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Regulating Corruption Through Free Trade Agreements: An Analysis of the NAFTA 2.0 Anti-corruption Provisions

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Dr Chijioke Chijioke-Oforji.[1]

Abstract

The recently unveiled United States, Mexico and Canada free trade agreement (USMCA) has generated considerable interest in academic and policymaking circles owing to a troubled negotiating history. In many respects, the conclusion of the agreement provides a welcome reprieve for the most dedicated followers of its negotiation. Far from harming trade relations between the North American neighbours, the agreement in its current form is likely to inspire new opportunities for cooperation in a number of areas. One area of increased cooperation is Anti-corruption where the agreement codifies a number of measures that are of potential benefit to its signatories. This article examines the USMCA anti-corruption provisions and connects it to an emergent trend of anti-corruption regulation through free trade agreements (FTAs).

I. Introduction

Almost three decades after the entry into force of the North American Free Trade Agreement (NAFTA),[2] a successor agreement has been negotiated by its signatories. The new agreement known as the United States-Mexico-Canada Agreement (USMCA) or NAFTA 2.0 comes against a background of infighting and protectionist rhetoric.[3] Notwithstanding this troubled history, the USMCA provides several reasons for optimism.

First, the agreement maintains vital trade and investment links across North America by further reducing tariff and non-tariff barriers to trade and investment.[4] The agreement also modernises its predecessor in a number of areas including labour rights, environmental protection, regulatory cooperation, digital trade and Anti-Corruption among others.[5]

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[2] North American Free Trade Agreement, 32 I.L.M. 289 and 605 (1993).

[3] Ana Isabel Martinez, David Lawder 'U.S. businesses fear NAFTA doomed; Mexico warns of consequences' *Reuters* (10 October 2017) <https://www.reuters.com/article/us-trade-nafta/u-s-businesses-fear-nafta-doomed-mexico-warns-of-consequences-idUSKBN1CF0WV> Accessed 20 April 2019.

[4] United States International Trade Commission 'U.S.-Mexico-Canada Trade Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors' (April 2019) <https://www.usitc.gov/publications/332/pub4889.pdf> Accessed 20 May 2019.

[5] Franz Christian Ebert and Pedro A. Villarreal 'the Renegotiated "NAFTA": What is in it for Labor Rights?' EJIL Talk (11 October 2018) <https://www.ejiltalk.org/the-renegotiated-nafta-what-is-in-it-for-labor-rights/> Accessed 20th May 2019. See also: Christopher A. Guerreiro 'Strengthened IP protection under the USMCA: Extensions to data protection and patent-term restoration headline forthcoming changes to Canadian law' (2018) <https://www.nortonrosefulbright.com/en/knowledge/publications/cef9e6cb/strengthened-ip-protection-under-the-usmca-extensions-to-data-protection-and-patent-term-restoration-headline-forthcoming-changes-to-canadian-law> Accessed 20 May 2019. Clay R. Fuller, 'An underlooked bright spot in NAFTA 2.0: A unified front against corruption' (2018) <http://www.aei.org/publication/underlooked-bright-spot-nafta-2-anti-corruption/> Accessed 15 April 2019. See also: Victoria Gaytan 'The USMCA and its new anti-corruption provisions' (Global Americans, 19 October 2018) <https://theglobalamericans.org/2018/10/the-usmca-and-its-new-anti-corruption-provisions/> Accessed 15 April 2019.

This paper sets out to analyse the Anti-corruption measures in the USMCA. It begins with a discussion on the nature and effects of corruption in international trade. This is followed by a thorough consideration of the regulatory responses to the threat of corruption in the multilateral rulemaking order. In this respect, the paper considers the 1997 OECD Anti-Bribery Convention and the 2003 United Nations Convention against corruption.

Having examined the nature of broader multilateral controls on corruption, the third section considers the emergent but interesting trend of anti-corruption regulation through international trade agreements. This section also evaluates the USMCA Anti-corruption provisions which set out a number of commitments for its signatories on corruption. It is argued here that the USMCA provides clear commitments on corruption and creates the conditions for a unified, trilateral front against corruption that may be of potential benefit to its signatories.

II. Corruption and International Trade: An Overview

Corruption, defined as the 'abuse of entrusted power for private gain'[6] is widely perceived as one of the greatest obstacles to the economic, political, and social development of developed and developing countries alike.[7] Current figures suggest that the overall cost of corruption to the global economy equals more than five percent of global Gross Domestic Product (GDP) which translates into US$ 3.6 trillion, with over US$ 1 trillion paid out in bribes annually.[8]

Much of this activity manifests in international trade and investment where the real impact of corruption remains hotly debated but nonetheless recognised.[9] Corruption in the international trading regime manifests through a number of practices including the bribery of foreign public officials and the embezzlement of property.[10]

At its simplest, bribery involves the offer or acceptance of forms of financial inducement in exchange for an illicit advantage.[11] In international commerce, bribery occurs in several forms but is said to be most common at the customs border where officials demand and receive varying sums from corporations and private traders to facilitate the transfer or movement of

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[6] Transparency International 'What is corruption' (2019) <https://www.transparency.org/what-is-corruption> Accessed 20th February 2018.

[7] OECD, 'The rationale for fighting corruption' (2014) <https://www.oecd.org/cleangovbiz/49693613.pdf> Accessed 20th February 2019.

[8] Stephen Johnson 'corruption is costing the global economy $3.6 billion dollars every year' (2018) <https://www.weforum.org/agenda/2018/12/the-global-economy-loses-3-6-trillion-to-corruption-each-year-says-u-n> Accessed 21st March 2019.

[9] Some studies note that corruption serves as 'grease' to oil the wheels and can allow firms to overcome cumbersome regulations, by providing underpaid bureaucrats with incentives to perform and so improving allocative efficiency. See: Pushan Dutt, Daniel Traça 'corruption and its impact on trade: Extortion or evasion?' Vox (25 June 2009) <> Accessed 28th February 2019. Other studies emphasise the negative impact of corruption which often serves as a form of distortionary taxation which reduces allocative efficiency via lost revenues for government and the increased transaction costs, uncertainty, and unenforceable contracts which hamper business activity. See: Sandra Sequiera 'Doing business with corruption' (2016) <https://www.theigc.org/blog/doing-business-with-corruption/> Accessed 1st March 2018.

[10] There are other forms of corruption such as Trading in Influence and Illicit Enrichment. However, transactional bribery and financial embezzlement are said to be the most prevalent form. See: Cecily Rose, International Anti-corruption Norms: Their Creation and Influence on Domestic Legal Systems (Oxford University Press, 2015) 7. See also:

[11] Krista Nadakavukaren Schefer, 'corruption and the WTO Legal System' (2009) 43 J. World Trade 737, 740-741.

goods and services.[12] Besides the 'petty' forms described above, bribery can also occur on a grand scale and may involve the transfer of pecuniary benefits to senior public officials within a given geographical area to alter or reduce taxation liabilities, turn a blind eye to illegal activities and/or ensure access to lucrative contracts and exemptions from normal administrative formalities.[13]

Nothing illustrates the grand-scale bribery described above than the recent Rolls Royce scandal which saw the British corporate giant fined by regulators for the bribery of foreign public officials.[14] Rolls Royce's woes began after it was revealed to have made illicit payments over many years to public officials in seven Asian countries including China, India, Thailand and Indonesia to secure access to lucrative export contracts.[15]

Cases of transnational bribery can also be seen in the Siemens scandal in which the German multinational company was fined over $800 million by American regulators under the Foreign Corrupt Practices Act (FCPA) for making approximately 4238 illegal payments to foreign public officials in Asia, Africa, Europe, the Middle East and the Americas totalling approximately over $1.4 billion.[16] Practices of this sort, if normalised, can induce adverse economic, political and social costs including an increase in the cost of doing business, a reduction in trade and Foreign Direct Investment (FDI) flows and ultimately, the erosion of public trust in institutions, businesses and governments.[17]

Alongside bribery, embezzlement is another common form of corrupt conduct in international commerce.[18] This involves the misappropriation of property or funds legally entrusted to another in their formal position as guardian or agent.[19] Like bribery, embezzlement and misappropriation in international commerce is most prevalent at the border where goods and properties are often diverted with serious costs to exporters and importers alike.[20]

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[12] Marie Chêne 'corruption at borders' (2018), 9 <https://www.u4.no/publications/corruption-at-borders.pdf> Accessed 25th March 2018.

[13] Ibid.

[14] Rob Evans, David Pegg and Holly Watt 'Rolls Royce to pay £671m over bribery claims' *The Guardian* (London 16 January 2017) <https://www.theguardian.com/business/2017/jan/16/rolls-royce-to-pay-671m-over-bribery-claims> Accessed 1 March 2019.

[15] John Moylan 'Rolls-Royce apologises after £671m bribery settlement' *BBC News* (London 18 January 2017) <https://www.bbc.co.uk/news/business-38644114> Accessed 3 March 2019.

[16] Trace International, 'Trace Compendium: Siemens AG' (2019) <https://www.traceinternational.org/TraceCompendium/Detail/124?class=casename_searchresult&type=1> Accessed 2 March 2019. See also: Bertrand Venard 'Lessons from the Massive Siemens corruption Scandal one decade later' *The Conversation* (13 December 2018) <http://theconversation.com/lessons-from-the-massive-siemens-corruption-scandal-one-decade-later-108694> Accessed 13 February 2019.

[17] Export.gov 'corruption' (2018) <https://www.export.gov/article?id=corruption> Accessed 20 February 2019.

[18] Cecily Rose, *International Anti-corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford University Press, 2015) 7. See also: Marie Chêne 'corruption at borders' (2018), 9 <https://www.u4.no/publications/corruption-at-borders.pdf> Accessed 25th March 2018.

[19] United Nations Convention against corruption (adopted 11 December 2003, entered into force 14 December 2005) 2349 UNTS 41 (UNCAC). Article 17.

[20] Marie Chêne 'corruption at borders' (2018), 9 <https://www.u4.no/publications/corruption-at-borders.pdf> Accessed 25th March 2018.

III. Regulating Corruption in the Multilateral Legal Order

Rising concern about the negative consequences of corruption in international trade and commerce has unsurprisingly inspired a number of regulatory responses at the multilateral level. One example is the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, an international treaty created under the auspices of the Organisation for Economic Cooperation and Development (OECD) in 1997.[21] Current signatories of the convention which include OECD member states like the United States and non-member states such as China, account for over two-thirds of the world's exports and almost ninety percent of total foreign direct investment outflows, making the OECD Convention an important instrument in the fight against cross-border corruption.[22]

Substantively, the Convention attempts to regulate bribery in international business transactions through the codification of minimum standards to be adopted by contracting parties. Its most important prescriptions include a mandatory requirement for signatories to criminalise the supply or active side of bribery where a person or entity offers, promises or gives a bribe to another, mostly a public official, to secure an illicit advantage (active bribery).[23] Signatories are also obliged to impose effective, proportionate and dissuasive sanctions as a deterrent against bribery in business transactions.[24]

The Convention also requires signatories to investigate and prosecute cases of bribery[25] and to provide prompt legal assistance to other countries investigating foreign bribery allegations.[26] The coverage of the convention further extends to the internal operations of private actors. In this regard, the Convention codifies *inter alia* a requirement for signatories to adopt measures regarding the maintenance of books and records, financial statement disclosures, and sound accounting standards for private sector organisations.[27] Notwithstanding the important provisions codified in the Convention, questions remain about its efficacy in the fight against corruption.

One concern relates to the parameters and coverage of the Convention.[28] As its official title indicates, the OECD Convention applies only to the bribery of foreign public officials in international business transactions; it does not extend to other forms of corruption such as the bribery of private sector officials, financial embezzlement and misappropriation not to mention

[21]Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents (Adopted by the Negotiating Conference on 21 November 1997, entered into force 15 February 1999) (1998) 37 ILM 1.

[22] Emil Bolongaita 'Mandate Without Means: Strengthening the OECD Anti-Bribery Convention' (2017), 1 <https://www.oecd.org/cleangovbiz/Integrity-Forum-2017-Bolongaita-oecd-anti-bribery-convention.pdf> Accessed 2 March 2019.

[23] OECD Convention (n 21) Article 1 and 2. See also: Indira Carr and Opi Outhwaite 'The OECD Anti-Bribery Convention Ten Years on' (2008) 1 Manchester Journal of International Economic Law 3, 7.

[24] Ibid Article 3.

[25] Ibid Article 5.

[26] Ibid Article 9.

[27] Ibid Article 8. See also: Andrew Tyler 'Enforcing Enforcement: Is the OECD Anti-Bribery Convention's Peer Review Effective' (2011) 43 Geo. Wash. Int'l L. Rev 137, 142.

[28] Cristina Sambrook 'The UN Convention against corruption: A Step forward from the OECD Convention: Pluses and Minuses from a Comparative Perspective' (2006) 2 Romanian J. Int'l L. 74, 75.

illicit enrichment, abuse of functions and trading in influence which are also common in the international political and economic space.[29]

A second, related limitation concerns the Convention's exclusive focus on the active or supply-side of bribery under which a person or entity offers, promises or gives a bribe, as contrasted with the demand or passive side which involves the act of soliciting or receiving bribes by public officials and others in positions of power.[30] To be sure, there are sound policy reasons for regulating the supply-side of bribery.[31] Yet, it is unclear whether targeting the supply of illicit funds is enough to address the overall challenge of bribery in international commerce which often involves the demand, solicitation and acceptance of financial inducements by persons in positions of power and influence.[32]

Besides the narrow and parochial scope of the Convention, there are also concerns about the adequacy of the rules set forth within the document. As Tyler notes, the OECD Convention is characterised by wholly generic and unspecific rules which are not self-executing and therefore depend on the goodwill of signatories.[33] This leaves a residual risk that the norms enshrined in the Convention may be transposed into national law in an uncoordinated and inconsistent way, which may ultimately undermine the letter and spirit of the agreement.

Alongside the substantive and normative limitations highlighted above, the Convention also faces issues of compliance and implementation. As several studies have indicated, the OECD Convention suffers from a serious compliance deficit even amongst its most renowned signatories. Although some signatories like the United States pursue vigorous enforcement of the provisions of the treaty, there are nonetheless, numerous laggards.[34] This was graphically revealed in a 2018 report by the advocacy group, Transparency International (TI) which noted that only seven of the 44 signatories to the Convention had actively enforced cases of bribery and corruption within their domestic legal systems with the remaining 37 signatories including important exporters like China, Canada and Mexico showing either limited or weak enforcement patterns.[35]

The extent of free-riding is perhaps unsurprising since the Convention provides neither an enforcement nor dispute resolution mechanism under which free-riding signatories can, in principle, be held to account. To be sure, the OECD Convention provides for a fairly rigorous

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[29] Ibid.

[30] Ibid. see also Andrew Tyler 'Enforcing Enforcement: Is the OECD Anti-Bribery Convention's Peer Review Effective' (2011) 43 Geo. Wash. Int'l L. Rev 137, 146. See also: International Monetary Fund 'OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions' (2001), 6 <https://www.imf.org/external/np/gov/2001/eng/091801.pdf> Accessed 20 March 2019.

[31] This includes the belief that Bribery is likely to be controlled by effectively cutting out the supply of illicit funds and resources by multinational corporations in their target destinations Andrew Tyler 'Enforcing Enforcement: Is the OECD Anti-Bribery Convention's Peer Review Effective' (2011) 43 Geo.Wash. Int'l L. Rev. 137, 147.

[32] Indeed, Steven Salbu has argued that regulating the demand side of the Bribery transaction may be an effective and desirable policy solution. See Steven Salbu 'A Delicate Balance: Legislation, Institutional Change and Transnational Bribery' (2000) 33(3) Cornell International Law Journal 658, 672.

[33] Tyler (n27).

[34] Christine E. Dryden 'Exploring the Promise and Potential of a WTO Anti-corruption Treaty' (2016) 79 Law and Contemporary Problems 249, 251.

[35] According to the Transparency International Report. China and Mexico show weak enforcement patterns whilst Canada on the other hand shows a rather limited one. See: Transparency International 'Exporting corruption – Progress report 2018: Assessing enforcement of the OECD Anti-Bribery Convention' (2018), 10 <https://www.transparency.org/whatwedo/publication/exporting_corruption_2018> Accessed 20th April 2019.

monitoring process led by the Anti-Bribery working group.[36] However, this process merely identifies weaknesses in compliance and does not enforce or sanction free-riders.[37] Together, these raise deep concerns about the adequacy of the OECD Convention in the fight against corruption.

The regulation of transnational corruption is by no means limited to the OECD Convention, other instruments like the 2003 UN Convention against Corruption (UNCAC) have been enacted for exactly the same reason. The UN Convention which is signed by over 180 countries, constitutes, unlike its OECD counterpart, a genuinely global, legally binding instrument on corruption and other related matters.[38]

The UN Convention arose, in part, from the deficiencies of the OECD Convention and a recognition amongst UN member states of the significant scale of corruption in the global political and economic order.[39] With this in mind, the UN Convention codifies a number of anti-corruption measures to be transposed, by signatories, into domestic law.

These include a requirement for contracting states to adopt and maintain rules and codes of ethics relating to the conduct of public officials.[40] Signatories are also required to ensure the existence of independent anti-corruption bodies capable of implementing, coordinating and overseeing anti-corruption policies.[41] Other substantive measures include transparency in public procurement,[42] the establishment of merit-based systems for the selection of civil servants[43] and transparency in the funding of political organisations and activities among others.[44]

More interesting though, are the provisions of the UNCAC on the criminalisation of corrupt practices under which signatories are obliged to take action against a wide range of criminal activity than that provided by the OECD Convention. Conduct proscribed in the UN Convention includes the bribery of public and private sector officials,[45] financial embezzlement and misappropriation,[46] trading in influence,[47] abuse of functions,[48] illicit enrichment[49] and the

[36] The mechanism involves a comprehensive assessment of the conformity of a country's anti-bribery laws with the OECD Convention. This is followed by intensive on-site visits to the examined country with key actors from government, business, trade unions and civil society to assess how effective that country's anti-foreign bribery laws are in practice. The on-site examination team is led by representatives of two member countries of the OECD Anti-Bribery Working Group. For more information, See: Nathan Jensen and Edmund Malesky 'Nonstate Actors and Compliance with International Agreements: An Empirical Analysis of the OECD Anti-Bribery Convention' (2018) 72(1) International Organization 33-69

[37] ibid.

[38] Ophelie Brunelle-Quraishi 'Assessing the Relevancy and Efficacy of the United Nations Convention against corruption: A Comparative Analysis' (2011) 2(1) Notre Dame Journal of International and Comparative Law 101, 106.

[39] Ibid at 105.

[40] UN Convention (n19) Article 8.

[41] Ibid at Article 6.

[42] Ibid at Article 9.

[43] Ibid at Article 7.

[44] Ibid.

[45] Ibid at Articles 15 and 21 respectively.

[46] Ibid at Articles 17 and 22.

[47] Ibid at Article 18.

[48] Ibid at Article 19.

[49] Ibid at Article 20.

laundering of the proceeds of crime among others.[50] The Convention also prescribes certain measures relating to the prosecution and enforcement of corrupt practices,[51] protection of whistle-blowers[52] and witnesses,[53] as well as the provision of remedies for victims of corruption.[54] It further codifies measures relating to international cooperation[55] against corruption and a revolutionary chapter on asset recovery.[56]

At face value, the UN Convention constitutes a far more comprehensive regulatory response than its OECD counterpart. As highlighted above, its provisions extend beyond the parochial offence of bribery which is the exclusive focus of the OECD treaty, making it a more inclusive, normative framework against corruption both in the public and private sphere. Yet, the convention is not without shortcomings and limitations.

One limitation is the ambiguity of certain provisions in the Convention which makes it difficult for a fair-minded observer to determine what type of action is being sought and how such action might be implemented in practice.[57] This is the case for provisions calling for the establishment of an adequate supervisory framework for financial institutions,[58] promotion of transparency among private entities,[59] and the prevention of the misuse of procedures regulating private entities.[60] Although this is counterbalanced by more specific and concrete language in other respects, one cannot escape the view that more precise language is desirable for a treaty that aspires to universal application.

Another limitation is the ambition of the convention and that of its provisions. For instance, only five of the eleven articles on the criminalisation of corrupt practices in the convention impose strict and mandatory obligations on state parties.[61] The remaining six which cover more insidious conduct such as the passive bribery of foreign public officials, bribery and embezzlement in the private sector,[62] trading in influence, abuse of functions and illicit

[50] Ibid at Article 23. See for a broader discussion: Cecily Rose, *International Anti-corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford University Press, 2015) 109.
[51] Ibid at Article 30.
[52] Ibid at Article 33.
[53] Ibid at Article 32.
[54] Ibid at Article 35.
[55] Ibid at Article 37 and 43.
[56] Ibid at Chapter V.
[57] Michael Bryane, 'What Does the UN Convention on corruption Teach Us About International Regulatory Harmonisation?' (2003), 9 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=512082> Accessed 20th April 2019.
[58] UN Convention (n19) Article 14
[59] Ibid at Article 12
[60] Ibid.
[61] Cecily Rose, *International Anti-corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford University Press, 2015) 108.
[62] The fact that the convention does not make private sector bribery and embezzlement a mandatory obligation speaks volumes about the ambition of the document since the line between public and private sector bribery are blurred in many countries especially in the context of globalisation, outsourcing etal. See: Antonio Argandona 'The United Nations Convention against corruption and its impact on International Companies' (2007) 74 Journal of Business Ethics 481, 490.

enrichment, are couched in weak, soft and non-mandatory terms, meaning that state parties are at liberty not to take action in respect of these practices.[63]

A further controversy relates to the widespread use of so-called safeguard or qualified clauses in ways that potentially reduce the relevance and significance of a number of provisions.[64] One example is Article 23 on the laundering of the proceeds of crime which provides *inter alia* that parties shall, 'subject to the basic concepts of its legal system', criminalise the 'acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime.'[65]

To the ordinary eye, the above may constitute a welcome attempt to address the use of the proceeds of crime. However, the provision is undoubtedly couched in language which allows the possibility that the tenets of a party's legal system may be invoked as justification for non-implementation.[66]

The above challenges arise even before considering the issues of monitoring and enforcement which are supposedly central to any legislative or regulatory instrument.[67] On the issue of monitoring, the UN Convention unlike its OECD counterpart operates a rather obscure review mechanism, created six years after the adoption of the Convention.[68] This mechanism is based on a much criticised three-stage assessment.[69] The first stage consists of a self-assessment process under which signatories are invited to examine their own compliance with an aspect of the Convention.[70] External scrutiny of this self-assessment exercise by other actors such as civil society organisations or academic experts is not required, meaning that there are no independent evaluations of the accuracy of these self-assessment reports.[71]

Following the self-assessment exercise is a peer review process where two peer countries appointed by the secretariat of the UNCAC assess the contents of the self-assessment checklist.[72] Upon completion of this review, a report is produced by the reviewers, detailing

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[63] Cecily Rose, *International Anti-corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford University Press, 2015) 108.

[64] Antonio Argandona 'The United Nations Convention against corruption and its impact on International Companies' (2007) 74 Journal of Business Ethics 481, 490.

[65] Ibid.

[66] Cecily Rose, *International Anti-corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford University Press, 2015) 108.

[67] Ophelie Brunelle-Quraishi 'Assessing the Relevancy and Efficacy of the United Nations Convention against corruption: A Comparative Analysis' (2011) 2(1) Notre Dame Journal of International and Comparative Law 101, 133.

[68] For a broader overview of the negotiations leading to the creation of a monitoring system. See: Matti Joutsen and Adam Graycar 'When Experts and Diplomats Agree: Negotiating Peer Review of the UN Convention against corruption' (2012) 18 Global Governance 425.

[69] Fritz Heimann, Gillian Dell, Gabor Bathory 'UN Convention against corruption Progress Report 2013' (2013),10<https://www.transparency.org/whatwedo/publication/un_convention_against_corruption_progress_report_2013> Accessed 14 April 2019.

[70] UNCAC Coalition 'UNCAC Review Mechanism' (2018) <https://uncaccoalition.org/en_US/uncac-review/uncac-review-mechanism/> Accessed 17 April 2019.

[71] U4 Anti-corruption Resource Centre 'UNCAC in a nutshell' (2017), 3 <https://www.cmi.no/publications/file/3769-uncac-in-a-nutshell.pdf> Accessed 20 March 2019.

[72] Ibid.

any challenges, successes, good practices, observations and recommendations for future implementation.[73]

In practice, these reports are rarely ever published and are only issued with the consent of the reviewed state.[74] Worse, there are no follow-up mechanisms to determine whether signatories are actually implementing the recommendations of the country reviews[75] nor are there explicit enforcement mechanisms within the ambit of the UN Convention that can be applied to persistent cases of non-compliance.[76] This leaves the Convention with a largely obscure and non-transparent monitoring system and a non-existent enforcement mechanism.

IV. Trade Agreements[77] as Emergent Instruments in the Regulation of Transnational Corruption: USMCA as an Example

Given the shortcomings of multilateral instruments, states are increasingly addressing the challenge of corruption through Free Trade Agreements (FTAs).[78] The use of FTAs in this regard is most visible in the trade policy of a number of actors including the United States and the European Union.[79]

For instance, the US first incorporated anti-corruption provisions into its trade deals with Singapore (2003) and Australia (2004), although these were commingled with other good

[73] Ibid.

[74] Fritz Heimann, Gillian Dell, Gabor Bathory 'UN Convention against corruption Progress Report 2013' (2013),10<https://www.transparency.org/whatwedo/publication/un_convention_against_corruption_progress_report_2013> Accessed 14 April 2019. See also: Ophelie Brunelle-Quraishi 'Assessing the Relevancy and Efficacy of the United Nations Convention against corruption: A Comparative Analysis' (2011) 2(1) Notre Dame Journal of International and Comparative Law 101, 138.

[75] Fritz Heimann, Gillian Dell, Gabor Bathory 'UN Convention against corruption Progress Report 2013' (2013), 6<https://www.transparency.org/whatwedo/publication/un_convention_against_corruption_progress_report_2013> Accessed 14 April 2019.

[76] Hannes Hechler, Gretta Fenner Zinkernagel, Lucy Koechlin and Dominic Morris 'Can UNCAC address grand corruption? A political economy analysis of the UN Convention against corruption and its implementation in three countries' (2011) U4 Anti-corruption Resource Centre Report, 24 <https://www.u4.no/publications/can-uncac-address-grand-corruption.pdf> Accessed 20 March 2019.

[77] At a basic level, FTAs are legally enforceable agreements between states that remove or reduce tariff and non-tariff barriers to trade and investment within the jurisdictional boundaries of the contracting parties. The scope and ambition of these agreements vary dramatically. Less complex agreements focus solely on trade facilitation measures such as the liberalisation of tariffs and custom duties while the more comprehensive agreements pursue deeper integration in wider areas including investment protection, intellectual property and government procurement among others. Comprehensive FTAs, in many instances, also allow for deeper cooperation among signatories in vast areas such as human rights, labour and environmental protection, sustainable development, labour mobility, data protection and anti-corruption where the rulemaking of multilateral organisations remains largely limited. See: Dani Rodrik 'What Do Trade Agreements Really Do?' (2018) 32(2) Journal of Economic Perspectives 73,76.

[78] Iza Lejárraga 'Multilateralising Regionalism' (2013) OECD Trade Policy Papers No. 152, 8 <http://www.oecdilibrary.org/trade/multilateralising-regionalism_5k44t7k99xzq-en> Accessed 12 April 2019. See also: Alina Mungiu-Pippidi 'Anti-corruption provisions in EU Free Trade and Investment Agreements: Delivering on Clean trade' (2018), 16 <http://www.europarl.europa.eu/RegData/etudes/STUD/2018/603867/EXPO_STU(2018)603867_EN.pdf> Accessed 3 March 2019.

[79] Ibid.

governance objectives such as transparency.[80] More standalone anti-corruption Chapters first appeared in the FTAs with Morocco (2004) and Central American Countries (DR-CAFTA) (2005) and have been rolled out more generally ever since including in the TPP.[81]

The EU has also included similar provisions in its FTAs such as the association agreements with the Ukrainian republic,[82] and Moldova.[83] The draft EU-Mexico FTA also contains a dedicated anti-corruption Chapter that commits the parties to far reaching action against corruption.[84]

This emerging practice is also reflected in the USMCA which codifies a number of anti-corruption provisions in Chapter 27 of the agreement.[85] Substantively, the Chapter begins with a stated commitment that all parties will 'prevent and combat bribery and corruption in international trade and investment.'[86] The signatories also reiterate their support for a host of multilateral instruments including the UN Convention against corruption and the OECD Anti-Bribery Convention amongst others.[87] Following this are a host of legislative, administrative and promotional measures to be implemented by the signatories.[88]

The most significant legislative measures in Chapter 27 of the USMCA include an obligation by the parties to criminalise bribery and corruption in international trade. To this end, the signatories commit to adopt or maintain legislative disciplines against the offer of bribes to public officials and the solicitation or acceptance by public officials of bribes.[89]

Alongside the provisions on bribery, the USMCA also requires parties to take legislative action against the embezzlement, misappropriation or diversion[90] of property, funds, securities or any other thing of value entrusted to a public official by virtue of their position.[91] This provision clearly calls on signatories to proscribe the embezzlement or diversion of property and is clearly modelled on the UN Convention which also regulates the embezzlement of property.

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[80] Matthew Jenkins 'Anti-corruption and Transparency Provisions in Trade Agreements' (2017), 8 <https://knowledgehub.transparency.org/assets/uploads/helpdesk/Anti-corruption-and-transparency-provisions-in-trade-agreements-2018.pdf> Accessed 11 April 2019.

[81] Iza Lejárraga 'Multilateralising Regionalism' (2013) OECD Trade Policy Papers No. 152, 17 <http://www.oecdilibrary.org/trade/multilateralising-regionalism_5k44t7k99xzq-en> Accessed 12 April 2019.

[82] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, Official Journal of the European Union L161/3, 29.5.2014.

[83] Association Agreement between the European Union and its Member States, of the one part, and the Republic of Moldova, Official Journal of the European Union L260/4, 30.8.2014.

[84] New EU-Mexico agreement 'The agreement in principle' (2018) <http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156791.pdf> Accessed 20 April 2019. See also:

[85] Agreement between the United States of America, the United Mexican States, and Canada (2018) <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> Accessed 20 March 2019.

[86] USMCA (n85) Article 27.2.

[87] Ibid.

[88] Collmann Griffin, Richard Mojica, Marc Alain Bohn 'Takeaways from the Anti-corruption Chapter of the USMCA' (*The FCPA Blog*, 9 January 2019) <http://www.fcpablog.com/blog/2019/1/9/takeaways-from-the-anti-corruption-chapter-of-the-usmca.html> Accessed 5 March 2019.

[89] USMCA (n85) Article 27.3.

[90] The term diversion is used to give effect to Canadian Law on Embezzlement or misappropriation. See: USMCA (n85) Article 27.3.

[91] USMCA (n85) Article 27.3

Other legislative measures enshrined in the USMCA include an obligation for the contracting parties to adopt dissuasive sanctions against the above-mentioned offences[92] and to prioritise the enforcement of Anti-corruption legislation within their domestic legal systems.[93] In the latter regard, the parties commit to avoid 'sustained or recurring courses of action or inaction' which ultimately violate the tenets of the agreement – an unusually robust commitment for an anti-corruption treaty.[94]

In addition to the legislative measures considered above, the USMCA also codifies a number of administrative measures. These include a requirement for the signatories to subject private entities to a host of governance objectives including the maintenance of books and records, financial statement disclosures, sound accounting and auditing practices and the prohibition of acts such as the creation of off-the-books accounts, the use of false documents and the intentional destruction of bookkeeping documents among others.[95] These measures are clearly directed towards preventing the illicit use of business organisations as conduits for corrupt practices.

Other measures of an administrative character include protections for whistle-blowers,[96] the disallowance of tax deductibility for bribe payments[97] and the adoption of policies and procedures to identify and manage conflicts of interest by public officials.[98]

The coverage of the USMCA further extends to a range of promotional actions. In this regard, the agreement requires its signatories to raise awareness among domestic public officials of relevant anti-corruption laws[99] and to promote the active participation of the voluntary and business sectors in anti-corruption efforts, including through public information and education programs.[100] This latter requirement channels networked-based theories of governance which accentuate the role of private and nongovernmental actors in the performance of public functions.[101] Yet, more pertinently, it recognises that the fight against corruption transcends the public sector and is unlikely to succeed without the co-optation of actors from the private and voluntary spheres.

Beyond the promotional elements considered above, the USMCA also requires its signatories to strengthen international cooperation among their respective law enforcement agencies in tackling cross-border corruption.[102] In this regard, the parties note the significant promise behind 'sharing their diverse experience and best practices in developing, implementing, and

[92] Ibid.
[93] USMCA (n85) at Article 27.6.
[94] ibid.
[95] Ibid.
[96] Ibid.
[97] ibid at Article 27.3
[98] Ibid at Article 27.4.
[99] Ibid at Article 27.5
[100] Ibid
[101] Tom Dedeurwaerdere, The Contribution of Network Governance to Sustainable Development (Institut du Développement Durable et des Relations Internationals 2005) <https://www.iddri.org/sites/default/files/import/publications/id_0504_dedeurwaerdere.pdf> Accessed 20 May 2019; Sandra Lavenex and Frank Schimmelfennig, 'EU Rules Beyond EU Borders: Theorizing External Governance in European Politics' (2009) 16(6) Journal of European Public Policy 791, 795.
[102] USMCA (n85) at Article 27.9.

enforcing anticorruption laws and policies.'[103] The parties also commit to 'consider undertaking technical cooperation activities, including training programs.'[104]

On paper, this allows all three signatories to work towards more integrated systems for rule-making and enforcement.[105] Yet, the more profound benefit of such cooperation is likely to be for Mexico which has traditionally lagged behind its North American neighbours in the enforcement of bribery and corruption laws[106] and is deemed to be 'highly corrupt' in reputable benchmarks such as the Transparency International Corruption Perception Index.[107] For Mexico, such benefit may come through the transfer of best practices and technical expertise in rulemaking and enforcement from the experienced agencies of its North American neighbours.[108]

Alongside the measures considered above, the USMCA, also provides for a means of enforcement of its Anti-corruption provisions. This is to be done through the specialised dispute settlement mechanism enshrined in Chapter 31 of the agreement under which contracting parties may submit disputes to a bespoke arbitral panel.[109]

There are, however, certain limits on the applicability of the dispute settlement mechanism to the Chapter 27 measures.[110] For instance, the signatories have explicitly excluded disputes arising from a party's failure to enforce laws adopted or maintained pursuant to the agreement. Simply put, a USMCA signatory cannot initiate a dispute under the agreement as a result of another's failure to enforce its Anti-corruption laws.

To a cynical mind, this might read like an abject surrender of a powerful weapon against corruption.[111] However, it is worth noting that the parties may have endorsed such a proviso to

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[103] ibid.
[104] ibid.
[105] Organisation for Economic Co-operation and Development (OECD), *Regulatory Cooperation for an Interdependent World* (Paris: OECD, 1994), 15 <https://read.oecd-ilibrary.org/governance/regulatory-co-operation-for-an-interdependent-world_9789264062436-en#page16> Accessed 2 June 2019.
[106] See: Transparency International 'Exporting corruption – Progress report 2018: Assessing enforcement of the OECD Anti-Bribery Convention' (2018), 10 <https://www.transparency.org/whatwedo/publication/exporting_corruption_2018> Accessed 20th April 2019.
[107] Mexico has often been rated as highly corrupt in reputable corruption indexes such as the Transparency International corruption Perception Index with a score of 28/100 and a rank of 138 out of 180 countries reflected in the index. By contrast, the United States and Canada fair comparatively better. Canada is ranked 9th out of 180 and the US 22nd out of 180. See: Transparency International 'corruption Perception Index 2018' <https://www.transparency.org/cpi2018> Accessed 2 March 2019.
[108] Luis Dantón Martínez Corres 'USMCA heralds new era of anticorruption and compliance' (*FCPA Blog*, 3 October 2018) <http://www.fcpablog.com/blog/2018/10/3/luis-danton-martinez-corres-usmca-heralds-new-era-of-anticor.html> Accessed 2 March 2019.
[109] USMCA (n85) at Article 27.8.
[110] Collmann Griffin, Richard Mojica, Marc Alain Bohn 'Takeaways from the Anti-corruption Chapter of the USMCA' (The FCPA Blog, 9 January 2019) <http://www.fcpablog.com/blog/2019/1/9/takeaways-from-the-anti-corruption-chapter-of-the-usmca.html> Accessed 5 March 2019.
[111] Austin Ignatius Pulle 'Demand Side of Corruption and Foreign Investment Law' (2017) 4(1) Journal of International and Comparative Law 1, 16.

forestall the risk of vexatious disputes or to preserve the sovereign right of a state to enforce its laws.[112]

More so, the carve-out does not preclude the distinct possibility that a party may still have recourse to the dispute settlement mechanism if it considers a trade or investment related measure of another party to be inconsistent with an obligation arising under the Chapter or if it considers a party to have failed in its obligation to enact or maintain regulatory measures in relation to the forms of corruption covered under the agreement.[113]

Taken together, the USMCA provides clear commitments on Anti-Corruption and uniquely allows for the policing of its prescriptions via an explicit dispute resolution mechanism. The agreement also commits the signatories to enhanced cooperation in rulemaking and enforcement. This is likely to inspire a unified, trilateral front against corruption that is of practical benefit to the three signatories.

V. Concluding Remarks

The corrosive impact of corruption in the global political and economic order has inspired a number of regulatory responses at the global level including the 1997 OECD Anti-bribery Convention and the 2003 UN Convention against Corruption. Decades after the adoption of these instruments, compliance levels remain low, raising questions about their efficacy.

Increasingly also, nation states are turning to free trade agreements to address governance challenges such as corruption given the limitations of broader multilateral rules. The USMCA is part of this rising trend. This paper considered the Anti-corruption provisions in Chapter 27 of the USMCA. It argued that the Chapter 27 measures provide clear commitments on Anti-corruption, ranging from the criminalisation of bribery and embezzlement to the co-optation of actors from the private and voluntary sectors in the fight against corruption. The paper also argued that the USMCA creates the conditions for proactive cooperation amongst the signatories in Anti-corruption regulation and enforcement which may prove helpful to addressing the deep challenges posed by corruption.

[112] Collmann Griffin, Richard Mojica, Marc Alain Bohn 'Takeaways from the Anti-corruption Chapter of the USMCA' (The FCPA Blog, 9 January 2019) <http://www.fcpablog.com/blog/2019/1/9/takeaways-from-the-anti-corruption-chapter-of-the-usmca.html> Accessed 5 March 2019.
[113] ibid.