bribery Act 2010*, LEGISLATION.GOV.UK (2010), <https://www.legislation.gov.uk/ukpga/2010/23/contents>.

102. *Wetboek van Strafrech 177-178*, SHERLOC UNODC (Aug. 27, 2014), https://sherloc.unodc.org/res/cld/document/nld/1881/penal-code-of-thenetherlands_html/Netherlands_Penal_Code_1881_as_amd_2014.pdf.

103. *Codice penale Art. 318-322*, ALTALEX.COM (2020), <https://www.altalex.com/documents/codici-altalex/2014/10/30/codice-penale>.

104. Germany: *Gesetz zur Bekämpfung der Korruption*, BUNDESANZEIGER VERLAG (Nov. 2015), https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&start=//*/%255B@attr_id=%27bgbl115s2025.pdf%27%255D#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl115s2025.pdf%27%5D_1464341755722%20/. France: *Sapin II* (2016), https://www.ejoint.com/doc/16_12/FLknuHuFltM_loisapin2.pdf.

105. *Criminal Code Art. 286 & 419-38*, MINISTERIO DE JUSTICIA (2013), https://www.legislationline.org/download/id/6443/file/Spain_CC_am2013_en.pdf.

Germany	Both private and public Illegal	Any bribe that is also a crime in the foreign nation	Up to 10 years in prison. Fine up to €10 Million.	May be liable for acts by employees or agents acting on behalf of the corporation.	State Prosecutor Office
France	Both private and public Illegal	Any bribe that is also a crime in the foreign nation	Up to 10 years in prison. Fine up to €5 Million.	May be liable for acts for their benefit by employees or other representatives.	French AntiCorruption Agency
Netherlands	Public illegal, private only if bribe is concealed and breaches duty of loyalty	Only Dutch nationals if some part of act was in Netherlands	Up to 6 years in prison. Fine up to €820,000	May be liable if conduct can reasonably be attributed to the corporation.	State Prosecutor Office
Spain	Public illegal, private only if related to hiring.	Any bribery of a foreign public official or any bribe that is also a crime in the foreign nation	Up to 6 years in prison. Fine up to 5x profit	May be liable for acts for their benefit by employees or other representatives.	Anti-Corruption Prosecutor's Office
Italy	Public illegal, private only if by key corporate officers; and only if it goes against corporate interests.	Any bribery of public officials if some part of act was in Italy	Up to 10 years in prison. Fine up to €600,000.	May be liability for acts undertaken by employees or "associated persons"	National Anti-Corruption Authority
China	Public Illegal, private if over RMB 60,000	For Chinese Nationals any act that is illegal in China, and any foreigners who act against the PRC state or against its citizens	Up to 10 years Fines at State's discretion	May be liable for the acts of their employees, directors and officers	National Bureau of Corruption Prevention of the PRC & Supreme People's Procuratorates

Enforcement of Laws

Transparency International evaluated OECD countries' foreign bribery enforcement under the OECD Anti-Bribery Convention; and below, the Selected EU countries and China are separated and highlighted.¹⁰⁶

106. Dell & McDevitt, *supra* note 50. (Transparency International explains its methodology as follows. "The enforcement categories (Active, Moderate, Limited, Little or No) show the level of enforcement efforts against foreign bribery. A country that is an "Active

Active Enforcement: United States, Germany, UK, Italy.

Limited Enforcement: France, Netherlands,

Little or No Enforcement: Spain, and China.¹⁰⁷

The *enforcement* of anticorruption laws in the Selected EU States is as follows.

Between 2014-2017: Germany has commenced 40 investigations and opened 13 cases for corruption charges; the UK has commenced 36 investigations and opened nine cases; Italy has commenced 27 investigations and opened 16 cases; France has commenced 40 cases and opened one case; the Netherlands commenced seven investigations and opened two cases; and Spain has commenced six investigations and opened two cases.¹⁰⁸

In the *United Kingdom*, the Serious Fraud Office, in charge of Bribery Act enforcement, has conducted 36 complete investigations, and is currently investigating 41 new cases.¹⁰⁹

In *France*, the French Anti-Corruption Agency has achieved three convictions since being created in 2017.¹¹⁰ Two high-profile bribery investigations are still pending: one involving a French Olympic Committee member accused of accepting bribes for voting for Brazil in 2016, and the second involving Electricite de France that opened in 2018.¹¹¹

enforcer” initiates many investigations into foreign bribery offences; these investigations reach the courts; the authorities press charges and courts convict individuals and/or companies both in ordinary cases and in major cases in which bribers are convicted and receive substantial sanctions. “Moderate Enforcement” and “Limited Enforcement” indicate stages of progress but are considered insufficient deterrence. Where there is “Little or No Enforcement”, there is no deterrence.” Recent improvements in the legal frameworks and enforcement are highlighted on pages 18-19).

107. *Id.* at 4. See also *Foreign Bribery Rages Unchecked in Over Half of Global Trade*, TRANSPARENCY INTERNATIONAL (2018) <https://www.transparency.org/news/feature/exporting-corruption-2018>. (The number of investigations and prosecutions between 2014-2017 is contained in a summarizing chart).

108. Dell & McDevitt, *supra* note 50.

109. *Our Cases*, SERIOUS FRAUD OFFICE, <https://www.sfo.gov.uk/our-cases/#aza> (In 2018 the Serious Fraud Office secured convictions of two directors of Skansen Interiors Ltd., resulting in prison sentences of 12 and 20 months). *Bribery & Corruption United Kingdom*, GLOBAL LEGAL INSIGHTS, (2019) <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/united-kingdom>

110. Jones Day, *France Takes Next Step in Anticorruption Enforcement: First “French DPAs” and What Companies Should Know* (Apr. 2018), <https://www.jonesday.com/france-takes-next-step-in-anticorruption-enforcement-firstfrench-dpas-and-what-companies-should-know-04-26-2018/>.

111. GLI, *Bribery & Corruption 2019 France*, <https://www.globallegalinsights.com/practice-areas/bribery-andcorruption-laws-and-regulations/France/>.

German authorities since 1999 have convicted 67 legal entities and 328 individuals for violations of anticorruption laws.¹¹² In 2014 about 20,000 corruption crimes were registered nationwide in Germany, whereas in 2017 that number dropped to about 5,000. A recent case was brought against Airbus by the Munich Public Prosecutor for paying bribes in relation to the sale of Fighter Jets and resulted in a fine of €81,300,000.¹¹³

In *Italy*, Milan prosecutors convicted the foreign companies Saipem Spa for bribing Nigerian public officials resulting in the forfeiture of €24.5 million in profits. The Milan Court of Appeals is currently reviewing the conviction and sentencing of the President of the Lombardy Region for bribery. The Prosecutor's Office of Rome is currently investigating top Roman politicians and businessmen for corruption and conspiracy with known Mafia figures.¹¹⁴

In *Spain*, there are ongoing cases of corruption in international economic transactions under investigation in the courts; and in 2017, two persons were convicted by the National High Court (*Audiencia Nacional*).¹¹⁵

In the *Netherlands*, over the last three years, Dutch prosecutors have reached large settlements with many large corporations, VimpelCom Ltd paid \$ 397.5 million in 2016, Telia Company AB paid \$274 million in 2017, and ING Bank NV paid €775 million in 2018.¹¹⁶

Settlements may or may not be useful in fighting international corruption. Transparency International's position is that while useful, unless they are made public, they do not deter corrupt practices.

Settlements can provide an important channel to hold companies to account for wrongdoing and resolve foreign bribery cases without resorting to a full trial or administrative proceeding. In many cases, they have helped to boost enforcement of foreign bribery laws and to improve corporate compliance. However, their deterrent effect is questionable if they are not transparent, do not provide effective, proportionate and dissuasive sanctions, and if there is no meaningful judicial review.¹¹⁷

112. OECD, *IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION: GERMANY 5* (Organization for Economic Co-Operation and Development, 2018), <http://www.oecd.org/corruption/anti-bribery/Germany-Phase-4-Report-ENG.pdf>.

113. GLI, *Bribery & Corruption 2019 Germany*, <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/germany>.

114. GLI, *Bribery & Corruption 2019 Italy*, <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/italy>.

115. GLI, *Bribery & Corruption 2019 Spain*, <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/spain>.

116. GLI, *Bribery & Corruption 2019 Netherlands*, <https://www.globallegalinsights.com/practiceareas/bribery-and-corruption-laws-and-regulations/netherlands/>.

117. Dell & McDevitt, *supra* note 50.

Chinese Enforcement

A recent prosecution of a Chinese company inside China under the Anti-Unfair Competition Law for corruption is illustrated by the following case.¹¹⁸

In November 2017, NT Medical Information Consultant (Shanghai) Co. Ltd. was found liable for commercial bribery in the form of the payment of conference fees, promotion fees, and similar fees to relevant departments and persons in hospitals, for the purpose of promoting sales.¹¹⁹

Foreign companies operating in China will also be prosecuted.

In the summer of 2013, GlaxoSmithKline (“GSK”), a British pharmaceutical company listed on both the London and New York stock exchanges, became the focus of the biggest corruption scandal in China involving a foreign company. The GSK chain was accused of bribing doctors in order to promote GSK’s medical products. GSK was found to have offered money or property to nongovernment personnel in order to obtain improper commercial gains and was found guilty of bribing non-government personnel. GSK was ordered to pay a fine of RMB 3bn (£297m) to the Chinese government. Five former GSK senior executives were sentenced to suspended imprisonment of two to three years.¹²⁰

Under the CCP’s Judicial Commission, Supervisory commissions are State anticorruption agencies. The National Supervisory Commission is the highest State supervisory organ, and all provincial, city and county-level regions have their own supervisory commissions.... [A]bout 33,000 people in 28,000 cases were convicted of taking bribes or dereliction of duty last

118. Todd Liao & Judy Wang, *China Announces Crackdown Campaign Against Unfair Competition Activities*, JD SUPRA, June 27, 2018, <https://www.jdsupra.com/legalnews/china-announces-crackdown-campaign-35601/>.

119. The payments were made by pharmaceutical representatives to doctors and other individuals at the hospitals in the form of a rebate, which was directly based upon the volume of sales at those hospitals. Investigators from the Shanghai Administrative Bureau of Industry and Commerce concluded that these unreported rebates to hospital personnel were made in exchange for business opportunities and sales promotion, and that they constituted commercial bribery under the PRC Anti-Unfair Competition Law. The company’s illegal profits were confiscated, and the company was fined 180,000 renminbi (\$27,381). Todd Liao & Judy Wang, *China Announces Crackdown Campaign Against Unfair Competition Activities*, JD SUPRA, June 27, 2018, <https://www.jdsupra.com/legalnews/china-announces-crackdown-campaign-35601/>.

120. GLI, *Bribery & Corruption 2019 China*, <https://www.globallegalinsights.com/practice-areas/bribery-andcorruption-laws-and-regulations/china>.

year, Chief Justice Zhou Qiang said in the [2018] work report of the Supreme People's Court.¹²¹

FCPA of U.S.

The FCPA¹²² is a formidable presence in the fight against international corruption. With this law, the U.S. uses anticorruption laws and sanctions to police the world!¹²³ It does not matter that there were no American citizens involved – since 1977, the FCPA has allowed the US to become the anticorruption policeman for the whole world.”¹²⁴

121. Zhang Yan, *Pressure Still High On Graft During Supervision Reform*, China Daily, Mar. 13, 2019, <http://www.chinadaily.com.cn/a/201903/13/WS5c88005ea3106c65c34ee3ea.html>. See also Jamie P. Horsley, *What's So Controversial About China's New Anti-Corruption Body?*, DIPLOMAT, May 30, 2018, <https://www.brookings.edu/opinions/whats-socontroversial-about-chinas-new-anti-corruption-body/>. (“The Commission is co-located with and has integrated its anti-corruption functions with the CCP’s own powerful anti-graft body, the Central Commission for Discipline Inspection (CCDI)... But the Law fails to subject anti-corruption work to the due process requirements of China’s criminal justice and administrative law systems. Instead, its stipulations appear to be enforceable only by the state supervisors it purports to regulate and by the CCDI.”)

122. The Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, et seq., available at <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act>. The top ten FCPA settlements: 1. Petrobras (Brazil) - \$1.78 billion in 2018; 2. Telia Company (Sweden) - \$965 million in 2017; 3. Siemens (Germany) - \$800 million in 2008; 4. VimpelCom (Netherlands) - \$795 million in 2016; 5. Alstom (France) - \$772 million in 2014; 6. Société Générale (France) - \$585 million in 2018; 7. Halliburton (US) - \$579 million in 2009; 8. Teva Pharmaceutical (Israel) - \$519 million in 2016; 9. Keppel Offshore & Marine (Singapore) - \$422 million in 2017; 10. Och-Ziff (US) - \$412 million in 2016. *Petrobras agrees to biggest FCPA settlement*, BIZBLOG, https://www.lexisnexis.com/communities/lexisnexis_biz/b/bizblog/archive/2018/10/05/a-new-no-1-petrobrasagrees-to-biggest-fcpa-settlement.aspx. See also *FCPA Digest 2019 – Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act*, <https://www.shearman.com/perspectives/2019/01/shearman-fcpa-digest-2019and-recent-trends-and-patterns-in-fcpa>. (“The DOJ entered into its first coordinated resolution with authorities in a foreign bribery case, possibly heralding the emergence of France as an important global anticorruption authority.”) *Id.* at 5.

123. Finbarr Bermingham, *Explained: How the US Uses Anticorruption Laws and Sanctions to Police the World*, SOUTH CHINA MORNING POST (Dec. 8, 2018), <https://www.scmp.com/economy/china-economy/article/2176998/explained-how-us-uses-anticorruption-laws-and-sanctions-police>. (“There are a lot of instances where the total conduct has taken place outside the US, by non-US persons. It’s a non-US company and non-US government officials, going about their business outside the US. But if any of the money transited through the US, if there was a bank account that was draw on there, or if a server based in the US was used to send an email, there is jurisdiction,” quoting Wendy Wysong, who leads the Asia-Pacific anticorruption and trade controls practice at law firm Clifford Chance).

124. *Id.* The cases of Patrick Ho and Sabrina Meng Wanzhou show the extraterritorial reach of US authorities. Conviction of former Hong Kong minister Patrick Ho in a New York court and the detention of Huawei’s chief financial officer, Sabrina Meng Wanzhou, in

Enforcement of the law has been vigorous and consistent

In 2018, the DOJ and SEC resolved seventeen corporate enforcement actions. Consistent with the trends and patterns over the past years, the DOJ apparently deferred to the SEC to bring civil enforcement cases in the less egregious matters, which has resulted in the SEC bringing eight enforcement actions without parallel DOJ actions and typically with lower penalty amounts.... Of the FCPA enforcement actions against individuals, 2018 has seen twenty-one individuals charged by the DOJ (or had charges unsealed), while the SEC brought cases against only four individuals.¹²⁵

The FCPA operates at a globally efficient level of enforcement with successful results.¹²⁶ With a strong administrative agency and civil and criminal penalties¹²⁷ aimed to deter corruption, it is a welcome ally to other countries' anticorruption fights.

Its reach is further expanded by the U.S. incorporating it as a provision in its FTAs.¹²⁸

Canada have demonstrated the global reach of United States law enforcement. Ho was convicted for money laundering and bribery, pertaining to oil rights in Chad and Uganda, on behalf of CEFC China Energy under the Foreign Corrupt Practices Act (FCPA), a US law aimed at combating bribery of foreign officials. Huawei CFO 'committed fraud to skirt Iran sanctions.

125. *FCPA Digest January 2019: Enforcement Actions and Strategies*, SHEARMAN AND STERLING at 5 <https://fcpa.shearman.com/siteFiles/FCPA%20Headlines/fcpa-recenttrends.pdf>. See also Mungiu-Pippidi, *supra* note 1 at 26 (The "recent Petrobras case shows another route to enforcement, with international investors seeking redress under US civil law. Hundreds of holders of Petrobras stock have begun to file 'derivative suits' through which shareholders can sue a company's directors and officers for breaching their fiduciary duties to that company.").

126. The top ten FCPA settlements: 1. Petrobras (Brazil) - \$1.78 billion in 2018; 2. Telia Company (Sweden) - \$965 million in 2017; 3. Siemens (Germany) - \$800 million in 2008; 4. VimpelCom (Netherlands) - \$795 million in 2016; 5. Alstom (France) - \$772 million in 2014; 6. Société Générale (France) - \$585 million in 2018; 7. Halliburton (US) - \$579 million in 2009; 8. Teva Pharmaceutical (Israel) - \$519 million in 2016; 9. Keppel Offshore & Marine (Singapore) - \$422 million in 2017; 10. Och-Ziff (US) - \$412 million in 2016. Lisa Thompson, *Petrobras agrees to biggest FCPA settlement*, BIZBLOG, Oct. 5, 2018, https://www.lexisnexis.com/communities/lexisnexis_biz/b/bizblog/archive/2018/10/05/a-newno-1-petrobras-agrees-to-biggest-fcpa-settlement.aspx.

127. IDENTIFY FCPA FOREIGN CORRUPTION ANTI-BRIBERY RISKS AND PREVENT VIOLATIONS, <https://www.visualofac.com/regulations/fcpa-violations-penalties/>. See also U.S. DEPARTMENT OF JUSTICE, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, (2012), <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>.

128. "It is U.S. Government policy to promote good governance, including host countries' implementation and enforcement of anti-corruption laws and policies pursuant to their obligations under international agreements. Since enactment of the FCPA, the United States

The *China Initiative*, a 2018 DOJ-wide initiative, focuses on “identifying and prosecuting Chinese economic espionage” in the U.S. and will focus mostly on trade and intellectual property, with one of its goals to “identify Foreign Corrupt Practices Act (FCPA) cases involving Chinese companies that compete with American businesses.”¹²⁹

Interestingly, foreign investors in China can also find themselves within the reach of U.S. law, under the FCPA.

Morgan Stanley’s real estate and fund advisory managing director, Garth Peterson, colluded with a former chairman of a Chinese state-owned enterprise, Yongye Enterprise Group. Peterson paid the Chinese official and himself “finder’s fees” of \$1.8 million that Morgan Stanley owed to third parties. In exchange for the fees and personal interest in Morgan Stanley’s investments, the Chinese official brought business to Morgan Stanley.¹³⁰

Anticorruption Provisions in FTAs

Bilateral and regional trade agreements have come to supplement the WTO’s good governance provisions and incorporated explicit anticorruption and transparency provisions into their agreements.

The RTAs have grown over time both in absolute numbers ... and in depth, particularly among the EU’s trade partners.... Over the last two decades it has become common for a number of states to enshrine the principle of transparency in the preambles to their bilateral and regional trade. ... Furthermore, certain trade agreements have begun to include a

has been instrumental to the expansion of the international framework to fight corruption. Several significant components of this framework are the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions negotiated under the auspices of the OECD (Antibribery Convention), the United Nations Convention against Corruption (UN Convention), the Inter-American Convention against Corruption (OAS Convention), the Council of Europe Criminal and Civil Law Conventions, and a growing list of U.S. free trade agreements.” EXPORT.GOV, <https://www.export.gov/article?id=Corruption>. “While it is U.S. Government policy to include anticorruption provisions in free trade agreements (FTAs) that it negotiates with its trading partners, the anticorruption provisions have evolved over time. The most recent FTAs negotiated now require trading partners to criminalize ‘active bribery’ of public officials (offering bribes to any public official must be made a criminal offense, both domestically and trans-nationally) as well as domestic ‘passive bribery’ (solicitation of a bribe by a domestic official). All U.S. FTAs may be found at the U.S. Trade Representative Website: <http://www.ustr.gov/trade-agreements/free-trade-agreements>.”

129. *FCPA Digest January 2019: Enforcement Actions and Strategies*, *supra* note 125, at 5. For a comprehensive review of cases, see *FCPA Digest 28*, <https://fcpa.shearman.com/?gclid=EAIaIQobChMIjd-V46v93wIVqh6tBh3yhAT7EAMYAiAAEgIV5fD>.

130. Jenkins, Chu, & Meadors, *supra* note 59.

'horizontal' chapter on transparency which extends transparency obligations to all policy areas of the trade agreement in question.¹³¹

The practicality of BITs in anticorruption fights is debatable; as the legality usually turns on local anticorruption laws as opposed to anticorruption provisions in the BIT.¹³² Some argue investment treaty arbitration outside the local legal institutions can be useful in resolving these disputes; but even this approach can be complicated. BITs from the Selected EU members and China contain no transparency or anticorruption language.¹³³

The usual setting within which investment arbitration is taking place is that of an investor bringing a claim against a host state, e.g. for compensation for loss of investment. By invoking the so-called corruption defense, however, the table turns, and it is the host state bringing a counterclaim against the investor by invoking acts of corruption, e.g. bribery, as a means to preclude any claims an investor might make and evade every liability. The *raison d'être* of the corruption defense is that while arbitral tribunals are not tasked with punishing acts of corruption, they clearly 'cannot grant assistance to a party that has engaged in a corrupt act.'¹³⁴

131. Mungiu-Pippidi, *supra* note 1, at 16-18. ("For instance, it has become standard practice for US trade agreements to include specific anti-corruption and anti-bribery commitments into cross-cutting transparency chapters. At least until very recently US anticorruption in international trade was similarly enhanced by the increased implementation of the FCPA and the inclusion of references in its texts to anti-bribery laws.")

132. Angelos Dimopoulos, ANTI-CORRUPTION ASPECTS OF INTERNATIONAL INVESTMENT LAW 2 (OCT. 4, 2015) http://www.law.kobeu.ac.jp/STP/GMAPs/ppt/0_4_1_Angelos.pdf. See also, Mungiu-Pippidi, *supra* note 1. See also Yu-Ting Ye, *Toward a Balanced and Liberal Chinese Bilateral Treaty Regime in the Context of One Belt One Road*, 41 HOUSTON INT'L J. 107 (2018); Jason Yackee, *Investment Treaties and Investor Corruption: An Emerging Defense for Host States?*, (Oct. 19, 2012), INT'L INSTITUTE FOR SUSTAINABLE DEVELOPMENT, <https://www.iisd.org/itn/2012/10/19/investment-treaties-and-investor-corruption-an-emergin-g-defense-for-hoststates/>.

133. BITs are available at UNCTAD, Investment Policy Hub, <https://investmentpolicy.hubold.unctad.org/IIA/IiasByCountry#iiaInnerMenu>. See also Yu-Ting Ye, *supra* note 133. ("While it may be tempting to harness the power of investment arbitration in the international fight against corruption, investment tribunals are ill-suited to hear allegations of corruption. The *in pari delicto* rule may encourage rather than discourage bribery, and investment arbitration tribunals fail to take into account the purpose of bribes. Undoubtedly, the international anti-corruption campaign should continue through other domestic and international means, but investment arbitration is a poor forum for the airing of allegations of corruption."). See also Leo O'Toole, *Investment Arbitration: A Poor Forum for the International Fight Against Corruption*, <https://www.yjil.yale.edu/investmentarbitration-a-poor-forum-for-the-international-fight-against-corruption/>.

134. Mbiyavanga, *supra* note 40. See also Reeder, *supra* note 44.

FTAs	Transparency Requirements	Anticorruption Requirements	Good Governance Requirements	Enforceable
EU	X		X	X
China	X		X	X
USA	X	X	X	X
CPTPP	X	X	X	X

European Union¹³⁵

In a Report for the Committee on International Trade of the European Parliament, “evidence showed that international trade agreements have the potential to act as the exogenous factor breaking the vicious circle of corruption in economies based on privileged connections rather than fair competition.”¹³⁶ The Report argues further,

The options offered are between an ‘economist’s approach’ with an apparently more modest but effective good governance package, a ‘lawyer’s’ approach’ with firm anticorruption language but unenforceable provisions even in EU countries (on bribery, for instance), and a ‘holistic’ approach where the EU would coordinate across international trade, promotion of norms and development aid to have a strong and consistent approach demanding good governance as part of its foreign and development policy.¹³⁷

135. EU’s promise of fighting corruption is “gradually being translated into action with new anticorruption provisions foreseen in the coming updated EU Mexico Global Agreement and recently launched EU Chile Association Agreement upgrade. The EU’s trade agreements add to the WTO’s baseline on procurements and customs through dedicated chapters which reinforce transparency provisions and electronic handling of public tenders and customs paperwork, for example. Recent EU trade agreements also include general transparency provisions in domestic regulation, namely for services. The chapter on investment protection in CETA, the trade agreement with Canada, stipulates that foreign investors that have paid bribes to obtain contracts will be excluded from the protection offered by the investment court foreseen in the treaty.” Iana Dreyer, *FTAs: How the EU Is Approaching the Fight Against Corruption*, BORDERLEX, (Jan. 24, 2018), <https://www.borderlex.eu/2018/01/24/ftas-how-the-eu-is-approaching-the-fight-against-corruption/>.

136. Mungiu-Pippidi, *supra* note 1, at 5.

137. *Id.*

Illustrative provisions from EU FTAs, such as in the Canada-EU Trade Agreement (CETA), are as follows.¹³⁸

Art 27.1 “Each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or made available in such a manner as to enable interested persons and the other Party to become acquainted with them.”

Art. 27.4 “Each Party shall establish or maintain judicial, quasi-judicial or administrative tribunals or procedures for the purpose of the prompt review and, if warranted, correction of final administrative actions regarding matters covered by this Agreement. Each Party shall ensure that its tribunals are impartial and independent of the office or authority entrusted with administrative enforcement and that they do not have any substantial interest in the outcome of the matter.”

The question is whether the anticorruption provisions will be drafted to successfully allow them within the scope of the dispute resolution procedures, either directly or by their affecting other FTA provisions.¹³⁹ Model language has been proposed.¹⁴⁰

138. Free Trade Agreement, Can.-EU, Chapter 27, 2016 <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-bychapter/>. Free Trade Agreement, EU-Japan, Chapter 17, 2018, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1684>.

139. Article 18.18 provides for the scope. “1. Without prejudice to the rights and obligations of the Parties under Chapter Twenty-Nine (Dispute Settlement), an investor of a Party may submit to the Tribunal constituted under this Section a claim that the other Party has breached an obligation under: Section C, with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of its covered investment, or Section D, where the investor claims to have suffered loss or damage as a result of the alleged breach.” Article 8.18.3 further provides: “Investors’ are precluded from submitting claims for the resolution of investment disputes when such investment is made corruptly or by other unlawful action.” There also is an obligation of governments to conduct procurement procedures in a manner that will prevent corrupt practices (Article 19.4(4c)).

140. Scope of FTA’s dispute mechanism on corruption: “Increasingly, investment treaties explicitly include references to corruption. Examples include ... CETA. The proposed article builds on the UN and OECD conventions on bribery but closes a loophole that allows payments to be made to a family member or business associate instead of directly to a politician or senior official. Implementation of the article from most enforcement and penal perspectives is through domestic law. However, by including this clause, a breach is also a breach of the treaty. Proposed [Model] Language [emphasis added] 1. Investors and their investments shall not, prior to the establishment of an Investment or afterwards, offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official of the Host State, or a member of an official’s family or business associate or other person in close proximity to an official, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, in order to achieve any favour in relation to a proposed Investment or any

Another more recent trade agreement between the EU and Vietnam (EUVIPA) incorporates an investment court system with a tribunal and an appellate tribunal.¹⁴¹ The conciliation and mediation mechanisms under CETA and EUVIPA use a more flexible evidentiary process aiming to provide a fair and independent system. EUVIPA provides for detailed rules concerning mediation with a mandatory six-month cooling period before a claim can be submitted for arbitration. During which the parties consult, followed by mediation or conciliation. A party can submit a notice of arbitration only upon expiration of the cooling period.¹⁴² Article 14 provides for transparency.¹⁴³

China

Illustrative provisions from China FTAs, such as in the China-New Zealand Agreement, are as follows.¹⁴⁴

Art 194.3 “The final report of the arbitral tribunal shall be made available as a public document after the lapse of 10 days from the date of its release.”

Art.168 “Each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or made available in such

licences, permits, contracts or other rights in relation to an Investment. 2. Investors and their investments shall not be complicit in any act described in paragraph 1, including incitement, aiding and abetting, and conspiracy to commit or authorization of such acts.” NATHALIE BERNASCONI-OSTERWALDER ET AL., HARNESING INVESTMENT FOR SUSTAINABLE DEVELOPMENT 10 (2018) <https://www.iisd.org/sites/default/files/meterial/harnessing-investment-sustainabledevelopment.pdf>.

141. EU-Vietnam trade and investment agreements, Art. 15, Free Trade Agreement Text, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>. See also EU-Vietnam Free Trade Agreement: Joint Press Statement by Commissioner Malmström and Minister Tran Tuan Anh, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=2041>. See also Shilpa Singh J., *Analyzing Features of Investment Court System under CETA and EUVIPA: Discussing Improvement in the System and Clarity to Clauses*, KLUWER ARBITRATION BLOG (Feb. 8, 2019) <http://arbitrationblog.kluwerarbitration.com/2019/02/08/analyzingfeatures-of-investment-court-system-under-ceta-and-euvipa-discussing-improvement-in-the-system-and-clarity-to-clauses/>.

142. Singh, *supra* note 141.

143. Free Trade Agreement, EU-Viet., Art. 14, Sept. 24, 2018, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>.

144. Analysis from the following China FTAs: Free Trade Agreement, China-N.Z., Chapter 13, 2008, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/china-fta/nz-china-fta-resources>.

Free Trade Agreement, China-Austl., Chapter 13, 2015, <https://dfat.gov.au/trade/agreements/in-force/chafta/official-documents/Pages/official-documents.aspx>.

a manner as to enable interested persons and the other Party to become acquainted with them.”

Art. 170 “Each Party shall, where warranted, establish or maintain judicial, quasijudicial or administrative tribunals, or procedures for the purpose of the prompt review and correction of final administrative actions regarding matters covered by this Agreement, other than those taken for prudential reasons. Such tribunals shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.”

From the China-South Korea FTA.¹⁴⁵

Article 4.5: Transparency 1. Each Party shall ensure that its customs and other trade-related laws, regulations, general administrative procedures and other requirements, including fees and charges, are readily available to all interested parties, via an officially designated medium including official website. Each customs authority shall publish¹⁴⁶ all customs laws and any administrative procedures it applies or enforces, via an officially designated medium including official website.

In summary, both EU and China provide in their FTAs for publishing relevant laws and regulations.

Other FTAs

United States

Illustrative provisions from U.S. FTAs, such as in the CAFTA-DR Agreement, are as follows.¹⁴⁷ CAFTA-DR examples:

145. Free Trade Agreement, China-S. Kor., Art. 4.5, June 1, 2015, http://fta.mofcom.gov.cn/korea/annex/xdzw_en.pdf.

146. See also Free Trade Agreement, U.S.-Austl., Art. 20.14, July 14, 2004, <https://ustr.gov/trade-agreements/free-tradeagreements/australian-fta/final-text>. (“The panel shall present a final report to the disputing Parties, including any separate opinions on matters not unanimously agreed, within 30 days of presentation of the initial report, unless the disputing Parties otherwise agree. The disputing Parties shall release the final report to the public within 15 days thereafter, subject to the protection of confidential information.”).

147. Analysis from the following FTAs: Free Trade Agreement, CAFTA-DR, Chapter 18, 2004, <https://ustr.gov/trade-agreements/free-tradeagreements/cafta-dr-dominican-republic-central-america-fta/final-text>. Free Trade Agreement, U.S.-Austl., Chapter 20, 2004, <https://ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text>. See also Lance Compa, Jeffrey Vogt, and Eric Gottwald, *Wrong Turn for Workers' Rights: The U.S.-Guatemala CAFTA Labor Arbitration Ruling – And What To Do About It*, INTERNATIONAL LABOR RIGHTS FORUM (Apr. 12, 2018), <https://laborrights.org/publications/wrong-turn-workers%E2%80%99-rights-us-guatemala-cafta-labor-arbitration-ruling-%E2%80%93-and-what-to-do> (discussing inherent issues and obstacles in enforcement).

Art 18.2 Publish laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by the Agreement.

Art 18.5 Maintain independent and impartial judicial, quasi-judicial, or administrative tribunals or procedures for the purpose of the prompt review and, where warranted, correction of final administrative actions regarding matters covered by this Agreement.

Anti-Corruption Measures: Art 18.8: 1. Each Party shall adopt or maintain the necessary legislative or other measures to establish that bribery is a criminal offense in matters affecting international trade or investment; and 2. Adopt or maintain appropriate penalties and procedures to enforce the criminal measures that it adopts.

About the recently negotiated but not yet ratified USMCA FTA,¹⁴⁸ it has been observed,¹⁴⁹

Chapter 27 of the USMCA's anticorruption measures can be divided into three categories, namely: (1) legislative measures—i.e., laws or other legislative measures to criminalize bribery; (2) administrative measures—i.e., measures that the countries may undertake through executive-branch regulation or similar action, rather than new legislation; and (3) promotional measures—i.e., measures that are less concrete and harder to quantify, but call for the three countries to promote and encourage awareness and the adoption of certain anticorruption practices while requiring no real specific action. Chapter 27 explicitly permits the parties to initiate claims through the USMCA's dispute settlement mechanism to challenge measures alleged to be inconsistent with the Chapter's requirements.

CPTPP

148. Free Trade Agreement, U.S.-Can.-Mex., 2018, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreementbetween>.

149. Collmann Griffin, Richard Mojica, & Marc Alain Bohn, *Takeaways from the Anti-Corruption Chapter of the USMCA*, FCPA BLOG, (Jan. 9, 2019), <http://www.fcpablog.com/blog/2019/1/9/takeaways-from-the-anti-corruption-chapter-of-the-usmca.html>. (“To be sure, there are clear limitations on the applicability of the dispute settlement mechanism to Chapter 27's anticorruption provisions. Most notably, the signatories have explicitly excluded disputes arising out of parties' failure to effectively enforce laws adopted or maintained pursuant to the agreement, likely due to sovereignty concerns. In addition, because the USMCA is ultimately a trade agreement, the dispute resolution mechanism only covers measures that affect trade or investment between the parties.”).

The recent recently completed CPTPP FTA has illustrative provisions.¹⁵⁰

Art 26.2. Publish laws, regulations, procedures and administrative rulings of general application with respect to any matter covered by this Agreement : Art 26.7 Anti-Corruption measures should be maintained by legislative and other measures as may be necessary to establish as criminal offences under its law, in matters that affect international trade or investment and make violators liable for sanctions.

Enforcement Mechanisms

China and the EU take a similar approach to the enforcement of the transparency provision in their FTAs. First off, claims under the transparency chapters can access the full dispute resolution options included in the agreement;¹⁵¹ this is unlike the labor and environmental chapters which have no access to binding arbitration in EU and China FTAs.¹⁵² If a binding arbitration is requested, the parties are responsible for implementing the arbitration decision, and there are penalties for failing to comply with the arbitration ruling.¹⁵³ The EU and China slightly differ in the steps that must be taken before a party “suspend obligations” of the trade agreement on all or some of the other parties’ benefits. China requires parties to first negotiate on compensation to resolve the noncompliance before suspending obligations¹⁵⁴, while the EU gives the parties the option to either negotiate compensation or suspend obligations.¹⁵⁵ Similarly, the U.S. and CPTPP enables a party to “suspend benefits” if the other party fails to implement an

150. Analysis from the following: CPTPP, Comprehensive and Progressive Agreement for Trans-Pacific Partnership, <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptppg/texttexte/index.aspx?lang=eng>. Agreement Analysis by New Zealand, Comprehensive and Progressive Agreement for Trans-Pacific Partnership, <https://www.mfat.govt.nz/assets/CPTPP/Comprehensive-and-Progressive-Agreement-for-Trans-Pacific-Partnership-CPTPP-National-Interest-Analysis.pdf>.

151. Failure to comply with transparency requirements can go to binding arbitration pursuant to CETA, Article 29.10.

152. See Ronald C. Brown, *FTAs in Asia-Pacific: 'Next Generation' of Social Dimension Provisions on Labor?* 26 IND. INT'L & COMP. L. REV. 69 (2016) at 2.

153. See Free Trade Agreement, China-N.Z., Art. 195, 2008, <http://fta.mofcom.gov.cn/topic/ennewzealand.shtml>. See also CETA, Can.-EU, Art. 29.12, 2017, <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>.

154. See Free Trade Agreement, China-N.Z., Art. 198, 2008, <http://fta.mofcom.gov.cn/topic/ennewzealand.shtml>.

155. See CETA, Can.-EU, Art. 29.14, 2017, <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>.

arbitration ruling after attempting to negotiate compensation.¹⁵⁶ These remedies are only available to Government Parties.

Third-party investors have a different set of dispute resolution remedies that are governed by the UNCITRAL Arbitration Rules.¹⁵⁷ All parties have ratified the “Convention on the Recognition and Enforcement of Foreign Arbitral Awards”¹⁵⁸ and are obligated to enforce foreign arbitration

156. See Free Trade Agreement, CAFTA-DR, Art. 20.16, 2004, <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republiccentral-america-fta/final-text>. See also Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Art 28.20, 2018, <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/ag-racc/cptpp-ptpgp/text-texte/index.aspx?lang=eng>.

157. See Art 8.41 CETA and Art 153 China-New Zealand FTA. See generally Julissa Reynoso, Michael A. Fernández, Ariel Flint, & Erin Baldwin, *The Corruption Defense: Practical Considerations for Claimants*, KLUWER ARBITRATION BLOG (Jan. 22, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/01/22/the-corruption-defense-practical-considerations-forclaimants/>. See also Reeder, *supra* note 44.

158. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“The New York Convention”), June 10, 1958, 330 U.N.T.S. 3; available at <https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>. See also Thomas G. Allen, Andrew Van Duzer, & Daniel E. Parga, *China Aims to Modernize Its Arbitration and Award Enforcement Regime*, GREENBERGTRAURIG (Sept. 2018), <https://www.gtlaw.com/en/insights/2018/9/china-aims-to-modernize-its-arbitration-and-award-enforcement-regime>. (“China’s reputation for enforcing foreign arbitration awards remains mixed, and there are examples of the process taking many years,” but reforms of arbitration were announced on Sept. 7, 2018 by China’s Standing Committee of the National People’s Congress in its five-year legislative plan “to study and potentially move forward with revisions to China’s arbitration law (Arbitration Law) and the implementation of a new civil enforcement law.”). Part of the problem for foreign parties in the enforcement of arbitration agreements in China arises when a foreign party is registered in China as a WFOE, because the Chinese then consider it a Chinese party and resorts to domestic law, not foreign treaty law for the enforcement. For discussion on reforms seeking to further align Chinese arbitration with international practices, with “a signal to the international arbitration community about China’s commitment to evolve into an arbitration-friendly environment,” see Jingzhou Tao and Mariana Zhong, *China’s 2017 Reform of Its Arbitration-Related Court Review Mechanism with a Focus on Improving Chinese Courts’ Prior-Reporting System*, 35 J. OF INT’L ARB. Issue 3, 371–378 (2018). Also, there are signs of liberalizing that definition in cases arising from a Chinese free trade zone, where a foreign party, even though a WFOE, may still be considered as a “foreign party. See also Tereza Gao and Edison Li, *China Cases Insight No. 5: Through Siemens v. Golden Landmark, China Reforms Arbitration for Free Trade Zones in Order to Prepare for “Belt & Road”*, STANFORD LAW SCHOOL CHINA GUIDING CASES PROJECT (June 29, 2018), <https://cgc.law.stanford.edu/commentaries/clc-1-201806insights-5-gao-li/> (“In January 2017, the SPC issued the Opinions of the Supreme People’s Court on the Provision of Judicial Safeguards for the Construction of Pilot Free Trade Zones, (the “2017 Opinions”), Paragraph 9 of which provides: where wholly foreign-owned enterprises registered in pilot free trade zones mutually agree to submit a commercial dispute to arbitration outside the territory [of China], [a people’s court] should not determine that the related arbitration agreement is invalid merely on the grounds that the [enterprises’] dispute does not have foreign related elements.”).

awards.¹⁵⁹ Additionally, third-party investors must have “clean hands,” to avoid corrupt investors using the dispute resolution mechanisms to evade liabilities.¹⁶⁰ Many EU countries have in the past

negotiated agreements which include a mechanism for resolving disputes between governments and investors known as investor-state dispute settlement (ISDS).¹⁶¹ CETA replaces this with a new and better Investment Court System (ICS). CETA contains an Investment Court,¹⁶² which has been confirmed to be compatible with EU treaties.¹⁶³

159. See Mo Zhang, *Enforceability: Foreign Arbitral Awards in Chinese Courts*, 20 SAN DIEGO INT'L L.J. 1 (2018), <https://digital.sandiego.edu/ilj/vol20/iss1/2/> (for information on enforcement of arbitration awards in China).

160. Article 8 of CETA stipulates if corruption affects an investment, access to investment court is precluded. Can.-EU Trade Agreement (CETA), Chapter 8, <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>. See also Mbiyavanga, *supra* note 40. (“The usual setting within which investment arbitration is taking place is that of an investor bringing a claim against a host state, e.g. for compensation for loss of investment. By invoking the so-called corruption defense, however, the table turns, and it is the host state bringing a counterclaim against the investor by invoking acts of corruption, e.g. bribery, as a means to preclude any claims an investor might make and evade every liability. The raison d’être of the corruption defense is that while arbitral tribunals are not tasked with punishing acts of corruption, they clearly ‘cannot grant assistance to a party that has engaged in a corrupt act.’”) While Article 8.41(4) goes back to the home country for enforcement of the arbitration, since all parties have ratified UNCITRAL it is essential they comply regardless if it is country with a weak rule of law. Additionally, if a government party fails to comply with an investor then the other government party can step in and suspend benefits. See CETA, EU-Can., Art. 29.12, 2017. See also provisions in the UNCITRAL model rules of arbitration addressing corrupt public procurement, <https://www.unodc.org/documents/treaties/UNCAC/COSP/session2/V0850164e.pdf>.

161. *CETA Explained*, EUROPEAN COMMISSION, http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/index_en.htm#read-more.

162. Investment provisions within Free Trade Agreement, EU-Can. (CETA), http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf. (“CETA creates a permanent investment Tribunal and an Appellate Tribunal. Contrary to the traditional investment dispute settlement approach, the Tribunal will be composed of fifteen members nominated by the Union and Canada and not by arbitrators nominated by the investor and the defending state. The tribunal will hear cases in divisions of three members appointed via a randomized procedure. The Appellate Tribunal will review decisions of the Tribunal. CETA clearly defines the grounds for reviewing awards of the Tribunal. The Members of the Tribunal and Appellate Tribunal will have the same qualifications as for the International Court of Justice and will have to be beyond reproach in terms of ethics. The Union and Canada will adopt a decision setting out the practical details, already identified in CETA. In addition, CETA contains a firm commitment that the Union and Canada will join efforts with other interested parties for the creation of an international multilateral investment court.”).

163. Guillaume Croisant, *Opinion 1/17 – The CJEU Confirms that CETA’s Investment Court System is Compatible with EU Law*, KLUWER ARBITRATION BLOG (Apr. 30, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/04/30/opinion-117the-cjeu-confirms-that-cetas-investment-court-system-is-compatible-with-eu-law/>. (“The Court of Justice of the

IV. Analysis

The Problem

[R]esearchers have found evidence for negative effects of corruption on Foreign Direct Investment (FDI) and the hypothesis that corruption deters foreign investment by acting as an extra tax.¹⁶⁴

Transparency International's new report, *Exporting Corruption*, finds that only 11 major exporting countries—accounting for about a third of world exports—have active or moderate law enforcement against companies bribing abroad in order to gain mining rights, contracts for major construction projects, purchases of planes and other deals.¹⁶⁵

China, as one of the world's largest exporters and foreign direct investors, especially under its BRI global economic development plan is identified as a state failing to enforce anticorruption and transparency standards.¹⁶⁶ Likewise, EU states' enforcement of anticorruption laws is not consistent among themselves.¹⁶⁷

To date, the current approach of international and national monitoring mechanisms, laws, and sanctions used as enforcement means are largely ineffective to end corruption in trade. Likewise, relying on peer-review evaluations that lack meaningful sanctions mechanism does not appear to be

European Union ("CJEU") confirmed the compatibility with EU law of the Investment Court System ("ICS") provided for by the Comprehensive Economic and Trade Agreement between the EU and Canada ("CETA").

164. Alberto Ades and Rafael Di Tella, *The New Economics of Corruption: A Survey and Some New Results*, 45 *POLITICAL STUDIES* 496 (1997), <http://www.people.hbs.edu/rditella/papers/pscorrsurvey.pdf>, cited in, Mungiu-Pippidi, *supra* note 1.

165. *Foreign Bribery Rages Unchecked in Over Half of Global Trade*, TRANSPARENCY INTERNATIONAL (2018) <https://www.transparency.org/news/feature/exporting-corruption-2018>. Country by country, the report names the top offenders as well as the flaws in national legal systems that allow these crimes to continue unchecked.

166. Dell, *supra* note 58.

167. *Anti-Corruption Report*, EUROPEAN COMMISSION, <https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report>. ("The report showed that the nature and scope of corruption varies from one Member State to another and that the effectiveness of anti-corruption policies is quite different. It also showed how corruption is a phenomenon affecting all Member States, and how continued action is needed across the EU.")

ending corruption. The European Commission too has seldom exercised sanctions for corruption against member states.¹⁶⁸

Regional trade agreements are enforced through both bilateral investor-state dispute settlements and bilateral Government-government dispute settlements. What happens, however, if a country lacks the proper institutions for the desired implementation of remedies for violations; for instance, judicial independence and rule of law generally? It is argued that “newly included references to anticorruption conventions are good news only as far as the simple ratification of those conventions goes, for such conventions can have almost no effect, particularly in countries with high corruption.”¹⁶⁹

Alternative Approaches

How to curb corruption in international trade and investment is certainly as formidable a task as religion’s efforts to eliminate sin. Scholars of the highest order have identified, explained, and proposed many approaches to end it, but the fight goes on to harness the most effective solutions.¹⁷⁰ Professor Mungiu-Pippidi laid out the challenge: “What synergies could be developed across the board to enhance the impact across trade and anticorruption policies? How have the international conventions and the anticorruption legal regime performed so far, and what kind of provisions in the international trade agreement could help them, or be helped by them?”¹⁷¹

Within the perimeters of this paper, focused on EU and China FTA provisions, what practical alternatives can be proposed for their mutual benefit with the goal of fighting corruption? Some basic observations are identified below:

International bribery and corruption are endemic. International standards and conventions produce inconsistent prosecution results at the state level. While the EU and its Members have had successes in prosecuting corruption under state law, enforcement is still inconsistent across the entire EU.¹⁷² China is negatively perceived on its role in corruption in international

168. See Mungiu-Pippidi, *supra* note 1, at 26. A monitoring mechanism with collective sanctions is included in the EU’s ‘trade for all’ strategy, but it was never implemented in the Cotonou agreement (the only one country has ever been sanctioned).

169. *Id.* at 25.

170. See e.g., Alina Mungiu-Pippidi, *Seven Steps to Control of Corruption: The Road Map*, (2018) https://www.mitpressjournals.org/doi/pdf/10.1162/daed_a_00500.

171. Mungiu-Pippidi, *supra* note 1, at 27.

172. *Id.* at 35. (“Today, the uneven implementation of the OECD antibribery convention even across EU members, let alone the rest of the world raises the question of whether

trade and investment and there is a paucity of evidence of successful prosecutions under its laws.¹⁷³

Therefore, what more can be done to effectively diminish the global plague of corruption? Standards, conventions, laws, trade agreements all appear to have their shortcomings. Is there an approach that can provide enhanced enforcement and an umbrella of protection to all states and citizens under it?

Recommended approaches in fighting corruption in international trade have been suggested.¹⁷⁴

Foremost is the necessity for a rule of law to exist in the country that would prosecute the case.¹⁷⁵ Without laws and their administrative and judicial enforcement there is only an inert law. As mentioned, China has a negative rating on endemic corruption, at least partly due to rule of law

emphasis on laws against bribery which cannot be enforced equally across parties actually brings more equal treatment and market access, or less. In fact, uneven enforcement of laws prohibiting foreign bribery puts companies that play by the rules while competing in a global marketplace at a serious disadvantage.”).

173. Jonathan E. Hillman, *Corruption Flows Along China's Belt and Road*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, (Jan. 8, 2019), <https://www.csis.org/analysis/corruption-flows-along-chinas-belt-and-road> (for example, comments include the following: “In many of the 80-plus countries that the BRI aims to connect, corruption is endemic. ... China adopted a foreign bribery law in 2011 but has done little to enforce it. Chinese companies are also among the least transparent according to a Transparency International study of 100 companies in 15 emerging markets.”).

174. See e.g., Dell & McDevitt, *supra* note 50. See also Dell, *supra* note 58. See also Mungiu-Pippidi, *supra* note 1. Some argue that “[to] date, the most effective enforcement mechanism we have seen in an anti-corruption treaty is the peer-review monitoring system overseen by the OECD Working Group on Bribery,” the fact is China is not a member of the OECD. *Where: Global reach*, OECD.ORG, <https://www.oecd.org/about/members-and-partners/>. For comments on the proposed terms for the USMCA, see Griffin, Mojica, & Bohn, *supra* note 149. (“Although there are no penalties as a result of these periodic peer-review assessments, the Working Group has proven to be a surprisingly powerful motivator for OECD members, appearing to drive legislative and administrative reform among countries simply through “naming and shaming.” Whether the USMCA dispute settlement will prove as effective as the OECD Working Group will be an important anti-corruption development to watch.”).

175. Mungiu-Pippidi, *supra* note 1 (noting that there is a “close correlation between the rule of law and control of corruption (at over 90 per cent in World Governance Indicators) so clearly, wherever corruption is high the rule of law is also inadequate. How then can legal approaches to anti-corruption be expected to work, or can the solution be the same as the problem itself? Furthermore, change in control of corruption in countries with an anti-corruption agency (ACA) but lacking the rule of law is on average marginally lower than in those which introduced an ACA and attained a certain level of the rule of law. The reasons are obvious, for regardless of how much emphasis the UNCAC and the international anticorruption community place on ‘autonomous’ anticorruption agencies, they can hardly be divorced from the context of the country.”).

issues and lack of openness.¹⁷⁶ Likewise, enforcement agencies, need authority and the availability of the rule of law to enforce. Beyond that, over the years, at the national level the following suggestions have been offered for inclusion in FTA provisions seeking to limit corruption.

Establish open markets¹⁷⁷

Have strong national laws

Develop the proper institutions to implement the law

Encourage due diligence by having it affect remedy. This can bring prevention and avoidance of corporate liability and penalties; and of course, save huge amounts of defense costs.¹⁷⁸

Include whistleblower protections

Monitor foreign bribery settlements

Debar violators from state benefits and government-backed financing¹⁷⁹

176. Hillman, *supra* note 173 (“A long list of Chinese companies has been debarred from the World Bank and other multilateral development banks for fraud and corruption, which covers everything from inflating costs to giving bribes. In many of the 80-plus countries that the BRI aims to connect, corruption is endemic. Among participating economies, the median credit rating is junk, so alternative lenders stay away. Chinese construction companies benefit because—backed by state financing and often state ownership—they are willing to take risks that others will not. They also know that, if the going gets tough, Beijing can intervene politically on their behalf. Of course, Chinese companies are not alone in being accused of peddling influence. But authorities in the United States and European Union are more vigilant in policing their own companies abroad. China adopted a foreign bribery law in 2011 but has done little to enforce it. Chinese companies are also among the least transparent according to a Transparency International study of 100 companies in 15 emerging markets.”).

177. Mungiu-Pippidi, *supra* note 1, at 35 (“Establish as the main goal a trade treaty to open markets. The evidence speaks for itself that the more a market is opened, the greater the contribution to countering corruption, even if only in the long run. ... [A] treaty which opens nearly all public procurement areas to external competition and makes it entirely transparent makes a far larger contribution than one which invokes criminal penalties which it cannot enforce.”).

178. Jenkins, Chu, & Meadors, *supra* note 59. Due diligence can save companies much money in lowered penalties. For example, it is reported, “Morgan Stanley because it had an effective compliance program in place, conducted a thorough investigation when the matter was discovered and fully cooperated with authorities. Morgan Stanley, because of its proactive practices, has saved many millions of dollars in investigation costs, legal fees, and potential fines and disgorgements. (In contrast, Wal-Mart disclosed that its FCPA investigation costs had reached \$230 million as of March of 2013, equating to approximately \$600,000 per day in professional fees, and continues to grow. The U.S. government hasn’t yet assessed Wal-Mart penalties or fees.)”

179. Hillman, *supra* note 173 (“Certain experts argue that trade agreements should include as standard provisions stipulating that countries may debar firms found guilty of corruption from competing for public contracts in either the home or host country. That is the model as practiced by the World Bank, for instance and found in treaties, for instance in the final [CP]TPP text, which stated that countries ‘may include’ procedures which would render ineligible for future contracts suppliers that have engaged in fraud.”). MungiuPippidi, *supra*

Limit the use of corrupt party's use of FTA dispute resolution procedures¹⁸⁰

Name and shame violators¹⁸¹

Require whistleblower provisions¹⁸²

Make public, international organizations and state evaluations and decisions regarding corruption, to the extent permissible by law¹⁸³

States could work with and utilize the resources of FCPA, as was done with France¹⁸⁴

note 1, at 23 (“By analogy, a long list of Chinese companies has been debarred from the World Bank and other multilateral development banks for fraud and corruption, which covers everything from inflating costs to giving bribes.”).

180. Mungiu-Pippidi, *supra* note 1, at 36 (“Disbarment of firms should be considered when countries have no anti-bribery laws or do not implement them.”).

181. This approach is used by the OECD.

182. Mungiu-Pippidi, *supra* note 1, at 23-24, 36. A US trade deal with Korea incorporated mandatory whistleblower protection measures, while other recent US trade agreements with Colombia, with Peru and with Panama have introduced measures providing for non-criminal sanctions for enterprises not subject to criminal penalties.

183. *Id.* (“GRECO and OECD evaluation reports are public by default, with UNCAC reports available only case-by-case. The US now includes in all its trade agreements, GPA equivalent measures such as a provision to ensure integrity in government procurement practices. A US trade deal with Korea incorporated mandatory whistleblower protection measures, while other recent US trade agreements with Colombia, with Peru and with Panama have introduced measures providing for non-criminal sanctions for enterprises not subject to criminal penalties.”).

184. *Id.* at 25. (“[T]he FPCA can be a formidable instrument and the recent practice of seeking claims on behalf of other countries promises more cooperation in future.”). *See also 2013 Mid-Year FCPA Update*, GIBSON DUNN (July 8, 2013), <https://www.gibsondunn.com/2013-mid-year-fcpa-update/>. (“On May 29, 2013, DOJ and the SEC announced a joint FCPA settlement with French oil and gas company Total, S.A. In one of the largest combined monetary resolutions in the statute’s history, Total, an ADR-issuer in the United States, agreed to pay a \$245.2 million fine to DOJ and to disgorge \$153 million in profits to the SEC, for a total payment of more than \$398 million. Simultaneously, French anti-corruption authorities announced that they are recommending that Total, a senior executive, and two Iranian businessmen stand trial on related charges before a Paris criminal tribunal. DOJ’s press release announcing the settlement that this case represents “the first coordinated action by French and U.S. law enforcement in a major foreign bribery case” and evidences that the two countries “are working more closely today than ever before to combat corporate corruption.” But the DPA itself reveals some of the challenges of French-U.S. law enforcement coordination, qualifying what is usually a boilerplate obligation to cooperate with U.S. authorities’ post-settlement with notations that any such cooperation must be consistent with French data protection, labor, and blocking statutes. . . . Total is contesting the French charges, releasing a statement that “Total and [the senior executive] will argue that the behavior that they are accused of was completely legal under French law. According to the U.S. settlements, between 1995 and 2004, Total utilized intermediaries to make approximately \$60 million in improper payments to the Chairman of a wholly owned subsidiary of the National Iranian Oil Company to obtain the rights to develop two significant oil and gas fields in Iran. Total

On the international level, a variety of approaches can be considered.

Create a new international prosecution body. The OECD Convention Against Corruption or UNCAC or GRECO could be expanded providing resort to a newly created international body that would prosecute individual cases after monitoring reveals an absence of national competency as measured by Convention criteria. But will China be included?

Insert in the EU-China FTA a provision for agreement to the application of a strong EU anticorruption enforcement law, such as that in the UK, and similar to the practice of the U.S. to insert the FCPA.¹⁸⁵

Having openness is perhaps the best and easiest approach to diminishing corruption, not just in the procurement process, but in all the government transactions, prosecutions for corruption, and contents of corruption settlements and decisions. One way to do this is through provisions in free trade agreements, bilateral or multilateral. In the case of an EU-China FTA, the umbrella of the agreement would affect 29 countries.

V. Conclusion: Path for Enhanced Enforcement and Umbrella Coverage of Anticorruption

An EU-China FTA can be a win-win proposition for each in that the anticorruption provisions can bring a *harmonization*¹⁸⁶ of obligations within and between 29 states (EU's 28 Members and China) regardless of the status of their local laws; and, at the same time, given the proper dispute resolution procedures, provide an alternative resolution through international arbitration.¹⁸⁷ For China, the win is to gain an international forum for

allegedly mischaracterized the unlawful payments as "business development expenses" paid through what purported to be legitimate consulting agreements with the intermediaries.")

185. All U.S. FTAs may be found at the U.S. Trade Representative Website: <http://www.ustr.gov/trade-agreements/freetrade-agreements>.

186. Griffin, Mojica, & Bohn, *supra* note 149. (Commenting on the proposed USMCA: "Use Chapter 27 to help streamline compliance programs—If the USMCA goes into force, the United States, Mexico, and Canada will be obliged to harmonize any domestic anti-corruption laws and practices that are out of step with the agreement. This harmonization should ideally help to establish a more uniform set of expectations from prosecutors and regulators in the United States, Mexico, and Canada, allowing companies to streamline policies and procedures that previously had to be tailored based on jurisdiction. In anticipation of this harmonization, companies and compliance professionals in the region can use Chapter 27 to begin streamlining their compliance programs in each of these countries to meet the anti-corruption standards set forth in the USMCA.")

187. Mungiu-Pippidi, *supra* note 1, at 25. ("Many trade agreements like ... the EU-Canada CETA offer foreign traders and investors certain protections similar to those provided by bilateral investment treaties. They allow investors to seek restitution outside the host state's judicial system, where that state has not complied with its treaty obligations subject to the government-government dispute settlement (GGDS) mechanism. Transparency International

resolving issues of corruption in international trade.¹⁸⁸ However, if the dispute resolution procedures are not crafted to largely avoid local institutions and domestic rule of law issues (especially on enforcement), FTA anticorruption, openness and good governance provisions will not necessarily be effective. Some of these alternatives to strengthen the dispute resolution provisions, which are the key to successful enforcement, discussed above could be considered and incorporated in the FTA.¹⁸⁹

The pathway to an EU-China FTA that has the potential to add an additional legal tool for addressing the endemic plague of bribery and corruption in international trade includes three steps.¹⁹⁰

First, provide substantive transparency and anticorruption provisions in the FTA.

Secondly, provide a broad procedural pathway to dispute resolution and binding arbitration, anticipating rule of law enforcement issues in some states.

Thirdly, authorize the dispute arbitrators with a panoply of remedies, including to bar claimants use of the procedures if in their relevant transactions they have engaged in corruption and bribery.¹⁹¹

(2017) highlights the necessity to implement RTAs at national level. A problem in local enforcement could arise.”).

188. Note that China is not a member of the OECD or a signatory of its Anti-Corruption Convention.

189. Mungiu-Pippidi, *supra* note 1, at 25. See also Westbroek, *supra* note 82, at 3.

190. Analysis from the following China FTAs: Free Trade Agreement, China-N.Z., Chapter 13, 2008, <http://fta.mofcom.gov.cn/topic/ennewzealand.shtml>; Free Trade Agreement, China-S. Kor., June 1, 2015, http://fta.mofcom.gov.cn/korea/annex/xdzw_en.pdf. One can look to the EU’s CETA provisions and China’s provisions in its New Zealand or South Korean FTAs. Also useful are the provisions in the CPTPP and the USMCA. Mungiu-Pippidi, *supra* note 1, at 25. (“Regional trade agreements are enforced through both bilateral Investor-state dispute settlements and bilateral Government-government dispute settlements. Many trade agreements like the North American Free Trade Agreement (NAFTA), TPP and the EU-Canada CETA offer foreign traders and investors certain protections similar to those provided by bilateral investment treaties. They allow investors to seek restitution outside the host state’s judicial system, where that state has not complied with its treaty obligations subject to the government-government dispute settlement (GGDS) mechanism. Transparency International (2017) highlights the necessity to implement RTAs at national level.”)

191. *Foreign Bribery Rages Unchecked in Over Half of Global Trade*, *supra* note 165. (“A long list of Chinese companies has been debarred from the World Bank and other multilateral development banks for fraud and corruption, which covers everything from inflating costs to giving bribes.”).
