WORKSHOP

Requested by the INTA committee

European Parliament

Anti-corruption provisions in EU free trade and investment agreements: Delivering on clean trade

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WORKSHOP

POLICY DEPARTMENT, DG EXPO
FOR THE COMMITTEE ON INTERNATIONAL TRADE (INTA)

European Parliament

Wednesday 24.01.2018 – **10:00-12:00**
ALTIERO SPINELLI BUILDING – ROOM **A1E-2**

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ANTI-CORRUPTION PROVISIONS IN EU FREE TRADE AND INVESTMENT AGREEMENTS:

DELIVERING ON CLEAN TRADE

CHAIRMAN: BERND LANGE

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DIRECTORATE-GENERAL FOR EXTERNAL POLICIES

POLICY DEPARTMENT

European Parliament

For the Committee on International Trade (INTA)

WORKSHOP

Anti-corruption provisions in EU free trade and investment agreements: Delivering on clean trade

Wednesday, 24 January 2018 - 10.00-12.00
Brussels, **Altiero Spinelli building** (ASP), **Room ASP A1E-2**

PROGRAMME

10.00 **Welcome and introductory remarks**

- **Bernd Lange,** Chair of the Committee on International Trade

10.10 **Presentation on Anti-corruption provisions in EU FTAs and investment agreements: Presentation of initial findings**

- **Alina Mungiu-Pippidi,** Professor of Democracy Studies at the Hertie School of Governance in Berlin and Chair of the European Research Centre for Anti-Corruption and State-Building (ERCAS)

10.30 **Reactions from the panel:**

- **Signe Ratso,** Director Trade Strategy and Analysis, Market Access at the DG Trade of the European Commission
- **David Gaukrodger,** Investment Division at the OECD
- **Ernani Checcucci,** Director of Capacity Building at the World Customs Organization (WCO)
- **Carl Dolan,** Director at Transparency International EU
- **Arnaldo Abruzzini,** Chief Executive Officer of Eurochambres

11.10 **Exchange of views**

- **Karoline Graswander-Hainz** (S&D/AT), INTA Rapporteur for Opinion on 'corruption and human rights in third countries'
- Discussion with participation of MEPs and stakeholders

11.50 **Closing remarks by the Chairman**

Fostering good governance through trade agreements
An evidence-based review

By Alina Mungiu-Pippidi[1]

EXECUTIVE SUMMARY

The report finds evidence that international trade agreements have the potential to act as the exogenous factor breaking the vicious circle of corruption in economies based on privileged connections rather than fair competition. International free trade agreements exert a positive influence by increasing competition directly in the removal of tariffs and so diminishing the power of *rentier* companies which influence domestic regulation in their favour, and by contributing to a fairer business environment through their transparency provisions; in other words, by reducing the non-tariff barriers generally used to the advantage of domestically connected companies. Evidence is presented that trade openness, red tape reduction and fiscal transparency, especially transparency of procurement, play positive roles in widening control of corruption and can be more easily influenced by external actors than the other important control of corruption factors- judicial independence, freedom of the press or the demand from civil society for good governance. The report argues that indirect good governance policies which increase competition and subvert power and economic monopolies or quasi monopolies are far more effective than direct anticorruption policies which in relying on domestic implementation tend to fall into the vicious circle again. The options offered are between an 'economist's approach' with an apparently more modest but effective good governance package, a 'lawyer's' approach' with firm anticorruption language but unenforceable provisions even in EU countries (on bribery, for instance), and a 'holistic' approach where the EU would coordinate across international trade, promotion of norms and development aid to have a strong and consistent approach demanding good governance as part of its foreign and development policy. However, the report also warrants that the three options may be used alternatively, depending on the degree of development and quality of governance of the trading partner.

[1] The ERCAS team members Ramin Dadasov, Alvaro Lopes, Victoria Dykes and Debora Ferreira have contributed research for this report.

Throughout the last two centuries international trade and the value of global exports have constantly increased, reaching a peak in the last globalization wave. According to the Organisation for Economic Co-operation and Development (OECD) total world exports of goods and services amounted to USD 23.6 trillion in 2014 (USD 14 trillion generated by OECD countries alone) and total imports of goods and services reached USD 22.8 trillion, with 13.9 trillion accounted for by OECD countries (OECD 2017). Trade among developing countries has become ever more important over time (South-South trade) in comparison with trade among developed and developing countries (North-South trade). In the late 1970s North-South agreements accounted for more than half of all agreements – in 2010 they accounted for about a quarter (Ortiz-Ospina & Roser 2017). Today, the majority of preferential trade agreements are between emerging economies, with the demise of the Transatlantic Trade and Investment Partnership (TTIP) promising a similar prospect for the future.

It was also during the last two decades of the latest globalization wave that corruption was identified as a major hindrance to free trade and a vast enterprise was begun to build a legal framework against international anticorruption. Its target is both national corruption –– abuse of authority for private benefit, as it is defined by most international organizations –– and international corruption, focusing in particular on transnational bribery. The European Commission set as a chief goal in all future trade agreements the negotiation of ambitious provisions on anti-corruption, beginning with the TTIP (by now defunct) and to use Free Trade Associations (FTAs) to monitor domestic reform in relation to the rule of law and governance. The EU already offers trade preferences to countries that ratify and implement international conventions relating to good governance, including the UN Convention Against Corruption (European Commission 2015).

The two agendas of promoting free trade and international anticorruption norms thus have certain common points and obvious synergies. But exactly how much association would be in the reciprocal interest of each of two still quite distinctive agendas? What is the cost-effective approach for EU trade policy where anticorruption is concerned? As the European Commission has noted (European Commission 2015) trade has already been advancing the cause of good governance. Can international trade do more and become an instrument of promoting anticorruption; and with what effects? This report will summarize the existing evidence and options for the EU by addressing these four questions:

What is the connection between trade and corruption? What is the mechanism linking the two, according to empirical evidence?

What is the most recent practice in regard to free trade agreements and anticorruption provisions that should be considered by the EU when designing its own strategy for the future?

What is the evidence concerning the performance of pure anticorruption provisions, not directly related to trade, in the form of international conventions and treaties against corruption, seeing that their inclusion in trade agreements is increasingly recommended?

What are the options for the EU, seeing that it is also the world's largest development donor, giving aid to more than 110 of the countries it trades with?

The evidence for this brief report is on the one hand based on secondary sources, as organizations such as the OECD or the Bretton Woods institutions have been researching this subject for quite some time, while on the other hand it is based on original research funded by the EU's own Seventh Framework project ANTICORRP (anticorrp.eu) which is dedicated to anticorruption.

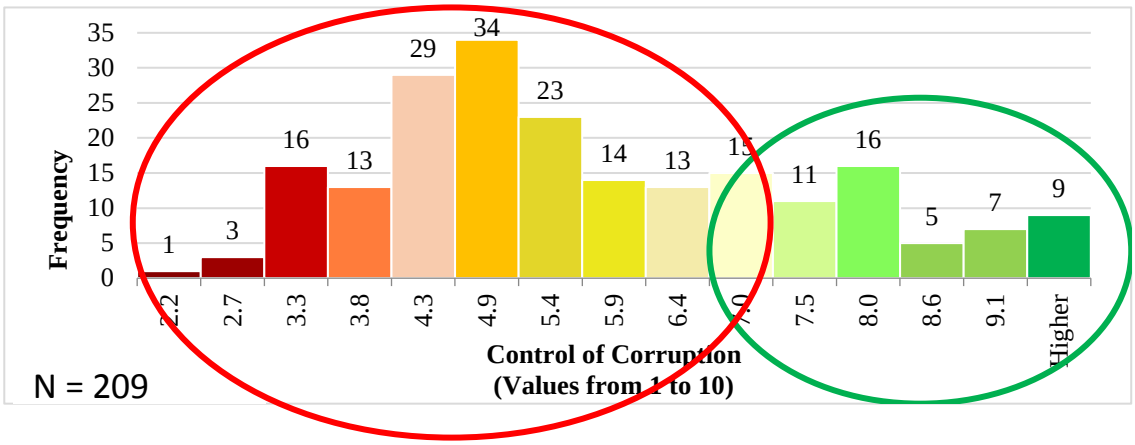
1 Trade and corruption – the nexus

The first section of this report asks, 'What is the association between corruption and trade?'

In the classic liberal view, freedom of trade and corruption are incompatible. Money should not flow to those who deal not in goods, but in favors and laws should not protect them against honest tradesmen (Rand 1992). However, contrary to the most obvious assumption that free trade and corruption are incompatible, allegations are often made that the expansion of global trade has always played an ambiguous role. Today's world is not the first to be confronted with the paradox of more globalization apparently creating more corruption. The first major corruption scandal of the modern world originated in the infamous East India company, which offered a fast track to enrichment in India not by trade alone, but by corruption, and was able to resist many parliamentary attacks at home in England because it had political protectors. A number of politicians profited directly as shareholders and therefore granted favours to the company, ranging from immunity, to bailouts from public money when bankruptcy loomed. But the East India Company was also the case which brought forward the argument by Edmund Burke that still holds good in our day and informs the ideology of the Foreign Corrupt Practice Act and the OECD anti-bribery convention, that one cannot have bad government abroad and good at home; that international traders and the governments protecting them have to be consistent in their defence of free and fair trade, without violence, extortion or corruption (Burke n.d.).

Corruption perception indexes such as the ones developed by Transparency International and the World Bank show large differences across countries. Developed countries emerge as mostly clean with certain exceptions, while as a general rule, underdeveloped ones are seen as corrupt. Less than a third of the world is in the upper third of a 1-10 scale of control of corruption, indicating that in most of the world corruption is the rule rather than the exception (see Figure 1). The paradox deepened by international trade is that exchanges between countries perceived as corrupt and countries perceived as non-corrupt lead to an increase in corruption and to negative spill-over. Companies working in economies perceived as clean pay bribes to enter the markets of countries perceived as corrupt. Put simply, it is the story of the encounter of Britain with India all over again, with corruption blamed on a local 'corrupt' culture but fuelled by the foreign 'clean' country. Presently a more balanced language emerged about international corruption, as 'supply and demand' sides which are both to blame. But as corruption is abuse of 'public authority' for private ends it is rather clear that there is asymmetry of authority between any office holder who has the power to grant or deny a favour and any applicant.

Figure 1. The frequency of countries by corruption ranks, 1-10



Source: World Bank Control of Corruption, recoded 1-10, with best governance 10 (green area) and poor governance 1 (red area). Column scores indicate the number of countries within that rank.

At the top of judicial fines for international bribery we encounter companies based in some of the cleanest countries in the world, starting with Sweden, for many years No 1 for public integrity in every ranking (see

Table 1, apart from the US and Israel all other fined companies are in the EU). The rise of the Brazilian company Oderbrecht, which will probably enter the top ten for bribery fines under the Foreign Corrupt Practices Act (FPCA) in 2018, might simply be an indicator of the development of Brazil.

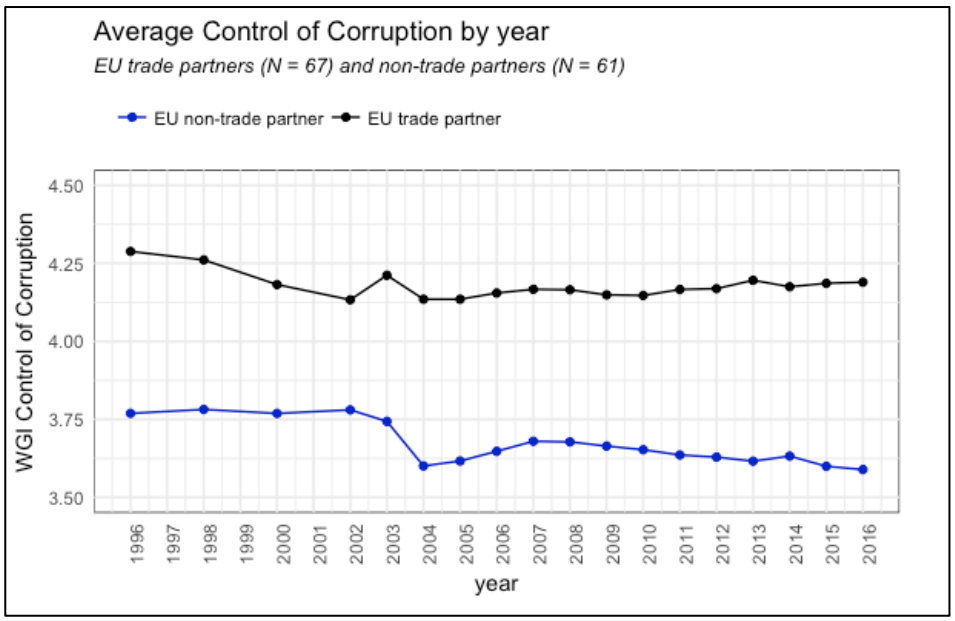
Table 1. Top fines paid by international companies for bribing abroad

Company fined	Amount	Country of origin
Telia Company AB	$965 million in 2017.	Sweden
Siemens	$800 million in 2008	Germany
VimpelCom	$795 million in 2016	The Netherlands
Alstom	$772 million in 2014.	France
KBR / Halliburton	$579 million in 2009.	United States
Teva Pharmaceutical	$519 million in 2016	Israel
Och-Ziff	$412 million in 2016	United States
BAE	$400 million in 2010	UK
Total SA	$398 million in 2013	France
Alcoa	$384 million in 2014	United States

Source: FPCA blog. Legend: the top of judicial fines imposed on companies for bribing abroad on the basis of Foreign Corrupt Practices Act

At first sight the simple avoidance of dealing with the most corrupt countries might seem the easiest way to avoid corruption. A company which chooses to invest in a country beneath the middle rank of Transparency International's Corruption Perception Index (CPI) score knows what is expected of it if it is to do business locally. As a British governor of the Straits aptly put it two centuries ago, if a company or individual, '…knowing the risks they run, owing to the disturbed state of these countries, choose to hazard their lives and properties for the sake of large profits which accompany successful trading, they must not expect the British government to be answerable if their speculation proves unsuccessful (Apud N.J. 1967, pp.122–3) .Engaging such countries has always been problematic. The average perceived corruption of, for instance, current EU trading partners is lower than for countries the EU does not trade with (see Fig. 2).

Figure 2. Average corruption across EU trading partners versus the rest of the world

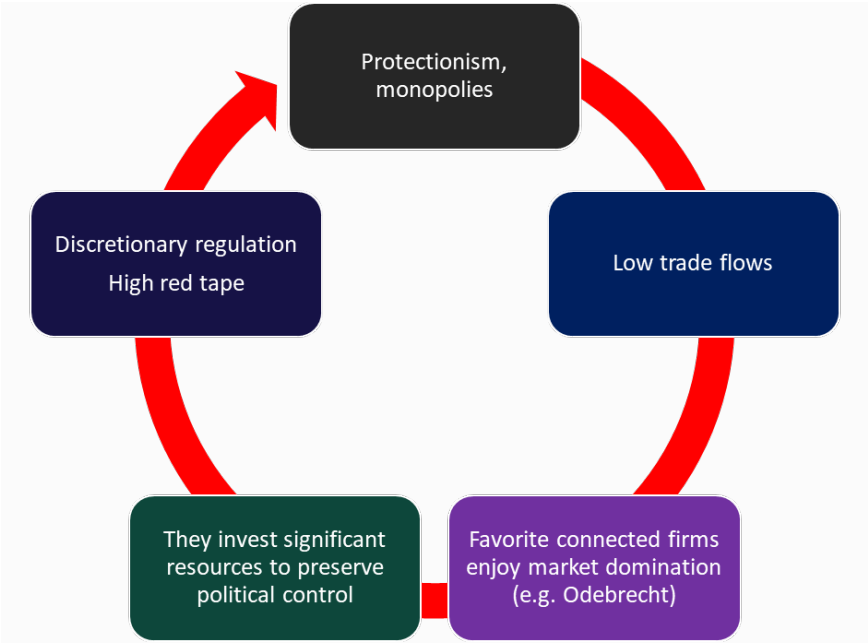


Source: World Governance Indicators from the World Bank.
Legend: Recoded 1-10 with 10 best control of corruption.

But pressure is growing to engage countries perceived as the most corrupt, which are for the most part the poorest. Such countries are recipients of foreign aid, which brings significant procurement of interest for international companies, but the poorer countries need to develop and therefore seek foreign investment and lower tariffs. Excluding them in order to avoid temptation is therefore increasingly seen as both morally problematic and practically difficult.

To treat both parties to an act of bribery equally would be to misunderstand the mechanism of international corruption, for such an approach might be fair without being altogether helpful. We need to understand what causes corruption and what makes it really harmful. In a landmark paper Ades and di Tella implied that more international competition brings the risk of more corruption, because countries where foreign competition is inhibited, perhaps due to natural resources or legal monopolies or protections, tend to be more corrupt (Ades & Di Tella 1999). The classic model of Shleifer and Vishny argued that governments manipulate legislation to create rents in order to consolidate their own economic and power bases (Shleifer & Vishny 2002) with a vicious circle of corruption and protectionism as a result, as shown in Figure 3. While an economy of that sort would be sustainable under certain conditions –– for instance if the price of the natural resource which is the main source of rents remains high (oil, diamonds) –– in the long term there arises the 'extractive institutions' vicious circle, of underdevelopment, as described by Acemoglu and Robinson. It is allocation not based on merit and is harmful to any economy.

Figure 3. The endogenous vicious circle rents manipulation- corruption-protectionism



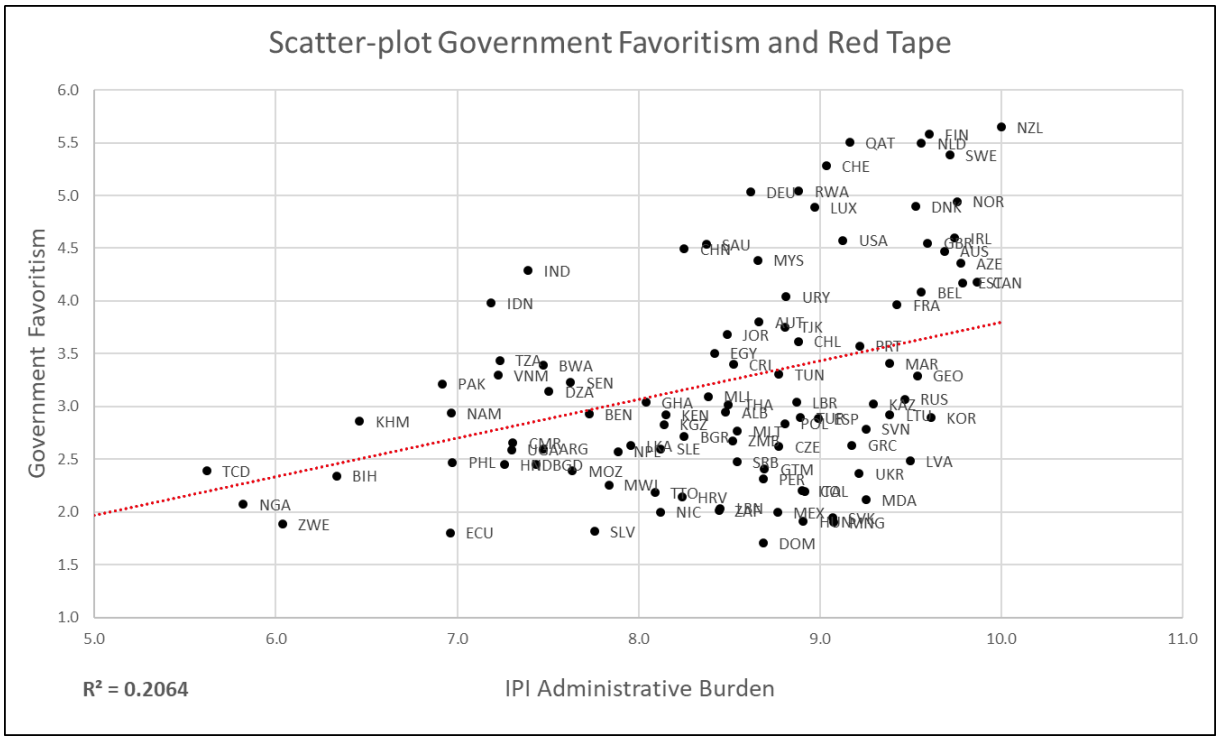
What is not clear is why governments which sustain themselves by manipulation of rents would be willing to open themselves to competition from foreigners, which might endanger domestic rents. The capacity of such situations to evolve would be very small, as for instance Leiff has warned, since governments would simply manipulate rules to allocate resources in a clientelistic way to preserve their domestic support (Leff 1964). Such allocation might become systematic and would indeed be rational under certain conditions, so to uproot it would be extremely difficult and would require long evolution. The tension between domestic extortion and international investors is an old one; Westerners living in underdeveloped countries have always been critical of corruption:

First, they have resented the payments of graft to which they are often subjected in the normal foreign direct investment and in the course of their business. Secondly, they have condemned corruption on moral grounds, and criticized it as both a cause and a characteristic of the backwardness of these countries' (Leff 1964, p.8)

Typical examples of corruption encountered by foreigners are the solicitation of bribes to obtain foreign exchange, import, export, investment or production licences or to avoid paying tax, although for international investors that sort of extortion amounts to an extra tax. Of course, certain foreign firms have obtained business because of bribes paid but the question is, 'How does that gain compare with their normal profit in a 'level playing field' environment?' If the firm is competitive the bribe is the equivalent of an extra-cost; only if the firm is not competitive does bribery become a necessary 'investment'. Although bribery might be profitable at the level of individual firms it might still create an opportunity cost for the country with the 'grasping hand' where extortion of foreign business is frequent. That in turn discourages potential foreign investment and hinders the corrupt country's ability to profit from globalization. However, economists have put forward the opposite argument that corruption is in fact the 'helping hand', the enabler of business in heavily bureaucratic systems and semi-closed economies. Most research on trade and corruption is therefore focused on trying to test such relationships; but the results are inconclusive.

For instance, certain researchers have found evidence for negative effects of corruption on Foreign Direct Investment (FDI) and the hypothesis that corruption deters foreign investment by acting as an extra tax (Ades & Di Tella 1997; Habib & Zurawicki 2002; Egger & Winner 2006). The effect varies, however, from developed economies to less developed ones and it might be that it decreases over the years (Egger & Winner 2006). Ades and di Tella found that corruption deters investment, but more so in an environment where red tape is low (Ades & Di Tella 1997). In other words, red tape is inherently detrimental to investment (see Figure 4 for an illustration).

Figure 4. The association between red tape and government favoritism



Source and legend: World Economic Forum Global Competitiveness Report (GCR) for Government Favoritism, coded 1-7 with 7 least corrupt; see https://govdata360.worldbank.org/indicators/govt.favor;
Index for Public Integrity (IPI) for Administrative Burden (red tape in opening, closing and paying business associated taxes), 1-10 with 10 least red tape, see www.integrity-index.org

Other authors found a clearly positive relationship between corruption and FDI, with corruption acting as a stimulus for FDI (Egger & Winner 2005). Others found that corruption generally hampers international trade, whereas paying bribes to customs enhances imports, particularly in importing countries with

inefficient customs services where long waiting times at the border significantly reduce international trade (de Jong & Bogmans 2011). While very different samples, controls and time intervals mean that results do not always concur on the impact of corruption on FDI, most reviews suggest that foreign investors generally avoid countries with poor institutions (Habib & Zurawicki 2002; Bénassy-Quéré et al. 2007). However, the reason for that is not only corruption but high transaction costs more generally. For instance, a World Bank paper found that both corruption and export orientation explain why a country attracts FDI or not, showing the complex linkage between corruption, trade and FDI (Singh & Jun 1995).

Our own review of the evidence relies on a general model explaining control of corruption as equilibrium between opportunities and constraints. Among the opportunities we find natural resources, administrative discretion fuelled by power inequality and discretionary regulation, and unaccountable money in the form of foreign aid. Among the most notable constraints are judicial independence, freedom of the press and civil society.

We test the major hypotheses arising from the literature on causality of corruption, with general controls based on this model, asking directly whether more globalization seems to produce more corruption or less. The estimation models presented in Table 2 introduce two indicators which are part of the Swiss 'KOF' Index of Globalization. One of them measures the degree of economic globalization that captures trade as well as financial openness, the second measures the degree of social openness based mostly on the data on information flows and use of telecommunication services (Dreher 2006)[2] The data cover the years 1996, 1998, 2000, and 2002-2010 from a sample of 113 countries. We applied two standard estimation methods for panel data analysis: the random effects model and the fixed effects model. The latter we used additionally to account for potential effects of country-specific unobserved time invariant factors such as political culture and tradition, for example. Since the results might have been affected by the inclusion of developed countries, columns (3) and (4) repeat the estimations from the previous two models considering only middle and low-income countries. Overall the models explain more than 70% of the differences in the level of control of corruption in our total data sample, most of which, however, result from cross-country rather than the time variation. The results show that power discretion and dependency on fuel-export determine poor control of corruption. By contrast, economic openness, consisting in lower trade and financial barriers, and social openness as well as press freedom positively influence control of corruption.

[2] The KOF Index of Globalization is provided by the KOF Swiss Economic Institute and was developed by (Dreher 2006). For more information see http://globalization.kof.ethz.ch/

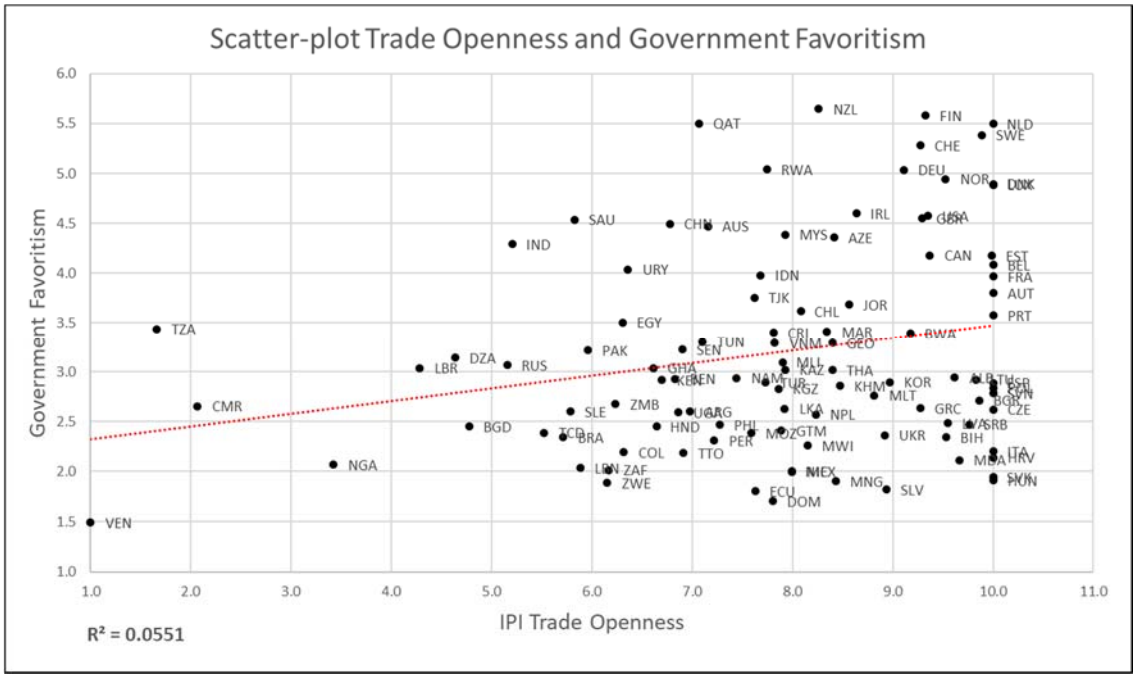
Table 2. Panel regressions with the effect of globalization on corruption

VARIABLES	All Countries		Middle and Low Income Countries	
	Random Effects	Fixed Effects	Random Effects	Fixed Effects
Physical integrity index (measures power discretion)	0.031***	0.029***	0.031***	0.033***
	(0.001)	(0.002)	(0.002)	(0.003)
Fuel exports	-0.034**	-0.025	-0.042**	-0.034*
	(0.039)	(0.151)	(0.010)	(0.072)
Freedom of the press	-0.006***	-0.004*	-0.004**	-0.003
	(0.003)	(0.097)	(0.043)	(0.271)
KOF index on economic openness	0.008***	0.007***	0.005*	0.006*
	(0.002)	(0.010)	(0.074)	(0.064)
KOF index on social openness	0.013***	0.009**	0.008**	0.008
	(0.000)	(0.046)	(0.018)	(0.111)
Rural population	-0.352***	-0.218	-0.035	-0.181
	(0.002)	(0.562)	(0.764)	(0.695)
Constant	0.542	0.142	-0.641	-0.196
	(0.326)	(0.921)	(0.282)	(0.916)
Observations	1051	1051	760	760
Countries	113	113	79	79
R-squared (overall)	0.707	0.706	0.358	0.314
R-squared (within)	0.094	0.097	0.088	0.091

Legend: p-values in parentheses: * p<0.1, **p<0.05, *** p<0.01; Heteroskedasticity and autocorrelation consistent standard errors are reported. All regressions include year dummies.

Drawing on Table 2 and other similar models we included trade openness (time to import-export) and red tape (time to open and close a business, as well as pay tax), two elements highly correlated with control of corruption (Mungiu-Pippidi & Dadašov 2016) in the Index of Public Integrity (IPI) for 110 countries. Those parameters reflect the countries' institutional capacity to control corruption (Mungiu-Pippidi, Ramin Dadasov, et al. 2017). The significant relationship between trade openness and control of corruption is illustrated in their bivariate association in Figure 5, which shows that the bulk of countries conform to the rule that hindrance of trade sustains corruption.

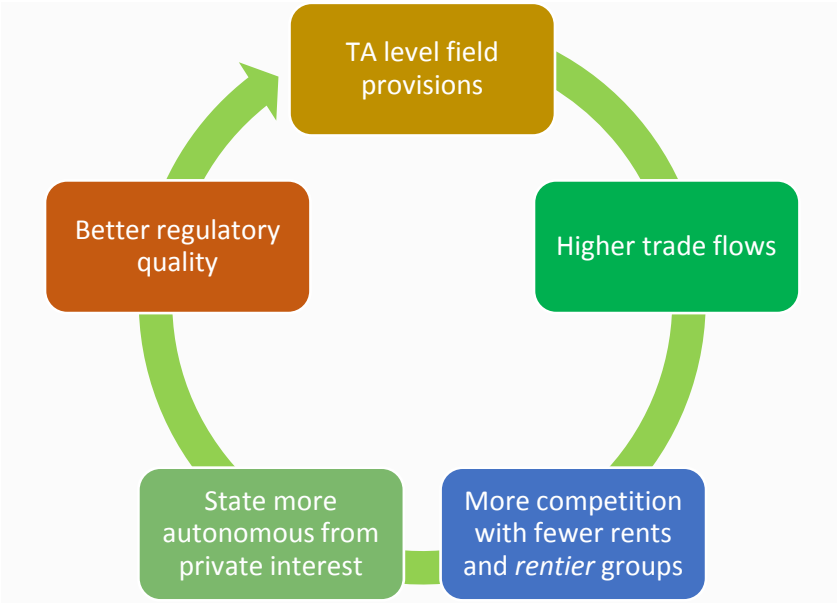
Figure 5. The association between trade openness and control of corruption



Source and legend: GCR Government favoritism (1-7) and IPI Trade Openness (1-10) with 10 most open of non-tariff barriers.

The close relationship between red tape and corruption explains why it is difficult to change corruption by regulation –– it is because corrupt elites shape regulations in order to maximize their own rents. A solution to the vicious circle can hardly be endogenous, so it is better that incentives for change come from outside. Foreign direct investment and trade are a hope in this sense, as research has shown that although not always, private money is usually more sensitive to corruption than is public money. In other words, while foreign aid does not penalize recipient countries for their corruption, private investors from clean countries frequently do (Alesina & Weder 2002). Poor countries need both international aid and foreign investment, which might together provide the exogenous impetus which could stimulate competition and begin the unravelling of the vicious structure of an economy based on privileged connections. An illustration of how adoption of a trade agreement which levels the playing field between domestic and foreign investors (both tariffs and red tape) can change the vicious circle shown at Figure 3 into a virtuous one as at Figure 6. How would it work? It would weaken domestic *rentier* companies and show governments that a gradual loss of rents can be amply compensated by new resources brought in by economic growth led by foreign investment. As can be seen in Figure 7, government favouritism and economic growth do not go together well. If a government accepted trade liberalization, its loss of very primitive rents in the form of favourite companies making kickbacks to officials or the governing party might easily be offset by gains derived from growth. Such gains would bring income to the budget and could help ameliorate social unrest associated with systematic corruption. However, experience shows that rents are not destroyed overnight, for what tends to happen is gradual transformation which allows favourite companies to become more competitive, as the mostly successful transformations of South Korea and Taiwan show (You 2017).

Figure 6. The virtuous circle based on an international trade agreement as entry point



We expect therefore that international trade agreements will help in the control of corruption in two ways:

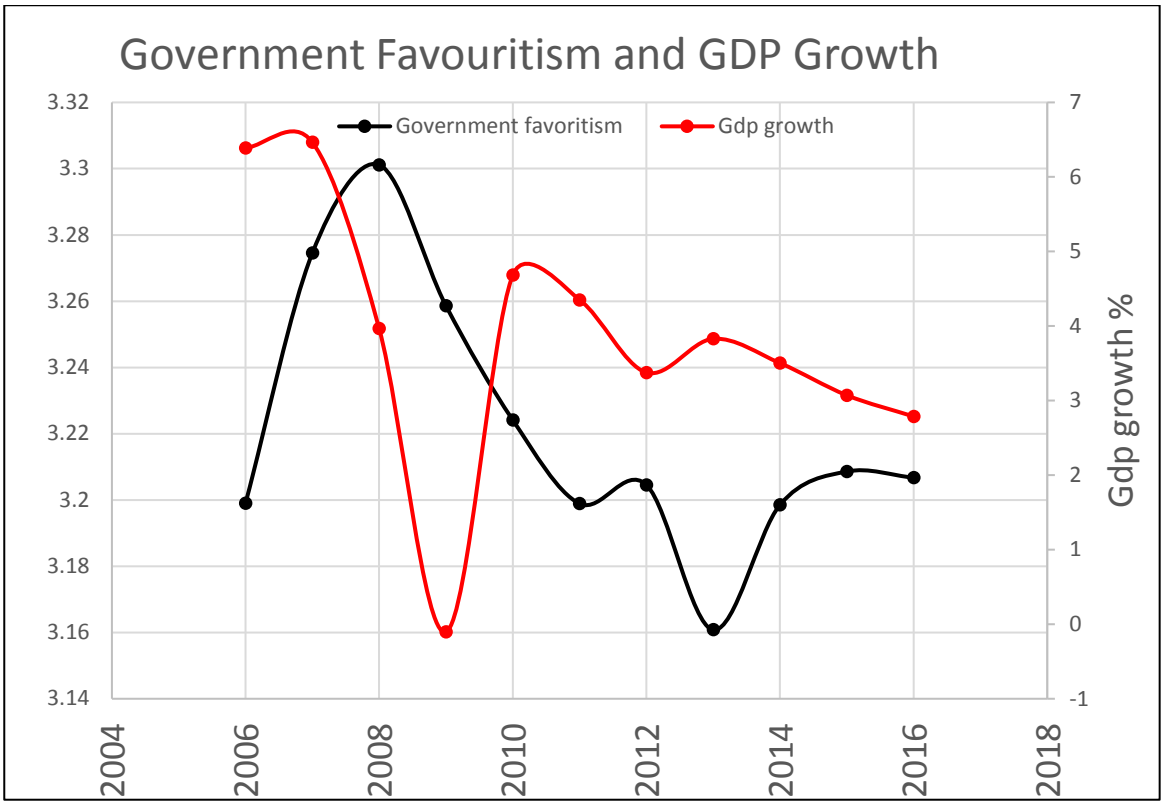
1. by increasing competition directly, due to removal of tariffs thereby diminishing the power of *rentier* companies which influence regulation in their favour and
2. by contributing to a fairer business environment through transparency provisions; in other words by reducing non-tariff barriers, generally used as an advantage to domestically connected companies.

Seeing the proliferation of trade agreements and the fact that certain corruption measurements are available to us –– although most are based on perception –– for very recent times researchers have started gathering direct evidence. Recent studies highlight that improving transparency in trade agreements can result in effective gains for trade[3].

Two studies in particular are of interest. One is by the OECD and based on multiple regional trade agreements and their transparency provisions, the other is based on the experience of an Asia-Pacific Economic Co-operation (APEC) regional treaty seen as best practice. The OECD study found a positive empirical relationship between transparency obligations and the level of trade, with the marginal elasticity of a transparency provision in Regional Trade Agreements (RTAs) found to be over 1%. They found each additional transparency commitment negotiated in an RTA to be associated with an increase in bilateral trade exceeding 1%; they therefore argue that considering that comprehensive RTAs typically contain on average a dozen such commitments, the expected increase in intra-regional trade could be more than 5% (Lejárraga & Shepherd 2013).

[3] "A study of the Asia-Pacific Economic Cooperation (APEC) countries, for instance, found that improving trade-related transparency could raise inter-APEC trade by approximately US$148 billion or 7.5 per cent of baseline trade in the region (Helble, Shepherd & Wilson 2009). Other studies estimate that including transparency commitments in regional trade deals could generate an increase in bilateral trade of over 1 per cent (Lejárraga & Shepherd 2013)." (Jenkins 2017, p.4)

Figure 7. Illustration of the negative relation between government favouritism and growth.



Source: GCR Government favouritism 1-7, with 7 as the least corruption. Averaged across 110 countries.

The APEC-based study shows that gains from improving transparency in APEC are substantial in relation to other reform options, being at least $148 billion, or 7.5% of baseline 2004 trade in APEC. According to Helble et al:

'Export gains are generally widely spread across the region. These estimates are only for intra-APEC trade; when considering trade with members outside of the region, the gains from increased transparency would be significantly larger. This is particularly true if reforms are undertaken on a non-discriminatory basis, anchored in open regionalism. Quantitative benchmarking suggests that future transparency priorities for APEC could include a specific focus on action to address unofficial payments and "hidden" trade barriers' (Helble et al. 2007).

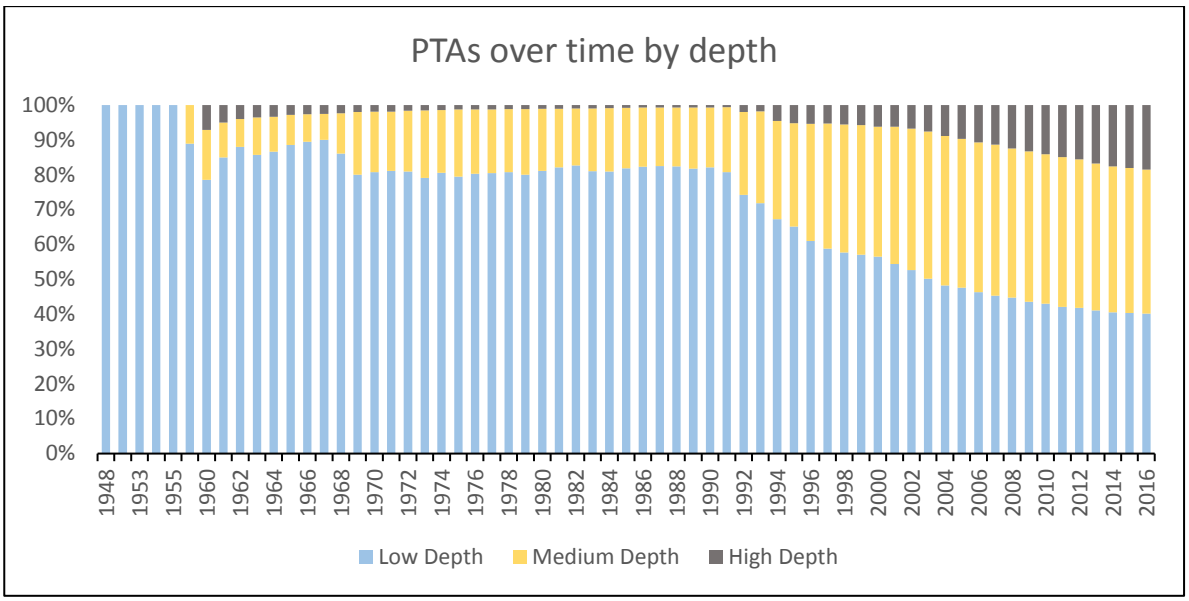
Although such results provide grounds for optimism, two limitations apply which must be fully understood. First, the OECD study found that countries with more democratic institutions and those with higher standards of governance are already more likely to include comprehensive coverage of transparency commitments, such as a fully-fledged transparency chapter in their RTA. Both effects are statistically significant at the 1% level (Lejárraga & Shepherd 2013) suggesting that the vicious circle might continue unaffected in the more difficult cases. Second, both studies look at the effect on trade inflows of transparency provisions in trade agreements, but do not test any direct effect of trade on corruption. We have no ex post evaluation research yet to show whether or not corruption has been reduced anywhere after the adoption of international trade agreements. Corruption has been largely stagnant in the world for the past two decades, so the association that we show between trade openness and corruption is largely of a structural nature. We can therefore be certain only that corruption and red tape are barriers to competition. We believe that in theory the opposite holds true too, but excepting the few examples offered in our edited book of collected success stories we can present no quantitative evidence for that view, for the simple reason that we have only those few successful cases at the global level (Mungiu-Pippidi & Johnston 2017).

2 Trade agreements' transparency and anticorruption provisions

The second section of this report asks, 'What is current practice on good governance provisions in international trade agreements? What is the most recent practice on free trade agreements and anticorruption provisions that should be considered by the EU when designing its own strategy for the future? To answer those questions, we have divided them into one part on the provisions themselves and a second part on the enforcement mechanism of such stipulations and the practice developed so far.

For over half a century non-discrimination and transparency have been basic principles of agreements governing world trade, with the goal of ensuring a level playing field for foreign businesses. That goal has been translated into ever-expanding provisions, through the various multilateral World Trade Organization (WTO) deals, which have persistently sought to open trade, particularly in the areas of customs and public procurement but also, at a later stage, though bilateral and regional agreements (Jenkins 2017). Dedicated anti-corruption provisions are of more recent date, although their goal of equal treatment of businesses regardless of country of origin remains the same. As WTO membership has evolved to become almost universal with over 164 members by mid-2017 and approximately twenty others still in the process of accession, the original homogeneity across members where quality of national governance is concerned has given way to great variety. Reaching consensus on a global and multilateral level has become increasingly difficult as certain countries resist 'deep provisions' into new policy areas they feel restrict their sovereignty (Lamy 2015), such as the 'Singapore issues'. The EU was particularly keen on three of the 'Singapore issues', namely investment, competition and transparency in government procurement, but none of them found their way onto the Doha Development Agenda.

Figure 8. The growth of PTAs in force in the world economy



Source: Own calculations using DESTA database

Consequently, deeper integration was sought through smaller groups and 'coalitions of the willing' rather than multilaterally, which explains why RTAs between states with similar interests and values have managed to go into more depth (see Figure 8). Furthermore, the expansion of trade across the most diverse governance regimes has meant that non-tariff measures (NTMs) began to weigh considerably, so needing an approach to achieve a degree of regulatory coherence across jurisdictions (OECD 2017). That then led to the common tendency of modern RTAs to address regulatory areas such as transparency and anti-corruption provisions alongside environmental and labour standards (Jenkins 2017), with more than 40

per cent of RTAs concluded since the millennium incorporating anti-corruption and anti-bribery commitments, which have no precedent under the WTO regime (Lejárraga 2014).

The WTO and anticorruption

There are no explicit provisions in WTO treaties to condemn corruption in trade. However, alongside tariff reduction the elimination of quantitative restrictions and other non-tariff barriers to trade, and non-discriminatory treatment of traded goods and services have always been the primary aims of the various WTO agreements. A certain number of corruption deterrence instruments have always been available to WTO Members in the three treaties regulating the procedures governing certain stages or types of trade, the General Agreement on Tariffs and Trade (GATT 1994), the General Agreement on Trade in Services (GATS), and to a lesser extent in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). A summary of legal provisions is stated in Table 3, being completed by the GPA, an agreement on procurement signed by a smaller group of members, although one which has been expanding recently. All those agreements aim to reduce administrative discretion and, under the rubric of 'transparency', to provide for members to ensure that their responsible officials will be unable to hide behind secretive processes to grant government contracts or licenses on the basis of particularistic considerations, whether protectionist or corrupt (Schefer 2009). The provision that losing bidders may challenge decisions is intended to solidify the requirements –– ensuring that post-hoc review can remedy failures in the deterrent effect of such rules (Schefer 2009).

Table 3. WTO traditional good governance provisions

Good governance requirement	GATT 1994	GATS	TRIPS Agreement
Procedural fairness (due legal process and access to courts)	ART X: 3 (b)	ART VI:2	ART 41:4
Reasonable, uniform, objective and impartial administration of measures	ART X: 3 (a)	ART VI:1	
Transparency, publication and notification requirements	ART X:1, X:2	ART III:1	ART 63.1

The Agreement on Government Procurement (GPA) is the most direct instrument to counter corruption among WTO Member governments. A multilateral treaty, the GPA applies only to those Members which have accepted its provisions. The GPA has advanced slowly, being accepted at first only by a small group of developed and non-corrupt countries; but it has recently seen great success. Of 22 WTO members covered at the beginning of 1996 it has now reached 47, with more applicants in the pipeline. The revised GPA and continuing gradual broadening of its membership means the annual addition of an estimated $80-100 billion to the value of the parties' market access commitments under the Agreement. With the additional coverage the Agreement now covers an estimated annual total of $1.7 trillion in procurements (Anderson & Müller 2017).

The revised GPA of 2012 builds on two previous versions of the Agreement, the initial one forged in the course of the Tokyo Round of multilateral trade negotiations and a second negotiated in parallel to the Uruguay Round. Continuous improvement of the Agreement over time has been prompted by earlier OECD reports of extensive patterns of discrimination in its members' governments' procurement activities. That realisation led to the conclusion that general non-discrimination rules (as in the GATT and GATS)

would not be sufficient by themselves to end discriminatory practices in the government procurement field; rather, a more subject-specific agreement would be required, to embody significant procedural and transparency rules too (Arrowsmith & Anderson 2011).

The Preamble to the GPA sets out the three main goals of the parties regarding procurement. First, GPA opens the market for government purchases to suppliers from all party territories. A second, related goal of the GPA is non-discrimination in the procurement process. The parties 'recognize' that government procurement laws should not and should not aim to discriminate in favour of national suppliers nor to the advantage of one country's suppliers over those of another.[4] The third goal of the Government Procurement Agreement is to enhance the 'transparency of laws, regulations, procedures and practices regarding government procurement' and to provide for 'fair' procedures to ensure that the rules on procurement are effective. Recently, the introduction of a monitoring mechanism was proposed and innovative proposals on e-procurement are included.

Furthermore and in parallel, WTO members concluded negotiations at the 2013 Bali Ministerial Conference on the landmark Trade Facilitation Agreement (TFA), which went into force on 22 February 2017 following its ratification by two-thirds of WTO members. The TFA contains provisions for expediting the movement, release and clearance of goods, including goods in transit. The TFA was explicitly driven by the need to reduce red tape because according to the WTO bureaucratic delays and excessive administration are a burden on traders wishing to move goods across borders. Simplification, modernization and harmonization of export and import processes, together amounting to trade facilitation, has therefore emerged as an important subject for the world trading system.[5] Full implementation of the TFA is expected to slash members' trade costs by an average of 14.3 per cent, with developing countries having the most to gain according to a 2015 study carried out by WTO economists (WTO 2015). The TFA is expected to reduce too, by over a day and a half, the time needed to import goods and by almost two days the time needed to export goods, representing a reduction in the current averages of 47 per cent and 91 per cent respectively (WTO 2015).

Despite such positive developments voices are still raised to ask the WTO to address directly matters of bribery and corruption, either by passing provisions that outlaw bribery explicitly or by requiring WTO Member States to sign a declaration against corruption (Schefer 2009).

Other scholars argue that such proposals are misguided. Their view is that trying to use the WTO system to combat corruption would be superfluous, ineffective and expensive, particularly given the inadequacy of the Dispute Settlement Body (DSB, see WTO 1) to deal with a problem like bribery (van der Ven 2014). Such scholars worry that attempts to use the WTO like that would only render it the more ineffectual in its core mission areas without bringing added value to international anticorruption.

Regional trade agreements

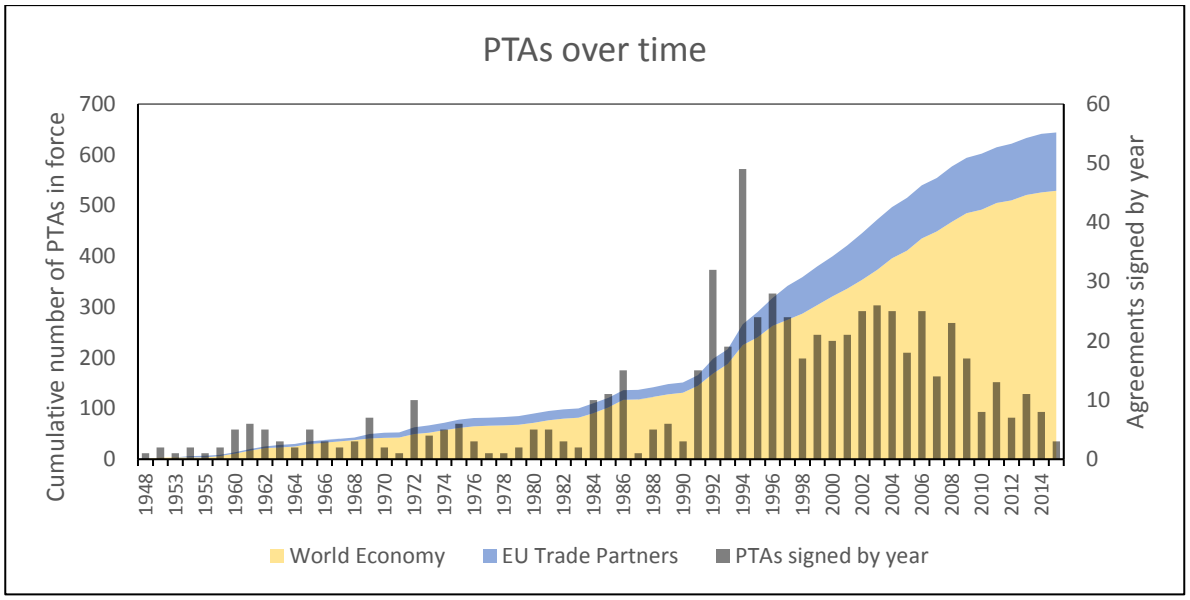
Because such limitations exist within the WTO, bilateral and regional trade agreements supplemented their good governance provisions and incorporated explicit anti-corruption provisions into their agreements. The RTAs have grown over time both in absolute numbers (see Figure 9) and in depth, particularly among the EU's trade partners (see Figure 10). Over the last two decades it has become common for a number of states to enshrine the principle of transparency in the preambles to their bilateral and regional trade

[4] See for instance, GPA Art. VII.1 (tendering procedures are to be applied in a "non-discriminatory manner"); GPA Art. VIII(c) (rules on qualification of suppliers are not to be applied "in order to keep suppliers of other Parties off a suppliers' list); GPA Art. X.1 (procurement bodies are to select tenderers non-discriminatorily; challenge procedures shall be open to all suppliers on a non-discriminatory basis in). GPA Art. XX.2 , (WTO 3)
[5] See WTO 2.

agreements. Furthermore, certain trade agreements have begun to include a 'horizontal' chapter on transparency which extends transparency obligations to all policy areas of the trade agreement in question (Jenkins 2017). For instance, it has become standard practice for US trade agreements to include specific anti-corruption and anti-bribery commitments into cross-cutting transparency chapters (Lejárraga 2013). At least until very recently US anticorruption in international trade was similarly enhanced by the increased implementation of the FCPA and the inclusion of references in its texts to anti-bribery laws.

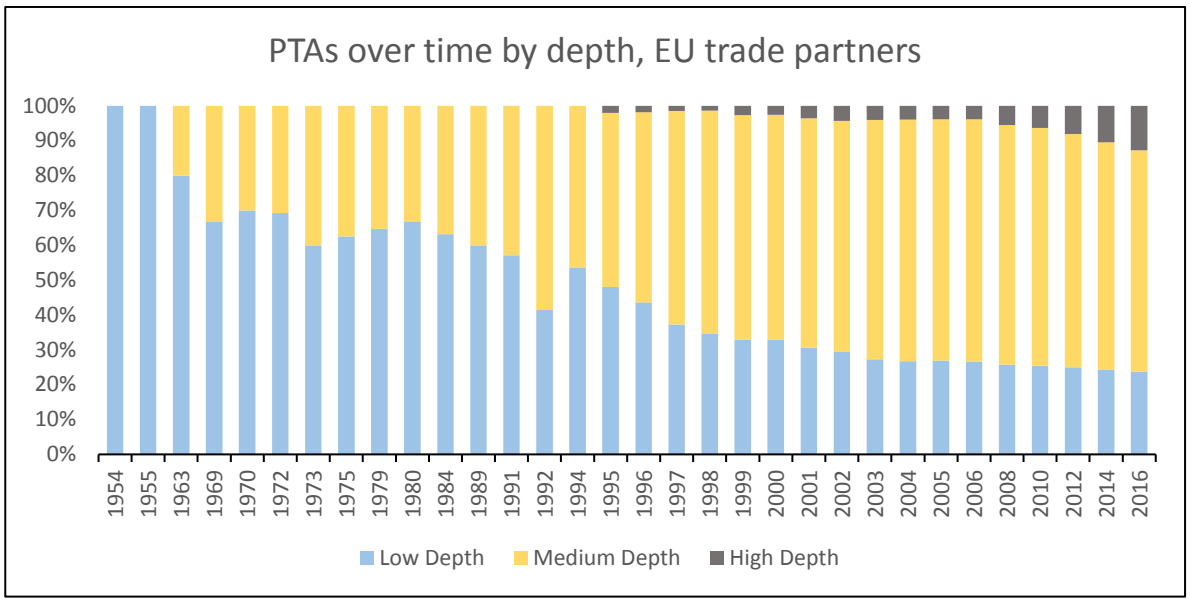
The evolution of RTAs can be traced by the Design of Trade Agreements (DESTA) dataset, which systematically collects data on various types of preferential trade agreements (PTAs). DESTA includes a sample of 790 agreements for a time span ranging from 1948 to 2016. Figure 10 shows how the depth of RTAs has gradually increased for the EU's trading partners.

Figure 9. The development of RTA's in time



Source: Own calculations using DESTA database

Figure 10. The deepening of PTAs, EU trade partners



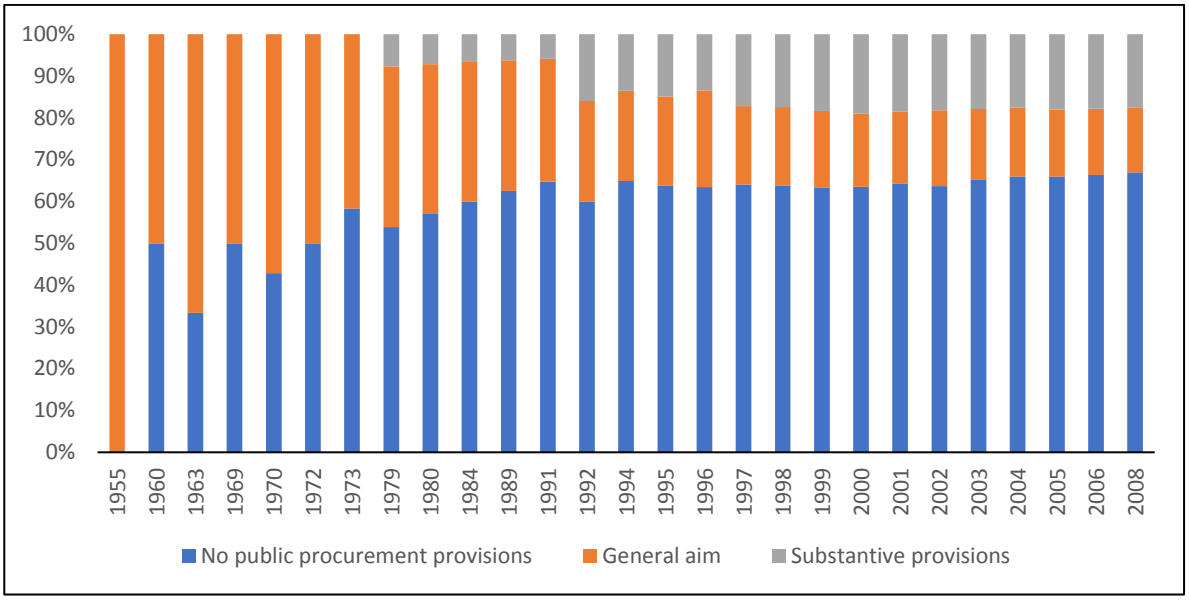
Source: Own calculations using DESTA database

The Procurement and Transparency section in the DESTA dataset includes the following characteristics of PTAs:

1. Does the agreement contain substantive provisions on public procurement?
2. Does the agreement guarantee national treatment with respect to public procurement?
3. Does the chapter on public procurement include a transparency pro- vision?
4. Which entities are covered by the public procurement chapter?
5. What is the scope of the public procurement provisions in the agreement?
6. Does the agreement contain a reference to the WTO/GATT procurement agreements?

While transparency provisions in more general terms are widespread, the most specific provisions, the ones on procurement, have grown slowly over the years and more as general aims than substantive provisions (see Figure 11).

Figure 11. Cumulative number of PTAs over time by procurement provisions, EU trade partners



Source: own calculation on the basis of DESTA

Recent RTAs better illustrate current approaches.

The **DR-CAFTA** includes seven signatories; the United States, Costa Rica, The Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua. It introduces procedural provisions for transparency in a specific section (Article 18, Section A) such as the necessity for each state party promptly to publish or make available 'laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement'. Other transparency provisions are dispersed among the agreement's thematic sections (e.g. Section F: Agriculture, Article 3.13).

The anti-corruption provisions of DR-CAFTA (Office of the US Trade Representative.2011) appear in the same article as those on transparency (Article 18, Section B). Article 18.7 includes the state parties' statement of principle to eliminate bribery and corruption in international trade and investment. The following Article 18.8(1) adduces a series of corruption-related situations for which 'Each Party shall adopt or maintain the necessary legislative or other measures to establish that it is a criminal offense under its law, in matters affecting international trade or investment'. However, Article 18.8(2) leaves open which procedures and penalties state parties should adopt to enforce the criminal measures predicated in the first paragraph, thereby weakening the provision.

On the other hand, Article 18.8(3) aims to guarantee that enterprises be sanctioned for conduct related to corruption even if not criminal, and Article 18.8(4) encourages protection for whistleblowers, deemed by

Transparency International (2017) as best practice to guarantee the enforcement of anti-corruption provisions in trade agreements.

The **EU-Canada Comprehensive Economic and Trade Agreement (CETA) too**, which came into force provisionally in September 2017 includes an independent section on transparency (Chapter Twenty-Seven), related mostly to the publication of information and to consultation procedures. In addition there are provisions on transparency among the thematic sections of the agreement.

CETA contains no autonomous chapter of anti-corruption provisions, making only brief mention of the impossibility of investors' submitting claims for the resolution of investment disputes when such investment is made corruptly or by other unlawful action (Article 8.18) and on the obligation of governments to conduct procurement procedures in a manner that will prevent corrupt practices (Article 19.4(4c)). However, the section of the agreement on procurement, dealing with Transparency of procurement information, asks for electronic publication of the whole procurement process from tender announcement to award of contract and is very good and specific. If failure to implement can be a ground for investors to dispute with a government which has not fulfilled the provisions of the agreement, such a chapter is more important than any separate anticorruption provision. Ideally, agreement with a country more corrupt than Canada would be completed with a specific mechanism where failure to comply could be prevented, indicated and resolved beforehand by some mediation body, rather than merely being dealt with afterwards through a procedure for dispute settlement (European Commission 2016).

The **Comprehensive and Progressive Agreement for Trans-Pacific Partnership agreement**, (TPP/CPTPP) which is still under negotiation among Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore, Viet Nam and New Zealand, was primed as a model for transparency and anti-corruption provisions, especially in its Chapter 26 referring to the United Nations Convention against Corruption (UNCAC) and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, as well as for extensively including measures to prevent and combat corruption. Its fate is not yet settled but the future seems less promising than it once did, including where anticorruption is concerned(APEC 2012).

TPP anti-corruption provisions include a mention of the criminalization of corruption-related conduct (Article 26.7(1)). Nonetheless, the provisions of TPP are more detailed, for example in reinforcing the liability of legal professionals for such conduct (Article 26.7(3)) and the necessity to promote integrity among public officials (Article 26.8). Furthermore, the TPP agreement reveals concern with enforcement mechanisms specifically designed for the implementation of such anti-corruption provisions (Article 26.9) and is innovative among RTAs in that it would stimulate engagement of the private sector and civil society in the fight against corruption (Article 26.10).

In more detail TTP Article 26.7 requires TPP signatories to maintain legislation to punish bribery and other unfair advantages given to public officials, similar to the sort of behaviour punished under legislation like the US Foreign Corrupt Practices Act (FCPA) or the UK Bribery Act. The TPP definition of 'public official' is broad and includes unpaid and temporary government workers, any 'person who performs a public function' and any other person defined as a public official in that country's domestic law. By contrast, the FCPA defines public officials as those who are 'government officer[s] or employee[s]' or 'acting in an official capacity for or on behalf of' a government. Article 26.7 also requires countries to have adopted measures protecting whistleblowers and prohibiting corruption through bookkeeping and accounting (Beach 2015). Chapter 26 also 'encourage[s] observance' of the APEC Anti-Corruption Code of Conduct for Business, which prohibits bribery of officials and asks corporations to implement programmes to combat bribery. The same Chapter recognizes and explicitly states that it does not conflict with a number existing anticorruption regimes, including UNCAC. In fact it asks that all signatories be members of UNCAC and of the Inter-American Convention Against Corruption, although only New Zealand and Japan, both at the top of good governance charts, are not members. The TPP does not mention the OECD Anti-Bribery

Convention even though a majority of prospective TPP signatories are members of it, but it has created a TPP dispute settlement system which can be invoked to enforce the commitments of the Chapter when a party has 'failed to carry out an obligation' or acted in a way 'inconsistent with an obligation'. However, parties can choose instead to address problems through the less formal TPP consultation process and may not use the dispute settlement process to challenge another party's alleged inadequate *enforcement* of its anticorruption law –– if such law exists but is not being implemented. In that regard the failure of the TTIP, considered the most advanced practice where anticorruption is concerned (might be regretted even more for the loss of its enforcement capacities than for its extensive provisions (APEC 2012).

The next important agreement worth mentioning in this context is the **Cotonou Agreement,** a broader development partnership between the EU and 79 members of the African, Caribbean and Pacific group of states (ACP countries). That agreement's origins are in the various foreign trade agreements with Europe's former colonies, which for many decades allowed them preferential access to the European market. However, in 2000 the WTO declared it 'one-sided market opening' and therefore unlawful. In response the EU concluded the Cotonou Agreement in 2007 and since then European countries have been in negotiations with African countries over corresponding free trade agreements. Because of strong reservations expressed by civil society organisations and states, by 2016 only one had been signed, for sub-Saharan Africa, (Barbière 2016).

Because the Cotonou Agreement is due to expire in 2020 EU member states have already expressed their positions during recent consultations and the Commission has advanced a proposal to the Council to be discussed and adopted in 2018. Good governance, which had been strongly provisioned in the Cotonou agreement has remained a priority, but the advance of other topics on the agenda, in particular migration from Africa is also to be noted (Gotev 2017).

The Cotonou agreement includes general transparency provisions in the same framework as the anti-corruption ones, within institutional development, capacity building and regional cooperation sections, along with sparsely set specific provisions (e.g. Article 67(7): transparency in setting the eligibility of economic operators to implement support programmes).

The anti-corruption provisions in the Cotonou agreement (European Commission 2000) are spread over Article 9(3) under good governance considerations, Article 29 (1b) on regional cooperation and integration and in Article 33(2) about institutional development and capacity building. Article 97 meanwhile lays down a specific consultation procedure and measures to be taken in cases of corruption.

According to Article 97 'serious cases of corruption should give rise to consultations between the Parties' and if 'the consultations do not lead to a solution acceptable to both Parties or if consultation is refused, the Parties shall take the appropriate measures'. In relation to 'appropriate measures' reference can be made to the dispute settlement mechanisms established in Article 98 of the same agreement, which predicts the use of a Council of Ministers, with arbitration as a last resource.

Although the Cotonou agreement empowers state parties to sanction corruption cases, that provision has been used only once, against Liberia in 2002, with subsequent unsuccessful attempts against other states. That leads to the conclusion that the effect of the agreement, although very strong on paper, has been minimal in practice in fighting corruption (Broberg 2010). The agreement in fact became so controversial after the EU began to put pressure on the African countries because they had not signed trade deals after many years of unilateral concessions, that further separate pressure on governance would not have been practicable, especially if separated from aid policy. Unlike Europe the United States has trade-related development aid schemes such as the African Growth and Opportunity Act, which link preferential market access for certain low-income countries to improvements in governance, such as the implementation of the OECD Anti-Bribery Convention. The US has also been tying Millennium Challenge funding to World

Bank governance indicators, in particular that of corruption, but with mixed results (Mungiu-Pippidi 2015, chap.7).

Certain experts argue that trade agreements should include as standard provisions stipulating that countries may debar firms found guilty of corruption from competing for public contracts in either the home or host country. That is the model as practised by the World Bank, for instance and found in some American treaties, for instance in the final TPP text, which stated that countries 'may include' procedures which would render ineligible for future contracts suppliers that have engaged in fraud (Jenkins 2017).

Anti-bribery and anticorruption conventions

The United States, with the Foreign Corrupt Practices Act (FCPA) of 1977, was the first country to declare it a crime for a domestic firm to bribe foreign public officials. The FCPA was later amended after the OECD's anti-bribery convention was adopted, when implementation too was increased. The US Department of Justice and the Securities Exchange Commission are the enforcing agents, and as table 4 shows they both have good records.

On 15 February 1999 the OECD Anti-Bribery Convention came into force. It required signatory countries to adopt similar legislation and to date 43 countries have signed the Convention. Cases of cross-border corruption have been alleged (see Table 4). 443 individuals and 158 entities have been sanctioned in criminal proceedings for foreign bribery since the Convention came into force up to the end of 2016. At least 125 of the sanctioned individuals were sentenced to prison terms for foreign bribery, with 53 individuals and 95 entities sanctioned in administrative and civil proceedings for foreign bribery in territory of four Parties. An additional 121 individuals and 235 entities have been sanctioned in criminal, administrative and civil cases for other offences related to foreign bribery, such as money laundering or false accounting, in 8 Parties (OECD 2016). A monitoring mechanism exists, based on peer –review; but of course there are no sanctions (OECD n.d.).

So far the impact has been minimal, as only Germany, the UK and US actually implement the convention. As an example of how full implementation would look it is enough to read the FPCA literature, which tends to indicate that more bribery takes place where there is more investment; in other words, no cases in such areas means no implementation, not no corruption. Similarly, one may consult World Bank research based on the Business Environment and Enterprise Performance Survey[6] conducted by the World Bank and the EBRD. The World Bank researchers found that foreign firms are as likely as domestic ones to make illicit payments when headquartered in a corrupt country (Hellman et al. 2003). Bribery payments as a share of annual revenues on average are also very similar for foreign and domestic firms, although differences were found in the forms of corruption, with foreign firms seeking procurement contracts observed to be more likely to offer bribes to prevent closure of that market against them, a feature lacking from domestic connections.

The two UN conventions relevant to us here, UNCAC and UNCTOC (see Table 4) addressing corruption and organized crime respectively, and the Council of Europe Group of States Against Corruption (GRECO) all address matters of corruption control with the focus on procedures. Countries are in effect told to create anticorruption agencies and adopt legislation, although a more recent shift towards implementation is noticeable. The OECD anti-bribery convention focuses more on enforcement but that too is based on peer review and lacks sanctions. GRECO and OECD evaluation reports are public by default, with UNCAC reports available only case-by-case. Before the policy shift of Donald Trump's presidency the American experience used to be seen as best practice concerning both anticorruption regulation and enforcement. The American approach consisted of adherence to and implementation of international conventions on AC and bribery, national legislation defining both active and passive bribery as a criminal offence, sanctions

[6] see http://data.worldbank.org/data-catalog/BEEPS

and procedures to enforce criminal penalties and the use of non-criminal sanctions like fines or debarment in jurisdictions where firms were not obliged by criminal responsibility. The US now includes in all its trade agreements 'GPA equivalent' measures such as a provision to ensure integrity in government procurement practices. A US trade deal with Korea incorporated mandatory whistleblower protection measures, while other recent US trade agreements with Colombia, with Peru and with Panama have introduced measures providing for non-criminal sanctions for enterprises not subject to criminal penalties (Jenkins 2017).

Table 4. Members and enforcement for main AC international treaties

LEGAL ACT	Adoption year	Members to-date	Number sanctions
FPCA	1977, amended 1998	1, but wide jurisdiction	204 SEC, 312 DOJ (Stanford Law School n.d.)
OECD anti-bribery convention http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm	1997	43	58 entities sentenced; 500 investigations under way in 29 Parties.
EU anticorruption convention **Convention against corruption involving officials** http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al33027	1997	28	
UNCAC, United Nations Convention against Corruption https://www.unodc.org/unodc/en/corruption/uncac.html	2005	183 (140)	Peer review mechanism with no sanctions
United Nations Convention against Transnational Organized Crime and the Protocols Thereto (UNCTOC) http://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html	2000	188 (144)	Peer review mechanism with no sanctions
WTO- GPA	1996, revised last 2014	19 parties of 47 WTO MS,	WTO Committee on Government Procurement
WTO- TFA	2017	10 would be 166	WTO's binding dispute settlement system

Practice and enforcement

The variety of approaches described here seems much less when practice is considered. Comparing approaches in international investment and trade law on three aspects of good governance, procedural fairness, transparency, and reasonable administration of measures, researchers found the standards adopted by the two regimes to be remarkably similar because of the common goal of wishing to protect the individual investors and the common approach to due legal process (Mitchell et al. 2016).

However, international anticorruption enforcement varies greatly both in means and outcomes. Table 4 offers a synthetic view.

The **WTO** has a dispute settlement system (DSB) which functions reasonably well in trade disputes. DSB allows Member States to sue only other Member States; individuals and firms may not bring WTO complaints directly, nor can they be directly sanctioned. The system is therefore inadequate to deal with

international bribery but can and does address other significant matters, particularly concerning equal treatment.

GPA asks all participating countries to open up their markets and establish independent 'domestic review systems', which means mechanisms to review complaints to which both foreign and domestic suppliers may apply for correction of procedural errors. GPA also establishes additional external oversight by making national procurement systems subject to scrutiny by the WTO Committee on Government Procurement, and through the WTO's binding dispute settlement system. There is the explicit hope that foreign suppliers from other, potentially less corrupt GPA Parties are likely to feel stronger incentives and fewer inhibitions than domestic players in reporting collusion or corruption, both of which are likely to be major obstacles to their participation in procurement markets (Anderson & Müller 2017). The WTO is currently engaging in various partnerships and horizontal alliances, for instance with the European Bank for Reconstruction and Development (EBRD), to help enforce GPA.

Regional trade agreements are enforced through both bilateral Investor-state dispute settlements and bilateral Government-government dispute settlements. Many trade agreements like the North American Free Trade Agreement (NAFTA), TPP and the EU-Canada CETA offer foreign traders and investors certain protections similar to those provided by bilateral investment treaties. They allow investors to seek restitution outside the host state's judicial system, where that state has not complied with its treaty obligations subject to the government-government dispute settlement (GGDS) mechanism. Transparency International (2017) highlights the necessity to implement RTAs at national level. What happens, however, if a country lacks the proper institutions for the desired implementation; for instance, judicial independence? Mechanisms might exist in trade agreements but have no impact if further development of enforcement structures is not pursued. But as the next section of this report will show, newly included references to anticorruption conventions are good news only as far as the simple ratification of those conventions goes, for such conventions can have almost no effect, particularly in countries with high corruption (membership is nearly universal, certain developed countries excepted).

International arbitration actually applies a complex system of legal principles which balance investor security against the sovereign autonomy of host states. Over time, investor-state arbitration has proved to be an emerging space for enforcement of international norms—including transparency and anticorruption (Young 2016b). The practice shifted from corruption being at first a defence offered by states seeking to avoid liability towards companies s corrupt deals are generally excepted from contract protection in trade agreements (see World Duty Free v Kenya and Plama Consortium v Bulgaria). However, more recently corruption has been used as a reason for action by investors claiming unfair treatment (see Yukos v Russian Federation). Over the past ten years, however, an increasing number of tribunals have been evaluating evidence of corruption at the jurisdictional stage of arbitration rather than at the merits stage, meaning that in practice they rather decline such cases. The Yukos case has already been reverted in the Hague, with the Court accepting the Russian defence that international norms and Russian regulations did not coincide (Strik et al. 2016).

Rather unconventionally the corruption cases with the heaviest impact come by way of the FCPA and civil lawsuits. As seen in Table 1 and 4, the FPCA can be a formidable instrument and the recent practice of seeking claims on behalf of other countries promises more cooperation in future. Researchers found that FCPA enforcement increases with US investment in a country and that the presence of bilateral mechanisms for cooperation in regulation and enforcement between the US and the given host country is strongly associated with increased FCPA enforcement in the host country (McLean 2012; Moyer et al. 2017). The FPCA provides the means to intervene in far more situations than appear at first sight for legislation which has only one party, the US itself. In fact, as the FIFA case showed among others, the FCPA jurisdiction can extend very far even if only minimal American connection exists such as FIFA's use of an American bank account, or the existence of an American shareholder to any part of it.

The very recent Petrobras case shows another route to enforcement, with international investors seeking redress under US civil law. Hundreds of holders of Petrobras stock have begun to file 'derivative suits' through which shareholders can sue a company's directors and officers for breaching their fiduciary duties to that company. For instance, in *In Re Petrobras Securities Litigation* a group of shareholders allege that Petrobras issued 'materially false and misleading' financial statements and 'false and misleading statements regarding the integrity of its management and the effectiveness of its financial controls'. They have done so because Petrobras has publicly praised its Code of Ethics and corruption prevention programme in order to attract investment. The claimants allege that as a result of price-fixing and cover-up, the value of Petrobras common stock fell by approximately 80%. In another case, *WGI Emerging Markets Fund, LLC et al v. Petroleo* the investment fund managing the Bill & Melinda Gates Foundation has alleged that failure by Petrobras to adhere to US federal securities law resulted in misleading shareholders and overstating the value of the company by $17 billion. The plaintiffs claim to have 'lost tens of millions on their Petrobras investments' as a result. (Young 2016a)

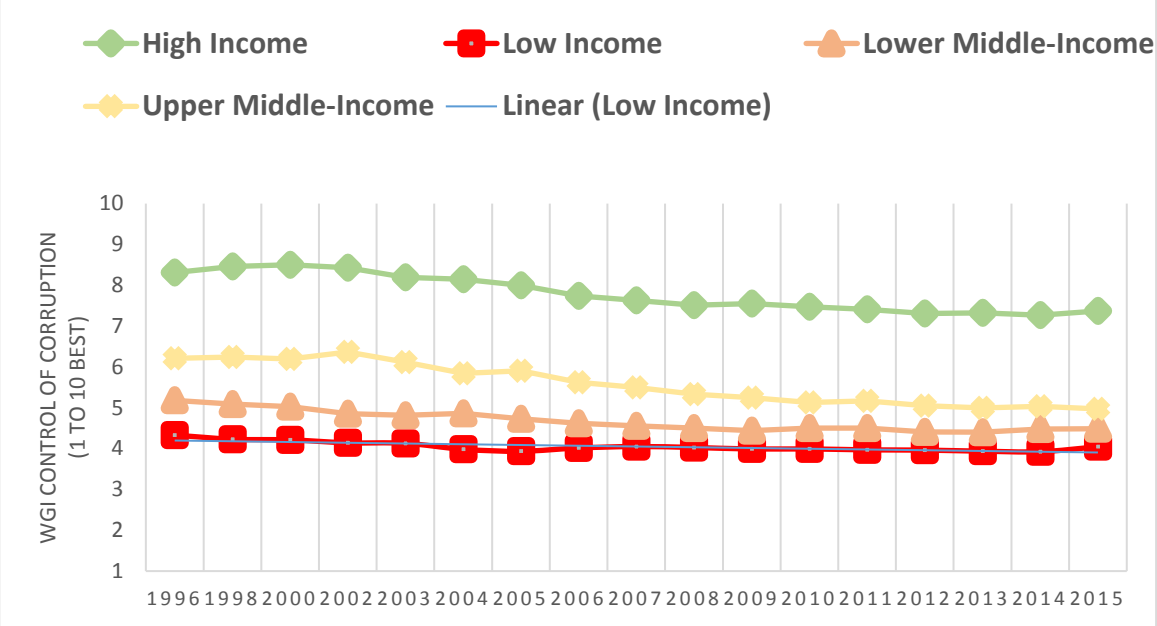
Monitoring mechanisms and collective sanctions are mentioned as enforcement means, but seldom implemented. Relying on peer-review evaluations the UN conventions, GRECO and the OECD completely lack any sanctions mechanism. Indeed it is unclear on what basis sanctions would operate, as those conventions focus more on instruments than results. A country which might adopt conflict of interest legislation but did not present any case for judgement would be safe in any event. The European Commission too has seldom exercised sanctions for corruption against member states nor aid recipients, although a mechanism for cooperation and verification (MCV) for Romania and Bulgaria served to monitor their capacity to control corruption, and EU funds were temporarily discontinued to those countries on corruption grounds, and the same happened in certain African countries receiving aid (Mungiu-Pippidi, Dadašov, et al. 2017). A monitoring mechanism with collective sanctions is included in the EU's 'trade for all' strategy, but as it was never implemented in the Cotonou agreement (only one country has ever been sanctioned) a solution has still to be found to unblock the collective sanctions instrument, despite that particular treaty's ample provision for sanctions.

3 The international anticorruption regime performance and outlook

The final questions addressed in this report are, 'What synergies could be developed across the board to enhance the impact across trade and anticorruption policies? How have the international conventions and the anticorruption legal regime performed so far, and what kind of provisions in the international trade agreement could help them, or be helped by them?

Governance at national level is notoriously difficult to change. While that can be blamed partly on lagging perception indicators – in other words, the least important explanatory factor for lagging governance is that the difficulty of change is acknowledged. Simply put, governance regimes are more difficult to change than political regimes, and corruption is a pattern of social allocation deeply engrained in a society. It depends on intrinsic power structures, and therefore tends to be stable (Mungiu-Pippidi 2017). Even when we consider the more recent objective indicators of corruption, their evolution from year to year is very small. In 2017 for instance, the world scored 6.64 on average in the Index for Public Integrity, up from 6.57 in 2015, though 2015 and 2017 are the only two years for which that index is available. Moreover, there was little significant change in any of the six components of judicial independence, freedom of the press, e-citizenship, administrative burden, fiscal transparency and trade openness.[7] If we calculate average change in the longer time series of the World Bank's Control of Corruption (COC) indicator over fifteen years and across the six income groups of countries, we notice that change is very much incremental, with richer and higher middle-income countries actually regressing while poorer countries stagnated. (see Figure 12).

Figure 12. Evolutions on control of corruption by income group, 1996-2015



The virtual non-existence of evolution in control of corruption over the past twenty years highlights an important difficulty in making a systematic assessment of the impact on the control of corruption across countries of policies of public accountability and of transparency instruments. If the world has not changed much over the last twenty years of unprecedented battling against corruption, does that mean nothing works? Actually, not. We have documented most of the tools used in the anticorruption industry, tools used on a large scale because they are promoted by treaties and conventions. In fact the use of them has

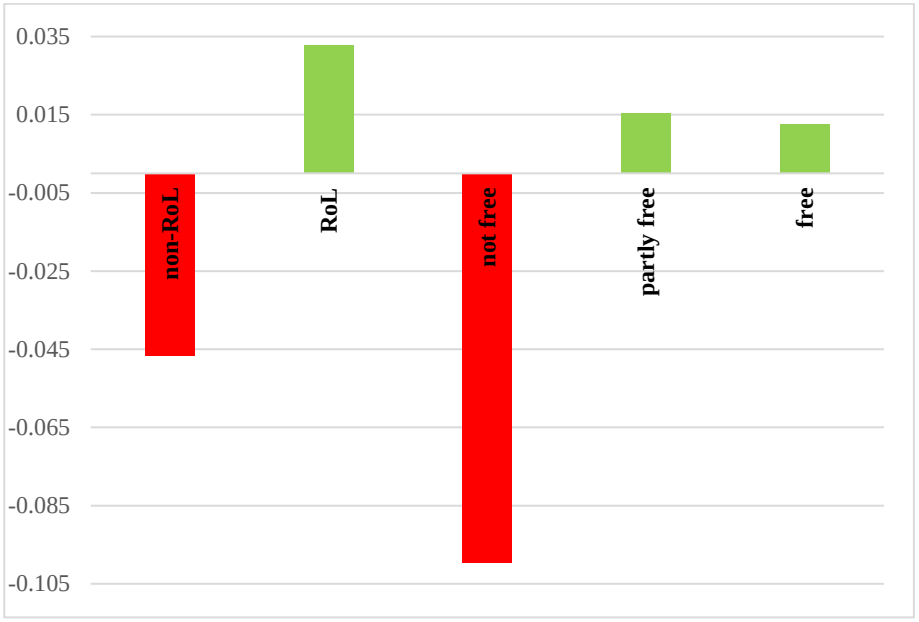
[7] www.integrity-index.org

eliminated another difficulty, which was the lack of systematic AC-policy documentation which would otherwise have existed. So our programme of documentation has led us to a degree of understanding of what works and in what context it works. Our understanding is based on more than 25 years of econometric literature on causes of corruption and on recent work in the policy pillar of the ANTICORRP project (www.anticorrp.eu).

Laws work only where the rule of law already exists

Apart from the main reason for slow evolution, which is that governance changes generally slowly, it is important to point out that evolution seems tied to certain broad governance contexts. The small progress recorded in the green columns in Figure 13, was observed only in countries under the rule of law, while countries under the World Bank rule of law average regressed more than those which progressed, since all change is shown to the second decimal. Similarly, almost no progress was recorded in countries which are either free or partly free, as ranked by Freedom House, while serious regression on corruption was recorded from non-free countries. As the main emphasis in international anticorruption is on the introduction of legislation, signing of conventions and adoption of anticorruption agencies, we went on to check how they were performing.

Figure 13. Progress on corruption evolution by rule of law and freedom



Source and legend: Worldwide Governance Indicators; Freedom House. non-RoL/RoL: countries with WGI 'rule of law' scores below/above the sample median; not/partly/ free – corresponding freedom status by Freedom House[8]

We see a very close correlation between the rule of law and control of corruption (at over 90 per cent in World Governance Indicators) so clearly, wherever corruption is high the rule of law is also inadequate. How then can legal approaches to anti-corruption be expected to work, or can *the solution be the same as the problem itself*? Furthermore, change in control of corruption in countries with an anti-corruption agency (ACA) but lacking the rule of law is on average marginally lower than in those which introduced an ACA and attained a certain level of the rule of law.[9] The reasons are obvious, for regardless of how much emphasis the UNCAC and the international anticorruption community place on 'autonomous'

[8] Methodology and data is downloadable from http://info.worldbank.org/governance/wgi/#doc-over for World Bank rule of law; Freedom House data available at www.freedomhouse.org

[9] There are many types of ACA. The ERCAS team investigated those described in OECD 2008, the separate types as well as an aggregate of all definitions. In principle we consider an ACA just the type modelled after Singapore and Hong Kong, in other words a relatively autonomous prosecutorial agency.

anticorruption agencies, they can hardly be divorced from the context of the country (Doig and Williams 2007; Mungiu-Pippidi and Dadasov 2017). Cases will still have to be tried in domestic courts; only in Ukraine is great effort put into creating separate Courts to judge anticorruption cases. Domestic circumstances might mean an agency dis not perform at all, or that it would act but would then be politically repressed with the same result. Agencies therefore work only when the political will to make them independent precedes them, in other words when political leaders are both not themselves corrupt and determined to fight corruption. An ACA can hardly succeed against a majority of the Parliament members and the executive, even if supported by the international community, as in Ukraine.[10]

Table 5. Average values for changes in control of corruption 2002-2014 in countries with and without an anti-corruption agency

	ACA	no ACA
RoL	-0.003 N=46	0.086 N=34
non-RoL	-0.062 N=52	-0.052 N=38

Source: Worldwide Governance Indicators CoC; ANTICORRP; own calculation. non-RoL/RoL: countries with 'rule of law' scores below/above the sample median; (no) ACA – (non) presence of an anti-corruption agency.

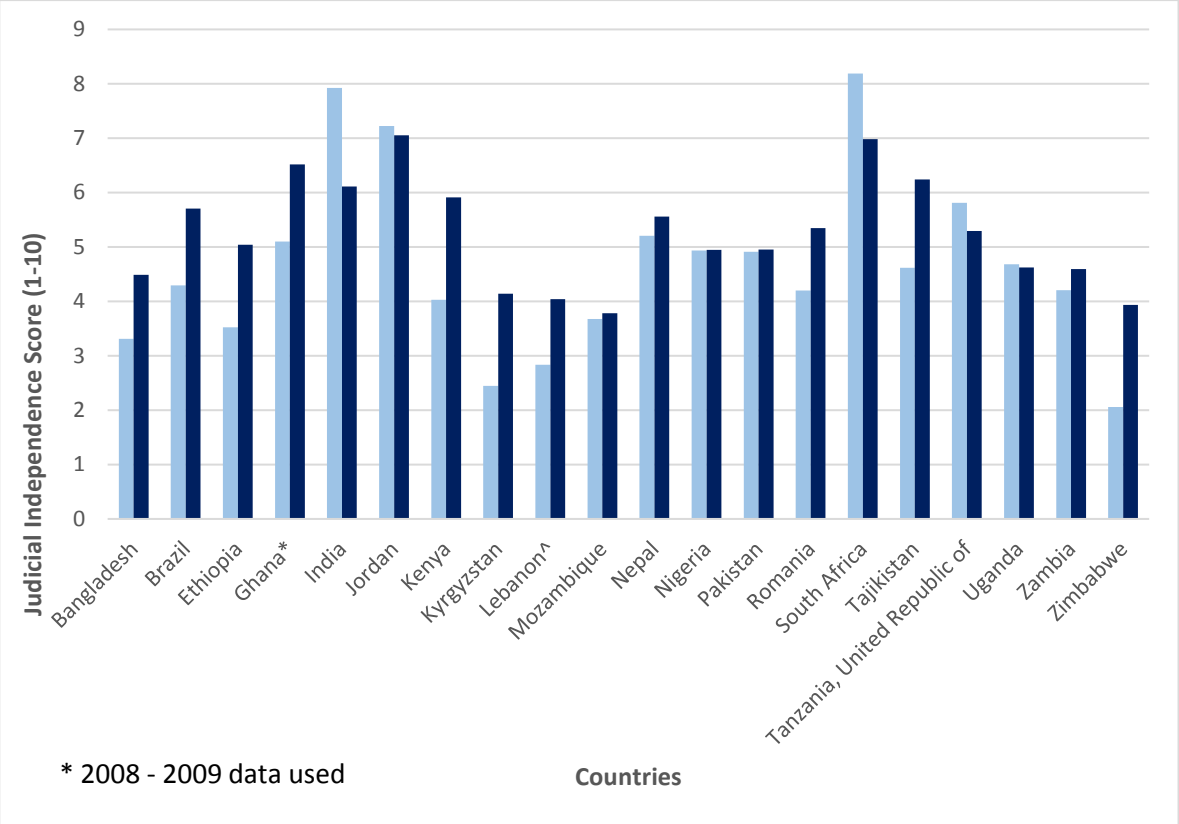
The existence of a judiciary which is independent from both government and private interests and is able to judge impartially, fairly and honestly is seen as an indispensable component of both the control of corruption and the rule of law. Not surprisingly, judicial independence has often been reported as having a significant effect on the extent of corruption (Ali and Isse 2003, Herzfeld and Weiss 2003, Damania et al. 2004, Mungiu-Pippidi 2015, Mungiu-Pippidi and Dadasov 2016). What countries need is not the unfeasible silver bullet of an autonomous anticorruption agency but genuine independence of magistrates from intervention by both government and private interests. More often than not that is an endogenous element of the control of corruption, as it is probable that the same factors lead to lack of independence of the judiciary and lack of overall accountability of the political elites who determine corruption. While an effective legal system is viewed as a key component in reducing corruption, researchers also found a significant inter-relationship between legal (in)effectiveness and various measures of corruption, in other words, a re-enforcing inter-relationship (Hertzfeld and Weiss 2003). Furthermore, judicial independence is notoriously difficult to influence from outside a country. A survey of change finds little progress across Africa, Middle East and North Africa (MENA) and Asia, for instance, for the twelve years for which data are available. Meanwhile, countries with the most active judicial anticorruption in the world, Romania and Brazil –– which have jailed dozens of politicians––have registered progress but still only within 1 point on the 1-10 scale. Their progress is therefore too little to offset setbacks in other countries, for instance in common law countries like India (see Figure 14).

If, being actually politically determined, the rule of law and independence of the judiciary are difficult to change because to do so would mean that deep power allocation would have to be changed too and that would in turn be difficult to influence from outside, then it follows that the purely legal tools promoted by treaties and anticorruption conventions in countries with worse than average rule of law could not but fall short. And indeed that seems to be true for instruments which rely primarily on legal and judicial implementation (Mungiu-Pippidi and Dadasov 2017). Earlier evidence from before the UNCAC had been ratified by nearly all countries in the world showed that the first countries to adopt the UNCAC have

[10] https://www.reuters.com/article/us-ukraine-corruption/ukraine-prosecutors-open-case-as-inter-agency-conflict-escalates-idUSKBN1DH1NE

progressed neither further nor faster than those who had not then adopted it (Mungiu-Pippidi 2015, chapter 4). The same kind of evidence exists relating to another important treaty intended to reduce corruption resources, the Extractive Transparency Initiative (EITI). Using the Worldwide Governance Indicators (WGI) control of corruption index, recent research found that EITI membership had not resulted in reduced corruption scores (Kasekende and all 2016). Apparently, countries with low scores for both the rule of law and control of corruption join EITI because they see it as a reputational intermediary, membership of which they can use to signal good intentions to international actors to reward achievement. But no real evolution has yet occurred after their joining (David-Barrett & Okamura, 2016).

Figure 14. Change in judicial independence across selected cases

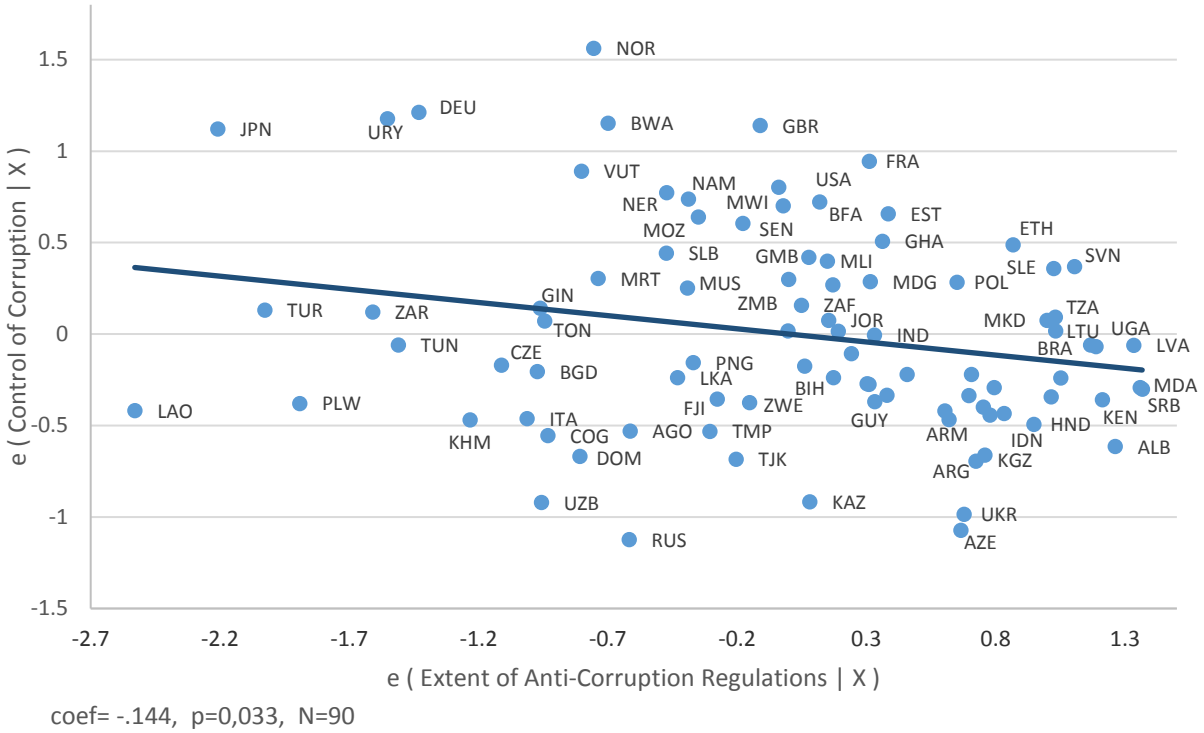


Source: Global Competitiveness Report Judicial Independence recoded 1-10 with 10 best. Legend: the lighter colour refers to 2007-2008, darker shade means the next decade

The lack of impact of the recent 'regulatory tsunami' of laws intended to curb corruption after UNCAC adoption falls into the same category. To capture the degree of active regulations on transparency and the accountability of public officials we used data provided by the Public Accountability Mechanisms (PAM) framework initiated by the World Bank. The PAM database covers 90 countries from all over the world and reflects the extent of regulation as at 2012. To construct a measurement of regulatory density, qualitative data is first quantified on a binary 0-1 scale, with 1 reflecting whether a certain regulation exists within the law. Scores are then aggregated into given categories for each mechanism by using an unweighted average of the binary values. An overall country score for each tool (e.g. financial disclosure, conflict of interest legislation, freedom of information and immunity from prosecution for public officials) is an unweighted mean of the respective category scores with higher values implying more regulation. We built a score of the total mechanisms per country to use as a proxy for the extent of accountability regulation. What we discovered after that exercise was that the old Roman saying that 'corrupt Republics have the most laws' is literally true (see Figure 15). *Corrupt countries have significantly more public accountability mechanisms, which have so far failed to deliver good governance because of what is commonly referred to as 'lack of political will' to implement the laws*. But if a country is below the global average for the rule of law,

should not lack of implementation there be presumed by default? Is not the strategy of pushing anticorruption regulation to corrupt countries the equivalent of saying that a problem of lack of political will can be solved only by more political will?

Figure 15. Negative correlation between density of AC regulation and corruption control



Source and legend: Own calculation using World Bank public accountability database by building a cumulative index of AC regulation; World Bank for Control of Corruption (COC)

Regulation does not necessarily do good, and it might even do harm. For instance, in the sensitive area of restrictions to party funding, promoted heavily by the international anticorruption community, the more regulation is adopted, the more corrupt a country becomes, probably because party funding migrates entirely to the shadows. We calculated density of party regulation using the IDEA database, and the results are robust and consistent in both cross-sectional regressions and time series, with both perception and objective indicators (frequency of non-competitive procurement allocations in Tender Electronic daily, the EU's procurement portal). While it is desirable that party finances be entirely transparent, excessive regulation of them increases corruption rather than decreasing it (Fazekas and Cingolani 2017; Mungiu-Pippidi and Dadasov 2017).

The story for the past is clear: in Figure 15, countries like Norway, Germany or Uruguay are outliers, showing that their good performance on control of corruption was not based on excessive integrity regulation. The historical achievers in corruption control have not achieved their optimal equilibrium on behalf of anticorruption regulation. But what if a country is missing those conditions which enabled them, what other enablers can we combine with regulation to correct the equilibrium? The right question becomes not what is the right tool, but what is the right complex of policies which could correct the context?

The right balance between opportunities and constraints for corruption

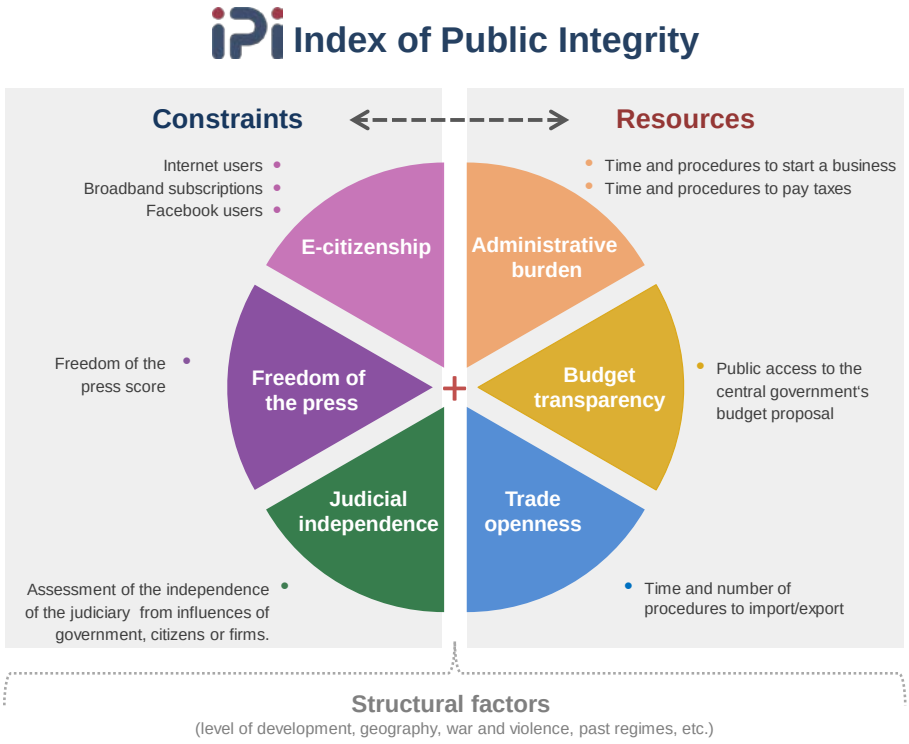
There is room for hope here. If isolated laws or instruments have not so far had much impact, policies of red tape reduction, tax simplification, e-services –– offered by government *and* used by the population –– and accountability tools like financial disclosure, fiscal transparency, quality of private audit and accounting practices do work and are even enhanced in the context of independence of the judiciary, press freedom and civil society activism, both digital and classic. Such contexts offer hope that a door out of the

vicious circle can eventually be found and unlocked, but there is no such thing as a universal key. Tools like financial disclosure and the mandatory public statements of politicians' assets do seem to work in time, rather as compensation for the lack of judicial independence than as a complementary factor. Such tools are enhanced by press freedom, which provides a certain amount of natural implementation (Mungiu-Pippidi and Dadasov 2017). In the absence of those things, conflict of interest legislation is simply redundant, for it needs transparency and civil society activism if it is to begin playing a role.

Some of the oldest academic corruption papers by economists have already grasped these truths and argued that ***policies, and not lawyers*** should be the solution to corruption problems in systematically corrupt countries (Ades and di Tella, 1997). In a context of 'weak governance' and poor judicial independence the sub-optimal equilibrium leading to corruption needs to be destabilised by a subtler approach. If direct constraints on corruption cannot be increased, resources for it can be gradually cut (Huther and Shah 2000).

Control of corruption is generally best modelled as a balance between opportunities (or resources) for corruption such as natural resources, unaccountable aid funds, lack of government transparency, administrative discretion; and constraints such as legal (an independent judiciary) and normative (the media, civil society, international community). That theoretical model (Becker 1968; NORAD 2011; Mungiu-Pippidi 2015 ch 4) is supported by a vast empirical literature, which was used to create the Public Integrity Index based on six components.

Figure 16. Control of corruption as interaction between resources and constraints



Administrative Burden measures the extent of *domestic* bureaucratic regulation. Excessive administrative burden and too many regulations open doors to discretion and red tape, resulting in higher corruption risks. The component is constructed combining the average number of procedures and the time needed to start a business and pay corporate tax. The data stems from the World Bank's 'Doing Business' dataset.

Trade Openness measures the extent of regulation of a country's *external* economic activity. Open countries can control corruption better by eliminating room for discretion at the level of administrative

trade barriers and thus allowing free competition. The component combines the average number of procedures and the time needed to export and import goods; using data from the World Bank's 'Doing Business' datasets.

Budget Transparency measures the extent and quality of public access to the executive's budget proposals in order to provide a control mechanism for discretionary public spending. The component is based on selected questions which are used for the Open Budget Survey provided by the International Budget Partnership. Note that this measurement does not fully correspond to the Open Budget Index but captures certain of its key concepts.

Judicial Independence captures how far the judicial system can be described as impartial and non-corrupt. It must apply legal constraints on government power and is thus a key element of effective control of corruption. The data stems from the 'Global Competitiveness' Database developed by the World Economic Forum.

E-citizenship captures the ability of citizens to use online tools and social media to exercise social accountability. Internet media in general and social networks in particular are indispensable components of citizen empowerment. The component is constructed by combining the number of broadband subscriptions and internet users with the share of Facebook users relative to the population. The data stems from the International Telecommunication Union and Internet World Stats.

Freedom of the Press measures the degree of media independence resulting from a specific national legal, political and economic environment in which print, broadcast, and internet-based media operate. A free media is indispensable to monitoring of democratic institutions, public accountability and good government. The component is based on Freedom House's 'Freedom of the Press' report.

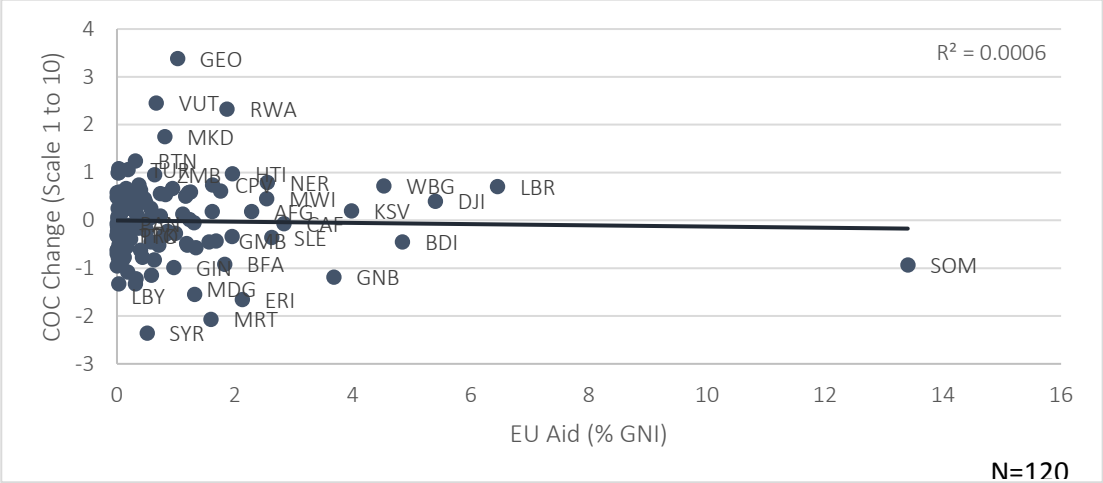
If we trace the individual components of the IPI or our combined model, it also becomes evident why corruption has not declined globally in the past twenty years compared to the previous interval in the 90s, when it registered some improvement. Freedom of the press, its main component, has been declining throughout the interval since the 90s. *Trade openness and economic freedom have stagnated*. A certain amount of red tape has been reduced, but as Fazekas (2017) argues the red tape mostly conducive to government favouritism is not usually the first to be cut. E-citizenship (access to the Internet combined with the number of Facebook users per country) has increased, but electronic government in general (e-services offered and e-services used) still has some way to go to have much impact.

This model is based on the understanding that regulation is shaped by rulers to fit their own interests and feed their rents, hence the close correlation between regulatory quality and control of corruption (Schleifer and Vishny 1998). Rather than asking what regulation should be added by international intervention, the first question must be, 'What regulations should be removed?' as those in place are designed to create barriers favouring connected (protected) companies against competition (Ades and di Tella 1999). The good news is that due to IMF conditionality, trade agreements in this area is closer than judicial independence to international intervention, hence the close correlations we found between non-tariff barriers and control of corruption. While each factor, as well as the whole, is powerfully correlated with control of corruption (unlike the previous legal factors reviewed), even within this powerful circle of determinants of control of corruption *interactions of factors* seem the most promising for policy interventions, in the forms of fiscal transparency or red tape reduction on the one hand, and civil society or media activism on the other (Mungiu-Pippidi and Dadasov 2017).

Finally, since the EU is the world's largest development donor a word is needed on the impact of aid on the control of corruption. **The evidence shows that bilateral aid from the largest European donors has no impact on governance, while multilateral financial assistance from EU Institutions (which is the only one at least partly conditional on good governance) leads to a small but statistically significant improvement in governance indicators in net recipients of EU Official Development Assistance**

(ODA). Aid dedicated to good governance and anticorruption within multilateral aid presents no sizable effect, although that finding is limited by the fact that there is little of it in general (Dadasov 2016; Mungiu-Pippidi and all 2017). An illustration chart at Figure 17 shows that countries like Georgia, Vanuatu, Rwanda, Macedonia, Bhutan and Uruguay which have managed to evolve over this interval by more than one point on a scale of 1 to 10, are positive outliers, meaning that they improved disproportionately compared to the EU per capita aid they received.

Figure 17. Change in Control of Corruption and EU ODA as % GNI 2002-2014



Source: Mungiu-Pippidi and all 2017. Legend: the great number of outliers suggests that no correlation exists between EU development aid and evolution on control of corruption.

The sample of recipient countries receiving dedicated EU aid to improve governance includes no more than 22 countries with registered disbursements from 2009 to 2014. Nevertheless, neither the difference between recipients and non-recipients of such aid nor the change from 2002 to 2014 in control of corruption is significant at the 95% CI. Therefore, the targeted EU governance aid has so far made no significant contribution. The same finding applies to aid for the civil sector and the rule of law (Mungiu-Pippidi and all 2017, Chapter 1). In conclusion, EU development aid plays a generally stabilizing role, translating as a small general improvement in governance. However, the EU's specific governance aid has not yet managed to change much in any given country and while its attention and funds generate a positive environment for reforms, specific policies and programmes which would bring progress have yet to be identified.

4 Options

Rather than offering a menu of all possible inclusions in future treaties, this concluding section will do two things. First, it will enumerate the preliminary considerations needed to approach each country and treaty in order to arrive at an effective transparency and anticorruption section. Secondly it will suggest the three alternative approaches which have arisen from research, without detailing the many possible variants within each.

What should be considered when crafting transparency/anticorruption provisions?

1. **Each country presents a different context and the treaty's provisions should reflect those differences.** The placement of a country on the World Bank indicators of the rule of law, voice and accountability, regulatory quality and control of corruption (for instance, below or above average) is highly revealing. All those indicators are strongly correlated and a trade treaty can only marginally affect governance; it cannot change it. Treaties should therefore vary by context across those dimensions and adjust to them. Equally, there seems to be no point in asking New Zealand, at the top of good governance charts, to join the UNCAC just for the sake of it for they either exceed the UNCAC institutions or do not need them. Nor is it any use asking a country with below average rule of law to pass whistleblower protection legislation that they would be unable to enforce anyway and which nobody would use. All treaty content should be adjusted to the governance context for the particular key of that particular policy context.

2. ***Establish as the main goal a trade treaty to open markets*.** The evidence speaks for itself that the more a market is opened, the greater the contribution to countering corruption, even if only in the long run. Effective opening of markets is therefore of paramount importance. The focus must be on equality of treatment, reduction of transaction costs and expansion in as many areas as possible. Simply put, a treaty which opens nearly all public procurement areas to external competition and makes it entirely transparent makes a far larger contribution than one which invokes criminal penalties which it cannot enforce.

3. ***Do not add to the pile of dead letters***. There are plenty of unenforceable conventions and regulations in the world, with inflation of regulation, good and bad but both equally ineffective in countries with poor governance. We have come to see a significant association between great corruption and inflation of public accountability mechanisms. A narrower but deeper agreement is better than extravagant gestures of integrity that can neither be monitored nor enforced. When countries have legislation like the FPCA or the UK anti-bribery laws one may expect implementation on bribery, for instance; but if such legislation is not in place it should not be presumed that it will be adopted –– much less implemented –– just because of a trade treaty. Corrupt countries do not expect to gain much from trade, and most of them already have unilateral concessions, so the leverage is too small.

4. ***Ask others to follow only where you are prepared to go.*** Today, the uneven implementation of the OECD antibribery convention even across EU members, let alone the rest of the world raises the question of whether emphasis on laws against bribery which cannot be enforced equally across parties actually brings more equal treatment and market access, or less. In fact **u**neven enforcement of laws prohibiting foreign bribery puts companies that play by the rules while competing in a global marketplace at a serious disadvantage. Mushrooming of 'integrity pacts', meant to solve collective action problems, are unlikely to achieve much as they target only those international companies paying bribes to open up access. They do not touch domestic companies connected to the authorities, which, either directly or as subcontractors or intermediaries of multinationals, are market leaders in corrupt environments. A mechanism stronger than the current peer review and Transparency International's naming and shaming report on enforcement

must be found if the OECD's anti-bribery convention is to be included in any treaty between two parties with very different levels of corruption control.

5. ***Monitor and prevent in good time.*** As the impact of anticorruption is so weak in general because most action comes after the event, there must be a change to preventive systems. Transparency of process is good because it can be monitored and give warnings in real time. Monitoring the impact of transparency and open trade policies, noting how transparent and competitive a market is, can also help avert problems and make corrections in good time. On the other hand, it is far less useful to monitor only inputs such as laws and regulations, which might never be implemented and might have no impact even if used to a certain extent.

These preliminaries help us organize the three great alternatives.

a) **THE 'ECONOMIST'S' ANTICORRUPTION**

The economist's anticorruption is good governance by market means,[11] or 'by stealth' as the early work by economists on corruption defined it. The focus of that approach is on opening markets effectively so as to make them more competitive, and the evidence on 'what works' confirms that. The focus should be on trade facilitation, meaning reduction of non-tariff barriers, less red tape associated with customs, import-export, registering a business, payment of tax and so on. There must also be more access to markets for public procurement, which should be transparent. It should include a procurement package modelled after GPA or CETA with a strong monitoring and prevention mechanism based on transparency (or ask every WTO member to join GPA). Disbarment of firms should be considered when countries have no anti-bribery laws or do not implement them. Other more demanding tools requiring enforcement in domestic courts depend on the proper working of the rule of law so should be considered only if the counter party already has reasonably stable rule of law and a good degree of judicial independence. Everything included should have clear and practical procedures for monitoring and redress.

b) **THE 'LAWYER'S' ANTICORRUPTION**

This alternative emphasizes the promotion of good governance. It tries to send an ambitious signal rather than achieve effective change. Such an approach would include references to all conventions against bribery and to the UNCAC, for instance by asking partners to join despite the lack of means to force them to do so. Partners should also be asked to establish anti-corruption agencies, as demanded by the UNCAC. The UNAC would also demand domestic legislation against both active and passive bribery, would require introduction of criminal responsibility, protection for whistleblowers and would insist on provision for broad consultations. The hope is that the impossibility of enforcing any of that could be offset by the strong policy message sent, despite anticorruption failing so far to align any real country to the legal country built in the last decade of anticorruption legal instruments proliferation.

c) HOLLISTIC ANTICORRUPTION

The essence of this option is integration of all EU external policies on trade, development and anything else that might refer to one country or another. This option has the advantage of controlling resources for corruption (the flux of potentially unaccountable money) as well as disposing of certain constraints. That would therefore increase the EU's leverage as incentives would be aligned with sanctions. At least on paper this approach in many ways closely approaches EU policy on certain associated areas with distant EU-accession perspectives, such as the Balkans or Ukraine.

Because the Cotonou agreement is due for renegotiation, future trade agreements, aid and sanctions could be put together in a stronger but more astute package. Lowering of non-tariff barriers, financial

[11] The lawyer/businessman/economist distinction in anticorruption belongs to economists Ades, A., & Di Tella, R. (1997). The new economics of corruption: a survey and some new results. *Political Studies*, *45*(3), 496-515.

transparency, even freedom of the press and judicial independence could all be made pre-conditions for aid. Additionally, a renegotiated agreement could include monitoring of corruption, in particular of competitive procurement to work against government favouritism both before and after allocation of contracts. Countries could draw roadmaps to improve their index for public integrity alongside their main Millennium Goals development plan.[12] However, the disadvantage had already become apparent during the controversies over Cotonou, in that the perception might grow that developed countries were bullying their former colonies to enlarge the former colonists' own market access and under the guise of anticorruption pushing their own commercial interests. So far the EU has had very limited success in addressing corruption in weaker countries like Kosovo, Macedonia or Moldova where its influence is important and the usual coordination obstacles can be foreseen. Still, if the goal is to intervene strongly to control corruption rather than simply open up markets, this would be the path to choose for it would certainly give more leverage in corrupt countries than option *b*.

While the above options can be seen as alternative approaches for all cases, they can also be seen as *choices* for different governance contexts. Option *a* could be applied in virtually every case as the default option, with option *b* applying to contexts in developed countries with strong rule of law. An example might be a treaty between the EU and New Zealand. Option *c* could be applied to corrupt countries (Cotonou agreement countries) which are heavily dependent on aid from the EU. Option *a* is the trade facilitation path on which, with considerable EU agency, the world has already engaged; and it is the correct path. Anything more ambitious should be weighted for capability to enforce unitary standards, ability to deliver on both threats and promises and determination to hold its course for a considerable time –– as long in fact as it might take to change governance for the better.

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Power Point Presentation

Fostering Good Governance through Trade Agreements

An evidence-based review for the workshop 'EU anticorruption chapters in EU free trade and investment agreements'

Brussels, January 24, 2018

Prof. Dr. Alina Mungiu-Pippidi
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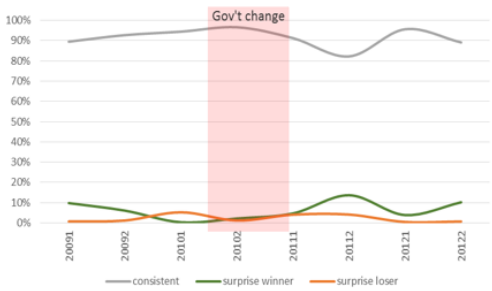
Questions addressed

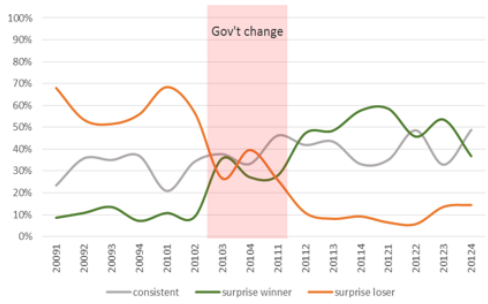
I. What is the connection between trade and corruption?
II. What is the practice in regard to free trade agreements and anticorruption provisions ?
III. How have the current international and European policies on transparency and anticorruption performed so far and what synergies could enhance the impact between trade and anticorruption?
IV. What are the options for EU, seeing that it is also the world's largest development donor?

I. What is the connection between trade and corruption?

How does government favoritism look like ? Markets ruled by connections with bribes used to open access

Control of corruption is the capacity of a society to prevent ruling elites from channelling social allocation on the basis of particular interests, rather than market (price) or citizenship (equal treatment)



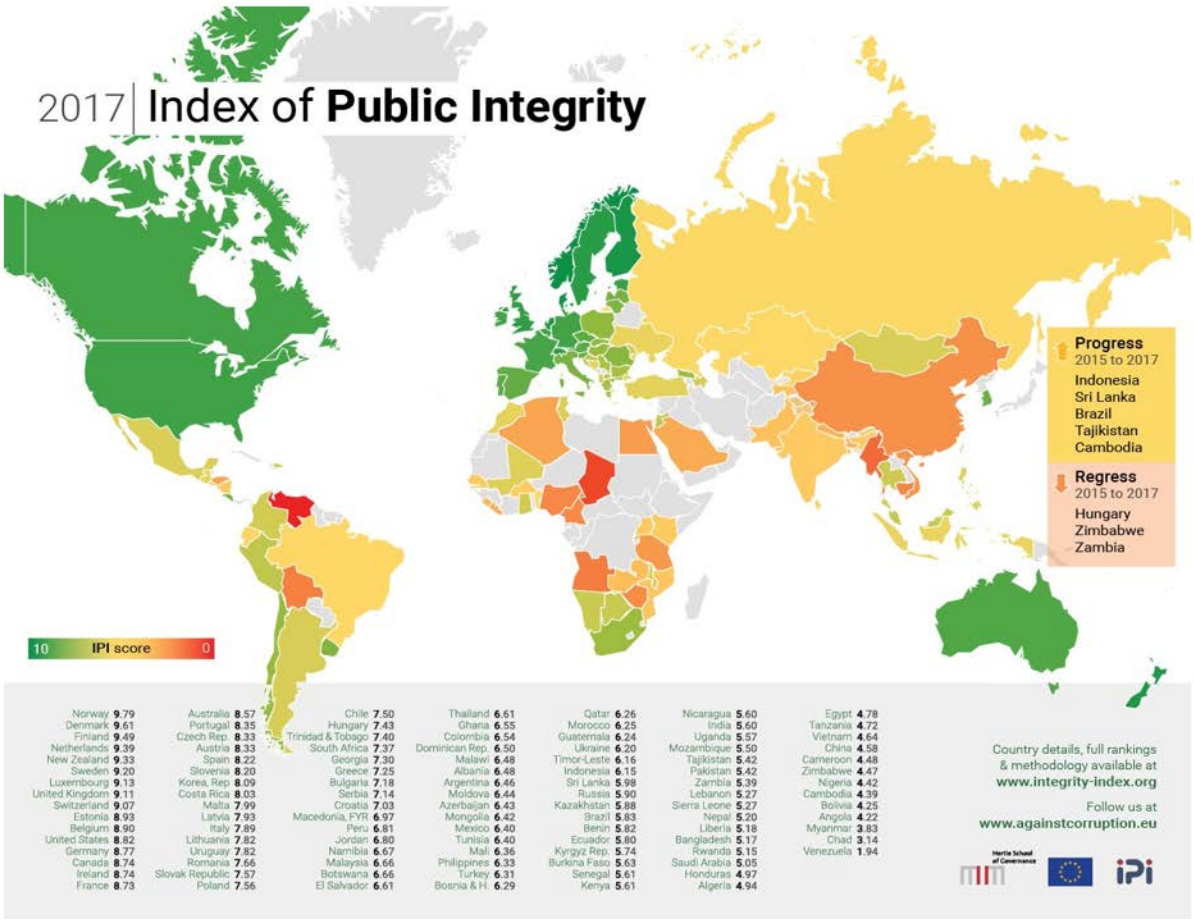


- Companies lose/win surprisingly when government changes
- Hungary and UK

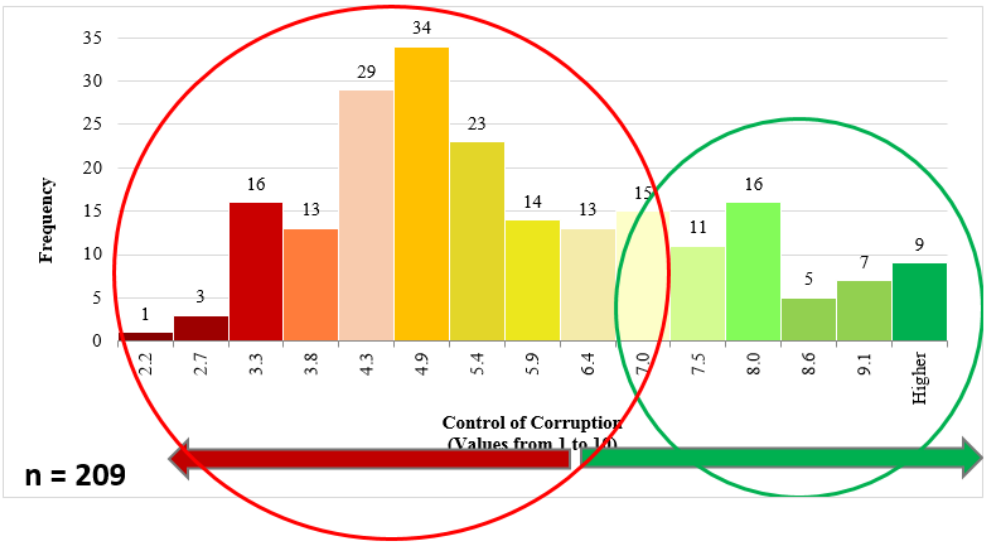
Source: againstcorruption.eu (M. Fazekas)

4

Where is it safe to trade? www.integrity-index.org



Under the threshold of 6 (1-10), most likely connections and bribes are norm



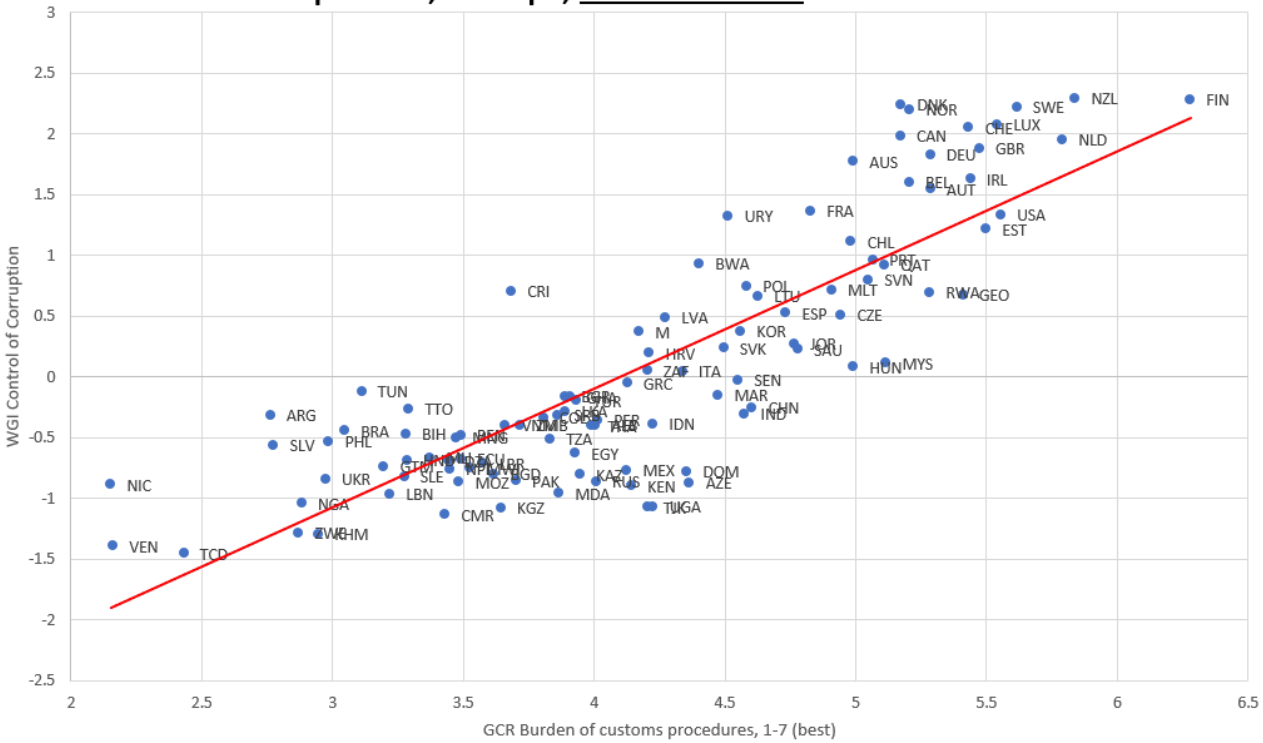
So has globalization brought more corruption?…

Top ten FCPA enforcement actions of all time come from 'cleanest' countries doing business in corrupt ones

- 1. **Telia Company AB** (Sweden): $965 million in 2017.
- 2. **Siemens** (Germany): $800 million in 2008.
- 3. **VimpelCom** (Holland) $795 million in 2016.
- 4. **Alstom** (France): $772 million in 2014.
- 5. **KBR / Halliburton** (United States): $579 million in 2009.
- 6. **Teva Pharmaceutical** (Israel): $519 million in 2016.
- 7. **Och-Ziff** (United States): $412 million in 2016.
- 8. **BAE** (UK): $400 million in 2010.
- 9. **Total SA** (France) $398 million in 2013.
- 10. **Alcoa** (United States) $384 million in 2014.

What does evidence tell us?

- **KOF globalization index negatively correlated with corruption in time series**
- **Corruption correlated strongly and positively with tariff and non-tariff barriers, such as trade openness, red tape, customs burden**

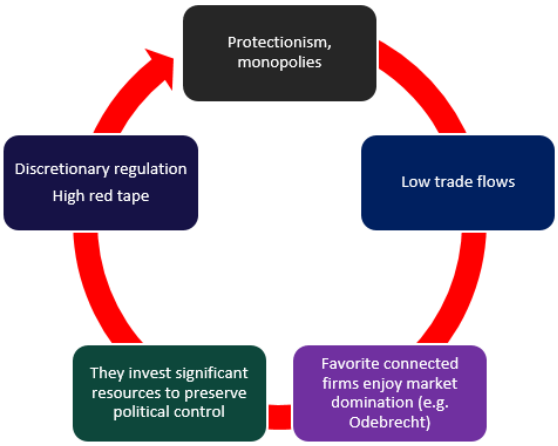


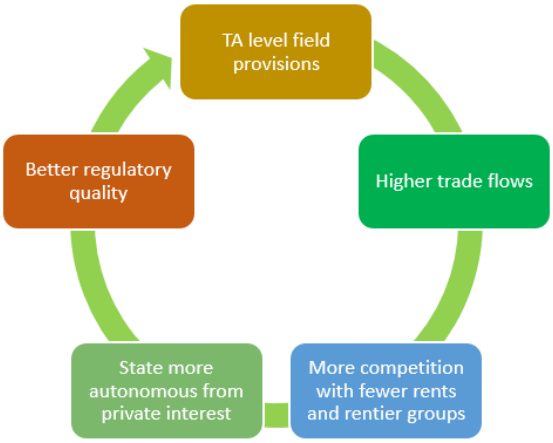
Transparency helps trade inflows, and indirectly corruption

- ❑Positive empirical relationship between transparency obligations and the level of trade- each provision in an RTAs is estimated to increase by bilateral trade exceeding 1%
- ❑As expected, countries with more democratic institutions and those with higher levels of governance are more likely to include comprehensive coverage of transparency commitments, such as a full-fledged transparency chapter in the RTA.
- ❑Gains from improving transparency in APEC are substantial relative to other reform options: at least $148 billion or 7.5% of baseline 2004 trade in APEC.

Sources: Lejárraga, I. and B. Shepherd (2013), "Quantitative Evidence on Transparency in Regional Trade Agreements", *OECD;* Helble, M., Shepherd, B., & Wilson, J. S. (2007). *Transparency & Trade Facilitation in the Asia Pacific: Estimating the Gains from Reform*. Department of Foreign Affairs and Trade, http://developing-trade.com/wp-content/uploads/2014/11/DTC-Article-Chapter-2007-2.pdf

The vicious- virtuous circle trade-good governance; looking for the entry point





Sources: Ades and di Tella; Schleifer and Vishny

II. What is the practice in regard to free trade agreements and anticorruption provisions ?

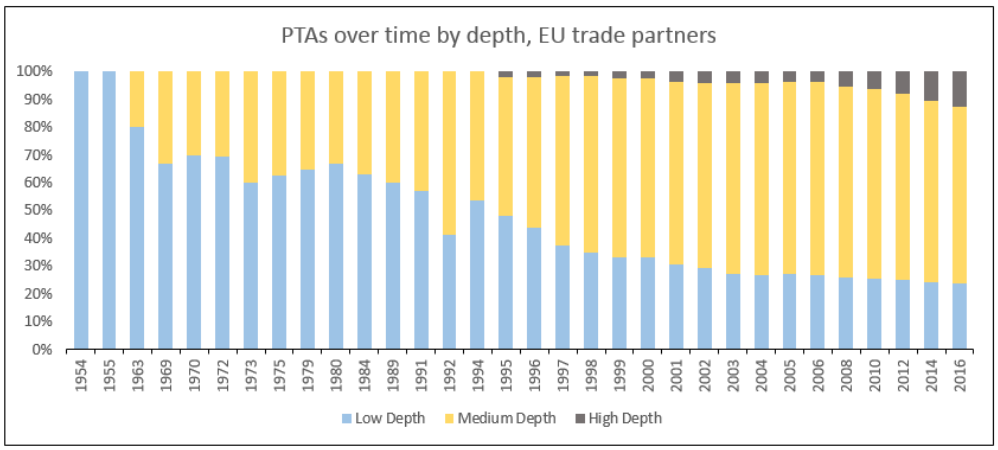
LEGAL ACT	Adoption year	Members to-date	Number sanctions
FPCA	1977, 1998	1, but wide jurisdiction	204 SEC, 312 DOJ
OECD	1997	43	58 entities sentenced 500 investigations are ongoing in 29 Parties.
EU anticorruption convention Cotonou agreement	1997 2000	28 79	MCV Romania and Bulgaria Liberia sanctioned LIberia sanctioned
UNCAC	2005	183 (140)	Peer review mechanism with no sanctions
UN Convention against Transnational Organized Crime	2000	188 (144)	Peer review mechanism with no sanctions
WTO- GPA	1996, revised last 2014	47 WTO MS (19 P) 31 observers, 10 prospective	WTO Committee on Government Procurement WTO's binding dispute settlement system

US experience as good practice

- Adherence to and implementation of international conventions on AC and bribery, strong FCPA enforcement, extending jurisdiction
- National legislation defining both active and passive bribery as a criminal offence
- Sanctions and procedures to enforce criminal penalties
- In jurisdictions where firms are not covered by criminal responsibility, non-criminal sanctions (fines, debarment, see World Bank mechanism)
- Whistleblower protection

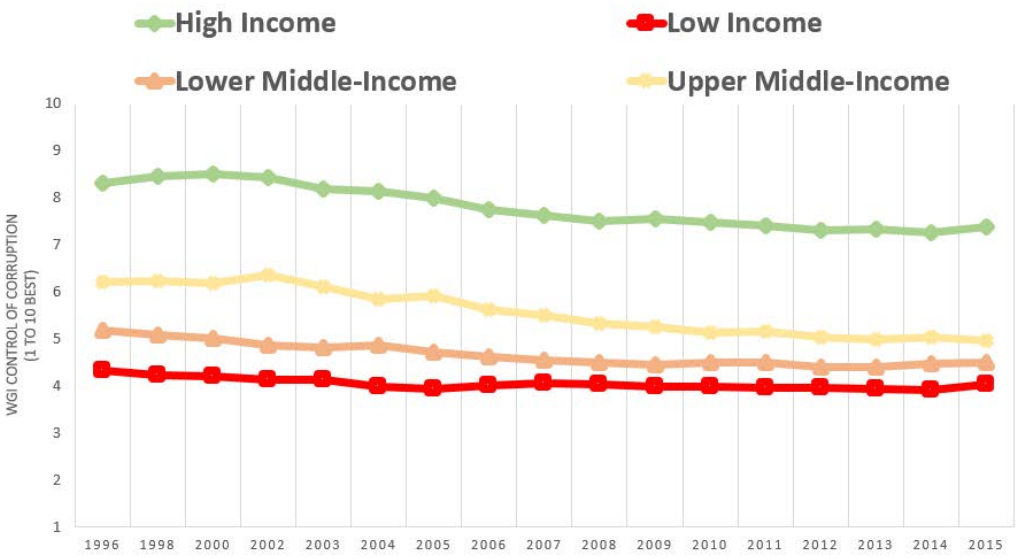
RTAs - increasingly more transparency and procurement provisions

- - North-South RTAs are more transparency-intensive than North-North or South-South RTAs. Country pairs are more likely to display deeper transparency commitments in their RTAs if the per capita income difference between them is relatively large.
- - OECD countries tend to exhibit higher transparency thresholds in their bilateral trade treaties with non-OECD countries. Source: OECD



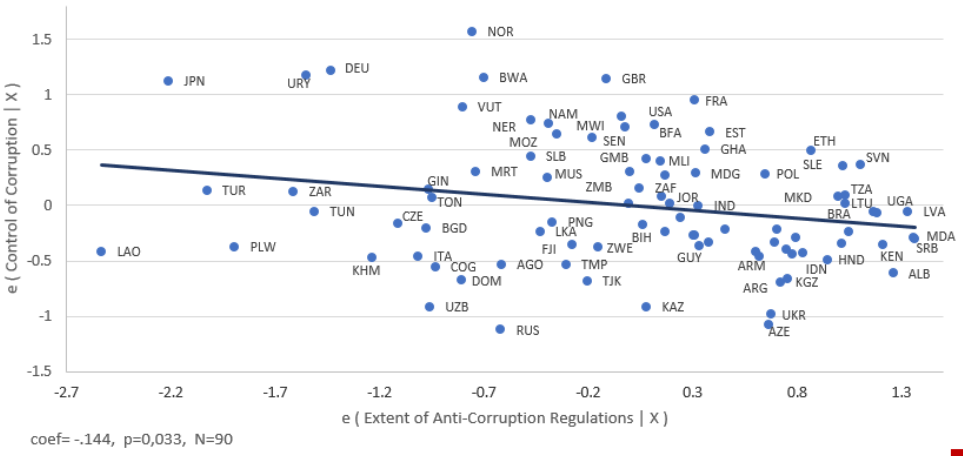
III. How have the current international and European policies on transparency and anticorruption performed so far and how can we help one another?

In 2017, the world scored on the average 6.64, up from 6.57 in 2015 on a 1-10 scale with 10 best CC
Not much progress in any income group



Data source: World Governance Indicators & World Bank

Wrong AC strategy -too many rules that nobody follows

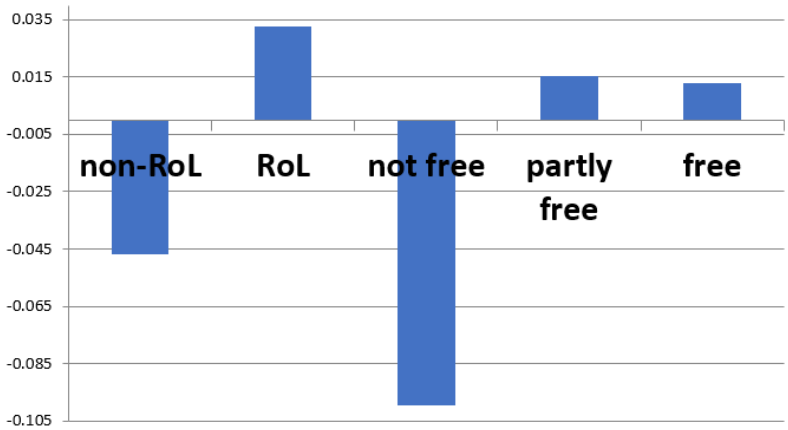


coef= -.144, p=0,033, N=90

More anticorruption laws do not mean less corruption (implementation gap)

- Societies higher on integrity are under-regulated, not overregulated (Sweden, Denmark, Netherlands)
- The most corrupt societies have the most laws (Latin saying)- literally true anticorruption

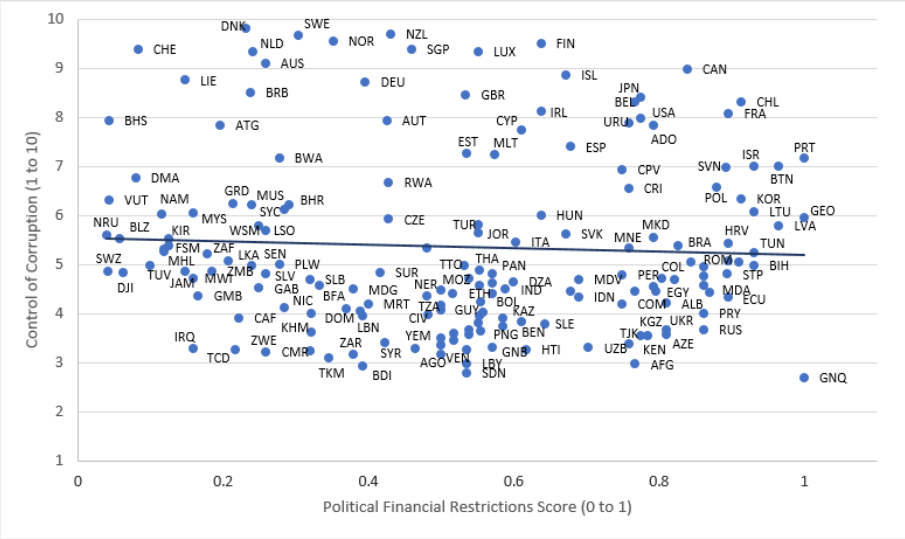
Regulation only works where there is rule of law Progress on corruption in the world is minimal and only where rule of law exists



Source: Worldwide Governance Indicators; Freedom House.
non-RoL/RoL: countries with WGI "rule of law" scores below/above the sample median;
not/partly/ free – corresponding freedom status by Freedom House.

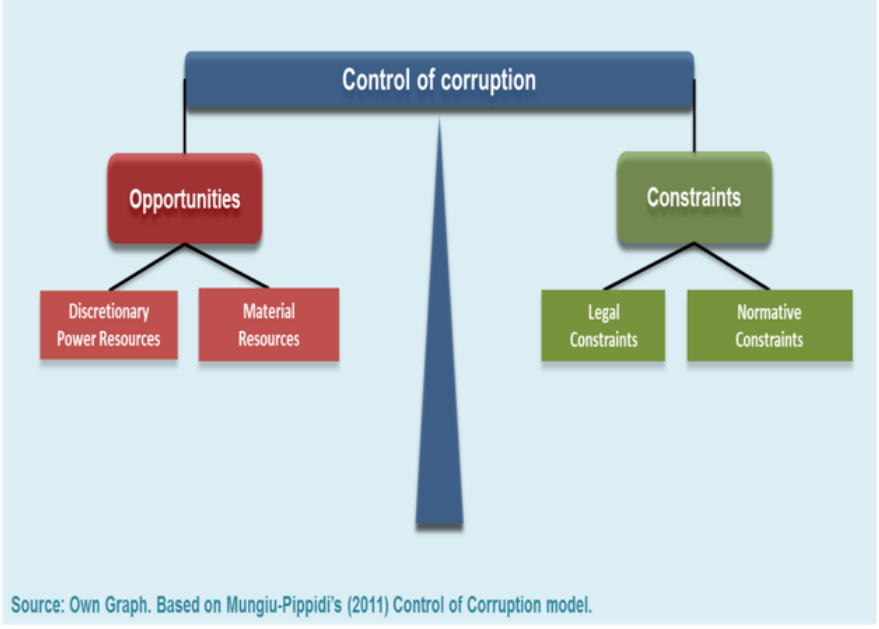
- Laws do not matter where rule of law does not exist, and anticorruption laws can do more harm than good
- Small progress even in ROL countries, leading to insignificant changes

Over-regulation may actually bring harm in other contexts



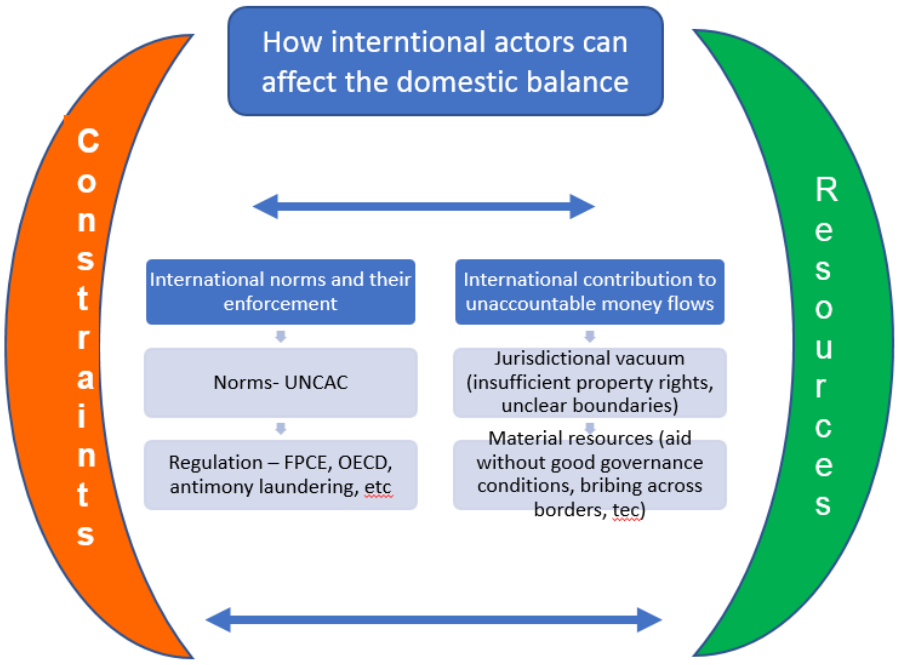
- Countries with higher political trust have fewer restrictions, not more
- The more restrictions, the more corruption
- In fact, even less progress on political finance as donations migrate to the informal, black area

WHAT SHOULD WE DO? CONTROL OF CORRUPTION = A BALANCE LARGELY DOMESTIC



Source: Own Graph. Based on Mungiu-Pippidi's (2011) Control of Corruption model.

- We need to cut resources for corruption, as well as increase constraints
- We need to manipulate both sides of balance
- We need to work with the state, as well as society



- The internation al factors adds constraints, but also resources to corruption
- A smart strategy would cut both

OPTIONS

The stated objective (Trade for All)

Corruption is a plague on economies and societies…

Trade policy already contributes to the fight against corruption, for example by increasing the transparency of regulations and procurement processes and by simplifying customs procedures. Under the GSP+ the EU offers trade preferences to countries that ratify and implement international conventions relating to good governance, including the UN Convention Against Corruption

The Commission will:

■ use FTAs to monitor domestic reform in relation to the rule of law and governance and set up consultation mechanisms in cases of systemic corruption and weak governance; and

■ propose to negotiate ambitious provisions on anti-corruption in all future trade agreements, starting with the TTIP

Source: European Commission http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf, 4.2.6

The options to reach it ?

a) THE 'BUSINESSMAN ANTICORRUPTION'

Anticorruption by stealth and market means (focus on non tariff barriers, opening procurement markets, transparency)

b) THE 'LAWYER ANTICORRUPTION'

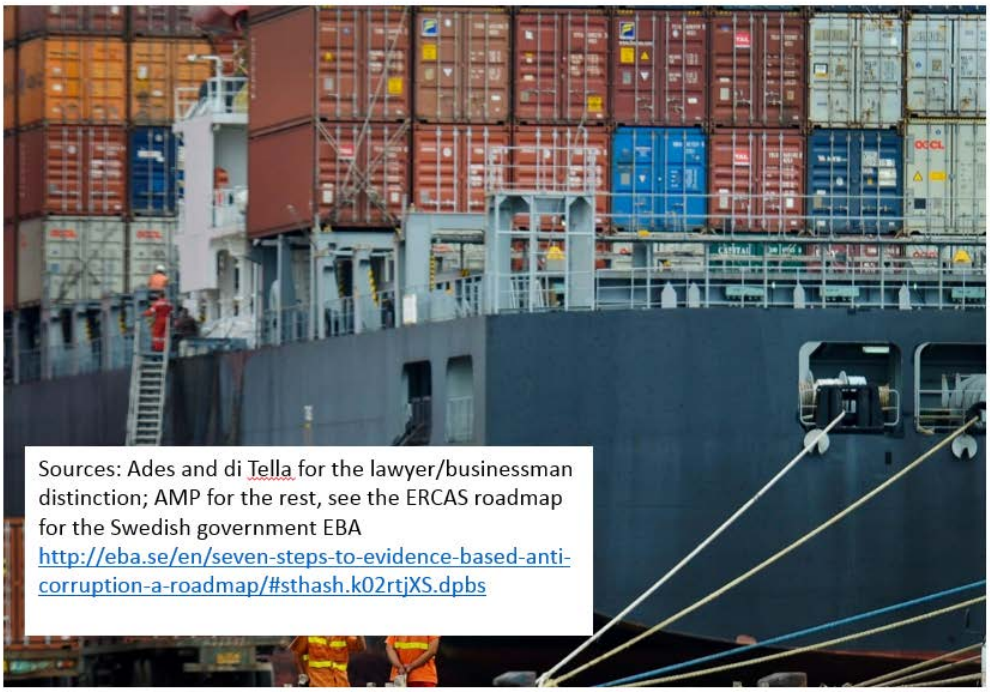
Focus on treaties and ambitious legislation adoption, strong on legal anticorruption, but mostly unenforceable and harder to accept by partners

c) THE 'IMPERIAL' ANTICORRUPTION

Coordination of development aid and trade policies, even migration. In theory, strong on both resources and constraints (but watching Kosovar example…)

➢ Monitoring % competitive tenders % total procurement

➢ But for now we do not even have this figure for EU 28!



Sources: Ades and di Tella for the lawyer/businessman distinction; AMP for the rest, see the ERCAS roadmap for the Swedish government EBA http://eba.se/en/seven-steps-to-evidence-based-anti-corruption-a-roadmap/#sthash.k02rtjXS.dpbs

'By pursuing his own interest (one) frequently promotes that of the society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the public good'

Adam Smith

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