CLEAN UP ON ILJ: TAKING DOMESTIC ACTION TO TACKLE BRIBERY AND CORRUPTION IN INTERNATIONAL COMMERCIAL ARBITRATION

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I. INTRODUCTION

It's common sense that there is a lot of money changing hands and business deals being conducted around the world, but have you ever conceptualized just how much of this is happening daily? The current numbers show that nearly $5.1 trillion in currency is being traded and 1.01 billion purchase transactions are made every day around the world.[1] With such incomprehensible numbers beyond what you or I will ever deal with in our personal lives, one can't help but wonder—how do commercial businesses cooperate, and what safeguards does the law have in place to ensure that these transactions go off without a hitch?

Throughout the years, the increasing scale of interaction has bred a need for international norms of cooperation between states, companies, agencies, and even individuals; through globalization, this need has preconditioned the shift of priorities towards a global discourse as the most promising mean of cooperation.[2] While this discourse has steered to new systems of international commercial actors being able to bargain and contract with one another, disputes between these actors still remain. Currently, companies from different countries have settled on international arbitration as the most common method for resolving these disputes.[3] However, despite continuing efforts at both national and international levels to create an even playing field for all actors, corruption remains a serious problem in international arbitration.[4] With the proliferation of international arbitration turning the tide of international adjudication, the need for a formalized set of

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[1] David Scutt, *Here's How Much Currency is Traded Every Day*, BUS. INSIDER (Sept. 2, 2016), https://businessinsider.com/heres-how-much-currency-is-traded-every-day-2016-9 (discussing the average amount of currency traded daily); Erica Sandberg, *The Average Number of Credit Card Transactions Per Day & Year*, CARDRATES (Nov. 9, 2020), https://www.cardrates.com/advice/number-of-credit-card-transactions-per-day-year/ (discussing global credit card transactions).

[2] *See* Caterina Carta, *Use of Metaphors and International Discourse*, 49 COOP. & CONFLICT 340, 342 (2013), https://doi.org/10.1177/0010836713494998; *see also* Sinan Ülgen & Ceylan Inan, *From the Local to the Global: The Politics of Globalization*, *in* CARNEGIE EUR., REWIRING GLOBALIZATION 5, 9 (2022), https://carnegieeurope.eu /2022/02/17/from-local-to-global-politics-of-globalization-pub-86310.

[3] David J. McLean, *Toward a New International Dispute Resolution Paradigm: Assessing the Congruent Evolution of Globalization and International Arbitration*, 30 U. PA. J. INT'L L. 1087, 1087 (2009).

[4] Divya Srinivasan et. al, *Effect of Bribery in International Commercial Arbitration*, 4 INT. J. PUB. L. & POL'Y 131, 132 (2014).

restrictions or pronouncement of rules condemning corruption becomes more palpable with each transaction.[5]

It has been nearly forty years since the United States ("U.S.") Supreme Court acknowledged that "[a]s international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade."[6] And it seems like the Court was correct. Most contracts have specified U.S. law to be applied in dispute resolution during international arbitration.[7] Although this is but one country contributing a significant amount of manpower and money to international business, as the world's largest economy, it can play a huge part in shaping legislation and spearheading an international campaign against corruption in international arbitration.[8] The U.S. set itself up as the front-runner in curbing international corruption when it enacted the Foreign Corrupt Practices Act ("FCPA") in 1977, nearly thirty years before the first truly global treaty would come to fruition.[9] Thus, the U.S. is conveniently poised to trailblaze again in the anti-corruption field and spearhead a campaign to show States how effective it can be to pass legislation condemning corruption in international arbitration.[10]

This Comment argues that to grapple with the complexities that globalization and international cooperation have brought, the U.S. must make structural changes to the FCPA, or else the international community faces a risk that corruption will continue to be legitimized through international arbitration. Thus, the U.S. must work harder to ensure that there are more effective enforcement mechanisms by amending the FCPA to account for bribery of international arbiters.

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[5] *See generally* Yoanna Schuch, *Tackling Corruption in International Arbitration: Key Issues and Challenges*, 32 YOUNG ARB. REV. 53, 54 (2019) (explaining that "there is a worldwide consensus that corruption has a harmful effect on economic development, political stability, and the rule of law. This has led to a global convergence of international and national legal rules condemning corruption which supports the general understanding that there is an international, or even transnational, public policy against corruption.").

[6] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 638 (1985).

[7] Christopher R. Drahozal, *Empirical Findings on International Arbitration: An Overview*, *in* OXFORD HANDBOOK INT'L ARB., 644, 658 (Thomas Schultz & Federico Ortino eds., 2020).

[8] *See generally* Remitr, *The Top 10 Countries for Global Business*, REMITR (July 19, 2019), https://remitr.com/blog/top-10-countries-for-global-business/ (discussing U.S.'s economy and currency).

[9] The Foreign Corrupt Practices Act, as amended, 15 USC § 78dd-1, et seq. (1977); *First Global Convention Against Corruption to Come into Force*, TRANSPARENCY INT'L (Sept. 16, 2005), https://www.transparency.org/en/news/first-global-convention-against-corruption-to-come-into-force [hereinafter Transparency Int'l, *First Global Convention*] ("UNCAC was adopted in 2003 and entered into force 2005").

[10] *See* Mark W. Friedman, Floriane Lavaud & Julianne J. Marley, *Corruption in International Arbitration: Challenges and Consequences*, *in* ARB. REV. OF THE AMERICAS 2018, GLOB. ARB. REV. 19, 19 (2017) ("The United States Foreign Corrupt Practices Act is a premier example of a national anti-corruption regime with international effect.").

Section II will discuss the background on the development of international law, where corruption typically arises, development of current enforcement mechanisms through well-known international conventions, current trends in international arbitration, and will end with a discussion on the FCPA as the U.S.'s national mechanism for curbing corruption. Section III will delve into analysis by comparing the mechanisms in place by the U.S. with the international mechanisms, showing how the OECD and FCPA have affected transparency and anti-corruption and will wrap up by considering proposed changes the U.S. will need to make to curb corruption in international arbitration. These changes to curb corruption are well within the means already at hand in both international conventions[11] and domestic law,[12] but this problem needs at least one country to begin the process to create effective enforcement against corruption within international arbitration.

II. BACKGROUND

In 2021, words like globalization[13], multinational corporations[14], and international arbitration[15] were commonplace; however, this has not always been the case. While trading laid the foundations for international business, the contemporary process of globalization did not truly begin until the mid-19th century as increased capital and labor led to a smaller world.[16]

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[11] *See generally* United Nations Convention Against Corruption, Oct. 31, 2003, S. Treaty Doc. No. 109-6, 2349 U.N.T.S. 41, https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf [hereinafter UNCAC]; Organization for Economic Co-operation and Development [OECD], Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1, https://www.oecd.org/corruption/oecdantibriberyconvention.htm [hereinafter OECD Anti-Bribery Convention].

[12] *See generally* Foreign Corrupt Practices Act.

[13] *See generally* Melina Kolb, *What Is Globalization?: And How Has the Global Economy Shaped the United States?*, PETERSON INST. FOR INT'L ECON. (last modified Aug. 24, 2021), https://www.piie.com/microsites /globalization/what-is-globalization ("Globalization is the word used to describe the growing interdependence of the world's economies, cultures, and populations, brought about by cross-border trade in goods and services, technology, and flows of investment, people, and information.").

[14] *See generally* James Chen, *Multinational Corporation (MNC)*, INVESTOPEDIA (last modified July 29, 2022), https://www.investopedia.com/terms/m/multinationalcorporation.asp ("A multinational corporation (MNC) is one that has business operations in two or more countries. These companies are often managed from and have a central office headquartered in their home country, but with offices worldwide.").

[15] *See generally* International Arbitration Information, *What is International Arbitration*?, ACERIS L. LLC, https://www.international-arbitration-attorney.com/what-is-international-arbitration/ ("International arbitration is . . . takes place before private adjudicators known as arbitrators. It is a *consensual*, *neutral*, *binding*, *private* and *enforceable* means of international dispute resolution, which is typically *faster* and *less expensive* than domestic court proceedings. Unlike domestic court judgments, international arbitration awards can be *enforced in nearly all countries of the world*, making international arbitration the leading mechanism for resolving international disputes.").

[16] *See* Kolb, *supra* note 13.

Throughout the past two centuries, globalization has given rise to international cooperation and grown beyond anything spice traders in the 16th century could have ever imagined.[17] As the number of international actors and transactions grew along with the frequency of arbitration, so did complementary international law.[18] Corruption, however, has always been a serious impediment to the rule of law and sustainable development.[19] So, beginning in the last quarter of the 20th century, States began to take international efforts to combat it at home[20] and abroad.[21] While most States have signed on to curb corruption internationally,[22] there is still much work to be done, especially in the realm of international arbitration.[23] This section breaks down how international law is made, where this corruption typically arises, international and domestic efforts to curb it respectively, and the rise and problems of international arbitration.

A. How International Law is Formed

International law can be a lot like domestic law in that it imposes obligations upon States except for one glaring difference: there is no true enforcement body.[24] While the United Nations ("U.N.") and other major international NGOs try to act as that enforcement placeholder, none of them have jurisdiction over domestic actors when acting internationally.[25]* In the international sector, there is no one governing body as in a domestic executive branch, but instead the "enforcement" process consists of States coming together and creating two kinds of international law: treaty law and

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[17] *See* Paul Freedman, *Search for Flavors Influenced Our World*, YALEGLOBAL ONLINE (Mar. 11, 2003), https://archive-yaleglobal.yale.edu/content/search-flavors-influenced-our-world ("The quest for spice was one of the earliest drivers of globalization. . . . As spices once created a global economic network in the Middle Ages, other commodities have followed a similar path."); *see also* Vitor Gaspar, Sean Hagan & Maurice Obstfeld, *Steering the World Toward More Cooperation, Not Less*, IMF: INT'L COOP. BLOG (Sept. 6, 2018), https://www.imf.org/en/Blogs/Articles/2018/09/06/blog-global-cooperation.

[18] *See* Kimberley Chen Nobles, *Emerging Issues and Trends in International Arbitration*, 43 CAL. W. INT'L L.J. 77, 78 (2012).

[19] *Accord* Sean Fleming, *Corruption Costs Developing Countries $1.26 Trillion Every Year - yet Half of EMEA Think it's Acceptable*, WORLD ECON. FORUM (Dec. 9, 2019), https://www.weforum.org/agenda/2019/12/corruption-global-problem-statistics-cost/ (discussing the effect of corruption on developing countries).

[20] *See generally* Foreign Corrupt Practices Act.

[21] *See* UNCAC, *supra* note 11; *see also* OECD Anti-Bribery Convention, *supra* note 11.

[22] Transparency Int'l, *First Global Convention*, *supra* note 9.

[23] Schuch, *supra* note 5, at 53.

[24] *See 2011 Treaty Event, Towards Universal Participation and Implementation*, UNITED NATIONS (2011).

[25] *Id.* *This statement does not include certain international actions that go against the Geneva Convention, international peremptory norms, or other crimes against humanity under which international courts do have jurisdiction.

customary international law.[26] Treaty law is much more consistent with what most people are familiar with in domestic law.[27] Generally, States must take concrete actions to "consent to be bound by" the treaty and after significant deliberation, it is passed to make some kind of concrete international change.[28] Similarly, there are two types of treaty law: self-executing and non-self-executing, which determines whether the treaty law can be directly applied in courts or if it first requires legislative implementation.[29]

On the other hand, customary international law differs from treaty law in that it comes from a general and consistent practice that is followed by a sense of legal obligation by States.[30] While there is no designated allotment of time in order for something to be considered "customary international law," it is generally promulgated by a general and consistent practice of several States and may eventually be written into law through treaty resolutions.[31] As the U.N. recognized, regardless of the kind of international law at hand, however, the issue still remains that "there is no over-arching compulsory judicial system or coercive penal system to address breaches of the provisions set out in treaties or to settle disputes."[32]

This is why corresponding domestic law is so important in making international law effective. For example, the U.S. Constitution states that while treaties cannot override the Constitution, the Supremacy Clause treats federal statutes *and* treaties as the "supreme law of the land."[33] In the same vein, domestic law cannot be enacted that directly overrides treaty obligations and U.S. courts are vehemently disinclined to find that Congress intended to override such an obligation when faced with interpreting competing legislation.[34] Thus, it is easily inferred that when States enact domestic law to help fulfill their treaty obligations, international law is strengthened, and the object and purpose of those treaties are better fulfilled.

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[26] *Customary International Humanitarian Law: Questions and Answers*, INT'L COMM. OF THE RED CROSS (Aug. 15, 2005) https://icrc.org/doc/resources/documents/misc/customary-law-q-and-a-150805.htm [hereinafter ICRC, Q&A].

[27] *Treaty*, NAT'L MUSEUM AM. DIPL. DEPT. OF STATE (June 10, 2019), https://diplomacy.state.gov/glossary/treaty-2/.

[28] *See* ICRC, Q&A, *supra* note 26.

[29] *See* Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 695 (1995).

[30] *Customary Law*, INT'L COMM. OF THE RED CROSS, https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law.

[31] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (AM. L INST. 1987) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.").

[32] *UN 2010 Treaty Event, Towards Universal Participation and Implementation* (2010), https://treaties.un.org/doc/source/events/2010/press_kit/fact_sheet_5_english.pdf.

[33] U.S. CONST. art. VI., cl. 2.

[34] Frederic L. Kirgis, *International Agreements and U.S. Law*, 2 AM. SOC'Y INT'L L.: INSIGHTS (May. 27, 1997), https://www.asil.org/insights/volume/2/issue/5/international-agreements-and-us-law.

B. Where Corruption Typically Arises

It is well settled that "corruption" embodies a slew of wrongful acts.[35] The most basic and well-known examples of corruption include bribery of national or foreign public officials,[36] trading in influence (also known as influence peddling),[37] abuse of public office with the intent of making a private gain,[38] theft and fraud,[39] illicit enrichment,[40] improper political contributions,[41] and money laundering.[42] However, corruption can also manifest at any time during a judicial proceeding or international arbitration.[43] This form of corruption would most reasonably fall under the umbrella term of either "obstruction of justice" or "judicial corruption."[44]

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[35] *See generally What is Corruption?*, TRANSPARENCY INT'L, https://www.transparency.org/en/what-is-corruption.

[36] *See* Michael Santos, *Understanding Federal Public Corruption And Bribery*, PRISON PROFESSORS: BLOG (Dec. 8, 2021), https://prisonprofessors.com/understanding-federal-public-corruption-and-bribery/ ("Bribery occurs when someone offers something of value to a corporate or public official in exchange for their cooperation in influencing a decision-making process, committing or allowing fraud against the official's organization, or otherwise violating their official duties.").

[37] *See* Jeffrey Shantz, *Political Influence Peddling*, 1 ENCYCLOPEDIA OF TRANSNAT'L CRIME & JUST. 323, 323 (Margaret E. Beare ed. 2012), https://sk.sagepub.com/reference/transntlcrime-justice/n124.xml ("Much concern over influence peddling involves relations between governments and representatives of corporations associated with the manufacture of arms or armaments.").

[38] *See* 5 C.F.R. § 2635.702 (1992) ("An employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations.").

[39] U.S. DEP'T OF JUST., FRAUD AND PUBLIC CORRUPTION (Feb. 24, 2020), https://www.justice.gov/usao-dc/criminal-division/fraud-and-public-corruption.

[40] LINDY MUZILA ET AL., ON THE TAKE: CRIMINALIZING ILLICIT ENRICHMENT TO FIGHT CORRUPTION 11–13 (2012) ("[S]ome provisions use the term 'illicit enrichment' for an offense that is actually a classical corruption offense, requiring an unlawful action or misconduct from the public official, while a 'pure' illicit enrichment offense is based only on the unexplained increase in the assets of a public official.").

[41] *See* CYNTHIA BROWN & L. PAIGE WHITAKER, CONG. RSCH. SERV., R44447, CAMPAIGN CONTRIBUTIONS AND THE ETHICS OF ELECTED OFFICIALS: REGULATION UNDER FEDERAL LAW 7 (2016) ("[A] number of federal political corruption provisions impose restrictions on the use of campaign contributions to influence official acts by elected officials . . . . These laws . . . penalize both the contributor for giving the unlawful contribution as well as the official for receiving the improper contribution.").

[42] Bill Kte'pi, Money Laundering: Methods, 1 ENCYCLOPEDIA OF TRANSNAT'L CRIME & JUST. 265, 265-266 (Margaret E. Beare ed. 2012) ("Money laundering is the practice of concealing information about financial transactions in order to convert the ill-gotten gains of criminal activities into 'clean' or 'laundered' assets.").

[43] Inan Uluc, Corruption in International Arbitration 5 (Apr. 13, 2016) (S.J.D. dissertation, Pennsylvania State University School of Law) (https://elibrary.law.psu.edu/sjd/1/).

[44] CHARLES DOYLE, CONG. RSCH. SERV., RL34303, OBSTRUCTION OF JUSTICE: AN OVERVIEW OF SOME OF THE FEDERAL STATUTES THAT PROHIBIT INTERFERENCE WITH JUDICIAL, EXECUTIVE, OR LEGISLATIVE ACTIVITIES 1 (2014) (discussing obstruction of justice); JAMES MICHEL, REDUCING CORRUPTION IN THE JUDICIARY, U.S. AGENCY INT'L DEV. 2 (2009) (discussing judicial corruption).

Obstruction of justice in international arbitration shares a lot of similar themes with what most people would consider to be corruption and comes in the form through the appointment of corrupt arbitrators, either party trying to bribe a participant or witness, or during the recognition and enforcement process.[45] Similarly, according to *Transparency International*, judicial corruption consists of "any inappropriate influence on the impartiality [of] the judicial process by [an] actor within the court system."[46] For instance, an arbitrator may disregard significant evidence in favor of either party or distort witness testimony, or court staff may manipulate court dates and make it difficult for a party to comply with their demands.[47] As *Transparency International* stresses in its report, corruption originates from an array of reasons such as:

> undue influence by the executive and legislative branches, social tolerance of corruption, low judicial and court staff salaries, fear of retribution, poor training and lack of rewards for ethical behavior, inadequately monitored administrative court procedures and lack of external control mechanisms.[48]

Lucinda Low aptly summarizes that with the recent rise of corruption as a subject of international agreements "and the convergence of obligations around its prevention, detection, and remediation in both the public and private sectors, corruption has increasingly figured as an issue in international arbitration."[49] Corruption in international arbitration is especially worrisome because of the functions the adjudication plays.[50] In a governing body, judicial prosecution and enforcement are meant to be a final barrier to curbing corruption.[51] So, when an adjudicating body tasked with ensuring a fair and impartial trial is rife with corruption itself, the system breaks down.[52] One scholar, Inan Uluc, identified that although international arbitration is the internationally preferred judicial mechanism,[53] international arbitration has

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[45] *See* Uluc, *supra* note 43, at xi-xii, 5.

[46] DIANA RODRIGUEZ & LINDA EHRICHS, GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS, TRANSPARENCY INT'L, at xxi (2007).

[47] *Id.*

[48] *Id.* at 4–6, 10.

[49] *See* Lucinda A. Low, *Dealing with Allegations of Corruption in International Arbitration*, 113 AM. J. INT'L L. UNBOUND 341, 341 (2019).

[50] *See* Diego García-Sayán (Special Rapporteur on the Independence of Judges and Lawyers), *Corruption, Human Rights, and Judicial Independence* (Jan. 10, 2019), https://www.unodc.org/dohadeclaration/en/news/2018/04 /corruption--human-rights--and-judicial-independence.html.

[51] *See id.*

[52] *See* Diego García-Sayán (Special Rapporteur on the Independence of Judges and Lawyers), *Rep. on the Independence of Judges and Lawyers*, paras. 26–29, at 6, U.N. Doc. A/HRC/44/47 (Mar. 23, 2020).

[53] Uluc, *supra* note 43, at 24.

essentially "legitimized corruption" due to the extensive use of these abusive tactics.[54]

C. International Anti-Corruption Mechanisms

It is similarly understood that corruption remains one of the biggest inhibitors to progression as a society today and the international sector has taken a strong stance to combat it whenever possible.[55] As the U.N. lays out in the forward to the United Nations Convention Against Corruption ("UNCAC"): "Corruption is an insidious plague that has … corrosive effects on societies. It undermines democracy and the rule of law … distorts markets, … allows organized crime, … and other threats to human security to flourish."[56]

Thus, while no international governing body has proffered substantive agreements or peremptory norms to curb corruption in international arbitration at large, there remain several well-settled international conventions[57] aimed at gaining support from States to take action domestically against corruption of foreign public officials in general.

i. Organization for Economic Cooperation and Development

The most well-known international convention for curbing corruption is the Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (traditionally shortened to "OECD Anti-Bribery Convention but will be referred to as just "OECD Convention" for this paper). Prior to the OECD Convention, the U.S. was the only country that imposed criminal sanctions for bribes paid abroad under the FCPA.[58] In 1989, the OECD began its deliberations on how to combat the issue of illicit payments in international business transactions.[59] The OECD established its *ad hoc* working group which would go on to do a comparative

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[54] *Id.* at i.

[55] *See generally* Kaunain Rahman & Jorum Duri, *Best Practices for Monitoring Aid Channeled to CSOs and the State During a Humanitarian Disaster in a Pre-existing Crisis Context* 3, TRANSPARENCY INT'L ANTI-CORRUPTION HELPDESK (Aug. 31, 2020), https://knowledgehub.transparency.org/assets/uploads/kproducts/Best-practices-on-monitoring-aid-being-channelled-to-CSOs-and-the-State-during-a-humanitarian-disaster-final_PR.pdf; UNCAC, *supra* note 11, at iii.

[56] UNCAC, *supra* note 11, at iii.

[57] *See* UNCAC, *supra* note 11; OECD Anti-Bribery Convention, *supra* note 11; G.A. Res. 51/191, United Nations Declaration Against Corruption and Bribery in International Commercial Transactions 1 (Dec. 16, 1996).

[58] IMF, *OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions*, at 3 (Sept. 18, 2001), https://www.imf.org/external/np/gov/2001/eng/091801.pdf.

[59] *See* Mark Pieth, *International Cooperation to Combat Corruption*, *in* CORRUPTION & GLOB. ECON., PETERSON INST. INT'L ECON. 119, 122 (Kimberly A. Elliott ed., 1997).

review of national legislations regarding the bribery of public officials.[60] After much deliberation and request for recommendations from member-states, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was concluded in 1997[61] and entered into force in 1999.[62] The Convention, joined by all OECD member states of the Organization for Economic Cooperation and Development, plus six non-members,[63] commits each signatory country to:

> take measures … to establish that it is a criminal offence … for any person intentionally to offer, promise or give any pecuniary or other advantage … to a foreign public official . . . in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.[64]

The OECD Convention is also unique in that it created a compulsory monitoring mechanism by the OECD Working Group on Bribery through a peer-review system of party-state's internal efforts.[65] While the OECD Convention is not self-executing, meaning countries must implement complementary domestic law in order for it to be given its full effect in domestic courts, the OECD has been particularly effective in curbing corruption in this way.[66] The monitoring mechanism takes place in several phases and is designed to ensure that each country meets its commitments laid out in the Convention.[67] Since its adoption, a 2018 report from *Transparency International* showed that eleven countries totaling about 30% of the world exports have actively enforced punishing foreign bribery.[68] That

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[60] *See* Organization for Economic Co-operation and Development [OECD] Secretary-General, *OECD Working Group on Bribery Annual Report 2014* 8–9, OECD WORKING GRP. BRIBERY (2014).

[61] OECD Anti-Bribery Convention, *supra* note 11, at 3.

[62] *Id.* at 47.

[63] OECD Anti-Bribery Convention Key Information, OECD (2018), https://www.oecd.org/corruption-integrity/explore/oecd-standards/anti-bribery-convention/ (As of May 2018, "all 38 OECD countries plus Argentina, Brazil, Bulgaria, Peru, Russia and South Africa - have adopted this Convention.").

[64] OECD Anti-Bribery Convention, *supra* note 11, art. I.

[65] Organization for Economic Co-operation and Development [OECD] Secretary-General, *Fighting the Crime of Foreign Bribery* 4, OECD WORKING GRP. BRIBERY (2018).

[66] *See* Vázquez, *supra* note 29, at 695–96 ("[A] non-self-executing treaty… [is] a treaty that may not be enforced in the courts without prior legislative 'implementation.'"); *see also* Nicola Ehlermann-Cache, *The Impact of the OECD Anti-Bribery Convention*, OECD 2, https://www.oecd.org/mena/competitiveness/39997682.pdf.

[67] Ehlermann-Cache, *supra* note 66, at 3.

[68] Gillian Dell & Andrew McDevitt, *Exporting Corruption: Progress Report 2018: Assessing Enforcement of the OECD Anti-Bribery Convention*, TRANSPARENCY INT'L 12 (Sept. 12, 2018), https://www.transparency.org/publications/exporting-corruption-2018 (The eleven countries that punish foreign bribery are Germany, Israel, Italy, Norway, Switzerland, United Kingdom, United States, Australia, Brazil, Portugal, and Sweden.).

leaves thirty-three other signatories with little to no enforcement in countries totaling more than 50% of total world exports.[69] Thus, while the OECD Convention has laid solid groundwork for domestic involvement to combat international corruption, it has fallen short of its overall goals of widespread domestic action so far.[70]

ii. United Nationals Convention Against Corruption

In a similar vein, the U.N. has taken steps to combat corruption. The UNCAC is currently the most widespread legally binding multilateral anti-corruption treaty.[71] Although it is more widely adopted than the OECD Convention with 140 signatories and 187 state parties, the UNCAC does not impose the same reporting requirements on its signatories when adopting domestic law to curb corruption.[72] Instead, the UNCAC focuses on simply requiring countries to enact domestic anti-corruption measures.[73] Countries that have ratified the Convention, however, are expected, but not required, to cooperate in criminal matters and consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption and participate in accountability processes.[74]

The U.N. Convention Against Corruption covers five main areas in its effort against corruption, namely, preventive measures, criminalization and law enforcement, international cooperation, asset recovery, and technical assistance and information exchange.[75] The UNCAC also covers many different forms of corruption, such as bribery, trading in influence, abuse of functions, and various acts of corruption in the private sector.[76] The UNCAC's general tone towards curbing corruption is reflected in Article 19:

> Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse

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[69] *Id.* (Argentina, Austria, Canada, Chile, France, Greece, Hungary, Lithuania, Netherlands, New Zealand, South Africa, Belgium, Bulgaria, China, Colombia, Czech Republic, Denmark, Estonia, Finland, Hong Kong, India, Ireland, Japan, Luxembourg, Mexico, Poland, Russia, Singapore, Slovakia, Slovenia, South Korea, Spain, and Turkey have little to no enforcement of foreign bribery.).

[70] *See id.* at 6.

[71] *See generally* Fritz Heimann, *The UN Convention Against Corruption*, *in* CONFRONTING CORRUPTION: PAST CONCERNS, PRESENT CHALLENGES, AND FUTURE STRATEGIES 104, 105–06 (2017).

[72] *See* Kyle Wombolt & Jeremy Birch, *The Long Arm of Law Enforcement*, *in* ASIA-PACIFIC INVESTIGATIONS REV. 2022, GLOB. INVESTIGATIONS REV. 20, 29 (2021).

[73] *Compare* OECD Anti-Bribery Convention, *supra* note 11, Follow-Up and Institutional Arrangements, *with* UNCAC, *supra* note 11, art 5.

[74] Mathias Huter & Ruggero Scaturro, *UNCAC in a nutshell 2021*, BERGEN: U4 ANTI-CORRUPTION RES. CTR., CHR. MICHELSEN INST. (Dec. 6, 2021), at 1 [hereinafter *U4 Guide 2021*].

[75] UNCAC, *supra* note 11, at V.

[76] *Id.* at art. 15–24.

> of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.[77]

Additionally, Article 12 provides for measures State Parties should take to prevent corruption involving the private sector, including enhanced accounting and auditing standards and appropriate civil or criminal penalties.[78] The most well-known measures that the State Parties take include: promoting cooperation between law enforcement agencies and private entities, promoting transparency, preventing conflicts of interest, establishing disclosure and accounting standards, and disallowing tax deductibility of expenses that constitute bribes.[79]

One of the strongest ways the UNCAC differs from the OECD convention is in its recognition of judicial corruption. Article 25 requires State Parties to adopt legislative measures necessary to curb the "obstruction of justice," or:

> The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony, to interfere in the giving of testimony, the production of evidence in a proceeding, or to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with this Convention.[80]

Despite this wide-reaching international convention, most countries have enacted limited domestic law to combat anti-corruption, making the UNCAC seem more effective in name rather than in action.[81] Thus, while the UNCAC has effectively drafted its far-reaching Convention to encourage all 140 of its

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[77] *Id.* at art. 19.
[78] *Id.* at art. 12.
[79] *Id.*
[80] *Id.* at art. 25.
[81] *See* Heimann, *supra* note 74, at 115–16 ("Implementation must be consistent between countries and for the different Convention provisions. The United Nations Convention must not be allowed to become an erratic patchwork quilt, with governments picking and choosing provisions that are easy to implement and ignoring the rest. Unless there is consistent global implementation, the United Nations Convention against Corruption cannot achieve its objectives.").

signatories to curb corruption and bribery in both public and private sectors, allegations of corruption in international arbitration have still risen.[82]

D. The Foreign Corrupt Practices Act

Finally, in the U.S., there's the Foreign Corrupt Practices Act ("FCPA"). The FCPA actually pre-dates both international agreements and was the framework off which the OECD based its final Convention.[83] The FCPA was enacted in 1977 after revelations of a $1.4 million bribe paid by the U.S. aircraft manufacturer Lockheed to the Japanese prime minister in an attempt to persuade Japan to buy Lockheed passenger aircraft.[84] "The domestic political reaction to these scandals led to the enactment of the [FCPA] that modified the Securities Exchange Act to require transparent accounting for payments to foreign officials by all firms listing their securities on American exchanges."[85] "Thus, all firms, American or foreign, in which Americans were likely to invest were made subject to punishment for concealing illegal payments, or offers of payment, to officers of foreign" or domestic governments.[86]

The FCPA is violated when someone "corruptly" makes a payment or a promise to pay a "thing of value" to a foreign government official for the purpose of doing or inducing business.[87] The prohibited action may be the subject of criminal prosecution in the U.S. even when the bribery itself took place in some foreign country.[88] The U.S. has remained firm in the basic sanctions of the FCPA, but after signing the OECD Convention, the Act was amended to bring American law into compliance with the Convention.[89] One substantive change made for this purpose was to legitimize "grease" payments, i.e. small rewards or tips paid to lower-ranking officers "to

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[82] *See* Paul Stothard & Lolan Sagoe-Moses, *Proving Corruption Allegations in International Arbitration: A return to the balance of probabilities standard?, in* NORTON ROSE FULBRIGHT INT'L ARB. REP. 29 (2020), https://nortonrosefulbright.com/knowledge/publications/3b94ac30/proving-corruption-allegations-in-international-arbitration.

[83] *See* Foreign Corrupt Practices Act; *see also* William Fox, *Adjudicating Bribery and Corruption Issues in International Commercial Arbitration*, 27 J. ENERGY & NAT. RES. L. 487, 493 (2009).

[84] Fox, *supra* note 83, at 491.

[85] Paul D. Carrington, *Enforcing International Corrupt Practices Law*, 32 MICH. J. INT'L L. 129, 132 (2001).

[86] *Id.* at 132–33.

[87] ROBERT W. TARUN & PETER P. TOMCZAK, THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK 2 (5th ed. 2018).

[88] Fox, *supra* note 83.

[89] See REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION, DEP'T OF JUST. (2010), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/05/07/oecd-phase1-report.pdf

expedite or to secure the performance of a routine governmental action."[90] Another reform was an extension of the law to criminalize bribes paid to officials of "public international organizations."[91]

The most effective elements of the FCPA are the criminal provisions, which are enforced by the Department of Justice.[92] The second of the most effective elements of the FCPA are the compliance requirements it imposes on companies whose securities are listed in the U.S.[93] The FCPA's accounting provision requires corporations to make and keep records that reflect the transactions made by the corporation and maintain an adequate system of internal accounting controls.[94] Thus, while the FCPA has had a great effect on prosecuting corruption and bribery abroad by U.S. corporations, at its core, it is only related to curbing bribery of foreign officials working in a governmental or public capacity.[95] Although the FCPA has done well in changing the tide of corruption and bringing domestic enforcement against international corruption, it could be doing more, which will be discussed in Section III.

E. The Rise of International Arbitration

The lack of an international court system with the power to resolve private disputes between international commercial businesses has led to a wide range of discourse and a host of issues within the international sector.[96] However, over the years, arbitration seems to have become the preferred method for resolving such disputes.[97] Additionally, while the "arbitrability of

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[90] *See* MICHAEL V. SEITZINGER, CONG. RSCH. SERV., R41466, FOREIGN CORRUPT PRACTICES ACT (FCPA): CONGRESSIONAL INTEREST AND EXECUTIVE ENFORCEMENT, IN BRIEF 2, 4 (2016); *see also* Foreign Corrupt Practices Act §78dd-2(b) (2006).

[91] Foreign Corrupt Practices Act §78dd-2 (2006).

[92] Matt Kelly, *What Is FCPA Compliance?*, GALVANIZE: COMPLIANCE BLOG (Nov. 4, 2020), https://wegalvanize.com/compliance/what-is-fcpa-compliance/.

[93] *See* Foreign Corrupt Practices Act § 78m (2006).

[94] *See* Stuart H. Deming, *FCPA Prosecutions: The Critical Role of the Accounting and Recordkeeping Provisions*, A.B.A.(Aug. 20, 2010), https://americanbar.org/groups/business_law/publications/blt/2010/08/06_deming/.

[95] *See* Nick Oberheiden, *10 Reasons Why FCPA Compliance is Critically Important for Businesses*, 10 NAT. L. REV., no. 206, July 24, 2020, https://www.natlawreview.com/article/10-reasons-why-fcpa-compliance-critically-important-businesses ("The FCPA is a massive piece of legislation that is designed to allow the DOJ and SEC to effectively combat corruption and bribery involving foreign officials. Ultimately, enforcement of the FCPA is intended to eliminate the costs of foreign corruption to the United States.").

[96] *See* Carolyn B. Lamm et al., *International Arbitration in a Globalized World*, 20 DISP. RESOL. MAG. 4, 4 (2014) ("The lack of a delocalized international court system with the power to resolve private cross-border disputes of all kinds has led to a fragmentation of dispute settlement fora[.]"); *see generally* Michael P. Malloy, *Current Issues in International Arbitration*, 15 TRANSNAT'L L. 43, 44–47 (2002).

[97] Lamm et al., *supra* note 96, at 4 ("[A]nd arbitration seems to have become the preferred method for the resolution of such disputes.").

disputes involving corruption is well settled[,]" addressing corruption in arbitration is not.[98] This has led to countless debates and discussions within the legal community about new trends, evidentiary requirements, burdens of proof, and just about everything else a tribunal would have to consider when faced with a difficult legal problem.

i. International Trends in Curbing Corruption in International Arbitration

Because of the shift in the legal framework towards international arbitration, international arbitration has accomplished great practical success all over the world.[99] As scholar Gary Born aptly recites, this success is reflected by "the increasing number of international arbitrations conducted each year, … the growing use of arbitration clauses in almost all forms of international contracts, [and] the preferences … for arbitration as a mode of dispute resolution[.]"[100]

The rise in the use of international arbitration has, however, led to the need for tribunals to grapple with questions of jurisdiction, admissibility, and consequences, as well as standards of proof.[101] Ilan Uluc found that "arbitrability of disputes involving corruption is well settled."[102] However, arbitrators still have significant issues with elements like "the standard of proof, the burden of proof, and the evidence to be brought."[103] Therefore, "arbitrators must determine how to approach situations where no corruption allegations arise, but the presented facts bring suspicions of corruption to the arbitrator's attention."[104] Most instruments regulating arbitral proceedings[105] have provided little guidance as far as evidentiary issues are concerned (such as which party has the burden of proof, what sort of evidence the parties should present, and the standard of proof by which tribunals should evaluate the evidence brought before them).[106]

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[98] Uluc, *supra* note 43, at 5.

[99] *See* Alan Redfern, *The Changing World of International Arbitration*, *in* PRACTISING VIRTUE : INSIDE INTERNATIONAL ARBITRATION 45, 49 (David D Caron et al. eds., 2015).

[100] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2 (3d ed. 2021).

[101] Uluc, *supra* note 43, at 5.

[102] *Id.*

[103] *Id.* ("However, arbitrators still labor with today's important and controversial issues, such as the standard of proof, the burden of proof, and evidence to be brought.").

[104] *Id.*

[105] *See generally* G.A. Res. 65/22, U.N. Doc. A/65/465, UNCITRAL Arbitration Rules (as revised in 2010) (Dec. 6, 2010), https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration; ICC Rules of Arbitration, *as amended*, INT'L CHAMBER COM. (entered into force Jan. 1, 2021), https://iccwbo.org/dispute-resolution-services/arbitration /rules-of-arbitration/ ; International Dispute Resolution Procedures, as amended, INT'L CTR. DISP. RES. (entered into force Mar. 1, 2021), https://adr.org/sites/default/files/ICDR_Rules.pdf.

[106] Born, *supra* note 100.

Most of the current discourse revolves around the burden of proof when alleging corruption in international arbitration. The problem with corruption is that even if the circumstances are suspicious, it is difficult to meet a high standard of proof, akin to that which is applied in criminal proceedings.[107] Various arbitral tribunals have expressed the view that it is "notoriously difficult to prove" corruption since there is often little to no physical evidence.[108] Previously tribunals applied the "clear and convincing evidence standard" but it has been cited for its challenges which has given rise to a much needed change in the burden of proof standard in corruption cases.[109] In a majority of cases, the new "preponderance of evidence" standard has been found to be sufficient in circumstances of corruption.[110] However, many people well versed in international arbitration have advocated for a more pragmatic approach using the "balance of the probabilities" standard as the starting point in determining the standard of proof.[111]

Although the finding of corruption in international arbitration makes an arbitral award unenforceable, corruption is still quite prevalent in international arbitration.[112] All of this goes to show that international arbitration needs a serious overhaul to ensure its effectiveness as an alternative to domestic judicial action.

III. CURBING CORRUPTION AND BRIBERY IN INTERNATIONAL ARBITRATION

International arbitration has seen a historic rise over the years in its prevalence—in 2006 nearly 73% of multi-national corporations favored international arbitration as their preferred method of dispute resolution jumping to over 90% in 2021.[113] International businesses choose

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[107] Stothard & Sagoe-Moses, *supra* note 82, at 29.

[108] EDF (Services) Ltd. v. Romania, ICSID Case No. ARB/05/13, Award, ¶ 221, at 64 (Oct. 8, 2009).

[109] Stothard & Sagoe-Moses, *supra* note 82, at 29.

[110] Robert B. von Mehren, *Burden of Proof in International Arbitration*, *in* PLANNING EFFICIENT ARBITRATION PROCEEDINGS: THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION 123, 127 (Albert Jan Van den Berg ed., 1996).

[111] Stothard & Sagoe-Moses, *supra* note 82, at 30.

[112] Aysu Duz, *The Problem of Corruption in International Arbitration*, TURKISH L.: BLOG (July 9, 2019), https://turkishlawblog.com/read/article/139/the-problem-of-corruption-in-international-commercial-arbitration

[113] Loukas Mistelis, PriceWaterhouseCoopers, *International Arbitration:Corporate Attitudes and Practices 2006: Perceptions tested: myths, data and analysis*, SCH. INT'L ARB., QUEEN MARY UNIV. OF LONDON 5 (2006), https://arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2006.pdf ("73% of corporations prefer international arbitration as a means for resolving cross border disputes."); Abby Cohen Smutny & Norah Gallagher, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World*, WHITE & CASE INT'L ARB. PRAC. & SCH. INT'L ARB., QUEEN MARY UNIV. OF LONDON 5 (2021), https://www.whitecase.com/publications/insight/2021-international-arbitration-survey ("International arbitration is the preferred method of resolving cross-border disputes for 90% of respondents").

international arbitration for a variety of reasons such as flexibility of procedure, the enforceability of awards, the privacy of the process, and the ability to choose arbitrators.[114] Similarly, while international arbitration does have its successes, there are several factors where it falls short in areas such as expense and length of time, the risk of court intervention, or the difficulty of bringing in third parties; however, most corporations agree that the advantages clearly outweigh the disadvantages.[115] When weighing the advantages with the disadvantages, one positive and negative factor of international arbitration seems to lie within the decentralization of state power over proceedings. This Section seeks to show how changing certain elements of proving corruption in international arbitration such as the burden of proof as well as proffering domestic law can help curb corruption in international arbitration.

A. Lack of Domestic Law and Enforcement Mechanisms in International Arbitration

One of the drawbacks to international arbitration is the lack of concurring domestic law and rules surrounding how to tackle corruption when it pops up.[116] Currently, there is no international or domestic law that is directly aimed at curbing corruption in international arbitration.[117] This absence of law has had the disadvantage of not only allowing corruption to run amok but also has made it increasingly difficult for individual actors to bring corruption claims against guilty parties.[118] While concrete data for the prevalence of corruption in international arbitration is lacking, that does not mean that corruption does not exist.[119] The topic of corruption in international arbitration is a broadly discussed topic in the international sector and with a record-breaking year for international arbitration in 2020, the need to address this issue becomes increasingly more palpable.[120]

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[114] Mistelis, *supra* note 113, at 6.

[115] *Id.* at 2.

[116] *See* Carlos F. Concepcion, *Combating Corruption and Fraud from an International Arbitration Perspective*, 11 DISP. RESOL. INT'L 23, 36 (2017).

[117] *See, e.g.*, Assad Bishara, *The Standard of Proof for Corruption in International Arbitration*, 16 MANCHESTER J. INT'L ECON. L. 441, 469 (2019) ("Curbing corruption undoubtedly requires combative measures and efforts at both levels; domestically and internationally.").

[118] *See id.* at 468 ("[T]he hybrid nature of international arbitration (balancing between world and national legal systems and cultures) in addition to the constantly shifting nature of corruption, would forcibly require [the] standard [of proof] to be a flexible one; … which requires parties to submit irrefutable evidence to support claims of corruption.").

[119] *See* Constantine Partasides, *Proving Corruption in International Arbitration: A Balanced Standard for the Real World*, 25 ICSID REV.: FOREIGN INV. L.J. 47, para. 27 (2010).

[120] Robert K. Campbell et al., *2020: A Record-Breaking Year for International Commercial Arbitration*, FAEGRE DRINKER (June 9, 2021), https://www.faegredrinker.com/en/insights/publications/2021/6/2020-a-record-breaking-year-for-international-commercial-arbitration.

B. How the FCPA Has Helped with Corruption Domestically

The FCPA has been around longer than most international conventions against corruption and has garnered a high level of praise and support from both the international sector.[121] Since its adoption, however, the OECD has established itself as an effective international mechanism for curbing corruption in two major ways.[122] First, a 2017 study found that multinational corporations subject to the convention were significantly less likely to engage in bribery than those that were not.[123] Second, it is effective because it imposes monitoring requirements upon signatory states, providing a moderate, yet not obligatory, sense of legal obligation to comply with the international convention.[124] And both of these factors have similarly had a positive effect on the FCPA's effectiveness both domestically and abroad. While only eleven country-states have enacted and significantly enforce domestic anti-corruption laws, the FCPA has proven to be substantially effective in the U.S.[125]

Although putting a concrete number to what is considered corrupt on an international scale seems arbitrary, Transparency International's framework is a good jumping-off point for determining what factors are important in deciding where countries fall short and where they excel.[126] Transparency International scores countries from zero (highly corrupt) to one hundred (very clean) and assesses the corruption within a country's public sector.[127] Similarly, Transparency International's Global Corruption Report focuses on how judicial systems are contaminated in the context of judges, court personals, and courts.[128] Furthermore, it also focuses on how judicial corruption affects human rights, economic development, and good governance.[129] The U.S. is currently sitting at sixty-seven, having gone down

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[121] *See* Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611, 1621–22 (2017).

[122] *See generally id.*, at 1631 ("The OECD Convention was quite effective, however, in permitting U.S. enforcement agencies to robustly prosecute the FCPA extraterritorially, vigorously policing multinational corporations in the United States and other major exporting countries.").

[123] Nathan M. Jensen & Edmund J. Malesky, *Nonstate Actors and Compliance with International Agreements: An Empirical Analysis of the OCED Anti-Bribery Convention*, 72 INT'L ORG. 33, 65 (2018) (finding that MNCs subject to the convention were less likely to engage in bribery than corporations based in non-member states).

[124] Dell & McDevitt, *supra* note 68, at 21.

[125] *See* Maya Efrati, *Foreign Corrupt Practices Act: How the Whistleblower Reward Provisions Have Worked*, NAT'L WHISTLEBLOWER CTR. 24 (2018), https://www.whistleblowers.org/foreign-corrupt-practices-act-a-comprehensive-look/.

[126] *The ABCs of the CPI: How the Corruption Perceptions Index is Calculated*, TRANSPARENCY INT'L (Dec. 20, 2021), https://www.transparency.org/en/news/how-cpi-scores-are-calculated [hereinafter Transparency Int'l, *The ABCs of the CPI*].

[127] *Id.*

[128] Rodriguez & Ehrichs, *supra* note 46, at xxix.

[129] Transparency Int'l, *The ABCs of the CPI* , *supra* note 126.

two points since 2019.[130] When comparing the U.S.'s score with the most highly rated country of Denmark (sitting at eighty-eight) and the lowest rated country of Somalia (sitting at twelve), it becomes clear that while the U.S. is doing well, it still has a long way to go on its path towards transparency. [131]

While the FCPA has done a lot of good in curbing international corruption in the private sector, it is not without its downsides. Although this may not seem like a large number, of the 240 corporations that have been prosecuted under the FCPA, over thirteen of these companies are repeat offenders and have been prosecuted at least twice since 2017.[132] This means that the recidivism rate is 5.5%.[133] As alluded to previously, the FCPA is currently drafted to target criminalizing bribery of international foreign officials acting within a governmental context and makes no mention of private actions let alone obstruction of justice.[134]

All of this goes to show that while the OECD places a legal obligation upon the obligations of the U.S., resulting in amendments to the FCPA, the FCPA is not without its challenges.[135] Thus, when looking at this lack of an international push to eradicate corruption in international arbitration alongside the lack of action by OECD party-states to enact anti-corruption legislation they're already obligated to enact, a corruption-free level playing field for companies around the world still seems like a distant dream.[136]

C. How Can the FCPA Be Changed to Help International Arbitration?

By far, one of the strongest factors of the FCPA is its proven track record. Since its inception, the U.S. has brought over 500 FCPA cases,[137]

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[130] *Corruption Perceptions Index* 2020, TRANSPARENCY INT'L 10 (2021), https://www.transparency.org/en/cpi/2020.

[131] *Id.*

[132] Richard L. Cassin, *How Big a Problem is Corporate FCPA Recidivism?*, THE FCPA BLOG (Sept. 9, 2021), https://fcpablog.com/2021/09/09/how-big-a-problem-is-corporate-fcpa-recidivism/ ("The DOJ and SEC have prosecuted 240 different companies (by my count) for FCPA offenses. Of those 240 companies, 13 have been repeat FCPA defendants."); *accord* Kimberly A. Parker, et al., *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021*, WILMERHALE at 6 (Jan. 28, 2021), https://www.wilmerhale.com/en/insights/client-alerts/20210126-2020-global-antibribery-yearinreview.

[133] Cassin, *supra* note 132.

[134] Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary, 112 Cong. 56, at 1 (2011) (Opening Statement of Rep. F. James Sensenbrenner, Jr., Chairman, Subcomm. on Crime, Terrorism and Homeland Security).

[135] U.S. DEP'T OF JUST. & SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE FOREIGN CORRUPT PRACTICES ACT 3 (2d ed., 2020) [hereinafter FCPA Resource Guide], https://www.justice.gov/criminal-fraud/fcpa-resource-guide.

[136] *Id*. at 86.

[137] Mintz Group, *Where the Bribes Are*, FCPA MAP (last updated Jan. 22, 2021) https://www.fcpamap.com.

several of which have had a combined $24.1 billion in penalty amounts.[138] Similarly, the FCPA has not one but two departments currently spearheading corruption cases against commercial actors—the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC").[139] While the FCPA as it is currently drafted is tailored to curbing international corruption with regard to foreign officials, the framework of the FCPA is written in such a way that makes it easy to amend to include "international arbiters" within the statute and the definitions of foreign officials.[140]

i. Changes to Include International Arbiters

Although foreign officials are traditionally described as people who work in an official capacity with a foreign government, the work international arbiters do falls directly within the object and purpose of the FCPA—to curb corrupt practices used abroad by American businesses to gain an advantage.[141] For one, international arbiters serve an inherently governmental role. [142] While they don't work for the actual government, judicial enforcement is a traditional government role.[143] Similarly, while international arbiters do not work for the government they are appointed as a neutral party to hear and resolve the claim much like judges do.[144]

Further, as discussed previously, the U.S. has an obligation to enact domestic legislation to conform with its treaty obligations.[145] As it stands currently, the U.S. has been a signatory to the UNCAC since 2006 and while it has enacted (or rather amended its) domestic legislation such as the FCPA in pursuit of its anti-corruption obligations, the U.S. still has not enacted legislation to put it in line with its obligations under Article 25 of the UNCAC.[146] Article 25 of the UNCAC refers to obstruction of justice and requires signatory members to enact legislation prohibiting "intimidation to interfere with the exercise of official duties by a justice or law enforcement

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[138] *Id.*

[139] NICOLE VANATKO, CONG. RSCH. SERV., F11588, THE FOREIGN CORRUPT PRACTICES ACT (FCPA): AN OVERVIEW 1 (2020).

[140] *See* Foreign Corrupt Practices Act § 78dd-1(f)(1) (defining "foreign official").

[141] Will Kenton, *Foreign Corrupt Practices Act (FCPA)*, INVESTOPEDIA (Mar. 26, 2021), https://investopedia.com /terms/f/foreign-corrupt-practices-act.asp.

[142] *See generally* Susan Franck, *The Role of International Arbitrators*, 12 ILSA J. INT'L & COMP. L. 499, 508 (2006) (discussing the functional similarities of judges and arbitrators).

[143] *Id.* at 512.

[144] *Id.* at 513.

[145] STEPHEN P. MULLIGAN, CONG. RSCH. SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 17 (2018).

[146] *See* FCPA Resource Guide, *supra* note 135, at 7.

official."[147] Currently, none of the signatories have enacted legislation to do so, but that doesn't lessen the necessity of fulfilling their obligations.[148]

Article 25 is the strongest piece of evidence in favor of the U.S. simply amending the FCPA to include international arbiters; although the FCPA is designed to curb bribery of international government officials, at its core it is anti-corruption legislation.[149] Thus, while the U.S. hasn't enacted legislation to curb corruption with regard to obstruction of justice, it is well within the purview of both the purpose of the FCPA, as well as its treaty obligations under the UNCAC.[150]

ii. How the FCPA Can Address Some Other Issues with International Arbitration

Currently, one of the biggest issues faced in proving corruption in international arbitration is settling the burden of proof. Tribunals require a high standard of proof to substantiate such a serious allegation.[151] As it stands currently, there is no one standardized burden of proof, but has generally come down to two schools of thought as discussed in Section II(e)(i).[152] There are two overarching fields of thought that dominate the discussion: balance of the probabilities standard[153] and preponderance of the evidence standard.[154] Both of them are incredibly important as they are aimed at tackling the lack of evidence that usually exists in arbitral corruption claims.[155] With regard to the FCPA however, as stated by the FCPA Professor, "[e]ven though the DOJ and SEC are almost never put in a position to prove an FCPA violation against an issuer, theoretically the DOJ's burden of proof is a very high beyond a reasonable doubt whereas the SEC's civil burden of proof is merely a preponderance of the evidence."[156] This shows that the burden of proof in international arbitration is directly in line with that which is traditionally used in FCPA cases and thus could help lessen the issues faced by individuals trying to bring corruption cases.

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[147] UNCAC, *supra* note 11, art. 25(b).

[148] Ioannis Androulakis & Stefano Betti, *State of Implementation of the United Nations Convention against Corruption: Criminalization, law enforcement and international cooperation*, UNITED NATIONS OFFICE ON DRUGS AND CRIME 79 (2d ed., 2017).

[149] Kenton, *supra* note 144.

[150] *See generally* Foreign Corrupt Practices Act; *see also* UNCAC *supra* note 11.

[151] Stothard & Sagoe-Moses, *supra* note 82, at 29.

[152] *Id.*

[153] *See Id.* at 30.

[154] *See generally*, Partasides, *supra* note 119, paras. 60-62 (discussing the standard of proof in arbitral tribunals).

[155] Stothard & Sagoe-Moses, *supra* note 82, at 30.

[156] Mike Koehler, *The Percentage of SEC FCPA Enforcement Actions that Also Involve a DOJ Component*, FCPA PROFESSOR (May 15, 2019), https://fcpaprofessor.com/percentage-sec-fcpa-enforcement-actions-also-involve-doj-component/.

iii. Potential Downsides

Although all of this sounds good in theory, there are a few downsides to amending the FCPA in this way. The most glaring issue with adopting this amendment is that there is little to no public discourse or policy recommendation on this as a viable option. While amending the FCPA to include international arbiters is well within the wheelhouse of the FCPA's objective and purpose as well as the U.S.'s obligations under the UNCAC, no one else has championed this as an option thus far.[157] On one hand, this may have to do with the fact that FCPA proceedings are stretched thin and often take years before reaching a resolution.[158] On the other hand, it may also have to do with the fact that the FCPA hasn't been amended since 1998, nor has any other country championed legislation on this matter.[159] In fact, most countries' domestic anti-corruption legislation is aimed at curbing corruption in the international public sector[160] and international arbitration definitively remains a private form of dispute resolution.[161]

Another issue with including corruption in international arbitration lies in the fact that proving corruption in international arbitration has been notoriously difficult.[162] As mentioned previously, proving corruption in international arbitration has a high burden of proof which does not pair well with corruption claims like these that have little to no physical evidence. Similarly, unlike the numerous oversight mechanisms in place in public adjudication mechanisms, private mechanisms like international arbitration are much less common, easier to spoof, and thus overall harder to track since they are not overseen by a governmental body. Additionally, the FCPA only allows the U.S. government to bring a public action, meaning that private actors will not be able to bring cases on their own behalf.[163] This limited reach is less concerning as a potential problem, however, because there is both a

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[157] UNCAC, *supra* note 11, art. 25.

[158] Mike Koehler, *Like Prior Years, The Grey Clouds of FCPA Scrutiny Lasted Too Long in 2020*, FCPA PROFESSOR (Jan. 6, 2021), https://fcpaprofessor.com/like-prior-years-gray-cloud-fcpa-scrutiny-lasted-long-2020/ ("FCPA scrutiny simply lasts too long. Specifically, as highlighted below, 4 years was the approximate median length of time companies that resolved FCPA enforcement actions in 2020 were under scrutiny.").

[159] Seitzinger, *supra* note 90, at 5.

[160] *See, e.g.*, Bribery Act 2010, c. 23 (U.K.); *European Anti-Corruption Conventions*, Anti-Corruption Legislation, GAN BUS. ANTI-CORRUPTION PORTAL, https://www.ganintegrity.com/portal/anti-corruption-legislation/european-anti-corruptionconventions/; African Union Convention on Preventing and Combating Corruption, 43 I.L.M. 5 (2004); Mini VandePol et al., *Anti-Corruption in China*, GLOB. COMPLIANCE NEWS, https://globalcompliancenews .com/anti-corruption/handbook/anti-corruption-in-china/.

[161] *Guide to International Arbitration*, LATHAM & WATKINS 42 (2014), https://www.lw.com/admin/Upload /Documents/Guide-to-International-Arbitration-May-2014.pdf.

[162] *See* Bishara, *supra* note 117, at 468.

[163] FCPA Resource Guide, *supra* note 135, at 3.

push to amend the FCPA to allow for private actions alleging corruption as well as others.[164]

However, there will never be a one size fits all solution to a problem as grave as corruption. The most readily available cons to this proposed amendment, though, while valid, are not strong enough to outweigh the enormous toll corruption plays in the international sector and the benefits that would be brought on by this amendment. Corruption within governments is a serious problem, and without domestic action to combat it, the world faces a risk of continuing to lose over $3.6 trillion each year due to corruption.[165]

IV. CONCLUSION

One of the biggest issues international law faces is its lack of compulsory enforcement, on either a domestic or international level and a sense of domestic, legal, obligation to fulfill internationally imposed obligations. While the OECD and UNCAC have both given rise to anti-corruption laws around the world, international law still has not done enough to make a push towards ending, or at the very least, curbing corruption. That is why domestic actors must take a stronger stance to commit to curbing corruption by enacting more wide-reaching legislation. With the added rise of internal arbitration as the chosen adjudication method of choice among international commercial actors, curbing corruption within this mechanism is an increasingly important task.

To help combat this, the U.S. must go one step further than it has already to enact even more effective domestic enforcement mechanisms to curb international corruption. As this comment has argued, the FCPA can easily be amended to provide a cause of action against international actors bribing "international arbiters" as a way to help ensure that the standard and burden of proof are less burdensome on the alleging party. Although there is no "one size fits all" answer to curbing international corruption, these steps can help clean up the issues the world is facing with corruption and bribery in international law.

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[164] Michael F. Buchanan et al., *Proposed Bill to Allow Private Enforcement of the FCPA*, PATTERSON BELKNAP (Jan. 2012), https://www.pbwt.com/publications/proposed-bill-to-allow-private-enforcement-of-the-fcpa/ (discussing private actions alleging corruption); Andrew Weissmann & Alixandra Smith, *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act*, U.S. CHAMBER INST. FOR LEGAL REFORM 7 (Oct. 27, 2010), https://instituteforlegalreform.com/wp-content/uploads/2020/10/restoringbalance_fcpa.pdf (Adding the compliance defense recognized by the U.K.; limiting a company's FCPA criminal successor liability for pre-acquisition acts; adding a "willfulness" requirement for corporate criminal liability; limiting a parent company's civil liability for acts of a subsidiary; and clarifying the definition of "foreign official").

[165] Stephen Johnson, *Corruption is Costing the Global Economy $3.6 Trillion Dollars Every Year*, WORLD ECON. FORUM (Dec. 13, 2018), https://www.weforum.org/agenda/2018/12/the-global-economy-loses-3-6-trillion-to-corruption-each-year-says-u-n.