

Home Countries and Transnational Bribery: China's Changing Approach

Ciprian N. Radavoi* & Yongmin Bian**

In 1999, Professor Philip Nichols argued that FCPA-style home country laws are efficient in combating transnational bribery, unlike host country regulation and corporate self-regulation. Observing feeble results obtained in 15 years of OECD Anti-bribery Convention, we find arguments for amending this assertion; home countries, aside from enforcing their own laws banning foreign bribery, should reconsider the classical ways of fighting transnational corruption, by helping host governments in their anti-corruption efforts and by encouraging their own corporations to join international dialogic webs. After presenting an original analysis of the reasons behind the limited impact of FCPA-style action, we would then further argue for the two alternative solutions backed by home states, looking respectively at the spectacular results of the anti-corruption campaign in Romania with US support, and at China's recent position that her corporations should adhere to international private standards on foreign bribery.

Keywords: Business Ethics, China, FCPA, International Bribery, OECD, Transnational Corruption.

* Lecturer in International Investment Law at the University of International Business and Economics (UIBE) Law School, Beijing, China; Member of Romanian Bar; Consul of Ministry of Foreign Affairs of Romania. LL.B. (Bucharest), LL.M. (Lund), Ph.D.(UIBE). ORCID: <http://orcid.org/0000-0002-9538-6019> The author may be contacted at: radavoi@uibe.edu.cn / Address: Shaoyaoju 2/13/1403, Chaoyang District, Beijing, P.R. China.

** Professor of Public International Law at the University of International Business and Economics (UIBE) Law school, Beijing, China. A.B./LL.M. (CUPL), Ph.D. (UIBE). ORCID: <http://orcid.org/0000-0002-7950-1160>. The author may be contacted at: bianyongmin@uibe.edu.cn / Address: 10 Huixin East Street, Chaoyang District, Beijing, 100029, P.R. China.

I. INTRODUCTION

In 1999, when the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions (hereinafter OECD Anti-bribery Convention: “OABC”) was entering into force, Professor Philip Nichols argued that globalization and fragmentation in the beginning of the millennium rendered home State action necessary for effectively combating transnational bribery, as host State action and corporate self-regulation had proven insufficient.¹ As it often happens, reality later contradicts the initial optimism. In tackling the supply side of international bribery, home States have been rather modest since 1999. Therefore, host State and self-regulation should complement it. We, however, focus on the home State in our research, because the home State could, should and actually did support host State and corporate anti-corruption efforts.

In December 2014, the OECD released a ‘ground-breaking’ report on foreign bribery (hereinafter the Report),² an analysis of data emerging from 427 enforcement actions - 263 individuals and 164 entities - resulting from the 207 cases since the entry into force of the OABC in 1999. The Report notes that the distribution of concluded foreign bribery cases per country is not proportionate to their respective importance as exporters and outward investors.³ The US, *e.g.*, accounts for most of the cases (128), while other countries with an important share of world exports, like Australia, Mexico, Russia or Brazil, have not concluded even a single case. Transparency International already signaled this situation in 2011,⁴ as twenty-one countries effected little or no enforcement.

Other data in the Report also seems to suggest that the OABC, trying to curb bribery in international transactions by targeting the supply side, does not work the way it was expected. Enforcement appears to have declined since 2011 in terms of criminal and monetary sanctions, and the average time taken to conclude foreign bribery cases has steadily increased over time, reaching an average of 7.3 years for the 42 cases concluded in 2013.⁵

According to the Transparency International’s Bribe Payers Index (“BPI”),⁶ many parties of the OABC have not realized a bribery free world yet. On a scale of 0 to 10 (10 means that companies from that country never bribe abroad), the US ranks the 10th out of the 28 countries (8.1); Brazil stands 14th (7.7), and Mexico is 26th (7.0), with only China and Russia behind. The results are not too