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# In Search of Corruption Funds

**A comparative study of country  
practices prepared in fulfillment  
of the Advanced Research Project**

*The Graduate Institute, Geneva, Fall 2016*



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## Acronyms and abbreviations

<b>ACT</b>	Anti-Corruption and Transparency (Experts' Working Group)	<b>FCPA</b>	US Foreign Corruption Practices Act
<b>AUCL</b>	Chinese Anti-Unfair Competition Law	<b>GAO</b>	US Government Accountability Office
<b>BP</b>	British Petroleum	<b>GONGO</b>	Government-owned NGO
<b>CAFRA</b>	US Civil Asset Forfeiture Reform	<b>ICE</b>	Instituto Costarricense de Electricidad (Costa Rica)
<b>CCP</b>	Chinese Communist Party	<b>INGO</b>	International NGO
<b>CDDI</b>	Chinese Central Commission for Discipline Inspection	<b>MRA</b>	US Miscellaneous Receipts Act
<b>CDSA</b>	Singaporean Drug Trafficking and Other Serious Crimes Act	<b>MVRA</b>	US Mandatory Victim Restitution Act
<b>CFPOA</b>	Canadian Corruption of Foreign Public Officials Act	<b>NCB</b>	non-conviction based
<b>CNAO</b>	China National Audit Office	<b>NPA</b>	non-prosecution agreement
<b>COECLCC</b>	Council of Europe Civil Law Convention on Corruption	<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>CPIB</b>	Singaporean Corrupt Practices Investigation Bureau	<b>OGI</b>	Chinese Open Government Information Regulations
<b>CSIS</b>	Center for Strategic and International Studies	<b>PCA</b>	Singaporean Prevention of Corruption Act
<b>CSO</b>	Civil Society Organization (NGO)	<b>RCPM</b>	Royal Canadian Mounted Police
<b>DOJ</b>	US Department of Justice	<b>SEC</b>	US Securities and Exchange Commission
<b>DPA</b>	deferred prosecution agreement	<b>SERAP</b>	Socio-Economic Rights and Accountability Project, Nigeria
<b>EPA</b>	US Environmental Protection Agency	<b>StAR</b>	Stolen Asset Recovery Initiative
<b>FBI</b>	US Federal Bureau of Investigations	<b>TI</b>	Transparency International
		<b>UNCAC</b>	United Nations Convention against Corruption

## **Executive Summary**

Prosecution of transnational corruption and potential avenues for disbursing funds acquired therefrom is slowly gaining traction. There has been a universally shared difficulty in creating and enforcing a disbursement mechanism for funds acquired through transnational corruption cases compared to national corruption cases. Nonetheless, and as the case studies show, there are some countries which have led the way in innovating their legal frameworks in this regard. This study provides a general overview of legal frameworks against transnational corruption, drawing from civil law and common law countries across three continents. Our case studies include some of the biggest economies in the world, with the largest shares of global trade, which reflect the importance of tracking the money in anti-corruption cases. Finally, the report will analyse the biggest challenges and successes observed in order to provide best practice examples.

One challenge is that anti-corruption lacks resources in several countries. In Canada, for example, there was virtually no enforcement against transnational corruption offences until 2009 due to underfunding. However, following criticism by the OECD Working Group on Bribery, and domestic pressure, Canada revamped its enforcement against foreign corruption, which in the last couple of years has resulted in at least 40 investigations. In Denmark, too, there have been relatively few resources allocated to prosecuting transnational corruption offences, reflecting a need to fight transnational corruption independent of fighting national corruption.

Some countries possess the legal framework necessary for distributing seized funds to victims or other third parties, but they do not do this in practice. For example, according to TI-Austria, there exists a legal framework in Austria for ordering the donation of funds to civil society organizations, but this has never occurred in practice. In Singapore an informal mechanism for the distribution of funds exists, but there are no known instances of this. It is therefore apparent that one potential way to utilize the existing legal frameworks is for NGOs to establish good relationships with courts, as a high degree of trust is necessary for disbursement of funds.

Further to this, in some of the countries surveyed, there is often worryingly little enforcement of existing transnational corruption legal frameworks. Those rules which are enforced are often done so unevenly, and the actual number of investigations and prosecutions are significantly lower than expected, given the countries' share of world exports. Based on the literature review and the interviews conducted, this is due to a lack of anti-corruption

policies on the part of governments that specifically aim to raise awareness and encourage discoveries as well as prosecution of any offences.

In some countries, it is only criminal law enforcement bodies which possess the jurisdiction to fight transnational corruption. In Canada, for example, investigating, prosecuting and even administrative enforcement proceedings for transnational corruption is limited to criminal law enforcement bodies. This significantly hinders the capacity to fight transnational corruption because it forgoes several types of prosecution, the inclusion of which would not only allow for greater reach, but would also place additional pressure on a offenders by running several parallel investigations.

Another challenge is that fines in some countries are still too low. Unfortunately, in many jurisdictions foreign bribery remains an attractive investment from the point of view of the offender. This is a frequent recommendation of the OECD Working Group on Corruption in its country reports. Beyond failing to sufficiently deter corruption, low fines lower potential funds to be disbursed to third parties.

The final major challenge in creating and employing mechanisms for the reallocation of funds seized in prosecuting corruption offenses is that governments have incentives to accumulate seized funds for themselves. This makes it difficult to push through legislation to channel such funds elsewhere. Agencies are incentivised in fighting corruption because potential funds acquired become part of their budget and thereby increase their clout. This is not bad in itself, as it may increase prosecution of corruption offences, but it does mean that government agencies are less inclined to reallocate these funds, as it would have a negative impact on their budget. A second incentive that agencies face is the uncertainty over what actually happens to the money that is meant for a third party, including those in a foreign country, which has proven to be one of the most popular arguments against setting up disbursement mechanisms. Governments also tend to prefer working with organizations directly after absorbing funds into their treasuries, retaining total control of funding, rather than channelling these funds through courts.

This section will summarise best practices and lessons learned from the countries surveyed. For almost three decades, the DOJ has routinely authorized the use of a percentage of the criminal proceedings from concluded environmental cases to fund environmental initiatives in the communities impacted by a company's violation. This innovation in litigation does not need to remain unique to environmental law, and the same process could also apply to the FCPA proceedings. This legal mechanism is country specific (as all the innovations noted below are) and linked with a federal statute, the *Miscellaneous Receipts Act*,

which can have a bearing on both environmental and corruption cases. How transferable such a mechanism may be to other country contexts remains to be seen, but at the very least it demonstrates a precedent for a potential mechanism to redistribute seized assets to benefit civil society or affected local populations.

There is also a precedent for the learning of best practices, even among very different political regimes. The implementation of audit reports in China from 2001 onwards was inspired by the U.S. Government Accountability Office (GAO). The “Audit Storm”, which swept through the central ministries in China, was overtly critical of powerful ministries and led to legal and disciplinary action against officials. Despite the resistance of central ministries, the China National Audit Office (CNAO) continues to conduct rigorous audits and has gradually been expanded from auditing income and expenditure to covering the effectiveness of government fiscal management, including unreasonable budget estimations, and slow progress in project implementation.

One best practice found in the US, UK and Germany, among others, is the deferred prosecution agreement mechanism that encourages disclosure by offering financial incentives. The adoption of such measures, and other settlement mechanisms, may be a good way to encourage companies to agree to settlements that include 3<sup>rd</sup> parties. Several companies and commentators have called for the implementation of such mechanisms that would allow for companies to come forward, voluntarily self-disclose, pay significant fees and implement remedial measures including donating resources to NGOs. By contrast, relatively weak enforcement and the lack of such provisions in Canada have likely reduced the number of corruption cases prosecuted.

Germany provides another best practice example, in the realm of settlement cases, where it is important that the information is made public in the aftermath. This is crucial for legitimacy, as well as to improve the flow of distribution of future settlements. Other countries, including China, have similar mechanisms that could be adapted for such purposes, as seen by China’s Open Government Information Regulations. In the case of Germany, the open settlement proceedings, in particular section 153a of the German Code of Criminal Procedure, have made third party damages possible through the use of prosecutorial discretion and an agreement between the prosecutor and the company to channel damages to a given third party.

Multilateral agreements are also an important impetus for reform, and much of the national legislation from the countries surveyed have been influenced by the work of the OECD Working Group on Corruption, or UNCAC. Denmark, that has largely lagged on anti-

corruption regulation, comprehensively reformed its legal framework throughout the early 2000s to conform with international conventions. China has also actively participated in UNCAC and faithfully implemented the relevant treaty obligations. This is an interesting example, as it shows a good faith flexibility to follow UNCAC recommendations on points of agreement, despite China pushing back any UN-based supervisory mechanism in the areas of human rights.

Further, it is good to look at ‘best practice’ countries by region, as countries learn from regional leaders. Many anti-corruption practitioners, for instance, have gone to Singapore to learn from its stellar anti-corruption framework, and the beginnings of an APEC version to the OECD Corruption Initiative was established in March 2011, with the formation of the Anti-Corruption and Transparency (ACT) Experts’ Working Group. The ACT Working Group has already begun to establish legally binding standards, such as the adoption of the Beijing Declaration on Fighting Corruption in 2014.

## Strategic recommendations

### 1. Cross-sectional learning: developing guidelines for government

The analysis of environmental law and settlements in the US determined by the legal scheme for settlements means the possibility for NGO access should be, at least in theory, very similar. NGOs should use the expertise and best practices developed in the environmental sector. For example, the EPA develops the “Supplemental Environmental Projects” policy that provides guidance for government in selecting and implementing projects aimed at restoration of environment and public health as part of settlement proceeds. Such guidelines assure that designating relevant projects are in line with the domestic law, but also provide a reliable and transparent guideline for their selection. In this example, the guidelines ask that there is a “*relationship between the underlying violation and the human health or environmental benefits that will result from the [project]*”; second, they also require that the project “*must improve, protect, or reduce risks to public health or the environment;*” and third, they stipulate the project “*must be undertaken in settlement of an enforcement action as a project that the violator is not otherwise legally required to perform.*”

It is advisable that NGOs in the US and elsewhere take on the task to prepare, independently or in collaboration with relevant corruption bureaus, similar guidelines for designation of corruption projects to address broader societal harms of corruption specific to a given country. Such initiatives have a potential to establish cooperation between governments

and NGOs by assuring transparency and legality of the projects financed from the settlement proceeds.

## **2. Campaign and lobby for institutional reforms, establish cooperation with the government**

Although some countries could use additional legislation to enhance corruption prosecution,<sup>1</sup> it appears that many countries do have an adequate legal framework that would, in theory, allow an NGO access to proceeds. In order for these provisions to be used in practice, NGOs need to develop and maintain contact with government and enforcement actors, key ministries, corruption offices, and concerned MPs and present them with a coherent and realistic plan. For this, NGOs need to develop case studies, potential champions for legislative initiatives and realistic proposals applicable to the framework of a given country. The unique role of NGOs is to create a communication channel between the actors and establish themselves as reliable partners – a key enabler to gaining greater access to corruption proceeds. It is of vital importance to use success stories and media campaigns of victims of corruption to gain leverage in negotiating with the government. Further key steps to incentivize the actors to cooperate are 1. **Generating useful information for law enforcement** (collect independent corruption information, cooperate with investigative journalists, etc.). 2. **Assisting in recovery of related investigations and prosecutions** (clarify legal standing of CSOs, consider added value, assess costs and implication for involved parties). 3. **Aid in developing and monitoring of newly-developed processes** that are in line with local legal requirements. 4. **Partner with relevant connected academic/other institutions** particularly important for entry in a country like China.

### **Technical recommendations**

#### **1. The Standing Doctrine**

The basic premise of the “standing doctrine” is that only those who are entitled by the law to do so can sue for corruption. To determine standing, the courts usually lead an inquiry into whether the complaining party has a sufficiently direct interest in the subject of the lawsuit. If the party lacks a particularly direct nexus to the alleged damaged, which is often the case with NGOs, the court will dismiss the complaint regardless of the merits. It is of extreme importance for NGOs to either have standing, or an established role within the corruption

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<sup>1</sup> Canada, for instance, and self-disclosure guidelines that could induce use of settlements, or legislation that would enable bringing civil claims parallel to criminal ones.

litigation and settlements. Across countries, the approaches to standing vary – some countries, like the US, have taken on a very restrictive approach. By contrast, some countries such as Italy have liberalized standing rules in selected areas (e.g. labour rights or environmental protection). In the context of national NGO work, it is important to be aware of the standing issues in order to make strategic choices about resources, but also to be able to mobilize and advance liberalization of the doctrine on its own merit.

## **2. Private Prosecution of Corruption**

The US and UK allow private citizens to bring a criminal prosecution, as opposed to civil claims for damages. It is well known that the state has limited budget and limited attention and private prosecution can fill this gap. Moreover, they can also make sure to go after cases that agencies have been unwilling to investigate involving political questions or large lobbyist corporations. In this way, private prosecution can not only ensure access to justice, but also ensure that some of the sensitive and political corruption cases see the light of the day.

## **3. Victim Status**

Obtaining victim status in the examined legal regimes largely depends on the victim's nexus to the alleged crime. Often it happens that victim status is a private right not available to NGOs, or that the legal practice is simply not in favour of recognizing the connection between corruption and social harms as sufficient for victim certification. It almost appears as if governments are more reluctant to “let the NGOs in the front door” (bringing the suit) as compared to the “back door” (including NGOs in settlements or fines-imposition). The institutional preference for status quo is unsurprising, especially when considering that the “front door” approach requires an investment, and thus political liability, from the government in the form of passing a certain law. Whereas the latter practices is usually only dependent on the prosecution practice. Given government's risk-aversion and preference for retaining status quo legislation, it appears wiser for NGOs to focus resources on the “back door,” namely from after the sentencing moment, upon agreement with prosecutors, etc. In such approaches, NGOs can offer more expertise and assistance to law enforcement during sentencing and settlements processes, which could make their jobs easier.

## **4. Settlements: self-disclosure provisions in settlements**

The comparison of Canada to the US highlights the importance of self-disclosure procedures for companies involved in corruption. The research suggests that such procedures and tools

that provide incentives for companies to come forward and admit to illegal practices not only save millions in prosecution and increase the number of firms prosecuted, but are often a precondition to establish a settlement system (or a quasi-settlement system as in Germany). Without evaluating the merits of the settlements practice overall, the study found that having a settlement system in general increased the opportunities for an NGO to enter in cooperation with law enforcement and gain access to funding. Even though countries that have not adopted settlements sometimes do have avenues to pay out compensation to a third party (e.g. Austria, Denmark), they seem to be much less frequently used. For NGOs strategizing entry into these countries, it may be valuable to consider how to turn these structures into a quasi-settlement ones (e.g. Austrian into the German one), given that such practices would not require cumbersome legislative amendments. Finally, even though settlements are often mentioned as a reward for “good behavior,” it may very well be that imposing settlements on companies that are not (with heavier penalties, for example) may have similarly positive effects in terms of NGO access to corruption funding. It is therefore recommended that the settlements discussion is not restricted to self-disclosure only.

## Part I: Introduction

### Ia. Overview of the problem

Corruption has been broadly defined as the abuse of public or private office for personal gain. It includes acts of bribery or nepotism, often associated with other illegal and unfair practices such as fraud, bid rigging or money laundering. Transparency International uses a working definition of corruption as “*the abuse of entrusted power for private gain.*”<sup>2</sup>

Corruption has been determined to be the “single greatest obstacle to economic and social development” by the World Bank.<sup>3</sup> Corruption reduces efficiency and widens the inequality gap. Yearly, the cost of corruption has been estimated to be more than 5% of global GDP (US\$ 2.6 trillion, World Economic Forum) with over US\$ 1 trillion paid in bribes each year (World Bank).<sup>4</sup> Historically, the harms have been located domestically, but with the rapid growth of globalization, transnational public bribery has become particularly harmful internationally and in the least developed countries.

In particular, globalization, privatization and foreign direct investment have created tremendous financial incentives for corruption carried out by these global private hegemony, exploiting the political and economic preconditions given by the weak rule of law. The World Bank estimates that around 20 billion to 40 billion USD is stolen every year from developing countries and hidden overseas through high-level corruption. The stolen assets are equivalent to 20-40% of official development assistance provided worldwide.<sup>5</sup> The Stolen Asset Recovery Initiative (henceforth “StAR”) estimated that about 5 billion has been recovered from transnational corruption only – this immense amount of money constitutes a meager 0.8% to 1.6% of the stolen assets.<sup>6</sup> And while corruption grows, the number of recovered assets that were returned to the country of origin or used to fight the causes of the apparent socioeconomic harms caused by corruption, has been close to zero.

Cases of international and domestic corruption undermine legitimacy and confidence in governments, contribute to fiscal deficits and increase all kinds of social inequality.

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<sup>2</sup> United Nations Global Corruption Book. (2015). Chapter 1: Social, Economic and Political Dimensions of Corruption

<sup>3</sup> US Department of State, Anticorruption and Good Governance Team, (2009). Corruption, a Critical Obstacle for Social Development. [online] Available at: <https://2001-2009.state.gov/p/inl/rls/rm/31027.htm> [Accessed 19 Nov. 2016].

<sup>4</sup> United Nations Global Corruption Book. (2015). Chapter 1: Social, Economic and Political Dimensions of Corruption

<sup>5</sup> World Bank & United Nations Office on Drugs and Crime (2007). Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan. Available at: <http://www.unodc.org/documents/corruption/StAR-Sept07-full.pdf>. [Accessed 19 Nov. 2016].

<sup>6</sup> United Nations Global Corruption Book. (2015). Chapter 5: Asset Recovery and Mutual Legal Assistance; STAR Initiative (Jacinta Anyango Oduor et al) (2012). *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*. [online] Available at: <https://star.worldbank.org/star/sites/star/files/9781464800863.pdf> [Accessed 21 Aug. 2016].

Damages in corruption cases often exceed what is subsequently restored through the governmental restitution of monetary loss or disgorgement of profit acquired through illicit acts. The societal costs may often involve impediment of development, stolen national assets or environmental harm that are difficult to calculate, claim in courts, and restore to their original state. There is an apparent need to return resources obtained from corruption enforcement back to the countries of the origin internationally or to the victims domestically through using the funds to address the root causes of corruption.

Several global and regional developments codified progress in this area. The United Nations Convention against Corruption (*henceforth* “UNCAC”), *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* and the Council of Europe Civil Law Convention on Corruption (*henceforth* “COECLCC”) require state parties to ensure that victims have a right to compensation. Article 35 of UNCAC creates a state obligation to provide for the right of victims of corruption to obtain damages in a private cause of action. Chapter 5 of UNCAC establishes asset recovery as one of its fundamental principles.

*“The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.”*

Despite these global trends, a third-party access to litigation proceeds from corruption—domestically or internationally—have not been widely acknowledged by lawmakers or relevant governmental agencies. Consequently, successful examples remain scarce. There also seems to be a strong opposition and unwillingness to discuss the potential of governments working or including NGOs in their corruption proceedings. For example, quite recently, the Nigerian accountability watchdog -- Socio-Economic Rights and Accountability Project (SERAP) – demanded the American Security Exchange Commission to put in place a policy that would allow government entities or NGOs to apply for victim states. On a case-by-case basis, and subject to appropriate anti-corruption safeguards regarding the trustworthiness and prior record of the applicant, the SEC could then decide to return some or all of the civil penalties and disgorgement proceeds back to the origin countries. The American law practitioners assessed the proposal in a following way:

*“I think it’s unlikely that U.S. enforcement authorities would share U.S. penalties with other countries, as U.S. penalties are intended to serve U.S. enforcement objectives and arise under various U.S. statutory schemes.”*

Some main causes for this negative attitude are the distrust of countries where money would be channeled as well as the overall mission of enforcement agencies that is not perceived to be “development.” Victims of corruption and NGOs thus faces several political and legal limitations. This study, however, believes that using or inserting third-party provisions is necessary to restore local and international interactions eroded by corruption and provide a just redress to all parties of which the list is often broader than the one litigated in the courtrooms. Civil society has a unique standing in the process because of its field expertise that can empower the mandate of government officials to represent public interest through establishing transparent and accountable means to use funding from corruption to address the broader societal damages.

## **Part II: Research Overview**

This study aims to map the legal frameworks governing state avenues for penalizing and appropriating means related to **domestic and transnational** corruption through a comparative study of **legal frameworks** and **state practices**. It is not the focus of this study to definitively establish what practice is the most prevalent in a given country (e.g. whether it is fees and fines or settlements, etc.) or even to exhaustively list all the possible avenues of prosecuting corruption. The study rather focuses on selected practices relevant to the possibility of **NGO access to state corruption proceeds**. These finding can take the shape of successful third-party access, a theoretical possibility for such an entry, or, at the very minimum, a high accumulation of resources from prosecution that could be tapped. The different examples and mechanisms will be discussed within the country studies; general observations and recommendations will be drawn using the insights gained from the primary research.

The study assumes that the appropriate legal frameworks and other practices relevant to researching 3<sup>rd</sup> party access to corruption can be verified from legal sources, academic literature and, where appropriate, opinion of practitioners. The study further assumes that there are benefits to grass-roots combating of corruption that can be verified from the literature. However, examining what these could be as well as potential uses of any funding received will not be the subject of this research and thus there will not be an extensive amount of attention paid to this subject. Where appropriate, the study will attempt to draw conclusions about challenges encountered in connection to the possible entry points for NGOs. The final conclusions will take on a form of recommendation that should not be treated as hard facts, but rather provide pointers for future research and management of resources.

## IIa. Research questions and key assumptions

Overall, the study attempts to answer, in whole or in part, the following questions based on data assembled from literature review, country-by-country research, and interviews with stakeholders.

*What mechanisms are available to CSOs to access funds seized from anti-corruption enforcement (damages, fees and various terms of settlement proceedings)?*

*Are there successful examples – if so can what key factors contribute to its success?*

*What are the greatest obstacles and impediments to the process?*

*Are there possible entry points for advocacy?*

*Are there risks?*

To conduct the research systematically, the study employs these set of assumptions. In every country analysis, we have used the following questions based on our expectations gained from academic overview of the frameworks and mechanisms. These assumptions assure that each study explores and analyzes a harmonized set of research questions to the extent that data was available for each given case.

### **i. Fines, settlements and recovered assets can be used to fund anti-corruption work:**

- Do the countries examined have an appropriate framework in place?
- If yes, what are these frameworks?
- Are the frameworks used?
- If not, what are the legal or policy requirements or contextual factors to make them usable?
- Who decides how and to whom funds are allocated?
- Have these activities been successful?
- Are the approaches plausible?

### **ii. CSOs can be considered as victims of corruption and as such can seek compensation for damages resulting from corruption**

- Who qualifies as a “victim” of corruption?
- Can CSOs be considered victims and gain the legal standing of complainants? Has the case been made?

- If not, how could it be made (any human rights examples)?
- If yes, what are the (legal) mechanisms in seeking compensations and how promising are they (explicit reparation mechanism, class action, civil law mechanisms, etc.)?
- When civil society accesses reparation funds, what are the possible mechanisms to manage them (autonomous funds, managed and monitored by third parties)?

### **iii . CSOs can gain, directly or indirectly, access to settlements proceeds**

- Are there examples of CSOs gaining access to litigation proceeds?
- What are the mechanisms that allow it?
- Are there litigation strategies or other legal/political frameworks conducive to this type of access?

### **iv. Challenges**

- Are there any practical challenges (calculating, allocating and distributing funds, reallocation, etc.)
- Legal challenges
- Political challenges (CSO access to funding, state of the judiciary, etc.)
- Policy challenges (CSOs “benefitting” from the proceeds of corruption or funded by settlements)
- Who are the actors that need to be influenced?

## **Iib. Methodology**

### **a. Country Selection**

The selection was influenced by our assumption that the “most active” implementers of the OECD Corruption Convention identified in the OECD Progress report, or active prosecutors of transnational bribery (which overlap), have a greater potential to provide examples of success in allowing NGO access to proceeds. This may be because such countries concentrated the greatest funds and thus most extensive practice in prosecution of corruption accompanied by a greater variety of legal and extra-legal tools.

The study examines a selection of civil and common law systems to account for differences, if any, amongst legal structures. This group is geographically diverse and ranking

relatively high on the 2015 OECD Progress Report “*Exporting Corruption.*” This report ranks countries that have ratified the OECD Convention against foreign bribery and weighs their share of world exports against their enforcement activities. From the “active” enforcers of the Convention,<sup>7</sup> the study analyzed Austria, Canada, Denmark,<sup>8</sup> Germany, Italy, Singapore and the US and include an experimental study of China. We believe the case study will provide an interesting developmental perspective and legal comparison to the civil/common law group practices of the most developed and active countries.

### **b. Country Data on Legal Structures and Legal Practices (Quantitative Data):**

The data collection consists of reviewing each individual countries’ legal framework for the prosecution of bribery-related offences domestically and transnationally, determining who are the influential actors, establishing what is the fee schedule for domestic and/or international corruption and where it is used, and finally, selecting relevant cases and practices in an attempt to elucidate the main practical uses of the legal and other structures from the point of an NGO seeking access to funds.

### **c. Practitioners and Experts Input (Qualitative Data):**

Where possible, the group attempted to gain opinions and experiences of practitioners or relevant experts from literature review or phone/mail interview in order to complement the data collection and gain practical insights.

For the final analysis and recommendations, relevant academic resources identify the main challenges and draw broader policy recommendations. We have consulted several country practitioners and regional Transparency International offices, which served as an inspiration in drawing recommendations which account not only for the relevant legal research, but also for social, political, and economic factors influencing the likelihood of establishing entry points for NGOs.

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<sup>7</sup> The rankings are based on cases of prosecuted corruption cases of foreign bribery weighted based on whether the defendant was a large corporation, where the bribe is large and whether this example set a major precedent in order to determine the level of effort required from the enforcement and the deterrent effect. Although the OECD Convention focuses on foreign bribery corruption, the study assumes that countries actively involved in prosecuting transnational corruption have no reason not to employ the resources and expertise in domestic corruption as well, so for the purposes of this project, there is no difference between the two.

<sup>8</sup> Denmark was selected because of the availability of the data and country expertise in the group, as well as its active involvement in bribery settlements in 1999-2012. In: STAR, (2012). *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*. [online] Available at: <https://star.worldbank.org/star/sites/star/files/9781464800863.pdf> [Accessed 21 Aug. 2016].

## Part III. Common law practice

### IIIa. The United States

#### Overview

The primary responsibility for the enforcement of UNCAC lies with the US Department of Justice (*henceforth* “DOJ”). The DOJ’s Public Integrity Section prosecutes criminal abuses of public trust by government officials. The Section has currently around 29 attorneys who assist, among others, prosecutors and investigators in the 94 United States’ Attorneys’ Offices in the country.<sup>9</sup> Further, there is the Criminal Division, supplementing the Public Integrity Section with attorneys from other sections such as the Fraud, Organized Crime and Racketeering, Computer Crimes and Intellectual Property, and Asset Forfeiture and Money Laundering.<sup>10</sup> Domestic corruption has extra resources assigned within The Federal Bureau of Investigations (*henceforth* “FBI”). The prosecution of foreign officials is split among three main agencies: the DOJ’s foreign bribery unit within the Criminal Division’s Fraud Section; the FBI’s International Anti-Corruption Unit; and the Securities and Exchange Commission’s (*henceforth* “SEC”) Foreign Bribery Unit.

Prosecutors in common law systems traditionally have broad and independent discretionary powers to prosecute alleged violations of law. In the US, the prosecutorial discretion over criminal law is vested upon the DOJ and the Attorney General. It is worth noting that UNCAC experts view US law enforcement in combating and deterring corruption as very effective. Experts also acknowledge that the prosecutorial discretion, as well as other US practices, have developed into good practices.<sup>11</sup>

#### The US Corruption Work Horse – Foreign Corruption Practices Act

Much of the world’s prosecution of foreign bribery cases is carried out in the United States under the American Foreign Corruption Practices Act (*henceforth* “FCPA”). The FCPA Unit of the Fraud Section of the DOJ’s Criminal Division handles all criminal and civil proceedings against non-issuers<sup>12</sup> under FCPA, assisted by investigators from the FCPA Squad of the FBI.<sup>13</sup> The rising number of corruption and fraud investigations overseas is also supported by the FBI International Corruption Unit and The US Department of Homeland

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<sup>9</sup> The federal judiciary system is composed of 94 districts, 93 of these are assigned to senior prosecutors (United States Attorneys, who are DOJ officials) and their staff. The Office is in charge of enforcing federal laws in the district – they are complementary to the Public Integrity Section in enforcing the US anti-corruption laws.

<sup>10</sup> United Nations Global Corruption Book. (2015). Chapter 6: Investigation and Prosecution of Corruption.

<sup>11</sup> United Nations Global Corruption Book. (2015). Chapter 5: Asset Recovery and Mutual Legal Assistance.

<sup>12</sup> “Non-issuers” refers to legal entities that have not issued and registered their company stock as required by the SEC regulations

<sup>13</sup> United Nations Global Corruption Book. (2015). Chapter 6: Investigation and Prosecution of Corruption

Security specialized units.<sup>14</sup> The anti-bribery provisions of the FCPA stipulate that it is unlawful to make a payment to a foreign official or other public figure in order to obtain or retain business. Indeed, the scope of application of the FCPA is wide, applying to not only domestic subjects, but also to any person, including foreign individuals and entities, who acts within US territory so as to contribute to the wrongful inducement of a foreign public official, or an issuer—i.e. entities that have securities registered with the United States’ SEC.<sup>15</sup> The SEC Enforcement Division is responsible for civil enforcement of the FCPA related to issuers of securities traded in the US.<sup>16</sup> Enforcement organs and courts thus assert jurisdiction to prosecute subjects based on their nationality, territoriality, or both. The wide reach of enforcement and high damages often gained from prosecution thus render the US the most active prosecutor of foreign bribery cases.<sup>17</sup> Proceeds from the settlements, however, rarely go to the countries of the origin. All money collected, disgorgement,<sup>18</sup> and any related charges go directly to the Treasury.<sup>19</sup>

Several business media outlets as well as professionals identified the windfalls that the FCPA garnered for the government as one of the reasons for the high level of the FCPA enforcement. A Business Insider article noted that “*quite simply, [FCPA enforcement] is lucrative for the government.*”<sup>20</sup> A former DOJ prosecutor spelled out the government logic in a Law360 article: “*The Department of Justice has figured out that conducting investigations of corporations is a lucrative business. This is the one area of government activity that actually brings money in rather than shoots money out. We’re talking about literally billions of dollars that the government is able to collect.*”<sup>21</sup> A former Security Commission official devoted a significant amount of time to explaining the FCPA prosecutions in an article published in Forbes magazine. His conclusions back the first impressions; the US government has a strong incentive to prosecute corruption domestically and worldwide and retain the

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<sup>14</sup> *Ibid.*

<sup>15</sup> US Securities and Exchange Commission (*henceforth* “SEC”); In general, all securities offered in the US must be registered with the SEC or must qualify for an exemption from the registration requirements. The relevant legislation governing the registration and exemptions is the US Securities Act of 1933.

<sup>16</sup> United Nations Global Corruption Book. (2015). Chapter 6: Investigation and Prosecution of Corruption.

<sup>17</sup> Until 1998, the Statute applied to US registered companies or US nationals; from 1998, it also applies to foreign firms and persons who take any act in furthering a corrupt payment while in the US: Title V of the Omnibus Trade and Competitiveness Act of 1988 also recognized as the “Foreign Corrupt Practices Act Amendments of 1988”

<sup>18</sup> A remedy used in certain jurisdictions to recover approximate amount earned from the illicit activity.

<sup>19</sup> Matthew Jacobson, a former senior US DOJ Fraud Section Official, interviewed in FCPA Fines: Where Does All the Money Go? (2009). [Blog] *TRACE: Anti-bribery solutions.* Available at: [http://www.traceinternational.org/blog/726/FCPA\\_Fines\\_Where\\_Does\\_All\\_the\\_Money\\_Go](http://www.traceinternational.org/blog/726/FCPA_Fines_Where_Does_All_the_Money_Go) [Accessed 23 Oct. 2016].

<sup>20</sup> The Rise And Rise Of FCPA. (2011). [Blog] *Business Insider.* Available at: <http://www.businessinsider.com/the-rise-and-rise-of-fcpa-2011-3?IR=T> [Accessed 23 Oct. 2016].

<sup>21</sup> Mahoney, B. (2012). FCPA Enforcement Will Stay Robust Beyond Obama’s 2nd Term. [Blog] *Law360.* Available at: <http://www.law360.com/articles/392138/fcpa-enforcement-will-stay-robust-beyond-obama-s-2nd-term> [Accessed 23 Oct. 2016].

benefits.<sup>22</sup> This uniquely positioned system of benefits make it a particularly good candidate to explore new ways of accessing corruption funds.

### **Environmental law – the concept of social damages**

Broadly speaking, the DOJ presently *has* the legal authority to use the criminal proceeds to fund anti-corruption activities. However, when it comes to settlements related to bribery, this effort is, in theory, prevented at the very outset of collecting the proceeds from corruption by the application of the *Miscellaneous Receipts Act* (henceforth “MRA”). The MRA is a federal statute requiring that a government official or agency “*receiving money for the Government from any source shall deposit that money with the Treasury.*”<sup>23</sup> It applies broadly to all sector litigations, i.e. from corruption settlements to environmental ones. This might come as a surprise to those who are aware that US governmental agencies have on several occasions imposed settlement conditions that diverted money to various activities outside the fees and fines schedule. Indeed, there is an exception that applies to the MRA that could be used in the settlements litigation.

It took several years of innovative litigation on the part of the Nuclear Regulatory Commission and ultimately the Environmental Protection Agency that wanted to use settlement money to fund community service projects repairing environmental harms.<sup>24</sup> The agencies pressured the Comptroller General and finally, in the early 1990s, he explained in a letter to a House subcommittee chairman the enforcement agency’s prosecutorial discretion “*empowers it to adjust penalties to reflect . . . concessions exacted from the violator.*”<sup>25</sup> Thanks to this, for almost three decades, the DOJ has routinely authorized the use of a percentage of the criminal proceedings to fund environmental initiatives in communities impacted by a company’s violation. For example, BP paid \$18.7 billion, on top of \$43.9 billion in criminal and civil penalties, to finance environmental programs and restoration efforts addressing the broad damages created by the BP oil spill in the Gulf of Mexico in 2010.<sup>26</sup>

There is no reason to believe that the same process could not apply to the FCPA proceedings as well. The MRA authorization exception is not uniquely applicable to

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<sup>22</sup> Perlis, M. and Chais, W. (2009). Investigating The FCPA. *Forbes*. [online] Available at: <http://www.forbes.com/2009/12/08/foreign-corrupt-practices-act-opinions-contributors-michael-perlis-wrenn-chais.html> [Accessed 23 Oct. 2016].

<sup>23</sup> 31 US Code § 3302 – Custodians of money

<sup>24</sup> Spalding, A. (2014). The much misunderstood Miscellaneous Receipts Act (Part 2) - See more at: <http://www.fcpablog.com/blog/2014/9/30/the-much-misunderstood-miscellaneous-receipts-act-part-2.html#sthash.6FMdJhol.dpuf>. [Blog] Available at: <http://www.fcpablog.com/blog/2014/9/30/the-much-misunderstood-miscellaneous-receipts-act-part-2.html> [Accessed 30 Sep. 2014].

<sup>25</sup> *Ibid.*

<sup>26</sup> Wade, T. and Hays, K. (2015). BP reaches \$18.7 billion settlement over deadly 2010 spill. Reuters. [online] Available at: <http://www.reuters.com/article/us-bp-gulfmexico-settlement-idUSKCN0PC1BW20150702> [Accessed 6 Nov. 2016].

environmental law, but to any settlement imposed by the federal government. This means that prosecutors, with NGOs in tow, have an opportunity to build up the corruption practice in a similar way to the environmental arena.<sup>27</sup> The key aspect is technical—the MRA says that once the penalties are turned over to the agency, they must be deposited in the Treasury. But any penalties that have not yet been received by the Treasury —say by a defendant who, in anticipation of a penalty and plausibly a conversation with the prosecutor who viewed such efforts favourably, offered to pay 10% of penalties in exchange for a penalty reduction—then no questions under MRA arise and the only thing that the government would do is to grant a sentence reduction, pursuant to prosecutorial discretion.<sup>28</sup> The lack of such results when it comes to corruption settlements is more political and systematic. The success of the environmental cases can provide examples of what NGOs need to do to establish themselves as a governmental partner in the process and pave the way for the growth of the practice.

It is thus clear that FCPA enforcement, combined with prosecutorial discretion and proper timing of claims, are more than capable of addressing root causes of corruption and involve NGOs. Some academics even claim that the FCPA was originally designed to build good governance and institutions in foreign countries.<sup>29</sup> These claims were forgotten while setting up a profitable revenue stream for the government and peddling the fear that returning money back to developing countries will result in more corruption and looting, or that NGOs themselves will partake on corrupt acts. Several cases mentioned later in this section demonstrate that it is possible to redistribute the money using civil society in ways that benefit local populations and establish a positive feedback loop for the risk-averse government actors.<sup>30</sup>

From a third-party access perspective, it is important to acknowledge from the outset the importance of governmental actors as stakeholders in the anti-corruption process. Especially in the US, where the government has expansive powers and receives comparably much higher sums of damages, it is vital to influence government actors and prosecutors. Because of the public scrutiny and political tendency to favor established and popular practices, government actors will be highly risk-averse towards any new parties or litigation method. For that reason, appropriate strategies will address the risk-aversion of government

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<sup>28</sup> Bornstein, A. (2015). The BOTA Foundation explained (Part Eleven): Future BOTAs and dictators' money. [Blog] The FCPA Blog. Available at: <http://www.fcpablog.com/blog/2015/4/28/the-bota-foundation-explained-part-eleven-future-botas-and-d.html> [Accessed 6 Nov. 2016].

<sup>29</sup> Spalding, A. (2014). Corruption, Corporations, and the New Human Right. *University of Richmond School of Law*.

<sup>30</sup> Bornstein, A. (2015). The BOTA Foundation explained (Part Eleven): Future BOTAs and dictators' money. [Blog] The FCPA Blog. Available at: <http://www.fcpablog.com/blog/2015/4/28/the-bota-foundation-explained-part-eleven-future-botas-and-d.html> [Accessed 6 Nov. 2016].

actors by establishing contacts within the agencies, submitting required evidence to gain third party access, developing process guidelines, etc.

### Access through Victim Compensation – slow-paced developments

The Mandatory Victim Restitution Act (*henceforth* “MVRA”) of 1996 allows for a restitution of victims subject to a criminal offence. Such restitutions fell into disuse with the latest cases dating back to 1990. The DOJ has not received any cases involving a restitution order between 1990 and 2010 at all.<sup>31</sup> From the period before the restitution hiatus, there was only one case brought under FCPA, dating back to 1979.<sup>32</sup> Reasons for the lack of restitution orders amongst law enforcers and practitioners is a lack of trust in how this money would be used, especially when involving foreign corrupt governments.<sup>33</sup> One can imagine similar reluctance also applies to designating NGOs as representatives of “societal victims” of corruption.

From 2010 onwards, however, there have been a few cases brought under the MVRA act that signaled a possible trend reversal. In 2010, in *United States v. Green*, a court ordered restitution regarding bribes paid in Thailand.<sup>34</sup> In *United States v. Diaz*, the court ordered an individual defendant to pay restitution to the Haitian government after discovery of a telephone rate conspiracy.<sup>35</sup>

The overall application concerning MVRA remains quite confusing, even though a body of world-recognized transnational bribery cases suggests that proper legal mechanisms are in place. It is not yet clear how the victim’s standing and access to damages could be litigated within the existing framework. The *US v Alcatel-Lucent* case exemplifies the general trend; in this case, the Costa Rican power company (*henceforth* “ICE”) was denied victim status and pursuant recovery under MVRA. The court declined to grant victim status to ICE on the facts, holding that ICE was a co-conspirator in the bribery scheme and in denying the restitution cites the pervasive and consistent illegal conduct perpetrated by the principals of ICE.<sup>36</sup> Although ICE’s claim for victim status was unsuccessful, it signaled a definite

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<sup>31</sup> See *U.S. v. F.G. Mason Engineering and Francis G. Mason*, Case No. B-90-29 (D. Conn. 1990).

<sup>32</sup> See *U.S. v. Kenny International Corp.*, Cr. No. 79-372 (D.D.C. 1979).

<sup>33</sup> FCPA Fines: Where Does All the Money Go?. (2009). [Blog] TRACE: Anti-bribery solutions. Available at: [http://www.traceinternational.org/blog/726/FCPA\\_Fines\\_Where\\_Does\\_All\\_the\\_Money\\_Go](http://www.traceinternational.org/blog/726/FCPA_Fines_Where_Does_All_the_Money_Go) [Accessed 23 Oct. 2016].

<sup>34</sup> FCPA Fines: Where Does All the Money Go?. (2009). [Blog] TRACE: Anti-bribery solutions. Available at: [http://www.traceinternational.org/blog/726/FCPA\\_Fines\\_Where\\_Does\\_All\\_the\\_Money\\_Go](http://www.traceinternational.org/blog/726/FCPA_Fines_Where_Does_All_the_Money_Go) [Accessed 23 Oct. 2016].

<sup>35</sup> The Haiti Telecom case involved a broad network of corrupt transactions including public officials employed by the state-owned telecom company. Amongst numerous individuals found guilty was Juan Diaz who pleaded guilty for violating the FCPA and money laundering charges. The judge referred to the government as the victim and ordered Diaz to pay restitution of in the amount of 73,824 USD *U.S. v. Diaz*, No. 1:09-20346-JEM (S.D. Fla. 2012); See also Maglich, J. 2011. “Under the FCPA, Where Are Victim’s Rights?” FCPA Blog, 25 May.

<http://www.fcpcablog.com/blog/2011/5/25/under-the-fcpa-where-are-victims-rights.html>

<sup>36</sup> Asner, M. and Thompson, G. (2013). Restitution from the Victim’s Perspective—Recent Developments and Future Trends. *Federal Sentencing Reporter*, 26(1).

exclusion of third parties' ability to seek victim-status and reparations. The legal basis for the social claim was acknowledged by the Attorney General of Costa Rica and based on Costa Rican Criminal Procedure Code, which states that “*civil action for social harm may be brought by the Attorney General's Office in the case of offenses involving collective or diffused interests.*”<sup>37</sup> The court ruled that the law does not protect all diffuse interests, and that the court possesses discretion to determine whether the relevant law protects the diffuse interests in question.<sup>38</sup>

### US settlement practice and lessons learnt

Settlements are the most commonly used tools in cases prosecuted under the FCPA. The statistics for 1999 – 2012 cite almost 70% of foreign bribery settlements occurring in the US. More than 88% of criminal foreign bribery cases have been resolved by settlement and only about 12% went to trial.<sup>39</sup> Despite the reputation of the procedure being “behind closed doors,” each plea agreement must be submitted to an appropriate adjudicating federal court for approval. The plea agreement contains a statement of facts summarizing the conduct to which the defendant pleads guilty. The submission is followed by a plea hearing where the prosecutor presents to the judge the evidence that would have been used had the case gone to trial. If the judge approves, the plea agreement becomes a matter of public record. In exchange for the guilty plea, the prosecutors usually offer the non-prosecution agreement (*henceforth* “NPA”)—no charges filed—or the deferred prosecution agreement (*henceforth* “DPA”), whereby the charges are filed without taking immediate action. The DPA is dismissed once the defendant fulfills its side of the agreement. NPAs, however, do not involve the court. In return for declining to file charges, the defendant often agrees to monetary sanctions, extraordinary restitution provisions, or review mechanisms.<sup>40</sup> NPAs are often thought of as taking both the justice and restitution funds outside public scrutiny.

US settlement practice affirms the possibility of third parties claiming damages. The BOTA Foundation in Kazakhstan was a direct example of returned assets in a case brought by the DOJ for \$84 million obtained from unlawful bribery transactions between oil and gas companies and Kazakh officials. The BOTA Foundation was designated by a Memorandum of Understanding between the US, Switzerland and Kazakhstan in order to ensure the funds

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<sup>37</sup> u4 Anti-corruption resource centre, (n.d.). Broadening Sanctions for Corruption Offences According to Damages Done. u4 Expert Answer.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.* See Also: U4, Anti-Corruption Resource Centre, (2014). *Impact of foreign bribery legislation on developing countries and the role of donor agencies*. No.6.

<sup>40</sup> U4, Anti-Corruption Resource Centre, (2014). *Impact of foreign bribery legislation on developing countries and the role of donor agencies*. No.6.

be used to benefit disadvantaged Kazakh citizens, under the supervision of the World Bank, Switzerland and the US. According to the disbursement reports, the Foundation used the money to help poor children, youth and families through various programs such as tuition assistance.<sup>41</sup> Yet one more recent example involves the DOJ settlement with the son of Equatorial Guinea's president, which signals some willingness on the part of the government to compensate victims. The settlement conditions included \$30 million for poor children in the Equatorial Guinea with the help of a charity organization.<sup>42</sup>

Examination of these cases points to the main actors in the anti-bribery process: the DOJ's prosecutors and the judges. The prosecutor must take the victim's rights into consideration and thus during negotiations, may insist that broad restitution be included in the settlement.<sup>43</sup> Often judges refused settlements that did not include broader restitution for victims, establishing a mechanism for the judicial enforcement of restitution.<sup>44</sup> Judges and prosecutors thus increasingly face pressure to scrutinize court settlements to protect victims' interests, which creates a broader and unexplored litigation space for accessing third party damages.

One of the greatest barriers to entry for any third party litigants (including NGOs) is the burden of proving the proper restitution amount.<sup>45</sup> Although this burden officially resides with the government, the government by default relies on the victim to establish the proper restitution amount. The high reliance on evidence provided by the victim is accompanied by a strict requirement for these claims for damages to have a causal link to the criminal behavior or underlying empirical evidence, which would allow the prosecutor to make a clear and convincing case that the third party was harmed. Such underlying causal connections are particularly hard to prove for third party NGO claims concerning broader societal damages. Potential strategies to mitigate the burden of proof requirement and to establish new entry points could include the following. Third parties could hire outside consultants to estimate losses or provide consulting advice on how to make a case;<sup>46</sup> third parties could approach the

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<sup>41</sup> United Nations Global Corruption Book. (2015). Chapter 5: Asset Recovery and Mutual Legal Assistance.

<sup>42</sup> Spalding, A. (2015). The BOTA Foundation explained (Part Twelve, conclusion): Future BOTAs and the FCPA. [Blog] Available at: <http://www.fcpablog.com/blog/2015/4/29/the-bota-foundation-explained-part-twelve-conclusion-future.html> [Accessed 6 Nov. 2016].

<sup>43</sup> Yannett, B., Rohlik, P. and Fulh, D. (2011). Victim or Villain? A Costa Rican State Entity's Claim for Restitution From Alcatel. *Westlaw Journal: White Collar Crime*, 25(11).

<sup>44</sup> E.g. US District Judge Leon refused to approve SEC brought settlement with IBM lest there would be condition that would require IBM to conduct a more rigorous reporting Zajac, A. and Schoenberg, T. (2012). IBM Judge Questions SEC on Foreign Bribe Settlement. *Bloomberg*. [online] Available at: <http://www.bloomberg.com/news/2012-12-20/ibmjudge-questions-sec-posture-on-foreign-bribe-settlement-1-.html> [Accessed 23 Oct. 2016].

<sup>45</sup> 18 U.S.C. § 3664(e) in Asner, M. and Thompson, G. (2013). Restitution from the Victim's Perspective—Recent Developments and Future Trends. *Federal Sentencing Reporter*, 26(1).

<sup>46</sup> E.g. The South African government used outside consultants to establish the harm the defendants caused to its rock lobster populations. In: *Ibid*.

prosecutor early with well-backed-up calculations and documentation to claim a conservative loss;<sup>47</sup> third parties could seek to establish working relationships with prosecutors to receive advice on how to provide most relevant information; and finally establish cooperation with a given NGO institutionally, so that they become a trusted partner to the government for providing accountable, transparent means of receiving and disbursing restitution funds.

There has been evidence of some NGO initiatives calling for wider third-party restitution. The Nigerian NGO Socio-Economic Rights and Accountability Project (SERAP) initiated a plan for a broader victim compensation scheme whereby the victim government would have 60 days after the end of an FCPA action to file a claim with a US court for part or all of the settlement proceeds.<sup>48</sup> The SEC would then evaluate on a case-by-case basis whether the NGO qualified and had appropriate safeguards in place. Thus far the SEC stated it would consider the proposal, but legislation would be needed, further highlighting the need for cooperation between NGOs and practitioners to fill in any gaps that could establish NGO access to restitution as a systematically used government procedure.<sup>49</sup>

To conclude, the FCPA represents a significant opportunity for NGOs to enter the settlement process and gain access to financing from restitution. The most important actors in the process are the DOJ's Fraud Office and the government prosecutors. The awareness and willingness of both of these actors to engage third parties is crucial. Despite the challenges discussed later, judges and prosecutors bear the burden to protect victim's rights and it is only a question of strategy and political will for NGOs to more actively participate in the process. Effective strategies to enter the litigation process include devoting more knowledge and resources into developing cases of harm, backed up by financial and other documentation that prosecutors could readily use and attach to the stipulation of damages. A greater cooperation between the government and NGOs is needed, as governments are risk averse and subject to public scrutiny and are thus less likely to expose themselves to "untested" disbursement of money.

### **Civil damages – an important player in domestic prosecution**

The DOJ may also decide to confiscate proceeds to pay the costs associated with forfeiture, satisfy valid liens, innocent owner claims and costs associated with accomplishing the legal forfeiture in accordance with the Comprehensive Crime Control Act of 1984. The Attorney

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<sup>47</sup> Litigation experience. In: *Ibid.*

<sup>48</sup> Frick, S. (2016). Ice' Capades: Restitution Orders and the FCPA. *Richmond Journal of Global Law and Business*, 12(3), pp.433–52., no. 3: 433–52; Sierck, A. (2012). African NGO Asks for Distribution of FCPA Recoveries. *FCPA Blog*, [online] Available at: <http://www.fcpablog.com/blog/2012/3/16/african-ngo-asks-for-distribution-of-fcpa-recoveries.html>. [Accessed 16 Aug. 2016].

<sup>49</sup> Frick, S. (2016). Ice' Capades: Restitution Orders and the FCPA. *Richmond Journal of Global Law and Business*, 12(3), pp.433–52.

General designates the use of the funds for these purposes.<sup>50</sup> Each year, more than 60 percent of federal forfeitures in the US is obtained through administrative forfeiture.

Specifically, the Civil Asset Forfeiture Reform Act (*henceforth* “CAFRA”) enacted in 2000 became a critical tool in the recovery of illicit gains arising from financial crimes such as fraud, embezzlement, and theft. Under CAFRA, the US ran the Asset Forfeiter Program from 2002 and 2015. This program facilitates the return of forfeited funds to victims, making restitution a priority of the civil and criminal forfeiture actions brought under CAFRA.<sup>51</sup> The forfeiture laws have expanded greatly in the past two decades. In 2000 CAFRA added a code amendment that enables the prosecutor to seek parallel civil and criminal proceedings against the same property.<sup>52</sup>

In 2002, the Criminal Division initiated a procedure called restoration that enables the Attorney General to transfer forfeited funds to a court to satisfy a criminal restitution order.<sup>53</sup> Restitution is provided if the victim generally qualifies for the provisions of remission, an unrelated relief with a similar objective that is intended to reduce hardship arising from forfeiture for persons who have incurred a monetary loss from the offense underlying the forfeiture.<sup>54</sup>

### Challenges and Conclusions

Bribery prosecuted in the US, domestic or foreign, often brings the largest settlements and the lowest rates of restitution. There is often a lack of trust by the prosecuting government of foreign government actors (e.g. *Alcatel Lucent* case), NGOs, and new practices. Therefore, establishing cooperation with NGOs in the prosecuting country would be a requirement to gaining an entry point in settlements. Such a mutually beneficial pact would make future cooperation more likely and give the opportunity to access greater funds. The paragraphs below offer a short overview of the settlement process in the US and several institutional risks that an NGO may want to consider when seeking entry points.

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<sup>50</sup>Department of Justice, (n.d.). *Forfeiture Fund*. [online] Available at: <https://www.justice.gov/afp/fund#po11> [Accessed 23 Oct. 2016].

<sup>51</sup> E.g. \$62.2 Million to Victims of MoneyGram Fraud, \$25.5 Million to Victims of Scott W. Rothstein, \$14.6 Million to Victims of Allen Hilly and others that were proceeds from the deferred prosecution agreements, civil settlement and civil forfeiture returned to victims, respectively. Department of Justice, Office of Public Affairs (n.d.). *Justice Department Returned Over \$4 Billion to Victims of Crime Through the Asset Forfeiture Program Between 2002 and 2015* [online] Available at: <https://www.justice.gov/opa/pr/justice-department-returned-over-4-billion-victims-crime-through-asset-forfeiture> [Accessed 23 Oct. 2016]. -program

<sup>52</sup> Further advantages of the parallel proceedings are discussed in part IIIb. Canada and Annex I. Overview of Legal Systems

<sup>53</sup> Restitution is an equitable remedy that is intended to make crime victims whole and prevent unjust enrichment to the perpetrator. Department of Justice, (2015). *Chapter 12: Forfeiture and Compensation for Victims of Crime*. [online] Available at: <https://www.justice.gov/sites/default/files/criminal-afmls/legacy/2015/01/26/victims.pdf> [Accessed 23 Oct.2016].

<sup>54</sup> *Ibid*.

A recent study of the StAR Initiative<sup>55</sup> examined foreign bribery settlements and relevant monetary sanctions. The study suggested that settlements did not hinder restitution. Rather, reiterating concerns mentioned, it identified a mix of legal and bureaucratic impediments as well as reluctance to return funds to developing countries due to concerns about corruption, the perception that governments may have endorsed the corrupt conducts, or the lack of initiative on the part of developing countries.<sup>56</sup> Yet examination of practices proved both the government's capacity and the potential for recipient's success demonstrated in the number of successful environmental cases that partially came from the corruption practices listed above. Just as in the BOTA case, proven foundation mechanisms could be established on a country-by-country basis to counteract government instabilities and election changes during the long process from investigations to final judgements on stolen assets. For such settlements to become the norm, the BOTA model as well as lesson learnt from the practice need to be examined and solidified.<sup>57</sup> NGOs may need to take a leading role in the process and use its knowledge, as well as media pressure, to spread this norm and establish durable country partnerships with relevant enforcement officers.

### IIIb. Canada

#### Overview

Canada has signed and implemented the OECD Anti-Bribery Convention and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Canada thus enacted the Corruption of Foreign Public Officials Act (*henceforth* "CFPOA") enforced by the Royal Canadian Mounted Police (*henceforth* "RCPM") specialized services responsible for combating economic crimes and corruption. Transnational corruption and corruption of foreign officials is specifically overseen within the RCPM Commercial Crime Program.

In 2008, RCPM established a separate International Anti-Corruption Unit that comprises of seven police officers based in Ottawa and Calgary. Given the size of the team, restructuring has been underway that includes the establishment of a new Sensitive Investigations Unit, which will carry out investigations under the CFPOA and assist foreign enforcement agencies with request. The Anti-Corruption Unit was disbanded in 2013 and

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<sup>55</sup> The STAR Initiative is a partnership between the World Bank Group and the UN Office on Drugs and Crime supporting anti-corruption work through cooperating with developing countries and financial centers to prevent the laundering of the proceeds from corruption and to ensure a systematic and timely return of the stolen assets to the victims.

<sup>56</sup> *Ibid.*

<sup>57</sup> Bornstein, A. (2016). The BOTA Foundation explained (Part Eleven): Future BOTAs and dictators' money [Blog] The FCPA Blog. Available at: <http://www.fcpablog.com/blog/2015/4/28/the-bota-foundation-explained-part-eleven-future-botas-and-d.html> [Accessed 6 Nov. 2016].

their resources were used converted into the National Division, where corruption investigations are handled by the Sensitive Investigations Unit in Ottawa’s National Division, or Calgary’s Financial Integrity Unit.<sup>58</sup> However, the capabilities of the provincial agencies remain hampered due to the incapability of provincial agencies to share investigative and prosecutorial tasks for breaches under the CFPOA, leaving this solely to the often understaffed RCMP.<sup>59</sup>

It is unclear to what extent re-organization of the anti-corruption units has increased the efficiency of enforcement. Transparency International’s 2014 Progress Report on the OECD Convention enforcement noted that Canada’s enforcement increased from “limited” to “moderate enforcement.”<sup>60</sup> One could speculate that the improvement is partly attributable to re-organization and attempts to align legislation with other corruption prosecutions.

The CFPOA was amended in 2013 and the most current version permits prosecution of corruption committed by companies and individuals abroad based on the nationality. NGOs have also become liable under the act, but according to an RCMP officer, investigations remain focused on for-profit businesses.<sup>61</sup> A violation can result in imprisonment for up to 14 years and significant fines. There is no limit on the fees imposed on corporations and courts can order corporate probationary terms that allow appointment of a third-party monitor at the expense of the corporation.<sup>62</sup>

Canada currently meets its international obligations under the OECD Anti-Bribery Convention through a combination of provisions in its Criminal Code<sup>63</sup> and CFPOA. The federal government is responsible for prosecuting all crimes that are not in the Criminal Code. Since bribing a foreign public official and any books and records offences are crimes enacted in the CFPOA, the decision to prosecute is ultimately up to The Public Prosecutions Service of Canada – an independent agency answering to the Attorney General and the Parliament.<sup>64</sup>

### **A common law practice that differs from the US**

Unlike in the US, the capacity to investigate foreign corruption practices is restricted to criminal law enforcement bodies. Canadian securities regulation authorities thus cannot investigate, prosecute, or even undertake administrative enforcement proceedings for foreign

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<sup>58</sup> United Nations Global Corruption Book. (2015). Chapter 6: Investigation and Prosecution of Corruption.

<sup>59</sup> Ibid.

<sup>60</sup> Transparency International, (2014). Exporting Corruption: Progress Report 2014: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery.

<sup>61</sup> United Nations Global Corruption Book. (2015). Chapter 2: Criminal Liability for Bribery and Corruption Offences

<sup>62</sup> Expert Guides. (2016). *Expert Guides - Conducting business in Canada: Navigating Canada’s anti-corruption laws*. [online] Available at: <https://www.expertguides.com/articles/conducting-business-in-canada-navigating-canadas-anti-corruption-laws/aryewzpf> [Accessed 21 Aug. 2016].

<sup>63</sup> Canada’s Criminal Code prohibits corruption, bribery, influence peddling, extortion, and abuse of office. See: Canadian Criminal Code 121(1)(a), 121(1)(b)

<sup>64</sup> Public Safety Canada, (2014). *Corruption in Canada: Definitions and Enforcement*.

corrupt practices.<sup>65</sup> This restriction has received criticism, especially from TI Canada.<sup>66</sup> TI recommended aligning legislation with the US, which would allow provincial securities regulators to take part in corruption enforcement and increase overall operational capacities. Additionally, broadening the enforcement power to these authorities would mean that there could be parallel civil investigations brought against an entity, as opposed to the current system that only allows criminal prosecution.

Regarding sanctions, bribery of foreign public officials under section 3(1) of CFPOA is punishable by a 14-year imprisonment, following the 2013 amendment. Accused persons may also face forfeiture of proceedings and Public Works and Government Services Canada will not contract with businesses convicted of offences under CFPOA.<sup>67</sup> Regarding domestic corruption, the Canadian Criminal Code does not have as detailed sentencing guidelines as those developed in the UK. Instead it has minimum and maximum penalties for each offence and the relevant preferences have evolved through case law. Bribery of judges, politicians and police officers appears to be the most serious domestic offence, punishable by up to 14 years' imprisonment.<sup>68</sup> Domestic corruption cases are often resolved by a bargained-for guilty plea, which may involve prosecutors reducing the number or the severity of the offences charges. Prosecutors and defense often agree on a sentence that will be recommended to the judge and Canadian law has consistently held that the judge should follow the jointly submitted recommendations.<sup>69</sup> This process leaves the door open for third parties to establish themselves as "partner institutions" to convince prosecutors to suggest alternatives that would address root causes of corruption as part of the damages paid.

### **Inadequate resources and need for legislative reform**

There has been nearly no enforcement under CFPOA prior to 2009 because of the scarce resources allocated to corruption enforcement in Canada, which was heavily criticized by the OECD Working Group on Bribery and eventually led to the creation of two new RCMP foreign corruption units. As of 2014, the RCPM reported over 35 ongoing investigations.<sup>70</sup>

*Corruption in Canada: Definitions and Enforcement*<sup>71</sup> report identified some weaknesses in Canadian foreign bribery law:

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<sup>65</sup> Cassels Brock & Blackwell LLP, (2014). A Primer on Canada's Foreign Anti-Corruption Enforcement Regime.

<sup>66</sup> United Nations Global Corruption Book. (2015). Chapter 6: Investigation and Prosecution of Corruption.

<sup>67</sup> *Ibid.*

<sup>68</sup> United Nations Global Corruption Book. (2015). Chapter 7: *Investigation and Prosecution of Corruption*.

<sup>69</sup> United Nations Global Corruption Book. (2015). Chapter 7: Investigation and Prosecution of Corruption.

<sup>70</sup> Mccarthy.ca. (2016). *McCarthy Tétrault - Canada Experiences Its Most Active Year Yet in Anti-Corruption Law and Enforcement - Article Detail*. [online] Available at: [http://www.mccarthy.ca/article\\_detail.aspx?id=6591](http://www.mccarthy.ca/article_detail.aspx?id=6591) [Accessed 21 Aug. 2016].

<sup>71</sup> Deloitte LLP, (2014). Public Safety Canada. *Corruption in Canada: Definitions and Enforcement Report # 46*.

- Under CFOPA, only criminal prosecutions can be brought against legal entities, unlike the US where the SEC can bring parallel civil charges stemming from its own investigative and prosecutorial powers. Given that the burdens of criminal proof are high, and/or the perpetrators of corruption are often difficult to find, civil sanctions enable much greater collection of funds related to corruption and one may speculate that upon introduction of such reform, Canada could greatly improve the amounts gained from corruption prosecution.
- There are no provisions for voluntary disclosure of self-reporting to regulatory authorities that are preconditions to the use of DPAs. DPA, as identified in the US or Germany, are instruments that enable greater third party access because both prosecutor and a company are motivated to enhance the greater public good, as discussed earlier.
- Unlike the US, Canada does not encourage disclosure by offering financial incentives. Incentives may encourage greater cooperation with authorities.<sup>72</sup> Arguably, they may also encourage the willingness of companies to agree to settlements including 3<sup>rd</sup> parties.

## Conclusion

Canada has not implemented DPA mechanism in its settlements. The absence of provisions for voluntary disclosure or self-reporting to regulatory authorities is a weakness that, if enacted, may lead to the use of deferred prosecution agreements as used in the US or UK.<sup>73</sup> Several companies and commentators have called for the implementation of such mechanisms allowing companies to come forward, voluntarily self-disclose, pay significant fees and implement remedial measures including donating resources to NGOs.<sup>74</sup> Such an approach would permit a company to conduct self-imposed remedies without guaranteeing the company's self-remedial measures foreclose prosecution. The incentives for self-disclosure remain minimal without assurances that such a procedure would not result in later prosecution.

The significant case-law involving transnational corruption is made of very few cases. The such case brought under CFPOA that resulted in conviction was *R v Griffiths Energy International*. In this case, the *Griffiths* Corporation paid out a bribe of over 2 million USD to the wife of Chad ambassador to Canada to help Griffiths secure a production sharing contract

<sup>72</sup> United Nations Global Corruption Book. (2015). Chapter 5: *Asset Recovery and Mutual Legal Assistance*.

<sup>73</sup> Public Safety Canada, (2014). *Corruption in Canada: Definitions and Enforcement*.

<sup>74</sup> Mccarthy.ca. (2016). *McCarthy Tétrault - Canada Experiences Its Most Active Year Yet in Anti-Corruption Law and Enforcement - Article Detail*. [online] Available at: [http://www.mccarthy.ca/article\\_detail.aspx?id=6591](http://www.mccarthy.ca/article_detail.aspx?id=6591) [Accessed 21 Aug. 2016].

in Chad. The court found Griffiths guilty and imposed a \$9,000,000 fine, and a 15% victim surcharge.<sup>75</sup> The acting prosecutor on the case commented that had the case been prosecuted in Canada instead of the US, a significant reduction in penalty would not have been available for self-reporting and cooperating with the investigation. He also noted that Griffiths investigation would have cost almost 5 million USD, had the new company management not come forth themselves and presented the relevant materials “nicely organized and ready for prosecution.”<sup>76</sup> Given the relatively weak Canadian enforcement and lack of incentives, the case law demonstrates that Canada’s corruption prosecution practices might score higher traffic if legislative amendments are made. More cases means larger funds, which means that it is also in the interests of TI and other NGOs to lobby for changes in legal frameworks that would allow for more prosecution (e.g. voluntary self-disclosure) but also allow new types of agreements (e.g. settlements) that were found conducive to third party access in other jurisdictions.

### IIIc. Singapore

#### Overview

According to TI’s Corruption Perception Index, Singapore stands out as the least corrupt country in Asia. Over the past couple of decades it has consistently climbed the index and its anti-corruption legislation today is recognized internationally. Singapore’s anti-corruption legal regime is a model for fighting transnational corruption because it has relatively good extraterritorial reach to include Singaporean companies and nationals.

The most important legislation of the anti-corruption regime in Singapore is the Prevention of Corruption Act (*henceforth* “PCA”), which is the most often invoked statutory provision. Section 5 of the PCA, on the punishment for corruption, states that any person who has engaged in corruption, either as a recipient or as a solicitor, is liable for conviction to a “*fine not exceeding \$100,000 or to imprisonment for a term not exceeding 5 years or to both.*” Section 7 enables the judiciary to increase the maximum imprisonment term to 7 years for convicted persons in cases where the offence was a transaction with “*the government or ... any public body.*” Furthermore, Section 13 empowers the courts to impose a penalty on the convicted person “*equal to the amount of that gratification ... and any such penalty shall be recoverable as a fine.*” However, it is section 37 that gives the anticorruption regime extraterritorial reach by stating if an act of bribery by a Singaporean takes place outside of

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<sup>75</sup> *R v Griffiths Energy International*, [2013] A.J. No. 412 (Q.B.).

<sup>76</sup> United Nations Global Corruption Book. (2015). Chapter 6: *Investigation and Prosecution of Corruption*.

Singapore, then it will be dealt with as if the bribe had taken place in Singapore.<sup>77</sup> While the PCA does not explicitly prohibit bribery of a foreign official, the general prohibition of bribery in the PCA read together with section 37 effectively prohibits foreign bribery.<sup>78</sup> Importantly, the PCA does not distinguish between natural and legal persons, and as such companies can be liable to criminal prosecution for attributable acts of its employees.

The second most important legislation is the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (*henceforth* “CDSA”), which enables the judiciary to confiscate any benefits derived from an offence as defined by the PCA. As such, the CDSA empowers courts to recover all benefits acquired through corrupt conduct. The CDSA also has extraterritorial reach for all foreign serious offences by virtue of section 3(3), where a “foreign serious offence” (excluding foreign drug-trafficking) is defined as being against the laws of a foreign country in addition to being a serious offence in the Second Schedule of the CDSA.<sup>79</sup> The anti-corruption regime in Singapore, therefore, allows for “custodial and pecuniary penalties,” as well as full disgorgement of all benefits acquired through transnational corruption through the PCA and the CDSA.

### **Enforcement – a developing practice with potential**

The only agency empowered to investigate corruption is the Corrupt Practices Investigation Bureau (*henceforth* “CPIB”), the independence of which is enshrined in the constitution.<sup>80</sup> Upon discovery of a potential corruption offence, any other law enforcement agency is obligated to hand over all information to the CPIB. While the CPIB carries out all investigations, cases are prosecuted by public prosecutors. In January 2015, the capabilities and manpower of the CPIB were expanded by more than 20% in order to combat increasingly complex corruption cases, including those with international links.<sup>81</sup>

Although the PCA helps to prosecute companies and individuals domestically, there are no legal precedents being invoked to hold Singaporean companies or persons liable for transnational corrupt acts.<sup>82</sup> With regards to domestic liability of natural persons, references

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<sup>77</sup> Ang, W. and Chan, D. (2016). *Getting the Deal Through – Anti-Corruption Regulation in Singapore 2016*. [online] Nortonrosefulbright.com. Available at: <http://www.nortonrosefulbright.com/knowledge/publications/127109/getting-the-deal-through-anti-corruption-regulation-in-singapore-2016> [Accessed 5 Dec. 2016].

<sup>78</sup> Gin, T. (2007). *The Law on Corruption in Singapore: Cases and Materials*. 1st ed. Singapore Academy of Law.

<sup>79</sup> Tan, J. and Yen, K. (2015). *The International Investigations Review*. [online] Wongpartnership.com. Available at: <http://www.wongpartnership.com/index.php/files/download/1953> [Accessed 5 Dec. 2016].

<sup>80</sup> Hin, K. (2011). *National Anti-Corruption Strategy: The Singapore Experience*. [online] Available at: [http://www.unafei.or.jp/english/pdf/RS\\_No86/No86\\_14VE\\_Hin1.pdf](http://www.unafei.or.jp/english/pdf/RS_No86/No86_14VE_Hin1.pdf) [Accessed 5 Dec. 2016].

<sup>81</sup> Ang, W. and Chan, D. (2016). *Getting the Deal Through – Anti-Corruption Regulation in Singapore 2016*. [online] Nortonrosefulbright.com. Available at: <http://www.nortonrosefulbright.com/knowledge/publications/127109/getting-the-deal-through-anti-corruption-regulation-in-singapore-2016> [Accessed 5 Dec. 2016].

<sup>82</sup> Lau, D., Wong, E., Lau, J. and Lau, T. (2011). *The Anti-Corruption Regime in Singapore: A Look at its Extraterritorial Nature and its Impact on Other Countries*. [online] Available at: [http://orgs.law.harvard.edu/lids/files/dlm\\_uploads/2014/09/LIDS-Global-Initiative-Volume-1.pdf](http://orgs.law.harvard.edu/lids/files/dlm_uploads/2014/09/LIDS-Global-Initiative-Volume-1.pdf) [Accessed 5 Dec. 2016].

can be made to *Teo Chu Ha v. Public Prosecutor*, and to *Tom Reck Security Services Pte Ltd v PP* [2001] 2 SLR 70 for domestic liability of legal persons, but the PCA has not been invoked for transnational prosecutions. There has therefore been relatively limited enforcement of transnational corruption, although this cannot definitively reflect poor enforcement. On the other hand, Singapore has been active in providing mutual legal assistance to other countries on the basis of the Mutual Assistance in Criminal Matters Act, which was revised in 2014 to widen the scope of assistance.<sup>83</sup>

The extraterritorial effects of the anticorruption legal regime have nonetheless been upheld by courts. For example, in *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR 410, a case in which a constitutional challenge of section 37 of the PCA was brought, the court observed that the provision was “*capable of capturing all corrupt acts by Singapore citizens outside of Singapore, irrespective of whether such corrupt acts have consequences within the borders of Singapore or not.*”<sup>84</sup>

With regards to funnelling confiscated funds back into anti-corruption efforts, there is no explicit provision that empowers courts to do so. In fact, the legal regime as a whole contains no provisions which address how such confiscated funds are to be allocated, which leaves the impression that it simply becomes state revenue. This is true for both national and transnational corruption cases, although in national cases, the victim can bring forth a civil suit against its offender to be repatriated. While there is legal backing for prosecuting acts of transnational corruption committed by Singaporeans, there is no “statutory disbursement mechanism” in Singapore through which victims can be compensated abroad. However, there is no prohibition of such statutory disbursement in the legal regime either. This is important because the High Court and the Court of Appeals of Singapore have the jurisdiction to grant “all reliefs and remedies at law and in equity,”<sup>85</sup> and it could thus be said that compensation for victims of transnational corruption may indeed be legally feasible in Singapore. In addition, it is worth mentioning that the Singaporean anti-corruption legal regime does not provide a formal mechanism to disclose violations in exchange for leniency, although plea bargains with public prosecutors may be available at their discretion.<sup>86</sup>

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<sup>83</sup> Ang, W. and Chan, D. (2016). *Getting the Deal Through – Anti-Corruption Regulation in Singapore 2016*. [online] Nortonrosefulbright.com. Available at: <http://www.nortonrosefulbright.com/knowledge/publications/127109/getting-the-deal-through-anti-corruption-regulation-in-singapore-2016> [Accessed 5 Dec. 2016].

<sup>84</sup> *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR 410 [1998] Cr Ref 1/1998 (Court of Appeal).

<sup>85</sup> See Section 18, Supreme Court of Judicature Act (Cap 322) and Section 14 of Schedule 1.

<sup>86</sup> Ang, W. and Chan, D. (2016). *Getting the Deal Through – Anti-Corruption Regulation in Singapore 2016*. [online] Nortonrosefulbright.com. Available at: <http://www.nortonrosefulbright.com/knowledge/publications/127109/getting-the-deal-through-anti-corruption-regulation-in-singapore-2016> [Accessed 5 Dec. 2016].

## Conclusion – a long way ahead

In sum, the Singaporean legal regime against transnational corruption in theory contains the necessary provisions for prosecuting acts of corruption that have been committed abroad. However, the case law is limited to domestic cases committed by natural and legal persons. Regarding the lack of reported transnational corruption cases, there may be two reasons for this, beyond there simply being no discovered cases: either they do not reach the chambers of the Attorney General or prosecutors chose not to go forward with the charges.<sup>87</sup> While the absence of any “statutory prohibition against restitution for victims of corruption” leaves open the question of compensation within the jurisdiction of the High Court and Court of Appeals, there is no instance of this having been carried out in practice.

## Part IV: Civil Law Practice

### IVa. Austria

#### Overview

Austria has concluded several multilateral agreements related to anti-corruption, including: UNCAC; the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention); and the Second Protocol of the Convention on the protection of the European Communities’ financial interests.

The main legal provisions governing bribery and corruption are contained in the Austrian Criminal Code (German: *Strafgesetzbuch* or *StGB*).<sup>88</sup> The Code recognizes bribery of public officials and in commercial practice as distinct crimes. It further distinguishes between active (offering) and passive (receiving) bribery. Further provision on corporate liability can be found in the Act on Corporate Criminal Liability (*German: Verbandsverantwortlichkeitsgesetz* or *VbVG*) from 2006.<sup>89</sup> The imprisonment terms enforced are relatively high and based on the value of the advantage offered or received.<sup>90</sup>

The crime of corruption will be prosecuted in Austria regardless of where it was committed if there is a nationality link to the offender or if the crime was committed in favour

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<sup>87</sup> Ang, W. and Chan, D. (2016). *Getting the Deal Through – Anti-Corruption Regulation in Singapore 2016*. [online] Nortonrosefulbright.com. Available at: <http://www.nortonrosefulbright.com/knowledge/publications/127109/getting-the-deal-through-anti-corruption-regulation-in-singapore-2016> [Accessed 5 Dec. 2016].

<sup>88</sup> “Austrian criminal code” [translation] *Österreichisches Strafgesetzbuch, StGB*

<sup>89</sup> “Act on Corporate Criminal Liability” [translation] *Verbandsverantwortlichkeitsgesetz, VbVG*

<sup>90</sup> Up to 10 years (Sec. 304 (2), 307 (2) of the Austrian Criminal Code. In: *GLI - Global Legal Insights Austria Bribery & Corruption 2016, 3rd Edition*. (2016). *GLI - Global Legal Insights Austria Bribery & Corruption 2016, 3rd Edition*. [online] Available at: <http://www.globallegalinsights.com/practice-areas/bribery-and-corruption/bribery-and-corruption/austria> [Accessed 20 Aug. 2016].

of an Austrian public official. This principle extends beyond territoriality and is quite rare among the European national jurisdictions.

### Unexplored legal provisions

In Austria, fines can be imposed up to a maximum of EUR 1.8 million based on the company's 40 to 180 daily rates and the entity's profitability.<sup>91</sup> This amount is relatively small compared to the expansive prosecution tools and fines levied by neighboring Germany or the US. The OECD report on Corruption recently recommended that Austria raise the fines for legal persons for foreign bribery offenses (currently max. EUR 1.3 million) in light of the disparity between fines imposed on foreign bribery offenses and those imposed on natural persons, because many Austrian companies are now internationally located.<sup>92</sup> A string of corruption cases including *BUWOG*, *Telekom* and *Eurofighter* damaged public perception of corruption in Austria just a few years ago, reinforcing concerns about the insufficiency of available legal remedies for corruption.

The *lax lata* in Austria does technically allow for corporations to donate funds to a specified civil society organization—a procedure called “diversion.” However, to date there has been no known instance.<sup>93</sup> It can therefore be concluded that there exist the following systemic obstacles for third party organizations to gain access to funds in Austria: comparatively small penalties imposed and thus received in revenue from corruption,<sup>94</sup> absolute inexperience with “diversion” procedure, and the set-up of the current system that channels any corruption proceeds exclusively to the state Treasury.<sup>95</sup>

### Conclusion

Austria has been seen as a “moderate” enforcer of the OECD convention. In recent years, there have been comparatively low numbers of prosecutions and convictions related to domestic or transnational bribery. Based on the legal analysis of penalties as well as the criminal code, it may appear that the legal frameworks and possibilities for prosecution of foreign bribery in particular is not yet widely known or fully understood by prosecutors.<sup>96</sup> It

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<sup>91</sup> *GLI - Global Legal Insights Austria Bribery & Corruption 2016, 3rd Edition*. [online] Available at: <http://www.globallegalinsights.com/practice-areas/bribery-and-corruption/bribery-and-corruption/austria> [Accessed 20 Aug. 2016].

<sup>92</sup> OECD, (2015). *Austria: Follow-up to the Phase 3 Report & Recommendations*. [online] p.8. Available at: <https://www.oecd.org/daf/anti-bribery/Austria-Phase-3-Follow-up-Report-ENG.pdf> [Accessed 26 Aug. 2016].

<sup>93</sup> Knötzl, B. (2016). Austrian framework for seizing and accessing corruption proceeds (TI-AC) Interview by Katarina Krasulova Resar Via Email.

<sup>94</sup> Austria's response to the criticism in the OECD follow-up report outlined that the Work Program of the Austrian governments for the 25<sup>th</sup> legislative period (lasting through the end of 2015) has as one of its goal is the “enhancement of the effectiveness of the VbVG” and explicitly mentions the level of fees in this respect. The extent to which the plan will be followed up on remains unclear. *Ibid*.

<sup>95</sup> Knötzl, B. (2016). Austrian framework for seizing and accessing corruption proceeds (TI-AC) Interview by Katarina Krasulova Resar Via Email.

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seems that Austria needs further reform, involving awareness raising about the available anti-corruption frameworks and how to use them, directed at enforcement personnel and lawmakers who would thus become aware of the status quo and make needed improvements. Such reforms would aid anti-corruption efforts and bring more attention to the process, which would subsequently allow for an easier entry for, or a discussion at the very least, of interested third parties.

In an interview, TI-Austria noted the absence of any political will to allow for direct access of NGOs to corruption funds. Politicians express a preference to work with organizations directly instead of channeling funds to their activities. The lack of political will in conjunction with Austrian inexperience with “more creative” types of prosecution, and the general insufficiency of penalties imposed, have made it difficult for NGOs seeking access to corruption funds.<sup>97</sup> Despite these difficulties, NGOs such as TI-Austria maintain access to corruption funds as a long-term goal. Certainly, a coherent and summarized experience from other countries would be helpful in discerning and establishing potential entry points and finding appropriate litigation and cooperation strategies.

## **IVb. Denmark**

### **Overview**

Denmark is widely regarded as one of the least corrupt countries in the world, if not the least corrupt. There is, however, relatively little legislation on corruption, and particularly on transnational corruption.<sup>98</sup> The state of the Danish legal regime against transnational corruption today is in large part a result of the government transposing provisions from international conventions over the past two decades. According to the OECD, there has been relatively little initiative from the Danish government to take initiative on independent legislation.<sup>99</sup>

Danish regulation on corruption, including transnational corruption, was comprehensively reformed in the early 2000s in order to conform with international conventions.<sup>100</sup> Since then, Denmark has taken on a range of obligations to criminalise

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<sup>97</sup> *Ibid.*

<sup>98</sup> OECD, (2016). *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Denmark*. [online] Available at: <http://www.oecd.org/daf/anti-bribery/Denmarkphase3reportEN.pdf> [Accessed 5 Dec. 2016].

<sup>99</sup> OECD, (2016). *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Denmark*. [online] Available at: <http://www.oecd.org/daf/anti-bribery/Denmarkphase3reportEN.pdf> [Accessed 5 Dec. 2016].

<sup>100</sup> Langsted, L. (2009). Bribery across Borders and the like from a Danish Perspective. *Scandinavian Studies in Law*, [online] pp.248-268. Available at: <http://www.scandinavianlaw.se/pdf/54-13.pdf> [Accessed 5 Dec. 2016].

transnational corruption in both the public and private sector.<sup>101</sup> In 2000, Denmark ratified the European Criminal Law Convention on Corruption, which covers “*active and passive bribery of national and foreign public officials in the private sector, and complicity in these actions.*” In 2002, Denmark adopted the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transaction, which obliges the Danish government to take the necessary steps to effectively prosecute transnational corruption. In 2003, Denmark signed the UNCAC, which additionally requires the criminalisation of bribery of national and international public officials, and also “*contains an obligation to criminalise public officials’ embezzlement or other forms of illegal appropriation of funds which are under the control of the official in question by virtue of their position.*”<sup>102</sup>

In recent years the government, in cooperation with industry representatives and international organisations, has published several guidelines and policy documents based on the above international conventions.<sup>103</sup> Although not a legal mechanism, this is important because according to a survey taken within the last couple of years, nearly half of Danish companies doing business abroad believe it is necessary to bribe or break laws in order to operate in certain countries, such as Brazil or India. This is a surprising result given that there has been minimal enforcement on transnational corruption in Denmark. According to the OECD, the limited legislation on prosecuting acts of corruption in Denmark should be seen as a deficiency. Although the relative scarcity of legislation on this issue may stem from an insufficient amount of transnational corruption in the first place, the low volume of cases is worrying according to commentators.<sup>104</sup>

### **Enforcement – a confusing system**

Since 2000 there have only been 13 foreign bribery allegations, and only one sanction has been successfully imposed, falling within Article 1 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.<sup>105</sup> According to the OECD, several of these were “closed without adequate investigation or sufficient efforts to

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<sup>101</sup> Danish Trade Council, (2006). *Anti-Corruption Policy for the Trade Council of Denmark*. [online] Available at: <http://um.dk/en/~media/UM/English-site/Documents/About-us/Anti-corruption%20policy/TC%20Anti-Corruption%20Policy%20revised%202202010> [Accessed 5 Dec. 2016].

<sup>102</sup> Danish Trade Council, (2006). *Anti-Corruption Policy for the Trade Council of Denmark*. [online] Available at: <http://um.dk/en/~media/UM/English-site/Documents/About-us/Anti-corruption%20policy/TC%20Anti-Corruption%20Policy%20revised%202202010> [Accessed 5 Dec. 2016].

<sup>103</sup> These guidelines are: (1) Confederation of Danish Industries publication ‘Avoid Corruption’; (2) Ministry of Justice booklet ‘How to Avoid Corruption’; (3) Danish Trade Council’s Anti-Corruption Policy; (4) Danish Investment Funds Anti-Corruption Guidelines.

<sup>104</sup> OECD, (2016). *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Denmark*. [online] Available at: <http://www.oecd.org/daf/anti-bribery/Denmarkphase3reportEN.pdf> [Accessed 5 Dec. 2016].

<sup>105</sup> ECD, (2011). *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*. [online] Available at: [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf) [Accessed 5 Dec. 2016].

secure foreign evidence.”<sup>106</sup> This does not include the 14 Oil-for-Food cases that occurred in Iraq as the statute of limitations for foreign bribery had expired and so none of the relevant companies were charged with substantive criminal offences of sanctions evasion. The single case that was successfully prosecuted in 2011 resulted in an out of court settlement in which the company was not deemed guilty of foreign bribery.<sup>107</sup> According to the Chair of TI-Denmark, it “simply is not in [the Danish prosecution agencies’] area of priority” to more actively enforce cases of transnational corruption.<sup>108</sup>

One significant barrier to fighting transnational corruption is the condition of dual criminality, whereby a Danish citizen can only be prosecuted for corruption offences if it is punishable in both the foreign state and Denmark. According to the Council of Europe Group of States against Corruption, this reflects a lacklustre commitment to fighting corruption on the part of Denmark.<sup>109</sup>

With regards to ensuring the reallocation of confiscated funds to financing anticorruption initiatives, the lack of legislation and opaqueness of the settlement process makes it difficult to do so in Denmark. Currently there is no legal statutory disbursement mechanism. As such, confiscated funds presumably become part of state revenue, and in the one resolved case of foreign bribery virtual opaqueness associated with settlements out of court make it unclear as to where the funds were allocated. Although legislation was amended in 2014 to allow the public to “request information about a penalty notice in a settlement,” this is unlikely to manifest as the public is not informed of settlements in the first place. In the words of the OECD (2013), “*the Settlement process in Denmark is opaque, lacks accountability and thus fails to instil public and judicial confidence.*”

## IVc. Germany

### Overview

Germany is an important player in the recovery of stolen assets linked to corruption, as well as being a country with a relatively high number of financial settlements related to foreign

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<sup>106</sup> OECD, (2016). *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Denmark*. [online] Available at: <http://www.oecd.org/daf/anti-bribery/Denmarkphase3reportEN.pdf> [Accessed 5 Dec. 2016].

<sup>107</sup> Collet, C., Bach, L. and Hansen, B. (2016). *Update On Anti-Corruption And Bribery - Criminal Law - Denmark*. [online] Mondaq.com. Available at: <http://www.mondaq.com/x/432762/Corporate+Crime/Update+On+AntiCorruption+And+Bribery> [Accessed 5 Dec. 2016].

<sup>108</sup> Fitzgibbon, W. and Chawkin, S. (2016). *World's "least corrupt" nations fail to police bribery abroad*. [online] International Consortium of Investigative Journalists. Available at: <https://www.icij.org/blog/2014/02/worlds-least-corrupt-nations-fail-police-bribery-abroad> [Accessed 5 Dec. 2016].

<sup>109</sup> Council of Europe, (2016). *Compliance Report on Denmark “Transparency of Party Funding”*. [online] Available at: [https://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoRC3\(2011\)8\\_Denmark\\_EN.pdf](https://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoRC3(2011)8_Denmark_EN.pdf) [Accessed 5 Dec. 2016].

bribery.<sup>110</sup> 11 years after its accession to the Convention, Germany ratified the UNCAC in 2014 and subsequently adopted a domestic legal framework to support its efforts to combat corruption. The obligations ensuing under the OECD Convention Combating the Bribery of Foreign Public Officials also provide relevant standards applicable to the criminalization of corruption in Germany. Germany ratified the Convention by passing the Act on Combating International Bribery (*German: IntBestG*).<sup>111</sup> The Act was recently replaced by a new Anti-Corruption Law, the Act to Combat Corruption from 20 November 2015.<sup>112</sup> The Act applies to extraterritorial corruption, but there is no corporate criminal liability. Natural persons can be penalized and serve imprisonment. Further, both materials and material advantages obtained may be confiscated.<sup>113</sup>

The maximum penalty that can be imposed for every committed administrative or criminal offence is EUR 10 million. In addition to the basic administrative penalty, there may be additional sanctions in the form of disgorgement of profits and forfeiture of assets.<sup>114</sup> The law allows German prosecutors to issue some of the largest corporate penalties in foreign bribery cases worldwide (e.g. *Siemens, Ferrostaal* and *Volkswagen*).<sup>115</sup>

Any penalties imposed and proceedings seized are governed by the “Guidelines on Criminal Proceedings and Imposition of Fines” (*German: Richtlinien für das Straf- und Bußgeldverfahren* or *RiStB*) -- the binding national uniform instructions for public prosecutors. The individual federal states of Germany enforce and investigate the individual domestic or foreign bribery cases. Within this framework, the imposed fines and/or confiscated assets are channeled to the budget of the federal republic that investigated and prosecuted the case (*German: Land*).<sup>116</sup> Similarly, in relation to confiscation of ill-gotten assets, the proceeds from seizure and confiscation are allocated to the individual state (*Land*) and subsequently integrated into the state budget.<sup>117</sup>

Generally, only legal persons are subject to confiscation measures. Section 30 of the German Administrative Offences Act (*German: Ordnungswidrigkeitengesetz* or *OwiG*) allows

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<sup>110</sup> STAR Initiative (Jacinta Anyango Oduor et al) (2012). *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*. [online] Available at: <https://star.worldbank.org/star/sites/star/files/9781464800863.pdf> [Accessed 21 Aug. 2016].

<sup>111</sup> “*Law Combat the bribery of foreign officials in international business*” [translation] *IntBestG Gesetz zu dem Übereinkommen vom 17. Dezember 1997 über die Bekämpfung der Bestechung ausländischer Amtsträger im internationalen Geschäftsverkehr*, *IntBestG*, German Official Gazette (Bundesgesetzblatt, BGBI.) of 1998, part II, p. 2327.

<sup>112</sup> The law considers three kinds of bribery: (i) bribery of public officials, (ii) commercial bribery (i.e., bribery of employees or agents of a business relating to the purchase of goods or services), and (iii) bribery of members of legislative bodies. See: “*Law on the fight against corruption*” [translation] *Gesetz zur Bekämpfung der Korruption*. BGBI. of 2015, part 1, p. 2025 ff.

<sup>113</sup> Section 73 et seq, German Criminal Code (Confiscation), Section 74 et seq. of the Code (Deprivation)

<sup>114</sup> [Globalinvestigationsreview.com](http://globalinvestigationsreview.com). (2016). *Edition*. [online] Available at: <http://globalinvestigationsreview.com/insight/the-european-middle-eastern-and-african-investigations-review-2016/1035878/germany> [Accessed 20 Aug. 2016].

<sup>115</sup> *Ibid.*

<sup>116</sup> Transparency International, (n.d.). *Where do corruption-related fines go?*. Helpdesk Research.

<sup>117</sup> *Ibid.*

a fine to be levied on the company's management under certain conditions.<sup>118</sup> The imposition of administrative fees occur, however, at the discretion of the prosecutor.<sup>119</sup>

### Settlements – A developed practice in a civil law country

German law does not stipulate the options for defense-prosecution agreements in its traditional form. A settlement with the prosecutor can occur as a result of a negotiated deal between the prosecutor and the company,<sup>120</sup> which results in the issuance of administrative sanctions in case the sanctions are not challenged by a party. The details of the settlement, together with the allocation of the proceedings, are available to the public.<sup>121</sup> Third party damages are possible through the use of prosecutorial discretion and an agreement between the prosecutor and the company to channel damages to a given third party. Particular attention has been given to section 153a of the German Code of Criminal Procedure (*German: Strafprozessordnung* or StPO) under which dozens of foreign bribery cases have been prosecuted since 2005.<sup>122</sup> <sup>123</sup> The procedure provides for a “conditional exemption” from prosecution by the public prosecutor upon agreement of both parties. The “condition” of the exemption includes a payment of a fine to the Treasury and/or to a non-profit organization. The prosecutor does not have the power to order compensation to victims, though the defendant's willingness to undertake victim compensation programs, charitable donations or effective compliance systems is decisive for public prosecutors in deciding whether to settle the case with an out of court administrative order, according to one law firm's assessment of the settlement practice.<sup>124</sup>

In 2011, TI-Germany received a total of EUR 69,000 in fines coming from nine different agreements under the aforementioned “conditional exemption.”<sup>125</sup> The entry points for third party NGOs in this case differ slightly from those offered by the US system. Specifically, in the US system, both the Prosecutor and the Defendant need to agree on the

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<sup>118</sup> Legal person can be liable when there is evidence that one of its representatives committed a criminal or administrative infraction that violates the obligations of the legal person or enriches it. Art 30 of the “Administrative Offenses Act” [translation] Ordnungswidrigkeitengesetz (OwiG)

<sup>119</sup> ECBA. (2016). *Overview on anti-corruption rules and regulations in Germany*. [online] Available at: [http://www.ecba.org/extdocserv/projects/ace/20160126\\_ACE\\_CountryreportGermany.pdf](http://www.ecba.org/extdocserv/projects/ace/20160126_ACE_CountryreportGermany.pdf) [Accessed 20 Aug. 2016].

<sup>120</sup> Section 153c of the German Code of Criminal Procedure (settlement without guilty plea) or Section 257c CCP (Settlement with guilty plea) In: Mondaq.com. (2016). *German Anti-Corruption Legislation And Procedure - Criminal Law - Germany*. [online] Available at: <http://www.mondaq.com/germany/x/340314/White+Collar+Crime+Fraud/German+AntiCorruption+Legislation+and+Procedure> [Accessed 20 Aug. 2016].

<sup>121</sup> *Ibid.*

<sup>122</sup> “German Code of Criminal Procedure” [translation] Strafprozessordnung. Available at [http://www.gesetze-im-internet.de/englisch\\_stpo/englisch\\_stpo.html](http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html)

<sup>123</sup> Transparency International, (n.d.). *Where do corruption-related fines go?*. Helpdesk Research.

<sup>124</sup> Globalinvestationsreview.com. (2016). *Edition*. [online] Available at: <http://globalinvestationsreview.com/insight/the-european-middle-eastern-and-african-investigations-review-2016/1035878/germany> [Accessed 20 Aug. 2016].

<sup>125</sup> In German: Weiß, O. (2016). *TI-Deutschland: Bußgelder 2011*. [online] Transparency.de. Available at: <http://www.transparency.de/Bussgelder-2011.2087.0.html> [Accessed 24 Oct. 2016].

inclusion of any damages that are to be distributed to third parties. Establishing working connections with the state prosecution office and actively seeking a) states that prosecute corruption cases with the use of the “conditional exemption” more often, and, b) states that have prosecutors who are more willing to cooperate and offer insights on how to enter settlement under “conditional exemption” as a third party could be valuable additions to the organizational strategy.

## Part V: Comparative study of China

### Overview

In recent years, the spotlight has increasingly shone on China in regards to its efforts to combat corruption, following the instigation of President Xi Jinping’s Anti-Corruption campaign, which is arguably the largest campaign of its sort in the world. Since 2012, the Chinese Communist Party (*henceforth* “CCP”) has seen some of its highest-level Party members imprisoned, billions of RMB seized by the government including assets owned abroad, and international manhunts to capture fleeing Chinese officials and business people. The incredible scale of this campaign, coupled with China’s position as a leader in the Asia Pacific region, and its increasing prominence in global governance, warrant closer inspection.

Since the Reform and Opening period of the 1980s, huge economic growth has led to widespread changes across the whole of Chinese society. The legal framework in China has unsurprisingly faced many challenges to keep up with such changes, undoubtedly beginning with the question of what laws and institutions are necessary for a market economy.<sup>126</sup> Currently, China is in the process of codifying a civil code, a fact confirmed in the CCP’s communiqué for the 4<sup>th</sup> plenary session of the 18<sup>th</sup> Central Committee.<sup>127</sup> Two points are worth mentioning here that influence the formation and implementation of Chinese law. The first is that the CCP often uses vague laws that rely upon regional/local implementation rules, under the principle of *yīndì zhìyí* (因地制宜), *to rule the land in accordance to region*.<sup>128</sup> Recent reforms have seen increased clarity to aspects of laws pertaining to Anti-Corruption, such as the March 2016 draft of the Anti-Unfair Competition Law.<sup>129</sup> However, the point

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<sup>126</sup> Wei, Shen and Casey G. Watters. 2016. "Do All Roads Lead To China?: Scholarship Of Chinese Commercial Law In The Past Decade (Part 1)". *China Review* 16 (2): 165-196. <http://www.jstor.org/stable/43831391>.

<sup>127</sup> Wei, Shen and Casey G. Watters. 2016. "Do All Roads Lead To China?: Scholarship Of Chinese Commercial Law In The Past Decade (Part 1)". *China Review* 16 (2): 165-196. <http://www.jstor.org/stable/43831391>.

<sup>128</sup> Cao, Deborah. 2004. *Chinese Law: A Language Perspective*. Hants: Ashgate Publishing Ltd. p. 8.

<sup>129</sup> Zhang, Haixiao and Shuguang Zhang. 2016. "Practical Law". *Uk.Practicallaw.Com*. <http://uk.practicallaw.com/4-520-3477?q=&qp=&qo=&qe=#>.

stands that much room is given to local governments and courts to interpret Chinese law. Secondly, an example from contract law can more generally illustrate the differences in implementation present in China, in comparison to a country like the US. Although conceptually identical, the US and China have strikingly different attitudes to the doctrine of good faith, which is applied in a substantially more limited manner in US courts. As Wei & Watters (2016) point out:

*“The different approaches of the United States and China reflect the countries’ profound cultural, political, and legal difference.”*<sup>130</sup>

Finally, the lack of truly independent monitoring mechanisms place certain hurdles, not only on the development of anti-corruption in China, but also on economic progress, a point recognised by China at the G20 Summit in Hangzhou this year.<sup>131</sup> The law often reflects a stated goal of independence in the public and private spheres,<sup>132</sup> but in reality, it is currently impossible to have an independent monitor who is not necessarily connected to the government.

The almost contradictory mixture of flexible laws and a central authoritarian regime reflects Jakobson’s observations that the People’s Republic of China is not a rigid top-down structure, despite how it might appear from the outside. There is substantial decentralisation and “significant deviation from central policy across bureaucracies and at the local level.”<sup>133</sup> Decentralisation, coupled with fierce competition between ministries, makes policy implementation unpredictable and at times contradictory. There is, therefore, a large area of unpredictability involved when dealing with an authoritarian regime of this nature. From the Chinese perspective, however, contradiction can be negotiated, rather than being something that is overtly negative. *Máo dùn* (矛盾), *contradiction*, in Chinese is made up of the characters for sword and shield and is “a tension to be managed, not an imperative to choose between conflicting goals.”<sup>134</sup> This chapter, therefore, identifies potential entry points for civil society actors and NGOs within this somewhat contradictory context.

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<sup>130</sup> Wei, Shen and Casey G. Watters. 2016. "Do All Roads Lead To China?: Scholarship Of Chinese Commercial Law In The Past Decade (Part 1)". *China Review* 16 (2): 165-196. <http://www.jstor.org/stable/43831391>.

<sup>131</sup> Zhang, Yan and Yin Cao. 2016. "CCDI Shows Progress In Hunt For Corrupt Officials". *Europe Chinadaily*. [http://europe.chinadaily.com.cn/china/2016-09/05/content\\_26697270.htm](http://europe.chinadaily.com.cn/china/2016-09/05/content_26697270.htm).

<sup>132</sup> Wei, Shen and Casey G. Watters. 2016. "Do All Roads Lead To China?: Scholarship Of Chinese Commercial Law In The Past Decade (Part 1)". *China Review* 16 (2): 165-196. <http://www.jstor.org/stable/43831391>.

<sup>133</sup> Jakobson, Linda. 2014. *China's Unpredictable Maritime Security Actors*. Sydney: Lowy Institute for International Policy.

<sup>134</sup> Saunders, Phillip C. 2014. "China'S Juggling Act: Balancing Stability And Territorial Claims". *Pacnet*, no. 33.

The CCP has recognised that corruption is a leading issue among citizens, and has demonstrated an understanding that this is a real source of instability.<sup>135</sup> Although perhaps worrying for the government, corruption has not significantly undermined their political legitimacy. One conventional explanation is China's 'authoritarian resilience', that the Party has continued through innovation and adaptation, while maintaining its political structure. This concept has been picked up by the government, as the so-called 'zhōngguó móshì (中国模式) China model.'<sup>136</sup> However, perhaps for nationalist reasons, this mainstream authoritarian thesis neglects an important aspect of Chinese government practices. It does not account for "the degree to which China is learning from international best practice based on the principles of transparency, rule of law and public participation."<sup>137</sup> Despite the risks to its rule, the CCP has created institutions that might in the long run pose serious challenges to its rule in order to enhance anti-corruption enforcement. This has opened the potential for social development, institutional capacity building and social activism (albeit with limitations), which furthermore have opened potential spaces for the participation of civil society actors at both the domestic and international level.

### Legal mechanisms & enforcement agencies

China uses a range of measures, which importantly do not rely solely on authoritarian methods, such as extra-legal detention or the use of the death penalty. Optimistically speaking, anti-corruption measures can better be explained by the CCP's ability to learn from overseas experiences, and to introduce initiatives that are "rule-of-law based, transparency-centred and democracy-driven."<sup>138</sup> This section will give a brief overview of the legal mechanisms and enforcement agencies, before discussing the potential role for civil society in China.

There are several domestic regulations related to bribery and corruption outlined by Zhang & Zhang in their 2016 article. The key law relating to cases involving foreigners is the previously mentioned the Anti-Unfair Competition Law (*henceforth* "AUCL"), effective from 1 December 1993.<sup>139</sup> Fines, or monetary thresholds are applied to all bribery and corruption offences. The State Administration for Industry and Commerce alone has the power to

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<sup>135</sup> Fu, Hualing. 2014. "Stability And Anticorruption Initiatives: Is There A Chinese Model?". In *The Politics Of Law And Stability In China*, 1st ed., 176–201. Edward Elgar Publishing.

<sup>136</sup> Fu, Hualing. 2014. "Stability And Anticorruption Initiatives: Is There A Chinese Model?". In *The Politics Of Law And Stability In China*, 1st ed., 176–201. Edward Elgar Publishing.

<sup>137</sup> Fu, Hualing. 2014. "Stability And Anticorruption Initiatives: Is There A Chinese Model?". In *The Politics Of Law And Stability In China*, 1st ed., 176–201. Edward Elgar Publishing.

<sup>138</sup> Fu, Hualing. 2014. "Stability And Anticorruption Initiatives: Is There A Chinese Model?". In *The Politics Of Law And Stability In China*, 1st ed., 176–201. Edward Elgar Publishing.

<sup>139</sup> Zhang, Haixiao and Shuguang Zhang. 2016. "Practical Law". *Uk.Practicallaw.Com*. <http://uk.practicallaw.com/4-520-3477?q=&qp=&qo=&qe=#>.

confiscate the illegal income from a bribe and impose a government fine, which under recent drafted reforms, can reach RMB 3 million.<sup>140</sup> It should also be noted that Criminal Law does not specify the minimum or maximum amount of a criminal fine for bribery cases, and so it is left to the discretion of the judges and can vary from case to case.<sup>141</sup> Further, contrary to past actions, Chinese authorities have become more active and “often commence criminal investigations before foreign authorities, for example, the well-known GSK [Glaxo Smith Kline] case.”<sup>142</sup>

Answering questions over the exact amounts confiscated, and where anti-corruption funds go, is not so easy. Exact figures are hard to find, but an official from the CCP’s Central Commission for Discipline Inspection (*henceforth* “CDDI”) stated in a rare 2015 interview that the anti-graft watchdog alone had confiscated RMB 20.1 billion from corrupt officials between late 2012 and June 2015.<sup>143</sup> The figures are likely to have grown since then, particularly given the recent high-profile, multi-agency campaign to hunt down corrupt officials who have fled overseas, “Operation Fox Hunt.” The money repatriated from abroad reportedly runs into several billions of yuan.<sup>144</sup> Information on the exact amounts and allocation of funds is limited, other than the statement by the CCDI that the majority of the funds are handed directly to the state treasury after trials are concluded, or after assets have been auctioned off. Further, “some money went to the victims if they could be found.”<sup>145</sup> A certain amount of information can also be found on Alibaba’s online auction platform, Taobao, which has been seen as a move to increase transparency and reduce corruption “behind closed doors” between courts and private auction companies.<sup>146</sup> There is increasing pressure on the government to create more efficient disclosure mechanisms that better inform the public on how this money is used. Indeed, there have been calls for officials to release regular updates on the amounts seized, and to consider using part of these funds to set up or

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<sup>140</sup> “China Proposes A Revamp To Its Anti-Unfair Competition Law - Changes Relevant To Companies' Business Practices”. 2016. *Hoganlovells.Com*. <http://www.hoganlovells.com/en/publications/china-proposes-a-revamp-to-its-antiunfair-competition-law-changes-relevant-to-companies-business-practices>.

<sup>141</sup> Zhang, Haixiao and Shuguang Zhang. 2016. “Practical Law”. *Uk.Practicallaw.Com*. <http://uk.practicallaw.com/4-520-3477?q=&qp=&qo=&qe=#>.

<sup>142</sup> Zhang, Haixiao and Shuguang Zhang. 2016. “Practical Law”. *Uk.Practicallaw.Com*. <http://uk.practicallaw.com/4-520-3477?q=&qp=&qo=&qe=#>.

<sup>143</sup> Wang, Xiangwei. 2016. “What Happened To The Billions Of Yuan Seized In China’S Anti-Graft Campaign?”. *South China Morning Post*. <http://www.scmp.com/week-asia/politics/article/2013135/what-happened-billions-yuan-seized-chinas-anti-graft-campaign>.

<sup>144</sup> Zhang, Yan and Yin Cao. 2016. “CCDI Shows Progress In Hunt For Corrupt Officials”. *Europe Chinadaily*. [http://europe.chinadaily.com.cn/china/2016-09/05/content\\_26697270.htm](http://europe.chinadaily.com.cn/china/2016-09/05/content_26697270.htm).

<sup>145</sup> Wang, Xiangwei. 2016. “What Happened To The Billions Of Yuan Seized In China’S Anti-Graft Campaign?”. *South China Morning Post*. <http://www.scmp.com/week-asia/politics/article/2013135/what-happened-billions-yuan-seized-chinas-anti-graft-campaign>.

<sup>146</sup> Lin, Zhan. 2012. “司法拍卖效率低、腐败多：上淘宝——法院搞网拍，冷落拍卖行 (Judicial Auction Efficiency Is Low, Corruption Is Manifold - Go On Taobao, The Courts Do Online Auctions And Cut Out The Auction Houses)”. *International Southern Weekend*. <http://www.infzm.com/content/78430>.

support funds/charities.<sup>147</sup> Under such conditions, there is a clear role for NGOs to enter dialogue with the government in how best to facilitate victim compensation and potentially to leverage funds.

### **The China National Audit Office & Open Government Information Regulations – case studies in civil society participation and more transparent governance**

The implementation of audit reports in China from 2001 onwards was largely inspired by the US Government Accountability Office (*henceforth* “GAO”) and came as a reaction to extra-budgetary funds, the uncontrolled collection of hidden revenues by local governments into “small treasuries.”<sup>148</sup> Aggressive publicity of audit reports were directly influenced by the GAO, and China’s so-called “Audit Storm” swept through the central ministries, was overtly critical of powerful ministries, and lead to legal and disciplinary action against officials. Despite the resistance of central ministries, the China National Audit Office (*henceforth* “CNAO”) continues to conduct rigorous audits and has gradually been expanded from auditing income and expenditure to covering the effectiveness of government fiscal management, including unreasonable budget estimations, slow progress in project implementation and inappropriate policies in state-owned enterprises. Recent years have also seen revisions to the Budget Law in order to better manage revenues and spending and strengthen supervision on power.<sup>149</sup>

China’s Open Government Information Regulations (*henceforth* “OGI”), which took effect in 2008, are an important example of how the government is attempting to increase transparency, and of the rising role of civil society in China. Under OGI Regulation, all administrative agencies are required to provide information obtained in the course of carrying out their duties and “to provide information to members of the public upon request.”<sup>150</sup> Ordinary citizens can thus make information known to the wider public, with the large caveat of information pertaining to commercial or state secrets, or to the privacy of a third party. The OGI system is mandated by UNCAC, but has also drawn on international experience and has developed under strong pressure from China’s emerging civil society. Most noticeable are environmental cases, in which green NGOs have been working to increase both the supply of

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<sup>147</sup> Wang, Xiangwei. 2016. "What Happened To The Billions Of Yuan Seized In China’S Anti-Graft Campaign?". *South China Morning Post*. <http://www.scmp.com/week-asia/politics/article/2013135/what-happened-billions-yuan-seized-chinas-anti-graft-campaign>.

<sup>148</sup> Fu, Hualing. 2014. "Stability And Anticorruption Initiatives: Is There A Chinese Model?". In *The Politics Of Law And Stability In China*, 1st ed., 176–201. Edward Elgar Publishing.

<sup>149</sup> "China To Improve Institutional Mechanism For Anti-Corruption". 2015. *Xinhua News*. [http://english.gov.cn/news/top\\_news/2015/03/04/content\\_281475065493700.htm](http://english.gov.cn/news/top_news/2015/03/04/content_281475065493700.htm).

<sup>150</sup> Fu, Hualing. 2014. "Stability And Anticorruption Initiatives: Is There A Chinese Model?". In *The Politics Of Law And Stability In China*, 1st ed., 176–201. Edward Elgar Publishing.

and demand for government information.<sup>151</sup> In terms of supply, they have organized trainings for officials and assisted in drafting detailed local rules on access to environmental information. In terms of demand, they have worked with lawyers and activists to help them bring requests to authorities, and in taking these authorities to court when requests are denied.<sup>152</sup>

There has been increased activism not only amongst lawyers and rights activists, but also amongst academics for the right to access government information, “*and more law professors are filing applications for information disclosure and bringing cases to public and media attention.*”<sup>153</sup> Requests on government spending, including “entertainment expenditure”, have come from leading universities, including Tsinghua and Peking University in Beijing. Chinese academic institutions have also successfully leveraged government and international funding, as several universities have influential centres for anti-corruption studies. In 2009, the American-based policy research organization CSIS, along with the World Bank and the Stuart Family Foundation, funded a project at Tsinghua University to create an index that objectively measures corruption in Chinese local government bodies and municipalities, as well as case studies on systemic loopholes in corruption investigations.<sup>154</sup> Although not without its dangers,<sup>155</sup> OGI Regulations have the potential to make the government more transparent, responsive and accountable. The “litmus test” in the next decade will be the extent to which the government will be moved to publicise embarrassing information.<sup>156</sup> Regardless, civil society and NGOs will have an important role in the process to increase government transparency.

### **Sky Net & APEC Anti-Corruption and Transparency (ACT) – the importance of international cooperation mechanisms**

Further to the domestic regulations above, there are several international anti-corruption conventions currently in force. China has actively participated in UNCAC, which has been effective since 12 February 2006, with Article 66(2) (disputes under the Convention to be

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<sup>151</sup> Fu, Hualing. 2014. "Stability And Anticorruption Initiatives: Is There A Chinese Model?". In *The Politics Of Law And Stability In China*, 1st ed., 176–201. Edward Elgar Publishing.

<sup>152</sup> Horsley, Jamie P. 2010. "Update On China's Open Government Information Regulations: Surprising Public Demand Yielding Some Positive Results". *FreedomInfo.Org*. <http://www.freedominfo.org/2010/04/update-on-china-open-government-information-regulations/>.

<sup>153</sup> Fu, Hualing. 2014. "Stability And Anticorruption Initiatives: Is There A Chinese Model?". In *The Politics Of Law And Stability In China*, 1st ed., 176–201. Edward Elgar Publishing.

<sup>154</sup> "Tsinghua University, China | Center For Strategic And International Studies". 2016. *Csis.Org*. <https://www.csis.org/programs/former-programs/hills-program-governance/governance-centers/tsinghua-university-china>.

<sup>155</sup> After the central government announced a four trillion RMB economic stimulus plan, Shanghai lawyer Yán Yiming requested publication of the details. In April 2009, Yán Yiming was beaten in the conference room of his office by thugs posing as potential clients. (Stern, Rachel E. 2013. *Environmental Litigation In China*. 1st ed. Cambridge [UK]: Cambridge University Press. p. 52.)

<sup>156</sup> Fu, Hualing. 2014. "Stability And Anticorruption Initiatives: Is There A Chinese Model?". In *The Politics Of Law And Stability In China*, 1st ed., 176–201. Edward Elgar Publishing.

submitted to the International Court of Justice) being reserved.<sup>157</sup> This exemplifies a good faith flexibility to follow relevant treaty recommendations on points of agreement, despite China pushing back any UN-based supervisory mechanism in the broadly defined areas of human rights.<sup>158</sup>

China has also been very influential in regional multilateral cooperation. The beginnings of an APEC version of the OECD Corruption Initiative was established in March 2011, with the formation of the Anti-Corruption and Transparency (ACT) Experts' Working Group. The ACT Working Group has already begun to establish legally binding standards, such as the adoption of the "Beijing Declaration on Fighting Corruption" in 2014, as well as a regular contact mechanism and a law enforcement cooperation mechanism to combat corruption.<sup>159</sup> These mechanisms still face many practical challenges, and China's bilateral and multilateral cooperation provides the context for greater involvement of NGOs and for the opening of an international dialogue on China's reforms.

In 2015 China launched Operation Sky Net, which is part of the preexisting Operation Fox Hunt. The campaign has seen over 2000 economic fugitives returned, and RMB 7.62 billion in illegal assets seized, with the help of bilateral extradition agreements and Interpol, who issued 100 red notices for Chinese fugitives in 2015.<sup>160</sup> The US still has no extradition treaty with China, but in September 2016, a landmark deal on the return of stolen assets was sealed with Canada. A foreign ministry official explained that "*this agreement provides an effective legal measure between China and Canada to confiscate criminal proceeds transferred to the other country, and opens doors to more such cooperation with other countries.*"<sup>161</sup> The agreement also requires that assets should be returned to their legitimate owners, but if the origin of the criminal proceeds cannot be identified, both countries will share the assets. The proportion of assets shared will depend on each country's contribution to the investigation.<sup>162</sup> According to Zhuang Deshui, a clean governance specialist at Peking University, the exclusion of such a clause to share assets seized in another country would

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<sup>157</sup> Zhang, Haixiao and Shuguang Zhang. 2016. "Practical Law". *Uk.Practicallaw.Com*. <http://uk.practicallaw.com/4-520-3477?q=&qp=&qo=&qe=#>.

<sup>158</sup> Fu, Hualing. 2014. "Stability And Anticorruption Initiatives: Is There A Chinese Model?". In *The Politics Of Law And Stability In China*, 1st ed., 176–201. Edward Elgar Publishing.

<sup>159</sup> "Anti-Corruption And Transparency Experts' Working Group". 2016. *Asia-Pacific Economic Cooperation*. <http://www.apec.org/groups/som-steering-committee-on-economic-and-technical-cooperation/working-groups/anti-corruption-and-transparency.aspx>.

<sup>160</sup> Zhang, Yan and Yin Cao. 2016. "CCDI Shows Progress In Hunt For Corrupt Officials". *Europe Chinadaily*. [http://europe.chinadaily.com.cn/china/2016-09/05/content\\_26697270.htm](http://europe.chinadaily.com.cn/china/2016-09/05/content_26697270.htm).

<sup>161</sup> Zhuang, Pinghui. 2016. "China And Canada Seal Deal On Return Of Assets Stolen By Fugitive Corruption Suspects". *South China Morning Post*. <http://www.scmp.com/news/china/policies-politics/article/2021977/china-canada-sign-treaty-return-assets-stolen-fraud>.

<sup>162</sup> Zhuang, Pinghui. 2016. "China And Canada Seal Deal On Return Of Assets Stolen By Fugitive Corruption Suspects". *South China Morning Post*. <http://www.scmp.com/news/china/policies-politics/article/2021977/china-canada-sign-treaty-return-assets-stolen-fraud>.

hamper international cooperation and the Canadian deal will become an example for countries signing extradition treaties with China.<sup>163</sup> Similar treaties already exist with New Zealand, Australia and France. It has been noted that in this climate, legal and human rights advocates should pursue a dialogue to bring China's penal code and civil justice system in line with international norms,<sup>164</sup> and that countries should seek guarantees from China regarding transparency and fairness of legal proceedings.<sup>165</sup> Canadian Prime Minister Justin Trudeau has already faced questions on how Canada will ensure that "high standards" are maintained when deciding whether to return Chinese citizens.<sup>166</sup> It is also possible to imagine that NGOs should place pressure on the governments involved to make third party damages possible in these proceedings, in a similar manner to section 153a of the German Code of Criminal Procedure previously mentioned.

## Conclusion

One way of understanding China's anti-corruption measures, helpful to NGOs, is the ability to learn from overseas experiences, and to introduce rule-of-law based initiatives. Potential entry points for NGOs exist, as calls are made for officials to release regular updates on funds, and to use some to support CSOs. NGOs must enter dialogue with the government on how best to facilitate victim compensation and potentially to leverage funds. Opening up and maintaining dialogue will be a major challenge for both international and domestic NGOs. INGOs (International NGOs) may consider partnering with academic institutions with strong government ties, or so-called GONGOs (Government Owned NGOs).

Greater transparency and rule-of-law is essential for creating an environment in which civil society can function. NGOs should push for greater transparency and rigid implementation of OGI regulations, as seen most noticeably in environmental cases. Further, there are an increasing number of bilateral and multilateral treaties and cooperation mechanisms that China has either spearheaded, or is actively involved in. Civil society and governments should place strategic pressure on China to meet international standards. There may also be entry points to making third party damages a part of bilateral agreements, along the lines of the shared asset clauses.

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<sup>163</sup> Zhuang, Pinghui. 2016. "China And Canada Seal Deal On Return Of Assets Stolen By Fugitive Corruption Suspects". *South China Morning Post*. <http://www.scmp.com/news/china/policies-politics/article/2021977/china-canada-sign-treaty-return-assets-stolen-fraud>.

<sup>164</sup> Horlacher, Travis. 2014. "China'S Anti-Corruption Move: Human Rights And Extraterritorial Enforcement". *S.J. Quinney College Of Law, The University Of Utah*. <https://law.utah.edu/chinas-anti-corruption-move-human-rights-and-extraterritorial-enforcement/>.

<sup>165</sup> de Jonge, Alice. 2014. "Chasing The Money: How China Is Clamping Down On Corruption". *The Conversation*. <https://theconversation.com/chasing-the-money-how-china-is-clamping-down-on-corruption-34042>.

<sup>166</sup> Ljunggren, David. 2016. "Canada's Trudeau Sidesteps Questions On Extraditions To China". *Reuters*. <http://www.reuters.com/article/us-canada-china-idUSKCN11Q309>.

## Annex I: Overview of the Legal Systems

The court proceedings related to corruption in general may involve criminal or non-conviction based (henceforth “NCB”) confiscation or private civil actions (described, where appropriate, in the individual country systems researched). The assets will be recovered through one, or a combination of, orders confiscation, compensation, damages, or fines. The confiscated assets then usually end up the prosecuting country’s treasury or confiscation fund. The return or sharing of the proceedings depends on the domestic legislation, a variety of international conventions or special agreements on asset sharing between countries.<sup>167</sup> In the recovery process, the recovery amount can be reduced to a compensation of the requesting state for the expenses relating to maintaining or disposing of the assets and legal expenses of the claimant. Assets may also be returned directly to the victims (“direct recovery”) through a direct compensation in a private civil action or through compensation or restitution in criminal or NCB cases.<sup>168</sup> Criminal proceedings and NCB forfeiture operate together to achieve best results.

- **Criminal forfeiture:** also known as confiscation (or forfeiture), is an order to deprive a person who had been criminally convicted of assets without compensation as a redress for recovering stolen assets. Since the procedure is governed by criminal law, in most countries guilt must be proven “beyond a reasonable doubt” in common law regimes or by judges “intimate conviction” in civil law regimes. The standard of proof for establishing which assets are connected to challenge criminal activities, most jurisdictions use a “balance of probabilities.”<sup>169</sup>
- **Non-conviction based forfeiture** can operate independently of whether there is a conviction in the criminal system. Forfeiture under civil proceedings merely requires that the property is “tainted” by being either part of the crime proceeds or an instrument of criminal activity. The process, also known as administrative confiscation, can proceed within the criminal proceedings, parallel to the criminal proceedings, or, in some jurisdictions, outside of the court system. The tool is of utmost importance in circumstances where there is a lack of evidence to support a criminal conviction or the offender is missing or dead.<sup>170</sup>

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<sup>167</sup> United Nations Global Corruption Book. (2015). Chapter 5: *Asset Recovery and Mutual Legal Assistance*.

<sup>168</sup> United Nations Global Corruption Book. (2015). Chapter 5: *Asset Recovery and Mutual Legal Assistance*.

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

- Both systems are referenced in the discussion of the national legal systems. There are many options under which a criminal trial on bribery can proceed. In common law countries, the persons charged with a criminal offence have the option of pleading guilty or not guilty. The latter leads to a trial before a judge where the prosecutor must prove beyond a reasonable doubt that the defendant is guilty of the charges brought against him in the trial. If found guilty, the judge imposes the sentence (e.g. imprisonment, probation, fine and/or forfeiture). In some countries, only persons can be criminally liable and organizations will often precede using administrative (civil) proceedings for corruption. Even countries that allow for criminal proceedings against companies such as the US, UK or Canada often opt out for pursuing resolution through using settlements that will be explained in the relevant section about the US. Further fees and fines that are imposed generally fall into one of the following categories:
  - **Administrating freezing and confiscation measures:** are orders to confiscate assets that are issued by governments rather than the judiciary and can be imposed domestically, without mutual legal assistance requests from abroad, in case of urgency.<sup>171</sup> In the years past, Canada, US, Switzerland and the EU have all introduced legislation that allows the respective governments to order financial institutions to freeze assets without a judicial order or mutual assistance from corrupt officials' countries.<sup>172</sup>
  - **Fines corresponding to the value of the benefit:** fines that are equal or greater to the benefit received from corrupt practices can be imposed on top of other corporate sanctions. They are usually a part of judgement that can be enforceable as a fine or debt and they often include all assets and profits that can be reasonably linked to the offences related to criminal conviction.<sup>173</sup> The fines are referred to as “value-based confiscation” because the fines paid are equal or greater in relation to the criminal benefit received from the criminal conduct. These fines are generally paid out to the treasury of the prosecuting jurisdictions.<sup>174</sup>

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<sup>171</sup> United Nations Global Corruption Book. (2015). Chapter 5: Asset Recovery and Mutual Legal Assistance.

<sup>172</sup> STAR Initiative (Jacinta Anyango Oduor et al) (2012). Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery. [online] Available at: <https://star.worldbank.org/star/sites/star/files/9781464800863.pdf> [Accessed 21 Aug. 2016]

<sup>173</sup> United Nations Global Corruption Book. (2015). Chapter 5: *Asset Recovery and Mutual Legal Assistance*.

<sup>174</sup> Gray, L. et al (2014). Few and Far: The Hard Facts on Stolen Asset Recovery. Available at: [http://www.keepeek.com/Digital-Asset-Management/oecd/development/few-and-far\\_9789264222311-en#page1](http://www.keepeek.com/Digital-Asset-Management/oecd/development/few-and-far_9789264222311-en#page1) [Accessed 6 Nov. 2016]

An overview of the options and procedures as assembled by The *United Nation's Global Corruption Book* is included below to illustrate the variety of options and paths that is mentioned in relation to individual country practices.

### **Criminal Options and Procedures**

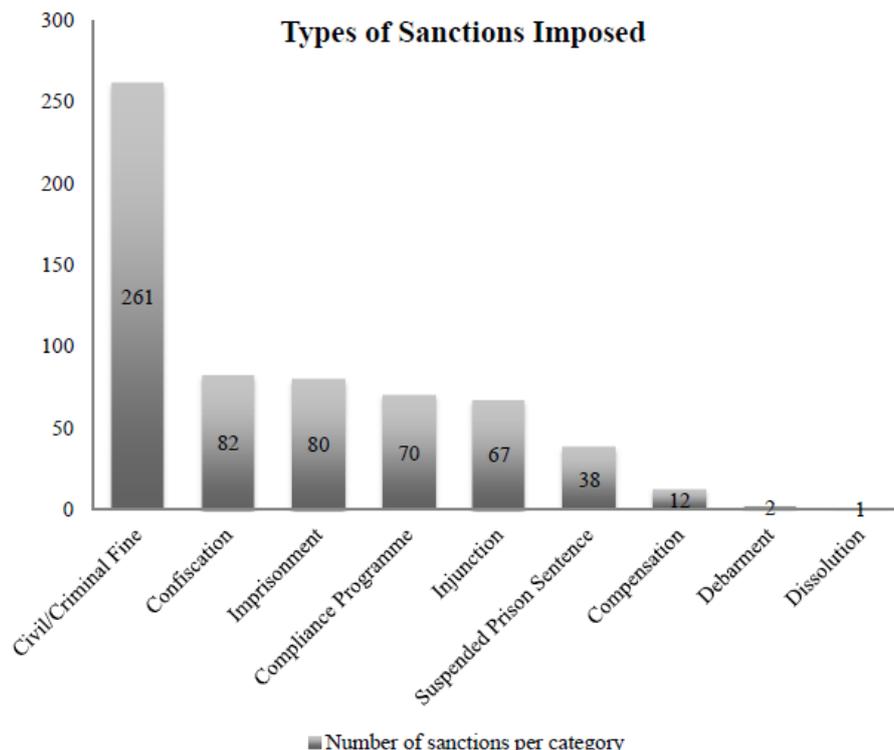
- (1) Charging Policies and the Choice of Charges;
- (2) Guilty Plea Negotiations, Settlement Agreements or Prosecution by Trial;
- (3) Sentencing an Offender after a Guilty Plea or after a Conviction at Trial.

### **Civil Options and Procedures**

Civil procedures may be undertaken as an alternative to pursuing criminal charges or they may be undertaken in addition to criminal charges. These civil procedures may include:

- (1) Civil Forfeiture Proceedings (freezing, seizing and recovery of illegally obtained assets);
- (2) Civil or Administrative Penalties (usually fines and/or suspension of licenses to operate)
- (3) Civil Actions for Damages, Contractual Restitution or Disgorgement of Profits

*The OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* from 2014 analyzed 427 foreign bribery cases to determine which sanctions were used most frequently:



Compensation in this chart included compensation for victims, civil damages, and state costs related to the case. The proceeds of compensation were either paid to NGOs designated by law or as restitution to the government of the country where the bribery took place. The graph clearly indicates a trend in transnational prosecution of bribery, which is also the area with the highest concentration of funds. The trend indicates a clear preference for imposition of civil and criminal fines and very negligible practice related to victim compensation through NGOs.

## **Annex II: The Concept of Broader Social Damages in Corruption**

Several policy issues arise in the asset recovery cases, as reviewed in the study. Since recovery of the proceeds from corruption is very hard, several civil society organizations argue for the for a broader use of the victim compensation, as applicable in particular to the settlements, whereby the settlements funds could be used to compensate the affected victims and communities, a practice that has been known and used in the environmental law arena for long.<sup>175</sup>

The need for NGO's to be compensated in order to address the "social harm" is closely interlinked with the concept of "social damages" as an emerging tool to obtain compensation for damages imposed on the society broadly. A concrete example can be found in Costa Rican law (and in a case discussed in the study), which allows the Attorney General to bring a civil action for compensation for societal damages.<sup>176</sup> An inclusion of social damages readily helps with the problem of companies viewing compensation orders as a mere cost of doing business through addressing the root causes of corruption. A social damage may be defined as a loss that is incurred not by specific groups, but entire communities that cover a broad spectrum of damages such as health, security, peace or good governance.<sup>177</sup> Civil societies such as the Transparency International play a vital role in the process because of their ability to deliver projects that target such broad audiences using their expertise and structures, none of which are available to the government reaping the profits of the corruption.

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<sup>175</sup> Spalding, A. (2015). Public Safety Canada, (2014). Corruption in Canada: Definitions and Enforcement. [Blog] The FCPA Blog. Available at: <http://www.fcpablog.com/blog/2015/4/29/the-bota-foundation-explained-part-twelve-conclusion-future.html> [Accessed 6 Nov. 2016].

<sup>176</sup> United Nations Global Corruption Book. (2015). Chapter 5: *Asset Recovery and Mutual Legal Assistance*.

<sup>177</sup> van der Does de Willebois, E. and Brun, J. (2013). Using Civil Remedies in corruption and asset recovery cases. *JIL*, 45:3(615).

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